

1992

Julie Anderson Turner v. Amy Nelson : Legal Brief

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

Legal Brief, *Julie Anderson Turner v. Amy Nelson*, No. 920195.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4138

This Legal Brief 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
DUCKET NO. 920195

UTAH SUPREME COURT

BRIEF

BLUE 4

IN THE SUPREME COURT OF THE
STATE OF UTAH

JULIE ANDERSON TURNER,	:	
Plaintiff and Appellant,	:	
vs.	:	Case No. 920195
AMY NELSON,	:	
Defendant and Appellee.	:	

APPENDIX OF EXHIBITS SUBMITTED IN SUPPORT OF
APPELLANT JULIE ANDERSON TURNER'S BRIEF IN CHIEF

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

JOHN E. HANSEN, #4590
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

JOHN W. ANDERSON, JR. OBA #13646
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
Admitted Pro Hac Vice
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172-0141
Telephone: (918) 588-4635
ATTORNEYS FOR PLAINTIFF/APPELLANT
JULIE ANDERSON TURNER

FILED

December 10, 1992

DEC 10 1992

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE
STATE OF UTAH

JULIE ANDERSON TURNER,	:	
Plaintiff and Appellant,	:	
vs.	:	Case No. 920195
AMY NELSON,	:	
Defendant and Appellee.	:	

APPENDIX OF EXHIBITS SUBMITTED IN SUPPORT OF
APPELLANT JULIE ANDERSON TURNER'S BRIEF IN CHIEF

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

JOHN E. HANSEN, #4590
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

JOHN W. ANDERSON, JR. OBA #13646
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
Admitted Pro Hac Vice
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172-0141
Telephone: (918) 588-4635
ATTORNEYS FOR PLAINTIFF/APPELLANT
JULIE ANDERSON TURNER

December 10, 1992

EXHIBITS LIST

EXHIBIT

- A. MOTION FOR APPORTIONMENT OF FAULT OF SALT LAKE CITY (R 100 - 101)
- B. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INCLUSION OF SALT LAKE CITY CORPORATION ON JURY VERDICT FOR APPORTIONMENT OF FAULT (R 112 - 118)
- C. NOTICE OF HEARING (R 119 - 120)
- D. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO INCLUSION OF SALT LAKE CITY CORPORATION ON JURY VERDICT FOR APPORTIONMENT OF FAULT (R 135 - 138)
- E. MINUTE ENTRY (R 139)
- F. MOTION TO ALLOW PLAINTIFF TO CALL A NEWLY DISCOVERED WITNESS, JIM MAKLING, AS A WITNESS AT TRIAL (R 143 - 160)
- G. SPECIAL VERDICT (R 288 - 291)
- H. EXCERPT FROM TRIAL TRANSCRIPTS
 - (R 324 - 326)
 - (R 329)
 - (R 331-332; 334)
 - (R 358)
 - (R 376)
 - (R 397)
 - (R 645)
 - (R 735 - 747)
 - (R 775)
 - (R 792)

EXHIBIT A

MOTION FOR APPORTIONMENT OF
FAULT OF SALT LAKE CITY (R 100 - 101)

ROBERT L. STEVENS [A3105]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant
50 South Main Street
Key Bank Tower, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

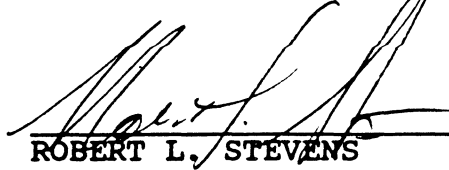
JULIE ANDERSON TURNER,	*	
	*	
Plaintiff,	*	MOTION FOR APPORTIONMENT OF
	*	FAULT OF SALT LAKE CITY
	*	
vs.	*	
	*	
AMY NELSON,	*	Civil No. C91-1901
	*	
Defendant.	*	Judge Frederick

Defendant, by and through her attorney of record, moves the court for its order determining that the verdict form at trial in this case will include an apportionment of fault to Salt Lake City Corporation.

As a basis for this motion, defendant shows the court that discovery has demonstrated that Salt Lake City Corporation was partially or completely at fault in causing the accident which is the subject of this action. This motion is supported by the accompanying memorandum of points and authorities.

DATED this 26th day of February, 1992.

RICHARDS, BRANDT, MILLER & NELSON



ROBERT L. STEVENS
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 26th day of Feb., 1992, to the following counsel of record:

Ford G. Scalley
John E. Hansen
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111



EXHIBIT B

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
INCLUSION OF SALT LAKE CITY
CORPORATION ON JURY VERDICT
FOR APPORTIONMENT OF FAULT (R 112 - 118)

ROBERT L. STEVENS [A3105]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant
50 South Main Street
Key Bank Tower, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-1777

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

JULIE ANDERSON TURNER,

Plaintiff,

vs.

AMY NELSON,

Defendant.

* MEMORANDUM OF POINTS AND
* AUTHORITIES IN SUPPORT OF
* INCLUSION OF SALT LAKE CITY
* CORPORATION ON JURY VERDICT
* FOR APPORTIONMENT OF FAULT

*
* Civil No. C91-1901
* Judge Frederick

FACTS

1. This action arises out of an automobile accident that occurred on July 6, 1989 at the intersection of 3rd Avenue and Canyon Road in Salt Lake City. The accident resulted when defendant did not stop at a stop sign and entered the intersection and collided with plaintiff.

2. There is evidence in this case that the stop sign was bent prior to the accident and was obscured by tree limbs. The limbs were cleared a day or two later.

3. Defendant will present evidence and expert opinion to the effect that because of the obstructed stop sign, defendant was not aware and would not reasonably have been aware that she needed to stop and, therefore, fault lies with Salt Lake City for failing to maintain the stop sign.

4. Plaintiff's Complaint was not filed until March 21, 1991, more than a year and a half after the accident. Consequently, plaintiff's action against the City was time barred by the Utah Governmental Immunity Act by the time the Complaint was filed.

ARGUMENT

**UNDER UTAH COMPETITIVE NEGLIGENCE LAW, IT IS APPROPRIATE TO
CONSIDER THE FAULT OF ALL RESPONSIBLE PARTIES SO THAT
LIABILITY AGAINST DEFENDANT NELSON IS RESTRICTED
TO HER OWN DEGREE OF FAULT.**

Prior to the passage of the Tort Reform Act of 1986, Utah law provides for joint and several liability of joint tortfeasors. This created numerous inequitable situations where a party who bore a limited degree of fault was compelled to pay for the fault of the other joint tort-feasor as well as his own. The Reform Act of 1986 was passed to remedy this inequity.

The Act specifically provides that a negligent party shall only pay for his own proportion of fault.

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.

§ 78-27-38, Utah Code Ann. (Emphasis added).

The Tort Reform Act went on to eliminate any right of contribution between joint tort-feasors. Section 78-27-40, Utah Code Annotated, provides:

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. (Emphasis added.)

The statutory scheme requires that all of the joint tort-feasors who are potentially at fault be included on the verdict form. Without that inclusion, a result totally contrary to the statutory scheme is possible.

For example, in the instant case, a jury could conclude that plaintiff was without fault. They could also conclude that the stop sign was obscured but that defendant Nelson still should have been traveling at a lower speed or in some other manner had a small degree of fault of 5 to 10 percent. Under the standard verdict form, a jury is forced to treat all of the fault presented to them as 100 percent. If they consider plaintiff's

fault to be zero and if no other persons were on the verdict form, they would be forced to conclude that defendant Nelson was 100 percent at fault. Defendant Nelson would end up paying for 100 percent of plaintiff's judgment when, in fact, she was only responsible for 5 to 10 percent of the judgment. She would then have no right to sue for contribution.

Other responsible persons must be included on the verdict form. Otherwise, defendant Nelson could pay more than her share in violation of the statute and its purpose.

Plaintiff will doubtless point to Section 78-27-41 regarding joinder of defendants and claim that the city should have been joined earlier. The fact is, however, that the statute says such parties may be joined as defendants. It is not mandatory. The overall statutory scheme is not conditioned on whether such defendants are joined. In fact, the statute defines "defendant" as any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery. 78-27-37(1), Utah Code Annotated. The definition does not require that the "defendant" actually be a party to the suit.

It is readily apparent that there is no unfair hardship or prejudice to the plaintiff by including Salt Lake City on the verdict form. Defendant Nelson's initial Answer in this matter raised the defense of the negligence of third parties. Her

Answers to Interrogatories dated May 23, 1991 included a response to Interrogatory No. 22 identifying the fact that the stop sign was bent and partially obscured by foliage. She repeated this information at her deposition on July 2, 1991.

Plaintiff has been well aware of the problem with the stop sign for over nine months. She has known that this is an issue relied on by defendant to contest liability. She cannot claim unfair surprise.

Whether the City is joined as a defendant in the case or simply included on the verdict form makes no difference to plaintiff. Because of the time bar of the Governmental Immunity Act at Section 63-30-13, plaintiff has no direct claim against the City and it could not be a direct defendant.

Whether the City was joined as an additional defendant under Section 78-27-41, Utah Code Annotated or not has had no effect on plaintiff and has not prejudiced her in any way. The City must be included on the verdict form in order to effectuate the policy of the Tort Reform Act.

CONCLUSION

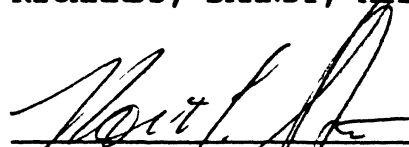
In this case, it appears that the joint tort-feasor with primary liability has not been joined as a defendant. Nevertheless, the parties have been aware of the existence of the claim of Salt Lake City's fault for over nine months. Including

Salt Lake City on the verdict form will not prejudice or jeopardize plaintiff or deny her any rights. On the other hand, if Salt Lake City is left off the jury form, defendant Nelson will be denied the benefit to which she is entitled under the Utah Tort Reform Act. The jury would be forced to apportion 100 percent of fault without having all of the tort-feasors before it, and the purpose and scheme of the Tort Reform Act will be frustrated.

Defendant's motion to include Salt Lake City on the verdict form should be granted. Alternatively, Salt Lake City should be listed as a defendant and included on the verdict form.

DATED this 26th day of February, 1992.

RICHARDS, BRANDT, MILLER & NELSON



ROBERT L. STEVENS
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was HAND DELIVERED on this 26th day of February, 1992, to the following counsel of record:

Ford G. Scalley
John E. Hansen
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

Jan P. Richardson

EXHIBIT C

NOTICE OF HEARING (R 119 - 120)

ROBERT L. STEVENS [A3105]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant
50 South Main Street
Key Bank Tower, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH


JULIE ANDERSON TURNER,	*	
	*	NOTICE OF HEARING
Plaintiff,	*	
vs.	*	
	*	
AMY NELSON,	*	Civil No. C91-1901
	*	
Defendant.	*	Judge Frederick

TO THE ABOVE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant's Motion in Limine and Motion for Apportionment of Fault of Salt Lake City will come on for hearing on Tuesday, March 3, 1992 at the hour of 9:15 a.m. before The Honorable J. Dennis Frederick, Judge of the Third District Court.

DATED this 26th day of February, 1992.

