

2005

# Louise Mann v. Samuel P. Fredrickson, Riddle Services, Inc., and Does 1 through 10 Inclusive : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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Louise Mann,

Plaintiff/Appellant,

Appellate Court Case No.  
20050955 - CA

v.

SAMUEL P. FREDRICKSON, RIDDLE  
SERVICES, INC., and DOES 1  
THROUGH 10 INCLUSIVE,

Defendants/Appellees.

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BRIEF OF THE APPELLANT

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Appeal from a Jury Verdict, and District Court Decision denying  
Appellant's Motion for a New Trial, in the Third Judicial District, in and  
for Salt Lake County, State of Utah, the Honorable Deno Himonas  
presiding.

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Counsel for Appellant *does* request oral argument.

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UTAH APPELLATE COURT

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**IN THE UTAH COURT OF APPEALS**

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Louise Mann,

Plaintiff/Appellant,

v.

SAMUEL P. FREDRICKSON, RIDDLE  
SERVICES, INC., and DOES 1  
THROUGH 10 INCLUSIVE,

Defendants/Appellees.

Appellate Court Case No.  
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**BRIEF OF THE APPELLANT**

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**JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

**ISSUES, STANDARD OF REVIEW, PRESERVATION**

Issue I: Whether the trial court erred in failing to grant the plaintiff's motion for judgment notwithstanding the verdict due to insufficiency of the evidence.

Standard of Review: An insufficiency of the evidence challenge to a denial of a motion for a judgment notwithstanding the verdict or a motion for a new trial is governed by one standard of review: An appellate court will reverse only if,

viewing the evidence in the light most favorable to the party who prevailed, it concludes that the evidence is insufficient to support the verdict. *Hansen v. Stewart*, 761 P.2d 14 (Utah 1988).

Preservation: Appellant now appeals the decision of the trial court, which denied the Appellant's motion for a judgment notwithstanding the verdict at the conclusion of the trial.

Issue II: Whether the trial court erred in denying plaintiff's motion for a new trial based upon the insufficiency of the evidence supporting the apportionment of 100% of the liability to the Plaintiff.

Standard of Review: An insufficiency of the evidence challenge to a denial of a motion for a judgment notwithstanding the verdict or a motion for a new trial is governed by one standard of review: The appellate court will reverse only if, viewing the evidence in the light most favorable to the party who prevailed, it concludes that the evidence is insufficient to support the verdict. *Hansen v. Stewart*, 761 P.2d 14 (Utah 1988).

Preservation: Appellant now appeals the decision of the trial court, denying the Appellant's motion for a new trial, challenging the reasonableness of the verdict apportioning 100% of the liability to the Plaintiff.

ISSUE III: Whether the trial court erred in denying plaintiff's motion for a new trial on grounds that Jury Instruction No. 28 was improperly given, as it was confusing, misleading and was not supported by sufficient evidence to serve as defendants' theory of the case.

STANDARD OF REVIEW: An appellate court review's "the trial court's determination concerning jury instructions for correctness, and accord[s] it no particular deference." *State v. Jones*, 878 P.2d 1175, 1176 (Utah Ct.App. 1994).

PRESERVATION: Appellant made a timely and sufficient objection to Jury Instruction No. 28 at trial, and presented this issue to the trial court in her motion for a new trial.

### **STATUTORY PROVISIONS**

Utah Code Annotated § 41-6-69(2) (2002).

Utah Code Annotated § 41-6-62(1) (2002).

### **STATEMENT OF THE CASE**

This case arises as a result of a motor vehicle accident occurring on or about November 1, 2002, where a furniture truck being driven by Appellee Fredrickson and owned by Appellee Riddle Services, Inc., struck Appellant's vehicle from behind. Following the accident, Plaintiff/Appellant Louise Mann filed a complaint against Samuel P. Fredrickson, Riddle Services, Inc., and Does 1 through 10 inclusive, alleging negligence and personal injuries.

On June 6, 2005, a jury trial commenced in this matter in the Third Judicial District Court, before the Honorable Robert W. Adkins. At the conclusion of the trial, on June 10, 2005, the jury returned a verdict finding the Plaintiff/Appellant Louise Mann 100% at fault, and accordingly finding Defendants/Appellees entirely free from any liability. Plaintiff's counsel moved for a judgment



notwithstanding the verdict on the basis of insufficiency of the evidence, which the Trial Court denied.

