1-19-2012

Hansen v. Roberts Appellant's Brief Dckt. 38904

IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY HANSEN, Plaintiff/Appellant, vs. MATTHEW ROBERTS, Defendant/Respondent.	**Supreme Court Docket No. 38904-2011** (Bonneville County District Court Case No. CV-2009—3163(2009-585)

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of Idaho
In and for the County of Bonneville

HONORABLE WILLIAM H. WOODLAND, DISTRICT JUDGE, PRESIDING

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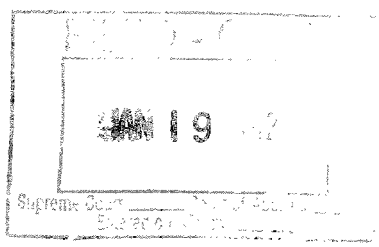

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a car crash case which caused injuries to Hansen and property damage to Roberts' vehicle.

II. COURSE OF PROCEEDINGS IN THE TRIAL COURT

The case was tried to a jury and a verdict was returned finding both parties negligent. The jury determined that Hansen was 90 percent at fault and Roberts was 10 percent at fault. The jury awarded damages to Roberts in the amount of $3,776.82.

The case was originally assigned to the Honorable Gregory Anderson until he retired, shortly before trial. The Honorable Jon Shindurling presided briefly over the case but assigned the case to the Honorable William H. Woodland for trial. The Honorable Dane H. Watkins is currently presiding over the case.

III. STATEMENT OF FACTS

Hansen made a right hand turn into a business parking stall when his vehicle was struck on the passenger side by Roberts, who attempted to pass Hansen on the right. The point of impact occurred where the road approached an intersection and started to widen from a single lane to three lanes: a left turn lane, straight lane, and a right turn lane.

ISSUES PRESENTED ON APPEAL

ISSUE #1: Whether the trial court erred in allowing Roberts to introduce expert opinion testimony from an accident reconstructionist and biomechanical engineer when (1) Roberts' expert disclosures were untimely and insufficient, (2) the testimony invaded the jury's province, and (3) there was a lack of foundation to support the opinions.

ISSUE #2: Whether the court erred by ruling that Hansen waived the right to object at trial to the introduction of portions of Roberts' deposition.

ISSUE #3: Whether the trial court erred by precluding Hansen from questioning the voir dire panel regarding employment or association with insurance companies or risk management.

STANDARD OF REVIEW

ISSUE #1: Expert Testimony

A. Exclusion of Witnesses Due to Non-Compliance with Scheduling Order and Untimely Discovery Responses

A trial court has authority to sanction parties for non-compliance with pretrial orders. The imposition of sanctions for non-compliance with pretrial orders and untimely discovery responses is committed to the discretion of the trial court, and will not be overturned absent a manifest abuse of that discretion. When determining whether a district court abused its discretion, this Court considers three factors: (1) whether the trial

court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its decision through an exercise of reason. *See Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (Idaho 2006).

B. Admission of Expert Testimony

This Court reviews trial court decisions admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. *Morris By and Through Morris v. Thomson*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997). In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Id.*

ISSUE #2: Error Regarding Waiver of Deposition Objections

This Court reviews errors regarding admissibility of evidence under a harmless error standard. An error is harmless unless a different result would have been probable had the error not occurred. *See Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Idaho Ct. App. 1987) and Idaho R. Civ. P. 61.

ISSUE #3: Voir Dire

The standard of review for a district court's limitations on jury voir dire is an abuse of discretion standard. *See State v. Bitz,* 93 Idaho 239, 244, 460 P.2d 374, 379 (1969).

ARGUMENT

ISSUE #1: The trial court erred in allowing Roberts to introduce expert opinion testimony from an accident reconstructionist and biomechanical engineer when (1) Roberts' pretrial expert disclosures were untimely and insufficient, (2) the testimony invaded the jury's province, and (3) there was a lack of foundation to support the opinions because they were not scientifically reliable.

A. Roberts' Disclosures Were Untimely and Insufficient

The trial court abused its discretion by allowing Roberts to introduce expert testimony from expert witnesses when Roberts violated the trial court's scheduling order and failed to make timely and sufficient pretrial disclosures pursuant to discovery requests. "This Court reviews trial court decisions admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard." *Morris By and Through Morris v. Thomson*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997) and *See Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (Idaho 2006). When determining whether a district court abused its discretion, this Court considers three factors: (1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable

legal principles, and (3) whether it reached its decision through an exercise of reason. *See Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (Idaho 2006).