RICHARDS, BRANDT, MILLER & NELSON



ROBERT L. STEVENS
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 26th day of Feb, 1992, to the following counsel of record:

Ford G. Scalley
John E. Hansen
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

Jan P. Niederhauser

EXHIBIT D

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
INCLUSION OF SALT LAKE CITY
CORPORATION ON JURY VERDICT
FOR APPORTIONMENT OF FAULT (R 135 - 138)

FORD G. SCALLEY, #2869
JOHN E. HANSEN, #4590
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JULIE ANDERSON TURNER,	:	MEMORANDUM OF POINTS AND
	:	AUTHORITIES IN OPPOSITION TO
Plaintiff,	:	INCLUSION OF SALT LAKE CITY
vs.	:	CORPORATION ON JURY VERDICT
	:	FOR APPORTIONMENT OF FAULT
AMY NELSON,	:	
	:	Civil No. C91-1901
Defendant.	:	Judge Frederick
	:	

ARGUMENT

THE ONLY APPLICABLE UTAH STATUTE
MANDATES THAT AN ENTITY BE JOINED
AS A PARTY DEFENDANT BEFORE IT CAN
BE ADDED TO THE SPECIAL VERDICT
FORM.

The relevant statute which must be interpreted is Utah
Code Ann. § 78-27-41 (1987), entitled "Joinder of defendants,"
and reads as follows:

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.

(Emphasis added.)¹

Section 78-27-41 gave Defendant the ability to add Salt Lake City Corp. ("Salt Lake City") to this lawsuit, but Defendant has chosen not to do so in a timely manner. If Defendant desired to add Salt Lake City to this lawsuit for the purposes of having their respective portion of fault determined, § 78-27-41 provides the necessary mechanism. Defendant was not deprived of the ability to have Salt Lake City added to the Special Verdict Form, but clearly was required to add it as a party defendant to the lawsuit before this Court is authorized to add Salt Lake City to the Special Verdict Form for the purpose of having its respective portion of fault determined.

Defendant was served with the Complaint in this case on March 21, 1991, almost a year ago. In December 1991, the Court set a trial date for March 4-6, 1992. The deadline for the completion of discovery was February 20, 1992. Now on February 26, 1992, less than one week before trial, Defendant has filed a motion to add Salt Lake City to the Special Verdict Form. The problem with adding Salt Lake City to the Special Verdict Form in this case is created by Defendant's pre-designed strategy or lack

¹ This statute was enacted in 1986, repealing the former statute making pre-1986 case law inapplicable.

of diligence. To allow Defendant to sit on her right created by § 78-27-41 and then at this late date attempt to slip these non-parties onto the Special Verdict Form would create horribly inequitable results. Defendant would be placed in the position of making allegations against an entity who is not a defendant and not properly defended in the lawsuit.

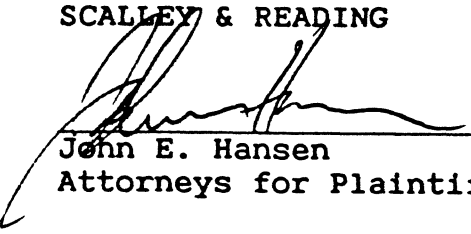
CONCLUSION

The statutory scheme contemplates only listing "defendants" and the plaintiff on the Special Verdict Form for the purposes of apportioning fault. It provides a mechanism to allow a defendant to add an additional party as a "defendant" for the apportionment of fault. Defendant chose for tactical reasons not to follow this procedure, instead attempting to add undefended parties to the Special Verdict Form.

The Court should not allow Defendant to ignore the statutory scheme and mechanism for adding parties to the Special Verdict Form. This would seriously and inappropriately prejudice Plaintiff Julie Turner.

RESPECTFULLY SUBMITTED this 3rd day of March, 1992.

SCALLEY & READING



John E. Hansen
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Memorandum of Points and Authorities in Opposition to Inclusion of Salt Lake City Corporation on Jury Verdict for Apportionment of Fault to be hand delivered to the following parties and counsel of record on this 3rd day of March, 1992:

Robert L. Stevens, Esq.
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

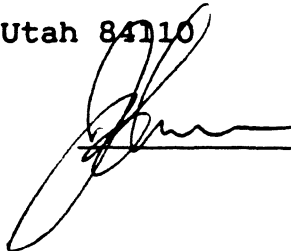


EXHIBIT E

MINUTE ENTRY (R 139)

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

TURNER, JULIE ANDERSON	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 910901901 PI
	:	DATE 03/03/92
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER ANNA BENNETT
NELSON, AMY	:	COURT CLERK CLB
	:	
DEFENDANT	:	

TYPE OF HEARING: MOTION HEARING
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. HANSEN, JOHN E.
D. ATTY. STEVENS, ROBERT L.

PRIOR TO TRIAL, THIS CASE COMES NOW ON BEFORE THE COURT FOR HEARING ON DEFENDANT'S MOTIONS IN LIMINE, ALL PARTIES PRESENT AND BEING REPRESENTED BY COUNSEL AS SHOWN ABOVE. THE VARIOUS MOTIONS ARE ARGUED TO THE COURT BY RESPECTIVE COUNSEL AND SUBMITTED. THE COURT HAVING CONSIDERED AND NOW BEING FULLY ADVISED IN THE PREMISES, RULES AS STATED ON THE RECORD.

EXHIBIT F

MOTION TO ALLOW PLAINTIFF TO
CALL A NEWLY DISCOVERED
WITNESS, JIM MAKLING, AS A
WITNESS AT TRIAL (R 143 - 160)

MAR 5 1992

By C. B. Bailey
SALT LAKE COUNTY

Ford G. Scalley, #2869
John E. Hansen, #4590
SCALLEY & READING
Attorney for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

JULIE ANDERSON TURNER,	:	MOTION TO ALLOW PLAINTIFF TO
	:	CALL A NEWLY DISCOVERED
Plaintiff,	:	WITNESS, JIM MAKLING, AS A
	:	WITNESS AT TRIAL
vs.	:	
	:	
AMY NELSON,	:	Civil No. C91-1901
	:	
Defendant.	:	Judge Frederick

As set forth in the affidavit of counsel attached hereto and incorporated herein as Exhibit "A," upon the completion of the first day of trial, and in response to the Court's granting, on the morning of trial, defendant's motion for apportionment of fault of Salt Lake City, and based upon defendant's very obvious strategy to contend that most, if not all, of the blame for this accident must be placed with Salt Lake City due to the allegedly obstructed stop sign, plaintiff's counsel has sought out and was successful in locating a resident in the immediate vicinity of the subject stop sign, Jim Makling, who has testimony directly relevant to the lack

of obstruction of the stop sign. Accordingly, plaintiff is filing this motion prior to commencing the second day of trial, in order to request that plaintiff be allowed to call Mr. Makling in her case-in-chief, or at the very least, plaintiff submits that she should be allowed to call Mr. Makling as a rebuttal witness should the defense call any witnesses who claim that the stop sign is obstructed.

Realizing that defendant's counsel has not had an opportunity to interview or depose this newly discovered witness, and in an effort to give the defendant fair and reasonable opportunity to evaluate witness Makling's testimony, plaintiff would agree to allow defendant to interview or take the deposition of this witness during a break in the proceeding if defendant would so desire. Plaintiff would then call witness Makling as a rebuttal witness after defendant presents her case.

This motion is based upon the accompanying affidavit of counsel as well as the case authority cited in 63 ALR 4th 712, surprise witnesses--nonexperts. Section 10 of 63 ALR 4th 712, found at page 786 and 787 citing cases wherein several courts in other jurisdictions had held that it was proper to allow or improper to exclude the testimony of an undisclosed witness where the calling party's need for the witness' testimony had not

previously been apparent, is attached hereto and incorporated herein by reference as Exhibit "B."

In conclusion, plaintiff submits that in the interest of justice, and in order to allow plaintiff to properly respond to the clearly directed attack in the unrepresented entity Salt Lake City, plaintiff respectfully submits that she should be allowed to call this most critical, newly discovered witness, Jim Makling, at trial.

RESPECTFULLY SUBMITTED this 4th of March, 1992.

SCALLEY & READING

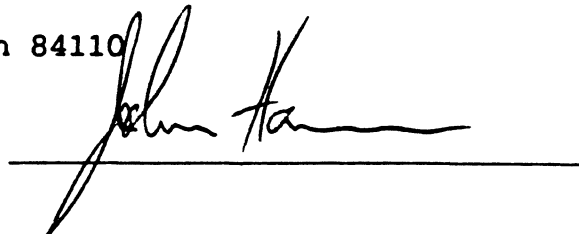


John E. Hansen
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 4th day of March, 1992, a true and correct copy of the foregoing motion was hand delivered to the following:

Robert L. Stevens, Esq.
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110



Ford G. Scalley, #2869
John E. Hansen, #4590
SCALLEY & READING
Attorney for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

JULIE ANDERSON TURNER,	:	AFFIDAVIT OF COUNSEL
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
AMY NELSON,	:	Civil No. C91-1901
	:	
Defendant.	:	Judge Frederick

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

I, John E. Hansen, being first duly sworn, depose and say
as follows:

1. I am counsel of record for plaintiff, Julie Turner,
in the above-referenced matter.

2. On February 26, 1992, less than one week before the
commencing of this trial, defendant filed a motion for
apportionment of fault of Salt Lake City.

3. Prior to defendant's filing of the motion to apportion fault of Salt Lake City, plaintiff had filed her designation of witnesses and exhibits.

4. On March 3, 1992, immediately prior to the commencement of the above-captioned trial, the Court granted defendant's motion to apportion fault of Salt Lake City.

5. Thereafter, defendant's counsel argued to the jury in opening statement that the party most responsible for causing this accident is Salt Lake City due to an obstruction of the stop sign by trees.

6. Because of the Court's ruling allowing Salt Lake City to be added to the special verdict on the first day of trial and based upon the strong and primary attack which the defendant is presenting against Salt Lake City, affiant has sought to find and has now located a previously unknown and unidentified witness critical to the presentation of plaintiff's case.

7. Upon the conclusion of the first day of trial, at 6:20 p.m. on March 3, 1992, affiant was able to contact said new witness, Jim Makling, for the first time.

8. Mr. Makling resides at 122 North Canyon Road in Salt Lake City and is willing and able to testify at trial.

9. Mr. Makling has resided at 122 North Canyon Road, in the immediate vicinity of the stop sign at issue in this lawsuit, for the past ten years.

10. Mr. Makling will testify that the stop sign has not been obstructed by trees or foliage during the past ten years and was not obstructed by trees or other foliage at the time of this accident.

11. Furthermore, Mr. Makling will testify that there has never been a need for and there has never been a trimming of the trees to eliminate obstruction of the subject stop sign.

12. Accordingly, affiant submits that Mr. Makling is a material and critical witness for the plaintiff in the above-referenced matter.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 4th day of March, 1992.

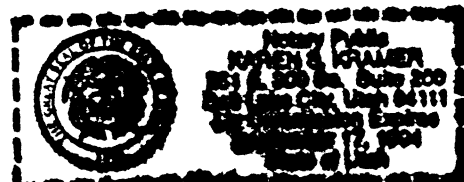


John E. Hansen

On this 4th day of March, 1992, before me, the undersigned notary, personally appeared John E. Hansen, who is personally known to me to be the person who signed the preceding document in my presence and who affirmed to me that the signature is voluntary and the document truthful.



Notary Public



§ 10. Lack of apparent need for witness

In the following cases, the courts held or stated that it was proper to allow or improper to exclude the testimony of an undisclosed witness, where the calling party's need for the witness' testimony had not previously been apparent.

