

1994

Lisa R. Duncan v. Jack V. Brown : Brief of Appellee

Utah Court of Appeals

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R. Phillip Ivie, Jeffrey C. Peatross; David N. Mortensen; Ivie & Young; attorneys for appellee.
Edward T. Wells; George T. Waddoups; Robert J. Debry & Associates; attorneys for appellant.

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IN THE COURT OF APPEALS 1A10
DOCKET NO. 940295
OF THE STATE OF UTAH

LISA DUNCAN,	:	
Plaintiff-Appellant,	:	Case No. 940295-CA
vs.	:	Oral Argument
	:	Priority 15
JACK BROWN,	:	
Defendant-Appellee.	:	

BRIEF OF DEFENDANT-APPELLEE

Appeal from a Final Judgment and Order
of the Fourth District Court of Utah County
The Honorable Ray M. Harding Presiding

Edward T. Wells (3422),
George T. Waddoups (3965)
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107
ATTORNEYS FOR APPELLANT

R. Phil Ivie (3657),
Jeffery C. Peatross (5221), and
David N. Mortensen, (6617)
IVIE & YOUNG
48 North University Avenue
Provo, Utah 84601
ATTORNEYS FOR APPELLEE

FILED

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this court pursuant to Utah Code Annotated § 78-2a-3(2)(k)(1994).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Was there sufficient evidence to support the jury's finding that the incident at issue did not proximately cause the injuries claimed by plaintiff?

In reviewing a challenge to a civil jury verdict, the appellate court views all evidence in the light most favorable to the verdict. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 799 (Utah 1991). The appellate court must assume the jury believed the evidence and inferences that support the verdict. Canyon Country Store v. Bracey, 781 P.2d 414, 417 (Utah 1989). When conflicting evidence was introduced at trial, appellate courts assume the jury believed those facts that support its verdict. Id.

The verdict of the jury will only be reversed if there is no substantial evidence to support it, and the appellate court concludes that reasonable people would not differ on the outcome of the case. Crookston, 817 P.2d at 799; Ames v. Maas, 846 P.2d 468, 475 (Utah Ct. App. 1993).

2. Did the trial court commit reversible error in admitting evidence that defendant was employed by Brigham Young University and then later admitting evidence that defendant was returning from a Mormon church service at the time of the accident?

The admission of evidence under Utah Rule of Evidence 403 is reviewed for an abuse of discretion and is made in two steps. State v. Dunn, 850 P.2d 1201, 1221 (Utah 1993). The reviewing court must first determine whether the trial court's finding that the evidence was admissible was beyond the limits of reasonability. Id. If the admission of the evidence was beyond the limits of reasonability, then the reviewing court will reverse only if there was a reasonable likelihood that a different result would have been reached had the evidence been excluded. Id.; Utah DOT v. 6200 South Associates, 872 P.2d 462 (Utah Ct. App. 1994).

3. Whether defense counsel's closing argument was so prejudicial that reversal is warranted when counsel referred to the name of plaintiff's counsel's law firm?

Because counsel have considerable latitude in their closing arguments, improper comments by counsel warrant reversal only if the appellate court concludes that absent the improper argument, there was a reasonable likelihood of an outcome more favorable to the plaintiff. State v. Dibello, 780 P.2d 1221 (Utah 1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Rule of Civil Procedure 59(a)(1) and Utah Rule of Evidence 403 have application in this case. Pursuant to Utah Rule of Appellate Procedure 24(b)(2) defendant refers the court to the Addendum of Appellant's Brief for copies of these rules.

STATEMENT OF THE CASE

This appeal arises out of a civil action in which plaintiff claimed significant injuries, including Thoracic Outlet Syndrome, resulting from an automobile accident. Defendant maintained that the impact of the accident was not significant enough to cause the claimed injuries. The jury returned a verdict that the accident did not proximately cause the injuries plaintiff claimed and plaintiff has appealed claiming the evidence was insufficient to support the verdict, prejudicial evidence was admitted, and that improper arguments were allowed.

In its attack on the sufficiency of the evidence to support the verdict, Plaintiff asks this court to consider evidence which was not presented to the jury. On page 8 of Plaintiff's Brief, plaintiff states:

Prior to trial, Duncan served interrogatories on Brown requesting him to identify the location of his car prior to impact and his speed immediately prior to impact.

Brown's answer was: 17(e), see accident report; (f) see accident report.

The accident report showed that Brown's vehicle was going 40 miles an hour when it was distracted by flashing lights and 25 miles per hour upon impact.

Significantly, neither the interrogatories nor the police report were admitted into evidence.

Plaintiff has attached the same to her Brief, and because they have not been admitted into evidence, they should be disregarded by this court. Except for this point, plaintiff's statement of the case accurately reviews some of the evidence admitted at trial and the procedural history of this case.¹ Plaintiff's statement of the case, however, omits a majority of the evidence upon which the jury may have rested its verdict has been omitted. Plaintiff has failed to marshal the evidence as required by the appellate courts. Plaintiff's failure to marshal the evidence is discussed more fully infra at page 22.

¹Plaintiff states on page 5 of her Brief that she made a Motion for a New Trial and indicated the bases of the Motion. However, plaintiff fails to note that the thrust of her motion for a New Trial was not that the plaintiff had been prejudiced or that the jury rendered its verdict under the influence of passion in regards to whether defendant was a BYU professor or not, but that "the jury favored the defendant because they were not aware that he had insurance coverage. The jury did not want the defendant to have to pay out of his pocket. The jury is not to concern itself with how a judgment is paid." (R. 258). In fact, plaintiff's Motion for a New Trial alleged that the jury deliberated for eight hours because of a 4/4 split, and that plaintiff's counsel had contacted members of the jury to determine how they had decided the case. Plaintiff's attack on the jury deliberations was not supported by an affidavit of any juror, but only upon plaintiff's counsel's affidavit that he contacted "a couple of the jurors." (R. 289).

On page 7 of plaintiff's brief she relates the following facts accurately. On December 2, 1988, plaintiff completed her Christmas shopping in Provo and was headed north on University Avenue. The light at the intersection of University Avenue and 3700 North was red. Approximately 15 cars were in front of plaintiff. The weather was good, the road was dry, and the time was 5:30 pm. At or about that time, plaintiff was rear-ended by a car driven by defendant Jack Brown. Defendant Brown was distracted by the flashing lights of the Sheriff's car parked on the side of the road. Utah County Sheriff's Officer David Hill had stopped to give a citation to another motorist when he witnessed Brown skidding and rear-ending the plaintiff. Officer Hill's best estimate of the speed of defendant's vehicle was 5 miles per hour upon impact.

The evidence which plaintiff failed to marshal is as follows. Plaintiff stated that upon impact, she was thrown forward. (R.415). Plaintiff also stated to Officer Baum that she had been thrown forward. (R.417). Likewise, plaintiff stated that her car was thrown forward. (R.445). In fact, plaintiff estimated that her car had been thrown forward two car lengths. (R.448). Nonetheless, plaintiff testified that she did not hit the car in front of her. (R.449). In her deposition, she stated that the car in front of her was a full car length ahead, but upon reflection changed that deposition answer to indicate that the car in front of her was only six feet ahead. (R.450).

At trial, plaintiff needed to read her deposition because she could not recall what happened to her body at the time of the accident. Plaintiff was asked:

Question: So you remember your neck going forward?

Answer: Yes.

Question: And then, did it go back as well?

Answer: Yes.

Question: Do you recall it going back or are you just assuming?

Answer: Well, when I came forward and then---well, when I came forward and then set myself back up.

Question: Did you essentially straight arm, you know, push yourself back with your arms, or do you recall?

Answer: I don't recall.

Question: Do you recall the back of your head coming in contact with the headrest of the vehicle?

Answer: As I set back up, I set back up against it and immediately got out of the car.

(R.479). This point was then clarified:

Let me make sure I understand what you told me. Your head flopped forward and you with your own muscles, using your own strength sat yourself back up, correct?

Answer: Yes.

(R.480). Plaintiff admitted no ambulance was called, nor were EMT's summoned. Id.

Plaintiff admitted that prior to the accident she and her husband had constructed a home, and that she had helped with the construction. Plaintiff further testified that at the time of the accident she had a three-month old baby, and that she carried her smaller children often. (R.483).

Plaintiff unequivocally stated that at the time of the accident she was stopped and had her foot on the brake. (R.492). Plaintiff admitted that she was first diagnosed with Thoracic Outlet Syndrome in January of 1990, over a year after the accident. (R.493).

