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# Richard A. Isaacson v. Clair Dorius et al : Brief of Respondents and Brief Raising Jurisdictional Issue

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD A. ISAACSON,
Plaintiff and Respondent,
vs.
CLAIR DORIUS,
Defendant and Appellant,
and
LAWRENCE W. LYNN,
Plaintiff and Respondent,
vs.
CLAIR DORIUS,
Defendant and Appellant.

Case No. 18166

# BRIEF OF RESPONDENTS AND BRIEF RAISING JURISDICTIONAL ISSUE

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
OF SANPETE COUNTY, UTAH, HONORABLE DON V. TIBBS, PRESIDING

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FILED

MAY 21 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF THE RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

In this action the plaintiffs and respondents sought damages for personal injury and property damages from the defendant arising out of a collision between an automobile driven by the plaintiff-respondent, Lawrence W. Lynn, in which plaintiff-respondent, Richard A. Isaacson, was traveling as a passenger, and a pickup truck driven by the defendant-appellant, Clair Dorius. The case on behalf of each plaintiff was brought as

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a separate action and the cases were consolidated for trial.

## DISPOSITION IN THE LOWER COURT

At the trial, after all parties had rested, Judge Tibbs granted respondents' motion for a directed verdict on the issue of liability, thereby determining that the defendant-appellant was negligent and his negligence the proximate cause of the collision as a matter of law, and determining that the plaintiffs-respondents were not negligent and that there conduct was not a proximate cause of the collision.

## RELIEF SOUGHT ON APPEAL

Plaintiffs-respondents seek to have the decision of the Trial Court affirmed.

Plaintiffs-respondents also assert that this Court lacks jurisdiction of this appeal for the reason that defendant-appellant did not timely file Notice of Appeal. This matter was raised earlier in this Court by motion of respondents seeking dismissal of the appeal for lack of jurisdiction. The Court denied the motion without prejudice to that issue being raised as an issue on appeal.

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## STATEMENT OF FACTS

This action arose out of an automobile collision between a vehicle driven by the plaintiff, Lawrence W. Lynn, in which plaintiff, Richard A. Isaacson, was a passenger, and a pickup truck driven by the defendant. The collision occurred on Highway SR28, commonly known as U. S. Highway 189, just north of Fayette, Utah, at a place on said highway where a dirt road leading from Fayette crosses said highway and proceeds on to a cemetery located on the east side of the highway. Prior to the collision the plaintiffs were proceeding north on Highway SR28 (the arterial highway) and the defendant was proceeding east on the dirt road. Travelers on the dirt road are required to stop at the stop sign before proceeding out onto Highway SR28. The defendant testified that he did not stop at the stop sign, and that he at no time saw the vehicle driven by the plaintiffs. (Tr:284) That defendant's actions were negligent and constituted a proximate cause of the collision is conceded by the defendant (Defendant's brief, page 6). Defendant, however, contends that plaintiff Lynn was also negligent on the basis that there was some evidence plaintiff's vehicle was going 65 miles per hour on a 55 miles per hour highway (Appellant's brief, page 7) and in allegedly failing to keep a proper lookout (Appellant's brief, page 7).

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The facts relating to the foregoing assertions are as follows:

SPEED: The only testimony in this action with respect to speed came from plaintiff Lynn and from Highway Patrolman David Bailey (who was qualified at the trial as an accident reconstruction expert) (Tr:64-66).

Plaintiff Lynn testified that at the time of the collision he was traveling 55 miles per hour. He testified that shortly after he and plaintiff Isaacson left Richfield, he set the cruise control on his 1979 Lincoln automobile at 55 miles per hour and that it remained at that setting until he applied his brakes after he observed that defendant was not going to stop for the stop sign as noted above (Tr:289-80). Plaintiff Lynn testified that as soon as he saw that defendant was not going to stop at the stop sign he immediately applied his brakes, causing his vehicle to go into a skid which continued until the collision between the two vehicles and even beyond. (Tr:281).

Trooper Bailey testified that from measurements taken at the scene of the collision and from calculations applied thereto, he determined he was able to arrive at "approximations" of speed. (Tr:74). He concluded that the plaintiff's vehicle was traveling approximately 65 miles per hour at a point which he described as "the point of perception," (Tr:74,94) but that the formula shed no light on speed prior to that point. (Tr:94). He testified that the perception time is approximately 3/4's of

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of a second (Tr:83), during which time, at 65 miles an hour, the plaintiff's vehicle traveled approximately 74 feet (Tr:84). Officer Bailey testified that there was an average of 81 feet of skid marks prior to impact and an average of 43 feet after (Tr:68). He therefore concluded that there were approximately 155 feet traveled by the Lynn vehicle from point of perception to point of impact. He testified that the defendant's vehicle was traveling, at the time of the impact, approximately 18 miles per hour, which he testified was 26 feet per second (Tr:73,87) and that the distance between the front bumper of defendant's vehicle at impact and the stop sign through which the said vehicle had passed was 59 feet (Tr:85). He stated that the defendant would have been traveling (at 18 miles per hour) for approximately 2.2 seconds from the time he proceeded past the stop sign to the point of impact (Tr:91). Trooper Bailey testified that at 65 miles per hour plaintiff's vehicle would travel 95 feet per second and at 55 miles per hour it would have traveled 80 feet per second (Tr:81).

There was no testimony as to the coefficient of friction on the highway nor as to what other changes, if any, in the aforesaid reconstruction data would be brought about by a change in speed in relation to skid distance and/or time and the like.

Trooper Bailey testified that in his opinion the speed of the Lynn vehicle was not a cause of the collision, but to the contrary, the cause of the collision was defendant's failure to

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heed the stop sign. Trooper Bailey states at page 78 of the transcript:

> "In my opinion the cause of the accident was that Vehicle #2 (the defendant's truck) did not stop at the stop sign and proceeded into an unsafe intersection."

Defendant claims no error for this question and answer on appeal.

At pages 79 and 80 of the transcript Trooper Bailey testified:

> "Q What I'm trying to say is: When you're talking about going 65 miles an hour contributed as a cause to this accident, whether it would not have happened if he was going faster or slower? You have to have some other factors in there; don't you?
>
> "A You have to have time. You have to figure in time equations, yes.
>
> "Q But I'm just saying if you'd been going 45 ten miles under the speed limit, or 65, ten miles over the speed limit, would Vehicle 1 constituted a hazard along that highway that whoever was approaching that stop sign should have stopped for?
>
> "A Yes. I would say he should have stopped for it."

