1974

F. William Mcginn Ii v. Utah Power & Light Company : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

F. WILLIAM McGINN II,
Plaintiff-Respondent,

v.

UTAH POWER & LIGHT COMPANY, a Maine corporation,
Defendant-Appellant.

Case No. 13619

REPLY BRIEF OF APPELLANT

**Appeal From an Order of the Third District Court
In and For Salt Lake County, Utah
The Honorable Marcellus K. Snow, Judge**

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PRELIMINARY STATEMENT

After appellant filed its initial brief, the Supreme Court of Colorado in *Simpson v. Anderson*, 526 P.2d 298 (Colo. 1974) held that informing the jury of the effect of its answers to the interrogatories was contrary to the intent behind the comparative negligence statute. Thus The Supreme Court reversed the Colorado intermediate court decision which the trial judge in the instant case relied upon in granting plaintiff's motion for a new trial.

The undisputed facts, as stated in appellant's and respondent's brief, show that the plaintiff was injured when he and four of his companions were carrying a sailboat with a 26 foot aluminum mast toward the north shore of Bear Lake when the mast struck defendant's power line.

Issues raised in plaintiff's brief and cross-appeal are answered below.

POINT I

SINCE THIS CASE WAS TRIED UNDER THE IDAHO COMPARATIVE NEGLIGENCE STATUTE, THAT STATUTE ALSO CONTROLS THE MANNER IN WHICH THE CASE IS SUBMITTED TO THE JURY.

From the outset of the trial there was agreement that this case would be tried under the Idaho Comparative Negligence Law. An important part of that statute is §6-802, which states:

> "6-802. Verdict giving percentage of negligence attributable to each party.—The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damage in proportion to the amount of negligence attributable to the person recovering. [1971, ch. 186, §2, p. 862.]

Further, it is evident from the Idaho Supreme Court's decision in *Holland v. Peterson*, 95 Idaho 728, 518 P.2d 1190 (1974) that it is improper for the attorneys or the court to inform the jury as to what effect its answers to the special verdict will have on the final outcome of the case. Now respondent is arguing that this part of the Idaho Comparative Negligence Law should not have been applied in the trial. He claims whether or not to inform the jury is merely a procedural matter, and under the accepted conflict of laws rule, the procedural rules of the forum state (Utah) should be applied.

However, respondent oversimplifies what is procedural and what is substantive. In essence, he would allow the court to try this case under the Idaho Comparative Negligence Statute, but would refuse to permit the court to use the underlying policy which makes this law operate in the effective manner intended by the Idaho legislature. This policy goes to the heart of the Idaho Comparative Negligence Statute, and for the Utah court to apply the Idaho law without also applying the clearly enunciated Idaho rule on comment to the jury would be to emasculate the Idaho law and subvert the very purpose of the statute—that being to convert the jury into an exclusive fact-finding body removed from the sway of passion or prejudice. Obviously this policy is part of the substantive Idaho law.

There are no hard and fast rules governing what is substantive and what is procedural. Professor Mor-

gan, in his article entitled "Choice of Law Governing Proof" (58 Harv. L. Rev., p. 153, 1944) states:

> ". . . The time has passed when the decision of important questions should turn on mere classification or upon the willingness or unwillingness of judges to pour enlarged meaning into old definitions. It is time to abandon both the notion and the expression that matters of procedure are governed by the law of the forum. It should be frankly stated that (1) the law of the locus is to be applied in all matters of substinance except where its application will violate the public policy of the forum; and (2) the law of the locus is to be applied in all such matters of procedure as are likely to have a material influence upon the outcome of the litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum." *Id.* at 195.

The law regarding permissible comment and instruction to the jury is likely to have a material influence upon the outcome of this litigation. Further, since the policy that it is *improper* to inform the jury of the effect of its answers to the special verdict is part of the law of every jurisdiction which has a comparative negligence statute similar to Utah's, there is no reason why applying this Idaho rule would violate Utah's public policy. Therefore, Idaho's policy that it is improper to inform the jury of the effect of its answers to the special verdict should be considered as an essential part of the Idaho Comparative Negligence substantive law and should be applied in this case.

