

2009

# John Boyle and Norrine Boyle v. Kerry Christensen : Brief of Appellee

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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JOHN BOYLE AND NORRINE BOYLE,  
Plaintiffs-Appellants-Petitioners,

**Case No. 20090822**

vs.

KERRY CHRISTENSEN,  
Defendant-Appellee-Respondent.

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On Appeal from the Utah Court of Appeals,  
Before the Honorable Judges Thorne, Davis and McHugh  
Case No. 20080582-CA, 2009 UT App 241

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**APPELLEE'S ANSWER BRIEF**

---

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### **STATEMENT OF JURISDICTION**

The Utah Court of Appeals opinion was entered September 3, 2009. Appellant's Petition for Writ of Certiorari was filed on October 5, 2009, and was granted on December 29, 2009. Jurisdiction is proper pursuant to Utah Code Section 78-3-10-2(3)(a) (2009).

### **STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW**

The following issues are presented for review:

1. Whether the trial court abused its discretion (Barrett v. Peterson, 868 P.2d 96, 98 (Utah Ct. App. 1993)) by asking Plaintiff's tort reform questions listed in his questionnaire in amended form and whether Plaintiff properly preserved this issue by simply proposing the jury questionnaire in the first place, but not objecting to the court's actions or requesting that the original questions be listed in the final questionnaire.
2. Whether the trial court abused its discretion when it overruled plaintiff counsel's objection to a harmless closing argument reference to a well-known case to counter the use of a per diem damages analysis.
3. Whether the trial court correctly granted Defendant's Motion in Limine dismissing Norrine Boyle's loss of consortium claim.

### **RELEVANT STATUTES AND RULES**

#### **Utah Code Ann. §30-2-11 (2005)**

- (1) For purposes of this section:
  - (a) "injury" or "injured" means a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:
    - (i) a partial or complete paralysis of one or more of the extremities;

- (ii) significant disfigurement; or
  - (iii) incapability of the person of performing the types of jobs the person performed before the injury; and
- (b) "spouse" means the legal relationship:
  - (i) established between a man and a woman as recognized by the laws of this state; and
  - (ii) existing at the time of the person's injury.
- (2) The spouse of a person injured by a third party on or after May 4, 1997, may maintain an action against the third party to recover for loss of consortium.
- (3) A claim for loss of consortium begins on the date of injury to the spouse. The statute of limitations applicable to the injured person shall also apply to the spouse's claim of loss of consortium.
- (4) A claim for the spouse's loss of consortium shall be:
  - (a) made at the time the claim of the injured person is made and joinder of actions shall be compulsory; and
  - (b) subject to the same defenses, limitations, immunities, and provisions applicable to the claims of the injured person.
- (5) The spouse's action for loss of consortium:
  - (a) shall be derivative from the cause of action existing in behalf of the injured person; and
  - (b) may not exist in cases where the injured person would not have a cause of action.
- (6) Fault of the spouse of the injured person, as well as fault of the injured person, shall be compared with the fault of all other parties, pursuant to Sections 78-27-37 through 78-27-43, for purposes of reducing or barring any recovery by the spouse for loss of consortium.
- (7) Damages awarded for loss of consortium, when combined with any award to the injured person for general damages, may not exceed any applicable statutory limit on noneconomic damages, including Section 78-14-7.1.
- (8) Damages awarded for loss of consortium which a governmental entity is required to pay, when combined with any award to the injured person which a governmental entity is required to pay, may not exceed the liability limit for one person in any one occurrence under Title 63, Chapter 30d, Governmental Immunity Act of Utah.

**Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure**

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated . . .

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and . . .

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

**Rule 46 of the Utah Rules of Civil Procedure**

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

**Rule 47(a) of the Utah Rules of Civil Procedure**

(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

**CITATION TO THE OPINION OF THE COURT OF APPEALS**

The citation to the opinion of the Utah Court of Appeals is Boyle v. Christensen, 2009 UT App 241, 219 P.3d 58, 2009 WL 2783006.

**STATEMENT OF THE CASE**

**A. Nature of the Case**

This case arises from a relatively minor auto pedestrian accident in which the Plaintiff was hit in a low speed collision in a grocery store parking lot. Alleging damages arising from the pedestrian's personal injuries, Plaintiffs (the pedestrian and his wife) brought suit against the defendant, who was driving the vehicle.

**B. Summary of Course of Proceedings and Disposition of the Trial Court.**

After discovery, but prior to trial, Defendant moved to dismiss the plaintiff spouse's loss of consortium claim. The trial court correctly reasoned the spouse had

failed to show the requisite facts to sustain a loss of consortium claim under Utah Code Ann. §30-2-11 (2005). The case continued to trial on the personal injury claim of the pedestrian.

Immediately preceding the trial, a proposed jury questionnaire was provided to the trial court by Plaintiff. Plaintiff's questions were received by the trial court, who implemented them into a single set of written questions that was created according to the trial court's discretion. Plaintiff's counsel never objected to the proposed voir dire questions, passed the jury for cause and eventually approved of the impaneled jury. Despite the lack of any objection at trial, Petitioners now complain that the trial court abused its discretion by combining the two sets of voir dire questions into one amended questionnaire.

During her closing argument, defense counsel mentioned a well-known case in order to counter a per diem analysis presented by Plaintiff during his closing argument. The court, in its discretion, overruled Plaintiff's objection as the reference was harmless lawyer talk during the closing argument. After deliberation, the jury returned a substantial verdict for the plaintiff.

The Utah Court of Appeals affirmed the actions of the trial court in all respects: We conclude that Mr. Boyle did not adequately preserve his argument that the district court erred in failing to ask requested juror bias and tort reform questions on voir dire. We also conclude that no error arose from Christensen's counsel's closing argument reference to Liebeck and that the district court properly dismissed Mrs. Boyle's loss of consortium claim. Accordingly, we affirm the judgment of the district court.

Opinion at ¶ 24.

**C. Material Background Facts.**

On July 22, 2004 plaintiff John Boyle was hit by a vehicle which was traveling at a very low speed in a Smith's parking lot. Plaintiff described the impact as follows:

- Q. Okay. Tell me what part of his vehicle struck what part of your body.  
A. The left front bumper, hood and tire struck me.  
Q. Okay.  
A. And as near as -- as near as I can figure, he hit me on the left-hand side front and then I turned because I was bruised on my left side on my arm, my hip, my leg and my shin. So that's all I have to go by.  
Q. Okay.  
A. I was sore other places, but that was where the impact occurred.  
Q. Okay. Were you able to remain upright?  
A. I was. I rode up on his hood and grabbed the bumper and the wheel well and stayed upright, otherwise I would have gone down.

(R. 240, Plaintiff Dep. pp. 23:23-24:14; R244-245, 258-259.)

Mr. Boyle did not seek out medical attention for allegedly-related injuries until five days after the accident, when he sought only chiropractic treatment from Walter Wagner for left-sided, lower back and buttock pain on July 26, 2004. (See Wagner Records, R. 245 at 267-316.) Mr. Boyle was an existing patient of Dr. Wagner, having seen him for similar left lower back, buttock and leg problems several times prior to the subject accident. Indeed, Mr. Boyle received treatment from Dr. Wagner for these problems as recently as June 2004, which was the month prior to the accident. (Id.) Mr. Boyle's medical records and imaging studies demonstrate he had complained of back pain for almost 40 years prior to the July 2004 accident. Moreover, imaging studies demonstrate that Mr. Boyle was suffering from severe degenerative disc disease at L5-S1 as far back as January of 1990. (Id.)

From the date of the accident through May 9, 2005, Mr. Boyle sought chiropractic treatment from Dr. Wagner twenty-three times. Twenty-two of these treatments came in the ten weeks following the accident. After the twenty-third treatment on May 9, 2005, Mr. Boyle did not receive any chiropractic treatment for back pain or injuries for over twelve months. (Id.) Then, on May 19, 2006, Mr. Boyle again began receiving chiropractic back treatments after a separate and unrelated trip and fall accident at work. (Plaintiff's Dep., R. 260-61(pp. 41:24-42:13.))

At the time of his deposition, Mr. Boyle worked at O'Curran, an inbound call center, and had been employed there since December 12, 2005. He made between \$20 to \$35 an hour (depending upon his sales numbers), worked thirty hours a week, and received health insurance benefits. (Id. at R. 253-54 (pp. 9-10.)) Mr. Boyle had no plans to quit working at O'Curran. (Id.) At the time of the accident, Mr. Boyle was working for Mascot Financial where he was doing almost exactly the same type of work that he currently does for O'Curran:

Q. Tell me what some of your job responsibilities are now currently on the phone.

A. I just take incoming phone calls, people who have an interest in getting out of debt, and then sell them the product, which is a \$350 product.

.....

Q. Okay. Now, tell me what you did for Mascot Financial.

A. You generate your own leads calling people and it's a debt reduction plan as well.

(Id. at R. 254-55(pp. 10:8-11, 11:23-25))

Mr. Boyle testified that from August 2004 to December 12, 2005, he could not work anywhere because of his back pain, and thus, was unemployed. (R. 247(p. 13:1.))

Yet, Mr. Boyle admitted later in his deposition that he is an avid golfer and worked at Glenmoor golf course in West Jordan eight to sixteen hours each week between August 2004 and December 2005. (R. 262-266(pp. 46, 50:10-16.)) Presumably, Mr. Boyle slowed down his work at the golf course when he got the job at O'Curran on December 12, 2005.

Prior to trial, on May 21, 2008, the trial court granted Defendant's motion in limine to dismiss plaintiff Norrine Boyle as she had not met the statutory requirements for making a loss of consortium claim. (Motions Transcript, see Addendum; R. 532-34 attached hereto.) Soon thereafter, this matter was heard at a jury trial June 3–6, 2008. Prior to trial, a jury questionnaire was provided to the court by the plaintiff. The trial court did not refuse to ask Plaintiff's questions; rather it considered Plaintiff's questions and created one set of written questions for the jury to respond to during oral voir dire. The written questions were *given to counsel before they were asked by the court*. (R. 436-40; 596-600.)

After receiving the court's written questions, neither party objected to the questionnaire that was ultimately presented by the court. (See id.) The court used the written questions it fashioned during oral voir dire and asked extensive follow-up questions while the jury was responding to the questions; again, there were no objections. (R. 693, Jury Selection Transcript at pp. 25-89, see Appellant Addendum, at Ex. 4.) After oral voir dire, the trial court met in chambers with counsel for both parties. (Id. at 90:13-21.) At this time, there was only one challenge for cause by defense counsel, which was denied by the court. (Id. at 91:4-92:16.)



During this meeting in chambers, there were no objections to the questionnaire as posed by the trial court and there were no requests to ask additional questions designed to reveal possible juror biases regarding tort reform or ask questions regarding tort reform issues. Indeed, the only request was by counsel for the defendant, who expressed a desire to ask further questions of juror number 8. (Id. at 92:21.) When the jury pool was brought back before the judge, he asked many additional questions of juror number 8. (Id. at 93-97.) After his questioning, the court invited counsel for both parties up for a bench conference and specifically asked if they any further questions, and both parties indicated that they had nothing further. (Id. at 97:10-18.)

Both parties then passed the jury panel for cause, (Id. at 97:21-98:3) and after the preemptory challenges were made, a jury was selected. At this point, both parties clearly indicated that the jury that eventually impaneled, was the jury that they had selected. (Id. at 99:10-20.) Not one objection was raised during the entire jury selection process. Moreover, the only additional questions requested, were the follow-up questions requested by counsel for the defendant, which the court promptly asked.

During closing arguments, counsel for defendant made an innocuous reference to another case in order to make a point:

The third main issue in this case is Mr. Boyle's pain and suffering. What has he been like since the accident? What's expected in the future? Ladies and gentlemen, they want a lot of money for this. A lot of money. What's been written on the board is called a per diem analysis.

Sometimes people like to use that in --

MR. CHRISTENSEN: I object to this, your Honor.

THE COURT: Your objection is overruled.

MS. VAN ORMAN: It's a per diem analysis. How many days has it been since the accident? How many days for the rest of his life? And how much per day

is that worth? That's what's been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee.

MR. CHRISTENSEN: Objection.

THE COURT: What's the basis of your objection? You are not stating those succinctly, the legal basis.

MR. CHRISTENSEN: My objection is it's prejudicial and it's not in evidence.

THE COURT: Okay. Your objection is noted but overruled.

(Closing Argument Transcript at R. 695, pp. 48:7-49:5.)

After having heard all the evidence, which included extensive medical expert testimony, the jury rendered a verdict for \$62,500.00, which was substantially more when interest was added. (R. 669-673.) Unhappy with the jury's decision, Plaintiffs' appealed. (R. 674-75.) The Utah Court of Appeals affirmed the trial court's determinations by holding 1) Plaintiff failed to adequately preserve for appeal his claim that the district court's voir dire questioning was inadequate, 2) the Judge did not commit error when he overruled plaintiff counsel's objection to defense's counsel's Liebeck reference, and 3) dismissal of Mrs. Boyle's loss of consortium claim was not error. Opinion, ¶24. Again, unhappy with the Court of Appeals Opinion, Plaintiffs' filed a Petition for Writ of Certiorari on October 5, 2009. This Court granted Plaintiffs' Writ of Certiorari on December 29, 2009.

### **SUMMARY OF ARGUMENT**

Plaintiff is not entitled to have a jury questionnaire presented in the exact form, depth, or extent as he claims. Even if Plaintiff is entitled to have the exact questions he proposed on his questionnaire asked during voir dire, his attorney failed to preserve the issue for appeal because he did not object when the trial court elected to submit the

written questions in amended form. Plaintiff's counsel also did not seek an opportunity to ask additional questions when given the opportunity to do so at the end of the trial judge's questions, even though defense counsel did request and receive additional questioning. (R 693 at p. 97.) An essential component of disagreeing with a court's decision is that counsel makes that objection known to the court; Plaintiff's counsel failed to do so at any time prior to or during this trial.

Moreover, the trial court judge properly ruled on plaintiff counsel's objection to defense counsel's harmless reference to the "McDonald's Coffee" case. Defense counsel used the reference in an effort to cast light on plaintiff counsel's attempt to inflate damages by presenting them as part of a per diem analysis. Defense counsel's closing argument references were a valid attempt to expose opposing counsel's highly prejudicial technique and defend her client against an excessive judgment. Regardless, even if it was error, it was harmless.

Lastly, Plaintiff's wife, Norrine Boyle, was not injured in this case. The legislature has set forth very specific rules for a loss of consortium claims; Plaintiff's injuries simply do not rise to the level required for his wife, Mrs. Boyle to sustain her claim for loss of consortium. Plaintiff Boyle was not incapable of performing the types of jobs the person performed before the injury. This was not a summary judgment motion, but simply a motion to interpretation of whether Ms. Boyle met the evidentiary requirements of Utah Code. Ann. § 30-2-11(1)(a)(iii).

The well-reasoned opinions of the trial court and the Court of Appeals correctly interpreted and applied long established Utah law regarding voir dire, preservation of the

record for appeal, and a trial court's discretion. Consequently, this Court should affirm the decision by the Utah Court of Appeals.

### **ARGUMENT**

The lower court did not commit error by allowing the trial court judge discretion to conduct voir dire, allowing counsel to use non-prejudicial "lawyer talk" during closing arguments, or dismissing Ms. Boyle's loss of consortium claim. Plaintiff counsel did not preserve the right to appeal regarding tort reform questions because there was no objection prior to or during voir dire. Defense counsel is allowed to use lawyer talk during closing arguments to defend her client. In addition, the trial court may dismiss a claim if a plaintiff is unable to meet an evidentiary standard prescribed by statute. Ultimately, the law is clear and the District Court and the Utah Court of Appeals properly resolved the issues raised by Plaintiff.

#### **POINT I    AFFIRMING A JUDGE'S DISCRETION WHEN CONDUCTING VOIR DIRE IS NOT IN CONFLICT WITH PRIOR DECISIONS AND IS NOT ERROR WHEN APPELLANTS FAILED TO PRESERVE THE RIGHT TO APPEAL.**

The trial court fashioned a voir dire questionnaire for potential jurors by combining submitted questions from opposing parties. This is proper under Rule 47(a) of the Utah Rules of Civil Procedure because the judge is given "considerable discretion" and "may itself conduct the examination" during voir dire. Utah R. Civ. P. Rule 47(a) (2008); see also Ostler v. Albina Transfer Co., 781 P.2d 445, 447 (Utah App. 1989). There is no question that a trial court judge does not need to use the exact questions suggested by either party, but instead may use alternative questions. Bee v. Aneheuser-

Busch, Inc., 2009 UT App 35, ¶16, 204 P.3d 204. In this case, Appellants' Brief simply does not contain a citation to the record showing they properly objected to the Trial Court's voir dire questionnaire.

Counsel is always on notice that it is necessary to show the right to appeal has been preserved. The Utah Rules of Appellate Procedure require an objection to preserve the issue for appeal. Rule 24(a)(5)(A) requires an appellant to include "a citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court." Utah R. Appellate P. (2008). A "challenging party must show they raised the issue in a timely fashion, specifically, and supported by evidence or relevant legal authority." Williams v. Bench, 2008 UT App. 306, ¶31, 193 P.3d 640 (internal quotations omitted). This supports the policy that "trial courts ought to be given an opportunity to address a claimed error and, if appropriate, correct it." Id. (internal quotations omitted). If a Plaintiff fails to do this, then he or she is "deemed to have waived the issue." Lamb v. B & B Amusements Corp., 869 P.2d 926, 931 (Utah 1993). Ultimately, "alleged deficiencies in voir dire must be brought to the district court's attention in order to be preserved for appeal." Opinion, at ¶7.

Furthermore, the Utah Court of Appeals has held parties are entitled to ask questions specifically designed to elicit "which jurors may have *read* or *heard* information generally on tort reform." Bee, 2009 UT App. at ¶16 (citing Barrett v. Peterson, 868 P.2d 96 (Utah Ct. App. 1993), which quotes Evans v. Doty, 824 P.2d 460, 467 (Utah Ct. App. 1991)) (ellipses omitted). The purpose for allowing this type of

questioning is specific; these questions are designed to determine whether any prospective juror has been exposed to tort reform propaganda, which can lead to subconscious biases. Id.; see also Alcazar, 2008 UT App. at ¶12 (noting “the trial court’s questions did not allow the plaintiff an opportunity to know which of the prospective jurors had been exposed to tort reform propaganda.”) (emphasis in original).

In Ostler, the plaintiff brought a personal injury action against the driver of a commercial truck for an accident in which the plaintiff was paralyzed from the waist down. 781 P.2d at 446. One of the issues on appeal by the plaintiff/appellant was that the jury voir dire did not adequately reveal bias related to exposure to “tort reform” propaganda. Id. at 447. The judge refused to ask the plaintiff’s proposed questions, and instead, asked (1) whether potential jurors would object to providing a large claim (exceeding a million dollars), (2) if they believed people should not resort to the courts to resolve disputes or recover damages, and (3) whether they “believed they were incapable of rendering a fair and true verdict based on the evidence.” Id. The Utah Court of Appeals found the modified “questions [were] substantively responsive to plaintiff’s concerns and appear[ed] sufficient to reveal ‘tort reform’ bias.” Id. Accordingly, the court upheld the trial court judge’s discretion when conducting voir dire.

In the present case, the Boyles have failed to show two things regarding voir dire: (1) they cannot establish the trial court judge abused his discretion, and (2) they cannot demonstrate they preserved the right to appeal. The Utah Court of Appeals already found the “district court conducted voir dire using its own questions without objection from either party.” Opinion, ¶4. Significantly, “[a]t no time [] did Mr. Boyle ever indicate to

the district court that the court's questions failed to adequately address the concerns posed by his own questions." Opinion, at ¶11. The Court of Appeals said:

Mr. Boyle argues on appeal that his mere submission of specific jury questions relating to damages and tort reform preserves for appeal his claim that the voir dire questions the district court actually posed were inadequate. *We disagree* . . . Here the district court attempted to reconcile the parties' proposed jury questions into a single set of voir dire questions that addressed each party's concerns. If Mr. Boyle believed that the district court's modification of his questions constituted error on the part of the district court, it was his obligation to bring this alleged error to the district court's attention. *His failure to do so constitutes a waiver of the issue as one for appeal*. See *id.*; compare Doe v. Hafen, 772 P.2d 456, 458 (Utah Ct. App. 1989) (finding no preservation where a party failed to "call the judge's attention to [a] specific question" in a set of voir dire questions that had been rejected by the trial court), with Alcazar v. University of Utah Hosps. & Clinics, 2008 UT App 222, ¶5, 188 P.3d 490 (addressing substantive issue where appellant had "repeatedly attempted to persuade the trial court to give the requested voir dire questions, including briefing the rather direct authority from this court on the issue, [but] the court declined and offered its own unique philosophical approach to voir dire in medical malpractice cases.").

Opinion, at ¶12 (emphasis added).

Plaintiffs' cite to Alcazar v. U. of U. Hosp., 188 P.3d 490 (UT. App. 2008) to further support that the lower court judgments should be reversed. Alcazar is distinguishable. In Alcazar, the underlying claim was for medical malpractice. The Plaintiffs' proposed a jury questionnaire that contained questions specific to biases and prejudices with regard to medical malpractice claims, yet the judge refused to ask any of the proposed med-mal questions. Here, the underlying case deals with an auto/pedestrian accident, but the questions Plaintiff argues should have been asked dealt with tort reform in general. Plaintiff's proposed questions dealt with general tort reform and the modified questions also dealt with tort reform. The Utah Court of Appeals explained:

As the trial approached, Mr. Boyle submitted a proposed jury questionnaire that included specific questions intended to elicit jurors' views regarding damages and tort reform. Christensen also submitted proposed voir dire questions, and the district court edited and combined the parties' proposed questions into a single set of voir dire questions that did not contain the exact questions posed by either party. The district court conducted voir dire using its own questions without objection from either party.

Opinion, at ¶4. Thus, the court asked “related questions” that adequately garnered information requested by Plaintiff to make a preemptory challenge. Opinion, at ¶14.

Plaintiffs' also cite to Bee to support their argument, but they mischaracterize the holding from that case. The Bee decision did not say plaintiffs were entitled to “elicit any information about the individuals' views regarding personal injury lawsuits or tort reform” as the Boyles' claim. Instead, the appellate court concluded:

[The] trial court should have asked the prospective jurors appropriate ***preliminary*** questions—either those suggested by appellant or alternative questions more to its liking—***designed to detect, initially***, whether any of the prospective jurors ***had been exposed to tort reform propaganda***. Had the trial court done so, ***and had any of the jurors responded positively to these initial questions***, appellant would have been entitled to have more specific questions put to the jurors designed to probe those jurors' attitudes regarding, and possible bias resulting from, the tort-reform information.

2009 UT App. at ¶16 (citing Barrett v. Peterson, 868 P.2d 96 (Utah Ct. App. 1993)) (ellipses omitted) (emphasis added).

Before questioning the jury pool, Judge Medley gave counsel a written list of questions that he intended to ask potential jurors. Later, he asked counsel in chambers whether they wanted any further questions asked of the jury pool. In response to a request by defense counsel, he further questioned potential juror number eight. Despite clear opportunities to seek further questioning, plaintiff counsel stayed silent. The



Boyles' had many chances to object or request further questioning prior to and during voir dire. Plaintiffs' counsel simply chose not to do so, presumably, because they believed the questions asked already asked by Judge Medley were adequate.

However, even if this Court determines plaintiffs' right to appeal was preserved, plaintiff counsel never requested the court to ask whether prospective jurors were exposed to tort reform propaganda. The four questions the Boyles claim the court should have asked do not seek whether potential jurors "may have read or heard information generally on tort reform." Despite this, similar to Ostler, and as required under Bee, the trial court asked potential jurors fifteen questions that were sufficient, in their totality and context, to reveal any tort reform bias, including:

13. Do you have any feelings or beliefs that would prevent you from being fair and impartial regarding persons who have personal injury disputes and who choose to resolve those disputes by going to court?

14. Do you have any personal religious or other beliefs that would prevent you from awarding damages in a large amount, small amount, or zero amount, if warranted and justified by the evidence and the law given you by the Court?

(R. 536). Plaintiffs' counsel claims it is "inherently prejudicial" not to ask potential jurors about their views on "tort reform issues," but Bee does not state this. Bee only uses "prejudice is presumed" language regarding a different issue—if a trial court may allow co-defendants separate sets of peremptory challenges—and not regarding tort reform voir dire, 2009 UT App. at ¶18.

Plaintiffs' contention that questions 13-14 did not, as a *preliminary* matter, address their tort reform questions is unfounded. Plaintiffs' counsel argues that these questions were insufficient because most prospective jurors responded merely with a "no" answer.

Yet under Bee, the case Plaintiffs' rely on, the trial court was only obligated to ask follow-up questions "had any of the jurors responded positively to these initial questions." 2009 UT App. at ¶16. In addition to these two questions, the court asked extensive questions of the jury during oral voir dire in order to discover any potential bias or prejudice.

The trial court is granted substantial discretion during the jury selection process and clearly did not abuse that discretion in this trial. It was not prejudicial against the Plaintiff to use alternative questions that elicited substantially equivalent information. Nevertheless, despite the sufficiency of questioning, plaintiff counsel failed to preserve this issue for an appeal. If the Court allows counsel to obtain a reversal without requiring a formal, proper objection, then it will be giving parties a free pass for a new trial. Instead, the Court should affirm the lower court determinations.

**POINT II ALLOWING NON-PREJUDICIAL LAWYER TALK DURING CLOSING ARGUMENTS IS HARMLESS AND NOT ERROR.**

The lower courts did not commit error by permitting counsel to use non-prejudicial "lawyer talk," and this ruling does not depart from the accepted course of judicial proceedings. Judges have "considerable latitude" of discretion over statements offered during closing arguments "as to what is permissible for counsel to argue, and as to what may be so prejudicial that a miscarriage of justice could result." Hales v. Peterson, 360 P.2d 822, 824 (Utah 1961). Thus, even if the argument in question is improper or has no bearing to the facts of the case, the petitioner must show the statement caused prejudice and affected the fundamental fairness of the trial to meet the standard

for reversible error. Jones v. Carvell, 641 P.2d 105, 112 (Utah 1982); see also Opinion, at ¶8 (explaining the court’s obligation to determine “whether remarks made during closing argument improperly influenced the verdict”).

Any claimed prejudice must be based on more than mere “lawyer talk,” which is not intended to substitute for evidence, because “the sensible and fair rule” with respect to presenting an argument “is to leave the propriety of counsel’s use of such argument to the sound discretion of the trial court.” Olsen v. Preferred Risk Mutual Ins. Co., 354 P.2d 575, 576 (Utah 1960). In addition, although plaintiff counsel refers to this case for another purpose, Spahr v. Ferber Resorts, LLC also persuasively highlights the Tenth Circuit rule regarding closing arguments and lawyer talk:

[V]acating a jury award and ordering a new trial on the basis of an inappropriate closing argument is an extreme remedy only to be granted in unusual cases . . . [because] even through an argument may be improper, a judgment will not be disturbed unless it clearly appears that the challenged remarks influenced the verdict.

No. 2:08-cv-72, 2010 U.S. Dist. LEXIS 9571 (D. Utah Feb. 4, 2010).

In Hales, a young girl was killed in an automobile/pedestrian accident. 360 P.2d at 824. During closing arguments, defense counsel stated the driver was not negligent because the highway patrol and investigating officers did not issue any citation or arrest for wrongdoing. Id. The court held this was not reversible error even though the argument was “immaterial” and had “no place in the argument to the jury.” Id.

In Olsen, which is particularly on-point, counsel for the plaintiff used a per diem calculation to argue for an award of pain and suffering damages before the jury and defense counsel objected. 354 P.2d at 576. The objection was overruled and the

defendant appealed. The defendant correctly asserted the per diem argument was prejudicial, but the Supreme Court affirmed and held the argument was simply a statement or “lawyer talk” that was not meant to be considered as evidence or a substitute therefore. Id. Consequently, even though a per diem argument was prejudicial, the court did not find reference to it to be an abuse of discretion. Id.

