

2001

Huey L. Depew v. Denton C. Sullivan : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Depew v. Sullivan*, No. 20010242 (Utah Court of Appeals, 2001).
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

HUEY L. DEPEW,

Plaintiff / Appellant,

v.

DENTON C. SULLIVAN,

Defendant / Appellee.

Case No. 20010242-CA

Priority No. 15

BRIEF OF APPELLEE

Appeal From a Jury Verdict and Orders of the Fifth Judicial District Court,
Washington County, State of Utah
Judge James L. Shumate

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Oral Argument and Published Decision
Requested

FILED
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MAY 13 2002

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED	1
DETERMINATIVE LEGAL PROVISIONS	3
STATEMENT OF THE CASE	4
I. NATURE OF THE CASE	4
II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW	4
III. STATEMENT OF FACTS	5
SUMMARY OF ARGUMENTS	8
ARGUMENT	9
I. BECAUSE REASONABLE MINDS COULD DISAGREE WITH THE GROUNDS ASSERTED BY MR. DEPEW, THE TRIAL COURT PROPERLY DENIED MR. DEPEW’S MOTION FOR A DIRECTED VERDICT	9
A. Whether Mr. Sullivan Violated Section 41-6-73 Is a Disputed Factual Issue and Could Not Be Decided as a Matter of Law	10
B. Based Upon the Facts Presented at Trial, a Reasonable Juror Could Have Disagreed With Mr. Depew’s Asserted Grounds For a Directed Verdict	13
II. MR. DEPEW HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT’S DENIAL OF THE MOTION FOR DIRECTED VERDICT AND THE MOTION FOR A NEW TRIAL	15

III.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OFFICER STACY RICHAN TO OFFER AN OPINION AS TO THE SPEED OF MR. DEPEW'S MOTORCYCLE	16
A.	The Trial Court Has Broad Discretion in Determining the Admissibility of Expert Testimony	17
B.	Officer Richan Had the Necessary Knowledge and Expertise to Offer an Opinion as to the Speed of Mr. Depew's Motorcycle	18
C.	Mr. Depew Has Not Asserted Any Specific Deficiencies in Officer Richan's Investigation and Evidence Gathering	19
IV.	THE TRIAL COURT ALLOWED MR. DEPEW MEANINGFUL AND ADEQUATE VOIR DIRE DURING JURY SELECTION	22
A.	The Inquiry Proposed by Mr. Depew Was Limited to Whether Potential Jurors Had Children Serving As Missionaries for the LDS Church	22
B.	The Trial Court Has Broad Discretion in Conducting the Voir Dire Examination	24
C.	The Appellate Courts in Utah Have Determined When Voir Dire May Properly Inquire Into Religious Affiliation and Belief	25
1.	<i>Under State v. Ball, Parties May Pursue Limited Inquiry Into Religious Beliefs Which Are Directly Related to the Subject Matter of the Action</i>	25
2.	<i>Under Hornsby v. Corp. of the Presiding Bishop, the Utah Court of Appeals Held That Jurors May Be Asked About Their Religious Affiliation When a Religious Organization Is a Party to the Action</i>	28

D.	The Trial Court’s Inquiry Was Adequate to Detect Any Bias Which Would Have Warranted a Challenge by Mr. Depew for Cause	30
E.	The Trial Court’s Refusal to Inquire as to Jurors’ Children Serving as Missionaries Did Not Constitute Prejudicial Error With Regard to Mr. Depew’s Peremptory Challenges	32
1.	<i>Because a Religious Organization Was Not a Party and the Subject Matter Was Not Related to Religion, the Trial Court Properly Refused to Inquire Into the Jurors’ Personal Religious Beliefs</i>	32
2.	<i>Any Error With Respect to Peremptory Challenges Was Not Prejudicial to Mr. Depew</i>	34
V.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING SANCTIONS AGAINST MR. DEPEW’S COUNSEL	34
A.	Mr. Depew’s Counsel Had Adequate Notice of the Potential for Sanctions to Be Entered Against Him	35
B.	Mr. Depew’s Counsel Was Given Adequate Opportunity to Object to the Order Imposing Sanctions	36
C.	The Trial Court Acted Within Its Broad Discretion in Sanctioning Mr. Depew’s Attorney	36
VI.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING DEPOSITION COSTS	37
	CONCLUSION	40
	ADDENDUM	Tab A
1.	Revised Ruling on Defendants’ Motion to Compel Discovery and for Sanctions (R. 305-09)	Add. 1
2.	Order Awarding Attorney’s Fees (R. 316-17)	Add. 6

3.	Memorandum Decisions Denying Objection to Award of Attorney’s Fees (R. 337-38)	Add. 8
4.	Transcript of Trial Court Denying Mr. Depew’s Voir Dire Question Concerning Missionary Service (R. 497 at 34-35)	Add. 10
5.	Transcript of Trial Court Denying Mr. Depew’s Motion for a Directed Verdict (R. 498 at 349)	Add. 13
6.	Judgment of Costs (R. 446-47)	Add. 15
7.	Memorandum Decision and Order Denying Mr. Depew’s Motion for New Trial (R. 456-58)	Add. 17
8.	UTAH CONST. Art. I, § 4.	Add. 20
9.	UTAH CODE ANN. § 41-6-73	Add. 20
10.	UTAH CODE ANN. § 78-46-3	Add. 20
11.	UTAH CODE ANN. § 78-46-5(1)(e)	Add. 21

TABLE OF AUTHORITIES

Cases

<i>Barrett v. Peterson</i> , 868 P.2d 96, 98 (Utah Ct. App. 1993)	2
<i>Brewer v. Denver Rio Grande W. R.R.</i> , 2001 UT 77, ¶ 33, 31 P.3d 557; UTAH R. APP. P. 24(a)(9)	15
<i>Casey v. Roman Catholic Archbishop of Baltimore</i> , 217 Md. 595, 143 A.2d 627(1958)	29
<i>Coleman v. United States</i> , 379 A.2d 951 (D.C. 1977)	29
<i>Doe v. Hafen</i> , 772 P.2d 456, 458 (Utah Ct. App. 1989)	23
<i>Gerbich v. Numed, Inc.</i> , 1999 UT 37, ¶ 16, 977 P.2d 1205	17
<i>Highland Constr. Co. v. Union P. R.R.</i> , 683 P.2d 1042, 1052 (Utah 1984)	38, 39
<i>Hornsby v. Corp. of the Presiding Bishop</i> , 758 P.2d 929, 932 (Utah Ct. App. 1998)	24, 28-30, 32, 33
<i>Jaime & Marie Gorostieta v. Parkinson</i> , 2000 UT 99, ¶ 31, 17 P.3d 1110	3
<i>Lawson Supply Co. v. General Plumbing and Heating, Inc.</i> , 493 P.2d 607, 609 (Utah 1972)	38
<i>Lloyd's Unlimited v. Nature's Way Mktg., Ltd.</i> , 753 P.2d 507, 512 (Utah Ct. App. 1988)	38
<i>Mahmood v. Ross</i> , 1999 UT 104, ¶ 16, 990 P.2d 933	1, 9
<i>McCloud v. Baum</i> , 569 P.2d 1125, 1127 (Utah 1977)	2, 11-13
<i>Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.</i> , 850 P.2d 447, 460 (Utah 1993)	3
<i>Pack v. Case</i> , 2001 UT App 232, ¶ 16, 30 P.3d 436	2, 17

<i>Starling v. Union Pac. R.R. Co.</i> , 22 S.W.3d 213 (Mo. Ct. App. 2000)	40
<i>State v. Ball</i> , 685 P.2d 1055 (Utah 1984)	25-28, 32
<i>State v. Bishop</i> , 753 P.2d 439, 448 (Utah 1988)	24
<i>State v. Clayton</i> , 646 P.2d 723, 276 (Utah 1982)	17
<i>State v. Kelley</i> , 2000 UT 41, ¶ 23, 1 P.3d 546	21
<i>State v. Moton</i> , 749 P.2d 639, 643 (Utah 1988)	24, 34
<i>State v. Pearson</i> , 943 P.2d 1347, 1353 (Utah Ct. App. 1997)	17
<i>State v. Tanner</i> , 675 P.2d 539, 544 (Utah 1983)	20
<i>Swain v. Alabama</i> , 380 U.S. 202, 85 S.Ct. 824 (1965)	29
<i>Wessel v. Erickson Landscaping Co.</i> , 711 P.2d 250, 253 (Utah 1985)	17, 18
<i>Williams v. Zions Coop. Mercantile Inst.</i> , 312 P.2d 564, 566 (Utah 1957)	13

Statutes

UTAH CODE ANN. § 41-6-73	3, 10
UTAH CODE ANN. § 78-46-5(1)(e)	3, 34
UTAH CODE ANN. § 78-46-3	3, 25
UTAH CODE ANN. § 78-2a-3(2)(j)	1
UTAH CONST. Art. I, § 4	3, 25

Rules

MO. R. CIV. PRO. Rule 57.03(c)(6))	40
Ut. R. Civ. P. 37(d) (1999)	35

UTAH R. CIV. P. 47(e) 34

UTAH R. CIV. P. 47(f)(6) 31

UTAH R. EVID. 702 17

UTAH R. EVID. 703 21

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to UTAH CODE ANN.

§ 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED

1. **Issue:** Whether the district court erred in denying Mr. Depew's motion for a directed verdict on the issue of Mr. Sullivan's negligence.

a. **Standard of Review:** When reviewing a challenge to a trial court's denial of a motion for directed verdict, the appellate court must review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict. *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933.

b. **Record Citation:** Trial Record [hereafter, "R."] 498 at 348-49.

2. **Issue:** Whether the district court erred in denying Mr. Depew's motion for a new trial.

a. **Standard of Review:** When reviewing a challenge to a trial court's denial of a motion for a new trial, the appellate court examines the record to determine whether the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and

unjust. If there is any evidentiary basis for the jury's decision, the denial of the new trial must be affirmed. *McCloud v. Baum*, 569 P.2d 1125, 1127 (Utah 1977).

b. **Record Citation:** R. 441-44, 457-58.

3. **Issue:** Whether the district court erred in allowing Officer Stacy Richan to offer an opinion regarding the speed of Mr. Depew's motorcycle.

a. **Standard of Review:** An appellate court reviews the trial court's determination regarding the admissibility of expert testimony under an abuse of discretion standard. *Pack v. Case*, 2001 UT App 232, ¶ 16, 30 P.3d 436.

b. **Record Citation:** R. 498 at 281.