Plaintiff stated that Dr. Cooper, her chiropractor, never diagnosed thoracic outlet symptoms

in any of the 60 visits during which she was treated prior to being diagnosed with Thoracic Outlet Syndrome. (R.494). Plaintiff admitted that discoloration of her arm began after the 60 visits with Dr. Cooper. (R.495). Plaintiff testified that during the treatment by Dr. Cooper, the chiropractor, put pressure on her shoulder in order to "crack" her back, and also used "significant force" on her neck to make her neck pop as well. (R.495-96). Plaintiff admitted that she had treated with chiropractors in the past, and in fact, in one instance had been treated for back ache during a pregnancy. (R.497). Lastly, plaintiff admitted that she had been referred to Dr. Gauvin, her treating surgeon, by the attorney who was handling her case at that time. (R.498).

Defendant, Jack Brown, explained his statement to Officer Baum concerning whether or not he was traveling at 40 miles an hour at the time of the accident. Mr. Brown explained:

As soon as I saw the yellow light I began to slow. And that was the 40 miles I had indicated, at least to me, indicated the speed I was going when I saw the yellow light. We continued to slow. I took my foot off the accelerator and just let it run. And then we were distracted and looked to the side. I noticed the light was green, just turned green ahead of us. And then we turned to look at the flashing yellow light and was distracted for that moment, turned back and saw the car in front of me. I slammed on my brakes. I was able to observe that I couldn't go left because the car was coming from the opposite direction. I could not go right because the policeman's vehicle was standing right there directly at the side of me. And so the only alternative was to go straight ahead.

(R.395-96; compare with R.380).

Mr. Brown testified that he did not feel anything upon impact, nor was he pushed forward or hit into anything. (R.396). Incidentally, Mrs. Brown who was sitting next to Mr. Brown felt nothing either. (R.722).

Mr. Brown testified that he was not in a hurry. (R.399). Mr. Brown stated that he did not tell Officer Baum, the investigating officer, how fast he was going upon impact. (R.400). Mr. Brown believed that if he had had another second to brake, the accident would not have occurred. Id. Mr. Brown stated that the damage to his vehicle was fairly depicted in the pictures presented at trial. (R.401). Mr. Brown also stated that the photographs of plaintiff's vehicle, attached hereto as Addendum 1, accurately depicted the damage as it existed after the accident. Id. Mr. Brown testified that he took the car to a dealer to have the front end inspected and that no internal damage was found. (R.405). As plaintiff has provided in her statement of the case, Mr. Brown testified that plaintiff said she was okay at the scene of the accident. (R.400).

Two law enforcement officers testified in this matter. Officer Baum, the investigating officer, and Officer Hill, a witness. Officer Baum testified that he was working part-time when he investigated this accident. Although Officer Baum arguably testified as an expert in the area of accident reconstruction, he admitted that he was unfamiliar with federal bumper absorption standards. (R.520). Officer Baum stated that he just estimated the speed of this accident by looking at the damage. (R.521). Officer Baum's estimate of speed was made although he conducted no test to see the internal structures of the vehicle,

nor could he say what kind of forces would produce the kind of damages as seen in the accident at issue. (R.521). Officer Baum stated that he did not use Officer Hill's estimate of speed as a basis of his opinion. (R.523).

Officer Hill, an actual eyewitness to the accident, stated that he has investigated over 100 accidents in 10 years. (R.601). He testified that he looked directly at the accident as it happened. (R.603; 613). Officer Hill said that plaintiff's vehicle was moved a foot or less. (R.604). In fact, Officer Hill stated that it is possible plaintiff's vehicle did not move at all. (R.610). Officer Hill testified that he disagreed with Officer Baum in the estimation of speed (R.607), and as plaintiff has stated in her statement of the case, Officer Hill's best estimate of speed was 5 miles per hour. (R.604; 610).

Lieutenant Greg DuVal, of the Provo Police Department, testified as an accident reconstructionist. Plaintiff inaccurately refers to Mr. DuVal as a part-time reconstructionist. In actuality, Mr. DuVal is a professional reconstructionist on a part-time basis, however, his full-time job is as a police officer for Provo City, a job in which his duties include accident reconstruction for the city. (R.685). Mr. DuVal testified and informed the jury of what exactly a reconstructionist does. (R.686). Mr. DuVal estimated that he has reconstructed in excess of 500 accidents in the last six or so years. (R.686). Mr. DuVal indicated that in preparation for his testimony he had reviewed a copy of the accident report, examined the vehicle being driven by defendant in this case, removed various parts of the defendant's vehicle to determine any internal damage, reviewed

photographs of the vehicle plaintiff was driving, and reviewed the depositions that had been taken in the case. (R.688). Additionally, Mr. DuVal had spoken personally with Officer Hill, an eyewitness to the accident. (R.688).

Mr. DuVal testified that he went to the police academy for his initial police training, and thereafter attended an intermediate accident investigation school, an advanced accident investigation school, and a reconstruction school all within the State of Utah. Subsequent thereto, Mr. DuVal attended Northwestern University in Chicago and went through their reconstruction program. (R.689). Mr. DuVal has attended courses taught at the Institute of Police Technology and Management and has attended other meetings and educational opportunities surrounding accident reconstruction. (R.689). Mr. DuVal stated that he was familiar with Federal Bumper Standards and explained what they were to the jury. (R.690). Mr. DuVal compared and verified the weights of the particular vehicles involved in this accident and based upon the damage to those vehicles, as well as speaking with witnesses and defendant, and reading plaintiff's deposition, came to a conclusion regarding speed. (R.691).

Mr. DuVal stated that damage to vehicles can be an indication of the speed the vehicles were traveling at the time of the accident. (R.691). Mr. DuVal testified specifically that as to defendant's vehicle, a person using their own strength could bend the hood of that vehicle. (R. 695). Mr. DuVal testified:

[A]s far as the damage to this car [defendant's vehicle], it is very, very small. We're talking an inch or two of plastic that's broken out that's recessed in there. This plastic is so weak I could stand on it and break it. With something like that we are talking about a very low speed. Three is a very good speed that could cause this damage.

The radiator is five inches behind the bumper as its measurement shows. Any of these pieces didn't have any opportunity to get damaged, but there's no strength across this area of the car. It would be very easy to contact the radiator with a bumper if the speed were larger than three miles an hour. The headlights are damaged, therefore we're talking about a very low speed.

(R.695-96). Mr. DuVal testified that he compared the damages in this case with testing data to see if his conclusion of three miles an hour was consistent therewith. Mr. DuVal stated that it was. (R.696).

Mr. DuVal testified that under the laws of physics if one is hit from behind they will be moved backwards. Mr. DuVal explained to the jury:

To give you an idea, if we were to have two equally weighted objects and one was traveling at five miles per hour when it collides with the back end of another object, it will accelerate that object to half of the impact speed or at two-and-a-half miles per hour. The fact that we have a heavier front vehicle and a lighter rear vehicle, means that the acceleration to the forward vehicle will be less. In this case it's about 45 percent of the total impact speed would be imparted to the front vehicle.

(R.698). Mr. DuVal stated: "If the brake were on and [the] foot still on the brake pedal, there would be very little if any movement of the vehicle from the impact." (R.700). Mr. DuVal also explained how forces are absorbed:

The forces are absorbed, one, by the creation of the damage, or two, the allowances that the bumper and things have. There is also absorption through the suspension system, through the seats, such as these padded seats we sit in.

If we were sitting in a car when a collision occurs, it's absorbed into the seat of the car as well.

(R.700-01). Mr. DuVal analogized the impact force of this accident to one where one rolls into a parking block in a parking lot. (R.701).

Mr. DuVal also testified that at three miles an hour one would need only five inches to stop. Mr. DuVal concluded that if Mr. Brown, the defendant, would have had five more inches to skid, he would have stopped short of touching the car. (R.712). Mr. DuVal testified that plaintiff's testimony that she was moved forward towards the steering wheel and then pushed herself back and sat up is inconsistent with the laws of physics. (R.713).

Four medical doctors testified in this matter: Dr. McIff, Dr. Gaufin, Dr. Root, and Dr. Cooper. Dr. Cooper testified that in the history that plaintiff gave him she stated that she was hit at 40 miles per hour. (R.638). Also, plaintiff indicated she was moving at the time of the accident. (R.638). Dr. Cooper admitted that there is a correlation between the force and injury; that is, that there must be some force in order for an injury to occur. (R.666). Dr. Cooper explained to the jury that he is a doctor of chiropractic, not a medical doctor. He explained that he only has an associates degree, and did not receive a bachelor's degree prior to going to chiropractic school. (R.667). Dr. Cooper testified that in over 60 visits he never diagnosed plaintiff with Thoracic Outlet Syndrome. (R.670). Dr. Cooper admitted that if there was no force there could be no injury. (R.670). Dr. Cooper further

admitted that if someone were to push another from behind there would not be enough force created to cause a flexion/extension injury. (R.681-682).

