

1995

Iola Dawn Patton v. Doris Keating : Brief of Appellee

Utah Court of Appeals

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John R. Lund, Esq.; Julianne P. Blanch; Snow, Christensen & Martineau; Attorney for Appellee.
Lewis R. Hansen; Attorney for Appellant.

Recommended Citation

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BRIEF

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DOCKET NO.

950169CA

IN THE UTAH COURT OF APPEALS

IOLA DAWN PATTON,

Plaintiff/Appellant,

No.: 950169-CA

vs.

Priority No. 15

DORIS KEATING,

Defendant/Appellee.

95-0490-CA

BRIEF OF DEFENDANT/APPELLEE

APPEAL FROM JUDGMENT ENTERED IN THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE HOMER WILKINSON, PRESIDING

JOHN R. LUND (A4368)
JULIANNE P. BLANCH (A6495)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellee
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

LEWIS R. HANSEN
Attorneys for Appellant
Professional Plaza
2727 West 3500 South, Suite 220
West Valley City, Utah 84119
Telephone: (801) 963-2222

FILED

AUG 10 1995

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SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellee
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

LEWIS R. HANSEN
Attorneys for Appellant
Professional Plaza
2727 West 3500 South, Suite 220
West Valley City, Utah 84119
Telephone: (801) 963-2222

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STATEMENT OF JURISDICTION

Appellee Doris Keating agrees with the statement of jurisdiction contained in Appellant Iola Patton's principal brief.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of The Proceedings, And Disposition Below.

Mrs. Patton filed this action against Mrs. Keating for personal injuries allegedly sustained in a rear-end automobile collision in January 1992. (R. 2). After a three-day trial in January 1995, the jury found Mrs. Keating fifty one per cent negligent and Mrs. Patton forty nine per cent negligent. (R. 86-8, 189-90). The jury awarded \$3,500.00 in damages. (R. 189-90).

Mrs. Patton filed a motion for a new trial on the bases that the damages awarded were grossly inadequate and that the trial court improperly excluded a portion of her intended cross examination of Mrs. Keating. (R. 199-203). The trial court denied the motion and this appeal followed. (R. 231).

B. Statement Of Facts.

1. AFTER BEING INVOLVED IN A LOW-IMPACT COLLISION, MRS. PATTON FILED A LAWSUIT FOR OVER ONE MILLION DOLLARS.

On January 14, 1992, Mrs. Patton drove a friend to the Lost Creek apartment complex in Murray. (R. 249, 280). She parked on the wrong side of a road in the complex, in a no-park area next to a curb, and remained in the car while her friend conducted business with a resident. (R. 282, 302). It was "pitch dark" at the time, and the condition of the road was icy and snow-covered. (R. 280, 282, 288, 314).

Mrs. Keating had just dropped off a friend in another area of the apartment complex parking lot. (R. 311). As she was turning a corner to leave the complex, her car began to slide. (R. 313). She applied her brakes but slid into the rear of Mrs. Patton's vehicle. (R. 313). Mrs. Keating described the accident as unavoidable. (R. 318). Although Mrs. Patton maintained at trial that Mrs. Keating was speeding, Mrs. Keating's statement that she was travelling at a very low rate of speed, about five miles per hour, was confirmed by expert testimony and by the minimal amount of damage to the vehicles. (R. 210, 289, 314-315).

The parties exited their vehicles to inspect for damage and did not find any on either vehicle. (R. 288, 316). Mrs. Patton also stated that she was not hurt. (R. 316-17, 320). She subsequently filed a personal injury suit against Mrs. Keating seeking payment of alleged medical expenses and one million dollars in general damages. (R. 4).

2. THE JURY DETERMINED THAT MRS. PATTON SUSTAINED \$3,500.00 WORTH OF DAMAGE.

Mrs. Patton claimed at trial that she was forced to drop out of Salt Lake Community College and lost a Pell Grant as a result of the accident. (R. 274, 278). She attempted to introduce evidence that she incurred medical expenses of \$23,000.00, but it was excluded for lack of foundation. (R. 277-8). She introduced a physician's certification of permanent total disability, but

later admitted on cross examination that she worked out two hours a day at the Holiday Health Spa. (R. 278, 307).

Mrs. Patton attempted to present expert testimony regarding the circumstances of the accident through Don Remington.

