

1997

Gary Ricci v. Charles Schoultz, M.D. : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970189-CA

IN THE UTAH COURT OF APPEALS

GARY RICE

Plaintiff, Appellant & Cross-
Appellee,

v.

CHARLES SCHOLTZ III

Defendant, Appellee & Cross-
Appellant.

**REPLY BRIEF OF THE
APPELLANT AND CROSS-
APPELLEE**

Case No 970189 CA

Priority No. 15

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE HOMER F. WILKINSON PRESIDING

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JAN 21 1998

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INTRODUCTION AND SUMMARY OF ARGUMENT

The defendant, Dr. Charles Shoultz, ran into the plaintiff, Gary Ricci, while the two were skiing at Snowbird Ski Resort. The case was presented to the jury on a negligence theory, using the jury instructions and special verdict form that Shoultz requested. The jury found that Shoultz was negligent and that his negligence proximately caused Ricci's injuries.

The trial court granted Shoultz a judgment notwithstanding the verdict (j.n.o.v.) and conditionally granted him a new trial. Having lost before the jury, Shoultz now tries to uphold the trial court's post-trial rulings by reinventing the facts of the case and suggesting that he cannot be liable for simple negligence. Shoultz claims that the trial court properly granted him a j.n.o.v. because he simply fell while skiing and, as a matter of law, it is not negligence to fall while skiing.

Shoultz did not simply fall. In fact, at trial Shoultz denied falling at all before the collision. (*See* Record ("R.") 806, 809.) Instead, the evidence, viewed in the light most favorable to Ricci, shows that Shoultz, an experienced skier, was skiing the easiest part of the trail when suddenly, without warning and without any explanation other than his own inattention and carelessness, Shoultz lost control of his skis, veered sideways across the trail and crashed into Ricci, who was unable to avoid Shoultz even though Ricci was some ten feet to the side of Shoultz. (*See, e.g.,* R. 587, 589-91.) Shoultz literally ran Ricci off the trail and into a tree, seriously injuring Ricci. Whether Shoultz's inattention and loss of control constituted negligence under the circumstances was for the jury to

decide. The trial court erred in taking the issue away from the jury. The trial court's j.n.o.v. should therefore be reversed. (Point I.)

Ricci agrees that there was evidence that would have supported a verdict in Shoultz's favor. Shoultz gave one version of the accident, and Ricci gave another. The jury chose to accept Ricci's testimony and disbelieve Shoultz's, perhaps because the physical and circumstantial evidence supported Ricci's version of the accident, not Shoultz's. That decision was also for the jury to make, and the trial court erred in substituting its view of the evidence and the credibility of the witnesses for the jury's. Therefore, the order granting Shoultz a new trial should also be reversed. (Point II.)

Shoultz claims that even if the trial court's ruling on his post-trial motion was wrong, he was still entitled to a new trial because the trial court erroneously excluded expert testimony at trial. Shoultz wanted to elicit expert opinion testimony from certain Snowbird employees at trial. However, Shoultz never designated the witnesses as experts. Moreover, there was no foundation for the proposed expert testimony. None of the witnesses saw or tried to re-create the accident. Furthermore, expert testimony would not have helped the jury but would have only served to tell the jury what result to reach. Therefore, the trial court did not abuse its discretion in excluding the evidence. Even if the trial court erred in excluding the testimony, the error was harmless. Shoultz has not shown a reasonable likelihood that the verdict would have been any different if the trial court had allowed the expert testimony. Therefore, Shoultz is not entitled to a new trial. (Point III.)

ARGUMENT

I.

THERE WAS COMPETENT EVIDENCE TO SUPPORT THE VERDICT; THEREFORE, THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT JUDGMENT NOTWITHSTANDING THE VERDICT.

The parties agree that, in determining whether the trial court properly granted the defendant a j.n.o.v., this court “must review the record and determine whether there is any basis in the evidence, including reasonable inferences which could be drawn therefrom, to support the jury’s determination” (Br. of Aplee. at 2 (quoting *Braithwaite v. West Valley City Corp.*, 921 P.2d 997, 999 (Utah 1996))).) If the court finds support for the jury’s verdict, it must reverse the trial court’s grant of a j.n.o.v. *Braithwaite*, 921 P.2d at 999.

Shoultz, the defendant and appellee, claims that there was no competent evidence to support the jury’s finding that he was negligent because there was “no evidence” that he “engaged in careless, reckless or out-of-control skiing” or otherwise “engaged in any sort of activity that increased the risk of him falling.” (Br. of Aplee. at 12.) At most, he claims, the evidence shows only that he fell while skiing, and, as a matter of law, it is not negligence to fall while skiing.

Ricci did not have to show that Shoultz was “reckless” or “engaged in . . . out-of-control skiing.” He only had to show that Shoultz was negligent. Negligence is a breach of the duty of care that the defendant owed the plaintiff. *See, e.g., Reeves v. Gentile*, 813 P.2d 111, 116 (Utah 1991). Shoultz agrees that he owed Ricci a duty to use reasonable

care to avoid injuring him. (*See* R. 224;¹ *cf.* Br. of Aplee. at 12 (“Shoultz had a duty to ski in a reasonable manner as determined by the totality of the circumstances”).) It was for the jury to determine whether Shoultz breached that duty.

