1990

Emmanuel N. Onyeabor v. Pro Roofing Inc. : Petition for Writ of Certiorari

Utah Supreme Court

Robert B. Sykes, Tamara J. Hauge; Sykes and Vilos, P.C.; Attorneys for Petitioner.
William A. Stegall, Jr.; Gustin, Green, Liapis and Stegall; Attorneys for Respondents.

BRIEF

ROBERT B. SYKES, ESQ. (3180)
TAMARA J. HAUGE, ESQ. (4334)
SYKES & VILOS, P.C.
Attorney for Petitioner
311 South State Street, Suite 240
Salt Lake City, UT 84111
Telephone: (801) 533-0222

IN THE UTAH SUPREME COURT

EMMANUEL N. ONYEABOR, Petitioner, v. PRO ROOFING INC., a Utah corporation, and PAM BATES, Respondents.	)	Supreme Court No. 900188

PETITION FOR CERTIORARI FROM THE DECISION OF THE UTAH COURT OF APPEALS, CASE NO. 87-0265-CA, FILED ON FEBRUARY 13, 1990

ROBERT B. SYKES, ESQ.
TAMARA J. HAUGE, ESQ.
SYKES & VILOS, P.C.
Attorneys for Petitioner
311 South State Street, Suite 240
Salt Lake City, UT 84111

William A. Stegall, Jr. Esq.
GUSTIN, GREEN, LIAPIS & STEGALL
Attorneys for Respondents
48 Post Office Place, Suite 300
Salt Lake City, UT 84101

ROBERT B. SYKES (3180)
SYKES & VILOS, P.C.
Attorney for Appellant
311 South State Street, Suite 240
Salt Lake City, UT 84111
Telephone: (801) 533-0222

IN THE UTAH SUPREME COURT

EMMANUEL N. ONYEABOR, Appellant, v. PRO ROOFING INC., a Utah corporation, and PAM BATES, Respondents.	ORDER GRANTING LEAVE TO FILE BRIEF IN EXCESS OF 20 PAGES Supreme Court No. 900188

Based upon the ex parte application of the Petitioner, and good cause otherwise appearing,

IT IS HEREBY ORDERED:

Petitioner may file a brief of 33 pages in support of his petition for a writ of certiorari.

DATED this 24 day of April, 1990.

BY THE COURT:

Hon. RICHARD HOWE
Associate Chief Justice

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and correct copy of the foregoing Order Granting Leave to File a Brief in Excess of 20

Pages was served upon the parties at the addresses listed below, by hand-delivering a copy thereof on the 23rd day of April, 1990.

William A. Stegall, Jr., Esq.
GUSTIN, ADAMS, KASTING & LIAPIS
48 Post Office Place, Third Floor
Salt Lake City, UT 84101

ROBERT B. SYKES
Attorney for Petitioner

775xmeb423

775o423

ROBERT B. SYKES, ESQ. (3180)
TAMARA J. HAUGE, ESQ. (4334)
SYKES & VILOS, P.C.
Attorney for Petitioner
311 South State Street, Suite 240
Salt Lake City, UT 84111
Telephone: (801) 533-0222

IN THE UTAH SUPREME COURT

EMMANUEL N. ONYEABOR, Petitioner, v. PRO ROOFING INC., a Utah corporation, and PAM BATES, Respondents.	)	Supreme Court No. _____

PETITION FOR CERTIORARI FROM THE DECISION OF THE
UTAH COURT OF APPEALS, CASE NO. 87-0265-CA,
FILED ON FEBRUARY 13, 1990

ROBERT B. SYKES, ESQ.
TAMARA J. HAUGE, ESQ.
SYKES & VILOS, P.C.
Attorneys for Petitioner
311 South State Street, Suite 240
Salt Lake City, UT 84111

William A. Stegall, Jr. Esq.
GUSTIN, GREEN, LIAPIS & STEGALL
Attorneys for Respondents
48 Post Office Place, Suite 300
Salt Lake City, UT 84101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. UTAH CASES

II. OTHER CASES

III. UTAH CODE CITATIONS

NONE

IV. UTAH RULES OF CIVIL PROCEDURE

V. LEGAL TREATISES

INTRODUCTION

The record will be referred to as "R. ___)." References to the transcript will be designated as "T. M-_____)," using the clerk's volume reference (19 volumes, designated as "A" through "S") and the reporter's page numbers. When certain lines on a page are referenced, for example Volume D, page 126, lines 3-14, this format will be used: (T. D-126:3-14)." Exhibits will be referred to as "Exhibit ___" and pages within exhibits as Exhibit 38:1, 5, 8, to refer to pages 1, 5 and 8 of Exhibit 38. The Appendix ("App.") includes the transcript excerpts demonstrating the comments on the evidence.

QUESTIONS PRESENTED FOR REVIEW

1. Does a plaintiff waive objections to numerous comments on the evidence involving statements, interruptions and non-verbal conduct occurring on each day of a 12-day trial, where plaintiff does not make a contemporaneous objection to every such comment and does not file an affidavit of prejudice?

2. Is an expert witness in a brain-injury case a surprise witness where: (a) the expert conducts a Rule 35 IME for defendants who then give notice that the expert will not be called; (b) the expert changes his mind and agrees to appear, but the fact is concealed from plaintiff for two to four weeks;

(c) the expert's name appears on a witness list just six (6) business days before trial; (d) there is no realistic opportunity to depose the expert before trial; and (e) the written report required by Rule 35 is provided on the third day of trial and is incomplete?

COURT OF APPEALS DECISION

The Utah Court of Appeals filed its opinion on February 13, 1990. The case is currently styled as Emmanuel N. Onyeabor v. Pro Roofing, Inc., a Utah corporation and Pam Bates, 128 Utah Adv. Rpt. 23, 787 P.2d 525 (Utah App. 1990) (see Attachment A at end of Brief).

JURISDICTION OF THE SUPREME COURT

The decision of the Court of Appeals was entered on February 13, 1990. On March 15, 1990, Petitioner obtained an ex parte 30-day extension of the time to file a Petition for a Writ of Certiorari, which expired on April 16, 1990. On April 13, 1990, by stipulation and order of the court, Petitioner obtained an additional seven-day extension to file this Petition, which extension expires on April 23, 1990. The Supreme Court has jurisdiction over this case pursuant to Utah Code Ann. 1953, §78-2-2(3)(a), as amended (1989).

CONTROLLING STATUTES

Two controlling Rules which govern this case are: Rules 26(e) and 35(b), Utah Rules of Civil Procedure (see Attachment B at end of Brief).

775tc

STATEMENT OF THE CASE

The Petitioner, Emmanuel N. Onyeabor, filed a personal injury action alleging a closed-head organic brain injury and a herniated lumbar disc. The case was tried to a jury beginning February 2, 1987, and continuing through February 18, 1987. The jury returned a verdict in favor of plaintiff but awarding the sum of only $16,850. The verdict was reduced by 25% due to a finding of contributory negligence on the part of Mr. Onyeabor (R. 658). A motion for a new trial and additur were both denied on April 1, 1987 (R. 20-1). This appeal was timely taken from the Judgment on Jury Verdict and the order denying the motion for a new trial and additur with notice of appeal being filed on April 30, 1987 (R. 722).

Five basic issues were presented in the briefs. One issue dealing with plaintiff's alleged contributory negligence was decided favorably to plaintiff, and two other issues are not pursued in this Petition. The two remaining issues in this Petition deal with the prejudicial impact of comments on the evidence and the appearance of a surprise, expert witness.

The case was argued to the court of appeals in October, 1989. The decision was issued on February 13, 1990.

//

//

//

STATEMENT OF FACTS

A. COMMENTS ON THE EVIDENCE.

The court made numerous prejudicial comments on the evidence by stating or inferring lack of believability of expert witnesses and the quality of their evidence; making extraneous prejudicial statements in ruling on the admissibility of certain evidence; and repeatedly interrupting counsel and witnesses without cause and making prejudicial comments in so doing (see Tables I and II herein). The main objectionable comments are contained in the Appendix. A flavor of the nature of the comments can be gleaned by reading Appendices 1, 2 and 3 (Table I), and 15, 16 and 17 (Table II).

The court also exhibited a prejudicial attitude toward Mr. Onyeabor and his counsel. This attitude was reflected in the court's demeanor including facial expressions, sighs, frowns and body language (Apps. 36-39). This attitude was also shown by the frequent refusal to allow counsel to approach the bench on important issues (T. B-46, C-76, I-103). In general the court was very harsh with Mr. Onyeabor's counsel in front of the jury, particularly during the first three days of trial (T. D-443-444).

Objections were made to the comments on the evidence which occurred on the during the first three days of trial. Unfortunately, the reporter had gone home, but court subsequently acknowledged these objections on the record:

> [Judge Croft] And you're absolutely right. We had a conference, and you in no uncertain

> terms stated your objection to not only my telling them that [about the notebooks], but you though that I was being very antagonistic toward you in my conduct of the trial. (emphasis added)

(T. P-87:18-22).

