

1986

Lee R. Meyers v. Salt Lake City Corporation, a municipal corporation of the State of Utah : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Roger F. Cutler; Salt Lake City Attorney; Greg R. Hawkins; Assistant City Attorney; attorneys for appellant.

Timothy C. Houpt; Houpt, Eckersley & Downes; attorney for respondent.

Recommended Citation

Brief of Respondent, *Meyers v. Salt Lake City Corporation*, No. 860183.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/1050

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTA.

DC

K ⁴ _{three} 3

5c

A:0

DOCKET NO. 860183-CA

DOCKET NO. 860183-CA

IN THE SUPREME COURT
OF THE STATE OF UTAH

LEE R. MEYERS,

Plaintiff/Respondent,

VS.

SALT LAKE CITY CORPORATION,
a municipal corporation of
the State of Utah,

Defendant/Appellant.

Case No. 860141

BRIEF OF RESPONDENT
LEE R. MEYERS

Roger F. Cutler
Salt Lake City Attorney

GREG R. HAWKINS
Assistant City Attorney
100 City & County Building
Salt Lake City, Utah 84111

Attorneys for Appellant

Timothy C. Houpt
HOUP, ECKERSLEY & DOWNES
419 Boston Building
Salt Lake City, Utah 84111

Attorney for Respondent

FILED

LEE R. MEYERS,
Plaintiff/Respondent,
vs.
SALT LAKE CITY CORPORATION,
a municipal corporation of
the State of Utah,
Defendant/Appellant.

Case No. 860141

Roger F. Cutler
Salt Lake City Attorney

GREG R. HAWKINS
Assistant City Attorney
100 City & County Building
Salt Lake City, Utah 84111

Attorneys for Appellant

Timothy C. Houpt
HOUP, ECKERSLEY & DOWNES
419 Boston Building
Salt Lake City, Utah 84111
Attorney for Respondent

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF ISSUES PRESENTED ON APPEAL	1
II. STATUTES AND RULES OF EVIDENCE REQUIRING INTERPRETATION	2
III. STATEMENT OF THE CASE	4
IV. STATEMENT OF FACTS	5
V. SUMMARY OF ARGUMENTS	8
VI. ARGUMENT.	9
POINT I	
THE POLICE CHEIF'S LETTER TO THE PLAINTIFF WAS PROPERLY RECEIVED IN EVIDENCE AS AN ADMISSION BY A PARTY ON A SUBJECT RELEVANT TO THE ACTION.	9
POINT II	
THE CITY'S REMAINING EVIDENTIARY OBJECTIONS WERE NOT MADE AT TRIAL AND CANNOT BE RAISED ON APPEAL	16
POINT III	
ANY ERROR IN RECEIPT OF THE LETTER WAS HARMLESS	16
VII. CONCLUSION	28

TABLE OF AUTHORITIES

TABLE OF CASES CITED

<u>Barson v. E.R. Squibb</u> , 682 P.2d 832 (Utah 1984)	16,17
<u>Denver Policemen's Protective Ass'n. v. Lichtenstein</u> , 660 F.2d 432 (10th Cir. 1981)	19
<u>Dowland v. Lyman Products for Shooters</u> , 642 P.2d 380, 381 (Utah 1981)	22
<u>Martinelli v. District Court In and For City, Etc.</u> , 612 P.2d 1083 (Colo. 1980).	19
<u>Michael v. Bauman</u> , 76 N.M. 255, 413 P.2d 888 (1966)	14,22
<u>Patrick v. South Central Bell Tel. Co.</u> , 641 F.2d 1192, 1196 (6th Cir. 1980)	18
<u>Pearce v. Wistinson</u> , 701 P.2d 489, 491 (Utah 1985)	22
<u>Rutherford v. State</u> , 605 P.2d 16 (Alaska 1979)	10
<u>Shea v. City and County of Honolulu</u> , 692 P.2d 1158, 1165 (Hawaii, 1985)	15
<u>State v. Kerekes</u> , 622 P.2d 1161, 1164 (Utah 1980)	12
<u>Terry v. Zions Coop Mercantile Institution</u> , 605 P.2d 314, 322-323 (1979).	28
<u>Walters v. Querry</u> , 588 P.2d 702, 703 (1978)	21
<u>Westmorland v. CBS, Inc.</u> , 601 F. Supp. 66, (S.D.N.Y. 1984)	18

STATUTES AND RULES CITED

§78-24-8(5) Utah Code Annotated	2
Rule 103(a) Utah Rules of Evidence	3,22

Rule 401 Utah Rules of Evidence	1,3,11
Rule 403 Utah Rules of Evidence	3,20
Rule 407 Utah Rules of Evidence1,16,18
Rule 801 Utah Rules of Evidence	14
Rule 804(B)(4) Utah Rules of Evidence	11
Rule 804(D)(2) Utah Rules of Evidence1,2,9

IN THE SUPREME COURT
OF THE STATE OF UTAH

LEE R. MEYERS,

Plaintiff/Respondent,

vs.

