

1992

Julie Anderson Turner v. Amy Nelson : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

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

John E. Hansen; Scalley and Reading; John W. Anderson, Jr.; Hall, Estill, Hardwick, Gable, Golden and Nelson; Attorneys for Appellant.

Robert L. Stevens; Richard, Brandt, Miller and Nelson; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Julie Anderson Turner v. Amy Nelson*, No. 920195.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4137

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

UTAH
DOCUMENT
KFU
45.9
S9
DOCKET NO:

BRIEF

920195

IN THE SUPREME COURT OF THE STATE OF UTAH

JULIE ANDERSON TURNER,

Plaintiff/Appellant,

vs.

AMY NELSON,

Defendant/Appellee.

Case No. 920195

BRIEF OF APPELLEE AMY NELSON

APPEAL FROM A FINAL JUDGMENT OF THE HONORABLE
J. DENNIS FREDERICK IN THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH

Robert L. Stevens [A3105]
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, UT 84110-2465
Telephone: (801) 531-2000

ATTORNEYS FOR DEFENDANT/APPELLEE
AMY NELSON

John E. Hansen
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, UT 84111
Telephone: (801) 531-7870

John W. Anderson, Jr.
HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON
4100 Bank of Oklahoma Tower
Tulsa, OK 74172-0141
Telephone: (918) 588-4635

ATTORNEYS FOR PLAINTIFF/
APPELLANT JULIE ANDERSON TURNER

FILED

JAN 26 1993

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

JULIE ANDERSON TURNER, Plaintiff/Appellant, vs. AMY NELSON, Defendant/Appellee.	Case No. 920195
--	------------------------

BRIEF OF APPELLEE AMY NELSON

APPEAL FROM A FINAL JUDGMENT OF THE HONORABLE
J. DENNIS FREDERICK IN THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH

Robert L. Stevens [A3105]
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, UT 84110-2465
Telephone: (801) 531-2000

ATTORNEYS FOR DEFENDANT/APPELLEE
AMY NELSON

John E. Hansen
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, UT 84111
Telephone: (801) 531-7870

John W. Anderson, Jr.
HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON
4100 Bank of Oklahoma Tower
Tulsa, OK 74172-0141
Telephone: (918) 588-4635

ATTORNEYS FOR PLAINTIFF/
APPELLANT JULIE ANDERSON TURNER

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW	1
DETERMINATIVE STATUTES	1
STATEMENT OF THE CASE	3
Nature of the Case and Course of Proceedings Below . . .	3
FACTS OF THE CLAIM	5
SUMMARY OF ARGUMENT	7
1. Mootness	7
2. The Statutory Scheme Provides for the Apportionment of Fault of Non-Parties	8
3. The addition of Salt Lake City to the Jury Form Did Not Prejudice Plaintiff	9
4. Plaintiff Failed to Comply with the Court's Order Regarding Identification of Witnesses and was Properly Precluded From Bringing on a Surprise Witness in the Second Day of Trial . . .	10
ARGUMENT	
POINT I	
PLAINTIFF'S OBJECTION TO THE INCLUSION OF SALT LAKE CITY ON THE VERDICT FORM IS MOOT	11
POINT II	
THE INCLUSION OF SALT LAKE CITY ON THE VERDICT FORM IS CONSISTENT WITH THE UTAH COMPARATIVE NEGLIGENCE STATUTES	13
POINT III	
THE ADDITION OF SALT LAKE CITY ON THE VERDICT FORM DID NOT PREJUDICE PLAINTIFF	18
POINT IV	
PLAINTIFF FAILED TO COMPLY WITH THE COURT'S ORDER REGARDING IDENTIFICATION OF WITNESSES AND WAS PROPERLY PRECLUDED FROM BRINGING ON A SURPRISE WITNESS IN THE SECOND DAY OF TRIAL	20
CONCLUSION	25

