

2009

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Roger P. Christensen; Karra J. Porter; Attorneys for Appellants.

Kristin A. VanOrman; Jeremy G. Knight; Attorneys for Appellee.

---

## Recommended Citation

Brief of Appellant, *Boyle v. Christensen*, No. 20090822.00 (Utah Supreme Court, 2009).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/2985](https://digitalcommons.law.byu.edu/byu_sc2/2985)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH SUPREME COURT

JOHN BOYLE and NORRINE BOYLE,

Plaintiffs / Appellants,

vs.

KERRY CHRISTENSEN,

Defendant / Appellee.

20090822-SC

Case No. 20080582

HON. TYRONE E. MEDLEY  
THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

**BRIEF OF APPELLANTS ON *CERTIORARI***

Roger P. Christensen, 0648  
Karra J. Porter, 5223  
CHRISTENSEN & JENSEN, P.C.  
15 W. South Temple, Suite 800  
Salt Lake City, Utah 84101  
Attorneys for Plaintiffs/Appellants

Kristin A. VanOrman  
Jeremy G. Knight  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180  
Attorneys for Defendant/Appellee

FILED  
UTAH APPELLATE COURTS

FEB 12 2010

IN THE UTAH SUPREME COURT

JOHN BOYLE and NORRINE BOYLE,

Plaintiffs / Appellants,

vs.

KERRY CHRISTENSEN,

Defendant / Appellee.

Case No. 20080582

HON. TYRONE E. MEDLEY  
THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

BRIEF OF APPELLANTS ON *CERTIORARI*

Roger P. Christensen, 0648  
Karra J. Porter, 5223  
CHRISTENSEN & JENSEN, P.C.  
15 W. South Temple, Suite 800  
Salt Lake City, Utah 84101  
Attorneys for Plaintiffs/Appellants

Kristin A. VanOrman  
Jeremy G. Knight  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180  
Attorneys for Defendant/Appellee

## TABLE OF CONTENTS

JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW .....	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
FACTS.....	6
SUMMARY OF ARGUMENT .....	10
ARGUMENT .....	11
I.    THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT AS TO THE VOIR DIRE QUESTIONS SUBMITTED TO THE JURY .....	11
A.    A party is entitled to ask jurors their views on tort-reform issues, and the denial of such an opportunity is inherently prejudicial.....	12
B.    The Court of Appeals’ ruling that Mr. Boyle failed to preserve his request for tort reform voir dire by not objecting after the trial court’s ruling conflicts with U.R.Civ.P. 46 and with other rulings of the court of appeals, and places trial counsel in an untenable position.....	17
II.    THE COURT OF APPEALS’ DECISION ALLOWING UTAH LAWYERS TO REFER TO THE NOTORIOUS “MCDONALD’S COFFEE” CASE IS CONTRARY TO THIS COURT’S PRECEDENT, GROSSLY PREJUDICIAL TO MR. BOYLE AND OTHER PLAINTIFFS, AND CREATES A SITUATION IN WHICH CLOSING ARGUMENTS WILL DIGRESS INTO A DEBATE ABOUT THE TRUE FACTS IN THAT CASE .....	21
III.   THE COURT OF APPEALS’ RULING ON MRS. BOYLE’S LOSS OF CONSORTIUM CLAIM ARTIFICIALLY NARROWS THE SCOPE OF THE STATUTE, AND ELIMINATES LOSS OF CONSORTIUM CLAIMS IN A WIDE RANGE OF CASES .....	25

CONCLUSION .....	29
------------------	----

## ADDENDUM

Exhibit 1 – Court of Appeals Opinion

Exhibit 2 – Minutes 05/19/2008 and Order Dismissing Norrine Boyle’s Claim

Exhibit 3 – Plaintiff’s Proposed Jury Questionnaire

Exhibit 4 – Judge’s Voir Dire Questions

Exhibit 5 – Order and Memorandum Decision in *E. James Spahr and Colleen Spahr v. Ferber Resorts, LLC*, 2:08-cv-0072, D. Utah, February 4, 2010 (J. Waddoups).

## TABLE OF AUTHORITIES

### CASES

<i>Alcazar v. University of Utah Hospitals, et al.</i> , 2008 UT App 222, 188 P.3d 490.....	1, 13, 14, 16, 20
<i>Barrett v. Peterson</i> , 868 P.2d 96 (Utah Ct. App. 1993).....	1, 13, 14, 15, 20
<i>Bee v. Anheuser-Busch, Inc.</i> , 2009 UT App 35, 204 P.3d 204.....	13, 15, 16, 19, 20
<i>Bluffdale Mountain Homes, LC v. Bluffdale City</i> , 2007 UT 57, 167 P.3d 1016.....	26
<i>Evans v. Doty</i> , 824 P.2d 460 (Utah App. 1991).....	13, 14, 20
<i>Gary Porter Construction v. Fox Construction</i> , , 2004 UT App 354, 101 P.3d 371.....	2
<i>Lamb v. B &amp; B Amusements Corp.</i> , 869 P.2d 926 (Utah 1993).....	19
<i>Liebeck v. McDonald's, et al.</i> , D-202-CV-9302419 (N.M. – Albuquerque District 1994).....	21, 22, 23, 24
<i>MacFarlane v. State Tax Comm'n</i> , 2006 UT 25, 134 P.3d 1116.....	2
<i>Peterson v. Kennard</i> , 2008 UT 90, 201 P.3d 956.....	1, 2
<i>Smith v. Vicorp, Inc.</i> , 107 F.3d 816 (10th Cir. 1997).....	13
<i>Spahr v. Ferber Resorts, LLC</i> , D.Utah, 2:08-cv-72 (February 4, 2010).....	27
<i>State v. Alonzo</i> , 932 P.2d 606 (Utah Ct. App. 1997) .....	2
<i>State v. Alonzo</i> , 973 P.2d 975 (Utah 1998) .....	2, 23
<i>State v. Eldredge</i> , 773 P.2d 29 (Utah 1989).....	20
<i>State v. GAF Corp.</i> , 760 P.2d 310 (Utah 1988) .....	27
<i>Stoddard v. Smith</i> , 27 P.3d 546 (Utah 2001) .....	1

### STATUTES

Utah Code Ann. § 30-2-11 .....	passim
Utah Code Ann. § 78A-3-102 .....	1

### RULES

Utah R.Civ. P. 46 .....	10, 18, 20
Utah R. Civ. P. 56(c).....	2
Utah Rules of Appellate Procedure 24(a)(5)(B) .....	20

### OTHER AUTHORITIES

“Java Jive: Genealogy of a Juridical Icon,” 56 <i>U. Miami L. Rev.</i> 113, 114 (2001).....	22
---	----

## JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-3-102(3)(a).

## ISSUES PRESENTED FOR REVIEW

The Court granted certiorari on the following issues:

**ISSUE NO. 1:** Whether the Court of Appeals erred in affirming the district court as to the voir dire questions submitted to the jury.

**Preservation:** At the Court of Appeals, this issue was addressed in appellees' Brief of Appellant, pp. 11-16, and Reply Brief of Appellant, pp. 1-9. In the trial court, the issue was addressed in plaintiffs' proposed Request for Submission of a Jury Questionnaire and for Reasonable Follow Up Voir Dire. (R. 596-600; Exhibit 2.)<sup>1</sup>. However, the Court of Appeals held that submission of the requested voir dire was not sufficient to preserve the issue for appeal. *See* Point I, *infra*.

**Standard of Review:** On a writ of certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Peterson v Kennard*, 2008 UT 90, ¶ 8, 201 P.3d 956. Interpretation of a Rule of Civil Procedure is a question of law. *Stoddard v Smith*, 27 P.3d 546, 548 (Utah 2001). A trial court's management of jury voir dire is reviewed for abuse of discretion. *Alcazar v University of Utah Hospitals, et al*, 2008 UT App 222 ¶9, 188 P.3d 490, 493; *Barrett v Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993).