4. **Issue:** Whether the district court erred in refusing to allow Mr. Depew to inquire whether potential jurors' children had served as missionaries for the LDS Church.

a. **Standard of Review:** An appellate court reviews challenges to the trial court's management of jury voir dire under an abuse of discretion standard. *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993).

b. **Record Citation:** Add. 10.

5. **Issue:** Whether the district court erred in imposing discovery sanctions against Mr. Depew's counsel.

a. **Standard of Review:** An appellate court reviews a trial court's imposition of sanctions for discovery violations under an abuse of discretion standard. *Jaime & Marie Gorostieta v. Parkinson*, 2000 UT 99, ¶ 31, 17 P.3d 1110.

b. **Record Citation:** R. 310-22, 321-22.

6. **Issue:** Whether the district court erred in awarding Mr. Sullivan costs for the videotaping and transcription of depositions.

a. **Standard of Review:** An appellate court reviews a trial court's award of deposition costs under Rule 54 under an abuse of discretion standard. *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 460 (Utah 1993).

b. **Record Citation:** R. 439-40.

DETERMINATIVE LEGAL PROVISIONS

The following statutes and ordinances are determinative of the issues presented and are set forth verbatim in the addendum: UTAH CONST. Art. I, § 4; UTAH CODE ANN. § 41-6-73; UTAH CODE ANN. § 78-46-3; and UTAH CODE ANN. § 78-46-5(1)(e).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an action in which Plaintiff Huey L. Depew (“Mr. Depew”) seeks to recover damages for injuries allegedly sustained from a collision between Depew’s motorcycle and the truck operated by Defendant Denton C. Sullivan (“Mr. Sullivan”).

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Mr. Depew brought an action against Mr. Sullivan in the Fifth Judicial District Court in Washington County, Utah. Mr. Depew’s complaint alleged that the collision was caused by Mr. Sullivan’s negligence. During discovery, the trial court granted Mr. Sullivan’s motion for sanctions against Mr. Depew and his counsel based upon Mr. Depew’s failure to respond to discovery requests.

The case was tried before a jury on November 13 and 14, 2001. At the close of evidence, Mr. Depew moved for a directed verdict on the issue of Mr. Sullivan’s negligence. The trial court denied the motion for a directed verdict, and the case was submitted to the jury. In its verdict, the jury found that Mr. Sullivan was not negligent and did not proximately cause Mr. Depew’s injuries. Mr. Depew filed a motion for a new trial which was denied by the trial court.

Mr. Depew has appealed the following rulings from the trial court: (1) the imposition of sanctions against Mr. Depew’s counsel; (2) the denial of Mr. Depew’s

motion for a directed verdict; (3) the denial of Mr. Depew's motion for a new trial; (4) the rejection of Mr. Depew's objection to expert testimony from Officer Stacy Richan regarding the speed of Mr. Depew's motorcycle; (5) the rejection of Mr. Depew's proposed jury voir dire questions regarding whether jurors had children serving as missionaries; and (6) the award of deposition expenses as taxable costs.

III. STATEMENT OF FACTS

On the early evening of May 21, 1996, Mr. Sullivan was driving a 1996 Chevrolet pickup northwest on Bloomington Drive East near Rio Virgin Drive in St. George, Utah. (R. 497 at 53, 81-82; Officer's Accident Report, attached to Appellant's Brief as Addendum A [hereafter, "Accident Report"] 1.) In this area, Bloomington Drive East is a two-lane road which runs slightly uphill in the direction Mr. Sullivan was traveling. (R. 497 at 140; Accident Report 2.) Mr. Sullivan slowed his truck and turned on his left turn signal in preparation for turning left into his grandmother's driveway. (R. 428 at 11-12.) At this location, Bloomington Avenue runs through a residential area, and it is common for vehicles traveling on Bloomington Avenue to turn into residential driveways. (R. 498 at 260.)

At roughly the same time, Mr. Depew was driving a racing-style 1991 Suzuki GSXR750 motorcycle southeast on Bloomington Avenue toward Mr. Sullivan's vehicle. (R. 497 at 53-54, 79, 135.) In the direction Mr. Depew was traveling, Bloomington Avenue has a slight downhill grade. (R. 497 at 140; R. 498 at 323.) The posted speed

limit on Bloomington Avenue is 25 miles per hour. (R. 497 at 53-54.) Depew's motorcycle was traveling between 41 and 46 miles per hour (R. 498 at 282).

After looking up the road and seeing no approaching vehicles, Mr. Sullivan began turning left into his grandmother's driveway. (R. 428 at 12-13.) Upon seeing Mr. Sullivan's vehicle turning left in front of him, Mr. Depew hit his brakes and the motorcycle tires skidded for approximately 41 feet before the motorcycle slid on its side and collided with Mr. Sullivan's truck. (R. 497 at 87-88; R. 498 at 261.) Mr. Depew jumped off the motorcycle approximately 20 feet before it collided with the truck. (R. 497 at 91.) The motorcycle hit Mr. Sullivan's truck between the truck's rear tire and the rear bumper. (R. 428 at 14.) After colliding with Mr. Sullivan's truck, the motorcycle slid on its side for an additional 48 feet. (R. 498 at 261.) As the result of the accident, Mr. Depew fractured his wrist and suffered other injuries. (R. 497 at 92-93.) Mr. Depew filed an action against Mr. Sullivan on November 13, 1997. (R. 497 at 54.)

During discovery, Mr. Sullivan's counsel served upon Mr. Depew's counsel a request for production of documents relating to the case. (R. 22-23.) When Mr. Depew failed to respond to these requests, Mr. Sullivan filed a motion to compel Mr. Depew to provide discovery responses and to award Mr. Sullivan the attorney's fees incurred in

bringing the motion. (R. 82a-84a.¹) The court granted Mr. Sullivan's motion to compel and entered an order requiring Mr. Depew and his counsel to pay Mr. Sullivan's attorney's fees associated with the motion to compel. (Addendum [hereafter "Add."] 1, 6.)

The case proceeded to trial before a jury. During voir dire of the jury panel, Mr. Depew requested that the trial court inquire whether the jurors had any children serving missions for the LDS Church. (Add. 10.) Refusing to ask the jurors this question, the trial court instead inquired whether the fact that Mr. Sullivan was on a religious mission would prevent the jurors from properly applying the facts to the law. (Add 10 .) None of the jurors indicated that Mr. Sullivan's missionary service would prevent them from rendering a verdict based upon the facts presented at trial. (Add 10.)

At the close of evidence at the trial, Mr. Depew moved for a directed verdict on the issue of Mr. Sullivan's negligence. (Add. 13.) The trial court denied this motion. (Add 13.) By a vote of 7 to 1, the jury returned a verdict indicating that Mr. Sullivan was not negligent and did not proximately cause the collision. (R. 498 at 401.) Mr. Sullivan submitted a memorandum of costs (R. 436-38), and Mr. Depew filed a motion asking the

¹It appears that the trial court mistakenly paginated the record so that two different documents include pages 81, 82, 83, and 84. Defendant's Motion to Compel is designated as pages 82 through 84, and Defendant's Memorandum in Support of Motion to Compel is designated as Pages 81 through 90. To clarify, Mr. Sullivan will refer to the pages in the Motion to Compel as pages 82a, 83a, and 84a.

trial court to scrutinize the appropriateness and amount of these costs (R. 439-40). The trial court ultimately entered judgment for costs in the amount requested by Mr. Sullivan. (Add. 15.) Mr. Depew also filed a motion requesting a new trial on the grounds that there was insufficient evidence to support the verdict. (R. 441-45.) The trial court denied this motion. (Add 17.) Mr. Depew then filed the present appeal.

SUMMARY OF ARGUMENTS

Mr. Depew's motion for a directed verdict was properly denied by the trial court because the evidence at trial could lead reasonable minds to disagree with Mr. Depew's argument that Mr. Sullivan was negligent as a matter of law. This Court should uphold the trial court's denial of Mr. Depew's motion for a new trial because Mr. Depew has failed to marshal the evidence in support of the jury's verdict and because the evidence presented at trial adequately supports the jury's findings. The trial court was within its discretion in allowing Officer Richan to testify regarding the speed of Mr. Depew's motorcycle, even though Officer Richan's expertise in motorcycle accident reconstruction was obtained after the accident. The questions asked in jury voir dire regarding the jurors' feelings about Mr. Sullivan's missionary service were sufficient to allow Mr. Depew to challenge jurors for cause and intelligently exercise his peremptory challenges. In any event, because a different exercise of Mr. Depew's three peremptory challenges would not have garnered the 6 votes out of 8 which are required for a civil verdict, any error relating to peremptory challenges was not prejudicial.

The trial court was within its discretion to sanction Mr. Depew's counsel for failing to provide requested documents which were admittedly in his or his client's possession. The trial court did not err in awarding as costs the expenses Mr. Sullivan incurred in transcribing and videotaping the depositions because those depositions were used at trial and were reasonably necessary to protect Mr. Sullivan's rights in defending this action.

ARGUMENT

I. BECAUSE REASONABLE MINDS COULD DISAGREE WITH THE GROUNDS ASSERTED BY MR. DEPEW, THE TRIAL COURT PROPERLY DENIED MR. DEPEW'S MOTION FOR A DIRECTED VERDICT

Mr. Depew first argues that the trial court erred in refusing to grant a directed verdict on the issue of Mr. Sullivan's negligence. In reviewing the trial court's denial of a directed verdict, this court must first "review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against" *Mahmood*, 1999 UT 104 at ¶ 16. Once the evidence is viewed in that light, the Court must determine "if reasonable minds could disagree with the ground asserted for directing a verdict." *Id.* If reasonable minds could differ, the denial of the motion for a directed verdict must be upheld. *Id.* In the present case, ample evidence was presented at trial which would cause reasonable minds to disagree with the grounds asserted by Mr. Depew for a directed verdict.

A. Whether Mr. Sullivan Violated Section 41-6-73 Is a Disputed Factual Issue and Could Not Be Decided as a Matter of Law

At trial, Mr. Depew argued that a directed verdict should be entered against Mr. Sullivan on the issue of negligence based upon the fact that Mr. Sullivan turned left in front of Mr. Depew. Mr. Depew's argument relies upon the following section of the Utah Code:

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard.

