

2005

# Nicholas J. Roberts v. William Kurt Dobson : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**  
**OF THE STATE OF UTAH**

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NICHOLAS J. ROBERTS,  
  
Plaintiff/Appellant,

vs.

WILLIAM KURT DOBSON,  
  
Defendant/Appellee.

**REPLY BRIEF  
OF APPELLANT**

Appellate Case No. 20050930

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APPEAL FROM THE GRANT OF JUDGMENT ON THE JURY VERDICT  
ISSUED BY THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH ON SEPTEMBER 20, 2005

ARGUMENT PRIORITY CLASSIFICATION \_\_\_\_\_

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## **REPLY TO APPELLEE'S STATEMENT OF FACTS**

The issues of this appeal as presented by the Appellee, William Kurt Dobson (hereinafter "Mr. Dobson") are: (1) "Has the Plaintiff [Mr. Roberts] properly marshaled the evidence and has Plaintiff shown that the evidence, when viewed in the light most favorable to the verdict, provides no basis for the jury's verdict"; and (2) "Did the trial court judge abuse its discretion in denying Plaintiff's [post trial] motions." (See Mr. Dobson's Brief, page 1). The facts submitted by Mr. Dobson, however, are not relevant to the issues and/or merely cloud the issues.

The material facts in resolving the issues are: first, at trial, it was stipulated that Mr. Dobson was negligent; second, the jury found Mr. Dobson's negligence was the proximate cause of Appellant, Nicholas J. Roberts' (hereinafter "Mr. Roberts"), injuries; and third, the evidence at trial regarding Mr. Roberts' injuries conclusively demonstrated that there was a period (a) when Mr. Roberts received reasonable and necessary medical expenses, (b) it was reasonable and necessary that Mr. Roberts took time off of work because of his injuries, and (c) the injuries sustained by Mr. Roberts affected his life.

The period in which the evidence is undisputed that Mr. Roberts was injured extends from the date of the accident, May 17, 2003, to October 1, 2003.

There were only four witnesses at trial. Mr. Dobson testified concerning his observations of Mr. Roberts at the scene of the accident. Testimony and evidence

presented by the remaining three witnesses, Mr. Roberts, Dr. Jonathan Horne (Mr. Roberts' treating physician), and Dr. Scott Knorpp (the physician called by Mr. Dobson to give testimony), was clear, consistent, and uncontroverted that Mr. Roberts was injured and that by reason of his injuries he had incurred reasonable and necessary medical expenses. Further, the cost of the medical treatments and expenses incurred from the date of the accident through October 1, 2003 was not in dispute and was in fact presented in stipulated Exhibits. Since the evidence of injury and damages during this first period, May 17, 2003 through October 1, 2003, was not disputed, the verdict of the jury cannot be allowed to stand.

The second period in which Mr. Roberts claimed damages extends from October 2, 2003 through the date of trial. Mr. Roberts does not dispute that the evidence and testimony regarding whether his injuries extended beyond October 2, 2003 were in dispute. It is this second period that Mr. Dobson's Statement of Facts addresses. Mr. Roberts acknowledges that if the evidence of injuries presented in this second period was the only evidence presented at trial, then his appeal would be without merit.

The evidence and testimony, however, conclusively demonstrate, at least during the period of May 17, 2003 through October 1, 2003, that the jury's verdict cannot be allowed to stand and that the trial court judge abused his discretion in denying Mr. Roberts' post trial motions.

## ARGUMENT

### POINT I

THE ALLEGATION THAT MR.  
ROBERTS FAILED TO MARSHAL  
THE EVIDENCE IS WITHOUT MERIT.