Dr. Max Root testified that he is a medical doctor specializing in physical medicine and rehabilitation. (R.615). Dr. Root admitted that in order for an injury to occur there must be force, and that, therefore, there is a correlation between the speed of colliding vehicles and whether a party could be injured. When the doctor was asked: "So regardless of whether we're experts in sheet metal or car parts, whatever, if there's no force on the person, there is no possibility of injury, correct? Answer: Yes." (R.626). Dr. Root also testified that if one is hit in a rear-end accident, any force would cause the head to go backward. (R.628). The doctor stated: "If there wasn't enough force there could not be a whiplash injury." (R.628). Dr. Root testified that his treatment of plaintiff would have been the same whether or not her complaints were trauma-related. (R.629). Dr. Root had no independent recollection of the patient's history, but stated that his records indicated the history he was given was that plaintiff was rear-ended at 40 miles per hour. (R.630).

Dr. Lynn Gaufin, plaintiff's physician of choice, is a medical doctor and the surgeon who performed a first rib resection in treating plaintiff for Thoracic Outlet Syndrome. Dr. Gaufin testified that the history communicated to him by plaintiff was that she was hit at 40 miles an hour. (R.536). Dr. Gaufin stated that Thoracic Outlet Syndrome can be caused by any sort of repetitive use of muscles, that specifically, Thoracic Outlet Syndrome can be caused by exercise, carrying things, and building things. (R.572). Dr.

Gaufin testified that Thoracic Outlet Syndrome can be associated with childbirth, as well as lifting and carrying babies and small children. Id. Dr. Gaufin admitted that he conducted no outside investigation of this case. (R.573). Dr. Gaufin acknowledged that plaintiff has a congenitally small outlet, but stated that even someone with a congenitally small outlet can experience a traumatic event, where relatively minor force or trauma is experienced, and not suffer any consequence. (R.573). Dr. Gaufin stated that if one is struck from behind they go backward, not forward. (R.574). Dr. Gaufin stated that in order for a problem in the thoracic outlet region to occur, one would necessarily need forces severe enough to tear muscles. (R.574). Dr. Gaufin stated: "If the force was not a violent force then you would have to look for some other cause other than the accident to produce the symptoms." (R.575-76). Dr. Gaufin stated that chiropractic manipulation could cause thoracic outlet problems. (R.575). Dr. Gaufin stated that he had been given no history of preexisting neck pain, head pain, shoulder pain, or upper back pain by plaintiff. (R.576). Dr. Gaufin stated that the plaintiff did not report prior problems of arthritis in the chest to him. (R.577).

Dr. Gaufin noted adhesions or scarring tissue in the thoracic outlet when he performed surgery on plaintiff and at trial stated that such adhesions were consistent with repetitive micro-trauma. (R.577). Dr. Gaufin stated that Thoracic Outlet Syndrome can become symptomatic, and then alternatively asymptomatic. (R.578). Dr. Gaufin did not review plaintiff's prior medical records. (R.579). Dr. Gaufin stated that he would not expect an impact occurring between three and four miles an hour to cause a thoracic outlet

aggravation or injury. (R.581-82). Dr. Gaufin testified that the possibility that an impact less than five miles an hour caused thoracic outlet problems was a very small, even remote, possibility. (R.581-83). Dr. Gaufin testified that temporal mandibular joint problems (TMJ) can have symptoms such as neck pain and headache. (R.584). Dr. Gaufin stated that neck pain does not necessarily mean that one is having problems with their thoracic outlet. (R.588-89).

Dr. E. Bruce McIff is a neuroradiologist practicing at Utah Valley Regional Medical Center. (R.739). Dr. McIff stated that he has a special interest in Thoracic Outlet Syndrome. (R.741). Because of this special interest in Thoracic Outlet Syndrome, and his experience in the area, Dr. McIff believes he has a thorough understanding of Thoracic Outlet Syndrome. (R.741-42). Dr. McIff explained to the jury how Thoracic Outlet Syndrome is diagnosed and told the jury how he developed the procedure that is used at Utah Valley Regional Medical Center; that is, how he modified the normal procedure used, and how he taught that procedure to Dr. Wing who is the radiologist who performed the angiogram on plaintiff in this case. (R.742-43).

Dr. McIff stated that the typical age for spontaneous onset of symptoms of Thoracic Outlet Syndrome is 25 to 35 years of age. (R.745). Dr. McIff explained to the jury that Thoracic Outlet Syndrome arises more in females than in males (R.746), and that the cause is usually a congenitally small thoracic outlet. (R.749). Dr. McIff stated that Thoracic Outlet Syndrome can be caused by trauma, such as fracture of the clavicle, by

callous formation, or bone disease. Id. In reviewing the radiological films in this matter, Dr. McIff stated that plaintiff has no evidence of fracture of the clavicle or fracture of the ribs. (R.749). Dr. McIff stated that he had reviewed Dr. Gaufin's operative notes. (R.749-50). In those notes there was mention of more than the typical amount of fibrous tissue or adhesions in plaintiff's thoracic outlet. (R.750). Dr. McIff stated that this fibrous tissue could have resulted from repetitive use. (R.750-51). Dr. McIff stated that chest pain can indicate Thoracic Outlet Syndrome and there have been instances where an initial diagnosis of heart attack had been made, but it turned out to be a thoracic outlet problem. (R.751). Dr. McIff testified that it is much more common to see thoracic outlet problems caused by repetitive kinds of relatively minor trauma, by which he meant the activities of normal life. (R.752). Dr. McIff also testified that thoracic outlet problems are seen in housekeepers who repeatedly sweep, mop and scrub floors. Id.

Dr. McIff stated:

A single event--the only documented single events have been those that have documented fracture with callous formation. To assume that a single event would produce enough adhesions and trigger it, it would take a fairly significant single event.

(R.752-53). Dr. McIff concluded:

Most things that we see that end up with a focal abnormality, all the way from bone tumors to brain tumors, patients frequently go back and say yes, I bumped my leg two-and-a-half years ago; I had a bruise here. So the question you're asking, do we relate these kinds of things to single events, the answer is that that's a very common thing.

Question: Even if it has no causative relationship?

Answer: Even if it has no causative relationship.

(R.753).

SUMMARY OF THE ARGUMENT

I. ABUNDANT EVIDENCE SUPPORTS THE JURY'S VERDICT

Plaintiff is not entitled to a new trial upon the basis that there is insufficient evidence to support the verdict. First, plaintiff has waived the right to attack the sufficiency of the evidence by failing to make a directed verdict motion. By allowing the matter to go to the jury without making a directed verdict motion, plaintiff gambled on a higher standard of review in the event that the defendant appealed the verdict. In this case, plaintiff gambled and lost.

Plaintiff's request that the appellate court review the sufficiency of the evidence is likewise barred by plaintiff's failure to marshal the evidence. In defendant's Statement of the Facts, defendant has listed almost 100 items of evidence cited to the record which plaintiff failed to marshal. For this reason, when the plaintiff omits the majority of the facts upon which the jury's verdict could have rested, the court should not address the matter.

In any event, abundant evidence existed for the jury to find that an extremely low-speed impact was involved in this accident, and that it could not have proximately caused the injuries plaintiff claimed. Defendant and his wife stated that they felt nothing upon impact. The only objective eyewitness to the accident said his best estimate of speed

was five miles per hour, and that plaintiff's vehicle might not have even moved forward. An expert in reconstruction showed the jury numerous reasons to believe that an insignificant impact had occurred. By accepting the defendant's contention that an insignificant impact had occurred, the jury could thereafter accept the medical testimony that without sufficient force an injury cannot occur. It was pointed out to the jury that plaintiff suffered from symptoms similar to those claimed in the lawsuit prior to the accident. Likewise, medical doctors explained that plaintiff's gender and lifestyle could have been a precipitating factor in plaintiff's physical problems.

II. THERE WAS NO IMPROPER INJECTION OF THE ISSUE OF RELIGION INTO THIS TRIAL

As a foundational background question, defense counsel asked defendant where he worked. The jury was informed that defendant worked at BYU and taught Spanish. Later, defense counsel asked plaintiff the purpose of his trip, to which defendant answered that he and his wife were returning from a trip to a local Mormon Temple. The question concerning defendant's work place is not prejudicial as it was simply foundational background information. In fact, plaintiff's counsel asked similar background foundational questions of plaintiff.

Defense counsel's question concerning the nature of defendant's trip was well within the realm of relevancy since it related to the state of mind of the defendant; for

example, the question was probative of whether he was in a hurry and whether or not he was attentive while driving.

III. NO PREJUDICIAL ARGUMENT WAS MADE BY DEFENSE COUNSEL IN CLOSING ARGUMENTS

In her Brief, plaintiff outlines four instances of alleged misconduct by defense counsel. On two of these instances, plaintiff did not object and therefore has waived any right to assert error based thereon.

