1982

Ben Miller and Jovalle Thomas v. Lawrence S. McMullen : Brief of Appellant

Utah Supreme Court

Ray H. Ivie; Ivie & Young; Attorneys for Defendant-Appellant;
Anthony M. Thurber; Attorney for Plaintiffs-Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

BEN MILLER and
JOVALLE THOMAS,

Plaintiffs-Respondents,

vs. Case No. 18085

LAWRENCE S. McMULLEN,

Defendant-Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, THE HONORABLE J. ROBERT BULLOCK,
DISTRICT JUDGE PRESIDING.

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NATURE OF THE CASE

This is a tort action arising out of a semi-truck, automobile accident which occurred on the 10th day of November, 1979, 4.1 miles West of Delta, in Millard County, State of Utah.

DISPOSITION IN THE LOWER COURT

The matter was tried to a jury resulting in a special verdict favoring plaintiffs. The court entered judgment on the verdict on June 24, 1981, in favor of plaintiff, Ben Miller, in the amount of $67,650.00; and in favor of plaintiff, JoValle Thomas, in the amount of $73,750.00.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment on the verdict.

STATEMENT OF FACTS

Anthony M. Thurber, plaintiffs' counsel, in his opening statement outlined the facts of the case. The collision was between a semi-truck driven in the eastbound lane by plaintiff, Ben Miller, and a Subaru station wagon driven in the westbound lane by defendant, Lawrence McMullen. The situs was a two-lane highway just West of Delta, Utah. As Mr. Miller approached the intersection, the Subaru signaled indicating a left turn. The Subaru turned into the east-bound lane of traffic. Mr. Miller, in order to avoid the collision, first applied his brakes but thereafter released them and turned to the left. When the vehicles were approximately 50 feet apart Mr. McMullen, in the Subaru, suddenly turned to the right, returning to the westbound lane of traffic. The point of impact was in the westbound, or Subaru's, lane of traffic. R-36 to 39.

Mr. Thurber characterized Mr. Miller as being the only real eye witness, or first hand eye witness to what had occurred. Mr. Thurber informed the jury that the impact of the Subaru collapsed the front bumper of the truck against the left front wheel, so that the truck had no steering control after the front wheel contacted the Subaru.

Ray H. Ivie, defendant's counsel, in his opening statement, admitted that Lawrence McMullen could not remember anything that had happened after he left Delta, Utah. He contended that Tim Woodward, a passenger in the McMullen vehicle, would testify that the McMullen Subaru was going down the road at a normal speed, that the parties

had no intention of turning right or left, and all of a sudden he looked up and right in front of the windshield was the semi-truck. He observed the driver of the Subaru crank it to the right. It was Mr. Ivie's contention that the physical facts would demonstrate that the Subaru was parallel to the road on impact. He informed the jury that there were two independent witnesses traveling in a car going in the same direction as the Subaru, and they did not observe the Subaru in the eastbound lane of traffic. Mr. Ivie informed the jury that he did not believe that Mr. Miller's version of what happened could be substantiated by the physical evidence.

Mr. Ivie informed the jury that he would call Newell Knight as an expert who would testify that in his opinion the absence of any fresh tire marks prior to impact indicated there was no sudden turning by either vehicle, the Subaru being absolutely parallel with the road at the point of impact at which time the semi-truck was at a 14° angle to the road striking the midpost of the Subaru.

AS TO THE POLYGRAPH TEST:

In chambers, immediately prior to trial, Mr. Thurber informed the court that he intended to introduce the results of a polygraph test taken by Mr. Miller. Mr. Ivie at that time informed the court that if there was a polygraph test, that he would not agree to the introduction of the results of such a test into evidence. The court, in chambers prior to trial, admonished Mr. Thurber not to mention the polygraph test in his opening statement.

The first witness in the trial was plaintiff, Ben Miller.

On cross-examination by defense counsel, Ray H. Ivie, the examination was not proceeding in the manner that Mr. Miller approved of. The question was asked: R-111, lines 15-16.

> "(By Mr. Ivie) You said that you were inside of the intersection. Where inside of the intersection were you?"

To which Mr. Miller gave the following answer: R-111, lines 17 to 19

> "Mr. Ivie, I know what you are trying to do, and I took a lie detector to verify what I'm testifying is the truth."

Mr. Ivie called for a recess and made a motion for a mistrial.

