

1992

Julie Anderson Turner v. Amy Nelson : Brief of Appellant

Utah Supreme Court

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BRIEF

SLUE 3

~~IN THE~~ SUPREME COURT OF THE
STATE OF UTAH

JULIE ANDERSON TURNER,
Plaintiff/Appellant,

v.

AMY NELSON,
Defendant/Appellee.

Case No. 920195

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

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JULIE ANDERSON TURNER

December 3, 1992

FILED

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CLERK SUPREME COURT
UTAH

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Plaintiff/Appellant,)	
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v.)	Case No. 920195
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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (1992).

STATEMENT OF THE ISSUES PRESENTED AND THE STANDARD OF APPELLATE REVIEW

(1) Whether the trial court erred in adding Salt Lake City Corporation, a non-party to the action, to the Special Verdict Form for purposes of allowing the jury to apportion the City's fault under Utah's comparative negligence statute. The trial court's statutory interpretation presents a question of law that is accorded no particular deference and is reviewed for correctness. Asay v. Watkins, 751 P.2d 1135 (Utah 1988).

(2) Whether the Plaintiff was prejudiced by the trial court's refusal to allow Plaintiff to call a proper rebuttal witness at trial. The trial court's rulings on the admission or exclusion of evidence are reviewed for abuse of discretion. State v. Griffiths, 752 P.2d 879 (Utah 1988).

DETERMINATIVE STATUTES

1. Utah Code Ann. §§ 78-27-37 - 78-27-41 (1992):

78-27-37. Definitions.

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

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

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

(3) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or

on behalf of another for whom it is authorized to act as legal representative.

78-27-38. Comparative negligence.

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

78-27-39. Separate special verdicts on total damages and proportion of fault.

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

78-27-40. Amount of liability limited to proportion of fault--No contribution.

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

78-27-41. Joinder of defendants.

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

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff/Appellant Julie Anderson Turner ("Turner") sued Defendant/Appellee Amy Nelson ("Nelson") in March, 1991, alleging negligence for injuries she received July 6, 1989 when Nelson ran a stop sign and collided with Turner's car.

B. Course of Proceedings and Disposition Below

Nelson answered Turner's complaint on April 12, 1991 and denied that she was negligent, and further alleged that Turner's injuries were caused by the negligence of third parties. Discovery ensued. At her deposition July 2, 1991, Nelson testified that the stop sign she ran was "partially covered" by trees. She confessed, however, that her memory was a bit vague concerning the facts surrounding the collision.

Discovery was concluded by court order on February 20, 1992 and trial was set for March 3, 1992. On February 26, 1992, Nelson asked the trial court to add Salt Lake City to the special verdict form for the purpose of having the jury consider and apportion a non-party's (Salt Lake City) alleged fault for Turner's injuries. On the morning of the first day of trial the court granted Nelson's motion. The jury found no fault on the part of Nelson, and judgment was entered against Turner.

STATEMENT OF FACTS

On July 6, 1989, Turner was driving westbound on Third Avenue near its intersection with Canyon Road in Salt Lake City. (R. 3). Nelson had just dropped her boyfriend off at the airport and was headed up Canyon Road to look at houses before going to work. (R. 324-26). Nelson had never been on Canyon Road before. (R. 325).

Nelson proceeded north on Canyon Road. (R. 326). She failed to heed the "Stop Ahead" warning sign on the road (R.

326), and then ran the stop sign at the corner of Canyon Road and Third Avenue. Nelson hit Turner's car in the front left quarter panel.

Salt Lake City Police Officer Mickey Paul was the first officer to arrive at the scene of the accident. (R. 432). Officer Paul neither observed nor noted any obstruction of the stop sign at that intersection. (R. 434). No indication of any obstruction appeared on the official report filed by the investigating officer. (R. 397). Neither Nelson nor Daniel Rusk, an eyewitness, ever told the investigating officer that the stop sign was obstructed. (R. 329, 645).

Turner's complaint was served on Nelson March 27, 1991. (R. 6-8). Nelson answered the complaint on April 12, 1991, and denied any negligence (R. 9-13). Nelson claimed that Turner was contributorily negligent, and further alleged that Turner's injuries were caused by the negligence of unspecified third parties. Id.