After the trial on this matter, the Honorable Robert W. Adkins was reassigned to a different court within the Third Judicial District, and the Honorable Deno Himonas presided over the post-trial proceedings. Following the entering of the judgment below, the Plaintiff/Appellant filed a timely motion for a new trial on the grounds that there was insufficient evidence to support the verdict and improper jury instructions. Plaintiff/Appellant's motion was heard and decided by the Honorable Deno Himonas, who denied the motion, relying on two partial statements and inconsistent facts viewed in isolation as the sole support for His ruling.

Following the denial of the motion for a new trial, the Plaintiff/Appellant filed a timely notice for appeal and the matter was assigned to this Court. Plaintiff/Appellant challenges the lower court's denial of her motions both for a judgment notwithstanding the verdict and for a new trial on the basis that the verdict was entirely inconsistent with the evidence and on grounds that the jury was improperly instructed. The Appellant petitions this Court for relief, and requests the Court to reverse the rulings of the district court and remand for a new trial.

### **STATEMENT OF FACTS**

The trial in this matter was a five-day proceeding with numerous medical experts testifying with regard to injuries and the potential causation of said

injuries; these complex issues were not ultimately reached as the case was decided on grounds of liability alone, 100% being assigned to the Appellant. The issues before the Court on this appeal involve the determination of liability returned by the jury. The following is a recitation of the facts relevant to liability.

The motor vehicle accident, which is the subject of this case, occurred on or about November 1, 2002, in Salt Lake County, Utah, on Redwood Road at approximately 9500 South in a construction zone. Partial Trial Transcript June 7, 8, & 9, 2005 (“Transcript I”) at p. 17; Partial Trial Transcript June 9, 2005 (“Transcript II”) at p. 14.

According to the Appellant, Ms. Mann, the subject accident occurred while she was driving through the construction zone on Redwood Road. Appellant stated that she saw a flagger who instructed her to stop, so she stopped. Transcript I at p. 18. Ms. Mann testified that she made a normal stop, and had stopped for ten or fifteen seconds before Mr. Fredrickson’s vehicle struck her from behind. Transcript I at p. 19.

According to the Appellee, Mr. Fredrickson, the subject accident occurred while both parties were driving through the construction zone on Redwood Road. Mr. Fredrickson stated that he followed the Appellant’s vehicle for a short time, and she suddenly stopped in the middle of the road, and he didn’t have enough time to stop. Transcript II at p. 16. Appellee stated that although he tried to stop, his truck started to fishtail, and he actually collided with the back of Appellant’s car at an angle. Id. Mr. Fredrickson stated that he saw no reason why the

Appellant would stop, but later acknowledged seeing a flagger standing approximately 20 feet from the scene of the accident. Transcript II at pp. 17, 19, 27.

Officer Matt Brown, the responding officer on the scene the day of the accident offered testimony at the trial. Officer Brown stated that according to his report of the accident, Mr. Fredrickson's vehicle was traveling too close and too fast and wasn't able to stop in time, and acknowledged the presence of a flagger on the scene. Transcript I at p. 35.

Ms. Mann claimed to have suffered severe physical injuries as a result of the subject accident, ultimately requiring extensive back surgery. As a result of the accident and her injuries, Ms. Mann filed the underlying action against the Appellees.

### **SUMMARY OF THE ARGUMENT**

The trial court erred in denying Appellant's motion for judgment notwithstanding the verdict and her motion for a new trial as there was no evidence to support the finding that Ms. Mann had any liability for the accident much less 100% of the liability as concluded by the jury. The trial court erred in its reliance upon partial unrelated and contradictory facts as the sole basis for denying Appellant's motion for a new trial. In addition, the trial court erred in the giving of Jury Instruction No. 28, as it was confusing and misleading to the jury, and was not supported by sufficient evidence.

## **DISCUSSION**

### **I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AND IS INCONSISTENT WITH THE JURY'S VERDICT**

The record below is free from any evidence that would support a verdict apportioning 100% of the liability of the subject accident to the Appellant. The verdict rendered by the jury was entirely inconsistent with the law and with the evidence presented at trial, and the decisions of the trial court should accordingly be reversed.