B. FACTS REGARDING DR. LINCOLN CLARK.

During the course of the litigation of this case, there were five separate trial dates set: 8/14/85, 4/18/86, 11/17/86, 12/8/86 and 2/2/87 (R. 18, 100, 124, 199, 302). Mr. Onyeabor's current counsel entered the case in July of 1986, and promptly amended the complaint, setting forth the issue of brain injury and damages more precisely (R. 145). Since the trial was at that point scheduled for November 17, 1986 (R. 124), the defense immediately moved for a Rule 35 mental examination of the plaintiff to be performed by Edward C. Beck, Ph.D., a psychologist (R. 155). Dr. Beck apparently get sick, so on November 8, 1986, defendants again moved for a continuance of the trial (R. 252). Defense counsel stated:

> The undersigned further represents that he will use all reasonable efforts to obtain the services of a substitute expert as rapidly as possible consistent with an adequate presentation of the case. The undersigned further represents that he will use all reasonable efforts to cooperate with plaintiff's attorney in providing an opportunity to him to discover the substance of the expert's evaluation and opinion. (emphasis added)

(R. 255). On November 10, 1986, the Motion for Continuance was heard, and the trial was continued until December 8, 1986 (R. 199).

During that period, the defendants procured a substitute expert, Dr. Lincoln Clark, a University of Utah psychiatrist. Dr. Clark examined Mr. Onyeabor. Thereafter he told defense counsel that he categorically would not be a witness at the trial (T. S-19).

Defendants moved for a continuance, which was strenuously opposed by Mr. Onyeabor because of his precarious medical and psychological condition (T. S-19-21). Dr. Clark was therefore summoned before the court on December 5, 1986, and examined on the record by Judge Dee. Dr. Clark stated he would not under any circumstances testify at trial and that his decision was final and irrevocable:

> ... I've already expressed I want out of this. I mean I made that very clear at the beginning. And I regret the inconvenience and everything else it has caused, and I wish it could be otherwise. I would otherwise be happy to proceed even with this short notice involved -- that's involved. But I simply-- and I say I thought about this very seriously before I came to this conclusion because I had a certain reputation -- myself, I'm concerned about as a witness, and I don't want to compromise that ... . And I'm not going to change my mind. (emphasis added)

T. S-18-19). Dr. Clark admitted that he had not been threatened by Mr. Onyeabor; he was simply fearful (T. S-18:6).

Judge Dee reluctantly ordered a fourth continuance of the trial to allow the defendants to procure yet another substitute expert witness in the head injury area to replace Dr. Clark (T. S-26-27). On December 16, 1986, Mr. Stegall confirmed to Mr. Onyeabor's counsel that the defense expert would be

psychologist Robert Cook, Ph.D. On December 17, 1986, the parties appeared before Judge Dee for a scheduling conference, and the new trial date of February 2, 1987, was set (R. 302). Mr. Onyeabor was examined by Dr. Cook in Salt Lake City in mid-January (T. K-89), and his deposition was pre-scheduled with counsel for Monday, January 26, 1987, in Denver (App. 40, p. 3).

On Thursday, January 22, 1987, exactly six business days prior to trial, Mr. Onyeabor's counsel received a revised witness list from Mr. Stegall (R.308), which included Dr. Lincoln Clark as a proposed witness! This was the first notice of Dr. Clark since his "irrevocable" withdrawal on December 5, 1986. Because Mr. Stegall was in Denver during January 23-27, 1987, and because Judge Dee, who was retiring effective January 31, 1987, wanted Judge Croft to hear motions, the first opportunity to schedule a motion in limine was Friday, January 30, 1987.

At the hearing on the Motion in Limine, Mr. Stegall indicated he had known about Dr. Clark's "reappearance" since "the first part of January" (T. Q-38). Dr. Clark testified at trial that he decided to come back into the case some time around Christmas, 1986 (T. L-127-128). This was never reported to plaintiff's counsel, despite many oral and written communications (App. 40). Judge Croft nevertheless denied the Motion in Limine (R. 326:T. Q-54).

Mr. Onyeabor's counsel did not receive a written report of the results of Dr. Clark's examination until the third day of trial, February 4, 1987. The report was incomplete in that it

did not render a psychiatric diagnosis of Mr. Onyeabor (App. 41: 7).

Dr. Clark testified convincingly at trial (L-76-80, 91,3, 94, 96-97, 103-104, 156-158, 192-193), rendering an opinion that Mr. Onyeabor suffered numerous pre-existing psychological problems (T. L-192-193).

ARGUMENT

POINT I

A PLAINTIFF SHOULD NOT BE REQUIRED, UPON PAIN OF WAIVER, TO MAKE A CONTEMPORANEOUS OBJECTION OR FILE A RULE 63 AFFIDAVIT OF PREJUDICE TO EVERY JUDICIAL COMMENT ON THE EVIDENCE, WHERE AN EARLY OBJECTION IS LODGED AND THE COMMENTS ARE NUMEROUS, OCCURRING ON VIRTUALLY EVERY DAY OF A 12-DAY TRIAL.

A. IMPORTANCE OF THIS ISSUE

The application of the waiver doctrine in this case is important to the practice of law in the State of Utah. The Court of Appeals' decision wrongly and unfairly requires contemporaneous objection to each of many comments on the evidence. This is an impractical and harsh burden on counsel and litigants, and does not appropriately assign responsibility to the court.

The doctrine of waiver as applied by the Court of Appeals in this case is an obsolete doctrine that fails to recognize the realities of the practice of modern law. The Supreme Court, through this case, should take the opportunity to

establish the State of Utah as an adherent of a more modern, practical approach to waiver.

B. NUMEROUS PREJUDICIAL COMMENTS ON THE EVIDENCE.

The trial court made numerous comments on the evidence which could generally be classified as: statements or inferences that the quality of plaintiff's expert testimony was weak; disruptive interjections; and non-verbal conduct that indicating that the court favored the position of the defendants (see Appendices 1 through 35). Utah law prohibits the court from commenting on the evidence. Rule 51, U.R.C.P. This court has stated:

> [A] trial judge is not permitted to comment on the quality or credibility of the evidence and may not indicate that the evidence is either weak or convincing. ... the court is ... enjoined from commenting on the quality or credibility of the evidence in such a way as to indicate that it favors the claims or position of either party. The enjoinder is necessary to prevent any intrusion upon the prerogatives of the jury to judge the credibility of the evidence and to determine the facts. (emphasis added).

State v. Long, 721 P.2d 493 at 496 (Hall, C.J. concurring and dissenting) (Utah 1986).

The court's demeanor, including facial expressions, gestures and actions can also amount to a comment on the evidence. Egede-Nissen v. Crystal Mountain, Inc., 606 P.2d 1214 (Wash. 1980). Any statement or action that can be reasonably interpreted to indicate the court's belief or disbelief concerning the veracity of witnesses, is a comment on the evidence. Id. Comments made during a trial which influence the

jury concerning the merits of the case, or which affect substantial rights of litigants, constitute grounds for reversal. Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121 at 129 (Okla. 1984).

Interjections and interruptions may constitute a comment on the evidence, particularly where they occur or are "phrased in a manner indicative of the court's attitude towards the merits of the case ..." Egede-Nissen, supra at 1222. The cumulative effect of repeated interjections by the court or comments on the evidence may constitute reversible error, even though each such interjection, standing alone, might not be error. Egede-Nissen, supra at 1223.

C. OBJECTION WAS LODGED, CONTRARY TO STATEMENTS IN COURT OF APPEALS OPINION.

The Court of Appeals' Opinion (hereinafter "Opinion") infers that plaintiff made no objection on the record to court's comments on the evidence, thereby waiving the objection. The Opinion states that Utah law therefore precludes appellate review of the issue. This analysis is faulty for several reasons. First, it is undisputed that plaintiff did make an objection to the court's comments on the evidence and prejudicial demeanor at the end of the third day of trial. Unfortunately, the court reporter had gone home, but the objections and the substance thereof was acknowledged by the court on the record:

> [Judge Croft] And you're absolutely right. We had a conference, and you in no uncertain terms stated your objection to not only my telling them that [about the notebooks], but

TABLE I

DIRECT COMMENTS ON EVIDENCE BY TRIAL COURT

Very Serious

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Comment on Evidence
1.	8 - 2/11	Alan Heal (P)	J 175-180, 182	Court expresses doubt that Mr. Onyeabor will ever go out and get a job as a superintendent of a construction project; casts doubt on Heal's opinion as to what Onyeabor would have made and interjects statements that emphasize that Heal's opinion is not valid for the U.S. but only for Nigeria; casts doubt upon Onyeabor's income potential.
2.	8 - 2/12	Boyd Fjeldsted (P)	K 18-22	Judge casts doubt on validity of expert's testimony as to value of lost future earnings by referring to it as "pure speculation"; reveals his opinion of Mr. Onyeabor's earning potential by allowing only testimony of $5.00 per hour.
3.	7 - 2/10	Edward Spencer M.D. (D)	I 45-46	Interjects comments that emphasize negative aspects of witness's testimony about Onyeabor.
4.	11 - 2/17	Linda Gummow, Ph.D. (P)	M 29-30	Judge offered opinion that counsel had not asked a certain question; (he was wrong - see T. 193-4 (2/12)).
5.	7 - 2/10	Linda Gummow, Ph.D. (P)	H 29-31	Court indicates sua sponte opinion that expert is not qualified to render an opinion as to whether Onyeabor was unconscious at scene because expert wasn't present.
6.	3 - 2/04	Thomas Soderberg, M.D. Gerald Moress, M. D. Richard Nielsen, M.D. (P)	D 325, 333, 348, 382, 383, 443, 444	Judge discredits documentary evidence by making disparaging comments about use of exhibit notebooks given to jurors at beginning of trial; severely scolds counsel in front of jury.
7.	11 - 2/17	Linda Gummow, Ph.D. (P)	M 49-53	On issue of using treatises to rebut prior witness's testimony, judge makes numerous comments that cast discredit upon plaintiff's expert by expressing dubiety on methods employed by the witness.