UTAH CODE ANN. § 41-6-73. Mr. Depew argues that Mr. Sullivan violated this statute as a matter of law. (Appellant's Brief 16.) Based upon this assumption, Mr. Depew asserts that such a violation constitutes prima facie evidence of negligence and that the trial court erred in not entering a directed verdict on this basis. (Appellant's Brief 10, 16.)

The problem with Mr. Depew's argument is simple—he has incorrectly assumed that, as a matter of law, Mr. Sullivan violated Section 41-6-73. In reality, whether Mr. Sullivan violated this provision depends upon factual determinations which must be made by the finder of fact.

Section 41-6-73 is not violated unless three conditions are met. First, a driver must be seeking to turn his or her vehicle left. Second, another driver must be approaching in the opposite direction whose vehicle is "so close to the turning vehicle as to constitute an immediate hazard." Third, the turning driver must fail to yield the right-

of-way to the second driver's vehicle. In the present case, it is undisputed that Mr. Sullivan was turning left and that Mr. Depew's motorcycle was approaching from the opposite direction. Also, Mr. Sullivan acknowledges that he did not yield the right-of-way to Mr. Depew's motorcycle. However, a disputed question of fact existed as to whether Mr. Depew's motorcycle was "so close to the turning vehicle as to constitute an immediate hazard."

The Utah Supreme Court has addressed this issue in a case with very similar facts. In *McCloud*, 569 P.2d at 1126, a motorcyclist was injured when he collided with a car turning left in front of him at an intersection. The motorcyclist had been following a camper which slowed to turn left at an intersection controlled by a flashing yellow light. *Id.* The motorcycle passed the camper on the right and collided with the rear portion of the defendant's vehicle. The defendant had been traveling in the opposite direction and turned left in front of the motorcyclist. *Id.*

At trial, the district court denied the motorcyclist's motion for a directed verdict on the issue of the defendant's negligence based upon Section 41-6-73.² Like the jury in the present case, the jury in *McCloud* found the plaintiff 100 percent liable and the defendant without negligence. On appeal, the Utah Supreme Court cited and relied upon a decision from the Wisconsin Supreme Court:

The [Wisconsin] court further observed that what is reasonable safety depends upon the facts in the particular case. An inference of negligence does not arise from the fact of collision alone involving a left-turning driver.

McCloud, 569 P.2d at 1127-28.

The Utah Supreme Court sustained the trial court's denial of a directed verdict, holding that the issue of an "immediate hazard" was a question of fact for the jury:

[Plaintiff] further contends, as a matter of law, he was in such close proximity to the intersection at the time defendant commenced her turn he constituted an immediate hazard. Based on the expert testimony in the record, the court could have found plaintiff was 225.56 feet from the intersection at the time defendant commenced her left turn. ***When this distance is considered with the other physical facts***, viz., the intersection

²When the claim in *McCloud* arose, Section 41-6-73 differed slightly from the current statute. At that time, Section 41-6-73 provided as follows:

The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection.

McCloud, 569 P.2d at 1127.

was controlled by a flashing yellow light and the single lane of travel was occupied by a large, slow moving vehicle, *there was a question of fact as to whether a reasonable person, exercising due care, would have apprehended an immediate hazard in executing a left turn.* The trial court properly submitted this issue to the jury.

Id. at 1127 (emphasis added); *see also Williams v. Zions Coop. Mercantile Inst.*, 312

P.2d 564, 566 (Utah 1957) (holding that determination whether vehicle was

“approaching so closely as to constitute an immediate hazard” was question of fact for

the jury). If the evidence can prompt reasonable minds to differ on the issue of whether a

vehicle is “so close . . . as to constitute an immediate hazard,” the issue cannot be decided

as a matter of law and denial of a motion for directed verdict must be upheld.

B. Based Upon the Facts Presented at Trial, a Reasonable Juror Could Have Disagreed With Mr. Depew’s Asserted Grounds For a Directed Verdict

There were ample facts presented at trial to persuade a reasonable juror that when Mr. Sullivan began his turn Mr. Depew’s motorcycle was not so close as to constitute an immediate hazard. Mr. Sullivan testified that he looked up the road before he started turning and saw no vehicle approaching. (R. 428 at 12.) An investigator hired by Mr. Depew testified that a vehicle in the position of Mr. Sullivan’s truck prior to turning would have an unobstructed view of an oncoming vehicle 430 feet away. (R. 497 at 184). The investigator acknowledged that Mr. Depew would have had a similar unobstructed view of Mr. Sullivan’s truck from 430 feet away. (R. 497 at 189.) The officer investigating the accident estimated that Mr. Depew was traveling between 41

and 46 miles per hour before he applied his brakes. (R. 498 at 282). Mr. Depew was therefore exceeding the 25-mile-per-hour speed limit by between 16 and 21 miles per hour. (R. 497 at 53-54.) Mr. Sullivan testified that the front wheels of his truck were already in his grandmother's driveway when the motorcycle collided with the truck. (R. 428 at 13.) Mr. Sullivan further stated that the motorcycle collided with his truck "right behind the exhaust pipe, further back between the exhaust pipe and the rear bumper." (R. 428 at 14.)

From this evidence, a reasonable juror could have concluded that at the time Mr. Sullivan began his left turn, Mr. Depew's motorcycle was far enough away that an average person would not have considered the motorcycle an immediate hazard to Mr. Sullivan's left-turning vehicle. Moreover, a reasonable juror could have concluded that the accident was caused by Mr. Depew's negligence in exceeding the speed limit and was not caused by any failure on Mr. Sullivan's part. In fact, in the present case, the Court need not rely solely on what hypothetical jurors might do. Seven of the eight actual jurors who were empaneled in this case apparently reached this very conclusion, as evidenced by the jury's 7-to-1 verdict that Mr. Sullivan was not negligent. (R. 498 at 400-01.) Clearly, reasonable minds could (and did) disagree with Mr. Depew's assertion that Mr. Sullivan was negligent as a matter of law. Accordingly, the trial court properly denied Mr. Depew's motion for directed verdict on the issue of Mr. Sullivan's negligence.

II. MR. DEPEW HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DENIAL OF THE MOTION FOR DIRECTED VERDICT AND THE MOTION FOR A NEW TRIAL

As indicated above, there was a disputed issue of fact at trial regarding whether Mr. Sullivan violated Section 41-6-73. In addition, Mr. Depew claims that because “the jury should have allocated at least some fault to defendant,” a new trial should be granted. (Appellant’s Brief 16.) In appealing these factual issues, Mr. Depew has the burden of “marshal[ing] the evidence in support of the verdict and then demonstrat[ing] that the evidence is insufficient when viewed in the light most favorable to the verdict.” *Brewer v. Denver Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557; UTAH R. APP. P. 24(a)(9). The appellate court “will not overturn a verdict on a challenge to the sufficiency of the evidence so long as *some evidence and reasonable inferences support the jury’s findings.*” *Id.* at ¶ 36 (internal quotations omitted) (emphasis added).

In seeking to overturn factual findings, Mr. Depew “is required to marshal the evidence, not simply attack its credibility or offer other contradictory evidence supporting the [defendant’s] position” *Id.* Mr. Depew has not even attempted to marshal the evidence supporting the trial court’s denial of a directed verdict or the jury’s verdict. Instead, Mr. Depew has simply attacked the credibility of supporting evidence and offered other contradictory evidence. The Utah Supreme Court has held that such an approach is inadequate. *Id.* (ruling that the trial court did not err in denying motion for directed verdict). Because the evidence presented at trial was such that a reasonable

person could have disagreed with Mr. Depew's basis for a directed verdict, and because "some evidence and reasonable inferences support the jury's findings," the trial court did not err in rejecting Mr. Depew's motion for a directed verdict and denying Mr. Depew's motion for a new trial. Accordingly, the trial court's ruling on these two motions should be upheld.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OFFICER STACY RICHAN TO OFFER AN OPINION AS TO THE SPEED OF MR. DEPEW'S MOTORCYCLE

Mr. Depew argues that the trial court erred in allowing Officer Stacy Richan to offer an opinion as to the speed of Mr. Depew's motorcycle before Mr. Depew started braking. (Appellant's Brief 10-16.) Officer Richan admitted that his expertise in estimating the speed of motorcycles was not obtained until after his investigation of the Depew accident. (R. 498 at 275-76, 292-93.) Relying on this fact, Mr. Depew concludes that Officer Richan "did not possess the expertise to gather and preserve all the material evidence at the time he made his investigation to the accident in question" and therefore should not have been allowed to opine as to Mr. Depew's speed. (Appellant's Brief 18.) However, the validity of Mr. Depew's contention is seriously undermined by his inability to cite any supporting case law or legal authority. In addition to being counterintuitive, Mr. Depew's argument is contrary to the provisions of the Utah Rules of Evidence.

A. The Trial Court Has Broad Discretion in Determining the Admissibility of Expert Testimony

Determinations as to the qualifications of an expert and the suitability of expert testimony are within the broad discretion of the trial court. *State v. Clayton*, 646 P.2d 723, 276 (Utah 1982) (“It is within the discretion of the trial court to determine the suitability of expert testimony in a case and the qualifications of the proposed expert.”); *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253 (Utah 1985) (“A trial court . . . is granted considerable discretion in determining whether an expert is qualified to give an opinion on a particular matter.”); *State v. Pearson*, 943 P.2d 1347, 1353 (Utah Ct. App. 1997) (“Regarding the admission or exclusion of expert testimony, the trial court has a wide measure of discretion.”). Appellate courts will not overturn the trial court’s ruling on the admissibility of expert testimony unless the trial court abused its broad discretion in this area. *Pack*, 2001 UT App 232 at ¶ 35; *Gerbich v. Numed, Inc.*, 1999 UT 37, ¶ 16, 977 P.2d 1205.

The admissibility of expert witness testimony is governed by Rule 702 of the Utah Rules of Evidence, which provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

UTAH R. EVID. 702. In applying this rule, the Utah appellate courts have noted that “the critical factor in determining the competency of an expert is whether that expert has

knowledge that can assist the trier of fact in resolving the issues before it.” *Wessel*, 711 P.2d at 253.

B. Officer Richan Had the Necessary Knowledge and Expertise to Offer an Opinion as to the Speed of Mr. Depew’s Motorcycle

Mr. Depew does not directly argue that Officer Richan lacked the necessary “knowledge, skill, expertise, training, or education” at the time of trial to opine as to the speed of Mr. Depew’s motorcycle. Instead, Mr. Depew makes the novel argument that because Officer Richan’s expertise was acquired after the Depew accident, Officer Richan could not have properly preserved evidence from the accident scene which would support his opinion as to the motorcycle’s speed. This argument is seriously flawed.