Trooper Bailey testified on redirect by Mr. Madsen at page 93 of the transcript as follows:

> "Q But then, again, we get into matters of the point of perception it has when braking begins and so on and there was not just a simple change in speeds; is that correct?
>
> "A Yes.
>
> "Q So it's impossible to say, as I have asked you originally, whether this accident would have or wouldn't have occurred had Vehicle #1 been going 55 or 65; is that correct?

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"A (No answer).

"Q You have to have a bunch of other factors involved besides the simple matter of speed; correct?

"A Yes, you have to have a point of perception."

On recross by Mr. Jeffs, Trooper Bailey states at pages 93 and 94 of the record as follows:

"Q But, aside from that, you still would have, if he'd been going 55, he would have been further down the road when Vehicle #2 crossed the highway?

"A Well, I don't know if I can answer that. All I can do is go from the point of perception to the point of impact. I don't know what his speed was prior to the point of perception. I don't know, you know, he might have been going 100 down the road or he might have been doing 20. I don't know."

"Q But let's assume the same thing that Counsel asked you when he asked you to assume that that was a constant 18 miles per hour that Vehicle #2 was crossing the highway. Let's assume a constant 55 miles per hour as he comes from Gunnison. He would have been further down the road when Vehicle #2 crossed that highway?

"A That's correct.

"Q And there wouldn't have been any accident?

"A Probably not."

On redirect Trooper Bailey was asked by Mr. Madsen at page 94 of the transcript:

"Q And that's why we'd asked if he had been going 80, he would have been way beyond any possible intersection in this same vein, and that's what you can't possibly state; correct?

"A That's correct."

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LOOKOUT: The testimony with respect to the issue of lookout on the part of plaintiff Lynn came largely from him. However, some testimony of the defendant is pertinent to this issue, although defendant Dorius testified that he at no time saw the plaintiff's vehicle. The testimony of Mr. Lynn has been quoted only in part by the defendant, and in so quoting it, that testimony has been seriously distorted. Mr. Lynn's testimony with regard to the matter starts on page 279 of the record and we will quote all relevant portions of that testimony.

At pages 279-81 of the transcript, questions are being put by Mr. Madsen, counsel for plaintiffs, and the answers are those of Mr. Lynn:

"Q What happened next?

"A As we proceeded down the road, I glanced over and saw a pickup truck coming up towards the road. This is Fayette and he was coming across from Fayette to the cemetery.

"Q How long or what distance down the road did you keep that vehicle under observation?

"A I glanced at it and saw it coming and paid no more attention to and then, all of a sudden, I realized he wasn't going to stop.

"Q When was it and where was he when you realized that he wasn't going to stop?

"A Within a hundred or a hundred and twenty feet or so, I'm not sure.

"Q Of the road itself?

"A Of the cross road, right.

"Q Did you keep him under observation from that point?

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"A From that point on, I yelled at Dick and I said, 'That knuckle head isn't going to stop, and I'm going to have to' -- and I slammed on my brakes and they skidded.

"Q At the same time you were saying this to Dick, you're slamming on your brakes?

"A Absolutely.

"Q About how fast do you estimate the pickup truck was going?

"A Oh, not over 20 or 25. I mean I'm no authority on speed when a car is going sideways but he wasn't speeding; that's for sure.

"Q Were you able to determine whether he was slowing down for the stop sign?

"A I didn't see any effort at all to slow down.

"Q Was there a stop sign there?

"A Oh, yes.

"Q Controlling access to the highway?

"A Right.

"Q And you did not see him stop at that stop sign?

"A No.

"Q Did you see him stop at any point during that 100 foot distance?

"A I didn't. As I observed him, I didn't see any stop whatsoever. Although, again, let me say I didn't exactly keep my eye on him all the time. I saw him and then the next time I saw him, I realized he wasn't going to stop.

"Q Was there anything obstructing your view of him at any point along the way?

"A No way. I could see him all the time."

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On cross-examination by Mr. Jeffs, plaintiff Lynn testified at pages 306-307 of the transcript as follows:

"Q And how far back was he from that stop sign when you first saw him?

"A This is conjecture. I can't tell you for sure, but it was back maybe a half block or a fourth of a block or a half a block.

"Q And do you have any estimate how far you were from where the collision took place at that time?

"A Not really. I had no reason to try to record the particular position in my mind.

"Q Well, I recognize that. I'm just trying to determine whether you do have any recollection of that. You have no estimate of how far back you were?

"A Not really.

"Q At the time you did become aware that there was a circumstance of grave concern you have indicated, I believe on direct examination that he was back about 100 feet from the stop sign; is that what you have testified to?

"A I didn't know for sure. I didn't say that, I don't believe.

"Q That's what I thought your direct testimony was that you estimated for Mr. Madsen that he was back maybe 100 feet before the stop sign.

"A 100 - 75 feet - 125 feet -- this is something which is strictly an estimation and has to be.

"Q From the time when you first saw the Dorius pickup truck until the time of the impact, did you ever become aware of that pickup truck stopping?

"A Absolutely not.

"Q Was there a time frame sufficient that it could have stopped and then re-proceeded without your being aware of it?

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"A Very unlikely.

"Q When you first saw the Dorius pickup truck coming from the west, had you already come up out of the dip in the road that lies to the south there?

"A Those dips of yours are so small that you're not even aware they're there or you're in them when you're in a car.

"Q Not aware of any obstruction of your visibility?

"A There wasn't any."

Further, with Mr. Jeffs continuing on cross-examination, plaintiff Lynn testified at page 311 of the transcript:

"Q What is your best estimate as to the distance from the stop sign of the Dorius vehicle when you first became aware that he was not going to stop at that stop sign?

"A As I recall he was probably passing the stop sign itself.

"Q You didn't become aware until he was actually passing it?

"A Until he actually wasn't stopping, yes.

"Q You didn't see him in the last hundred feet before that stop sign?

"A Not -- you probably see someone but you're not really looking at him; you're not conscious of it, you're looking at the road.

"Q Didn't you testify that he didn't make any effort to slow down for the stop sign?

"A In my estimation he didn't.

"Q Is that a conclusion you have drawn by after the fact or is that from observation?

"A That's from an observation and from what he said himself. I'm quoting him there.

"Q Well, I'm asking you what you saw.

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"A Okeh. I didn't see him slow down and I didn't see him stop. I saw him move through the stop sign at a fairly good rate of speed.

"Q And at what distance before the stop sign did you see him proceeding to and through that stop sign?