At the recess the following dialogue took place:

R-112 line 9 to R-115 line 25

"THE COURT: State your law matter.

MR. IVIE: Yes, I ask for a mistrial at this time, because he volunteered that he had taken a lie detector test, and this is prejudicial. This matter was brought up by the Court, counsel, and there was not to be any mention of this until the Court ruled on it. I think it's prejudicial error.

THE COURT: Well, for the record, it was brought up before we came out, and it had to do with the opening statements and I asked Mr. Thurber not to say anything about it in the opening statements until such time -- and not to say anything about it in the opening statement; that at an appropriate time we would decide whether or not that evidence was admissible. Now, if this is the time to decide whether that kind of evidence is admissible, fine. If it's not, then I'll rule upon your --

MR. IVIE: I think this is the time, because I asked for

a mistrial. I don't lay in the bushes until I've lost it.

THE COURT: All right, that's fine. You've made a motion for a mistrial upon the grounds that that kind of evidence is not admissible and, therefore, it would be prejudicial and to the extent that it could not be cured by any kind of instructions by the Court. Now, I'll hear, then, the positions with respect to the lie detector evidence which may be proffered.

MR. THURBER: Well, your Honor, it's true that Mr. Miller did, before this lawsuit was ever started and at the insistence of Mr. Ivie's client, submit to a polygraph examination.

THE COURT: Was it at their insistence?

MR. THURBER: Yes. They refused to pay the property damage until it was --

THE COURT: And they had the lie detector test, then?

MR. IVIE: I don't know about that.

MR. THURBER: Well, they had insisted on it before they pay the property damage.

THE COURT: But they insisted on you having it taken before they would negotiate with you, is that right?

MR. THURBER: They wouldn't pay until they had.

MR. IVIE: That may be State Farm in Salt Lake, I had nothing to do with that, and my client is a separate party.

THE COURT: Now, Mr. Ivie, you are not representing to this court that you represent this man and not State Farm?

MR. IVIE: Oh, no. I represent them, too. They are the same here. But I had no knowledge of this being taken."

***

"MR. IVIE: Okay. Who insisted on this in Salt Lake?

MR. THURBER: Carolyn Jones?

THE WITNESS: (Mr. Miller) Carolyn Jones wouldn't say anything about settling the property until we had a copy of the lie detector test.

MR. IVIE: Have you got a copy you could furnish me?

MR. THURBER: They have it. It should be in your file.

MR. IVIE: Never seen anything, of this date.

MR. THURBER: I'll be glad to get one for you.

THE COURT: You have access to the file.

MR. IVIE: Do you have a copy?

MR. THURBER: I'm sure I do have in my file. I'd have to dig it out.

THE COURT: Who did the test?

MR. THURBER: A fellow named Steve Batley, who does the examination for the Salt Lake Police Department.

THE COURT: And the test was clean, not deceptive?

MR. THURBER: That's right.

THE COURT: And the only reason it was taken is because the plaintiff in this case insisted upon that, when I say "the plaintiff" I mean the insurance carrier for the plaintiff, insisted that it be taken before negotiations would be had with regard to the matter, is that so?

MR. THURBER: The insurance carrier for the defendant McMullen. The only reason we had him submit to it.

THE COURT: I don't know. I'm going to take this matter under advisement, but I'm going to go on with the trial.

MR. IVIE: Okay.

THE COURT: And I will receive evidence with regard to it, to the results of the test.

MR. IVIE: Based upon their representation?

THE COURT: Yes.

MR. IVIE: Okay. You are positive of that, now, you are not taking his word on something?

MR. THURBER: No. I was in on it.

THE WITNESS: (Mr. Miller) He was the one that told me I was going to take the polygraph test; not me. I hired him to do the legal work."

Carolyn Jones, of State Farm, who was the person handling the claim in question, testified that Ben Miller had suggested to her that he would take a lie detector test and furnish a copy to her. R-268 to R-277.

Mr. Miller, when he was specifically asked about the test, stated:

> "...It was you, (Mr. Thurber), thought that I should take it (lie detector test) and we should have it on record for you...I told her (Carolyn Jones) what I was doing. And I said, 'We'd be most happy to give you a copy of it'." R-277

And on cross examination of Mr. Miller in regards to the test, Mr. Ivie asked: R-280 line 20 to 22.

