

1991

Leeann Nay, Matthew and Merissa Nay and
Virginia Nay, Connie Wheeler, Carolyn Gallegher,
Joan Nay and Jalynn Nay v. General Motors
Corporation, GMC Truck Division and Ron
Green Chevrolet Pontiac GMC, Inc. : Brief of
Appellant

Utah Supreme Court

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H. James Clegg; Snow, Christensen & Martineau; attorneys for respondent.

Stephen G. Morgan; Morgan & Hansen; attorneys for appellants.

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IN THE UTAH SUPREME COURT

LEEANN NAY, individually and as :
personal representative for
MATTHEW and MERISSA NAY, the
heirs of ROBERT NAY; and :
VIRGINIA NAY, individually
and as personal representative
for CONNIE WHEELER, CAROLYN :
GALLEGHER, JOAN NAY and
JALYNN NAY, the heirs of
WAYNE NAY, :

Plaintiffs,

: Appeal No. 910244

vs.

GENERAL MOTORS CORPORATION, GMC :
TRUCK DIVISION AND RON GREEN
CHEVROLET PONTIAC GMC, INC., :

Defendants.

SUPPLEMENTAL BRIEF OF THE APPELLANT

APPEAL

from the Judgement of the Third
Judicial District Court in and For Salt Lake County,
Honorable Richard H. Moffat, District Judge

H. James Clegg
Snow Christensen & Martineau
Eleventh Floor
10 Exchange Place
Salt Lake City, Utah 84145

Attorneys for Respondent

Stephen C. Morgan
Morgan & Hansen
Kearns Building, Eighth Floor
136 South Main
Salt Lake City, Utah 84101

Attorneys for Appellants

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Utah Code Ann. §78-2-2(3)(i) 1

Utah Code Ann. §78-2a-3(3)(h) 1

IN THE UTAH SUPREME COURT

LEEANN NAY, individually and as :
personal representative for
MATTHEW and MERISSA NAY, the
heirs of ROBERT NAY; and :
VIRGINIA NAY, individually
and as personal representative
for CONNIE WHEELER, CAROLYN :
GALLEGHER, JOAN NAY and
JALYNN NAY, the heirs of
WAYNE NAY, :

Plaintiffs, :
vs. : Appeal No. 910244

GENERAL MOTORS CORPORATION, GMC :
TRUCK DIVISION AND RON GREEN
CHEVROLET PONTIAC GMC, INC., :

Defendants.

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. §78-2-2(3)(i). The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(3)(h).

STATEMENT OF THE ISSUES

3. Did the trial Court err in granting General Motors' Motion to Require the Appellant to Include Additional Transcripts in Record on Appeal?

Standard of Review: This Court reviews the trial court's conclusions of law for correctness, and no deference is given to the trial court's findings. State By and Through the Div. of Consumer Protection v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990); Doelle v. Bradley, 784 P.2d 1176 (Utah 1989); Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989); Oates v. Chavez, 749 P.2d 658 (Utah 1988); Scharf v. BMC Corp., 700 P.2d 1068 (1985).

STATUTORY PROVISIONS

Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides:

If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such a finding or conclusion.

STATEMENT OF THE CASE

1. Nature of the Case

This is a products liability action concerning a 1986 GMC High Sierra truck which was involved in an accident on September 20, 1986, killing Robert Nay and Wayne Nay. During trial, the appellants contended that the accident was caused when a stone became lodged in a "pinch-point" between the flexible coupling and the end retainer nut on the steering box. The appellants also contended that the "pinch-point" constituted a defect which was unreasonably dangerous to users of the vehicle.

2. Course of the Proceedings

On May 31, 1991, the appellants filed their request for transcripts with the trial court reporter (See letter to Hal Walton, attached as Exhibit "F"). The appellants requested the direct and redirect examination of each of their expert witnesses, Dr. Ben Bayse, Lindley Manning, and David Stephens. The appellants also requested the entire testimony of LeEarl Nay and Matthew Nay.

On June 11, 1991, General Motors filed a Designation of Addition Parts of the Record to be Included in Transcript on Appeal (Attached as Exhibit "G"). In this Designation, General Motors requested that the appellants include in the record on appeal the testimony from its expert witnesses as well as the cross examination of appellants' expert witnesses.

Through a letter dated June 13, 1991, the appellants informed General Motors that they would not request the additional transcripts because the testimony was not relevant to the appeal (See letter from Steve Morgan to H. James Clegg, attached as Exhibit "H".) On June 24, 1991, General Motors filed a motion to require the appellants to include the requested transcripts in the record on appeal (attached as Exhibit "I"). The appellants filed a memorandum in opposition to this motion on June 28, 1991 (attached as Exhibit "J"). General Motors filed a reply memorandum on July 2, 1991 (attached as Exhibit "K").

Through a minute entry dated July 16, 1991, the trial court granted General Motors' motion (attached as Exhibit "L"). An order to this effect was prepared by General Motors' counsel (attached as Exhibit "M").

STATEMENT OF THE FACTS

A full statement of the facts is contained in the appellants' original brief. The facts relevant to this portion of the appeal are contained in the Course of the Proceedings above.

SUMMARY OF THE ARGUMENT

Rule 11(e) of the Utah Rules of Appellate Procedure provides that the appellant shall provide the appellate court with all transcripts which are relevant to the appeal. The issue before this Court is whether the testimony sought by General Motors is relevant to this appeal.

