1999

Cheryl Holmstrom v. C.R. England, INC and Joseph Hyatt : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHERYL HOLMSTROM, Plaintiff-Appellant, vs. C.R. ENGLAND, INC., a Utah corporation, and JOSEPH HYATT, an individual, Defendants-Appellees.	**Appeal No. 990354-CA** Priority No. 15

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated section 78-2a-3(2)(j).

II. STATEMENT OF ISSUES PRESENTED FOR APPEAL

Plaintiff's Issues A and B relate to their claim that the trial court failed to give requested jury instructions. The proper standard of review by this Court is the "correctness of error standard." As used by Utah's appellate courts, "correctness" means that no particular deference is given to the trial court's ruling on questions of law. *See Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). Plaintiff failed to preserve Issue "A" for appeal.

Plaintiff's Issues C and D involve the trial court's claimed failure to grant post-trial motions for JNOV or in the alternative, for a new trial. The proper standard of review for both issues is the "traditional abuse of discretion standard." The abuse of discretion standard flows from the trial court's significant role in pre-appellate litigation. The trial court has "a great deal of latitude in determining the most fair and efficient manner to conduct court business." *Morton v. Continental Baking Co.*, 938 P.2d 271, 275 (Utah 1997). This is because "[t]he trial judge is in the best position to evaluate the status of his cases, as well as the attitudes, motives, and credibility of the parties." *Id.* A

trial court abuses its discretion if there is "no reasonable basis for the decision." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). A trial court's determination will be reversed if the ruling "is so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion." *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993). Whether a trial court properly denied a motion for a new trial is clearly within the abuse of discretion standard. *See Child v. Gonda*, 972 P.2d 425, 428 (Utah 1998). Further, this Court has indicated that at the extreme end of the discretion spectrum would be a decision by the trial court to grant or deny a new trial based on insufficiency of the evidence. *See A.K.&R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 522 (Utah Ct. App. 1999).

Because plaintiff's Issues C and D involve a claim that both the jury and the judge failed to make proper rulings based upon "insufficiency of the evidence," the applicable standard of review for these issues is the traditional abuse of discretion standard.

III. SUMMARY OF THE ARGUMENTS.

1. Plaintiff has failed to cite any relevant case law, statute or ordinance which suggests a duty exists requiring a motorist to choose one public road over another

based upon a subjective declaration of "hazardous." To adopt this "duty" would be to bestow a viable cause of action upon every person involved in an accident, whether they were technically at fault or not, assuming they could find a safer route for the other party to have taken.

In addition, any error is "harmless" because plaintiff was more familiar with this road and intersection than was the defendant and would therefore be subject to more "fault" than defendant under her "unsafe route" theory.

Finally, a party is not entitled to have every "creative theory" reduced to a jury instruction. The plaintiff's claim is that the defendant negligently drove his vehicle. The plaintiff was not precluded from arguing that the defendant could and should have taken a safer route and in fact did so in closing arguments. The jury heard the argument but simply was not convinced.

2. The Court agreed to give a "sudden peril" instruction. However, the language used by plaintiff was not clear. Particularly, the plaintiff used the phrase "if, but not only if" without further explanation for that qualifier. The Court simply asked plaintiff's counsel to reword the instruction, to have it approved by defense counsel and the instruction would be given. Contrary to plaintiff's suggestion in her brief, plaintiff's counsel never came back to defense counsel or the Court with another sudden peril

instruction. She simply abandoned the sudden peril instruction. The record is devoid of any attempt by plaintiff's counsel to allow the Court to rule on the issue and, accordingly, the plaintiff did not adequately preserve this issue for appeal.

3. Although the plaintiff did not sufficiently marshal the evidence supporting the jury's verdict, even the plaintiff's brief contains more than adequate evidence to support the jury's verdict. Specifically, if the jury believed nothing more than the plaintiff's own expert accident reconstructionist when he acknowledged that there was "a very good likelihood that the collision would have happened even if Mr. Hyatt [the defendant] has stayed completely in his own lane of travel." That piece of information alone is sufficient for the jury to find that although the defendant may have been negligent for slightly passing over the center line, he was not a "substantial factor" in causing the accident since the plaintiff was almost entirely left of center and would have collided with the defendant even if the defendant had been completely within his own lane.