SALT LAKE CITY CORPORATION, a
municipal corporation of
the State of Utah,

Defendant/Appellant.

:
:
:
:
:
:
:
:
:
:

Case No. 860141

BRIEF OF RESPONDENT
LEE R. MEYERS

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the letter from defendant Salt Lake City's Police Chief to the plaintiff, informing him of the City's conclusion that the event he complained of did occur, properly received in evidence as a relevant admission by a party within the meaning of Rules 401 and 804(D)(2) of the Utah Rules of Evidence?

2. Did the City preserve as a contention of error on appeal its objection to the receipt of the letter on the grounds that (a) the letter is a "subsequent remedial measure" within the meaning of Rule 407 of the Rules of Evidence; (b) the letter is subject to the executive privilege established

by Utah Code Ann. §78-24-8, and (c) the letter's prejudicial impact substantially outweighs its probative value within the meaning of Rule 403 of the Utah Rules of Evidence?

3. If the letter was improperly received in evidence, did it likely have a substantial effect on the jury's decision?

STATUTES AND RULES OF
EVIDENCE REQUIRING INTER-
PRETATION

1. Utah Code Ann. §78-24-8(5)(Supp. 1986).

Privileged Communications. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

* * *

(5) A public officer cannot be examined as to communications made to him in official confidence when public interest would suffer by the disclosure.

2. Rules 801(d)(2) of the Utah Rules of Evidence:

(2) Admission by party opponent. The statement is offered against a party and is (A) his own statement, either in his individual or representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or employee, made during the

existence of the relationship;
or (E) a statement by a co-
conspirator of a party during
the course and in furtherance
of the conspiracy.

3. Rule 401 of the Utah Rules of Evidence:

Relevant evidence means evidence
having any tendency to make the
existence of any fact that is of
consequence to the determination
of the action more probable or
less probable than it would be
without the evidence.

4. Rule 403 of the Utah Rules of Evidence:

Although relevant, evidence may be
excluded if its probative value
is substantially outweighed
by the danger of unfair prejudice,
confusion of the issues, or
misleading the jury, or by consider-
ations of undue delay, waste of time
or needless presentation of
cummulative evidence.

5. Rule 103(a) of the Utah Rules of Evidence:

Error may not be predicated upon
a ruling which admits or excludes
evidence unless a substantial
right of the party is affected . . .

STATEMENT OF THE CASE

Lee Meyers brought this negligence action against Salt Lake City for an injury he sustained when City police officer J.R. Nelson slammed a car door on his ankle.

(Prior to trial, a second cause of action against Officer Nelson for intentional injury was voluntarily dismissed).

A jury trial was held on October 29, 30 and 31, 1985, before the Honorable Kenneth Rigtrup. The evidence received at trial included a letter mailed to the plaintiff from Chief of Police Bud Willoughby and Lt. W.C. Duncan to which the City objected. The jury found in a special verdict that both the plaintiff and defendant were negligent and that their negligence jointly caused plaintiff's injury. They found the City to be 99% negligent in causing the injury and the plaintiff, 1%. The jury found special damages in the amount of \$6,740.88 lost wages, \$5,221.96 medical expenses, and \$15,000 in general damages. The award was reduced by 1% for plaintiff's negligence, and by \$4,015.79, representing a portion of medical expenses previously paid by Salt Lake City. Judgment was entered for \$22,676.55 plus interest and costs. (R.2477).

Plaintiff moved for a new trial on damages or an additure, (R.254) and defendant moved for a new trial on the ground that the City's letter to the plaintiff should not have been received in evidence (R.251). Both motions were

denied (R.264) and the City brought this appeal. The plaintiff/respondent's motion for a summary disposition of the appeal was denied by this Court.

STATEMENT OF FACTS

Plaintiff Lee Meyers is an employee of Salt Lake City Parks Department . He was on his way to work on May 31, 1983, during flooding which required rerouting of traffic in downtown Salt Lake City, when the incident which gave rise to this action occurred. (R.373.) Plaintiff's wife, Denice Meyers, was a passenger in the car.

At the intersection of Sixth South and Main Streets, plaintiff attempted to make a left turn following several other cars which had been permitted to do so. At that point, Officer J.R. Nelson, who was directing traffic at the intersection, came over to plaintiff's car, shouted at him, and began slamming his fist on the hood and the side of the vehicle. (R.300-303, 379-383). Plaintiff stopped his car, opened the door, and began to get out to talk to the officer and to observe what damage had been done. Officer Nelson shouted at the plaintiff to get back in the car, and as Meyers was sitting back down, the officer put his hands on the car door and forced it shut on plaintiff's left ankle, continuing to apply pressure despite plaintiff's protests. (R.303-304, 384-387). He then pulled plaintiff out of the car, and was in the process of placing him under arrest when Officer Robyn Howell, who was

also stationed at the intersection, intervened. Howell persuaded Nelson not to arrest the plaintiff, and instructed plaintiff to leave the intersection (R. 338-341, 388). These events were observed by Denice Meyers and by Gary Clark, the driver of the car immediately behind the plaintiff's at the time. Both testified, as did Officer Howell.