Ricci agrees that the mere fact that someone falls while skiing does not necessarily mean that he was negligent. But Shoultz did not merely fall. In fact, at trial he denied falling at all. (R. 806, 809.) Instead, Shoultz suddenly veered to his left and literally ran Ricci off the trail and into a tree. (R. 589-91.)

The mere fact that an accident happens does not necessarily means that someone was negligent. *See, e.g., Martin v. Safeway Stores Inc.*, 565 P.2d 1139, 1142 (Utah 1977); MUJI 3.3. But, by the same token, it also does not mean that someone was *not* negligent. *Cf. Randle v. Allen*, 862 P.2d 1329, 1335 (Utah 1993) (disapproving of “unavoidable accident” instructions on the grounds that they could mislead the jury into reaching a result without applying the elements of a cause of action for negligence; labeling an accident as “unavoidable” does not necessarily mean that it was not caused by

¹ Schoultz requested (R. 489) and the trial court gave the jury the following instruction:

A person has a duty to use reasonable care to avoid injuring other people or property. “Negligence” simply means the failure to use reasonable care. Reasonable care does not require extraordinary caution or exceptional skill. Reasonable care is what an ordinary, prudent person uses in similar situations.

The amount of care that is considered “reasonable” depends on the situation. You must decide what a prudent person with similar knowledge would do in a similar situation. Negligence may arise in acting or in failing to act. . . .

(R. 224.) The instruction is taken from MODEL UTAH JURY INSTRUCTIONS--CIVIL [MUJI] no. 3.2 (1993).

negligence). Whether or not someone was negligent depends on the facts and circumstances of the case, and a jury could conclude from the evidence in this case that Shoultz was negligent.

Shoultz argues that there is no evidence that he “was inattentive while he was skiing on the runout” (Br. of Aplee. at 13), but he refutes his own argument. As he points out in the preceding paragraph, the evidence at trial showed that the accident occurred on the easiest part of the mountain; that the runout where the accident occurred was “catted” or groomed snow, that is, that it had been smoothed out by a tractor-type machine, “making it easier to ski” (Br. of Aplee. at 7 n.2); that the day was clear and the weather good; that there was nothing in Shoultz’s path to obstruct him; and that an experienced skier would not have lost control under those conditions if he was paying attention to his skiing. (Br. of Aplee. at 13.) The evidence also showed that Shoultz was an experienced skier. (Br. of Aplee. at 7.) In other words, there was no reason for Shoultz to lose control and run Ricci off the mountain except for his own inattentiveness. In fact, Shoultz testified that just before the collision he was paying attention to another member of his ski class, who had just passed him. (R. 806.) A jury could certainly conclude that Shoultz was not paying proper attention to his skiing and that his negligence was a proximate cause of Ricci’s injuries.

Shoultz argues that a violation of the skier’s responsibility code is evidence of negligence. (Br. of Aplee. at 19-20 & n.4.) The skier’s responsibility code applied to Shoultz as well as to Ricci. The code states:

There are elements of risk in skiing that common sense and personal awareness can help reduce.

1. Ski under control and in such a manner that you can stop or avoid other skiers or objects.

(Ex. P-12.) The jury could reasonably conclude that Shoultz violated the first rule of the skier's responsibility code when he failed to ski under control and in such a manner that he could avoid Ricci. The jury could further conclude that Shoultz's violation of the code showed a lack of "common sense and personal awareness" that amounted to negligence.

Shoultz argues that, because falling while skiing is foreseeable and an "inherent" risk of skiing, as a matter of law it is not negligence to fall while skiing. Even if the evidence showed that Shoultz merely fell, which it did not, this argument flies in the face of Shoultz's argument in point II of his brief that the skier's responsibility code imposes duties on skiers, the violation of which can be negligence. Those duties include a duty to ski under control and to avoid other skiers. By Shoultz's own reasoning, if a skier falls because he is not skiing under control and he collides with another skier, he has violated the code and can be found negligent.