In *Darwin v Metropolitan Atlanta Rapid Transit Authority* (1981) 158 Ga App 635, 281 SE2d 361, the court, discussing the admissibility of the testimony of a witness who had not been disclosed in a pretrial order, stated that it would never curtail a party's right to produce in its behalf witnesses whose necessity or perhaps existence was only lately realized.

Finding that the trial court in a wrongful death action had not abused its discretion in allowing the defense to call an undisclosed witness, the court in *Curry v Sum-*

mer (1985, 4th Dist) 136 Ill App 3d 468, 91 Ill Dec 365, 483 NE2d 711 (disagreed with on other grounds *Chambers v Rush-Presbyterian-St. Luke's Medical Center* (1st Dist) 155 Ill App 3d 458, 508 NE2d 426), noted that a defendant had contended that the witness' testimony became necessary due to the plaintiff's strategy in cross-examining other defense witnesses. Stating that it did not approve of the complete lack of notice, the court nevertheless affirmed judgment on a jury verdict in favor of the defendants.

In *Huhn v Marshall Exploration, Inc.* (1976, La App 2d Cir) 337 So 2d 561, 55 OGR 454, cert den (La) 339 So 2d 854, an action seeking cancellation of an oil and gas lease, the court found no abuse of discretion in the trial court's having allowed the testimony of an undisclosed defense witness, where the witness was called because the testimony of other defense witnesses had been excluded on hearsay grounds. The excluded testimony concerned vandalism which caused the defendant not to be able to market gas during a 4-month period, while the unlisted witness, an employee of the defendant, was in the field and periodically observed the effect of the vandalism.

The court in *Nichol v El Par Motor Sales* (1973) 45 Mich App 426, 206 NW2d 790, holding that the trial judge in an action arising from an automobile accident was justified in allowing the testimony of a witness for the plaintiff, explained that the plaintiff had been unable to obtain records from the owner of the automobile, his employer, which would establish that

one of the automobiles involved in the accident had been sold by the defendant manufacturer to the defendant dealer, and that the witness had been able to identify the vehicle based on an accident report which he had prepared while acting as an insurance adjuster. The witness' name had not been listed in the pretrial summary, nor was it submitted to opposing counsel within the 45-day period allowed under the pretrial order for amending the witness list.

Rejecting the contention that the trial court in an action for breach of an employment contract should have granted a new trial because of the plaintiff's failure to comply fully with discovery requests calling for the identification of witnesses, the court in *Farrell v Auto Club of Michigan* (1986) 155 Mich App 378, 399 NW2d 531, 1 BNA IER Cas 1437, held that the trial court had not abused its discretion in accepting as true the plaintiff's explanation that he had not identified a witness during discovery because he had not expected to rely on the witness' testimony until shortly before trial. The court also noted that the plaintiff disclosed the witness 10 days before trial and agreed to allow an interview of the witness prior to the commencement of the trial.

BOARD OF ED. OF SOUTH SANPETE, ETC. v. BARTON Utah 347

Cite as, Utah, 617 P.2d 347

whether it was poor, rich or nondescript; and incidentally, there is no such thing as "jail clothes" in the sense of being in a uniform or having distinctive markings so indicating.³ In any event, that sole fact would have revealed nothing new to the jury, certainly nothing concerning his guilt or innocence. They could not have failed to be aware that a man charged with armed robbery was in custody and being held in jail. Indeed, that fact was brought out in the evidence. Moreover, there is no basis other than the merest conjecture as to whether whatever type of clothing the petitioner was wearing would inspire sympathy for, or prejudice against, the petitioner, or would have any effect on the jury's determination of his guilt or innocence.

In the interest of giving effect to legal procedures and the solidarity of judgments once fairly arrived at, it is our settled law that in order to justify reversing a conviction, it is essential that it be made to appear both that an error was committed and that it was prejudicial in that there is a reasonable likelihood that it affected the outcome of the trial.⁴

In summary, there are several propositions, each of which should prevent the reversal of the judgment:

First, the absence of any credible basis in the evidence to show that the petitioner wore so-called jail clothing, or that there was any prejudice which resulted therefrom.

Second, failure to call attention to the matter either at the time of the original trial, or at the time of sentence, or on appeal.

Third, there are the presumptions of regularity and verity of the original trial and the judgment which has not been accorded.

Fourth, the same statement applies as to this proceeding and the affirmative duty to show prejudicial error.

Fifth, all of those, together with the too-long delayed complaint about matters

which should long since have been at rest, combine, in my mind, to make a convincing case for supporting the judgment of the trial court.

This petitioner has had not only all of the protections the law allows, including the jury trial, assisted by competent counsel, but he was also given a full and fair opportunity in this habeas corpus proceeding to present any evidence to persuade a different, fair and conscientious district judge that he has suffered an injustice. Having failed in both of those trials, the majority opinion directs that this proceeding be further proliferated. That is the prerogative of this Court to which I owe such deference as is appropriate. But it is equally my prerogative and responsibility to express my disagreement therewith and my judgment that there should be no such further proceedings. I would affirm and approve the judgments already entered herein.

HALL, J., concurs in the opinion of CROCKETT, C. J.



**The BOARD OF EDUCATION of SOUTH
SANPETE SCHOOL DISTRICT, Plain-
tiff and Respondent,**

v.

**Donald K. BARTON and Utah Farm
Production Credit Assn., Defendants
and Appellant.**

No. 15946.

Supreme Court of Utah.

Aug. 28, 1980.

Landowner appealed from judgment entered by the District Court, Sanpete

3. This case is similar to *State v. Archuleta*, 28 Utah 2d 255, 501 P 2d 263 (1972)

4. This is the express mandate of Section 77-42-1, U.C.A. 1953. See e.g., *State v. Neal*, 1 Utah 2d 122, 161 P 2d 756 (1953)

County, Don V. Tibbs, J., on jury verdict in eminent domain proceeding. The Supreme Court, Stewart, J., held that: (1) fact that complaint had stated that the value of land was higher than amount awarded by the jury did not show that the damages were insufficient where the complaint referred to the value of land and water rights and the judgment referred only to the land, but (2) landowner should have been permitted to elicit, from expert witness whom he wished to call, fact that the expert had originally been hired by the condemning authority to make an appraisal of the property.

Reversed and remanded.

Crockett, C. J., filed a dissenting opinion.

1. Eminent Domain ⇐ 241

Where school district's complaint in eminent domain proceeding stated that value of the property was \$48,980 but that figure included both land and water rights and trial court correctly ruled that water rights were not to be taken, the allegation in the complaint did not preclude an award of only \$40,000 for the tract.

2. Eminent Domain ⇐ 191(1)

Landowner was entitled to the value of his land as fixed by the jury, based upon the evidence, and not necessarily the amount stated in the pleadings of either party in the eminent domain proceeding.

3. Evidence ⇐ 142(1)

In eminent domain proceeding involving 24.49 acres, trial court properly excluded, as not being a comparable sale, evidence of the sale of an acre of land to a church for \$10,000 where the testimony indicated that transaction actually involved more than one acre and that the seller was to give the church some adjoining property as part of the deal.

4. Trial ⇐ 62(1)

"Rebuttal evidence" is that which tends to refute, or to so modify or explain as to nullify or minimize the effect of, the opponent's evidence.

See publication Words and Phrases for other judicial constructions and definitions.

5. Pretrial Procedure ⇐ 753

Where defense witness gave testimony about an allegedly comparable sale which could have been regarded as requiring explanation, it was proper and consistent with pretrial order limiting the parties to the witnesses named therein except for rebuttal witnesses to allow testimony from another witness concerning that transaction.

6. Evidence ⇐ 543(3)

Landowner should have been permitted to call, as witness to give opinion as to the value of the land, a person who had originally been hired by the condemning authority to appraise the land and to elicit testimony to the effect that he had been employed by the condemning authority for that purpose.

7. Witnesses ⇐ 319, 330(1), 331½

Attack on credibility of a party's witness may be conducted by the other party either by his own cross-examination of the witness or by calling other witnesses to accomplish that purpose.

8. Evidence ⇐ 560

Where testimony of one expert whom landowner wished to call would have set the value of the property below that testified to by his other experts, trial court ruling that he could not elicit from the witness the fact that the witness had originally been hired by the condemning authority to make an appraisal of the land effectively precluded the defendant from calling that witness, as his testimony without the explanation would have been harmful.

Paul R. Frischknecht, Manti, for Farm Production Credit Ass'n.

Arthur H. Nielsen and Clark R. Nielsen of Nielsen, Henriod, Gottfredson & Peck, Salt Lake City, for Barton.

Bruce Findlay and Dan S. Bushnell of Kirton & McConkie, Salt Lake City, for plaintiff and respondent.

BOARD OF ED. OF SOUTH SANPETE, ETC. v. BARTON Utah 349

Cite as, Utah, 617 P.2d 347

STEWART, Justice:

Defendant Donald K. Barton appeals, complaining of the inadequacy of a jury award of \$40,000 for his 24.49 acre tract of land in Manti taken by eminent domain by the plaintiff.

[1, 2] The defendant's first argument in support of his contention that insufficient damages were awarded for his property is that the plaintiff's complaint itself had stated the value to be \$48,980. The rejoinder to this is that that figure included both the land and water rights. The trial court correctly ruled that the water rights were not to be taken. Plaintiff's appraiser testified that the defendant's property would be worth substantially less without the water rights. Accordingly, the \$40,000 awarded could reasonably be found to be supported by the expert testimony as to the value of the land. Nevertheless, what the defendant was entitled to was the value of his land as fixed by the jury, based upon the evidence, and not necessarily as stated in the pleadings of either party.

[3] Defendant further urges that the trial court committed error which influenced the jury in not awarding greater damages in its rulings concerning testimony about the sale of an acre of land in Manti to the L.D.S. ("Mormon") Church for \$10,000 by one Grant Cox. The trial court's statement that it was not a comparable sale is apparently correct. The testimony of the defendant's appraiser, Marcellus Palmer, and the plaintiff's witness, Wilbur Cox, indicated that the transaction involved more than one acre and that Grant Cox was to give the church some adjoining property as part of the deal.

[4, 5] Defendant also complains about permitting Wilbur Cox to be called as a witness concerning this transaction. He asserts that it had been agreed, and the court included in its pre-trial order, that the only witnesses to be called were those named therein, except for rebuttal. Rebuttal evidence is that which tends to refute, or to so modify or explain, as to nullify or minimize the effect of the opponent's evidence. See

Soliz v. Ammerman, 16 Utah 2d 11, 395 P.2d 25 (1964). Since the testimony Mr. Palmer had given about the Cox transaction could have been regarded as requiring explanation, it was quite proper and consistent with the just-stated definition to consider Wilbur Cox's testimony as rebuttal. See *Jenson v. S. H. Kress & Co.*, 87 Utah 434, 49 P.2d 958 (1935). It is also pertinent to note that the defendant cross-examined Wilbur Cox about the matter without showing any significant difference from the other evidence. We are unable to perceive how the trial court's rulings, or what was said with respect to the Cox sale, resulted in any prejudice to the defendant.