TABLE I CONTINUED

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Comment on Evidence
				Serious
8.	2 - 2/03	Dennis Leavitt, (P)	C 76-79	Judge expresses doubt that Onyeabor's car struck center median, causing him to be jostled; casts plaintiff's theory of mechanism of injury into doubt; and cross-examines witness.
9.	2 - 2/03	Dennis Leavitt, Officer (P)	C 72	Judge comments that the officer's experience did not justify him in expressing opinion that Onyeabor could have struck head; casts doubt on plaintiff's theory of head trauma causing brain injury.
10.	3-4 - 2/04-2/05	Richard Goka M.D. (P)	D 483-E 495-6	Judge says he is "troubled" by a glossary of terms and states that most words used by the doctor "don't mean a thing to us ... I am sure they don't to the jury"; effectively casts doubt on testimony of expert medical witnesses.
11.	5 - 2/06	Linda Gummow Ph.D. (P)	F 845	Judge interjects sua sponte and cuts off witness who is explaining future risk of head injury to plaintiff; thereby implies little risk.
				Important
12.	3 - 2/04	Patrick Chukwu (P)	D 295	Judge refers to Nigerian witness as one of "these young ones," demeaning this witness and other younger Nigerians who had previously testified.
13.	8 - 2/11	Elizabeth Onyeabor (P)	J 132-135	Casts doubt about ability of wife to have knowledge of and comment on why plaintiff took certain classes more than once, and why he had certain grades.
14.	2 - 2/03	Dennis Andrews (P)	C 142-144	Questions witness sua sponte about details of accident leaving impression that witness was perhaps not thorough.

775/CHART1

TABLE II

INTERJECTIONS AND INTERRUPTIONS (SUA SPONTE)* BY TRIAL COURT

Very Serious Interruptions †

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Interjection or Interruption
15.	3 - 2/04	Richard Nielsen M.D. (P)	D 460	Judge invites opposition to object to expert's qualifications; casts doubt upon expert's qualifications.
16.	6 - 2/09	Mark Zelig, Ph.D. (P)	G 95-96	Judge interjects comment to help defense; scolds plaintiff's expert witness; one of few instances in trial where judge interjected during defense examination.
17.	8 - 2/11	Alan Heal (P)	J 187	Judge interjects to help defense; questions plaintiff's expert on basis of opinion.
18.	6 - 2/09	Mark Zelig, Ph.D. (P)	G 66-67	Judge interjects and tells jury that the doctor is "broadening his answer ... too much."
19.	9 - 2/12	Boyd Fjeldsted (P)	K 9	Rude interjection which implies that plaintiff's counsel has suggested an answer.
20.	8 - 2/11	Alan Heal (P)	J 196	Rude and unnecessary interjection which suggests that plaintiff's expert has not answered a question posed by defense counsel.
21.	8 - 2/11	David Nilsson Ph.D. (P)	J 63	Rude interruption during plaintiff's examination of expert suggesting that expert has exceeded his expertise.
22.	3 - 2/04	Gerald Moress, M.D. (P)	D 422	Interjects to question expert witness about where plaintiff hit his head.
23.	9 - 2/12	Robert Cook, Ph.D. (D)	K 209	Court interjects to help defense witness on re-cross as to what was said earlier.
			Serious Interruptions	
24.	4 - 2/05	Richard Goka, M.D. (P)	E 497	Questions plaintiff's expert as to whether he understands certain head injury terms from a glossary.

* Raised by the court without defense counsel objections.

† Other serious interjections are cataloged in Table I, Tab Nos. 3, 5, 6, and 11.

TABLE II CONTINUED

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Interjection or Interruption
25.	8 - 2/11	David Nilsson, Ph.D. (P)	J 38	Questions plaintiff's expert about something that "troubled me" regarding scope of jury's decision to decide the case.
26.	5 - 2/06	Duncan Wallace, M.D. (P)	F 744-5	Judge interjects to unnecessarily restrict plaintiff's re-direct examination on expert witness's own drop in IQ after expert's gas poisoning head injury; defense counsel had earlier raised the issue of expert's own injury on cross-examination to impeach expert's objectivity.
27.	8 - 2/11	David Nilsson, Ph.D. (P)	J 9	Interjects in attempt to narrow scope of answer by plaintiff's expert.
28.	6 - 2/09	Mark Zelig, Ph.D. (P)	G 91	Interrupts to help defense counsel's examination on issue of grades.
29.	11 - 2/17	Emmanuel Onyeabor (P)	M 6	Interrupts plaintiff's answer to important question.
30.	3 - 2/04	Richard Goka, M.D. (P)	D 474	Interjects to try to narrow scope of witness's expertise.
				Unnecessary and Disruptive Interjections
31.	7 - 2/10	Emmanuel Onyeabor (P)	I 103	Price of left-front tire repair offered to show that plaintiff did in fact hit the median strip and was severely jostled; witness hassled by judge.
32.	3 - 2/04	Stevens Pedersen (P)	D 311-12	Didn't want plaintiff's father-in-law to testify about the fact that he was hard of hearing; offered to lay foundation that plaintiff's wife would notice hearing problems in plaintiff caused by the accident.
33.	3 - 2/04	Richard Goka, M.D. (P)	D 476-7	Interrupted to get evidence admitted before plaintiff's counsel had finished laying foundation.
34.	3 - 2/04	Richard Nielson M.D. (P)	D 456	Unnecessary scolding of counsel on evidentary matter.
35.	Many/ Various	Patrick Chukwu Mr. Onyeabor Pamela Walker, MA Stevens Pedersen Richard Goka, M.D. Linda Gummow, Ph.D. Mark Zelig, Ph.D. (P)	Many	Many rude, unnecessary, annoying interruptions and interjections that amounted to witness intimidation.

775/CHART3

> you thought that I was being very antagonistic toward you in my conduct of the trial. (emphasis added)

(T. P-87:18-22). The objections were also referenced in Mr. Onyeabor's motion for a new trial (R. 694-5) and the argument on the motion for a new trial (T. P-24:19-22).

The Opinion finds that such an objection, though undisputedly made, cannot be countenanced on appeal because there was no record, citing Birch v. Birch, 771 P.2d 1114 (Utah App. 1989) and Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040 at 1045 (Utah 1983). However, those cases do not stand for that proposition, and should not apply to the facts of this case. In Birch, for example, the trial court allegedly told the appellant in an off-the-record discussion that his mind was made up before the trial. The appellant entered into a stipulation and then asked to have the resulting order set aside 88 days later. The alleged remarks were disputed by the court and opposing counsel, and there was no reference in the record whatsoever to support the appellant's contention. Birch, supra at 1116. However, in Onyeabor the court acknowledges the substance of the objections having been made in a timely manner.

In Franklin, the appellant claimed an argument was raised in the hearing on a motion for summary judgment. However, there was no evidence supporting his claim that the argument was in fact raised at that time. The Franklin court stated:

> For a question to be considered on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon;

> we cannot merely assume that it was properly raised.

Franklin, supra at 1045. In Franklin, there was nothing in the record or briefs to show the objection was ever made. In Onyeabor, there is a reference in the record acknowledging the objection. The Franklin opinion suggests that if there had been something in the record to indicate the argument, the result would have been different.

The Court of Appeals' Opinion also refers to a requirement of filing a Rule 63(b) affidavit alleging judicial bias, and infers that absent such an affidavit of bias, Petitioner's claims are not properly before the court on appeal. The Opinion states: "we need not decide, however, whether the sole failure to file this affidavit was procedurally fatal to the claim of bias ..." because of other alleged infirmities. Thus, it would appear that references to the Rule 63(b) affidavit are dictum, and not the basis of the decision herein. In any event, the citation of the Birch case is inappropros. Onyeabor involves an on-the-record acknowledgement by the court of a timely objection. There is no such acknowledgement of a timely objection in Birch.

D. STRICT, INFLEXIBLE APPLICATION OF THE WAIVER DOCTRINE IS BAD PUBLIC POLICY AND DENIES SUBSTANTIAL JUSTICE.

The Court of Appeals has applied the waiver doctrine in this and other cases with an inflexible, meat-ax approach. Essentially, under the standard set forth in Onyeabor, if a

contemporaneous objection is not lodged to each comment on the evidence, it is waived. The court stated:

> Although reluctance to make frequent objections may be understandable, we failed to find in the portions of the record highlighted by plaintiff even one such contemporaneous objection.

Onyeabor, supra at p. 527.