This Court has previously held that a trial court abused its discretion and committed reversible error by allowing expert testimony that was not properly disclosed in violation of rule 26. *See Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991). This Court explained in *Radmer* the purpose of the rule requiring pretrial expert witness disclosures:

> It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved. . . . Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon. If an attorney is required to await examination at trial to get this information, he [or she] often will have too little time to recognize and expose vulnerable spots in the testimony.

Id.

The burden of providing the disclosures is on the party intending to introduce the testimony. *See Clark v. Klein*, 45 P.3d 810 (Idaho 2002). Thus, this Court held in *Clark* that the trial court erred by shifting the burden to the adverse party to file a motion to compel the disclosure when the party introducing the expert testimony failed to make timely or sufficient disclosures. *See id.* at n. 1.

Additionally, rule 26(e)(1)(B) requires a party to "seasonably" supplement discovery responses directed at expert discovery. The trial court may exclude testimony

offered by a party who failed to seasonably supplement a disclosure. *See* Idaho R. Civ. P. 26(e)(4). "[A]n important inquiry in determining whether a response was given 'seasonably' is: was the opposing party *given an opportunity for full cross examination*?" *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (Idaho 2006).

In making its decision on whether to impose a sanction, the trial court should request an explanation of the late disclosure, weigh the importance of the testimony in question, determine the time needed for preparation to meet the testimony, and consider the possibility of a continuance. *See Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Idaho Ct. App. 1982).

In this case, the trial court entered a scheduling order requiring each party to disclose the identity of expert witnesses at least 90 days before trial. *See* R. Vol. I, p. 34. The scheduling order precluded either party from conducting discovery after 70 days before trial and required all discovery to be submitted so that responses would be due prior to the discovery cutoff date. *See* R. p. 35 and n.2.

The following timeline shows relevant expert discovery and disclosure dates:

November 23, 2009 – Hansen Serves Rule 26(b)(4) Interrogatory on Roberts. *See* R. Vol. I, p. 1.

July 21, 2010 – Expert Witness Identity Disclosure Deadline. *See* R. Vol. I, p. 34.

July 21, 2010 – Roberts Discloses Scott Kimbrough as Potential Expert Witness. *See* R. Vol. I, p. 38.

August 9, 2010 – Discovery Cutoff. *See* R. Vol. I, p. 34.

August, 2010 – Roberts Retains Scott Kimbrough. *See* Tr. Vol. I, p. 379, LL. 17-25.

September 24, 2010 – Roberts Provides Partial Rule 26(b)(4) Answer to Interrogatory for Scott Kimbrough. *See* R. Vol. I, p. 86.

September 29, 2010 – Roberts Hires John Droge. *See* R. Vol. I, p. 111.

October 1, 2010 – Roberts Discloses John Droge to Hansen. *See* R. Vol. I, p. 111.

October 4, 2010 – Roberts Provides Partial Rule 26(b)(4) Answer to Interrogatory for John Droge. *See* R. Vol. I, p. 119.

October 19, 2010 – Roberts Provides Hansen with Scene Diagram Created by Scott Kimbrough. *See* Tr. Vol. I., p. 359, LL. 8-10.

October 19, 2010 – Trial. *See* R. Vol. I, p. 34.

Prior to the examination by Roberts of his expert witnesses, Hansen sought exclusion of the experts. The trial court held a hearing outside the presence of the jury. During the hearing, Hansen's counsel informed the court of the late and incomplete disclosures. Hansen's counsel pointed out to the court that the disclosures only came a couple of weeks before trial and that they did not include a disclosure of compensation,

prior cases in which they had testified at trial or deposition, and in Droge's case, the basis of his opinions or the data he used to support his opinions. *See* Tr. Vol. I., pp. 328-332.

Roberts' counsel noted that Hansen did seek rule 26(b)(4) disclosures but suggested that her disclosures were timely even though they were made just before trial and well past the expert disclosure deadlines imposed by the court's scheduling order. *See* Tr. Vol. I., p. 332, LL. 13-25 through p. 333, L. 23. Roberts' counsel argued that Hansen should have filed a motion to compel or a motion in limine to address the issue at a prior time. *See* Tr. Vol. I., p. 333, LL. 16-23.

The trial court listened to arguments of counsel and then summarily ruled that the experts would testify:

THE COURT: All right. They will be allowed to testify.

MR. GORDON: Based on what, the identity of Dr. Droge? He wasn't even told – we didn't even know until –

THE COURT: Your objection is noted.

Tr. Vol. I., p. 338, LL. 10-16.