"A That's hard to say. I mean I really, really wasn't looking over his way particularly but I could see when I saw him and realized he was coming through, he was already had his nose coming up toward the stop sign.

"Q You didn't pay any particularly attention to him in that hundred feet before that?

"A No. You really kind of trust people thinking they're going to stop when it says to.

"Q Was there anything between your line of sight and the Dorius vehicle at any time from the time you first saw him that would have obstructed your vision of him?

"A I really don't think so. As I've looked at it since, I could see nothing. I've been by since, you know, and I've looked at it and I could see nothing that could prevent him from seeing anything coming down the road.

"Q Was there anything that obstructed your seeing him?

"A Well, that's the same question over again. Of course not."

On redirect by Mr. Madsen, plaintiff Lynn testified on page 321 of the transcript:

"Q Calling your attention to your observations of the pickup truck, had the pickup truck stopped and had its driver gotten out to pick something up, would you have seen that? Were you that aware of the truck at this time?

"A I was down the road about a mile and a half. I couldn't have seen it.

"Q Did it so stop and did the driver get out at any

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time under your observation?

"A Absolutely not."

Plaintiff Lynn testified that after the collision he had a conversation with defendant Dorius, at which time Dorius stated to him:

> "Gee, I'm sorry. I didn't see you. I didn't stop; it was all my fault." (Tr:284).

In his own testimony Dorius confirmed that that statement was accurate (Tr:332).

Mr. Dorius testified that he was proceeding east on the dirt road approaching Highway SR28, that he stopped on the highway, left his vehicle running and got out and removed a limb from the highway (Tr:326). He stated that it took him "probably ten seconds" to bring "the vehicle to a stop, get out and move the limb and get back into the vehicle." (Tr:329). He stated that he stopped for the limb at a distance of at least 100 feet west of an electrical substation situated beside the dirt road and that the substation was somewhere between 40 and 100 feet west of the stop sign, so that the limb was between 140 and 200 feet west of the stop sign (not 40 or 50 feet as stated at page 3 of appellant's brief) (Tr:353).

Defendant was asked by his counsel on direct examination,

> "Did you consider the stopping to get the limb the equivalent of stopping for the stop sign?"

to which Mr. Dorius stated:

> "Yes, I did." (Tr:354-6)

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He further stated on direct examination by Mr. Jeffs (Tr:340-341):

"Q (By Mr. Jeffs) Your answer is: There was never a time that a vehicle could be completely obscured from coming from the south?

"A Not where I was stopped. There was no reason why I couldn't have seen something.

"Q Okeh. Do you have any explanation for why, as you got back in your vehicle, that you did not see the Lynn vehicle coming from the south?

"A Well, I think something must have obscured my view in the truck, either the post on the door, the mirror on the side of the truck, as I was going on, something. We must have been going in the same area, so that when I looked out there, he must have been there but the mirror or the post must have covered it. The circumstances were that he was there but I couldn't see him because of some object that was in the truck itself.

"Q Now, what are you talking about when you say the post?

"A The door post, where the window is, it's part of a door or part of the window or possibly it was the rear view mirror or something.

"Q The rear view mirror that's on the right hand side?

"A Yes."

On cross-examination by Mr. Madsen, the transcript discloses the following testimony by defendant at page 356:

"Q Now, let me be sure I have it in sequence. You looked to the south at the time you got back in the car and started across SR-28?

"A Right.

"Q And did not look at the south again until impact?

"A I didn't ever look again evidently.

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"Q Did you look to the north at the time you got back into the truck after removing the limb?

"A Yes, certainly.

"Q Did you look to the north again after that first view until the accident?

"A I really can't remember what I did.

"Q When you indicated my client, as you referred to him, told the truth when he indicated in a conversation specifically. Do you remember telling him you did not stop for the stop sign?

"A I knew I felt bad for having run out in front of them.

"Q Answer the question.

"A I feel like what they said is as close as I can recall what was said.

"Q Specifically, do you recall telling them you did not stop for the stop sign?

"A I remember the conversation with the officer but I don't remember saying that particular thing.

"Q Do you remember telling them that you were at fault?

"A I think they told the truth when they said that.

"Q I'm asking you what you remember that you said?

"A I had received a pretty bad bump on the head. I'm sure I was just going on because they both had their, you know --

"Q Are you trying to suggest that you don't really clearly remember what was it he said in that conversation?

"A I know the gist of what he said at this time but being a year later, I would agree with them that is what was said.

"Q They have testified you told them that you didn't see the stop sign and didn't stop for it and you were sorry and that it was your fault.

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"A Well, I haven't heard a dishonest thing from then yet and I would go on just that."

After both sides had rested, the plaintiffs made a motion for a directed verdict on the issue of liability of the grounds that there was no evidence that any purported negligence on the part of plaintiff Lynn was a proximate cause of the collision in question. That matter was argued to the Court, and the Court granted the motion and stated that he felt there was no evidence of negligence. The Court stated (Tr:391):

"The Court is of the opinion, and so finds, that the defendant is negligent and that the plaintiffs are not negligent, and the Court grants a directed -- will direct the jury to just determine the issue of damages."

The Court further added:

"For the purpose of the record, the Court finds further that likewise there is no proximate cause, but I don't find that there is any negligence and so I don't think it makes any difference."

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TIMELINESS OF APPEAL: The facts relating to the timeliness of defendant's appeal are as follows:

After entry of Findings of Fact, Conclusions of Law, and Judgment, the defendant filed a Motion for New Trial. Briefs were filed by the parties relating thereto, and the matter was argued orally before Judge Tibbs in Manti. Judge Tibbs denied the Motion for New Trial and Order Denying Motion for New Trial was entered in the Register of Actions on November 13, 1981. (R:95,179)(See also Affidavit of Wanda Bartholomew, Deputy County Clerk of Sanpete County, filed in the Supreme Court in connection with Motion to Dismiss Appeal for Lack of Jurisdiction.)

Thus the time for appeal began to run on November 13, 1981, and would have been up on December 13, 1981 (one month later), but the 13th was a Sunday, so that the last day of the one-month appeal time was December 14, 1982. Defendant actually filed his Notice of Appeal in the District Court of Sanpete County on December 16, 1981, two days late (R:97,181).

On or about December 31, 1981, respondents made a motion in this Court to dismiss the appeal of the defendant for lack of jurisdiction. That motion was heard by this Court on January 18, 1982. At that time the Court denied the Motion to Dismiss the Appeal, but denied the same "without prejudice to raise as an issue on appeal."