In support of that position, the Court of Appeals does not cite even one case that deals with "comments on the evidence." Birch dealt with bias and Franklin Finance dealt with an unrecorded oral argument on a motion for summary judgment. The court also cites Hill v. Cloward, 14 Utah 2d 55, 58, 377 P.2d 186, 188 (1962), for the proposition that it is unjust for a party to just sit silently by, though believing prejudicial error has been committed, and then belatedly assert the issue on appeal. However, Hill deals with failure of a party to object to the introduction of evidence of insurance, and subsequent failure to ask for an instruction to rectify the harm that was done. The Opinion cites Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538, 542 (Utah App. 1988). In Madsen, the judge indicated before ruling that he was a customer of the defendant bank. Despite the clear disclosure of the conflict, defense counsel made no motion to recuse the judge until 39 days after the decision.

Thus, none of the cases cited by the Court of Appeals in support of its requirement of a contemporaneous objection deal with comments on the evidence, which is the issue in Onyeabor.

It seems strange indeed that when Petitioner writes 40 pages of brief (main and reply briefs) on the issue of "comments on the evidence," cites seven cases dealing with failure to object to comments on the evidence and attaches 40 appendices relevant to that issue, the Court of Appeals does not even cite one relevant, factually similar case that supports it's position.

Petitioner has no quarrel with the general rule that objections should generally be waived if not made at trial. However, this rule should not be inflexibly applied, particularly in cases such as this, where the objections would be futile, counterproductive or could not correct the error. One treatise commented:

> However, because of the special status of the trial judge in the eyes of the jury, prejudicial and erroneous comments by the trial judge during the trial may be reviewed on appeal even where not objected to at the time they are made. (emphasis added)

75 Am. Jur. 2d, "Trial, " §120, p.218. The court should not find a waiver where it is obvious that continued objections to repeated comments on the evidence would simply emphasize and exacerbate the prejudice. In Collins v. Sparks, 310 S.W.2d 45 (Ky. 1958), the trial judge questioned a witness during the direct examination of a rear-end collision case and asked, in conclusion, "You honestly believe that?" No objection was made. The reviewing court noted that the remarks imputed that the judge did not believe the witness' testimony, which was critical to the case. The appellate court overturned the jury's verdict in this case, noting:

> When the trial judge makes an objectionable remark, counsel is faced with a dilemma. He may risk antagonizing a judge by calling attention to the objectionable remarks, which scarcely can be erased in the minds of the jurors by a subsequent admonition. If objection is made unsuccessfully, the harm may be aggravated, and the situation may be worsened. He may make no objection in the hope that the jury will ignore the remark. This places the counsel in an unfair position and at a disadvantage which may not be due to any conduct on his part. The trial judge is charged with knowing how to conduct a fair and impartial trial. He should know what is necessary to be said and when it should be said, bearing in mind the possible effect on the jury. Viewed in this light, an objection to the remarks of a trial judge is unnecessary, and when such remarks are prejudicial, they constitute such palpable error as will be considered on review....

Id. at 48-49. In the Collins case, the court noted that a motion for a new trial on the issue preserved the right to object on appeal, even though no objection was made at trial. In Onyeabor, the issues raised in this brief were argued extensively in the motion for new trial, which provided the trial court an opportunity to correct the error and the prejudice if it so desired (R. 694-695).

The futility of continued contemporaneous objections by counsel in this case is manifest. The court acknowledged counsel's strong objection at the end of the third day of trial (T. P-87:18-22 "... and you in no uncertain terms stated your objection ..."). Yet, perusal of Tables I and II show that 23 of Petitioner's 35 claimed comments on the evidence occurred after the third day of trial. Thus, despite the clearly acknowledged objection, the objectionable conduct continued.

The Court of Appeals' Opinion puts counsel in the position of losing a possibly winnable case by antagonizing the jury because of perceived "attacks" on the judge, or to lose it by forfeiting all rights on appeal because contemporaneous objection was not lodged. Such a requirement is unfair, particularly where the court's demeanor and attitude was prejudicial throughout the trial and the comments on the evidence were frequent, pervasive and came without warning. One court characterized the effect on the jury of the judge's actions as follows:

> Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that the jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of case may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard-fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of perplexity. On the other hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of a trial, lead to great prejudice. (emphasis added)

State v. Jackson, 145 P. 470 (Wash. 1915), quoted with approval in Risley v. Moberg, 419 P.2d 151 at 153 (Wash. 1966).

The difficulty of repeated objections by counsel and interjections by the judge and their impact on the jury is evident when one postulates possible contemporaneous objections.

For example, the objection to the comments in Appendix 1 would have gone something like this:

> Your honor, I object to your inference that you do not believe that Mr. Onyeabor could have obtained a job as construction superintendent (T. J-177; App. 1); or
>
> I object to your statement that jobs Mr. Onyeabor could have held in Nigeria are irrelevant, even though Mr. Heal, a qualified rehabilitation expert has said that they are relevant (T. J-180, 182; App. 1).

With respect to Appendix 2, the objection might have read:

> I object to your statement that my expert economist's testimony is "pure speculation," just because it is based in part upon functions and income of Mr. Onyeabor in Nigeria. That is a matter of weight for the jury.

The objection to the comment in Appendix 3 could have read:

> Your Honor, I object to you unnecessarily emphasizing, sua sponte, that my client's medical records show some "hysterical features."

The objection to the comment in Appendix 15 would have read:

> Your Honor, I object to your sua sponte inference that Dr. Richard Nielsen has not been qualified and is not an expert in the field of otolaryngology, and that there is no foundation for his testimony.

Although in real life, the objections would have been tempered a little more, the prejudicial impact would not likely escape the jury's notice.

Had contemporaneous objections been made, it undoubtedly would have sparked additional prejudicial exchanges such as the one which occurred in Appendix 6 over the use of the exhibit notebooks. On that occasion, counsel attempted an

objection of sorts to the court's instruction to the jury not to refer to exhibit notebooks. That incident provoked a more prejudicial exchange with the court than if nothing had been said (T. D-443-4; App. 6).

E. THE WAIVER DOCTRINE IS OBSOLETE.

The Court of Appeals has not correctly applied the waiver doctrine in this case. A fact-sensitive application of the waiver doctrine in this case should produce a different result. However, in the event this Court determines the doctrine to have been correctly applied by the Court of Appeals, then the doctrine itself should be discarded as it relates to judicial improprieties because it is obsolete. Other states have done so.

In Commonwealth v. Hammer, 494 A.2d 1054 (Pa. 1985), the trial judge conducted an extensive and repeated examination of witnesses and was charged by the defendant as acting ofttimes in the role of an advocate for the prosecution, sometimes exhibiting incredulity at defendant's testimony. No objection was made by the defense counsel to the court's manner of questioning of witnesses, so the prosecution claimed waiver. Pennsylvania had adhered to the doctrine of waiver, but the Pennsylvania Supreme Court questioned "the continued validity of the waiver doctrine as applied to improprieties of the trial judge;" strict enforcement of the doctrine "becomes inadvisable" when the position of power and authority enjoyed by the trial judge is considered. Id. at 1058. The Pennsylvania court

explained the policy of not requiring an objection in this type of case as follows:

> The efficacy of counsel in assuring impartiality of the judge is negated by this self-regulatory function and the authority of the bench, for a judge who poses a question or makes a comment during trial is predisposed to believe that the question or comment is proper, lest it not be spoken. Given that predisposition, the likelihood that the judge will be well-cautioned by counsel's objection is negligible. In that context, the rationale underlying the waiver doctrine, that timely objection gives the court the opportunity to cure the error, becomes a relatively empty one. Indeed, the possibility exists that counsel's objection would be viewed as a source of annoyance and may well aggravate the situation. (emphasis added)

Id. at 1059. This was precisely the situation faced by Onyeabor's counsel in this case. The court exhibited a predisposition against Onyeabor. A strong objection was voiced at the end of the third day of trial. The problems continued. The court's demeanor was harsh and intimidating throughout the trial as witnessed by the four affiants (see Appendix Nos. 36 through 39). The "opportunity to cure the error" that the respondents argue for in this case would have been truly an "empty one."

Petitioner does not argue necessarily that this Court should throw out the waiver doctrine entirely, as some courts have done. Rather, Petitioner proposes a balanced, flexible approach, particularly where it is obvious that contemporaneous objection would have been to no avail. Where the trial judge shows a repeated inclination to comment on the evidence, to

interject statements in the record sua sponte, and/or exhibits a demeanor and attitude which is prejudicial (Appendices 36-39), a flexible approach to the waiver doctrine is warranted. The suggested position is:

> If there is a reasonable possibility that a timely objection would have cured or resolved the problem, then the objection should be deemed waived; however, where the comments or conduct are so frequent or significant that an objection would likely be futile, counterproductive or otherwise meaningless, contemporaneous objection should not be required as long as the matter is raised in a post-trial motion.

Such a position would not only be reasonable and in harmony with the position of many other states, but would also have significant benefit for both the bench and the bar in Utah. A strict application of the waiver rule puts the entire burden of waiver at trial on counsel, and hence on the public who are the litigants. Thus, under the "strict" approach, attorneys and the public bear the burden even for the errors of judges. Yet, judges as individuals are given a pre-eminent position in the law. They are supposedly chosen from the better lawyers, and are presumed to have above-average abilities, knowledge of the law and wisdom. Judges were described in one case as follows:

> The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exception, looks for guidance, and from whom the litigants expect absolute impartiality. ... To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice.

Commonwealth v. Myma, 123 A. 486, at 487 (Pa. 1924), as cited in Hammer, supra at 1058.