---

<sup>1</sup> Plaintiff's Proposed Request for Submission of a Jury Questionnaire and for Reasonable Follow up Voir Dire are attached hereto as Add.Exh. 3. Perhaps because it was submitted as an attachment to correspondence, the document was not docketed at the time of its initial filing. However, defendant acknowledged receiving it (R. 436), and it was incorporated in part by the trial court (R. 536 # 1, 2, 9, 11, 14 and R. 599-600, # 5-9). To clear up the record, the plaintiffs subsequently resubmitted another copy of the document without objection. (R. 599-600)

**ISSUE NO. 2:** Whether the Court of Appeals erred in affirming the district court’s overruling of Petitioners’ objection to references to another case in closing argument.

**Standard of Review:** On a writ of certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Peterson v. Kennard*, 2008 UT 90, ¶ 8, 201 P.3d 956. The trial court’s decision to allow defense counsel to refer to the McDonald’s coffee case in closing argument is reviewed for abuse of discretion *State v. Alonzo*, 932 P.2d 606, 615 (Utah App. 1997), and *State v. Alonzo*, 973 P.2d 975, 981 (Utah 1998).

**Preservation:** In the Court of Appeals, the issue was raised in the Brief of Appellants, pp. 16-19, and the Reply Brief of Appellant, pp. 9-12. At trial, Plaintiff objected on the record at the time of the prejudicial statement. (R. 695, p. 48:17-23.)

**ISSUE NO. 3:** Whether the Court of Appeals erred in its construction and application of Utah Code Ann. § 30-2-11(1)(a)(iii).

**Standard of Review:** On a writ of certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Peterson v. Kennard*, 2008 UT 90, ¶ 8, 201 P.3d 956. Statutory interpretation is a matter of law that is reviewed for correctness. *MacFarlane v. State Tax Comm’n*, 2006 UT 25, ¶ 9, 134 P.3d 1116. As the defendant’s “motion in limine” was, in actuality, a motion for summary judgment on Mrs. Boyle’s claims, dismissal could be granted (and affirmed) only if there was “no genuine issue as to any material fact and . . . the moving party [was] entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c). All facts and reasonable inferences must be drawn in the light most favorable to the nonmoving party. *Gary Porter Construction v. Fox Construction*, 2004 UT App 354 ¶ 10, 101 P.3d 371.



**Preservation:** These issues were raised in the Court of Appeals in the Brief of Appellants, pp. 19-22, and Reply Brief of Appellants, pp. 12-15. In the trial court, the issues were raised in Plaintiffs' Memorandum in Opposition to Defendant's Motion in Limine to Dismiss Plaintiff Norrine Boyle. (R. 326-355.)

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES, ORDINANCES, AND RULES**

Utah Code Ann. § 30-2-11: Action for consortium due to personal injury.

- (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 78B-5-817 through 78B-5-823, 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 78B-3-410.
- (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 63G, Chapter 7, Governmental Immunity Act of Utah.

Utah Rules of Civil Procedure – Rule 46. Exceptions unnecessary.

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.

## **STATEMENT OF THE CASE**

*Nature of the case, course of proceedings, and disposition below*

Plaintiff John Boyle filed a negligence action against Defendant Kerry Christensen on July 14, 2005, alleging that Mr. Christensen was responsible for an automobile / pedestrian accident on July 22, 2004 in which Mr. Boyle was injured. (R. 1-5.) Mr. Boyle's spouse, Norrine Boyle, was subsequently added as a plaintiff, alleging loss of consortium. (R. 105.)

On January 8, 2008, Defendant Christensen filed a Motion in Limine requesting dismissal of Norrine Boyle's Loss of Consortium claim, arguing that Mrs. Boyle's claim

lacked the necessary evidentiary support to meet the statutory requirements of Utah Code Ann. § 30-2-11. (R. 240-316.) The trial court granted the motion by order dated May 28, 2008. (R. 528, 532-534 (collectively attached hereto as Add.Exh. 2).)

The defendant stipulated to liability (R. 693, p. 6:20-21), and John Boyle's claims for damages were tried to a jury from June 3-6, 2008. Prior to trial, both parties provided proposed Jury Questionnaires to the trial court. (R. 436-40 (defendant's); 596-600 (plaintiff's, attached hereto as Add.Exh. 3.) The court took the two sets of proposed questions, to which neither party objected, and culled and combined them into one document. The court then conducted oral voir dire using the document it had created. The court declined to ask any of Mr. Boyle's questions designed to reveal possible juror biases regarding tort reform, nor was Mr. Boyle afforded an opportunity to question the jurors on the tort reform issues. (R. 693, pp. 25-98.)

Later, during closing argument, Defendant Christensen's counsel, arguing that Mr. Boyle's compensatory damage analysis would result in an excessive verdict, stated "That's how we get verdicts like in the McDonald's case with a cup of coffee." (R. 695, p. 48:17-22.) The trial court overruled Mr. Boyle's objection that the comment was not supported by the evidence and was prejudicial. (*Id.*, pp. 48:23-49:5.)

Despite significant injuries, including a back surgery, the jury returned a verdict of only \$62,500, including medical expenses, which included only \$27,800 in non-economic damages. The trial court entered the Final Verdict on the Judgment June 20, 2008. (R. 669-673.) Plaintiffs timely appealed. (R. 674-675.) The Court of Appeals affirmed (*see*

Add.Exh. 1), and the Boyles filed a petition for writ of certiorari, which this Court granted.

## FACTS

### *The accident and injury / Mrs. Boyle's loss-of-consortium claim*

On July 22, 2004, Plaintiff John Boyle was struck by a pick-up truck while he was in a crosswalk in front of a Smith's grocery store. As noted above, defendant admitted liability for the accident. (Opinion, ¶ 5; R. 241.)

The accident caused a severe disc herniation and other injuries that eventually necessitated surgery. (R. 339-40.) Although the surgery provided some relief, it proved to be largely unsuccessful. As a result, Mr. Boyle has been left with permanent chronic pain. Since the accident, Mr. Boyle has not been able to sleep in a bed and is only able to get limited sleep in a recliner. His lack of sleep causes problems with everything that he does. It has not precluded him from working at a sedentary job, but even at that kind of work, it has interfered with his productiveness and precluded him from working full eight hour days. He is not able to perform employment with any significant physical demands and can no longer even carry small baskets of golf balls. Prior to the accident, Mr. Boyle was an accomplished golfer, and, at one point in his adult life, worked as the golf pro at a golf course. Now, according to Mr. Boyle, his chronic pain and lack of sleep "permeates everything that I do." (R. 261-62.)

Based upon the foregoing, Mr. Boyle's wife of many years, Norrine, asserted a claim for loss of consortium. The parties did not dispute that, under Utah Code Ann. § 30-2-11(2), the spouse of a person must show that the person was "injured" by a third

party in order to assert a loss-of-consortium claim. See Utah Code Ann. § 30-2-11(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.”).

“Injury” or “injured,” in turn, is defined as “a significant permanent injury to a person that substantially changes that person’s lifestyle and includes . . . (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)(iii). Mrs. Boyle argued that the evidence presented was sufficient to satisfy this method of showing an injury, but the trial court disagreed, and dismissed her claim prior to trial. (R. 532-34.) On appeal, the parties’ disagreement centered on the meaning of the statutory term “incapability.” See pp. 25-28, *infra*.

*Requested voir dire on tort reform issues*

After the dismissal of Mrs. Boyle’s consortium claim, Mr. Boyle’s claims proceeded to trial. Consistent with the court’s Case Management Order, Plaintiff submitted a written list of requested voir dire questions for potential jurors. (R. 596-600.) Because a substantial part of John Boyle’s claims were for general damages for chronic pain, Mr. Boyle sought insight into the jurors’ attitudes regarding general damages and awards for pain and suffering:

Four of the questions were intended to solicit jurors’ views on issues generally known as tort reform issues:

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?

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      ☐ yes ☐ no

b. Mental anguish            ☐ yes ☐ no

c. The impact on a wife of partially disabling injuries to her husband?

d. Future medical bills      ☐ yes ☐ no

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: ☐ yes ☐ no If YES, what do you believe these limitations should be?