None of the cases Shoultz cites held that, as a matter of law, it is never negligence to fall while skiing. Instead, those cases applied the rule, followed in some jurisdictions, that a participant in a sporting event owes no duty to co-participants to avoid injuring them by negligent conduct. *See, e.g., Freeman v. Hale*, 36 Cal. Rptr. 2d 418, 421 (Cal. Ct. App. 1994) (participants in sports have no legal duty to protect others from risks inherent in the sport itself and can only be liable for intentional or reckless conduct);

Thompson v. McNeill, 559 N.E.2d 705, 706 (Ohio 1990) (between participants in a sporting event, “[t]here is no liability for injuries caused by negligent conduct”). *See also* *Cheong v. Antablin*, 946 P.2d 817, 820 (Cal. 1997) (requiring reckless or intentional wrongdoing for liability in a case involving a collision between two skiers). Other courts have refused to adopt this rule, *Estes v. Tripson*, 932 P.2d 1364, 1365-66 (Ariz. Ct. App. 1997); *Auckenthaler v. Grundmeyer*, 877 P.2d 1039, 1040-44 (Nev. 1994);² *Lestina v. West Bend Mut. Ins. Co.*, 501 N.W.2d 28, 33 (Wis. 1993), or to apply it to a collision between skiers, *Novak v. Virene*, 586 N.E.2d 578, 580 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 24 (Ill. 1992). *See also* *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730, 734-35 (10th Cir. 1977) (applying a negligence standard to a collision between two skiers); *Ninio v. Hight*, 385 F.2d 350, 351-52 (10th Cir. 1967) (same); *Gray v. Houlton*, 671 P.2d 443, 444 (Colo. Ct. App. 1983) (same); *Babych v. McRae*, 567 A.2d 1269, 1269-70 (Conn. Super. Ct. 1989) (applying a negligence standard to a hockey game); *Duke’s GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1123, 1124 (Ind. Ct. App. 1983) (applying a negligence standard to a golf injury).

Shoultz is precluded from now arguing that he cannot be liable for mere negligence because he failed to make the argument at trial. Shoultz agreed below that he

² Both the Arizona and the Nevada courts rejected the lower standard of care that California courts have adopted (which requires a showing of reckless or intentional misconduct) on the grounds that such a reduced standard of care is based on assumption-of-risk principles, and those jurisdictions do not recognize assumption of risk as a complete defense. *See Estes*, 932 P.2d at 1365-66; *Auckenthaler*, 877 P.2d at 1040, 1041-44. Similarly, in Utah the assumption-of-risk defense has been subsumed under the comparative fault scheme of the Utah Liability Reform Act, UTAH CODE ANN. §§ 78-27-37 through -43 (1996). *See, e.g.*, UTAH CODE ANN. § 78-27-37(2) (“fault” includes “assumption of risk”).

had a duty to use reasonable care to avoid injuring Ricci and could be liable for negligence. (See R. 187, 189.) The case was presented to the jury under a negligence theory, using the instructions Shoultz requested and essentially the same special verdict form Shoultz submitted. (See R. 187-89, 204-06, 222-24, 244-46.) A party cannot object on appeal to jury instructions he proposed. *State v. Perdue*, 813 P.2d 1201, 1203-06 (Utah Ct. App. 1991). Now that the jury has found him negligent based on instructions he submitted, it is too late for Shoultz to suggest that he cannot be liable for negligence. See *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (“on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error”).

In any event, regardless of what the standard is in other jurisdictions, under Utah law negligence is a sufficient basis for liability in cases involving skiing accidents. See *White v. Deseelhorst*, 879 P.2d 1371, 1374-75 (Utah 1994) (action against ski resort); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991) (same). Cf. *Harrop v. Beckman*, 15 Utah 2d 78, 387 P.2d 554, 554 (1963) (applying a negligence standard to a water skiing accident). In *Clover*, a Snowbird employee collided with the plaintiff while they were skiing, severely injuring her. The plaintiff sued Snowbird alleging that it was liable for its employee’s negligence. 808 P.2d at 1039. The trial court held that the employee was not acting within the scope of his employment at the time of the collision, but the Supreme Court reversed, concluding that there was sufficient evidence from which a jury could conclude that the employee was acting within the scope of his

employment, making Snowbird potentially liable for its employee's negligence. *See id.* at 1043.

The only Utah cases Shoultz cites for his argument are easily distinguished. *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995), dealt with the duty the owner of a baseball team owed to spectators, not the duty one sport participant owes to another. Nevertheless, the court in that case applied a negligence standard. The court held that "a baseball facility 'must use reasonable care in providing a reasonably safe place for its patrons.'" 901 P.2d at 1015 (quoting *Hamilton v. Salt Lake City Corp.*, 120 Utah 647, 237 P.2d 841, 843 (Utah 1951)). The court then discussed what was reasonable care under the circumstances and concluded that it only required the defendant to "screen the area behind home plate and to provide screened seats to as many spectators as would normally request such seats on an ordinary occasion." *Id.* The court concluded that the plaintiff had presented no evidence that the defendant had breached its duty of reasonable care. *Id.* at 1015-16.

Schnuphase v. Storehouse Markets, 918 P.2d 476 (Utah 1996), the other Utah case Shoultz cites, involved a slip and fall in a grocery store. The court there also applied a negligence standard of care but concluded that there was no evidence that the defendant was negligent.

Lawson and *Schnuphase* are simply specific applications of the general rule that negligence is normally a question of fact for the jury but, like other questions of fact, can be taken from the jury if there is no evidence to support a finding of negligence or the

facts are undisputed and only one conclusion can be drawn from them. *See, e.g., Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 339-40 (Utah 1997); *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 615 (Utah 1985).