> "Then it was at your suggestion that you had the polygraph test taken, not at the request of anyone from State Farm?"

And to that Mr. Miller replied: R-280 lines 23 to 25

> "I never did say that it was requested. I told her that my attorney suggested that I take one, and she says, 'I would like to have a copy of it'. Now, that's the way --

And then Mr. Ivie asked: R-280 lines 26-27

> "So it was at your attorney's suggestion that you took it?"

To which Mr. Miller replied: R-280, lines 28 to 30

> "No. No. It was my attorney's suggestion that I took it; but when I told her about we were going to take it she said, 'I would like to have a copy of it'."

After Mr. Miller and Carolyn Jones had testified, Mr. Ivie stated to the court: R-281, lines 25 to 30 and R-282 lines 1 to 3

> "Apparently, when you come down to the truth of the matter, Tony thought it would be a good idea to have Ben take a polygraph test, he took one and furnished it to Carolyn Jones. So far as the test is concerned, it's simply self-serving. If it's favorable, he gives it to her. If it's unfavorable, not. Now here's this man (Lawrence McMullen) with this, and he's got a big stake in this case here, his lips are sealed because he has no memory of this. And to allow a -- he can't testify as to what happened."

Mr. Thurber then stated his position to the court: R-282 lines 9 to 12

> "Well my position is simply this, your Honor: Mr. Ivie's entire thrust here is that Mr. Miller is lying, just bald-face lying about this thing, and it's the best kind of evidence we can have."

The court then stated: R-282 lines 13 to 15

> "On the issue, Mr. Ivie, of whether or not this man is telling the truth, what better evidence is there available to anybody than a polygraph test?"

The court made its ruling. R-283 line 20 to R-284 line 16

"Okay. I'm going to deny the mistrial. I think it's only fair that the Court announce that decision at this time, and that gives the parties a right to or the opportunity to take whatever action they want to take, knowing what the result will be. And I do it on the basis that where the purport of cross examination of the plaintiff by the defendant is the assertion that the plaintiff has lied on direct examination with respect to the specifics as to how the accident occurred, it is not grounds for a mistrial that the plaintiff spontaneously blurts out that he has previously taken a polygraph test with respect to those specific matters and that he passed the test, if in fact it is true and if the examiner or if -- strike that -- and if the test results are available and proffered. I think under the circumstances and the circumstances, further, of this case it would be error to refuse to allow the evidence and the examiner's testimony, if it were offered. However, I will not, and this may be error also, but I believe that the state of the art with respect to polygraph examinations is not such that even under the circumstances of this case I could admit the results of the test without foundation. Now that's where you are. So don't try to get the test result in before the Jury unless you are prepared to bring the examiner, and we'll not talk about the polygraph test on either side unless the evidence comes in to the Jury concerning it, unless I admit evidence concerning it. Okay?"

After the admonition of the court, as above set forth, testimony was taken of the first rebuttal witness, as follows:

R-472 line 24 to R-474 line 4

DIRECT EXAMINATION

BY MR. THURBER:

Q What is your occupation -- I'm sorry. Give us your name first.

A My name's Steven Taylor.

Q It's not Thomas.

A No, not Thomas.

Q Where do you reside, Mr. Taylor?

A In Salt Lake City.

Q What is your occupation or profession?

A I'm a polygraph examiner.

Q And will you tell us what that is?

A A polygraph is a lie detector. I administer lie detection tests for various businesses, both private and public businesses.

Q Now, what education and practical experience have you had in that field?

A In that field, in my background in education as a bachelors degree at Utah State University and graduate work in exercise physiolo

MR. IVIE: No, sir ---

THE COURT: Now just a minute. Approach the bench, please.

(Off the record.)

THE COURT: We are going to take a short recess, Ladies and Gentlemen. A law question has arisen, I want to discuss this matter with counsel in chambers. And I'll ask them to come in.

(WHEREUPON, the Court and Counsel removed from the courtroom, where discussion was had off the record, and reconvened in open court upon return to the courtroom at 1:26 o'clock p.m.)

THE COURT: Ladies and Gentlemen, the Court has concluded that as a law matter that, and after discussing with counsel what the purpose of this testimony might be, that it is precluded by the Rules of Civil Procedure; and, therefore, the Court declines, Mr. Thurber, to permit the proffered testimony to approach the Jury.