(R. 599; see Add.Exh. 3.); see Opinion, ¶ 4 (“Mr. Boyle submitted a proposed jury questionnaire that included specific questions intended to elicit jurors’ views regarding damages and tort reform”). The defendant indicated that he did not “object to the questionnaire submitted by plaintiffs. .” (R. 436.)

Unlike most district court judges, it is undisputed that the trial court in this case did not provide counsel with any advance notice of its intentions regarding voir dire until it had already ruled on the parties’ proposed questions by conducting the voir dire. The court did not, for example, provide a copy of its final list of voir dire questions for counsel’s review before questioning the jury pool. Nor did the court ask counsel afterward if they wanted any other questions asked of the pool, or solicit exceptions.

On appeal, defendant Christensen argued, and the Court of Appeals agreed, that plaintiff had failed to preserve his request for tort reform-related voir dire by not objecting *after* the trial court had conducted its voir dire. Opinion, ¶¶ 12, 14. Appellant

Boyle argued that, under U.R.Civ.P. 46, a party is not required to object once a court has already ruled. The Court of Appeals did not address this argument or Rule 46.

*Defense counsel's reference to the "McDonald's" case*

At trial, the defense strategy centered on casting Mr. Boyle in a negative light for requesting a substantial amount of money for his injuries. This theme was carried too far in closing arguments where defense counsel compared Mr. Boyle's claim for damages to those made in an unrelated 1994 New Mexico case often referred to as the "McDonald's coffee case":

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

(R. 695, p. 48:17-22)

Mr. Boyle's counsel objected on the grounds that the statement addressed a matter not in evidence and was prejudicial, but the objection was overruled. (R. 695, pp. 48:17-49:5) The jury returned a very low verdict of only \$62,500, of which only \$27,800 was awarded for general damages.

A majority of the Court of Appeals held that, not only was it not an abuse of discretion to allow defense counsel to reference the "coffee case," but that such a reference is in fact proper. Opinion, ¶ 18. Concurring in the result, Judge McHugh would have held that reference to the McDonald's case was improper, but that there was no prejudice to the plaintiff. Opinion, ¶¶ 26-31.

## SUMMARY OF ARGUMENT

A party's right to question prospective jurors regarding their views on tort reform issues has been recognized in Utah for nearly two decades. (Hence the fact that the defendant did not object to Mr. Boyle's proposed questions in this case.) As the Court of Appeals has repeatedly stated, without this type of information, a party's ability to intelligently exercise his peremptory challenges is materially impeded. Consequently, the trial court's refusal to ask any of Mr. Boyle's tort reform questions – while simultaneously asking injury-specific questions that aided the defendant in his peremptory challenges – was both contrary to Utah law and inherently prejudicial, particularly where the amount of damages was the only issue at trial.

The Court of Appeals' ruling that Mr. Boyle did not preserve this issue for appeal because he did not object after the trial court ruled on his request is in direct conflict with U.R.Civ.P. 46, which expressly states that exceptions to adverse rulings need not be taken. In the relatively rare instance when a trial court fails to advise the parties of its decision regarding voir dire before conducting the voir dire, and does not elicit input before moving on to for-cause challenges, the issue has been preserved in the only way that is practicable and required under Rule 46, *i.e.*, timely submission of the proposed questions. Moreover, in the absence of authority putting Mr. Boyle on notice that submission of the questions was insufficient preservation, the Court of Appeals should have considered the trial court's omission under a plain error analysis.

Mr. Boyle was further prejudiced in closing arguments when the defendant's counsel compared Mr. Boyle's claim for damages to an unrelated, nationally notorious tort reform



case, the “McDonald’s coffee case.” Defendant’s mention of this case – an increasingly common defense tactic in Utah – was patently intended to inflame jurors’ prejudices regarding perceived excessive damage awards in personal injury cases, which was highly prejudicial to the plaintiff in this “damages only” lawsuit.

Finally, the trial court erred in dismissing plaintiff Norrine Boyle’s consortium claim prior to trial. The Boyles’ record citations, and reasonable inferences therefrom, raised a question of fact as to whether Mr. Boyle was materially limited in his ability to perform the same type of jobs as before the accident, which is a sufficient method of proving an “injury” for purposes of the loss-of-consortium statute. The Court of Appeals’ much narrower reading of the statute is an overly restrictive interpretation.

## **ARGUMENT**

### **I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT AS TO THE VOIR DIRE QUESTIONS SUBMITTED TO THE JURY.**

Pursuant to the Scheduling Order in place, Mr. Boyle provided the trial court with a proposed Request for Submission of a Jury Questionnaire and for Reasonable Follow Up Voir Dire which included his short, two-page, questionnaire. (R. 599-600.) Four of the questions were intended to solicit jurors’ views on issues generally referred to as tort reform issues. *Id.*

Although the defendant did not object to the questions, the trial court nonetheless did not ask any of the plaintiff’s “What are your views...” questions designed to elicit information for peremptory challenges. *See* Opinion, ¶¶ 10, 11. Instead, it limited its voir dire to “Are you biased?” questions that are designed to enable for-cause challenges.

*Id.*; see pp. 13-15, *infra* (cases recognizing that the latter type of questions are of little or no use in exercising peremptory challenges).

The only questions that were arguably designed to elicit responses regarding biases were the trial court's questions 13, 14 and 15:

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 fair, impartial, neutral, judge of the facts and follow the law as given to you by the Court?

(R. 536; see Add.Exh. 4.)

Not surprisingly, prospective jurors who were asked these general questions answered “No, No, and Yes,” without elaboration. (R. 693, pgs. 33, 39, 41, 47, 51, 55-56, 61, 62, 64, 65, 70, 73, 79, 82, 84, and 89). The questions were neither designed to, nor did they, elicit any information about the individuals' views regarding personal injury lawsuits or tort reform.

**A. A party is entitled to ask jurors their views on tort-reform issues, and the denial of such an opportunity is inherently prejudicial.**

Over the past two decades, the Court of Appeals has consistently held that parties are entitled to seek information from prospective jurors regarding their views on tort reform-related issues. See *Bee v. Anheuser-Busch, Inc.*, 2009 UT App 35, ¶16, 204 P.3d

204; *Alcazar v. U of U Hospitals*, 2008 UT App 222, ¶¶ 5, 19, 188 P.3d 490 (noting “rather direct authority” and “prior, clear precedents” establishing plaintiffs’ entitlement to *voir dire* questions regarding tort reform), citing *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991) and *Barrett v. Peterson*, 868 P.2d 96 (Utah App. 1993). *See also*, *Smith v. Vicorp, Inc.*, 107 F.3d 816, 817 (10<sup>th</sup> Cir. 1997) (citing *Barrett* for the proposition that “state trial courts in Utah are required to afford plaintiffs the opportunity to poll potential jurors for possible tort reform bias.”)

In *Alcazar*, the trial court declined to ask questions the plaintiffs requested in order to elicit jurors’ potential biases regarding medical malpractice claims and tort reform. Instead, as in this case, the court decided to ask more general questions. *Id.*, ¶¶ 5-7. The jury returned a verdict finding the defendant not negligent.

On appeal, the *Alcazar* court explained why the trial court’s *voir dire* procedure was both erroneous and prejudicial. First, the court discussed its holding in *Evans*, in which the trial court had asked a line of general questions regarding fairness and impartiality that “was only effective in identifying proper for-cause challenges.” Such narrow questioning was insufficient, this Court held:

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, totally aside from whether the prospective jurors would themselves admit such exposure had changed their attitudes or biased them. Essentially, we concluded that the trial judge’s line of questions ignored the plaintiff’s need to gather information to assist in exercising her peremptory challenges.

*Alcazar*, 2008 UT App 222, ¶12 (emphasis in original; citations omitted).