The evidence presented at trial established that Officer Richan had the “knowledge, skill, expertise, training, or education” to be qualified as an expert for purposes of estimating the speed of Mr. Depew’s motorcycle. While working for the Wendover Police Department, Officer Richan completed a 40-hour course with the Nevada Highway Patrol in accident reconstruction. (R. 498 at 267.) Officer Richan subsequently joined the St. George Police Department where he attended a two-week school of intermediate and advanced accident investigation. (R. 498 at 256-57.)

During his nine years of service with the St. George Police Department, Officer Richan served four years in the Traffic Enforcement Division and two years in a traffic investigations rotation. (R. 498 at 256-57.) Within the two years prior to trial, Officer

Richan attended three additional weeks of accident reconstruction training from officers in the West Valley and Orem police departments. (R. 498 at 257-58.) Although Officer Richan did not have training in motorcycle accident reconstruction at the time he investigated the Depew accident, he subsequently received approximately three days of training on motorcycle accidents and acquired knowledge of this subject through study of manuals and other relevant materials. (R. 498 at 277-78.) In light of this evidence, the trial court was within its discretion to hold that Officer Richan had the requisite knowledge, skill, expertise, training, and/or education to give his expert opinions as to the speed of Mr. Depew's motorcycle.

C. Mr. Depew Has Not Asserted Any Specific Deficiencies in Officer Richan's Investigation and Evidence Gathering

Although Mr. Depew claims that Officer Richan did not properly preserve evidence from the accident scene, Mr. Depew has not identified any specific deficiencies in Officer Richan's investigation. While baldly asserting that "[n]o conscientious expert in the field of motorcycle accident reconstruction would venture an opinion regarding the speed of plaintiff's motorcycle based upon the information Officer Richan gathered and preserved in his report," Mr. Depew does not specify what Officer Richan might have done differently at the accident scene. It is undisputed that Officer Richan completed an accident report which included witness statements, the positions of the vehicles, and measurements of the marks from the skidding tires and the scrapes from the sliding

motorcycle. (Accident Report 1-2.) Mr. Depew has suggested no reason why the evidence preserved in Officer Richan's accident report may not be relied upon by Officer Richan in formulating an opinion as to the speed of Mr. Depew's motorcycle.

While Mr. Depew argues that Officer Richan improperly assumed that both wheels of the motorcycle skidded for the entire length of the 41-foot skid mark (Appellant's Brief 18), that issue goes to the weight to be given to the testimony and not its admissibility:

Any deficiencies in the [expert's] testimony, however, go to its weight rather than to its admissibility. The weight and credibility to be given an expert's testimony are matters to be decided by the factfinder. Defense counsel may of course challenge the testimony on cross-examination, but such challenge goes to the weight to be given the testimony, not to its admissibility.

State v. Tanner, 675 P.2d 539, 544 (Utah 1983). Mr. Depew had every opportunity to try to discredit Officer Richan's opinions through cross-examination or to present his own expert to testify regarding the skid marks and the speed of Mr. Depew's motorcycle. However, Mr. Depew is not entitled to keep the evidence away from the jury simply because he disagrees with Officer Richan's methodology or conclusions.

As a practical matter, expert witnesses are allowed (and usually expected) to formulate their opinions based upon information gathered by non-experts. Accident reconstruction experts almost never have the opportunity to actually gather evidence at the scene of the accident. Instead, such experts, who are retained after the fact, utilize

information from the police reports and other sources to formulate their opinions about the accident. Under Rule 703 of the Utah Rules of Evidence, expert witnesses are allowed to base their opinions upon facts or data “perceived by or made known to the expert at or before the hearing.” UTAH R. EVID. 703; *State v. Kelley*, 2000 UT 41, ¶ 23, 1 P.3d 546 (“Thus, under our case law, it is not necessary for experts to have perceived all aspects of their testimony personally.”). In fact, an expert’s opinion can even be based upon inadmissible evidence, so long as the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject” UTAH R. EVID. 703.

If a different officer, who did not have extensive experience in recreating motorcycle accidents, had gathered the evidence and information from the Depew accident scene, Rule 703 would have allowed Officer Richan to testify as to his opinions based upon facts or data from that investigation. Similarly, Mr. Depew could have retained an expert to provide an opinion based upon Officer Richan’s report. There is no reason why Officer Richan’s lack of motorcycle accident experience at the time of the investigation should preclude him from testifying as an expert witness based upon his own accident report. If anything, Officer Richan’s opinion testimony should be considered more reliable because he actually observed the accident scene shortly after the accident.

In short, Officer Richan was qualified to provide opinion testimony as an expert witness, and Rule 703 allowed him to rely upon the information he observed and recorded in his accident report. Accordingly, the trial court did not err in allowing Officer Richan to provide opinion testimony as to the speed of Mr. Depew's motorcycle prior to the accident.

IV. THE TRIAL COURT ALLOWED MR. DEPEW MEANINGFUL AND ADEQUATE VOIR DIRE DURING JURY SELECTION

Mr. Depew claims that the court prevented him from conducting meaningful voir dire during jury selection. Specifically, Mr. Depew argues that the trial court erred in refusing to allow him to ask jurors whether they had children serving as missionaries for The Church of Jesus Christ of Latter-day Saints (the "LDS Church").

A. The Inquiry Proposed by Mr. Depew Was Limited to Whether Potential Jurors Had Children Serving As Missionaries for the LDS Church

At the time of trial, Mr. Sullivan was serving a two-year term as a full-time missionary for the LDS Church in Pennsylvania. (R. 497 at 21-22.) The trial court granted Mr. Sullivan's motion to present his testimony through a videotaped deposition, (R. 244-54, 295) and Mr. Depew has not appealed the trial court's decision to grant that motion. During jury voir dire, the following exchange took place between Mr. Depew's counsel and the trial court:

MR. PRISBREY: There was -- obviously, one of the issues has to do with the fact Mr. Sullivan is on an LDS mission and I wanted to ask the jury some questions as to whether they do have children on missions.

THE COURT: Counsel, I'm not going to go that direction because religious affiliation has nothing to do with jury service. But let me ask you, ladies and gentlemen, there may be evidence given and maybe eventually your decision that a judgment should be entered in favor of Mr. Depew, the plaintiff in this matter, and against Mr. Sullivan, the defendant. Would the fact that Mr. Sullivan, the defendant, is on a religious mission at the present time give you any problem in applying the facts in the law as you find it from the evidence in this case? If that's a difficulty for you would you raise your hand. The answer there is in the negative. . . .

(Add. 10.)

In his brief, Mr. Depew argues that he “asked that prospective jurors be required to disclose any affiliation they may have with LDS missionaries and to indicate whether any potential jurors had served an LDS mission.” (Appellant’s Brief 19.) This statement is not an accurate description of the request made by Mr. Depew’s attorney. The trial transcript shows that Mr. Depew’s attorney simply said he “wanted to ask the jury some questions *as to whether they do have children on missions.*” (Add. 10 (emphasis added.)) Nowhere in the trial transcript did Mr. Depew’s attorney ask the court to inquire into the potential jurors’ affiliation with the LDS Church or whether the potential jurors themselves served as missionaries for the LDS Church. Accordingly, these two issues were not preserved at trial and should not be considered on appeal. *Doe v. Hafen*, 772 P.2d 456, 458 (Utah Ct. App. 1989) (holding that plaintiff who did not call the court’s attention to a specific question it desired the court to ask on voir dire failed to

preserve the issue for appeal). The only issue remaining before this Court regarding jury voir dire is whether the trial court erred in refusing to ask whether any juror had a child serving a mission for the LDS Church.

B. The Trial Court Has Broad Discretion in Conducting the Voir Dire Examination

“The trial court has traditionally been given considerable latitude as to the manner and the form of conducting the voir dire examination and is only restricted in that discretion from committing prejudicial error.” *State v. Moton*, 749 P.2d 639, 643 (Utah 1988). Thus, this Court must consider whether the trial court’s refusal to question potential jurors as to LDS Church missions served by their children was an abuse of discretion and constituted prejudicial error. The trial court abuses its discretion when, “considering the totality of the questioning, counsel [is not] afforded the adequate opportunity to gain the information necessary to evaluate jurors.” *State v. Bishop*, 753 P.2d 439, 448 (Utah 1988).

Jury voir dire has two principal purposes: (1) detecting bias sufficient to challenge a prospective juror for cause; and (2) collecting data to permit informed exercise of peremptory challenges. *Hornsby v. Corp. of the Presiding Bishop*, 758 P.2d 929, 932 (Utah Ct. App. 1998). Mr. Depew’s brief does not indicate whether the alleged error during voir dire prejudiced his rights with respect to challenges for cause or peremptory challenges. Accordingly, both types of juror challenges will be addressed.

C. The Appellate Courts in Utah Have Determined When Voir Dire May Properly Inquire Into Religious Affiliation and Belief

Article I, Section 4 of the Utah Constitution provides in pertinent part that “[t]he rights of conscience shall never be infringed . . . nor shall any person be incompetent as a . . . juror on account of religious belief or the absence thereof.” UTAH CONST. Art. I, § 4. The Utah Code provides that “[a] citizen shall not be excluded or exempt from jury service on account of . . . race, color, religion, sex, national origin, age, occupation, disability, or economic status.” UTAH CODE ANN. § 78-46-3. Thus, a juror may not be excluded from jury service based solely upon his or her religion.

1. *Under State v. Ball, Parties May Pursue Limited Inquiry Into Religious Beliefs Which Are Directly Related to the Subject Matter of the Action*

Two decisions of the Utah appellate courts have considered whether inquiry may be made into the religious beliefs or associations of potential jurors. The first case, *State v. Ball*, 685 P.2d 1055 (Utah 1984), involved a defendant charged with driving under the influence of alcohol. During voir dire, the trial court asked the potential jurors whether any of them had prejudices against people who drink. None responded that they did. *Id.* at 1056. The defendant’s counsel then asked if any of the potential jurors chose not to drink for any reason. Four potential jurors responded that they did not drink. *Id.* Defendant’s counsel asked to inquire if those jurors’ choice not to drink was for a personal or religious conviction. The trial court refused to present this question to the

potential jurors. *Id.* Defendant removed three of the four non-drinking jurors by exercising all three of his peremptory challenges. The fourth teetotaling juror, however, sat on the jury that convicted the defendant. *Id.* at 1057.