There can be no doubt that a comparative negligence statute along with its underlying policies is not merely procedural but affects the substantive rights of the parties. In *Chism v. Phelps,* 311 S.W.2d 297 (Ark., 1958) the court, in considering this issue stated:

> "While no simple formula can be evolved to determimne the difference between the two (comparative negligence and contributory negligence), we think the right of a party plaintiff to recover substantial damages even though he is 10% or even 49% negligent involves a substantive right and is not a matter of procedure." *Id.* at 300.

If the forum state chooses to apply the comparative law of a foreign jurisdiction, as Utah has done in this instance, must the Utah court merely adopt the whole of the foreign state's law or can the court merely accept the basic framework of submitting special interrogatories to the jury for its percentage findings, but reject the underlying principals and policies essential to the operation of this law? To allow a court to do this would be to subvert the entire rationale for applying the foreign law. Such reasoning was followed in *Fitzpatrick v. International Ry. Co.,* 169 N.E. 112 (N.Y., 1929) when a New York court held:

> ". . . As we have said, the Ontario (Comparative Negligence) Act goes beyond a matter of procedure and gives a right unknown to the common law, the right of an injured person to recover for another's negligence, even though contributing by his own neglect to bring it about.

> For these reasons the trial court was quite correct in charging the jury in accordance with the Ontario statute.
>
> The appellant suggests that, as this act does not refer to the burden of proof, the plaintiff, under our form of procedure, should have the burden of proving either freedom from contributing negligence or else the degree to which his own negligence contributed. We have no such law in this state. *To follow the appellant's suggestion would still require our courts to adopt a portion of the Ontario statute. If we adopt a part we must apply it as a whole, because it affects the substantial rights of the parties."* (emphasis added) *Id.* at 115.

Appellant respectfully submits the Idaho policy of not permitting a jury in a negligence case to be informed of the effect of its answers is clearly an integral part of the substantive law of that jurisdiction. The Utah court, when it applied the Idaho Comparative Negligence statute in this case, was correct in its initial ruling that the whole of the Idaho law, including this essential policy, should govern the trial.

POINT II

UNDER THE UTAH COMPARATIVE NEGLIGENCE LAW, THE JURY SHOULD NOT BE ADVISED OF THE EFFECT ITS PERCENTAGE FINDINGS HAVE ON THE OUTCOME OF THE CASE.

Even if this court should rule that this essential Idaho policy is procedural and not substantive, and thus apply Utah procedure, it should have no effect on the final outcome of this appeal. Utah law on this point should follow every other comparative negligence jurisdiction, and it is respectfully submitted that this court should adopt the rule permitting no comment to the jury regarding the effect of its answers to the special verdict.

Appellant agrees that this is a matter of first impression under Utah's new comparative negligence law. It was shown in appellant's brief that every other comparative negligence jurisdiction including Wisconsin, Minnesota, Arkansas, Tennessee, Colorado and Idaho have found after experience with this system that comparative negligence works best and most efficiently if the jury is not informed of the effect of its percentage findings. Respondent argues that even though Utah's comparative negligence law was patterned after the Wisconsin and Idaho statute, Utah should not adopt the Wisconsin and Idaho rule regarding comment on the percentages. The only case respondent could cite which substantiated his position was a decision by an intermediate Colorado court, *Simpson v. Anderson*, 517 P.2d 416 (1974) which held that the jury should be advised of the effect its findings had upon the verdict. However, on September 9, 1974, the Supreme Court of Colorado reversed this case holding:

> "During closing argument, counsel for the respondent-defendant informed the jury that the

> plaintiff would be entitled to recover only if the jury found the plaintiff less negligent than the defendant. *Such comment or explanation to the jury is contrary to the intent behind our comparative negligence statute:* (1971 Perm. Supp., C.R.S. 1963, 41-2-14). We hold that comment, explanation, or instruction to the jury on the effect of its answers in the special verdict form in negligence cases is clearly improper under our comparative negligence statute. We therefore find that reversible error exists and that this cause must be remanded for a new trial." (emphasis added). *Simpson v. Anderson,* 526 P.2d 298 (1974).