In *Barrett*, the *Alcazar* court pointed out, it had again reversed a trial court's refusal to ask about exposure to tort reform information, which had deprived the plaintiff of "information necessary both to detect actual bias and to intelligently exercise his peremptory challenges." *Id.*, ¶ 13, quoting *Barrett*, 868 P.2d at 102 n.7. In both *Evans* and *Barrett*, the *Alcazar* court noted, the plaintiffs had not been given an opportunity to "determine which, if any, prospective jurors had been exposed to tort reform propaganda, much less whether that exposure produced hidden or subconscious biases affecting the jurors' ability to render a fair and impartial verdict." *Id.* at ¶14.

*Alcazar* then observed that, under *Evans* and *Barrett*, "our inquiry does not end once we have established that the trial court abused its discretion in failing to ask any meaningful tort reform . . . questions during voir dire." *Id.* at ¶15. Once the determination has been made that a party was substantially impaired in its right to exercise peremptory challenges, "[w]e will reverse if, considering the totality of the questioning, counsel was not afforded an adequate opportunity to gain the information necessary to evaluate the jurors. *Id.* at ¶15 (internal citations to quotes omitted).

In *Alcazar*, the only question the trial court asked specifically regarding tort reform was: "Have any of you or a close friend or relative personally formed an opinion either in favor or opposed to tort reform or been a member of any organization that has?" *Id.* at ¶18. As in this case, most of the other questions were designed to uncover general biases and prejudice. However, the trial court "allowed the potential jurors to be questioned as to both their experience with doctors and hospitals and any negative aspects of this experience." *Id.* Based on these facts, the *Alcazar* court concluded that

the “trial court simply left Plaintiffs’ counsel without the necessary information needed to ferret out a potential juror’s actual bias or to intelligently exercise peremptory challenges, thus prejudicing Plaintiffs.” *Id.* The Court reversed and remanded for a new trial due to the restrictive *voir dire*. *Id.* at ¶¶ 18-19.

The longstanding entitlement to tort reform questions is so clear, in fact, that the Court of Appeals’ entire discussion of the issue in *Bee* consisted of a quotation from *Barrett*, concisely articulating why questioning prospective jurors about their views on tort reform issues is necessary for a fair trial, and why it is inherently prejudicial not to do so:

“[I]n tort cases we cannot ignore the reality that potential jurors may have developed tort-reform biases as a result of an overall exposure to such propaganda.” “Reason suggests that exposure to tort-reform propaganda may foster a subconscious bias within certain prospective jurors.” This is precisely the type of bias that counsel must be allowed to uncover if an impartial jury is to be impaneled.

\* \* \*

In this case, none of the questions asked by the trial court even remotely addressed whether the prospective jurors had heard or read anything relating to tort-reform issues. Nor did the trial court attempt to address in a more general fashion the issues of tort-reform propaganda in its *voir dire* questioning. The court asked only broad questions concerning the prospective jurors’ self-assessed ability to be fair and impartial. As a result of this limited line of questioning, appellant was unable to determine which, if any, prospective jurors had been exposed to tort reform propaganda, much less whether that exposure produced hidden or subconscious biases affecting their ability to render a fair and impartial verdict. Thus, under *Evans*, the trial court’s line of questioning ignored appellant’s need to garner information necessary both to detect actual bias and to intelligently exercise his peremptory challenges.

*Bee*, 2009 UT App 35, ¶16, 204 P.3d 204, 209 (emphasis in original; ellipses and citations omitted.)

In this case, Mr. Boyle's request was neither ambiguous nor onerous. Of the 15 questions proposed by him, only four were other than generic background inquiries, and those four all addressed the same issue: tort reform. This was not some arcane legal concept; this was an area in which the law has been "clear," and seemingly uncontroversial, for more than fifteen years. *Bee, supra*.

Nonetheless, just as in *Alcazar*, the trial court in this case rejected Mr. Boyle's specific tort-reform questions, and instead asked narrow, yes-or-no questions that did nothing more than elicit obvious answers. After declining to elicit information as to jurors' prejudices regarding lawsuits and tort reform, the court then allowed defense counsel to appeal to those very prejudices by specifically referring to an unrelated lawsuit that is the "poster child" of tort reform propaganda (*see infra*).

Compounding the prejudice, the trial court allowed *voir dire* questions that were beneficial to the defendant in exercising his peremptory strikes. At trial, the only issue was the amount of damages to be awarded from an automobile / pedestrian accident in which back injuries were alleged. The trial court asked specific questions regarding both automobile /pedestrian accidents and back injuries.<sup>2</sup>

For those who answered the defendant's questions in the affirmative, the trial court followed up with "who," "what," "where," "when," and "how" inquiries. (R. 693 at pp 30-33, 45-47.) With that information, the defendant was able to use two of his three

---

<sup>2</sup> "11. Have you, any close family member or close friend ever been involved in an automobile /pedestrian accident?" (R. 536) "12. Have you, any close family member or close friend ever sustained back injuries?" *Id*

peremptory strikes on a juror who had a close friend who was involved in an auto accident who suffered back and neck injuries (*id.* at 30, 31), and another juror who suffers from neck and back injuries from an automobile accident (*id.* at 45, 46). (The Jury List including the peremptory information is at R. 537.)

**B. The Court of Appeals' ruling that Mr. Boyle failed to preserve his request for tort reform voir dire by not objecting after the trial court's ruling conflicts with U.R.Civ.P. 46 and with other rulings of the Court of Appeals, and places trial counsel in an untenable position.**

That the trial court committed error in declining plaintiffs' request for tort reform questions seems unequivocal. The Court of Appeals did not order a reversal, however, because it concluded that Mr. Boyle waived the issue. This aspect of the Court of Appeals' ruling involves an important dilemma in which counsel are occasionally placed at trial. Before trial, courts typically require parties to submit their requested voir dire questionnaires. Upon review of the parties' proposed questions, the court then combines and/or rejects various questions, essentially ruling on the parties' requests by compiling the court's own list of questions.

Most district court judges provide a copy of the final list before conducting voir dire. That allows counsel to see which questions are being asked and which are being rejected or revised, and to argue for inclusion of questions before the court conducts its voir dire.

Unfortunately, that is not a universal practice. As noted above, counsel in this case submitted their proposed questionnaires as usual, but the trial judge gave no indications of his intentions regarding voir dire until he walked into court and began

questioning the jury pool. After concluding its list of questions, the court did not ask counsel if they wanted any other questions asked of the pool, or if counsel had any exceptions. *See, by comparison*, U.R.Civ.P. 51 (providing procedure for exceptions to jury instructions). Instead, the court proceeded immediately to challenges for cause. *See* R. 693 pp. 90-97.

The Court of Appeals held that Mr. Boyle waived his right to appeal this alleged error because “[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, and Mr. Boyle ultimately passed the jury for cause.” Opinion, ¶ 11.

Because it is undisputed that the parties had no notice of the court’s disposition *before* the voir dire, when the Court of Appeals says “at no time” did Mr. Boyle object to the court’s questions, it necessarily means that Mr. Boyle did not object *afterward*. But that ruling is directly contrary to this Court’s Rule of Civil Procedure 46, which the Court of Appeals did not address. U.R.Civ.P. 46 states:

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 therefore; 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.

(Emphasis added.)

There is no dispute that, “at the time the ruling [was] sought,” Mr. Boyle “ma[de] known to the court the action which he desire[d] the court to take,” *i.e.*, to ask prospective jurors about their views on tort reform. There is also no dispute that the court had



effectively ruled on the proposed voir dire when he proceeded to ask his own questions, and did not afford an opportunity for response, questions, exceptions, or feedback from counsel before moving on to challenges for cause.

Once a court has made a decision, an attorney has no obligation to – and may risk serious consequences if he does – repeat a request that has already been denied, explicitly or otherwise, by the court. The Court of Appeals erred by failing to recognize that Rule 46 eliminates any such requirement.