As noted above, a trial court abuses its discretion by failing to (1) perceive the issue as one of discretion, (2) act within the boundaries of its discretion and consistently with applicable legal principles, and (3) reach its decision through an exercise of reason. The trial court failed on all three accounts. The trial court's conclusory ruling does not

satisfy its obligation to perceive the issues as one of discretion, provide the parties or this Court any indication that it reached it's decision through an exercise of reason, or determine whether it acted within the boundaries of its discretion and consistently with applicable legal principles. Instead, the parties and this Court are left to speculate as to the reasoning behind the trial court's ruling.

To the extent the trial court relied on Roberts' counsel's argument that the burden was on Hansen to file a motion to compel, that reasoning clearly violates the second prong of the abuse of discretion test. *See Clark v. Klein*, 45 P.3d 810, 814 n. 1 and 815 (Idaho 2002) (holding that trial judge's decision to allow expert testimony despite untimely rule 26(b)(4) disclosures failed the second part of test by indicating "that the burden was on Appellants to file a motion to compel the substance of the testimony.").

Further, as this Court pointed out in *Edmunds*, the trial court should determine whether the discovery responses were "seasonably" supplemented by affording Hansen with an opportunity for full cross examination. This Court in *Edmunds* held that a supplemental disclosure made eight months before trial was not an abuse of discretion because it gave the opposing party an opportunity to undertake additional discovery and prepare a cross examination. Unlike the disclosing party in *Edmunds*, Roberts' supplemental discovery providing *partial* 26(b)(4) disclosures did not come until after the discovery cutoff deadline and just weeks before trial.

Particularly disturbing was the production of a scene diagram created by Kimbrough and produced on the day of trial. The trial court admitted the diagram into evidence without any explanation or reasoning supporting its ruling. *See* Tr. Vol. I., p. 359, LL. 6-11.

The trial court abused its discretion by summarily ruling that Roberts' experts could testify when the trial court failed to (1) perceive the issue as one of discretion, (2) act within the boundaries of its discretion and consistently with applicable legal principles, and (3) reach its decision through an exercise of reason. The case law provided by Hansen shows similar examples where this Court has found an abuse of discretion when trial courts admit expert testimony when the disclosures were untimely and violated the trial court's scheduling order or were made shortly before trial. This Court has noted that untimely disclosures preclude the opposing party from preparing an effective cross examination of the witness. A new trial is warranted because the trial court's abuse of discretion affected a substantial right of Hansen – the ability to effectively prepare a cross-examination of Roberts' expert witnesses. Accordingly, Hansen respectfully requests that this Court vacate the judgment and remand the case to the trial court for a new trial.

B. Kimbrough Invaded the Province of the Jury

The trial court erred in allowing Kimbrough to testify about whether Hansen or Roberts were negligent because it is inappropriate to allow an expert to provide testimony on subjects that are not beyond the common sense of the average juror. Expert testimony is allowed if it will assist the trier of fact. *See* Idaho R. Evid. 702. However, expert testimony is not allowed where the normal experience and qualifications of lay jurors permit them to draw proper conclusions from given facts and circumstances. *See Rockefeller v. Grabow*, 136 Idaho 637, 647; 39 P.3d 577, 588 (Idaho 2001) and *State v. Hester*, 114 Idaho 688, 695; 760 P.2d 27, 34 (Idaho 1988) (noting that expert testimony is not admissible if the expert is not better equipped than a lay person). Further, an expert may not enter the realm of fact-finding that is well within the capacity of a lay jury and render an opinion regarding the weight of disputed evidence. *See State v. Hester*, 114 Idaho 688, 696; 760 P.2d 27, 35 (Idaho 1988).

Kimbrough testified that the accident was caused by Hansen's careless right hand turn. *See* Tr. Vol. I., p. 357, LL. 14-17. Kimbrough developed his opinion by reading the police report, reading Hansen's deposition, looking at the accident site on Google Earth, visiting the accident site, and speaking with an ex-highway patrolman. *See* Tr. Vol. I., p. 356, L. 7 through p. 357, L. 4. Kimbrough testified that his opinions were based on his personal weighing of the evidence. *See* Tr. Vol. I., p. 374 L. 15 through p. 375, L. 15.

Kimbrough testified that he is no better than the jury in weighing the evidence. *See* Tr. Vol. I., p. 375, LL. 5-15. Kimbrough testified that Roberts' conduct was reasonable and that Hansen's conduct was not reasonable. *See* Tr. Vol. I., p. 369, L. 19 through p. 370, L. 22.

