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Utah Court of Appeals

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BRIEF

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DOCKET NO. 920654

IN THE UTAH COURT OF APPEALS

STEVEN C. DAVIS	:	
Plaintiff-Appellant	:	
vs.	:	Case No. 920654-CA
KARL N. WEENIG and JOHN P. PORTER,	:	
	:	Priority 15
Defendants-Respondents.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD PARK, JUDGE, PRESIDING

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FILED

APR 16 1993

COURT OF APPEALS

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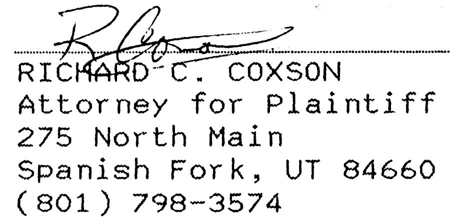
FILED
APR 16 1993
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STEVEN C. DAVIS, Plaintiff and Appellant, vs. KARL N. WEENIG and JOHN P. PORTER, Defendants and Apellees.	**NOTICE OF COMPLIANCE WITH RULE OF APPELLATE PROCEDURE 24(a)(6) AND RULE 24(F)** Case No. 920654-CA

In as much as no constitutional provisions, statutes, ordinances, rules and regulations whose interpretation is determinative are cited to in the Reply Brief, none are either referred to nor set out herein. The Rules of Appellate Procedure have therefore been satisfied.

DATED this 14 day of April, 1993.



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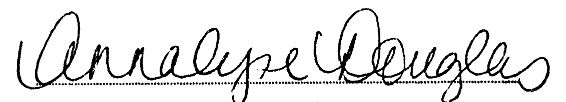

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IN THE UTAH COURT OF APPEALS

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STEVEN C. DAVIS	:	
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KARL N. WEENIG and JOHN P. PORTER,	:	
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Defendants-Respondents.	:	

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REPLY BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE FOURTH
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IN THE UTAH COURT OF APPEALS

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Plaintiff-Appellant	:	
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	:	
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I. ISSUES ON REPLY

1. Whether pre-existing conditions relieve a tortfeasor from liability.

2. Whether the jury may ignore the clear weight of evidence.

II. ARGUMENT

POINT I

The Facts Are Not In Dispute

There is no serious dispute as to the facts in this case. Mr. Davis had pre-existing injuries to his back (R 354 Plaintiff's Exhibit 80), his knee (R 354 pp. 762-764) and had pre-existing psychological and emotional problems (R 354 pp. 617-651).

However, all of the evidence with regard to new injuries presented at trial showed that the accident in question did in fact aggravate all of these conditions. Dr. Charles Smith, an orthopedic

physician who performed defendant's "independent examination" stated that there was in fact new strain and damage to both the knee and the back (R 354 pg. 482). With regard to the pre-existing psychological and emotional problems, it is also only a question as to the extent, and not whether these pre-existent problems were aggravated (R 354 pp. 720-721, 825-826).

The defendants-appellees, however, seem to be arguing that a pre-existing condition or disability will immunize any later tortfeasor from liability when their actions aggravate a pre-existent condition. That is not the law in Utah. In Brunson v. Strong, 412 P.2d 451, 17 Utah 2d 364 (1966), the court stated that:

> Our view of the basic issue here is that even though it is true that one who injures another takes him as he is, nevertheless the plaintiff may not recover damages for any pre-existing condition or disability she may have had which did not result from any fault of the defendant, but that she is entitled to recover damages for any injury she suffered, including any aggravation or lighting up of such a pre-existing condition or disability, which was proximately caused by the defendant's negligence. Brunson, 412 P.2d at 453 (Emphasis added).

The evidence shows that there were pre-existing conditions to Mr. Davis with regard to his knees, his back and his emotional condition. The undisputed evidence further shows, including that of defendants' own expert, Dr. Charles Smith, that in fact there was aggravation to the pre-existing conditions by the accident.

POINT II

A Jury May Not Enter Findings Contrary To The Facts

This was a trial by jury, and therefore great deference is

given to the decision of the jury. In Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983) held that :

> It is the exclusive province of the jury to determine the credibility of the witnesses, weigh the evidence, and make findings of fact. (Citations omitted) Where the evidence is conflicting and the jury is properly instructed, we do not upset those findings of fact on appeal except upon a showing that the evidence, viewed in the light most favorable to the verdict, so clearly preponderated in appellant's favor that reasonable persons could not differ on the outcome of the case. Groen, 667 P.2d at 601

The jury must make its findings based upon the facts as presented to them. They may not speculate or enter findings contrary to the clear weight of the evidence. In Marsh v. Irvine, 449 P.2d 996, 22 Utah 2d 154 (1969) the court held that:

> We agree that the jury should not be allowed such unbridled license as to base its verdict upon something which would be a physical impossibility. Marsh, 449 P.2d at 998.

The only evidence presented at trial with regard to causation, both by the defense and the plaintiff, was that there was aggravation of the pre-existing injuries. There was no evidence presented that there was no aggravation. Any finding by the jury to contrary is therefore against the clear weight of evidence (R at 269).

Reasonable individuals, confronted with undisputed evidence that there was aggravation of pre-existing injuries, could only find that in fact there was causation of damage. Because the jury denied any causation, they acted against the clear preponderance of evidence, and therefore the jury verdict must be reversed.

CONCLUSION

A tortfeasor must take an individual the way he finds him. Any aggravation or lighting up of a pre-existent injury becomes the responsibility of the tortfeasor. The only evidence presented at trial was that the pre-existing conditions were aggravated by the accident.

A jury may not speculate or enter a verdict contrary to the clear weight of the evidence. Because the only evidence presented at trial was that there was aggravation of the injuries of Mr. Davis, the jury verdict must therefore be reversed and remanded for new trial.

DATED this 9 day of April, 1993.

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