Discovery commenced and on July 2, 1991, Nelson was deposed. (R. 16). During her deposition, Nelson claimed that the stop sign had been "partially obstructed," but testified that she had seen the stop sign prior to entering the intersection and hitting Turner's car. (R. 331-32).

On December 12, 1991, the trial court issued a scheduling order setting February 20, 1992 as the discovery cutoff and March 3, 1992 as the trial date. (R. 68). On February 26, 1992, Nelson filed a "Motion for Apportionment of Fault of Salt Lake City" and accompanying brief. (R. 100-

101; 112-18). Nelson sought a hearing on her Motion the morning of the first day of trial. (R. 119). Turner filed an objection to the motion. (R. 135-38). The trial court granted the motion without argument. (R. 357-58).

After the court granted Nelson's Motion, trial began. In his opening statement, Nelson's counsel began his attack on the City *in absentia*:

I think the real fault here that -- we're suggesting is with Salt Lake City. It's a bad design. They didn't have it well signed.

(R. 376).

That evening, Turner's counsel set out to find a witness to rebut Nelson's attack upon the non-party City. Counsel discovered Mr. Jim Nakling, a resident of the Canyon Road/Third Avenue area for 10 years. Mr. Nakling was prepared to testify that he had walked his dog by that intersection, twice daily, and that the stop sign was not obstructed by trees or foliage at the time of the accident, nor at any time since. (R. 148).

The morning of the second day of trial, counsel filed a motion seeking permission to call Mr. Nakling at trial. (R. 143-45). The motion was accompanied by the affidavit of counsel and relevant case law supporting the motion. (R. 146-48, 150-60).

On the third day of trial, counsel called Mr. Nakling as a rebuttal witness. The court refused to allow the rebuttal evidence. (R. 744). Counsel then proffered Mr.

Nakling's testimony,¹ arguing that the testimony was proper rebuttal and was critical to the fair presentation of the case to the jury. Counsel also sought a continuance of the trial in order to allow Nelson to depose Nakling if she desired. (R. 745). The court denied the request, and refused to allow the rebuttal evidence. Id.

Nelson's primary attack in her closing argument was upon the absent City for causing the accident. (R. 775). The jury returned a verdict of *no negligence* on the part of Nelson, from which Turner appeals. (R. 792).

SUMMARY OF ARGUMENT

The plain language of Utah Code Ann. § 78-27-41 mandates that a *defendant* be joined as a party before her negligence can be considered by the trier of fact. The policy considerations underlying the Act and the Legislature's statutory scheme support this interpretation.

¹ I would like to proffer a Mr. Jim Nakling--and I found his name is spelled N-a-k-l-i-n-g, and he resides at 122 North Canyon Road, one house away from the stop sign, and his testimony is that for the past 10 years he has walked his dogs past that stop sign two times per day on a usual day and he has never seen any obstruction of that stop sign. The tree to which it is alleged obstructed of the stop sign has never been cut. The tree in front of his house has never been cut in the past 10 years that he's been there and furthermore, the stop sign has never been changed and he's never observed it bent during the past seven or eight years.

He will further testify that the stop ahead sign which is somewhat in dispute as to when it placed there, he will testify that that stop ahead sign has been there, as has the stop sign, since the road was repaired after the floods of 1983, so this is all of the testimony that I think is essential that this witness would testify about. (R. 746)(emphasis supplied).

Restricting the apportionment of negligence to parties to an action is wholly consistent with, and substantially furthers, the policies of judicial economy and fairness to the parties to the litigation. It encourages the joinder of all potentially responsible tortfeasors into the initial litigation, which in turn ensures that no named defendant will be liable for more than her share of fault. It further prevents multiple and successive litigation by plaintiffs seeking to bind "ghost" tortfeasors legally for acts for which a jury finds them theoretically responsible.

Nelson provided no adequate explanation either for failing to add the City when she uniquely possessed knowledge of the City's potential negligence, or for her failure to notify the trial court and Turner of her intention to add the City to the special verdict form until six days before trial. Nelson's motion to add the City, made less than a week before trial, and the trial court's addition of the City the day of trial was manifestly unfair and prejudicial to Turner, and constituted an abuse of the trial court's discretion.