MR. THURBER: Thank you.

THE COURT: Okay. So you may step down.

MR. THURBER: Thank you for coming."

Mr. Thurber then continued: R-474 line 5 to 12

"Your Honor, my next witness would be another certified polygraph operator, Steve Bartlett, who is out of the State and not available.

In view of his absence, we'll call another rebuttal witness. We'll call Ben Miller.

THE COURT: All right. Now Counsel approach the bench.

(Off the record.)

Mr. Thurber then continued his rebuttal. R-474 line 13 to 26

FURTHER DIRECT EXAMINATION

BY MR. THURBER:

Q Mr. Miller, now you were present during Major Knight's testimony yesterday and today, were you not?

A Yes, sir.

Q And you saw his reconstruction of the attitudes, according to his view of the two vehicles, at the time they came in contact, did you not?

A Yes, sir.

Q Is that the way it was?

A No, sir. No way.

Q Have you ever lied or will you ever lie to anyone about what happened as relates to this accident?

A No, sir."

The counsel, at the bench above referred to, disclosed the fact that Mr. Steven Taylor had performed a polygraph test on

Ben Miller some time after the trial commenced and before his testimony was offered.

AS TO THE COURT'S JURY INSTRUCTION:

The court gave Jury Instruction No. 10, over defendant's objection, to-wit: R-471 lines 6 to 12.

> "Defendant objects to the giving of Instruction No. 10 for the reason that the Court has informed the Jury of the effect of their verdict sofar as the comparative negligence law is concerned. And although McGinn v. Utah Power case is a case that arises out of Idaho, I still think that is the law of the State of Utah. So for that reason I object to it."

This objection was made before the instruction was given to the jury.

ARGUMENT

POINT I

THE COURT COMMITTED ERROR IN FAILING TO GRANT DEFENDANT McMULLEN'S MOTION FOR A MISTRIAL WHEN PLAINTIFF, BEN MILLER, AS THE FIRST WITNESS, TESTIFIED THAT HE HAD TAKEN A LIE DETECTOR TEST THAT VERIFIED WHAT HE WAS TESTIFYING TO WAS THE TRUTH.

The court committed error in failing to grant defendant McMullen's motion for a mistrial when plaintiff, Ben Miller, as the first witness, testified that he had taken a lie detector test that verified what he was testifying to was the truth.

A 1980 Utah criminal case established the following rule on the admission of polygraph examinations:

> "Polygraph examinations may be admitted under binding stipulation between parties, but even if there is stipulation, admissibility must be premised upon proof that examiner was qualified and that examination was

conducted according to accepted principles, and it does not necessarily follow that licensure of examiner will by itself be sufficient to establish examiner's qualifications." State of Utah v. Collins, 612 P.2d 775.

The Court in the Collins case, supra, reviewed the development of the use of the polygraph and noted that there are some recent decisions admitting polygraph examinations at least under certain conditions. The Court further noted the vast majority of courts which have ruled on the issue, as to the admissibility of polygraph tests, have held unstipulated polygraph examinations inadmissible. The Court stated:

> "...it is impossible to address the issue of the admissibility of polygraph results without an adequate evidentiary record, including expert testimony which deals with such factors as the validity of the underlying theory upon which polygraph examinations are based, the practical application of those principles to the issue of detection of fabrication, the verifiability of polygraph test, and the problem whether successful deception of the polygraph can be accomplished." State vs Collins, supra, at 778.

A 1979 Utah case, State of Utah vs. Abel, 600 P.2d 994, addressing itself to whether a stipulation was necessary as a foundation for admissibility of the polygraph test stated:

> "...a stipulation does not in any way establish the reliability or accuracy of polygraph test results. However, it does embody an important notion of fairness for those parties who consider the polygraph reliable and are willing to rely on it. A stipulation forecloses one party from preventing admission of an adverse test after he and the opposing party have agreed it would be admissible, simply because he does not like the results. In addition, a stipulation allows each of the parties to insist that the polygraph be administered by reputable, qualified persons, in a manner most conducive to producing accurate results, and in a manner that can be monitored."