Plaintiff assigns error to the statement of defendant's counsel that plaintiff's counsel brought the suit. Such a comment was allowable in that plaintiff's counsel tried to blame defendant for requiring plaintiff to go to trial. Plaintiff's counsel asked the jury rhetorically why defendant had put plaintiff "through the hoops." He asserted that defendant, by and through his counsel, had lengthened the trial improperly. It is to this statement that defense counsel was replying. The comments made by defense counsel were not improper because they were responsive to comments made by plaintiff's counsel. Since there is no basis upon which error can be predicated, this court should affirm the jury's verdict.

ARGUMENT

I. ABUNDANT EVIDENCE SUPPORTS THE JURY'S VERDICT

Abundant material evidence exists to support the jury's verdict. Accordingly, plaintiff is not entitled to a new trial. However, this court should not make a determination of whether the evidence supports the verdict in this case because plaintiff failed to make a

directed verdict motion concerning proximate cause below. Likewise, plaintiff has failed to marshal the evidence and therefore may not challenge the sufficiency of the evidence.

A. PLAINTIFF HAS WAIVED THE RIGHT TO ATTACK THE SUFFICIENCY OF THE EVIDENCE BY FAILING TO MAKE A DIRECTED VERDICT MOTION

"The law is that one who does not move for a directed verdict generally has no standing to urge on appeal that the evidence does not support the judgment." Henderson v. Meyer, 533 P.2d 290, 291 (Utah 1975). Accord Pollesche v. Transamerica Ins. Co., 27 Utah 2d 430, 497 P.2d 236 (1972). The record below only indicates that plaintiff moved for a directed verdict regarding the negligence of the defendant. (R. 727-729). A review of the record indicates that plaintiff never made a directed verdict motion on the issue of proximate cause. Accordingly, plaintiff should not be allowed to attack the sufficiency of the evidence to support the verdict on this issue.

While taking exceptions to the jury instructions, defense counsel took exception to the special verdict form. Defense counsel asked the court to split the medical bills into categories of past and future, and to have the issue of permanent disability separately determined by the jury. Defense counsel requested this action so that a record on the no-fault tort threshold could be made. It was defendant's belief that the plaintiff had not met the threshold requirements of Utah Code Annotated § 31a-22-309. The court ruled:

Well, the court has advised you, now on the record I will state that the court, as a matter of law, finds that the threshold has been met by the expenditure of

medical expenses that were reasonably and necessarily incurred in excess of \$3,000.

(R. 761). The appellate court should note that this was not plaintiff's motion. It was only a ruling of the court denying defendant's request to have medical bills split on the special verdict form.

Plaintiff now wishes to have this ruling construed as a directed verdict as to causation. Plaintiff's claim fails for a number of reasons. First, there was no motion by plaintiff for such action. Second, the court did not actually rule as to causation, but only that an expenditure of \$3,000 in medical expenses had occurred. Lastly, although defendant does not appeal this ruling, the ruling was erroneously made. Utah Code Annotated § 31a-22-309(1) provides:

A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- • •
(c) permanent disability;
- • •
(e) medical expenses to a person in excess of \$3,000.

Defendant is unsure of whether the court understood his request to have the medical bills separated by categories of past or future as the record reveals. (R. 761). It is the defendant's position that if the jury came back with a verdict of less than \$3,000, the trial court would have to enter a verdict of no cause of action finding plaintiff had not met the

requirements of § 31A-22-309. In any event, because no motion was made by plaintiff for a directed verdict regarding this tort threshold or the issue of causation, and because the court did not make any ruling as to causation, this court should disregard plaintiff's argument regarding the insufficiency of the evidence to support the verdict.

Failure of the appellant here to present to the trial court a motion for directed verdict not only foreclosed the trial court from consideration of his motion for judgment notwithstanding the verdict, but . . . such failure precludes the appellate court from reviewing the sufficiency of the evidence to sustain the verdict.

Brigham v. Moonlake Electric Assoc., 24 Utah 2d 292, 470 P.2d 393 (1970)(citation omitted). The Nevada Supreme Court explained the policy behind this rule. In Price v. Sinnot, 460 P.2d 837 (Nev. 1969), the court stated:

It is solidly established that when there is no request for a directed verdict, the question of sufficiency of the evidence to sustain the verdict is not reviewable. (citations omitted). A party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it.

Id. at 841. In this case, plaintiff gambled. If she had made the directed verdict motion and won, the issue would have been reviewed de novo, since the decision to grant a directed verdict is a legal conclusion wherein no deference is given to the trial court. Management Comm. of Grace Pine Homeowners Assoc. v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982). On the other hand, when plaintiff allowed the issue of causation to go to the jury, plaintiff gambled that she would prevail. If the matter were to be appealed, all inferences would go in favor of the prevailing party. In this case, plaintiff gambled and lost.

Plaintiff claims numerous times in her Brief that the court directed a verdict in favor of plaintiff on whether she sustained injuries as a result of the accident. See Plaintiff's Brief at 4, 5, and 11. In each instance plaintiff maintains that the court ruled as a matter of law that plaintiff sustained medical expenses "as a result of the accident." See Id. Such is not the case, as stated, since the court only stated that the threshold had been met by the "expenditure" of medical expenses of excess of \$3,000. Defendant never disputed that plaintiff had gone to the doctor enough times to incur \$3,000 in medical bills. Defendant did dispute that plaintiff's injuries were a result of the accident and that defendant should be responsible therefore.

More importantly, plaintiff has waived any right to claim that the verdict is inconsistent with the earlier ruling of the court. As plaintiff has pointed out, the jury was asked to resolve only two issues: whether Brown's negligence caused Duncan's injuries, and if so, what amount of damages should she be awarded. See plaintiff's brief at 5 and R. 222-224 and the Judgment on the Special Verdict R. 250-252. Plaintiff never excepted to the jury form. Therefore, since no directed verdict as to causation was made, and no exception to the jury's special verdict form was made, no error can be predicated thereon. Accordingly, the court should not review the sufficiency of the verdict.²

²Although plaintiff cites to the record concerning defendant's motion relative to § 31A-22-309, plaintiff does not argue the point at all in her Brief.

B. PLAINTIFF HAS FAILED TO MARSHAL THE EVIDENCE

Plaintiff has failed to marshal the evidence. More specifically, plaintiff has neglected to follow the appellate court's admonitions and instructions as laid out in West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991), and more recently recited in Oneida-SLIC v. Oneida Cold Storage & Warehouse, 872 P.2d 1051, 1053 (Utah Ct. App. 1994) wherein the court stated:

[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling] duty . . . the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence produced at trial which *supports* the very finding the appellant resists.

Id. Thereafter, the appellant must show the verdict is so lacking in support as to be against the clear weight of evidence, thus making the verdict clearly erroneous. Id. The appellate courts of Utah have noted that the marshaling requirement reflects that the appellate courts do not sit to retry cases and will refuse to consider the merits of challenges if the evidence is not marshaled.

Plaintiff has failed to marshal the evidence in this case, and in fact, the same could be said of plaintiff's arguments as was said concerning a challenge to the sufficiency of the evidence in Hodges v. Gibson Products Co., 811 P.2d 151, 156 (Utah 1991):

As written, their arguments are reasonable and have persuasive effect. From the point of view of appellate procedure, however, they ignore the rules designed to give stability to jury verdicts.

The court in Hodges found that the appealing party had failed to marshal the evidence and stated: "We emphasized it is counsel's professional duty to analyze the evidence with care and provide record citations for every asserted factual proposition." Id. Appellant's duty implicitly includes that appellant may not omit evidence which hurts her case.

In plaintiff's brief, while she cites a few facts which do not support her case, she omits the majority of facts upon which the jury's finding on causation could have rested. Because plaintiff failed to marshal the evidence, plaintiff should be precluded from seeking review of this matter. Nonetheless, if one reviews the evidence, one finds that the medical doctors are in harmony, all stating that without sufficient force there could not be injury. While it is true that on direct examination some of the physicians stated that they believed the accident caused plaintiff's injuries, such conclusions were based upon plaintiff's statements to the physicians that an impact of 40 miles an hour had occurred. The evidence at trial showed that a 40 mile an hour collision did not occur. Accordingly, the jury had ample opportunity to find that with a minor touching of the vehicles as occurred in this case, there was no causative link between the accident and plaintiff's claimed injuries.

C. ABUNDANT EVIDENCE EXISTED FOR THE JURY TO FIND THAT AN EXTREMELY LOW IMPACT WAS INVOLVED IN THIS ACCIDENT

Pictures speak a thousand words, and accordingly, defendant directs the court's attention to the "damage" to plaintiff's vehicle as shown in defendant's Exhibit 13. See Addendum 1.