Mr. Roberts, as the appellant, acknowledges his duty to fully marshal the evidence in this appeal. To this purpose, Mr. Roberts relied on, referred to, and referenced the testimony and evidence submitted by Mr. Dobson's medical expert, Dr. Knorpp, regarding his findings during the period Mr. Roberts was injured and his opinion regarding Mr. Roberts' medical treatment and time off of work. The testimony and evidence by Mr. Roberts and Dr. Horne was to the effect that the injury sustained by Mr. Roberts in the May 17, 2003 accident was more severe and longer lasting than that indicated by Dr. Knorpp in his testimony. (R. 275 at 104:22; 111:19-20; 112:1-2; 128:17-23; 154:4-5). Mr. Roberts in his initial Brief presented Dr. Knorpp's opinions of Mr. Roberts' injuries and the reasonableness and necessity of Mr. Roberts' medical treatments, costs of treatments, costs of prescription medications, and time off of work (R. 276 at 208:9-17; 209:24-25; 210:1-2; 210:7-10; 212:3-8; 240:3-11) during the period beginning on the date of the accident through October 1, 2003.

The following are the undisputed facts which were presented in detail in Mr. Roberts' initial Brief:

1. Mr. Roberts Suffered Injuries as a Result of the Motor Vehicle Accident. Dr. Knorpp testified that there was an “exacerbation or temporary worsening” of Mr. Roberts. (R. at 197).

It is pertinent to note that Dr. Horne testified, without dispute, that prior to the May 17, 2003 accident, Mr. Roberts was asymptomatic in his neck and back for approximately 18 months. (R. 275 at 104:25). Dr. Knorpp reviewed the records of Dr. Horne. (See Dr. Knorpp’s Report, R. at 182-198). At page 9 of his report, Dr. Knorpp acknowledges that Dr. Horne treated Mr. Roberts for neck and back pain on June 27, 2000. From June 27, 2000 to May 17, 2003, Dr. Horne’s records and testimony indicate that he treated Mr. Roberts on only two occasions: June 3, 2001 for an allergic reaction and December 9, 2001 for a knee injury. (R. at 190).

2. The Treatment Received by Mr. Roberts. Dr. Knorpp testified that between May 17, 2003 and October 1, 2003 it was reasonable and appropriate that Mr. Roberts receive medical treatment from Dr. Horne. (R. 276 at 208:9-17). The undisputed medical costs incurred by Mr. Roberts from Dr. Horne were \$1,375.50. (R. 275 at 47:1-15; Stipulated Trial Exhibit 7).

3. The MRI Scans. Dr. Horne ordered MRI scans of Mr. Roberts’ neck, back, and head. (R. 275 at 107:9-10). Dr. Knorpp testified that the MRI scans performed on Mr. Roberts’ neck and back were reasonable. (R. 276 at 209:24-25; 210:1-2). The undisputed costs of the two (2) MRI scans was \$2,530.00. (Stipulated Trial Exhibit 9).



4. Time Off of Work Following the Accident. Dr. Horne examined Mr. Roberts on May 19, 2003, two days following the accident, and he recommended that Mr. Roberts take time off of work to recover from the injuries sustained in the motor vehicle accident. (R. 275 at 39:24-25). Dr. Knorpp testified that the time Mr. Roberts took off from work to recover from the motor vehicle accident was reasonable. (R. 276 at 212:3-8). Both doctors unequivocally recommended that Mr. Roberts take a week off of work after the accident. It was undisputed that Mr. Roberts lost wages from May 17, 2003 through October 1, 2003 of \$1,046.54, based upon Mr. Roberts' hourly rate of pay of \$29.48 and the number of hours lost (54.5). (Stipulated Trial Exhibit 12).

5. Physical Therapy. Following the motor vehicle accident, Mr. Roberts attended two physical therapy sessions. Dr. Horne recommended that Mr. Roberts' have physical therapy. (R. 275 at 147:4-6). Dr. Knorpp testified that the two physical therapy sessions attended by Mr. Roberts were reasonable. (R. 276 at 210:7-10). The undisputed cost for the physical therapy was \$158.29. (Stipulated Trial Exhibit 8).

6. Time Off of Work to Receive Medical Treatment. As noted above, Dr. Horne provided medical treatment to Mr. Roberts (Stipulated Trial Exhibit 2). As also noted, Dr. Knorpp testified that the medical treatment received by Mr. Roberts from the date of the accident to October 1, 2003 were reasonable and necessary. Mr. Roberts obtained medial treatment from Dr. Horne from May 17,

2003 through October 1, 2003 on the following dates: May 17, 2003, May 19, 2003, June 5, 2003, August 9, 2003, August 15, 2003, August 16, 2003, August 18, 2003, and October 1, 2003. (Stipulated Trial Exhibit 7).