When considering a trial court's denial of a motion for judgment notwithstanding the verdict, or for a new trial, an appellate court will "reverse [the trial court's decision] only if, viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict."

*Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 799 (Utah 1991). To demonstrate that the evidence is insufficient to support the jury verdict, the party challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict. *Crookston* 817 P.2d at 799.

To demonstrate the lack of evidence presented at trial in support of the jury's verdict finding the Appellant 100% at fault for the subject accident, the relevant facts, marshaled in favor of the verdict, are as follows:

- a. All parties testified that the accident occurred in a construction zone.

Transcript I at 17, Transcript II at 14.

b. Appellant could not give an estimate of the impact speed of the accident.

Transcript I at 74.

c. Appellant testified that there was a flagger on the road who instructed her to stop, so she stopped. Transcript I at p. 18.

d. Appellant testified that she made a normal stop, and was stopped for ten to fifteen seconds before her vehicle was struck from behind by the truck driven by Mr. Fredrickson. Transcript I at p. 19.

e. Appellee Fredrickson testified that the accident occurred in a construction zone. Transcript II at p. 14.

f. Appellee Fredrickson testified that he followed the Appellant's vehicle for a short period of time, and she suddenly stopped in the middle of the road, and he didn't have enough time to stop – he tried to stop, slammed on his brakes, but his truck began to fishtail and he struck the back of the Appellant's car at an angle. Transcript II at p.15.

g. Appellee Fredrickson's statement at the scene of the accident stated, "Following car, I noticed she stopped quickly, not enough time for our big truck to stop." Transcript II at p. 17.

h. Appellee Fredrickson testified that at the time of the accident he was very surprised that Appellant stopped suddenly, and he didn't see any reason why she should have. Id.

i. Appellee Fredrickson testified that after the accident, once he got out of the truck, he first noticed a flagger standing approximately twenty feet from the scene of the accident. Transcript II at p. 19.

j. Excerpts of Appellee Fredrickson's deposition were read and discussed. Appellee explained that he had testified that "there was nothing [Ms. Mann] could have done to avoid the accident" because he was assuming there was confusion on the part of the flagger, as he didn't see any reason why she would have had to stop suddenly. Transcript II at p.33.

k. Officer Matt Brown was the responding officer who performed the investigation on the scene of the accident, and testified that the accident occurred in the middle of the road. Transcript I at pp. 34, 41.

l. Officer Brown's report stated that Appellee Fredrickson's vehicle was traveling too close and too fast and wasn't able to stop in time. Transcript I at p. 35.

m. Officer Brown testified that according to his recollection there was no involvement of a flagger other than requesting vehicles to stop. Id.

n. The court took judicial notice of Utah Code Ann. § 41-6-69(2), a statute which Officer Brown was unaware of, which concerns sudden stops. Transcript I at 43.

**1. The trial court erred in denying Appellant's post-trial motions for judgment notwithstanding the verdict and for a new trial.**

Utah courts have held that “[i]n most cases where one car “rear-ends” another, it accords with common sense and experience to believe that the following car has disregarded the duty to keep a lookout ahead and to keep the car under control, and is, therefore, at fault.” *Anderson v. Sharp*, 899 P.2d 1245, 1247 (Utah App. 1995). While under Utah law there is no formal “rear-end presumption” as in other jurisdictions<sup>1</sup>, *Anderson* indicates that Utah recognizes a common sense “rear-end presumption” of negligence. This notion arises from a duty codified under Utah Code Ann. §41-6-62(1) (2002), which provides:

- “(1) The operator of a vehicle:
  - (a) may not follow another vehicle more closely than is reasonable and prudent, having regard for the:
    - (i) speed of the vehicles;
    - (ii) traffic upon the highway; and
    - (iii) condition of the highway; and
  - (b) shall allow sufficient space in front of the vehicle to enable any other vehicle to enter and occupy the space.”