Defendant also assigns error in the trial court's ruling concerning Dee Ogden, who had made an appraisal at the instance of the plaintiff. Pursuant to a discussion of this matter in the absence of the jury, plaintiff requested the court to rule that the defendant could not elicit before the jury the fact that Ogden had been employed by the plaintiff Board of Education. The plaintiff's motion was

[t]o prevent Mr. Ogden from, in any way, testifying or the defendant landowner from asking the witness that his appraisal was made for the School Board, or that Mr. Ogden was paid a fee

The trial court explained its ruling as follows:

The motion is granted and it looks to me like it would not be proper and I think I would be committing prejudicial error to allow this to go in. You can call him for an appraisal but not to give testimony that he was employed by the School District or make any reference to the School District's paying him so you may get his appraisal, but that's the limit of it, Mr. Ogden.

[6] The trial court erred in ruling that the defendant could call Ogden to give his appraisal of the condemned land but could not be questioned as to the fact that he was employed by the school district. That testimony went to the heart of the issue at trial.

Defendant's purpose was to elicit testimony concerning the value of the property,

which it may be assumed was greater than what plaintiff's witnesses had testified to. It was, of course, directly probative of the central issue in the case. But equally important, defendant had strong reason and a legal right to ask Ogden the identity of his employer. That testimony, with the likelihood of greater objectivity, would have served to rebut the valuation testimony of plaintiff's expert witnesses. To deny the defendant that right is to deny him a fair trial. The jury was entitled to know the essential background facts of the witness so as to be able to give proper weight to his testimony.

The term "expert testimony" connotes a degree of objectivity imposed by the discipline and training of the expert. But valuation testimony as to property in a condemnation proceeding sometimes falls short of that objective, partly because of the numerous subjective and variable values, and therefore may differ sharply from the testimony of another expert witness. Experts' opinions, especially in the area of valuation of property, often vary so widely that one may wonder whether they are valuing the same parcel of land.

The court in this case prevented inquiry as to the identity of the employer of an expert witness. The jury could not, therefore, evaluate the process by which plaintiff chose his experts nor determine the appropriate weight to be afforded the testimony of the witnesses for the respective parties.

The defendant had a right to bring to the jury's attention the fact that a witness had been initially enlisted by plaintiff and pursuant to that employment had acquired his knowledge and formed his opinion as to the property's value. The circumstances by which Ogden became aware of the facts needed to form his opinion provided the necessary foundation for the jury to weigh the valuation testimony. More importantly, his employment bore directly on the all-important issue of his objectivity or bias. This information was essential, especially in light of the highly disparate views of the same facts that may be arrived at by different experts. See Myers, "Battle of the

Experts": *A New Approach to an Old Problem in Medical Testimony*, 44 Neb.L. Rev. 539 (1965); McCoid, *Opinion Evidence and Expert Witnesses*, 2 U.C.L.A.L.Rev. 356 (1955); DeParcq, *Law, Science and the Expert Witness*, 24 Tenn.L.Rev. 166 (1956).

Expert witnesses, like other witnesses, are influenced by unconscious, and sometimes conscious, biases. The problem of the expert witness's bias has been commented on by Dean Wigmore:

That bias itself is due, partly to the special fee which has been paid or promised him, and partly to his prior consultation with the party and his selfcommittal to a particular view. His candid scientific opinion thus has had no fair opportunity of expression, or even of formation, swerved as he is by this partisan committal [2 Wigmore on Evidence § 563 at 761 (Chadbourn rev. 1979).]

Defendant clearly was entitled to the testimony which the prohibited questions would have elicited, simply because it may well have been less likely to be biased than any of the other experts called by the parties. This is especially true in this case because the valuation of plaintiff's and defendant's experts were poles apart. Ogden's appraisal was made under the direction of the party adverse to the party who sought to adduce Ogden's testimony and thus carried a mark of objectivity that may not have been commanded by the other experts.

[7] The defendant did not propose to call Ogden simply to impeach him. The questions prohibited by the trial court could not possibly have resulted in impeaching the witness; indeed, they would have given weight and substance to his testimony. If the proffered testimony would have discredited anyone's testimony, it would have been the testimony offered by plaintiff's witnesses. It is axiomatic that an attack on the credibility of a party's witnesses may be conducted by the other party either by his own cross-examination of the witnesses or by calling other witnesses to accomplish that purpose. *Haver v. Central Railroad Co.*, 64 N.J.L. 312, 45 A. 593 (1900). More

importantly, the testimony, because of its direct relevance as to value, went well beyond impeachment evidence.

[8] Before Ogden was permitted to testify, plaintiff's counsel interrupted by approaching the bench for a discussion and made the motion above referred to to prevent the testimony of the witness. The court responded by an order which precluded defendant's obtaining the testimony regarding the witness's employment by the school district or any reference to the school district's paying him to make an appraisal. Having been denied the right to examine the witness properly and to adduce the evidence of employment, the defendant cannot be faulted for not having called the witness to testify solely as to the amount of his appraisal. Such testimony, no doubt, would have been lower than the amounts testified to by defendant's other experts and therefore without the necessary information as to the witness's background, damaging to defendant's case. Accordingly, the defendant was effectively precluded from calling Ogden under the restriction imposed.

Because of that error which appears to us as substantial and prejudicial, it is necessary that the judgment be reversed and the case remanded. No costs awarded.

MAUGHAN, WILKINS and HALL, JJ., concur.

CROCKETT, Chief Justice (dissenting).

I am in agreement with the main opinion, except as to the manner in which it deals with the trial court's handling of the matter relating to possible testimony of Mr. Dee Ogden. He appears to have made an appraisal at the instance of the plaintiff, but was not called as a witness. Pursuant to a discussion of the matter in the absence of the jury, plaintiff requested the court to rule that defendant could not elicit that fact before the jury. As will be noted in the statement quoted in the main opinion, the court told defendant's counsel:

You can call him for an appraisal, but not to give testimony that he was employed by the school district. [Emphasis added.]

In regard to the charge of error, I make several observations. The first is that I offer no defense of any notion that an expert cannot be asked who hired him. It is to be conceded that such a witness may be examined as to who employed him, and who is paying him, as having a possible bearing upon his motivation and his credibility.¹ Nor is it to be doubted that a trial court should be quite liberal in allowing any competent evidence offered by a party to prove his case.

In regard to the evidence in question, it is my impression from the record that the trial court simply rejected the idea that Mr. Ogden could be called solely for the purpose of showing that he had been hired by the plaintiff School Board to make an appraisal and that the Board then failed to call him as its witness. It is significant to note that defendant's counsel did not pursue the matter and make plain to the trial court what he was proposing; and that he did not in any manner indicate what Mr. Ogden's testimony would be.² Therefore, any question as to the latter's credibility was never placed in issue; and more importantly, there is no basis upon which to determine whether the trial court's statement had any prejudicial effect upon the defendant's case.

I think the trial court was justified in its view that each side had a full and fair opportunity to present its evidence, including that the experts for each side had sufficiently presented their respective views as to value to the jury to enable it to make a fair determination on that issue. When that procedure has been accomplished, and the trial judge has also placed his stamp of approval upon the verdict by denying the motion for a new trial, this Court on review should indulge the verdict and the judgment with the presumptions of verity; and

1. See 31 Am.Jur 2d, Expert and Opinion Evidence, § 50, and authorities cited in the main opinion

2. That a proponent of evidence must make some such offer or indication of the substance of evidence, see Rule 5, Utah Rules of Evidence

should not disturb it unless it is shown that there is substantial error in whose absence there is a reasonable likelihood that there would have been a different result.³

Upon the basis of the record, I am not persuaded that there was any such error or unfairness as to justify upsetting the verdict and judgment.



Velma Gladys YATES, Plaintiff
and Appellant,

v.

VERNAL FAMILY HEALTH CENTER, a
Project of the Division of Family and
Community Medicine, University of
Utah; Uintah County; Uintah County
Hospital; Vernal Drug Company, a Utah
corporation; Gordon Lee Balka, M. D.,
Defendants and Respondents.

No. 16602.

Supreme Court of Utah.

Aug. 29, 1980.

Appeal was taken from order of the Fourth District Court, Uintah County, Allen B. Sorenson, J., dismissing medical malpractice complaint filed against health center, county, county hospital, drug company, and physician. The Supreme Court, Wilkins, J., held that: (1) trial court did not err in dismissing medical malpractice complaint against health center, drug company, and physician, in that plaintiff failed to serve proper notice of intent to commence action prior to filing complaint; (2) plaintiff had one year to file another medical malpractice complaint against drug company, health center, and physician; and (3) trial court did not err in dismissing with prejudice medical malpractice complaint against

county and county hospital, in that plaintiff failed to serve proper notice of intent to commence action prior to filing complaint, and failed to give notice required by Governmental Immunity Act and statute governing actions against county.

Affirmed.

1. Drugs and Narcotics ⇨20

Hospitals ⇨8

Physicians and Surgeons ⇨18.20

Trial court did not err in dismissing medical malpractice complaint against health center, drug company, and physician, in that plaintiff failed to serve proper notice of intent to commence action prior to filing complaint. U.C.A.1953, 78-14-8.

2. Limitation of Actions ⇨130(1)

Even though plaintiff failed to serve proper notice on health center, drug company, and physician of intent to commence action prior to filing medical malpractice complaint, failure to serve notice did not constitute adjudication on merits; thus, plaintiff had one year from filing of opinion in which to file another complaint. U.C.A. 1953, 78-12-40, 78-14-8.

3. Counties ⇨212

Trial court did not err in dismissing with prejudice medical malpractice complaint against county and county hospital, in that plaintiff failed to serve proper notice of intent to commence action prior to filing complaint and failed to give notice required by Governmental Immunity Act and statute governing claims against county. U.C.A.1953, 17-15-10, 63-30-13, 78-14-8.

4. Statutes ⇨85(1)

Statute requiring notice to health care provider of intent to commence malpractice action was not unconstitutional special legislation. U.C.A.1953, 78-14-8.

Robert M. McRae of McRae & DeLand,
Vernal, for plaintiff and appellant.

3. See Rule 61, U.R.C.P.; *Eager v. Willis*, 17 Utah 2d 314, 410 P.2d 1003 (1966).

operations. However, this examination came much too late to save the depositors' money.

Section 63-30-10(4) (1978) (amended 1982 & 1985), which provides that immunity is not waived for injury that arises out of a failure to make an inspection or by reason of making an inadequate or negligent inspection of any property, presents no problem here. By the very language of subsection (4), it is inapplicable here since there is no complaint of negligent inspection of *property*. The cases which we have decided under subsection (4) confirm that it pertains to inspection of tangible property. In *Velasquez v. Union Pacific R.R.*, 24 Utah 2d 217, 218-19, 469 P.2d 5, 6 (1970), the plaintiff complained that the defendant, the Utah Public Service Commission, had not established a program to discover dilapidated railroad crossing signs and to replace them. In *White v. State*, 579 P.2d 921, 923 (Utah 1978), the plaintiff, who was injured while working with machinery in a vegetable cannery, contended that the defendant was aware, or should have been aware, of several violations of the safety regulations of the Utah Occupational Health and Safety Act by inspection. In the instant case, the plaintiff does not complain of the Department's failure to make an inspection of tangible property but of the Department's failure to examine and supervise West America Credit. I do not believe that the legislative intent in subsection (4) was to categorize financial examinations and supervision as "inspections of property." Therefore, subsection (4) does not confer any immunity upon the Department in this action.

I would reverse the summary judgment granted the Department and remand the case to the trial court for a determination of the statutory duty of the Department in this case and the other issues.

STEWART, J., concurs in the dissenting opinion of HOWE, Associate C.J.