After discussing the incident with a supervisor of Officer Nelson at another location, plaintiff was directed to the police department's Internal Affairs Unit where he filed a formal complaint about Nelson's use of excessive force against him, noting the injury to his left ankle (R. 182, 391). He pointed out to Lt. Duncan the dents in his car caused by Officer Nelson's fist, and the impression in the door caused by forcing it against his leg.

Immediately afterwards, Mr. Meyers went to the emergency room at L.D.S. Hospital where his ankle was observed to be tender and swollen and bruises on his arm were noted (Plaintiff's Exhibit, R. 188). The emergency room physician, Dr. Ray Thomason, diagnosed the ankle injury as a sprain, and instructed Meyers to return in three days. When the injury had not healed, the plaintiff was referred to Dr. Thomas Bauman, an orthopedic surgeon, who performed further diagnostic tests and identified the injury as a severe ligament disruption and tear. Plaintiff remained under Dr. Bauman's care for the next two years. Three separate surgeries were required to

treat plaintiff's injuries, and after considerable pain and limitation of his activities, he was left with a serious permanent impairment. (R. 466, 494).

Approximately one month after this incident and the filing of the Internal Affairs Complaint, plaintiff received by mail a letter on Salt Lake City Police Department stationary signed by Lt. W.C. Duncan of the Internal Affairs Division, under the name of Chief Bud Willoughby. (The letter is reproduced as Exhibit A in the appendix). The letter refers to plaintiff's complaint "charging Officer James R. Nelson with excessive force . . . relative to an incident which occurred on 5/31/83 at 6th South and Main Street." It informed plaintiff that the investigation was completed and that

. . . the allegations contained in your complaint was determined to be "sustained" by the Officer's division commander, Captain O.J. Peck. "Sustained" means: The event did occur and the officer is guilty of the complaint alleged or other infraction.

The plaintiff was thanked for bringing the matter to their attention, and invited to contact Lt. Duncan if he had any questions.

Later, this action was brought. In answering plaintiff's complaint, the City denied that Officer Nelson had acted negligently or had caused any injury to the plaintiff (R. 19-20). Because of the apparrant inconsistency between the City's letter to the plaintiff and its pleading, plaintiff's counsel was permitted by the district court to examine the City's file relating to its internal affairs investigation (R.108-

110). Prior to trial, the City filed a motion in limine in which the court was asked to restrain the plaintiff from "introducing evidence of or referring to the disposition of the Internal Affairs investigation" on the ground that such information was irrelevant and immaterial to the lawsuit (R. 227, 236).

In response to the motion in limine, and again during trial, plaintiff offered the letter he received from the police chief as well as two documents from the internal affairs file: plaintiff's written complaint (R. 182)(Exhibit B) and a document entitled "complaint disposition review" (R. 184)(Exhibit C). The court ruled that the two documents from the police file were inadmissible but that the letter could be received as an admission of a party (R. 279-280).

SUMMARY OF ARGUMENTS

1. The disputed letter is defined as non-hearsay under the Rules of Evidence since it constitutes an admission of a party, and is relevant because it concerns facts which are in issue in this action.

2. The City's remaining evidentiary objections were raised for the first time in posttrial proceedings. Those objections; first, that the letter discloses subsequent remedial measures; second, that the letter is protected by a statutory or common law executive privilege, and third, that the prejudicial impact of the letter outweighs its probative value, are meritless anyway.

3. In addition to the letter, there is substantial, uncontradicted evidence of the City's liability for the plaintiff's injury. Therefore, it if was error to receive the letter in evidence, it was harmless error.

ARGUMENT

POINT I

THE POLICE CHIEF'S LETTER TO THE PLAINTIFF WAS PROPERLY RECEIVED IN EVIDENCE AS AN ADMISSION BY A PARTY ON A SUBJECT RELEVANT TO THE ACTION.

The letter whose admissibility is the subject of this appeal is a classic example of an extrajudicial statement by a party which is not subject to hearsay objection under Rule 801(d)(2) of the Utah Rules of Evidence:

Statements which are not hearsay.
A statement is not hearsay if

* * *

(2) Admission by party opponent.
The statement is offered against a party and is (a) his own statement, either in his individual or representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning this subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The letter in issue was offered against a party, the defendant Salt Lake City. It was made by agents of Salt Lake City, Chief of Police Willoughby and Lt. Duncan, during the existence of their employment relationship. The City has never contended that the subject matter of the letter was outside the scope of the employment of its authors; the chief of police is the city officer responsible for the entire police department, and Lt. Duncan is the person to whom the investigation which is the subject of the letter was assigned.

On the same ground, in a very similar case, the Alaska Supreme Court ruled that a memorandum reflecting the results of an internal police department investigation of an officer's culpability for a traffic accident should have been received in evidence in a civil trial arising out of the accident. Rutherford v. State, 605 P.2d 16 (Alaska 1979). The Alaska Court held that as a memorandum prepared by agents of the City authorized to investigate the accident it was admissible as substantive evidence of the facts admitted, without regard to whether the admissions were in the form of opinion or were based on other than first hand knowledge, and without the foundation or predicate ordinarily required for impeaching evidence.