As discussed above, the application of this statute to a rear-end collision creates a rebuttable common-sense presumption that the driver of the following

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<sup>1</sup> Other states interpret their statutes requiring a following driver to maintain a proper lookout as creating a rebuttable presumption of negligence to the following driver in a rear-end collision. Some of these states include Florida, Louisiana, New York, Massachusetts, Michigan, Rhode Island, Colorado. *See generally* *Cleaveland v. Florida Power and Light, Inc.*, 895 So.2d 1143 (Fla. App. 4 Dist. 2005); *Charrier v. Primm*, 909 So.2d 1033 (La. App. 2 Cir. 2005); *Russ v. Investech Sec.*, 6 A.D.3d 602, 775 N.Y.S. 2d 867 (N.Y.A.D. 2004); *DiLoreto v. Fireman's Fund Ins. Co.*, 383 Mass. 243, 418 N.E.2d 612 (Mass. 1981); *Reed v. Breton*, 264 Mich. App. 363, 691 N.W.2d 779 (Mich. App. 2004); *Plourde v. Myers*, 823 A.2d 1138 (R.I. 2003); *Bettner v. Boring*, 764 P.2d 829 (Colo. 1988).

vehicle violated the duty created by §41-6-62(1). This “common sense presumption” can be overcome; however, a verdict related to liability that is entirely adverse to the leading car and attributes *no* negligence to the following car *must be supported by sufficient evidence*. A jury’s disregard of this common-sense notion, and allocation of 100% of the fault in a rear-end accident to the leading driver would accordingly require a substantial amount of objective evidence indicating wrongdoing on the part of the leading driver or completely exonerating the following driver.

The Utah Supreme Court has considered a case with similar facts as the present case. In *King v. Fereday*, 739 P.2d 618 (Utah 1987), the plaintiff and defendant were involved in a low speed rear end collision. *King* 739 P.2d at 620. At trial the jury in *King* rendered a verdict for the defendant (following car) and the plaintiff brought a motion for a new trial, which was denied by the trial court and upheld by the Supreme Court. The reasoning for sustaining the verdict in *King* was the existence of specific evidence in favor of the verdict. The Supreme Court pointed to detailed evidence that supported the verdict for the defense. First, the plaintiff in *King* testified that the impact was not significant enough to move her vehicle. *Id.* In addition, plaintiff testified that she abruptly “hit her brakes to avoid hitting the car in front of her” and that she had told the investigating officer not to give the defendant a citation because the traffic was so bad that “we could have all hit each other.” *King* at 621. The facts in *King* set forth at least some basis for justifying a verdict in favor of the defendant, as even



the plaintiff in that matter presented objective facts which could reasonably tend to exonerate the defendant.

In the instant case, there was no evidence presented which would demonstrate the required substantial wrongdoing on the part of Ms. Mann as indicated by the jury; and further, there was no evidence that would completely exonerate Mr. Fredrickson – to the contrary, Mr. Fredrickson’s own testimony clearly indicates that he had some degree of fault in causing the accident. Mr. Fredrickson testified to the following objective facts indicating he had a significant degree of liability in causing the accident:

- a. There was “nothing [Ms. Mann] could have done to avoid the accident.

Transcript II at pp. 31, 33.

- b. [Ms. Mann] stopped quickly, not enough time to stop my big truck.

Transcript II at p. 17.

- c. Mr. Fredrickson testified that after seeing Appellant stop suddenly, *he* slammed on his brakes, causing his truck to fishtail, ultimately striking her vehicle. Transcript II at p. 16.

- d. Mr. Fredrickson did not see the flagger controlling traffic until after the accident occurred, and he had exited his vehicle. Transcript II at pp. 19, 27.

- e. Mr. Fredrickson testified that he didn’t see any reason why Ms. Mann would have stopped her vehicle. Transcript II at pp. 17, 33.

Adopting Mr. Fredrickson’s version of the facts as true, there remains absolutely no evidence that would reasonably point to the Appellant as being

100% negligent, as apportioned by the jury, and likewise *no* evidence to justify a conclusion of zero negligence by the jury with respect to Mr. Fredrickson. His testimony establishing that he “did not have enough time to stop his big truck” coupled with his agreement that there was “nothing [the Appellant] could have done to avoid the accident” demonstrate that a verdict apportioning zero liability to the Appellee is unreasonable and unjust.