In Spahr, the defendant claimed the plaintiff made “at least seventeen arguments based on matters not in the record.” No. 2:08-cv-72, 2010 U.S. Dist. LEXIS 9571, at \*25. The court also found that plaintiff’s attorney did “refer to matters that were not arguably supported by the record.” Id. at \*29. However, the court found that these “arguments made in closing argument . . . were unlikely to have improperly influenced the jury.” Id.

In her closing argument, defense counsel for Mr. Christensen was properly explaining to the jury that the Boyles were claiming unreasonable damages by relying on a prejudicial calculation method. While doing this, she made an innocuous statement that referenced Liebeck v. McDonald’s Restaurants, P.T.S., Inc., case no. D-202-CV-9302419, 1995 WL 360309 at \*1 (N.M. Dist. Aug. 18, 1994). The Utah Court of Appeals explained, “Mr. Boyle attempts to characterize Christensen’s counsel’s comment as one that calls to the jury’s attention material that the jury would not be justified in considering in reaching its verdict, but we reject that characterization.” Opinion, at ¶15 (internal quotations and citations omitted). Instead, the appellate court characterized this reference as a harmless statement that allowed counsel to make a point, helped undo the harmful effects of the Boyles’ prejudicial per diem analysis, and did not prejudice the Boyles.

Specifically, the Court of Appeals said, “we see no harm in allowing Christensen to use a cultural reference as shorthand to make the point that, in Christensen’s opinion, Mr. Boyles’s damages methodology was likely to render this jury’s verdict excessive. Such an argument is not inappropriate . . . .” Id. at ¶17.

Reference to the McDonald’s case is not inherently prejudicial. As noted above, the trial court asked sufficient questions regarding the jurors’ views on tort reform and damages to eliminate potential biases regarding these issues. The sole purpose of defense counsel’s reference to the McDonald’s case was to expose Plaintiff’s prejudicial per diem damages calculations. In addition, plaintiff counsel also made reference to Liebeck before the jurors:

We note that Mr. Boyle’s counsel also made reference to Liebeck in his closing argument, albeit in reply to Christensen’s counsel’s comment: “The McDonald’s case was mentioned. What was not mentioned is the court has a right to, and did, fix that. The bad verdict got all the press. The fact that the court reduced it to less than I think ten percent of the original amount of course didn’t make the press”

Id., at ¶17, n.2. Therefore plaintiff’s counsel brought even greater attention to the reference, and also had a chance to correct any possible prejudicial effect.

Counsel obviously did not mean to offer the case as evidence, or a substitute therefore, but simply as a statement offered to appeal to the jury’s common sense. Although Judge McHugh did differ in her interpretation of State v. Alonzo, 973 P.2d 975, 981 (Utah 1998), she nevertheless agreed “that the decision of the trial court should be affirmed.” Opinion, at ¶26. She agreed because, as plaintiff counsel notes, “there was no

prejudice to the plaintiff.” Opinion, at ¶¶26–31; see also Brief of Appellants on *Certiorari*, at 9.

Regardless, even if the statement was immaterial or had no place in closing arguments, it did not affect the fundamental fairness of the trial. Instead, the trial court judge clearly instructed the jurors about the relevant issues. The single comment, clearly offered as “lawyer talk,” was not sufficient to create a miscarriage of justice. Consequently, this Court should not take the extreme remedy of disturbing the lower court judgment, but should instead affirm the reference as a simple use of cultural shorthand to protect against an inappropriate and prejudicial damage calculation.

**POINT III THE COURT OF APPEALS SUFFICIENTLY EXAMINED AND RESOLVED THE ISSUE OF DEFINING “INCAPABLE” BETWEEN THE PARTIES.**

Plaintiffs’ brief could not, and did not identify any factual context that created a material issue of fact that is relevant to this motion. The evidence presented simply identifies what we already know—that there is a dispute as to the causation and *extent* of Mr. Boyle’s lower back injury. However, Plaintiffs did not indicate any facts showing Mr. Boyle sustained injuries that would entitle his wife to make a loss of consortium claim under Utah Code § 30-2-11 (“The Loss of Consortium Act” or “the Act”).

Plaintiffs wrongly claim “the existence of a significant permanent injury was thus essentially uncontested [by Defendant].” This assertion is completely unfounded given that the crux of this issue is whether Mr. Boyle had a “significant permanent injury” as defined by statute. The Loss of Consortium Act is very clear; “injured” means a significant permanent injury to a person that includes the following:

- (i) a partial or complete paralysis of one or more of the extremities;
- (ii) significant disfigurement; or
- (iii) incapability of the person of performing the types of jobs the person performed before the injury.

Utah Code Ann. § 30-2-11(1)(a) (2009). Defense counsel further stressed this at oral argument regarding motions in limine on May 19, 2008 when she stated, “[T]here has to be a significant permanent injury that substantially changed the plaintiff’s life, Mr. Boyle’s life. That I would degree [sic] is in dispute in this case.” (R. 691, Motions Transcript, at 5:14–18, May 19, 2008.)

Plaintiffs cite to Spahr v. Ferber Resorts, LLC, No. 2:08-cv-72, 2010 U.S. Dist. LEXIS 9571 (D. Utah Feb. 4, 2010) in an attempt to broaden the Loss of Consortium statute beyond the scope of the significant permanent injury contemplated by the legislature. In Spahr, the wife produced evidence of “massive and deep scarring” that caused her husband to be “ashamed to be seen” to convince the court the plaintiff suffered “extreme scarring.” Id., at \*12. This met the Act’s test of significant permanent injury because it represented a significant disfigurement.

Mr. Boyle’s brief indicates a dispute between the parties as to the source, extent, and duration of Mr. Boyle’s back injury. Mr. Boyle did not seek out medical attention for injuries allegedly related to this accident until five days after the incident occurred when he only sought chiropractic treatment from Walter Wagner for left-sided, lower back and buttock pain on July 26, 2004. (R. 267-316.) Plaintiffs argue that all of the experts, including those hired by defendant, agree the impact was sufficient to cause a ruptured disc. Plaintiff claims he had bruises on his left arm, left side, left thigh, and left

shin, abrasions on his foot, and very distinct pinpointed back pain. Whether the Mr. Boyle had a disc herniation in his back because of the subject accident was disputed; yet counsel never asserted this injury included a partial or complete paralysis of one or more of the extremities or a significant disfigurement. (R. 264-265.)

Mr. Boyle simply did not suffer any type of permanent paralysis. Although he may have some surgical scarring, it is not severe, and he is not disfigured.

Furthermore, the court expressly noted Spahr is distinguishable from this case:

The Utah Court of Appeals' decision in Boyle v. Christensen does not persuade the court otherwise. In Boyle, the injured party admitted in his deposition that he had performed the same jobs after his injury that he had performed before his injury, albeit in "significant discomfort." In that context, the Boyle court found that the party was capable of doing those jobs, noting that "the statute does not speak in terms of impairment, but rather, 'incapacity.'" Here, the record supports a conclusion that Mr. Spahr is *not simply in discomfort* doing jobs he had done before, but is *incapable* of kneeling and climbing ladders. Accordingly, Ms. Spahr's claim does not hinge on an argument that he is *impaired* in his gardening and carpentry, but *on proof that he is altogether precluded from them*.

Id. at \*14–15 (citations omitted) (emphasis added). Thus, the individual does not need to be "completely incapable of doing a job even in a most limited and extraordinary way" as was argued by the defendant in Spahr, but rather he must be clearly unable to complete the essential parts of his job after the injury. Mr. Boyle does not meet even this broader interpretation of Utah Code Ann. § 30-2-11(1)(a)(iii) as evidenced by his continued and substantially similar employment at O'Currence and Glenmoor Golf Course.

There are no facts to suggest Mr. Boyle could no longer work in the same type of employment as before the accident. Plaintiffs claim Mr. Boyle was doing substantially different work before the accident even though he admitted in his deposition testimony



that he sold a debt reduction plan prior to the accident, just as he sells at O'Currence (Id. at R. 254-55.) Mr. Boyle also trained employees at O'Currence, just as he previously did on occasion at his former job, until he stopped because he could make more money selling the product. (Id. at R. 253.) Before the accident, Mr. Boyle worked from home and only drove when going to his appointments or an occasional trip to the office. (Id. at R. 257-58.) At his current job, he sells the same type of product over the phone from an office. By no stretch of the imagination is this "substantially different" work.

Furthermore, Mr. Boyle's deposition reads as follows:

Q. Okay. What about your back, does your back prevent you from doing anything at work?

A. Not at that work [speaking of O'Currence]. I do work at the golf course on Saturday mornings from a half hour before daylight until 10:00 o'clock.

\* \* \*

Q. . . . How long have you worked there on Saturdays?

A. Three years. Three years plus.

Q. All right. Prior to this accident --

A. Excuse me, I should tell you I did some work for them after the surgery, but all I was doing then was standing behind a counter and checking people in, checking people out. So during that time I was unemployed I still worked some hours. It would range from probably eight to 16 hours a week.

(Id. at pp. 49:10-14, 50:6-16.)

Plaintiffs' counsel suggests that Mr. Boyle's spine problems are "disabling," yet in his deposition, Mr. Boyle clearly indicated that he could work, and in fact did still work. He is working almost forty hours a week at a job outside of the home that is substantially similar to his pre-accident employment. Mr. Boyle works at O'Currence, an inbound call center, and has since December 12, 2005. He makes between \$20 to \$35 an

hour (depending upon his sales numbers), puts in thirty hours a week, and receives health benefits. (R. 253-54.) At the time of his deposition, Mr. Boyle had no plans to quit working at O’Currance. (*Id.*) While it may or may not be true that Plaintiff is uncomfortable at work, he simply cannot deny the above-stated facts. Moreover, he is still an avid and frequent golfer.

Mr. Boyle was not incapable, under any definition, of performing the types of jobs he performed before the accident. In fact, Mr. Boyle is working in the same type of profession he did prior to the accident. Therefore, there was no evidence to support Norrine Boyle’s claim for loss of consortium, and that is why her case was dismissed by the trial court.

Plaintiffs would have this court believe that the test for whether or not a spouse of an injured party can bring a loss of consortium claim is whether the injured party sustained “a significant permanent injury that substantially changes that person’s lifestyle, which *also* includes significant disfigurement, or the incapability of the injured person of performing the types of jobs the person performed before the injury.”

(Appellant Brief at p. 22.) Plaintiff’s are incorrect about the applicable test. The correct test is whether Mr. Boyle’s significant injury “*includes*” either a partial or complete paralysis, a significant disfigurement or renders him incapable of performing the types of jobs he performed before the accident. § 30-2-11(1)(a).

The district court “agreed with Christensen that Mr. Boyle’s claimed injuries did not meet the statutory definition of an injury and dismissed Mrs. Boyle’s loss of consortium claim.” Opinion, ¶3. The Utah Court of Appeals affirmed the district finding

by holding that “Mrs. Boyle failed to present evidence that would support a loss of consortium claim under the parties' mutual interpretation of the governing statute.”

Opinion, ¶19. Regardless of how Mrs. Boyle personally feels, she was unable to make the statutory threshold showing necessary to state a claim for loss of consortium.

### **CONCLUSION**

Based upon the foregoing points and authorities, the appellate court’s decisions and rulings should be affirmed on appeal.

Respectfully submitted this 10 day of March, 2010.

STRONG & HANNI

By: 

Kristin A. VanOrman  
Jeremy G. Knight  
Pamela E. Beatse

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 10 day of March, 2010, true and correct copies of the foregoing Appellee's Answer Brief, in hard copy and electronic (pdf.) format were served by mail, postage fully prepaid, upon the following:

Roger P. Christensen, #0648  
Karra J. Porter, #5223  
Scot A. Boyd, #9503  
CHRISTENSEN & JENSEN, P.C.  
15 W. South Temple, Suite 800  
Salt Lake City, UT 84101



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### **ADDENDUM**

Trial Court Transcript of Jury Selection.

Trial Court Transcript of Oral Argument on Defendant's Motions in Limine.

Spahr v. Ferber Resorts, LLC, No. 2:08-cv-72, 2010 U.S. Dist. LEXIS 9571 (D. Utah Feb. 4, 2010).

# **Exhibit A**

Utah Court of Appeals Opinion, 2009 UT App 241

This opinion is subject to revision before  
publication in the Pacific Reporter.

FILED  
UTAH APPELLATE COURTS

IN THE UTAH COURT OF APPEALS

SEP 03 2009

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John Boyle and Norrine Boyle,	}	OPINION
	}	(For Official Publication)
Plaintiffs and Appellants,	}	Case No. 20080582-CA
	}	
v.	}	F I L E D
	}	(September 3, 2009)
Kerry Christensen,	}	
	}	2009 UT App 241
Defendant and Appellee.	}	

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Third District, Salt Lake Department, 050912506  
The Honorable Tyrone E. Medley

Attorneys: Roger P. Christensen and Scot A. Boyd, Salt Lake  
City, for Appellants  
Kristin A. VanOrman and Jeremy G. Knight, Salt Lake  
City, for Appellee

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Before Judges Thorne, Davis, and McHugh.

THORNE, Associate Presiding Judge:

¶1 John and Norrine Boyle, husband and wife, appeal from the district court's judgment awarding Mr. Boyle damages of \$62,500 against Kerry Christensen. We affirm the judgment of the district court.

#### BACKGROUND

¶2 In 2004, Christensen struck Mr. Boyle with his vehicle while Mr. Boyle was walking in a crosswalk located in a grocery store parking lot. As a result, Mr. Boyle suffered back injuries that ultimately required back surgery. The surgery was only partially successful and left Mr. Boyle with chronic back pain. In 2005, the Boyles sued Christensen for negligence and loss of consortium.

¶3 In January 2008, Christensen filed a motion to dismiss Mrs. Boyle's loss of consortium claim. Christensen's motion argued that loss of consortium as a cause of action is governed by statute and requires an "injury" as that term is statutorily

defined. See Utah Code Ann. § 30-2-11 (Supp. 2008). The district court agreed with Christensen that Mr. Boyle's claimed injuries did not meet the statutory definition of an injury and dismissed Mrs. Boyle's loss of consortium claim.

¶4 Trial on Mr. Boyle's negligence claim took place in June 2008. As trial approached, Mr. Boyle submitted a proposed jury questionnaire that included specific questions intended to elicit jurors' views regarding damages and tort reform. Christensen also submitted proposed voir dire questions, and the district court edited and combined the parties' proposed questions into a single set of voir dire questions that did not contain the exact questions posed by either party. The district court conducted voir dire using its own questions without objection from either party. At the close of voir dire, both Mr. Boyle and Christensen passed the jury for cause.

¶5 Christensen had admitted liability for Mr. Boyle's injuries, and trial commenced solely on the issue of damages. After each side rested its case, the parties made their closing arguments to the jury. During Christensen's closing argument, his counsel characterized Mr. Boyle's closing argument relating to pain and suffering damages as follows:

It's a per diem analysis. How many days has it been since the accident? How many days for the rest of his life? And how much per day is that worth? That's what's been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee.

Mr. Boyle's counsel timely objected to the reference to "the McDonald's case"--a New Mexico lawsuit docketed as Liebeck v. McDonald's Restaurants, case no. D-202-CV-9302419, that resulted in a famously large 1994 jury verdict--stating that "it's prejudicial and it's not in evidence." The district court overruled this objection, and Christensen's counsel completed her closing argument without further reference to Liebeck.

¶6 The jury ultimately rendered Mr. Boyle a damages verdict of \$62,500, of which \$27,800 was for general pain and suffering. The jury's general damages award was significantly less than that sought by Mr. Boyle, and he appeals from the resulting judgment. Mrs. Boyle also appeals from the dismissal of her loss of consortium claim.



## ISSUES AND STANDARDS OF REVIEW

¶7 Mr. Boyle first argues that the district court erred in failing to question potential jurors on the issues of juror bias and tort reform. "We review challenges to the trial court's management of jury voir dire under an abuse of discretion standard." Bee v. Anheuser-Busch, Inc., 2009 UT App 35, ¶ 8, 204 P.3d 204 (internal quotation marks omitted). However, alleged deficiencies in voir dire must be brought to the district court's attention in order to be preserved for appeal. See Doe v. Hafen, 772 P.2d 456, 458 (Utah Ct. App. 1989).

¶8 Next, Mr. Boyle argues that the district court erred by allowing Christensen to reference Liebeck in his closing argument. "The determination of whether remarks made during closing argument improperly influenced the verdict is within the sound discretion of the trial court." Green v. Louder, 2001 UT 62, ¶ 35, 29 P.3d 638.

¶9 Finally, Mrs. Boyle argues that the district court erred when it granted Christensen's motion to dismiss her loss of consortium claim. "We review a trial court's ruling on a motion to dismiss for correctness, according no deference to the trial court." Code v. Utah Dep't of Health, 2007 UT App 390, ¶ 3, 174 P.3d 1134; see also Buckner v. Kennard, 2004 UT 78, ¶ 9, 99 P.3d 842.

## ANALYSIS

### I. Voir Dire on Juror Bias and Tort Reform

¶10 Mr. Boyle's first argument on appeal is that the district court erred in failing to conduct voir dire questioning on issues relating to juror bias and tort reform. In his jury questionnaire, Mr. Boyle proposed the following voir dire questions:<sup>1</sup>

4[.] What are your feelings or opinions about people who bring personal injury lawsuits? If supported by the evidence, could you award a large amount of money to the plaintiff in this case?

---

1. Mr. Boyle's questionnaire included various "yes" or "no" check boxes that have been omitted here for ease of quotation.

5[.] If you were seriously hurt or injured by the negligence of another, would you sue? Please explain your answer:

6[.] If supported by the evidence, could you award money damages for

- a. Future physical pain
- b. Mental anguish
- c. The impact on a wife of partially disabling injuries to her husband?
- d. Future medical bills

If you answered NO to any of the above, please explain:

7[.] Do you believe the law should impose limits on money that can be awarded for pain and suffering[?] If YES, what do you believe these limitations should be?

The district court did not ask the potential jurors these questions but, rather, conducted voir dire using a set of questions that it had drafted itself.

¶11 The district court's voir dire asked potential jurors the following questions relating to juror attitudes about personal injury claims and damages:

13. Do you have any feelings or beliefs that would prevent you from being fair and impartial regarding persons who have personal injury disputes and who choose to resolve those disputes by going to court?

14. Do you have any personal, religious or other beliefs that would prevent you from awarding damages in a large amount, small amount, or zero amount, if warranted and justified by the evidence and the law given you by the Court?

15. Given all considerations and everything you know about this case so far, can you be a fair, impartial, neutral, judge of the facts and follow the law as given to you by the Court?

At no time, however, did Mr. Boyle ever indicate to the district court that the court's questions failed to adequately address the concerns posed by his own questions, and Mr. Boyle ultimately passed the jury for cause.

¶12 Mr. Boyle argues on appeal that his mere submission of specific jury questions relating to damages and tort reform preserves for appeal his claim that the voir dire questions the district court actually posed were inadequate. We disagree. "[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (alterations in original) (internal quotation marks omitted). Here, the district court attempted to reconcile the parties' proposed jury questions into a single set of voir dire questions that addressed each party's concerns. If Mr. Boyle believed that the district court's modification of his questions constituted error on the part of the district court, it was his obligation to bring this alleged error to the district court's attention. His failure to do so constitutes a waiver of the issue as one for appeal. See id.; compare Doe v. Hafen, 772 P.2d 456, 458 (Utah Ct. App. 1989) (finding no preservation where a party failed to "call the judge's attention to [a] specific question" in a set of voir dire questions that had been rejected by the trial court), with Alcazar v. University of Utah Hosps. & Clinics, 2008 UT App 222, ¶ 5, 188 P.3d 490 (addressing substantive issue where appellant had "repeatedly attempted to persuade the trial court to give the requested voir dire questions, including briefing the rather direct authority from this court on the issue, [but] the court declined and offered its own unique philosophical approach to voir dire in medical malpractice cases").

¶13 Mr. Boyle argues for the first time in his reply brief that the district court's failure to question the jury on the requested issues constitutes plain error and is thus an exception to the preservation requirements. See generally Nielsen v. Spencer, 2008 UT App 375, ¶ 14, 196 P.3d 616 (discussing plain error), cert. denied, 207 P.3d 432 (Utah 2009). In the past, we have refused to consider arguments of plain error raised for the first time in an appellant's reply brief, even if the plain error argument is in response to a dispute over preservation raised for the first time in the appellee's brief. See, e.g., Moore v. Smith, 2007 UT App 101, ¶ 24, 158 P.3d 562, cert. denied, 182 P.3d 910 (Utah 2007). Accordingly, we do not conduct a plain error analysis here.

¶14 We conclude that Mr. Boyle failed to adequately preserve for appeal his claim that the district court's voir dire questioning was inadequate. Although the district court did not ask the exact questions submitted by Mr. Boyle, it did ask related questions. Thereafter, Mr. Boyle passed the jury for cause without objection and without explaining the alleged harm resulting from the fact that his proposed questions had not been asked. Under these circumstances, Mr. Boyle failed to preserve

any claim of error arising from the district court's failure to ask his submitted questions. Accordingly, we decline to address that issue.

## II. Closing Arguments

¶15 Mr. Boyle next argues that he is entitled to a new trial because of Christensen's counsel's reference to Liebeck--the McDonald's coffee case--in her closing argument. Closing arguments represent the final opportunity for parties to summarize their cases and attempt to influence the jury, and parties are allowed substantial leeway in doing so. See State v. Alonzo, 932 P.2d 606, 615 (Utah Ct. App. 1997), aff'd, 973 P.2d 975 (Utah 1998).

Counsel for both sides have considerable latitude in their closing arguments. They have the right to fully discuss from their perspectives the evidence and all inferences and deductions it supports. However, counsel exceeds the bounds of this discretion and commits error if he or she calls to the jury's attention material that the jury would not be justified in considering in reaching its verdict.

Id. (citation and internal quotation marks omitted). Mr. Boyle attempts to characterize Christensen's counsel's comment as one that "calls to the jury's attention material that the jury would not be justified in considering in reaching its verdict," see id., but we reject that characterization.

¶16 Mr. Boyle argues that there had been no evidence presented about the Liebeck case and that the reference was therefore improper as "unrelated commentary . . . that is not supported by the evidence." Mr. Boyle cites State v. Alonzo, 932 P.2d 606 (Utah Ct. App. 1997), aff'd, 973 P.2d 975 (Utah 1998), in support of his argument. In Alonzo, the defendants were charged with assaulting a police officer following a physical altercation between the defendants and police. See id. at 608-09. During closing arguments, the defendants referred to "'those Rodney King cops that are doing time in the Federal pen'" in an attempt to illustrate that police officers who use excessive force could lose their jobs and go to jail. See id. at 614-15. The district court disallowed this use of the Rodney King matter but did clarify "that the jury could consider defense counsel's arguments involving the Rodney King officers for the purpose of weighing 'the credibility of the witnesses, if they want to examine it in that way.'" Id. at 615. This court affirmed the district court's treatment of the Rodney King issues. See id.

¶17 Mr. Boyle has failed to demonstrate that Alonzo renders Christensen's counsel's reference to Liebeck erroneous. In both this case and Alonzo, counsel used references to iconic legal matters to make legitimate points to the jury. Mr. Boyle argues that Liebeck is synonymous with excessive verdicts and runaway juries, and that may be true. But we see no harm in allowing Christensen to use a cultural reference as shorthand to make the point that, in Christensen's opinion, Mr. Boyle's damages methodology was likely to render this jury's verdict excessive. Such an argument is not inappropriate, and Christensen's counsel's use of Liebeck to illustrate the point is surely no more objectionable than counsel's usage of what is arguably the nation's most famous police brutality case in Alonzo,<sup>2</sup> see id. at 614-15.

¶18 In sum, we see no error created by Christensen's counsel's comment to the jury. Accordingly, we decline to disturb the judgment below on this ground.

### III. Mrs. Boyle's Loss of Consortium Claim

¶19 Finally, Mrs. Boyle argues that the district court erred when it dismissed her loss of consortium claim. We agree with the district court that Mrs. Boyle failed to present evidence that would support a loss of consortium claim under the parties' mutual interpretation of the governing statute.

¶20 Loss of consortium claims are governed by Utah Code section 30-2-11. See Utah Code Ann. § 30-2-11 (Supp. 2008). "The spouse of a person injured by a third party . . . may maintain an action against the third party to recover for loss of consortium." Id. § 30-2-11(2). However, not every injury to a spouse will support a loss of consortium claim. Section 30-2-11 defines the required degree of injury:

"[I]njury" or "injured" means a significant permanent injury to a person that

---

2. We note that Mr. Boyle's counsel also made reference to Liebeck in his closing argument, albeit in reply to Christensen's counsel's comment:

The McDonald's case was mentioned. What was not mentioned is the court has a right to, and did, fix that. The bad verdict got all the press. The fact that the court reduced it to less than I think ten percent of the original amount of course didn't make the press.

substantially changes that person's lifestyle and includes the following:

- (i) a partial or complete paralysis of one or more of the extremities;
- (ii) significant disfigurement; or
- (iii) incapability of the person of performing the types of jobs the person performed before the injury.

Id. § 30-2-11(1)(a).

¶21 Here, both parties argued to the district court and on appeal that no loss of consortium claim will lie unless the injured spouse suffers paralysis of an extremity, significant disfigurement, or job incapacity. Accepting this interpretation of the statute for purposes of this appeal,<sup>3</sup> we agree with the district court that Mr. Boyle's injuries do not fall within the statutory definition of an injury.

¶22 On appeal, Mrs. Boyle argues that Mr. Boyle's injuries meet the job incapacity prong of the statutory definition because he "is impaired in his ability to perform the job to the same degree and extent that he could prior to the incident."<sup>4</sup> However, that prong of the statute does not speak in terms of impairment but, rather, "incapacity." See Utah Code Ann. § 30-2-11(1)(a)(iii). Mr. Boyle's deposition established that he worked in sales and at a golf course both before and after his injury. Although these jobs apparently caused Mr. Boyle significant discomfort after the injury, he was capable of performing them. In light of these facts, Mrs. Boyle has not presented evidence that Mr. Boyle is "incapab[le] . . . of performing the types of jobs [he] performed before the injury." See id.

¶23 Under these circumstances, we cannot say that the district court erred in dismissing Mrs. Boyle's loss of consortium claim. Mrs. Boyle agreed with Christensen that the relevant statute required one of three specific types of injuries in order for her

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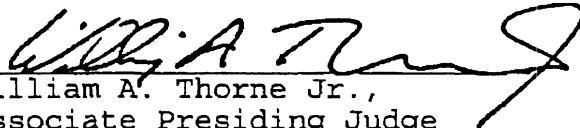
3. We express no opinion on whether the parties are correct in their interpretation of section 30-2-11(1)(a).

4. Mrs. Boyle does not argue on appeal that her claim can proceed under either of the other statutory prongs--paralysis of an extremity or significant disfigurement. See Utah Code Ann. § 30-2-11(1)(a)(i)-(ii) (Supp. 2008).

claim to be actionable, and she failed to present evidence that Mr. Boyle's injuries fell into one of the required categories. Accordingly, the district court correctly dismissed Mrs. Boyle's loss of consortium claim.

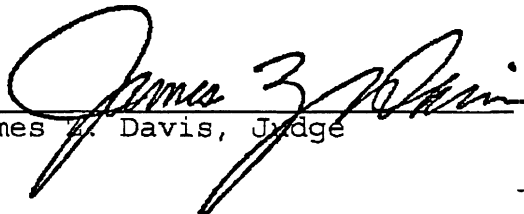
#### CONCLUSION

¶24 We conclude that Mr. Boyle did not adequately preserve his argument that the district court erred in failing to ask requested juror bias and tort reform questions on voir dire. We also conclude that no error arose from Christensen's counsel's closing argument reference to Liebeck and that the district court properly dismissed Mrs. Boyle's loss of consortium claim. Accordingly, we affirm the judgment of the district court.