Here, as shown above, there was evidence, viewed in the light most favorable to Ricci, that Shoultz failed to exercise reasonable care to avoid injuring Ricci. It was therefore for the jury to decide whether Shoultz was negligent.

Finally, Shoultz cites Utah's Inherent Risk of Skiing statute, UTAH CODE ANN. §§ 78-27-51 to -54 (1996), for the proposition that falling while skiing is an inherent risk of skiing for which liability should not attach. Shoultz points out that the statute defines "inherent risks of skiing" to include "collisions with other skiers." *See* UTAH CODE ANN. § 78-27-52(1). The statute further provides: "Notwithstanding anything in Sections 78-27-37 through 78-27-43 [the Utah Liability Reform Act] to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing." *Id.* § 78-27-53. As Shoultz concedes (Br. of Aplee. at 15), the statute only immunizes ski area operators from liability.³ It does not immunize other skiers from liability. If the legislature had intended to impose a higher standard of care on skiers than simple negligence or if it had intended to immunize skiers from liability arising out of a so-called inherent risk of skiing, it certainly knew how to do so.

³ Even then it only immunizes them from liability for injuries caused by an inherent risk of skiing, not for those caused by the ski area operator's own negligence. *Clover*, 808 P.2d at 1046-47. If a ski area operator, whom the Inherent Risks of Skiing statute was meant to protect from liability, can still be liable for its own negligence, then *a fortiori* a skier, whom the statute was not meant to protect, can also be liable for his negligence.

It chose not to. Skiers can still be liable under the principles set forth in the Liability Reform Act. Under that act, a plaintiff may recover from any defendant or group of defendants whose “fault” exceeds his own. *Id.* § 78-27-38(2). The act defines “fault” to include “negligence in all its degrees.” *Id.* § 78-27-37(2).

In other words, there is no statutory or case law to support Shoultz’s suggestion that skiers cannot be liable for simple negligence, nor can the court say that, as a matter of law, it is not negligence to fall while skiing. To hold otherwise would lead to undesirable results. Skiers would not even be required to exercise the same degree of care that motorists, for example, are required to exercise. Skiers could ignore the skier’s responsibility code, which Shoultz claims constitutes the “rules of the road” for skiers. To uphold the j.n.o.v. in this case would immunize an experienced skier who through his own carelessness and inattentiveness forced another skier off the mountain.

In short, Shoultz did not merely fall while skiing. He did not pay proper attention to his skiing and, as a result, lost control of his skis and careened into Ricci’s path without warning, knocking him off the trail. Whether Shoultz was negligent under the facts of this case was a question of fact for the jury to decide. The jury heard the evidence and concluded that Shoultz was negligent. The trial court erred by substituting its judgment for that of the jury.

II.

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR A NEW TRIAL.

In granting Shoultz's motion for a new trial, the trial court also substituted its judgment for that of the jury.

The trial court granted Shoultz a new trial under Utah Rule of Civil Procedure 59(a)(5), on the grounds that the jury's award of damages was excessive, and under rule 59(a)(6), on the grounds that there was insufficient evidence to support the verdict. (R. 400-01.) Shoultz does not claim on appeal that he is entitled to a new trial under rule 59(a)(5) or that the jury's damage award was excessive. Instead, he argues that the trial court properly granted him a new trial because there was "substantial competent evidence" at trial to support a verdict in his favor. (Br. of Aplee. at 17.)

Ricci recognizes that the Utah Supreme Court has said that in reviewing an order for a new trial based on insufficiency of the evidence, "we must determine whether there was "substantial competent evidence which would support a verdict for [the moving party]."" *Braithwaite v. West Valley City Corp.*, 921 P.2d 997, 1001 (Utah 1996) (citations omitted). This standard is inherently problematic, however.

Rule 59(a)(6) only allows the trial court to grant a new trial if there is insufficient evidence to justify the verdict (or "it is against law," which Shoultz does not claim). If the trial court erred in granting Shoultz's motion for a j.n.o.v., then there was sufficient evidence to support the verdict, and there were no grounds for granting Shoultz a new trial under rule 59(a)(6). Indeed, by denying Shoultz's motion to dismiss made after the

plaintiff rested (*see* R. 151), the trial court concluded that there was sufficient evidence to submit the case to the jury.

The Utah Supreme Court has said that a “trial court cannot grant a new trial if there is sufficient evidence to support a verdict for either party and the judge merely disagrees with the judgment of the jury. Mere disagreement is not a sufficient basis on which to set aside a verdict and order a new trial.” *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 n.9 (Utah 1991). To justify a new trial, it is not enough to show that there is some evidence to support a verdict for the losing party. The trial court must conclude that the jury’s verdict was “clearly” or “manifestly” against the weight of the evidence. *See id.* at 799 n.9, 804.