7. Prescription Medicine Costs. Mr. Roberts incurred additional damages based upon the cost of prescription medications prescribed by Dr. Horne from May 17, 2003 through October 1, 2003 of \$1,129.50. (Stipulated Trial Exhibit 2; Stipulated Trial Exhibit 11). As noted, Dr. Knorpp testified that the medical treatment which Mr. Roberts obtained from Dr. Horne from May 17, 2003 through October 1, 2003 was reasonable and appropriate. (R. 276 at 24:3-11).

8. Pain and Discomfort Following the Motor Vehicle Accident. It was undisputed that Mr. Roberts suffered injuries as a result of the motor vehicle accident at least until October 1, 2003. As a result of his injuries, Mr. Roberts clearly would have had a degree of pain and discomfort. (Stipulated Trial Exhibit 6; Stipulated Trial Exhibit 15). Mr. Roberts testified without contradiction that his injuries affected his quality of life. (R. 275 at 26:3-6; 34:2-19).

#### ARGUMENT 1

The undisputed evidence was that between the date of the accident (May 17, 2003) and October 1, 2003, a total of 136 days, Mr. Roberts' necessary and reasonable medical treatment, physical therapy, and prescription costs were \$5,469.29. It was also undisputed that Mr. Roberts incurred lost wages for time off work to recover from the accident and obtain medical treatment in the amount of

\$1,046.54. Finally, it was undisputed that Mr. Roberts was injured and that he suffered pain and discomfort from his injuries.

Notwithstanding the undisputed evidence, the jury awarded Mr. Roberts:

Special Damages:	\$1100.00
General Damages:	\$ 300.00
TOTAL DAMAGES:	\$1400.00

(R. at 244-246).

## ARGUMENT 2

The undisputed evidence demonstrates that the jury disregarded the undisputed evidence. Mr. Roberts is, therefore, entitled to a reversal of the verdict. The trial court abused its discretion in denying Mr. Roberts' post trial motions for the reasons set forth herein.

Mr. Dobson states at page 12 of his Brief:

Plaintiff failed to include any mention of Dr. Knorpp's testimony that Plaintiff failed several credibility tests during his physical examination and evaluation and that Dr. Knorpp testified specifically that Plaintiff's examination did not meet the criteria for "aggravation" of a prior injury. Plaintiff also failed to include the fact that Dr. Knorpp testified that the objective data showed no negative change in Plaintiff's spinal anatomy after the subject accident and that both experts actually observed improvement when comparing the earlier MRIs with the 2003 MRIs.

During the period from the date of the accident through October 1, 2003, the testimony and evidence undisputedly and conclusively was that Mr. Roberts was injured and received necessary and reasonable treatment for his injuries.

The “credibility test” administered by Dr. Knorpp were performed on January 22, 2005. (R. at 182). The purpose of the test was not to determine whether Mr. Roberts had been injured, since Dr. Knorpp had already concluded that Mr. Roberts had been injured and the treatment he received for those injuries up to October 1, 2003 were reasonable. The use of the “credibility test” was for the purpose of evaluating the injury and treatment of Mr. Roberts after October 1, 2003. Evidence of a credibility test does not alter the conclusion nor is it relevant to the issue of whether there was a period in which Mr. Roberts was injured and that his medical treatment and time off of work during the period from the date of the accident to October 1, 2003 were reasonable and necessary.

### ARGUMENT 3

Mr. Dobson next submits at page 12 of his Brief that “Dr. Knorpp testified specifically that Plaintiff’s examination did not meet the criteria for “aggravation of a prior injury”. Mr. Dobson, however, acknowledges at page 7 of his Brief that “Roberts complained of having pain but suffered only a temporary worsening or ‘exacerbation’ of the preexisting injuries”. It was undisputed that there was, at a minimum, a worsening or exacerbation of Mr. Roberts’ pre-existing injuries.