Jurors are presumably drivers or have driven in cars and are adequately qualified to determine whether Hansen or Roberts' actions are negligent. Kimbrough did nothing beyond review the evidence that was presented to the jurors to reach his conclusions. Kimbrough's testimony did not assist the jury to understand the evidence or to determine a fact in the case. Instead, his testimony was, admittedly, simply his own interpretation of the facts after he personally weighed the evidence. Kimbrough admitted that the jury was just as qualified as him to come to its own conclusions regarding the fault of the parties. Accordingly, the trial court erred by admitting Kimbrough's own personal opinions about the fault of the parties since his testimony was within the normal experience and qualifications of lay jurors.

The trial court abused its discretion by failing to recognize that the admissibility of expert testimony is a matter of discretion, by failing to act within the outer boundaries of that discretion and consistent with applicable legal standards, and reach its decision through the exercise of reason. As was the case for the late disclosures, the trial court made a conclusory ruling that Kimbrough could testify so there was no acknowledgment

by the trial court that the ruling was a matter of discretion and there was no record that the trial court reached its decision through the exercise of reason. Further, the trial court did not act consistent with applicable legal standards because expert testimony is not admissible to testify regarding the negligence of drivers involved in an automobile crash.

This Court should vacate the judgment and remand the case for a new trial because the trial court abused its discretion by admitting Kimbrough's testimony. A new trial is warranted because the trial court's abuse of discretion affected a substantial right of Hansen – the ability to have the case decided by a jury of peers without an invasion of the jury's province by Roberts' paid expert.

C. Droge's Testimony was not Scientifically Reliable

The trial court erred in allowing Droge testify because Roberts failed to provide adequate foundation that Droge's testimony was scientifically reliable. Expert testimony is only admissible if it is based on scientific, technical, or other specialized knowledge and will assist the trier of fact. *See* Idaho R. Evid. 702.

To determine whether scientific knowledge will assist the trier of fact, a trial court must make a two-step inquiry: (1) determine that the underlying scientific principles are reliable and (2) determine that the scientific principles or methodology were properly applied by the expert. *See State v. Perry*, 139 Idaho 520, 522; 81 P.3d 1230, 1232 (Idaho 2003) (noting that a trial court must make a "preliminary assessment of whether the

reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").

For example, this Court found that expert testimony regarding polygraph test results was not admissible and that the trial court abused its discretion in admitting the test results because polygraph testing was not shown to be scientifically reliable. *See id.* at 524-25, and 1234-35. So in *Perry*, the first step of the inquiry – showing that the underlying scientific principles were reliable – was not established.

In *State v. Williamson*, 144 Idaho 597, 600; 166 P.3d 387, 390 (Idaho Ct. App. 2007), the court of appeals held that laser speed detection devices are scientifically reliable. It made that determination based, in part, on case law from other jurisdictions accepting the reliability of laser speed detection. However, the court of appeals noted that the State still had to meet the second step of admissibility by showing that the officer using a laser device was qualified, that the unit was properly maintained, and that it was used correctly. *Id.*

Biomechanical engineering is not necessarily scientifically reliable. In 2008, the Nevada Supreme Court, after affirming the trial court's exclusion of expert testimony by a biomechanical engineer, noted that, unlike radar detection devices, it was not aware of any jurisdiction that had judicially noticed the general reliability of biomechanical

engineering or its ability to assess the cause of personal injuries in automobile accidents. *See Hallmark v. Eldridge*, 189 P.3d 646, 653 (Nev. 2008).

On the contrary, the Nevada Supreme Court cited to a number of cases that excluded testimony from a biomechanical engineer because it was not reliable. One case that is highly relevant is *Reali v. Mazda Motor of Am., Inc.*, 106 F. Supp. 2d 75 (D. Me. 2000). In *Reali*, the court excluded a biomechanical engineer's testimony regarding accident forces because the court found that the methodology used to determine the forces was unreliable. The biomechanical engineer determined that the Delta V, or change in velocity of the vehicle, was 12 m.ph. Knowing the change in velocity would allow the engineer to calculate the forces imposed on a passenger in the vehicle and then render an opinion whether those forces were sufficient to cause an injury. The biomechanical engineer derived the Delta V by assumptions made from viewing photographs of the damaged automobile. The court found that no evidence was presented to show that eyeballing property damage photographs was an acceptable method to derive Delta V.

In this case, Roberts did not lay the foundation showing that biomechanical engineering is scientifically reliable. Instead, Roberts merely asked Droge what biomechanical engineering was and whether he had a degree in biomechanical engineering. *See* Tr. Vol. I., p. 392 L. 13 through p. 393, L. 9. Thus, Roberts did not lay

a foundation to meet the first step of the analysis – to show that biomechanical engineering is scientifically reliable in determining the causation of injuries in car crashes.