A strict application of the waiver doctrine is not only unfair to the public and their attorneys, but, in the long run, harmful to the bench. It reduces the incentive for a judge to conduct a trial in a fair, impartial and responsible manner. It rewards poor judicial conduct rather than encouraging excellence.

Strict enforcement of the waiver doctrine also demeans the judiciary in the eye of the public. If a judge conducts a trial in an arbitrary and capricious manner and "gets away with it," no matter how outrageous or egregious the facts may be, it will appear to the public participants that a "technicality" is being used to deny substantial justice, and that arbitrary judges are above the law.

The balanced approach proposed by Mr. Onyeabor places a proper amount of responsibility both on counsel and judges. It says that both must be competent and responsible. It promotes the fair administration of justice. The court should adopt this approach.

F. THE COURT ERRED IN STRIKING AFFIDAVITS TO SUPPLEMENT THE RECORD.

The Opinion stated that there was nothing in the record to contradict defendants' claim that the comments on the evidence were simply "explanatory" or "clarifying." Opinion, supra at 528. The court's footnote indicates that although Petitioner submitted four memoranda "attesting ... non-verbal manifestations of bias on the part of the judge" and the motion to supplement

the record was provisionally granted, the court was now denying the motion to supplement. The affidavits are included as Appendix Nos. 36, 37, 38 and 39. Because of the unusual nature of this case, such affidavits should be countenanced on appeal. Defendants had the opportunity to respond with counteraffidavits. There is no other way to show non-verbal conduct, which simply will not appear within the four corners of the record. Accordingly, Petitioner requests this court overrule the Court of Appeals and accept the affidavits.

G. SUMMARY.

The Court of Appeals Opinion tells the average practitioner that if a judge comments on the evidence, he has to take a bad situation and make it worse in order to preserve the issue for appeal. That position is impractical, unfair and unwise. It is impractical and unrealistic to ask trial counsel to antagonize a jury and a judge, which most assuredly would happen, by making a contemporaneous objection to every comment on the evidence, where the comments are numerous. In this case, it was very important for the Petitioner to try the case, and not have a fifth continuance for medical reasons. Good judicial and social policy dictates that the court should adopt a flexible approach to the waiver doctrine and not require contemporaneous objection where the objections would be fruitless or more damaging to the plaintiff's case than silence. In the alternative, the court should reject the waiver doctrine.

POINT II

DR. LINCOLN CLARK, A DEFENSE PSYCHIATRIST, WAS A PREJUDICIAL SURPRISE WITNESS BECAUSE: HIS REAPPEARANCE IN THE CASE WAS CONCEALED FROM PETITIONER UNTIL SIX BUSINESS DAYS BEFORE TRIAL; THERE WAS NO REALISTIC CHANCE TO TAKE A MEANINGFUL DEPOSITION; THE DOCTOR'S RULE 35 IME REPORT WAS NOT PROVIDED UNTIL THE THIRD DAY OF TRIAL AND WAS INCOMPLETE; AND THE DOCTOR'S TESTIMONY CAUSED PREJUDICE.

A. IMPORTANCE OF THIS ISSUE.

The effect of the Court of Appeals' decision is to allow very late notice of a major expert witness. Such late notice will be deemed substantial compliance with Rule 26(e) U.R.C.P. (duty to seasonably supplement discovery responses on identity of expert witnesses) as long as the other side conducts thorough cross-examination at trial and has called experts on the same subject matter.

This ruling will lessen the standards of practice among litigating attorneys. However, this Petition presents an opportunity to make an important statement that unfair discovery tactics will not be tolerated. Such a statement is necessary to uphold the perceived fairness of the system. It is important that application of the pre-trial discovery rules has the appearance of being fair and even handed.

B. SURPRISE WITNESSES SHOULD BE EXCLUDED.

Rule 26(e)(1) provides that a party has a duty to "seasonably ... supplement his response with respect to ... the identity of each person expected to be called as an expert witness at trial. ..." The court should exclude a defense

medical expert where the name and/or subject matter of the testimony is not disclosed in a timely manner. Acosta v. Superior Court, 706 P.2d 763 (Ariz. App. 1985); Hadid v. Alexander, 462 A.2d 1216 (Md. App. 1983); Lodrigue v. Houma-Terrebone Airport Com'n, 450 So.2d 1004 (La. App. 1984); and Sturdivant v. Yale-New Haven Hosp., 476 A.2d 1074 (Conn. App. 1984). Exclusion of the witness is further justified where no report or a late report is prepared, or where the report does not disclose important information. Otherwise, cross-examination is hindered. Hoover v. U.S. Dept. of Interior, 611 F.2d 1132 (5th Cir. 1980); Sirianni v. General Motors Corp., 325 F.Supp. 509 (W.D. Pa. 1971); DeMarines v. KLM Royal Dutch Airlines, 433 F.Supp. 1047 (E.D. Pa. 1977).

The trial court abuses its discretion if it denies a Rule 59(a)(3) motion for a new trial where there is a surprise "which ordinary prudence could not have guarded against." Jensen v. Thomas, 570 P.2d 695 (Utah 1977). The surprise contemplated by Rule 59(a) must result from some adverse circumstance or situation in which a party is placed unexpectedly to his injury, and without any fault or negligence of his own. Havas v. Haupt, 583 P.2d 1094, 1095 (Nev. 1978).

C. DR. CLARK WAS A SURPRISE WITNESS.

Dr. Clark was most assuredly a surprise witness. He irrevocably left the case on December 5, 1986. Notice of his reappearance was not received until Thursday, January 22, 1987, just six business days prior to trial.

Dr. Clark's reappearance in the case was obviously concealed from Petitioner for two to four weeks, despite the requirements of Rule 26(e)(1). At the hearing on Petitioner's Motion in Limine to exclude Dr. Clark, defense counsel stated that he had known about Dr. Clark's reappearance since "the first part of January" (T. Q-38-39). Yet, Petitioner's counsel was not served with a notice until January 21st. There was no written report as required by Rule 35 until the morning of the third day of trial, February 4, 1987. Neither delay has ever been explained.

Dr. Clark's own trial testimony is puzzling and evasive on the issue:

> Q. (Mr. Sykes): When did you do that [offer to re-enter the case]?
> A. (Dr. Clark): I have forgotten the exact date when that occurred?
> Q. Early in January, late in December?
> A. I think that Mr. Stegall would have to answer that.
> Q. I am asking you.
> A. I do not have a record, of that, when it was exactly.
> Q. Well do you -- it has only been two months. Do you recall approximately, was it before or after Christmas?
> A. Well, I think it was after Christmas, but I am not certain of that. (emphasis added)

(T. L-127-128). Prior to Dr. Clark's reappearance, all of the correspondence and oral conversation between counsel indicated that Dr. Cook of Denver would be defendants' only expert witness on the issue of brain injury. (App. 40 and 41) Petitioner prepared for trial accordingly.

Courts generally refuse to allow surprise experts to testify in similar situations. For example, in Hoover v. U.S. Dept. of Interior, supra, the Court held that an opposing party is entitled to discover the substance of the facts and the opinions of the expected testimony. "The primary purpose of this required disclosure is to permit the opposing party to prepare an effective cross-examination." (emphasis added) Id. at 1142. An "effective cross-examination" is precisely what was denied Petitioner with respect to Dr. Clark. In the case of DeMarines v. KLM Royal Dutch Airlines, supra, the defendant in an airline decompression case called a doctor of whom no prior notice was given, to testify that the Petitioner's condition resulted from pre-existing causes (similar to Dr. Clark's testimony in this case). The Petitioner's counsel objected to this improper testimony on the grounds that the report furnished to him by the doctor did not contain any such diagnosis. The trial judge excluded the testimony ruling:

> I am not going to permit that testimony if there is not something [about the problem] in this report because, frankly, the very reason for handing over reports is so that both sides will be aware of what is going on and not be sprung any surprises. (emphasis added)

Id. at 1058. The Court also noted the importance that all parties be informed "before trial as to the substance of the other party's expert testimony in order that he may be prepared to meet this testimony and will not be surprised by it." Id. at 1059. The appellate court, therefore, found no prejudicial error

in excluding the doctor's testimony. Accord, Hadid v. Alexander, supra, Sturdivant v. Yale-New Haven Hosp., supra (the court correctly refused to allow a party's medical expert to testify where the party had claimed that although the medical expert had been informally consulted previously, he had not been formally retained until the day after the jury selection began; the court characterized this conduct as "tactical subterfuge," which justified the sanction).

The policy reasons for forbidding a last minute expert to testify where the untimeliness of notice is unexplained are well set out in the case of Acosta v. Superior Court, supra, which has amazing parallels to Onyeabor. In Acosta, the plaintiff was a petitioner in a wrongful death malpractice action scheduled for trial on September 4, 1985. The real party in interest was an anesthesiologist. The defense list of witnesses did not include a certain doctor. Two days after the deadline for filing notice of witnesses, and 18 days prior to the trial date, defense counsel apparently received a letter from the doctor containing his opinion as to the cause of death. The defense counsel notified the plaintiff's counsel that the doctor would be a witness but did not furnish a report until 13 days later, or five days before trial. The witness in question was unavailable for deposition until trial. The trial judge indicated his intention to allow the witness to testify, and the plaintiff brought a special action appealing the trial court's refusal to strike the expert witness. The appellate court held

that the trial court had abused its discretion, and vacated the order allowing testimony by the witness. The appellate court stated that preclusion of a witness:

> ... should only be invoked where there is both absence of good cause for the untimeliness and prejudice to the opposing party. Both conditions are met on the facts of this case. Counsel for the [defendants] has suggested no reason for the late revelation of the witness save failure of his clients to discovery him until the eve of trial. This is not good cause; dilatoriness never is. Beyond this, no reason was advanced for withholding the content of the witness' testimony for an additional two weeks. (emphasis added)

Id. at 764.