(R. 211). However, Mr. Remington conceded on cross examination that he had limited knowledge about the accident, having only learned of it a few days before trial and having only learned Mrs. Patton's version of events. (R. 211). By contrast, expert accident reconstructionist Newell Knight testified for Mrs. Keating. (R. 210). He explained that the bumper and seats of Mrs. Patton's vehicle were designed to absorb force from a collision and thereby prevent injury. (R. 210-11).

Two physicians testified at trial. (R. 212). Dr. Wood, who treated Mrs. Patton after the accident, diagnosed her with merely a lumbar spasm or strain. (R. 211). Dr. Foley noted that while Mrs. Patton reported "an acute onset of radiculopathy" following surgery unrelated to the accident, this condition was not connected to the accident. (R. 211). Dr. Schwartz, who performed back surgery on Mrs. Patton after the accident, was not called to testify. (R. 211). All treating physicians agreed that their diagnosis relied heavily on the subjective symptoms reported by Mrs. Patton. (R. 212).

At the close of evidence, counsel delivered their closing arguments. Mrs. Patton never objected to any portion of Mrs. Keating's closing argument. (R. 251-264). After the jury rendered its verdict awarding \$3,500 in special damages and no

general damages, Mrs. Patton did not request that the jury be directed to reconsider the amount of special or general damages. (R. 213).

Mrs. Patton filed a motion for a new trial shortly afterwards, asserting only that the damages awarded were inadequate and contrary to the evidence, and that she should have been able to question Mrs. Keating regarding alcohol consumption merely because Mrs. Keating attended a Veteran of Foreign Wars function before the accident.¹ (R. 199-203). The court denied the motion.

SUMMARY OF ARGUMENTS

POINT I: The trial court did not abuse its broad discretion in precluding Mrs. Patton from questioning Mrs. Keating on alcohol consumption. Mrs. Patton had no foundation to pursue the line of questioning and made no viable proffer of admissible evidence.

POINT II: The jury's assessment of fault and damages was well supported by the evidence presented. Mrs. Patton cannot receive a new trial simply because she did not receive a favorable outcome the first time around.

POINT III: Mrs. Patton's attack on Mrs. Keating's closing argument, raised for the first time on appeal, lacks merit. The

¹Mrs. Patton attempted to ask Mrs. Keating on cross examination whether the Veterans of Foreign Wars served alcohol at functions. (R. 249). The trial court precluded questions regarding alcohol consumption on the grounds of unfair surprise and prejudice; Mrs. Patton did not raise the subject of alcohol consumption until trial, and there was no evidence that Mrs. Keating had been drinking. (R. 249-251).

closing argument did not violate the open courts provision. The last twenty minutes of the trial did nothing to erase the existence of Mrs. Patton's day, or three days, in court. Moreover, there was no constitutional infringement because there was no state action. Neither was the closing argument "grossly improper"; asking the jury to question whether a one million dollar verdict is warranted in light of the flimsy evidence presented lies well within the expansive boundaries of appropriate closing argument.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE
ITS BROAD DISCRETION IN PRECLUDING
A LINE OF QUESTIONING FOR WHICH THERE
WAS NO GOOD FAITH BASIS.

Although Mrs. Patton had absolutely no evidence that Mrs. Keating had been drinking before the accident, she nonetheless attempted to create that inference at trial by asking Mrs. Keating about the Veterans of Foreign Wars. It is a fundamental rule of cross-examination that parties cannot question witnesses about a subject without a good faith belief to support the questioning. The trial court acted properly in halting the fishing expedition.

A. Mrs. Patton's Intended Line Of Questioning Lacked Foundation.

The following exchange occurred during cross examination of Mrs. Keating:

Q: Now my understanding is that evening you had been at a meeting with the Veteran of Foreign Wars?

A: The Foreign Wars, yes, Auxiliary.

Q: Now do the Veterans of Foreign Wars, do they serve alcohol at their various functions?

Mr. Lund: Objection, there's no evidence whatsoever of any alcohol consumption here and it's inappropriate for him to ask that now.

. . .

The Court: I would sustain. (R. 249).

