

2009

# Ken Claypoole v. Neil G. Skougard, Boyd Ross, Winward Electric Service and Michael Wood : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEN CLAYPOOLE,

Appellant and Plaintiff,

vs.

NEIL G, SKOUGARD and BOYD ROSS  
and WINWARD ELECTRIC SERVICE,  
INC., and MICHAEL WOOD,

Appellees and Defendants.

APPELLANT'S BRIEF

Appellate Case No. 20090390 CA

Appeal from the Judgment of the Honorable Rodney S. Page, Judge of the Second  
Judicial District Court, Davis County, State of Utah

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**Appellant request oral argument and a published opinion.**

**IN THE UTAH COURT OF APPEALS**

<p>KEN CLAYPOOLE,</p> <p style="text-align: center;">Appellant and Plaintiff,</p> <p>vs.</p> <p>NEIL G, SKOUGARD and BOYD ROSS and WINWARD ELECTRIC SERVICE, INC., and MICHAEL WOOD,</p> <p style="text-align: center;">Appellees and Defendants.</p>	<p style="text-align: center;"><b>APPELLANT’S BRIEF</b></p> <p style="text-align: center;">Appellate Case No. 20090390 CA</p>
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Appeal from the Judgment of the Honorable Rodney S. Page, Judge of the Second  
Judicial District Court, Davis County, State of Utah

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**Appellant request oral argument and a published opinion.**

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## **JURISDICTION OF THIS COURT**

Plaintiff/Appellant Ken Claypoole filed his Notice of Appeal on April 30, 2009.

The Utah Court of Appeals has jurisdiction over this appeal pursuant to §78A-4-103(2)(j).

### **STATEMENT OF ISSUES PRESENTED ON APPEAL**

1. Did the trial court commit reversible error by (a) not allowing a written jury questionnaire, (b) failing to ask prospective jurors appropriate preliminary questions designed to detect whether any of the prospective jurors had been exposed to tort reform propaganda, (c) failing to allow the Plaintiff the intelligent exercise of his peremptory challenges?

The issues were preserved for appeal at R. Partial Transcript of Pretrial Conference September 16, 2008, 3:10, 4:3, R. 1308, R. 1381, R. 1383

2. Did the trial court commit reversible error when it allowed Plaintiff's settlement demand letter, from a previous civil case, into evidence?

The issue was preserved for appeal at R. 1621, 80:11, R. 1622, 315:7,

3. Did the trial court commit reversible error by submitting a confusing special jury verdict form to the jury?

The issue was preserved for appeal at R. 1623, 517:14, 522:23 - 523:11.

### **STANDARD OF REVIEW**

1. Regarding Issue No. 1, the Utah Court of Appeal has stated,

“We review challenges to the trial court's management of jury voir dire under an abuse of discretion standard. Generally, the trial court is afforded broad discretion in conducting voir dire, “but that discretion must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors.”



*Barrett v. Petersen*, 868 P.2d 96, 98 (Utah Ct. App. 1993) (quoting *State v. Hall*, 797 P.2d 470, 472 (Utah Ct. App.), cert. Denied, 804 P.2d 1232 (Utah 1990)) (other citations omitted).

Due to the strong interest in enabling parties “to elicit necessary information for ferreting out bias,” *State v. Saunders*, 1999 UT 59, ¶ 34, 992 P.2d 951, a trial court’s discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge’s discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries. *Id.* at ¶ 43.

*Depew v. Sullivan*, 2003 UT App. 152, 71 p.3d 601, at ¶¶ 10, 11.

2. Regarding Issue No. 2, the Utah Court of Appeals has stated:

We review the trial court's determinations regarding the admissibility of evidence under an abuse of discretion standard. See *Davidson v. Prince*, 813 P.2d 1225, 1230 (Utah Ct.App.1991).

*Anderson v. Thompson*, 176 P.3d 464, 2008 UT App 3 (Utah App., 2008) at ¶25.

3. Regarding issue No. 3, the Utah Court of Appeals has stated:

"[t]he use of special verdicts or interrogatories is a matter for the trial court's sound discretion." *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1241 (Utah 1987); ...A trial court may use a special verdict form as long as the form does not "mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advise[] the jury on the law." *Summerill v. Shipley*, 890 P.2d 1042, 1044 (Utah Ct. App. 1995) (citation and quotations omitted).

*Vaughn v. Anderson*, 2005 UT App 423 (UT 10/6/2005),

## **STATEMENT OF THE CASE**

In this personal injury action, the trial court rejected plaintiff's requested use of a jury questionnaire and also rejected most of plaintiff's requested voir dire questions designed to reveal prospective jurors' exposure to negative reports about personal injury cases and their prejudices against such cases. During the trial, the court allowed defendants to introduce most of a settlement demand letter that was used in an unrelated case in which plaintiff's counsel made certain statements regarding plaintiff's physical condition. The court submitted a special jury verdict questionnaire which was confusing to the jury. The jury returned a verdict of no cause.