D. PREJUDICE CAUSED BY DR. CLARK.

The Court of Appeals Opinion states: "... plaintiff fails to demonstrate how he was prejudiced" and any error would have to be disregarded unless it affected "the substantial rights of the parties under Rule 61, U.R.C.P. Reversal would follow only if Petitioner demonstrated that the error was substantial and prejudicial and "... deprived [appellant] in some manner of a full and fair consideration of the disputed issues by the jury." The Opinion indicates that because of Petitioner's "extensive presentation of expert testimony and ... thorough cross-examination of Dr. Clark," Petitioner has failed to demonstrate prejudice. Opinion, supra at 529. This holding ignores the realities of trial practice. The prejudice was as follows:

1. Failure to Provide a Timely Report. The prejudice to Mr. Onyeabor involves several dimensions. The first is the failure to provide a timely report, as required by Rule 35(b), U.R.C.P. That rule states:

> ... the party causing the examination to be made shall deliver to [the plaintiff] a copy of a detailed written report of the examining physician setting out his findings, including the results of all tests made, diagnosis and conclusions. ... (emphasis added)

Even though Dr. Clark had been back in the case since late December or early January, no report had apparently been prepared as of the time of the Motion in Limine, January 30, 1987, so the court ordered defendants to produce a report from Dr. Clark within a few days. The seven page report was hand-delivered to Petitioner's counsel on the morning of Wednesday, February 4, 1987, the third day of trial. (App. 41)

The late delivery of such a report is prejudicial for many reasons, as any seasoned trial attorney knows. The report deals with a complex topic, whether or not someone suffers from brain injury. Later that same day, Mr. Onyeabor began calling his expert witnesses on the brain injury issue (Drs. Moress, Nielsen and Goka -- see Vol. D of transcript), and had called virtually all of these witnesses by the close of trial on Friday, February 6th. Thus, none of Petitioner's witnesses really had an opportunity to read and assess Dr. Clark's report prior to the time they testified. Counsel did not have time to analyze the report and discuss it with his experts, because of the hectic

nature of daily trial preparation in a major case. Thus, Petitioner was effectively denied the important and critical opportunity to deal with Dr. Clark's contentions with Petitioner's witnesses on direct examination.

In Sirianni v. General Motors Corp., supra, the trial judge excluded the testimony of a physician where the plaintiff presented no pre-trial report to the defense. The court regarded the testimony of the doctor as that of a "new medical witness" even though the doctor had treated the plaintiff three years prior to trial. The court held:

> The exclusion of such testimony without a prior report is a well-standing practice in this court under our pre-trial rules in support of a strong policy against the introduction of surprise testimony of expert opinion witnesses.

Id. at 511.

2. Inability to Obtain a Deposition. Because of Dr. Clark's late appearance in the case, and failure to provide a report until the third day of trial, Petitioner was effectively denied the opportunity to take a deposition. If Dr. Clark were a mere fact witness to the accident, that may not have been quite so prejudicial. However, he was the major expert witness called by the defendants in their attempt to establish that Petitioner did not suffer from brain injury. Pre-trial discovery of the views of a major expert witness is often critical and can determine the outcome. Such was the case here (see discussion below). Such a deposition would have been crucial in properly preparing direct testimony on the brain injury issue the

Petitioner intended to offer on the third, fourth and fifth days of trial. Petitioner's experts were thus deprived of whatever advantage would have been gleaned from having Dr. Clark's deposition in advance of their own testimonies.

The Court of Appeals' Opinion states the Petitioner must now somehow demonstrate how this prejudiced the Petitioner. But how does one show the value of such a deposition that was never given and therefore not available for comment at trial? In a case such as this, failure to timely produce an expert for deposition should create a rebuttable presumption of prejudice. Otherwise, this court creates the irony of placing the burden on the party who has been wronged by the defendants' concealing of an expert witness, when it was the act of concealing that witness that inhibits the production of the proof of the prejudice which resulted.

3. Report Failed to State a Conclusion. The failure of Dr. Clark's report to state a medical conclusion was highly prejudicial. The report contained no adverse diagnosis or clue as to what Dr. Clark's opinion really was on several issues having to do with brain injury (App. 41:7). The report made no claim, for example, that Petitioner suffered from any type of a pre-existing "personality disorder." This was quite damaging to Petitioner's case because Dr. Clark did state such an opinion for the first time on the witness stand at trial. When Dr. Clark was asked why there was no diagnosis in his report, he stated:

> I could do that readily. I think it is self-evident in terms of it being a personality

> disorder with histrionic features, and also explosive features as well. And his hysteroid, it is a personality disorder, other mixed type with histrionic, and I agree, an explosive feature as well. (emphasis added) (Note: The actual testimony was far more lucid; this passage reflects some confusion by the reporter.)

(T. L-192:15). Dr. Clark also stated that the personality disorder was pre-existing. Since the doctor brought that up, counsel was forced to cross-examine on the issue (T. L-193-199). This gave Dr. Clark an additional opportunity to expound on Mr. Onyeabor's allegedly pre-existing personality disorder (T. L-193-4). This would have not happened had Mr. Onyeabor's counsel had the prior opportunity to learn the details of Dr. Clark's opinion in a complete report. Furthermore, Petitioner could have dealt with that issue extensively during the direct examination of his witnesses during the first week of trial.

E. INADEQUATE CROSS-EXAMINATION.

The Court of Appeals' Opinion states there was no prejudice to Petitioner because of Petitioner's lengthy cross-examination of Dr. Clark. As any trial lawyer knows, lengthy cross-examination is not always good, and frequently is bad, examination. It sometimes reflects lack of preparation. In this instance, the examination was lengthy because Petitioner's counsel was forced, in essence, to do discovery on the witness stand. It is an uncomfortable and an unfair position to be in. Had Mr. Onyeabor had the opportunity to discover Dr. Clark's opinions prior to the trial, the cross-examination would have been more effective, and completed in half the time.

The fact of the matter is that Petitioner was not merely entitled to an interval of time at trial in which to conduct cross-examination of defendants' major expert witness. The rules of court, professional courtesy and common sense dictate that Petitioner is entitled to effectively-prepared cross-examination. This presupposes a timely, pre-trial deposition, not taken during the heat of battle in a 12-day trial, with inadequate preparation and no opportunity to consult with Petitioner's experts. Such basic fairness and courtesy presupposes an opportunity to review, in quiet reflection, Dr. Clark's views in order to prepare cross-examination, and to do so sooner than Friday, the 13th, on the 10th day of a 12-day trial.

F. SUMMARY.

The Court of Appeals has sanctioned the concealing of a major expert witness until the last minute, and then asserted that Petitioner cannot show any prejudice thereby, when the wrongful act significantly inhibits the showing of that prejudice. This decision further ignores practical prejudice in trial practice. It will encourage the late disclosure of experts. It damages the utility of the laws of discovery, particularly Rules 26(e) and 35(b). One might as well tear out those pages because they are not going to be enforced by the Court of Appeals.

This case allows one party to greatly and unfairly enhance the burden upon his or her opponent in litigation. Even though a party intends to use an expert witness a month and half

before a major trial, he can wait until six business days before the trial and hand-deliver a notice of the new expert to his opponent. Under Onyeabor, the offending party will "appear to have substantially complied with Rule 26(e)(1)" (Opinion, supra at 528) because that amount of time has been validated by the Court of Appeals. Furthermore, counsel will not have to deliver a Rule 35(b) report to the other side until the third day of trial, because that has been validated by the Court of Appeals. Additionally, the report can be evasive on the doctor's ultimate diagnosis of the client as long as the "subject matter and substance" of the testimony is contained in the report. Opinion, supra at 528. At the very least, the offending party will gain substantial advantage over his opponent, even if his opponent does manage to find the time to take the deposition of the doctor during trial.

//

//

//

//

//

//

CONCLUSION

This case is bad law. The Supreme Court should reverse it and remand it for a new trial.

DATED this 23th day of April, 1990.

ROBERT B. SYKES
Attorney for Petitioner

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and correct copy of the foregoing Petition for Certiorari from the Decision of the Utah Court of Appeals was served upon the parties at the addresses listed below, by hand-delivering a copy thereof on the 23rd day of April, 1990.

William A. Stegall, Jr., Esq.
GUSTIN, ADAMS, KASTING & LIAPIS
48 Post Office Place, Third Floor
Salt Lake City, UT 84101

ROBERT B. SYKES
Attorney for Appellant

775cert420

Emmanuel N. ONYEABOR, Plaintiff and Appellant,

v.

PRO ROOFING, INC., a Utah corporation, and Pam Bates, Defendants and Respondents.

No. 870265–CA.