The rebuttal evidence proffered by Turner at trial was clearly proper rebuttal evidence calculated to meet new evidence and the newly added "party" at trial. Under the facts and circumstances of the case, the court's denial of Turner's rebuttal evidence was manifestly unfair and patently prejudicial, and constituted a clear abuse of

discretion. The court's ruling should be reversed, and the case should be remanded for a new trial.

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT'S ADDITION OF A NON-PARTY TO THE SPECIAL VERDICT FORM WAS PREJUDICIAL ERROR

The court below permitted Salt Lake City Corporation (the "City"), a non-party to the action, to be added to the special verdict form the day of trial for the purpose of apportioning the City's alleged negligence. The court's ruling was based upon an erroneous interpretation of Utah's Liability Reform Act, and was unjust, inequitable and prejudicial. The court's ruling should be reversed and remanded for retrial in accordance with the plain language of Utah Code Ann. § 78-27-41 and Utah's Liability Reform Act.

A. THE STATUTORY SCHEME AND THE PLAIN LANGUAGE OF § 78-27-41 PRECLUDES THE APPORTIONMENT OF FAULT TO NON-PARTIES

This appeal presents a question of first impression in Utah concerning the proper interpretation of Utah's Liability Reform Act. The Utah Legislature passed the Liability Reform Act (the "Act"), Utah Code Ann. §§ 78-27-37 - 42, in 1986. The Act eliminated contributory negligence, joint and several liability and contribution between tortfeasors, and established a pure comparative negligence system under which no defendant is liable for more than her respective share of fault.

In passing the Act, the Legislature made an express and deliberate policy decision to place the burden upon the party seeking to have the negligence of nonparties considered to join any and all other potentially negligent tortfeasors as parties to the action in order to have those tortfeasors' negligence, if any, considered. The plain language of the Act, the policy considerations underlying the statutory scheme chosen by the Utah Legislature and the statutory scheme itself all reflect the Legislature's considered decision not to permit the apportionment of negligence to non-parties to an action.

Restricting the apportionment of negligence to parties is wholly consistent with, and substantially furthers, the policies of judicial economy and fairness to the parties to the litigation. It encourages the joinder of all potentially responsible tortfeasors into the initial litigation, which in turn ensures that no named defendant will be liable for more than her share of fault. It further prevents multiple and successive litigation by plaintiffs seeking to bind "ghost" tortfeasors legally for acts for which a jury has found them theoretically responsible.

1. The Plain Language of the Act

The Act begins by defining the three key terms under the Act: "defendant," "fault" and "person seeking recovery." It then provides:

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 that defendant.

Utah Code Ann. § 78-27-38 (1992)(emphasis supplied). The Act defines a "defendant" as "any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery." *Id.* § 78-27-37. A "person seeking recovery" under the Act is "any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative." *Id.*

Defendant is thus defined more broadly in the Act than its customary usage,² and there is no requirement that either a defendant or a person seeking recovery be a party to the action.³ A defendant's liability to a person seeking recovery under the Act is limited to the proportion of the total damages equal to that defendant's fault. *Id.* § 78-27-40. The Act provides for separate special verdicts determining the amount of damages sustained and the percentage of fault attributable to each person seeking recovery and to each defendant. *Id.* § 78-27-39.

Read together, nothing in these sections appears to prohibit the consideration of any alleged negligence by non-parties to the action. Read in conjunction with § 78-27-41,

² A defendant is the party against whom relief or recovery is sought in an action or suit. *E.g.*, *Black's Law Dictionary*, at 377 (5th Ed. 1979).

³ As a practical matter, however, a person seeking recovery under the Act will most often be the party bringing the action.

however, it is clear that the Legislature intended that only the negligence of parties⁴ to the action be apportioned.

Section 78-27-41 provides:

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.