It became clear as Droge's testimony developed that he made an unscientific and subjective determination of changes of velocity based on eyeballing photographs. Droge admits that he made a subjective guess of the accident forces (a function of Delta V or change of velocity) by simply eyeballing the property damage photographs and reviewing the repair damage estimates. *See* Tr. Vol. I., p. 391, LL. 3-5; p. 398, LL. 17-20; p. 399, LL. 14-15; p. 414, LL. 7-15 (the change of velocity is an estimate based on damage to the vehicles). Droge made all other determinations of speeds or angles of the vehicles and other unknowns from his initial gut feeling regarding the change of velocity. *See* Tr. Vol. I., p. 417 LL. 6-7 (you take this change of velocity, and we're working to other unknowns). Droge then stated that he compared his eyeball guess to a database of 70,000 other car crashes and "believed" that he found 2 crashes that supported his guess but did not provide any details of the crashes. *See* Tr. Vol. I., p. 419, LL. 1-2.

At the end of the day, all Droge did was eyeball photos of the vehicles and make a guess as to what kind of forces were involved in the crash and, not surprisingly, he found that the forces were insufficient to cause an injury. As noted in *Reali*, eyeballing a couple of photographs is not sufficient to lay a foundation to show that the testimony is

scientifically reliable. Further, like *Hallmark*, Roberts did not offer any evidence that biomechanics is a recognized field of expertise, that Droge's opinion was capable of being tested or that it had been tested, that Droge's theories had been published or subjected to peer review, or that his opinions were accepted to any degree in the scientific community. Finally, Droge formed his opinions without knowing the vehicles' starting positions, their speeds at impact, the length of time that the vehicles were in contact during impact, or the angle at which the vehicles collided – these are all admittedly unknowns and his calculations of these unknowns are all derived from his initial guess of the change of velocity. *See* Tr. Vol. I., p. 399, LL. 14-15.

The trial court abused its discretion by failing to recognize that the admissibility of expert testimony is a matter of discretion, by failing to act within the outer boundaries of that discretion and consistent with applicable legal standards, and reach its decision through the exercise of reason. The trial court made a conclusory ruling that Droge's testimony was admissible so there was no acknowledgment by the trial court that the ruling was a matter of discretion and there was no record that the trial court reached its decision through the exercise of reason. Further, the trial court did not act consistent with applicable legal standards because expert testimony is not admissible unless the trial court makes a two-step inquiry to ensure that underlying scientific principles are reliable and were properly applied. The Court did not undergo any inquiry regarding the

foundation for Droge's testimony. This Court should vacate the judgment and remand the case for a new trial because the trial court abused its discretion by admitting Droge's testimony. A new trial is warranted because the trial court's abuse of discretion affected a substantial right of Hansen – the right to have the case decided by admissible evidence and not unreliable and unscientific guesses.

ISSUE #2: The trial court erred in ruling that Hansen waived the objections he made during Roberts' video deposition.

The trial court erred when it ruled that Hansen waived the objections he made during Roberts' video deposition by not addressing those objections during a scheduled hearing to review jury instructions. A party may object at the trial to receiving in evidence any deposition for any reason which would require the exclusion of the evidence if the witness were then present and testifying. *See* Idaho R. Civ. P. 32(b).

Roberts' video deposition was taken for purposes of trial. During the deposition, Hansen's counsel raised a number of objections during the deposition and Roberts' counsel raised a number of objections during Hansen's cross examination of Roberts. Roberts' counsel agreed at the conclusion of the deposition to provide the trial court with a copy of the deposition transcript and review the objections prior to trial so she could edit the video deposition to remove inadmissible testimony. *See* Tr. Vol. I., p. 259. Instead, Roberts' counsel submitted a motion to address only her objections, along with a

request for an expedited hearing on her motion to combine it with a previously scheduled hearing to review jury instructions. *See* Tr. Vol. I., pp. 259-62.

When the issue of Hansen's objections were raise at trial, the trial court ruled that the hearing was scheduled "for the sole purpose of editing that particular trial deposition." Tr. Vol. I., p. 260, LL. 20-22. The trial court ruled that Hansen's counsel waived any objections during the jury instructions hearing by not addressing them at the hearing. *See* Tr. Vol. I., p. 260, L. 13 and p. 263, LL. 1-8.