Neither the Court of Appeals nor Mr. Christensen cited any cases holding that a written request for voir dire was inadequate to preserve the issue under Rule 46 and the procedure followed by the trial court. In fact, the Court of Appeals' recent decision in *Bee* appears to be inconsistent. In that case, the plaintiff's counsel similarly requested voir dire regarding tort reform before trial, but the court did not ask the questions. "*Bee* asserts that he again raised the issue of the tort reform questions during a sidebar held off the record at the close of voir dire but that the trial court rejected his request to question the potential jurors on the issue," the Court noted. 2009 UT App. 35, ¶ 4.

As defendant Christensen pointed out to the lower court, under *Lamb v. B & B Amusements Corp.*, 869 P.2d 926, 931 (Utah 1993), an informal sidebar is insufficient to preserve an issue for appeal, because it is not on the record. Therefore, the only arguable preservation in *Bee* was the written request before trial, as was done in this case. The Court of Appeals panel in that case apparently found that to be sufficient, reversing the trial court.

Additionally, by penalizing Mr. Boyle for passing the jury “for cause,” the Court of Appeals is conflating the peremptory and for-cause phases of jury selection. As noted above, tort reform questions are pertinent to the exercise of peremptory challenges, not for-cause challenges. When a party has been denied such questions, and no juror has voluntarily provided an answer that would allow a for-cause challenge, passing the jury for cause to the extent they have been questioned is a party’s only option.

Under U.R.Civ.P. 46, Mr. Boyle preserved his request for voir dire on the subject of tort reform. However, even if some ambiguity existed on the issue, the trial court’s failure to conduct the requested voir dire would constitute plain error anyway. For plain error to exist, two elements must be met: The error must be “plain,” and it must be prejudicial. *Davis*, 905 P.2d 888, 892 (UT App. 1995)(abrogated on unrelated issue)(citing *State v. Eldredge*, 773 P.2d 29, 35 (Utah 1989)). The Court of Appeals has repeatedly stated that its precedent on this issue is “clear,” and that the failure to ask tort reform questions is inherently prejudicial. *Bee, supra; Alcazar, supra; Barrett, supra; Evans, supra.*

The Court of Appeals declined to consider the issue of plain error because, the court said, the issue was raised for the first time in appellants’ reply brief, and therefore it would not be considered. Application of this general rule in the present case is not appropriate, however, because Mr. Boyle was not on notice that an argument would be made that he did not preserve the issue. (U.R.A.P. 24(a)(5)(B) requires a statement of grounds in the opening brief for review of an issue “not preserved in the trial court.”)

There is no Utah precedent that would have placed counsel on notice that complying with the trial court's prescribed procedure for voir dire would be claimed to be inadequate under Rule 46 and the circumstances of this case. As demonstrated by the argument above, appellants had, at the very least, a legitimate belief that preservation was not at issue. When the defendant challenged what appellants thought was a non-issue, appellants were put on notice of the issue, and responded at that time by noting, in addition to their other arguments, that the omission would constitute plain error.

**II. THE COURT OF APPEALS' DECISION ALLOWING UTAH LAWYERS TO REFER TO THE NOTORIOUS "MCDONALD'S COFFEE CASE" IS CONTRARY TO THIS COURT'S PRECEDENT, GROSSLY PREJUDICIAL TO MR. BOYLE AND OTHER PLAINTIFFS, AND CREATES A SITUATION IN WHICH CLOSING ARGUMENTS WILL DIGRESS INTO A DEBATE ABOUT THE TRUE FACTS IN THAT CASE.**

As noted above, in closing argument defense counsel was allowed, over objection, to compare Mr. Boyle's claim for damages to those awarded in an unrelated 1994 case often referred to as the "McDonald's coffee case":

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 been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee. (R. 695, p. 48:17-22)

No evidence was presented in the court below (nor would it have been proper) regarding *Liebeck v. McDonald's, et al.*, D-202-CV-9302419 (N.M. – Albuquerque District 1994), also known as the "McDonald's coffee case." In the fifteen years since the (in)famous punitive damages verdict was rendered in *Liebeck*, it has become a "powerful cultural icon" and acquired "great symbolic significance" in the tort reform

debate, “Java Jive: Genealogy of a Juridical Icon,” 56 *U. Miami L. Rev.* 113, 114 (2001), largely through misreporting and misstatements of the actual facts of the case. *Id.*, pp. 118-162.

On appeal, defendant Christensen asked the Court of Appeals to find “harmless” and “innocuous” his counsel’s reference to the McDonald’s case “in an effort to cast light on Plaintiff counsel’s attempt to inflate the damages by presenting them as part of a per diem analysis.” (Brief of Appellee, p. 2; *also id.*, pp. 1, 14, 16.)<sup>3</sup>

Neither the defendant nor the Court of Appeals disputed that *Liebeck v. McDonald’s* has become the poster child of tort reform in this country (an “iconic” case, as the Court of Appeals says; a case of “national notoriety,” as Mr. Christensen concedes). By its very nature, reference to the McDonald’s case is inherently prejudicial, particularly in a case like this, where the sole issue to be decided was damages, and the trial court had not asked jurors their views on general damages or tort reform. Indeed, counsel’s reference to the case was plainly intended to appeal solely to jurors’ prejudices about tort reform exemplified (in their minds) by that case.

There is also no dispute that defense counsel incorrectly stated the nature of that case by telling the jury that the *Liebeck* verdict resulted from a per diem compensatory damages argument, when it was actually an award of punitive damages that had nothing to do with a per diem argument (and, in fact, was later remitted).

---

<sup>3</sup> The defendant never identified what aspect of counsel’s argument he believed to constitute a “per diem” argument. In any event, however, because per diem arguments are permissible and the defendant never objected to whatever Mr. Boyle’s counsel was saying, Mr. Boyle has assumed that it was a per diem argument for purposes of appeal.

As Judge McHugh wrote in her concurrence, the latitude afforded to counsel in closing arguments “does not extend to counsel calling the jury’s attention to material that the jury would not be justified in considering in its verdict.” Opinion, ¶ 29, quoting *State v. Alonzo*, 973 P.2d 975, 981 (Utah 1998).

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.

Opinion, ¶ 30 (McHugh, J., concurring in result).

In *State of Utah v. Alonzo*, *supra*, two defendants were accused, and later found guilty, of assaulting a police officer and one of interfering with an arrest. In his closing argument, their counsel attempted to draw parallels between their case and the controversial Rodney King case in Los Angeles. The trial court precluded references to the King case, and both the Court of Appeals and this Court upheld that ruling. “We have held in the past that attorneys have broad latitude in presenting closing arguments,” the Court wrote, “but that such 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.” 973 P.2d at 981 (emphasis added).

The majority and Judge McHugh differ in their interpretation of this court’s opinion in *Alonzo*, *supra*. The majority reads *Alonzo* as allowing defense counsel to mention *Liebeck* in a personal injury trial. Judge McHugh believes that it does not, and

that reference to *Liebeck* falls within *Alonzo*'s prohibition against calling improper material to the attention of the jury. Judge McHugh's interpretation of *Alonzo* is not only supported by the language of that opinion – that counsel's "latitude does not extend to" referencing material that could not properly have been introduced at trial – but also by important practical considerations.

References to the McDonald's coffee case by defense counsel is an increasingly common occurrence in Utah. (It has happened at least three times recently to attorneys at the undersigned's firm alone.) If defense counsel can mention the McDonald's verdict, then plaintiffs' counsel presumably can respond by telling the jury not to worry, because the judge can reduce a verdict if he thinks it is too big, as the judge did in the McDonald's case. Counsel may also point out that opposing counsel is misrepresenting the verdict in that case. In short, closing arguments may deteriorate into a debate about a 15-year-old New Mexico case that has nothing to do with what the jury is charged with deciding.