Further, plaintiff's argument is essentially to do away with the concept of "proximate cause." The plaintiff suggests that anytime a jury finds a party negligent, it must then also find that the party was a proximate cause of the injury. Were that the case, proximate causation would no longer be an element of a tort.

4. Notwithstanding the fact that plaintiff's brief contains five complete pages of citations and quotes supporting the jury verdict (even though this is an incomplete listing), the plaintiff then suggests that this is insufficient evidence because she then lays out seven-and-a-half pages of evidence contrary to the verdict. Multiple fact and expert witnesses testified in support of the verdict and in this case, the defendant suggests that the evidence was overwhelmingly in favor of the jury's verdict.

IV. ARGUMENT

A. The District Court Properly Refused to Give a Separate Jury Instruction Regarding the Plaintiff's Claim that Defendant had a Duty to Take a Different Route.

Plaintiff contends that she was entitled to instruct the jury that they may find a party negligent for driving on a "hazardous" route. The proposed jury instruction is as follows:

> You may find, depending on the facts and circumstances of this case, either or both drivers negligent not only for their driving conduct itself but also, if he or she or both knew the route taken was hazardous, for taking that route. (R. at 778).

To begin, plaintiff did not even attempt to define for the jury the word "hazardous." That failure alone justifies the Court's refusal to give the instruction. Was it hazardous because blind or deaf children lived on the street? Was it hazardous because hazardous

materials were stored adjacent to the roadway? Was it hazardous because the road was slippery, or bumpy, or in bad repair, etc.?

In addition, plaintiff has failed to establish any duty on the part of the defendant to take a different route. Plaintiff assumes, without any support, that all drivers have a duty to plan their route out in advance to take the least traveled, safest route there is to your destination. Failure to do so, under the plaintiff's argument, is an actionable tort. There is no state statute, city ordinance or Utah case law to support the proposition that a new duty has been create which precludes motorists from using a particular public road because there may be, in someone else's mind, a safer route. Plaintiff's tort action for a hazardous intersection is not against a motorist using the public road; rather, against those responsible for the hazardous road. In this case, the plaintiff complains of a blind "S" curve, foliage near the corner and old cars parked on the corner. Her cause of action for the blind "S" curve is against those who designed the road; her cause of action for the overgrown foliage near the home is against the homeowner on the corner who allowed the foliage to overgrow, and her cause of action for the presence of old cars on the corner is against the owners of the old cars. Plaintiff suggests that rather than pursuing those causes of action, the motoring public must cease using this public roadway. This argument is implausible, impractical, and not supported by Utah law. Indeed, should the

Court adopt plaintiff's argument, even a drunk motorist who runs a red light will be able to sue the person that he hits because that person could have, and should have, taken a safer route.

Plaintiff cites four cases in support of her proposed jury instruction, but fails to lay out one fact in any of them. That is because the Utah cases deal with pedestrian injuries decided during the era when contributory negligence barred recovery. None of the Utah cases even involve an automobile. They deal with pedestrians falling into ditches (*Wold v. Ogden City*, 258 P.2d 453 (Utah 1953)), on sidewalks (*Wightman v. Bettilyon's Inc.*, 390 P.2d 120 (Utah 1964)), or even in hallways in apartment buildings (*Baker v. Decker*, 212 P.2d 679 (Utah 1949)). The Illinois case found a pedestrian contributorily negligent for crossing a busy road at night at an uncontrolled intersection when she could have crossed at a controlled intersection, with a crosswalk one block down. *Blacconeri v. Aguayo*, 478 N.E.2d 546 (Ill. App. 1985). All these cases dealt with a pedestrian plaintiff who assumed a known risk, not a defendant driver who failed to take a different public roadway. The comparison to this case is so weak that it did not even justify a recitation of the facts by plaintiff.

Even if a motorist has a duty to carefully pick the safest route to his or her destination, any error by the court in failing to give this instruction is harmless. One of

the facts that plaintiff failed to marshal in her brief is that the plaintiff was likely more familiar with this road and intersection than was the defendant. The plaintiff's boyfriend, James Johnson, testified in his deposition, that:

> We had been down the road because her work was there, my work was just over on West Temple and 27th South. If the traffic was, well, her work was real close so she took that road a lot. And there was no reason, except for I mean, she would have had to have had some special reason for being out in the middle of the road like that. (R. 583) (Emphasis added.)