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ARGUMENT

POINT I. THERE IS NO EVIDENCE THAT ANY NEGLIGENCE OF THE PLAINTIFFS WAS A PROXIMATE CAUSE OF THE COLLISION.

SPEED. Defendant attempts to establish negligent speed on the part of the plaintiffs by reference to Sec. 41-6-46(2)(c) In Cardon v. Brenchley, 575 P2d 184 (Utah 1978), this Court discussed the matter of prima facie evidence of negligent speed. The Court there stated:

> "The overriding principal governing negligence is the exercise of the degree of care which an ordinary, reasonable person would exercise under the circumstances. In order for the plaintiff to recover, she must show that the defendant was negligent in failing to exercise that degree of care; and also that his negligence was the proximate cause of the collision."

Defendant has the burden of proof to establish that plaintiffs' speed was negligent and that such speed, if negligent, was a proximate cause of the collision. Defendant fails on both counts There is no showing in this case that plaintiffs' speed—either 55 or 65 or anything in between—amounted to negligence under the circumstances of this case, but furthermore there is no showing whatsoever that the plaintiffs' speed was a proximate cause of the collision.

In his brief defendant mentions the word "causation" once on page 6 of the brief, but nowhere refers to any evidence whatever from which it could be concluded that speed in any way caused the collision. There simply is no such evidence.

The thrust of defendant's speed argument is found in his brief (page 8), where he asserts that "speed was a factor in the accident." He there quotes from Trooper Bailey ((Tr:94)(in response to a question by Mr. Jeffs:

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"Let's assume a constant 55 mile per hour as he comes from Gunnison. He would have been further down the road when Vehicle #2 crossed that highway."

To which Trooper Bailey answered:

"That's correct."

But, if we assume a constant speed of 75 or 85 miles per hour, we would have to acknowledge that plaintiff would have been way past the point of impact at the time in question. It is obvious that such reasoning is specious and totally irrelevant. Trooper Bailey's own testimony was that his calculations shed no light upon the speed of the Lynn vehicle prior to point of perception. There is therefore no testimony whatsoever from any source that plaintiff Lynn was exceeding 55 miles per hour prior to the point of perception, which was his speed by his own testimony.

There are numerous cases in which the aforesaid "speed" argument of defendant has been rejected.

We refer the Court to the case of Larson v. Evans, 364 P2d 1088 (1961) 12 Ut 2d 245. That case involved a fact situation similar to the instant case. In that case the trial court had submitted to the jury the issue of plaintiff's contributory negligence and denied a motion for a new trial on the part of the plaintiff on the grounds that the jury could not reasonably find that plaintiff's speed was a proximate cause of the accident. The Supreme Court of Utah noted that there was evidence submitted which would support a finding that the speed of the Larson vehicle was in excess of 30 miles per hour and noted that evidence of plaintiff's speed was irrelevant to the question of his negligence

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in the absence of a showing that such speed violated some duty which he might have had under the circumstances. The court noted at page 239:

> "Not only did the defendant fail to show that John Larson was negligent in the speed at which he was traveling, but he failed also to show any causal connection between plaintiff's speed and the accident." (Emphasis added.)

The same can be said of the facts of this case as the defendant has toally failed to show any causal connection between plaintiff's speed and the collision which occurred in this action

In the case of Smith v. United States, 94 F.Supp. 681 (U.S. Dist. Court, W.D. No. Carolina, Charlotte Div., 1951) the facts involve a situation where the plaintiff ran a stop sign and proceeded from a secondary road onto a favored highway, there colliding with a vehicle being driven on the main highway by the defendant. Plaintiff contended that the defendant was speeding. The court stated that even if it were to be assumed that the defendant had been speeding, still such speeding was not a proximate cause of the accident. The court stated:

> "If one would assume that the automobile of the defendant was being operated too rapidly or in violation of the speed regulations of North Carolina in force and effect as of the date of the collision, still it could hardly be said that the rate of speed would have been the proximate cause of the alleged injury of the plaintiff or the damage to his property. Undoubtedly, the cause of plaintiff's injury is predicated upon his driving out from a secondary roadway into the highway into the face of oncoming traffic."

In Kane v. Williams, 181 A.2d 651 (Maryland 1962), the Court of Appeals of Maryland upheld the granting of a motion for

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directed verdict. In that case the appellant, an 11-year-old, was riding a bicycle and ran a stop sign and proceeded out into the highway. The appellant claimed that the motorist who collided with the 11-year-old was driving at an excessive rate of speed. The court held as a matter of law that the negligence of the cyclist was the proximate cause of the accident. The court stated:

> "On the theory that the defendant was traveling too fast in a school zone on a school day and at a time when children were going to school and should therefore have foreseen what happended, the infant plaintiff further suggests that he should not be charged with contributory negligence as a matter of law, but his argument is not sound under the circumstances. For here, where the defendant had the right of way, and the movements of the infant plaintiff were the proximate cause of the accident, it would be mere conjecture to say that the cyclist might not have been struck if the motorist had been driving slower and had exercised more foresight."

In Chiasson v. Connecticut, 144 So.2d 726 (Louisiana 1962), the fact situation was presented in which the driver of a car approaching a through highway stopped at a stop sign and then proceeded cautiously into the intersection. The trial court had held that both that driver and the driver of the vehicle on the main highway were guilty of negligence. There was some testimony in that action that the driver of the vehicle on the main highway was exceeding the speed limit. The appellate court held that the evidence of such alleged excessive speed was not sufficient, but stated further:

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> "Moreover if the station wagon was traveling at approximately 5 miles per hour as the trial judge found and if in fact the accident occcurred while Orgeron was going 40 miles per hour it still would have occurred had he been going only 30 miles per hour. It follows that his speed was not a proximate cause of the accident . . .
>
> "We might indulge in all sorts of mathematical calculations in an endeavor to determine whether Orgeron could have stopped in time to avoid the accident after he saw or should have seen the station wagon, and all of the calculations would ultimately be based on the estimates of speed and distance testified to by Mrs. Chiasson and Orgeron. In our opinion the proof is insufficient to show that Orgeron could have avoided the accident."

We believe in the instant case there is likewise insufficient evidence to show that any difference in speed would have had a different result in this case.