The testimony was as follows. Upon impact, defendant Mr. Brown stated that he felt nothing. (R.397). Likewise, Mrs. Brown, who was a passenger in Mr. Brown's vehicle, felt nothing. (R.722). Officer Hill, the only objective eyewitness to the accident, said his best estimate of the speed of defendant's vehicle upon impact was five miles per hour. (R.604; 610). Officer Hill stated that it is possible plaintiff's vehicle did not move at all. (R.610). Mr. Brown clarified his statement to Officer Baum, the investigating officer, that he was traveling at 40 miles an hour prior to the accident. (R.380). Mr. Brown did not tell Officer Baum how fast he was going at impact. (R.400). The plaintiff admitted at trial that there was no damage to her car. (R.475). Defendant reported that plaintiff told him that she was okay. (R.400). Plaintiff stated that she was thrown forward, a statement which defies the laws of physics and a point with which several expert witnesses disagreed. (R.574; 628; 713).

Although plaintiff suggests Mr. DuVal may not have been qualified by repeatedly referring to him as a part-time reconstructionist, a review of evidence shows that Mr. DuVal is well qualified. In fact, part of his full-time profession as a member of the Provo Police Department includes the investigation of accidents. Mr. DuVal noted the following facts which he explained to the jury. There was only minor damage to the defendant's vehicle in this case. As stated, there was no damage to plaintiff's vehicle. Mr. DuVal explained how the structure of the vehicles would absorb all of the force, and that plaintiff's depressed brake would likewise absorb force. (R. 701). In other words, plaintiff

herself would experience no force. Mr. DuVal explained that plaintiff's description of her own body movement upon impact could not have happened as she stated. (R. 713). Mr. DuVal also explained how forces transferred and that since the solid structures behind the plastic grill in the front of defendant's vehicle had no damage, and that there was nothing between the plastic and those solid elements, there must not have been very much force. (R. 696). Based upon these observations, and understanding the applicable Federal Bumper Standards, as well as the structural make-up of the vehicles involved, Mr. DuVal stated that in his best estimate the impact speed was three miles an hour. (R. 696).

Upon the foregoing evidence, the jury may have found that the impact speed in this case was three miles an hour or less. The testimony of Mr. DuVal is comparatively more credible than Officer Baum. The jury is free to believe whom they wish, and they could have believed the testimony of Mr. DuVal and not that of Officer Baum. The jury could have found Mr. DuVal more qualified than Officer Baum. The jury may have been surprised that Officer Baum did not consider the testimony of the only objective eyewitness in making this conclusion as to speed (R. 523), and may have found his testimony unconvincing as he is unfamiliar with Federal Bumper Standards, and did not know what kind of forces would have been involved in an accident of this kind. (R. 521). While there may have been some minutia of evidence to the contrary, on appeal, the jury verdict will only be reversed upon a showing that the evidence so clearly preponderates in favor of the appellant that a reasonable person would not differ in the outcome of the case. Pratt v. Pro

Data, 246 Utah Adv. Rep. 3 (Utah 1994). As the jury had ample evidence before it to find that the accident at issue involved an impact speed of three miles an hour or less, the pivotal question then becomes, whether the accident could have caused the plaintiff injury given the low rate of speed.

Plaintiff's main physical complaint related to Thoracic Outlet Syndrome.

Plaintiff submitted medical bills in excess of \$15,000, including the costs of thoracic outlet surgery. Plaintiff's suggested a damage award in closing arguments to the jury in excess of \$340,000. (R. 777). Thoracic Outlet Syndrome and the causes therefore were explained to the jury by Dr. McIff and Dr. Gaufin. Dr. McIff, a medical doctor specializing in neuroradiology, informed the jury of his special interest and understanding of Thoracic Outlet Syndrome. (R. 741-42). He informed the jury that he modified the procedure for diagnosing Thoracic Outlet Syndrome and taught that procedure to Dr. Wing, the radiologist who performed the angiogram on plaintiff. (R. 742-43).

Dr. McIff explained to the jury some alternate causes of Thoracic Outlet Syndrome, many of which are applicable to plaintiff. Dr. McIff explained that it is typical for the onset of thoracic outlet symptoms to occur between the ages of 25 and 35. (R. 745). Plaintiff was 28 at the time of the accident and would therefore fall directly in this group. Likewise, plaintiff is female and Dr. McIff explained that thoracic outlet problems are seen more often in females than males. (R. 746). Dr. McIff also stated that plaintiff had a congenitally small thoracic outlet. (R. 746). Dr. McIff testified that Thoracic Outlet

Syndrome, when trauma related, is usually caused by severe trauma such as a fractured clavicle or rib, and that the diagnostic films and plaintiff's history showed no evidence of a fractured clavicle or rib. (R. 749). Dr. McIff testified that thoracic outlet problems are commonly confused with heart attack symptoms as they both can involved chest pain. (R. 751). The jury was aware that plaintiff had suffered from chest pain before the accident and had been treated by a chiropractor. (R. 459).

Dr. McIff had reviewed plaintiff's medical records and noted that Dr. Gaufin's operative notes addressed adhesions or scar tissue found in the thoracic outlet region. Dr. McIff opined that such could have been the result of repetitive use. (R. 751). Dr. McIff stated that thoracic outlet problems are usually caused by normal life activities, such as housekeeping, mopping, and scrubbing, for example. Dr. McIff stated that the only single-event-trauma documented which would cause Thoracic Outlet Syndrome was a fracture of some kind. (R. 752-753). If a single traumatic event were to cause Thoracic Outlet Syndrome, Dr. McIff stated: "It would take a fairly significant single event." (R. 753).

Dr. Gaufin likewise testified concerning the cause of the injuries claimed by plaintiff. On direct examination, Dr. Gaufin stated:

I thought given the history she provided me, unless there was data to the contrary, that she stated she had been asymptomatic before her accident; that I believed that having been born with a congenitally narrow outlet, then an accident would cause extension and flexion movement of the neck resulting in some tearing of the muscles and soft tissues in that area, perhaps even some bleeding; that that creates a condition for scarring around the nerve and can cause what was once an asymptomatic condition to become symptomatic.

(R. 549-50)(emphasis added). Notably, Dr. Gaufin qualified his statement on causation with the premises of "given the history [plaintiff] provided" and "unless there was data to the contrary." Id. In this case, the jury was witness to a large amount of data to the contrary. Dr. Gaufin stated that plaintiff had given him a history of an impact at 40 miles per hour. (R. 570). As already highlighted, the jury could have found this history to be inaccurate.

Like Dr. McIff, Dr. Gaufin gave the jury examples of causes for Thoracic Outlet Syndrome other than trauma. Dr. Gaufin stated that Thoracic Outlet Syndrome has been associated with childbirth. (R. 572). The jury was informed that plaintiff had a three-month old baby at the time of the accident. (R. 483). Dr. Gaufin also stated that carrying babies and small children can precipitate thoracic outlet problems. (R. 572). During plaintiff's examination she testified that she carried babies and small children. (R. 483). Dr. Gaufin stated that he had been given no history of prior neck pain, head pain, shoulder pain, upper back pain, or chest pain. (R. 576). The jury was informed that plaintiff had suffered from prior problems in these regards. When asked what kind of force would be needed to create problems with thoracic outlet area, Dr. Gaufin testified that there would have to be enough force to tear the muscle tissue. (R. 574). Dr. Gaufin also stated that chiropractic manipulations can cause thoracic outlet problems. (R. 575). Dr. Gaufin stated that he had not reviewed plaintiff's medical records. Accordingly, he might not have been made aware of the numerous preexisting conditions from which the plaintiff suffered or the other variables which may have affected his opinion on the cause of plaintiff's problems. Most

telling, Dr. Gaufin stated that he would not expect a collision of three or four miles an hour to cause thoracic outlet aggravation or injury. He stated that the possibility of thoracic outlet problems being caused by a three to four mile per hour impact was "very small, you might say remote." (R. 581-83). The jury could have found that the possibility was too remote.

Dr. Root also testified as to plaintiff's condition. Dr. Root concurred with Dr. Gaufin and Dr. McIff that one must have speed and force in order to inflict an injury on the human body. (R. 626). In other words, if there is no force there is no injury. Like all the other treating physicians and health care providers in this case, plaintiff had supplied Dr. Root with a history of a 40 mile per hour impact. (R. 630). Dr. Root stated that his treatment had to do with plaintiff's pain and would have been the same whether or not it was trauma-related. (R. 629).

Plaintiff's main treating health care provider immediately after the accident was Dr. Cooper, a doctor of chiropractic. Plaintiff told Dr. Cooper that the impact speed of the accident was 40 miles per hour. (R. 638). Like all other medical witnesses in this case, Dr. Cooper admitted that one needs force to be applied to the body in order for an injury to occur. (R. 666; 670). Dr. Cooper acknowledged that he never diagnosed Thoracic Outlet Syndrome in the plaintiff. (R. 670). Dr. Cooper also stated that someone could push another person from behind, and that would not necessarily cause a flexion/extension injury. (R. 681-82). Interestingly, plaintiff never told Dr. Cooper about prior back pains. (R. 676). Dr. Cooper stated that there are many causes for muscle spasm, including stress. (R. 677).