Although plaintiff's attorneys attempted to get Mr. Johnson to alter his testimony at trial, he did not. (R. 593.) Therefore, plaintiff's negligence was at least equal to any negligence she wants to bestow upon the defendant for the defendant's use of that road. Her knowledge of the road would have required her to use a different route, according to plaintiff's own argument, or to use extraordinary care. She did neither and therefore any error in the Court's refusal to give the requested jury instruction was harmless.

Finally, parties are not entitled to have every creative theory they may come up with reduced to a jury instruction. Plaintiff's theory against defendant was negligence. The umbrella of negligence certainly includes plaintiff's theory that the defendant should have used a different route. The Court did not preclude the defendant from arguing her

theory in closing, and indeed, the plaintiff made a detailed argument regarding this unsafe route theory, but the jury was simply unconvinced.

B. The Court Did Not Refuse to Give a "Sudden Peril" Instruction. Plaintiff Failed to Preserve This Issue on Appeal.

Plaintiff's counsel proposed the following jury instruction:

> You may appropriately determine that Mr. Hyatt's negligence was a proximate cause of Ms. Holmstrom's injuries if, but not only if, you find: (1) that Mr. Hyatt negligently caused the situation of sudden peril; and (2) that Ms. Holmstrom, acting under the impulse of fear, made an instinctive effort to escape; and (3) in doing so, Ms. Holmstrom sustained injuries, even though it may now appear that Ms. Holmstrom's attempt to escape was unwise or should have been made differently.

The defendant objected to the jury instruction as written because it was a variation of the "MUJI" stock instruction. The phrase "if, but not only if" appeared confusing and the defendant asked that it either be removed or modified such that the jury would understand it. The Court, after reading the proposed instruction, agreed, stating:

> Is there another way to phrase that so that, I'm not sure that I understand it when I read it, what the 'but not only if' does to the phrase.

(R. 820.)

In addition, defendant asked the Court to add a balancing sentence which stated that if the imminent peril was caused by the plaintiff's own conduct, that you are to

disregard the instruction. (R. 821.) After the defendant requested the balancing sentence, the following conversation took place:

> THE COURT: I think that's accurate. Is there a way to do the introductory that kind of makes clear for the jury that is not, your case doesn't live or fall on this one instruction?
>
> MR. COLLINS: You know, and we've got to keep this thing moving. What this is going to require is a couple of minutes of me seeing what I can come up with and seeing if Mr. Naegle and I can work it out. Could I have a couple of minutes to see what I can create and see if Mr. Naegle will agree to it?
>
> THE COURT: I'll let you do that. What I'll do is I'll get the clerk started on the two that you have and the other one here.

(R. 822.)

The Court was clearly willing to give an "imminent peril" jury instruction. In fact, it would have given the stock MUJI instruction. The Court went even further and was willing to give another variation of this instruction, devised by plaintiff's counsel, so long as it was not confusing. The Court simply asked plaintiff's counsel to rephrase the "if, but not only if" part of the instruction. Plaintiff's counsel said that he would do so and work it out with defense counsel. Plaintiff suggests in her brief that "Ms. Holmstrom

and the defendants were unable to agree to satisfactory alternative language and, accordingly, the district court did not give the proposed instruction." (Appellant's Brief, p. 20.) In fact, plaintiff's counsel never came to defense counsel with alternative language, and never went to the Court with alternative language. The record clearly reflects that no further conversation was had with respect to this jury instruction. Plaintiff simply failed to give the Court the opportunity to rule on the issue after plaintiff said it would revise the proposed instruction and present it to the Court. Indeed, the record is devoid of any language by the Court denying plaintiff's request for a "sudden peril" jury instruction.

Having failed to preserve this issue on appeal, plaintiff cannot now suggest that there was "off the record" discussions between plaintiff and defendant regarding this instruction and because no agreement was reached, the plaintiff "assumed" the Court would deny his request. No "off-the-record discussions" were held between plaintiff and defense counsel, and plaintiff never allowed the Court to specifically rule on the instruction. After the jury was instructed, the Court stated:

> THE COURT: The record will reflect that the jury is out of the courtroom, the door is closed. Counsel, any problems with the instructions as read other than the objections that were made for the record prior to preparation?

MR. COLLINS: None from us, Your Honor.

MR. NAEGLE: No, Your Honor.

THE COURT: Okay. Anything we need to make part of the record?