  
William A. Thorne Jr.,  
Associate Presiding Judge

-----

¶25 I CONCUR:

  
James L. Davis, Judge

-----

MCHUGH, Judge (concurring in result):

¶26 While I agree with my colleagues that the decision of the trial court should be affirmed, I write separately to indicate my differing view on the challenge to Christensen's closing argument. Although I agree that the narrow use of the Liebeck v. McDonald's, No. CV-93-02419, 1995 WL 360309, at \*1 (N.M. Dist. Aug. 18, 1994), decision was not prejudicial, I would hold that it was improper. Furthermore, I do not read State v. Alonzo, 932 P.2d 606 (Utah Ct. App. 1997), aff'd, 973 P.2d 975 (Utah 1998), as approving the introduction of such extraneous matter during closing argument.

¶27 The Alonzo defendants claimed that police officers had used excessive force against them and, in closing argument, cited the prison sentences imposed on the police officers involved in the Rodney King case as an example of why police officers would be

motivated to lie about their use of force against a defendant. See id. at 614-15. The trial court overruled the State's objections to the references, but gave the jury a limiting instruction that allowed it to consider the references only to the extent they related to the credibility of the police officers. See id. at 615. Credibility was at issue because the stories of the defendants and those of the police officers about the circumstances of the arrest varied greatly and because the prosecution had suggested that the defendants had a motive to lie. See id. at 609, 614-15. After deliberations, the jury found the defendants guilty of assault on a police officer. See id. at 610.

¶28 On appeal to this court, the defendants argued that the limitations on the use of the Rodney King references constituted prejudicial error. See id. at 615. This court affirmed, holding that "the trial court's restrictions on defense counsel's references to the 'Rodney King' officers were not improper." Id. On certiorari, the supreme court agreed that "the trial court properly restricted certain references to Rodney King as material the jury should not consider." State v. Alonzo, 973 P.2d 975, 981 (Utah 1998). However, neither this court nor the supreme court was asked to consider the issue present here--whether the references to the unrelated case were proper at all.

¶29 After acknowledging the broad latitude generally available in presenting closing arguments, the supreme court in Alonzo stated, "[S]uch latitude does not extend to counsel calling the jury's attention to material that the jury would not be justified in considering in its verdict." Id. at 981. Indeed, the opinion issued by this court, which was affirmed by the supreme court, is more explicit:

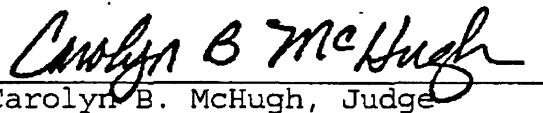
Although counsel has considerable latitude in closing arguments, the trial court could have reasonably concluded that defense counsel was exceeding the bounds of this discretion when counsel referred to the Rodney King officers. The trial court could have determined that defense counsel's references to Rodney King were an attempt to inflame the jury or suggest that because the Rodney King officers were found guilty, the officers in this case were also guilty of using excessive force.

Alonzo, 932 P.2d at 615 (emphasis added). If the trial court could have excluded the references entirely as inflammatory, it is not surprising that the limitations placed on the use of the Rodney King argument did not constitute prejudicial error.



¶30 Moreover, in Alonzo, the Rodney King references could be considered by the jury only in weighing the credibility of the police officers and their motive to lie. See id. at 615-16: These matters were legitimately at issue due to the differences between the testimony of the officers and that of the defendants, and by the State's suggestion that only the defendants had a motive to lie. Here, there is nothing relevant about the Liebeck case. Christensen's closing argument suggests that the allegedly excessive verdict in Liebeck was caused by that jury's use of a per diem analysis like the one Mr. Boyle had proposed in this case. As Mr. Boyle correctly notes, however, the damages perceived by members of the public to be excessive in Liebeck were punitive damages and did not involve a per diem analysis. See Liebeck v. McDonald's, No. CV-93-02419, 1995 WL 360309, at \*1 (N.M. Dist. Aug. 18, 1994). Thus, unlike the Rodney King references in Alonzo, the reference to Liebeck had no arguable relevance to this case.

¶31 Under these circumstances, I would hold that the references to the McDonald's coffee case improperly "call[ed] the jury's attention to material that the jury would not [have been] justified in considering in its verdict." Alonzo, 973 P.2d at 981. Moreover, the fact that the Liebeck case is "iconic," "synonymous with excessive verdicts," or even infamous would make me more inclined to find its use in oral argument improper rather than less so inclined. Supra ¶ 17.

  
Carolyn B. McHugh, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of September, 2009, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

ROGER P. CHRISTENSEN  
KARRA J. PORTER  
SCOT A BOYD  
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SALT LAKE CITY UT 84101

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HONORABLE TYRONE E. MEDLEY  
THIRD DISTRICT, SALT LAKE  
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THIRD DISTRICT, SALT LAKE  
ATTN: MARINA DAVIS & LYN MACLEOD  
450 S STATE ST BX 1860  
PO BOX 1860  
SALT LAKE CITY UT 84114-1860

  
Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 050912506  
APPEALS CASE NO.: 20080582-CA

# **Exhibit B**

Trial Court Transcript of Jury Selection

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

JOHN BOYLE and NORINNE	)	
BOYLE,	)	
	)	
Plaintiffs,	)	Case No. 050912506
	)	
vs.	)	
	)	Judge:
KERRY CHRISTENSEN,	)	
	)	Tyrone E. Medley
Defendant.	)	
	)	

---

TRANSCRIPT OF JURY SELECTION

Date of Proceeding: JUNE 3-6, 2008

Reporter: Diana Kent, CSR, RPR, CRR  
Notary Public in and for the State of Utah

A P P E A R A N C E S

FOR THE PLAINTIFFS:

Roger P. Christensen  
CHRISTENSEN & JENSEN  
Attorney at Law  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101

FOR THE DEFENDANT:

Kristin A. Van Orman  
STRONG & HANNI  
Attorney at Law  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180

P R O C E E D I N G S

THE COURT: The record should reflect that this is Case No. 050912506 in the matter of John Boyle versus Kerry Christensen. Mr. Christensen, on behalf of your client, Mr. Boyle, are you ready to go forward, sir?

MR. CHRISTENSEN: Yes, Your Honor.

THE COURT: And Ms. Van Orman, on behalf of your client, Mr. Christensen, are you ready to go forward, as well?

MS. VAN ORMAN: Yes, Your Honor.

THE COURT: All right. Thank you.

Counsel, Members of the jury panel, first of all, I want to thank you very much for your appearance here today. I'm going to assume automatically that it's highly unlikely that any of you stood up and applauded when you received that final notification that you're going to be required to come to court today and render jury service. I'm certain that all of you, to one extent or another, have been inconvenienced and I would like for you to keep in mind and understand that myself and Counsel are going to jealously guard your time and move this case along in the most possible efficient and

1     thorough manner that we can.

2             I would also, however, like you to keep in  
3     mind that your jury service here today is very  
4     important. Your fair and impartial jury service, in  
5     fact, will help ensure the rights and privileges that  
6     all of us benefit from and enjoy as citizens of this  
7     great country and state that we live in. And, in  
8     fact, without citizens willing to make the necessary  
9     sacrifices to render jury service in court cases,  
10    whether it be in this state or in other states in  
11    this country, of course, our third branch of  
12    government would come to a screeching -- come to a  
13    screeching halt.

14            I sort of view jury service high on the  
15    list with other responsibilities of citizenship such  
16    as voting and military service. So certainly on  
17    behalf of myself, on behalf of the judiciary of this  
18    state, on behalf of counsel and their clients, I want  
19    to thank you very much for your service here today.

20            We're going to get started right away with  
21    the jury selection phase of this particular case. I  
22    would first like you to know and keep in mind that I  
23    will be assisted throughout the course of this trial  
24    by my clerks who are seated to my immediate left,  
25    Tina and Stephanie, and I will also be assisted by my

1 primary bailiff Kathy. I think you've already met  
2 her. I don't see her in the courtroom right at this  
3 very moment but she periodically has to cover other  
4 courts, as well. And I may have other bailiffs  
5 substituting for her, as well.

6 Keep in mind also, Members of the Jury  
7 Panel, that also during this course of the phase of  
8 the case a number of questions are going to be put to  
9 you. I think it's important for you to know up front  
10 that none of these questions are really designed to  
11 pry into your innermost private affairs and, in fact,  
12 if you think a question touches upon some issue that  
13 you would rather respond to in private, just let me  
14 know that, and myself and Counsel and their clients  
15 can retire to my chamber area and have you give your  
16 answer to that type of a question in that format.

17 However, because of the nature of today's  
18 case, I'm not sure that you will have any problems  
19 responding to the questions that are going to be put  
20 to you.

21 The first task that must be performed,  
22 Members of the Jury Panel, is that the responses to  
23 the questions that you're going to give must, in  
24 fact, be under oath. So I do need for you to please  
25 stand and raise your right hands at this time so you



1 can be placed under oath.

2 THE CLERK: You and each of you do  
3 solemnly swear that you will answer truly such  
4 questions as may be put to you testing your  
5 competency to serve as trial jurors in the case now  
6 before you, so help you God.

7 (Jury Panel answers yes in unison.)

8 THE COURT: You may be seated.

9 Members of the Jury Panel, the first thing  
10 I would like to do is get some idea of the nature of  
11 the case that's going to be tried. This case is what  
12 we generally describe as a civil case. It is a  
13 personal injury civil case. And in this case the  
14 plaintiff, and the plaintiff is the party who files  
15 the lawsuit, the plaintiff is John Boyle, and the  
16 plaintiff in this case seeks to recover damages on  
17 account of an automobile/pedestrian accident wherein  
18 Mr. Boyle was struck by a vehicle operated by Mr.  
19 Kerry Christensen.

20 Mr. Kerry Christensen admits he was  
21 responsible for causing accident. However, he denies  
22 that the accident caused Mr. Boyle injuries to the  
23 extent claimed in this case. The accident occurred  
24 on or about July the 22nd of 2004 at the Smith's food  
25 store at 4080 West 90th South in West Jordan, State

1 of Utah.

2 Now, Members of the Jury Panel, the first  
3 thing I would like to know is whether or not any  
4 member of the panel is familiar with the particular  
5 facts of this case. And if so, would you please  
6 indicate this by raising your hand at this time?

7 The record should record that there are no  
8 hands raised.

9 Now, next, Members of the Jury Panel, what  
10 I would like to do is I'm going to turn to counsel  
11 and have them introduce themselves to you. They're  
12 also going to introduce their clients. They are also  
13 going to identify by naming the witnesses they  
14 anticipate will testify in this particular case. And  
15 Members of the Jury Panel, once they have completed  
16 identifying these individuals, I'm going to ask you  
17 whether or not you know or are familiar with or have  
18 any relationship whatsoever with any of these  
19 individuals. So please pay particular attention.

20 Mr. Christensen.

21 MR. CHRISTENSEN: Yes. I'm Roger  
22 Christensen. I've been an attorney for a number of  
23 years. I'm with the law firm of Christensen &  
24 Jensen, which is headquartered here in Salt Lake  
25 City. This is Sue Harrison, who is a paralegal in

1 that firm who is going to be assisting in the trial.  
2 This is John Boyle, who is the plaintiff in this  
3 case. We anticipate calling the following witnesses  
4 currently: Mr. Boyle; Mr. Christensen; a Dr. Lyle  
5 Mason, an orthopedic surgeon who also works with the  
6 Utah Jazz; Mr. Boyle's son Adam; his daughter Laura  
7 Stice; Dr. Junius Clawson, an orthopedic surgeon with  
8 the Intermountain Spine Institute, Felton Lancaster,  
9 ^ someone who works part-time with Mr. Boyle at the  
10 Glenmoor ^ Golf Course; Mr. Boyle's son, Tucker  
11 Boyle; his wife Norrine Boyle; and potentially an  
12 eyewitness, Chris Jones.

13 THE COURT: Thank you, Mr. Christensen.

14 Members of the Jury Panel, first of all, I  
15 would like to start with Mr. Christensen and his  
16 client, Mr. Boyle. I would like to know whether or  
17 not any member of the jury panel knows, is familiar  
18 with, or has any relationship whatsoever with Mr.  
19 Christensen or his client, Mr. Boyle, and if so,  
20 would you please indicate this by raising your hand  
21 at this time. And the record should reflect that  
22 there are two hands raised.

23 And Mr. Owen, did you have your hand  
24 raised?

25 MR. OWEN: I did.

1                   THE COURT: And I don't want you to go  
2 into detail at all, Mr. Owen, but I just want you to  
3 name who it is you recognize.

4                   MR. OWEN: I'm an attorney and have  
5 practiced in --

6                   THE COURT: Well, who is it you recognize,  
7 sir?

8                   MR. OWEN: Christensen, Jensen & Powell,  
9 that firm.

10                  THE COURT: Okay. And that was why you  
11 raised your hand?

12                  MR. OWEN: That's correct.

13                  THE COURT: Okay. Thank you very much,  
14 Mr. \*Lion -- And, Mr. Owen, I'll be coming back to  
15 you in just a moment.

16                         And do you pronounce is it "Ryman"?

17                  MS. REIMANN: Yes, it is. Very good.

18                  THE COURT: Ms. Reimann, who is it that  
19 you recognize?

20                  MS. REIMANN: My husband is a cousin of  
21 Sue Harrison's husband.

22                  THE COURT: I'm sorry, say that again.  
23 Your husband?

24                  MS. REIMANN: My husband is Sue Harrison's  
25 cousin's -- husband's cousin, sorry.

1 THE COURT: Okay. Thank you very much,  
2 ma'am. Did I miss any hands raised in response to  
3 that question? The record should reflect that there  
4 are no hands raised.

5 Next, Members of the Jury Panel, I would  
6 like to know whether or not you know, are familiar  
7 with, or have any relationship whatsoever, if you  
8 have not already responded, to any of the potential  
9 witnesses that Mr. Christensen identified may testify  
10 in this case. And if so, would you please indicate  
11 this by raising your hand at this time. The reflect  
12 should reflect that Mr. Owen, you had a hand raised.  
13 And which witness individual did you recognize?

14 MR. OWEN: I am acquainted with Chris  
15 Jones. I don't know if that's the same one that's  
16 going to be a witness.

17 THE COURT: And the Chris Jones that  
18 you're familiar with, can you tell us how he's  
19 employed?

20 MR. OWEN: Yes, he's a basketball coach.

21 THE COURT: Where is he coaching at now?

22 MR. OWEN: He just left the University of  
23 Utah and went to Utah State.

24 THE COURT: Mr. Christensen, is that the  
25 same or different Chris Jones?

1 MR. CHRISTENSEN: No. This Chris Jones is  
2 actually a woman.

3 THE COURT: Okay. And did I miss any  
4 other hands raised in response to that question?  
5 I'm sorry, Mr. Yeates, who did you think you  
6 recognized?

7 MR. YEATES: Well, the physician here  
8 that's going to testify, his name again? He's with  
9 the Jazz; is that right?

10 MR. CHRISTENSEN: Lyle Mason.

11 MR. YEATES: Okay. If I have any  
12 relationship it's a superficial relationship.

13 THE COURT: All right. Did I miss any  
14 hands raised in response to that question?

15 The record should reflect that there are  
16 no other hands raised.

17 Ms. Van Orman, would you do the same,  
18 please.

19 MS. VAN ORMAN: My name is Kristin Van  
20 Orman. I'm with the law firm of Strong & Hanni. My  
21 client, Kerry Christensen, is sitting next to me. We  
22 will be calling, let's see, three other witnesses: A  
23 Dr. Pontiff Nors, ^ he's a neurologist; Dr. Stephen  
24 Marble, he's a physiatrist; and Dr. Alan Goldman, a  
25 neurologist.

1                   THE COURT: Thank you very much, Ms. Van  
2 Orman.

3                   Members of the Jury Panel, I would like to  
4 know, first, if any of you know or are familiar with  
5 or have any relationship whatsoever with either Ms.  
6 Van Orman or her law firm or her client, Mr.  
7 Christensen in this case, and if so, would you please  
8 indicate this by raising your hand at this time.

9                   The record should reflect that there are  
10 no hands raised.

11                  And finally, Members of the Jury Panel, I  
12 would like to know whether or not any of you know or  
13 are familiar with or have any relationship whatsoever  
14 with any of the potential witnesses that Ms. Van  
15 Orman just identified, as well. And if so, would you  
16 please indicate this by raising your hand at this  
17 time.

18                  The record should reflect that there are  
19 no hands raised.

20                  MR. CHRISTENSEN: Your Honor, I've been  
21 reminded we have one additional witness.

22                  THE COURT: Oh, I'm sorry, go ahead.

23                  MR. CHRISTENSEN: Mr. Merrill Norman who  
24 is a CPA and a financial expert.

25                  THE COURT: And Members of the Jury Panel,

1 Mr. Christensen just identified an additional  
2 potential witness, Mr. Merrill Norman. And if any of  
3 you are familiar with, know, or have any relationship  
4 whatsoever with Mr. Norman, would you please indicate  
5 this by raising your hand at this time.

6 And the record should reflect that Mr.  
7 Owen has his hand raised.

8 Mr. Owen, is it through your profession  
9 that you know Mr. Norman?

10 MR. OWEN: Well, it's both. I have hired  
11 him, he's worked for me, and he is a friend and I've  
12 met him. ^

13 THE COURT: Thank you, Mr. Owen.

14 Did I miss any response to that follow-up  
15 question? The record should reflect that there are  
16 no additional hands raised.

17 Well, Members of the Jury Panel, I'm going  
18 to take just a brief moment to summarize for you what  
19 the roles and responsibilities to the participants in  
20 this particular case are going to be. And at a later  
21 point in time I will be going into a more detailed  
22 description of the law that will apply in this  
23 particular case which will also further define for  
24 you what the respective roles and responsibilities  
25 are. I would like to give you a summary of that



1 description at this time.

2 First of all, Members of the Jury Panel,  
3 let me say to you, obviously it will be the role and  
4 responsibility for plaintiff in this particular case  
5 to present their evidence in an effort to establish  
6 their case. And again, I will go into a more defined  
7 definition of what those roles and duties and  
8 responsibilities are in light of the nature of this  
9 case.

10 It will be the role and responsibility of  
11 Ms. Van Orman, in essence, to represent her client,  
12 Mr. Christensen and to defend this case.

13 It will be the role and the responsibility  
14 of the jury in this case, Members of the Jury Panel,  
15 first of all to be fair and impartial to both sides  
16 of this case. The jury will be required to fairly  
17 and impartially decide what the facts are in this  
18 case. And through that process the jury also will be  
19 called upon to determine what weight should be given  
20 to the various pieces of evidence and testimony  
21 that's introduced during the course of this case.  
22 The jury will be called upon to weigh the credibility  
23 of the various witnesses that are going to be called  
24 to testify in this case, as well.

25 Additionally, Members of the Jury Panel,

1 of course, it will be the jury's responsibility to  
2 fairly and impartially render a verdict in this  
3 particular case. It's very important for you to keep  
4 in mind, Members of the Jury Panel, that it will be  
5 my role and responsibility as the judge in this case  
6 to decide the issues of law as those issues arise  
7 during the course of this trial. You should keep in  
8 mind and understand that it's very common for counsel  
9 to make objections during the course of the trial to  
10 a particular question or to a particular piece of  
11 evidence. That's a normal part of the trial process.  
12 And what's important for you to know and understand,  
13 that when a lawyer makes an objection, that he or she  
14 is simply asking the court, the judge, to make a  
15 legal decision. So it will be my role and  
16 responsibility to make those types of legal  
17 decisions.

18 I would like for you to keep in mind that  
19 I'm going to go out of my way to try to resolve those  
20 decisions here in open court so that we don't  
21 unreasonably delay this case. But you should also  
22 keep in mind and understand, however, that the law is  
23 fairly clear that there are some legal issues that I  
24 must hear outside of your presence. So we may have  
25 the occasion where I have you retire to the jury

1 deliberation room so I can listen to oral argument on  
2 a particular point of law, resolve that issue, then  
3 bring you back in. But again, I'm going to go out of  
4 my way to try to reduce those occurrences.

5           You should also keep in mind and  
6 understand that at the conclusion of the case,  
7 Members of the Jury Panel, it will be my role and  
8 responsibility to instruct you or give you the law  
9 that applies in this particular case. And it will be  
10 your sworn duty and obligation, Members of the Jury  
11 Panel, as jurors on this case, to follow the law as  
12 given to you by the Court.

13           And let me give you an example of a  
14 portion of the law that I'm going to be instructing  
15 the jury with at a later point in time in more  
16 detail. I'm just going to give you an example, a  
17 summarized example at this point in time.

18           Because of the nature of this particular  
19 case, it's very likely that I'm going to be  
20 instructing the jury on the subject matter of  
21 damages. There is governing law in this state which  
22 governs the issues of damages in this type of a case.  
23 And our law in this state, in essence, defines  
24 damages into two separate categories.

25           First, the first category is defined as

1 economic damages. And economic damages include  
2 reasonable and necessary expenses for medical care  
3 and other related expenses, both past and future.  
4 That's the first category of damages that the law  
5 recognizes in this type of a case. The second  
6 category of damages that the law recognizes in this  
7 type of a case is what the law defines as noneconomic  
8 damages. And noneconomic damages include, for  
9 example, damages for pain and suffering, both mental  
10 and physical; the extent, if any, wherein one is  
11 prevented from pursuing the ordinary affairs of their  
12 life, and to the extent they may be limited in  
13 enjoyment of their life.

14 That's a very brief, general description  
15 of the types of damages that the law recognizes in  
16 this particular case. But what is important for you  
17 to keep in mind and understand, Members of the Jury  
18 Panel, is that since it is my duty and responsibility  
19 to instruct you or give you the law that applies in  
20 this case, it is the jury's sworn duty and obligation  
21 to follow the law as given to you by me, even if you  
22 were to think that the law is different from what I  
23 state it to be, or even if you think the law ought to  
24 be different from what I state it to be.

25 The bottom line is, you don't get the

1 opportunity to be the Utah State legislature in this  
2 particular case; you simply must follow the law as  
3 given to you by the Court. Consequently, Members of  
4 the Jury Panel, I would like to know if there is any  
5 member of the Jury Panel who is of the opinion that  
6 you would not be able to follow the law as given to  
7 you by the Court. Would you please indicate this by  
8 raising your hands at this time.

9 The record should reflect that there are  
10 no hands raised.

11 Now, the next subject I would like to talk  
12 to you about, Members of the Jury Panel, and I'm  
13 going to utilize a little bit of history here, I  
14 guess, I can remember a time when a jury panel member  
15 could almost give any reasonable excuse and be  
16 excused from jury service. Fortunately for  
17 individuals like me who are responsible for  
18 conducting jury trials, that day has come and gone.  
19 It really takes some point, some basis which rises to  
20 a level that would impair your duty and  
21 responsibility to be fair and impartial to both sides  
22 of this case. It really takes something that rises  
23 to the level that would prevent you from giving this  
24 case the conscientious attention that it deserves  
25 before you can be excused from jury service.

1           Now, at the same time, Members of the Jury  
2 Panel, Counsel and myself do not want to be  
3 insensitive to what your individual needs are. So I  
4 would like to give you a general overview of what I  
5 anticipate the schedule and time demands of this case  
6 are going to be.

7           First let me say that I'm describing this  
8 case as a four-day case. And what I mean by that I'm  
9 counting today as the first day, so in other words,  
10 Tuesday, Wednesday, Thursday and Friday. I think  
11 what you also should know and keep in mind in this is  
12 that I do know that the goal, the shared goal of  
13 Counsel is to complete all of the evidence of this  
14 case by Thursday so that Friday can be reserved for  
15 closing argument and jury deliberation.

16           I would like for you to also keep in mind  
17 and understand that when I say four days, what I  
18 anticipate is going to occur is this: That we will  
19 start -- I expect to start promptly each morning at  
20 9:00 a.m. I also anticipate taking a lunch break  
21 promptly at noon and reconvening approximately at  
22 1:15. I also anticipate breaking promptly at 5:00  
23 p.m. at the end of each day. Of course, then you  
24 will be recessed to return home. This is not a case  
25 where you're going to be sequestered in a hotel for

1 the period of time of this trial.

2 I also expect that approximately each hour  
3 we will be taking a 10-minute recess on each day, as  
4 well. So that is the general overview of what I'm  
5 expecting for this particular case.

6 Now, Members of the Jury Panel, with that  
7 direction, and I'm going to actually take your  
8 response to this next question row by row. And when  
9 I say row by row, I mean starting on my far left with  
10 who I believe is Ms. Allen-Kidder and going straight  
11 across the front. Then we'll get to the second row  
12 and third row and fourth row. But starting with the  
13 front row with that direction and overview of the  
14 schedule I gave you, is there any member of the Panel  
15 on the front row who is of the opinion you have some  
16 matter that is sufficiently pressing that would  
17 prevent you from rendering fair and partial jury  
18 service? And if so, would you please indicate this  
19 by raising your hand at this time on the front row?

20 The record should reflect that there are  
21 no hands raised.

22 Then going to the second row, starting  
23 with I believe it's Ms. Hanson and going straight  
24 across, Members of the Jury Panel, if you think you  
25 have such a problem, would you please indicate this

1 by raising your hand at this time.

2 The record should reflect that there are  
3 two hands raised. You may put your hands down.

4 Ms. Harrison, you had your hand raised?

5 MS. HARRISON: I did.

6 THE COURT: Ms. Harrison, can I get you to  
7 stand so counsel won't have any problems seeing you?

8 MS. HARRISON: No problem.

9 THE COURT: Ms. Harrison, tell me why you  
10 raised your hand in response to the --

11 MS. HARRISON: I'm a school teacher and  
12 we're just closing school right now. But I also am  
13 of the opinion if you really need me I'm here and I  
14 can do things after I get through with the court  
15 case.

16 THE COURT: I'm sorry, I didn't hear your  
17 last statement.

18 MS. HARRISON: If I need to be here, I  
19 will be here and I'll do things after. I'll just go  
20 back to my school and finish what I need to in the  
21 evening time if I need to do that.

22 THE COURT: And let's assume for a moment  
23 you were required to serve. It sounds as if you're  
24 going to be leaving your work here during the day and  
25 then, you know, going home or back to school to



1 finish whatever is required there. Are you still  
2 going to give this case the conscientious attention  
3 it deserves?

4 MS. HARRISON: Yes, I would.

5 THE COURT: Thank you very much, Ms.  
6 Harrison.

7 Ma'am, would you please stand. And is it  
8 "Botger" or "Boatger"?

9 MS. BOETTGER: "Betger".

10 THE COURT: "Betger." Excuse me for not  
11 pronouncing that correctly.

12 MS. BOETTGER: That's okay.

13 THE COURT: Why did you have your hand  
14 raised?

15 MS. BOETTGER: It just concerns next week.  
16 We're leaving for a vacation out of the country. So  
17 if it were to fall in next week, that would be a  
18 problem.

19 THE COURT: You know, let me say this:  
20 It's always difficult to predict how long a case is  
21 going to take so that -- I'm usually very reluctant  
22 to give you a 100 percent guarantee, but I really  
23 want to give you a 99.999 percent guarantee that  
24 based upon what I know about this case, at this  
25 point, for the life of me I can't see how we would

1 end up into next week . But I can't give you a 100  
2 percent guarantee, but I appreciate that response.

3 Okay. Let's go next to the third row.  
4 And I believe I will be starting with ^ Mr. Frost.  
5 And those on the third row, if you have a response to  
6 this question regarding the schedule, would you  
7 please indicate this by raising your hand at this  
8 time.

9 The record should reflect that there are  
10 no hands raised.

11 And I would like to go next to the fourth  
12 row and I think Mr. Mills is back there on my far  
13 left. And if you have a response to this question,  
14 would you please indicate this by raising your hand  
15 at this time.