See also *Avery v. Wadlington,* 526 P.2d 295 (Colo. 1974), a companion case to *Simpson* in which the Colorado Supreme Court more fully sets out its reasons for adopting the "no comment rule."

With *Simpson* reversed, respondent cannot point to even one comparative negligence jurisdiction which has adopted the rule which he is now urging the Utah courts to adopt. The reason these other states, including our sister states of Idaho and Colorado, have all adopted the no comment policy is that they recognize such a policy is essential if the underlying concept of the jury operating solely as a fact-finding body is to be achieved.

Under the Utah comparative negligence statute, the division of responsibility between the court and jury is evident. The jury is the finder of fact and simply answers special questions based on what it determines the facts to be. By stature, the court applies the law

and brings about the result by appropriate judicial order. Under this system, it is not the jury's function to attempt to understand the comparative negligence law nor to attempt to have the effect of this law reflected in its answers to the special verdict. Jury involvement is therefore greatly simplified, even in very complex multiple party, multiple claim, multiple issue cases.

Where a jury is told only what it needs to know under proper instructions integrated with the special verdict form, a jury's thought processes and function are channeled along specified lines. Since it is not necessary for the jury to concern itself with how much the plaintiff receives, the policy makes it more likely that a "pure verdict" unaffected by passion, prejudice or misunderstanding will be obtained. A jury will simply carry out its function and while in some instances it may wonder or perhaps even know the effect of particular findings, it will not concern itself with that aspect of the case because it is clearly not part of the jury's sworn duty.

On the other hand, if the jury is given unnecessary information as to the effect of its special findings, and emphasis is placed upon the particular percentage findings necessary to bring about a particular result, the jury may very well believe that it is a jury function to cause a certain end result and thus may adjust its percentage allocations and monetary award accordingly.

Take for example the trial of the present case,

where the jury found the plaintiff's negligence to be 60%. The jury answered the special interrogatory to that effect because that was its described function, and neither the attorneys nor the judge suggested that the jury should be aware of the end result. The jury may have felt sorry for the injured plaintiff and wanted him to receive something, but the instructions, special verdict and conduct of the trial clearly defined its function, and the jury did not go beyond it. If the jury is informed of the effect of its answers and mistakenly tries to perform the court's function, it will inevitably fail to carry out its function under the comparative negligence law. Telling the jury invites confusion, injects unnecessary collateral information and encourages the jury to succumb to the effects of passion and prejudice, thus abandoning its role as a strict finder of fact.

The facts in *McGinn* are relatively simple and involve only two parties. Many cases, however, can become quite complex with multiple issues, multiple parties, crossclaims and counterclaims. If a jury is simply directed to answer specific questions with the court then to apply the law, even complicated cases can be tried with relative ease. But, if the jury is told about the effect its answers will have on each issue and party, the case will be impossible to control and the jury will certainly end up confused. In fact, it would probably be impossible in a multi-issue, multi-party case for the court to draft instructions explaining the mechanics of the comparative negligence law in a manner which is

comprehensible to layman jurors. A policy of the jury operating as fact-finders is far superior to respondent's suggested policy which, in complicated cases, would result in chaos.

The special verdict concept of channeling jury thought and function along specified lines is nothing new in Utah. It is seen daily in other areas of the law. Jurors in criminal cases are not told about what sentence an accused could receive if convicted and the jury does not fix the penalty. The reason is that the jury function is only to determine guilt or innocence, not to determine the legal result of that finding. The jury is not told whether there is insurance in a case and what the limits of coverage are. The jury is not informed whether or not the plaintiff has been paid in full or in part by his own insurance. Further, the jury is not told whether the accident is covered by workman's compensation so that a portion of plaintiff's recovery, if any, will be paid to the compensation carrier. It is deemed improper to tell the jury that attorneys' fees will come from the award; that the plaintiff will receive interest from the date of judgment; and that plaintiff will not be required to pay income tax on the judgment. The reason the jury is not told is that the jury does not need to know and its findings should not be influenced and perhaps prejudiced by unnecessary collateral issues.

