1994

Andrew Berry, Jr. v. Michael K. Coons : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDREW BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff/Appellant,

vs.

MICHAEL K. COONS,

Defendant/ Appellee.

BRIEF OF THE APPELLEE

Appeal No. 940342-CA

Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH, THE HONORABLE DAVID L. MOWER PRESIDING

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I.

PARTIES TO THIS PROCEEDING

All the parties to this proceeding are identified in the caption.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k). The Utah Supreme Court transferred this case to the Utah Court of Appeals on or about June 6, 1994.

V.

ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

The issues presented for review are:

1. Has the plaintiff/appellant demonstrated that the evidence is insufficient to support the jury verdict? The standard of review for this issue is whether, when "viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991). The appellate court must assume the jury believed the evidence and inferences that support the verdict. Canyon Country Store v. Bracey, 781 P.2d 414, 417 (Utah 1989). **If the appellant fails to properly marshal the evidence, appellate courts refuse to consider the appeal and summarily affirm the trial court.** Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051, 1053 (Utah App. 1994).

2. Has plaintiff/appellant waived any claim of improper jury contact? Defendant/appellee agrees with plaintiff that the proper standard of review for this issue is whether the trial

court abused its discretion. State v. Pena, 869 P.2d 932, 936-39 (Utah 1994).

3. Was there any prejudicial appeal to "sympathy," and is plaintiff now barred from raising this issue because it was not included in plaintiff's Docketing Statement? The standard of review for this issue is whether the trial court abused its discretion. State v. Pena, 869 P.2d 932, 938 (Utah 1994); State v. Griffiths, 752 P.2d 879, 883 (Utah 1988).

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS
STATUTES, ORDINANCES, RULES AND REGULATIONS

The determinative rules are Rules 59(a) and 61 of the Utah Rules of Civil Procedure. (Addendum, Tab A.)

VII.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition in the Lower Court

This is a child dart-out case. On October 27, 1989, then four-year-old Reynold Johnson, III darted out on his bicycle from the west side of the paved north/south main highway in Manti, Utah and pedalled his bicycle into the side of a trailer being towed by Mr. Michael K. Coons behind Coons' northbound motor vehicle. Johnson filed suit in the Sixth Judicial District Court in and for Sanpete County, suing Coons for alleged negligence. In June 1993 the parties entered into a Stipulation and Motion,

reduced to the trial court's Order, to try the case on liability, only, damages agreed upon in a fixed amount if liability attached. (See Stipulation, Motion and Order in the Addendum at Tab B; Record at 60-61.) Liability was tried to a jury on August 4, 5, and 6, 1993. The jury found, on a Special Verdict, that defendant Michael K. Coons was not negligent. (Addendum, Tab C; Record at 213.) Judgment was entered on the Special Verdict in favor of defendant, and against plaintiff, no cause of action. (Addendum, Tab D; Record at 218-19.) Plaintiff's post-trial motions were duly denied. (Addendum, Tabs E, F and G; Record at 273-75, 291-93, 327-28.) This appeal followed. The Utah Supreme Court duly transferred this appeal to this honorable Court.

B. Statement of the Facts Relevant to the Issues Presented for Review

On October 27, 1989 defendant Coons was driving his van northbound on the main north/south state highway through Manti, Utah. Coons was towing a trailer behind his van. Coons was going 30 miles an hour, 5 miles below the speed limit. (Tr. Vol. I, pp. 199-200.)

Plaintiff Reynold Johnson, III, then four years old, darted out on his bicycle from the west side of the highway. Johnson pedalled his bicycle into the side of the trailer being towed behind Coons' northbound motor vehicle, resulting in personal

injuries to Johnson.[1] In his closing argument to the jury, plaintiff's lawyer, Mr. Wells, admitted that the child, Johnson, rode his bike into the side of the trailer being towed behind defendant Coons' motor vehicle as it proceeded northbound. ("'The boy hit us,' he says. Sure, he [plaintiff Johnson] hit him [defendant Coons]." (Tr. Vol. III, p. 564, lines 17.) Coons was, at all times, in the proper lanes for northbound traffic. (Tr. Vol. I, p. 206.) Coons never, at any time, exceeded 30 mph in the 35-mile-per-hour zone. (Tr. Vol. I, p. 200.) Johnson travelled from west to east until Johnson ran into the side of Coons' trailer. (Tr. Vol. I, p. 180, lines 7-9.)

VIII.

SUMMARY OF THE ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY VERDICT.

Plaintiff has not, as plaintiff is required to do, marshalled the evidence that supports the jury verdict. The evidence supports the verdict. Plaintiff's theory of the case consists of erroneous notions of law and fallacious arguments

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[1]Independent witness Rolland Bagley testified:

> Q: Then the boy on the bike ran into the trailer; is that the way it was?
>
> A: Yes.

(Tr. Vol. I, p. 180, lines 7-9.)

rejected by the jury. The mere fact that an accident happens does not mean, as plaintiff is convinced, that Coons was negligent. Coons did not have a duty to "slow down." Coons did not have a duty to lock in his undivided attention, to the exclusion of all else on and around the roadway, to the plaintiff. Plaintiff urges that on different facts there would have been no accident, and that consequently the court must find that defendant Coons was negligent. Plaintiff's "reasoning" is just another form of the unpersuasive conclusion that if none of us ever drove motor vehicles, there would never be motor vehicle accidents. The trial court properly denied plaintiff's motions for directed verdict, J.N.O.V., and new trial.

POINT II

PLAINTIFF WAIVED ANY CLAIM OF IMPROPER JURY CONTACT.

Plaintiff's "evidence" of improper jury contact consists of the affidavits of plaintiff's lawyer/guardian, the legal assistant for plaintiff's lawyer/guardian, and plaintiff's mother, all of whom were present throughout the jury trial. All complained of conduct they allege they witnessed before the jury deliberated, yet none complained until a month after a jury verdict that did not please them. Plaintiff waived any claim of improper jury contact.

POINT III

THERE WAS NO PREJUDICIAL APPEAL TO "SYMPATHY."

Plaintiff has "unclean hands" to complain about "sympathy." The extremely minute portion of defendant's opening statement, not closing argument, about which plaintiff now complains was not a "sympathy" argument. At trial plaintiff either blessed or waived what he now condemns. The trial judge gave the jury repeat instructions to not decide the case on sympathy, and defense counsel at trial also asked the jury to decide the case on the facts, not sympathy. Finally, if there was any jury sympathy for defendant Coons, it resulted from the abusive, protracted examination of Coons by plaintiff's counsel in front of the jury, not from any prejudicial appeal to sympathy.

IX.

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY VERDICT.

A. Plaintiff Has Not, As Required, Marshalled the Evidence that Supports the Jury Verdict.

In Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991), the Utah Supreme Court held that on an appeal based on alleged insufficiency of the evidence, the evidence must be reviewed in the light most favorable to the prevailing party (in this case, defendant Coons), and that the appellant must first

marshall the evidence in support of the verdict, and only then proceed to show that the evidence is insufficient. This, plaintiff has utterly failed to do, omitting, among a great many other things, testimony of two defense accident reconstruction experts, including Captain Knight's expert opinion that the only thing Coons could have done that he didn't do to avoid this accident was be "clairvoyant." (Tr. Vol. II, p. 468, lines 3-23.)

In Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051 (Utah App. 1994), this Court specifically refused to consider the appeal and summarily affirmed the trial court because the appellant failed to marshal the evidence in support of the trial court's findings.[2]

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[2]This rigorous standard reflects the doctrine that appellate courts "do not sit to retry cases submitted on disputed facts.". . . Accordingly, "[w]hen the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid.". . .

> Oneida has failed to marshal the evidence in support of the trial court's factual findings. Rather than bearing its marshalling burden, Oneida has merely presented carefully selected facts and excerpts of trial testimony in support of its position. Such selective citation to the record does not begin to marshal the evidence; it is nothing more than an attempt to reargue the case before this court--a tactic that we reject. . . . Because Oneida has failed to marshal the evidence supporting the trial court's findings, we hold that those findings are accurate and affirm the trial court's dismissal based on those findings.

Id. at 1053 (citations omitted).

In late December 1994, plaintiff filed his Brief on Appeal from a three-day jury trial in August 1993, complaining first, foremost, and primarily of alleged "insufficiency of the evidence" to support the verdict, yet plaintiff has made no attempt to comply with this most rudimentary "marshaling" requirement of appealing on this ground, despite frequent and repeated guidance from the appellate courts of this state on this point. This Court should follow Oneida and summarily affirm the trial court and refuse to consider this appeal.

B. The Evidence Supports the Verdict.

The only issue for the jury was whether Coons was negligent. (See Stipulation, Motion and Order to try the case on liability only at Addendum, Tab B; Record at 60-62.) Although it is plaintiff/appellant's, not defendant/appellee's, burden, to marshal the evidence that supports the verdict, defendant will set forth some of the evidence that supports the verdict:

1. Captain Knight testified without objection that it was his expert opinion that the only thing Coons could have done that he did not do to avoid the accident was be "clairvoyant." (Tr. Vol. II, p. 468, lines 3-23.)

Captain Knight also testified that Coons' accident avoidance efforts were proper. (Tr. Vol. II, p. 467, lines 5-7).

Incredibly, Mr. Wells solicited Captain Knight's opinion that the accident was Johnson's fault:

> Q: All right. So basically what you're saying is--is that this accident is Reynold Johnson's fault?

A: I--that's what I've said all along. The boy moved out. He hit us in the side. We were almost past him. If you change those relative positions and those relative times, we don't know what would have happened. But we know that the collision occurred because he comes in to the trailer when we're--we are up there going on past him.

Q: Are you aware--

A: There's no question about that.

Q: Are you aware of the fact, Newell, that the Court has ruled already that Reynold Johnson has no fault in this?