It should further be noted that there is a serious danger in attempting to determine with mathematical precision stopping distance, reaction times and the like based upon estimates only. As was noted in the case of Mulbach v. Hertig, 15 Ut 2d 121, 388 P2d 414 (1964):

> "Defendant's counsel has proceeded from estimates as to speeds and distance to precise refinements down to fractions of seconds of time and feet and inches of distance to demonstrate that at the time defendant was at the stop sign the plaintiff must have been at sufficient distance away that he could have stopped or so controlled his truck as to avoid the collision. No useful purpose would be served by setting forth and analyzing these niceties. It may well be that had plaintiff kept a constant watch directly upon the defendant and nothing else, he might in some manner have avoided this accident. But in the exercise of due care he could not very well do so, but was

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obliged to be alert to other possible dangers on the highway and particularly at the intersection."

We believe the same argument can be made in the instant case.

Finally, we cite to the Court the case of Davis v. Brooks, 186 F.Supp. 366 (U.S. Dist. Court, Dist. of Delaware, 1960). In that case the plaintiff's decedent ran a stop sign and proceeded out into the highway at an excessive rate of speed, there colliding with a truck driven by the defendant. There was evidence that the truck had been exceeding the speed limit slightly. The court held at page 368:

> "The first question for decision is whether Massie was guilty of any negligence which was a proximate cause of the accident. If not, that is an end to the matter. He was going slightly, very slightly, in excess of the legal limit. This was negligence per se. But was this excess speed of two miles per hour over the statute a proximate cause of the accident? The point of inquiry is whether this accident would have ever happened at all but for the incredibly reckless operation of the plaintiff's machine, bearing in mind that even had the defendant's truck been stopped, the accident would have still happened. Thus viewed, it is apparent that the sole cause of the accident was the reckless negligence of the plaintiff Davis." (Emphasis added.)

It was established without question that the defendant's truck was moving at approximately 47 miles per hour, and it is thus clear that where the court states that the accident would have happened anyway, the court is assuming that the defendant had to be deemed to be at the point of impact in that case in any event. The court has thus concluded that it is irrelevant to talk in terms of the speed of the truck as being slower or faster

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than the speed limit in terms of proximity to the accident, obviously for the same reasons as we have heretofore pointed out—that a difference in speed would have placed the defendant at a different location entirely from that at which this collisic occurred. Thus a difference in the defendant's speed might in a philosophical sense be considered to be a cause of the accident inasmuch as a driver's speed, whatever it is, is the speed necessary to bring him to the point of impact. But the point is that speed is not a proximate cause of the accident just because it is the speed that brings the motorist to the point of impact. In order for the speed to become a proximate cause, it must be shown by the weight of the evidence that the speed under the facts of a given case somehow contributed to the accident in some way other than simply showing that that was the necessary speed to bring the motorist to the point of impact.

There is no evidence whatsoever in this action that the plaintiff's speed in any way contributed to the collision in question. The Court was entirely justified in so holding as a matter of law, and indeed, we believe, was required to do so under the facts of this case.

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LOOKOUT: With respect to the matter of lookout, plaintiff Lynn testified that he first saw defendant's vehicle when it was one-fourth to one-half a block west of the highway (Tr:306). As noted in Mulbach v. Hertig, supra, plaintiff was not required to keep a "constant watch directly upon the defendant and nothing else" thereafter. As noted in that case, in the exercise of due care he could not do that, but was obliged to be alert to other possible dangers on the highway and particularly at the intersection. We believe that the testimony with regard to the lookout maintained by plaintiff Lynn more than meets that standard. The testimony of Mr. Lynn discloses:

1. Lynn observed the defendant's vehicle when it was between 75 and 125 feet from the stop sign (Tr:306). It should be noted that the stop sign was approximately 59 feet from the point of impact, which indicates that plaintiff Lynn clearly saw the vehicle west of the stop sign.

2. Plaintiff Lynn observed that the defendant did not stop at the stop sign (Tr:279-281), and plaintiff Lynn testified that he first became aware that Dorius was not going to stop at the stop sign when Dorius was "probably passing the stop sign itself." (Tr:311) He further testified that he saw that the defendant did not slow down, saw that he did not stop and saw that he moved through the stop sign at a "fairly good rate of speed."/ (Tr:311) At another place in his testimony, he puts

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the speed at approximately 20 miles per hour (Tr:280).

3. Plaintiff Lynn testified that he did not see the defendant stop his truck and get out of it and remove the limb from the road, or any such action (Tr:321).

4. He testified that when he realized that defendant was not going to stop, the defendant "already had his nose coming up toward the stop sign." (Tr:311).

5. Plaintiff Lynn testified that, after observing that defendant was not going to stop for the stop sign, he "yelled at" his companion in the car: "That knuckle head isn't going to stop" and "slammed on his brakes." (Tr:280)

It is thus clear that plaintiff Lynn kept the defendant under frequent and repeated observation from the time he first noticed him. This observation was not constant, but it was reasonable and prudent under the circumstances. In view of the defendant's rather moderate speed, there was nothing that the defendant did until he actually didn't stop that would have alerted plaintiff to any danger. It is possible that had the defendant been speeding, that the plaintiff might have been on notice earlier that the defendant was not going to stop and/or could not stop. However, at a speed of 20 miles an hour (and Trooper Bailey places the speed at 18 miles per hour at impact) there was no circumstance to alert the plaintiff to danger until plaintiff reached the stop sign and failed to stop for the same.

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The testimony is undisputed that plaintiff was watching the defendant at that point and thereafter.

Defendant would have us believe that plaintiff Lynn was required to assume that defendant would not observe the stop sign. Utah law is directly to the contrary. Plaintiff had a right to assume that defendant would observe the law until such time as a contrary result was evident.

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It is thus clear that plaintiff Lynn is only required to be aware of the danger at that point when it was clear that defendant was not going to stop, but rather was going to proceed out on to the highway in a collision course with plaintiff.

There is no evidence whatsoever in this action that Lynn did not keep a reasonable and proper lookout, and to have submitted the matter to the jury on that issue would have been clearly error.

At the trial, and also in his brief, defendant spends considerable time discussing the matter of the limb on the road. We believe that discussion to be nothing more than a "red herring" and to be totally irrelevant. Even if defendant did stop 140 to 200 feet west of the stop sign, it would not constitute a stop for the stop sign under any view of this case. The fact that defendant deemed it to be a stop at the stop sign shows only total lack of judgment. Further, it appears that the defendant is attempting to infer that since the plaintiff did not see the defendant stop, the plaintiff was somehow not keeping a proper lookout. By defendant's own testimony, it took him ten seconds to stop, get out of the truck, remove the limb and get back into the truck. He then had a minimum of 140 feet to travel to the stop sign. At 18 miles per hour (26 feet per second), it would take him another 5.4 seconds minimum to get to the stop sign. Furthermore, since he would be accelerating from a stop, it would no doubt take a second or two longer than that.