Plaintiff argues that such a policy of no comment demonstrates a distrust of the jury system. This is sim-

ply not the case. The issue is not one of "distrust" at all. The problem is that the jury does not need to know and is particularly ill-suited to attempt to understand and apply the comparative negligence statute. It is not a matter of distrust, but rather a recognition that jurors often allow sympathy to cause them to violate their oath to return a verdict based on fact. A concise statement of the reason for the rule of no comment is contained in *Wright v. Convey*, 349 S.W.2d 344 (Ark. 1961):

> *The reason for the rule is that the special interrogatories are intended to elicit the jury's unbiased judgment upon the issues of fact, and this purpose might be frustrated if the jurors are in a position to frame their answers with a conscious desire to aid one side or the other.* (emphasis added).

One of the foundation stones of comparative negligence is its policy of a fact-finding jury which returns a "pure verdict" by way of the special verdict procedure. Emasculation of this main feature of the law and the procedural nightmare that will result should not be permitted. Utah should follow the precedent of every other comparative negligence state by not informing the jury of the effect its answers will have on the final outcome of the case.

POINT III

THE INSTRUCTION TO THE JURY EXPLAINING THE LACK OF RELATION-

SHIP BETWEEN THE PERCENTAGES OF RELATIVE FAULT AND DAMAGES WAS PROPER.

A. The Special Verdict Clearly Set Out The Fact That The Jury Should Ignore The Percentage Of Relative Fault Interrogatory When Answering The Damage Interrogatory.

Under comparative negligence, the jury determines the percentage of fault and also finds the total damages. If the jury holds by its percentage finding that the defendant is at least 51% at fault, the court performs the necessary mathematics to determine the dollar amount of the verdict. A comparative negligence jury should be made aware that it should answer the damage interrogatory without considering its answers to the preceeding fault interrogatories. This requirement was clearly met by the instruction given in the McGinn damage interrogatory which read:

> "Question No. 4. *Disregarding any of the previous answers,* what is the *total amount* of damages sustained by plaintiff F. William McGinn II as a result of the incident?" (emphasis added).

In plain and concise English this instruction told the jury to disregard its answers to the previous fault interrogatories and find the total amount of plaintiff's damages There is no evidence on the record that the jury was confused in this regard. Its finding of $150,000.00 general damages and $18,150.00 special damages was

what they believed plaintiff's total damages to be. This instruction was proper and sufficient, and not misconstrued by the jury. It must be presumed that the jury followed the clear instructions given to it by the court, and disregarded its previous answers to the fault interrogatory. Any instruction which went into too much detail on this point would have tended to overemphasize the percentage figures, thus causing the jury to improperly guess at their meaning and to stray from its fact-finding role.

B. Respondent Has Waived His Right To Object To The Interrogatory On Damages.

Both parties submitted requested instructions and a special verdict form to the court. Respondent's requested special verdict (R 188) was couched in language which tended to inform the jury of the effect its answers had on the final outcome of the case and was refused by the judge. After a discussion concerning what form the damage interrogatory should take, the court decided upon the language quoted in subsection A. After the instructions and special verdict were read and the jury retired to deliberate, respondent made various objections and exceptions to specific instructions (R 886-887). *Respondent did not object or except to the giving of the damage interrogatory, nor did he request the instruction he now argues should have been given.* Respondent admitted this during the argument on the motion for a new trial. On page R 930-931 of the record, counsel for respondent stated:

". . . and admittedly I didn't make this request at trial but I think you have the discretion to consider it now.

Although I did not request this instruction at the time of trial, I feel it is excusable neglect in view of the fact that it is the first trial any of us have tried . . ."

Rule 51 of the Utah Rules of Civil Procedure governs this point. It states in pertinent part:

> . . . If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection."

Another sentence of Rule 51 says:

> "Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving or the failure to give an instruction."

This language gives the court discretion under certain circumstances to review the giving or refusal to give a *requested* instruction. This language is not applicable in the case at bar since here we are dealing with an instruction which was not requested or presented to the court and which is not contained in this record on appeal. Counsel's argumemnt on this point

is not based on the record and should be disregarded in the interests of justice.