The appellants are contending before this Court that the directed verdict granted to General Motors by the trial court was erroneous. In reviewing this directed verdict, this Court applies the following standard:

We must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgement in favor of the losing party, the directed verdict cannot be sustained.

Management Comm. v. Greystone Pines, 652 P.2d 896 (Utah 1986). Since the issue is whether the appellants introduced sufficient evidence to state a claim against General Motors, the appellants contend that the only evidence necessary to decide the appeal is that evidence introduced by the appellants. If that evidence states a claim against General Motors, the directed verdict must be reversed. If the evidence does not state a claim for relief, the verdict stands. There is simply no need to include evidence introduced by the respondent on appeal.

The appellants assert that this case is controlled by Koer v. Mayfair Mkts., 19 Utah 2d 339, 431 P.2d 566 (1967). In Koer, this court found that in reviewing directed verdicts, all evidence must be viewed in the light most favorable to the appellants and all evidence contradicting the appellants' evidence must be discarded. Id. at 343, 431 P.2d at 569. There is no need to include the respondent's expert witness testimony because this Court must disregard it anyway.

The appellants filed their brief with this Court long before the trial court ordered the additional transcripts included. In that brief, the appellants did not rely on any of General Motors' expert witness testimony. This is *prima facie* evidence that such evidence is irrelevant to this appeal.

ARGUMENT

IV.

THE TRIAL COURT ERRED BY REQUIRING THE APPELLANTS TO SUPPLEMENT THE RECORD WITH GENERAL MOTORS' EXPERT WITNESS TESTIMONY AND CROSS EXAMINATION OF APPELLANTS' EXPERTS.

A. STANDARD OF REVIEW

This Court reviews the trial court's conclusions of law for correctness, and no deference is given to the trial court's findings. State By and Through the Div. of Consumer Protection v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990); Doelle v. Bradley, 784 P.2d 1176 (Utah 1989); Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989); Oates v. Chavez, 749 P.2d 658 (Utah 1988); Scharf v. BMC Corp., 700 P.2d 1068 (1985).

B. THE TRIAL COURT ERRED IN REQUIRING APPELLANTS TO SUPPLEMENT THE RECORD

Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides that "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such a finding or conclusion." U.R.App.P. 11(e)(2). The issue before this Court is whether the additional transcripts requested by General Motors are relevant to the appeal,

and therefore must be provided in the record¹. The appellants urge that these transcripts are not relevant and should not have been included.

The appellants have asked this Court to reverse the directed verdict granted to General Motors by the trial court. This Court applies the following standard of review in addressing directed verdicts:

We must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgement in favor of the losing party, the directed verdict cannot be sustained.

Management Comm. v. Greystone Pines, 652 P.2d 896 (Utah 1986); See also Little America Refining Co. v. Leyba, 641 P.2d 112 (Utah 1982); Kim v. Anderson, 610 P.2d 1270 (Utah 1980); Asay v. Rappleye, 593 P.2d 132 (Utah 1979). Furthermore, the evidence must be such that reasonable men could not arrive different conclusions. Anderson v. Gribble, 30 Utah 2d 68, 513 P.2d 432 (1973); Rhiness v. Dansie, 24 Utah 2d 375, 472 P.2d 428 (1970). Thus, reversal is

¹ General Motors has requested the transcripts on their own accord. Therefore, the requested transcripts will be part of the record on appeal regardless of the outcome of this portion of the appeal. However, Rule 11(e)(3) of the Utah Rules of Appellate Procedure requires the appellant to pay for the relevant transcripts. Thus, while the issue has been framed as whether the additional transcripts are relevant to the appeal, the true issue is whether the appellants should be forced to pay for these transcripts.

appropriate if the appellants can establish sufficient evidence of each element of their claim against General Motors. Hansen v. Stewart, 761 P.2d 14 (Utah 1988); Koer v. Mayfair Mkts., 19 Utah 2d 339, 431 P.2d 566 (1967).

The appellants assert that this case is controlled by Koer v. Mayfair Mkts., 19 Utah 2d 339, 431 P.2d 566 (1967). In Koer, this Court found that:

In disposing of a post verdict motion as well as in directed verdicts, all of the testimony and all reasonable inferences flowing therefrom which tend to prove the plaintiff's case must be accepted as true, and all conflicts and all evidence which tends to disprove it must be disregarded.

Koer, 19 Utah 2d at 342, 431 P.2d at 569 (citing Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953)). This is consistent with the general principle that all evidence on appeal must be viewed most favorably to the losing party. Management Comm. v. Greystone Pines, 652 P.2d 896 (Utah 1986); Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953).

Applying this standard to the subject case, the transcripts requested by General Motors are not relevant to this appeal. General Motors requested the cross examination of the appellants' expert witnesses. The purpose of this cross examination was to discredit these witnesses. But Koer mandates that all conflicts be disregarded and the appellants' evidence be accepted

as true. Therefore, there is no need to require the appellant to include in the record on appeal transcripts which will not, and cannot, be used by this court in reviewing the directed verdict.

The trial court also required the appellants to include the testimony of General Motors expert witnesses. These witnesses each testified that the accident was not caused by stone interference, as the appellants asserted, but rather was caused by driver error. Each of the appellants' expert witnesses testified that there was no driver error. Under Koer, this Court must accept as true the appellants' expert witnesses testimony. There is simply no need for General Motors' expert witness testimony because these witnesses testified contrary to the appellants' experts and, under Koer, the appellants' testimony must be accepted as true.