The only hearsay objection presently in issue is one the City raises for the first time on appeal, that the

trial court erred in admitting the letter without first determining that the declarant was unavailable. This argument is completely without merit. If a written statement satisfies the requirements of Rule 801(d), it is a "statement which is not hearsay" and any hearsay objection is overcome without regard to the availability of the declarant. (Confusion may arise since the Rules require a showing of unavailability before the prior statement against interest of a non-party is received under Rule 804(b)(4), A party is, of course, available by virtue of its presence at trial).

The actual basis of the City's objection to the letter at trial was that it is irrelevant and immaterial to the issues of the case.

Rule 401 of the Utah Rules of Evidence defines relevant evidence as follows:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The letter in question, by its terms, relates to "an incident which occurred on 5/31/83 at 6th South and Main Street", and which led Lee Meyers to charge Officer Nelson "with excessive force". This action was filed because of an incident on that date at that location, and the plaintiff's claim is that Officer Nelson physically injured him through

the use of unreasonable force. The letter and lawsuit obviously relate to the same subject matter, and any doubt is removed by comparing the letter with the plaintiff's internal affairs complaint (Exhibit B).

The critical admission in the letter is that the complaint was "sustained" and that sustained means "the event did occur." In effect, the City, through its agents, said that it investigated the charge made by Lee Meyers that certain events occurred, including the use by an officer of "excessive force", and that the City concluded that these events did occur and the officer did use excessive force.

Whether or not Officer Nelson used excessive force in his interactions with Lee Meyers is "a fact of consequence to the determination of the action." That the City admitted he used excessive force is definitely evidence having a tendency to make it more probable that he did. The very basis for what this Court has called "the age old common law exception to the hearsay rule known as an admission of a party", State v. Kerekes, 622 P.2d 1161, 1164 (Utah 1980), is the natural presumption that a party's admission against its own interest tends to be reliable.

The City contends that its conclusion that Officer Nelson was guilty of excessive force was based upon different evidentiary standards than those which apply in a civil action and that its use of the phrase "guilty of the complaint alleged

or other infraction" means that Nelson might have been found guilty of violating an administrative rule unrelated to the elements of a tort action.

Even if these contentions had any bearing on the relevancy of the letter, they are not accurate. The complaint disposition review sheet from the City's internal affairs file establishes both the basis of the City's conclusions and the evidentiary standard employed (R. 184, Exhibit C).

First, the form describes the four findings which might be made as a result of an internal affairs investigation:

UNFOUNDED - The complaint, as reported, didn't occur.

EXONERATED - The event did occur as reported, but the officer's actions were lawful and reasonable.

NOT SUSTAINED - Facts do not support a conclusion of guilt or innocence on the part of the officer. Therefore, the complaint is resolved in his favor.

SUSTAINED - The event did occur and the officer is guilty of the complaint alleged or other infraction.

It is noteworthy that before a complaint against an officer is sustained, the Internal Affairs Department must conclude both that the event complained of occurred and that the conduct of the officer was not lawful and reasonable. Furthermore, the evidence considered must preponderate against the officer before a complaint will be sustained.

The comments of Division Commander Peck also establish that the basis of the finding was the same conduct which

was the subject of the lawsuit: Nelson's use of unreasonable force which caused an injury to the plaintiff.

Although the complaintant was wrong in making the left turn described, I feel the Officer over reacted and used excessive force. The available physical evidence, i.e., bruises and discoloration of the complaintant's skin and the dents and marks on the automobile are consistent with the complaintant's allegations. All witnesses, except Nelson, agreed substantially on what took place with the exception of Nelson calling the complaintant a SOB. (R. 184)(Appendix C).

Neither the evidentiary standards nor the factual findings which led to the July 1 letter are so different from those employed in the tort action as to render the letter irrelevant.

Most importantly, it should be recognized that it is not the burden of one offering the extrajudicial statement of a party opponent to establish the underlying reasons for the admission. Once the requirements of Rule 801 are satisfied as to a statement which relates to the subject matter of the lawsuit, the statement should be admitted. The party who made the statement is then free to explain the basis or the context of the statement, or even to disavow it, through his own testimony. Michael v. Bauman, 76 N.M. 255, 413 P.2d 888 (1966).

As the Supreme Court of Hawaii said in reference

to the identical evidentiary provision,

'The extrajudicial statements of a party opponent, when offered against the same, are universally deemed admissible at trial as substantive evidence of the fact or facts stated.' [P]arty admissions, unlike statements against interest, need not have been against the declarant's interest when made, need not be based on the declarant's personal knowledge, may be in the form of an opinion, and are admissible at trial regardless of whether the declarant is unavailable.' Their free admissibility 'is grounded upon the adversary theory of litigation' rather than any circumstantial indicia of reliability.

* * *

'A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath.' And if his earlier statement is not repeated accurately, 'he now as opponent has the full opportunity to put himself on the stand and explain his former assertion.' 4 Wigmore, Evidence §1048 (Chadbourn rev. 1972).