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Assay v. Watkins</u> , 751 P.2d 1135 (Utah 1988)	1
<u>Beitzel v. City of Coeur d' Alene</u> , 827 P.2d 1160 (Ida. 1992)	12
<u>Bode v. Clark Equipment Co.</u> , 719 P.2d 824 (Okla. 1986)	15, 17
<u>DaFonte v. Up-Right, Inc.</u> , 828 P.2d 140	17
<u>Dietz v. General Electric Company</u> , 821 P.2d 166 (Ariz. 1991)	17
<u>Hardy v. Hardy</u> , 776 P.2d 917, 925 (Utah App. 1989) . .	1,11,24
<u>Kelly v. Utah Power and Light</u> , 746 P.2d 1191 (Utah App. 1987)	1, 19
<u>Kott v. City of Phoenix</u> , 763 P.2d 235 (Ariz. 1988)	24
<u>Kremer v. Audett</u> , 668 P.2d 1315, 1317 (Wa. App. 1983) . . .	24
<u>Mills v. Brown</u> , 735 P.2d 603 (Ore. 1987)	16
<u>Morgan v. Commercial Union Assurance Companies</u> , 606 F.2d 554 (5th Cir. 1979)	22
<u>National Farmers Union Property & Casualty Co.</u> <u>v. Frackelton</u> , 662 P.2d 1056 (Colo. 1983)	16
<u>Paul v. N.L. Industries, Inc.</u> , 624 P.2d 68 (Okla. 1980) . .	17
<u>Pocatello Industrial Park Co. v. Steel West, Inc.</u> , 621 P.2d 399 (Ida. 1980)	17
<u>State v. Albretsen</u> , 782 P.2d 515 (Utah 1989)	23
<u>Warmbrodt v. Blanchard</u> , 692 P.2d 1282 (Nev. 1984)	16
<u>Wirth v. Commercial Resources, Inc.</u> , 630 P.2d 292 (N.M. App. 1981)	23
<u>STATUTES</u>	
Utah Code Ann. §§ 78-27-37 - 41	1-3, 8,9 13,14-16
Utah Code Ann. § 63-30-12	3

OTHER AUTHORITIES

1973 Law Review, "Comparative Negligence, Contribution
Among Joint Tort-Feasors, and the Effect of a Release--
A Triple Play by the Utah Legislature", p. 406 18

ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW

1. Whether the issue of Salt Lake City's inclusion on the special verdict form for apportionment of fault is moot. The jury determined that defendant was without fault and did not reach the issue of the City's fault or any apportionment.

2. Whether under Utah's Comparative Negligence Statutes, non-parties are includable on the special verdict form, for the purpose of apportioning fault. The trial court's ruling is reviewed for correctness. Assay v. Watkins, 751 P.2d 1135 (Utah 1988).

3. Whether plaintiff was prejudiced by the trial court's inclusion of Salt Lake City on the verdict form. The trial court's finding of no prejudice is reviewed for abuse of discretion. Kelly v. Utah Power and Light, 746 P.2d 1191 (Utah App. 1987).

4. Whether the trial court's refusal to allow plaintiff to call a witness which plaintiff had failed to designate on her court ordered witness list was an abuse of discretion. The trial court's rulings on admission or exclusion of evidence are reviewed for abuse of discretion. Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989).

DETERMINATIVE STATUTES

1. Utah Comparative Negligence Statutes, Sections 78-27-37 through 41:

78-27-37. Definitions. As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

78-27-38. Comparative negligence. The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

78-27-39. Separate special verdicts on total damages and proportion of fault. The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

78-27-40. Amount of liability limited to proportion of fault--No contribution. Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages

equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

78-27-41. Joinder of defendants. A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below.

Plaintiff (appellant) Turner was involved in an automobile accident with defendant (appellee) Nelson on July 6, 1989. The only witness listed on the police report, Daniel Rusk, observed that the stop sign controlling Nelson's direction of travel was obscured by foliage. Plaintiff did not make a claim against the city within the statutory one-year period (Utah Code Ann. § 63-30-12). Plaintiff filed this action against Nelson nearly two years after the accident. (Complaint, R. 2-4.)

Nelson's Answer denied negligence and claimed that a third party was at fault (R. 9-11). In her Answers to Interrogatories filed in May 1991 and her deposition in July 1991, she explained that the stop sign was blocked. At his deposition taken in January of 1992, Daniel Rusk also testified that the sign was obstructed. (R. 738-39.)

Plaintiff pressed for an early trial setting, representing to the Court that her discovery was complete. (R. 23; 52-53; R. 62-63.) The Court held a scheduling conference and set a trial date of March 3, 1992. The Court ordered further provided that exhibits and witness lists were to be exchanged no later than February 14, 1992 with all discovery to be concluded February 20, 1992. (Scheduling Order, R. 68.)

Defendant filed her designation of witnesses in accordance with the Court's Order. (R. 94-95.) Plaintiff filed her designation late, on February 19, 1992. (R. 97-98.)