The Utah Supreme Court has also specifically held that Utah appellate courts are not to weigh the evidence on appeal or determine facts by a preponderance of the evidence. Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952). Under Finlayson, the Court may not use General Motors' expert witness testimony or its cross examination of appellants' expert witnesses to discredit the appellants' explanation of the accident. Rather, the appellants' explanation of the cause of the accident must be accepted as true.

Finally, the appellants filed their brief with this Court before the testimony sought to be included by General Motors was transcribed by the trial court reporter. In their brief, the appellant neither cite to nor refer to the testimony sought by General Motors. The appellants were able to meet their burden of establishing evidence of each element of their claim against General Motors without the transcripts requested by General Motors. This is perhaps the best evidence of all that there is no need for the transcripts requested by General Motors.


C. CONCLUSION

The transcripts requested by General Motors should not be included in the record on appeal. Under Koer v. Mayfair Mkts., 19 Utah 2d 339, 431 P.2d 566 (1967), all evidence offered by the appellants must be regarded as true, and any evidence that is contrary to the appellants' evidence must be disregarded. General Motors wants to include their expert witness testimony and the cross examination of appellants' expert witnesses for the sole purpose of discrediting the evidence offered by the appellants. This is impermissible under Koer. Furthermore, the transcripts requested by General Motors should be excluded because this court cannot use them in determining the cause of the accident. Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952).

The appellants have filed their brief without reference to the requested transcripts. General Motors is capable of arguing the validity of the directed verdict without these transcripts. The trial court's order granting General Motors' Motion to Require Appellant to Include Additional Transcripts in the Record on Appeal should be reversed.

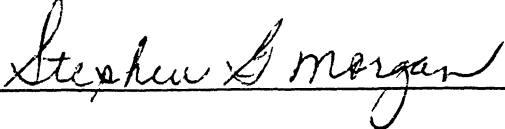
Dated this 9 of August, 1991.

MORGAN & HANSEN


Stephen G. Morgan
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of August, 1991, I caused a true and correct copy of SUPPLEMENTAL BRIEF OF THE APPELLANT to be hand delivered to H. James Clegg, SNOW CHRISTENSEN & MARTINEAU, Attorney for Defendants/Respondents, 10 Exchange Place, Eleventh Floor. P.O. Box 45000, Salt Lake City, Utah 84145.



Tab F

STEPHEN G. MORGAN*
DARWIN C. HANSEN
DENNIS R. JAMES
JOHN C. HANSEN
CHASE H. PARKER
RANDALL D. LUND
*A PROFESSIONAL CORPORATION

LAW OFFICES OF
MORGAN & HANSEN
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KEARNS BUILDING EIGHTH FLOOR
136 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 531-7888
FAX (801) 531-9732

OF COUNSEL
MICHAEL J. COOPER
WRITER'S DIRECT NUMBER:

May 31, 1991

Hal Walton
Court Reporter
Third Judicial District Court
240 East 400 South
Salt Lake City, Utah 84111

RE: Nay v. General Motors: C 88-6114

Dear Hal:

You are hereby requested to prepare, certify, and transmit to the clerk of the Third District Court the following transcripts for our appeal:

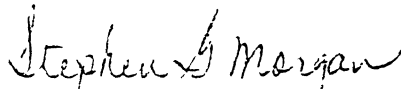
1. The direct and redirect examination of C. Ben Bayse, Lyn Manning, and David C. Stephens.
2. The entire testimony of Matthew Nay and Earl Nay.
3. Transcript of the hearing on September 26, 1990 in which the Court considered defendants Motion in Limine.
4. Transcript of the hearing conducted on April 5, 1991 concerning the plaintiffs' Motion for New Trial and defendant's Motion for Directed Verdict.

You are further requested to acknowledge receipt of this request and to notify the Clerk of the Supreme Court of the date which you expect to file the transcript and of the date on which the transcript is filed.

This letter serves as certification to the Court that I have made satisfactory arrangements with you for payment of the cost of the transcript.

Sincerely yours,

MORGAN & HANSEN


Stephen G. Morgan

cc: Clerk of the Third District Court
Clerk of the Supreme Court
James Clegg

Tab G

H. JAMES. CLEGG (A0681)
RODNEY R. PARKER (A4110)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
General Motors Corporation
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

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

LEEANN NAY, individually and
as personal representative for
MATTHEW and MERISSA NAY, the
heirs of ROBERT NAY; and
VIRGINIA NAY, individually and
as personal representative for
CONNIE WHEELER, CAROLYN
GALLEGHER, JOAN NAY and JALYNN
NAY, the heirs of WAYNE NAY,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
GMC TRUCK DIVISION and RON
GREEN CHEVROLET PONTIAC GMC,
INC.,

Defendants.

DESIGNATION OF ADDITIONAL
PARTS OF RECORD TO BE INCLUDED
IN TRANSCRIPT ON APPEAL

No. C-88-6114

Judge Richard H. Moffat

(Supreme Court No. 910244)

Pursuant to Rule 11(e)(3), Utah Rules of Appellate Procedure, defendant/appellee General Motors Corporation designates the following additional portions of the transcript in this case to be transcribed and included in the record on appeal:

1. All testimony of C. Ben Bayse, Lyn Manning, and David C. Stephens not heretofore designated by plaintiffs/appellants.

2. The entire testimony of Chester Johnson.

3. The entire testimony of Newell Knight.

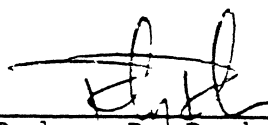
4. The entire testimony of Jerry Confer.