Id. § 78-27-41 (emphasis supplied). Simplified, "any party . . . may join as parties any [non-party] defendants . . . for the purpose of . . . determin[ing] their respective proportions of fault." Id. The statute clearly and succinctly requires that a defendant be joined as a party if her negligence is to be considered. Had the Legislature intended that non-parties' negligence be considered, it would simply have omitted any requirement that defendants be joined as parties in order to have their negligence considered. The Legislature's language and intent must be respected by this Court.

In construing a statute, all words are presumed to have been used advisedly. Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989). The terms of a statute should be interpreted in accordance with their usually accepted meanings. Savage Industries, Inc. v. Utah State Tax Comm'n., 808 P.2d 1037 (Utah 1991). By adopting into a statute a

⁴ A "party" to an action is the person whose name is designated on the record as plaintiff or defendant. *E.g.*, *Black's Law Dictionary*, at 1010 (5th Ed. 1979).

word or phrase with a distinct legal meaning, the legislature is presumed to have intended that the meaning be applied by the courts in construing the statute. Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975).

The Legislature specifically used the term "party" in conjunction with the allocation of fault under the Act. The reason for the Legislature's choice of that term is clear: its intent that only parties be considered when apportioning negligence under the Act. See Greenhalgh, 530 P.2d 799 (Utah 1975).

The language of § 78-27-41 is plain and unequivocal. It provides that any party defendant may join any other defendant as a party for the purpose of determining all parties' proportion of fault. The Legislature has thus expressly provided the mechanism for a tortfeasor to ensure, consistent with the other provisions of the Act, that she will only be responsible for her share of the plaintiff's damages.

Any other interpretation of this section renders it mere surplusage; it clearly does not bestow upon plaintiffs or defendants any right that they do not already possess under the Utah Rules of Civil Procedure. See Utah R. Civ. P. 13, 14, 17, 19, 20, 22. A contrary interpretation of this section would also conflict with the requirements of, and policies behind, Rule 19 of the Utah Rules of Civil Procedure.

In Kemp v. Murray, 680 P.2d 758 (Utah, 1984), this Court stated that Rules 17 and 19 of the Utah Rules of Civil Procedure exist to protect the same interests: judicial economy and fairness to the parties in litigation. The Court then articulated the purpose of, and policies behind, these rules:

The purpose of Rule 19(a), 'which requires the joinder of indispensable parties as a condition to suit, is to guard against the entry of judgments which might prejudice the rights of such parties in their absence'⁵ . . . In addition, by requiring joinder of necessary parties, Rule 19(a) protects the interests of parties who are present by precluding multiple litigation and contradictory claims over the same subject matter as the original litigation.

Id. at 760.

Restricting the apportionment of negligence to parties is wholly consistent with, and substantially furthers, these policies. It encourages the joinder of all potentially responsible tortfeasors into the initial litigation, which in turn ensures that no named defendant will be liable for more than her share of fault. It further prevents multiple and successive litigation by plaintiffs seeking to bind "ghost" tortfeasors legally for acts for which a jury finds them theoretically responsible. Finally, it assigns the risk of inaction to the party who properly should bear that risk.

⁵ (citing Sanpete County Water Conservancy District v. Price Water Users Ass'n, 652 P.2d 1302, 1306 (Utah 1982)).

A. The Permissive "May" Does Not Affect
Allocation of the Burden Under the Act.

Nelson argued below that the Legislature's use of the word "may" in § 78-27-41 implies that joinder of a defendant under the Act is optional. As this Court stated in Kennecott Copper Corp. v. Salt Lake City, 575 P.2d 705, 706 (Utah 1978),

There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. The intention of the legislature, however, should be controlling and no formalistic rule of grammar or word form should stand in the way of carrying out the legislative intent.

* * * * *

Generally those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute, are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.

Id. at 706 (citing 1A Sutherland Statutory Construction § 25.03, at 299-300 (4th Ed.))(emphasis added). Section 78-27-41 clearly requires the joinder of other defendants "for the purpose of having determined their respective proportions of fault." Because substantial rights of a person seeking recovery under the Act are at issue, the word "may" in § 78-27-41 is mandatory to the extent that defendant Nelson wishes to have other defendants' negligence apportioned. See Kennecott, 575 P.2d at 706.