A: I know what the statute is, as well as you do, Mr. Wells, because I know what the presumptions are. But I also know what boys do and when I do accident reconstruction, I look to see what people do wrong, regardless of what the presumptions are under the CODE.

(Tr. Vol. II, pp. 507 and 508.)

2. Coons testified that he was "attentive" (Tr. Vol. I, p. 250, line 12), that he "was as attentive as any other driver would be" (Tr. Vol. I, p. 250, lines 7-8), that two other cars "darn near" hit Johnson (Tr. Vol. I, p. 241, lines 1-2), and that the only way he, Coons, could have avoided the accident was if he had been looking at Johnson at the moment Johnson started across. (Tr. Vol. I, p. 240, lines 20-21.)

3. Dave Stevens' expert testimony provided a reasonable basis for the jury to conclude that Coons was not negligent:

A: Ah, because, ah, particularly with boys on bicycles, they're very unpredictable. There are many things that are unpredictable as we drive our cars on the highway. If you're driving down the highway and somebody on the opposite side of the road as pedestrian steps off the roadway and implies there's a possibility of that he will cross the street, that does not start

an emergency mode in the mind of the driver of the vehicle because there is an extremely high probability that person will take appropriate action, allow the car to go by before proceeding across the street or may not even proceed across the street.

By the same token, with a boy on a bicycle, their actions are so unpredictable that when a driver observes a buy [sic] on bicycle, generally speaking, unless it is a--a close enough proximity to create an immediate obvious emergency, the driver will go into a sort of a "wait and see mode, wherein "I'm gonna keep on eye on that boy, but I'm not going to make any changes or--or make any decisions until I see more information."

And in this case, particularly if a boy rides from the opposite side of the street, ah, once again applying human factors from studies and understanding driver behavior, the driver is not going to begin responding to the actions of this boy until the boy gives, I guess you could say, body language signals that he is, in fact, intending to cross the street. Because kids will ride out onto the street and we all have had it. I mean I don't think there's a person in this room that hasn't experienced the puzzlement of wondering what a child on a bicycle is going to do.

* * *

Q I understand. Would you consider it prudent to start slowing down when you see him start to run?

A Perhaps. But not always.

Q In other words you ought to just leave your cruise control on and go ahead?

A It happens all day every day many times.

* * *

Q I want you to assume that Mr. Coons testified that for two to three seconds he was looking at mirrors and doing things, other than looking at the field of vision in front of his vehicle as he approached the corner, having previously seen children on both sides of the street, and I want you to tell me whether, as a safety expert, <u>you believe taking your attention away</u>

from what's going on in front of you for that period of time is a prudent thing for a driver to do.

A It is because it's normal procedure.

Q So you think it's prudent to give--take two to three seconds away from your attention in front of you and do something else. And then what happens if during that two to three seconds a child--one of those children darts into the road?

A It is not possible to view children on the west side of State Street and 4th North and children on the east side of State Street and 4th North at the same instant, so there must be movement of eyes. And--and in my opinion, a high school education driving instructor will tell you that your eyes should be constantly moving.

Q I understand that.

A Okay. Now it is very possible that a person can be looking at a child on the right, because this child constitutes, in the eye or in the mind of this driver, a greater hazard than the child on the left.

Q Okay.

A And at that point, if the child on the left starts into the street and darts across, then you see the driver's what we might call a sitting duck because he was being a prudent driver at the time. By the same token, every driver is expected to keep his eye on his mirrors. He can look in his mirrors without being a negligent driver.

(Tr. Vol. II, p. 381, line 17 through p. 282, line 20; p. 416, lines 14-19; p. 419, line 4 through p. 420, line 11. (Emphasis added.)

More of Stevens' testimony that constitutes sufficient evidence for the jury verdict is set forth infra at pp. 17-18.

4. Rolland Bagley testified that "the boy on the bike ran into the trailer . . ." (Tr. Vol. I, p. 180, lines 7-9.)

5. Jamie Johnson, plaintiff's sister, gave testimony that poked gaping holes in the plaintiff's theory of the case that the child Coons first saw on the side of the street was Johnson. From Jamie's testimony, it was entirely reasonable to conclude that the child Coons first saw was not Johnson, but one of the other children, and that Johnson darted out, unabated, from north to south on the west side of the street, then, with no stop, from west to east across the main highway.

> Q There's been a little confusion here about a piece of paper. Maybe you can help us out. I'd like you to take a look at this piece of paper that's been marked as EXHIBIT 34, and my question to you is real simple. Did you draw that?
>
> A Yes.
>
> Q Is that your signature there, Jamie?
>
> A Yes.
>
> Q 10-3-89?
>
> A Yes.
>
> * * *
>
> Q Was it your best recollection at the time?
>
> A Yes. It was.
>
> Q Jamie, does your drawing show the path of your brother from the gazebo on up to the minute--or the second the accident happened?
>
> A I believe so.

(Tr. Vol. I, p. 194, line 23 through p. 195, line 25 and Exhibit 34, in Addendum at Tab H.)

If there ever was a case that presented a jury question, this case was it. The jury did its best. The plaintiff had a full and fair day in court. The jury simply found against the plaintiff. For all the reasons presented herein, the judgment should be affirmed.

C. Plaintiff's Theory of the Case Consists of Erroneous Views of Law and Fallacious Arguments Rejected by the Jury.

The "Facts" portion of Plaintiff's Brief on Appeal is not made up of "facts" at all, but is simply a rehash of plaintiff's theory of the case.

Plaintiff argues that "uncontroverted evidence" shows that the time necessary for plaintiff to traverse the roadway was more than sufficient to allow defendant to react and avoid an accident. The jury obviously found to the contrary.

Plaintiff argues that the physical evidence did not coincide with Mr. Coons' testimony. Again, this is plaintiff's theory of the case--it is obviously not what the jury concluded.

Plaintiff relies on Holmes v. Nelson, 326 P.2d 722 (Utah 1958), a 37-year old case, which was decided not only prior to the Liability Reform Act of 1986, but also fifteen years prior to the Comparative Negligence Act of 1973. A major difference between the Holmes case and this case is that in the Holmes case the defendant saw the child leaving the sidewalk after the southbound car (not the defendant's car) passed the children. "Defendant saw the children himself when he was 200 feet south of where the child was struck. A car approached from the north and

defendant observed the children move back to permit the southbound car to pass. Defendant's car and the southbound car passed at a point about 100 to 125 feet south of the point of impact." Id. at 723.

> The Court: After this car passed you going the other way you saw the child. Then where was the child when you first saw it after the car passed you?
>
> A The child was coming off the sidewalk north of the Holmes' driveway.
>
> The Court: He was how far off the sidewalk at that time?
>
> A Off the sidewalk, oh - directly off the road probably 10 or 12 feet.
>
> The Court: 10 or 12 feet off the sidewalk or off the road?
>
> A Off the road. He was just leaving the sidewalk when I observed him the first time.

Id. at 724.

Thus, in the Holmes case, the defendant saw the child come off the sidewalk and come on into the street for some considerable time and distance. In this case, however, defendant Coons did not see the child until the child had actually darted substantially across the southbound lanes.

Moreover, there was a fundamental question for the jury as to whether the child that Coons saw off to the west side of the street as he approached from the south was in fact the child that actually darted out sometime later, i.e., Reynold Johnson. The testimony of Reynold's sister, Jamie Johnson, and her diagram created shortly after the accident must be kept in mind. Jamie

clearly had Reynold darting all the way from the gazebo on the northwest corner of the intersection clear on across the street. Again, plaintiff's Brief is just another recitation of plaintiff's theory of the case, which the jury didn't have to agree with and obviously did not agree with.

1. The mere fact that an accident happened does not mean Coons was negligent.

Plaintiff states as a "fact" that "the evidence clearly shows the accident was preventable." Plaintiff's lawyer, Mr. Wells will go to his grave believing that if there is an accident, that someone must be at fault. The law is to the contrary. The Court instructed the jury to the contrary. Mr. Wells took no objection to the Court's instruction that the mere fact that an accident happened does not, in and of itself, mean that any party was negligent.

Plaintiff argues that to support the jury's verdict in this case, one would have to say that the evidence preponderates in favor of a finding that the accident was unavoidable. This fallacious argument is simply not so. Accidents do not have to be "unavoidable" for a jury to find that neither party was negligent. The statement that to support the jury's verdict in this case one would have to say that the evidence preponderates in favor of a finding that the accident was unavoidable is what Mr. Wells wants the law to be, not what the law is or should be. If this statement were true, any time a plaintiff files a

Complaint the defendant would have the burden of showing that the accident was unavoidable. This is simply not the case.

2. Coons did not have a duty to "slow down."

The trial court gave extensive, comprehensive instructions on "negligence." (See Instructions 13K-13W, Record at 171-183, Tr. Vol. III, pp. 528-32; Addendum at Tab I.) Plaintiff's counsel took not a single objection to any of the trial court's instructions. (Tr. Vol. III, p. 572, lines 24-25.) The "duty" defined by the instructions is one of "reasonable care," "greater, extra care for children than adults," a "proper lookout," a "reasonable and prudent" speed, etc. it was not, as plaintiff argues, a duty to "slow down."

3. Coons did not have a duty to lock in his undivided attention on the plaintiff to the exclusion of all else on and around the roadway.

The discussion of the trial court's instructions contained in the immediately preceding paragraph applies equally to this erroneous argument of plaintiff. Plaintiff wants to characterize defendant's testimony that he checked his mirrors as defendant "removing his eyes from the road." Every person who has driven a vehicle knows that when you check your mirrors that even though your eyes are not focused straight ahead down the road, you still have a consciousness of what lies ahead of you. If this were not so, drivers would be taught to never check their mirrors instead of being taught to regularly check their mirrors.