The jury also heard from plaintiff herself giving testimony as to the force of the accident. The jury could easily have found this testimony not credible. Plaintiff stated on numerous occasions that she was thrown forward, which is a physical impossibility under the facts of this case, unless of course she had slammed on her brakes causing the accident. Plaintiff stated that she had been thrown two car lengths ahead, although the vehicle in front of her was only six feet ahead and was not touched. Plaintiff's testimony concerning the accident disagrees with all other witnesses to the accident, including the Browns and Officer Hill.

The evidence at trial also showed that plaintiff had numerous preexisting conditions. Prior to the accident she experienced headaches (R. 674), back pain (R. 676), back pain associated with childbirth (R. 497) which was treated by a chiropractor, Temporal Mandibular Joint Disorder (TMJ), which included headaches and facial pain (R. 440), headache and ringing in the ears (R. 457), chest pain which at one time was thought to be some form of arthritis (R. 459), and to another doctor she described daily headaches which she had had for four to five years. (R. 461).

Less than two years prior to the accident, plaintiff had complained of pain in her shoulders and upper back and lower back pain. (R. 462). Plaintiff had likewise complained of back pain flare-ups during pregnancy. (R. 462). Again, in 1987 plaintiff had complained to health care providers concerning headaches, neck pain, and upper back pain. (R.468).

In order to help the jury understand that plaintiff had not been injured in the accident at issue, a medical record from the day of the accident was read into evidence. An x-ray of the plaintiff's back was taken on the day of the accident and showed:

The vertebral bodies, disc spaces and alignment are normal. The spinous process and pedicles are intact. The SI joints appear normal. No spondylolysis spondylolisthesis are noted.

Impression: Normal AP and lateral views of the lumbar spine. Alignment and configuration of the cervical vertebrae are normal, and disc spaces are not narrowed. Pre-vertebral soft tissues are normal. Oblique view show patent neural foramina. Posterior elements are intact.

(R.788). The radiologist's impression was: "Normal cervical spine exam."

(R.788)(Defendant's Exhibit #28).

The record is clear that plaintiff had her day in court and was given the opportunity to present whatever evidence she had that she had been injured in the accident at issue. The jury was well within its bounds to assess the credibility of the respective witnesses and to choose what evidence to believe or disbelieve. The fact that plaintiff said that she was completely asymptomatic prior to the accident is not compelling evidence given the fact that her medical records show preexisting conditions and also showed she was not diagnosed with Thoracic Outlet Syndrome until well after a year following the accident. In sum, the jury could have simply not believed plaintiff.

As stated, all presumptions and inferences in this appeal regarding the sufficiency of the evidence must be made in favor of the validity of the verdict. Joseph v. W.H. Groves Latter-Day Saints Hospital, 10 Utah 2d 94, 348 P.2d 935 (1960). A

conscientious review of the record, construing all things in favor of the verdict, leads to the conclusion that an overabundance of evidence existed to support a verdict that the accident in this case did not cause the injuries plaintiff claimed. There was ample evidence to believe that the collision occurred at three miles an hour or less. There was abundant evidence to believe that plaintiff suffered from preexisting injury and was not asymptomatic at the time of the accident. Likewise, there was abundant evidence upon which the jury could have rested their verdict that the force involved in this accident was not sufficient to cause injury to plaintiff. "It is the exclusive province of the jury to determine the credibility of the witnesses, weigh the evidence and make findings of fact." Groen v. Tri-O-Inc., 667 P.2d 598, 601 (Utah 1983). Likewise,

[w]here the evidence is conflicting and the jury is properly instructed, we do not upset those findings of fact on appeal except upon a showing of the evidence, viewed in the light most favorable to the verdict, so clearly preponderating in appellant's favor that reasonable persons could not differ on the outcome of the case.

Id. The Utah Supreme Court in Hodges v. Gibson Products Co., 811 P.2d 151, 156 (Utah 1991) stated:

We accept the evidentiary inferences that tend to support the verdict rather than contrary inferences that support the appellant's version of the facts, even if we might have judged those inferences differently had we been deciding the matter in the first instance, and not as an appellate court. When the testimony of the witnesses is in conflict, we accept that testimony which supports the jury's verdict, unless it is inherently impossible, and ignore the evidence which does not support the verdict, even if we might think it more convincing.

Applying the Hodges standard of review, the verdict must stand.

II. THERE WAS NO IMPROPER INJECTION OF THE ISSUE OF RELIGION INTO THIS TRIAL

Out of over 800 pages of transcript, plaintiff wishes to assign reversible error upon two questions which were asked of defendant. First, Mr. Brown was asked what he did for a living, and second, Mr. Brown was asked the purpose of the trip at the time of the accident. Plaintiff claims that the jury's knowledge that defendant worked at BYU and taught Spanish there, as well as the fact that defendant and his wife were returning from a trip to a local Mormon temple, were facts that so prejudiced the jury that reversal is mandated and a new trial should be granted.

Plaintiff's argument fails for a number of reasons. First, the issue of religion was not injected into trial. Second, defendant's answers were not belabored during examination nor were they even mentioned at any time by either attorney after the questions were answered. Lastly, plaintiff suffered no prejudice from the testimony. In order for this court to vacate the jury verdict, the court would have to conclude that a reasonable likelihood exists that absent the alleged error, the result would have been more favorable to the appealing party. State v. White, 880 P.2d 18 (Utah Ct. App. 1994). The appellate court must conclude that had Mr. Brown not so testified the jury would have decided otherwise and that therefore the appellate court's confidence in the verdict is undermined. State v. Dibello, 780 P.2d 1221 (Utah 1989); Pratt v. Pro Data Inc., 246 Utah Adv. Rep. 3 (Utah Ct. App. 1994).

The issue of religion was not injected into the trial. Plaintiff's argument is actually a desperate attempt to inject an issue into the trial that simply did not exist. The record clearly indicates that neither counsel for the defendant nor defendant himself ever mentioned religion or made an appeal to religious prejudice. The first item of evidence which plaintiff claims is prejudicial arose out of the following sequence of questions:

Question: Incidentally, Mr. Brown, what do you do for a living?

. . .

Answer: I work at BYU.

Question: What do you do there, sir?

Answer: I teach Spanish.

Question: And how long have you been there?

Answer: Nearly thirty years.

(R.398). While the jury may have assumed that one who works at BYU is a member of the church which sponsors BYU, on its face, religion was not injected into the trial. Instead, defendant's counsel was simply attempting to lay some initial foundation as to who Mr. Brown is. Defense counsel never asked defendant about his religious beliefs, but simply asked what the defendant did for a living. This is common practice in trial.

Personal background questions tend to put a witness at ease, allow a trier of fact a few moments to become familiar with the witness before hearing what she has to say, and add to the witness's credibility. Typical subjects of a background inquiry include witness's place of residence and employment, and general job duties.

Bergman, Trial Advocacy in a Nutshell 111 (2nd Ed. West Pub. Co., 1989). In fact, when the court ruled on plaintiff's objection to the mention of the place of Mr. Brown's employment, the court ruled: "The court feels that that was merely background,

foundational." (R.731). Like defendant, plaintiff apprised the jury of her background information. Plaintiff's counsel asked for plaintiff's current address, how long she had been at that address, and where she lived before she was at that address. (R. 412). Also as background information, in order to personalize his client, plaintiff's counsel asked how long plaintiff knew her husband before she got married (R.413), and how long they had been married. (R.413). Thus, the record exhibits that both parties asked background and foundational questions to their clients in order to personalize them before the jury.

Even if the jury knew that the defendant worked at BYU, it is a far stretch to conclude that the issue of religion was thrust into the trial thereby. The conclusion that the issue of religion was not thrust into trial is compounded by the fact that this testimony was not mentioned by any other witnesses, no reference thereto was ever made after the testimony, nor was there any allusion made thereto in closing argument.

As a second basis to assert that religion was improperly injected into trial, plaintiff asserts that the following question and answer were prejudicial. Defendant's counsel asked the defendant, "Question: What was the purpose of your trip? Answer: We were returning from the temple." (R.399). This question was not posed for the purpose of soliciting any testimony of a religious nature. The answer could easily have been, "We were going home." However, defendant stated simply that they were returning home from the temple. The point was not belabored further, and there exists no evidence that the jury was prejudiced by the knowledge of this fact.

Interestingly, the exact same question was asked of plaintiff. Plaintiff's counsel asked plaintiff: "Question: On December 2, 1988, approximately 5:00 or 5:30 pm, where were you going? Answer: We were leaving Provo. Question: Why were you in Provo? Answer: We had been Christmas shopping." (R.413). While plaintiff asks this question as background or foundational testimony, defendant's question is also probative of whether or not the defendant was in a hurry.