(Citations omitted); Shea v. City and County of Honolulu, 692 P.2d 1158, 1165 (Hawaii 1985).

The City in this case had every opportunity to explain its prior statement, both by calling witnesses, and through argument. (R. 283-285). Nothing more was required.

POINT 2

THE CITY'S REMAINING EVIDEN-
TIARY OBJECTIONS WERE NOT
MADE AT TRIAL AND CANNOT BE
RAISED ON APPEAL.

In addition to challenging its relevance and materiality, the City raises three grounds of error in the admission of the July 1 letter; first, that the letter was evidence of subsequent remedial measures within the meaning of Rule 407 of the Utah Rules of Evidence; second, that the letter is protected by the official information privilege established by Utah Code Anno. §78-24-8, and third, that if the letter is relevant, its unfairly prejudicial impact substantially outweighs its probative value within the meaning of Rule 403 of the Utah Rules of Evidence.

None of these grounds for objection to the admissibility of the letter were asserted by the City at trial. The City's motion in limine states no grounds (R.227) and its memorandum deals exclusively with the question of relevance and materiality (R. 236). Similarly, in oral argument on the motion, those grounds were not asserted and only hearsay, relevance and materiality were discussed (R. 273-286). The additional grounds were raised for the first time in the City's motion for a new trial (R. 251), and are asserted again on appeal.

In the case of Barson v. E.R. Squibb, 682 P.2d 832 (Utah 1984) the defendant drug manufacturer objected

at trial to the receipt in evidence of package inserts published after the date of the injury out of which the action arose. At trial, the sole contention was that the prejudicial impact of the documents outweighed their probative value within the meaning of former Rule 51 of the Utah Rules of Evidence. In a motion for a new trial and on appeal the company argued that the documents were hearsay and should have been excluded on that ground as well. Declining to consider that claim of error, this Court stated, as follows:

The burden is always on the party objecting to make certain that the record adequately preserves an objection or argument for review in the event of an appeal.

In order to preserve a contention of error on appeal, the party claiming error in admission of evidence must raise the objection to the trial court in clear and concise terms and in a timely fashion calculated to obtain a ruling thereon. Where there was no clear and definite objection on the basis of hearsay, that theory cannot now be raised on appeal. Squibb did raise a hearsay objection after judgment was entered in the case. However issues raised for the first time in post-judgment motions are raised too late to be reviewed on appeal. Therefore, we are precluded from addressing this assertion of error on the merits.

Barson v. E.R. Squibb and Sons, Inc., supra, 682 P.2d at 837-838.

This Court ought not to reach the merits of the three objections raised for the first time after trial. Nevertheless, each will be briefly addressed.

(1) Subsequent remedial measures. Rule 407 of the Utah Rules of Evidence states, as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

By its terms, this rule has no application to the July 1 letter. The letter contains no reference to a measure taken after an event " . . . which, if taken previously, would have made the event less likely to occur." It does not, for example, inform Mr. Meyers that Officer Nelson was suspended for a day as a result of his conduct.

Rule 407 "prohibits evidence of post-accident changes that make things different or better than they were at the time of an accident." Patrick v. South Central Bell Tel. Co., 641 F.2d 1192, 1196 (6th Cir. 1980). No such changes are referred to in the disputed letter. The rule does not prohibit "competent evidence resulting from an internal investigation of a mishap", Westmorland v. CBS, Inc., 601 F. Supp. 66 (S.D.N.Y 1984), which is what the plaintiff offered in this instance.

2. Official Privilege. Utah Code Ann. §78-24-8(5) (Supp. 1986), the section relied upon by the City as the basis of its claim for privilege, provides, as follows:

Privileged Communications. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

* * *

(5) A public officer cannot be examined as to communications made to him in official confidence when public interest would suffer by the disclosure.

Lt. Duncan and Chief Willoughby were not examined as witnesses about their internal investigation of the plaintiff's injuries. They mailed a letter to the plaintiff who offered it in evidence himself. This statutory provision has no application whatsoever to the admissibility of the letter.

The City also cites cases which address the applicability of a common law "official information privilege" to discovery requests for access to confidential executive files, e.g., Martinelli v. District Court In and For City Etc., 612 P.2d 1083 (Colo. 1980); Denver Policemen's Protective Ass'n. v. Lichtenstein, 660 F.2d 432 (10th Cir. 1981). These decisions and the standards they express were fully considered by the trial court in ruling on the plaintiff's pretrial discovery motions requesting access to the Internal Affairs

file in the first instance (R. 49-93, 108-109). The pre-trial discovery order is not the subject of this appeal. The official information privilege can have no bearing on the admissibility of the disputed letter since the exhibit was not obtained through disclosure of confidential information in official files. Any privilege that might arguably apply to the results of an official internal investigation was waived as to the contents of the letter the City voluntarily mailed to the plaintiff.