This conclusion is bolstered by the Court's Kennecott analysis. Several courts have noted that comparative negligence statutes were enacted in part to alleviate the harshness of the contributory negligence rule upon plaintiffs. See Mills v. Brown, 735 P.2d 603, 605-606 (Ore. 1987); Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978). Plaintiffs are thus 'protected' under the statute. Because of the very real potential, as demonstrated in this case below, for prejudice to a plaintiff's rights by the inclusion of a "ghost" tortfeasor at trial, the Legislature has required defendants to join as parties all other defendants whose negligence they wish to be considered at trial.

Moreover, even assuming, *arguendo*, that Nelson's argument is correct, it neither changes the analysis nor shifts the burden under the Act. The Legislature chose in § 78-27-41 to place the burden upon the party seeking to have a non-party's negligence considered to join those defendants for the purpose of determining their respective proportions of fault. Section 78-27-41 simply and equitably assigns the risk of inaction to the party who should bear that risk. Other interrelated policy considerations lend further support to this argument.

2. Policy Considerations

Section 78-27-41 embodies the Legislature's considered decision to place the burden upon a defendant to ensure that she does not become liable for more than her proportionate

share of plaintiff's damages. See Utah Code Ann. § 78-27-38 (1992). There are compelling policy considerations behind this choice.

Foremost is fairness to the plaintiff. As amply demonstrated at trial below, "it is unfair to saddle the plaintiff with the burden of litigating liability issues of a non-party or to try the absent tortfeasor *in absentia* under conditions which could not bind that person under principles of *res judicata* or collateral estoppel." National Farmers Union Property & Casualty Co. v. Frackelton, 662 P.2d 1056, 1060 (Colo. 1983) (*En Banc*) (citation omitted). The plaintiff, conversely, may be collaterally estopped to deny issues litigated in the prior suit. See *id.*; see also Eurich v. Alkire, 597 P.2d 1207, 1209 (Kan. 1978) ("[A]ll persons who are named as parties and who are properly served with summonses are bound by the percentage determination of causal negligence." (emphasis added)).⁶ The Colorado Supreme Court also noted, again as conclusively demonstrated in this case, that "a comparison of the negligence of absent tortfeasors may work to defeat any recovery by a deserving plaintiff." Frackelton, 662 P.2d at 1060.

Another factor supporting the Legislature's decision to place the burden upon the defendant to join other

⁶ This principle is fully consistent with Utah law that a trial court may only make a legally binding adjudication between parties actually joined in the action. *E.g.*, Hilstley v. Ryder, 738 P.2d 1024 (Utah 1987).

tortfeasors is that the defendant typically possesses superior knowledge concerning the identity of responsible parties. This case is an excellent example of this principle. The facts supporting an action against the City were uniquely within Nelson's knowledge and control. Neither Nelson nor anyone else present at the scene the day of the collision reported any obstruction of the stop sign. This fact, in conjunction with Nelson's admittedly "vague" recollection of an obstruction at her deposition, made it difficult, if not impossible, for Turner's counsel to file an action against any other party in good faith. See Utah R. Civ. P. 11.

Further, as a matter of equity, "[i]t is preferable to place the burden of finding and suing absent tortfeasors on those who caused [the] plaintiff to suffer damages." Id.; see also Martinez v. First National Bank of Santa Fe, 755 P.2d 606, 609 (N.M. Ct. App. 1987) (Noting "nothing in the record which would have precluded defendant from joining . . . [the] third party defendant and thus proving his negligence if, indeed, there was any to be proved").

Closely related to these considerations is the interest of the Legislature in promoting judicial economy. By placing the burden of adding responsible parties upon the party with the greatest interest in having all parties' liability adjudicated, the Legislature has attempted to ensure that plaintiff's injuries will be redressed in a

single action. See Kemp v. Murray, 680 P.2d 758 (Utah, 1984); Utah R. Civ. P. 19.

