

1977

## Reid E. Jensen v. Connie Gail Thomas : Appellant's Brief of Newly Uncovered Cases

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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REID E. JENSEN,

Plaintiff and  
Appellant,

-vs-

CONNIE GAIL THOMAS,

Defendant and  
Respondent.

CASE NO. 14838

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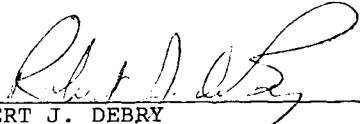
APPELLANT'S BRIEF OF NEWLY UNCOVERED CASES

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Pursuant to Rule 75(p)(3), Utah Rules of Civil Procedure, respondent submits the attached pages of newly uncovered cases for insertion in the reply brief of appellant, all cases applying to POINT IV of appellant's reply brief.

DATED this 17 day of July, 1977.

By

  
ROBERT J. DEBRY  
Attorney for Appellant  
2040 East 4800 South, #203  
Salt Lake City, Utah 84117

The case of Rickett v. Hayes, 473 S.W. 2d 446 (Arkansas 1971) is also instructive. In Rickett, an action for medical malpractice, the lower court ruled that the plaintiff could not, prior to trial, depose the defendant's expert witness about his opinion as to whether or not the defendant had met the standard of care required of doctors in that locality. On appeal, the Arkansas Supreme Court held that such denial constituted reversible error and the case was remanded for a new trial. Concerning the pre-trial discovery of the opinion of an expert witness the court stated at 448-51:

We have recognized the importance of cross-examination of an adverse witness not only to test his credibility but also in an attempt to wring disclosures which might modify or explain his testimony on direct examination or bring it into a perspective which might present a view more favorable to the cross-examiner. . . .

Planning effective cross-examination of adversary witnesses is one of a trial lawyer's most important responsibilities in preparation for trial, particularly when the witnesses are experts. See Allen v. Arkansas State Highway Commission, supra; United States v. 23.76 Acres, 32 F.R.D. 593, (D.C. Md. 1963). Handicaps to attempting full cross-examination of an expert witness without pre-trial discovery of his opinion with its supporting data and theoretical basis are discussed by Professor Friedenthal in "Discovery and Use of an Adverse Party's Expert Information," 14 Stanford Law Review 455, 485 et seq. The desirability of permitting discovery of adverse expert witnesses to enable advance preparation for effective cross-examination is well stated in the Advisory Committee's Notes to Proposed Amendments to Federal Rules of Civil Procedure Relating to Discovery at 48 F.R.D. 487. Depositions taken under the applicable statute may be used for the express purpose of contradicting or impeaching the testimony of the deponent at the trial of the case. Ark.Stat. Ann. 28-348(d)(1). . . .

Decisions upholding limitations on discovery of an expert witness, particularly where there was a foreclosure of inquiry as to the expert's opinions and conclusions, are abundant and might well support an order such as that entered here in the ordinary case. Still, there are recognized exceptions to the otherwise proper limitation of discovery of the conclusions of an adverse party's expert where the evidence is indispensable to a determination of a material issue and would be otherwise unavailable. Leininger v. Swadner, 279 Minn. 251, 156 N.W.2d 254 (1968); United States v. Meyer, 398 F.2d 66 (9th Cir. 1968). An entirely different situation obtains, however, when the expert's testimony pertains to the very crux of the issue to be determined on trial. United States v. Meyer, supra; United States v. 364.82 Acres of Land, 38 F.R.D. 411 (D.C.Cal. 1965).