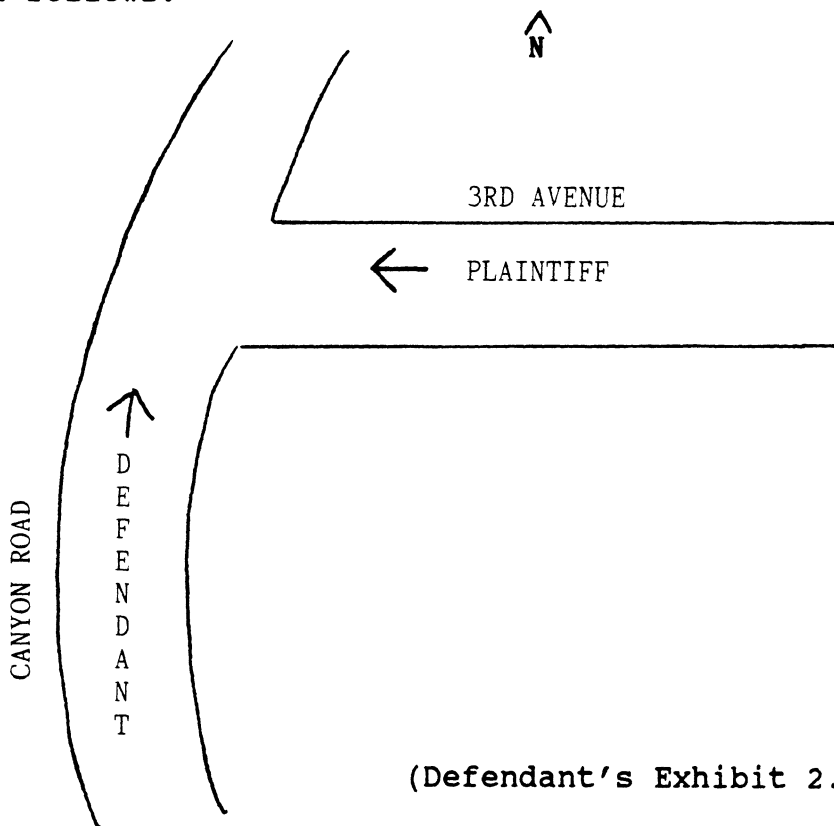
At the pretrial settlement conference on February 21, 1992, defense counsel advised the Court and plaintiff's counsel of his belief that Salt Lake City Corporation should be on the jury verdict form for the purpose of apportioning its fault. Plaintiff objected. Subsequently, defendant made a formal motion to include the City which was granted. (R. 100-101; 358.)

Trial commenced on March 3, 1992 as scheduled. On March 4, 1992, plaintiff moved the Court for leave to offer a previously unlisted witness, Jim Nakling. (Motion, R. 143-45.) Plaintiff represented that the witness would deny that the stop sign was obstructed. (Affidavit, R. 146-47.) Plaintiff gave no explanation for her failure to locate and identify this witness within the time set by the Court's Order. The court denied plaintiff's motion.

Trial was concluded on March 5, 1992. (Verdict, R. 288-91.) The jury returned its verdict finding that plaintiff was not negligent. The jury did not reach the question of whether or not Salt Lake City or plaintiff was negligent in causing the accident. Plaintiff's motion for a judgment notwithstanding the verdict was denied (R. 297-98) and an order entered dismissing plaintiff's Complaint as no cause of action. (R. 294-95.)

FACTS OF THE CLAIM

The accident occurred at the intersection of Third Avenue and Canyon Road in Salt Lake City. An approximate drawing of the intersection follows:



(Defendant's Exhibit 2.)

This was the T-type intersection. However, unlike most T-type intersections, the through-way of traffic was the stem of the "T" (the direction that plaintiff was traveling), and not the top of the "T" (the direction that defendant was traveling). (R. 415-16; 437; 653-54.) Defendant had never been on the road or through the intersection before. (R. 686.)

The road on which defendant approached the intersection is curved, making it impossible for her to have appreciated the size and layout of the intersection until she was within 50 feet of it. (R. 417-18.) There was a dispute in the evidence as to whether or not there was a "stop ahead" sign in place to warn defendant of the intersection. (R. 394; 642; 649.)

Defendant did not see the stop sign until immediately before she entered the intersection. She applied her brakes when she saw it but was unable to get completely stopped before the accident. (R. 331-32.)

Plaintiff was traveling west on 3rd Avenue approaching the intersection. Plaintiff originally testified that she was going 30-35 miles an hour which was in excess of the speed limit.