The Legislature's requirement that defendants be parties to the action in order to have their negligence considered is also consistent with the policy most often relied upon by courts in allowing non-parties' negligence to be apportioned: the premise that a tortfeasor should not be liable for more than her proportionate share of fault. See Paul v. N.L. Industries, Inc., 623 P.2d 68 (Okla. 1981); Pocatello Industrial Park Co. v. Steel West, Inc., 621 P.2d 399 (Idaho 1980); Brown v. Keill, 580 P.2d 867 (Kan. 1978). The Utah Legislature has simply chosen a more equitable means of achieving this goal than Oklahoma, Idaho and Kansas.

Furthermore, the Oklahoma, Idaho and Kansas cases were all decided at least five years prior to the passage of the Act. It is fair to assume that the Legislature was aware of these cases and their reasoning, and that the Legislature intentionally chose not to adopt their position when drafting the Act. Several sister states have considered these cases and have also expressly declined to follow their reasoning. See Mills v. Brown, 735 P.2d 603 (Ore. 1987); Warmbrodt v. Blanchard, 692 P.2d 1282 (Nev. 1984); National Farmers Union Property & Casualty Co. v. Frackelton, 662 P.2d 1056, 1060 (Colo. 1983)(*En Banc*).

The Utah Legislature has chosen in § 78-27-41 to allocate the burden of spreading liability proportionately

to the party seeking to have the negligence of others considered under the Act. Compelling policy considerations support the Legislature's decision. The Court should honor that decision.

3. Statutory Scheme

The Act comprises a carefully considered and precisely worded scheme by which the comparative fault of all parties to an action can be assessed. The inclusion of § 78-27-41 is clear evidence of the Legislature's intent that only parties to the action be considered.

The legislative intent as expressed in the statute is the governing consideration when interpreting a statute. See Kennecott Copper Corp. v. Salt Lake City, 575 P.2d 705, 706 (Utah 1978). In order to ascertain legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe the act *in pari materia*. See Brown v. Keill, 580 P.2d 867, 872 (Kan. 1978).

As noted, nothing in the first four sections of the Act appears to preclude a court from apportioning fault to a non-party to the action. When those sections are read in conjunction with § 78-27-41, however, the Act must be interpreted to prohibit the allocation of negligence to a defendant unless that defendant is joined as a party.

The trial court erroneously relied exclusively upon § 78-27-38, without considering the language or effect of §

78-27-41, or the Act's statutory scheme, in deciding to allow the City's negligence to be considered:

It's my view that the purpose of No-Fault Act has to do with assuring that no party will be responsible to pay more than their appropriate share of the fault causing the accident, and given that overview, it seems to me that policy consideration behind the act, it seems to me that in these circumstances it's a fair request that Salt Lake City be considered on the apportionment portion of the verdict for purposes of assessing all of the fault that may have contributed to the cause of this accident

(R. 358). By itself, § 78-27-38 arguably supports the court's conclusion. The court may not, however, consider the Act piecemeal. See Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989); Brown v. Keill, 580 P.2d 867, 872 (Kan. 1978).

The plain language of § 78-27-41 mandates that a defendant be joined as a party before her negligence can be considered by the trier of fact. The policy considerations underlying the Act and the Legislature's statutory scheme support this interpretation.

This Court is not required to accord the trial court's interpretation of a statute any deference, and may review the trial court's interpretation *de novo*. Asay v. Watkins, 751 P.2d 1135 (Utah 1988). The trial court focused upon an isolated section of the Act, and in so doing failed properly to construe the Act as written and intended by the Legislature. The trial court's erroneous application of the Act was manifestly prejudicial to Turner, and should be reversed.

**B. THE TRIAL COURT'S ADDITION OF THE CITY TO THE
SPECIAL VERDICT FORM THE DAY OF TRIAL WAS
ERRONEOUS AND PREJUDICIAL**

Should the Court decide that non-parties' negligence may be apportioned under the Act, the Court should, in the interests of equity and justice, remand the case for a retrial and give Turner and the City the opportunity to litigate the case fully and fairly.⁷ Nelson's motion to add the City less than a week before trial, and the trial court's addition of the City the day of trial was unfair and prejudicial to Turner, and constituted an abuse of the trial court's discretion.