If the trial court’s grant of a new trial can be upheld any time there is “substantial competent evidence” to support the losing party’s case, then trial courts have *carte blanche* to grant a new trial any time they disagree with the jury’s verdict. The “substantial competent evidence” standard merely requires evidence “sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify *some, but not necessarily all*, reasonable minds acting fairly thereon, to believe it to be the truth.” *Utah State Rd. Comm’n v. Steele Ranch*, 533 P.2d 888, 890 (Utah 1975) (emphasis added). Any time the evidence presents a jury question, there is sufficient evidence to justify some (but not necessarily all) reasonable minds in finding for the losing party. *See, e.g., Winsness v. M.J. Conoco Distribs., Inc.*, 593 P.2d 1303, 1304 (Utah 1979); *Newton v. Oregon Short Line R.R. Co.*,

43 Utah 219, 134 P. 567, 570 (1913). Thus, by definition, in every case in which the trial court allows the case to go to the jury there is “substantial competent evidence” to support the losing party’s case.

In other words, the “substantial competent evidence” standard, as argued for by Shoultz, would allow the trial court to grant a new trial whenever it disagrees with the jury’s verdict. No matter how many times the case is retried, the court could keep granting new trials until, in the court’s opinion, the jury “got it right” (meaning, that the jury reached the result the trial court would have reached). Indeed, in initially denying Shoultz’s motion for a new trial in this case the trial court indicated that it would do just that if it granted a new trial and the second jury reached the same result as the first: “My first inclination was to grant a new trial, but if the same evidence came up, and the same verdict came in, and the same motion was filed again, I would set it aside.” (R. 343.)

Where, as here, the testimony at trial presents different accounts of an event, the trial court cannot grant a new trial simply because it believes testimony different from the testimony the jury believed. *Crookston*, 817 P.2d at 799 n.9; *Nelson v. Hartman*, 648 P.2d 1176, 1178 (Mont. 1982). To uphold such action would allow the trial court to nullify a fair and regular jury verdict and would obliterate the function of the jury. See *Nelson*, 648 P.2d at 1179.

The “substantial competent evidence” standard can be harmonized with *Crookston*’s prohibition against trial courts substituting their judgment for the jury’s by considering *Crookston*’s requirement that the trial court describe the basis for its decision.

See Crookston, 817 P.2d at 804 (quoting *Saltas v. Affleck*, 99 Utah 381, 386-87, 105 P.2d 176, 178 (1940)). If the trial court gives a legally sufficient reason for its grant of a new trial, its discretion will be upheld on appeal if there is “substantial competent evidence” to support a verdict for the moving party. However, if the trial court fails to give a legally sufficient reason, it abuses its discretion in granting a new trial. The reason the trial court offered in this case for granting a new trial was that it felt that the jury was “dead wrong.” (R. 342.) In other words, the trial court merely substituted its view of the evidence for the jury’s. That is not a legally sufficient reason for disturbing the first jury’s verdict. *See Crookston*, 817 P.2d at 799 n.9. Therefore, this court should hold that the trial court abused its discretion in granting a new trial. *Cf. Zerbetz v. Municipality of Anchorage*, 856 P.2d 777, 784 (Alaska 1993) (for a new trial to be appropriate, the evidence supporting the verdict must be completely lacking or so slight and unconvincing as to make the verdict plainly unreasonable and unjust); *Nelson*, 648 P.2d at 1179 (a jury verdict should be reinstated if there is substantial credible evidence to support it); *Herrell v. Johnson*, 899 P.2d 759, 762 (Or. Ct. App. 1995) (when the issue is the sufficiency of the evidence, the jury’s verdict must stand unless there was no evidence to support it).⁴

⁴ To protect a party’s right to a jury trial, federal courts review the grant of a new trial more stringently when it is granted on the grounds that the verdict is against the great weight of the evidence as opposed to other grounds and reverse the grant if there was sufficient evidence to support the jury’s verdict. *See, e.g., Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991); *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556-59 (11th Cir. 1984); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 438-41 (3d Cir. 1971), *cert. denied*, 404 U.S. 898 (1971). By reversing a trial court’s grant of a new trial, “the appellate court is not reexamining facts found by a jury but is reinstating the jury’s findings as against the contrary findings of the judge.” 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2819, at 205 (1995). Such review does not violate but protects the constitutional right to a jury trial. *Id.*

Shoultz claims that Ricci did not meet his burden to show that the trial court erred in granting Shoultz's motion for a new trial because Ricci did not marshal the evidence supporting Shoultz's case and show how that evidence was "not sufficiently substantial or credible to support a verdict" in Shoultz's favor. (Br. of Aplee at 17 n.3 (quoting *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 58 (Utah 1986)).) Nevertheless, Shoultz says, he will set forth the evidence that would support a verdict in his favor. (Br. of Aplee. at 17 n.3.) The evidence Shoultz relies on is essentially the same evidence that Ricci set out in his opening brief. (*Compare* Br. of Aplee. at 18-22 *with* Br. of Aplt. at 8-9, 20.)