MR. COLLINS: Not us.

(R. 858.)

Accordingly, because the Court was never given the opportunity to rule on plaintiff's request for a "sudden peril" jury instruction, this issue is not properly before this Court.

C. The Court Properly Denied Plaintiff's Motion for Partial Summary Judgment Notwithstanding the Verdict with Respect to the Proximate Cause Issue.

To prevail on this proximate cause issue, plaintiff must convince this Court that based on the evidence presented, any reasonable juror would be forced to conclude that (1) there was a cause-and-effect relationship between the defendants' negligence and the plaintiff's injuries; (2) that the defendants' negligence played a "substantial role" in causing those injuries; and (3) that a reasonable person could foresee that some injury could result from that negligence.

In essence, the plaintiff is making the argument that there was insufficient evidence for the jury to conclude as they did on the issue of proximate cause. Therefore,

this issue is "at the extreme end of the discretion spectrum" and this Court should give great deference to the trier-of-fact. *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993).

Plaintiff's argument, taken to its logical extreme, purports to do away with the concept of "proximate cause." Plaintiff suggests that any time a jury finds a defendant negligent, that jury must also find that there was a cause and effect relationship and that the defendant's negligence must have played a "substantial role in causing the injuries." The concept of proximate cause argues against that theory. The law accepts the fact that an individual may be negligent, but not the proximate cause of another's injuries. This Court has stated that:

> Trial court [is] justified in granting a JNOV only if, after looking at all the evidence and all its reasonable inferences in light most favorable to [the non-moving party], the trial court concludes that there [is] **no competent evidence** to support a verdict in [the non-moving party's] favor. (Emphasis added.)

Ricci v. Shultz, 963 P.2d 784, 785 (Utah Ct. App. 1998).

In arguing that there was no competent evidence to support the verdict, the plaintiff ignores the testimony of her own expert accident reconstructionist, Ronald L. Probert. Mr. Probert testified that even if Mr. Hyatt, the defendant, had made his turn entirely within his own lane, there was a "very good likelihood" that the accident still

would have occurred based on the fact that the responding police officer's measurements, which Mr. Probert did not dispute, placed the plaintiff's vehicle entirely left of center except for her right-side passenger tires. (Tr., Vol. II, pp. 249-250.)

This evidence alone is competent evidence supporting the jury's verdict that either there was no "cause and effect" relationship between Mr. Hyatt's negligence and Ms. Holmstrom's injuries or that Mr. Hyatt's negligence did not play a "substantial role" in causing those injuries.

Further supporting evidence that the defendant did not play a substantial role in causing the accident is that plaintiff's expert witness, Ron Probert, testified that it is plausible that the defendant was stopped in the roadway, as he testified, for at least two seconds prior to impact. (Tr. 259.) Further, Mr. Probert testified that if the defendant was stopped in the roadway for two second, a plausible scenario, then the plaintiff could have avoided the accident by simply staying in her own lane and safely passing by the stopped truck. (Tr. 260-261.) Finally, Officer Reid Garff, the investigating police officer, testified that as the plaintiff came out of the "S" curve, she was considerably left of center and that the plaintiff told him that she was looking down at her clock and that when she looked up, "there the truck was." (Tr. 778.) His opinion of the plaintiff's

conduct was that "she was not paying attention to where she was going. She was watching her clock." (Tr. 779.)

Taken together, the jury had evidence before it, presented by the plaintiff herself, the responding police officer and the plaintiff's own expert accident reconstructionist, which could lead a reasonable juror to conclude that the plaintiff was not paying attention to where she was going; that she was almost entirely left of center at the point of impact; that the defendant saw the plaintiff and stopped his truck for a full two seconds prior to impact, without any corresponding reaction on the plaintiff's part; and that even if the defendant had stayed entirely in his own lane, the accident still would have occurred because the plaintiff was so far left of center. This is certainly reasonable evidence, if not overwhelming, in favor of the jury's verdict. The jury apparently concluded that although the defendant may have been negligent for crossing the center line slightly, his negligence did not play a substantial role in causing the accident and resulting injury. The jury concluded that the defendant was paying attention, stopped his vehicle when he saw the plaintiff, but that the plaintiff was not paying attention and struck the defendant's vehicle while her vehicle was almost entirely left of center. Accordingly, the jury properly interpreted the proximate cause jury instruction and determined that there was either no cause and effect relationship, or that the defendant's

negligence did not play a substantial role in causing the plaintiff's injuries. Either way, they were justified by the facts and by the law in reaching their conclusion.