16 The record should reflect that there are  
17 no hands raised.

18 MS. PRESTON: Your Honor?

19 THE COURT: Oh, did I miss one? Okay.  
20 Just one moment. Is it Ms. Preston?

21 MS. PRESTON: Yeah.

22 THE COURT: Ms. Preston, would you stand  
23 for me, please.

24 MS. PRESTON: Sure.

25 THE COURT: Why did you have your hand

1 raised, Ms. Preston?

2 MS. PRESTON: Okay. If I'm correct, this  
3 is the schedule for the week?

4 THE COURT: Yes. I just described it.

5 MS. PRESTON: Okay. Tomorrow, I know this  
6 doesn't sound like it's very important.

7 THE COURT: Well, ma'am, let's hear it.

8 MS. PRESTON: But I am an Avon  
9 representative and tomorrow is our day of recognition  
10 at a luncheon at -- well, it starts at eleven o'clock  
11 in the morning at Ricotti ^ . And it's something we  
12 look forward to from year to year.

13 THE COURT: So what is just the general  
14 time frame, from 11:00 a.m. to --

15 MS. PRESTON: To about 3:00.

16 THE COURT: Thank you very much, Ms.  
17 Preston. I appreciate that information.

18 Now, Members of the Jury Panel, did I miss  
19 any hands raised in response to that last question?

20 The record should reflect that there are  
21 no other hands raised.

22 Now, Members of the Jury Panel, what I  
23 would also like to know from you, in light of the  
24 general schedule that I just described for you, I  
25 would like to know whether or not any Member of the

1 Jury Panel is currently suffering from any mental or  
2 physical limitations or disabilities that would  
3 prevent you from rendering fair and impartial jury  
4 service on this case. And if so, would you please  
5 indicate this by raising your hand at this time.

6 The record should reflect that there are  
7 no hands raised.

8 Now, Members of the Jury Panel, we're  
9 going to go next to the questionnaire that you have  
10 in front of you, and I would like to explain to you  
11 how we're going to do this. We're actually going to  
12 do this on an individual basis and we're going to  
13 start on my far left with Ms. Claudia Allen-Kidder.  
14 And when your turn comes I'm going to have you stand,  
15 and then I'm going to have you begin responding to  
16 the questions that you have before you. What I would  
17 like you to understand is don't be surprised or  
18 caught off guard if I stop you or interrupt you,  
19 because it's very likely that I'm going to engage you  
20 with some additional follow-up questions depending  
21 upon the response that you give.

22 Additionally, let me say to you that it's  
23 not necessary for you to read the question and then  
24 begin responding to it. You can simply begin by  
25 responding to the question. Also let me say to you,

1 it may very well be that an appropriate answer to a  
2 question would be no. So I would appreciate -- for  
3 example, let's take question 7 as an example. If  
4 your answer to Question 7 is "no," if you would say,  
5 "The answer to Question 7 is no," that's an  
6 appropriate response.

7 With that direction, let's start with Ms.  
8 Claudia Allen-Kidder. Would you stand, ma'am, and  
9 give us your name.

10 MS. ALLEN-KIDDER: Claudia Allen Kidder.

11 THE COURT: And your spouse's name?

12 MS. ALLEN-KIDDER: William Kidder.

13 THE COURT: Okay.

14 MS. ALLEN-KIDDER: I am a flight attendant  
15 and also an operational field service manager for  
16 Delta Airlines.

17 THE COURT: How long have you been  
18 employed in that capacity?

19 MS. ALLEN-KIDDER: I have been there for  
20 eight years, a little over eight years.

21 THE COURT: Okay.

22 MS. ALLEN-KIDDER: And my husband is  
23 privately employed as a dentist ^ auto number 2. I  
24 am currently in school and I have six years of  
25 education getting ready to finish up my ^ cent.

1 THE COURT: And do you have a particular  
2 field of expertise you're working on?

3 MS. ALLEN-KIDDER: Public administration.

4 THE COURT: And where are you currently  
5 attending school?

6 MS. ALLEN-KIDDER: BYU.

7 THE COURT: Do you have an undergraduate  
8 degree?

9 MS. ALLEN-KIDDER: Yes, I do.

10 THE COURT: And so are you working towards  
11 a Master's or a doctorate?

12 MS. ALLEN-KIDDER: Master's.

13 THE COURT: And where did you get your  
14 undergraduate degree?

15 MS. ALLEN-KIDDER: University of Phoenix,  
16 and my associate from Dixie College.

17 THE COURT: Okay . Great. Question  
18 Number 4?

19 MS. ALLEN-KIDDER: My leisure time  
20 currently is spent studying. I have very little time  
21 for leisure with working full-time and going to  
22 school.

23 THE COURT: If you had leisure time, what  
24 would be some of the first fun things you would be  
25 interested in doing?

1 MS. ALLEN-KIDDER: Traveling is at the  
2 very top.

3 THE COURT: Is that the very top?

4 MS. ALLEN-KIDDER: The very top, yes.  
5 Hobbies, I am a fly fisherman. Fly fisherwoman, I  
6 should say.

7 Clubs and organizations, I'm not in any  
8 official organizations. My husband and I are members  
9 of private duck hunting clubs in the State of Utah.  
10 I am in a leadership position at work.

11 THE COURT: And what is your title at work  
12 or what is the leadership position.

13 MS. ALLEN-KIDDER: I am an operational  
14 field service manager.

15 THE COURT: Okay. And Number 6?

16 MS. ALLEN-KIDDER: I have received  
17 training in the health profession. Prior to working  
18 for the airline industry I was a licensed dental  
19 assistant in the State of California and also a  
20 receptionist who was involved in submitting claims.

21 THE COURT: Through the office you worked  
22 in?

23 MS. ALLEN-KIDDER: Yes, uh-huh  
24 (affirmative).

25 THE COURT: And for how many years were

1 you employed in that capacity?

2 MS. ALLEN-KIDDER: For 15 years, on and  
3 off part-time. It was during the time when I was  
4 raising my children, so it was normally part-time on  
5 and off for about 15 years.

6 THE COURT: Okay. Question Number 7?

7 MS. ALLEN-KIDDER: Yes, I have served on  
8 jury duty before.

9 THE COURT: When did you do that?

10 MS. ALLEN-KIDDER: It was approximately, I  
11 want to say about ten years ago.

12 THE COURT: Was it here in Utah?

13 MS. ALLEN-KIDDER: Yes, it was.

14 THE COURT: Do you remember what kind of  
15 case it was?

16 MS. ALLEN-KIDDER: Arson.

17 THE COURT: Excuse me. Do you believe it  
18 to have been a criminal case?

19 MS. ALLEN-KIDDER: I think so.

20 THE COURT: Let me ask you this question:  
21 Did the jury return a verdict of either guilty or not  
22 guilty?

23 MS. ALLEN-KIDDER: Yes, we did.

24 THE COURT: And what was the verdict?

25 MS. ALLEN-KIDDER: Guilty.



1           THE COURT: And anything about that case  
2 at all that would prevent you from being a fair and  
3 impartial juror on today's case?

4           MS. ALLEN-KIDDER: No. It was an entirely  
5 different case.

6           THE COURT: And any other jury service?

7           MS. ALLEN-KIDDER: The last time I was  
8 summoned to jury duty I was dismissed.

9           THE COURT: Okay. Question Number 8?

10          MS. ALLEN-KIDDER: A friend.

11          THE COURT: And close friend?

12          MS. ALLEN-KIDDER: Very close friend.  
13 She's like a sister.

14          THE COURT. And what kind of case was it,  
15 if you --

16          MS. ALLEN-KIDDER: It was a medical case,  
17 an auto accident. She was rear-ended.

18          THE COURT And did you have any  
19 participation in that case at all?

20          MS. ALLEN-KIDDER: No, I did not. I was  
21 not with her.

22          THE COURT: When did the event occur, the  
23 accident occur?

24          MS. ALLEN-KIDDER: Oh, gosh. It was  
25 several years ago, but it was just settled like

1 maybe, I want to say four years ago. But it happened  
2 probably about eight years ago. It was kind of a  
3 long, ongoing case.

4 THE COURT: And are you aware of the  
5 nature of her injuries?

6 MS. ALLEN-KIDDER: Yes, I am.

7 THE COURT: And can you describe those  
8 briefly for us.

9 MS. ALLEN-KIDDER: She has a lot of back  
10 and neck injuries.

11 THE COURT: How often do you associate  
12 with this friend?

13 MS. ALLEN-KIDDER: Often. She lives  
14 across the street from me.

15 THE COURT: At least once a week, or more  
16 than that?

17 THE WITNESS: I would say more than once a  
18 week.

19 THE COURT: How would you describe her  
20 current medical/physical condition, to the best of  
21 your present knowledge?

22 MS. ALLEN-KIDDER: I would say that she's  
23 in pain just about every day resulting from the  
24 injuries that she sustained from the accident.

25 THE COURT: Any other response to Question

1 Number 8?

2 MS. ALLEN-KIDDER: No.

3 THE COURT: Now, let me ask this follow-up  
4 question, Ms. Allen-Kidder. In light of that  
5 response and my earlier description of the nature of  
6 today's case, anything about that experience that  
7 would prevent you from rendering fair and impartial  
8 jury service on today's case?

9 MS. ALLEN-KIDDER: Hopefully not.  
10 Because, again, I wasn't involved in that case.

11 THE COURT: Any other response to Question  
12 Number 8?

13 MS. ALLEN-KIDDER: No.

14 THE COURT: Let's go on to Question  
15 Number 9.

16 MS. ALLEN-KIDDER: Not that I'm aware of.

17 THE COURT: Question Number 10.

18 THE WITNESS: No.

19 THE COURT: And that question, obviously  
20 to you, is calling for some situation other than to  
21 which you've already responded?

22 MS. ALLEN-KIDDER: Right.

23 THE COURT: Question Number 11.

24 MS. ALLEN-KIDDER: Just a small -- I've  
25 had a couple of small accidents myself, but nothing

1 that sustained injury.

2 THE COURT: Let me start with were they  
3 auto/pedestrian accidents?

4 MS. ALLEN-KIDDER: Just one.

5 THE COURT: And when is the last time you  
6 had such an occurrence?

7 MS. ALLEN-KIDDER: Oh, gosh, probably 22  
8 years ago.

9 THE COURT: But were there any injuries  
10 resulting from that occurrence?

11 MS. ALLEN-KIDDER: No.

12 THE COURT: Okay. Question Number 12.

13 THE WITNESS: No.

14 THE COURT: Question Number 13.

15 MS. ALLEN-KIDDER: No.

16 THE COURT: Question Number 14?

17 MS. ALLEN-KIDDER: No.

18 THE COURT: And Question Number 15.

19 MS. ALLEN-KIDDER: I can be fair.

20 THE COURT: Thank you very much, Ms.

21 Allen-Kidder.

22 Ms. May.

23 MS. MAY: Heather May. My spouse is Paul  
24 May. I am employed as a registered nurse, clinical  
25 analyst.

1 THE COURT: How long have you been  
2 employed in that capacity?

3 MS. MAY: Five years.

4 THE COURT: And who do you work for?

5 MS. MAY: I work for Intermountain Health  
6 Care.

7 THE COURT: And can you give us some more  
8 definition of the type of work you do.

9 MS. MAY: Sure. I work clinically in the  
10 trauma ICU for the University of Utah about once a  
11 month, but I work primarily as an analyst doing  
12 information systems and developing clinical  
13 information systems for use in healthcare settings.

14 THE COURT: Okay. And how is your spouse  
15 employed?

16 MS. MAY: He owns his own company as well  
17 as works for an electrical contractor here in Salt  
18 Lake.

19 THE COURT: And the company he owns, is  
20 that in electrical contracting?

21 MS. MAY: No, it is not. It's in  
22 expedition equipment.

23 THE COURT: And Question Number 3.

24 MS. MAY: I have a Master's degree in  
25 nursing infomatics as well as two Bachelor's degrees,

1 one in business, one in nursing.

2 THE COURT: Where did you get your degrees  
3 from?

4 MS. MAY: The University of Utah for the  
5 business degree and the Master's in nursing  
6 infomatics, and Westminster College for the nursing  
7 degree.

8 THE COURT: And Question Number 4.

9 MS. MAY: I like to spend time outdoors.  
10 I don't have a lot of leisure time, but I understand  
11 that. ^ I like to read, bike, hike, camp.

12 THE COURT: Question Number 5.

13 MS. MAY: I am a member of Sigma Beta Tau,  
14 it is a nursing honor society, as well as Phi Sigma  
15 Kappa, which is another nursing honor society. I  
16 also belong to the Healthcare Information Management  
17 Systems Society, Utah Nursing Alliance, Nursing  
18 Network Infomatics Alliance, American Medical  
19 Infomatics Association.

20 THE COURT: Okay. Question Number 6.

21 MS. MAY: Yes.

22 THE COURT: And when you respond "yes" to  
23 that question --

24 MS. MAY: I also, besides my healthcare,  
25 besides my registered nurse practice, in 1998 I did

1 work for a company that processed medical claims.

2 THE COURT: What was the name of the  
3 company?

4 MS. MAY: Health South, their insurance  
5 division that was run here in Salt Lake.

6 THE COURT: And what were your particular  
7 duties?

8 MS. MAY: I was a claims processor.

9 THE COURT: Okay. And how long were you  
10 employed in that capacity?

11 MS. MAY: Six months. I have never been  
12 on a jury. I have not or do not know anybody who has  
13 been involved in a lawsuit.

14 THE COURT: Number 9.

15 MS. MAY: No.

16 THE COURT: Number 10.

17 MS. MAY: No.

18 THE COURT: Number 11.

19 MS. MAY: Yes. I did in 1999, I had a  
20 close friend who actually hit a pedestrian.

21 THE COURT: Is that here in Utah?

22 MS. MAY: It was.

23 THE COURT: Did you have any involvement  
24 in that occurrence at all?

25 MS. MAY: Other than going and picking her

1 up after that occurred, no.

2 THE COURT: And if I've understood you  
3 correctly, your close friend was the driver of the  
4 vehicle?

5 MS. MAY: Driver of the vehicle.

6 THE COURT: And is this close friend still  
7 a close friend?

8 MS. MAY: No.

9 THE COURT: And how often do you see her?

10 MS. MAY: I've probably seen her once in  
11 the last two years.

12 THE COURT: Does she live in Utah now?

13 MS. MAY: I believe she does.

14 THE COURT: And did you have -- do you  
15 have any knowledge of whether or not any injuries  
16 resulted from that occurrence?

17 MS. MAY: I do know that injuries did  
18 result and that she was sued, but I was not a part of  
19 the case at any point.

20 THE COURT: So do you know or have any  
21 idea what the outcome of any lawsuit was?

22 MS. MAY: I believe she settled out of  
23 court.

24 THE COURT: Is it correct that you don't  
25 know any of the details, if there were such a



1 settlement?

2 MS. MAY: No, I have no idea.

3 THE COURT: Anything at all about that  
4 experience that would prevent you from rendering a  
5 fair and impartial jury service in light of the  
6 nature of today's case?

7 MS. MAY: No.

8 THE COURT: Okay. Let's go on to Question  
9 Number 12, Ms. May.

10 MS. MAY: Yes, I have suffered back  
11 injuries, most of my nursing friends have suffered  
12 back injuries. It's --

13 THE COURT: Let's talk about yours for  
14 right now. Any particular event that leads to that  
15 experience or is it just part and parcel of the type  
16 of work you do, or some other occasion?

17 MS. MAY: Part and parcel of the type of  
18 work that I do. At the time where a lot of my  
19 friends in college suffered back injuries, we had a  
20 lot of ^ bariatric patients we were moving. In the  
21 nature of the clinical work that I did, we moved a  
22 lot of patients.

23 THE COURT: And describe for me what your  
24 current situation is with your back.

25 MS. MAY: That's why I don't do clinical

1 bedside work a lot and I went into an area of nursing  
2 where back injuries are not as prominent.

3 THE COURT: Are you currently receiving  
4 any type of rehabilitation or do you receive medical  
5 treatment or do you currently take any medical -- any  
6 medication for your condition?

7 MS. MAY: No. I went through about six  
8 months of physical therapy to get my back stronger.

9 THE COURT: Would you describe yourself  
10 having back pain currently?

11 MS. MAY: No.

12 THE COURT: All right. Let's move on to  
13 Question Number 13.

14 MS. MAY: No.

15 THE COURT: Number 14.

16 MS. MAY: No.

17 THE COURT: Number 15.

18 MS. MAY: No. Oh, wait, wait. Yes, I can  
19 be fair and impartial.

20 THE COURT: Thank you very much, Ms. May.  
21 Ms. Swenson.

22 MS. SWENSON: My name is Julie Swenson.  
23 My husband's name is Curtis Swenson. I am mostly a  
24 homemaker, mother. I do do massage therapy part  
25 time.

1                   My husband is -- he works in the mortgage  
2                   lending industry.

3                   I went to BYU. Got s Bachelor's degree in  
4                   Health Sciences.

5                   Some of my hobbies --

6                   THE COURT: I'm sorry. I should ask you  
7                   when you graduated from the Y?

8                   MS. SWENSON: Oh. It was '90 -- I believe  
9                   '91.

10                  THE COURT: And did you do anything with  
11                  your Health Sciences degree? And by that, I mean did  
12                  you become employed in the Health Science field?

13                  MS. SWENSON: Not really. No. No.

14                  THE COURT: All right. Question Number 4?

15                  MS. SWENSON: Number 4? Some sewing, some  
16                  dancing, some typing, reading.

17                  THE COURT: Question Number 5?

18                  MS. SWENSON: Not -- not -- I'm a primary  
19                  president.

20                  THE COURT: Number 6?

21                  MS. SWENSON: Well, no. Not in the health  
22                  care profession, just some health care training just  
23                  through my Bachelor's degree and then massage therapy  
24                  school.

25                  THE COURT: Okay. Number 7?

1 MS. SWENSON: No. I haven't sat on a  
2 jury.

3 No.

4 THE COURT: No to Question 8?

5 MS. SWENSON: No to Number 8.

6 THE COURT: Number 9?

7 MS. SWENSON: No.

8 THE COURT: Number 10?

9 MS. SWENSON: Number 10? No.

10 THE COURT: Number 11?

11 MS. SWENSON: No, on

12 automobile/pedestrian.

13 THE COURT: Number 12?

14 MS. SWENSON: Not -- not any serious. I  
15 mean, my mother had some back problems, but mostly  
16 from just doing too much. And she's better now.

17 No on Number 13.

18 No on Number 14.

19 And I -- I can be fair.

20 THE COURT: Thank you very much, Ms.  
21 Swenson.

22 Mr. Vannoy?

23 MR. VANNOY: Thomas Vannoy. And I'm  
24 divorced. I'm a receiving clerk for a company called  
25 L-3 Communications, here in Salt Lake.

1 THE COURT: And how long have you worked  
2 for L-3 Communications?

3 MR. VANNOY: Seven years.

4 THE COURT: Okay. Thank you.

5 Number 3?

6 MR. VANNOY: Highest grade is eleventh,  
7 with a GED. And then I received an AA degree from  
8 Mountain West College.

9 THE COURT: Did you go to school here in  
10 Utah or somewhere else?

11 MR. VANNOY: Utah and California. High  
12 school in California.

13 THE COURT: Number 4?

14 MR. VANNOY: I play drums in a band and  
15 road trips in the mountains.

16 THE COURT: All right. Number 5?

17 MR. VANNOY: No.

18 THE COURT: Number 6?

19 MR. VANNOY: No.

20 THE COURT: Number 7?

21 MR. VANNOY: No on number -- well, I was  
22 summoned to jury duty back in '90. It was dismissed.

23 THE COURT: Now that question, for the  
24 panel members, really is designed to determine  
25 whether or not you actually served on a jury.

1 MR. VANNOY: So no.

2 THE COURT: Okay. Number 8?

3 MR. VANNOY: I'm not quite sure. I have a  
4 cousin who was just in a car accident and I'm not  
5 sure if they are taking it to court or not.

6 THE COURT: And when did that accident  
7 occur?

8 MR. VANNOY: I believe it was around  
9 December.

10 THE COURT: You have any involvement at  
11 all with that occurrence?

12 MR. VANNOY: No.

13 THE COURT: How often do you see your  
14 cousin?

15 MR. VANNOY: Once a month.

16 THE COURT: And to your knowledge, was he  
17 injured?

18 MR. VANNOY: He did suffer whiplash and he  
19 has some back problems. I don't know the details of  
20 what's taking place, if anything.

21 THE COURT: Anything at all about that  
22 knowledge or experience that would prevent you from  
23 being a fair and impartial juror on this case, Mr.  
24 Vannoy?

25 MR. VANNOY: No.

1 THE COURT: Okay. Question Number 9?

2 MR. VANNOY: Again, I had a friend in  
3 California that I think they settled out of court in  
4 a car accident. He was injured.

5 And he since has been deceased also.

6 THE COURT: Okay. Did you have  
7 participation or involvement in that situation at  
8 all?

9 MR. VANNOY: No.

10 THE COURT: And do you -- are you familiar  
11 with any of the specifics of the accident or how the  
12 matter was resolved?

13 MR. VANNOY: I believe they settled out of  
14 court. Again, I don't know how -- what the details  
15 were. And it was out of state also.

16 THE COURT: Are you familiar with the  
17 nature of his injuries?

18 MR. VANNOY: He had a neck injury from it.  
19 And it was pretty severe. It was causing a lot of  
20 problems.

21 THE COURT: Anything at all about that  
22 experience that would prevent you from being a fair  
23 and impartial juror on today's case?

24 MR. VANNOY: No.

25 THE COURT: Okay. Question Number 10?

1 MR. VANNOY: No.

2 THE COURT: Number 11?

3 MR. VANNOY: No.

4 THE COURT: Number 12?

5 MR. VANNOY: Uh --

6 THE COURT: That's other than what you've  
7 already responded to.

8 MR. VANNOY: I, myself, have neck and back  
9 injuries from a car accident.

10 THE COURT: And when did you have that  
11 accident?

12 MR. VANNOY: '80 -- '88.

13 THE COURT: What kind of accident was it?

14 MR. VANNOY: It was a motor vehicle  
15 accident. I ran off the road and flipped my vehicle  
16 and was ejected out of the window.

17 THE COURT: So it was a single car  
18 accident?

19 MR. VANNOY: Single car.

20 THE COURT: And what were the nature of  
21 your injuries?

22 MR. VANNOY: I sustained a C-5 neck  
23 injury, sublocated. And fractured my T-7 back.

24 THE COURT: And obviously you received  
25 medical treatment for those injuries?



1           MR. VANNOY: I did. I had to wear a halo  
2 for three months and some follow-up rehabilitation.

3           THE COURT: And when did the follow-up  
4 rehabilitation cease?

5           MR. VANNOY: Well, it really never took  
6 place because they never prescribed me going to  
7 anybody. So it was sporadic. I just went to massage  
8 therapists and chiropractors on my own. And I've  
9 done that periodically.

10          THE COURT: Okay. And when you say you go  
11 to a chiropractor periodically, how frequently do you  
12 do that?

13          MR. VANNOY: When I can't get up out of  
14 bed in the morning. But that's very, very, very  
15 seldom. I'm pretty well functioning.

16          THE COURT: I'm trying to get a sense if  
17 we're talking about a couple of times a year, once a  
18 month, how frequent do you see a chiropractor for  
19 those conditions you've just described?

20          MR. VANNOY: After the accident, I had a  
21 personal friend who was a chiropractor and I probably  
22 saw him maybe a dozen times within a year.

23          THE COURT: Well, let me come at this  
24 question a different way.

25                 In this year, 2008 --

1 MR. VANNOY: Zero.

2 THE COURT: -- have you seen a  
3 chiropractor?

4 MR. VANNOY: I haven't seen a chiropractor  
5 in probably five years.

6 THE COURT: Okay. And are you currently  
7 experiencing back or neck pain?

8 MR. VANNOY: It's ongoing, but I'm  
9 functionable. It's something I live with and deal  
10 with on a day-to-day basis.

11 THE COURT: All right. Let's go then to  
12 Question Number 13?

13 MR. VANNOY: No.

14 THE COURT: 14?

15 MR. VANNOY: No.

16 THE COURT: 15?

17 MR. VANNOY: I could be fair.

18 THE COURT: Let me ask you, Mr. Vannoy, in  
19 light of your personal experience with the accident  
20 you had, the neck issue and back issue which you've  
21 just described, taking into consideration the nature  
22 of today's case and if there is evidence in this case  
23 related to neck and back pain, do you think you would  
24 be able to be a fair and impartial juror to each side  
25 of this case?

1 MR. VANNOY: I do.

2 THE COURT: Any question at all about  
3 that?

4 MR. VANNOY: No.

5 THE COURT: All right. Thank you very  
6 much, Mr. Vannoy.

7 Mr. Pearce?

8 MR. PEARCE: Yes. My name is Kent Pearce.  
9 My wife is Marie.

10 I'm employed as a (unintelligible) foreman  
11 for the Church of Jesus Christ of Latter Day Saints.

12 My spouse is employed at -- I don't  
13 remember what it's called

14 THE COURT: We won't tell her that.

15 MR. PEARCE: Yeah. Well, Distribution  
16 Services for the Church. Okay. That's what it is.  
17 They just changed the name, that's why I was off.

18 My highest grade, high school. I had four  
19 years in trade school.

20 THE COURT: Where did you get that  
21 schooling at? Here in Utah?

22 MR. PEARCE: Yes.

23 I spend my leisure time -- I like to read  
24 and draw.

25 My hobbies are fly fishing, hiking. I

1 snowshoe.

2 I don't have any health care training.

3 I have served on a jury before.

4 THE COURT: When was that?

5 MR. PEARCE: Well, I don't know.

6 THE COURT: Well --

7 MR. PEARCE: A long time ago.

8 THE COURT: What decade was it?

9 MR. PEARCE: 15 years ago at least.

10 THE COURT: Okay. Here in Utah?

11 MR. PEARCE: Yes.

12 THE COURT: Do you remember what kind of  
13 case it was?

14 MR. PEARCE: It was an automobile car -- I  
15 mean, a motorcycle/car accident.

16 And we were instructed by the judge to not  
17 determine damages, just -- just negligence.

18 THE COURT: And do you remember what the  
19 outcome of the case was?

20 MR. PEARCE: We determined that the  
21 motorcycle was the negligent party. Yeah.

22 THE COURT: And was that party the  
23 defendant or the plaintiff; do you remember?

24 MR. PEARCE: I think the defendant. But I  
25 am not sure.

1 THE COURT: Okay. And anything at all  
2 about that experience that would prevent you from  
3 being a fair and impartial juror on today's case?

4 MR. PEARCE: No.

5 THE COURT: Any other juror service?

6 MR. PEARCE: No.

7 THE COURT: I guess I should also ask, are  
8 you a member of any clubs or organizations?

9 MR. PEARCE: No. I am not.

10 THE COURT: Okay. Let's go then to  
11 Question 8?

12 MR. PEARCE: Question 8 is no.

13 9 is no.

14 10 is no.

15 And 11 is no.

16 12 is yes. When I was about 10 or 11, I  
17 was standing in my tree house next door and it broke.  
18 I fell about 20 feet and injured my back. I received  
19 treatment then, but I have no -- no problems with it  
20 now. I did see a chiropractor maybe two or three  
21 times a year. That keeps me from having any  
22 complications at all. I can carry a backpack. I  
23 think I can do anything.

24 THE COURT: Anything at all about that  
25 experience that would prevent you from rendering fair

1 and impartial jury service on today's case?