(R. 618.) At the time of trial, she testified that she was going 15-20 miles an hour. (R. 604.) She also applied her brakes and was almost able to stop before impact. (R. 604.) The two cars had slowed to approximately 5 miles per hour at the time of impact. (R. 408; 683.)

Defendant testified that the stop sign was obscured by trees and foliage as she approached it and was only capable of being seen just before she entered the intersection. (R. 335-36.) Her testimony was corroborated by the testimony of the witness, Rusk. (R. 640.)

Plaintiff testified that she did not see any obstruction to the stop sign. (R. 608.) She also presented a police officer who was at the scene, Mickey Paul, who indicated that he did not observe any obstruction of the stop sign (R. 434) and an expert, Newell Knight, who testified based upon his inspection of the accident scene that in his opinion the sign was not obstructed. (R. 398.)

The jury apparently found defendant and Mr. Rusk to be more believable and concluded that defendant was not negligent. In view of that conclusion, the jury did not reach the issue as to plaintiff's negligence or the negligence of Salt Lake City.

SUMMARY OF ARGUMENT

1. **Mootness**--Plaintiff's appeal is based primarily upon the inclusion of Salt Lake City on the special verdict form. That issue is moot due to the fact that the jury found no negligence on the part of defendant. They did not reach the issue of apportioning fault. Even if Salt Lake City had not been on the jury form, defendant would have been fully entitled to

argue that she was not at fault due to the obstruction of the stop sign. The same evidence would have been received and the same arguments made. The presence of Salt Lake City on the form was inconsequential and, therefore, this issue is moot.

2. The Statutory Scheme Provides for the Apportionment of Fault to Non-Parties--The Utah comparative negligence statutes specifically provide for the consideration of the fault of any person who is claimed to be liable in causing the accident. Section 78-27-39 provides for the use of a special verdict form which determines "the percentage or proportion of fault attributable to each person seeking recovery and to each 'defendant'." As noted in plaintiff's brief, the word "defendant" is specifically defined by Section 78-27-37 to be any person who is claimed to have had fault in causing the injury, it is not limited to parties.

The statutes, which were passed in 1986, eliminated the previous scheme of a joint and several liability of joint tortfeasors as well as contribution actions. They specifically limited a defendant's liability to his particular proportion of fault only. (Section 78-27-38).

The inclusion of non-party tort-feasors is essential to the statutory scheme. Without such persons on the verdict form, a defendant or plaintiff may be saddled with more than his proportionate share of fault resulting in an improper result.

Plaintiff's argument that Section 78-27-41 changes the entire approach of the statutes and requires that any person to whom fault may be apportioned must be a party to the litigation is a misreading of the statute and its overall intent. That section merely provides that a defendant may join a joint tortfeasor as a party to the litigation but does not require it. Such a joinder may work to a defendant's benefit in order to facilitate discovery or for other strategic purposes in handling the lawsuit. But the section is not mandatory and does not change the basic statutory scheme.

3. The Addition of Salt Lake City to the Jury Form Did Not Prejudice Plaintiff--Plaintiff waited more than one year after the accident before commencing any litigation. The statute of limitations for a claim against Salt Lake City had run. Whether Salt Lake City was joined as a defendant in this lawsuit or not, made no difference to plaintiff because plaintiff could not recover from Salt Lake City.

The key issues of fact in the case were unchanged by adding Salt Lake City to the verdict form. Plaintiff claimed that the stop sign was visible to the defendant and she should have stopped. The defendant claimed that the stop sign was obstructed.

As pointed out by Judge Frederick:

My decision to allow Salt Lake City on the verdict form for the purpose of apportionment of the responsibility here really does not change the essential defense that the sign was obstructed.

(R. 744.)

The facts and evidence were unchanged. Plaintiff was not caught unaware that defendant was claiming that the sign had been obstructed. Plaintiff had been aware of that claim from early on in the case. There was no new or surprise defense and, therefore, no prejudice to plaintiff.

4. Plaintiff Failed to Comply with the Court's Order Regarding Identification of Witnesses and was Properly Precluded From Bringing on a Surprise Witness in the Second Day of Trial--

The issue of foliage obstructing the stop sign had been known to plaintiff no later than May 29, 1991 when defendant responded to plaintiff's First Set of Interrogatories. Plaintiff began trial with three witnesses on the obstruction issue: herself, the police officer and her expert. On the second day of trial, plaintiff's counsel advised the Court that he had found a fourth witness and wanted to offer his testimony.