Plaintiff claims that allowing defendant to testify that he is employed as a Spanish professor at BYU and the fact that he had just attended a Mormon temple are prejudicial and should not be allowed into evidence as provided for under Rule 403 of the Utah Rules of Evidence. The admission of evidence under Utah Rule of Evidence 403 is reviewed for an abuse of discretion and is made in two steps. State v. Dunn, 850 P.2d 1201, 1221 (Utah 1993). The reviewing court must first determine whether the trial court's finding the evidence was admissible is beyond the limits of reasonability. Id. If the admission of the evidence was beyond the limits of reasonability, then the reviewing court will reverse only if there was a reasonable likelihood that a different result would have been reached had the evidence been excluded. Id.; Utah DOT v. 6200 South Assoc., 872 P.2d 462 (Utah Ct. App. 1994). In this case, plaintiff cannot meet either of the steps required under the Dunn decision. Plaintiff has made no showing that the admission of evidence that the defendant was not in a hurry was beyond the limits of reasonability. Even more

important, it is inconceivable that this piece of evidence was so material as to convince the court that a different result would have been reached had the evidence been excluded.

As the previous section of defendant's brief shows, there is abundant evidence upon which the jury could rest its verdict. In fact, the case was not exceptionally close. All the witnesses to the accident except the plaintiff, that is Mr. and Mrs. Brown and Officer Hill, concurred that the impact was five miles an hour or less. The physical damage to defendant's car and the absolute lack of damage to plaintiff's vehicle, coupled with the expert testimony of Greg DuVal easily would lead the reasonable person to believe that a low speed, insignificant impact had occurred. Once the premise is accepted that a low speed collision occurred, then all of the medical testimony concurs that without sufficient force, no injury could occur. Accordingly, the other defects claimed by plaintiff, specifically the questions relating to defendant's employment and where he was going at the time of the accident are hardly weighty matters which would indicate that the jury would have decided the matter otherwise had those facts not been in evidence.

Defense counsel's question regarding the purpose of defendant's trip was probative of whether defendant was in a hurry or not. Whether defendant was in a hurry or not is an issue properly brought before the jury because it has bearing on defendant's state of mind prior to the accident, and would have some indication as to whether he was speeding or inattentive. A review of the record shows that such was the intent of the question. (R.399). Defense counsel did not ask the defendant where he had just been or if he was coming from

the temple in a subtle attempt to appeal to the jury's religious prejudice.³ Instead, the question was simply: "What was the purpose of your trip?" (R.399). The fundamental fairness of the trial was not affected and reversal is not called for because a different result is not likely to have occurred. Jones v. Carvel, 641 P.2d 105 (Utah 1982).

The case law cited by the plaintiff in support of her argument that the jury verdict should be vacated because the jury knew where Mr. Brown worked and was aware of the purpose of his trip at the time of the accident are unpersuasive when applied to the facts of this case. In fact, the cases plaintiff cites highlight that an egregious and prejudicial injection of an inflammatory issue did not occur in the case at bar. Almost all of the cases cited by plaintiff address either comments made in closing argument or cases where an elaboration of the evidence was made. For example, plaintiff cites the case of Giuamura v. O'Donnell, 466 N.Y.2d 692 (N.Y. Sup. Ct. 1983) for the proposition that elaborating on the religious preference of a plaintiff warranted a new trial. However, a thorough review of the Giuamura case indicates that while the court did state that elaborating on the religious preference of the plaintiff was improper, there were abundant other reasons why the case warranted a new trial. First, the Giuamura court stated that the evidence was insufficient to

³Assuming that the majority of the members of the jury were members of the predominant religion in Utah County, any competent attorney would refrain from injecting the issue of religion since for every member of the jury panel that might be enamored with having a religion in common with a party, an equal number of jurors would be offended and find repugnant an appeal to decide the case on a religious basis.

support the verdict and on this basis a new trial should be granted. The court in Giuamura actually stated several different reasons why a new trial was warranted, including that the defense attorney indicated that plaintiff's husband was a criminal or was claiming welfare under six different names, referring to a chiropractor as a quack, referring to plaintiff's lawyer as a "very, very clever lawyer from a very prestigious New York City law firm in the Empire State Building," and eliciting testimony from a witness that "green poultice syndrome" is a disease which is cured by a nice big insurance check. Id. at 695. The court in Giuamura found that these cumulative and prejudicial comments warranted a new trial. Id.

In closing arguments, the defense attorney in Giuamura elaborated on the religion issue to an excess. The same cannot be said at the case at bar. In this case, defense counsel made no reference in closing argument to the defendant's place of employment, nor to the fact that he had been at a church service. The other cases cited by plaintiff similarly address unwarranted elaboration concerning religious preference or instances. For example in State v. Marvin, 606 P.2d 406 (Ariz. 1980), a criminal defendant attempted to put in to evidence his religious beliefs to show that he was not inclined to criminality. Mr. Brown's beliefs were not mentioned, and therefore Marvin is not comparable to this case. In short, the cases cited by the plaintiff are easily distinguishable.⁴

⁴The case of Ogodziski v. Gara, 181 N.W. 227 (1921) involved questions related to religion. In this case, counsel for the defendant simply did not ask any question related to

The Utah Supreme Court has reviewed instances where an appellant has argued that an appeal to bias was made. In State v. Thomas, 777 P.2d 445 (Utah 1989), a prosecutor made a single reference to a defendant's race during closing arguments. On appeal, the defendant argued that the prosecutor's reference to him as "a black man" was improper. The court held that the single reference was not improper for several reasons. First, it was obvious to the jury that the defendant was black. Second, the comment was not

religion. Likewise, Bulleri v. Chicago Transit Authority, 190 N.E. 2d 476 (Ill. Ct. App. 1963), is inapposite where the court held that injection of religious questions was improper. The case of Kolaric v. Kaufman, 67 Cal. Rptr. 729 (Cal. Ct. App. 1968), did not involve religious questions. Although the court stated that questions or argument of counsel relative to race, nationality, or religion of a party were improper, the court in Kolaric held the question of whether someone had been in prison and concentration camp improper because it suggested that the plaintiffs were members of a class subject to imprisonment. The court in Kolaric simply does not discuss religious questions. While perhaps not within the general knowledge of the plaintiff, persons were confined to concentration camps for numerous reasons besides semitic origin.

The court in Kolaric did not overturn the lower court just because a defense attorney asked a single question about the concentration camp. The court in Kolaric stated: "We have reached this conclusion from a consideration of the entire case and an application of the rules to the unique set of facts." Kolaric at 733. The case of Morgan v. Maunders, 37 S.W. 2d 791 (Tex. Ct. App. 1931) like some of the other cases plaintiff cites, applied to closing arguments where the religious comments were held objectionable or counsel's comments arguably elaborated and highlighted the religion of a party.

Ogodziski v. Gara, 181 N.W. 227 (Wis. 1921), likewise bears no resemblance to the facts of the case at bar. The incident in Ogodziski occurred in a church and defendant was a Catholic Priest. The plaintiff argued that the other defendants were taught blind obedience and not one of them would think of testifying differently than their priest had commanded and that all the powers of the Catholic church had been exerted to deceive the rights of the plaintiff and justice. The Ogodziski case exhibits the egregious level to which the injection of religion could rise. However, in this case, religion was not injected into the trial. The fact that the defendant had been to the temple was not a point on which defense counsel elaborated, and therefore, the cases cited by the plaintiff are inapplicable.

made with derogatory intent. Third, the prosecutor's remark was isolated and not part of a continued effort to bias the jury, as the appellant had contended. Id. at 448. The prejudicial effect complained of in Thomas is similar to that complained of in the case at bar, and accordingly the Utah Supreme Court's reasoning in Thomas applies.

Defense counsel in the case at bar never mentioned religion. As it was obvious to the jury in Thomas that the defendant was black, it should hardly be a shock to a Utah County jury that defendant is a member of the predominant church in the county. Likewise, as the record reflects, there was no intent on the part of defense counsel or defendant in the case at bar to use religion for an improper purpose. Furthermore, any evidence from which an inference of religion could be construed was isolated, inadvertent and not an attempt, as appellant contends, to ". . . divert the jurors from a judicial consideration of the facts and the law." See Appellant's Brief at 33.

Because the issue of religion was not in fact injected into the trial, plaintiff's basis for appeal is without merit. Even if evidence regarding religion had been elicited in this case, the testimony was isolated and not part of a continued effort to bias a jury. A vacation of the verdict is unwarranted. Accordingly, plaintiff's second point of alleged error does not provide a basis for reversal.