For example, in an eminent domain proceeding, the critical issue is usually the amount of just compensation, and evidence on that issue generally consists of the opinions of opposing experts and the factual and theoretical bases upon which they rest. In United States v. Meyer, supra, it was held that a landowner was entitled to a disclosure of the condemnor's appraisers' opinions and their factual and theoretical foundations to enable him to fairly evaluate the respective claims for settlement purposes, determine the real area of dispute, narrow the actual issues, avoid surprise and prepare adequately for cross-examination and rebuttal. In so holding, the court there recognized that the weight to which an appraiser's opinion testimony is entitled rests upon the validity of the appraiser's premises, procedures, and theories, the soundness of his factual determinations, the methods he has followed and the formulae he has applied. The court in Meyer felt that full pre-trial disclosure of the opinions of the experts was essential to the accomplishment of the basic purposes of the discovery rules, and that the opinions of these appraisers and their basis were information that could not be obtained from any other source. The same effect, see Franks v. National Dairy Products Corporation, 41 F.R.D. 234 (D.C. Texas 1966), aff'd 414 F.2d 682 (5th Cir. 1969); United States v. 23.76 Acres, 32 F.R.D. 593 (D.C. Md. 1963). The propriety of pretrial examination of an adverse expert in such cases for the purpose of trial cross-examination is consistent with the rationale of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and the ideal of liberal construction there expressed. A similar result has been reached in permitting discovery of certain reports of an adverse party's expert in a patent infringement case as part of the facts involved. Elmer DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D.C. Del. 1959). . . .

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Thus, in a situation where it might be calculated that the particular expert's testimony would carry considerable weight, appellant's attorneys may well have been severely handicapped, as he claimed on the threshold of the trial, in conducting a cross-examination of this witness, which might be the only effective means of minimizing the weight to be given to his testimony by the jury. Because of this, the trial court's order was unduly restrictive. This conclusion is in harmony with our longstanding commitment to the liberal interpretation of the discovery act necessary to accomplish its salutary purposes. See Bower v. Murphy, 247 Ark. 238, 444 S.W.2d 883; Arkansas State Highway Commission v. Stanley, 234 Ark. 428, 353 S.W.2d 173, 4 A.L.R.3d 749.

Even though appellant's attorneys conducted an apparently extensive cross-examination of Dr. Stuckey, we cannot say that the error in unduly restricting the scope of discovery inquiry was harmless in view of what we have said. We could only speculate whether the cross-examination would have been more effective if appellant had not been limited in his discovery. We presume that error is prejudicial unless we can say with assurance that the record discloses that it is harmless. Arkansas State Highway Commission v. Parks, 240 Ark. 719, 401 S.W.2d 732, 26 A.L.R.3d 775; Allen v. Arkansas State Highway Commission, 247 Ark. 857, 448 S.W.2d 27. This we cannot do.

As in Ricketts, the expert opinion testimony here went to the heart of plaintiff's case. This is so because the only real issues to be tried were whether Thomas caused Jensen's visual problems and, if so, how much Jensen should be paid to compensate him for his injuries. It was, therefore mandatory that Jensen's attorney be forewarned as to Dr. Hershgold's opinion as to causation, so that counsel could prepare for cross-examination. Jensen's counsel, however, was given no forewarning but instead learned of Dr. Hershgold's testimony for the first time as it was being given to the jury in open court. Under these facts, as in Ricketts, the only fair way

to handle the problem is to grant a new trial. Appellant's respectfully request that a new trial be granted.

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of July, 1977, two true and correct copies of the foregoing Appellant's Brief of Newly Uncovered Cases were delivered to Stephen Nebeker, attorney for respondent, 400 Deseret Building, Salt Lake City, Utah 84111.

Stephen Nebeker

Original

IN THE SUPREME COURT OF THE STATE OF UTAH

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REID E. JENSEN,

Plaintiff and  
Appellant,

-vs-

CONNIE GAIL THOMAS,

Defendant and  
Respondent.