Plaintiff's Brief argues that all experts admitted that the accident could have been avoided if defendant had begun to react when plaintiff entered the roadway. This is not so. Even if it were so, it begs the question as to whether Coons was negligent. Mr. Stevens gave clear expert testimony, to which plaintiff raised not a single objection, that had Coons, as plaintiff claims he should have, honed his focus in solely and exclusively on young Reynold Johnson, that he would have been negligent by ignoring other potential hazards.

> Q And my question to you, sir, is as a driver sees northbound on a highway through a town like Manti, what should that driver be observing as he proceeds northbound up the road?
>
> A Primarily be observing the road.
>
> I see that Mr. Coons has placed it would southbound vehicles in the--in his drawing. Ah, he shows other children on the southeast corner. Apparently this is the boy's sister.
>
> [INDICATED]
>
> He cannot be--ah--relied upon--or he cannot be--or it cannot be demanded or expected of him that he concentrates soley [sic] on Ren, who is over at position B.
>
> [INDICATED]
>
> He has an entire field of vision to take into consideration and, ah, I've seen too many accidents where, ah, there are other possible accidents occurring or potential accidents. You can't--you can't just look at something like this by hindsight and say that should have been concentrated on because there were other possibilities equally as serious as this one.
>
> Q And what if a driver did focus on just one object in his entire field of vision, for example like focusing soley [sic] on Ren at point B?

A He would be negligent.

Q What way?

A In failing to take into consideration the other factors in his field of vision, the other two vehicles, the other children such as that, because all of that presents potential hazard.

(Tr. Vol. II, p. 383, line 2 through p. 384, line 6.) (Emphasis added.)

4. Conclusion.

That different facts may have led to no accident is not evidence that Coons was negligent; it is nothing more than a form of the unpersuasive conclusion that if none of us ever drove motor vehicles, there would never be motor vehicle accidents, or that if Coons had stayed in bed that day, there would have been no accident.

The jury was perfectly free to reject plaintiff's "facts." The jury was perfectly free to reject plaintiff's fallacious arguments. The jury was perfectly free to arrive at the reasonable conclusion that Mr. Coons was not negligent.

D. The Trial Court Properly Denied the Motions for Directed Verdict, J.N.O.V., and New Trial.

1. Introduction.

Although plaintiff moved pursuant to subparagraphs 1, 2, 6, and 7 of Rule 59, subparagraphs 2 and 7 were not involved. Subparagraph 2 of Rule 59 governs misconduct of the jury. Plaintiff presented no evidence at the trial court, and still presents none, that there was any misconduct of the jury.

Subparagraph 7 of Rule 59 addresses "error in law." Plaintiff presented no evidence at the trial court, and still presents none, that there was any "error in law."

Thus, plaintiff is left with a Rule 59(6) claim that the evidence is insufficient to justify the verdict.[3]

2. Applicable Law.

The opening clause of Rule 59 states "Subject to the Provisions of Rule 61 . . . " Rule 61 is captioned "Harmless Error." Significantly, the case law on Rule 61, and thus Rule 59, squarely and clearly places the burden on the party making the motion to show not only that an error occurred, but also that it was substantial and prejudicial, and that the movant was deprived in some manner of a full and fair consideration.[4]

Further, the case law clearly establishes that judgments are presumed valid, that all presumptions are in favor of the validity of a verdict and judgment, and that the presumption arises that the judgment should not be disturbed unless the movant meets the requirement of showing that the error is substantial and prejudicial and that there is reasonable

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[3]Plaintiff also tacked on a Rule 59(1) claim based on an alleged "irregularity" by defendant Michael K. Coons in an alleged "improper contact" with the jury in an alleged "attempt to ingratiate defendant with the jurors and create an improper rapport" (emphasis added), but even plaintiff didn't allege that the "attempt" was successful, or that the alleged conduct made any difference in the result. The alleged improper jury contact is discussed fully in POINT II, below.

[4]Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Onyeabor v. Pro Roofing Inc.., 787 P.2d 525 (Utah App. 1990).

likelihood the result would have been different in the absence of such error.[5]

Finally, the case law provides that it is the duty of the Court to disregard errors unless there is error both substantial and prejudicial and a reasonable likelihood the result would have been different without it, and that the burden is on the movant to show not only that there was error, but also that the error was prejudicial to the extent that there is a reasonable likelihood that in its absence there would have been a different result.[6]

3. Holmes v. Nelson.

Plaintiff relied almost exclusively on the case of Holmes v. Nelson, 326 P.2d 722 (Utah 1958). Plaintiff reads entirely too much into the case of Holmes v. Nelson, which simply stands for the proposition that the granting of a new trial is largely a matter of discretion with the trial judge and that the trial judge's decision will be reversed on appeal only for an abuse of discretion. The two justices in the Holmes concurring opinion,

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[5]Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982); Hall v. Blackham, 417 P.2 664 (Utah 1966); Joseph v. W.H. Groves Latter-Day Saints Hosp., 348 P.2d 935 (Utah 1960)

[6]Crookston v. Fire Insurance Exch., 817 P.2d 789 (Utah 1991); Harris v. Utah Transit Auth., 671 P.2d 217 (Utah 1983); Redevelopment Agency v. Mitsui Inv., Inc., 522 P.2d 1370 (Utah 1974); Batt v. State, 503 P.2d 855 (Utah 1972); Ewell & Son, Inc. v. Salt Lake City Corp., 493 P.2d 1283 (Utah 1972); Ortega v. Thomas, 383 P.2d 406 (Utah 1963); Bowden v. Denver & Rio Grande R.R., 286 P.2d 240 (Utah 1955)

Justice Crockett and Justice Wade, pointed out as much. They noted:

> That such prerogative [of granting a new trial] should be exercised with caution and forbearance consistent with his important and imperative duty to safeguard the right of trial by jury. The verdict, when supported by substantial evidence, should be regarded as presumptively correct and should not be interfered with merely because the judge might disagree with the result. The prerogative should only be exercised when, in the view of the trial court, it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law, or made findings clearly against the weight of the evidence so that the verdict is offensive to his sense of justice to the extent he cannot in good conscience permit it to stand.

Id. at 726 (emphasis added). The dissenting judge, Justice Henroid, totally disagreed with the granting of the new trial.

4. Plaintiff's Affidavits.

The Affidavits submitted by plaintiff were from obviously highly biased and prejudiced litigants - the guardian, himself a trial lawyer by trade; the guardians' legal assistant, obviously motivated to please his boss; and the plaintiff's mother, obviously motivated to do everything she possibly can to try to help her own son. (Record at 223-28.) The Affidavits submitted by plaintiff were sadly mistaken on even the basic facts. The trial started on August 4, 1993 and lasted three days. August 5, 1993, was the second day of trial, not the first day, as Mrs. Johnson swears. The instructional hearing in chambers was on Thursday afternoon, August 5, 1993, the second day of the trial. The

third and last day of the trial consisted of arguments, instructions, and deliberations, only. There was no instructional hearing in chambers on the third and last day of the trial.

Defendant's Affidavit, on the other hand, established that the conversation apparently complained of was between him and the bailiff, not the jurors, and that a juror interjected an innocuous comment as to the location of two people. (See Affidavit of Defendant, Record at 253-55; Addendum at Tab J.) For the reasons set forth below, such conduct does not, as a matter of law, rise to the magnitude of justifying a new trial.

5. Plaintiff Failed to Meet Plaintiff's Rule 59 Burden of Showing Substantial Prejudice and the Reasonable Likelihood that the Result Would Have Been Different.

Plaintiff's post trial motions were nothing more than sour grapes about a jury verdict that went against plaintiff. Plaintiff utterly failed to meet plaintiff's Rule 59 motion burden. Plaintiff failed to show substantial error and prejudice. Plaintiff also failed, as is plaintiff's burden, to show the reasonable likelihood that the things plaintiff complained about made any difference to the verdict.

The alleged "church mission" discussion is innocuous. It is certainly no less harmful than what came out in voir dire--that one of the venire had worked with Mrs. Johnson, the plaintiff's mother, at "the temple." (Presumably the LDS Temple in Manti). It is also no less sympathy arousing than having both the devoted mother, Mrs. Johnson, and the plaintiff, a freshly scrubbed,

beautiful boy, with coloring book and story books, present at counsel's table adjacent to the jury box throughout the entire trial, even though plaintiff's counsel obviously never intended to call either as a witness.

If Coons' conduct were so substantial and prejudicial, or if there were any reasonable likelihood that it made any difference to the result, one has to wonder why the plaintiff's mother and/or the plaintiff's own court appointed guardian, a lawyer by trade, didn't call it to the Court's attention during the trial, or, for that matter, until more than a full month after the jury returned its verdict.

Plaintiff's affiants all claim it happened right in front of their eyes--yet they did nothing about it at the time, and never called it to the Court's attention until more than a month later, after the jury had been discharged. It just won't wash--their inaction belittles any claim of substantiality and prejudice and any claim it made any reasonable likelihood of a different result.

In California Fruit Exch. v. Henry, 89 F. Supp. 580 (W.D. Pa. 1950); aff'd, 184 F.2d 517 (3d. Cir. 1950), one of the cases discussed in Brief of Appellant, the appellate court refused to grant a new trial, holding that a court should not grant a new trial in the absence of intentional wrong where the communication between a party and the jury did not involve the case. Id. 588-90. In this instance, the alleged communication did not involve

the case. Thus, the Henry case cited by plaintiff actually supports the position of defendant Coons.

In Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983), the Utah Supreme Court held that the only evidence admissible to impeach a jury verdict is that which demonstrates that the verdict was determined by chance or resulted from bribery and all other proof as to what was said or done in the jury room, including evidence that the jury was confused or that it misunderstood or disregarded the facts or the applicable law, is inadmissible as violative of the policy against attempts to undermine the integrity of verdicts. A fortiori the same result should be reached in our case.