The Utah Supreme Court held that the defendant's question regarding the four jurors' reasons for not using alcohol should have been allowed. *Id.* at 1060. The court held that if religious beliefs are directly related to the subject matter of the action, a preliminary inquiry into those beliefs must be allowed:

Religious beliefs, unlike gender or race, are not readily apparent, and their existence, *if directly related to the subject matter of the suit (as they may be in a case involving alcohol consumption)*, must be determined by preliminary inquiry. Should those religious beliefs (or the absence thereof) be the basis for actual bias, prejudice, or impartiality [sic], a challenge for cause would likewise lie.

Id. at 1057 (emphasis added). The Court emphasized, however, that it had not addressed the question of whether a juror's adherence to certain religious beliefs would have constituted grounds for dismissal for cause:

We stress that we do not examine the scope of permissible grounds for a challenge for cause relating to claimed bias solely by reason of a person's adherence to specific religious beliefs, as that question is not before us. We only hold that a question as to the existence of a religious ground for a venireman's abstention from alcohol was not prohibited by the Utah constitution and should have been allowed.

Id. at 1060-61. The court also noted that "it does not follow that the person who abstains from alcohol for religious or moral reasons will therefore necessarily be unable to act as a fair and impartial juror in a trial for driving under the influence of alcohol." *Id.* at 1060.

The Utah Supreme Court also held that the trial court's refusal to inquire into any religious convictions against drinking precluded the defendant from intelligently exercising his peremptory challenges:

We view the question asked here by defense counsel as being reasonably calculated to discover any latent bias that may have existed among the four veniremen who stated that they did not drink; the information sought, even if it would not have supported a challenge for cause, would have allowed defense counsel to exercise his peremptory challenges more intelligently.

Id. at 1059-60.

The court emphasized the trial court's obligation to protect the jurors' privacy during the information gathering process. "The criminal defendant's right to a fair trial does not create a license in his defense counsel to conduct an inquisition into the private beliefs and experiences of a venireman." *Id.* at 1060. The court concluded, however, that the issue of juror privacy was not a concern in the case at hand given the general nature of the question and its close relationship to the subject matter of the action:

The mere revelation of the general fact that a religious belief is the basis of a practice, without a further probing of the nature or extent of any particular religious belief, does not result in any injury to the juror. Any harmless disturbance of a juror's privacy that may occur through the revelation of such general information is outweighed by its close relevance to the possibility of bias in the context of a trial for driving under the influence of alcohol.

Id.

The court ultimately held that the failure to inquire whether the jurors' abstention from the drinking of alcohol has a religious basis "was not only error, but also, inasmuch

as one of the jurors in question actually sat on the panel that convicted defendant, prejudicial error.” *Id.* at 1060.

The holding in *Ball* may be summarized as follows: Because religious beliefs are directly related to the subject matter of the suit, a defendant charged with driving under the influence of alcohol may inquire whether potential jurors have a religious ground for abstaining from alcohol. However, any “further probing of the nature or extent of any particular religious belief” should not be allowed because it would violate the jurors’ right to privacy.

2. *Under Hornsby v. Corp. of the Presiding Bishop, the Utah Court of Appeals Held That Jurors May Be Asked About Their Religious Affiliation When a Religious Organization Is a Party to the Action*

The second relevant case is *Hornsby*, 758 P.2d at 929. In *Hornsby*, the plaintiff motorcyclist was injured when he attempted to avoid a collision on a public highway with a cow owned by the Corporation of the Presiding Bishop of the LDS Church. *Id.* at 931. At trial, plaintiff’s counsel proposed to ask the potential jurors questions regarding their church affiliation, including whether they were members of the LDS Church and whether they held any leadership positions in the LDS Church. *Id.* Refusing to ask these questions, the trial court instead made the following inquiry:

Are there any of you who feel that you would have trouble being an impartial juror because of feelings you may have either pro or con with regard to the L.D.S. Church that you think might affect your ability to be a fair and impartial juror in this case? If so, I’d like you to raise your hand.

Id. at 931-32. All of the members of the jury panel indicated that religious feelings would have no effect on their decision. *Id.* at 932. The jury ultimately found no negligence on the part of the defendant and determined that plaintiff's negligence was the proximate cause of his injuries. *Id.* at 931.

On appeal, the Utah Court of Appeals considered whether the trial court's refusal to make the requested inquiries had affected the plaintiff's right to dismiss jurors for cause or to properly exercise his peremptory challenges. The court held that "the question asked by the trial court was sufficient to detect any actual subjective bias to warrant a challenge for cause" *Id.* at 932. The court also noted that "[t]he religious beliefs of prospective jurors are not directly related to the subject matter of this suit, and hence could not properly be examined during voir dire." *Id.* at 933 n.2.

The court held that the questions regarding the jurors' religious affiliations with the LDS Church should have been allowed in order to provide information for the plaintiff's informed exercise of his peremptory challenges:

Both *Swain* [*v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965)] and *Ball* recognize there are cases where religion and group affiliation are appropriate topics for voir dire. In the instant case, defendant did not propose to question the prospective jurors as to their specific beliefs. Rather, as the L.D.S. Church was one of the parties, defendant merely proposed to question the jurors regarding their affiliation with the L.D.S. Church. Whenever a religious organization is a party to the litigation, voir dire regarding the jury panel's religious affiliations is proper. *State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985); *Coleman v. United States*, 379 A.2d 951 (D.C. 1977); *Casey v. Roman Catholic Archbishop of Baltimore*, 217 Md. 595, 143 A.2d 627(1958).

Id. at 933. The court noted that, upon remand, the trial court would retain its considerable discretion to “contain voir dire within reasonable limits . . . ,” and cited *Ball* with respect to the trial court’s duty to protect juror privacy. *Id.*

In short, the court in *Hornsby* held that the trial court’s general inquiry into whether the jurors’ feelings toward the LDS church would affect their impartiality was sufficient to detect any bias which would support a challenge for cause. However, for purposes of the plaintiff’s peremptory challenges, the trial court should have allowed the plaintiff to inquire into the jurors’ affiliation with the LDS Church because an entity associated with the LDS Church was a party. The court emphasized, however, that the plaintiff was not allowed to inquire into the jurors’ religious beliefs because those beliefs were not directly related to the subject matter of the action.

D. The Trial Court’s Inquiry Was Adequate to Detect Any Bias Which Would Have Warranted a Challenge by Mr. Depew for Cause

In the present case, the trial court’s questions to the jury panel were sufficient to reveal any bias on the part of the jurors which would have warranted a challenge for cause. To challenge a juror for cause, a party must establish one or more of the six grounds outlined in Rule 47(f) of the Utah Rules of Civil Procedure. Mr. Depew has not delineated any of the six grounds outlined in Rule 47(f) which he believes would have supported a challenge for cause. Because there was no evidence of a familial or financial relationship between any potential jurors and the parties, and because there had been no

previous trial between the parties, subsections (1) through (5) of Rule 47(f) are not at issue. The only possible basis for challenging a juror for cause would be subsection (6) which requires “[c]onduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially.” UTAH R. CIV. P. 47(f)(6).

The trial court’s questioning of the jurors was adequate to reveal any “state of mind or other circumstances” relating to Mr. Sullivan’s connection with the LDS Church which could reasonably have led the court to conclude that any juror was not likely to act impartially. Specifically, the trial court asked the following question, which was answered negatively by all prospective jurors:

But let me ask you, ladies and gentlemen, there may be evidence given and maybe eventually your decision that a judgment should be entered in favor of Mr. Depew, the plaintiff in this matter, and against Mr. Sullivan, the defendant. Would the fact that Mr. Sullivan, the defendant, is on a religious mission at the present time give you any problem in applying the facts in the law as you find it from the evidence in this case? If that’s a difficulty for you would you raise your hand. The answer there is in the negative. . . .

(Add. 10.) This question is very similar to the question asked by the trial judge in

Hornsby:

Are there any of you who feel that you would have trouble being an impartial juror because of feelings you may have either pro or con with regard to the L.D.S. Church that you think might affect your ability to be a fair and impartial juror in this case? If so, I’d like you to raise your hand.

Hornsby, 758 P.2d at 931-32. The Utah Court of Appeals held that this general inquiry by the trial judge in *Hornsby* was adequate to “detect any actual subjective bias to warrant a challenge for cause,” even when an entity related to the LDS Church was a party to the action. *Id.* at 932. In the present case, where no religious organization is a party and religion is not directly related to the subject matter, the trial judge’s inquiry to the jury panel was more than adequate to detect any bias which would have supported a challenge for cause. Accordingly, for purposes of allowing Mr. Depew challenges to potential jurors for cause, the trial court did not err in refusing to inquire whether any jurors’ children were serving missions for the LDS Church.

E. The Trial Court’s Refusal to Inquire as to Jurors’ Children Serving as Missionaries Did Not Constitute Prejudicial Error With Regard to Mr. Depew’s Peremptory Challenges

1. *Because a Religious Organization Was Not a Party and the Subject Matter Was Not Related to Religion, the Trial Court Properly Refused to Inquire Into the Jurors’ Personal Religious Beliefs*

In *Ball*, the Utah Supreme Court ruled that a party was allowed to inquire into “the general fact that a religious belief is the basis of a practice [of abstaining from alcohol], without a further probing of the nature or extent of any particular religious belief” *Ball*, 685 P.2d at 1060. This inquiry was allowed because of the religious belief’s “close relevance to the possibility of bias in the context of a trial for driving under the influence of alcohol.” *Id.* In *Hornsby*, the Utah Court of Appeals allowed inquiry into the

potential jurors' association with the LDS Church, to provide information for informed peremptory challenges, because "a religious organization is a party to the litigation." *Hornsby*, 758 P.2d at 933. In the present case, religion is not directly related to the subject matter of the action and no religious organization is a party. Accordingly, neither *Ball* nor *Hornsby* support Mr. Depew's argument that he should have been allowed to inquire about jurors' children serving missions for the LDS Church.

The voir dire question proposed by Mr. Depew simultaneously asked too much and too little. It asked too much because acknowledging that a juror has a child serving a mission for the LDS Church is a very strong indication that the juror himself or herself adheres to the tenets of the LDS Church. In essence, the question is an indirect way of asking if the jurors themselves belong to the church for which Mr. Sullivan was serving a mission. The court in *Ball* never suggested that the parties could inquire into a juror's particular religious denomination, and the court in *Hornsby* only allowed such a question because a church entity was a party to the action.