5. The entire testimony of Pete Riede.

Pursuant to Rule 11(e)(3), defendant requests that plaintiffs order said additional portions of the transcript from the court reporter. Defendant makes this request on the basis that the additional portions of the transcript bear upon the issues presented by the plaintiffs in their docketing statement and that Rule 11(e)(2) therefore requires plaintiffs to include the transcripts of said evidence in the record.

DATED this 11th day of June, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By 
Rodney R. Parker
Attorneys for Defendant General
Motors Corporation

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Nancy Hughes, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for plaintiffs herein; that she served the attached **DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE INCLUDED IN TRANSCRIPT ON APPEAL** (Case Number C88-6114, Salt Lake County District Court, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Stephen G. Morgan
MORGAN & HANSEN
136 South Main, 8th Floor
Salt Lake City, Utah 84101

and causing the same to be mailed first class, postage prepaid, on the 11th day of June, 1991.

Nancy Hughes
Nancy Hughes

SUBSCRIBED AND SWORN to before me this 11th day of June, 1991.

Catherine E. Dunn
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:
12-23-93
60
S.T. CLARK

Tab H

STEPHEN G. MORGAN
DARWIN C. HANSEN
DENNIS R. JAMES
JOHN C. HANSEN
CHASE H. PARKER
RANDALL D. LUND

* A PROFESSIONAL CORPORATION

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SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 531-7686
FAX: (801) 531-9732

OF COUNSEL
MICHAEL J. COOPER

WRITER'S DIRECT NUMBER:

June 13, 1991

H. James Clegg
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Dear Jim:

We have received your designation of additional transcripts which you wish included on appeal. Having reviewed Rule 11 of the Utah Rules of Appellate Procedure, we decline to request any additional transcripts from the court.

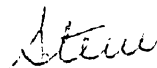
Under Rule 11(e)(2), we need provide the appellate court with the evidence relevant to the issue being decided. If the appellate court finds evidence which would support a verdict for the plaintiff, the directed verdict must be overturned. The transcripts we have requested from the trial court provide ample evidence of General Motor's negligence.

Since the issue on appeal is whether there is any evidence to support plaintiff's position, we do not believe the transcripts you have requested would be helpful to the appellate court because they support General Motor's position.

General Motors may, under Rule 11(e)(3), request the transcripts. However, we believe we have supplied the appellate court with the necessary transcripts to overturn the trial court's directed verdict.

Sincerely,

MORGAN & HANSEN



Stephen G. Morgan

Tab I

H. JAMES. CLEGG (A0681)
RODNEY R. PARKER (A4110)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
General Motors Corporation
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

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

LEEANN NAY, individually and
as personal representative for
MATTHEW and MERISSA NAY, the
heirs of ROBERT NAY; and
VIRGINIA NAY, individually and
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NAY, the heirs of WAYNE NAY,

Plaintiffs,

vs.

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GMC TRUCK DIVISION and RON
GREEN CHEVROLET PONTIAC GMC,
INC.,

Defendants.

**MOTION TO REQUIRE APPELLANT TO
INCLUDE ADDITIONAL PARTS OF
TRANSCRIPT IN RECORD ON APPEAL**

No. C-88-6114

Judge Richard H. Moffat

(Supreme Court No. 910244)

Pursuant to Rule 11(e)(3), Utah Rules of Appellate Procedure, defendant/appellee General Motors Corporation moves the court to require appellant to include the following additional portions of the transcript in this case in the record on appeal:

1. All testimony of C. Ben Bayse, Lyn Manning, and David C. Stephens not heretofore designated by plaintiffs/appellants.

2. The entire testimony of Chester Johnson.

3. The entire testimony of Newell Knight.

4. The entire testimony of Jerry Confer.

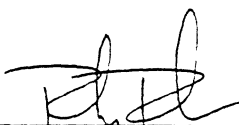
5. The entire testimony of Pete Riede.

Defendant makes this motion on the basis that the additional portions of the transcript bear upon the issues presented by the plaintiffs in their docketing statement and that Rule 11(e)(2) therefore requires plaintiffs to include the transcripts of said evidence in the record.

DATED this 24 day of June, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By



Rodney R. Parker
Attorneys for Defendant General
Motors Corporation

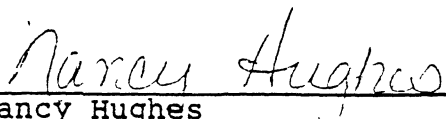
AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Nancy Hughes, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for plaintiffs herein; that she served the attached **MOTION TO REQUIRE APPELLANT TO INCLUDE ADDITIONAL PARTS OF TRANSCRIPT IN RECORD ON APPEAL** and accompanying **MEMORANDUM IN SUPPORT OF MOTION TO REQUIRE APPELLANT TO INCLUDE ADDITIONAL PARTS OF TRANSCRIPT IN RECORD ON APPEAL** (Case Number C88-6114, Salt Lake County District Court, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Stephen G. Morgan
MORGAN & HANSEN
136 South Main, 8th Floor
Salt Lake City, Utah 84101

and causing the same to be mailed first class, postage prepaid, on the 24th day of June, 1991.



Nancy Hughes

SUBSCRIBED AND SWORN to before me this 24th day of June, 1991.



NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

11/29/92

H. JAMES. CLEGG (A0681)
RODNEY R. PARKER (A4110)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
General Motors Corporation
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
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GMC TRUCK DIVISION and RON
GREEN CHEVROLET PONTIAC GMC,
INC.,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE APPELLANT TO
INCLUDE ADDITIONAL PARTS OF
TRANSCRIPT IN RECORD ON APPEAL

No. C-88-6114

Judge Richard H. Moffat

(Supreme Court No. 910244)

Defendant General Motors Corporation submits this memorandum in support of its motion to require plaintiffs to include additional parts of the transcript in the record on appeal. For the court's reference, a copy of plaintiffs' transcript order is attached as Exhibit A, a copy of defendant's designation of addi-

tional part of the transcript is attached as Exhibit B, and a copy of plaintiffs' response is attached as Exhibit C.

Rule 11(e)(2), Utah Rules of Appellate Procedure, provides:

If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Plaintiffs' docketing statement lists the following as an issue on appeal:

Did the trial court err in granting defendant's Motion for Directed Verdict on the issue of negligence in light of plaintiffs' weighty expert witness testimony?

In ordering the transcripts of that "weighty" expert testimony, plaintiffs ordered only the direct and redirect examination of those experts transcribed, and failed to order the transcripts of other "weighty" evidence which supported General Motors. The rule, however, requires a transcript of "all evidence relevant to" the court's conclusion on the issue, and clearly contemplates that cross-examination and other evidence will be transcribed.

Plaintiffs assert in their letter response (Exhibit C) to defendant's designation that the issue on appeal is whether there is any evidence to support plaintiffs' position. They argue that they are therefore not required to designate portions of the transcript which would support General Motors' position. Plaintiffs misread the rule. It requires designation of all evidence "relevant to" the issue raised. The Utah Supreme Court has held:

In testing the sufficiency of the evidence on motion for nonsuit, the evidence must be viewed as a whole, including the status of the evidence after cross-examination.


Oberg v. Sanders, 111 Utah 507, 184 P.2d 229, 233 (1947). Plaintiffs ask the appellate court to test the sufficiency of the evidence, and must include all of the evidence, including cross-examination, in the record.

Defendant has also designated for transcription the testimony of Chester Johnson, Newell Knight, Jerry Confer, and Pete Riede. These individuals all gave expert testimony relevant to the cause of the accident, which is clearly relevant to the issue plaintiffs raise. Under Rule 11(e)(2), plaintiffs are required to order and pay for transcripts of their testimony as well.

DATED this 24th day of June, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By



Rodney R. Parker
Attorneys for Defendant General
Motors Corporation

Tab J

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

LEEANN NAY, individually and as	:	
personal representative for	:	
MATTHEW and MERISSA NAY, the	:	MEMORANDUM IN OPPOSITION
heirs of ROBERT NAY; and	:	TO DEFENDANT GENERAL
VIRGINIA NAY, individually	:	MOTORS MOTION TO REQUIRE
and as personal representative	:	APPELLANT TO INCLUDE
for CONNIE WHEELER, CAROLYN	:	ADDITIONAL PARTS OF
GALLEGHER, JOAN NAY and	:	TRANSCRIPT IN RECORD ON
JALYNN NAY, the heirs of	:	APPEAL
WAYNE NAY,	:	
	:	
Plaintiffs,	:	Civil No. C 88-6114
vs.	:	
GENERAL MOTORS CORPORATION, GMC	:	
TRUCK DIVISION AND RON GREEN	:	
CHEVROLET PONTIAC GMC, INC.,	:	
	:	
Defendants.	:	

Plaintiffs submit the following Memorandum in Opposition to Defendant General Motors' Motion to Require Appellant to Include Additional Parts of the Transcript in Record on Appeal.

In ruling on a Motion to Supplement the Record, this Court should consider "the necessity of the supplemental material, prior opportunities to introduce the supplemental material and the length of the resulting delay." Jeschke v. Willis, 793 P.2d 428

(Utah App. 1990). Defendant General Motors has requested that the Plaintiffs provide the appellate court with Defendant's expert witness testimony and the cross examination of Plaintiffs' expert witnesses. Plaintiffs contend the transcripts requested by General Motors are neither necessary nor relevant to the appeal.

The basis for this Court's granting of Defendants' Motion for Directed Verdict was that Plaintiffs "didn't prove your case", and that the Court "didn't think that the steering interference claim was a valid claim." Thus, the "finding" in issue for Rule 11(e)(2) purposes was that the Plaintiffs failed to provide sufficient evidence to prove that General Motors negligently designed the vehicle.

When reviewing a directed verdict based on the plaintiffs failure to provide sufficient evidence to state a claim, the Utah Supreme Court has held reversal is appropriate if, viewing the evidence most favorably to the plaintiff, it concludes there is any substantial evidence to support a verdict in their favor. Hansen v. Stewart, 761 P.2d 14 (Utah 1988); Koer v. Mayfair Mkts., 19 Utah 2d 339, 431 P.2d 566 (1967).

Under this standard, the only evidence "relevant" for Rule 11 purposes to the trial court's finding is the evidence introduced by the Plaintiffs to support their claim. If there is sufficient evidence to establish the Plaintiffs' claim, the

directed verdict will be reversed. If not, the directed verdict will be sustained. There is simply no need to include in the appellate record evidence produced by the Defendants at trial.

Furthermore, the Defendant's Motion for Directed Verdict was made at the close of Plaintiff's case. The Court subsequently granted the Motion. Thus, whether or not the Court should have granted Defendant's Motion for Directed Verdict will depend upon the evidence before the Court at that time, which was the testimony presented by the Plaintiffs, not the subsequent testimony presented by the Defendant.