Court of Appeals of Utah.

Feb. 13, 1990.

Northbound driver brought action against westbound driver and her husband's business to recover for injuries caused by collision. The Third District Court, Salt Lake County, Bryant H. Croft, Senior Judge, entered judgment on jury verdict in favor of northbound driver and denied his motions for a new trial, judgment notwithstanding verdict, and additur. Northbound driver appealed. The Court of Appeals, Bench, J., held that: (1) allegedly erroneous admission of testimony of defense expert who was identified for northbound driver 12 days before trial did not prejudice him; (2) northbound driver was not negligent; and (3) evidence supported damage awards.

Affirmed in part, reversed in part, and remanded.

1. Courts ⇐111

Precept that record should be made of all proceedings applies to conferences in chambers as well as courtroom proceedings.

2. Appeal and Error ⇐654

Affidavits which were not part of record below could not supplement record on appeal.

3. Appeal and Error ⇐1043(1)

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff: expert was one of five defense experts in response to testimony of plaintiff's 15 experts, and plaintiff thor- Proc., Rules 26(e)(1), 61; U.C.A.1953, 41–6–46(1)(1981).

4. Appeal and Error ⇐241

Plaintiff's pretrial motion to exclude testimony of defense expert preserved issue, even though plaintiff failed to object to expert's testimony.

5. Automobiles ⇐167(1)

Driver who was approaching intersection in his own lane of traffic at or near speed limit was not negligent when he collided with a car that pulled out from a shopping center.

6. Damages ⇐130(3), 133, 134(1), 135

Evidence supported awards of $4,000 for pain and suffering during four months following automobile accident, $1,850 for medical expenses, $4,500 for loss of earnings, $5,000 for future medical and psychotherapy expenses, and $1,500 for future lost earnings; jury could believe evidence of back injury and could disbelieve evidence of head injury or causal connection between head injury and accident; and evidence indicated that injured driver possibly had preexisting back condition.

Robert B. Sykes and M. Gale Lemmon, Salt Lake City, for plaintiff and appellant.

William A. Stegall, Jr., Salt Lake City, for defendants and respondents.

Before BENCH, BILLINGS and GREENWOOD, JJ.

BENCH, Judge:

Plaintiff appeals from a jury verdict in his favor in an action arising from injuries sustained in a motor vehicle accident. We affirm in part and reverse in part.

FACTS

On June 15, 1984, plaintiff Emmanuel M. Onyeabor was driving home for lunch from his job as a carpenter on a construction project in Midvale, Utah. At approximately 1:10 p.m., he was traveling north on 900 East in unincorporated Salt Lake County,

Boulevard (7105 South). Plaintiff's vehicle was in the inside of two northbound lanes and was traveling at or near the posted speed limit of 45 m.p.h.

As plaintiff approached the intersection, a car driven by defendant Pam Bates entered 900 East from a shopping center on the southeast corner of the intersection. Bates was en route to perform an errand for her husband's business, defendant Pro Roofing, Inc. Bates intended to turn west onto Fort Union Boulevard from 900 East, and crossed over the northbound lanes of 900 East to enter the left turn lane. The drivers' views of each other were obstructed by a northbound vehicle between them. When Bates's car suddenly entered plaintiff's lane of traffic, plaintiff attempted to stop, but could not, and skidded into Bates's vehicle. The collision caused minor damage to the right side of his car and the left rear bumper of Bates's car.

Moments after the collision, plaintiff approached Bates's car and began shouting and cursing at her and pounding on the driver's side window. Bates remained in her vehicle. Eventually, plaintiff left to contact the sheriff's department, which dispatched a deputy to investigate the accident. The deputy's report indicated that neither party complained of injury at the time of the accident.

Six months later, plaintiff brought suit, alleging that he had sustained "severe and continuing bodily injuries" in the accident, and sought damages for medical expenses and loss of earnings. The record indicates that he was treated in August 1984 for "low back pain," which he said he had experienced since the accident. This problem was subsequently diagnosed as a herniated lumbar disk and was treated without surgery.

Plaintiff's continuing treatment necessitated a continuance of the trial originally scheduled for August 1985. Trial was continued without date, and plaintiff's attorney withdrew from the case. Plaintiff retained new counsel and trial was reset. Shortly thereafter, plaintiff again dismissed his attorney. One month after re- after the accident, plaintiff filed a motion to amend his complaint to allege damages for "closed-head brain injury and/or post-traumatic syndrome." The motion was granted with defendants' stipulation, and plaintiff amended his complaint to allege damages in excess of $600,000 for back, shoulder, head, and left wrist injuries. Plaintiff subsequently submitted an extensive pretrial brief, claiming that he was "permanently and totally disabled from future meaningful employment." He sought damages in the amount of $1,152,498.79.

Trial was held February 2–18, 1987. After more than thirty witnesses testified and more than a hundred exhibits were received, the jury returned a special verdict in favor of plaintiff. Total damages were found to be $16,850, but the jury determined that 25% of the negligence involved in the accident was attributable to plaintiff. Plaintiff was awarded $12,637.50 plus interest and costs, and the trial court denied his "Motions for a New Trial, for Judgment N.O.V. and for Additur."

ISSUES

Plaintiff appeals the jury verdict, claiming that: (1) the trial judge was biased against him, and that such bias was manifested in the judge's demeanor and comments on the evidence; (2) the trial court erred by permitting a defense witness to testify at trial without adequate notice; (3) there was insufficient evidence to support the jury's finding that plaintiff was partially negligent; (4) the trial court abused its discretion in denying plaintiff's motion for additur or, in the alternative, new trial; and (5) the trial court erred in making certain evidentiary rulings.

ANALYSIS

I

The procedure for resolving allegations of judicial bias is provided by Utah R.Civ.P. 63(b):

> Whenever a party to any action ... or his attorney shall make and file an affidavit that the judge before whom such

prejudice ..., such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after ... such bias or prejudice is known.

See also Birch v. Birch, 771 P.2d 1114, 1116 (Utah Ct.App.1989).

In this case, plaintiff never filed such an affidavit, even after the alleged bias admittedly became known to him during the first day or two of trial.[1] We need not decide, however, whether the sole failure to file this affidavit was procedurally fatal to the claim of bias, since there are a number of other infirmities underlying plaintiff's claim.

Defendants assert that plaintiff failed to make contemporaneous objections to the court's comments alleged to be prejudicial. "If something occurs which the party thinks is wrong and so prejudicial to him that he thereafter cannot have a fair trial, he must make his objection promptly and seek redress by moving for a mistrial, or by having cautionary instructions given, if that is deemed adequate, or be held to waive whatever rights may have existed to do so." *Hill v. Cloward*, 14 Utah 2d 55, 58, 377 P.2d 186, 188 (1962). Otherwise, "[i]t would be manifestly unjust to permit a party to sit silently by, believing that prejudicial error had been committed" and then "if he loses, come forward" claiming error. *Id.*

Plaintiff states that, "Obviously, Mr. Onyeabor's counsel was reluctant to object every time the court commented on the evidence." Although reluctance to make frequent objections may be understandable, we failed to find in the portions of the record highlighted by plaintiff even one such contemporaneous objection. Nor can we find any motion made by plaintiff for a mistrial. Plaintiff states that such a motion was "impractical because Mr. Onyeabor needed to have the case tried for medical reasons."

[1] Plaintiff nonetheless argues that he made a proper objection in chambers after the third day of trial. The discussion between counsel and the court went unrecorded because the reporter had departed for the day. The precept that a record should be made of all proceedings applies to conferences in chambers as well as courtroom proceedings. *Birch*, 771 P.2d at 1116. "The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review in the event of an appeal." *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040, 1045 (Utah 1983).

We are thus constrained by the record, which includes the following remarks by the trial judge during the hearing on plaintiff's motion for new trial:

You have made mention of the fact ... that some of your witnesses sitting in the courtroom told you that it was obvious that the judge didn't like you. Well, again if they got that impression, I'm sorry, because that isn't true....

But you go on in your brief stressing the fact that my conduct throughout the trial gave the jury a powerful message that your methods were time consuming, meaningless, perhaps an attempt to put something over on the jury. That surprised me.... And you suggest that my conduct, by the tone of my voice, by the shrug of my shoulders, by a sigh, gave a powerful message to the jury that I didn't think much of your case, and I was trying to hurry the case along and not willing to give you a fair shake.... The only way I can respond to that sort of indictment of the Court's conduct at the trial is by saying I plead not guilty.... I deny that throughout the trial I did things intentionally or unintentionally to discredit you or your witnesses or to the face of the jury.

1. *See Madsen v. Prudential Fed. Sav. & Loan*, 767 P.2d 538, 542 (Utah Ct.App.1988) (Motions to disqualify must be made promptly and may only when rulings are unfavorable. "Not only is such a tactic unfair, but it may evidence a belief that the judge is not in fact biased.").

[2] There is nothing to contradict defendants' observation that the questioned remarks were "simply explanatory statements made by the court either in the course of ruling on objections, or limiting the admissibility of evidence or testimony, or clarifying the testimony given by a witness." [2] Based on our review of the record, including the instructions given to the jury,[3] we reject plaintiff's claim of bias.