The error was especially prejudicial in this case. Because the defendant admitted liability, the trial was entirely focused on the damages to be awarded. The "McDonald's coffee case" comment was not directed to a peripheral issue at trial, it was directed to the only issue at trial, the proper amount of damages to award to a plaintiff who needed back surgery after being struck by a vehicle. Under these circumstances, it is difficult to imagine how it could not be prejudicial to mention a case widely perceived by the lay public as a lawsuit in which excessive damages were awarded. (See, e.g., the *Liebeck v.*

*McDonald's Restaurants* Wikipedia entry (noting characterization of *Liebeck* case as “the poster child of excessive lawsuits”).<sup>4</sup>

### **III. THE COURT OF APPEALS’ RULING ON MRS. BOYLE’S LOSS OF CONSORTIUM CLAIM ARTIFICIALLY NARROWS THE SCOPE OF THE STATUTE, AND ELIMINATES LOSS OF CONSORTIUM CLAIMS IN A WIDE RANGE OF CASES.**

This case presents an issue of first impression, *i.e.*, what does the word “incapability” mean for purposes of the loss-of-consortium statute?

For purposes of its motion in limine and in the Court of Appeals, defendant Christensen did not contest that the evidence was sufficient for a jury to find a “dispute as to the causation and extent of Mr. Boyle’s back injury,” or that, from plaintiff’s evidence, the evidence might seem “severe.” (Brief of Appellee, pp. 17, 19.) It was also largely uncontested that the injury is permanent and life-altering. (*E.g.*, R. 334, 342-345 (citing to testimony of plaintiff’s expert Dr. Lyle Mason).)

That a fact issue exists as to the existence of a significant permanent injury was thus essentially uncontested. Instead, Mr. Christensen’s principal argument was that the Boyles lacked evidence of an “injur[y]” under the provision upon which Mr. Boyle was relying, Utah Code Ann. § 30-2-11(1)(a)(iii) (“incapability of the person of performing the types of jobs the person performed before the injury[.]”).

On appeal, the parties agreed that there is no Utah case law interpreting this language. The defendant argued that the plaintiff must be 100 percent incapable; thus, if the

---

<sup>4</sup> [http://en.wikipedia.org/wiki/Liebeck\\_v.\\_McDonald's\\_Restaurants](http://en.wikipedia.org/wiki/Liebeck_v._McDonald's_Restaurants) (last accessed February 8, 2010).

plaintiff retains any ability to perform the types of jobs, regardless of restrictions or limitations, then he is not injured under Section (1)(a)(iii). (Brief of Appellee, p. 18 (must be “completely” incapable).)

Appellant Boyle argued that the statute is satisfied if the person is materially incapable of performing the jobs. Materiality is typically a question of fact, *see, e.g., Bluffdale Mountain Homes, LC v. Bluffdale City*, 2007 UT 57, ¶ 50. 167 P.3d 1016, and a jury could find Mr. Boyle’s ability materially limited from an inability to work full-time, to carry anything even as heavy as a full basket of golf balls, and/or an ability to work only through significant pain, all of which were supported by evidence in the record. *See, e.g., R.* 261-262.<sup>5</sup>

The Court of Appeals agreed with the defendant’s interpretation, holding that the fact that Mr. Boyle “worked in sales and at golf course both before and after his injury” – regardless of the nature of the jobs or any physical limitations – precludes an argument of “incapacity.” Opinion, ¶ 22.<sup>6</sup>

Under the Court of Appeals’ interpretation of the statute, an injury could relegate an individual to permanent part-time employment with significant ramifications (loss of benefits, impaired promotional opportunities, etc.), or with physical restrictions, yet

---

<sup>5</sup> In relation to this issue, Mr. Boyle also cited evidence from which a jury could have found that the jobs he was working after the accident were materially different from the same type as the jobs he performed before the injury. *See, e.g., R.* 331-332 (former job included training functions, extensive driving to private residences for sales presentations, and very high income potential, whereas present job is sedentary work at a call center).

<sup>6</sup> The Court of Appeals’ opinion uses the word “incapacity,” whereas the statute uses the word “incapability.”



technically he would not be “completely” incapable of performing the work, and therefore no loss of consortium could be sought. Indeed, the plaintiff might be able to work only standing up, or for only a few hours per week, and he would still not qualify under (1)(a)(iii). That is not a reasonable interpretation. *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) (“It is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.”)(internal citation omitted).

As one Utah federal district court judge recently observed, “Such a literal reading of the statute is not warranted by the face of the statute.” *Spahr v. Ferber Resorts, LLC*, , 2:08-cv-72, United States District Court for the District of Utah, Central Division, Order and Memorandum Decision at 8-9 (J. Waddoups, February 4, 2010) (attached hereto as Add.Exh. 5.) In *Spahr*, the plaintiff suffered a knee injury from a fall on the defendant’s premises, and a jury found for both Mr. Spahr and for his wife on her loss-of-consortium claim. Seeking a new trial, the defendant argued that Utah Code Ann. § 30-2-11(1)(a)(iii) was not satisfied because, although Mr. Spahr “could not kneel to garden and could not climb ladders to engage in carpentry,” that was insufficient under the statute. “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,” the court summarized. *See id.* at 8.

The court rejected such a narrow interpretation 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 lying down, or to buy a hydraulic lift to help him build ceilings or complete other jobs that would normally be 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 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.

*Id.* at 9.<sup>7</sup>

It is apparent from the language of the statute that the legislature was only interested in allowing a consortium claim where serious, ongoing injuries were involved in order to avoid soft, frivolous claims. Viewed in the light most favorable to Mrs. Boyle, the evidence adduced in opposition to defendant's motion in limine reflected that Mr. Boyle, after his back surgery, is suffering from ongoing pain issues that are extensive enough that he is incapable of sleeping anywhere other than in a recliner, is suffering from recurring sleep deprivation causing an inability to work full-time at a sedentary job, and is unable to even lift a small amount of weight at his slightly less than sedentary job at the golf course. Even with very little physical exertion delivering golf carts and staffing a golf shop, he is still in enough pain after just a few hours that he has to go home and rest for a couple of hours to alleviate the pain. (*E.g.*, R. 261:12-21; R. 262:10-22.)

---

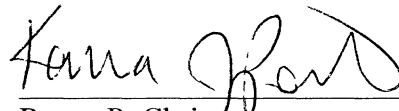
<sup>7</sup> The defendant in *Spahr* cited the Court of Appeals' ruling in this case for its restrictive interpretation of the statute. The federal court distinguished *Boyle* factually based upon the Court of Appeals' statement that Mr. Boyle "admitted in his deposition that he had performed the same jobs after his injury that he had performed before his injury, albeit in 'significant discomfort.'" *Id.* at 9. But as noted above, Mr. Boyle cannot work full time or lift anything heavy, and there was evidence from which the jury could find that his pre-accident and post-accident jobs were not "the same jobs." See p. 26, *supra*.

## CONCLUSION

For the reasons set forth above, Appellants / Plaintiffs respectfully request the Court reverse the Court of Appeals, and remand to the trial court for a new trial on the claims of John and Norrine Boyle.

DATED this 12<sup>th</sup> day of February, 2010.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read "Karra J. Porter", is written over a horizontal line.

Roger P. Christensen

Karra J. Porter

Scot A. Boyd

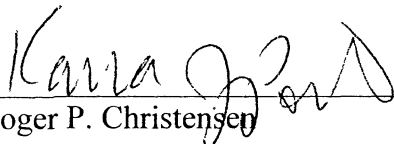
Attorneys for Plaintiffs/Appellants

### CERTIFICATE OF SERVICE

This is to certify that on the 12th day of February 2010, two true and correct copies of the foregoing **BRIEF OF APPELLANTS ON *CERTIORARI*** were mailed, first-class postage prepaid, to:

Kristin A. VanOrman, 7333  
Jeremy G. Knight, 10722  
STRONG & HANNI  
Attorneys for Defendant/Appellee  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180

CHRISTENSEN & JENSEN, P.C.

  
\_\_\_\_\_  
Roger P. Christensen  
Karra J. Porter  
Attorneys for Appellants

# **Addendum Exhibit 1**

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

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

John Boyle and Norrine Boyle,	)	OPINION
	)	(For Official Publication)
Plaintiffs and Appellants,	)	
	)	Case No. 20080582-CA
v.	)	
	)	F I L E D
Kerry Christensen,	)	(September 3, 2009)
	)	
Defendant and Appellee.	)	<div style="border: 1px solid black; padding: 2px;">2009 UT App 241</div>

-----

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

-----

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?