Plaintiff's attempt to bring on a new witness was in violation of the Court's Scheduling Order. Plaintiff's counsel gave no explanation of why this witness was not located and listed prior to trial. Plaintiff suggested that the addition of Salt Lake City to the verdict form had somehow changed the

factual issues in the case. Judge Frederick properly rejected this argument, pointing out that plaintiff had been aware of the issue of obstruction of the stop sign from early on in the case and had already presented several witnesses on the issue.

Judge Frederick enforced the Scheduling Order and precluded the new witness.

The trial court's determination will not be disturbed absent an abuse of that discretion. Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989). "The trial court does not abuse its discretion in refusing to admit evidence which is not timely provided to the opposing counsel contrary to the court's instructions." Id. at p. 925.

ARGUMENT

POINT I

PLAINTIFF'S OBJECTION TO THE INCLUSION OF SALT LAKE CITY ON THE VERDICT FORM IS MOOT.

The jury determined that defendant was not negligent. The jury did not reach the issue of whether or not plaintiff herself was negligent or Salt Lake City was negligent. In view of the jury's determination, the issue of whether or not Salt Lake City should be included on the jury verdict form is of no consequence.

Plaintiff's attempt to suggest that the inclusion of Salt Lake City on the verdict form in some way altered the facts,

evidence or argument of the case is incorrect. Defendant's position from the time of filing her answer in this case was that she was not negligent. In proving that position, she was entitled to put on evidence to demonstrate her freedom from fault and the fault of others. Even if Salt Lake City had not been on the verdict form, defendant would have made the same argument, claiming that she was free of fault because the stop sign could not be seen.

The inclusion or failure to include a non-party joint tort-feasor on the verdict form is of no consequence when the party at issue is found to have no negligence. Beitzel v. City of Coeur d' Alene, 827 P.2d 1160 (Ida. 1992). The Beitzel case is analogous to the instant case. It involved a situation in which a non-party was erroneously not included on the special verdict form. The Idaho Supreme Court held that since the plaintiff was found to have no fault in the accident, the inclusion or non-inclusion of the non-party on the verdict form was irrelevant.

In the Beitzel case, the fact that plaintiff had no negligence made the inclusion of non-parties on the special verdict form irrelevant. Similarly, in the instant case, the fact that defendant was found to be free of negligence makes the inclusion or lack of inclusion of Salt Lake City on the special verdict form irrelevant and moot.

POINT II

THE INCLUSION OF SALT LAKE CITY ON THE VERDICT FORM IS CONSISTENT WITH THE UTAH COMPARATIVE NEGLIGENCE STATUTES.

The applicable Utah comparative negligence statutes were enacted in 1986 as the Tort Reform Act. The Act eliminated contribution between joint tort-feasors and established a system under which no defendant is liable for more than her respective share of fault. (§ 78-27-38 U.C.A.) In order to effectuate the purpose and scheme of the Act, it is necessary to include all of the persons or entities who share in the fault, not just those who happen to be parties to the case.

The Act uses a special definition of the word "defendant" to include "any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery." (§ 78-27-37(1) U.C.A.) There is no requirement that a "defendant" be an actual party to the lawsuit. This expansive definition includes non-party joint tort-feasors.

The Legislature specifically directs how special verdict forms should be structured in Section 78-27-39. It provides:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

(Emphasis added.)

Based upon the Act's special definition of the word "defendant", this section means that the special verdict form will provide for an allocation of fault attributable to each person or entity who is claimed to be a joint tort-feasor, regardless of whether or not they are actually parties to the lawsuit. Any other interpretation of Section 39 as clarified by the definition found in Section 37 ignores the clear language of those sections and would violate Section 38 which limits each party's liability to his own percentage of fault.

Plaintiff's claim that the Legislature reversed this rule by the provisions of Section 78-27-41 is incorrect. Section 41 provides that any party to the lawsuit may join as parties any joint tort-feasors by filing a third party complaint that does not seek dollar relief, but simply asks for apportionment. The section does not require such joinder. There is nothing in Section 41 that states that in the absence of such joinder, those non-parties will be kept off of the special verdict form. The only section that deals with the special verdict form is Section 39 which directs their inclusion.