The question was properly excluded for two reasons. First, it would have been wholly inadequate to support a reasonable inference that Mrs. Keating was under the influence of alcohol when the accident occurred. The only claimed "foundation" for this line of questioning is Mrs. Patton's assertion that the Veterans of Foreign Wars is "very well known" to serve alcoholic beverages. (Appellant's Brief at p. 16). She has never proffered affidavits or other evidence to establish this alleged fact. Yet she sought to imply to the jury from this unsupported fact that Mrs. Keating must have been drinking before the accident. The trial court appropriately prevented Mrs. Patton from using the bare assertion that the Veterans of Foreign Wars serves alcohol as a springboard to implying that Mrs. Keating was intoxicated. See State v. Sorenson, 619 P.2d 1185, 1191 (Mont. 1980) (mere assumption of counsel that witness was under influence of drugs is insufficient foundation to ask about drug use).²

²Mrs. Patton incorrectly cites Sorenson as support for her notion that questioning about alcohol use is always fair game. (Appellant's Brief at 15). The other cases cited for this notion

Second, Mrs. Patton intended to create this prejudicial inference without even knowing whether Mrs. Keating actually had consumed alcohol that evening. Utah Rule of Evidence Rule 103(2) (attached as Addendum A) provides that error may not be predicated on a ruling which excludes evidence unless the substance of the excluded evidence has been made known to the court by an offer of proof. Mrs. Patton never submitted an offer of proof concerning Mrs. Keating's use of alcohol. Without this offer of proof, the court never had an opportunity to determine if there was specific admissible evidence regarding use of alcohol and properly excluded the line of questioning. See State v. Rammel, 721 P.2d 298, 499 (Utah 1986); Bradford v. Alvey & Sons, 621 P.2d 1240, 1243 (Utah 1980) (appellate court cannot say that exclusion of evidence was error without proffer).

A party may not ask a witness a prejudicial question in front of the jury without having good-faith knowledge of what the answer is. In People v. Vialpando, 804 P.2d 219 (Colo. App. 1990), defense counsel attempted to ask a rape victim questions about her prior sexual activities without knowing whether she had in fact been sexually promiscuous. Approving the trial court's exclusion of these questions, the court noted that counsel

may not properly propound to a witness questions which can cause a doubt in the jury's mind as to the witness'

are similarly unavailing. See State v. Mitchell, 571 P.2d 1351 (Utah 1977) (known heroin dealer could be asked about heroin use); State v. Tucker, 800 P.2d 819 (Utah App. 1990) (witness could be questioned about cocaine use for limited purpose of impeachment).

credibility when there is no reasonable basis in fact for that interrogation.

804 P.2d at 223.

Just as it would have been prejudicial to ask the rape victim in Vialpando whether she had been sexually promiscuous, it would have been inappropriate to ask Mrs. Keating if she had been drinking.³ Regardless of what the witness' answer might have been, an inference of drinking would have been already been created by the mere asking of the inflammatory question. See Lily v. Scott, 598 P.2d 279, 283 n.3 (Okla. App. 1979) (improper questions having for their sole purpose the casting of reflections upon the character of witnesses is prejudicial conduct).

B. Mrs. Patton Has Not Demonstrated That The Preclusion, If Improper, Had A Substantial Effect On The Trial's Outcome.

Even if this Court determines that Mrs. Patton should have been allowed to question Mrs. Keating without foundation and without a good faith basis, a new trial is still unwarranted. Improperly excluded evidence becomes reversible error only if it can be shown that the exclusion had a substantial effect on the trial's outcome. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 796 (Utah 1991).

Mrs. Patton has not suggested, much less demonstrated, that a different outcome would have been probable had she questioned

³As a practical reality, Mrs. Patton obtained this prejudicial effect by, without reasonable notice, asking Mrs. Keating whether the Veterans of Foreign Wars served alcohol.

Mrs. Keating about alcohol consumption. To the contrary, evidence that Mrs. Keating consumed alcohol before the accident, if it had any effect at all, would have weighed upon Mrs. Keating's degree of negligence. Even if Mrs. Patton could prove that the jury would have found Mrs. Keating 100% negligent had she been able to pursue her line of questioning, damages would have remained \$3500.00. Mrs. Keating would have then been responsible for the entire damages amount rather than just 51% of it, but the damages still would have been "grossly inadequate," as Mrs. Patton calls them. Mrs. Patton complains on appeal that the jury's damages award was grossly inadequate compared to the amount of injury she suffered, yet evidence of intoxication properly could only have affected amount of liability, not damages. Mrs. Patton has done nothing to suggest, as is her burden, that the outcome would have been different had she been permitted to question about alcohol consumption. Instead, any error on the part of the trial court was harmless.

This Court should not order a new trial on the basis of the limited cross examination. The trial court, in a unique position to assess the relevance and prejudicial effect of evidence, acted properly in preventing the unsubstantiated and inflammatory interrogation from reaching the jury.

POINT II
THE EVIDENCE WAS SUFFICIENT TO
SUPPORT THE VERDICT.