STATE of Utah, Plaintiff and Appellee.

v.

Douglas R. ALBRETSSEN, Defendant
and Appellant.

No. 880154.

Supreme Court of Utah.

Oct. 25, 1989.

Defendant was convicted in the Third District Court, Salt Lake County, Raymond S. Uno, J., of aggravated burglary and theft, and he appealed. The Supreme Court, Howe, Associate C.J., held that: (1) probative value of mug shots for purposes of corroborating identification of defendant outweighed any prejudice caused by suggestion of prior criminal activity, and (2) trial court acted within its discretion in allowing testimony of rebuttal witness to impeach defendant's alibi evidence, even though prosecutor did not notify defendant prior to trial.

Affirmed.

1. Criminal Law §438(3)

Probative value of mug shots to corroborate victim's identification of her attacker outweighed any prejudice which might have been caused by mug shots creating suggestion of prior criminal activity. Rules of Evid., Rules 403, 404(b).

2. Criminal Law §1168(2)

Taping over, rather than cutting off, booking references at bottom of mug shots used to corroborate victim's identification of defendant, was not prejudicial error; defendant was additionally identified by victim from six-picture photo display and in lineup. Rules of Evid., Rules 403, 404(b).

3. Criminal Law §629.5(5)

Trial court acted within its discretion in allowing rebuttal witness to testify, even though prosecuting attorney did not notify



defendant before trial that witness would testify to contradict and impeach defendant's alibi evidence; evidentiary development occurred in course of trial, prosecutor acted in good faith and defense counsel was told of possible rebuttal testimony as soon as need was discovered. U.C.A.1953, 77-14-2(1, 4).

Debra K. Loy, Joan C. Watt, Salt Lake City, for defendant and appellant.

R. Paul Van Dam, Sandra L. Sjogren, Salt Lake City, for plaintiff and appellee.

HOWE, Associate Chief Justice:

Defendant Douglas R. Albretsen appeals from convictions of aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (1978), and theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1978).

On May 11, 1987, Maureen Leavitt returned home from work at approximately 5:30 to 5:45 p.m. After entering her house, she walked down the hall leading from the family room to the kitchen. As she approached the end of the hallway, a man with a club raised in his hand suddenly stepped in front of her; he was approximately two feet away. They looked at each other for approximately three seconds before he started beating her with the club, leaving her unconscious. She suffered extensive injuries and was hospitalized for two days.

On May 14, 1987, Leavitt identified defendant as her attacker from a black loose-leaf binder containing 30 to 50 mug shots given her by Detective Hutchison. Upon making this identification, she stated to her husband, "This looks like the man that beat me." The next day, Detective Hutchison showed Leavitt a display of six photos mounted on a piece of cardboard. She again selected the photograph of defendant. After defendant's arrest, Leavitt attended a lineup where she again identified him as her assailant.

Several months prior to trial, defendant filed a notice of intent to rely on the defense of alibi, as required by Utah Code

Ann. § 77-14-2(1) (1982). He listed Brenda Davis and Cindy Edwards as alibi witnesses. The State filed its reply to the notice, listing Detective Hutchison as a rebuttal witness.

At the trial, the prosecutor moved for admission of the six-picture photo display, as well as the mug shots of defendant which he had removed from the black binder and had altered by masking the booking references which appeared at the bottom. Defendant did not object to the admission of the photo display, and it was admitted. However, he did object to the mug shots on the ground that they were inherently prejudicial and because of the masking, which he argued would raise the jury's curiosity and suspicion. The court overruled the objection and admitted the mug shots to show one source of Leavitt's identification. On cross-examination, defendant's counsel had Leavitt repeat that when she identified defendant from the loose-leaf binder, she told her husband: "This looks like the man that beat me." Then, defense counsel questioned Leavitt about her identifications of the photographs.

Several months prior to trial, Detective Hutchison obtained a handwritten statement from Brenda Davis in which she claimed that defendant was with her at the time of the crime. Davis wrote that they had "gone up into the mountains for a ride, into Parley's Way and Emigration Canyon." At the trial, however, she testified in detail as to the route taken on the ride. After the defense rested, the prosecution informed the court that he anticipated some rebuttal and requested a recess in order to locate a Mr. Miller from the Utah Department of Transportation, who he believed would testify that the route claimed to have been taken by defendant and Brenda Davis was closed to traffic on May 11, 1987. Defense counsel objected to the recess and moved that evidence be closed at that time. The court denied the motion, and Mr. Miller was later allowed to testify over defendant's objection.

I

Defendant first contends that the trial court committed prejudicial error in admit-

ting mug shots of him. He argues that they suggested prior criminal activity, which suggestion was exacerbated by the masking of the booking reference. He relies upon rules 403 and 404(b), Utah Rules of Evidence.

Although this Court has never determined whether mug shots are admissible to corroborate identification testimony, rule 404(b) of the Utah Rules of Evidence states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident.

(Italics added.) However, even if evidence of prior wrongdoing is admissible under that rule, such evidence may be excluded under rule 403, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Thus, if the probative value of the evidence is not substantially outweighed by the danger of prejudice, the scales are tipped in favor of admission.

[1] In the instant case, the lower court correctly ruled that the mug shots were admissible for purposes of establishing identity. Even though we recognize that under rule 403, they could still be excluded, the mug shots here were crucial in establishing the identity of defendant, which was the main issue. They were the initial source of Leavitt's identification, and they explained her reaction when she identified him as her attacker. Also, admitting the mug shots served to rebut defendant's theory that later identifications by her were connected to the mug shots rather than to the attacker.

In a similar case, the testimony of a manager of a store that he recognized the

defendant from police photographs or "mug shots" as the person for whom a money order had been cashed was held admissible on issue of identification. *State v. Owens*, 15 Utah 2d 123, 388 P.2d 797 (Utah 1964). Similarly, in *State v. Jiron*, 27 Utah 2d 21, 22, 492 P.2d 983, 984 (Utah 1972), this Court decided that "evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial [citation], but as independent evidence of identity." (Quoting *People v. Gould*, 54 Cal.2d 621, 626, 354 P.2d 865, 867, 7 Cal.Rptr. 273, 275 (1960).)

During the trial, defendant argued that Leavitt had "difficulties with identification" based on her statement, "This looks like the man that beat me." Thus, the mug shots were valuable in showing that while they were somewhat outdated, they nevertheless were identifiable likenesses of defendant. The jury was not equipped to decide whether Leavitt's identification was faulty without viewing the mug shots she used to identify him. The jury as the trier of fact had the duty of determining from the proof presented, which in this case included the mug shots, whether Leavitt's identification was reliable.

A Michigan court correctly observed in a similar case:

[I]t would be better if the jury was not allowed to see mug shots of the defendant. However, where, as here, defense counsel has made an issue of the witness's ability to recognize the defendant from the picture he was shown by the police, it was not improper for the trial court to admit the photos.

People v. Travier, 39 Mich.App. 398, 402, 197 N.W.2d 890, 892 (1972).

[2] We next address whether the procedures used by the trial court to minimize any possible prejudicial effect of the mug shots were proper and effective, i.e., taping over the booking references. Although the State had a demonstrable need to introduce the mug shots to establish identity, the trial court nevertheless erred in not cutting off the reference at the bottom. When suggestive material is masked, the curiosity of the jury is increased. Trial courts

should employ safeguards to disguise the origin of police photographs, including the removal of police identification numbers, *United States v. Watts*, 532 F.2d 1215, 1217 (8th Cir.), *cert. denied*, 429 U.S. 847, 97 S.Ct. 131, 50 L.Ed.2d 119 (1976), and separating the combined profile and frontal views characteristic of mug shots. *Id.* Since Leavitt additionally identified defendant from the six-picture photo display as well as in a lineup, we do not find the error to have been prejudicial to defendant.

II

[3] Defendant next assails the trial court's failure to sustain his objection to the admission of testimony by the State's rebuttal witness, Richard L. Miller, which admission defendant asserts violated Utah Code Ann. § 77-14-2 and denied him due process. That section provides:

77-14-2. Alibi—Notice requirements—Witness lists. (1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.

(2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses of additional witnesses which come to the attention of either party after filing their alibi witness lists.

(3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.

(4) The court may, for good cause shown, waive the requirements of this section.

In her handwritten statement given the police, Brenda Davis stated that she and defendant had, on the day of the crime, "gone up into the mountains for a ride into Parley's Way and Emigration Canyon." However, when she testified at the trial, she described the exact route they took, stating that they drove up Parley's Canyon (not Parley's Way, which is a different street), took the turnoff to East Canyon and followed that highway to the turnoff to Emigration Canyon and then came down Emigration Canyon, which brought them back to Salt Lake City. Miller, an engineer for the Utah Department of Transportation, testified, over defendant's objection, that from April 13 to June 17, 1987, SR-65, the highway which Davis claimed that they took linking Parley's Canyon and Emigration Canyon, was closed to traffic.

Defendant asserts that the trial court should not have allowed Mr. Miller to testify since the prosecuting attorney did not notify defendant prior to trial of its intent to have Miller testify to contradict and impeach defendant's alibi evidence, as required by section 77-14-2(1). We find no error in view of the fact that the State could not have reasonably anticipated the discrepancy between Davis's handwritten statement and her later testimony at trial. Inasmuch as there was a significant change in the route claimed to have been taken, the trial court reasonably allowed the prosecution to add to its rebuttal list when this evidentiary development occurred in the course of trial. The trial court acted within the discretion accorded by section 77-14-2(4), which provides, "The court may, for good cause shown, waive the requirements of this section." The prosecutor acted in good faith when he apprised defense counsel of the possible

rebuttal testimony as soon as its need was discovered. The Montana Supreme Court, in *State v. Madera*, 206 Mont. 140, 670 P.2d 552, 556 (1983), held that discretion should be given to "the District Court to permit additions to the witness list when good cause is shown; good cause must certainly be construed to include the amendment of the witness list because of evidentiary matters developed during the presentation of the case of either party, matters which require clarification or rebuttal by that party."

Defendant's convictions are affirmed.

HALL, C.J., and STEWART,
DURHAM and ZIMMERMAN, JJ.,
concur.



STATE TAX COMMISSION of Utah,
Plaintiff and Appellee,

v.

Clay K. IVERSON, Defendant
and Appellant.

Nos. 20965, 860329.

Supreme Court of Utah.

Nov. 2, 1989.

On State Tax Commission's applications, the Third District Court, Salt Lake County, Kenneth Rigtrup, J., issued writ of mandate compelling individual to file income tax returns and adjudged individual in contempt of court for failing to comply with subpoena duces tecum issued by the Commission. Individual appealed. The Supreme Court, Hall, C.J., held that: (1) evidence would not support granting of writ of mandate compelling filing of tax returns; (2) individual's failure to exhaust administrative remedies with respect to notice of deficiency precluded consideration

of individual's claims that he was not taxpayer and that Commission's assessment and actions in regard thereto were invalid; and (3) excessive scope of subpoena did not provide individual good cause for failing to appear and provide information relating to availability of assets to satisfy tax assessment, so individual was appropriately held in contempt.

Writ of mandate vacated; contempt citation affirmed.

Stewart, J., concurred in result.