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Thus, it is clear that a minimum of approximately 18 seconds elapsed between the so-called stopping of the vehicle for the limb and defendant's reaching the stop sign. If plaintiff was traveling 55 miles an hour, then working backwards 18 seconds from point of impact would place the plaintiff at least 1,440 feet south of the point of impact (18 seconds times 80 feet per second). At 65 miles per hour times 18 seconds, the plaintiff would be down the highway 1,720 feet (95 feet per second times 18 seconds).

It appears unlikely that the defendant could stop his truck, get out of it, remove a limb and get back into it in the 10 seconds he indicates. It would appear likely that it would take considerably longer than that, probably a minimum of 20 to 30 seconds. If that is so, it would place the plaintiff Lynn even further down the highway.

Thus, it is evident that it would not be unusual for a driver not to particularly take notice of someone stopping on a dirt road in excess of 1,440 feet (or 1,710 or more feet) down the highway. Whether a driver would notice such conduct at that distance is pure speculation, and in any event would not be negligence nor indicate any lack of attention. For the Court to have submitted that matter to the jury would simply have permitted the jury to speculate on a totally irrelevant matter.

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Defendant cites a number of cases in his brief standing for the proposition that the driver who has the right-of-way cannot, because of his favored status, totally ignore everything else that is happening on the road in front of him. Those cases are collected generally in defendant's brief on pages 11 to 21. We do not quarrel with the aforesaid proposition. However, those cases are inapplicable in this case because the uncontroverted evidence is that the plaintiff Lynn kept a reasonable lookout at all times. Furthermore, canvassing those cases cited by the defendant reveals that each one is factually very different from the instant case.

Country Club Foods v. Barney, 10 Ut 2d 317, 352 P2d 776 (1960), involved a case where the favored driver initially saw the other vehicle when it was a considerable distance away, and didn't see it again "until a split second before the impact." The trial judge sitting as a factfinder in that case found that there might be some negligence inherent in that circumstance, but held that any such negligence was not a proximate cause of the collision.

In the instant case plaintiff Lynn was aware of defendant when he was one-fourth to one-half a block away and almost continually from the time he was 75 to 100 feet away. He testified that he was only alerted to the fact that defendant was not going to stop at the stop sign until he in fact did not stop for it.

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As soon as he was aware that defendant intended to violate the law, he applied his brakes. There can be no negligence nor causation in those facts.

In Sine v. Salt Lake Transp. Co. et al., 106 Ut 289, 147 P2d 875 (1944), the favored driver had entered the intersection before he ever saw the other driver, who was then 50 feet away going 40 miles per hour. The favored driver testified that he assumed the other would stop, but he did not look again until "just at the moment of impact." There was no stop sign involved and that case presents a totally different fact picture than the instant case.

In Gren v. Norton, 117 Ut 121, 213 P2d 356 (Utah 1949), the favored driver proceeded past a stop sign at a time when the other driver was 250 feet north of the intersection. The favored driver never again looked until "about 10 feet east of the point of collision."

In Hickok v. Skinner, 113 Ut 1, 190 P2d 514 (1948), the court states in effect that once a driver notices another car which is a potential hazard, the first driver cannot ignore the other vehicle completely thereafter. In that case the favored driver stopped at the stop sign, observed the other car a considerable distance from the intersection and the favored driver proceeded through the intersection, but never again looked at the other vehicle.

In Johnson v. Syme, 6 Ut 2d 319, 313 P2d 468 (1957),

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the favored driver never saw the other vehicle at all, even though the other vehicle had lights burning.

In Thurman v. Partridge, 8 Ut 2d 9, 326 P2d 1024 (1958) the street was covered with six inches of snow. The Court held that it could not say as a matter of law that the favored driver was not negligent. This was apparently based upon the speed of the favored driver in the light of the fact that there was six inches of snow on the ground and that neither driver was able to control his vehicle at the speeds at which they were going.

In Richards v. Anderson, 9 Ut 2d 17, 337 P2d 59 (1959) the favored driver never saw the other vehicle "until he was a few feet" from him. The Court concluded in that case that the favored driver had ample opportunity to observe and avoid the other vehicle.

Anderson v. Bradley, 590 P2d 339 (Utah 1979) involved an auto-pedestrian collision on Sunnyside Avenue. In that case the favored pedestrian was crossing the street, and there was testimony the pedestrian "didn't seem to be aware that a car was bearing down on him", which presented a case where there was evidence from which negligence of the favored pedestrian could be determined.

Lamkin v. Lynch, 600 P2d 530 (Utah 1979) presented a case where the evidence disclosed that neither the driver nor the pedestrian saw the other. The pedestrian had dark clothing and it was a dark, cloudy day. That case obviously presented a

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situation which was proper for jury determination on comparative negligence.

In Little America Refining v. Leyba et al., 641 P2d 112 (Utah 1982) the trial court directed a verdict of no liability as to defendant Heimberg apparently on the basis that the evidence disclosed that the Leyba vehicle had hit or pushed the Heimberg vehicle into plaintiff's gas pumps and that Heimberg was thus an innocent third party. The Supreme Court however held that there was evidence from which a factual determination could be made that Leyba and Heimberg had been racing down Victory Road, and that that circumstance, if true, could constitute a proximate cause.

Conklin v. Walsch, 113 Ut 276, 193 P2d 437 (1948) involved a case in which a full stop was made before entering the highway. Furthermore, the favored driver, although he noted the other driver on one occasion, never thereafter observed the other driver at any time.

In Badger v. Clayson, 18 Ut 2d 329, 422 P2d 665 (1967) there was a collision at a "blind intersection" for the two vehicles in question. It was a matter of a changing right-of-way situation affected by the traffic light and the language quoted by appellant that under such traffic device, changing conditions must be observed, is good law, but not applicable here since we are dealing with a permanent traffic regulator in the form of a stop sign, not a changing one. Moreover, the party in that case who had the right-of-way admitted he did not look to the left to

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see whether the defendant was or was not coming because of the obstructed corner. The case is helpful in that it makes clear that the favored driver can rely on the other driver observing the law until he "sees, or in the exercise of reasonable care should have seen, that the other vehicle is going to proceed against the signal."

Martin v. Stevens, 121 Ut 484, 243 P2d 747 (1952) is another "blind intersection" accident where there was no traffic control device, and again we agree with so much of the case as quoted by appellant as being good law in that fact situation, but not helpful here.