Utah courts have long required that amendments to the pleadings or the addition of parties made shortly before, or at, the time of trial be fair to the opposing party. See Girard v. Appleby, 660 P.2d 245 (Utah 1983). This Court has held, in fact, that such motions are to be construed so as to further the interests of justice, and are to be subjected to much stricter scrutiny when made at, or during, trial. Gillman v. Hansen, 486 P.2d 1045 (Utah 1971).

In Girard, the Court affirmed the trial court's denial of a motion to amend to add new causes of action the day of trial. The Court based its affirmance upon the plaintiff's

⁷ Because this is an issue of first impression in this State, Julie would respectfully request, for reasons set forth in this Proposition, that the Court's ruling be applied prospectively and that she be granted a retrial based upon prejudice caused by the timing of the addition of the City.

inability to state an adequate reason for the untimeliness of the motion, and upon the disadvantage and surprise to the defendant, stating that "the interests of justice will best be served by the court's denial of the motion to amend." Id. at 248 (citing Johnson v. Brinkerhoff, 57 P.2d 1132 (1936)). Similarly, in Tripp v. Vaughn, 746 P.2d 795 (Utah Ct. App. 1987), the court of appeals affirmed the denial of a motion to add a third party defendant made two weeks before trial where "inadequate reasons for the untimely motion were presented" Id. at 98

In Kelly v. Utah Power & Light, 746 P.2d 1189 (Utah Ct. App. 1987), the court held that the proper standard for a trial judge considering a motion to amend is "whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not time to prepare." Id. at 1190 (citing Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983)). Nelson filed her motion less than a week before trial she offered no explanation for her failure to add Salt Lake City as a party during discovery,⁸ and offered no adequate reason for the delay in

⁸ Except the conclusory allegation, without citation of authority, that the City could not be added under the Utah Governmental Immunity Act. Regardless of the accuracy of Nelson's statement under Utah law, Nelson's choice, at her peril, see Utah Code Ann. § 78-27-41, not to join (or attempt to join) the City should not be allowed to work to Julie's prejudice. See Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983)(Adjudication of issue for which party had insufficient time to prepare constituted unavoidable prejudice).

notifying the trial court and Turner of her intent to add the City to the special verdict form.⁹

Nelson's delay, whether the result of a tactical decision or a lack of diligence, should not have been allowed to prejudice Turner and deny her any recovery for her injuries. The interests of justice would best have been served by the trial court's denial of the motion to amend to add the City six days before trial. Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983). The trial court clearly abused its discretion.

II. THE TRIAL COURT'S REFUSAL TO PERMIT REBUTTAL TESTIMONY WAS PREJUDICIAL ERROR

The trial court compounded its error in adding the City the day of trial by subsequently prohibiting Turner from presenting witness Jim Nakling's ("Nakling") rebuttal testimony. Nakling would have directly controverted Nelson's testimony that the stop sign was obstructed, and would have nullified or minimized her assault against the

⁹ Cf., for example, Colo. Rev. Stat. § 13-21-111.5 (1992 Cum. Supp.), which requires that a party file notice within ninety (90) days of the filing of the complaint of her intent to have the negligence of non-parties considered. The party must identify the non-party's name and last-known address, or "the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault." Failure to designate the nonparty within the specified time precludes consideration of the nonparty's alleged negligence. Colorado thus expressly recognizes the potential for abuse by a party "laying behind the log" until discovery has concluded (or the statute of limitations has run) and then seeking to add an "empty chair" to shift the blame to at trial.

newly-added "ghost" tortfeasor, the City. Nakling's testimony was clearly proper rebuttal testimony intended to meet new evidence in the case, and Nelson would have suffered no demonstrable prejudice from its introduction.

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. Board of Education of South Sanpete School District v. Barton, 617 P.2d 347 (Utah 1980). Rebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief. Morgan v. Commercial Union Assurance Cos., 606 F.2d 554 (5th Cir. 1979)(emphasis original); see also Soliz v. Ammerman, 395 P.2d 25 (Utah 1964)(Rebuttal evidence should be confined to proof which answers or explains an adversary's evidence). Rebuttal evidence is designed to meet facts not raised prior to the defendant's case in chief, not facts which could have been raised. Id. at 555.