III. NO PREJUDICIAL ARGUMENT WAS MADE BY DEFENSE COUNSEL IN CLOSING ARGUMENTS

Plaintiff has failed to preserve this issue. Plaintiff claims that defendant inserted the name of plaintiff's counsel's law firm as an issue in the case on numerous occasions. For the most part, plaintiff failed to object below and therefore has waived the issue. Plaintiff claims that defense counsel's comment on plaintiff's counsel's willingness to use the jury system was prejudicial. See Plaintiff's Brief at 35. The court will note that no objection to this statement was made at trial. (R.376-77).

Plaintiff also asserts that the court committed error by allowing defendant's counsel to state that Duncan's lawyer did not call all of the witnesses he said he would. See plaintiff's brief at 37. A review of the trial transcripts indicates that no objection was made to the argument below. (R.781). Accordingly, two of the statements to which plaintiff would assign error have been waived for the purposes of appeal as no objections were made below.

During cross-examination of plaintiff, defense counsel impeached plaintiff using her answers to interrogatories. In order to impeach the witness, defense counsel attempted to establish whether plaintiff had answered the interrogatories which she signed under oath, or whether the answers were supplied by her attorneys. Plaintiff's answers to interrogatories were arguably inconsistent with her testimony at trial, and thus the answers constituted a viable means of impeachment. If the answers were untrue, why did she sign

the document? Defense counsel's examination constituted valid impeachment of plaintiff and no real objection was stated by plaintiff's counsel. Instead, plaintiff's counsel simply offered: "Any reference that counsel helped her [in answering interrogatories]--counsel does the same." (R. 454). Of course, defense counsel did not deny that attorneys often help their clients answer interrogatories and stated: "There's no problem there." Id. Since defense counsel's questions were well within the bounds of impeachment in cross-examination, and because plaintiff did not state a viable objection, no error can be predicated upon this exchange.

Plaintiff attempts to create a picture that defense counsel apprised the jury that the law firm of Robert J. DeBry & Associates was using the jury system and had assisted plaintiff in providing answers to written questions. See Plaintiff's Brief at 36. The jury was well aware that plaintiff was being represented by the law firm of Robert J. DeBry & Associates as such fact was presented to the jury during the voir dire process. (R. 313). Again, the fact that plaintiff was given assistance in providing answers to written interrogatories was proper impeachment. Plaintiff claims, however, that the foregoing statements were ground work laid in preparation of a closing argument wherein defense counsel stated: "Ladies and Gentlemen, counsel tells you it is too bad that Ms. Duncan has to be here. I agree with that. It is too bad. However, Mr. Brown did not bring her here. The law firm of Robert J. DeBry & Associates brought her here." (R. 778). It is clear that plaintiff's counsel was not objecting to the fact that defendant was asserting that the law firm

had brought their client to court, but instead was concerned that the jury was being reminded of who was representing the plaintiff. Plaintiff's counsel stated: "This is the third time he has referred to our law firm." (R. 779).

In any event, a review of the closing argument of plaintiff indicates that defendant's attorney was simply answering an allegation that had been made in plaintiff's closing argument. Counsel for plaintiff improperly argued: "Mr. Brown always denied he was responsible. (R. 766)."⁵ Subsequently, plaintiff's counsel stated:

[The court] has found Mr. Brown negligent. He is entitled to his day in court. As an attorney, I understand that, if you want your day in court you are entitled to that. But when the evidence is so overwhelming, why put Lisa through the hoops; why lengthen the trial for that purpose?

(R. 766-67). The comments made by defense counsel were not improper because they were responsive to the comments made by plaintiff's counsel. Such a conclusion is sustained by law. For example, in Smelko v. Brinton, 740 P.2d 591 (Kan. 1987), defense counsel stated during closing arguments that the plaintiff had consulted a lawyer shortly after the complained of injury occurred. In response, plaintiff's counsel said: "He went to a lawyer fairly soon afterwards, and I think you can see why." Id. at 595. The defendant in Smelko argued on appeal that plaintiff's counsel's statement was improper and prejudicial. The

⁵See Henker v. Preybylowski, 524 A.2d 455, 458 (N.J. Ct. App. 1987)(Argument to the effect that the parties were forced to go to court because of the other party's unfair action is prejudicial). See also Plaintiff's brief at 39.

Smelko court held, however, that plaintiff's counsel's comments were "fairly responsive" to defendant's closing argument and thus did not constitute prejudicial reversible error. Id.

Likewise, the Colorado Court of Appeals in Halliburton v. Public Service Co., 804 P.2d 213 (Colo. Ct. App. 1990) addressed defendant's complaint on appeal concerning a reference made by plaintiff's counsel during closing argument about a settlement reached by the plaintiffs with the seller of a defective stove. In Halliburton the court concluded: "Since plaintiff's comments regarding settlement with the seller of the stove were made in response to defendant's closing argument concerning the responsibility of that seller," they were not prejudicial. Id. at 218.

Even if we assume, arguendo, that the mention of the effect of the settlement with the seller of the stove was improper, defendant opened the door on the subject by its argument, and it was permissible for plaintiff's counsel to respond.

Id. See accord Uptain v. Huntington Lab, Inc., 685 P.2d 218 (Colo. Ct. App. 1984), aff'd, 723 P.2d 1322 (Colo. 1986); Grammer v. Kohlhaas Tank & Equip. Co., 604 P.2d 823 (N.M. Ct. App. 1979).

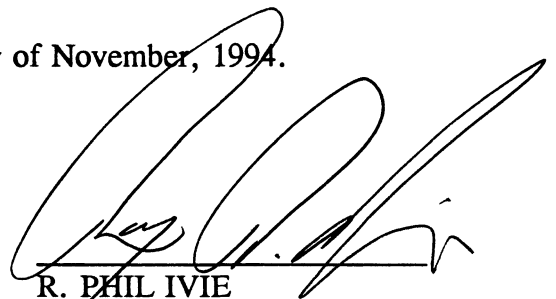
As in the case of Halliburton, the case at bar presents facts where plaintiff's counsel opened the door for defendant's arguments by asserting in his closing argument that defendant had wrongly denied responsibility for the accident and that he had put plaintiff "through the hoops" and lengthened the trial for an improper purpose. Where plaintiff has so opened the door, she should not be able to claim error when the defense responds.

Once again, even assuming, arguendo, that defendant's counsel's comments were improper, they do not constitute reversible error. In order to overturn the jury's verdict on the basis of defense counsel's arguments, appellant must show that absent the improper argument, there was a reasonable likelihood of an outcome more favorable to the appellant. State v. Dibello, 780 P.2d 1221 (Utah 1989). The appellant in this case has made no such showing. Furthermore, in order to constitute reversible error an improper remark in closing argument must be of an important fact and must be clearly unfair and outside the record. State v. Baroni, 79 Utah 285, 10 P.2d 622 (1932). After all, "[i]t is not every inaccuracy or flight of oratory that will constitute error." Grammer v. Kohlhaas Tank & Equip. Co., 604 P.2d 823, 831 (N.M. Ct. App. 1979). As stated, the jury already knew the name of plaintiff's law firm through the voir dire process and it would be a desperate stretch of the law for plaintiff's counsel to argue that the mere mentioning of his law firm's name would be grounds for overturning a jury verdict. The argument complained of was insignificant, was made in response to plaintiff's own argument, and was based on facts which were in the record. Accordingly, no error can be predicated thereupon and no basis for a vacation of the jury verdict exists.

CONCLUSION

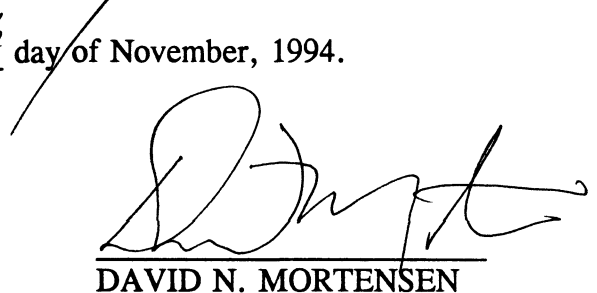
By failing to make a directed verdict motion, and by failing to marshal the evidence, plaintiff has waived her right to review the sufficiency of the evidence to support the verdict in this matter. A review of the record indicates in any event, that significant and abundant evidence exists which supports the verdict. The issue of religion was not injected into this trial, and plaintiff's alleged improper closing arguments were responsive to comments made by plaintiff's counsel. Defendant, therefore, requests this court to affirm the jury's verdict. Plaintiff has argued no reasonable grounds for reversal and the record is clear that plaintiff had her day in court and must now live with the jury's verdict.

DATED AND SIGNED this 18th day of November, 1994.



R. PHIL IVIE

DATED AND SIGNED this 18th day of November, 1994.



DAVID N. MORTENSEN

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Defendant-Appellee with postage prepaid thereon this 18th day of November, 1994, to the following:

Edward T. Wells, Esq.
George T. Waddoups, Esq.
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107



DAVID N. MORTENSEN

ADDENDUM 1

SALT LAKE CITY

464 CEF

GARY GARFF USMOBILE