1. Taxation ¶1083

Evidence did not support granting of petition for writ of mandate to compel individual to file income tax return; individual specifically denied that he received "income" for the time in question and stated that to the best of his knowledge he had no filing requirement as to federal taxes, much of the exchange considered by court in making decision centered on unsworn statements regarding past conversations between the individual and counsel for State Tax Commission that the individual testified he could not recall, and there was no support for court's taking judicial notice that the individual's services could be equated to federal minimum wage levels. U.C.A.1953, 59-14A-71, 59-31-7 (now U.C.A.1953, 59-10-525, 59-1-707).

2. Administrative Law and Procedure ¶229

Generally, parties must exhaust applicable administrative remedies as prerequisite to seeking judicial review.

3. Administrative Law and Procedure ¶229

Exceptions to rule that parties must generally exhaust applicable administrative remedies as prerequisite to seeking judicial review exist in unusual circumstances in which it appears that there is likelihood that some oppression or injustice is occurring so that it would be unconscionable not to review alleged grievance or when it appears that exhaustion would serve no useful purpose.

EXHIBIT G

SPECIAL VERDICT (R 288 - 291)

MAR 5 1992

SALT LAKE COUNTY
By C. Bowditch

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JULIE ANDERSON TURNER,

Plaintiff,

vs.

AMY NELSON,

Defendant.

*
*
*
*
*
*
*
*

SPECIAL VERDICT

Civil No. C91-1901

Judge Frederick

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

1. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the defendant, Amy Nelson, was negligent as alleged by the plaintiff?

ANSWER: Yes _____ No ✓

2. If you answered Question No. 1 as "yes", answer this question. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the negligence of the defendant, Amy Nelson, was either the sole proximate cause or a contributing proximate cause of the injuries of Julie Turner?

ANSWER: Yes _____ No _____

If you answered either question No. 1 or Question No. 2 as "no", do not answer the remaining questions.

3. Considering all of the evidence in this case, do you find from a preponderance of the evidence that Salt Lake City was negligent alleged by the defendant?

ANSWER: Yes _____ No _____

4. If you answered Question No. 3 as "yes", answer this question. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the negligence of Salt Lake City was either the sole proximate cause or a contributing proximate cause of the injuries of Julie Turner?

ANSWER: Yes _____ No _____

5. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the plaintiff, Julie Turner, was negligent as alleged by the defendants?

ANSWER: Yes _____ No _____

6. If you answered Question No. 5 as "yes", answer this question. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the negligence of the plaintiff, Julie Turner, was either the sole proximate cause or a contributing proximate cause of plaintiff's injuries?

ANSWER: Yes _____ No _____

7. If you have answered either Question 4 or 6 or both of them as "Yes," then, and only then, answer the following question: Assuming the combined negligence of all parties to total 100%, what percentage of that negligence is attributable to:

A. Defendant, Amy Nelson	_____ %
B. Salt Lake City	_____ %
C. Plaintiff, Julie Turner	_____ %
TOTAL	100%

8. State the amount of special and general damages, if any, sustained by the plaintiff as a proximate result of the injuries complained of.

Medical Special Damages \$ _____

General Damages \$ _____

TOTAL \$ _____

DATED this 5th day of MARCH, 1992.

C. Craig Watson
Foreperson

EXHIBIT H

EXCERPT FROM TRIAL TRANSCRIPTS

(R 324 - 326)

(R 329)

(R 331-332; 334)

(R 358)

(R 376)

(R 397)

(R 645)

(R 735 - 747)

(R 775)

(R 792)

A M Y N E L S O N , having been duly summoned and sworn as
a witness on behalf of the Plaintiff, took the stand and testified
as follows:

DIRECT EXAMINATION

BY MR. HANSEN:

Q Will you please state your full name for the jury?

A Amy Nelson.

THE COURT: Ms. Nelson, you'll have to move up to the mike, if you will, please, and speak right into it so we can all hear you. Can you get up there?

THE WITNESS: Kind of.

THE COURT: That's better

Q (By Mr. Hansen:) Ms. Nelson, what is your present address?

A 4001 East Prospector Drive.

Q Is that with your parents that you reside?

A Yes, that's correct.

Q So you're single; is that right?

A That's correct.

Q You recall this accident that occurred in July of 1989; is that right?

A Right.

Q And am I correct that on that morning you had taken your fiance to the airport to go back to Minnesota or wherever

0324

1 he was from?

2 A That's correct.

3 Q What time was that that you took him to the airport?

4 A From what I remember, I believe it was about 7:30,
5 something like that.

6 Q You recall what time this accident occurred?

7 A Around 8:30, 9.

8 Q And from 7:30 until the time of the accident, you
9 were just driving around; is that correct?

10 A That's correct.

11 Q I see. You indicated you were trying to kill some
12 time until you had to be to work at ten o'clock; is that
13 right?

14 A That's right.

15 Q Okay, and it's also correct, isn't it, that you'd
16 never been on this road before?

17 A That's correct.

18 Q And the road we're referring to is Canyon Road?

19 A Right.

20 Q Is that your -- is that correct?

21 A Right, that's correct.

22 Q Okay, and do you remember having your deposition
23 taken on July 2nd, 1991?

24 A I do.

25 Q Do you remember that?

0325

1 A Uh-huh (affirmative).

2 Q At that time you indicated that you were thinking

3 you'd go look at some homes behind the Capitol; is that

4 right?

5 A That's right.

6 Q Were you looking at homes at the time that this

7 accident occurred?

8 A No.

9 Q Now, you were proceeding in somewhat of a northbound

10 direction on Canyon Road; is that right?

11 A That's right.

12 Q Did you observe the "Stop Ahead" sign as you were

13 driving northbound on Canyon Road before reaching the

14 intersection with Third Avenue?

15 A I don't remember.

16 Q You don't remember seeing it, do you?

17 A No, I don't.

18 Q And you didn't see the "Stop" sign, did you?

19 A No, I didn't.

20 MR. HANSEN: Your Honor, for clarification, I was not

21 expecting we'd get to witnesses this morning. I was going

22 to call Newell Knight as our first witness and admit this

23 exhibit that he took a photograph of and I've shown it to

24 counsel. I think he's stipulated that he has no objection

25 to that, provided that Mr. Knight testifies that that's a

1 A No, not exactly.

2 Q Is it your testimony that you -- that the "Stop" sign
3 was partially obstructed?

4 A It is.

5 Q How clear are you on that recollection?

6 A Pretty clear.

7 Q At the time of your deposition you indicated that you
8 were somewhat vague about your recollection.

9 MR. STEVENS: Can you tell me what page you're
10 referring to, counsel?

11 MR. HANSEN: I was asking her a question specifically--
12 let's turn to page 34 of your deposition then.

13 THE COURT: Better give her a copy of it, counsel.

14 Q (By Mr. Hansen:) Let me first ask before I get to this
15 question, let me just ask, there was an investigating
16 officer from Salt Lake City Police there at the scene of the
17 accident; isn't that right?

18 A That's right.

19 Q Were there more than one, do you recall?

20 A I believe there were two.

21 Q Okay, and isn't it true that you didn't tell either of
22 these officers that there was any obstruction of the "Stop"
23 sign?

24 A That's true.

25 Q Well, let me look -- let me have you look at page 34

1 A That's right.

2 Q Now, you indicate you applied your brakes in full;
3 is that right?

4 A That's right.

5 Q How quickly did you stop before the accident
6 occurred?

7 A Excuse me?

8 Q What distance did you start applying your brakes
9 before the accident occurred?

10 A As soon as I saw the "Stop" sign.

11 Q Pardon?

12 A I must have been out in the intersection, I suppose.
13 I don't know.

14 MR. HANSEN: Your Honor, my hearing's not the best that
15 it should be. I'm having a hard time hearing the witness.

16 THE COURT: Speak right into the mike, please, and
17 keep your voice up.

18 THE WITNESS: After I saw the "Stop" sign, I put on
19 my brakes and also when I saw Julie Turner's car coming.

20 THE COURT: I'm having a problem hearing you, too.
21 If you'll speak right up into the mike. Maybe you'll have
22 to move up closer to the mike. It's not a very good mike,
23 I might add.

24 Go ahead, counsel.

25 Q (By Mr. Hansen:) All right. You said after you saw

0331

1 the "Stop" sign?

2 A After I saw the "Stop" sign.

3 Q And at what point did you see the "Stop" sign?

4 A When I was -- I don't know.

5 Q So the "Stop" sign wasn't obstructed then at some

6 point when you looked at it.

7 A Well, that's right.

8 Q Okay, but I've got to get this straight because

9 initially you indicated that you didn't see the "Stop" sign.

10 Then you testified you did see the "Stop" sign, and then

11 you're also saying it was partially obstructed. Which is it?

12 A Well, there's a point that you could see it, but you

13 couldn't see it until you come right up on it because --

14 I don't know, it's just -- I just -- that's all I can

15 remember, I guess.

16 Q You've also testified it was partially obstructed.

17 A Right.

18 Q Was it three-quarters obstructed? Half obstructed?

19 What did you observe?

20 A Between three-fourths and half, I would think.

21 Q So in other words, you could still see half of the

22 "Stop" sign?

23 A Between three-fourths and half.

24 Q Okay, and you're not claiming that the "Stop ahead"

25 sign was obstructed, are you?

0332

1 Q So you had gone into the Third Avenue intersection
2 before you ever saw the plaintiff?

3 A That's right.

4 Q And I guess you just didn't have enough time to get
5 any estimates as to her speed; isn't that right?

6 A That's right.

7 MR. HANSEN: I think that's all the questions I have
8 right now, your Honor.

9 THE COURT: All right. You don't have any examination
10 of this witness at this time, do you, Mr. Stevens?

11 Well, I'm not asking if you want to take a break or
12 not. We're going to break now, but I was simply inquiring
13 if you're going to have any cross-examination of your own
14 witness.

15 MR. STEVENS: I thought that I would, your Honor.
16 However, I don't know how you've ruled on that as far as my
17 ability to recall her.

18 THE COURT: I haven't ruled on your ability to recall
19 her. She's your witness. You can call her whenever you
20 want to.

21 MR. STEVENS: All right. I would like to ask her a
22 couple of questions.

23 THE COURT: Well, we'll recess at this point. You may
24 do that after we come back.

25 Members of the jury, we're going to recess until 1:30

0334

1 MR. HANSEN: And your Honor, I guess last night as
2 I was researching this, I came up with a case that hadn't
3 been cited and I think it's directly on point with the
4 Court's ruling, Davidson v. Prince, a 1991 Court of Appeals
5 opinion that I wanted to make sure that I didn't misrepresent
6 anything in our argument, and I think the Court's ruling is
7 correctly reflective of the Davidson opinion and we will
8 follow that.

9 THE COURT: All right, Counsel.

10 MR. STEVENS: Your Honor, if I understand correctly
11 then, and really, I don't have a problem with your Honor's
12 ruling on this either. I heard experts in the past asked who
13 was negligent or to compare the negligence or who was at
14 fault. Those would not be permitted, and that was my
15 concern.

16 THE COURT: Okay, I won't allow that. The expert,
17 however, assuming there's a proper foundation laid, may
18 testify with regard to his opinion regarding the cause of the
19 accident.

20 MR. HANSEN: May I ask for one more clarification
21 on that ruling? I guess my question is to specifically ask
22 him what each driver may have done to contribute to the cause
23 of the accident, is that appropriate?