In Crookston, supra, the Utah Supreme Court held that on a new trial motion based on alleged insufficiency of the evidence, the evidence must be reviewed in the light most favorable to the prevailing party (in this case, defendant Coons), and that the movant must first marshall the evidence in support of the verdict, and only then show that it is insufficient. This plaintiff utterly failed to do so, omitting, among a great many other things, testimony of two defense accident reconstruction experts, specifically including Captain Knight's opinion that the only way Coons could have avoided this accident was by being "clairvoyant."

6. Conclusion.

If there ever was a case that presented a jury question, this case was it. The plaintiff had a full and fair day in court. The jury simply found against the plaintiff. For all the reasons presented herein, the trial court properly denied plaintiff's motions for directed verdict, J.N.O.V., and new trial.

POINT II

PLAINTIFF WAIVED ANY CLAIM OF IMPROPER JURY CONTACT.

A. Plaintiff's Affidavits.

The alleged "evidence" of improper jury contact consists entirely of the affidavits of Andrew Berry (plaintiff's attorney/guardian), Liesl Draper (Mr. Berry's legal assistant), and Doreen Johnson (plaintiff's mother). (See Affidavit of Andrew Berry, Affidavit of Liesl Draper and Affidavit of Doreen Johnson, all filed September 7, 1993. Record at 223-28.)

Each affidavit indicates that each affiant was aware, prior to the time the jury was instructed, and while the judge and trial lawyers were in chambers working on jury instructions, that the alleged improper contact between defendant and jury members occurred. Berry Affidavit at ¶ 3; Draper Affidavit at ¶ 3; and Johnson Affidavit at ¶¶ 3 and 4.

Neither plaintiff's lawyer/guardian, the lawyer's legal assistant, plaintiff's mother, nor anyone else informed the Court of the alleged improper contact, or objected in any way to the

alleged improper contact, until one month after the jury verdict when plaintiff filed his motion for new trial, after a verdict adverse to plaintiff.

B. Plaintiff Cannot Become Aware of Alleged Improper Contact, Wait for the Jury Verdict Without Informing the Court of the Improper Contact, and Then Move for a New Trial Based on the Alleged Improper Contact When the Verdict is Adverse.

The rule by overwhelming weight of authority is that an objection to improper contact with the jury must be made as soon as possible, or it is waived:

> As a general rule, if a party obtains knowledge during the progress of the trial of acts of jurors, or acts affecting them, which he shall wish to urge as objections to the verdict, he must object at once, or as soon as the opportunity is presented, or be considered has having waived his objections.

See 89 C.J.S. Trial § 483. Compare Broberg v. Hess, 782 P.2d 198 (Utah App. 1989) (where plaintiff failed to object to trial court's failure to ask voir dire questions before jurors were empaneled, he could not raise the issue for the first time in a motion for a new trial); and Salt Lake County v. Carlston, 776 P.2d 653 (Utah App. 1989) (female defendant's claim she was denied fair trial because of country's preemptory challenges to women jury members would not be considered on appeal where defendant failed to present the issue to the trial court until after return of adverse verdict).

For example, in Bernier v. National Fence Co., 410 A.2d 1007 (Conn. 1979), the court and parties became aware during trial that a juror had seen a newspaper article concerning the details

of the case. The court interviewed the juror that had seen the article and concluded that the juror's exposure to the article resulted in no prejudice. The parties made no objection.

Subsequently, after the jury returned a verdict for the defendant, the plaintiff obtained the article and discovered it contained a reference to a worker's compensation lien. Plaintiff filed a motion for new trial on the grounds that the jury had been prejudiced by the juror's exposure to the article's outside influence. The trial court denied the motion.

On appeal, the Supreme Court noted in pertinent part as follows:

> The record reveals clearly that the plaintiff was timely put on notice that a newspaper article of potentially prejudicial content was published and read by one of the jurors. If the plaintiff believed, for any reason, that the court's cautionary instructions to the jury or to the panel as a whole were insufficient, it was incumbent upon the plaintiff to make a request for such remedial action as was felt necessary, at that time, and not to reserve possible objections until after an adverse verdict was rendered. . . .
>
> . . . A motion for a new trial for extrinsic causes will not be sustained if the ground for it existed at the time of trial and was either known to the petitioner at the time of trial, or might have been known in the exercise of reasonable diligence.

See 410 A.2d at 1008-09. See also Fontaine v. Federal Paper Board Co., 434 N.E.2d 331, 339 (Ill. App. 1982) ("Only after the defendant became aware that the jury had ruled against it and was deliberating on damages did it make an objection or move for mistrial," and thus the defendant waived its objections).

The reasons for such a rule are obvious. As the court stated in Eastern Airlines, Inc. v. J. A. Jones Constr. Co., 223 So. 2d 332 (Fla. App. 1969):

> Had the plaintiff's counsel made a timely objection, the trial court would have been given an opportunity to correct its error, if any in fact had occurred. By waiting until the jury returned its verdict before objecting, we think the plaintiff waived its right to object.

See 223 So. 2d at 333. See also Martin v. Atherton, 116 A.2d 629 (Maine 1955) ("A party is not permitted to take his chance of a favorable verdict, and then, if it is adverse, interpose an objection to it based on facts which were known to him before it was rendered.").

In this case plaintiff's own affidavits make clear that plaintiff knew full well of the alleged improper contact between defendant and the jury. But plaintiff waited until after the Court completed its instructions to the jury, until after an adverse verdict was returned, until after the jury was discharged, and indeed, until one month later before raising the issue in the motion for new trial.

Plaintiff's actions thus prevented the Court from learning the scope of the alleged contact on the spot, from being able to correct any alleged problems with a cautionary instruction, and prejudices both the Court, the parties and the jurors allegedly involved by purporting to require a subsequent evidentiary hearing now that plaintiff has learned the verdict was adverse. Plaintiff's objection to the alleged improper contact between

defendant and the jury is untimely, was waived, and should not now be the basis of any motion for new trial.

C. Utah Law is Clear that the Issue Plaintiff Now Attempts to Raise has been Waived.

Utah law is very clear that "issues not raised in the trial court in timely fashion are deemed waived, precluding this court [the Court of Appeals] from considering their merits on appeal." Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah App. 1989) "It is axiomatic that, before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon." Id. at 655.

With regard to alleged improper jury contact, the rule is that "a motion for a new trial for extrinsic causes will not be sustained if the ground for it existed at the time of trial and was either known to the petitioner at the time of trial, or might have been known through the exercise of reasonable diligence." See Bernier v. National Fence Co., 410 A.2d 1007 (Conn. 1979) (emphasis added).

In this case, Mr. Well's argument is apparently that he has not waived his objection to the alleged contact between defendant and the jury because although the plaintiff's attorney guardian and his paralegal were aware of the contact before the jury was instructed, Mr. Wells, personally, was not aware of the contact at that time. Nevertheless, as the Court itself noted in its November 4, 1993, Order:

> The named plaintiff in this case, Andrew B. Berry, Jr., is an attorney, licensed to practice law in the State of Utah and currently practicing, oft-times before the undersigned. Consequently, he would have knowledge about the proper relationship between parties and jurors.

See Order of November 4, 1993, at p. 2.

Clearly the circumstances of this case are such that assuming there really was some prejudicial contact between defendant and jury members, plaintiff and his trial lawyer "should have known of the misconduct through the exercise of reasonable diligence." Indeed "there can be but little difference, in legal effect, between actual knowledge . . . by the [movant for a new trial], at the time of trial, and their . . . negligence in not ascertaining it. And it would be unjust to subject the [movant for a new trial] to a new trial, by reason of such negligence." Bernier, 410 A.2d at 1009.

D. Conclusion.

In this case, plaintiff's guardian attorney and his trial attorney either admittedly knew, or should have known, about the alleged contact between defendant and the jurors, and clearly did nothing about it while the Court still had an opportunity to instruct the jurors. Rather, they waited to determine whether the verdict would be adverse to them before objecting. Under the circumstances, Utah law is clear that they have waived their objection, and the alleged contact between defendant and the jury cannot now be the basis for any motion for a new trial.

POINT III

THERE WAS NO PREJUDICIAL APPEAL TO "SYMPATHY."

A. Plaintiff Waived this Issue by Not Including It in the Docketing Statement.[7]

Several cases from the appellate courts of this state have indicated that the failure of an appellant to preserve an issue in the Docketing Statement constitutes a waiver of the issue and a bar to the appellate court considering it on appeal. See, e.g., Dairyland Ins. Co. v. State Farm Mutual Auto. Ins. Co., 882 P.2d 1143, 1144 n.1 (Utah 1994); Gregory v. Fourthwest Invs., Ltd., 735 P.2d 33, 34 (Utah 1987); C.M.C. Casity, Inc. v. Aird, et al., 707 P.2d 1304, 1305 (Utah 1985); Brooks v. Department of Employment Security, 736 P.2d 241 (Utah App. 1987).

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[7]The plaintiff not only didn't raise the issue in the Docketing Statement, but also failed to raise this issue in his post-trial motions to the trial court. Plaintiff raised only two issues in his post-trial motions. They are found at page 2 of plaintiff's Memorandum in Support of Post-Trial Motions, Record at 232, a copy of which is in the Addendum at Tab K. The only two issues raised were:

ISSUES

The following issues are raised by this Motion:

1. Was the evidence insufficient to support the verdict?

2. Was the contact between defendant and members of the jury during the trial improper and irregular and sufficient to justify a new trial.

Id.