In the case of Yoshitaro Okuda v. Rose, 5 Ut 2d 39, 296 P2d 287 (1956) there was a pedestrian-automobile accident at night involving circumstantial evidence which of course required a factfinder, and the case is not helpful in the instant fact situation.

Appellant cites Kim v. Anderson, 610 P2d 1270 (1980) wherein this court states:

> "The trial court is to examine the evidence in the light most favorable to the party against whom a directed verdict motion is made."

We do not quarrel with that law, but point out merely that this action was a medical malpractice case where a dentist dropped a drill bit down the throat of his patient. Presenting the issue of whether or not there had been adequate evidence from medical experts on the standard of care in the profession is

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not helpful in the instant fact situation.

In Bates v. Burns, 3 Ut 2d 180, 281 P2d 209 (1955), although it appears that the favored driver was essentially without fault, he did not see the other driver until the favored driver was well into the intersection, thus presenting a jury question on his contributory negligence.

It is thus evident that the cases relied upon by defendant generally involved belated observation by the favored driver or cases where the favored driver observed the other driver at some considerable distance from the point of impact and thereafter totally disregarded the existence of the other driver. This is not at all the fact situation involved in the instant case.

At page 16 of his brief defendant refers to Section 41-6-71, Utah Code Annotated, and attempts to rely on the provisions thereof. The problem is that that section gives the driver stopping at a stop sign no rights until he has stopped. At that time he can proceed provided there are no other vehicles consituting an immediate hazard. In the instant case the testimony is uncontroverted that the defendant never stopped at the stop sign. He stopped some 140 feet prior to the stop sign, but that cannot be construed as a stop under any circumstances.

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At page 4 of defendant's brief he asserts:

> "The defendant-appellant was proceeding from his stopped position across the arterial highway and at the time of impact had reached 18 miles per hour."

There is no basis in the facts for that assertion whatsoever. The so-called "stopped position" was 140 feet from the stop sign and is no more starting out across the highway from a stopped position than could be claimed for Mr. Dorius starting out from his home from a stopped position and then proceeding across the arterial highway later in the day. It is a statement absolutely without basis in fact.

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POINT II. DEFENDANT'S NOTICE OF APPEAL WAS NOT TIMELY.

Order Denying Motion for New Trial was entered in the Register of Actions on November 13, 1981. Notice of Appeal should have been filed within one month thereof, to-wit, on December 13, 1981. Since December 13 was a Sunday, the filing deadline was extended to December 14, 1981. The Notice of Appeal was not filed until December 16 (two days late) and therefore the appeal was not timely and should be dismissed for lack of jurisdiction.

The time for filing notice of appeal to the Supreme Court is governed by Rule 73, Utah Rules of Civil Procedure. The relevant portions of that rule are as follows:

> (a) "When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month from the date of the entry in the Register of Actions of the judgment or order appealed from unless a shorter time is provided by law . . .
>
> "The running of the time for appeal is terminated by a timely motion pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the date of the entry in the Register of Actions of any of the following orders made upon a timely motion under such rules:. . . denying a motion for a new trial under Rule 59.
>
> "A party may appeal from a judgment by filing with the district court a notice of appeal, together with sufficient copies thereof for mailing to the Supreme Court and all other parties to the judgment, and depositing therewith the fee required for docketing the appeal in the Supreme Court. The clerk of the

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> district court shall forthwith transmit one copy of the notice of appeal, showing the date of filing, together with the required fee, to the Supreme Court where the appeal shall be duly docketed. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. (Emphasis added.)
>
> (b) "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall designate that the appeal is taken to the Supreme Court. Notification of the filing of the notice of appeal shall be given by appellant serving a copy [copies] thereof on all the parties to the judgment. The notification to a party shall be given by serving a copy of the notice of appeal on his attorney of record or, if the party is not represented by an attorney, then on the party at his last known address, and such notification is sufficient notwithstanding the death of the party or his attorney prior to the giving of the notification." (Emphasis added.)

It is clear that Rule 73 provides that the appeal must be taken within one month fron entry in the Register of Actions and the notice of appeal must be filed, not merely mailed within that period of time. Although it states half way through the third paragraph of Rule 73(a) that failure to take "further steps" is not jurisdictional, this clearly indicates that the matters which precede that declaration in the said section, to-wit, the "one month" requirement and the "filing" requirement are both jurisdictional.

There is a provision in subparagraph (b) of Rule 73 relating to appellant's mailing copies of notice of appeal.

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Since the mailing requirement appears after the clause describing nonjurisdictional matters, the mailing itself would appear to be nonjurisdictional, but this only emphasizes the fact that the filing within one month is jurisdictional.

In summary, the filing within one month appears to be clearly jurisdictional, whereas the mailing of copies is not considered such. Rule 73 has not been amended in the particulars noted since its original adoption (although it has been amended with relation to other matters).

Utah case law, without exception, has interpreted the one month filing requirement as jurisdictional.

In Anderson v. Anderson, 3 Ut 2d 277, 282 P2d 845, the order appealed from was entered on February 23, 1954. On March 23, 1954, defendant served upon counsel for plaintiffs a notice of appeal to the Supreme Court, but did not present it to the clerk for filing until March 24. At page 279 of the opinion our Supreme Court refers to Rule 73(a), URCP, and sets forth in italics the phrase which we have referred to above, "by filing with the district court." The Court then states the following at page 280, clearly showing failure to file is jurisdictional:

> "The purpose of this Rule to make jurisdictional a failure to file the notice of appeal on time is clearly evident by the special provision therein that:
>
> "'Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this

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rule or, when no remedy is specified, for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal.' (Italics supplied.)

"In the cause In re Estate of Lynch (Brennan v. Lynch), Utah, 254 P.2d 454, we held:

"'Rule 73, Utah Rules of Civil Procedure, requires an appeal to be taken within one month from the entry of the judgment appealed from . . . and that a party may appeal from a judgment by filing with the district court a notice of appeal.'"

In In re Estate of Ratliff, 19 Ut 2d 346, 431 P2d 571, the Order Denying Motion for New Trial was entered March 1, 1966, and the Court stated at page 348:

"Under Rule 73(a), U.R.C.P., appellant had one month from that date or until April 1, 1966, in which to file her notice of appeal."

The Court then goes on the state that the notice of appeal was received for filing in the office of the County Clerk on April 1, 1966, but inasmuch as it was not accompanied by the filing fee, was not filed until a later date. The Court then concluded at page 349:

"Since the notice was filed more than one month after the entry of judgment or the order appealed from (Rule 73(a), U.R.C.P.), this court lacks jurisdiction to entertain the appeal, and is therefore compelled to order a dismissal thereof."