Dr. Horne testified that by reason of the motor vehicle accident Mr. Roberts had a “new injury event” which was “quite a significant injury”. (R. 275 at 104:19-22). Dr. Horne also testified that prior to the “new injury event” Mr. Roberts had been pain free for approximately 18 months. (R. 275 at 104:25).

The jury was given the following instruction:

A person who has a condition or disability at the time of an injury is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury. This is true even if the person's condition or disability made the injured person more susceptible to the possibility of ill-effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

If plaintiff's pre-existing condition or disability is aggravated, then plaintiff is entitled to recover all of the damages which were caused by the aggravation.

This instruction references the case of Biswell v. Duncan, 742 P.2d 80 (Utah

1987). The Court held in Biswell:

The rule is well settled that when a defendant's negligence ***aggravates or lights up a latent, dormant, or asymptomatic condition***, or one to which the injured person is predisposed, ***the defendant is liable*** to the injured person for the full amount of damages which ensue, notwithstanding such diseased or weakened condition. In other words, when a latent condition itself does not cause pain, but that condition plus an injury brings on pain by aggravating the pre-existing condition, then the injury, not the dormant condition, is the proximate cause of the pain and disability. A plaintiff, therefore, is entitled to recover all damages which actually and necessarily follow the injury. (Emphasis added).

The evidence was undisputed that Mr. Roberts had an aggravation or “lighting up” of a pre-existing injury. The aggravation or lighting up of Mr. Roberts’ injury lasted, at a minimum, from the date of the accident to October 1, 2003.

#### ARGUMENT 4

Finally, Mr. Dobson references Dr. Knorpp’s testimony as to whether there was an objective date showing no negative change in Mr. Roberts’ spinal anatomy. (Mr. Dobson’s Brief at page 12). The relevant point is that the evidence and testimony was undisputed that Mr. Roberts was injured, that the medical treatments and procedures for those injuries from May 17, 2003 through October 1, 2003 were necessary and reasonable, and that Mr. Roberts lost time from work. Mr. Roberts’ damages for medical treatments, medical procedures, prescription medications, and lost time from work during the period May 17, 2003 through October 1, 2003 totaled \$6,239.83. Notwithstanding the undisputed evidence of Mr. Roberts’ damages, the jury only awarded Mr. Roberts \$1,100.00 in special damages.

In the case of Judd v. Rowley’s Cherry Hill Orchards, Inc., 611 P.2d 1216 (Utah 1980), the plaintiff presented evidence concerning medical and hospital costs and loss of earnings to date of the trial in the amount of \$15,761.48. This evidence was uncontroverted. The jury in Judd, however, only awarded the plaintiff \$15,000.00 in special damages. The Supreme Court found:

The only evidence before the jury, which was credible, was that Plaintiff's special damages amounted to \$15,761.48. The jury was instructed to determine the amount which would fairly compensate plaintiff for these items, and obviously disregarded the uncontroverted evidence in returning a verdict of \$15,000. The special verdict should therefore be increased to \$15,761.48.

Id. at 1221.

In this case, the evidence that Mr. Roberts incurred \$6,239.83 in medical expenses and lost wages was uncontroverted. Mr. Dobson did not dispute that Mr. Roberts incurred such costs. Clearly, the jury disregarded the uncontroverted evidence in returning a verdict of \$1,100.00 in special damages. The jury's verdict is clearly outside the limits of the undisputed evidence presented at trial and the jury's award of special damages of \$1,100.00 and general damages of \$300.00 should be increased by an amount sufficient to compensate Mr. Roberts for his damages.

Mr. Roberts did not fail to marshal the relevant evidence of the case. The undisputed, to the conclusion that Mr. Roberts was found by both medical experts to be injured and both medical experts testified about his injuries and reasonableness and necessity of treatments for those injuries.