Utah courts have consistently refused to permit an appeal based upon instructions which were not objected to at the time of trial. In *Morgan v. Pistone*, 25 Utah 2d 63, 475 P.2d 839 (1970), where plaintiff appealed based upon the giving of an erroneous instruction, the court stated:

> "Such error, at best a highly debatable one, was not urged at the trial but for the first time on appeal. Our rules say, and repeatedly we have said that such exception must be asserted and made a matter of record at the trial level, failing which it is not reviewable on appeal except where unusual and compelling circumstances exist calling for correction by the existence of sound discretion. Such circumstances are not apparent here." 475 P.2d at 840.

Respondent should have objected or excepted to the giving of the damage interrogatory at trial. Even though afforded ample opportunity, respondent made no such objection. It was only after the adverse jury verdict that the respondent manifested any objection to an interrogatory with which he had seemed perfectly happy. Therefore, under the law respondent should be precluded from objecting to the damage interrogatory in this appeal since he took no steps to timely preserve the question at the time of trial. Further, respondent cannot appeal based upon an instruction which he neither requested or presented to the court until after the jury verdict.

C. Since The Jury's Answer To The Percentage Of Fault Interrogatories Made The Damage Interrogatory Irrevalent, Said Damage Interrogatory, Even If Incorrect, Constituted Harmless Error.

The jury considered the percentage of fault interrogatory and found the plaintiff more negligent than the defendant. Under the Idaho comparative negligence law such a finding dictated a judgment of no cause of action regardless of what the jury found the damages to be. Thus, once the jury determined that the plaintiff was 60% negligent, any finding on damages was irrelevant.

Of course, appellant takes the position that the language of the damage interrogatory was clear, concise and proper. But even if the damage interrogatory were to be held improper, the giving of that instruction was harmless error due to the jury's answers to the previous fault interrogatory. To argue otherwise respondent would have to convince the court that somehow the jury's determination of the damages affected its percentage findings. However, it is clear from the record that the jury answered the percentage of relative fault interrogatory based upon the facts elicited at trial. The jury's finding that the greater fault lay with the plaintiff negated any importance of the damage interrogatory. Thus, the utmost an improper damage instruction could constitute in this case would be harmless error, and it is well established Utah law that a jury verdict will not be overturned on the basis of

harmless error. See Rule 61 of the Utah Rules of Civil Procedure; *Joseph v. W. H. Groves Latter-Day Saints Hospital*, 10 Utah 2d 94, 348 P.2d 935 (1960); and *Wilson v. Gardner*, 10 Utah 2d 87, 348 P.2d 931 (1960).

POINT IV

THE TRIAL COURT PROPERLY REFUSED TO ADMIT CERTAIN PHOTOGRAPHS.

A few days after the accident, defendant's employees assigned to the area nailed warning signs on two poles on the 46 KV line bordering the accident area (Exhibits 66p, 67p and 68p). The signs nailed to the poles were identical to Exhibit 58p.

The photographs of the signs on the poles were offered in evidence during the testimony of a Utah Power & Light employee, Mr. Daniel James Raymond, District Representative of the Montpelier, Idaho District which includes the Camp Lifton area.

Plaintiff asked the court for a cautionary instruction that the photographs were *not to be considered as evidence of negligence* but were offered to show: the practicality and ease with which the signs could have been put up; to impeach the testimony of Mr. Raymond; and on the issue of whether or not the plaintiff was a trespasser at the time of the accident (R 797-798).

Mr. Raymond stated on direct examination he was familiar with the signs (R 794), that there was a supply of the signs in the Montpelier Office (R 794) and that they were sent out with the information that they should be put around irrigation systems (R 796). When Mr. Raymond was asked if it would have been *practical* and *feasible* to place the signs in recreational areas he answered *yes.*

> Q (By Mr. Roberts) Is there any reason why that couldn't protect someone with any kind of a long pole?
>
> A (Mr. Raymond) Any reason it couldn't?
>
> Q Yes.
>
> A I don't see why it couldn't, if they would read it, yes.
>
> Q And it would have been practical and feasible to take this very sign and place it on various poles around in the state park west of Lifton, would it not?
>
> A I think there would be any observing of pipes being raised or anything of this sort it may have been.
>
> Q It would have been practical and feasible is my question. Is the answer to that yes?
> A It is, yes. (R 797)

After a recess was taken so the court could hear arguments on the admissibility of Exhibits 66p, 67p and 68p, Mr. Raymond was called back to the stand and asked:

> Q (By Mr. Roberts) Just a few more matters, Mr. Raymond. One thing, where we left off,

would you agree with me, sir, that as of July 1972 before this accident happened there was no particular reason why this sign could not have been used in a recreational area had you seen fit to do so?