In this case, the plaintiff utterly failed to raise the "sympathy" issue in his Docketing Statement. A copy of page 4 of the plaintiff's Docketing Statement is included at Tab L of the Addendum. It sets forth, at ¶ 8, the following issues:

> 8. Issues presented for review.
>
> (1) Was the evidence sufficient to preclude a finding of no negligence by the jury?
>
> (2) Was the contact between Coons and members of the jury during the trial improper and irregular and sufficieot to justify a new trial.
>
> (3) Should the Court have granted plaintiff's motion for a directed verdict or Motion for Judgment N.O.V.?
>
> (4) Can a Court rule there was no unavoidable accident, and then allow the jury to rule there was no negligence?

Nowhere is there any reference to the "sympathy" issue the plaintiff now attempts to raise. This is another example of plaintiff's failure to comply with the basics of appellate practice, but rather, attempt to present issues seriatim. Plaintiff has waived the "sympathy" issue by failing to raise and preserve it in the Docketing Statement.

B. Plaintiff Has Unclean Hands to Make this Argument.

Plaintiff has unclean hands to complain about any jury appeal to sympathy. Plaintiff's entire case was of passion and sympathy, rather than logic and reason, in the hope that, although plaintiff pedalled his bike into the side of defendant's trailer, the jury would nevertheless feel sorry for plaintiff and

give him money. Some of the examples of plaintiff's appeals to sympathy include:

1. Little Reynold Johnson, III and his mother were present at counsel's table in front of the jury throughout the entire trial, even though neither was ever called as a witness. (Tr. Vol. I, p. 18, lines 1-10 and p. 19, lines 20-22 and p. 20, lines 5-8.)

2. Mr. Wells did call Reynold Johnson, III's 15-year-old sister (12 at the time of the accident) as a witness at trial. Mr. Wells' examination of her is found at pp. 189-194 of Tr. Vol. I., and had marginal, if any, relevance. It did, however, give Mr. Wells opportunities to tell her she had to speak up, even though "it's hard" and she is "nervous." It also gave her the opportunity to cry in front of the jury. Id. at 191.

3. In his closing argument, Mr. Wells referred to Reynold Johnson, III as "cute." (Tr. Vol. III, p. 559, line 7.)

C. It Was Not a Sympathy Argument.

Mr. Coons was not feeling well the first day of the trial. The trial judge so told the jury. (Tr. Vol. I., p. 169, line 24 through p. 170, line 1.)

After Mr. Wells insisted on calling Coons as a witness that day, it was necessary to have Coons explain to the jury on cross-examination that he was not in the same shape on the day of his alleged inattentiveness that allegedly caused the accident as he was four years later on the day he testified to the jury.

Therefore, the following testimony was given, without a single objection from the plaintiff:

Q How are you feeling today, Mr. Coons?

A Pretty sick.

Q Were you in the kind of condition on October 27th of 1989 that you are today?

A No, sir.

Q How were you feeling on October 27th of 1989?

A I was feeling like I was when I first came into this courtroom, which was healthy. But I only have a lasting power of about two hours and then my disabilities begin to show.

Q And what was it that caused you your disability?

A I had a parachute malfunction from 800 feet.

Q And that was at Fort Bragg in 1983?

A Yes, sir. I was an infantry captain.

Q Can you tell me how many major operations you've had on your body?

A 13.

Q Could you tell the ladies and gentlemen of the jury what happens to you when your--what did you call them? Your--?

A The post traumatic.

Q No. Your maintenance, after a couple of hours you said started to what--

THE COURT: The word he used was "disabilities."

MR. HENDERSON: Your disabilities, yeah.

WITNESS: My mind clouds. I stutter. I can't connect thoughts together to be able to be expressive.

I have a masters degree in business, but it hasn't done me much good since the accident.

(Tr. Vol. I, p. 246, line 23 through p. 248, line 3.)

Defense counsel's opening statement was nothing more than an explanation why Mr. Coons was not in the same shape on the day of his alleged inattentiveness that allegedly caused the accident as he was four years later when he appeared in front of the jury. The opening statement simply told the jury what the evidence would be on that point (which said evidence was later received without a single objection from plaintiff). "It is well settled that trial court rulings on the admissibility of evidence are not to be overturned in the absence of a clear abuse of discretion." State v. Griffiths, 752 P.2d 879, 883 (Utah 1988). The entirety of the opening statement that plaintiff now complains of is set forth here:

> You may have observed Mike Coons has been here in the courtroom today, but he doesn't look too good today. He didn't sleep last night and he went to the hospital at 5:00 o'clock this morning and got a shot of demerol. And he's in pain and this stems from a parachute accident he had when he was on active duty in the--
>
> MR. WELLS: Your Honor, I'm going to object. This is a ploy to sympathy.
>
> MR. HENDERSON: It's not a ploy for sympathy. It's an explanation of why he doesn't look too good today and why he's in pain, because I'm sure that--and I won't dwell on it. I'll briefly touch on it and then move on. It's certainly no more than his effort at sympathy.
>
> THE COURT: Okay. Overruled.

You can continue.

MR. HENDERSON: Thank you.

He had a parachute accident in 1983 when he was on active duty in Fort Bragg in the 82nd Airborne Division. He was seriously injured. He's had 13 surgeries and he does have a lot of pain.

In October of 1989 he was between surgeries and he was feeling fairly well and it should have been a happy day for him and it started out a happy day.

(Tr. Vol. I, p. 114, line 21 through p. 115, line 18.)

Thus, the only thing plaintiff objected to was the reference in opening statement, not testimony or closing argument, to Mr. Coons' pain that resulted from a parachute accident. It was not an appeal to sympathy, but was, rather, a preview of the evidence why Coons appeared as he did to the jury, and to contrast that with his condition on the day of the accident four years earlier. It later came into evidence through the testimony of Mr. Coons without a single objection.

The admissibility of evidence is so far within the discretion of the trial court that it will not be overturned absent abuse of discretion. Griffiths, supra. This cannot seriously be argued to constitute abuse of discretion. The law of this jurisdiction is that a trial court's ruling on whether counsel's conduct warrants a mistrial will not be overturned absent an abuse of discretion. State v. Speer, 750 P.2d 186 (Utah 1988). Surely the innocuous introductory remarks of counsel in opening statement regarding what the evidence is going to be about a party's appearance in court as opposed to the day

of the accident is not grounds for a mistrial, and the trial judge's overruling of the objection to the comments was within his discretion.

D. At Trial, Plaintiff Blessed or Waived What He Now Condemns.

Cases are legion holding that a party may not, on appeal, complain about something at the trial court the party invited, acquiesced in, tacitly concurred in, or take a position on appeal inconsistent with the position taken in the trial court. See, e.g., Estate of Justheim v. Ebert, 824 P.2d 432, 438 (Utah App. 1991); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 527 (Utah App. 1990); Samaden Oil Corp. v. The Corp. Comm'n of the State of Oklahoma, 755 P.2d 664, 668 (Okl. 1988).

It is important to consider plaintiff's action and inaction in the trial court to the things he complains of here, with this legal principle in mind.

1. In his closing argument, Mr. Wells referred to Mr. Coons' "unfortunate accident" and that Mr. Coons "doesn't feel well and is disabled." (Tr. Vol. III, p. 559, lines 9-10.)

2. Even though Mr. Coons was quite sick on the first day of the trial, Mr. Wells insisted on calling him as a witness that day. (Tr. Vol. I, p. 197, line 1.) Mr. Wells then stated, in front of the jury, "We may need to take a five-minute recess so we can get him here." (Id. at lines 4-5.)

3. When Coons did appear, Mr. Wells stated on his own, volunteered, in the presence of the jury, "I think it will be

easier for Mr. Coons if the Clerk could administer the oath without him having to get up again." (Tr. Vol. III, p. 198, lines 10-12.)

4. After the Court accepted Mr. Wells' invitation for Coons to take the oath without rising,[8] and after Coons stated he would tell the truth, the Court and Mr. Wells had the following colloquy:

> THE COURT: I'm satisfied that he's taken the oath. Are you, Mr. Wells?
>
> MR. WELLS: That's fine.

(Tr. Vol. I, p. 198, lines 18-20.)

E. The Judge Gave the Jury Repeat Instructions to Not Decide the Case on Sympathy and Defense Counsel Asked the Jury to Decide the Case on the Facts, Not Sympathy.

In defense closing argument to the jury, defense counsel told the jury:

> The question for you is was Mike Coons negligent? Or was he not? If you find he exercised reasonable care, the answer to that question is he was not negligent.
>
> I need your help on this. I need your vote on this. Not out of as maybe Mr. Wells has suggested some time during this trial, not out of sympathy for Mike Coons. But because it's the right result, based on the evidence. And I do want you to decide this case on the evidence and the law given to you by the Judge.

---

[8]On appeal, plaintiff makes the crass and undignified allegation that this somehow indicates that the trial judge was sympathetic to Coons. If anything, the trial judge was sympathetic to the plaintiff, as evidenced by the trial court refusing to award defendant $1,120.55 in uncontested taxable costs. (See Memorandum of Costs, Record at 214-217, Addendum at Tab M; Judgment on Special Verdict, Record at 219, Addendum at Tab D.)

> Really my only worry in this case is that you'll decide this case based on sympathy, compassion, and prejudice. I want you to decide it on the evidence, and the right result on the evidence is this accident was not the fault of Mike Coons. It just wasn't.

(Tr. Vol. III, p. 557, line 20 through p. 558, line 8.) (Emphasis added.)

Prior to the evidence, the trial judge gave the jury extensive preliminary instructions. (Tr. Vol. I, pp. 103-107 and 118-120.) These instructions specifically included the instruction "Consider the evidence fairly, without any bias or sympathy toward either side." (Tr. Vol. I, p. 119, lines 5-6.) (Emphasis added.)

At the conclusion of all the evidence, the trial court gave the jury instructions that fill up pages 522 through 533 of Tr. Vol. III. These instructions specifically included the instruction, "You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action." (Tr. Vol. III, p. 525, lines 8-10.) (Emphasis added.)