II

[3] Plaintiff also claims that the court erred in admitting the testimony of Dr. Lincoln Clark, an expert witness for the defense. Plaintiff describes Dr. Clark as a "surprise" witness in that plaintiff had no notice of his planned testimony until six business days before trial and did not receive a copy of Dr. Clark's report until the third day of trial.

Defendants retained the services of Dr. Clark, a psychiatrist, after a previous expert was unable to continue his involvement in the case due to ill health. After interviewing plaintiff, Dr. Clark determined that his involvement in the case constituted a significant risk to his safety and the safety of his family. On December 5, 1986, the court continued the trial date based on Dr. Clark's assertion that his disassociation with the case was final. On January 21, 1987, however, defendants filed an amended witness list on which Dr. Clark's name reappeared. Defendants contended that Dr. Clark had reevaluated his decision, and became convinced he had overstated the threat to his safety. Plaintiff then filed a motion in limine to exclude Dr. Clark as a witness. Judge Croft heard the motion on January 30, the Friday before trial, and decided to permit Dr. Clark to testify provided that a written report was submitted to plaintiff the first day or two of trial. A copy of that report was subsequently delivered to plaintiff early Wednesday morning, the third day of trial. Dr. Clark testified on February 13, nine days later; plaintiff neither objected to the testimony nor moved for a continuance.

[4] Defendants argue that plaintiff failed to preserve the issue for appeal by failing to object at the time Dr. Clark was called to the witness stand. However, plaintiff's pretrial motion to exclude the testimony was adequate to preserve the issue. "A matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue." *Hardy v. Hardy*, 776 P.2d 917, 924 (Utah Ct.App.1989) (quoting *State v. One 1979 Pontiac Trans Am*, 771 P.2d 682, 684 (Utah Ct.App.1989)).

The essence of plaintiff's objection appears to be that he was prejudiced because there was insufficient time prior to trial to depose Dr. Clark. However, defendants appear to have substantially complied with rule 26(e)(1) of the Utah Rules of Civil Procedure requiring a party to

> seasonably supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Dr. Clark was identified twelve days before trial and plaintiff's counsel was familiar with Dr. Clark from his testimony in another head injury lawsuit. The subject matter and substance of the expert's testimony was contained in the report delivered to plaintiff nine days before Dr. Clark testified.

2. Plaintiff has attempted to supplement the record on appeal with affidavits attesting to alleged nonverbal manifestations of bias on the part of the trial judge. Although his motion was provisionally granted pending the hearing of this appeal, affidavits which are not part of the record below will generally not be considered on appeal. *See State v. Aase*, 762 P.2d 1113, 1117 (Utah Ct.App.1988). Accordingly, we now deny plaintiff's motion to supplement the record.

3. *See, e.g.*, Jury Instruction No. 2:

> Anything done or said by me during the trial should not be considered by you as indicating my view on any issue in this case. Any belief you may have as to what my view may be should receive no consideration by you in your deliberations.

Even if we assume that the admission of Dr. Clark's testimony constituted error, plaintiff fails to demonstrate how he was prejudiced. Any error in the admission of evidence must be disregarded unless it affects the substantial rights of the parties. Utah R.Civ.P. 61. This provision has been construed as "placing upon an appellant the burden of showing not only that an error occurred, but that it was substantial and prejudicial in that the appellant was deprived in some manner of a full and fair consideration of the disputed issues by the jury." *Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987). Dr. Clark was but one of five expert witnesses called by defendants in response to the testimony of plaintiff's fifteen experts. In view of the extensive presentation of expert testimony and plaintiff's thorough cross-examination of Dr. Clark, plaintiff has failed to demonstrate prejudice resulting from the admission of Dr. Clark's testimony. Accordingly, we conclude that plaintiff's claim is without merit.

III

[5] We next address plaintiff's contention that there was insufficient evidence to support a finding of negligence on the part of plaintiff. A jury verdict will be reversed "only if, viewing the evidence in the light most favorable to the verdict, there is no substantial evidence to support it." *Canyon Country Store v. Bracey*, 781 P.2d 414, 417 (Utah 1989) (quoting *In re Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985)). An appellant must marshal all the evidence supporting the verdict and then show that the evidence is insufficient to support it even when viewed in the light most favorable to the verdict. *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985).

We have reviewed the evidence marshaled by plaintiff and agree that it cannot support a finding that plaintiff was partially negligent. There is no dispute that plaintiff was traveling in his own lane of traffic at or near the speed limit before the accident. The relevant statutory provision

> No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or ... when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Utah Code Ann. § 41–6–46(1) (1981).

Although a jury may determine that the operation of a motor vehicle within the speed limit may be negligent under given circumstances, *see Lochhead v. Jensen*, 42 Utah 99, 102–03, 129 P. 347, 348–49 (1912), there is no evidence indicating that plaintiff drove faster than was reasonable and prudent, or that the speed was unsafe and inappropriate, or that road or weather conditions necessitated a slower speed. Nor was there evidence of special hazards or unsafe driver behavior. The only evidence that was offered to suggest that plaintiff was negligent was the testimony of one of the defense experts who was "concerned" that plaintiff's car was still moving at the speed limit "that close to an intersection." In short, we could find no substantial evidence that would support a reduction in damages for plaintiff's negligence. Accordingly, we reverse the special verdict attributing 25% of the total negligence to plaintiff.

IV

[6] The final contention of plaintiff which we fully address is that involving the trial court's denial of his motion for additur or, in the alternative, a new trial. Under rule 59(a)(5) of the Utah Rules of Civil Procedure, a new trial may be granted or a new judgment may be entered if the influence of passion or prejudice resulted in inadequate damages. "However, when the damages are not so inadequate as to indicate a disregard of the evidence by the jury, a court is not empowered to entertain a motion for an additur." *Dupuis v. Nielson*, 624 P.2d 685, 686 (Utah 1981). This deference given on review of a damages

award stems from the "prerogative of the jury to make the determination of damages." *Jensen v. Eakins*, 575 P.2d 179, 180 (Utah 1978). "[W]e cannot substitute our judgment for that of the fact finder unless the evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion." *Id.*

Plaintiff alleged various injuries resulting from the accident, including injuries to his back and head. The jury's verdict obviously reflects the fact that they believed plaintiff's evidence of a back injury, but either did not believe that there was a head injury or that it was not caused by the accident.

In closing argument, defense counsel summarized plaintiff's damages that were consistent with a back injury. He calculated plaintiff's medical expenses to be $1,835. The jury awarded plaintiff $1,850. Defense counsel estimated plaintiff's loss of earnings to be $3,200. The jury awarded $4,500. Defense counsel suggested that $4,000 was a reasonable sum for general damages for pain and suffering during the four months following the accident. The jury awarded plaintiff $4,000. The jury also awarded plaintiff $5,000 for future medical and psychotherapy expenses and $1,500 for future lost earnings. These amounts appear to be reasonable, particularly in view of other evidence that plaintiff may have had a preexisting back condition which was aggravated by the accident and an incident in a "karate class."

On the other hand, defense counsel argued that plaintiff demonstrated "no loss of consciousness, no amnesia, no external sign of injury" after the accident—in short, "no sound evidence" of brain injury. This hotly disputed question of fact was for the jury, whose exclusive province it is to weigh the evidence and determine the credibility of witnesses. *See Steele v. Breinholt*, 747 P.2d 433, 436 (Utah Ct.App.1987). We conclude that "reasonable minds acting fairly" could lack "reasonable certainty that plaintiff suffered such injury and damage." *Dunn v. McKay, Burton, McMurray & Thurman*, 584 P.2d 894, 896 (Utah 1978). Thus, plaintiff simply failed to convince the jury of his entire case.

With respect to plaintiff's claims regarding various evidentiary rulings, a trial court's determination to admit or exclude evidence will not be overturned in the absence of an abuse of discretion. *Pearce v. Wistisen*, 701 P.2d 489, 491 (Utah 1985). We have reviewed the rulings in question and conclude that there was no abuse of discretion.

In summary, we affirm the finding of liability against defendants, but reverse the finding of negligence attributable to plaintiff and remand the case to modify the judgment consistent with this opinion.

BILLINGS and GREENWOOD, JJ., concur.

Sharleen M. McREYNOLDS, Plaintiff and Appellant,

v.

Glenn L. McREYNOLDS, Defendant and Respondent.

No. 890172-CA.

Court of Appeals of Utah.

Feb. 13, 1990.

Former wife sought to recover past due child support. Former husband filed counterpetition seeking reduction and revision in schedule for visitation. The Fourth District Court, Utah County, George E. Ballif, J., refused to award judgment for unpaid child support. Wife appealed. The Court of Appeals held that wife's interference with or prevention of husband's exercise of visitation rights did not permit trial court to extinguish past due child support.

Reversed and remanded.

impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) With respect to discovery obtained under Subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and timing of discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location

of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery conference.** At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) a statement of the issues as they then appear;

(2) a proposed plan and schedule of discovery;

(3) any limitations proposed to be placed on discovery;

(4) any other proposed orders with respect to discovery; and

(5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) **Signing of discovery requests, responses, and objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the

Rule 35. Physical and mental examination of persons.

(a) **Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of examining physician.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(c) **Right of party examined to other medical reports.** At the time of making an order to submit to a medical examination under Subdivision (a) of this rule, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any physician employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial, or may make such other order as is authorized under Rule 37.