Hansen's counsel raised the issue again shortly before the deposition was played for the jury. Hansen's counsel argued that rule 32(b) allowed a party to raise objections to a deposition at trial. *See* Tr. Vol. I., p. 286, LL. 8-14. The trial court indicated that he had gone back over the record of the jury instruction hearing and "I did specifically ask Mr. Ipsen about any objections from plaintiff's side, and he specifically said nothing from the plaintiff." Tr. Vol. I., p. 286, LL. 15-19.

Contrary to the trial court's memory and its subsequent review of the record, Hansen's counsel did not waive the right to raise objections to Roberts' deposition testimony during the jury instructions hearing. After addressing Roberts' objections, the following exchange took place at the jury instruction hearing:

> THE COURT: Okay, all right. Now does that include everything? We covered everything on your motion?

MS. BRIZEE: We've covered everything on my motion.

THE COURT: All right. You had not filed a motion, Mr. Ipsen?

MR. IPSEN: No, Your Honor.

THE COURT: I didn't think there was anything there from the plaintiffs. We had scheduled a jury trial conference as well. Are you both ready to do that?

See Tr. Vol. I., p. 249, L. 16 through p. 250, L. 1.

The record shows that Hansen's counsel did not waive any objections to Roberts' deposition and it shows that the hearing was not conducted for the sole purpose of addressing objections to the deposition. Instead, the hearing was scheduled to review jury instructions. During the hearing, the trial court did not specifically ask Mr. Ipsen "about objections from plaintiff's side" and Mr. Ipsen did not specifically say "nothing from the plaintiff." Instead, the trial court specifically asked Mr. Ipsen, "You had not filed a motion?" Mr. Ipsen specifically answered, "No."

The trial court erred because Hansen was not required to file a motion to address his objections because rule 32(b) permits a party to make objections to depositions at trial and Hansen's counsel did not waive his objections at the jury instruction hearing.

A substantial amount of inadmissible evidence was introduced based on the trial court's erroneous ruling that Hansen waived his deposition objections. First, Roberts made hearsay statements regarding the amount of money the collision repair company

said it would cost to repair his vehicle, along with the written repair estimates. *See* Tr. Vol. I., pp. 299-302. Hearsay is not admissible except as provided by the rules of evidence. *See* Idaho R. Evid. 802. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *See* Idaho R. Evid. 801(c).

Receipts for repair work are inadmissible hearsay. *See State v. Miller*, 141 Idaho 148, 150; 106 P.3d 474 (Idaho 2004) and *Marshall v. Bare*, 107 Idaho 201, 204; 687 P.2d 591, 594 (Idaho Ct. App. 1984). Both of the foregoing cases hold that repair estimates are hearsay. In *Marshall*, a party attempted to circumvent the hearsay rule by arguing that the repair estimates were not offered for the truth of the matter. The Court of Appeals disagreed and pointed out that if the repair estimates were not introduced for the truth of the matter then they would be inadmissible as irrelevant. Other jurisdictions have issued similar opinions in cases involving the introduction of repair estimates for vehicle damage. *See Home Mutual Fire Insurance Co.* v. *Hagar*, 242 Ark. 693, 415 S.W.2d 65 (1967) and *In the Interest of J.T.*, 285 Ga. App. 465 (Ga. Ct. App. 2007).

Second, hearsay statements made by Roberts to Hansen, police dispatch, and oral and written statements to the police officer were inadmissible. *See* Tr. Vol. I., pp. 310-14. Roberts' counsel was under the mistaken belief that statements by her own client were not hearsay. *See* Tr. Vol. I., p. 310, LL. 24-25. The rule is that statements by a

party-opponent are not hearsay. *See* Idaho R. Evid. 801(d). None of Roberts' statements to Hansen, dispatch, or the police officer, including his written statement, are admissible because they are hearsay.

Finally, Roberts' testimony that he did not receive a citation is inadmissible and violated the trial court's prior ruling on the issue. *See* Tr. Vol. I., p. 315, LL. 16-21. The trial court ordered before trial that there would be no testimony "concerning admission of citation. In other words, the parties will not testify that there was a citation." *See* Tr. Vol. I., p. 51, LL. 18-23. Roberts' testimony that he did not receive a citation violates the court's pretrial order because it implies that Hansen received a citation since most jurors will believe that one of the drivers will get a citation.

The trial court's error was not harmless because without the hearsay evidence regarding the repair estimates Roberts would not have had any evidence at all to support his damages so he would not have been awarded anything even if the jury found Hansen primarily at fault. Although Hansen only needs to show a probable change in the outcome of the trial due to the trial court's error, the lack of any evidence other than inadmissible hearsay to prove Roberts' damages would certainly have changed the outcome of trial.