In support of his allegations of Ms. Mann’s negligence, Mr. Fredrickson pointed to his contention that the plaintiff negligently slammed on her brakes, not giving him enough time to stop his truck. In furtherance of this contention he caused the court to take judicial notice of Utah Code Annotated § 41-6-69(2), which states:

“A person may not stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the operator of any vehicle immediately to the rear *when there is an opportunity to give a signal.*” (emphasis added).

Even construed liberally, this statute does not create a generalized duty for drivers to not “stop suddenly” as asserted below by the Appellees; and this statute certainly does not diminish the general duty of following drivers to maintain a proper lookout and allow enough distance to safely control their vehicle. Specifically, what this statute *does* do is to create a limited duty applicable in limited circumstances. According to the actual language of the statute, a leading vehicle, when coming to a stop, has a duty to signal a following vehicle *only when there is an opportunity to give a signal*. The verdict rendered by the jury, finding Ms. Mann entirely at fault, reflects a negligent violation of this duty Ms. Mann

presumably owed to the defendant, a contention wholly unsupported by the evidence.

The defendant introduced absolutely no evidence at trial about the opportunity, if any, Ms. Mann had to give an appropriate signal, but only that she stopped too quickly to give him enough time to stop his big furniture truck. Not only was there no evidence offered to support Ms. Mann's failure to give a signal, but Mr. Fredrickson's own testimony conflicted with this assertion, as he agreed that "there was nothing Ms. Mann could have done to have avoided the accident." Transcript II at pp. 31, 33.

Even construing the evidence in the light most favorable to the verdict, there is insufficient evidentiary basis for the finding of any negligence on the part of Ms. Mann, much less the 100% represented by the verdict. In fact, the evidence presented at trial was completely contrary to the verdict rendered by the jury. The inconsistent verdict is plainly unreasonable and contrary to justice. The verdict is the result of the jury's disregard and misapplication of facts in evidence and the consideration of unknown facts or assertions, which were outside the evidence presented at trial. As such, the court should reverse the determination of the district court and order a new trial based on the grounds discussed herein.

**2. The trial court erred in relying on partial, remote and inconsistent facts considered in isolation as the sole basis for upholding the verdict.**

In making the ruling below, the trial court combined portions of contradicting testimony given by the opposing parties, and used excerpts of each

to uphold the verdict. As set forth above, Ms. Mann claimed to have entered the construction zone, to have seen the flagger, and to have slowed to a controlled stop where she sat for 10-15 seconds before being struck by Mr. Fredrickson's vehicle. Mr. Fredrickson testified that he did not see the flagger until after the accident, but that the accident occurred because Ms. Mann slammed on her brakes for some unknown reason, not allowing him enough time to stop his vehicle.

When considering a challenge to a jury verdict, a court of appeals in Utah "will upset a jury verdict only upon a showing that the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case." *Ortiz v. Geneva Rock Products, Inc.*, 939 P.2d 1213, 1216 (Utah App. 1997) (internal citations and quotations omitted); *see also Dairyland Ins. Co. v. Holder*, 641 P.2d 136, 138 (Utah 1982) (stating that an appellate court should uphold jury verdict unless jury's finding is " 'so plainly unreasonable as to convince the court that no jury acting fairly and reasonably could make [such a] finding' "(citation omitted)).

The jury's verdict in this case was plainly unreasonable. At the hearing on the motion for a new trial, the trial court presented as a "reasonable basis" for the verdict, the excerpt of Ms. Mann's testimony that she saw the flagger 10-15 seconds before the accident occurred together with Mr. Fredrickson's contention that Ms. Mann suddenly slammed on her brakes. September 23, 2005 Oral Argument ("Transcript III") at pp. 1-2. The court combined these two partial pieces of testimony to propose that the jury could have concluded that Ms. Mann

was telling the truth only about seeing the flagger 10-15 seconds beforehand, but adopting Mr. Fredrickson's testimony that she took no action until the last minute, slamming on her brakes and causing the accident. Transcript III at p. 2.