A (Mr. Raymond) I think that is what I said just before the recess. (R 708)

The photographs were not admissible to impeach Mr. Raymond's testimony because he admitted it would have been practical and feasible to put the signs in the area where the accident happened (R 797, 708 p 486).

By claiming the photographs should have been allowed in evidence to show that it would have been *practical* and *feasible* to put the signs up, plaintiff obviously was offering the Exhibits to show negligence. The admission of the Exhibits would have clearly violated Rule 51, Rules of Evidence, which states:

> Subsequent Remedial Conduct. When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, *evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.* (emphasis added).
>
> NOTE: This rule relates only to negligence and not to causation. It is not intended to exclude evidence which might be admissible on other grounds, independent of such provisions.

The ruling of the court in refusing to admit the photographs was in accord with the Rules of Evidence

and also in accord with the earlier Utah case of *Potter v. Dr. W. H. Groves Latter-Day Saints Hospital,* 99 Utah 71, 103 P.2d 280 (1940) where this court held:

> " . . . Evidence of alterations or repairs to premises under his control made following an accident therein is *inadmissible* to show as against a defendant that the former condition was unsafe or was being negligently maintained. (emphasis added).

This rule is recognized in practically all jurisdictions. See annotation, *Admissibility of Evidence of Repairs, Change of Conditions or Precautions Taken After Accident,* 64 ALR2d 1298.

Since the accident happened on Utah Power & Light property, defendant claimed one of the issues was whether or not the plaintiff was a trespasser and if so, what duty was owing to him.

The plaintiff's main reason for offering the photographs of signs posted after the accident was to show that the plaintiff was *not* a trespasser. *[1]

The court ruled as a matter of law that the plaintiff was *not* a trespasser at the time and place of the accident and that the photographs of the signs posted after the accident were not admissible (R 815).

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*1 See argument of plaintiff's counsel (R 801):
MR. ROBERTS: Those pictures are before your honor for admission, that you haven't ruled on them yet.
THE COURT: I see. Then what you intend to do would be to argue to the jury, these are taken, well, sometime after the accident. Would that be your purpose; wouldn't it?
MR. ROBERTS: To show that there is no trespass. . . .

(The Court) "The court also finds that this plaintiff was not a trespasser at the time and place in question of this accident.

And the court also will not permit any further Exhibits or evidence or anything of that nature in connection with the remedial steps taken." (R 815).

This ruling obviated the plaintiff's request to admit the photographs.

The trial court should be granted discretion in ruling on the admissibility of this type of evidence.

He should consider the policy of the law; to encourage precautionary measures taken after accidents to prevent further injury. He must weigh this policy against the reason for which the evidence is offered. In this case none of the reasons for which the photographs were offered were valid.

Mr. Raymond's *admission* that the signs were available and could have been posted; the statement of plaintiff's counsel that the Exhibits were *not offered to show negligence;* and the court's ruling that the plaintiff was *not* a trespasser as a matter of law eliminated the relevancy of the proposed Exhibits.

It is respectfully submitted that the trial judge did not commit prejudicial error in refusing to admit these photographs into evidence.

POINT V

THE TRIAL COURT DID NOT UNREASONABLY RESTRICT PLAINTIFF'S COUNSEL IN CLOSING ARGUMENT.

After the court ruled that the jury would not be advised of the effect of the comparative negligence, the question arose as to how far counsel could go in arguing the negligence of each party.