A. EXPERT WITNESS TESTIMONY

Defendant General Motors has requested that testimony from its expert witnesses be included in the appellate transcripts. In light of the above discussion, this request should be denied because this evidence was introduced by the Defendant, and was introduced after the close of Plaintiffs' case and after Defendant had made its Motion for Directed Verdict. The evidence introduced by the Defendant has no bearing on whether Plaintiff was able to state a prima facie case for relief against General Motors at the close of Plaintiffs' case.

Furthermore, evidence presented by the Defendants can not be used by the appellate court in ruling on the Motion for Directed Verdict. The Supreme Court has specifically ruled that courts

deciding or reviewing directed verdicts are not to weigh the evidence or determine issues by a preponderance of the evidence. Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952). The appellate court will be prohibited from taking into account Defendant General Motors' expert witness testimony since it was not presented by Plaintiffs to support their claim. Thus, the evidence presented by the Defendant is not relevant to the appeal since it can not be used by the appellate court even if included in the trial transcript.

Simply stated, Defendant General Motors expert witness testimony is not relevant to the issue of whether Plaintiffs have established a prima facie case of negligence against General Motors, and therefore the request for transcripts should be denied.

B. CROSS EXAMINATION OF BAYSE, MANNING, AND STEPHENS

Defendant General Motors also requests that the cross examination testimony of Plaintiff's expert witnesses be included in the appellate transcripts. For reasons similar to those set forth above, this request should also be denied because it is not relevant.

As presented above, the only evidence which is relevant to the appellate review of a directed verdict is that evidence presented by the Plaintiffs. Cross examination is not evidence presented by the Plaintiff, and therefore should be excluded.

Cross examination is used primarily to attack the credibility of Plaintiffs' expert witnesses, and any testimony introduced during cross examination was elicited by General Motors' attorney. Such testimony thus constitutes part of the defense presentation and has no bearing on whether Plaintiffs have stated a prima facie claim for relief.

Cross examination testimony is also not relevant to the appellate court review because the court must view all evidence in the light most favorable to the losing party, or in this case, Plaintiffs. Management Comm. v. Greystone Pines, 652 P.2d 896 (Utah 1982); Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953). Thus, any inconsistencies in the expert witness testimony must be resolved in favor of the plaintiff. Therefore, cross examination testimony is not "relevant" to the appeal.

C. REASONABLE MINDS CAN DIFFER WITH RESPECT TO THE EVIDENCE PRESENTED BY THE PLAINTIFFS.

In order to grant a directed verdict, the Court must conclude that, viewing the evidence in the light most favorable to the party being moved against, that reasonable minds could not differ that the Plaintiffs had failed to prove a case of negligence against Defendant General Motors. Management Comm. v. Greystone Pines, Inc., 652 P.2d 896 (Utah 1982); Anderson v. Gribble, 30 Utah 2d 68, 513 P.2d 432 (1973).

The fact that this case was submitted to the jury and four members of the eight person jury found that Plaintiffs had proved a case of negligence against General Motors argues against any conclusion that reasonable minds could not differ. The fact is, based on the evidence presented by the Plaintiffs, reasonable minds did differ and based thereon, the Court should not have granted Defendant General Motors' Motion for Directed Verdict.

CONCLUSION

Plaintiffs have provided all "relevant" information to the appellate court. They have provided the testimony from the three expert witnesses Plaintiffs used to support their claim for negligence, as well as the testimony from the only eye witnesses to the accident, Matthew Nay and LeEarl Nay. Plaintiffs therefore have fully complied with Rule 11(e)(2).

The transcripts Defendant General Motors has requested have no bearing on whether Plaintiff established a prima facie case of negligence against General Motors. Therefore, Defendant's Motion should be denied.

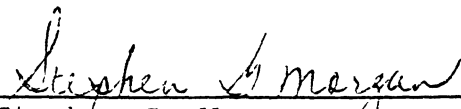
Defendant General Motors, in making its Motion to Require Appellant to Include Additional Parts of Transcript in the Record on Appeal, is simply attempting to force the Plaintiffs to add parts of the transcript that are not relevant to Plaintiffs' appeal. In addition, General Motors seeks to require Plaintiffs,

who are far less able to afford the cost of this litigation than General Motors, to pay for such additional parts and thus hopefully discourage Plaintiffs from pursuing this appeal.

Thus, assuming arguendo, that the Court allows Defendant General Motors to include in the appellate record transcripts of the cross examination of Plaintiff's expert witnesses as well as the testimony of Defendant's expert witnesses, which Plaintiff vigorously resists for the reasons stated above, the Court should require that Defendant General Motors pay for the costs of such transcripts instead of the Plaintiffs.

DATED this 28 day of June, 1991.

MORGAN & HANSEN



Stephen G. Morgan

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT GENERAL MOTORS MOTION TO REQUIRE APPELLANT TO INCLUDE ADDITIONAL PARTS OF TRANSCRIPT IN RECORD ON APPEAL to be mailed, first class, on the 28 day of June, 1991, H. James Clegg, Snow, Christensen & Martineau, Attorneys for Defendants, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, UT 84145.