Appellant contends that the pragmatic piecing together of contradicting testimony examined out of context and in isolation, in order to salvage a jury verdict demonstrates the unreasonableness of the verdict and satisfies the standard which would warrant reversal of the trial court's determination. When pressed by counsel, as to whether the court's proposed scenario would justify the 100% negligence apportioned by the verdict, the court responded, "Sure, under that circumstance. Then we're just talking about was it 90, 80, 100." Transcript III at p.

3. The vacillation by the court in answering this question conclusively and decisively, indicates that there may have been some indication of unreasonableness in the verdict. Worth noting as well, is that the scenario adopted by the court in support of the verdict was created and fashioned entirely by the court and was not proposed by Appellees' counsel at any stage of the proceeding. The court noted that Appellant's motion for a judgment notwithstanding the verdict was denied by the previous trial judge, but did not dispute counsel's assertion that no real basis or reasoning was given for that decision. Transcript III at p.4.

The dissected scenario proposed and adopted by the trial court as the only basis for upholding the verdict is plainly unreasonable. Consideration of the totality of the evidence presented at trial, no reasonable jury could have arrived at

such a conclusion. The trial in this matter was a five-day proceeding, focusing primarily upon medical records and expert testimony surrounding the injuries sustained by Ms. Mann and the causation of those injuries. The jury's verdict apportioning 100% of the negligence to Ms. Mann is blatantly inconsistent with the evidence presented with respect to liability. The trial court's ruling incorporates a method of picking and choosing portions of two contradictory statements from a five-day proceeding it was unable to preside over<sup>2</sup>, and piecing them together in order to salvage an unreasonable and unjust verdict. Should such an approach be allowed to stand, trial courts would be left with unfettered discretion to uphold any and all unreasonable and unjust verdicts.

While Appellant concedes it is the exclusive province of the jury, or finder of fact, to judge the credibility of witnesses, this province is subject to the limitation that a jury cannot capriciously or arbitrarily reject credible evidence when there is no sound reason for doing so. *See Super Tire Market, Inc. v. Rollins*, 417 P.2d 132, 135 (Utah 1966) (citing *Holland v. Brown*, 394 P.2d 77 (Utah 1964)). When a jury acts outside these limitations, it is the duty of the trial court to ensure a just result. Appellant maintains that the trial court failed to "fulfill [its] function of maintaining general supervision over litigation to guard against miscarriages of justice which sometimes occur at the hands of juries." *Holland v.*

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<sup>2</sup> The Honorable Deno Himonas, who presided over the hearing on the motion for a new trial had been recently appointed to the particular district court where this matter was heard – the Honorable Judge Robert W. Adkins presided over the trial on this matter.

*Brown*, 394 P.2d 77. Accordingly, based upon the foregoing Appellant respectfully requests that this Court reverse the trial court's denial of her motions.

**II. JURY INSTRUCTION NO. 28 WAS IMPROPERLY GIVEN, AS IT WAS CONFUSING, MISLEADING AND NOT SUPPORTED BY SUFFICIENT EVIDENCE TO SERVE AS DEFENDANTS' THEORY OF THE CASE.**

The trial court erred in giving Jury Instruction No. 28. In addition to the insufficiency of the evidence presented at trial, the Appellant, respectfully requests this Court to reverse the lower court's determinations, and order the district court to set aside the verdict, vacate the judgment and grant a new trial based on the fact that Jury Instruction number 28 was misleading, confusing, and unsupported by the evidence.

To require a new trial on the basis of an improper jury instruction, it must be shown that the erroneous instruction "was prejudicial, i.e., that it tend[ed] to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advise[d] the jury on the law." *Holmstrom v. C.R. England, Inc.*, 2000 UT App 239. As Appellant's counsel argued, Instruction 28 was misleading and confusing to the extent that it was prejudicial to the Ms. Mann; it affected her substantial rights, was inconsistent with substantial justice, and justified the granting of a new trial.

The Appellant took timely exception to Instruction 28 at trial for the aforementioned reasons. Appellant believes that the giving of this instruction directly contributed to a verdict that was contrary to the evidence offered at trial.