Further, the hearsay evidence regarding statements made by Roberts to the police officer along with his statement that he did not get a citation would probably have

changed the jury's apportionment of fault and either reduced Hansen's liability to Roberts or swung the jury all the way to Hansen's side. Importantly, the jury initially was considering apportioning fault 51/49 but, implicit in its question to the court, it wanted to give Roberts some money. *See* Tr. Vol. I., p. 491 L. 22 through p. 492, L. 4. The jurors sent the following question to the court during deliberations:

> If we decide that Larry [Hansen] is 51 percent and Matt [Roberts] is 49 percent, would Matt still get the award amount of damages as if we did 90 percent to 10 percent. Period or question mark. In other words, does the percentage matter?

Id.

Further, only nine jurors signed the special verdict form. *See* R Vol. I, p. 206. Swaying one or two more jurors to Hansen's side or arming the pro-Hansen jurors with additional arguments, while at the same time reducing arguments for the pro-Roberts jurors, would probably have changed the dynamics of deliberations so that the jury apportioned more fault on Roberts than Hansen and either reduced Hansen's liability to Roberts or resulted in a recovery by Hansen from Roberts. Accordingly, the error was not harmless.

ISSUE #3: Limitations on Voir Dire

The trial court abused its discretion by prohibiting Hansen from inquiring whether a prospective juror or one of his family members were or had ever been employed by an insurance carrier. The standard of review for a district court's limitations on jury voir

dire is an abuse of discretion standard. *See State v. Bitz,* 93 Idaho 239, 244, 460 P.2d 374, 379 (1969).

Voir dire is an important tool available to the parties to ensure that a fair and impartial jury is impaneled. Accordingly, this Court has held that "some latitude must be given in the matter of examining jurors on their *voir dire*, to enable counsel to determine whether or not such jurors should be challenged for implied bias, and also for obtaining information as to whether or not it is desirable to exercise a peremptory challenge." *See Wilson v. St. Joe Boom Co.*, 34 Idaho 253, 262; 200 P. 884, 886 (Idaho 1921).

This Court has noted that a potential juror may be biased due to his employment. "It is the privilege of a party within reasonable limits and good faith, to ascertain the occupation of a juror and the extent of his possible interest in the trial." *Byington v. Horton*, 61 Idaho 389, 102 P.2d 652 (Idaho 1940).

In injury cases, this Court has repeatedly held that it is the privilege of the plaintiff to inquire whether a prospective juror or one of his family members are or have ever been employed by an insurance carrier. *See Wilson v. St. Joe Boom Co.*, 34 Idaho 253, 262; 200 P. 884, 886 (Idaho 1921) (holding that prospective jurors are subject to inquiry regarding their interest in a casualty company); *Cochran v. Gritman*, 34 Idaho 654, 664; 203 P. 289, 292 (Idaho 1921) (holding that counsel may ascertain whether jurors have interest in the result of litigation although it might show juror's connection with a

casualty company); *Bressan v. Herrick*, 35 Idaho 217, 221; 205 P. 555, 556 (Idaho 1922) (permitting counsel in personal injury action to ask jurors whether they had any connection with casualty companies); *Faris v. Burroughs Adding Mach. Co.*, 48 Idaho 310, 322; 282 P. 72 (Idaho 1929) (holding that statements of counsel that defendant was insured were not prejudicial); *Shaddy v. Daley*, 58 Idaho 536, 540; 76 P.2d 279, 281 (Idaho 1938) (holding that plaintiff was within his rights in propounding question as to whether prospective juror is or has been employed by an insurance company); *Byington v. Horton*, 61 Idaho 389, 395; 102 P.2d 652, 654 (Idaho 1940) (same); and *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (Idaho 1979) (same).

In *Byington*, each prospective juror was asked whether he or any member of his family had been employed by any insurance company engaged in the business of insuring against automobile accidents. This Court found the line of question proper and quoted from a prior decision holding, "It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company." (quoting *Faris*).

More recently, this Court reiterated that an inquiry concerning prospective jurors and their family members' employment or ownership interest in a casualty company is

permissible. "We have held that such inquiry is permissible if made in good faith with the intent to expose bias and not for the purpose of informing the jury about the existence of the defendant's insurance." *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (Idaho 1979).

Notably, every time this issue is raised on appeal, it has been raised by the defense when the trial court has allowed such inquiries. This case raises an issue of first impression before this Court because in this case the trial court prohibited such inquiries.