In the Abel case, supra, speaking of the accuracy of the polygraph, the Court stated:

> "This Court has heretofore observed that even its most sanguine proponents admit that it cannot be relied on to determine with absolute and invariable assurance whether a person is lying or telling the truth. State vs. Jenkins, Utah, 523 P.2d 1232(1974)"

The Abel case, supra, stands for the proposition that the stipulation to introduce the polygraph results into evidence, must be binding on both sides. In the Abel case, supra, the defendant had signed the stipulation, but the counsel for the State of Utah had not signed the stipulation. The Court said there is no stipulation because only the defendant is bound by the agreement and held that the Court by allowing the test results into evidence had committed error.

In the case at bar, now being considered by the Court, there is no claim that there was a stipulation for the admission of the polygraph test results. There was the erroneous representation that the defendant's insurance company representative had requested such a test but the plaintiff, Ben Miller, specifically testified that was not so. R-277 and R-280 lines 20 to 30.

If the rule for the admission of polygraph test results is that there must be a binding stipulation, a foundation by the operator as to his qualifications, and a showing that the test was conducted according to accepted principles; it would then seem logical that the alleged results of the test could not be introduced by the statement of a witness that he had taken a test and the evidence that he was giving was truthful.

The California District Court of Appeal, Second District, in People vs. Aragon, 316 P.2d 370, in analyzing a case similar to the one at bar, stated:

> "In the instant case there is nothing before us to establish what kind of lie detector test was given, if any; there is nothing concerning the accuracy of such a test; there is no showing that the tests, even if properly given, have achieved scientific recognition in this state; there is no foundation for the admission of any test results; and there is no stipulation that the testimony could be received in evidence. It is not at all unlikely that a popular belief has been formed from press, radio, television, stage and screen that the lie detector is an accomplishment of modern science the results of which are as reliable as those of fingerprinting, blood tests and ballistics. However this is not correct. It is general knowledge among those familiar with the lie detector machines that the results are greatly dependent upon the training, experience and skill of the operators and that the results vary with different types of subjects. ...Appellate court reports throughout the country would indicate an agreement that the best lie detector test to date is a thorough painstaking and searching cross-examination by competent counsel.
>
> If the result of the lie detector test is inadmissible in the first instance, surely no one would contend that the results can be cloaked in the raiment of an accusatory statement and then slipped into evidence. If we were to hold that such a course is proper we would have sanctioned the receipt of damaging evidence which, but for such masking, could not be heard by the jury. We believe that the prosecution should not be permitted to introduce into evidence by indirection what would be highly improper if done directly. Our system of jurisprudence is not constructed upon such a foundation. Moreover, it would be hard to believe that the jury here considered the statements solely as accusatory statements.
>
> Obviously the statements with reference to the lie detector test as introduced in this case were highly prejudicial and in our opinion constituted prejudicial error."

The calling of the first rebuttal witness, a Steven Taylor, who purportedly had conducted a polygraph test on Ben Miller after the commencement of the trial at bar; the statement by Mr. Thurber

that the next witness would be another certified polygraph operator, Steve Bartlett, who was out of the state and not available; and the recalling of Ben Miller to state again that he had not lied to anyone about what happened as it related to the accident; constituted further prejudicial error.

The Utah Supreme Court adopted Rules of Evidence, February 17, 1971, which were effective July 1, 1971. Rule 2, provides as follows:

> "Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

Defendant in the case before the bar contends in civil matters there is no procedural rule or statute applicable to the specific situation of the admissibility of the results of the lie detector test that should make the rule different in civil and in criminal cases.

Other Courts have dealt with the matter of lie detector tests in civil cases.

The California Court in 1957 laid down the hard and fast rule:

> "Lie detector tests have no place in California law." Gideon vs. Gideon, 314 P.2d 1011.

The Montana Court in 1972, stated:

> "...Few jurisdictions allow the polygraph tests in criminal actions. An extensive research reveals fewer jurisdictions have considered such evidence in civil actions. After hearing the evidence offered by the polygraph expert at the trial, the court properly excluded his testimony." Gropp vs. Lotton, 503 P.2d 661, at 666.

The New Mexico Court in 1966, stated:

> "That Legislature by statute saw fit to license and regulate polygraphy did not raise profession or occupation to such scientific dignity as would justify Supreme Court's recognition of results of polygraph tests as admissible evidence." In re Moyer, 421 P.2d 781.

However, by 1976, the New Mexico Court had modified its rule in civil cases to the point where the Court stated:

> "present standard for admissibility of polygraph evidence takes into consideration qualifications of polygraph operator, reliability of procedure used, validity of test made, and other evidentiary requirements." Hammond vs. Reeves, 552 P.2d 1237, at 1238.