Albrecht v. Uranium Services, Inc., 596 P2d 1025 (Utah 1979)(reversed on other grounds at 607 P2d 836) is a case cited by appellant at oral argument in this matter on respondents' Motion to Dismiss for lack of jurisdiction. In that case, this Court held that where the order appealed from was entered in the

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Register of Actions on July 5, 1978, that notice of appeal filed on August 7, 1978, was timely because August 5 was a Saturday and appellant therefore had until the following Monday in which to file the appeal. We do not see how this helps the defendant because in the instant case the one-month period ended on a Sunday, and we have conceded that the appellant had until the following Monday in which to file the appeal; however, this appeal was not filed until two days later, to-wit, on Wednesday. At page 1026 of the Albrecht case the Court stated:

> "Respondent states the time commenced to run July 5, 1978 (we assume it to have been entered in the Register of Actions on that day), and Notice of Appeal was not filed until August 7, 1978. The filing was timely because August 5, 1978, fell on a Saturday, and the following Monday was the next day not excluded by Rule 6, U.R.C.P."

It should be noted that the Court here again talks in terms of filing, not in terms of mailing.

On page 1027 of the decision in Albrecht, this Court states as follows:

> "For example, if the judgment or order appealed from were to be entered in the Register of Actions on the 6th of July, the last day on which a Notice of Appeal could be filed would be the 6th of August, unless such 6th of August fell on 'a Saturday, a Sunday, or a legal holiday.' In such latter event, the period would run 'until the end of the next day which is not a Saturday, a Sunday, or a legal holiday."

In addition we refer the Court to the following cases which hold in accordance with the foregoing: Peay v. Peay, at

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607 P2d 841 (Utah 1980), and Bigelow v. Ingersoll, 618 P2d 50, (Utah 1980).

Chapter 37 of Title 63, Utah Code Annotated, 1953, as amended, is not applicable to filing of appeal in the Supreme Court.

At said oral argument of this matter the defendant cited to the Court as governing the time for filing notices of appeal Chapter 37 of Title 63. The thrust of that chapter is that reports, claims and other documents of the type there enumerated are deemed filed when they are postmarked. It also provides that the date of registration or certification shall be deemed the post-marked date and also provides that such an item will be deemed filed if the sender "establishes by competent evidence" that the item was deposited in the United States Mail on or before the date for filing or paying.

It is clear that Chapter 37 was never intended to govern appeals to the Supreme Court. Section 1 thereof states that the section is to govern:

> "Any report, claim, tax return, statement or other document or any payment required or authorized to be filed or made to the state of Utah, or to any political subdivision thereof . . ."

It is clear that that language was never intended to encompass the court of the state. "Political subdivision" is no doubt intended to have the meaning given to it in the Governmental Immunity Act at Section 63-30-2(2) where it states:

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> "The words 'political subdivision' shall mean any county, city, town, school district, special improvement or taxing district, or any other political subdivision or public corporation;"

There is considerable authority that the courts have inherent rule-making power and that the legislature cannot make rules for the court any more than the court can make rules for the legislature. In the instant case, however, it is not necessary to canvass that body of law. The legislature of Utah and the courts have concurred in establishing the Utah Rules of Civil Procedure. Section 78-2-4, UCA, 1953, provides:

> "The Supreme Court of the State of Utah has power to prescribe, alter and revise, by rules, for all courts of the State of Utah, the forms of process, writs, pleadings and motions and the practice and procedure in all civil and criminal actions and proceedings, including rules of evidence therein, and also divorce, probate and guardianship proceedings. Such rules may not abridge, enlarge or modify the substantive rights of any litigant. Upon promulgation the Supreme Court shall fix the date when such rules shall take effect and thereafter all laws in conflict therewith providing for procedure in courts only shall be of no further force and effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, prescribe or repeal any such rules heretofore prescribed by the Supreme Court."

Pursuant thereto the Supreme Court adopted the Utah Rules of Civil Procedure. Section 63-37-1, et seq., does not on its face require that it be interpreted to include proceedings in court. It does not mention courts and in accordance with familiar doctrines of statutory interpretation 63-37-1, et seq., should be interpreted in such manner as to be consistent with Section 78-2-4, Utah Code Annotated, 1953. See In re Utah Savings and Loan Association, 21 Utah 2d 169, 442 P2d 929 (1968).

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Furthermore, in accordance with common doctrines of statutory interpretation, the language defining the types of instruments to be covered by 63-37-1, et seq., must be determined in accordance with the documents enumerated. Section 63-37-1 states that: "any report, claim, tax return, statement or other documents or any payment" is in effect covered by the section and in accordance with the principle of ejusdem generis, the "other documents" must of necessity be of the same kind as those enumerated, and that would clearly not include court pleadings, notices of appeal and the like. (See Anderson v. Utah County, 13 Ut 2d 99, 368 P2d 912 [1962].) It would be a stretch of the imagination to suppose that the legislature intended in 63-37-1, et seq., to "take away" what it had "granted" in 78-2-4.

Furthermore, the rule enunciated in Section 63-37-1, Utah Code Annotated, and urged by defendant would be totally impractical and impossible of application in connection with appeals to the Supreme Court. That section would allow a litigant, presumably at any time, to come forward with proof that he had mailed a notice of appeal (even a month or so late presumably), and if he could show that he actually mailed it, but that it somehow did not arrive at court, he would still be entitled to relief. Under this procedure, litigants would never know when their case had come to rest and the proceedings terminated. Titles to real property would be left up in the air and other mischief result. See Norville v. State Tax, 98 Ut 170, 97 P2d 937 (1940) Head Note #7, page 177.

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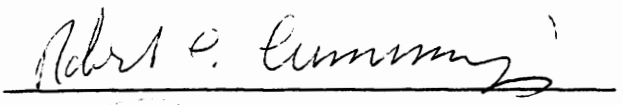
## CONCLUSION

We respectfully submit that the decision of the lower court is fully supported by the law and the evidence in this action and that the Court correctly determined that a directed verdict was proper on the question of liability.

We further respectfully submit that the appeal of the defendant-appellant was not timely perfected, that the Court lacks jurisdiction, and that this appeal should, for that reason, be dismissed.

DATED the 31 day of May, 1982.

Respectfully submitted:



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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Respondents to M. Dayle Jeffs, attorney for defendant-appellant, at his address, 90 North 100 East, P. O. Box 683, Provo, Utah 84603, postage prepaid, this _____ day of May, 1982.

_____
Attorney for Plaintiffs
and Respondents

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