Mr. Depew's proposed inquiry also asks too little. Jurors who may be biased in favor of LDS Church missionaries but who have no children who served missions for the LDS Church could have honestly answered his question in the negative without giving any indication of their bias. The trial judge's broader question addressed the real issue—whether the jurors had any bias for or against LDS Church missionaries. When the jurors responded in the negative, no further questioning was necessary.

2. *Any Error With Respect to Peremptory Challenges Was Not Prejudicial to Mr. Depew*

The Utah Supreme Court has noted that a trial court's error must be prejudicial to warrant a reversal. *Moton*, 749 P.2d at 643. In the present case, the jury voted 7 to 1 that Mr. Sullivan was not negligent. Mr. Depew apparently asserts that his inquiry would have revealed information which may have persuaded him to exercise his peremptory challenges differently. Assuming this to be true for the sake of argument, Mr. Depew's three peremptory challenges could have replaced not more than three jurors. UTAH R. CIV. P. 47(e.) Thus, even assuming all three new jurors would have voted that Mr. Sullivan was negligent, the result would have been a vote of 4 to 4. In order to prevail, Mr. Depew was required to obtain a verdict in which at least 6 of the 8 jurors found that Mr. Sullivan was negligent. UTAH CODE ANN. § 78-46-5(1)(e). Thus, even under the best possible circumstances for Mr. Depew, it is mathematically impossible for Mr. Depew's peremptory challenges to have altered the ultimate verdict. Because additional questioning leading to a different exercise of Mr. Depew's peremptory challenges could not have changed the verdict, any alleged error relating to peremptory challenges was not prejudicial to Mr. Depew and does not justify reversal.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING SANCTIONS AGAINST MR. DEPEW'S COUNSEL

Mr. Depew argues that the trial court erred in imposed discovery sanctions on Mr. Depew's counsel. Mr. Depew argues that the sanctions against his counsel were

improper because: (1) Mr. Sullivan did not give Mr. Depew's counsel proper notice of and an opportunity to defend a request for sanctions against Mr. Depew's counsel; (2) Mr. Sullivan's counsel submitted the proposed order without first serving it upon Mr. Depew's counsel; and (3) nothing in the record suggests that the failure to provide timely discovery should be attributed to Mr. Depew's counsel. None of these arguments establishes that the trial court abused its discretion.

A. Mr. Depew's Counsel Had Adequate Notice of the Potential for Sanctions to Be Entered Against Him

Mr. Sullivan served document requests on Mr. Depew in April of 1998. (R. 22-23.) In his Motion to Compel Discovery, which was filed with the court ten months later on February 22, 1999, Mr. Sullivan explicitly requested "sanctions as allowed under Rule 37(b) of the Utah Rules of Civil Procedure." (R. 82a.) In his supporting memorandum, Mr. Sullivan requested that the court "award attorney's fees to defendant's counsel for having to bring this Motion." (R. 89.) At the time Mr. Sullivan filed his motion, Rule 37(d) provided as follows:

. . . In lieu of any order or in addition thereto, the court shall require the party failing to act *or the attorney advising him or both* to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Ut. R. Civ. P. 37(d) (1999) (amended in 2000 and 2001). Nowhere in his motion or memorandum did Mr. Sullivan ask the court to exclude Mr. Depew's counsel from any

sanctions. (R. R. 82a-84a, 81-89.) Clearly, Mr. Sullivan's counsel had notice that the court might sanction him in place of or in addition to his client.

B. Mr. Depew's Counsel Was Given Adequate Opportunity to Object to the Order Imposing Sanctions

Mr. Depew's counsel argues Mr. Sullivan failed to comply with Rule 4-504 of the Utah Rules of Judicial Administration because Mr. Sullivan did not serve a copy of the proposed order imposing sanctions upon Mr. Depew prior to filing the proposed order with the court. Mr. Depew argues that he was therefore deprived of the opportunity to object to the proposed order before it was entered by the court. (Appellant's Brief 24.) It is clear from the record, however, that Mr. Depew filed an objection after the proposed order was signed by the court and that Mr. Sullivan filed a response to that objection. The trial court considered the objection and the response and ruled that the "Objection to Award of Attorney's Fees is denied" and that the "[a]ward remains as entered." (Add. 8.) Mr. Depew raised his objections to the order which was entered, and the trial court considered and rejected those objections. Accordingly, any prejudice to Mr. Depew's attorney may have suffered from not being able to object to the proposed order in advance was cured when the court subsequently considered and ruled on his objection.

C. The Trial Court Acted Within Its Broad Discretion in Sanctioning Mr. Depew's Attorney

In ruling upon Mr. Sullivan's motion for sanctions, the trial court noted that Mr. Depew's delays in answering discovery were not substantially justified and that there

were no circumstances which would make an award of attorney's fees unjust. (Add 1.)

The trial court emphasized that Mr. Depew's medical reports appeared to have been in Mr. Depew's or his attorney's possession since October of 1996 but were not provided to Mr. Sullivan until "after discovery had run, after the threat of a Motion to Compel, and finally, after the filing of a Motion to Compel" on February 22, 1999. (R. 82a-84a; Add. 1.) The trial court also noted that Mr. Depew had failed to provide documents relating to his lost wage claim, even though Mr. Depew admitted that his tax returns were in his possession. (Add. 1.) Under these circumstances, it was certainly within the discretion of the trial court to hold that an award of attorney's fees was warranted. Also, in light of the fact that the documents which Mr. Sullivan requested were in Mr. Depew's possession but were not produced until after a motion to compel was filed, the trial court could have concluded (and apparently did conclude) that Mr. Depew's counsel was jointly at fault for not obtaining the documents from his client. The trial court was clearly acting within its broad discretion in requiring Mr. Depew's counsel to pay the attorney's fees Mr. Sullivan incurred in bringing his motion to compel.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING DEPOSITION COSTS

Mr. Depew argues that the trial court erred in awarding Mr. Sullivan costs in the amount of \$3,085.05 for deposition transcripts and video deposition charges. Mr. Depew asserts that these costs should not have been charged to him because: (1) the only

deposition used at trial was the video deposition of Mr. Sullivan, and (2) Mr. Sullivan's deposition was taken for his own convenience and was not necessary for the trial. Both of these assertions are incorrect.

The Utah Supreme Court has stated that the expenses of taking depositions are taxable as costs if "the taking of the deposition and its general content were reasonably necessary for the development of the case in the light of the situation then existing." *Lawson Supply Co. v. General Plumbing and Heating, Inc.*, 493 P.2d 607, 609 (Utah 1972). In supporting the trial court's award of deposition costs, the court in *Lawson Supply* noted that the depositions revealed certain critical facts which were necessary to the plaintiff's development of the case. "The trial court, through its inclusion of the depositions in the costs, impliedly found them reasonably necessary to protect the plaintiff's rights; there appears to be no abuse of discretion involved therein." *Id.* at 610. Another factor the Utah Supreme Court considers is whether "the depositions were used at trial on cross-examination, both to impeach veracity and to refresh memory." *Highland Constr. Co. v. Union P. R.R.*, 683 P.2d 1042, 1052 (Utah 1984). The trial court's ruling on whether to award a party costs of depositions is "presumed correct and will not be disturbed unless it is so unreasonable as to manifest a clear abuse of discretion." *Lloyd's Unlimited v. Nature's Way Mktg., Ltd.*, 753 P.2d 507, 512 (Utah Ct. App. 1988).

In the present case, the depositions taken by Mr. Sullivan were reasonably necessary for the development of Mr. Sullivan's defense. Both Mr. Sullivan and Cody Plumbhoff (the witness who was in Mr. Sullivan's vehicle at the time of the accident) were unavailable to testify at trial. (R. 497 at 21-22.) The videotaped deposition of Mr. Sullivan was published at trial and shown to the jury without objection from Mr. Depew. (R. 497 at 227; R. 428 at 1-88.) Likewise, Mr. Plumbhoff's videotaped deposition was published and shown to the jury. (R. 497 at 195-214.) Mr. Depew's deposition was used at trial to impeach Mr. Depew or refresh his memory regarding the speed he was traveling (R. 497 at 85.), the injuries he sustained from previous motorcycle accidents (R. 497 at 132-33), the fact that both tires on the motorcycle skidded (R. 497 at 136-39), and Mr. Depew's inability to accurately calculate his lost wages (R. 497 at 145-46). Clearly, these three depositions, two of which were actually shown to the jury, were reasonably necessary for the development of Mr. Sullivan's defense.

Mr. Depew argues that the Utah Rules of Civil Procedure "contain no provision for the assessment of costs associated with the production, editing, and using an audio-visual or tape recorded depositions [sic]." (Appellant's Brief 27.) This is not surprising in light of the fact that the Utah Rules of Civil Procedure do not contain explicit provisions for any type of deposition expenses, including transcription, to be taxed as costs. Nonetheless, the Utah Supreme Court has held that reasonably necessary deposition expenses are properly taxed as costs under Rule 54(d). *Highland Constr.*, 683

at 1051. It should be noted that decisions on this issue generally refer to allowing “deposition costs” and do not delineate between transcription and videotaping. So long as the expenses of making a videotape of a deposition are “reasonably necessary,” they clearly fall into the category of “deposition costs” which may be awarded to the prevailing party pursuant to the trial court’s discretion.

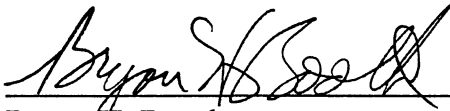
Mr. Depew cites *Starling v. Union Pac. R.R. Co.*, 22 S.W.3d 213 (Mo. Ct. App. 2000) for the proposition that the expense of videotaping a deposition should not be taxed as costs. (Appellant’s Brief 26.) Mr. Depew fails to note, however, that this decision is based upon a court rule in Missouri which provides that “the expense of video taping [a deposition] is to be borne by the party utilizing it and shall not be taxed as costs.” *Id.* at 216 (citing MO. R. CIV. PRO. Rule 57.03(c)(6)). In the absence of a similar procedural rule in Utah, the holding in *Starling* does not present a persuasive argument for denying an award of expenses for the videotaping of reasonably necessary depositions.

CONCLUSION

Based upon the foregoing, this Court should affirm the trial court’s denial of Mr. Depew’s motion for a directed verdict and motion for a new trial. The Court should affirm the jury’s verdict, the discovery sanctions imposed by the trial court, and the costs awarded to Mr. Sullivan by the trial court.