The following colloquy occurred between the court and counsel:

> MR. ROBERTS: In reference to this matter of telling the jury why we cannot under your ruling comment on the effect of it, of the percentage findings, would there be any prohibition against urging them to find the defendant more responsible than the plaintiff, things like that, without telling them what the percentages are? Now it seems to me that is certainly fair comment and fair argument. I urge you to.
>
> THE COURT: Yes. Let's go further. I think each one of you can urge that your party was not negligent at all, that the whole contributing cause of this accident and negligence was the other party.
>
> MR. ROBERTS: Or if he was negligent, we think it was relatively slight with that of the power company, or something like that. I think that is certainly fair game.
>
> THE COURT: You would agree to that?
>
> MR. NEBEKER: I would agree with the court's statement that counsel could argue that

he thinks his client was not negligent and the other party was, or vice versa. The danger with getting into this slight or greater than may be a little hazardous. I am not sure about that. But I think it depends on how it is stated and what inference is given to it as to whether or not there is an effect. I think you have to be very careful in explaining that to the jury.

THE COURT: I think each party can argue within legal bounds that their own client was either not negligent at all or very, very slight and that the other party was grossly negligent or almost the only negligence, but no mention of the fact that the money award depends on the degree. See what I mean? Even like a ten-ninety or anything else. Stay away from anything like that, and especially don't even get near that fifty-fifty thing.

MR. ROBERTS: Yes.

MR. NEBEKER: I think that is proper. (R 816-817)

This subject was again discussed by the court and counsel just before the matter was submitted to the jury.

MR. NEBEKER: My request is that going to the judge's ruling that we not argue the effect of the comparative negligence, I think that is what the court has ruled, and I think maybe we should have that ground rule understood.

THE COURT: I think it should be understood that in making your arguments with respect to liability that of course neither side will mention the effect of the percentage application or allocation of negligence that they are going to be asked in the verdict. If you mention blame and negligence I think it should be done in the con-

text of in every case urging the jury that your client is entirely free from negligence, and that the cause of this action was caused by the negligence of the other party.

MR. ROBERTS: I think we should argue that comparatively speaking the negligence of the power company is substantially more than the negligence of our client, if any, we believe.

THE COURT: That part is all right. But don't mention the word percentage or refer to that particular question they have to answer in connection with your argument at all, because I will instruct them on that. Do you see what I mean?

MR. ROBERTS: We have to have some way to get to it. Can't we say they will be asked to answer certain questions and without trying to attribute the responsibility to the two parties, and we would urge that as between the two our client is not responsible at all, or if so, very little, and the power company is very responsible, and we've got to be able to argue that.

THE COURT: I think you can go that far.

MR. ROBERTS: I want the record at the same time to show our exception to this, and we think the jury ought to know what they are doing, and I am sure we have already made our record on that. (Mr. Roberts was excepting to the ruling by the court that the jury would not be informed of the effect of their answers to the special interrogatories). (R 825-826)

The court, in stating that counsel should stay away from that "fifty-fifty thing" was directing that admonition to *defendant's* counsel, not plaintiff's counsel.

Inasmuch as this 50-50 argument has been effectively utilized by *defense* counsel, the court properly advised counsel for *both* sides to avoid such argument.

The court gave counsel for both parties the right to argue the relative negligence of each party. Certainly there was no prejudice to the plaintiff by this "ground rule." It prevented the 50-50 argument which was what the court was trying to avoid.

Since both counsel observed the "ground rules" stated by the court, there was no prejudice to the plaintiff.

CONCLUSION

This Interlocutory Appeal presents an important issue regarding comparative negligence law: whether the jury should be informed of the effect its answers have on the final outcome of the case. Appellant has demonstrated that every other comparative negligence jurisdiction, including our sister states of Idaho and Colorado, have adopted the "no comment rule." Since this case was tried under Idaho law, the whole of that state's comparative negligence law should be recognized and applied by the Utah court. Furthermore, it is respectfully submitted that Utah should also adopt the policy under our new comparative negligence act. Only through such a rule can the concept of the juries function as a strict fact-finding body be preserved.

The trial court did not commit prejudicial error by refusing to admit the photographs of the signs nailed on poles bordering the accident area a few days after the accident happened.

The trial court did not unreasonably limit plaintiff's counsel in closing argument.

Therefore, the trial court's order granting a new trial should be reversed and the jury verdict and judgment of no cause of action should be reinstated.

Respectfully submitted,

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