## POINT II

**PLAINTIFF HAS NOT IGNORED THE  
ROLE OF THE JURY NOR HAS HE  
IMPROPERLY REQUESTED  
INAPPROPRIATE RELIEF FROM THIS  
COURT.**

Mr. Dobson's argument, taken to its logical conclusion, would be that: (1) juries never make mistakes; (2) juries never ignore undisputed evidence; (3) juries never award excessive or inadequate damages appearing to have been given under passion or prejudice; and (4) Rule 59 of the Utah Rules of Civil Procedure is superfluous and unnecessary and this Court need never be asked to review a jury and/or trial court's decision.

In this case, the undisputed evidence demonstrated that Mr. Roberts was injured and that he received medication and medical treatment and that he lost time from work during the period of May 17, 2003 through October 1, 2003. Mr. Roberts, based upon the unopposed and stipulated Exhibits, had special damages of \$6,239.83, but the jury only awarded \$1,100.00. The jury's findings were clearly inadequate and, based upon the evidence, erroneous.

A review of the jury's damage award should be allowed to stand unless "the award indicates that the jury disregarded competent evidence". Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078 (Utah 1985).

Mr. Dobson, at page 13 of his Brief, states:

[T]he evidence regarding the cause of Plaintiff Roberts' injuries is disputed. While it is undisputed that Defendant Roberts [sic] was negligent in driving it is disputed that the resulting accident caused any of Plaintiff Roberts' damages.



This ignores the jury's finding that Mr. Dobson's negligence was the proximate cause of Mr. Roberts' injuries and, that Mr. Dobson's medical expert found that Mr. Roberts' injuries extended from the date of the accident to October 1, 2003. There is, in fact, no dispute regarding the cause of Mr. Roberts' injuries. Mr. Roberts is not proposing that the jury was obligated to accept "a particular version of the facts", he submits that the jury was obligated to accept the undisputed facts and follow the jury instructions.

Mr. Dobson's argument regarding the stipulated exhibits is without merit. Mr. Roberts' referenced in his Brief the evidence (Dr. Knorpp's evaluation) and Dr. Knorpp's testimony regarding the period of Mr. Roberts' injuries and then references the treatment and costs from the date of the accident to October 1, 2003.

The stipulated and undisputed medical expenses and lost wages incurred by the Plaintiff as a result of the motor vehicle accident from the date of the occurrence through October 1, 2003 were, as noted:

- (a) Medical treatment by Dr. Horne from May 17, 2003 through October 1, 2003 in the amount of \$1,375.50. (Stipulated Trial Exhibit 7).
- (b) Physical therapy by Larry Fullmer from May 17, 2003 through October 1, 2003 in the amount of \$158.29. (Stipulated Trial Exhibit 8).

(c) Lumbar MRI and cervical MRI conducted on August 15, 2003 in the amount of \$1,265.00 for each MRI, or \$2,530.00 for the two MRI scans. (Stipulated Trial Exhibit 9).

(d) Prescription medications for the period May 17, 2003 through October 1, 2003 in the amount of \$1,129.50. (Stipulated Trial Exhibit 11).

(e) Lost wages for the period May 17, 2003 through October 1, 2003 in the amount of \$1,046.54. (Stipulated Trial Exhibit 12).

### POINT III

#### THE TRIAL COURT ERRED IN DENYING MR. ROBERTS' POST TRIAL MOTIONS.

Rule 59 of the Utah Rules of Civil Procedure provides that a new trial may be granted if the damages awarded are excessive or inadequate and appear to have been given under the influence of passion or prejudice. In this case, the jury, by entering a verdict in an amount far less than the stipulated and undisputed evidence, shows that the jury acted with passion and prejudice and the trial court's failure to grant a new trial was an abuse of discretion. The jury in this case clearly misapplied or failed to take into account proven evidence, specifically the stipulated damages. The trial court abused its discretion when it failed to grant Mr. Roberts a new trial based upon the influence of passion or prejudice. The clear and undisputed evidence at trial demonstrate that: (1) Mr. Dobson was negligent in causing the motor vehicle

accident; (2) Mr. Roberts suffered injuries as a result of the accident; (3) Mr. Roberts obtained reasonable and necessary medical treatment for his injuries; (4) Mr. Roberts incurred expenses for medical treatment, prescription medications, and lost wages in the amount of \$6,239.83. The jury's award of \$1,100.00 in special damages is not supported by the evidence and testimony presented at trial.