(c) Rule 403. Rule 403 of the Utah Rules of Evidence provides, as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The City contends that the disputed letter confused the issues, misled the jury, and unfairly prejudiced the City's defense because "the jury was never instructed that the determination made in the letter was not based upon negligence" or that the determination was based upon "an entirely different factual and legal standard than that which concerned the tort case", and because the letter left it unclear whether the conduct evaluated by the City was the same conduct involved in the civil case. (Brief of Appellant, p. 26).

There is no merit to the City's argument that an admission of a party is unfairly prejudicial unless the declarant weighed the relevant evidence according to the standards applicable in a civil trial before making the statement which is offered. If this were so, admissions of a party would almost never come into evidence since people do not customarily engage in something akin to the civil trial process before making extra-judicial statements, see, e.g., Walters v. Querry, 588 P.2d 702, 703 (1978), in which this court affirmed the admissibility of a statement made by a party to an automobile accident moments afterwards that "she felt like she was the cause of the accident."

The City's suggestion that the July 1 letter might have related to facts other than those which plaintiff attempted to prove is simply not substantiated by the record. As discussed previously, the complaint review sheet describes exactly what conduct the investigator dealt with, and demonstrated that the facts were reviewed by the City under standards similar to those employed in civil litigation. (Appendix C).

All admissions by parties are prejudicial; they are objectionable only if their unfairly prejudicial qualities substantially outweigh their probative value. As noted previously, the City had the right to explain and even to contradict its prior admission if it chose to, and was given the opportunity

to do so. Michael v. Bauman, supra, (R. 284-285). The City has not shown how Rule 403 was violated by receipt of the letter.

POINT 3

ANY ERROR IN RECEIPT OF THE
LETTER WAS HARMLESS.

Rule 103(a) of the Utah Rules of Evidence provides that

Error may not be predicated upon
a ruling which admits or excludes
evidence unless a substantial
right of the party is affected . . .

This Court has consistently held that

. . . The fact alone that evidence
was erroneously admitted [is not]
sufficient to set aside a verdict
unless it has 'had a substantial
influence in bringing about the
verdict'.

Pearce v. Wistinson, 701 P.2d 489, 491 (Utah 1985). Or, as
this Court has also said, error in the admission of evidence

. . . does not rise to the level
of prejudicial error unless there
is a reasonable likelihood that
the jury would have reached
a different result if the error
had not occurred.

Dowland v. Lyman Products for Shooters, 642 P.2d 380,
381 (Utah 1982).

There is no likelihood at all that the jury would
have reached a different verdict had it not been for admission
of the disputed letter. The evidence that Officer Nelson

slammed the car door on the plaintiff's ankle was actually uncontradicted. The plaintiff, his wife, and the driver of the car behind him all described that event (R. 302-304, 384-387, 502). Even Officer Nelson did not deny it, testifying simply that he did not remember whether he closed the door on plaintiff's foot, and therefore neither admitted nor denied having done so (R. 334).

The City contends that the letter's effect on the jury's decision is apparent from its finding of liability despite evidence that the injury did not occur in the manner plaintiff claimed and evidence that the whole incident was plaintiff's fault.

In arguing that the jury disregarded evidence that the injury did not occur as alleged, the City has seriously mischaracterized the record. First, the City contends

1. The plaintiff's ankle injury could not have been sustained by the compression of a door on the ankle; Rather, plaintiff Meyers' own physician testified it must have been the result of a twisting action. No twisting action occurred at the scene.

(Brief of Appellant, p. 27). Dr. Thomas Bauman did, in fact, testify that the type of sprain the plaintiff suffered typically occurs as a result of "an inward twist or hyperplantar flexion . . . such as would occur if your foot was forced markedly

down into flexion . . ."(R. 487).

In his testimony, the plaintiff testified that he sustained such a twisting injury when his foot was trapped in the car door and demonstrated it to the jury:

I sat back down and I went to pull my foot up, you know, to put it in, you know and he caught it right on the ankle part here, twisting my foot and twisting -- caught it right in the door . . .

(R. 385-386).

* * *

Q. And do you remember at what angle your foot was caught at that point?

A. Yes. It was -- I can't twist it now, but it was in a twisty -- I was trying to pull it out of there because I could feel it start hurting. I was pulling up.

(R. 386).

Dr. Ray Thomason, the physician who treated the plaintiff in the emergency room the morning of the injury, gave the following explanation of the manner in which the ankle sprain occurred:

Q. (Mr. Hawkins) I do have one more question, and that is, Doctor: If the door is shutting with equal pressure on both ankle bones on a person who's sitting in the car -- and I'll represent to you that Mr. Meyers has indicated, at one time, he was sitting in the -- when that pressure was incurring, how would that twisting of the ankle have occurred?

A. It would be very simple. As a matter of fact, if I wanted to sprain your ankle, the easiest way to do it would be to first, stabilize it where it can't be removed, and then move your upper body one way or the other. And that's how sprains, usually occur. In other words, it's planted, fixed in one position, and then the -- the upper extremity as it moves, causes the tear.

(R. 188, plaintiff's Exhibit 16, p. 21). (Dr. Thomason was unavailable as a witness at trial, and his deposition testimony was published and read to the jury).