All of the Courts seem to require that before polygraph test results will be admissible in evidence, a foundation must be laid that the examiner is qualified and the examination was conducted according to accepted principles. The case at bar falls short of even the very minimum standard.

In the interest of uniformity it would seem that both in civil and in criminal matters, under the Rules of Evidence for Utah and the Collins case, supra, a further prerequisite should require stipulation between the parties.

POINT II

THE COURT COMMITTED ERROR IN INSTRUCTING THE JURY AS TO WHAT EFFECT THEIR ANSWERS WOULD HAVE ON THE FINAL OUTCOME OF THE CASE.

The court committed error in instructing the Jury as to what effect their answers would have on the final outcome of the case.

Over the objection of defendant's counsel, the court instruct the Jury as follows in Instruction No. 10.

"In considering your answer to Question No. f, the Court cautions you that the amounts you arrive at are not necessarily the amounts plaintiff Ben Miller will be awarded as a judgment against the defendant. The Court may be required to make certain adjustments to your findings by reason of the comparative negligence law of this State.

Under that law plaintiff Ben Miller will not ultimately be awarded judgment for any amount, regardless of your answers, if you find his negligence equal to or greater than that of the defendant. On the other hand, if you find the defendant's negligence greater than plaintiff Miller's negligence, then plaintiff Miller will ultimately be awarded a judgment, but in awarding judgment to him the Court will reduce your figures in answer to Question No. 4 by the percentage of negligence which you have attributed to him if any, in your answer to Question No. 3.

With respect to plaintiff Jovalle Thomas, the Court will ultimately award judgment to her against the defendant for the full amount stated in your answer to Question No. 5, without reduction, as she is not affected by the comparative negligence law."

In Comparative Negligence Manuel, by Carroll R. Heft, J.D. and C. James Heft, J.D., published by Callaghan & Company, 1971, it states:

"The special verdict is the very cornerstone of the comparative negligence concept, and the jury does not, and should not, know the legal effect and result of its answers to the interrogatoreis in the special verdict. By using the procedure of a special verdict under comparative negligence, a jury finds the facts without regard to the ultimate outcome of the case. The court takes the facts as found by the jury and awards judgment. The procedure is intended to ascertain the truth untainted by prejudice or a desire to see one of the parties win or lose." (Chapter 8, page 1.)

In 1974, the Utah Supreme Court, in the case of McGinn vs. Utah Power & Light Company, 529 P.2d 423, ruling upon a comparative negligence case that arose under the laws of the State of Idaho construing Idaho law, held that the jury should not be informed as to the effect of their verdict on the final outcome of the case.

Judge Henroid, speaking for the Utah Court, stated:

> "The general rule is that it is reversible error for the trial court to instruct the jury as to what effect their answers will have on the final outcome of the case."

While Utah law was not in issue, Judge Henroid said the Court chose to subscribe to the rule as above announced.

Counsel for defense urges that the above is a good and proper rule and should be the law of this case.

CONCLUSION

The results of polygraph examinations may be admitted under binding stipulation between the parties, but even if there is stipulation, admissibility must be premised upon proof that the examiner was qualified and that the examination was conducted according to accepted principles.

The court committed prejudicial error in the case at bar in failing to grant defendant McMullen's motion for a mistrial when plaintiff, Ben Miller, as the first witness, testified that he had taken a lie detector test that verified what he was testifying to was the truth.

Plaintiff's counsel laid a foundation for the court's prejudicial error when he made the erroneous representation that the defendant's insurance company representative had requested the polygraph test.

The prejudicial error was further compounded by the statement of Mr. Thurber that the next witness would be another certified polygraph operator, Steve Bartlett, who was out of the state and not

available; and the recalling of Ben Miller to state again that he had not lied to anyone about what happened as it related to the accident.

The court committed prejudicial error in instructing the jury as to what effect their answers to the special verdict would have on the final outcome of the case.

Respectfully submitted this 18th day of February, 1982.

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Mailed two (2) copies of the foregoing Brief of Appellant to Anthony M. Thurber, Attorney for Plaintiffs-Respondents, 211 East Broadway, Suite 213, Salt Lake City, Utah 84111, this 18th day of February, 1982.

Secretary