Plaintiff's argument that this literal interpretation makes Section 41 mere surplusage is fallacious. Section 41 gives all parties to the lawsuit the ability to join joint tort-feasors for the purpose of discovery and trial. Each party can make a

strategic decision as to whether there is benefit or not in joining such non-party joint tort-feasors. For example, it may be to a defendant's benefit to join the non-party in order to facilitate the taking of depositions, obtaining documents, and other discovery procedures it needs in order to prepare its case. Additionally, a defendant may conclude that it would be of assistance at trial to have them joined. These are strategic options which Section 41 gives to all parties to the lawsuit. However, the giving of that option with the permissive word "may" does not change the basic structure of Sections 37-39 which provides for inclusion of all joint tort-feasors on the special verdict form.

Plaintiff's argument ignores the realities of many lawsuits. For example, a particular joint tort-feasor may not be subject to jurisdiction in Utah. Nevertheless, under the statutory scheme, a plaintiff may go ahead and sue those joint tort-feasors who are subject to Utah jurisdiction. The defendants in such a case would not be precluded from having fault allocated to the joint tort-feasor who is not subject to Utah jurisdiction and therefore not a party.

The inclusion of non-parties on the verdict benefits not only defendants but plaintiffs as well. Bode v. Clark Equipment Co., 719 P.2d 824 (Okla. 1986). In the Bode case, the Oklahoma court affirmed a plaintiff's right to include a non-

party on the special verdict form. Plaintiff's concern was to assure that his own fault was calculated at less than 50 percent. The same concern will apply for plaintiffs in Utah cases.¹

Utah's statutory language is unique but similar to the statutes of a number of other states. Generally, only those states whose statutes specifically restrict the special verdict "to all parties" will preclude non-parties from the verdict form. Those state courts are constrained by the statutes passed by their legislatures. See, for example, Mills v. Brown, 735 P.2d 603 (Ore. 1987); Warmbrodt v. Blanchard, 692 P.2d 1282 (Nev. 1984) and National Farmers Union Property & Casualty Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983). These are the cases relied upon by plaintiff in her brief. They are all easily distinguishable because of the restricted statutory language utilized.

Cases from those states with statutes which, like Utah's, do not specifically limit the special verdict form to the

¹For example, suppose that Plaintiff's fault was 40 percent, Defendant A was 20 percent, Defendant B was 20 percent, and Defendant C who is not subject to the court's jurisdiction is 20 percent. Under Section 78-27-38, if all joint tort-feasors are included on the special verdict form, Plaintiff will recover 20 percent of her damages from Defendant A and 20 percent from Defendant B. However, if Defendant C were not included on the special verdict form because it was not a party to the lawsuit, the fault would be evenly split between Plaintiff on the one hand and Defendants A and B jointly on the other hand. As a result, under Section 38, Plaintiff would recover nothing.

parties, support the rule of law that all joint tort-feasors should be included on the special verdict form. The rationale was summarized by the Idaho Supreme Court as follows:

We now adopt the rule which was suggested by *Tucker and Jensen* which is clearly the prevalent practice among state courts. "It is established without doubt that when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors by operation of law or because of a prior release." [Citation.] "The reason for such a rule is that true apportionment cannot be achieved unless that apportionment includes all tort-feasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case." [Citations.]

Pocatello Industrial Park Co. v. Steel West, Inc., 621 P.2d 399 (Ida. 1980) at 403. (Emphasis added.)

See also, DaFonte v. Up-Right, Inc., 828 P.2d 140.

"Damages must be apportioned among 'universe' of tort-feasors including 'non-joined defendants'." 828 P.2d at 146; Dietz v. General Electric Company, 821 P.2d 166 (Ariz. 1991); and Paul v. N.L. Industries, Inc., 624 P.2d 68 (Okla. 1980). ". . . the negligence of tort-feasors not parties to the lawsuit should be considered by the trial jury in order to properly apportion the negligence of those tort-feasors who are parties." Cited with approval: Bode v. Clark Equipment, Supra.

The public policy supporting the consideration of fault of non-parties is not new. The concept and theory of comparative fault requires full comparison with all tort-feasors, whether or not they are parties. This is particularly true when, as in Utah, the defendants have no right of contribution. Professor E. Wayne Thode of the University of Utah Law School argued for such consideration even under Utah's previous comparative negligence statutes. 1973 Law Review, "Comparative Negligence, Contribution Among Joint Tort-Feasors, and the Effect of a Release--A Triple Play by the Utah Legislature", p. 406. Without the inclusion of all tort-feasors on the verdict form, the comparative fault analysis becomes distorted and illogical.