D. The Court Properly Denied Plaintiff's Motion for a New Trial on All Issues.

Plaintiff's final issue on appeal is simply that the entire jury's verdict was based on insufficient evidence. This Court's standard of review for this issue is "at the extreme end of the discretion spectrum . . ." and great deference should be given the jury's verdict. *See Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). The Utah Supreme Court has stated that:

> A trial court should carefully consider whether it is appropriate to grant a new trial on the basis of insufficiency of evidence. In *Goddard,* 658 P.2d at 532, this court noted, "the power of a trial judge to order a new trial is to be used in those rare cases where a jury verdict is manifestly against the weight of the evidence." *See also Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1992). ("A second trial is not without its costs in terms of scarce litigant and judicial resources . . . . Consequently, the trial judge's prerogative to grant a new trial on an evidentiary basis under Rule 59(a)(6) should be exercised with forebearance.")

Braithwaite v. West Valley City Corp., 921 P.2d 997 (Utah 1996).

In addition, the Supreme Court stated in *Winters v. W.S. Hatch Co.*, 546 P.2d 603 (Utah 1976), that:

> The sole issue before the court on this appeal is whether the record discloses any substantial evidence to support the verdict of the jury. A motion for judgment notwithstanding the verdict presents solely a question of law to be determined by the court. In passing on a motion of this kind, the court is not justified in trespassing in the province of the jury in its prerogative to judge all questions of fact in the case. The court is not free to weigh the evidence, and the weight of the evidence and the credibility of the witnesses are within the jury's sole province. In considering a motion for judgment notwithstanding the verdict, the trial court must view the evidence most favorable to the party against whom the motion is made.

Id. at 605.

For the same reasons stated in subsection "C" of this brief, plaintiff's argument that there is insufficient evidence to support the jury's verdict must fail. This Court must review the evidence in the light most favorable to the defendant and grant a new trial only in that rare case where the "jury verdict is manifestly against the weight of the evidence." Considering the fact that plaintiffs have presented the Court with five pages of evidence supporting the jury verdict, including substantial evidence from both fact and expert witnesses, plaintiff's argument that the evidence is "so slight and unconvincing as to make the verdict plainly unreasonable and unjust" seems hollow. A

quick review of pages 29 through 34 of plaintiff's brief establishes more than enough evidence, viewed in the light most favorable to the defendant, to support the jury's verdict.

Plaintiff's admit that there are no Utah cases with similar facts that support their position. They argue, however, three cases from other jurisdictions support their position. However, the Court will note that the plaintiff did not lay out the factual scenario in any of the three cases cited because to do so would expose the weaknesses of the comparison.

In *Hardison v. Bushnell*, 22 Cal. Rptr. 2d, 106 (Cal. App. 1993), the plaintiff was a passenger in a vehicle traveling northbound on Old River Road. The defendant was traveling south on Old River Road. The defendant then turned left across the northbound lanes and was struck by the northbound vehicle. The collision occurred in the northbound lane. The jury found the defendant negligent but not a proximate cause, potentially because the driver of the plaintiff's vehicle was speeding and had consumed alcohol before the accident. The California Court of Appeals reversed the judgment, concluding that the verdict was not supported by substantial evidence.

The California case and the case before this Court are easily distinguished. The plaintiff in *Hardison* never left his lane of travel. The accident occurred fully within

the plaintiff's lane of travel. The defendant turned left in front of the plaintiff, obstructing his entire lane. None of those factors are present in the case before this Court. In this case, the accident occurred almost entirely in the defendant's lane of travel because the plaintiff was left of center. In the case before this Court, the substantial evidence suggests that the plaintiff was not paying attention, did not correct her vehicle back into her own lane as she came out of an "S" curve, and struck a stopped vehicle in the opposite lane of travel. Had those facts been before the California court, it is highly unlikely they would have found that the jury's verdict was not supported by substantial evidence.