Stephen H. Morgan

THE COURT: Well, I understand and I want some-
clear with you two learned Gentlemen. I really feel that
you're right on your motion, that we should have had a three-
quarter decision one way or the other in that case. I made a
mistake in allowing them not to be hung. But to enter in a
verdict which in effect was a clear indication that you had
not carried your burden, but by the same token I don't think
it was an indication that the Jury had a right to enter that
verdict. So I think that is clearly correct under the circum-
stances here. But on the other hand, I frankly, honestly
feel that had the Jury come in with a verdict at that time I
would have granted a Directed Verdict or Judgement NOV,
because I frankly, feel, again, it just may be my understand-
of the evidence, that it-probably I view it differently than
of course the plaintiffs do. But I just didn't think that the
teering interference claim was a valid claim; and so I would
at this point, grant that motion, because I think that's the
way that case should have come out legally and under the
facts. So now, I guess we're at the point where nobody is har-
by.

MR. MORGAN: No. Let me just say for the record
plaintiffs respectfully disagree with you, but would you like
Mr. Clegg to prepare the Order?

THE COURT: No, I am going to let you prepare it.

MR. MORGAN: Want me to prepare it? I'll prepare
it.

come in with a verdict by a 2/3rds vote one way or the other. Now, I am concerned---

MR. MORGAN: Three/fourths.

THE COURT: Or 3/4ths, excuse me, I misstated myself. On the other hand, my view of the evidence at the time of the trial, and I again respectfully disagree with the plaintiff in this case, is that you didn't prove your case.

I frankly don't think there was a cause of action in that law suit. So, what I am going to do, and then you both will have some common appeal, is I am going to set the verdict aside and grant you a new trial; then I am going to grant Mr. Clegg's Motion for a Directed Verdict.

MR. MORGAN: That being the case, I take it that the costs that were assessed on the judgment are a nullity at this point?

THE COURT: Well, I am not going to rule on that, because I am not sure what the law is, but I think you may be right. But I think that wasn't before the Court here and that may be the ultimate result.

I suppose if we go up on appeal and they reverse me, and sent the thing back down for trial, that those costs on that first trial would be added to the costs of the second trial, whichever way the thing comes out, if the Court in its discretion so decided.

MR. CLEGG: I would make no move to collect on those without giving the Court and counsel adequate notice.

Tab K

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RODNEY R. PARKER (A4110)
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Telephone: (801) 521-9000

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

LEEANN NAY, individually and
as personal representative for
MATTHEW and MERISSA NAY, the
heirs of ROBERT NAY; and
VIRGINIA NAY, individually and
as personal representative for
CONNIE WHEELER, CAROLYN
GALLEGHER, JOAN NAY and JALYNN
NAY, the heirs of WAYNE NAY,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
GMC TRUCK DIVISION and RON
GREEN CHEVROLET PONTIAC GMC,
INC.,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE APPELLANT TO
INCLUDE ADDITIONAL PARTS OF
TRANSCRIPT IN RECORD ON APPEAL

No. C-88-6114

Judge Richard H. Moffat

(Supreme Court No. 910244)

Plaintiffs' opposition to General Motors' motion is based
upon inapplicable legal authority and upon an incorrect factual
analysis.

Plaintiffs begin their analysis with a quote from Jeschke v.
Willis, 793 P.2d 428 (Utah App. 1990). That case involved a

motion to supplement the record. That is not the issue presented here. Here, the designated materials will be included in the record regardless of the court's ruling. The issue before this court is who will pay for the transcript.

Plaintiffs misstate the standard the appellate court will apply in reviewing the directed verdict in this case. They say the standard is whether, looking only at evidence elicited by the plaintiffs' attorney, and disregarding everything else, any evidence at all exists that might have supported a verdict for plaintiffs. That standard is nice and simple, but it is wrong.

The Supreme Court stated the correct standard in Management Committee of Graystone Pines Homeowners Association v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982), as follows:

This Court's standard of review of a directed verdict is the same as that imposed upon the trial court. We must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained.

652 P.2d at 898.

The difference between this standard and the standard as stated by plaintiffs is that the standard set forth in Graystone allows the court to consider all of the evidence, not just the evidence elicited by plaintiffs' lawyer. That is why a motion for directed verdict must be renewed at the close of all the evidence.

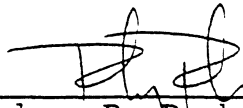
This is illustrated by an example from the trial of this case. Mr. Manning testified, in direct examination by plaintiffs' counsel, to a scenario in which a rock could be lofted up from the road, pass from the wheel well to the engine compartment, and lodge in the steering. He based this opinion on studies of 1983 or 1984 model year pickup trucks in a St. Louis case. However, in the cross-examination of Mr. Bayse, another of plaintiffs' experts, it was brought out that the model of truck which plaintiffs' decedent was driving had a fiberboard dust shield between the wheel well and the engine compartment, which prevents the scenario which Mr. Manning speculated could occur.

Plaintiffs want the appellate court to consider Mr. Manning's testimony without the benefit of the undisputed facts brought out in the cross-examination of Mr. Bayse, which make Mr. Manning's hypothesis totally impossible. They cannot do that. That is the reason the Graystone case speaks in terms of the evidence, not just plaintiffs' direct evidence. It is also the reason the Supreme Court held in Oberg v. Sanders, 111 Utah 507, 184 P.2d 229 (1947), that "the evidence must be viewed as a whole, including the status of the evidence after cross-examination."

Plaintiffs chose to raise these issues on appeal. The rules require them, not the defendant, to provide the appellate court with all evidence bearing upon the factual conclusions which they challenge.