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BRIEF OF APPEAL

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

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REID E. JENSEN,	)	
	)	
Plaintiff and	)	
Appellant,	)	
	)	
-vs-	)	CASE NO. 14838
	)	
CONNIE GAIL THOMAS,	)	
	)	
Defendant and	)	
Respondent.	)	
	)	

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## CASES CITED

- Flinders v. Hunt, 60 Utah 314 (1922) . . . . .
- Maher v. Roisner, 57 N.W. 2d 810 (Minn. 1953) . .
- McLemore v. International Union, 88 So. 2d 170  
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P.2d 617 (Colo. 1972). . . . .
- Moore v. Denver & Rio Grande Railroad, 4 Utah  
2d 255; 292 P.2d 847 (1956). . . . .
- Ogden L. & I. R. Co. v. Jones, 51 Utah 62 (1917) .
- Parker v. Williams, 99 So. 2d 210 (Ala. 1957) . .
- Reis v. McComb, 545 P.2d 64 (Ariz. 1976) . . . . .
- Salt Lake City v. Anderson, 148 P.2d 346, 106 Utah 350
- Snell v. Cisler, 1 Utah 298 (1876) . . . . .
- Stewart Mining Co. v. Coulter, 3 Utah 174 (1881) .
- Walker v. Distler, 296 P.2d 452 (Ida. 1956) . . .
- Whitfield v. Debrincat, 64 P.2d 960 (Cal. 1937) .

### STATEMENT OF NATURE OF THE CASE

This is an appeal from the lower court's refusal to grant a new trial.

### DISPOSITION IN THE LOWER COURT

Jensen sued Thomas for negligence. The jury returned a verdict "no cause of action". Jensen moved for a new trial pursuant to Rule 59(a)(3) on the grounds of surprise. The lower court denied Jensen's motion for a new trial.

### RELIEF SOUGHT ON APPEAL

Jensen seeks a new trial.

### FACTS

1. On January 16, 1974, Jensen and Thomas were involved in an auto collision (Record 295).
2. The proximate cause of the collision was Thomas' negligence (Record 176).
3. A few hours after the collision, Jensen experienced a type of temporary blindness known as Transcient Ischemic Attacks (hereinafter T.I.A.) (Record 290-91). Jensen had never experienced any T.I.A. attack prior to the collision (Record 302). The frequency of the T.I.A. attack has gradually increased from the time of the accident to the trial (Record 303-304).
4. At trial the only issue presented to the jury was whether or not the T.I.A. was caused by the collision (Record 176).

5. The jury returned a verdict for Thomas "no action" (R. 188).

6. Jensen made a timely motion for a new trial upon surprise (R. 227). The lower court denied Jensen's motion for a new trial (R. 263).

#### POINT ONE

#### COUNSEL FOR THOMAS INJECTED SURPRISE TESTIMONY INTO THE TRIAL

1. During the pretrial discovery, Jensen advised Thomas that two theories would be presented at trial. First, that the auto caused Transient Ischemic Attacks or "mini strokes". Second, that the auto accident caused Raynaud's disease (R. 95, 96).

2. On March 25, 1976, Jensen served the following interrogatory on Thomas: "Identify each expert witness you intend to call at the trial of the above-entitled matter, identify by name, address, specialty, and the basic substance of the said witnesses testimony (R. 74).

3. In response to the interrogatory, Thomas stated that Dr. Edward Hershgold and Dr. Reed Clegg would be called as defendant's expert witnesses (R. 85). Thomas further stated that Hershgold's testimony would be limited to the causal relationship between the auto collision and Raynaud's disease (R. -- two un-numbered sheets between Record 226 and Record 227; also R. 257).

4. After the deposition of Hershgold was finished, Jensen informed Thomas that Jensen would not claim any error.

relationship between the auto collision and the Raynauds; and that Jensen would proceed on the sole theory that the auto collision caused the T.I.A. (R. 98 and 99, also R. 258).

5. Jensen further notified Thomas that Dr. Rich and Dr. Van Dyke would testify for Jensen on the causal relationship between the auto collision and the T.I.A. (R. 98).

6. Shortly before the trial, Thomas notified Jensen of a last minute expert witness who would testify on the causal relationship between the auto accident and the T.I.A. The last minute witness was named Dr. Jarcho (R. 258).

7. Jensen advised Thomas that Van Dyke's (Jensen's expert on T.I.A.) testimony would be given at trial by deposition (Van Dyke deposition p. 3).