The Idaho Court of Appeals suggested, in dicta, that trial judges in Idaho are free to prohibit this line of questioning, relying on *Kozlowski v. Rush*, 121 Idaho 825, 831; 828 P.2d 854, 860. *See Harris v. Alessi*, 141 Idaho 901, 907; 120 P.3d 289, 296 (Idaho Ct. App. 2005). The Court of Appeals' statement should not be adopted by this Court for two reasons: First, the Court of Appeals' reliance on *Kozlowski* was misplaced because the inquiry in *Kozlowski* was not whether a juror had an interest in an insurance company as an employee or stockholder, which would make the juror incompetent to serve as a juror. Instead, the inquiry in *Kozlowski* related to the jurors' exposure to anti-tort advertising campaigns, which would not necessarily give rise to a cause challenge. The Court of Appeals did not explain in *Harris* how a party could exercise their right to exclude incompetent jurors or effectively exercise peremptory challenges if questioning regarding jurors' interests in insurance companies was prohibited.

Second, the dicta in *Harris* seems driven by remarks in that particular case by plaintiff's counsel singling out a specific insurance company. *See Harris*, at 295. While the Court of Appeals' concerns are legitimate, the statement that trial courts can prohibit all inquiries into incompetency due to employment with an insurance carrier goes too far. Indeed, this Court's holdings on the subject already state that inquiries into employment by an insurance carrier are appropriate so long as they are not intended to signal that insurance is available. A simple question as to whether a juror or a juror's close family members have ever worked for an insurance company is innocuous, yet it provides plaintiffs with information necessary to determine whether a juror is competent or biased.

In this case, Roberts moved for an order in limine prohibiting any use of the word insurance. Hansen's counsel objected at oral argument and argued that inquiry into prospective jurors' interests in insurance companies during voir dire was appropriate. "[S]pecifically, I'm thinking that if there is an insurance adjuster or someone who works in the insurance industry who is on the jury, I'm not sure if my client would get a fair trial." Tr. Vol. I, p. 22 L. 22 through p. 23, L. 5. The trial court ruled that knowledge of the prospective jurors and their spouses' *current* employment was sufficient to address counsel's concerns.

Hansen's counsel again raised the issue of voir dire on the day of trial, seeking some latitude to inquire about jurors' interests in insurance companies. "Questions I

would like to explore would be the person's job history with regard to whether they ever worked in risk management, insurance claims as an agent or insurance adjuster, [or] whether they've had close family members or friends who work in the insurance industry." Tr. Vol. I, p. 66, LL. 6-17. The trial court again denied this request.

Accordingly, Hansen was precluded from learning whether a juror had previously worked in the insurance industry or whether other close family members – such as parents, children, or siblings – had ever been employed in the insurance industry.

Also, consider that a juror may have been improperly removed for cause solely because she worked for Allstate. Voir dire of prospective juror, Ms. Hix, comprised all of three lines in the transcript. *See* Tr. Vol. I., p. 71, LL. 21-24. The restriction on mentioning insurance precluded Hansen's counsel from inquiring whether Ms. Hix worked in claims or for an agent. The distinction is important because views and attitudes of employees in claims, whose job is to minimize liability, is significantly different than those who work as agents, whose job it is to extol the virtues and benefits of insurance to customers and prospective customers. Hansen was precluded from determining Ms. Hix's views on automobile insurance claims and whether she could fairly and impartially decide the case. Instead, Hansen had to presume that she was incompetent solely because she worked for Allstate so he moved the court to remove her

for cause. Roberts' counsel did not object and the trial court removed Ms. Hix for cause with no examination from defense counsel. See Tr. Vol. I., p. 102, LL. 5-13.

If the trial court presumed that Ms. Hix was incompetent to serve as a juror solely because she worked for an insurance company, it is safe to believe that a juror who formerly worked for an insurance company could also be biased against plaintiffs. Similarly, a juror whose mother or father worked as an insurance agent may also be biased against plaintiffs. For the foregoing reasons, the trial court erred when it prohibited Hansen from ascertaining whether potential jurors or their spouses had any prior employment with an insurance company or whether any of their close family members were currently or previously employed with an insurance company. The error was prejudicial because it prevented Hansen from eliciting bias so that he could effectively challenge jurors for cause or so he could better utilize his peremptory challenges.

CONCLUSION

For the foregoing reasons, Hansen requests that this Court vacate the judgment in favor of Roberts and remand to the trial court for a new trial.

DATED this 19th day of January, 2012.

Brent Gordon

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2012, I faxed and caused two (2) true and correct copies of the foregoing instrument to be delivered to the following via U.S. Mail, postage prepaid:

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