POINT III

THE ADDITION OF SALT LAKE CITY ON THE VERDICT FORM DID NOT PREJUDICE PLAINTIFF.

Plaintiff was aware from the time she received defendant's Answers to Interrogatories in May of 1991 that defendant was claiming that the stop sign in question was obstructed by trees and foliage. (R. 14.) Plaintiff's attorney was present at the depositions of defendant and witness Rusk which further elaborated on the nature of the obstruction. Plaintiff was clearly aware that part of defendant's defense was to claim that the stop sign was not properly visible. Adding Salt Lake City to the verdict form did not change the factual

issue regarding obstruction of the stop sign whatsoever. It was an issue that plaintiff had been long familiar with.

In her brief on appeal, plaintiff has alleged that the inclusion of Salt Lake City caused prejudice to her.

Judge Frederick properly found that no prejudice was involved. The inclusion of Salt Lake City did not change the defense presented by defendant nor did it change or alter the evidence. The factual issue still remained as to whether the stop sign was obstructed by foliage.

Plaintiff's brief has cited a number of cases regarding amendment to pleadings. In this case, there was no amendment of pleadings. There was no change of claim or defense.

Even if this matter were to be considered under the standards regarding late amendments to pleadings, it is clear that the trial judge was well within his discretion. As cited by plaintiff, in the case of Kelly v. Utah Power & Light, 746 P.2d 1189 (Utah App. 1987), the Court of Appeals commented:

In considering a motion to amend, a trial judge must decide 'whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare.' [Citation.] Absent a clear abuse of discretion, this court will not disturb a trial court's ruling on a motion to amend.

746 P.2d at 1190. (Emphasis added).

In this case, Judge Frederick found that plaintiff was not having to adjudicate an issue for which she had not had time to prepare. She had known about the obstruction issue for almost a year. The facts not only support but compel Judge Frederick's conclusion that plaintiff had shown no prejudice.

POINT IV

PLAINTIFF FAILED TO COMPLY WITH THE COURT'S ORDER REGARDING IDENTIFICATION OF WITNESSES AND WAS PROPERLY PRECLUDED FROM BRINGING ON A SURPRISE WITNESS IN THE SECOND DAY OF TRIAL.

Plaintiff pushed this case to early trial. (R. 23; 52-53; 62-63.) She represented that her discovery and investigation were complete and ready for trial.

At the time the Court set trial at plaintiff's insistence, the Court ordered that witness lists be exchanged by February 14, 1992, 18 days prior to trial. Plaintiff did not comply with the Order but did file a designation of witnesses five days late on February 19, 1992.

On the second day of trial, while plaintiff's case in chief was still going forward, plaintiff advised the Court that she had discovered a new witness, Mr. Nackling, and wished to offer his testimony with regard to whether or not the stop sign was obstructed. Mr. Nackling had not been included on plaintiff's witness list. Plaintiff subsequently renewed her

motion at the close of defendant's case, attempting to characterize Mr. Nackling as a rebuttal witness.

Defendant objected. Judge Frederick refused to permit the witness to testify, stating:

. . . It has been the essential defense here that the sign was obstructed, thereby limiting the defendant's opportunity to timely observe it and take appropriate action. That aspect of the Geurts testimony is not new, and my decision to allow Salt Lake City on the verdict form for the purposes of apportioning the responsibility here really does not change the essential defense that the sign was obstructed. The claim here has been made that that was a fact and evidence has been adduced, if it is believable to the jury, that that was the fact, and now at this point, this late date, it seems to me it puts the [defendant] at an unfair disadvantage, not knowing who this individual is, and having had the opportunity to cross examine or at least depose this witness, while as Mr. Geurts was available and notified in a timely fashion as far as the opposition was concerned, that he would be testifying. I am persuaded that it would place the [defendant]² in an unfair posture to grant this motion and its denied.

(R. 744.)

Judge Frederick's ruling is consistent with orderly litigation management and the particular facts of this case. It was plaintiff's burden in presenting her case in chief to demonstrate that defendant either failed to keep a proper lookout

²Judge Frederick inadvertently said "plaintiff" rather than "defendant." In subsequent discussion he clarified that he meant to refer to defendant. (R. 744-745.)

or failed to observe a stop sign. Plaintiff was fully aware that defendant was claiming that the stop sign was obstructed. It was part of plaintiff's case in chief to demonstrate that the stop sign was there and observable. She put on evidence to prove that it was observable through her expert, Newell Knight, R. 398-403; through the testimony of Officer Mickey F. Paul, R. 434) and through her own testimony, (R. 608). For plaintiff to now claim that the obstruction of the stop sign was "something new" raised for the first time in defendant's portion of the case is fallacious and Judge Frederick's ruling pointed out that fact.