8. It was further stipulated by counsel that Jarcho's (Thomas' expert on T.I.A.) testimony would be given at trial by deposition (R. 258 §8).

9. In summary the pretrial discovery fully disclosed that Jensen had dropped his claim for a causal relationship between the collision and Raynauds. The only issue for trial was the causal relation between the collision and T.I.A. Thomas was committed to present the Jarcho deposition on the T.I.A. issue. Jensen was committed to present the Van Dyke deposition on the T.I.A. issue.

10. Notwithstanding the detailed and extensive pretrial discovery and pretrial stipulations discussed above, Thomas called Dr. Hershgold as a witness even though Raynauds was not

an issue. Notwithstanding express representations to the contrary (R. -- two un-numbered sheets between R. 226 - Thomas began to interrogate Hershgold on matters directly related to T.I.A. (R. 234 - R. 238).

11. Jensen made a timely objection to the surprise testimony (R. 238) and advised the court that:

MR. DeBRY: You (counsel for Thomas) indicated that Dr. Hershgold would be a witness, and therefore at our expense, our time, we took Dr. Hershgold's deposition and we asked by Interrogatory who you intended to call. And you indicated by Answer to Interrogatory that you intended to call Dr. Hershgold on the issue of Raynauds. And, therefore, we went to the time -- we went to the expense to interrogate him on that issue. Now, that issue has never been brought up in this case. And we are completely surprised by surprise and completely prejudiced. And there is no way we haven't had a chance to interview or take a deposition of this witness beyond the scope of Dr. Raynaud's problem.

And if the interrogation goes beyond the scope of the Raynaud's problem, it is no issue in this case (R. at 239).

12. Jensen also moved that the testimony be stricken (R. 241 and R. 242).

13. Jensen's objections were overruled and Hershgold was permitted to continue with the surprise testimony (R. 243).

14. Thereafter Thomas did not publish the Jarcho deposition but relied solely on the surprise testimony from Hershgold.

#### POINT TWO

THE SURPRISE TESTIMONY OF DR. HERSHGOLD WAS HIGHLY PREJUDICIAL AND DAMAGING TO JENSEN

1. By reason of the pretrial discovery, Jensen was led to believe that Thomas only testimony on T.I.A.

be from the Jarcho deposition (Point One, supra).

2. The Jarcho testimony on the issue of causation was completely innocuous. For example, the critical part of the Jarcho deposition was as follows:

Q. Based upon your examination and upon the history which he gave you and upon your opinion as a neurologist, first of all have you come to any conclusion about this particular visual disturbance based upon a reasonable medical certainty?

A. I haven't come to a conclusion but I can, if you wish, discuss possible causes which I have considered.

(Deposition of Jarcho p. 15 and 16).

3. Indeed the Jarcho deposition was probably not even admissible on the issue of causal relationship between the collision and the T.I.A. Moore v. Denver & Rio Grande Railroad, 4 Utah 2d 255; 292 P.2d 849 (1956).

4. At trial, Jensen's expert gave testimony (by deposition) that the auto collision was to a reasonable medical certainty the cause of the T.I.A. (R. 376).

5. In summary, prior to the surprise testimony of Hershgold, Thomas had no expert testimony on causation of T.I.A. On the other hand Jensen's expert gave very persuasive testimony on the causation of the T.I.A.

6. The surprise testimony of Hershgold immediately changed the entire complexion of the trial. With absolutely no forewarning, Hershgold gave extensive testimony on causation of T.I.A.

First, Hershgold gave extensive testimony describing how T.I.A. is caused by hardening of the arteries. In fact, Hershgold stated that, ". . . the most common cause, by far, of Transient Ischemic Attacks is first the roughening of the blood vessel which comes from hardening of the arteries" (R. 236). Hershgold then went on to testify that he found Jensen to have hardening of the arteries (R. 237-238). The implied argument was that hardening of the arteries not the auto collision caused the T.I.A. Then on redirect examination Hershgold gave his expert opinion that the T.I.A. was caused by hardening of the arteries and not by the auto collision (R. 251-252).