Plaintiff's counsel took not a single objection to any of the trial court's instructions. (Tr. Vol. III, p. 572, lines 24-25.)

F. If There Was Any Jury Sympathy for Coons, it Resulted from the Protracted, Abusive Examination of Coons by Plaintiff's Counsel in Front of the Jury.

If the jury did have any sympathy for Mr. Coons, it was only because of Mr. Wells' protracted, abusive examination of

Mr. Coons as a witness. After Mr. Wells had already grilled Mr. Coons extensively[9] (Tr. Vol. I, pp. 199-245), and after

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[9]For example, after already grilling Mr. Coons repeatedly, Mr. Wells and Mr. Coons had this interchange:

> **A** To get the first two cars to slow down, yes, sir.
>
> **Q** And you didn't see him do that?
>
> **A** No, sir. When I heard the commotion I turned and looked and saw that he was there and when I did, I shifted into the righthand lane, honking and stepping on my brake.
>
> Q Is there some reason why you couldn't see him just before you heard the commotion?
>
> A Huh-huh. He wasn't moving. It only takes a second to do that.
>
> Q One second?
>
> A Please, let's not be that specific. I'm not that good at kind of time. None of us are.
>
> Q Well what I'm trying to get you to admit, Mr. Coons, is that there was some period of time out there where he went from a dead stop to full speed when you weren't watching him.
>
> A Sir, we don't know that he was at full speed, but we could have him ride a bike and see.
>
> Q Well, you testified that he was going really fast.
>
> A Yes, sir. But I didn't say "full speed."
>
> Q All right. But from a dead stop to really fast and you didn't see that happen?
>
> A He had to go really fast to get that far across the intersection to hit my trailer.
>
> Q And you didn't see that happen?

Mr. Coons cried when he told the jury, "You don't--you haven't been involved with accidents with kids and just walk away." (Tr. Vol. I, p. 249, lines 13-17.) Mr. Wells insisted on standing up on re-direct examination and pointlessly grilling Mr. Coons:

> Q Don't you think it would have helped if you'd have been paying attention to where you could see Ren start up and start to come into the street?
>
> A Please, Mr. Wells. I tried and I was as attentive as any other driver would be. And I felt the pain of that mother and her son and the rest of those children for a long time. Please don't do this any more.
>
> Q Mr. Coons, I'm not saying you're a bad person.
>
> A I was attentive.
>
> Q What I'm saying is I think you made a mistake and I think the mistake was that you weren't looking ahead of your vehicle as you should have been. And I'm asking you if you had seen Ren start up and come out into that street, don't you think there's something more you might have been able to do?

> A Yes, sir. I've told you and you've told me when I saw him out the side. The trooper explained to you, too, that I saw him out my side window and I moved over out of the way and braked at the same time, hoping to avoid a collision with the young man. And apparently, according to the other testimony, even though he had bad brakes he put his feet on the ground to try and stop, too.
>
> Q So he was trying to stop; you were trying to stop.
>
> A If he wasn't going very fast, he wouldn't have had to worry about dragging his feet to stop. I don't know why we have to drag him through this anyway. He's a sweet young man and it seems like we are just beating this out.

(Tr. Vol. I, p. 228, line 1 to p. 229, line 14.)

MR. HENDERSON: Your Honor, I'm going to object. He's been over this and over it and over it and the witness has answered it.

THE COURT: I think that's asked and answered. That objection is sustained.

We'll instruct you not to answer that question.

(Tr. Vol. I, p. 250, lines 4-24.)

X.

CONCLUSION

Plaintiff had his day in court. The jury fully heard and rejected all of the unpersuasive arguments that the plaintiff now attempts to re-hash here. In view of the basic facts of the case, i.e., the plaintiff pedalled his bicycle into the side of the trailer being towed behind defendant's motor vehicle, it is not at all surprising that the jury would conclude that the defendant was not negligent. To the contrary, it is a highly foreseeable result on these facts. Plaintiff has failed to demonstrate that the evidence was insufficient to support the verdict. Plaintiff has failed to come forward with any other meritorious, persuasive argument as to why plaintiff should get a second bite at the apple. Plaintiff waived any claim of improper jury conduct, and there was no prejudicial appeal to "sympathy." This Court should affirm the judgment on the Special Verdict in favor of defendant, and against plaintiff, no cause of action.

DATED this 27th day of January, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By Robert H. Henderson
Robert H. Henderson
Attorneys for Defendant/Appellee

ADDENDUM

Tab A	Copy of Rule 59(a) and Rule 61 of the Utah Rules of Civil Procedure
Tab B	Stipulation, Motion and Order to Try the Case on Liability, Only (Record at 60-62.)
Tab C	Special Verdict (Record at 213.)
Tab D	Judgment on Special Verdict (Record at 218-20.)
Tab E	Order Denying Motion for JNOV and New Trial on Alleged Insufficiency of Evidence (Record at 273-75.)
Tab F	Order on Motion to Vacate Evidentiary Hearing (Record at 291-93.)
Tab G	Order Denying Motion for New Trial Based on Alleged Improper Jury Contact (Record at 327-28.)
Tab H	Jamie Johnson Trial Exhibit 34
Tab I	Jury Instructions on "Negligence" (Record at 171-83; Tr. Vol. III, pp. 528-32.)
Tab J	Affidavit of Michael K. Coon (Record at 253-55.)
Tab K	Page 2 of Plaintiff/Appellant's Memorandum in Support of Post-Trial Motions (Record at 232.)
Tab L	Page 4 of Plaintiff/Appellant's Docketing Statement
Tab M	Memorandum of Costs (Record at 214-17.)

Tab A

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Tab B

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiffs, vs. MICHAEL K. COONS, Defendant.	STIPULATION, MOTION AND ORDER Civil No. 0920600128 Judge David Mower

STIPULATION AND MOTION

The plaintiff, by and through his guardian and by and through his counsel of record, and the defendant, by and through his counsel of record, hereby stipulate to try this case on liability only, submitting the case to the jury on a special verdict form which shall pose two questions:

1. Was Michael K. Coons negligent? (and if the answer is "yes")

2. Was the negligence of Michael K. Coons a proximate cause of the injuries of plaintiff?;

and, in the event the jury answers yes to both questions, to settle the case for $100,000. The parties move the Court for an Order in accordance with this Stipulation.

DATED this 2nd day of June, 1993.

ROBERT J. DEBRY & ASSOCIATES

By: _____
EDWARD T. WELLS
Attorneys for Plaintiff

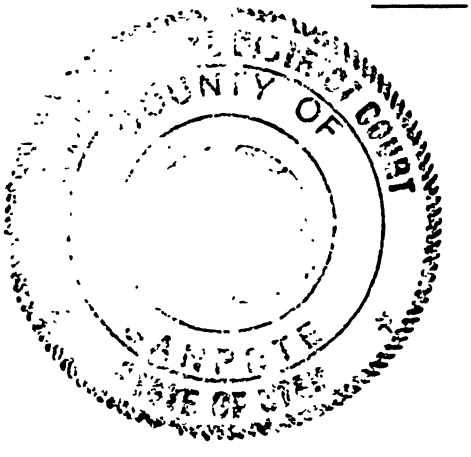
SNOW, CHRISTENSEN & MARTINEAU

By _____
Robert H. Henderson
Attorneys for Defendant

ORDER

The court having reviewed the file, and having met with counsel for the parties and the guardian for and on behalf of Reynold Johnson, III, a minor, and being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that: this case will proceed to trial on August 5, 1993, on liability only. In the event the jury finds that Michael K. Coons was negligent and that his negligence was a proximate cause of plaintiff's injuries, upon presentment of an appropriate Petition for Settlement of a Minor's Claim, the Court will enter an appropriate Order approving the settlement in the amount of $100,000 agreed to by the parties.

DATED this ___ day of June, 1993.



BY THE COURT:

DAVID L. MOWER
DISTRICT COURT JUDGE

Tab C

DISTRICT COURT, STATE OF UTAH
SANPETE COUNTY

Andrew B. Berry, Jr., as guardian for and on behalf of Reynold Johnson III, a minor child,

Plaintiff,

vs.

Michael K. Coons,

Defendant.

SPECIAL VERDICT

Case number 920600128

Judge David L. Mower

Based on a preponderance of the evidence, we, the jury, find as follows:

1. Was the defendant, Michael K. Coons, negligent?

_____ Yes

__✓__ No

(If you answered "No" to question number 1, then your work is finished. Sign the verdict and notify the bailiff.)

2. Was the negligence of Michael K. Coons a proximate cause of plaintiff's injuries?

_____ Yes

_____ No

Signed on August 6, 1993.

Jury Chair

Tab D

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiff, vs. MICHAEL K. COONS, Defendant.	JUDGMENT ON SPECIAL VERDICT Civil No. 0920600128 Judge David Mower

This case having come on regularly for jury trial on August 4, 5, and 6, 1993, and the jury having answered the Special Verdict:

1. Was the defendant Michael K. Coons negligent?

Yes _____

No x

NOW, THEREFORE, based thereon, it is hereby ORDERED, ADJUDGED, AND DECREED that: Judgment be, and hereby is entered in favor of defendant and against plaintiff, no cause of action,

and that defendant be, and hereby is awarded costs in the amount of $ 0.00 Dm.

DATED this 27 day of August, 1993.

BY THE COURT:

DAVID MOWER
DISTRICT COURT JUDGE

Approved as to form:

ROBERT J. DEBRY & ASSOCIATES

By _____
Edward T. Wells
Attorney for Plaintiffs

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Donna Campbell, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant herein; that she served the attached Proposed JUDGMENT ON SPECIAL VERDICT (Case Number 0920600128, Sixth Judicial District Court in and for Sanpete County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107

and causing the same to be hand-delivered on the 9th day of August, 1993.