In her brief, defendant takes great pains to attempt to describe Mr. Nackling's testimony as "rebuttal" testimony. As such, she argues she should be exempt from the requirements of the court order to designate witnesses and should have been able to present Mr. Nackling. Even her own cases do not support this proposition. She cites the case of Morgan v. Commercial Union Assurance Companies, 606 F.2d 554 (5th Cir. 1979) in which the Fifth Circuit upheld the trial court's refusal to allow a witness who was not listed in the court ordered designation of witnesses to testify. The court pointed out:

However that may be, a defense witness whose purpose is to contradict an expected and anticipated portion of plaintiff's case can never be considered a "rebuttal witness" or anything analogous to one.

606 F.2d at 556.

In this case, Mr. Nackling's testimony was intended to bolster plaintiff's case in chief on the obstruction issue and to attack an "anticipated portion" of the defendant's case.

State v. Albretsen, 782 P.2d 515 (Utah 1989) cited by plaintiff stands for the same principle. In that case, the Utah Supreme Court upheld a trial court's decision to allow a non-listed rebuttal witness to testify. But the holding was based upon the fact that the defendant in the case had changed her testimony at trial raising new facts. The court found that there was "new" evidence that justified the new rebuttal testimony. No such new evidence was involved in this case.

In this case, the trial court refused to allow plaintiff to bring on an undisclosed witness who would testify regarding issues that were not new and that had been specifically addressed in plaintiff's case in chief. In such cases, appellate courts uniformly uphold the decision of the trial court. See, for example, Wirth v. Commercial Resources, Inc., 630 P.2d 292 (N.M. App. 1981).

Although defense counsel tried to characterize Mr. Patterson's testimony as "rebuttal" it was not such. As suggested in the pretrial order, rebuttal witnesses are those persons "the necessity of whose testimony reasonably cannot be anticipated before the time of trial." . . . Being part of the planned defense, it was not rebuttal evidence. The court did not err in refusing to allow it.

630 P.2d at 298; and Kremer v. Audett, 668 P.2d 1315 (Wa. App. 1983). (Emphasis added.)

Rebuttal evidence is admitted to enable the plaintiff to answer a new matter presented by the defense. [Citation]. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case.

668 P.2d at 1317. (Emphasis added.)

The Rules of Civil Procedure as adopted in Utah and most states of the United States are intended to provide each party with full access to the other's case to avoid surprises at trial. To allow one side to use a witness that was not revealed in violation of a court order jeopardizes the other party's trial preparation and should not be permitted. Kott v. City of Phoenix, 763 P.2d 235 (Ariz. 1988).

The Utah Court of Appeals has not hesitated to uphold a trial judge's ruling in excluding a witness who was not listed. Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989). The court stated:

The trial court does not abuse its discretion in refusing to admit evidence which is not timely provided to the opposing party contrary to the court's instructions.

Id. at p. 917.

CONCLUSION

Plaintiff's primary basis for this appeal has become moot. The jury found no fault on the part of the defendant. The issue of apportionment was not reached on the special verdict form and, therefore, was of no consequence. Even in the absence of mootness, the inclusion of Salt Lake City on the verdict form was mandated by the comparative negligence statutes and caused no prejudice to plaintiff.

The trial court's exclusion of witness Nackling is solidly supported by case law. Plaintiff failed to list Mr. Nackling on her court ordered designation of witnesses. Mr. Nackling's testimony was addressed to one of the issues of plaintiff's case in chief. Judge Frederick's decision to exclude Nackling was correct.

DATED this 26th day of January, 1993.

RICHARDS, BRANDT, MILLER & NELSON


ROBERT L. STEVENS

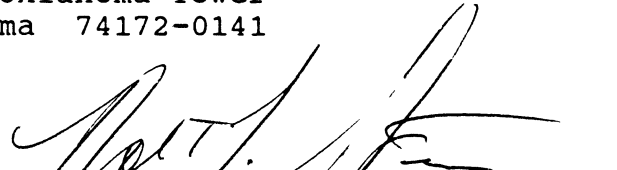
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 26th day of January, 1993, to each of the following:

John E. Hansen
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111

John W. Anderson, Jr.
HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172-0141


Robert L. Stevens