The following is the evidence Shoultz relies on as the evidence in his favor: Shoultz testified that he did not catch an edge or start to fall before the collision and that Ricci ran into him from behind without warning; Shoultz had photographs showing severe bruising on his right back side, tending to support his testimony of how the accident happened; and Shoultz testified that he hit the trees with his shoulders, which would explain the bruising on his left shoulder (though not his left thigh).

Ricci concedes that, had the jury believed Shoultz's testimony, it could have found in his favor. The jury, however, chose not to believe Shoultz's testimony, for good reason. The physical evidence strongly supported Ricci's testimony about how the accident happened. Shoultz claimed that Ricci ran him over from behind while Shoultz was skiing straight ahead in the center of the run. (R. 698-700, 806.) Ricci testified that he was skiing the left side of the run with Shoultz to his right when Shoultz suddenly

(footnote omitted).

veered left, came across the slope and drove Ricci off the left side of the trail into a tree. (R. 589-93.) After the collision, both skiers were found in the trees off to the left of the trail. (R. 775, 836-37.) If Ricci had run into Shoultz from behind, as Shoultz claimed, the skiers would have ended up in the snow on the groomed or catted part of the run. Instead, they ended up in the trees to the left of the run, supporting Ricci's testimony.

There were also inconsistencies between statements Shoultz made at the time of the accident and his testimony at the time of his deposition, which were brought out at trial. (*See* Br. of Appt. at 9 n.1.)

Moreover, although Shoultz introduced photographs showing bruising on his back right side, his medical records showed that he also had significant injuries to his left side, a fact that Shoultz initially concealed from Ricci and his counsel but which was eventually exposed on cross-examination. (*See* R. 689-98; ex. P-18.) The jury could reasonably conclude that Shoultz was trying to hide unfavorable evidence, and it was entitled to disbelieve the rest of his testimony.

For all these reasons, the jury was justified in rejecting Shoultz's testimony and accepting Ricci's. *See, e.g.,* MUJI 2.10 & 2.11 (if the jury finds that a witness made inconsistent or willfully false statements, the jury may disregard the witness's testimony).

Shoultz argues that the evidence shows that Ricci violated the skier's responsibility code in that he was the "downhill" or "overtaking" skier and failed to avoid Shoultz. The skier's responsibility code does not impose any liability on skiers, much less strict liability. Even assuming that a violation of the code can be considered some

evidence of negligence⁵ and that Ricci violated the code provision dealing with downhill and overtaking skiers,⁶ that would not absolve Shoultz from liability. It would simply provide some basis for finding Ricci negligent.⁷ It would not mean that Shoultz was not also negligent. In fact, the jury found that Ricci was negligent, but it also found that his negligence was neither the sole nor a contributing proximate cause of his injuries. (R. 245.) Shoultz does not claim on appeal that the jury's verdict on this point was inconsistent or unsupported by the evidence.

In short, the evidence in this case supported the jury's verdict. The jury was faced with two diametrically opposed versions of how the accident happened, from the only two eyewitnesses to the accident. The physical evidence supported Ricci's testimony and refuted Shoultz's. Ricci was a credible witness concerning the accident; Shoultz was not.

⁵ All the cases Shoultz has cited for the proposition that violation of a code may be considered as evidence of negligence involved the violation of a statute or regulation having the force of law. The skier's responsibility code was promulgated by the National Ski Area Association and does not have the force of law. It is therefore not conclusive on the standard of care. *See, e.g., Runkle v. Burlington N.*, 613 P.2d 982, 993 (Mont. 1980); *Prine v. Thelan*, 496 P.2d 905, 907 (Wyo. 1972). Even where the responsibility code has been codified, it is not conclusive. *See Ullissey v. Shvartsman*, 61 F.3d 805, 809 (10th Cir. 1995).

⁶ Ricci testified that, at the time of the accident, Shoultz and he were traveling at about the same speed (R. 586-87) and that he was not overtaking Shoultz (R. 667). The evidence also showed that, at the place of the accident, the skiers were actually going slightly uphill, with Ricci behind Shoultz. (R. 581-82, 589, 668, 835.) Although there was evidence from which the jury could have concluded that Ricci was overtaking Shoultz (*see* R. 666-67), the jury was not required to draw that conclusion.

⁷ Although the jury could (and did) find that Ricci was negligent, it was not required to do so. Even where a person violates the "rules of the road" and runs into someone else from behind, the jury may still find that the person was not negligent under all the facts and circumstances of the case. *See LaVine*, 557 F.2d at 733-34; *Anderson v. Sharp*, 899 P.2d 1245, 1249 (Utah Ct. App.), *cert. denied*, 910 P.2d 426 (Utah 1995).

The jury chose to believe Ricci's version and disbelieve Shoultz's. The fact that the jury could have found for Shoultz if it had believed his testimony and rejected Ricci's does not justify granting Shoultz a new trial. To uphold the trial court's grant of a new trial in this case would impermissibly invade the province of the jury and allow a court to overturn a jury verdict any time the court disagreed with the jury. Therefore, the trial court's order conditionally granting Shoultz a new trial should be reversed.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EXPERT TESTIMONY REGARDING THE SKIER'S RESPONSIBILITY CODE.