The only evidence was that the plaintiff's ankle injury occurred when it was caught in the car door on May 31, 1983. Dr. Bauman and Dr. Thomason described the mechanism of the injury in medical terms as did the plaintiff in layman's terms. While the City Attorney in examining the plaintiff's witnesses continually attempted to elicit testimony that the ankle injury could not have happened or did not happen in this manner, there was no such testimony.

Secondly, the City inaccurately states in its brief that

The medical records show plaintiff Meyers severely twisted his ankle while elk hunting. Later, on a deer hunt, he also, apparently, injured his ankle requiring medical attention.

(Brief of Appellant, p. 27).

The suggestion that Lee Meyers severely twisted his ankle while elk hunting is false. There is no reference to any injury elk hunting in plaintiff's medical records which make up the exhibit the City cites as the basis of this claim.

In his office notes of October 21 Dr. Bauman made the following statement:

Mr. Meyers returns today because he has been having increasing pain in his left ankle. Most of the pain is on the lateral aspect of the ankle. He has been deer hunting and this has aggravated it somewhat but it started even prior to the deer hunting.

(Plaintiff's exhibit 1, office notes of Salt Lake Clinic, October 21, 1983). This office note contains no reference to any new injury while hunting and is the only reference in the records to hunting.

Plaintiff testified that he went elk hunting shortly before this visit with Dr. Bauman, that his ankle was very sore at the time, and that he restricted his activity as a result. However, he denied any fall or any new injury (R. 410). Dr. Bauman testified that Meyers reported no re-injury while hunting (R. 475). Furthermore, the doctor testified that his condition at that time of the October 21st visit presented no evidence of a new injury:

Q. Doctor, on that occasion did you see any evidence by your examination of some intervening accident or injury?

A. No. In fact, he was tender all the way around where he had sprained his ligaments, but I specifically stated that he was without any severe swelling or other specific findings in that area. So he had no great amount of swelling or evidence of a new injury at that time.

(R. 475).

While the City Attorney repeatedly raised the possibility at trial that the plaintiff had sustained a new injury to his ankle while deer hunting or elk hunting, there was never any such evidence, and the uncontroverted evidence was to the contrary.

Finally, the City argues that the prejudicial impact of the letter is apparant because the jury found the City 99% negligent even though "the whole incident was caused by plaintiff Meyer's refusal to obey the lawful directions of a police officer". (Brief of Appellant, p. 27).

The City simply begs the question. Even Officer Nelson admitted that in interacting with a citizen in Mr. Meyers' position a police officer has an obligation to use reasonable care to avoid injuring him (R. 335) and the City has never contended otherwise. The letter was offered as evidence that Officer Nelson acted unreasonably in his actions toward the plaintiff and injured him. However, since the other evidence on this question was contradicted, it is virtually certain that the jury would have reached the same verdict

without the letter. In any event, the City has in no way demonstrated that the letter had a substantial effect on the outcome of the case. The introduction of the letter, if it was error, was harmless error.

CONCLUSION

This Court has held that the ruling of a trial court as to the admissibility of evidence will not be disturbed unless it is shown that the trial judge abused his discretion, Terry v. Zions Coop Mercantile Institution, (605) P.2d 314, 332-323, 1979). The City has failed to demonstrate that the trial court abused its discretion by receiving the disputed letter.

The City voluntarily mailed a letter to the plaintiff, admitting that his allegations about the conduct of a City police officer were true. When the plaintiff filed a lawsuit on account of that conduct, the City denied what it had previously admitted. The trial judge was entirely correct in ruling that the letter should be received in evidence as an admission by agents of Salt Lake City on a subject relevant to the lawsuit.

Even if the court erred in receiving the letter, it could not have materially affected the jury's verdict since the evidence on the question of the City's liability was essentially uncontradicted. The judgment of the trial court should be affirmed.

DATED this 23rd day of September, 1986.



Timothy C. Hopt
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed this 23rd day of September, 1986, to the following:

Greg R. Hawkins
Assistant City Attorney
100 City & County Building
Salt Lake City, Utah 84111



HOUP, ECKERSLEY & DOWNES

APPENDIX A

SALT LAKE CITY CORPORATION



POLICE DEPARTMENT

E.L. "BUD" WILLOUGHBY
CHIEF OF POLICE

450 SOUTH THIRD EAST
TELEPHONE 535-7222
SALT LAKE CITY, UTAH 84111
July 1, 1983

Lee R. Meyers
885 East 575 North
Layton, Utah
84041

Re: I.A. Case #83/032

Dear Sir,

On 5/31/83, you filed a complaint with our Internal Affairs Unit charging Officer James R. Nelson with excessive force. Your complaint was relative to an incident which occurred on 5/31/83, at 6th South and Main St.

This letter is to inform you that the investigation is completed and the allegation contained in your complaint was determined to be "Sustained" by the Officer's division commander, Captain O.J. Peck.

"Sustained" means: The event did occur and the officer is guilty of the complaint alleged or other infraction.