8. Moreover, the surprise testimony of Dr. Hershgold was an express violation of Rule 26(e)(1)(B) which states: "A party is under a duty to <sup>s</sup>easonably supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, and the subject matter on which he is expected to testify". (Emphasis added)

### POINT THREE

#### PLAINTIFF HAS NO PRACTICAL REMEDY TO SURPRISE TESTIMONY BY A NEW TRIAL

A lawyer's "first line of defense" to surprise testimony is to make appropriate objections at the trial. However, upon analysis it is apparent that that remedy is more illusory than real. Merely making the objection can



more harm than good. The jury resents the objecting party because they feel he is trying to hide something. Moreover, the fact that an objection is made tends to focus the jury's attention on the prejudicial material. As the Supreme Court in Alabama has noted in a similar case,

"To insist upon and argue such a matter at that time would tend to magnify the fact in the estimation of the jury. It would, therefore, seem appropriate to wait and make a motion for a new trial if the decision is adverse and have that as one of the grounds".  
Parker v. Williams, 99 So. 2d 210 (Ala. 1957)

After the surprise testimony gets in, the opposing lawyer is faced with the problem of whether or not to cross examine. If there is no cross-examination, the jury might infer that the opposing lawyer concedes the truthfulness of the testimony. On the other hand, if the opposing lawyer attempts a cross-examination, he is faced with the problem of cross-examining an expert witness without any preparation.

In short, surprise testimony may theoretically be cured by appropriate objection and instruction from the court at the time of trial; however, as a practical matter such devices are ineffective and the only true remedy is a new trial.

#### POINT FOUR

#### RELEVANT STATUTES AND CASE LAW EXPRESSLY PROVIDE FOR A NEW TRIAL IN THIS TYPE OF SITUATION

Rule 59(a)(3) of the Utah Rules of Civil Procedure provides that a new trial may be granted for accident or surpris

which ordinary prudence could not have guarded against. The Utah Supreme Court has reviewed the statutes on only a few occasions, Snell v. Cisler, 1 Utah 298 (1876); Ogden L. & I.R. Co. v. Jones, 51 Utah 62 (1917), Stewart Mining Co. v. Coulter, 3 Utah 174 (1881), Flinders v. Hunt, 60 Utah 314 (1922), and none of these seem to be in point here. However, other courts when faced with the situation of surprise testimony have not hesitated to order a new trial if the evidence introduced was prejudicial.

The most recent case is Reis v. McComb, 545 P.2d (Ariz. 1976). In that case the plaintiff claimed to have given a \$4,000.00 promissory note signed by the defendant. At the trial the defendant suddenly introduced the defense that he was in California on the date the note was made. A friend also testified introducing an appointment book which showed that the two had been together in California on the day in question. In that case the Court made particular note that "discovery indicated nothing to appellant about the unusual twist which McComb's story would take. Throughout his deposition, answers to interrogatories, and his answers to request for admissions McComb denied knowing anything about the note. No supplementary answers to appellant's interrogatories were filed. The court concluded that this was a "most egregious demonstration of surprise" and granted a new trial.

In the case of Walker v. Distler, 296 P.2d 452 (Ida. 1956), the plaintiff brought a malpractice suit against her physician for injuries allegedly suffered as a result of his administration of an anaesthetic. At the trial the physician presented a defense that emergency conditions required the administration of an anaesthetic. In order to prove the emergency condition, the physician introduced results of the plaintiff's urine tests without forwarning the plaintiff. Based on surprise the trial court ordered a new trial and the Supreme Court affirmed.

In Whitfield v. Debrincat, 64 P.2d 960 (Cal. 1937) a witness gave surprise testimony. In affirming a new trial the appellate court stated that,

"All of the cases agree that if a witness suddenly changes . . . or fails to testify in accordance with his previous assurances, by reason of any fact or occurrence of which neither the witness nor the party calling him is in any measure responsible that a new trial will be granted ex debito justitiae."