Shoultz claims that, if he is not entitled to a j.n.o.v. or to a new trial for insufficiency of the evidence, he is entitled to a new trial because the trial court abused its discretion when it excluded expert testimony concerning the skier's responsibility code.⁸

Before trial, Ricci moved in limine to exclude opinion testimony of certain lay witnesses who were Snowbird Ski Resort employees, on the grounds that, among other things, the parties had not designated any expert witnesses, the Snowbird employees did not qualify as experts, expert testimony was not needed, the proposed testimony would merely tell the jury what result to reach, and the evidence sought to be excluded was unduly prejudicial. (R. 118-28.) The trial court ruled that Shoultz's witnesses could

⁸ The parties agree that trial court's alleged error in excluding expert testimony is reviewed for an abuse of discretion. *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1347 (Utah 1993).

testify as to what the skier's responsibility code is and where it is posted at Snowbird but could not opine as to what took place. (R. 441-42.)

At trial, Shoultz called Kenneth Bonar, the mountain manager at Snowbird, who testified as to where the skier's responsibility code was published at Snowbird at the time of the accident. The court, however, would not let Mr. Bonar testify as an expert. (R. 788-94.)

Although Shoultz made no proffer as to Mr. Bonar's proposed expert testimony at the time (*see* R. 788-94), Shoultz now claims that the trial court erred by not allowing Mr. Bonar to testify that Ricci, as the uphill skier, had a duty to avoid Shoultz, the downhill skier, and that his failure to do so caused the accident. (Br. of Aplee. at 24.)⁹ The trial court did not err in excluding Shoultz's proposed expert testimony.

The rules of evidence do not require expert testimony in every case. Utah Rule of Evidence 702 provides that, if specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . *may* testify thereto in the form of an opinion or otherwise." (Emphasis added.) It is well established that the decision whether or not to allow expert testimony is committed to the sound discretion of the trial court. *See, e.g., Steffensen*, 862 P.2d at 1347. *See also General Elec. Co. v. Joiner*, 118 S. Ct. 512, 515 (1997).

⁹ Shoultz also claims that Bonar should have been allowed to offer testimony as to the "enforcement" of the skier's responsibility code. (Br. of Aplee. at 25.) There was no issue at trial as to the "enforcement" of the code. No one claimed that Snowbird was at fault in any way for failing to enforce the code.

Shoultz, through his counsel, admitted that he had not designated as experts any of the witnesses he proposed to call. (R. 433.) He claims, however, that it was error to exclude his proposed experts for that reason because the trial court did not impose a deadline for designating expert witnesses and the witnesses were asked in their depositions (over the plaintiff's objection, *see* R. 330) their opinions about the cause of the accident and whether the parties had violated the skier's responsibility code. (*See* Br. of Aplee. at 24.)

This court has held that, "absent an order creating a judicially imposed deadline, a trial court may not sanction a party by excluding its witnesses under [Utah Rule of Civil Procedure] 37(b)(2)." *Berrett v. Denver & Rio Grande W. R.R. Co.*, 830 P.2d 291, 296 (Utah Ct. App.) (footnote and citation omitted), *cert. denied*, 836 P.2d 1383 (Utah 1992). In this case, the trial court did not enter an order setting a deadline for designating expert witnesses. Nevertheless, the rules of civil procedure were meant to do away with trial by ambush. *Burningham v. Ott*, 525 P.2d 620, 621 (Utah 1974). The evidence one intends to rely on at trial should be known to his opponent. *Id.* At some point, a party's failure to designate a witness as an expert should preclude a party from calling the witness as an expert at trial. Certainly Shoultz should have designated his expert witnesses by the day of trial, yet he had not done so. (*See* R. 433.) Because he had not done so, Ricci was not prepared with an expert witness to rebut Shoultz's proposed expert testimony. (*See* R. 440, 341.)

In any event, Shoultz's failure to designate the witnesses as experts was just one basis for precluding them from giving expert testimony. In granting the motion, the court ruled that Shoultz's proposed experts could not "give opinions as to what took place, with them not being there, and they're not being able to say what took place." (R. 441-42.)¹⁰

Shoultz apparently wanted to elicit expert testimony from his witnesses that Ricci violated the skier's responsibility code and that his violation of the code caused the accident. However, none of Shoultz's proposed experts saw Ricci before the accident, and none saw the accident. (*See, e.g.*, R. 794, 833-35.) None tried to re-create the accident. Their opinions as to Ricci's alleged violation of the skier's responsibility code and the cause of the accident were based solely on their understanding of how the accident happened (*see* R. 333-34), which in turn was based primarily on their conversations with Shoultz (*see* R. 133-35, 141, 142, 147-48).