2 MR. PEARCE: No.

3 THE COURT: Okay. Let's go to Question  
4 Number 13, Mr. Pearce?

5 MR. PEARCE: 13 is no.

6 And 14 is no.

7 And 15 is yes.

8 THE COURT: Thank you very much, Mr.  
9 Pearce.

10 Mr. Haslam?

11 MR. HASLAM: My name is Robin Haslam. I  
12 don't have a spouse.

13 I'm employed with Cache Valley Electric  
14 for 23 years.

15 THE COURT: What do you do there?

16 MR. HASLAM: I'm a project  
17 manager/foreman.

18 Had four years of trade school.

19 THE COURT: Where did you get the trade  
20 school?

21 MR. HASLAM: Community College.

22 THE COURT: Did you go to high school here  
23 in Utah?

24 MR. HASLAM: Yes. Cyprus High School.

25 THE COURT: Okay.

1 MR. HASLAM: Leisure time, I'm a boater,  
2 motorcycles, snowmobiler, camping, hiking.

3 I'm a member of the Salt Lake Chapter  
4 Harley's Owners Group. I'm a member IBW local union  
5 354.

6 I've not been trained in health care.

7 I served on a jury about --

8 THE COURT: What -- what about the legal  
9 profession or --

10 MR. HASLAM: No.

11 THE COURT: Or profession that handles  
12 claims, medical injury?

13 MR. HASLAM: No. I served on a jury five  
14 years ago. It was a criminal case. A kid beat up a  
15 girlfriend's car.

16 THE COURT: And do you remember what the  
17 outcome of the case was?

18 MR. HASLAM: He was found guilty.

19 THE COURT: Anything at all about that  
20 experience that would prevent you from rendering fair  
21 and impartial jury service on today's case?

22 MR. HASLAM: No.

23 THE COURT: Okay. Any other jury service?

24 MR. HASLAM: No. That's it.

25 THE COURT: Question Number 8?

1 MR. HASLAM: Question Number 8. No to  
2 Question 8.

3 Number 9, I was in a -- I got rear-ended  
4 January 5th of this year by a drunk driver.  
5 Currently the insurance companies are paying for  
6 everything.

7 THE COURT: And let's talk about that for  
8 just a moment.

9 Did you require any medical attention?

10 MR. HASLAM: Yes. I was taken to the  
11 hospital. They x-rayed my back, my neck and  
12 everything to make sure I was okay. My back was sore  
13 for about a month afterwards. And after that I'm  
14 good now.

15 THE COURT: So did you require any type of  
16 rehabilitative treatment?

17 MR. HASLAM: No. No. No. They just  
18 wanted to make sure my back and neck were okay.

19 THE COURT: Anything at all about that  
20 experience, Mr. Haslam, that would prevent you from  
21 rendering fair and impartial jury service on today's  
22 case?

23 MR. HASLAM: No. Huh-uh (negative).

24 THE COURT: Okay.

25 MR. HASLAM: Let's see. Don't know



1 anybody that's done a claim against any person yet.

2 I've had one of my friends that I grew up  
3 with got hit by a car and there was a huge claim on  
4 it. I don't know what the dollar amount was on it.

5 THE COURT: What year did that occur?

6 MR. HASLAM: That was back in '65, '66.

7 THE COURT: Was it here in Utah?

8 MR. HASLAM: Yeah.

9 THE COURT: And did you have any  
10 involvement at all with that situation?

11 MR. HASLAM: No.

12 THE COURT: And do you know the extent of  
13 your friend's injuries when that occurred?

14 MR. HASLAM: Busted both legs, busted his  
15 pelvis, broke his back. I think that's about it. He  
16 was in the hospital for about nine months.

17 THE COURT: Do you associate with that  
18 friend at all today?

19 MR. HASLAM: Yes. I snowmobile with him.

20 THE COURT: Say that -- I'm sorry?

21 MR. HASLAM: I snowmobile with him.

22 THE COURT: Anything at all about that  
23 experience that would prevent you from rendering fair  
24 and impartial jury service to either side of this  
25 case?

1 MR. HASLAM: No. Huh-uh (negative).

2 THE COURT: And did I understand you to  
3 say that you were not aware of any details of any  
4 outcome of that situation in terms of court or any  
5 kind of a crime?

6 MR. HASLAM: Just he was awarded a bunch  
7 of money. I don't think they actually went to court.  
8 I think it was settled out of court. They gave him a  
9 bunch of money. I don't know a dollar figure.

10 THE COURT: All right. Question Number  
11 12?

12 MR. HASLAM: Question 12. Just my back  
13 was sore for a month after that wreck is all.

14 THE COURT: But again, you did not require  
15 any types of medical treatment?

16 MR. HASLAM: No.

17 THE COURT: Any medications?

18 MR. HASLAM: No. They -- they -- well,  
19 they gave me some pain and anti-inflammatory I used  
20 for a month.

21 THE COURT: Okay.

22 MR. HASLAM: Other than that, no.

23 THE COURT: All right.

24 MR. HASLAM: 13? No. No.

25 THE COURT: 14 is no?

1 MR. HASLAM: Do you have any personal or  
2 religious beliefs -- no.

3 Yes. I can give good --

4 THE COURT: And your answer to 15 is yes?

5 MR. HASLAM: Yes.

6 THE COURT: Thank you very much, Mr.  
7 Haslam.

8 MR. HASLAM: Uh-huh (affirmative).

9 THE COURT: Okay. Now ma'am, you're going  
10 to have to pronounce your last name for me.

11 MS. FICHIALOS: Sierra Fichialos. My  
12 husband is Rich Fichialos.

13 THE COURT: Fichialos. Thank you very  
14 much, ma'am.

15 MS. FICHIALOS: I am a high school  
16 teacher. This is there graduation this week. Some  
17 that are first generation. Like the whole century is  
18 graduating.

19 My husband is --

20 THE COURT: And before you go on, I -- I  
21 -- particularly because you didn't raise your hand in  
22 response --

23 MS. FICHIALOS: I didn't -- I told my  
24 students I'll see what I can do when I get in here.  
25 They were on a (unintelligible).

1 THE COURT: I'm sorry. I know I keep  
2 going back to this and you want to move on, but I  
3 just want to make sure your response is clear.

4 If you were required to serve on this  
5 jury, you would be able to make the necessary  
6 adjustments and render fair and impartial jury  
7 service?

8 MS. FICHIALOS: Yes.

9 THE COURT: Okay. All right. I'm sorry  
10 for cutting you off, but I just wanted to be clear on  
11 your answer.

12 MS. FICHIALOS: My husband is an  
13 irrigation designer for Sprinkler World.

14 I'm currently getting a Master's agree in  
15 School Counseling.

16 THE COURT: What grade do you teach?

17 MS. FICHIALOS: I teach high school. So I  
18 teach tenth through twelfth.

19 THE COURT: Okay.

20 MS. FICHIALOS: Resource.

21 THE COURT: Okay.

22 MS. FICHIALOS: Leisure time, don't have  
23 much, but when I do it's my children, reading,  
24 traveling, outdoors and stuff.

25 THE COURT: Number 5?

1 MS. FICHIALOS: I'm a member of the PTA.  
2 6, in-school counseling. We have mental  
3 health classes and pieces to that. But nothing else.

4 Number 7, yes. I served on a jury about  
5 four years ago. It was a rear-end car accident. We  
6 were looking at the damages to award.

7 THE COURT: Here in Utah?

8 MS. FICHIALOS: Yes.

9 THE COURT: And do you remember what the  
10 outcome of the case was?

11 MS. FICHIALOS: Well, it was on much was  
12 going to be awarded. They -- but I don't remember  
13 how much the award was.

14 THE COURT: But you do remember there was  
15 an award?

16 MS. FICHIALOS: Yes.

17 THE COURT: And anything at all about that  
18 experience that would prevent you from rendering fair  
19 and impartial jury service on this case?

20 MS. FICHIALOS: No.

21 THE COURT: Do you remember any of the  
22 facts of that case?

23 MS. FICHIALOS: Uh-huh (affirmative).

24 THE COURT: Give me a brief summary of  
25 what you remember.

1 MS. FICHIALOS: It was a lady who was  
2 medically fragile. She had had a bunch of accidents  
3 in the past. And this teen girl had rear-ended her.  
4 It just tipped over the scales of the medically  
5 issues. And they were trying to decide how much was  
6 her -- the third accident complicating what she had  
7 already received in injuries before.

8 THE COURT: And can I assume it was here  
9 in the Third District Court?

10 MS. FICHIALOS: Yes.

11 THE COURT: Wasn't in this courthouse; was  
12 it?

13 MS. FICHIALOS: No.

14 THE COURT: It was in the older  
15 courthouse?

16 MS. FICHIALOS: No. It was in this one.

17 THE COURT: Do you remember what judge  
18 presided?

19 MS. FICHIALOS: It was a female.

20 THE COURT: Okay.

21 MS. FICHIALOS: My memory is not the  
22 greatest.

23 THE COURT: But again, is there anything  
24 at all about that experience that would prevent you  
25 from rendering fair and impartial jury service on

1 this case?

2 MS. FICHIALOS: No.

3 THE COURT: Okay. Let's move on then to  
4 Question Number 8?

5 MS. FICHIALOS: 8 is no.

6 9 is yes. A close friend was in a car  
7 accident and received a lump sum for mostly neck and  
8 injuries with -- as a result, like a migraine.

9 THE COURT: Does that friend live here in  
10 Utah?

11 MS. FICHIALOS: Uh-huh (affirmative).

12 THE COURT: And when did this accident  
13 occur?

14 MS. FICHIALOS: Over ten years ago.

15 THE COURT: And how often do you socialize  
16 with this friend?

17 MS. FICHIALOS: Daily.

18 THE COURT: And do you know whether or not  
19 this friend is still experiencing any physical --

20 MS. FICHIALOS: Yes, she is.

21 THE COURT: -- conditions related to the  
22 accident?

23 MS. FICHIALOS: Yes. She still gets  
24 cortisone shots in the neck and migraines.

25 THE COURT: Did you have any participation

1 or involvement in that case whatsoever?

2 (No verbal response.)

3 THE COURT: Anything about that experience  
4 that would prevent you from rendering fair and  
5 impartial jury service to either side in this case?

6 MS. FICHIALOS: No.

7 THE COURT: Okay. Let's move on then to  
8 Question --

9 MS. FICHIALOS: 10 is no.

10 11 is no.

11 12 is no.

12 13 is no.

13 14 is no.

14 15 is yes.

15 THE COURT: Thank you very much.

16 Ms. Kipp?

17 MS. KIPP: My name is Carolyn Kipp. And  
18 my husband's name was Herman, and he's deceased.

19 I am not currently employed.

20 Graduated from high school and had a year  
21 of school at the University of Utah.

22 My leisure time is skiing in the winter,  
23 playing golf in the summer and traveling.

24 I am in the Assistance League of Salt Lake  
25 City.



1 THE COURT: You said the Assistance  
2 League?

3 MS. KIPP: League.

4 THE COURT: And help me with what type of  
5 organization that is, ma'am?

6 MS. KIPP: That is a women's organization.  
7 We actually -- that I just joined. We help provide  
8 clothing for children in needy schools and several  
9 other youth projects.

10 I've never worked in the health care  
11 industry.

12 I've never served on a jury.

13 8 is no.

14 9 is no.

15 10 is no.

16 11 is no.

17 12 is no.

18 13 is no.

19 14 is no.

20 15 is yes.

21 THE COURT: Ms. Kipp, how -- how -- how  
22 long was your husband a lawyer in this state?

23 MS. KIPP: 50 years, I think.

24 THE COURT: If it's the same person I'm  
25 thinking of, your husband was a very fine lawyer,

1 ma'am.

2 MS. KIPP: Thank you.

3 THE COURT: Thank you, Ms. Kipp.

4 Ms. Hanson?

5 MS. HANSON: Lynnette Hanson. I am  
6 single.

7 I am employed as an office manager at a  
8 local distributor for industrial supplies. I have  
9 approximately four years of college, but no degree.

10 THE COURT: And where did you get those  
11 four years of college at?

12 MS. HANSON: Mostly through BYU and  
13 extension here in Salt Lake, through the Y.

14 THE COURT: Did you have any particular  
15 fields of interest?

16 MS. HANSON: Humanities and history.

17 THE COURT: All right. Thank you.

18 MS. HANSON: Very limited leisure time. I  
19 go every weekend to Idaho. I take care of my  
20 93-year-old, invalid mother. I love to travel. And  
21 my trips up there are part of that travel and leisure  
22 time for me. I love history. I love to read.

23 I do belong to some circle organizations,  
24 like Utah Circle Society, the VUP.

25 Right currently, I don't have any

1 leadership positions, except my job at work.

2 THE COURT: And what's your leadership  
3 position at your job?

4 MS. HANSON: I'm the office manager.

5 THE COURT: Okay. Thank you.

6 MS. HANSON: I have not worked -- no, is  
7 the answer to 6.

8 I have not served on a jury.

9 No to 8.

10 No to 9.

11 No to 10.

12 No to 11.

13 No to 12.

14 No to 13.

15 No to 14.

16 And yes to 15.

17 THE COURT: Thank you very much, Ms.  
18 Hanson.

19 Ms. Harrison?

20 MS. HARRISON: I'm Barbara Harrison. My  
21 husband's name is Joe Harrison.

22 I'm presently employed by Jordan School  
23 District. I teach (unintelligible) science in high  
24 school.

25 I have my teaching degree and Master's. I

1 teach at the U of U and other facilities.

2 In my spare time, I spend time with my  
3 family, reading, camping.

4 And as far as organizations, I'm a member  
5 of UFAC and also UCTE, (unintelligible). Let's see.  
6 I'm also Department Chairman for my high school  
7 department.

8 Number 6 is no.

9 Number 7 is no.

10 Number 8 is no.

11 9, no.

12 10, no.

13 11, no.

14 12, yes. I have an uncle that a garage  
15 door fell down on him and he sustained a back injury.

16 THE COURT: When did that event occur, Ms.  
17 Harrison?

18 MS. HARRISON: I believe in -- 30 years  
19 ago. It's been quite a long time.

20 THE COURT: All right.

21 MS. HARRISON: 13 is no.

22 14 is no.

23 And 15, yes.

24 THE COURT: Thank you very much, Ms.  
25 Harrison.

1 Can you pronounce your name for me, again?

2 MS. BOETTGER: It's Boettger. Forget the  
3 "O."

4 THE COURT: Okay.

5 MS. BOETTGER: I am Jill Boettger. My  
6 husband is David Boettger.

7 I'm a speech pathologist and audiologist  
8 for the State Health Department. I have a Master's  
9 degree from Utah State University and a Bachelor's  
10 from University of California Santa Barbara.

11 Let's see. I spend my time chasing after  
12 my sons. And gardening, if there is any time left  
13 over.

14 I'm a member of the American Speech and  
15 Hearing Association and the Utah Speech and Hearing  
16 Association.

17 No to 6.

18 No, I have not served on a jury before.

19 My husband and I were plaintiffs in a real  
20 estate lawsuit that settled out of court.

21 THE COURT: And when was that case filed?

22 MS. BOETTGER: That was in 1992.

23 THE COURT: Was that here in Utah?

24 MS. BOETTGER: Yes.

25 THE COURT: And when did the case settle?

1 What year, approximately?

2 MS. BOETTGER: The same year, '92.

3 THE COURT: Anything at all about that  
4 experience that would prevent you from being fair and  
5 impartial to either side in this case?

6 MS. BOETTGER: No.

7 THE COURT: Any other response to question  
8 Number 8?

9 MS. BOETTGER: Yes, actually. My husband  
10 is a pediatrician. He is currently a defendant in a  
11 medical malpractice suit.

12 THE COURT: Okay. And is that case here  
13 in this district or somewhere else in the state?

14 MS. BOETTGER: In this district.

15 THE COURT: Okay. And do you have any  
16 involvement at all regarding that case?

17 MS. BOETTGER: No. Just supporting him.

18 THE COURT: Okay. And anything at all  
19 about that experience that would prevent you from  
20 rendering fair and impartial jury service on this  
21 case?

22 MS. BOETTGER: I don't think so.

23 THE COURT: Do you have any doubt or  
24 question about it at all?

25 MS. BOETTGER: Well, of course in my

1 husband's case I haven't been paying any insurance  
2 out.

3 THE COURT: That's sort --

4 MS. BOETTGER: (Unintelligible).

5 THE COURT: Let me finish. That sort of  
6 is not my question.

7 MS. BOETTGER: Okay.

8 THE COURT: What I need to know is whether  
9 anything regarding your husband's situation would  
10 have any impact upon your duty and responsibility to  
11 be fair and impartial to each side of this case?

12 That's what I'm -- that's what I'm really  
13 after.

14 MS. BOETTGER: Yeah. I think probably  
15 not.

16 THE COURT: And, you know, I'm not trying  
17 to give you a hard time. I'm just trying to probe  
18 your response. When you use the word "probably," it  
19 made me think that maybe you had a hesitation?

20 MS. BOETTGER: Well, maybe there is a  
21 little hesitation in terms of just supporting my  
22 husband and this case making me -- feeling he's  
23 unfairly being sued.

24 THE COURT: Do you -- are you of the  
25 opinion that -- that that sense of unfairness you

1 would extend to this case?

2 MS. BOETTGER: I think I'd be able to  
3 separate the two out.

4 THE COURT: Any other response to that  
5 question?

6 MS. BOETTGER: No. That's it. That's  
7 enough.

8 THE COURT: Okay. Question Number 9?

9 MS. BOETTGER: No to number 9.

10 No to Number 10.

11 No to Number 11.

12 And then I do have a history of back and  
13 neck injuries.

14 THE COURT: Describe that history for us.

15 MS. BOETTGER: Starting probably about  
16 1992, when I was lifting my firstborn son, who was  
17 huge. And have had neck and back injuries since that  
18 time.

19 Then when my second son -- he was huge,  
20 too -- further injured my back and my neck.

21 THE COURT: And give us an idea of your  
22 course of treatment over that period of time for  
23 those conditions.

24 MS. BOETTGER: So far I've been able to  
25 avoid surgery. I do -- I receive physical therapy



1 for those back injuries. And I do exercises daily to  
2 help keep my back strong.

3 But I do have discomfort on and off. I  
4 find it hard to sit for really long periods of time.

5 THE COURT: And have you been -- through  
6 those treatment modalities, have you been diagnosed  
7 with any particular condition of your back?

8 MS. BOETTGER: Yes. I have a herniated  
9 disc, C-5. And (unintelligible) L-3/4.

10 THE COURT: Anything at all about that  
11 experience that would prevent you from rendering fair  
12 and impartial jury service in this case if, in fact,  
13 there were evidence of, in this case, regarding back  
14 problems?

15 MS. BOETTGER: No.

16 THE COURT: All right.

17 MS. BOETTGER: And no to 13.

18 And no to 14.

19 And yes to 15.

20 THE COURT: Thank you very much.

21 Ms. Rasmussen?

22 MS. RASMUSSEN: My name Elda Sue  
23 Rasmussen. There is no Mr. Rasmussen.

24 I work for Qwest. I have done for  
25 41 years.

1 THE COURT: What do you do there?

2 MS. RASMUSSEN: This year I collect bills  
3 from the long distance carriers.

4 THE COURT: And prior years, what have you  
5 done there?

6 MS. RASMUSSEN: I've worked with customer  
7 service reps for residential, small business, direct  
8 with complication when the old Mountain Bell had  
9 telephone books. So a nice, long service career.  
10 And now I want to play.

11 THE COURT: Question Number 3?

12 MS. RASMUSSEN: I had high school, some  
13 college. Some at the University of Utah, not BYU.  
14 Steven-Henager's Business College in business  
15 classes.

16 I like to travel some and golf, reading,  
17 music, needle work.

18 I don't belong to any big clubs or  
19 anything.

20 I'm not in the medical or legal  
21 profession.

22 I've never been on a jury.

23 And I'm going to answer Number 11, first,  
24 yes. I had a nephew that was involved as a driver in  
25 an automobile/pedestrian. I don't know of any

1 lawsuits. That took place three and a half years  
2 ago. A young man wandered into traffic. Two cars  
3 avoided him and my nephew had to be the one who hit  
4 him. He died.

5 And other than that, I've been -- yes?

6 THE COURT: The -- I want to stick with  
7 that question for a moment.

8 MS. RASMUSSEN: Okay.

9 THE COURT: As a result of that incident,  
10 do you know whether or not any lawsuit was filed or  
11 any claim of any nature --

12 MS. RASMUSSEN: I'm not aware of any  
13 lawsuit.

14 THE COURT: Did you have any participation  
15 in that situation at all?

16 MS. RASMUSSEN: No. Other than emotional  
17 support.

18 THE COURT: Right. And I'm sorry, what  
19 year did you say that occurred?

20 MS. RASMUSSEN: I think that was about  
21 three and a half years ago.

22 THE COURT: And that was here in Utah?

23 MS. RASMUSSEN: Yes.

24 THE COURT: And again, you have no  
25 knowledge of any type of action being taken?

1 MS. RASMUSSEN: I've never heard that  
2 there was ever a lawsuit filed against him.

3 THE COURT: Okay. Anything about that  
4 experience, would it prevent you from being fair and  
5 impartial to either side of today's case?

6 MS. RASMUSSEN: No. It would make me  
7 probably more aware and fair, not to judge too  
8 harshly one way or the another.

9 THE COURT: Okay. You may go on, ma'am.

10 MS. RASMUSSEN: 8, 9 and 10, I'm not aware  
11 of any. Nor 12.

12 No to 13 and 14.

13 And yes to 15.

14 THE COURT: Thank you very much, Ms.  
15 Rasmussen.

16 Mr. Cotterman?

17 MR. COTTERMAN: My name is Michael Stanley  
18 Cotterman. I go by Stan. But me legal name is  
19 Michael.

20 THE COURT: And let me just stop you  
21 there, Mr. Cotterman.

22 Members of the Jury Panel, let me just  
23 tell you, we're -- since we've been in here awhile,  
24 we're getting very close to taking a ten-minute  
25 recess. So if you can, be patient with me.

1                   Go ahead, Mr. Cotterman.

2                   MR. COTTERMAN: Okay. My wife's name is  
3 Marilyn.

4                   I'm retired, but I am employed part time.

5                   THE COURT: What are you retired from,  
6 sir?

7                   MR. COTTERMAN: Just retired. I was 65.

8                   THE COURT: Well, how were you mainly  
9 employed when you were working?

10                  MR. COTTERMAN: Well, I work part time.

11                  THE COURT: Well, you work part time  
12 currently?

13                  MR. COTTERMAN: Yes.

14                  THE COURT: At this -- at what type of  
15 work do you do?

16                  MR. COTTERMAN: Ace Automotive Warehouse.  
17 I'm an auto parts counterman.

18                  THE COURT: How long have you worked part  
19 time?

20                  MR. COTTERMAN: About three years.

21                  THE COURT: Where did you work before  
22 that?

23                  MR. COTTERMAN: Auto parts, same thing.

24                  THE COURT: So you've been employed in  
25 that area for some time?

1 MR. COTTERMAN: Yeah. Since the mid-'60s  
2 actually.

3 THE COURT: Okay. All right.

4 MR. COTTERMAN: And my wife's name is  
5 Marilyn. She's a hair stylist. Has her own beauty  
6 shop up in Holladay.

7 And highest grade was 12.

8 THE COURT: Was that here in Utah?

9 MR. COTTERMAN: Yes.

10 THE COURT: What high school did you go  
11 to?

12 MR. COTTERMAN: West High.

13 THE COURT: All right.

14 MR. COTTERMAN: Leisure time, since I have  
15 quite a bit, I walk a lot. Golf a little bit and  
16 spend a lot of time in coffee shops.

17 THE COURT: What's a "little bit" of golf?

18 MR. COTTERMAN: Maybe once every week or  
19 two. About it.

20 THE COURT: Where do you usually golf at?

21 MR. COTTERMAN: Oh, I don't know. I just  
22 spread it around. It's -- it's --

23 THE COURT: I don't want you to give me an  
24 exact address -- let me finish my question. I don't  
25 want you to give me an exact address of where you

1 live, but do you golf mainly in Salt Lake City?

2 MR. COTTERMAN: In Salt Lake. Right.

3 Uh-huh (affirmative).

4 THE COURT: But in Salt Lake City or in  
5 the County or both?

6 MR. COTTERMAN: Salt Lake City.

7 THE COURT: When is the last time -- if  
8 you have, when is the last time you golfed in  
9 Glenmoor.

10 MR. COTTERMAN: Probably about five years  
11 ago.

12 THE COURT: How many total times have you  
13 golfed at Glenmoor?

14 MR. COTTERMAN: Oh, probably 20.

15 THE COURT: 20?

16 MR. COTTERMAN: It's decreased. My golf  
17 game has decreased a lot through the years. Just  
18 haven't gotten any better, to tell you the truth. I  
19 find doing it less and less (unintelligible).

20 THE COURT: Any other response to Question  
21 Number 4 in terms of your leisure time?

22 MR. COTTERMAN: No.

23 As far as hobbies go, I love trains.  
24 Always have. Since I grew up around them when I was  
25 young. Every chance I get to ride on railroads, I

1 do. And I've ridden Frontrunner three, four -- about  
2 four times already, to Ogden and back. So that kind  
3 of shows --

4 THE COURT: Number 5?

5 MR. COTTERMAN: Number 5, no.

6 No on Number 6.

7 Yes on Number 7.

8 THE COURT: When did you give jury  
9 service?

10 MR. COTTERMAN: It was the early '90s  
11 somewhere. I would say probably '93, '94. Somewhere  
12 there.

13 THE COURT: Here in Utah?

14 MR. COTTERMAN: Yeah.

15 THE COURT: Do you remember what kind of  
16 case it was?

17 MR. COTTERMAN: It was involving a  
18 concealed weapon. I don't remember too many details  
19 about it.

20 THE COURT: Was there a guilty or not  
21 guilty verdict?

22 MR. COTTERMAN: Guilty.

23 THE COURT: Okay. Anything at all about  
24 that experience that would prevent you from being  
25 fair and impartial to either side in this case?



1 MR. COTTERMAN: No. Not at all.

2 THE COURT: Any other jury service?

3 MR. COTTERMAN: No. That's it.

4 THE COURT: Okay. Let's go to Question  
5 Number 8?

6 MR. COTTERMAN: No.

7 THE COURT: Number 9?

8 MR. COTTERMAN: And no on Number 9.

9 No on Number 10.

10 No on Number 11.

11 Yes on Number 12.

12 THE COURT: Why did you answer 12 yes?

13 MR. COTTERMAN: Okay. My brother was  
14 involved in a -- he had a serious -- some serious  
15 back problems. Had them ongoing for quite awhile.  
16 He was under some pretty extensive medication and  
17 stuff for them. And I think it was in '78, if I  
18 remember right, he -- he was out at the Murray -- I  
19 don't remember what hospital it was out there, a  
20 hospital in Murray somewhere, and he just kind of  
21 freaked out and went crazy, was under such severe  
22 pain. And didn't have medication. I guess he went  
23 out there trying to get medication, had a weapon.  
24 And the Murray police shot him.

25 THE COURT: What year was that?

1 MR. COTTERMAN: Killed him. '78, I  
2 believe.

3 THE COURT: Okay. And the back problems  
4 that you described that he had, was there some  
5 singular event that led to those problems or not?

6 MR. COTTERMAN: You know, not that I'm  
7 aware of. I didn't really see an awful lot of him at  
8 that particular time. But not that I'm aware of.  
9 No. I think it had just built up.

10 THE COURT: Anything at all about that  
11 experience that would prevent you from being a fair  
12 and impartial juror to either side of this case?

13 MR. COTTERMAN: No.

14 THE COURT: Okay. Let's go on then to  
15 Question Number 13?

16 MR. COTTERMAN: No.

17 And no on 14.

18 And yes on 15.

19 THE COURT: Thank you very much, Mr.  
20 Cotterman.

21 Ms. -- is it Mahler or Mahler?

22 MS. MAHLER: Mahler.

23 THE COURT: Thank you, Ms. Mahler.

24 MS. MAHLER: I am Annette Mahler. My  
25 spouse is Michael Mahler.

1 I am employed at the Utah Medical  
2 Association.

3 THE COURT: What do you do there?

4 MS. MAHLER: I'm the Director for some  
5 subspecialty medical societies.

6 THE COURT: And give me a better -- more  
7 detailed description of the type of work you do.

8 MS. MAHLER: It's a -- it's a physician  
9 membership organization. So anything to do with  
10 physicians. I do -- I'm the Director for  
11 Ophthalmology and the Executive Administrator for  
12 OB/GYNs.