In the *Rogers v. Di Christina,* 600 N.Y.S. 2d 402 (N.Y. App. 1993), the plaintiff was involved in two separate rear end accidents and consolidated the two accidents into one case. At trial, the defense argued that the plaintiff's injury, a herniated disk, was caused by a work related accident rather that the two automobile accidents. The jury found the defendants' negligent but not the proximate cause of plaintiff's injury. The trial court granted plaintiff's motion to set aside the jury verdict as against the weight of evidence. The appellate court sustained the lower court. However, the appellate court's decision, only three paragraphs long, does not include any discussion of the evidence presented at trial other than to say that "several medical witnesses testified

regarding the nature and cause of plaintiff's injuries." *Id.* As a result, this case supplies no support for the plaintiff's proposition. It simply stands for the proposition that a jury's verdict might be overturned because of insufficient evidence, but it provides no factual basis for its determination and therefore supplies no support for the plaintiff's contentions in this case.

Finally, in *Murteza v. State of Connecticut*, 508 A.2d 449 (Conn. App. 1986), the plaintiff was injured when the vehicle in which she was a passenger struck another vehicle which had run a red light. The court found the defendant negligent but not the proximate cause of the plaintiff's injuries. The plaintiff appealed and the court upheld the jury's verdict. In doing so, the court stated that "the trial court's refusal to set aside the verdict is entitled to great weight and every reasonable presumption should be given in favor of its correctness." *Id.* at 453. The court ultimately ruled that:

> The jury, as the ultimate judge of the credibility of witnesses and the weight to be accorded their testimony, was entitled to disbelieve the plaintiff's damage claims entirely.

Id. at 449.

Plaintiff either misreads the *Murteza* case or the proximate cause jury instruction given to the jury in the case before this Court. It is not enough that the jury simply find a "cause and effect relationship." The jury was instructed that "cause and

effect alone is not enough." In addition, the jury must find the negligence to have played a "substantial role in causing the injury." The question of whether a "substantial injury" occurred is irrelevant to this discussion. "Cause and effect" does not determine proximate cause, as suggested by plaintiff. It is only one factor, but it, alone, is not enough. The jury had sufficient evidence before it to conclude either there was no "cause and effect" relationship or that even if there was a "cause and effect" relationship, the negligence of defendant did not play a "substantial role" in causing the plaintiff's injuries, whether the injuries were substantial or not. Regardless of which they chose, it defeated the proximate cause element of the claimed tort.

Finally, plaintiff states as support for her argument, that her counsel has "found no case from Utah or elsewhere with facts and issues similar to ones involved in this case, in which a no proximate cause verdict has been upheld on appeal." (Appellant's Brief, p. 48.) That evidence supports defendant's position, not plaintiff's. Because the Court must look at all the evidence in the light most favorable to the defendant and must grant the jury's verdict and trial court's rulings great deference, the lack of case law supporting plaintiff's position preponderates heavily in favor of the defendant.

V. CONCLUSION AND STATEMENT OF RELIEF SOUGHT.

Plaintiff has failed to establish a duty for the motoring public to affirmatively choose the safest route between destinations versus the shortest route. If a road is unsafe, or hazardous, the cause of action is against those who made it unsafe, not against the member of the public who is rightfully using a public road.

Plaintiff failed to preserve the "sudden peril" jury instruction issue on appeal.

Plaintiff's remaining two issues are based on a claimed "insufficiency of evidence" argument and this Court must view all evidence in a light most favorable to the defendant and should not weigh the evidence and the credibility of the witnesses, as those are within the jury's sole province. There is more than substantial evidence to support the jury's verdict. If no other evidence was presented by the defendant at trial, other than the cross-examination testimony it elicited from plaintiff's own expert accident reconstructionist, the jury's verdict must stand. Accordingly, the defendant respectfully requests that the Court uphold the jury's verdict and the trial court's ruling denying plaintiff's request for a new trial.

RESPECTFULLY SUBMITTED this 28 day of January, 2000.

RICHARDS, BRANDT, MILLER
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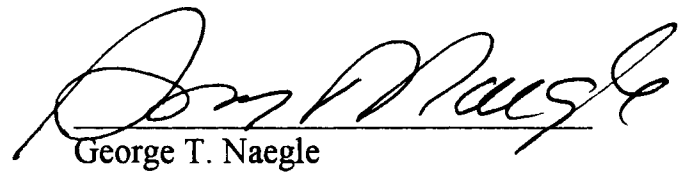

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that ten true and correct copies of the foregoing Brief of Appellee were mailed, first-class, postage prepaid, on this 28 day of Jan., 2000, to the following:

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