#### POINT FIVE

#### IT IS NOT NECESSARY TO MOVE FOR A MISTRIAL AT THE TIME OF SURPRISE

The Utah Rules of Civil Procedure do not require counsel to make a motion for mistrial when confronted with the surprise testimony in order to later qualify for a new trial.

Cases from some foreign jurisdictions have sometimes stated that one seeking a new trial based on surprise must move for a mistrial when confronted with the surprising testimony. There are no Utah cases on point. However, the best reasoned cases hold that it is not necessary to move for a new trial at the time of surprise. The case Whitfield v. Debrincat, supra, specifically addressed this point and concluded that "the bell had rung, and could not be unrung". Likewise in Reis v. McComb, supra, and Walker v. Distler, supra, it does not appear that the movant made motion for mistrial at the time of trial.

In Maier v. Roisner, 57 N.W. 2d 810 (Minn. 1953) plaintiff's counsel dropped an envelope containing newspaper advertisements which the court had ruled inadmissible. It was clear that the jury saw some of the ads as counsel picked up. Although defense counsel did not move for a mistrial, even object at the time, the Minnesota Supreme Court ordered a new trial. "Where the misconduct was a fundamental and manifest as that exhibited here, we feel that the new trial was not to discipline counsel for any misconduct, but was necessary to correct the extreme prejudice that the defendant had suffered.

And, in McLemore v. International Union, 88 So. 2d 170 (Ala. 1956), defendant's counsel wrote the words "equality" and "liberty" on the courtroom floor with chalk and then referred to them during his argument. Even though there was no objection at the time, it was held that this conduct was prejudicial and required a new trial.

POINT SIX

THE LOWER COURTS REFUSAL TO GRANT A NEW TRIAL WAS AN ABUSE  
OF DISCRETION

It is sometimes said that the power to grant or deny a new trial rests generally within the sound discretion of the trial court. Nevertheless it is clear that the Supreme Court will review any abuse of discretion exercised by the lower court. Salt Lake City v. Anderson, 148 P.2d 346, 106 Utah 350.

The term "abuse of discretion" should not be a tool to mechanically "rubber stamp" the conduct of the lower court judge. Indeed it has been held that the phrase "abuse of discretion" does not cast any reflection upon the lower court judge, but indicates that the appellate court is simply of the opinion that there was a commission of error in the law and the circumstances. Media v. District Court for Otero County, 493 P.2d 617 (Colo. 1972).

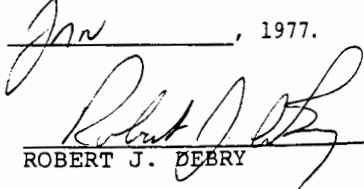
In weighing the "abuse of discretion" of the lower court, this court should also consider the policy considerations of this case. When judges and lawyers in Utah analyze whether a new trial is appropriate for surprise they will read two things. They will read the statute (Rule 59(a)(3)) and they will read this case. The policy question is simply this. If the facts here do not compel a new trial under the statute, where then is the line. Shouldn't a lawyer in Utah be able to protect himself from surprise testimony by thorough discovery and preparation?

Mr. Jensen deserves a new trial under the statute but even more, lawyers and judges in Utah need the guidance of this court in how to fairly prepare and conduct their trials.

#### CONCLUSION

Defendant improperly injected surprise testimony into the trial. The surprise testimony was highly prejudicial and forced plaintiff's counsel to cross-examine an expert witness without any prior notice or preparation. The lower court erred in not granting a new trial pursuant to Rule 59 (a) (3) of the Utah Rules of Civil Procedure.

DATED this 31 day of Jan, 1977.

  
ROBERT J. DEBRY

This is to certify that I mailed a true copy of the foregoing Brief of Appellant to Stephen Nebeker, attorney for defendant, at his address of 400 Deseret Building, Salt Lake City, Utah, this 31st day of January, 1977, postage prepaid and properly addressed.