24 THE COURT: That's fair.

25 All right, this issue on the motion for

1 apportionment of fault on the part of Salt Lake City, a non-
2 party to this action, I've reviewed both of your memoranda
3 regarding that issue and I am of the view, Counsel, that
4 while, as I interpret it, there are no appellate decisions
5 dealing with that issue in Utah -- am I correct about that?

6 MR. STEVENS: I think that we've both cited
7 nothing, your Honor.

8 THE COURT: It's my view that the purpose of the
9 No-Fault Act has to do with assuring that no party will be
10 responsible to pay more than their appropriate share of the
11 fault causing the accident, and given that overview, it seems
12 to me that policy consideration behind the act, it seems to
13 me that in these circumstances it's a fair request that Salt
14 Lake City be considered on the apportionment portion of the
15 verdict for purposes of assessing all of the fault that may
16 have contributed to the cause of this accident, so your
17 request, Mr. Stevens, to allow Salt Lake City to be named on
18 the verdict form only as a contributor, potential contributor
19 to the accident, is granted.

20 MR. STEVENS: Thank you, your Honor.

21 THE COURT: All right, Counsel. If there's nothing
22 further --

23 MR. STEVENS: There was one additional item, your
24 Honor. I think we sent out a notice of hearing on it. That
25 was regarding a late --

1 Now, those are the facts as far as who's at fault.
2 Our position is, and I think you'll find, that there was some
3 obstruction of that stop sign and that to say this is just an
4 ordinary running through a stop sign is not the case. I've
5 had cases like that before, but here we have an eyewitness
6 who was there, who checked.

7 I think you'll also find that Julie Turner was
8 probably going a little bit faster than she should have been,
9 and the really sad part about it is if Julie Turner had
10 gotten on her brakes just a little bit sooner or had been
11 traveling just a little bit slower, the cars never would have
12 come together.

13 Likewise, I'll have to admit, had Amy Nelson been
14 able to see that stop sign 20 feet sooner and gotten on the
15 brakes that much sooner, the cars would not have come
16 together. You would not be here. I would not be here, the
17 Judge wouldn't be here, but that's not what happened. I
18 think the real fault here that -- we're suggesting is with
19 Salt Lake City. It's a bad design. They didn't have it well
20 signed.

21 Now, Plaintiff has talked about the injuries.
22 After this accident occurred, Julie Turner had her step-
23 daughter with her in the car. She was not hurt. Amy was not
24 hurt. She, as a matter of fact, had forgotten to put on her
25 seat belt. She was thrown forward a little and bumped her

1 A Okay.

2 Q Let me just ask you, Mr. Knight, in regards to
3 accident reconstruction, is traffic sign obstruction some-
4 thing that reconstructionists deal with?

5 A Oh, absolutely. That is part of reconstruction.
6 If a sign is covered, if it isn't covered, how is it covered,
7 why was it covered, what's the configuration of the streets
8 -- that's just typical of what you do.

9 Q What about an investigating officer? Is that
10 something that an investigating officer to an accident deals
11 with?

12 A Sure.

13 Q And are they expected to report whether there's
14 obstructions of traffic signs?

15 A There's no question about it. In fact, on the
16 accident report itself there's a section that you put down if
17 you have obstructions. It's specifically requested if
18 there's an obstruction, you put it down.

19 Q What about with regards to this accident?

20 A They should have put it down if there's an
21 obstruction.

22 Q What did they put down?

23 A Well, they didn't --

24 MR. STEVENS: Your Honor, I object.

25 THE COURT: Counsel, the exhibit hasn't been

1 A I did.

2 Q But it's also true that you never told Officer Paul
3 or any of the other investigating officers at the scene that
4 you observed any obstruction of the stop sign; isn't that
5 true?

6 A That's correct.

7 Q And isn't it true that the reason why you didn't
8 tell any of the officers about the obstruction is you didn't
9 think it was significant; isn't that what you testified to in
10 your deposition?

11 A That's correct, and I think I said that I was
12 planning on taking care of it.

13 Q But you didn't tell the police --

14 A No.

15 Q -- anything about that, right?

16 Now, you've said you didn't see the stop ahead
17 sign. You weren't aware of the stop ahead sign at that time;
18 isn't that right?

19 A Correct.

20 Q And wasn't it your testimony in your deposition
21 that the reason why you say you weren't aware if that stop
22 ahead sign was there or not is because you didn't travel that
23 road northbound.

24 A Correct.

25 Q Wasn't that your deposition testimony?

CE45

1 this patient.

2 Q Do you feel any doubt about that opinion?

3 A No question, no doubt.

4 MR. STEVENS: That's all I have. Thank you.

5 THE COURT: All right. Mr. Hansen?

6 MR. HANSEN: No cross-examination.

7 THE COURT: All right, Doctor, you're free to go.

8 Thank you.

9 That concludes your evidence, does it not?

10 MR. STEVENS: That does, your Honor.

11 THE COURT: The Defense rests?

12 MR. STEVENS: We do.

13 THE COURT: Members of the jury, I have a matter of
14 law now to discuss with counsel outside your presence, so I
15 will excuse you. We'll tell you when it's time to come back
16 in. Remember the admonition I've given you.

17 (Whereupon, the jury exited the courtroom.)

18 THE COURT: The jury has exited the courtroom.

19 Counsel, this is the time that I indicated I would
20 hear from you with regard to the Plaintiff's filed motion to
21 allow a newly discovered witness to be called as rebuttal or
22 in the case in chief. You may proceed if you wish,
23 Mr. Hansen. I've reviewed your motion and affidavit.

24 MR. HANSEN: Yes, your Honor, and I think the basis
25 for seeking to call this rebuttal witness was set forth in

1 the motion and my affidavit. Since the time that motion and
2 affidavit has been filed, I think there's further strong
3 evidence and reason for why this rebuttal witness is neces-
4 sary and critical to the Plaintiff's proper presentation of
5 her case. Specifically, Mr. Guertz testified yesterday as a
6 witness for the Defense and Mr. Guertz was identified as a
7 witness on the Defendant's exhibit list which was timely
8 filed, but also was after the time of discovery cutting off,
9 so there was no opportunity for us to depose Mr. Guertz. We
10 were aware that Mr. Guertz might testify that it was his
11 impression that the -- there was obstruction of the stop
12 sign. We've never heard that Mr. Guertz was going to render
13 testimony that the stop sign had been changed, may have been
14 moved. Those are additional matters that aren't addressed in
15 my written memoranda but I think are additional reasons why
16 this witness is so critical to rebut the testimony that the
17 Defendant has put on in the presentation of its case.

18 I have provided some authority from cases outside
19 of the state of Utah when I hurriedly put together my motion
20 to allow this new witness.

21 Additionally, last night I quickly tried to
22 research the issue with regards to Utah law and I think the
23 case that may be most helpful or as close as I was quickly
24 able to find is State v. Albretsen and that is 782 P.2d 515.
25 It's a Utah 1989 case before the Utah Supreme Court. In that

1 case the Supreme Court held that the trial court had acted
2 within its discretion in allowing a rebuttal witness to
3 testify and this was a criminal matter, even though the
4 prosecuting attorney had not notified the defendant before
5 trial that the witness would testify to contradict and
6 impeach defendant's alibi testimony. It says that the
7 evidence developed during the course of trial and that the
8 prosecutor identified the possible rebuttal witness as soon
9 as it was -- in good faith, it says, as soon as the need
10 became known, and I think we've complied with that in this
11 case.

12 As I saw the change in the posture of the case and
13 especially with Mr. Guertz's testimony and also Daniel
14 Rusk's, we just believe it is very critical and we identified
15 this new witness as soon as we were able to and I think we're
16 entitled to put him on.

17 THE COURT: All right. Thank you, Mr. Hansen.

18 Mr. Stevens, do you wish to respond?

19 MR. STEVENS: I certainly do, your Honor.

20 The Court ordered an exchange of witnesses on
21 February 14th. There had already been interrogatories back
22 and forth about who witnesses would be and some informal
23 designation that Mr. Hansen and I had sent each letters or
24 spoken on the phone about. We complied with that designa-
25 tion. Mr. Hansen didn't but filed the designation late. Our

0737

1 designation went out February 14th.

2 I believe Mr. Hansen was aware -- if we're talking
3 now that Mr. Guertz is a surprise, and that's a new argument
4 to me, he was aware of Mr. Guertz's involvement before that,
5 I believe, but certainly by February 14th. There was abso-
6 lutely no effort to seek any deposition of Mr. Guertz or ask
7 what he might have to say. We spoke on the phone. He told
8 me what he thought Mr. Knight was going to say and I gave him
9 an outline generally of what Mr. Guertz was going to say, but
10 no effort to depose him, no effort at all to find out what
11 was up with him.

12 Now, Mr. Guertz testified, I'll agree, that the
13 sign post had been replaced. That would be his opinion.
14 That opinion, as I see it, goes only to the validity of the
15 photographs that have come in, not to anything else, and
16 we've all agreed that the photographs that came in don't
17 necessarily represent the scene at the time anyway, so I
18 don't see how there's any surprise there, nor did Mr. Guertz
19 even offer the opinion that it had been moved, just that it
20 could have been.

21 I think we get back to the basic issue in this case
22 which is, was the sign obstructed or not, and Mr. Hansen
23 claims there's some big surprise and prejudice to him because
24 Salt Lake City's going to be on the verdict. Well, your
25 Honor, that just isn't true, and the fact is this case was

1 filed back in March '91. In April we raised the issue of
2 third-party fault. In May we sent interrogatory answers
3 saying the tree obstructed the stop sign. In July
4 Plaintiff's deposition was taken and we went over and over
5 the tree in front of the stop sign.

6 We had anticipated calling Mr. Rusk all along.
7 Mr. Hansen didn't set his deposition to find out what he had
8 to say. I don't know if he contacted him, but I set his
9 deposition and we took his deposition in January. At that
10 time Mr. Rusk testified as he did in court that the tree
11 obstructed the stop sign. Mr. Hansen has known from at least
12 May of last year that the obstruction of that stop sign was
13 an issue. If he needed to go out and get a witness and find
14 somebody, he had ample time to do so. It was reinforced in
15 July. It was further reinforced in January.

16 It appears to me that what happened was on the day
17 of trial, the night of the first day of trial, they make an
18 effort to go find somebody and they've dug someone up. I
19 haven't seen the person. I don't know who he is. I've had
20 no opportunity to depose him. I've had no opportunity to
21 find out at all what this person plans on testifying to. I
22 don't know if he's -- what his basis would be to testify, and
23 to say that now you can come in at this date and essentially
24 run rampant through everybody's trial prep, the whole theory
25 of the case that we presented in our opening statement and

1 say we have to bring in this new witness because of surprise,
2 I think is absolutely ridiculous.

3 If the argument Mr. Hansen makes is, well, you
4 added Salt Lake City on the verdict so that justifies this,
5 that makes no sense, your Honor. Up until Salt Lake City was
6 added to the verdict, he knew that the position we were
7 taking was that Salt Lake City was 100 percent responsible
8 and he was going to have to anticipate contesting with that
9 issue, that Salt Lake City was at fault and Amy was not. He
10 needed evidence on that and he knew he needed evidence on
11 that.

12 The fact that now we have a situation where we're
13 saying, well, maybe Salt Lake City's only 90 percent instead
14 of a hundred percent, that doesn't change the investigation
15 he needs to make. That doesn't change the issues in front of
16 the jury as far as was it obstructed or wasn't it obstructed.
17 That issue has been here for months, almost a year, and to
18 come in now and say well, we ran around after trial ended and
19 we came up with a guy with no explanation as to why they
20 couldn't have found such a person months ago, I think, does
21 not meet any sort of standard.