Instruction number 28 was unsupported by the evidence, and was confusing and misleading to the jurors, and improperly influenced the jury to the plaintiff's detriment. It is important to note that during the course of the proceeding, the court deliberately took special care to limit instructions regarding outside influences such as the actions or inaction of an "unknown flagger" due to a complete lack of evidence; accordingly, as there was no evidence of "flagger negligence," reference to said flagger was properly kept off of the special verdict form by the court. The instruction in question should have been given similar treatment. The Appellees had the burden to offer evidence to prove their allegation of negligence on the part of Ms. Mann. As outlined in the jury instructions the defendants below had the burden to prove that Ms. Mann (1) Failed to stop or slow down without observing that it could be done safely, and (2) Failed to give a proper signal that her vehicle was stopping. Jury Instruction No. 28. The evidence presented by the Appellees, as a matter of law, failed to satisfy this burden. Review of all trial testimony surrounding liability, construed in the light most favorable to the verdict, demonstrates that the evidence offered by defendants did not warrant Instruction Number 28.

The Appellees introduced at trial Utah Code Annotated §41-6-69(2), upon which the challenged instruction is based, to illustrate negligence on behalf of the Ms. Mann. Appellees did not, however, offer any evidence to warrant the instruction. Thus, the jury was left to speculate and consider facts outside of the evidence presented to arrive at their verdict.



The instruction in question consists of multiple elements that create a duty, which any leading driver would presumably owe to following vehicles. These elements create a limited rather than generalized duty, one restricted to a set of circumstances not proven in the present case. One of the essential elements of the statute and corresponding instruction is the opportunity to give a signal. Defendants at trial presented *no* evidence that Ms. Mann had an opportunity to give a signal. Since no evidence was presented to support this essential element, the defendants below could not have satisfied their burden with respect to the statute or corresponding instruction, and thus the instruction was inappropriate and should not have been given.

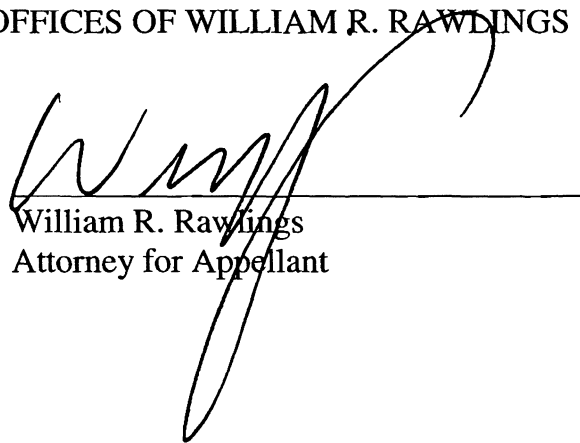
The administering of this misleading instruction, which was unsupported by the evidence was confusing to the jury, was prejudicial to the Appellant, and resulted in a verdict which was inconsistent with and contrary to the evidence. Accordingly, the submission to the jury of Instruction 28 was not harmless error and therefore the Appellant should be granted the relief sought on these grounds.

### **CONCLUSION**

Based upon the foregoing grounds, the Appellant respectfully urges this court to reverse the rulings below, and to issue an order instructing the trial court to set aside the verdict, vacate the corresponding judgment and grant the Appellant's motion for a new trial.

DATED this 8<sup>th</sup> day of March, 2006.

LAW OFFICES OF WILLIAM R. RAWLINGS

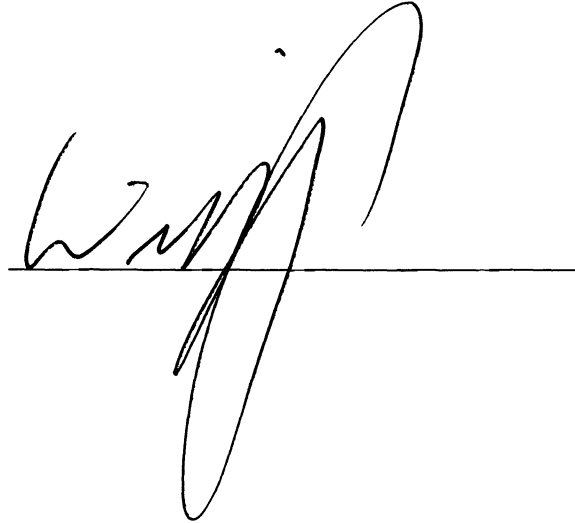
A handwritten signature in black ink, appearing to read 'W. R. Rawlings', is written over a horizontal line. The signature is stylized with a large, sweeping flourish that extends upwards and to the right.