Mr. Dobson submits that the facts of this case "bear a striking resemblance to those in the case of Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 (Utah 1999). Contrary to Mr. Dobson's allegation, the facts in Tingey are different in many respects from those of this case. For example:

(1) Tingey at ¶3 provides, in part: "Tingey was already in great pain before the 1993 accident." In this case, Mr. Roberts had been pain free for approximately 18 months prior to the motor vehicle accident. (R. 275 at 104:25).

(2) Tingey at ¶4 provides, in part: "The parties stipulated that Tingey received reasonable and necessary medical expenses of \$33,669.34 after the accident, although they did not stipulate that such costs arose as a result of the accident." In this case, both medical experts and Mr. Roberts testified that Mr. Roberts sustained injuries as a result of the accident and that he received reasonable and necessary medical treatment, prescription medication, and took time off of work to receive treatment for and recover from the injuries sustained in the motor vehicle accident.

(R. at 275 at 39:24-25; 67:6-8; 41:6-14; 41:19-22; 44:20-25; 46:21-22; 47:1-15; 276 at 209:24-25; 210:1-2; 210:7-10; 212:3-8; 240:3-11

(3) Tingey at ¶9 provides, in part: “Tingey . . . had a chronic history of pain . . . Tingey’s TMJ could have been caused by several factors . . . Based on this evidence, the jury’s verdict was reasonable.” In this case, Mr. Roberts did not have a chronic history of pain, and in fact, had been pain free for over a year prior to the motor vehicle accident. (R. 275 at 104:25). Dr. Horne testified that the injury suffered by Mr. Roberts by reason of the motor vehicle accident was a “new injury event” which was “quite a significant new injury”. (R. 275 at 104:19-22). Dr. Knorpp testified that the objective data supports that there was an exacerbation or temporary worsening of Mr. Roberts following the motor vehicle accident. (R. 276 at 205:24-25; 206:1).

There was insufficient evidence to support the jury’s verdict and, therefore, the trial court abused its discretion in denying Mr. Roberts’ post trial motions.

### CONCLUSION

The jury returned a verdict awarding Mr. Roberts special damages in the amount of \$1,100.00 and general damages in the amount of \$200.00, for a total damage award of \$1,300.00. (R. at 244-46). The jury’s verdict does not reflect the stipulated and undisputed evidence presented at trial.

The medical experts agreed: (1) the medical treatment received by Mr. Roberts for the treatment of the injuries which he sustained in the motor vehicle accident from May 17, 2003 through October 1, 2003 were reasonable and necessary (R. 276 at 271:3-9); (2) the cervical MRI and lumbar MRI were reasonable (R. 276 at 271:10-11); (3) the time Mr. Roberts took off of work to recover from his injuries was reasonable. (R. 276 at 271:24-25; 272:1-2).

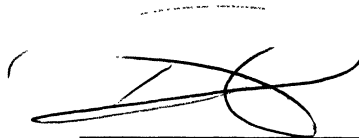
Mr. Dobson's attorney, in her closing argument at trial, clearly demonstrated what reasonable minds would have to conclude based upon the evidence and testimony presented at trial:

If you add up Dr. Horne, the MRIs, and give him the two physical therapies, plus a week off of work, okay? That totals \$5,200. . . . I would suggest that two or \$3,000 for – for general damages, at most as much as his medicals; that puts you anywhere between six and at most \$10,000 for this case.

(R. 276 at 272:18-22; 273:3-10).

The trial court erred when it refusal to order an additur, new trial, and/or directed verdict. The trial court's order denying Mr. Roberts' post-trial motions must be reversed and this case remanded for a new trial.

DATED this 10<sup>th</sup> day of April, 2006.



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ROBERT W. HUGHES  
Attorney for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed two (2) copies of the foregoing Reply Brief of Appellant to Kristin A. VanOrman, STRONG & HANNI, 3 Triad Center #500, Salt Lake City, Utah 84111, postage prepaid, this \_\_\_\_\_ day of April, 2006.

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