13 THE COURT: Okay. All right.

14 MS. MAHLER: I have three-plus years at  
15 the University of Utah. Did not graduate.

16 THE COURT: I'm sorry. I may have missed  
17 this. Did you say anything about your spouse?

18 MS. MAHLER: He's employed as a loan  
19 officer at a mortgage company.

20 THE COURT: Okay. Go ahead. Number 3?

21 MS. MAHLER: Number 4, I bike and golf.

22 THE COURT: And I'm sorry, Ms. Mahler. I  
23 missed your response to Question Number 3, your level  
24 of education?

25 MS. MAHLER: Three-plus at the University

1 of Utah.

2 THE COURT: Okay.

3 MS. MAHLER: Three-plus years.

4 THE COURT: Any particular --

5 MS. MAHLER: Psychology.

6 THE COURT: Psychology. Okay. All right.

7 I'm sorry. Number 4?

8 MS. MAHLER: I golf and I ride a bike.

9 THE COURT: How often do you golf?

10 MS. MAHLER: In the summertime, typically  
11 maybe two, three times a month.

12 THE COURT: And where do you usually golf  
13 at?

14 MS. MAHLER: I just played Hill Air Force  
15 Base. That's the last time I golfed. It can vary.

16 THE COURT: So you golf all over?

17 MS. MAHLER: All over. But not Glenmoor.

18 THE COURT: Have you ever golfed at  
19 Glenmoor?

20 MS. MAHLER: No. Not that I can recall.

21 THE COURT: All right. Any hobbies?

22 MS. MAHLER: I read and travel quite a  
23 bit. I -- I travel quite a bit with my -- my  
24 position at the Medical Association.

25 THE COURT: And when you travel for your

1 work, what types of events are you usually traveling  
2 to and the locations?

3 MS. MAHLER: It varies. The annual  
4 meeting for OB/GYNs, I do some legislative traveling  
5 as well.

6 I have obviously worked in the health care  
7 profession. I have worked several different  
8 positions within a medical office, a clinical office,  
9 medical manager. I've worked for BlueCross.  
10 BlueShield as the Coordinator for the HIP Program,  
11 which is the Health Insurance Pool.

12 THE COURT: When did you -- how long were  
13 you employed in that capacity?

14 MS. MAHLER: Two years at BlueCross.  
15 Approximately 15 years in the medical profession.

16 Number 7, no.

17 8, no.

18 9, no.

19 10, no.

20 11, no.

21 12, no.

22 13, no.

23 14, no.

24 And 15, I believe I can be fair and  
25 impartial, yes.

1 THE COURT: Thank you very much, Ms.  
2 Mahler.

3 Mr. Wright?

4 MR. WRIGHT: My name is Denton Wright. My  
5 wife's name is Karen.

6 I'm employed as a truck driver. And she's  
7 employed as a banker.

8 THE COURT: And when you say you're  
9 employed as a "truck driver," I mean, independently,  
10 for a company?

11 MR. WRIGHT: No. Penske Delivery  
12 Industries.

13 THE COURT: And do you drive -- where do  
14 you drive?

15 MR. WRIGHT: Just locally.

16 THE COURT: Okay. Go ahead.

17 MR. WRIGHT: 24 years accident free.

18 THE COURT: Okay. Number 3?

19 MR. WRIGHT: Eleventh grade.

20 THE COURT: Here in Utah?

21 MR. WRIGHT: Yeah.

22 THE COURT: Okay.

23 MR. WRIGHT: I spend my leisure time  
24 boating.

25 My hobbies, I play with my grandkids.

1 And no on 5.

2 No on 6.

3 No on 7.

4 No on 8.

5 No on 9.

6 10, no.

7 11, no.

8 12, no.

9 13, no.

10 14, no.

11 And 15, yes.

12 THE COURT: Thank you very much, Mr.

13 Wright.

14 Ms. Glazier?

15 MS. GLAZIER: Yes. My name is Cheree  
16 Glazier. My husband is Scott Glazier.

17 I am employed through Jordan School  
18 District as a teacher's assistant for a kindergarten  
19 class.

20 And my husband is employed through a sign  
21 company as an install foreman.

22 My highest grade is 12th grade, West  
23 Jordan High School, here in Utah.

24 Leisure time with my kids, reading,  
25 playing the piano.

1 Member of the PTA.

2 I have no -- Number 6 is no.

3 7, no.

4 8, yes.

5 THE COURT: And why did you answer yes to  
6 8?

7 MS. GLAZIER: Well, my husband was a  
8 witness in an automobile accident. It was actually  
9 part of -- got -- it was nine years ago.

10 THE COURT: And when you say he was a  
11 "witness," does that mean he actually testified in  
12 court?

13 MS. GLAZIER: He did have to go to court.  
14 I don't believe he was ever called up.

15 THE COURT: Okay. And did he have any  
16 other role in that incident you just described?

17 MS. GLAZIER: As in the trial or --

18 THE COURT: Yeah. In the -- in the  
19 accident itself?

20 MS. GLAZIER: He was actually -- it was an  
21 automobile accident. The driver was under the  
22 influence. My husband was injured in it. Yes.

23 THE COURT: And what was --

24 MS. GLAZIER: He was in the car. He was  
25 not driving. He was in the car with the driver.



1 THE COURT: And what were the extent of  
2 your husband's injuries, if I heard you correctly.

3 MS. GLAZIER: Just had to have his ear  
4 partially sewn back on, his lip. Had a bunch of  
5 cracks and stuff in his head.

6 THE COURT: And did you have any other  
7 participation in that situation at all?

8 MS. GLAZIER: No.

9 THE COURT: And do you have any idea as to  
10 what the outcome of any lawsuit was?

11 MS. GLAZIER: I do not know what the  
12 outcome was.

13 THE COURT: Okay. Any other response to  
14 Question Number 8?

15 MS. GLAZIER: Yes. My parents were  
16 involved -- my -- well, let's take care of two.

17 My brother was hit by a car walking home  
18 from school. And I don't know if it was my parents  
19 -- well, I know my parents were involved in the  
20 process, the legal process. I believe they were --  
21 they received partial -- his medical bills were paid  
22 partially by the driver.

23 THE COURT: When did that event occur?

24 MS. GLAZIER: That was about 20 years ago.

25 THE COURT: How old was your brother at

1 the time?

2 MS. GLAZIER: He was 15, I believe. Yeah.  
3 Right before he turned 16.

4 THE COURT: I'm sorry to do this to you --

5 MS. GLAZIER: That's okay.

6 THE COURT: -- how old were you at the  
7 time?

8 MS. GLAZIER: I was -- well, he's six  
9 years older than I. So I was 9.

10 THE COURT: And what can you tell me, if  
11 anything, about your brother's injuries?

12 MS. GLAZIER: He broke both of his legs.  
13 He had problems with his face. He had to have teeth  
14 broken out, sewn up.

15 THE COURT: And to your knowledge, does  
16 your brother still currently deal with any of the  
17 issues or conditions resulting from that accident?

18 MS. GLAZIER: With his knee, yes.

19 THE COURT: And describe that briefly.

20 MS. GLAZIER: He -- it's not enough -- I  
21 mean. He's a runner. So -- but he has suffered from  
22 the knee injuries. But he does not -- he's not  
23 treated for it.

24 THE COURT: Anything at all about that  
25 experience that would prevent you from rendering fair

1 and impartial jury service to either side of this  
2 case?

3 MS. GLAZIER: I don't believe so.

4 THE COURT: All right. Any further  
5 response to that question?

6 MS. GLAZIER: My parents were also  
7 involved in a lawsuit because my brother -- a  
8 different brother -- in an automobile accident, where  
9 they were suing for personal injury.

10 THE COURT: What year did that accident  
11 happen?

12 MS. GLAZIER: It was a long time ago as  
13 well.

14 THE COURT: More than ten years ago?

15 MS. GLAZIER: Yes.

16 THE COURT: And do you know what injuries  
17 your other brother sustained?

18 MS. GLAZIER: My brother was not injured.  
19 It was the other person, the person who hit him.

20 THE COURT: So it was your brother, you  
21 believe, was being sued?

22 MS. GLAZIER: He was a minor.

23 THE COURT: Okay. Do you have any  
24 knowledge of any -- of the outcome of that situation  
25 at all?

1 MS. GLAZIER: I -- I don't believe. I --

2 THE COURT: Is there anything -- is there  
3 anything about that particular experience that would  
4 prevent you from being fair to either side of today's  
5 case?

6 MS. GLAZIER: No.

7 THE COURT: Any other response to that  
8 question?

9 MS. GLAZIER: I don't think so.

10 THE COURT: Question Number 12?

11 MS. GLAZIER: No. Not that I know of.

12 THE COURT: 13?

13 MS. GLAZIER: No.

14 THE COURT: 14?

15 MS. GLAZIER: No.

16 THE COURT: And 15?

17 MS. GLAZIER: Yes.

18 THE COURT: Thank you very much, Ms.  
19 Glazier.

20 Members of the Jury Panel, we are going to  
21 take a -- I'm going to call it a 15-minute recess at  
22 this time.

23 Please -- it's very important, number one,  
24 that when you return to the courtroom, that you  
25 return to the same seats that you're currently

1 sitting in.

2                   Additionally, Members of the Jury Panel,  
3 during this recess, it's very important that you go  
4 out of your way to have no contact whatsoever with  
5 any of the lawyers, their clients or any of the other  
6 participants in this particular case.

7                   Additionally, I'm going to have to require  
8 that you have no discussions or conversations with  
9 anyone regarding anything that's taken place here  
10 this morning so far. And that means no conversations  
11 amongst yourselves about this case as well.

12                   We'll recess for 15 minutes at this time.

13                   And Counsel, in about five minutes, I  
14 think I'd like to see you in chambers.

15                   We are in recess.

16                   (Recess taken at 11:15 to 11:30 a.m.)

17                   (Discussion held in chambers.)

18                   THE COURT: We are on the record.

19                   And -- and the record should reflect,  
20 again, this is case number 050912506. I have in  
21 chambers Mr. Christensen and Ms. Van Orman.

22                   And we're at a point in the jury selection  
23 phase of the case where we have questioned 16 panel  
24 members.

25                   And I understand that Ms. Van Orman wishes

1 to challenge for cause one of the first 16 panel  
2 members.

3 Go ahead, Ms. Van Orman.

4 MS. VAN ORMAN: Yes. I would challenge  
5 for cause Juror Number 1, Claudia Allen-Kidder. She,  
6 when questioned, talked about her very close friend  
7 who lives across the street who was rear-ended and  
8 was a plaintiff in a lawsuit. She said that she --  
9 her friend was in pain every day from back problems  
10 resulting from the motor vehicle accident. And that  
11 she -- appeared that she was very concerned about  
12 that.

13 When she was asked if this would effect  
14 her ability to be impartial in this case, her  
15 response was "hopefully not." I feel that that shows  
16 that there is some partiality there. She did not  
17 answer unequivocally. And therefore, I think she  
18 would be partial.

19 And there is a challenge for cause.

20 THE COURT: Do you wish to respond, Mr.  
21 Christensen?

22 MR. CHRISTENSEN: Yes. I don't think that  
23 the level of concern that's been raised there is any  
24 higher than we may raise over several others. I  
25 don't think it arises to the level of a valid

1 challenge for cause.

2 THE COURT: Now let me say that in my  
3 questioning of Ms. Allen-Kidder, I think she  
4 responded substantially consistent with the manner in  
5 which Ms. Van Orman described it. I had a different  
6 view of her response, though. I was satisfied, based  
7 upon her response, that she could be fair and  
8 impartial. I did attempt to probe her with more  
9 detail as it related to her neighbor, who she  
10 indicates that she has these problems -- that has the  
11 problems, back and neck injury, that she associates  
12 with frequently.

13 But I am satisfied that she did, in fact,  
14 give sufficiently satisfactory responses, that she  
15 could, in fact, be fair and impartial. So I'm going  
16 to deny the challenge for cause.

17 Ms. Van Orman, are there any other  
18 challenges for cause as it relates to the first 16  
19 panel members who have been questioned?

20 MS. VAN ORMAN: Not at this time. Unless  
21 -- I -- I would like to question Juror Number 8.

22 THE COURT: And let me tell you what I'm  
23 intending to do. When we recess, I'm going to go  
24 back out and I'm going to start in with Ms. Kipp and  
25 get some additional information from her. And then

1       once we have her responses on the record, then what  
2       I'm going to ask is with -- whether or not you pass  
3       the panel for cause, with the exceptions already  
4       taken. If you pass the panel for cause, then I'm  
5       going to have you commence exercising your preemptory  
6       challenges.

7                     And I just want to make clear on the  
8       record, you have no challenges for cause; is that  
9       correct, Mr. Christensen?

10                    MR. CHRISTENSEN: Correct.

11                    THE COURT: Okay. Anything else?

12                    MS. VAN ORMAN: No.

13                    THE COURT: How long -- how long do you  
14       think your opening statements are going to be?

15                    Even though I think what we're going to do  
16       is recess for lunch and come back.

17                    MR. CHRISTENSEN: My guess is 30 minutes.

18                    THE COURT: Yeah. We'll get the jury  
19       picked. Then we'll recess and come back. Okay.

20                    (Recess taken from 11:34 to 11:37 a.m.)

21                    THE CLERK: All rise.

22                    The Court is again in session.

23                    Please be seated.

24                    THE COURT: The record should reflect that  
25       the jury panel has returned to the courtroom. And



1 counsel and their clients are also present.

2 Mrs. Kipp, I'm going to ask that you  
3 stand. I have some additional follow-up questions  
4 I'd like to put to you.

5 You previously described for us that -- I  
6 think you said, anyway, your husband was a lawyer in  
7 this community for 50 years; is that correct?

8 MS. KIPP: Yes. Uh-huh (affirmative)  
9 (affirmative) (affirmative).

10 THE COURT: And to the best of your  
11 knowledge, are you -- what firms was he associated  
12 with?

13 MS. KIPP: He had his firm, Kipp &  
14 Christensen.

15 THE COURT: And was that the only firm he  
16 worked with?

17 MS. KIPP: Yes. He started it.

18 THE COURT: And -- I know this question  
19 may seem obvious to you, and I'm not looking for an  
20 exact year, but as best as you can remember, what  
21 year was the firm established?

22 MS. KIPP: Well, it was Kipp & Charlier  
23 when he graduated -- right out of law school. Kipp &  
24 Charlier started a law firm. And then it became Kipp  
25 & Christian.

1           But you know, it was probably 50 years  
2 before. Yeah. He had that firm and he didn't go  
3 anywhere else.

4           THE COURT: And did your husband have a  
5 specialty in his legal practice?

6           MS. KIPP: He did insurance defense. He  
7 did malpractice. He did business -- did some  
8 plaintiff work also, but a lot of defense.

9           THE COURT: And -- and you may not know  
10 the answer to this question because you've stated  
11 that he did mostly defense.

12           Do you have any way of determining, just  
13 by estimate, the percentage of work he did on the  
14 defense side versus on the plaintiff's side?

15           MS. KIPP: Yeah. Probably 70 percent.  
16 You know, I'm just guessing.

17           THE COURT: When you say "70 percent," 70  
18 percent on the --

19           MS. KIPP: Defense.

20           THE COURT: -- defense side?

21           MS. KIPP: Uh-huh (affirmative)  
22 (affirmative) (affirmative).

23           THE COURT: And maybe 30 percent on the  
24 plaintiff's side.

25           Did you often discuss the cases he worked

1 on with him?

2 MS. KIPP: Not a lot. Yeah. I kind of  
3 knew what was going on. You know, if they were big  
4 cases, I guess we did. It's been so long ago.

5 I also worked as a legal secretary. I  
6 forgot to say that in that one thing we said.

7 THE COURT: Where did you work at as a  
8 legal secretary?

9 MS. KIPP: Kipp & Christian; Ray, Quinney  
10 and Nebeker, and Jones and something.

11 THE COURT: Jones Waldo maybe?

12 MS. KIPP: No. It was small.

13 THE COURT: No. Okay. What --  
14 approximately what years did you work as a legal  
15 secretary?

16 MS. KIPP: I worked as a legal secretary  
17 until 1977. So it was in my earlier life.

18 THE COURT: Okay. I'm curious to know as  
19 a result of the -- I'll describe it as legal  
20 experience that you've had, have you formed any  
21 opinions that would prevent you from being fair and  
22 impartial to either the plaintiffs or the defendants  
23 on this case?

24 MS. KIPP: Not at all. Not at all.

25 THE COURT: Are you satisfied that with

1 the experience you've described, that you can be a  
2 fair and impartial juror?

3 MS. KIPP: Yes. Very much.

4 THE COURT: Did you have any particular --  
5 you had no particular field of expertise as a legal  
6 secretary or did you?

7 MS. KIPP: Just --

8 THE COURT: Did some of everything?

9 MS. KIPP: Yeah.

10 THE COURT: All right. Counsel, would you  
11 approach?

12 And you may be seated.

13 MS. KIPP: Thank you.

14 (Bench conference held.)

15 THE COURT: Did you have any other  
16 questions you want me to put to her?

17 MS. VAN ORMAN: That's fine. Thank you.

18 MR. CHRISTENSEN: No.

19 (Bench conference concluded.)

20 THE COURT: Now counsel, starting with Mr.  
21 Christensen, do you pass the panel for cause, with  
22 the exception of the exceptions already taken?

23 MR. CHRISTENSEN: Yes, to the extent we've  
24 questioned the jurors.

25 THE COURT: Ms. Van Orman?

1 MS. VAN ORMAN: Yes, your Honor.

2 THE COURT: Okay. Thank you.

3 Members of the Jury Panel, what that means  
4 at this point is that counsel are going to exercise  
5 what the Rules call their preemptory challenges. The  
6 Rules give each side of the lawsuit a certain number  
7 of -- there is no other way, but to say strikes.  
8 They are called preemptory challenges. It simply  
9 means that counsel can strike certain panel members'  
10 names off of the jury panel list.

11 You should know that they don't need my  
12 permission to exercise their preemptory challenges at  
13 this point.

14 And as soon as the -- counsel have  
15 exercised their preemptory challenges, what we will  
16 do next then is identify those who have been selected  
17 to hear this case and then we will immediately excuse  
18 those who have not been selected.

19 And then for those who are selected, I  
20 have some brief preliminary instructions for you and  
21 then we're going to take the lunch recess.

22 Just one moment.

23 And counsel, you may begin to exercise  
24 your preemptory challenges.

25 (Jury selection process from 11:43 to

1 11:50 a.m.)

2 THE COURT: Members of the Jury Panel --  
3 excuse me -- as your names are called, would you  
4 please stand, step forward and have a seat in the  
5 jury box at the Clerk's direction.

6 THE CLERK: Heather May, Kent Pearce,  
7 Carolyn Kipp, Lynnette Hanson -- Lynnette Hanson,  
8 Barbara Harrison, Elda Sue Rasmussen, Michael Stanley  
9 Cotterman, Annette Mahler.

10 THE COURT: Mr. Christensen, is this the  
11 jury you've selected, sir?

12 MR. CHRISTENSEN: Yes, your Honor.

13 THE COURT: Ms. Van Orman, is this also  
14 the jury you've selected?

15 MS. VAN ORMAN: Yes, your Honor.

16 THE COURT: And counsel, do either of you  
17 have any objection with the remaining panel members  
18 being discharged at this time?

19 MR. CHRISTENSEN: No.

20 MS. VAN ORMAN: No.

21 THE COURT: You may be seated.

22 Members of the Jury Panel who have not  
23 been selected, again, thank you very much for your  
24 appearance and participation here today. We will  
25 keep you no longer and you are excused at this time.

1 Thank you very much.

2 And Counsel, at this time, you may reverse  
3 your seating as well at this time.

4 (End of requested portion of transcript.)  
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REPORTER'S CERTIFICATE

STATE OF UTAH                    )  
  ) ss.  
COUNTY OF SALT LAKE         )

I, Lanette Shindurling, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That on June 30, 2008, I produced transcript pages 1 through 37 from electronic medium at the request of Attorney Roger Christensen;

That the testimony of all speakers was reported by me in stenotype and thereafter transcribed, and that a full, true, and correct transcription of said testimony is set forth in the preceding pages, according to my ability to hear and understand the tape provided;

That the original transcript was sealed and delivered to Attorney Roger Christensen for safekeeping.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 5th day of July, 2008.

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Lanette Shindurling, RPR, CRR  
Notary Public





# Jury Selection

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# Jury Selection

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# **Exhibit C**

Trial Court Transcript of Oral Argument on  
Defendant's Motions in Limine

0000-0502

ORIGINAL TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

JOHN BOYLE and NORINNE BOYLE,	)	
	)	CD transcription of
Plaintiffs,	)	<u>MOTIONS</u>
	)	
vs	)	
	)	
KERRY CHRISTENSEN,	)	Case No 050912506
	)	
Defendant	)	Judge Tyrone E Medley

May 19, 2008

Reporter Dawn M Davis, CSR  
Notary Public in and for the State of Utah

FILED DISTRICT COURT  
Third Judicial District

AUG 13 2008

By *bn* SALT LAKE COUNTY

Deputy Clerk

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\* \* \*

P R O C E E D I N G S

THE COURT: This is case number 050912506.  
Counsel, would you identify yourself for  
the record, please?

MR. CHRISTENSEN: Roger Christensen for  
the plaintiffs.

MS. VAN ORMAN: Kristin Van Orman on  
behalf of the defendant.

THE COURT: You may go forward,  
Miss Van Orman.

MS. VAN ORMAN: Thank you.

Your Honor, we are here with three  
motions. And I don't know if you have a particular  
order that you would like me to address them or one  
at a time or just do them all. What is your  
preference?

THE COURT: Well, we probably should start  
with the fact that I thought you were initially here  
only on one motion but that's probably my mistake.

MS. VAN ORMAN: Oh, no. Okay.

We are here this morning on three motions.  
The first is the motion to dismiss the loss of  
consortium claim from Mrs. Boyle.

The second --

1 THE COURT: And that's the one I think I  
2 definitely knew was on the calendar. But go ahead.

3 MS. VAN ORMAN: Okay. The second is the  
4 motion to dismiss Dr. Mason as a -- an expert witness  
5 in the case. That was filed back in December, I  
6 believe.

7 THE COURT: Okay, go ahead.

8 MS. VAN ORMAN: And the third is a motion  
9 to dismiss Helen Woodard as an expert in the case.  
10 So those are the three.

11 THE COURT: I did start reading the motion  
12 to dismiss of at least Miss Woodard --

13 MS. VAN ORMAN: Okay.

14 THE COURT: So I have some knowledge of  
15 what that issue is about, but go forward.

16 MS. VAN ORMAN: Okay. I'll just start  
17 with loss of consortium.

18 THE COURT: That's fine.

19 MS. VAN ORMAN: And all of these motions  
20 are going to be straightforward and pretty brief.

21 This particular case, as the Court is  
22 aware, we are set to go to trial in, I think, about  
23 two weeks. It's an automobile/pedestrian accident  
24 where the plaintiff was coming out of Smith's. We  
25 were coming around the corner, struck him in front of

1 Smith's. Liability is not in dispute in the case.  
2 It's an issue of causation and damages.

3 The plaintiff, Mr. Boyle, has brought the  
4 suit. His wife, Norinne, has brought a -- a claim  
5 for loss of consortium. And we have filed the motion  
6 to preclude that claim based on the language in the  
7 statute. And we do not believe that they meet this  
8 as a matter of law and that she should not be able to  
9 proceed in front of the jury with her claims.

10 Under the law, in order to establish a  
11 claim for loss of consortium, there is, as the  
12 Court's aware, some criteria. And I think we talked  
13 about this in our pretrial back in chambers.

14 The first is there has to be a significant  
15 permanent injury that substantially changed the  
16 plaintiff's life, Mr. Boyle's life. That I would  
17 degree is in dispute in this case so there are issues  
18 of fact on that.

19 However, taking that aside, the other  
20 criteria that must be met by the plaintiff is that  
21 there must be either a partial or complete paralysis  
22 of one or more extremity, significant disfigurement  
23 or incapable of performing the types of jobs  
24 performed before the injury.

25 We don't believe that Mr. Boyle can meet

1 this threshold requirement of any of these.

2 Number one, there was no complete or  
3 partial paralysis. He had a back injury. He has  
4 claimed that he has sustained a herniated disk in the  
5 accident and that he underwent a diskectomy.

6 I don't think there are any allegations  
7 that he has had a partial or complete paralysis.  
8 There is no residual numbness or inability to move  
9 any of his extremities, nothing like that in this  
10 particular case.

11 The second requirement is significant  
12 disfigurement. I don't believe that there are  
13 allegations of a significant disfigurement. I think  
14 in the briefing they have addressed the possibility  
15 of the scar where -- the small scar where the  
16 incision was made for the diskectomy. I don't  
17 believe that that qualifies as a significant  
18 disfigurement to establish a loss of consortium  
19 claim.

20 And the third is incapable of performing  
21 the types of jobs performed before the injury. In  
22 the current case, pursuant to the plaintiff's very  
23 own deposition testimony, he is currently working.  
24 He is working 30-plus hours a week. His job is  
25 nearly the same as before. He works in the -- it's a

1 desk job kind of -- I want to say the mortgage  
2 industry but it's not really the mortgage industry.  
3 He works for Occurrence. It's -- perhaps counsel  
4 could better enlighten the Court on what this job  
5 entails. Prior to the accident he was working for  
6 Mascot Financial. He worked there approximately a  
7 month or two. My understanding is that Mascot  
8 Financial is no longer in business, so he couldn't be  
9 working there anyway.

10 But he, pursuant to his own deposition  
11 testimony, said that -- he was asked if his back  
12 prevents him from doing anything at work. And his  
13 response was "Not at that work."

14 He is able to work. He is able to put in  
15 a substantial work week. He is also -- the testimony  
16 is -- was undisputed, he has maintained his  
17 employment at Glenmoor Golf Course where he works I  
18 believe one day a week in order to keep up his  
19 privileges to golf once a week for free. That has  
20 been consistent since the accident. And so I don't  
21 believe that there is any evidence that he is  
22 incapable of performing the types of jobs performed  
23 before the injury.

24 There is no evidence in this case from any  
25 physician and I don't anticipate that there will be



1 expert testimony. It's not in any of the reports  
2 that he could not go back to the same job that he was  
3 in prior or that he had any kind of work restrictions  
4 placed on him.

5 So, for those reasons we do not believe  
6 that he meets the criteria for his wife, Norinne, to  
7 establish a loss of consortium claim.

8 THE COURT: Okay.

9 MS. VAN ORMAN: Would you like counsel to  
10 respond or would you like me to just go through the  
11 others?

12 THE COURT: Unless he has a real problem  
13 with it, I would prefer you move on with all three  
14 motions.

15 MS. VAN ORMAN: Very well.

16 MR. CHRISTENSEN: That's fine.

17 MS. VAN ORMAN: Very well. Thank you.

18 All right. Let's talk about Helen Woodard  
19 first since the Court has indicated that you've read  
20 part of that briefing. That is a very, very  
21 straightforward motion.

22 Let's see. Our -- we had a case  
23 management order in this case -- in this particular  
24 case that was put into place. Expert disclosures  
25 were due August 29th, 2007. So last August.

1           For Helen Woodard, she was, in fact,  
2       disclosed to us August 3rd of 2007, so she was  
3       disclosed timely. There was an amended disclosure  
4       that listed her as an expert witness.

5           However, that -- at that time the  
6       designation did not contain any kind of reports,  
7       nothing like that.

8           The disclosure date came and went.  
9       August 29th, 2007, still no report.

10          We basically had our pretrial conference  
11       about a month ago and I have not seen a report still  
12       from Helen Woodard.