In Rodriguez v. Olin Corp., 780 F.2d 491 (5th Cir. 1986), the Fifth Circuit Court of Appeals reversed the district court's refusal to allow rebuttal testimony in response to defendant's expert's testimony. In its decision, the court discussed the rules and considerations governing the admission or denial of rebuttal testimony. The court held that rebuttal evidence should be allowed where "new" testimony is presented during defendant's case in chief. The court stated that

Logic and fairness lead us to conclude that new evidence for purposes of rebuttal does not mean "brand new." Rather, evidence is new if, under all the facts and circumstances, the court concludes that the evidence was not fairly and adequately presented to the trier of fact before the defendant's case in chief.

Id. at 496. The court pointed out that a plaintiff only bears the burden of proving a *prima facie* case, and is not required to "prove the negative" of defendant's facts or theories:

This rule proceeds from the view that a plaintiff has the right to adduce whatever evidence is necessary to establish its *prima facie* case and is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised on defense.

Id.; accord, Kaczmarek v. Allied Chemical Corp., 836 F.2d 1055 (7th Cir. 1987). The court held that the defendant's expert's "corrosion fatigue entrapment" testimony was "new," that the plaintiff had no cause or duty to go forward in its case in chief and negate that testimony, and that the district court's exclusion of the plaintiff's proffered rebuttal testimony was improper and prejudicial. Id. The court reversed and remanded the case.

Witness Nakling's proffered testimony was clearly proper rebuttal evidence that should have been admitted by the trial court. See Barton, 617 P.2d 347, 349 (Utah 1980). It was offered to refute Nelson's testimony that the stop sign was obstructed, and to controvert the testimony of Nelson's expert, who testified that, due to the obstruction, Nelson could not reasonably have been aware that she needed to stop. Nelson and her expert's testimony was

unquestionably "new" evidence which Turner was under no obligation to anticipate and negate in her case in chief. Rodriguez, 780 F.2d at 496. Moreover, it is undisputed that the substance of Nakling's testimony had not adequately been presented to the jury prior to Nelson's case in chief. See id.; see also Everett v. S.H. Parks & Associates, Inc., 697 F.2d 250, 252 (8th Cir. 1983) (plaintiff's rebuttal evidence "was not truly relevant until [defendant] presented its defense"). Turner was thus effectively prevented from offering any evidence that the sign was not obstructed. The trial court abused its discretion by prohibiting Nakling from testifying.

Nelson's obstruction testimony was not the only "new" bit of evidence faced by Turner at trial. The presence of the City as a "ghost" tortfeasor, *made known to Turner just minutes before opening statements*, constituted "new" evidence of monstrous dimensions. The entire thrust of Nelson's case changed from contesting her own negligence to proving the alleged negligence of Salt Lake City, without the City present to respond to or defend those allegations. Turner was required to respond not just to new evidence, but to new issues raised against a new party.

Moreover, the admission of Nakling's testimony would have caused no demonstrable prejudice to Nelson. Turner's counsel offered to continue the trial or to allow Nelson to depose Nakling at her convenience in order to prepare cross-examination. See State v. Albretsen, 782 P.2d 515, 519 (Utah

1989)(Additions to the witness list should be permitted where good cause is shown. "[G]ood cause must certainly be construed to include . . . evidentiary matters developed during the presentation of the case of either party, matters which require clarification or rebuttal by that party").

Nelson further could not have been prejudiced by the nature of Nakling's testimony. Nelson presented two witnesses who testified that the sign was obstructed. Nakling's testimony simply controverted Nelson's witnesses, and clearly went to the weight, not the admissibility, of the evidence. The jury should have been permitted to hear both sides of the story.

Under the facts and circumstances of the case, the court's denial of Turner's rebuttal evidence was manifestly unfair and patently prejudicial, and constituted a clear abuse of discretion. The court's ruling should be reversed, and the case should be remanded for a new trial.

CONCLUSION

For the foregoing reasons, Turner respectfully requests that the trial court's rulings be reversed, and that the case be remanded for a new trial consistent with Utah Code Ann. § 78-27-41 and the case law cited herein.

Respectfully submitted,

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CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 3rd day of December, 1992, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

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