DATED this 3rd day of May, 2002.

KIRTON & McCONKIE




Bryan H. Booth

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2002, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be mailed by United States mail, postage prepaid, to the following:

Aaron J. Prsbrey
1071 East 100 South, Bldg D, Suite 3-S
St. George, UT 84770



Tab A

ADDENDUM

Index

<u>Item</u>	<u>Page</u>
1. Revised Ruling on Defendants' Motion to Compel Discovery and for Sanctions (R. 305-09)	Add. 1
2. Order Awarding Attorney's Fees (R. 316-17)	Add. 6
3. Memorandum Decisions Denying Objection to Award of Attorney's Fees (R. 337-38)	Add. 8
4. Transcript of Trial Court Denying Mr. Depew's Voir Dire Question Concerning Missionary Service (R. 497 at 34-35)	Add. 10
5. Transcript of Trial Court Denying Mr. Depew's Motion for a Directed Verdict (R. 498 at 349)	Add. 13
6. Judgment of Costs (R. 446-47)	Add. 15
7. Memorandum Decision and Order Denying Mr. Depew's Motion for New Trial (R. 456-58)	Add. 17
8. UTAH CONST. Art. I, § 4.	Add. 20
9. UTAH CODE ANN. § 41-6-73	Add. 20
10. UTAH CODE ANN. § 78-46-3	Add. 20
11. UTAH CODE ANN. § 78-46-5(1)(e)	Add. 21

**IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

HUEY L. DEPEW,

Plaintiff,

v.

DENTON C. SULLIVAN and JOHN DOES
I-IV,

Defendants.

REVISED RULING ON DEFENDANTS'
MOTION TO COMPEL DISCOVERY AND
FOR SANCTIONS

Civil No. 970501868

Judge James L. Shumate

This case comes before the Court on Defendants' Motion to Compel Discovery, filed Feb. 22, 1999. Plaintiff's Objection to Defendants' Motion to Compel Discovery was filed Mar. 1, 1999, and Defendants' Response to Plaintiff's Objections to Motion to Compel Discovery was filed Mar. 10, 1999. A hearing on the Motion occurred Apr. 7, 1999, in which "[t]he Court denied the Motion to Compel." See Court Minutes, Apr. 7, 1999. However, at a second hearing which occurred on May 12, 1999, Defendants requested that the Court reconsider the Motion. After Hearing oral arguments, the Court revised its former ruling and "order[ed] that all documents that show damage to the [Plaintiff be] given to counsel [for Defendant] within 30 days." See Court Minutes, May 12, 1999. The Court did not rule on Defendants' request for sanctions at that time, however, but instead took the matter under submission.

Having reviewed the parties memoranda and affidavits, and having reviewed relevant Utah law, the Court now issues the following:

RULING

Before the Court addresses the issue of Sanctions, it first provides a brief legal explanation regarding its decision to revise its former ruling.

(1) Revision

In relevant part, Utah R. Civ. P. 54(b) provides as follows:

. . . Any decision which adjudicates fewer than all the claims shall not terminate the action, and the order or decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In other words, a ruling may be revised at any time by the Court, provided final judgment has not been made in the case. Furthermore, pertinent case law holds that such a revision may be based upon the presentment of the matter in a "different light," or upon "manifest injustice," among other things. See, e.g., Tremblv v. Mrs. Fields Cookies, 884 P.2d 1306, 1310-1311 (Utah 1994).

In the present case, the Court's revision of its previous Apr. 7, 1999 ruling is based upon the manifest injustice which it perceives would result if Plaintiff were allowed to further delay discovery, and also upon the arguments made by counsel for Defendants at the May 12, 1999 hearing which the Court believes place matters in this case a different light.

(2) Sanctions

An important part of the rules of civil procedure, the rules of discovery "were designed to secure 'the just, speedy and inexpensive determination of every action.'" See W.W. & W.B. Gardner, Inc. v. Park W. Vil., 568 P.2d 734, 738 (Utah 1977)(citing Utah R. Civ. P. 1(a)). Indeed, "[a] party to an action has a right to have the benefits of discovery procedure promptly" Id. However, the decision of whether to impose any sanctions under Rule 37 is "discretionary with the court," and will not be set aside on appeal absent a showing of "abuse of discretion." See G.M. Leasing Corp. v. Murray First Thrift & Loan Co., 534 P.2d 1244, 1245 (Utah 1975).

Outlining the basis upon which a Court may impose sanctions after a party fails to answer discovery, Utah R. Civ. P. 37(d) provides as follows:

. . . In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Moreover, "[u]nder Rule 37(d) sanctions are justified without reference to whether the unexcused failure to make discovery was wilful." See Gardner, Inc., supra. Furthermore, "once the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in the interim between the filing of the motion for sanctions and the hearing on the motion." Id. at 737.

In the present case, it is not apparent to the Court that Plaintiff's delays in answering discovery were in any way "substantially justified." See Rule 37(d). Nor does it appear "that other circumstances make an award of expenses unjust." Id. Rather, the Court tends to agree with Defendants' assertions that "Plaintiff's attorney cannot in good faith claim to the Court that no sanctions are justified when the [medical] reports [appear to have been] in his or his client's possession [since October, 1996] and were not provided to Defendants' counsel until after discovery had run, after the threat of a Motion to Compel and finally, after the filing of a Motion to Compel." See Defendants' Response to Plaintiff's Objections to Motion to Compel Discovery, p. 2 [hereinafter Defendants' Response Memo]. Moreover, given Plaintiff's failure to provide Defendant with the requested discovery related to lost wage claims, despite Plaintiff's admission that the requested tax returns were in fact in his possession, the Court also tends to agree with the contention that "Defendant[s] should not have to file a Motion to Compel to obtain that which was due pursuant to Interrogatories and Requests for Production of Documents[, and a]ccordingly the attorney fees [and expenses] for the filing of the Motion should be granted." Id. at 4.

CONCLUSION

On the basis of the foregoing, Defendants request for sanctions against Plaintiff is hereby granted. Counsel for Defendants is directed to prepare an affidavit of costs and expenses incurred by the bringing this motion, and submit it to the Court within 15 days of the date hereof.

Dated this 21st day of June, 1999.



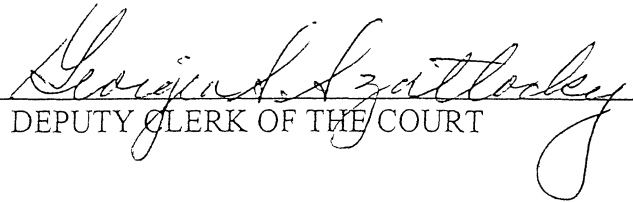
JAMES L. SHUMATE
DISTRICT COURT JUDGE

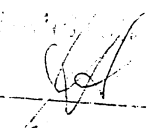
CERTIFICATE OF MAILING OR HAND DELIVERY

I certify that on this 22nd day of June, 1999 I provided true and correct copies of the foregoing REVISED RULING to each of the attorneys named below by placing a copy in such attorney's file at the Fifth District Courthouse in St. George, Utah, or by placing a copy in the United States Mail first-class postage prepaid, and addressed as follows:

Paul H. Matthews
PO Box 45120
SLC UT 84145-0120

Aaron Prisby
1071 E 100 S
St. George UT 84770


DEPUTY CLERK OF THE COURT

FILED
FIFTH DISTRICT COURT
'99 JUL 6 PM 4 20
WASHINGTON COUNTY
BY: 

Paul H. Matthews (#2122)
KIRTON & McCONKIE
Attorneys for Defendant Denton C. Sullivan
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

IN THE FIFTH DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

HUEY L. DEPEW

Plaintiff,

v.

DENTON C. SULLIVAN

Defendants.

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**ORDER AWARDING
ATTORNEYS FEES**

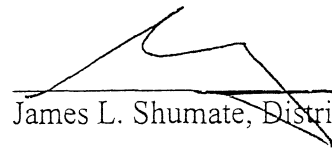
Civil No. 970501868

Judge: James L. Shumate

Based upon the Court's revised ruling on Defendant's Motion to Compel Discovery and for Sanctions, and based upon the Affidavit of Paul H. Matthews in Support of the Award of Attorneys Fees, defendant is awarded the amount of \$822.25 dollars attorneys fees against plaintiff and his counsel.

Dated this 8 day of Jul, 1999.

BY THE COURT


James L. Shumate, District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 1999, I caused a true and correct copy of the foregoing **ORDER AWARDING ATTORNEYS FEES** to be mailed through United States mail, postage prepaid, to the following:

Mr. Aaron J. Prisbey
1071 East 100 South, Bldg. D. Suite 3-S
St. George, UT 84770

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

TO: x JUDGE JAMES L SHUMATE
____ JUDGE G. RAND BEACHAM
____ JUDGE J. PHILIP EVES

Re: Case # 970501868

Plaintiff: Aurey L. Depew

vs

Defendant: Denton C. Sullivan and
John Does I-V

A Notice to Submit for Decision/ Request for Ruling was filed on the 28 day of Sept.,
19 99, by x attorney for plaintiff Aaron J. Prisbrey
____ attorney for defendant _____
____ other _____

The following motions are submitted for decision:

____ PLA's ____ DEF's Motion for Summary Judgment
____ PLA's ____ DEF's Motion for Judgment on the Pleadings
____ PLA's ____ DEF's Motion to ____ Dismiss ____ Continue ____ Compel
x PLA's ____ DEF's Objection to Proposed Order Awarding Attorney Fees

COURT'S RULING:

Objections to Award of Attorney's
Fees is denied. Award remains
as entered

Dated this 30 day of Sep, 1999.

[Signature]
District Court Judge

I hereby certify that on the 5th day of Oct, 19 99, I mailed a copy of
the foregoing Court's Ruling to the following:

Aaron Prisbrey
Hand Delivered
Aaron Prisbrey
Hand Delivered

Paul Matthews
P.O. Box 45120
SLC 84145-0120

[Signature]

Aurey L. Depew
934 Almond Circle
St. George, UT 84790

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

TO: x JUDGE JAMES L SHUMATE
____ JUDGE G. RAND BEACHAM
____ JUDGE J. PHILIP EVES

Re: Case # 97-0501868

Plaintiff: Huey L. Depew

vs

Defendant: Denton C. Sullivan
and John Does I-V

A Notice to Submit for Decision/ Request for Ruling was filed on the 28 day of Sept.,
19 99, by x attorney for plaintiff Aaron J. Prisbrey
____ attorney for defendant _____
____ other _____

The following motions are submitted for decision:

____ PLA's ____ DEF's Motion for Summary Judgment
____ PLA's ____ DEF's Motion for Judgment on the Pleadings
____ PLA's ____ DEF's Motion to ____ Dismiss ____ Continue ____ Compel
____ PLA's x DEF's Objection to Response to Plaintiff's Objection
to Proposed Order Awarding Attorney Fees

COURT'S RULING:

AH's Award remains as ordered

Dated this 30 day of Sep, 1999.