13          I inquired from counsel if he was still  
14       intending to call her. In fact, I sent a letter on  
15       April 10th of 2008 asking if she was still intending  
16       to testify because she was listed on the final trial  
17       witness designation.

18          As of April 10th, 2008 we still had no  
19       report from her. We were told by a letter in  
20       response to counsel that she would still be called to  
21       testify and that they would be producing her report  
22       shortly.

23          We filed our motion on April 14th, 2008 to  
24       exclude her as a witness. We finally received a  
25       report from her May 6th, which is a long time after

1 the disclosure date has come and gone.

2 Trial is set to begin the first week of  
3 June. I think producing a report one month prior to  
4 trial, when we had not received any type of report,  
5 is inappropriate and she should be precluded from  
6 testifying in this case.

7 That's Helen Woodard.

8 Dr. Mason is a bit more complicated but  
9 not a whole lot.

10 By the way, Helen Woodard I believe is  
11 like a lifetime planner. I believe that's her --  
12 that's her expertise.

13 Dr. Mason, he is, I believe, a surgeon.  
14 He was not the surgeon in this particular case. That  
15 was Dr. Clawson. Dr. Clawson will be testifying in  
16 this case. So it's our position that excluding  
17 Dr. Mason from testifying would not be prejudicial to  
18 the plaintiff.

19 In fact, Dr. Clawson, in his own operative  
20 report, which I thought was quite interesting, as  
21 kind of a side note; but in his own operative report  
22 he opined regarding causation in the accident. So  
23 it's not something that the plaintiff, by excluding  
24 Dr. Mason -- that that would prejudice them by not  
25 having him testify.

1           Let's talk about Dr. Mason. Again, the  
2 case management order in this case, expert  
3 disclosures and reports were due August 29th of 2007.

4           We had a -- let me go to my timeline here.  
5 We had a mediation set September 28th, 2007. That's  
6 when the mediation was held in this case.

7           We received Dr. Mason's first report,  
8 which essentially was a one-paragraph letter. No --  
9 none of the Rule 26 disclosure requirements had been  
10 met. None of his background, not his CV, his rates,  
11 anything that he had testified prior to. And the  
12 one-paragraph report -- we've submitted it with our  
13 briefs -- was very, very brief, did not talk about  
14 any of the records that had -- he had reviewed,  
15 nothing. It just basically in one paragraph said,  
16 "I've looked at everything and I think that the  
17 surgery was related to the accident." That's a very,  
18 very small paragraph.

19           I don't even recall getting this via fax.

20           THE COURT: And, again, because of my lack  
21 of information on this motion --

22           MS. VAN ORMAN: Sure.

23           THE COURT: -- Doctor -- do I understand  
24 that Dr. Mason is not a treating physician?

25           MS. VAN ORMAN: That's correct.

1 THE COURT: He is an expert.

2 MS. VAN ORMAN: He is essentially an IME  
3 doctor retained by the plaintiff.

4 THE COURT: Okay, go ahead.

5 MS. VAN ORMAN: My records at work look  
6 like two days prior to the mediation that paragraph  
7 letter was faxed to my office. I don't recall even  
8 receiving it until the date of the mediation,  
9 September 28th.

10 Again, regardless of either of those  
11 dates, it's a month late for the one-paragraph  
12 report. That one-paragraph report was absolutely not  
13 sufficient.

14 Counsel is an excellent, excellent lawyer.  
15 His reputation in the community is the highest. He  
16 knows what is sufficient and what is not.

17 We had a scheduling conference before this  
18 Court November 29th of 2007. At that time your Honor  
19 asked me what motions we intended to file in this  
20 case. And I had indicated the loss of consortium  
21 motion and also a motion regarding Dr. Mason, to  
22 exclude him as an expert.

23 And shortly thereafter, December 5th, we  
24 received a new report from Dr. Mason that was more in  
25 keeping with the Rule 26 disclosures. It was

1 still -- let's see, August, November, December -- two  
2 months late. And our motion was filed to preclude  
3 him from testifying December 10th. It had actually  
4 crossed in the mail so we had prepared the motion  
5 prior to receiving the new report.

6           However, once we got the new report it was  
7 still deficient. It's still deficient, especially in  
8 time as it did not comply with the case management  
9 order unless -- also note that there were no requests  
10 for extensions. There was no request, which I would  
11 have given, but they weren't -- it wasn't asked. And  
12 no request for extensions, no request for the  
13 opportunity to provide a supplemental report.

14           And, again, we think that the case  
15 management order should be upheld in this case.  
16 There is no excuses for not. And excluding Dr. Mason  
17 would not prejudice the plaintiff in this case. They  
18 do have another doctor who is going to testify  
19 regarding causation. This is merely duplicative for  
20 the doctor to testify regarding it.

21           Counsel, I believe, is going to make a  
22 suggestion that, well, we didn't depose any of their  
23 experts and so it doesn't matter when they have  
24 disclosed them. And I think that's inappropriate.

25           We did take the deposition of Dr. Clawson.

1 We knew he would be testifying.

2 Dr. Mason, I had his deposition scheduled.  
3 But then I looked at the report and I said, "This is  
4 a paltry report, he should not be allowed to  
5 testify," and we filed the motion.

6 That's where we are and I will submit it  
7 at this time.

8 THE COURT: Thank you, counsel.

9 MR. CHRISTENSEN: Your Honor, with respect  
10 to the motion to dismiss Mrs. Boyle's claim for loss  
11 of consortium, it is true this statute, the Utah  
12 statute on loss of consortium is not a model of  
13 clarity. But it does appear that what is  
14 contemplated is an injury that's sufficiently severe  
15 that it substantially changes someone's lifestyle.  
16 And as counsel has admitted, they don't dispute that.  
17 And that it makes --

18 THE COURT: Can I -- I hope you won't mind  
19 a question. Sufficiently severe --

20 MR. CHRISTENSEN: Sure.

21 THE COURT: -- to impair a party's  
22 lifestyle, is that language in the statute?

23 MR. CHRISTENSEN: I think it's changed, to  
24 change their -- substantially change their lifestyle.

25 THE COURT: Okay. But that's out of the

1 statute?

2 MR. CHRISTENSEN: Yes.

3 THE COURT: Okay, go ahead.

4 MR. CHRISTENSEN: Which has clearly  
5 happened in this case.

6 It also talks about also involving  
7 paralysis. In this case Mr. Boyle did go through a  
8 period where he had numbness because of the herniated  
9 disk. It talks about disfigurement, although it  
10 doesn't give us a lot of guidance on what that means.

11 Obviously he has a scar from the major  
12 back surgery that he had. It also talks about not  
13 being able to do the kinds of -- and I believe the  
14 word is jobs -- previously done. I think that it's  
15 generally been interpreted as jobs around the house,  
16 employment, various things.

17 Clearly Mr. Boyle, with the -- well, with  
18 the injury he sustained there is a lot of jobs he  
19 can't do. It -- the statute does not say, as counsel  
20 has suggested, that it is limited to the employment  
21 that he had at the time he was hurt. Although his  
22 testimony was he could not return to that for the  
23 better part of the year.

24 He gives us insight. Years ago he was  
25 a pro for a golf course. He gave that up a number of



1 years ago because it was too many hours away from his  
2 family. He was not doing that job at the time. I  
3 think it's pretty clear, there is no way he can do it  
4 now if he chose to.

5 He described what he is doing at Glenmoor  
6 Golf Course. "I bring out the carts, the golf carts,  
7 and I tend the shop -- the pro shop. And I find that  
8 I can't lift two buckets of balls. They may be  
9 eight pounds each. I can't lift two of them at once.  
10 By the end of the shift my back really hurts and I go  
11 home and I get in the recliner for a couple of hours  
12 so it just won't hurt so much. I used to do lifting,  
13 I used to do things that I can't do anymore."

14 He has testified that since this accident,  
15 again, which involved a herniated disk, severely  
16 compressing the L-5 nerve root, that -- he gave this  
17 testimony. "I can't recall having slept through the  
18 night twice since the accident. One was the first  
19 day that this friend gave me a Lortab, gave it to me  
20 about 4 o'clock when we went to play golf. I came  
21 home and sat in my recliner after 6 o'clock and I  
22 woke up the next morning at 6. That's probably three  
23 times longer than I've slept any time -- any one time  
24 since the accident."

25 And then he goes on to explain that his

1 lack of sleep causes problems in everything he does  
2 "I get frustrated much more quickly I don't have  
3 endurance I don't work eight hours a day because  
4 six is about all I can handle And some days I can't  
5 handle that I wake up tired every day Very often  
6 I go back to bed Not to bed but to a recliner for  
7 10 or 15 minutes just so I can function "

8 Obviously someone with this level of  
9 disability, there are a lot of jobs that he can't do  
10 that he could do before he had that disability

11 I think -- and also, your Honor, there is  
12 no question this has had an impact on his  
13 relationship with his wife They can't sleep in the  
14 same room anymore. He spends the night bouncing  
15 around the house from recliners to other things and  
16 just a lot of the night unable to sleep.

17 I think we more than meet the statutory  
18 requirements for loss of consortium here. And, of  
19 course, this is Mrs. Boyle's claim.

20 THE COURT Go ahead.

21 MR CHRISTENSEN. With respect to Helen  
22 Woodard We disclosed Helen some time ago We asked  
23 her for a report She has had some problems with her  
24 husband's health and other things She was much  
25 slower than we had expected in getting the report

1 That did get provided to counsel recently.

2 Helen Woodard is not a mystery in the  
3 personal injury area in Salt Lake. I suspect counsel  
4 is quite familiar with Miss Woodard. She does have  
5 her full report.

6 To be candid with the Court and counsel, I  
7 am seriously questioning at this time whether it's  
8 worth the investment to fly Miss Woodard in from  
9 Denver to testify and the likelihood is that we will  
10 not do that. So that may be a moot issue. But I  
11 don't see any prejudice to the defense in this case.  
12 They have her report well in advance of trial and  
13 it's straightforward. And, again, this is a woman  
14 who testifies frequently in the more serious personal  
15 injury cases.

16 Frankly, I am surprised that they are  
17 pushing the issue with Dr. Mason. We had an initial  
18 deadline in this case for disclosing experts. We met  
19 the deadline. The defendant didn't. And the  
20 defendant called and asked for several more months,  
21 which I agreed to, which I have found in my practice,  
22 life's too short to create too many unnecessary  
23 hassles for opposing counsel. Those always basically  
24 come back to you.

25 So we worked with them. They have now

1 designated three experts that don't even necessarily  
2 agree with each other But they have three medical  
3 experts

4 We have designated one other -- other than  
5 the treating physician, Dr Clawson We provided a  
6 report to Dr -- giving them details on Dr Mason  
7 This was September of '06, so almost two years ago  
8 At least a year and a half ago

9 He stated, "I have reviewed the records  
10 forwarded to me regarding the treatment of injuries  
11 suffered by Mr Boyle in an accident on 7-22-04 I  
12 did not have the opportunity to review the  
13 particulars of the accident itself but only the  
14 treatment rendered for his back problem

15 "The record indicates that after the  
16 accident in question he experienced back and leg pain  
17 and was let in to receive treatment, which included  
18 chiropractic manipulation, medication and injections  
19 Because these modalities did not produce long-term  
20 benefit he sought the advice of a spine surgeon

21 "He underwent an MRI scanning which  
22 revealed multi-level degenerative disk disease and a  
23 disk herniation at L4-L5 on the left which compressed  
24 the L-5 root on that side

25 "He eventually underwent diskectomy at

1 L4-5 on the left, which initially resolved his pain.  
2 As time has progressed some pain has returned, which  
3 studies have shown to be due to scarring at the  
4 surgical site, which is not uncommon. Unfortunately,  
5 it is likely this pain will be permanent.

6 "Based on the records reviewed, I believe  
7 to a high degree of medical certainty that the disk  
8 herniation was due to the accident of 7-22-04. That  
9 the surgery was indicated by the disk herniation and  
10 that the scar pain is a direct result of the surgery.

11 "It is extremely likely that he will have  
12 to deal with that scar pain for the rest of his  
13 life."

14 That pretty well says it. That was the  
15 initial report.

16 They had asked to take Dr. Mason's  
17 deposition. We scheduled that, we cooperated fully.  
18 Shortly before it was taken they cancelled.

19 We said, "Let us know when you want to  
20 depose him. We will make him available."

21 They have chosen not to depose him.

22 When we were over here a few months ago  
23 and counsel indicated for the first time, to my  
24 knowledge, the concern there, I got with Dr. Mason  
25 and got her a -- an extensive report the next day,

1 which addressed the concerns that were raised. I  
2 personally think this is more than adequate. In  
3 fact, I think brevity is a virtue, not a vice. But  
4 we've provided a second -- provided a second expert  
5 report from Dr. Mason outlining all the records he  
6 looked at and so forth. As the Court may recall,  
7 this trial got rescheduled once to accommodate  
8 Dr. Mason's schedule. He is the orthopedist for the  
9 Jazz. And because of the playoffs it conflicted with  
10 our prior trial schedule. That's now a moot issue as  
11 of Friday night.

12 It would be highly prejudicial for us to  
13 not be allowed to use Dr. Mason. He has been the  
14 main one that is prepared to address the various  
15 causation issues which the defense has raised here.

16 It is true that the orthopedic surgeon  
17 that did the surgery is on our witness list but he  
18 hasn't looked at this in nearly the detail that  
19 Dr. Mason has.

20 In this case, your Honor, the defense has  
21 gone back I think at least 40 years and gathered up  
22 medical records on Mr. Boyle. Every time a medical  
23 record showed any sort of a back pain it's been noted  
24 and made an issue.

25 And, as I mentioned before, they have

1 three experts on their witness list and it would be  
2 very unfair to us not to have Dr. Mason allowed to  
3 testify.

4 Honestly, I don't see the concern. There  
5 has been no unfairness here. They have been on  
6 notice for almost two years of what the crux of his  
7 expert testimony would be. At the time that was  
8 provided it was expected that he would be deposed. I  
9 am surprised he hasn't been, but that's their choice.

10 We provided even more detail later. They  
11 have had all the records. It frankly seems to be  
12 some level of gamesmanship here to -- rather than  
13 addressing this case on the merits, to try to  
14 eliminate probably our single most important witness  
15 because liability has been stipulated.

16 So, your Honor, we would strongly urge the  
17 Court to deny that motion.

18 THE COURT: Thank you, counsel.

19 Miss Van Orman.

20 MS. VAN ORMAN: I will be very brief.

21 As to the loss of consortium, the test is  
22 that the plaintiff, Mr. Boyle, is incapable of  
23 performing the types of jobs performed before the  
24 injury.

25 He is going to get -- it's pretty much

1       guaranteed, he is going to get damages for his own  
2       pain and suffering in this case, so the things that  
3       counsel has talked about, him not being able to sleep  
4       well, et cetera, et cetera, he will get compensated  
5       for that.

6               A loss of consortium claim takes it to a  
7       different level. It's a different claim. It's a  
8       claim of his wife. And it takes complying with the  
9       statutory requirements in order for her to make this  
10      claim. And I don't believe that he does that. I  
11      don't believe there is evidence to support that fact,  
12      that he makes it to that level for her to bring a  
13      claim. He is going to have his claim for his pain  
14      and suffering. He will get money for that. It's her  
15      claim that just does not stand.

16             As for Dr. Woodard -- Helen Woodard, I am  
17      not going to address that. I think that that has  
18      been sufficiently dealt with.

19             The only thing I would add to Dr. Mason.  
20      Counsel -- maybe he misspoke -- said that September  
21      of 2006 that one-paragraph letter was produced. It  
22      wasn't -- the date on the letter was from  
23      September 2006. I think that's when Dr. Mason wrote  
24      it. It wasn't produced until a year later, in 2007,  
25      at the time of the mediation. He was designated



1       timely but the disclosure --

2               THE COURT: Are there any type of mailing  
3 certificates or anything like that on that letter  
4 reflective of when it at least was served --

5               MS. VAN ORMAN: Right I don't -- I could  
6 not find any type of a mailing certificate. I looked  
7 and I looked. I asked my paralegal to find when --  
8 excuse me -- what documentation we have. And I think  
9 on the top there is a fax date of September 26th.

10              My own recollection was that we were at  
11 the mediation and I recall the mediator coming in and  
12 saying -- you know how they, of course, play devil's  
13 advocate. He says, "What about Dr. Mason?"

14              I said, "What about Dr. Mason? Who is  
15 Dr. Mason?"

16              And he says, "Well he has been listed as  
17 a -- an expert."

18              I said, "Well, that's great but I haven't  
19 seen him anything from him."

20              And so he got permission from counsel to  
21 bring in the one-page letter and that's where -- my  
22 first recollection of ever seeing this one-paragraph  
23 letter that counsel read to you in full.

24              So that was September 28th, giving them  
25 the benefit of the doubt from the date of the fax,

1 two days before the mediation, September 26th of  
2 2007, which is, you know, a month late.

3 But the issue is, once we get that, that  
4 doesn't comply with Rule 26. Those aren't  
5 appropriate disclosures. We didn't get the  
6 appropriate disclosures until December 5th.

7 So I just wanted to clear that up.

8 THE COURT: Thank you, counsel. Listen,  
9 I'd -- we'd like to set, if it works with the two of  
10 you, Wednesday at 8:15 in the morning for a telephone  
11 conference call on the record where I am going to  
12 rule on these three matters.

13 Does that time work for both of you?

14 MS. VAN ORMAN: It does.

15 MR. CHRISTENSEN: This coming Wednesday.  
16 And what was the date again, your Honor?

17 THE COURT: What is this Wednesday?

18 THE CLERK: The 21st.

19 THE COURT: The 21st.

20 MR. CHRISTENSEN: And at what time.

21 THE COURT: 8:15.

22 MR. CHRISTENSEN: Yes, that would be  
23 wonderful. That would work.

24 MS. VAN ORMAN: Your Honor, may I  
25 just have -- I have one small request. If -- and I

1 don't know what your ruling is going to be. On  
2 Wednesday if you do rule that Dr. Mason may testify,  
3 I would ask -- I know it's short notice and I know we  
4 both have busy schedules -- I do want to depose him.  
5 I have wanted to depose him all along but I needed to  
6 see if he was going to be testifying first.

7 THE COURT: Go ahead. You wish to say  
8 anything, then?

9 MR. CHRISTENSEN: I have been clear that  
10 we would make him available from day one for  
11 deposition. And I -- I would also like to say, your  
12 Honor, it is my belief -- but I did not appreciate it  
13 was going to be this kind of an issue -- it was my  
14 belief that we sent this letter to opposing counsel  
15 shortly after we received it and certainly --

16 THE COURT: Do you evidence of that?

17 MR. CHRISTENSEN: I don't know. I'm going  
18 to have to go look through my file.

19 THE COURT: That's why I asked the  
20 question of counsel, whether or not there was any  
21 type of mailing certificate evidencing service.

22 MR. CHRISTENSEN: I -- I'll be extremely  
23 surprised if they first learned of this letter at the  
24 mediation. Now, I don't question if that's what  
25 counsel recalls, but that would be very different

1 from my normal practice, not to give counsel a copy  
2 of this kind of information from an expert shortly  
3 thereafter, although the point remains, either way  
4 there is no prejudice to them and we will cooperate  
5 on producing Dr. Mason for deposition even at this  
6 late time. But, as I mentioned, I think counsel has  
7 decided to try to take a technical approach to get  
8 rid of a key witness rather than deal with the  
9 substance of the witness's testimony.

10 THE COURT: I really just wanted to know  
11 if you had anything else to say only about the -- the  
12 deposition issue.

13 MR. CHRISTENSEN: Oh. We will work with  
14 them. We'll make sure it happens.

15 THE COURT: I'll talk to both of you then  
16 on Wednesday at 8:15.

17 Court will be in recess.

18 (Proceedings concluded.)

19 \* \* \*  
20  
21  
22  
23  
24  
25

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

WITNESS MY HAND AND OFFICIAL SEAL this  
11th day of August, 2008.

Dawn M. Davis  
Dawn M. Davis, CSR  
Notary Public  
Residing in Davis County

# **Exhibit D**

Spahr v. Ferber Resorts, LLC, No. 2:08-cv-72,  
2010 U.S. Dist. LEXIS 9571 (D. Utah Feb. 4, 2010)



LEXSEE 2010 U.S. DIST LEXIS 9571

**E. JAMES SPAHR and COLLEEN SPAHR, Plaintiffs, vs. FERBER RESORTS,  
LLC d/b/a RODEWAY INN, Defendant,**

**Case No. 2:08-cv-72-CW**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,  
CENTRAL DIVISION**

***2010 U.S. Dist. LEXIS 9571***

**February 4, 2010, Decided**

**February 4, 2010, Filed**

**COUNSEL:** [\*1] For E. James Spahr, Colleen Spahr, Plaintiffs: A. Bryce Dixon, William J. Dixon, LEAD ATTORNEYS, DIXON TRUMAN FISHER & CLIFFORD (UT), ST GEORGE, UT.

For Choice Hotels International, Inc., a Corporation organized in Delaware, Defendant: Fred R. Silvester, LEAD ATTORNEY, SILVESTER & CONROY LC, SALT LAKE CITY, UT.

For Rodeway Inn & Suites, Ferber Resorts, a Corporation organized in Utah, Defendants: Trent J. Waddoups, LEAD ATTORNEY, CARR & WADDOUNS, SALT LAKE CITY, UT.

**JUDGES:** Clark Waddoups, United States District Judge.

**OPINION BY:** Clark Waddoups

**OPINION**

**ORDER and MEMORANDUM DECISION**

Now before the court is Defendant Ferber Resort's motion for a judgment as a matter of law or, in the alternative, for a new trial or remittitur (Dkt. No. 26).<sup>1</sup> For the reasons discussed below, this motion is DENIED

in its entirety.

1 Ferber Resorts' motion for oral argument on this matter (Dkt. No. 107) is DENIED. Ferber Resorts has already had two opportunities to argue its position at summary judgment and at trial. Moreover, oral argument will not assist the court in resolving this motion, as it is not particularly complicated. Under *DUCiv.R. 7-1(f)*, therefore, Ferber Resorts has not shown good cause to hold a hearing and this motion [\*2] will be decided on the basis of the written memoranda.

#### **BACKGROUND**

Plaintiffs E. James Spahr and Colleen Spahr brought this action for negligence and loss of consortium against Ferber Resorts. In short, Mr. Spahr suffered a serious knee injury after falling into a six foot deep concrete ditch while he walked from his room toward the motel office across a parking lot of the Rodeway Inn operated by Ferber Resorts. The Rodeway Inn was located in Springdale, Utah and the accident happened in the early morning hours. The Spahrs contended that Ferber Resorts failed to provide adequate lighting and protection for guests against falling in the ditch, since it was open, very near the parking lot connecting the guest buildings and the office building, and could be mistaken for a continuation of the parking lot in the early morning

darkness.

A week-long jury trial was held starting on October 19, 2009. At the close of the Spahrs' evidence, Ferber Resorts moved for a judgment as a matter of law on both counts. The court denied this motion. On October 23, 2009, the jury reached a verdict in favor of the Spahrs on both claims, finding on the negligence claim that Ferber Resorts was 99% at fault for [\*3] the accident, while Mr. Spahr was 1% at fault. The court entered judgment on the jury's verdict on October 29, 2009 in the amount of \$ 393,001.45 in favor of Mr. Spahr and \$ 42,498.55 in favor of Ms. Spahr.

Ferber Resorts made a timely motion for judgment as a matter of law pursuant to *Federal Rule of Civil Procedure 50* or alternatively for remittitur or a new trial pursuant to *Rule 59*. In support of its motion for judgment of a matter of law, Ferber Resorts contends that the verdict was contrary to law because Ferber Resorts owed no duty to Mr. Spahr and because Ms. Spahr did not satisfy the requirements under Utah law for her loss of consortium claim. In support of its request for new trial or remittitur, Ferber Resorts asserts that the verdict was against the weight of the evidence, that the awards were excessive, and that the jury was improperly prejudiced by the Spahrs' closing arguments.

## ANALYSIS

### I. Legal Standards

#### A. Judgement as a Matter of Law under *Rule 50*

"Judgment as a matter of law is appropriate only when the evidence presented at trial does not permit a reasonable jury to find for the non-movant." *Manzanares v. Higdon*, 575 F.3d 1135, 1142 (10th Cir. 2009) (citations omitted). [\*4] In deciding such a motion, a court must "not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." *Id.* (internal quotation marks and citation omitted). Further, the court "must view the evidence and all inferences in the light most favorable to. . . the non-moving party, and. . . must be guided by the requirements of the underlying cause of action." *Palmer v. City of Monticello*, 31 F.3d 1499, 1503 (10th Cir. 1994).

#### B. New Trial or Remittitur under *Rule 59*

A motion for a new trial or remittitur under *Rule 59* should be granted only if the jury's verdict is "clearly, decidedly or overwhelmingly against the weight of the evidence." *Escue v. Northern Okla. College*, 450 F.3d 1146, 1157 (10th Cir. 2006) (internal quotation marks and citation omitted). Moreover, when considering such a motion, "the jury's award is inviolate unless. . . it [is] 'so excessive that it shocks the judicial conscience and raises an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial.'" *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 766 (10th Cir. 2009) (citation omitted). As with a motion under *Rule 50*, when considering a [\*5] motion under *Rule 59* for a new trial or remittitur, all evidence must be viewed in the light most favorable to the prevailing parties. See *Escue*, 450 F.3d at 1156.

### II. Ferber Resorts' Motion

#### A. Judgement as a Matter of Law under *Rule 50*

Ferber Resorts argues that it is entitled to judgment as a matter of law on both Mr. Spahr's negligence claim and Ms. Spahr's loss of consortium claim. The evidence at trial was sufficient to support the jury verdict finding Ferber Resorts liable on both claims, requiring the court to deny both motions.

#### 1. Ferber Resorts Owed a Legal Duty to Protect Mr. Spahr from a Dangerous Condition.

Ferber Resorts contends that Mr. Spahr knew that he was walking into the darkest part of the property and took the risk that he might be injured as a result. According to Ferber Resorts, Mr. Spahr's doing so relieved Ferber Resorts of any legal duty to Mr. Spahr.

The court concludes that the evidence does not compel a finding that, because Mr. Spahr knew it was dark, the dangerous condition at the Rodeway Inn should have been open and obvious to him. To the contrary, Mr. Spahr presented evidence that reasonably supported the jury's finding that Ferber Resorts had a legal duty [\*6] to provide adequate lighting and otherwise protect against the risk that a person would not see the ditch while attempting to walk from the motel rooms to the motel office. For example, Mr. Spahr testified that while attempting to reach the office in the early morning hours he was not simply walking into a pitch dark area. Rather, he recalled that there was bright lighting near the guest buildings and ambient lighting as he walked away from



the guest buildings. Moreover, there was a light on near the office which he testified he was walking directly toward. There was also evidence that the drive way light on the pole next to the ditch was not on, the automatic timer apparently having turned the light off long before day light. This testimony was corroborated by other evidence. Mr. Spahr further testified that the area of the ditch that he walked into appeared to him to be a continuation of the pavement, not simply an abyss. The photographs of the ditch and its surroundings, as well as other evidence, support this testimony. This testimony, along with other evidence, supports a finding that the darkness into which Mr. Spahr walked did not alone reasonably put him on notice of a danger. [\*7] <sup>2</sup>

2 Ferber Resorts also argues in reply that the darkness was the only possible source of negligence and that darkness was a temporary condition of which Mr. Spahr did not show Ferber Resorts had notice. First, because Ferber Resorts makes these arguments for the first time on reply and not in response to any argument in Mr. Spahr's opposition, they may be disregarded. In any event, these arguments have no merit. The facts support a conclusion that it was negligent for Ferber Resorts to leave the ditch unlit and unprotected because it was reasonably foreseeable that someone exercising proper care might nonetheless fall in the ditch. More specifically, the jury could have reasonably concluded that it was reasonably foreseeable to Ferber Resorts that a guest in low lighting might mistake the ditch for a continuation of the parking lot's pavement. Moreover, it is clear that Ferber Resorts made a decision to place the lights on an automatic timer that turned the lights off before day light during part of the year. The dangerous condition was created by the lack of lighting and the unprotected ditch opening. While providing lighting might have helped to avoid a negligence claim, the lack [\*8] of lighting was not the only cause of the dangerous condition here. Accordingly, the jury could have reasonably concluded that even if the accident had occurred before the automatic light turned off, Ferber Resorts was still aware of a dangerous condition under Ferber Resorts' control. In any event, in Instruction 22, the jury was specifically informed that a business owner cannot be held liable for a condition of which the owner had no knowledge. Ferber Resorts was

therefore free to argue to the jury that it had insufficient notice to say that it knew of any danger.