22 Now, the case that he's just cited, this criminal
23 case, State v. Albretsen, refers to allowing a witness in
24 when there's some surprise in the trial, when it's because of
25 some new evidentiary matter that comes up. Well, if we had

1 surprise him, if we hadn't said we're claiming the stop
2 sign's blocked and if we walked in the first day of trial and
3 Amy for the first time said, "Well, I think there were trees
4 in front of it," then he'd have a position and then he'd be
5 able to say surprise, "I've got to get something and you've
6 got to let me get a witness because my trial prep has been
7 disorganized because of you, defendant's, actions," but
8 that's not the case we've got here.

9 The case is that we have both known of this issue
10 for a long, long time and it's not proper to go get somebody
11 at the last minute. I think if the Court -- even the cases
12 that he's cited where he put in the cite from A.L.R.4th, even
13 those cases refer to a test of whether the need could have
14 reasonably been anticipated, and in this case, it could have
15 been, and in cases that do allow this kind of surprise
16 witness, seems to me to say you've got to have a continuance
17 then and we've got to go out and have an opportunity to
18 depose this new person, if there is some justification for
19 letting him in. I think a continuance is not what either
20 side wants. It's not fair to us and I think to shove a new
21 witness on us now is not fair to us.

22 I'd cite the Court -- the quick research that I was
23 able to get done this morning -- to 63 A.L.R.4th, section 16.
24 It's the same A.L.R. cite. There is a listing of cases
25 upholding a denial or reversing the allowance of such a

1 witness when it has a prejudicial effect on the trial prepa-
2 ration and strategy of the other party, and that's exactly
3 what we've got here.

4 We built our case, we put it together, we got
5 witnesses. They apparently didn't. I don't know why not,
6 but it's certainly not our fault and we shouldn't bear the
7 burden of it.

8 Thank you, your Honor.

9 THE COURT: All right, thank you, Mr. Stevens.

10 MR. HANSEN: May I respond?

11 THE COURT: Yes, you may, Mr. Hansen.

12 MR. HANSEN: Your Honor, when Mr. Stevens says that
13 a year ago this was a big issue and it was well known, I
14 would go back to asking why was it that Mr. Stevens waited
15 until six days before trial to file his motion to add Salt
16 Lake City to the special jury verdict?

17 As I previously argued, I think the statute indi-
18 cates that they shouldn't bring them in for purposes of the
19 apportionment of fault. That was not done, but six days
20 before trial, he made his motion, and on the morning of
21 trial, the Court in an effort to be fair, stating that the
22 Court felt that the statutory scheme is to avoid any party
23 being responsible for more than its proportionate share,
24 allowed that to occur. I submit that that was in an attempt
25 of fairness to the parties. I don't believe it was timely

1 done by Mr. Stevens.

2 Now he's turning the tables and trying to say that
3 because his approach, that he's granted on the morning of
4 trial, the opportunity to point to Salt Lake City as some
5 defendant who isn't even here in essence, and he wants to
6 argue now that we shouldn't be able to try to respond to that
7 change of circumstances, I think is unfair prejudice to my
8 client.

9 I'd also submit that rebuttal testimony doesn't
10 have to be based on surprise.

11 There's also the Utah case of Board of Education of
12 South Sanpete v. Barton which is at 617 P.2d 347. I do have
13 a copy, your Honor. In that case the Court talks about
14 rebuttal witnesses. It says, "Rebuttal evidence is that
15 which tends to refute or to so modify or explain as to
16 nullify or minimize the effect of the opponent's evidence."

17 Now, I submit that there is considerable evidence
18 that the Defendant has presented in their case that I think
19 we're entitled to present rebuttal testimony and some of it
20 is surprise. Mr. Guertz's testimony that because there was
21 some statement that the sign may have been bent, that he now
22 says that he thinks that sign was replaced, that is new and
23 that is surprising and we have a witness who's prepared to
24 rebut most of the -- most, if not all, of the points of the
25 Defendant with regards to the obstruction of the stop sign,

1 with regards to whether it was in a bent and improper con-
2 dition, and we submit that it is critical that we be allowed
3 to call this witness in the interest of fairness and accord-
4 ing to the rules.

5 THE COURT: Counsel, I am persuaded that the motion
6 to call the new witness should be and is denied, and my
7 reasoning is as has been stated by Mr. Stevens, but moreover,
8 it has been the essential defense here that the sign was
9 obstructed, thereby limiting the Defendant's opportunity to
10 timely observe it and take appropriate action. That aspect
11 of the Guertz testimony is not new, and my decision to allow
12 Salt Lake City on the verdict form for purposes of apportion-
13 ment of the responsibility here really does not change the
14 essential defense that the sign was obstructed. The claim
15 here has been made that that was a fact and evidence has been
16 adduced, if it's believable to the jury, that that was the
17 fact, and now at this point, this late date, it seems to me
18 that it puts the Plaintiff at an unfair disadvantage, not
19 knowing who this individual is and having had the opportunity
20 to cross-examine or at least depose this witness, while as
21 Mr. Guertz was available and notified in a timely fashion as
22 far as the opposition was concerned, that he would be testi-
23 fying. I am therefore persuaded that it would place the
24 Plaintiff in an unfair posture to grant this motion and it's
25 denied.

1 MR. HANSEN: You mean the Defendant?

2 THE COURT: Excuse me, the Defendant's position is
3 sustained. Your motion is denied.

4 Let's now repair to chambers and work on
5 Instructions.

6 MR. HANSEN: Your Honor, if I may, I would move for
7 a continuance and request that Defendant be given the oppor-
8 tunity to depose this rebuttal witness. I think this testi-
9 mony is critical. I believe it is essential that we be able
10 to allow this rebuttal testimony and if the Court's position
11 is that there's unfair timing on this, then we would will-
12 ingly agree and would move for a continuance of the trial to
13 allow sufficient time for Mr. Stevens to take this deposi-
14 tion, which my direct testimony on him is not going to be any
15 more than 20 minutes, so 10 to 20 minutes, so I don't think
16 it would be a long deposition. I think we could take it over
17 the noon hour or whenever the Court would desire, but I'd
18 move for a continuance, your Honor.

19 THE COURT: No. For the reasons stated, Counsel,
20 your request for a continuance is denied.

21 We will now recess and work on our Instructions.

22 MR. HANSEN: One more -- may I proffer the
23 evidence? We have the witness here.

24 THE COURT: Well, I think his proposed evidence is
25 basically set forth in your motion and your affidavit. He

0745

1 will testify the sign wasn't obstructed.

2 MR. HANSEN: And in talking with him, he would give
3 more detail than what I provided in the affidavit. I would
4 like to proffer a Mr. Jim Nakling -- and I found his name is
5 spelled N-a-k-l-i-n-g, and he resides at 122 North Canyon
6 Road, one house away from the stop sign, and his testimony is
7 that for the past 10 years he has walked his dogs past that
8 stop sign two times per day on a usual day and he has never
9 seen any obstruction of that stop sign. The tree to which it
10 is alleged obstructed the stop sign has never been cut. The
11 tree in front of his house has never been cut in the past 10
12 years that he's been there and furthermore, the stop sign has
13 never been changed and he's never observed it bent during the
14 past seven or eight years.

15 He will further testify that the stop ahead sign
16 which is somewhat in dispute as to when it was placed there,
17 he will testify that that stop ahead sign has been there, as
18 has the stop sign, since the road was repaired after the
19 floods of 1983, so this is all of the testimony that I think
20 is essential that this witness would testify about.

21 THE COURT: Well, and that's fine. It seems to me
22 that insofar as the dispute about the condition of the
23 visibility of the sign is concerned, we do have conflicting
24 evidence on both sides, that Mr. Nakling's testimony would be
25 duplicative of that, and that's what I perceive to be the

1 principle issue here and not whether or not the sign was bent
2 or removed, so my ruling will stand, Counsel.

3 Let's now recess.

4 (Whereupon, a recess was taken.)

5 THE COURT: The jury, parties and counsel are
6 present.

7 Instructions to the jury.

8 MR. STEVENS: Your Honor, one preliminary matter
9 your clerk called to my attention. There are a couple of
10 exhibits that she didn't have a formal ruling on. I think it
11 was 42 and --

12 THE CLERK: Twenty-five through 39.

13 MR. STEVENS: I think we both agreed that those
14 would come in.

15 THE COURT: That's correct.

16 MR. HANSEN: That's correct.

17 THE COURT: Very well, those exhibits will be
18 received.

19 MR. STEVENS: Thank you, your Honor.

20 THE COURT: All right. Thank you.

21 (Whereupon, Judge Frederick read aloud Instructions
22 to the jury.)

23 THE COURT: Counsel, you may present your closing
24 arguments.

25 How much time do you anticipate, Mr. Hansen?

1 going any speed, and she would have stopped and there would
2 have been no accident. That's my point. I'm not inconsist-
3 ent, I don't think.

4 Now, Mr. Hansen makes a big issue of the fact that
5 Mr. Guertz says he can't say speed was a factor, but the fact
6 is all Mr. Guertz can analyze is the crush of the autos which
7 he came out at five miles per hour each on, and Mr. Knight
8 essentially agrees and he doesn't have information on speed,
9 if she was going 60 and slowed down and got going to five
10 miles per hour. All he knows is that's what she was doing at
11 the time. He said, "Well, gee, there weren't any skid marks
12 noted on the police report," but keep in mind, ladies and
13 gentlemen, that both of these people told the cops, "I'm not
14 hurt," and this was not a big accident. This was not an
15 involved accident investigation. It was a minor intersection
16 accident, so when we look at Plaintiff's own testimony, it
17 appears there's some fault there.

18 The prime fault, as Mr. Hansen mentions, and I
19 agree, is Salt Lake City. The prime fault for the sign. The
20 instruction you've got in the package the Judge will give you
21 says they have to maintain the sign and the evidence is
22 undisputed they didn't. It was covered. It was blocked.
23 That's what the prime fault of this accident is, and I
24 understand that Julie Turner didn't realize that and for
25 years she's been angry at Amy Nelson and assumed that she

1 the evidence. If you find the evidence preponderates in
2 favor of the issue presented, answer yes. If you find the
3 evidence is so equally balanced that you cannot determine a
4 preponderance of the evidence, or if you find that the
5 evidence preponderates against the issue presented, answer
6 no. Also, any damages assessed must be proven by a prepon-
7 derance of the evidence.

8 Number one, considering all of the evidence in this
9 case, do you find from a preponderance of the evidence that
10 the Defendant, Amy Nelson, was negligent as alleged by the
11 Plaintiff? Answer, no. Dated this 5th day of March, 1992,
12 signed by the foreperson.

13 THE COURT: Counsel, do you wish to have the jury
14 polled, Mr. Hansen?

15 MR. HANSEN: Yes, we do, your Honor.

16 THE COURT: Members of the jury, I'll ask you one
17 question, to which you will answer either yes or no, and that
18 question is, was this and is this your verdict, Mr. Little?

19 MR. LITTLE: Yes.

20 THE COURT: Ms. Adams?

21 MS. ADAMS: Yes.,

22 THE COURT: Ms. Hill?

23 MS. HILL: Yes.

24 THE COURT: Mr. Watson?

25 MR. WATSON: Yes.

0792