Donna Campbell

SUBSCRIBED AND SWORN to before me this 9th day of August, 1993.

NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

7-21-94

NOTARY PUBLIC
JANEEN BEAGLEY
910 Exchange Place #1100
Salt Lake City, Utah 84111
My Commission Expires
July 21, 1994
STATE OF UTAH

Tab E

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff,

vs.

MICHAEL K. COONS,

Defendant.

ORDER

Civil No. 0920600128

Judge David Mower

Plaintiff's Motion for JNOV and Motion for New Trial came on regularly for a hearing on September 27, 1993. The plaintiff was represented by Edward T. Wells of the law firm Robert J. DeBry & Associates, the defendant was represented by Robert H. Henderson of the law firm Snow, Christensen & Martineau. The Court had fully reviewed the Motion, Memoranda, and Affidavits on file. The Court fully heard more than an hour of oral argument on the pending Motions. The Court considers itself to be fully informed.

The Court is of the opinion that this case presented fact questions for the jury, and that the evidence is sufficient to

support the jury's verdict. Based thereon, NOW, THEREFORE, IT HEREBY ORDERED that:

1. Plaintiff's Motion for JNOV be, and hereby is denied;

2. Plaintiff's Motion for a New Trial based on the alleged insufficiency of the evidence be, and hereby is denied.

It is further ordered that Plaintiff's Motion for a New Trial based on the alleged improper conduct of the defendant be, and hereby is set down for an evidentiary hearing at 3:00 p.m. on November 17, 1993, at which the Court will hear live testimony, under oath, from the four affiants on file.

DATED this 1st day of October, 1993.

BY THE COURT:

DAVID L. MOWER
DISTRICT COURT JUDGE

Approved as to form:

ROBERT DEBRY & ASSOCIATES

By _____
Edward T. Wells
Attorneys for Plaintiff

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Donna Campbell, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant herein; that she served the attached Proposed ORDER (Case Number 0920600128, Sixth Judicial District Court in and for Sanpete County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107

and causing the same to be mailed first class, postage prepaid, on the 30th day of September, 1993.

Donna Campbell

SUBSCRIBED AND SWORN to before me this 30th day of September, 1993.

NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

NOTARY PUBLIC
CONNIE CALO
10 Exchange Place, 11th Fl
Salt Lake City, Utah 8411
My Commission Expires
September 2, 1997
STATE OF UTAH

Tab F

DISTRICT COURT, STATE OF UTAH
SANPETE COUNTY
160 North Main, Manti, Utah 84642
Telephone (801) 835-2131 Facsimile (801) 835-2135

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff,

vs.

MICHAEL K. COONS,

Defendant.

ORDER ON MOTIONS (1)FOR EXPEDITED DISPOSITION OF MOTION TO VACATE EVIDENTIARY HEARING and (2) TO VACATE EVIDENTIARY HEARING

Case number 920600128

Judge David L. Mower

Defendant's motion for Expedited Disposition of Motion to Vacate Evidentiary Hearing is granted. The Motion to Vacate Evidentiary Hearing set for November 17, 1993 is granted. All counsel should inform their witnesses that appearance on November 17, 1993 is not required and that the hearing has been vacated.

The sole remaining issue to be decided by the Court in this case is described generally by the phrase "improper contact between parties and jurors." However, a more specific description of the issues perhaps would include phrases such as "waiver," and "imputed knowledge" and "timing." I will attempt to explain in more detail.

Plaintiff has claimed that there was improper contact between the defendant and some jury members during a time when the Court was in recess, but the Judge and the lawyers were in chambers working on jury instructions. Affidavits describing these contacts have been provided by Andrew B. Berry, Liesl H. Draper and Doreen Johnson.

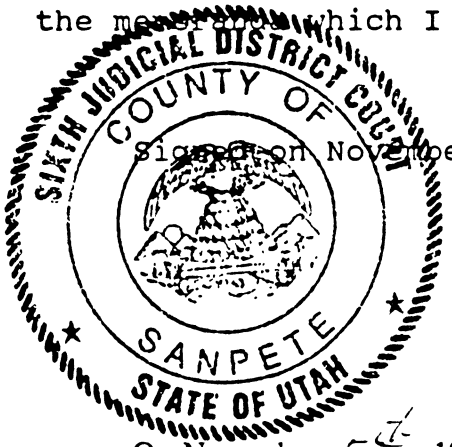
Plaintiff's counsel, Mr. Wells, claims that he didn't bring the matter of improper contacts to the Court's attention until after the verdict because he didn't know about them.

The named plaintiff in this case, Andrew B. Berry, Jr., is an attorney, licensed to practice law in the State of Utah and currently practicing, oft-times before the undersigned. Consequently, he would have knowledge about the proper relationship between parties and jurors.

Because of that situation, I would like Mr. Wells to provide me with a brief or a memorandum which helps to answer these question: Why shouldn't the plaintiff's knowledge about improper contacts be imputed to plaintiff's counsel? And, if plaintiff's counsel had knowledge about the improper contacts, doesn't it constitute a waiver of any claim based thereon if plaintiff fails to bring the matter to the Court's attention before the matter is

submitted to the jury for decision?

Unless Mr. Wells requests an enlargement of time, I will deny his motion for a new trial, completely and in full, based on the memoranda which I have in the file on December 1, 1993.



Signed on November 4, 1993.

David L. Mower, Judge

CERTIFICATE OF SERVICE

On November 5th, 1993 a copy of the above ORDER ON MOTIONS (1) FOR EXPEDITED DISPOSITION OF MOTION TO VACATE EVIDENTIARY HEARING and (2) TO VACATE EVIDENTIARY HEARING was sent to each of the following by the method indicated:

Addressee	Method (Mail, in Person, Fax)	Addressee	Method (Mail, in Person, Fax)
Mr. Edward T. Wells ROBERT J. DEBRY & ASSOCIATES 4252 South 700 East Salt Lake City, UT 84107	[/]	Mr. Robert H. Henderson SNOW, CHRISTENSEN & MARTINEAU 10 Exchange Place, Eleventh Fl. Post Office Box 45000 Salt Lake City, UT 84145	[/]

Tab G

DISTRICT COURT, STATE OF UTAH
SANPETE COUNTY
160 North Main, Manti, Utah 84642
Telephone (801) 835-2131 Facsimile (801) 835-2121

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff,

vs.

MICHAEL K. COONS,

Defendant.

ORDER ON MOTION FOR A NEW TRIAL

Case number 920600128

Judge DAVID L. MOWER

Plaintiff's motion for a new trial is denied. The motion was based on alleged improper contacts between defendant and some jurors during a time when the Court was in recess but before the matter had been submitted to the jury for decision.

The motion is denied because plaintiff failed to raise the issue in a timely fashion. Failure to object on a timely basis constitutes a waiver of the claimed error.

Signed on January 7, 1994.

David L. Mower, Judge

CERTIFICATE OF SERVICE

On January 7, 1994 a copy of the above ORDER ON MOTION FOR A NEW TRIAL was sent to each of the following by the method indicated:

Addressee	Method (Mail, in Person, Fax)	Addressee	Method (Mail, in Person, Fax)
Mr. Edward G. Wells 4252 South 700 East Salt Lake City, UT 84107	[M]	Mr. Robert H. Henderson 10 Exchange Place 11th Floor P.O. Box 45000 Salt Lake City, UT 84145	[M]

Timothy Moore

Tab H

10-30-92

Friday, Oct. 9:00 am

Times Publishing

PLAINTIFF'S EXHIBIT

EXH # 24

CASE # 92-12K

Tab I

control to prevent it from running over Renyold Johnson; failing to keep a proper lookout for pedestrians; failing to yield the right of way to a pedestrian; traveling too fast for existing conditions; and failing to operate his vehicle at a safe speed to allow him to stop without running over Renyold Johnson; failing to exercise appropriate caution upon observing children close to the roadway; failing to reduce speed at an intersection; failing to reduce speed in the presence of pedestrians; failing to exercise appropriate care to avoid colliding with a pedestrian.

To return a verdict for plaintiff Renyold Johnson you must find by a preponderance of the evidence that Michael K. Coons was negligent and the negligence of Michael K. Coons was an proximate cause of injuries to Renyold Johnson.

No. 13K. Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances or doing what such person under such circumstancess would not have done. The fault may lie in acting or in omitting to act.

No. 13L. You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and

encouraged, the law does not demand them as a general standard of conduct.

No. 13M. A person must exercise greater care for the protection of young children than adults. One dealing with children must anticipate the ordinary behavior of children, the fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they are often thoughtless and impulsive imposes the duty to exercise a degree of vigilance and caution commensurate with such circumstancess in dealing with children.

No. 13M. When a child is known to be in a situation of possible danger, a driver has a duty to observe extra caution for his safety. Failure to do so is negligence.

No. 13O. You are instructed that because of his age Renyold Johnson was not negligent--"--no.

"13P. It is the duty of the driver of any vehicle to exercise ordinary care at all times to avoid placing others in danger and to obey all statutes, ordinances, and rules of the road designed to promote safety. Failure to do so is evidence of negligence.

No. 13Q. Every person operating a motor vehicle must have the vehicle under reasonable control. A vehicle is under reasonable control when the driver is observing

others using the road and has the ability to guide and direct the course of the automobile, fix its speed, and bring the automobile to a stop within reasonable distance. In that regard every driver is obliged to keep a lookout for bicyclists and highway conditions which reasonably may be anticipated to keep the vehicle under proper control, to drive a safe speed having proper regard for the width, surface, and condition of the highway, other traffic, visibility, and any existing or potential hazards.