William R. Rawlings  
Attorney for Appellant

# CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing  
BRIEF OF APPELLANT in the United States Mail, postage prepaid, on this 10<sup>th</sup>  
day of March, 2006, to the following:

Albert W. Gray  
SMITH & GLAUSER, P.C.  
7351 South Union Park Ave. #200  
Salt Lake City, UT 84047

A handwritten signature in black ink, appearing to be 'W. Gray', is written over a horizontal line. The signature is stylized with a large loop at the end.

## **ADDENDUM A**

Utah Code Annotated § 41-6-62 – Following another vehicle --Safe distance --  
Exceptions.

(1) The operator of a vehicle:

(a) may not follow another vehicle more closely than is reasonable and prudent, having regard for the:

(i) speed of the vehicles;

(ii) traffic upon the highway; and

(iii) condition of the highway; and

(b) shall allow sufficient space in front of the vehicle to enable any other vehicle to enter and occupy the space.

## **ADDENDUM B**

Utah Code Annotated § 41-6-69 – Turning or changing lanes --Safety --Signals --  
Stopping or sudden decrease in speed --Signal flashing --Where prohibited.

(2) A person may not stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the operator of any vehicle immediately to the rear when there is opportunity to give a signal.

## **ADDENDUM C**



OCT 26 2005

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

*Attorneys for Defendant Fredrickson and Riddle Services, Inc.*

**Judge Deno Himonas**

Plaintiff's motion for new trial came before this Court for hearing on September 23, 2005. Plaintiff was represented by counsel, William R. Rawlings. Defendant was represented by counsel, Albert W. Gray, Smith & Glauser, P.C. The Court, having read the memoranda of points and authorities in support of, memorandum of points and authorities in opposition to, and memoranda of points and authorities in reply to Plaintiff's motion for new trial, the Court received oral argument from Plaintiff on the matter.

Having reviewed evidence produced in the trial of this matter, having considered the memoranda in support of and in opposition to Plaintiff's motion for new trial, having heard the arguments of Plaintiff, the Court now enters this Order:

IT IS HEREBY ADJUDGED, DECREED AND ORDERED that Plaintiff's motion for new trial is denied.

The Court specifically finds that the verdict reached by the jury is supported by sufficient evidence.

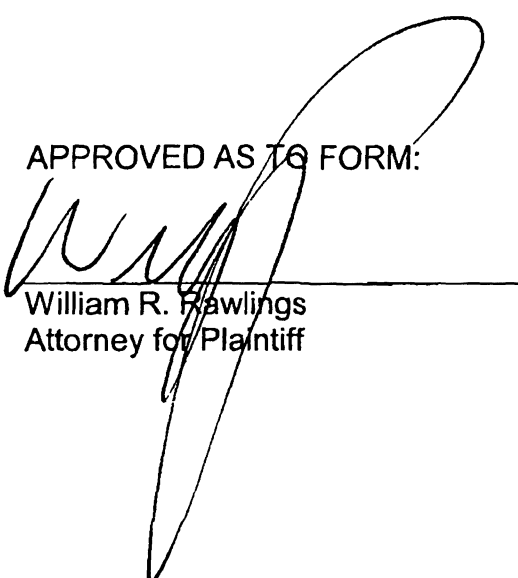
The Court further finds that there was no error in giving of Jury Instruction No. 28 and that there was sufficient evidence for Jury Instruction No. 28 to have been given.

DATED this 26 day of Oct, 2005.

**BY THE COURT:**

15  
The Honorable Deno Himonas  
Third District Court Judge

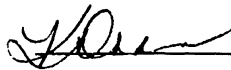
APPROVED AS TO FORM:

  
\_\_\_\_\_  
William R. Rawlings  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be mailed, postage prepaid, this 28<sup>th</sup> day of September, 2005, a true and correct copy of the foregoing ORDER ON PLAINTIFF'S MOTION FOR NEW TRIAL to the following:

William R. Rawlings, Esq.  
LAW OFFICE OF WILLIAM R. RAWLINGS  
11576 South State St, #401  
Draper, UT 84020



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