---

<sup>1</sup>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

---

<sup>2</sup>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

---

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

<sup>4</sup>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 Z. 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



# **Addendum Exhibit 2**

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

JOHN BOYLE,	:	MINUTES
Plaintiff,	:	RULING FROM 5/19/08
	:	
	:	
vs.	:	Case No: 050912506 PI
	:	
KERRY CHRISTENSEN,	:	Judge: TYRONE E. MEDLEY
Defendant.	:	Date: May 21, 2008

---

Clerk: tinaa  
TELEPHONE CONFERENCE

PRESENT

Plaintiff's Attorney(s): ROGER P CHRISTENSEN  
Defendant's Attorney(s): KRISTIN A VAN ORMAN  
Video  
Tape Number: 8.16-8.30

---

HEARING

This matter is before the Court for a Ruling from the Oral Argument heard on 5/19/08. Appearances as stated above.

1. Defendants Motion in Limine to Dismiss Plaintiff Norrine Boyle's Loss of Consortium Claim is Granted.

2. Defendant's Motion to Strike Lyle B Mason's Expert Testimony is Denied.

3 Defendant's Motion to Strike Helen Woodward as an Expert Witness is granted.

Kristin Van Orman is to prepare an Order with in 1 week. The Court would like this Order to be approved as to form.

Kristin A. VanOrman (#7333)  
Jeremy G. Knight (#10722)  
**STRONG AND HANNI**  
Attorneys for Defendant  
3 Triad Center, Suite 500  
Salt Lake City, UT 84180  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

rg

---

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


JOHN BOYLE,	
Plaintiff,	ORDER
vs.	
KERRY CHRISTENSEN,	Civil No.050912506
Defendant.	Judge Tyrone E. Medley

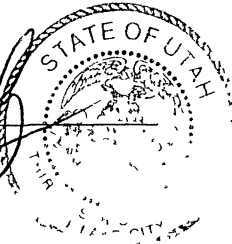
This matter came before the Court on May 19, 2008 for Defendant's motions in limine seeking to exclude Helen Woodard and Dr. Lyle Mason as expert witnesses as well as Defendant's motion to dismiss plaintiff Norrine Boyle's claims for loss of consortium. Oral argument was held with Roger Christensen in attendance for the plaintiffs and Kristin VanOrman representing the defendant.

After review of the submitted briefs as well as considering oral argument, this Court hereby ORDERS, ADJUDGES AND DECREES as follows:

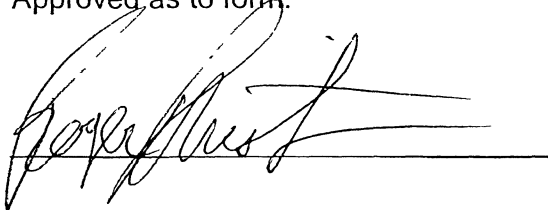
1. Defendant's motion to exclude Helen Woodard is **granted**. Ms. Woodard's report was produced late in the proceedings in violation of this Court's case management order.
2. Defendant's motion to exclude Dr. Lyle Mason is **denied**. Defense counsel is to be given the opportunity to depose Dr. Mason prior to the trial of this matter.
3. Defendant's motion to dismiss plaintiff Norrine Boyle's claim for loss of consortium is **granted**. It is the Court's ruling that the plaintiffs do not meet the statutory requirements for bringing a claim for loss of consortium and therefore such a claim is hereby dismissed.

DATED this 28 day of May, 2008.

  
Judge Tyrone Medley  
Third District Court Judge



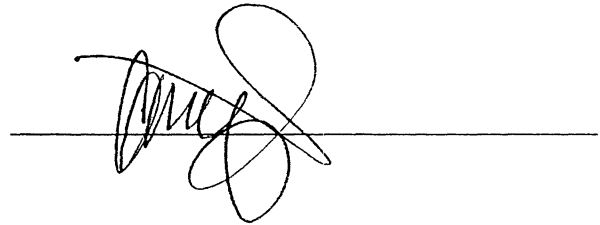
Approved as to form:



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 13<sup>rd</sup> day of May, 2008, a true and correct copy of the foregoing ORDER was served by mail, postage fully prepaid, upon the following:

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

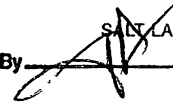


# **Addendum**

## **Exhibit 3**

**FILED DISTRICT COURT**  
Third Judicial District

Roger P. Christensen, #0648  
CHRISTENSEN & JENSEN, P.C.  
50 South Main Street, Suite 1500  
Salt Lake City, Utah 84144  
Telephone: (801) 323-5000  
*Attorneys for Plaintiffs*

JUN - 9 2008  
SALT LAKE COUNTY  
By  Deputy Clerk

---

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

---

JOHN BOYLE and NORRINE BOYLE,  
Plaintiffs,

vs.

KERRY CHRISTENSEN,  
Defendant.

**PLAINTIFF'S REQUEST FOR THE  
SUBMISSION OF A JURY  
QUESTIONNAIRE AND FOR  
REASONABLE FOLLOW UP VOIR DIRE**

Case No: 050912506

Judge: Tyrone E. Medley

---

Plaintiff hereby requests the Court to have the attached questionnaire completed by the potential jurors in this case, with copies provided to the Court and counsel, prior to the jury selection process.

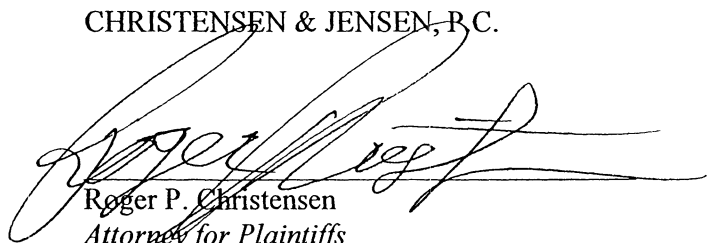
Plaintiff also requests the Court to allow plaintiffs' counsel the opportunity to ask reasonable jury voir dire questions following up on the individual jurors answers to the questionnaire. Plaintiff also requests the Court to allow plaintiffs' counsel to address the following additional areas with individual jurors in jury voir dire:

1. The juror's willingness and/or reluctance to follow the law, as instructed by the Court, in spite of personal disagreement with it.

2. Experience, training, knowledge and insights regarding people who have sustained some level of back injury and/or chronic pain.

DATED this 18<sup>th</sup> day of April, 2008.

CHRISTENSEN & JENSEN, P.C.



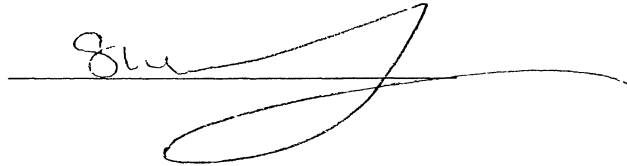
Roger P. Christensen  
*Attorney for Plaintiffs*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of April, 2008 a copy of the foregoing PLAINTIFFS' REQUEST FOR THE SUBMISSION OF A JURY QUESTIONNAIRE AND FOR REASONABLE FOLLOW UP VOIR DIRE was mailed, first class mail, postage prepaid, to the following:

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

A handwritten signature in black ink, appearing to read "K. Van Orman", written over a horizontal line.

The information given in this questionnaire is confidential and will be used only to assist with jury selection in this case.