We thank you for bringing this matter to our attention. If you have any questions concerning this investigation please contact Lt. W.C. Duncan, during normal working hours.

Sincerely,

E.L. "Bud" willoughby
Chief of Police

A handwritten signature in cursive script that reads "Lt. W.C. Duncan".

W.C. Duncan
Lieutenant
Internal Affairs Division
Salt Lake City Police Department

WCD:lf

cc: file

APPENDIX B

CONFIDENTIAL

Salt Lake City Police Department
Internal Affairs Unit

CONFIDENTIAL
RESTRICTED MATERIAL
INTERNAL AFFAIRS INVESTIGATION

CITIZEN COMPLAINT AGAINST POLICE CONDUCT OR PROCEDURE

IA CASE # 83/032 NOTARIZED: YES XXX NO
SLCPD CASE # ASSIGNED TO ☒ I.A.
NATURE OF COMPLAINT Excessive Force (10)
AGAINST NELSON, J.R. DIVISION West
CAPTAIN NOTIFIED O.J. PECK DATE 6/2/83
DATE OF THIS REPORT 5/31/83 TIME 09:00 TAKEN BY Lt. Duncan
LOCATION OF OCCURRENCE Main & 6th South DATE 5/31/83 TIME 7:30 a.m.
COMPLAINANT MEYERS, Lee
ADDRESS 885 E 575 N, Layton, Utah ZIP CODE 84041
PHONE # (H) 544/0445 (B) 535/7706 City Cemetary

WITNESS MEYERS, Denise
ADDRESS 885 E 575 N/Layton, Ut
PHONE 544/0445

DETAILS OF COMPLAINT:

Comp attempting to make left turn at 6th S and Main. Traffic was being controlled by Officer J.R. Nelson. Comp says Officer Nelson struck complainants car with his fist, cursed him, slammed door on complainants ankle, twisted his right arm behind him and arrested him. Complainant is claiming damage to vehicle, damage to left leg and right arm. No arrest made.

ADDITIONAL INFORMATION SHOULD BE PLACED ON REVERSE OR ADDITIONAL SHEET

*COMPLAINANT: READ BEFORE SIGNING: I REALIZE BY SIGNING THIS COMPLAINT THAT:

1. I AGREE TO SUBMIT TO A POLYGRAPH EXAMINATION TO VERIFY THE ABOVE INFORMATION.
2. I REALIZE THAT IT IS A CRIMINAL OFFENSE TO FALSIFY INFORMATION TO A MEMBER OF THE POLICE DEPARTMENT

Lee R. Meyers

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 2 DAY OF June 1983

Linda L. Brown
NOTARY

8-18-85
COMMISSION EXPIRES

APPENDIX C

INTERNAL AFFAIRS DIVISION
COMPLAINT DISPOSITION REVIEW

CONFIDENTIAL
RESTRICTED MATERIAL
~~INTERNAL AFFAIRS INVESTIGATION~~

I HAVE PERSONALLY REVIEWED THE FACTS AND FINDINGS OF THE INVESTIGATOR IN THIS CASE AND RECOMMEND THE FOLLOWING DISPOSITION:


- ☐ UNFOUNDED - The complaint, as reported didn't occur.
- ☐ EXONERATED - The event did occur as reported, but the officer's actions were lawful and reasonable.
- ☐ NOT SUSTAINED - Facts do not support a conclusion of guilt or innocence on the part of the officer. Therefore, the complaint is resolved in his favor.
- ☒ SUSTAINED - The event did occur and the officer is guilty of the complaint alleged or other infraction.

COMMENTS: Although the complainant was wrong in making the left turn described, I feel Officer over reacted and used excessive force. The available physical evidence, i.e. bruises and discoloration of the complainant's skin and the dents and marks on the mobile, are consistent with the complainant's allegations. All witnesses, except Nelson, agreed substantially on what took place with the exception of Nelson calling the complainant a SOB.

It is my recommendation that this complaint be sustained and that Officer Nelson receive two (2) days off without pay.

6/27/83

DATE



DIVISION COMMANDER

I HAVE REVIEWED THE DISCIPLINARY OR CORRECTIVE ACTION, IF ANY, TAKEN BY THE COMMANDING OFFICER OF THE ACCUSED AND...
COMMENTS:

I concur with the recommendation of Captain Peck. This officer has received many praising letter's and because of his past work, I believe that two days off without pay, with the option to work the two days, is sufficient. Had he had problems in the past, I would recommend more.

6-29-83

DATE

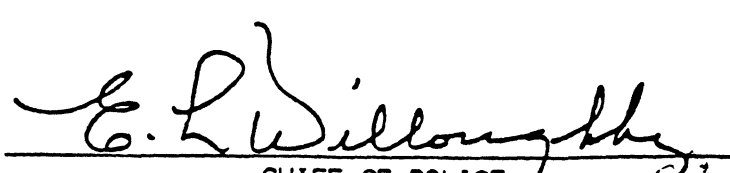

BUREAU COMMANDER

COMMENTS:

One (1) day - Can work the day -

6/30/83

DATE


CHIEF OF POLICE