Ferber Resorts relatedly argues that the question regarding an open and obvious danger on the verdict form was improper. On the form, the jury was asked if the condition of the land was an open and obvious danger to Mr. Spahr. Ferber Resorts contends that the jury should have been separately asked whether the darkness alone was open and obvious to Mr. Spahr and whether he knowingly took a risk by walking into that darkness. But there is no Utah case in which darkness by itself governed the open and obvious inquiry. Rather, in cases such as *Black v. Nelson*, 532 P.2d 212, 212-14 (Utah 1975), Utah courts look at all the circumstances [\*9] in which the plaintiff found him or herself in darkness, including, among other things, the degree of the darkness, the characteristics of the area in which the plaintiff encountered the darkness, and the obvious alternatives to walking into the darkness. The Second Restatement of Torts, on which Ferber Resorts relies, underlies this principle, stating that if a "person knows of the actual conditions and dangers involved," then such a person can be said to have purposely incurred a risk. *Restatement (Second) of Torts* § 343(A) (emphasis added). This statement of the law makes plain that darkness is but one factor in the factual analysis of whether there was a known danger. In this case, the evidence fairly supported a jury finding that the darkness was only one factor that created the dangerous condition.

In any event, Ferber Resorts was free to, and did, argue to the jury that the darkness was so extreme that any reasonable person would have taken the darkness alone as a danger. Ferber Resorts also made other arguments that the danger was open and obvious. For example, Ferber Resorts pointed to safer alternatives that Ferber Resorts contended should have been obvious to Mr. Spahr. Ferber [\*10] Resorts also argued that Mr. Spahr was not walking on pavement immediately before he fell into the ditch, and the characteristics of the terrain on which he was walking should have given him notice of a potential danger. Ferber Resorts also suggested that during his several day stay at the motel Mr. Spahr had seen or should have seen the area into which he fell before he attempted to walk to the office in the dark. None of these arguments were precluded by the form of the question on the verdict form. If the jury had accepted them, it would have been reasonable for the jury to find

that the danger was open and obvious to Mr. Spahr on Question 1 of the form, or alternatively that Mr. Spahr was over 50% at fault. And the jury was expressly instructed to, and in fact did on the verdict form, consider and quantify the extent of Mr. Spahr's own actions in causing the accident.

And the evidence indeed reasonably supported the jury's nearly complete rejection of Ferber Resorts' arguments, which was reflected in the verdicts that the dangerous condition of the land was not open and obvious to Mr. Spahr and that he was only 1% at fault. As already mentioned, Mr. Spahr testified that he was not [\*11] in total darkness and did not believe he was walking into it either. This testimony rebuts the arguments that the darkness alone was a known danger to Mr. Spahr and that he had some reason to seek out another route. Mr. Spahr also testified that he was walking on pavement immediately before he fell which the jury could have reasonably believed. Mr. Spahr further testified that he had not previously noticed the ditch into which he fell which the jury was also free to believe.

In sum, Mr. Spahr presented evidence sufficient to support his contention that the dangerous condition at the Rodeway Inn was not open and obvious to him. He was therefore not precluded from claiming that Ferber Resorts owed him a legal duty of care.

## 2. The Evidence Supports the Verdict for Loss of Consortium.

Ferber Resorts asserts that Ms. Spahr did not prove a significant injury to Mr. Spahr sufficient to satisfy *Utah Code Annotated* § 30-2-11, the loss of consortium statute. Specifically, Ferber Resorts contends that Ms. Spahr did not present evidence that Mr. Spahr was "paralyzed," that he had a "significant disfigurement," or that he was "incapable" of performing the types of jobs he did before the injury as [\*12] required by § 30-2-11(1)(a).

Mr. Spahr did not claim to have been paralyzed and no evidence was offered to support such an assertion. Ms. Spahr did, however, present evidence of scars on Mr. Spahr's knee, a fact that Ferber Resorts concedes. The most striking evidence was a photograph taken shortly after the injury showing massive and deep scarring. This photograph was received together with testimony that the scarring was at present slightly less pronounced than in the picture. There was further testimony that Mr. Spahr

was ashamed to be seen in shorts because people might see the scarring to his knee. While neither party has cited any Utah authority establishing what exactly is required to show a "significant disfigurement" under § 30-2-11(1)(a)(ii), the court is convinced that the extreme scarring to Mr. Spahr's knee reasonably meets that definition.<sup>3</sup>

3 The court is not convinced to the contrary by *Stone v. Ware Shoals Mfg. Co.*, 192 S.C. 459, 7 S.E.2d 226, 227-29 (S.C. 1940), which is an extremely dated, non-Utah case interpreting the question of what was meant by "serious bodily disfigurement" under South Carolina's then-existing worker's compensation statute.

Moreover, there was evidence that [\*13] Mr. Spahr was unable to perform key aspects of the types of jobs he did before the injury. For example, Ms. Spahr presented evidence that Mr. Spahr could not kneel to garden and could not climb ladders to engage in carpentry. Ferber Resorts contends that "incapability" in § 30-2-11(1)(a)(iii) must be read literally, meaning that if Mr. Spahr has any possible means to perform jobs, he is capable of those jobs.<sup>4</sup> Such a literal reading of the statute is not warranted by the face of the statute. Unless they are paralyzed (which is covered separately by § 30-2-11(1)(a)(i)), resourceful people may often find new and inventive ways to accomplish many of the same jobs they did before injury. For example, Mr. Spahr may be able to garden laying down, or to buy a hydraulic lift to help him build ceilings or complete other jobs that would be normally done on a ladder. Rather than being literally and completely incapable of doing a job even in a most limited and extraordinary way, then, being unable to engage in an essential part of a job in a routine manner must suffice to make one incapable of performing that job under the statute. In this case, the evidence reasonably supported a finding by [\*14] the jury that Mr. Spahr was incapable of performing many of the jobs he had done before the injury. It cannot be reasonably disputed that as a routine matter, gardening requires kneeling and carpentry requires climbing ladders.

4 Ferber Resorts also contends that "jobs" must mean paid employment. There is nothing in the statute that compels that reading, and the word jobs is commonly understood to include paid and unpaid pursuits.

The Utah Court of Appeals' decision in *Boyle v.*

*Christensen*, 219 P.3d 58, 63, 2009 UT App 241 (Ut. Ct. App. 2009) does not persuade the court otherwise. In *Boyle*, the injured party admitted in his deposition that he had performed the same jobs after his injury that he had performed before his injury, albeit in "significant discomfort." *Id.* In that context, the *Boyle* court found that the party was capable of doing those jobs, noting that "the statute does not speak in terms of impairment, but, rather, 'incapacity.'" *Id.* (citing *Utah Code Annotated* § 30-2-11(1)(a)(iii)). Here, the record supports a conclusion that Mr. Spahr is not simply in discomfort doing jobs he had done before, but is incapable of kneeling and climbing ladders. Accordingly, Ms. Spahr's claim does not hinge [\*15] on an argument that he is impaired in his gardening and carpentry, but on proof that he is altogether precluded from them.<sup>5</sup>

5 Even if the court has improperly distinguished *Boyle* and a more correct reading of the statute would lead to the conclusion that Mr. Spahr is not incapable of performing these jobs, a straight forward reading of the statute makes clear that Ms. Spahr needed only to prove one of the three factors under § 30-2-11(1)(a)(i)-(iii).

For the above reasons, the evidence supports a finding by a reasonable jury that Mr. Spahr was either significantly disfigured, incapable of performing jobs he did before the injury, or both. Either of these findings supports the conclusion that Mr. Spahr was significantly injured as defined by the Utah loss of consortium statute. Accordingly, Ms. Spahr was not precluded as a matter of law from proceeding on her loss of consortium claim.

## **B. New Trial or Remittitur under Rule 59**

Ferber Resorts argues that a new trial or remittitur should be granted for several reasons, all of which are broad and largely without objections made during the trial. First, it argues that no substantial evidence supported the amounts awarded by the jury. Next, it [\*16] argues that the verdicts resulted from inappropriate and reversible passion, bias and/or prejudice stemming from the Spahrs' closing arguments. The court will address the Ferber Resorts' arguments below.

### **1. The Size of the Non-economic Damage Awards is Not Excessive Given the Evidence Presented.**

Ferber Resorts contends that the size of the damage awards -- about \$ 393,000 in Mr. Spahr's favor and about

\$ 42,500 in Ms. Spahr's favor (both to be reduced by 1% due to Mr. Spahr's fault in the accident) -- are either shocking to the judicial conscience or are so excessive as to "raise an irresistible inference of passion, prejudice or other improper cause." *Blanke v. Alexander*, 152 F.3d 1224, 1237 (10th Cir. 1998). As a remedy, Ferber Resorts seeks either remittitur of the awards or a new trial.

Ferber Resorts' arguments are not well taken. Far from making a bare or unsupported assertion of non-economic damages, the Spahrs put on a great deal of evidence to support that claim. Mr. Spahr testified to the considerable pain, mental and emotional suffering and serious life consequences he has experienced since his injury.<sup>6</sup> Mr. Spahr described in detail the agony he suffered when he fell into a [\*17] nearly six-foot concrete ditch in which he landed almost full-force on his knee. He testified that the fall was a complete surprise and that he had no opportunity to brace or otherwise protect himself from injury on impact. He recalled calling for help for 20 minutes or more without any response and not knowing when he might be found. He explained that he had to stand on an injured leg to cry for help. He described having to devise a strategy to save his strength to maximize his chances of being rescued and not exhaust himself from yelling. He recounted having to hide his bloodied knee when he was finally pulled from the ditch so that his wife would not be overly traumatized by the sight of it. There was evidence that the long ambulance ride to the hospital was bumpy and painful for Mr. Spahr. There were photos of the injuries on Mr. Spahr's entire body from the fall, not limited to his knee. He presented evidence of the need for emergency surgery and the hospital stay afterwards. The painful and awkward multi-legged trip home from Utah to Nevada to Michigan was detailed. And there was evidence of the arduous, painful, and uncomfortable months-long period of recuperation and physical [\*18] therapy. Mr. Spahr further put on evidence that he could expect pain, suffering, and a limited range of motion in his knee into the future.

6 Oddly, Ferber Resorts cites *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416 (10th Cir. 1997) to suggest that only "exceedingly graphic or detailed" testimony will support substantial non-economic damages. The court reads *Smith* as making clear that graphic or detailed testimony is not needed for such damages, especially when the totality of the

circumstances is considered along with the testimony. *See id.* While Mr. Spahr was somewhat stoic during his testimony, the court does not believe that this stoicism compels a conclusion that the accident had an insignificant physical and emotional effect on him. In any event, the jury could reasonably find that Mr. Spahr gave detailed and graphic description of his injury.

Mr. Spahr also detailed the effects of the injury on his personal life. There was evidence that the injury interfered and continues to interfere with the intimacy between the Spahrs. There was evidence that Mr. Spahr will no longer be able to garden or work as a carpenter. There was further evidence that he will be impaired [\*19] or unable to do other activities that he was looking forward to in his retirement, such as water skiing, snow skiing, racquetball, jogging and hiking. The evidence was that Mr. Spahr enjoyed these activities before the injury and would no longer be able to engage in them. Indeed, the Spahrs were at the Rodeway Inn to hike in national parks.

In light of the evidence that Mr. Spahr put on regarding his non-economic harm, the court's conscience is not shocked by the size of the award. While \$ 393,000 is a considerable sum, it can hardly be called a windfall when one considers the evidence put on about the incident and its consequences. Moreover, while this figure is more than ten times the approximately \$ 30,000 in medical bills that Mr. Spahr put on as evidence, there is no question that the injury was serious and extensive and required a significant period of recuperation. The law does not require a direct correlation between the evidence of the amount paid for medical care and the award for the total injury. The overall harm to the person, taking into account the impact it may have on all aspects of life, may significantly exceed the out-of-pocket costs for medical care. For all these [\*20] reasons, the court does not believe the award to Mr. Spahr to be so excessive as to "raise an irresistible inference of passion, prejudice or other improper cause." *Blanke*, 152 F.3d at 1237.

Likewise, Ms. Spahr put on ample evidence of the non-economic impact of the accident on her. She testified to the shock and trauma of being awakened by a stranger and then discovering Mr. Spahr visibly injured and in agony. She described having to take on unfamiliar responsibilities at a time of great stress. She detailed her own emotional pain at watching Mr. Spahr in physical

and emotional pain and discomfort from the time of the accident until the present. She testified to her interrupted sleep, life, and work schedules while helping Mr. Spahr recuperate. She affirmed the negative impact on her intimate life with Mr. Spahr. And she described the loss of Mr. Spahr's companionship while she participates in activities that he is unable to do or finds too painful to enjoy.

To be sure, \$ 42,500 is not an insignificant amount of money. But given the evidence that Ms. Spahr put on, it can hardly be said to shock the conscience. Moreover, while Ms. Spahr put on evidence of lost wages of only about \$ [\*21] 3,000, the impact of this accident was felt by Ms. Spahr in every aspect of her life, not just professional. The award to Ms. Spahr is thus not "so excessive as to raise an irresistible inference of passion, prejudice, or other improper cause." *Id.* <sup>7</sup>

<sup>7</sup> The court agrees with the Spahrs that the facts and the figures in this case are strikingly similar to those in *Blanke*, in which the court upheld substantial non-economic damage awards. While *Blanke* gives a comfort level that the awards here are appropriate, the court is aware that each case must be considered on its own individual merits, and it has done so here.

## **2. The Spahrs' Closing Argument, While Inappropriate or Inartful in Some Aspects, Did Not Unduly Prejudice Ferber Resorts.**

Ferber Resorts contends that the Spahrs' closing argument was so improper as to warrant a new trial. Ferber Resorts points to four main categories of argument that it maintains were improper: referring to matters out of evidence, advancing personal opinions of counsel, implying intentional malevolence by Ferber Resorts, and making improper references to Ferber Resorts' actions in defending this lawsuit.

First, Ferber Resorts' complaint is procedurally flawed. [\*22] It is well established that a party must bring to the attention of the court errors that can be corrected during the trial. Ferber Resorts objected only once to one line of argument during Spahrs' closing and the objection was immediately sustained. Ferber Resorts did not object to any other part of the closing and did not request a corrective instruction. Moreover, Ferber Resorts did not move for a mistrial based on the closing argument before this case was submitted to the jury. In *Computer*

*Systems. Engineering Inc. v. Qantel Corp.*, 740 F.2d 59, 69 (1st Cir. 1984), the court ruled that a party's failure to object during close or to move for a mistrial barred the party from later "urging the improper argument as grounds for a new trial after the jury had returned its verdict." (citations omitted). The court reasoned that "a party may not wait and see whether the verdict is favorable before deciding to object." *Id.*

While the Spahrs do not cite a Tenth Circuit case in which a party was barred from requesting a new trial on these grounds, *Computer Systems* and its ruling was cited with approval in *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 962 (10th Cir. 1993). It is therefore [\*23] probable that the Tenth Circuit would approve of the court following *Computer Systems* in this case. Accordingly, the court agrees with the Spahrs that Ferber Resorts' failure to object alone justifies the denial of this motion to the extent it is based on improper close. This is especially true in light of the fact that the one time Ferber Resorts did object, the objection was immediately sustained.

Second, even if Ferber Resorts' failure to make timely objections or a motion for a mistrial does not preclude this motion, the court alternatively finds that any claims of impropriety in the closing did not, in context and in the totality of the argument, unfairly prejudice Ferber Resorts. Ferber Resorts fails to meet the relevant standards for the motion to prevail. In the Tenth Circuit, vacating a jury award and ordering a new trial on the basis of an inappropriate closing argument is an extreme remedy only to be granted in unusual cases. This proposition is made clear in *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1124 (10th Cir. 2009), a case relied upon heavily by Ferber Resorts. In *Whittenburg*, the Tenth Circuit described itself as "reluctant" to order a new trial based on [\*24] an improper closing argument. This reluctance would be unremarkable except for the fact that the *Whittenburg* court analyzed a closing argument that was blatantly improper in its entirety, since it compromised mostly of "fictitious admissions," and "vituperative and unprovoked attacks on defendants and their counsel" made with unusual "volume and volubility," that the impropriety continued "unrebuked despite contemporaneous objections" and that the impropriety had an "apparent influence" on the jury's verdict. *Id.* The *Whittenburg* court emphasized that it was only a "confluence of these three factors-the extensiveness of the improper remarks, the absence of

any meaningful curative action, and the size of the verdict" that compelled the new trial in that case. *Id.* at 1133.

Put another way in another Tenth Circuit case, "even though an argument may be improper, a judgment will not be disturbed unless it clearly appears that the challenged remarks influenced the verdict." *Lambert v. Midwest City Mem. Hosp. Auth.*, 671 F.2d 372, 375 (10th Cir. 1982) (citations omitted). Further, "[i]n applying this standard, we have consistently afforded trial counsel considerable leeway." *Id.* On the other [\*25] hand, when "extraneous matter" is included in closing, the court must decide whether they had a "reasonable probability of influencing the jury." *Id.* (citation omitted).

The Spahrs' closing arguments in a few instances crossed the sometimes fuzzy line between proper and improper. On occasion counsel spoke in terms that could have been understood by the jury to be his personal beliefs as to how the evidence should be viewed. But as a whole, the court is confident that the closing fell considerably and decisively short of the level of impropriety that would merit a new trial. Ferber Resorts' arguments otherwise, discussed below, are not persuasive.

First, Ferber Resorts contends that the Spahrs made at least seventeen arguments based on matters not in the record. Before addressing any of these points specifically, it must be pointed out that the court gives weight to the fact that in this case, the jury was instructed that attorney argument is not evidence on two occasions: once before the opening statements and once before the closing arguments. The Tenth Circuit has emphasized that such instructions can mitigate the effects of references to matters not in evidence. See *Whittenburg*, 561 F.3d at 1131 [\*26] ("[W]e have sometimes suggested that a general instruction at the close of trial, reminding the jury that counsels' arguments are not evidence, can help mitigate an improper closing argument.") (citation omitted). Moreover, in the instructions given before closing arguments, the jury was told in Instruction 11 that "If any reference by the court or by the attorneys to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations." Even further, the court provided each juror with a written copy of the jury instructions, including the instructions making clear that attorney argument is not evidence and that the jurors'

recollection controls. The jurors were allowed to follow along on the written instructions while the court read them and to take their individual copies into the jury room. The court is thus satisfied that the jurors were well informed that they should ignore any allegations or argument that were not supported by the record and assumes that the jury understood that charge.

Turning to the substance of the arguments, the court agrees with the Spahrs that many of the arguments that Ferber Resorts asserts [\*27] are unsupported by the record were in fact "comments to evidence in the record and reasonable inferences from that evidence." *Id.* at 1125 (citations omitted). For example, the court agrees, after looking at pictures of the ditch as it existed at the time of the accident, the jury could reasonably infer that a child could have fallen into it. Making this argument did not require evidence that a child had actually done so. As another example, Ferber Resorts emphasized at various points in its examination and evidence presented during the trial the fact that Mr. Spahr had beer in his cooler at the time of the accident. It was also Ferber Resorts that elicited testimony from the officer who initially responded to the scene of the accident that the officer thought that Mr. Spahr must have been drunk to have fallen into such an obvious hazard. The Spahrs' attorney was thus justified in arguing that Ferber Resorts was trying to portray Mr. Spahr as a "stumbling drunk," even if Ferber Resorts' attorney subjectively believes otherwise. Moreover, as to the several examples of the Spahrs' attorney arguing that Mr. Spahr would have lifelong pain, there was evidence that allowed the jury to infer [\*28] that he would have such pain.

Ferber Resorts also points to a few instances when the Spahrs' attorney argued that Ferber Resorts had viable alternatives to leaving the ditch and its surroundings in the condition they were in at the time of the accident and that blaming guests appeared to be a cheaper idea for Ferber Resorts. Ferber Resorts argues that the Spahrs should not have made such an argument because Ferber Resorts did not argue that it had no feasible alternatives. But Ferber Resorts cites no case law for the proposition that the defense must first raise an issue before the plaintiff can argue that was a reason for the defendant's action. Further, it is quite clear from the closing that it was the Spahrs attorney's theory only that Ferber Resorts believed blaming guests to be cheaper than fixing problems. As such, this contention was not portrayed as a fictitious admission by Ferber Resorts, as in the

*Whittenburg* case, but rather as an opinion of the Spahrs' attorney. The expression of that personal opinion was not in good form, but it was a minor point in the overall argument and was not emphasized to the point that it should be concluded it improperly influenced the jury.

To [\*29] the extent that the Spahrs' attorney did a few times refer to matters that were not arguably supported by the record, the court finds that they were "minor aberrations" unlikely to have prejudiced the jury. *Id.* at 1128. For example, the Spahrs' attorney's references to the employer/employee relationship were obviously an analogy intended to explain the concept of compensatory damages. Those references were thus not likely to have confused the jury or to have made the jury believe that Ferber Resorts employed Mr. Spahr.

For all these reasons, the court finds that the arguments made in closing argument that Ferber Resorts characterized as references to matters not on the record were unlikely to have improperly influenced the jury.

The next category of purportedly improper arguments are what Ferber Resorts characterizes as personal opinions of counsel, of which Ferber Resorts cites eight. First, the court acknowledges that some of the instances where Spahrs' counsel used the phrases "I think" and "it seems to me" were not in good form and counsel would be better advised to be more careful in his use of language. Nevertheless, in the context of the closing as a whole, it was clear that counsel [\*30] was speaking in a colloquial sense and was not attempting to offer a personal assessment. Moreover, the court is baffled by Ferber Resorts' apparent contention that it is improper for counsel to make arguments about witness' credibility. That is exactly a purpose of closing. Calling his clients decent and honest, saying his expert is honest, and asserting that an opposing witness' testimony is not worth a hill of beans are precisely what the Spahrs' counsel was expected to do at closing. In zealously representing his clients, counsel could properly make those arguments. What would have been improper is for the Spahrs' counsel to purposely give the impression that he had formed a personal opinion based on information known to him but outside of the record. *See, e.g., Whittenburg*, 561 F.3d at 1130. But at no point during the closing did the court believe that counsel acted so outside of the leeway properly allowed to him to require a conclusion that he was trying to press his personal opinion on the jurors instead of his passionate arguments

on the case, nor is there any reason to believe that the jurors so understood the arguments.

The third category of improper argument that Ferber [\*31] Resorts identifies is allegations of intentional malevolence by Ferber Resorts. As Ferber Resorts points out, a suggestion by plaintiff's counsel that the defendant "acted with a degree of calculated intentional malevolence" is one that "has no foundation in [a] trial on negligence." *Id. at 1129*. In reviewing the nine instances of such conduct specified by Ferber Resorts, the thrust of most of the arguments is that Ferber Resorts is trying to escape responsibility for the safety of guests and the injury to Mr. Spahr.<sup>8</sup> The court accepts that these arguments may have implied some level of malevolence by Ferber Resorts, which was improper in this negligence trial. But the prejudice that might have been caused by this line of argument did not rise to the level at which the court needs to start seriously considering a new trial. For example, in *Whittenburg*, not only did the plaintiff invent an admission by the defendant that the defendant was going to act recklessly and then relentlessly and cruelly attack the plaintiff to try to get out of it, but the jury was asked to put itself in the plaintiff's children's shoes in considering this admission. *See id.*<sup>9</sup>

8 There are also instances of appearing [\*32] to disparage Ferber Resorts for defending this action, which are addressed below.

9 Moreover, the court observes that during Ferber Resorts' closing, its counsel did not always treat the Spahrs with a gentle touch either. For example, as the court recalls (though without referring to the transcript), Ferber Resorts' counsel argued that Mr. Spahr's decisions on the morning of the injury were alternatively idiotic, stupid and boneheaded. And none of these adjectives are needed to show simple negligence, which is simply failing to use reasonable care. Accordingly, Ferber Resorts's closing was not without some level of impropriety that was fair game for the Spahrs to "cancel out." *Id. at 1130*.

The final type of argument Ferber Resorts identifies is the Spahrs' counsel appearing to disparage Ferber Resorts for defending this action, suggesting that Ferber Resorts' actions in defending the litigation are appropriately considered in the liability and damages analysis, and making other similar references to Ferber Resorts' actions in defending this action. This ground is

Ferber Resorts' strongest, and is "especially concerning" to courts considering this type of motion. *See id. at 1129*. A defendant [\*33] has a right to deny the plaintiff's allegations and to vigorously defend against the claims. Plaintiff's counsel cannot properly argue to the jury that a defendant acted improperly or that the jury should punish a defendant for doing so. But for the reasons discussed below, the court is convinced that to the extent the Spahrs' counsel engaged in these types of improper arguments, the level of impropriety was not significant enough to vacate the award here.

First and most importantly, the court sustained Ferber Resorts' objection to the Spahrs' line of argument near the end of their closing that Ferber Resorts' actions in defending this suit harmed the Spahrs. These arguments were the most flagrantly improper and potentially influential ones that the Spahrs made. When Ferber Resorts' counsel objected to them, he gave as grounds that "this is going into conflated litigation difficulty with any sort of damages that are recoverable under tort law." (Trial Transcript, Dkt. No. 92-2 at Pages 30-31 of 36). The court sustained this objection, without any hesitation, without allowing argument by the Spahrs' counsel, and without qualifying counsel's description of the impropriety. Ferber Resorts [\*34] did not request any corrective instruction. After the objection was sustained, the Spahrs' counsel again argued that a verdict in the Spahr's favor would restore their good name. But Ferber Resorts failed to object or request any curative instruction to clarify what was wrong with the argument, nor did it move for a mistrial.

If this particular line of argument had played out differently, Ferber Resorts might have a stronger case for a new trial. But unlike in *Whittenburg*, the court intervened to decisively stop improper argument immediately in response to Ferber Resorts' sole contemporaneous objection. Ferber Resorts sought no remedy to the potential prejudice beyond the granting of its objection, and the grounds stated for the sustained objection made clear that litigation difficulties are separate from tort damages. While the Spahrs' counsel again made reference to restoring the Spahrs' good name by granting judgment in their favor, the jury was put on notice by the objection that damage to one's reputation is not properly considered in deliberating on a negligence case.

The other arguments of this type identified by Ferber

Resorts were improper, but were not significant enough for [\*35] the court to believe they had a likely influence on the jury. For example, when the Spahrs' counsel stated that he was irritated because it seemed that Ferber Resorts was exceeding the bounds of propriety, it was clear in the context of the trial that he was referring to his own agitated behavior on cross examining a defense witness. The suggestion that Ferber Resorts was behaving improperly was obviously attorney argument that the jury was instructed not to treat as fact. The Spahrs counsel's references to the number and costs of Ferber Resorts' experts were made in passing and may well have been evidence the jury was allowed to consider in considering what weight to give to their opinions. These references were therefore unlikely to have the effect of suggesting Ferber Resorts' wealth or reprehensibility in defending the action. *Id. at 1129-31*. The court has reviewed the other instances identified by Ferber Resorts and is

satisfied that they were unlikely to have influenced the jury.

#### **CONCLUSION AND ORDER**

For all of these reasons, Ferber Resorts' motion for judgment as a matter of law and for remittitur or a new trial is DENIED.

SO ORDERED this 4th day of February, 2010.

BY THE COURT:

/s/ [\*36] Clark Waddoups

Clark Waddoups

United States District Judge



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