[Signature]
District Court Judge

I hereby certify that on the 5th day of Oct, 19 99, I mailed a copy of
the foregoing Court's Ruling to the following:

Barbara Kayen Bushney
Barney Delivered
Barney Barney
Barney Delivered

Paul Matthews
P.O. Box 45120
S.L.C. 84145-0120

[Signature]

Huey L. Depew
924 Almond Circle
St. George UT 84770

ORIGINAL TRANSCRIPT

IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

HUEY L. DEPEW,

Plaintiff,

VS.

DENTON C. SULLIVAN, et al.,

Defendants.

TRIAL TRANSCRIPT

VOLUME I

Case No. 970501868

Judge James L. Shumate

November 13-14, 2000

Location: Washington County Courthouse
220 North 200 East
St. George, UT 84770



~~CitiCourt, LLC~~
THE REPORTING GROUP

50 South Main, Suite 920
Salt Lake City, Utah 84114

1 but that's probably as far as I'm willing to go. Do you
2 want to make any further record on it, Mr. Prisbrey?

3 MR. PRISBREY: Is that the entire list of
4 questions?

5 THE COURT: Yes, counsel.

6 MR. PRISBREY: Question number 29, will you
7 ask that?

8 THE COURT: Let me get to 29 here. I'm not
9 going to cover that, counsel.

10 MR. PRISBREY: I do have a record to make. Do
11 you want me to make that now or do you want me to
12 reserve it?

13 THE COURT: Why don't you go ahead and reserve
14 it if you would like. Mr. Matthews, I've found your
15 voir dires here in the file and now I have lost them
16 again.

17 MR. MATTHEWS: I think you have covered all of
18 them.

19 THE COURT: We have covered everything we
20 needed. All right.

21 MR. PRISBREY: Your Honor, can we talk about a
22 few issues in chambers?

23 THE COURT: Certainly, counsel. If you want
24 to bring those now, let's go ahead and do it.

25 MR. PRISBREY: There was -- obviously, one of

1 the issues has to do with the fact Mr. Sullivan is on an
2 LDS mission and I wanted to ask the jury some questions
3 as to whether they do have children on missions.

4 THE COURT: Counsel, I'm not going to go that
5 direction because religious affiliation has nothing to
6 do with jury service. But let me ask you, ladies and
7 gentlemen, there may be evidence given and may be
8 eventually your decision that a judgment should be
9 entered in favor of Mr. Depew, the plaintiff in this
10 matter, and against Mr. Sullivan, the defendant. Would
11 the fact that Mr. Sullivan, the defendant, is on a
12 religious mission at the present time give you any
13 problem in applying the facts in the law as you find it
14 from the evidence in this case? If that's a difficulty
15 for you would you raise your hand. The answer there is
16 in the negative. Anything else, counsel?

17 MR. PRISBREY: There was also an issue, your
18 Honor, that Mr. -- or I don't know if it was an issue,
19 but Mr. Depew was a barber at the time, and if any of
20 the potential jurors have any specialized knowledge or
21 they work in that field. Would you ask that question?

22 THE COURT: All right. Is this a loss of
23 wages for a period of time, counsel?

24 MR. PRISBREY: It is, your Honor, and his loss
25 of ability to engage in that profession any longer.

ORIGINAL TRANSCRIPT

IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

HUEY L. DEPEW,

Plaintiff,

VS.

DENTON C. SULLIVAN, et al.,

Defendants.

TRIAL TRANSCRIPT

VOLUME II

Case No. 970501868

Judge James L. Shumate

November 13-14, 2000

Location: Washington County Courthouse
220 North 200 East
St. George, UT 84770



50 South Main, Suite 920
Salt Lake City, Utah 84144

1 testimony of Dr. Green also indicated that that would be
2 necessitated as a result of his accident.

3 We would ask for a directed verdict relative
4 to negligence on the part of Mr. Sullivan as well as the
5 testimony before the court was that Mr. Sullivan turned
6 left across the lane of traffic in front of my client.

7 THE COURT: Thank you, counsel. The motions
8 are denied. As well, the record is adequate to bring
9 this matter to the attention of the jury. Anything else
10 we need to do except bring the jury back in and read and
11 argue? All right. Madam Bailiff, if you will accompany
12 the jury back into the courtroom we will go to work.

13 (The jury was excused.)

14 THE CLERK: Your Honor, there is one thing as
15 far as Exhibits.

16 MR. PRISBREY: Oh, yeah.

17 THE COURT: Oh, do we have a problem with
18 Exhibits?

19 MR. PRISBREY: Your Honor, there was a problem
20 with the Exhibits.

21 MR. MATTHEWS: Your Honor, there was a
22 problem. You had two number 20's, two Exhibits that
23 were numbered 20, and we by stipulation agreed to change
24 those. The 20's were --

25 THE CLERK: The medical records and then the

Paul H Matthews (#2122)
KIRTON & McCONKIE
Attorneys for Respondent
1800 Eagle Gate Tower
60 East South Temple
P O Box 45120
Salt Lake City, Utah 84145-0120
Telephone (801) 328-3600

01 JAN 2 AM 9 35

IN THE FIFTH DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

HUEY L DEPEW

Plaintiff,

v

DENTON C SULLIVAN

Defendants

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JUDGMENT OF COSTS

Civil No 970501868

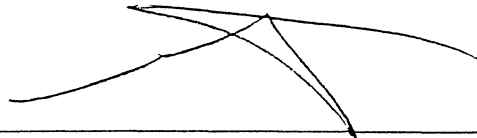
Judge James L Shumate

The above-referenced matter, having come before the Court for Trial on November 13 and 14, 2000, a judgment on the verdict having been entered in favor of the Defendant subsequent to jury deliberation, the Defendants having submitted a Memorandum of Costs pursuant to Rule 54(D) it is,

NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants are ordered taxable costs in the amount of Three Thousand Eighty-five and 05/100 Dollars (\$3,085.05) as against the Plaintiff.

DATED this 2 day of ~~December~~ ^{Jan}, 2000.

BY THE COURT:



Judge ~~Gordon J. Low~~ James L. Schumate

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

TO: Judge G. Rand Beacham
✓ Judge James L. Shumate

Re: Case # 970501868
Plaintiff: Harry DeRue
vs
Defendant: Denton Sullivan

A Notice to Submit for Decision/ Request for Ruling was filed on the 1 day of Feb,
20 01, by attorney for plaintiff
✓ attorney for defendant Paul H Matthews
 other

The following motions are submitted for decision:

 PLA's DEF's Motion for Summary Judgment
 PLA's DEF's Motion for Judgment on the Pleadings
 PLA's ✓ DEF's Motion to Dismiss Compel Continue
 Requests for decision on Pla's motion
for new trial.

COURT'S RULING:

Motion Denied

Dated this 2 day of Feb, 20 01.

District Court Judge

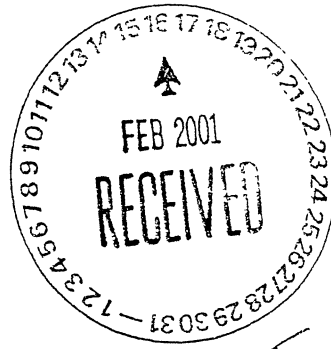
I hereby certify that on the 5 day of Feb, 20 01, I mailed a copy of the
foregoing Court's Ruling to the following:

Paul Matthews
PO Box 45120
Salt Lake City, UT 84145-
0120

Aaron J Prisbrey
(By hand)

Aaron Prisbrey
Deputy Clerk

Paul H. Matthews (#2122)
KIRTON & McCONKIE
Attorneys for Respondent
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600



IN THE FIFTH DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

HUEY L. DEPEW

Plaintiff,

v.

DENTON C. SULLIVAN

Defendants.

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ORDER

Civil No. 970501868

Judge: James L. Shumate

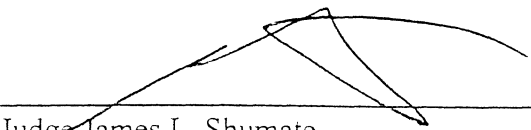
The Court, having considered the Motion for a New Trial filed by the Plaintiff, having reviewed the Plaintiff's Motion and Memorandum, having reviewed the Defendant's Memorandum in Opposition, and having reviewed the Plaintiff's Reply Memorandum, orders as follows:

It is hereby ORDERED, ADJUDGED and DECREED, that:

The Plaintiff's Motion for a New Trial is denied.

DATED this 16 day of February, 2001

BY THE COURT:



Judge James L. Shumate

UTAH CONST. Art. I, § 4:

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

UTAH CODE ANN. § 41-6-73:

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard.

UTAH CODE ANN. § 78-46-3:

A citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, age, occupation, disability, or economic status.

UTAH CODE ANN. § 78-46-5:

- (1) A trial jury consists of:
 - (a) twelve persons in a capital case;
 - (b) eight persons in a criminal case which carries a term of incarceration of more than one year as a possible sentence for the most serious offense charged;
 - (c) six persons in a criminal case which carries a term of incarceration of more than six months but not more than one year as a possible sentence for the most serious offense charged;
 - (d) four persons in a criminal case which carries a term of incarceration of six months or less as a possible sentence for the most serious offense charged; and
 - (e) eight persons in a civil case at law except that the jury shall be four persons in a civil case for damages of less than \$20,000, exclusive of costs, interest, and attorney fees.
- (2) Except in the trial of a capital felony, the parties may stipulate upon the record to a jury of a lesser number than established by this section.
- (3)
 - (a) The verdict in a criminal case shall be unanimous.
 - (b) The verdict in a civil case shall be by not less than three-fourths of the jurors.
- (4) There is no jury in the trial of small claims cases.
- (5) There is no jury in the adjudication of a minor charged with what would constitute a crime if committed by an adult.