The skier's responsibility code was in evidence. (Ex. P-12.) The code is simple, clear and unambiguous. It is meant to be read and understood by ordinary people. (*See* R. 137, 793-94.) There is no evidence that the jury needed any help in understanding it. The court instructed the jury that it could consider the code in deciding whether or not a party exercised reasonable care under the circumstances. (R. 232.) The court allowed Shoultz to argue that Ricci was negligent because he violated the code by not watching

¹⁰ At the hearing on Shoultz's motion for a new trial, over five months after the trial, the court remembered the untimeliness of Shoultz's designation as the grounds for keeping out the witnesses. (R. 341.) However, that was not the reason the court gave on the record at the time it granted Ricci's motion in limine. (*See* R. 441-42.)

out for the person in front of him and that his negligence caused his injuries. (R. 877-80.) The only reason to allow Shoultz's witnesses to give their opinions that Ricci violated the skier's responsibility code and that his violation of the code caused the accident was to tell the jury what result to reach.

Although Utah Rule of Evidence 704 allows an expert witness to give an opinion that "embraces an ultimate issue" for the jury to decide, the rule "does not mean that a trial court must admit all expert opinions addressing ultimate issues. Questions which merely authorize the witness to tell the jury what result to reach are not permitted." *Steffensen*, 862 P.2d at 1347 (citations omitted). Opinion testimony couched as legal conclusions (for example, testimony that a party violated the applicable standard of care and that his violation proximately caused his injuries) "is not helpful to the fact finder." *Id.* See also *Davidson v. Prince*, 813 P.2d 1225, 1231 (Utah Ct. App.), *cert. denied*, 826 P.2d 651 (Utah 1991), and cases cited therein. Such opinions "tend to blur the separate and distinct responsibilities of the judge, jury, and witness" and increase the danger "that a juror may turn to the expert rather than the judge for guidance on the applicable law." *Steffensen*, 862 P.2d at 1347-48 (citation omitted). The trial court therefore did not abuse its discretion in excluding Shoultz's proposed expert testimony.

Even if it were error to exclude the testimony, Shoultz must still "prove that there is a reasonable likelihood that the verdict would have been different if the trial court had allowed the expert testimony." *Id.* at 1347. See also UTAH R. EVID. 103(a) ("Error may

not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected”).

Shoultz claims, “Apparently, the jury was confused as to the code’s interpretation.” (Br. of Aplee. at 25.) Shoultz cites no evidence to support this bald assertion. Instead, he simply argues that there is a difference between losing control of one’s skis and failing to “[s]ki under control and in such a manner that you can stop or avoid other skiers or objects,” as required by the skier’s responsibility code (ex. P-12), which, Shoultz claims, means not skiing “excessively fast, recklessly or carelessly.” (Br. of Aplee. at 26.) There is no evidence or proffer of evidence in the record to support Shoultz’s interpretation of the skier’s responsibility code. More important, there is no evidence that the jury did not understand the code the way Shoultz interprets it or did not appreciate Shoultz’s distinction.¹¹ The evidence showed that Shoultz *was* skiing “carelessly.” In any event, the jury could find that Shoultz did not violate the skier’s responsibility code, yet it could still find him negligent. (*See* R. 232.) On the other hand, the jury could find that Ricci violated the skier’s responsibility code, yet it was not required to find that he was negligent under the circumstances. (*See* R. 232; *Anderson v. Sharp*, 899 P.2d at 1249.) In fact, the jury found both skiers negligent (R. 244-45), and Shoultz has not challenged on appeal the jury’s findings as to proximate causation. Therefore, the result could not have been more favorable to Shoultz if the trial court had

¹¹ Shoultz was free to argue his interpretation of the code to the jury but chose not to. (*See* R. 877-94.)

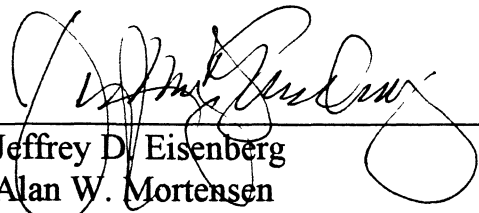
admitted his proposed expert testimony. Shoultz has therefore failed to meet his burden of showing a reasonable likelihood that the verdict would have been any different. *Cf. Macris & Assocs., Inc. v. Images & Attitude, Inc.*, 941 P.2d 636, 643 (Utah Ct. App. 1997) (to establish prejudice from excluded testimony, it is not enough to show that an excluded witness's testimony "significantly supported" the losing party's claim and that the testimony must have been important to that party's case because the other side contested its admission). Therefore, Shoultz was not entitled to a new trial based on the trial court's exclusion of his proposed expert testimony.

CONCLUSION

The trial court erred in granting the defendant's motion for a j.n.o.v. and conditionally granting his motion for a new trial. On the other hand, the trial court did not abuse its discretion in excluding Shoultz's proposed expert testimony, and any error in that regard was harmless. This court should therefore reverse the trial court's judgment and remand for entry of judgment in accordance with the jury's verdict.

DATED this 21st day of January, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 1998, I caused to be served two copies of the foregoing reply brief by U.S. mail, first-class postage prepaid, on the following:

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