DATED this 2nd day of July, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By 

Rodney R. Parker
Attorneys for Defendant
General Motors Corporation

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Nancy Hughes, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for plaintiffs herein; that she served the attached **REPLY MEMORANDUM IN SUPPORT OF MOTION TO REQUIRE APPELLANT TO INCLUDE ADDITIONAL PARTS OF TRANSCRIPT IN RECORD ON APPEAL** (Case Number C88-6114, Salt Lake County District Court, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

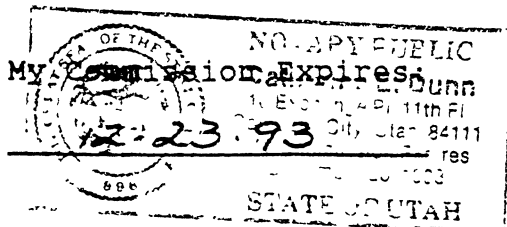
Stephen G. Morgan
MORGAN & HANSEN
136 South Main, 8th Floor
Salt Lake City, Utah 84101

and causing the same to be mailed first class, postage prepaid, on the 2nd day of July, 1991.

Nancy Hughes
Nancy Hughes

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1991.

Catherine E. Dunn
NOTARY PUBLIC
Residing in the State of Utah



Tab L

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

LEEANN NAY, individually and as	:	MINUTE ENTRY
personal representative for		
MATTHEW and MERISSA NAY, the	:	Case No. 880906114 PI
heirs of ROBERT NAY; and		
VIRGINIA NAY, individually	:	
and as personal representative		
for CONNIE WHEELER, CAROLYN	:	
GALLEGHER, JOAN NAY and		
JALYNN NAY, the heirs of	:	
WAYNE NAY,		
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
GENERAL MOTORS CORPORATION, GMC	:	
TRUCK DIVISION AND RON GREEN	:	
CHEVROLET PONTIAC GMC, INC.,	:	
	:	
Defendants.		

The Court having considered the Motion to Require Appellant to Include Additional Parts of the Transcript in the Record on Appeal, the Memorandum and the Reply Memorandum in Support thereof and the Memorandum in Opposition thereto and now being fully advised in the premises makes its:

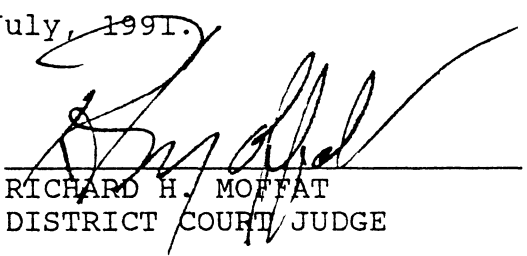
MINUTE ENTRY

Said Motion is granted. The Court is of the opinion that the rule requires that all relevant testimony relating to an issue raised by the Notice of Appeal must be included within the

the transcript. All relevant testimony includes testimony that is not only direct but cross-examination. It further includes testimony in opposition to the testimony raised by any one party. For these reasons, inter alia, and those set forth in defendants' memorandum and reply memorandum in support of it's motion, said motion is granted.

Counsel for the defendants will prepare an appropriate order.

DATED this 16th day of July, 1991.



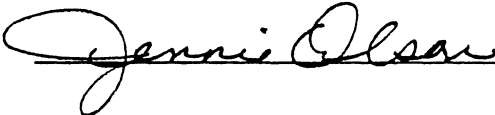
RICHARD H. MOFFAT
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 17th day of July, 1991:

Stephen G. Morgan
MORGAN & HANSEN
Attorney for Plaintiff
136 South Main, 8th Floor
Salt Lake City, Utah 84101

H. James Clegg
Rodney R. Parker
SNOW, CHRISTENSEN & MARTINEAU
Attorney for Defendants
P. O. Box 45000
Salt Lake City, Utah 84145



A handwritten signature in cursive script, reading "Jenni Olson", is written over a horizontal line.

Tab M

RECEIVED

JUL 19 1991

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Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LEEANN NAY, individually and
as personal representative for
MATTHEW and MERISSA NAY, the
heirs of ROBERT NAY; and
VIRGINIA NAY, individually and
as personal representative for
CONNIE WHEELER, CAROLYN
GALLEGHER, JOAN NAY and JALYNN
NAY, the heirs of WAYNE NAY,

ORDER

No. C-88-6114

Plaintiffs,

Judge Richard H. Moffat

vs.

GENERAL MOTORS CORPORATION,
GMC TRUCK DIVISION and RON
GREEN CHEVROLET PONTIAC GMC,
INC.,

(Supreme Court No. 910244)

Defendants.

The court has considered defendant General Motors Corporation's Motion to Require Appellant to Include Additional Parts of the Transcript in the Record on Appeal. Pursuant to Rule 4-501, the motion was submitted to the court without oral argument. Plaintiffs were represented by their counsel, Stephen G. Morgan

of Morgan & Hansen. Defendant was represented by its counsel, Rodney R. Parker of Snow, Christensen & Martineau. The court being fully advised in the premises, hereby

ORDERS that the motion should be, and hereby is, granted. Plaintiff is ordered to include the following additional portions of the transcript in this case in the record on appeal:

1. All testimony of C. Ben Bayse, Lyn Manning, and David C. Stephens not heretofore designated by plaintiffs/appellants.
2. The entire testimony of Chester Johnson.
3. The entire testimony of Newell Knight.
4. The entire testimony of Jerry Confer.
5. The entire testimony of Pete Riede.

DATED this ____ day of July, 1991.

BY THE COURT:

Richard H. Moffat
District Court Judge