Mrs. Patton's bald assertion that the verdict lacked any support in the evidence is meritless. In her one-page "argument" that the evidence was insufficient, she simply notes that when a verdict is "obviously unreasonable and unjust," the appellate court may reverse it. (Appellant's Brief at 16-17). However, she fails to explain how the verdict in this case was unreasonable and unjust, leaving this Court nothing to review for injustice.

A. Mrs. Patton Has Failed To Marshal The Evidence.

A jury verdict may be reversed only if, "viewing the evidence in the light most favorable to the verdict, there is no substantial evidence to support it." In re Estate of Kesler, 702 P.2d 86, 88 (Utah 1985). An appellant challenging a jury verdict must marshal all evidence supporting the verdict and show that evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict. W. Fiberglass v. Kirton, McConkie and Bushnell, 789 P.2d 34 (Utah App. 1990); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah App. 1990).

Mrs. Patton has not made the necessary showing. Rather than marshalling the evidence, her brief does not list one scintilla of evidence the jury could have relied on in reaching its verdict. Furthermore, she does not point to any evidence detracting from the verdict. She broadly suggests that the low damages award could not have been supported by any evidence because she

feels she suffered serious injury. Her attack on the liability assessment is similarly vacuous; she asserts the jury completely ignored liability because it was riveted on Mrs. Keating's "cold, calculated" closing argument. (Appellant's Brief at 17).

Mrs. Patton has neither marshalled the evidence for or against the verdict.

Mrs. Patton's "argument" against the jury verdict is unsubstantiated rhetoric. It lacks facts, it lacks legal authority and it lacks legal analysis. Appellate Rule of Procedure 24(a) requires appellate briefs to contain **arguments**. Mrs. Patton's page worth of assertions is insufficient to create an issue reviewable on appeal. See English v. Standard Optical Co., 814 P.2d 613, 618-9 (Utah App. 1991) (court declined to consider issues raised on appeal for failure to comply with Rule 24).

B. There Is Substantial Evidence To Support The Verdict.

The jury drew upon substantial evidence to support its finding that Mrs. Keating was only 51% negligent. The evidence at trial showed this accident to be unavoidable on Mrs. Keating's part. The jury heard evidence, both expert and lay, that she was travelling slowly as she negotiated a turn in an icy parking lot at night. When she saw Mrs. Patton's vehicle parked just around the corner, she braked but inevitably slid into her. The jury

also heard evidence that Mrs. Patton was parked the wrong way in a no-park zone.⁴

Evidence that the accident was not serious was also introduced. There seemed to be no damage to either vehicle immediately after the accident, and Mrs. Patton said she was not hurt. The doctor who performed surgery on her back was not there to testify about why the surgery was necessary. The two doctors who did testify could not link any current impairment to the accident.

Considering the evidence received, the jury's verdict was not surprising. Mrs. Patton cannot prove that there was no evidence to support it simply by stating that the jury should have decided differently.

POINT III
MRS. KEATING'S CLOSING ARGUMENT
WAS PROPER.

Mrs. Patton lodges an inaccurate and untimely allegation that Mrs. Keating's closing argument represented "gross misconduct." This Court should reject the last argument on appeal.

⁴Mrs. Patton contests for the first time on appeal the insufficiency of the verdict based on fault apportionment. Her motion for new trial only protested the insufficiency of damages. Since Mrs. Patton did not present the issue of whether the jury had sufficient evidence to apportion fault the way it did, this Court should not address that issue.

A. Mrs. Patton Cannot Criticize The Closing Argument For The First Time On Appeal.

During Mrs. Keating's entire closing argument, Mrs. Patton never objected. She never moved for a mistrial based on a prejudicial closing argument. As Mrs. Keating supposedly inundated the jury with "the highest degree of prejudice possible," Mrs. Patton let the argument continue uninterrupted.

Her failure to object contemporaneously to the closing argument precludes her from objecting now. As the court in Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah App. 1990), explained:

If something occurs which the party thinks is wrong and so prejudicial to him that he thereafter cannot have a fair trial, he must make his objection promptly and seek redress by moving for a mistrial, or by having cautionary instructions given, if that is adequate, or be held to waive whatever rights may have existed to do so. Otherwise, it would be manifestly unjust to permit a party to sit silently by, believing that prejudicial error has been committed, and then if he loses, come forward claiming error.