The law provides that any person--"excuse me. This is No. 13H. "The law provides that any person driving a motor vehicle on a public highway shall keep a proper lookout. A proper lookout means maintain the lookout that an ordinarily careful person would use in light of all present conditions and those reasonably to be anticipated. A proper lookout includes a duty to see objects and conditions in plain sight, to see that which is open and apparent and to realize obvious dangers. This duty does not merely require looking, but also requires observing and understanding other traffic and the general situation.

No. 13S. It is the duty of every person using a public street or highway, whether as a pedestrian or as a driver in a vehicle, to exercise ordinary care at all times to avoid placing one's self or others in danger and to use reasonable care to avoid causing an accident.

No. 13T. UTAH CODE--"--that abreviation stands for annotated, and that's probably a word that none of you has ever seen before. UTAH CODE ANNOTATED is the collection of all of the laws that's been passed by our legislature and I'm gonna quota couple of laws for you. So that's what that's referring to, UTAH CODE ANNOTATED.

"Section 41-6-46(1) provides in part as follows: A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, given regard to the actual and potential hazard that existed, including when approaching and crossing, an intersection and special hazards exist due to other traffic. If you find from a preponderance of the evidence that the defendant conducted himself in violation of the statute just read to you, which is proposed for the safety of Renyold Johnson and persons in whose class he was at the time, such conduct is evidence of negligence.

No. 13U. UTAH CODE ANNOTATED, Section 41-6-80 provides in pertinent part as follows: The operator of a motor vehicle shall give an audible signal when necessary and exercise appropriate precaution upon observing any child.

If you find from a preponderance of the evidence that the defendant conduct--"--should say--"--conducted himself in violation of the statute just read to you, which

is proposed for the safety of Renyold Johnson and persons in whose class he was at the time, such conduct is evidence of negligence.

No. 13V. Every driver has a duty to drive at a speed that is safe under the circumstances with proper regard for existing and potential hazards. The posted speed limit at the time of this accident was 35 miles per hour. This speed limit is reasonable in the absence of any special hazards. Speed in excess of the posted limit constitutes evidence of negligence. Regardless of the speed limit, all drivers must drive at an appropriate reduced speed when approaching and crossing an intersection when the pedestrians are present or when required to do so because of weather or other special highway conditions.

No. 13W. Even if a driver complies with an applicable statute, ordinance, or safety rule, this does not make that driver immune from the duty to act with reasonable care in other respects. One must always maintain a proper lookout for other traffic and hazards reasonably anticipated on the highway and keep one's car under proper control.

No. 13X. It is your duty to make findings of fact as to the questions I will submit to you. In making your findings of fact you should bear in mind that the burden of proving any disputed fact rests upon the party claiming the fact to be true. And that fact must be proved

Tab J

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiff, vs. MICHAEL K. COONS, Defendant.	AFFIDAVIT OF MICHAEL K. COONS Civil No. 0920600128 Judge David Mower

Michael K. Coons, being first duly sworn, deposes and states as follows:

1. I am the defendant in this case.

2. The facts stated herein are based upon my own personal knowledge.

3. I have read the Affidavits of Andrew Berry, Liesl Draper, and Doreen Johnson in this case, all dated 6 or 7 September, 1993.

4. The Affidavits are in error in a major way. I never approached any member of the jury and engaged them in conversation until <u>after</u> the trial was over.

On one occasion, I was in the courtroom speaking with the court bailiff about his job. The conversation turned to the current location of a person we both knew. A juror, on the juror's own, unsolicited by me or the bailiff, interjected that the person the bailiff and I were talking about and her husband were working for the church in Israel. Nothing else was discussed.

Further, affiant sayeth not.

I duly acknowledge that I have read the foregoing Affidavit, understand the same, and that the contents are true of my own knowledge.

DATED this 17th day of September, 1993.

Michael K. Coons

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 17th day of September, 1993, personally appeared before me Michael K. Coons, the signer of the above instrument, who, upon being duly sworn, acknowledged under oath that he had read the foregoing, understands the same, and executed the same as his own free act and deed.

Notary Public
Residing in State of Utah

My Commission Expires:

NOTARY PUBLIC
DONNA L. CAMPBELL
10 Exchange Place
Salt Lake City, Utah 84111
My Commission Expires
July 15, 1993
STATE OF UTAH

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Donna Campbell, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant herein; that she served the attached AFFIDAVIT OF MICHAEL K. COONS (Case Number 0920600128, Sixth Judicial District Court in and for Sanpete County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107

and causing the same to be mailed first class, postage prepaid, on the 20th day of September, 1993.

Donna Campbell

SUBSCRIBED AND SWORN to before me this 20th day of September, 1993.

NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

NOTARY PUBLIC
Sharon McCormick
10 Exchange Place 11th Fl.
Salt Lake City, Utah 84145
My Commission Expires
September 15, 1997
STATE OF UTAH

Tab K

On August 30, 1993, judgment in favor of defendant was duly entered by the court clerk.

ISSUES

The following issues are raised by this Motion:

1. Was the evidence insufficient to support the verdict?

2. Was the contact between defendant and members of the jury during the trial improper and irregular and sufficient to justify a new trial.

FACTS

1. The accident in question happened at 400 North and Main Street in Manti, Utah at approximately 6:00 p.m. on October 28, 1989.

2. Main Street runs north and south in front of the home of plaintiff's parents.

3. The highway is 62½ feet wide from curb to curb.

4. There are two (2) southbound lanes, two (2) northbound lanes and two (2) parking lanes.

5. The point of impact was approximately 8-10 feet west of the eastside curb line.

6. The speed limit was 35 miles per hour.

7. Defendant was northbound at 25 miles per hour.

8. Defendant saw plaintiff on the side of the road to

Tab L

Judge, Coons had improper contacts with jury members. The extent of this contact is disputed. Counsel for plaintiff did not become aware of these contacts until after the jury had been dismissed.

The jury found Mr. Coons not to have been negligent in any degree.

8. Issues presented for review.

(1) Was the evidence sufficient to preclude a finding of no negligence by the jury?

(2) Was the contact between Coons and members of the jury during the trial improper and irregular and sufficient to justify a new trial.

(3) Should the Court have granted plaintiff's motion for a directed verdict or Motion for Judgment N.O.V.?

(4) Can a Court rule there was no unavoidable accident, and then allow the jury to rule there was no negligence?

9. Determination of Case by Supreme Court.

This case involves issues of first impression which should be resolved by the Supreme Court.

10. Determinative Law.

Utah Code Ann. § 41-6-46;
Utah Code Ann. § 41-6-80;
U.R.C.P., Rule 59;
California Fruit Exchange v. Henry, 89 F.Supp. 580 (W.D.Pa. 1950);
Holmes v. Nelson, 7 Utah 2d 435, 326 P.2d 722 (1958);
Kilpack v. Wignall, 604 P.2d 462 (Utah 1979).

Tab M

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY

STATE OF UTAH

ANDREW B. BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child,

Plaintiff,

vs.

MICHAEL K. COONS,

Defendant.

MEMORANDUM OF COSTS

Civil No. 0920600128

Judge David Mower

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

ROBERT H. HENDERSON, being first duly sworn, deposes and says that he is counsel for defendant in the above-referenced action, and that to his knowledge the following costs are correct and were necessarily incurred in this action:

CLERK'S FEE:

Jury Fee	$	50.00
subtotal	$	50.00

WITNESSES AT TRIAL:

Newell Knight, witness fee plus mileage	$	79.50
David C. Stephens, witness fee plus mileage	$	79.50
Allen Plant, witness fee plus mileage and service of process on Allen Plant	$	85.00
Jason Plant, witness fee plus mileage and service of process on Jason Plant	$	85.00
subtotal	$	329.00

DEPOSITIONS USED AT TRIAL

Michael K. Coons	$	48.75
Newell Knight	$	265.75
subtotal	$	314.50

DEPOSITIONS ESSENTIAL TO PREPARATION FOR TRIAL

David C. Stephens	$	97.65
Doreen Johnson, Jamie Johnson and Patrick J. Coons	$	329.40
subtotal	$	427.05
GRAND TOTAL	$	1,120.55

DATED this 10th day of August, 1993.

ROBERT H. HENDERSON

Subscribed and sworn to before me this 10th day of August, 1993.

Donna L. Campbell
Notary Public
Residing in Salt Lake City, Utah

My Commission Expires:

DONNA L. CAMPBELL
10 Exchange Place
Salt Lake City, Utah
My Commission Expires
July 15, 1995
STATE OF UTAH

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Donna Campbell, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant herein; that she served the attached MEMORANDUM OF COSTS (Case Number 0920600128, Sixth Judicial District Court in and for Sanpete County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107

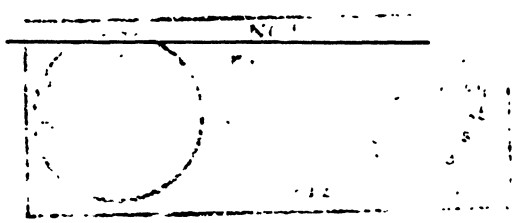
and causing the same to be mailed first class, postage prepaid, on the 10th day of August, 1993.

Donna Campbell

SUBSCRIBED AND SWORN to before me this 10th day of August, 1993.

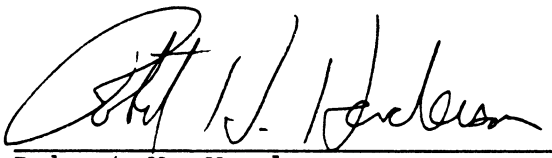
Sharon McCormick
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:



CERTIFICATE OF MAILING

I certify that on the 27th day of January, 1995, I served two true and correct copies of the foregoing Brief of Appellee by first class mail, postage prepaid, to the following: Edward T. Wells, ROBERT J. DEBRY & ASSOCIATES, 4252 South 700 East, Salt Lake City, Utah 84107.



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