JUROR NAME: \_\_\_\_\_ AGE: \_\_\_\_\_ JUROR #: \_\_\_\_\_

<p>1. What is the highest grade that you completed in school?</p>   <p>If college, please list any degrees received:</p>	<p>2. Where do you work and what is your job title?</p>  <p>What jobs have you held in the past?</p> <p>What jobs has your spouse or significant other held in the past?</p>	<p>3. Circle any of the following in which you have received training or education:</p> <table> <tr> <td>Business</td> <td><b>Law</b></td> </tr> <tr> <td>Engineering</td> <td>Psychology</td> </tr> <tr> <td>Health/Medicine</td> <td>Statistics</td> </tr> <tr> <td>Insurance</td> <td>Teaching</td> </tr> <tr> <td colspan="2">Accident Investigation</td> </tr> </table>	Business	<b>Law</b>	Engineering	Psychology	Health/Medicine	Statistics	Insurance	Teaching	Accident Investigation	
Business	<b>Law</b>											
Engineering	Psychology											
Health/Medicine	Statistics											
Insurance	Teaching											
Accident Investigation												
<p>4. What are your feelings or opinions about people who bring personal injury lawsuits?</p>   <p>If supported by the evidence, could you award a large amount of money to the plaintiff in this case?</p>	<p>5. If you were seriously hurt or injured by the negligence of another, would you sue?</p>  <p>Please explain your answer.</p>	<p>6. If supported by the evidence, could you award money damages for</p> <p>a. Future physical pain <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>b. Mental anguish <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>c. The impact on a wife of partially disabling injuries to her husband?</p> <p>d. Future medical bills <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If you answered NO to any of the above, please explain:</p>										
<p>7. Do you believe the law should impose limits on money that can be awarded for pain and suffering?</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, what do you believe these limitations should be?</p>	<p>8. Have you ever been the plaintiff (the party suing) or a defendant (the party being sued) in a lawsuit? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, please explain:</p>	<p>9. Have you ever served as a juror in a civil case? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, what type of civil case was it?</p> <p>What was the verdict in that case?</p> <p>Were you the foreperson? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Do you have any negative feelings as a result of your experience as a juror?</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, please explain:</p>										

<p>10 What are your 3 favorite TV shows?</p> <p>1 2 3</p> <p>What newspapers, magazines, or journals do you read regularly?</p>	<p>11 What groups or organizations do you/loved ones/family members belong to?</p>	<p>12 List 3 people you admire the most</p> <p>1 2 3</p> <p>List 3 people you admire the least</p> <p>1 2 3</p>																		
<p>13 Which of the following words would you use to describe yourself? Please check all that apply</p> <table border="0"> <tr> <td><input type="checkbox"/> Analytical</td> <td><input type="checkbox"/> Old-fashioned</td> </tr> <tr> <td><input type="checkbox"/> Careful</td> <td><input type="checkbox"/> Open-minded</td> </tr> <tr> <td><input type="checkbox"/> Compassionate</td> <td><input type="checkbox"/> Pro-business</td> </tr> <tr> <td><input type="checkbox"/> Detail-oriented</td> <td><input type="checkbox"/> Pro-consumer</td> </tr> <tr> <td><input type="checkbox"/> Emotional</td> <td><input type="checkbox"/> Sensitive</td> </tr> <tr> <td><input type="checkbox"/> Frugal</td> <td><input type="checkbox"/> Skeptical</td> </tr> <tr> <td><input type="checkbox"/> Generous</td> <td><input type="checkbox"/> Suspicious</td> </tr> <tr> <td><input type="checkbox"/> Impulsive</td> <td><input type="checkbox"/> Visual</td> </tr> <tr> <td><input type="checkbox"/> Judgmental</td> <td><input type="checkbox"/> Worrier</td> </tr> </table>	<input type="checkbox"/> Analytical	<input type="checkbox"/> Old-fashioned	<input type="checkbox"/> Careful	<input type="checkbox"/> Open-minded	<input type="checkbox"/> Compassionate	<input type="checkbox"/> Pro-business	<input type="checkbox"/> Detail-oriented	<input type="checkbox"/> Pro-consumer	<input type="checkbox"/> Emotional	<input type="checkbox"/> Sensitive	<input type="checkbox"/> Frugal	<input type="checkbox"/> Skeptical	<input type="checkbox"/> Generous	<input type="checkbox"/> Suspicious	<input type="checkbox"/> Impulsive	<input type="checkbox"/> Visual	<input type="checkbox"/> Judgmental	<input type="checkbox"/> Worrier	<p>14 What do you enjoy doing in your spare time?</p> <p>Do you consider yourself to be  <input type="checkbox"/> Conservative <input type="checkbox"/> Moderate <input type="checkbox"/> Liberal</p> <p>Who makes the financial decisions in your home?</p> <p>Who writes the checks or pays the bills in your home?</p>	<p>15 Is there any reason you could not serve as a juror in this case?  <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, please explain</p> <p>Add any comments you wish to make</p>
<input type="checkbox"/> Analytical	<input type="checkbox"/> Old-fashioned																			
<input type="checkbox"/> Careful	<input type="checkbox"/> Open-minded																			
<input type="checkbox"/> Compassionate	<input type="checkbox"/> Pro-business																			
<input type="checkbox"/> Detail-oriented	<input type="checkbox"/> Pro-consumer																			
<input type="checkbox"/> Emotional	<input type="checkbox"/> Sensitive																			
<input type="checkbox"/> Frugal	<input type="checkbox"/> Skeptical																			
<input type="checkbox"/> Generous	<input type="checkbox"/> Suspicious																			
<input type="checkbox"/> Impulsive	<input type="checkbox"/> Visual																			
<input type="checkbox"/> Judgmental	<input type="checkbox"/> Worrier																			

I hereby swear or affirm that all the answers contained in this juror questionnaire are true and correct

\_\_\_\_\_  
Juror's Signature

\_\_\_\_\_  
Date

# **Addendum**


## **Exhibit 4**

J U R Y

**FILED DISTRICT COURT**  
Third Judicial District

**JUN - 3 2008**

1. State your name and your spouse's name.
2. How are you employed? How is your spouse employed?
3. What is the highest grade that you completed in school?
4. How do you spend your leisure time? Do you have any hobbies?
5. Are you a member of any clubs or organizations? Any leadership positions?
6. Have you ever worked in or received training in the health care profession, legal profession, or any profession that handles medical and injury claims?
7. Have you ever served on a jury?
8. Have you, any close family member or close friend ever been a plaintiff, defendant or a witness in any lawsuit?
9. Have you, any close family member or close friend ever made a claim for personal injuries against someone whether or not such claim resulted in a lawsuit?
10. Have you, any close family member or close friend ever had a claim for personal injuries made against you or them?
11. Have you, any close family member or close friend ever been involved in an automobile/pedestrian accident?
12. Have you, any close family members or friends ever sustained back injuries?
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?

By  SALT LAKE COUNTY  
Deputy Clerk

# **Addendum Exhibit 5**

THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

E. JAMES SPAHR and COLLEEN SPAHR,  
Plaintiffs,

vs.

FERBER RESORTS, LLC d/b/a RODEWAY  
INN,

Defendant,

**ORDER and  
MEMORANDUM DECISION**

Case No. 2:08-cv-72-CW

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.

**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

---

<sup>1</sup> 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 will be decided on the basis of the written memoranda.

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 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). 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 Okl. 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 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 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.<sup>2</sup>

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

---

<sup>2</sup> 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 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.

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 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 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 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 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>

Moreover, there was evidence that 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

---

<sup>3</sup> The court is not convinced to the contrary by *Stone v. Ware Shoals Mfg. Co.*, 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.

<sup>4</sup> 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

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 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.

The Utah Court of Appeals' decision in *Boyle v. Christensen*, 219 P.3d 58, 63 (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 on an argument that he is impaired in his gardening and carpentry, but on proof that he is

---

paid and unpaid pursuits.

altogether precluded from them.<sup>5</sup>

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 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

---

<sup>5</sup> 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).



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 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

---

<sup>6</sup> 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.

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 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.

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 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 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 a 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 \$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. 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 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 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 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 (“[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 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 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 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 Spahr's 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 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 Spahr's 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 Spahr's 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 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>

---

<sup>8</sup> There are also instances of appearing to disparage Ferber Resorts for defending this action, which are addressed below.

<sup>9</sup> 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 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 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 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:

A handwritten signature in black ink, appearing to read "Clark Waddoups", written over a horizontal line.

Clark Waddoups  
United States District Judge