787 P.2d at 527, quoting Hill v. Cloward, 377 P.2d 186, 188 (Utah 1962).

It is well-established that an issue not preserved at the trial level cannot be considered on appeal.⁵ State v. Brown, 856 P.2d 358 (Utah App. 1993). Mrs. Keating requests that this Court disregard the last three points raised in Mrs. Patton's brief for untimeliness.

⁵Because Mrs. Patton does not comply with Utah Rule of Appellate Procedure 24(a)(5)(A), it is impossible to tell where, if anywhere, she believes she preserved this issue with sufficient specificity.

B. Mrs. Keating's Closing Comments Fell Well Within The Wide Latitudes Allowed During Closing Argument.

Counsel enjoy considerable latitude in closing arguments. They have a "right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom." State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988), cert. denied 112 S.Ct. 1942 (1992).

Mrs. Keating's closing argument was appropriate in all respects. It summarized the relevant evidence, including the facts that the accident was not immediately reported, that Mrs. Patton said she was not hurt, that Mrs. Patton was parked close to the corner in a no-park zone, that weather conditions were poor, and that the impact was slight (R. 253-6). Counsel highlighted the pertinent medical evidence as well, reminding the jurors that the two testifying doctors could not link her current problems to the accident. (R. 257-261). The closing argument did not violate the Golden Rule, as Mrs. Patton asserts; counsel never urged the jurors to place themselves in the defendant's position. Neither was the closing argument a diatribe for tort reform in this nation, as Mrs. Patton contends; rather, counsel asked the jury to consider whether such a low-speed collision could result in damages of over one million dollars. (R. 255). Simply because the jury considered the question in Mrs. Keating's favor does not mean the closing argument was grossly prejudicial.

Finally, Mrs. Patton cannot cite any caselaw showing that the particular comments she complains of warrant a new trial. In

the only case she can find where a closing argument was determined to be improper, the Supreme Court determined that the trial court did not abuse its discretion in granting a new trial based on counsel's remarks that the defendant was a giant company and that the plaintiff had made reasonable efforts to resolve the dispute before trial but the defendant refused. In affirming the trial court in that case, the court recognized its duty to accord great deference to the trial court's unique position to observe whether the jury had been prejudiced by these remarks. Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067, 1068 (Utah 1987). The comments in Donohue are unlike those in Mrs. Keating's closing argument, where counsel simply requested that the jury consider the plausibility of a one million dollar verdict in light of the evidence presented.

C. The Closing Argument Did Not Violate The Open Court Provision Of The Utah Constitution.

Mrs. Patton's final grievance with the closing argument is that it violated the open courts provision. Notwithstanding Mrs. Keating's closing argument, Mrs. Patton still had her day, or three days, in court. To the extent she may be claiming that the closing argument sapped her case of its strength, she had the opportunity to present a rebuttal argument afterwards to rehabilitate her case.

The argument that Mrs. Keating's argument violated constitutional rights also must fail because there is no state action. Mrs. Keating is not an arm of the state, and neither is her

counsel. Only the government or its actors can violate a citizen's constitutional rights. Nielson v. Central Waterworks Co., 645 P.2d 48, 50 (Utah 1982).

CONCLUSION

Mrs. Patton has not presented any reason for this Court to grant a new trial. Cross examination was appropriately limited, the verdict was supported by the evidence, and the closing argument was proper. Paring down her various arguments to their core, her message seems to be that she deserves a new trial because she was not pleased with the outcome in the original trial. Because this is not a proper reason for a new trial, Mrs. Keating respectfully requests that this Court affirm the trial court's denial of the motion for new trial.

DATED this 10th day of August, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By 

John R. Lund

Julianne P. Blanch

Attorneys for Appellee

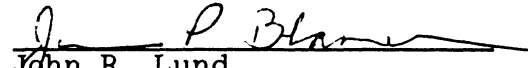
CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the foregoing BRIEF OF APPELLEE to be served upon the following:

Lewis R. Hansen
Attorneys for Appellant
Professional Plaza
2727 West 3500 South, Suite 220
West Valley City, Utah 84119

by causing the same to be mailed first class, postage prepaid, on the 10th day of August, 1995.

SNOW, CHRISTENSEN & MARTINEAU


John R. Lund
Julianne P. Blanch
Attorneys for Appellee

ADDENDUM A:

Utah Rules of Evidence, Rule 103

Rule 103. Rulings on evidence.

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context, or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

ADDENDUM B:

Utah Rules of Appellate Procedure, Rule 24(a)

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue, the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in

the trial court, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.