## **STATEMENT OF FACTS**

1. Ken Claypoole was involved in two motor vehicle collision within approximately five minutes of each other. Mr. Claypoole was hit by a pickup truck owned by Boyd Ross and driven by his minor step son Neil Skougard. Boyd Ross is Neil Skougard's step-father. Mr. Claypoole, while parked on the side of the road, was hit again from behind by a truck owned by Winward Electric Service, Inc., and driven by Michael Wood, Winward's employee. R. 1, R. 4.

2. Mr. Claypoole sued defendants Neil G, Skougard and Boyd Ross and settled with them prior to trial for \$25,000 and \$2,000 respectively.

3. Mr. Claypoole also sued defendants Winward Electric Service, Inc., and its driver, Michael Wood. R. 1, R. 4.

4. This trial was scheduled to start on November 10, 2008. R. 267.

5. On September 16, 2008, following oral arguments on 11 motions in limine and a pre-trial, plaintiff informed the court that he was going to submit a jury questionnaire to the court for submission to the jury panel. R. Partial Transcript of Pretrial Conference September 16, 2008, 3:10, 4:3.

6. The court on September 16, 2008 indicated to counsel that he was not going to submit a jury questionnaire to the jury panel. R. Partial Transcript of Pretrial Conference September 16, 2008, 4:6, 4:11, 4:16.

7. On or about September 25, 2008, (filed October 2, 2008), plaintiff submitted his motion and supporting memorandum requesting a jury questionnaire be submitted to the jury as part of the jury voir dire. R. 1308.

8. The November, 2008 trial setting was continued until March 9, 2009. R. 1324.

9. On February 23, 2009, during a telephone conference with the court and defense counsel, the plaintiff again requested that a jury voir dire questionnaire be submitted to the jury panel. Plaintiff was told by the court that no jury voir dire questionnaire would be allowed. Plaintiff was also told by the court that no jury voir dire by counsel would be allowed, but, follow up questions would be permitted. The telephone conference was not recorded, consequently there is no record of this conversation.

10. On February 27, 2009, (filed March 16, 2009), Plaintiff submitted to the court his requested jury voir dire. R. 1383.

11. On the 2<sup>nd</sup> day of March, 2009, (filed March 16, 2009), Plaintiff submitted his requested jury instructions and special verdict form. R. 1381. Addendum 2.

12. Trial was held starting March 9, 2009. R. 1370.

13. During voir dire the court asked the question “The next thing I'd like to ask you, do any of you hold the opinion that in this country today there's a lawsuit crisis caused by excessive jury verdicts? Do any of you hold that kind of an attitude? Ms. Sorensen?” R. 1621, 32:19.

14. Ms. Sorensen, one of the members of the jury venire, indicated that she had an attitude that there is a lawsuit crisis caused by excessive jury verdicts and that she thinks “there’s too much...” R. 1621 33:1 The trial court then interrupted Ms Sorensen and proceeded to rehabilitate her in open court:

THE COURT: “Well, let me phrase it in this sense, I'm certain we're all concerned about things that we have that we observe in our society. The question becomes as you sit here as a juror in regards to the plaintiff here, Mr. Claypoole and these other individuals as defendant, what we are looking for is a juror that would be able to look at the facts as they're presented during the course of the trial and render a fair judgment without prejudgement or pre-predilection to go in a certain direction or do a certain thing. For instance, are you feelings such that you could not award to Mr. Claypoole a judgment of damages if you felt it was supported by the evidence? Would you be able to do that? R. 1621, 33:2.

Ms. Sorensen replied: “I would be able to.” R. 1621, 33:15.

The court then continued with his rehabilitation questions:

THE COURT: You wouldn't have any trouble doing that if you felt the evidence...

MS. SORENSEN: No trouble if...

THE COURT: supported that?

MS. SORENSEN: if I felt the evidence...

THE COURT: We're primarily talking about those kinds of lawsuits basically where it would be found that there was no justification. Is that what you're thinking about?

MS. SORENSEN: Right. R. 1621, 33:16 - 25.

15. The trial court asked a few other questions, purportedly to discover potential juror bias in regard to cases such as this and in regard to attitude towards attorneys. In so doing he phrased his question as follows:

THE COURT: "This next question, I ask each of you, do any of you have any such negative feelings about attorneys that you couldn't act fairly in this case? But the point is again as I've indicated, is that you're going to be asked to judge this case on what you see here in court and not be prejudiced or bias because of any feelings that you have generally about counsel. Do any of you have kinds of feelings that would prevent you from being fair and just in this case? Response is negative." R. 1621, 34:12

16. The court allowed plaintiff to ask some follow up questions, after the court, at plaintiff's request, explained to the panel the different burden of proof in a civil case from a criminal case. Plaintiff started to ask questions to ferret out any prejudice or bias in the jury venire's members' minds and to question the jury venire about the ability to make any award based upon harms and losses suffered by plaintiff. The court interrupted counsel when he was asking the question regarding harms and losses. The exchange went as follows:

MR. HAVAS: Yes, Your Honor, just following up on that, on the preponderance, some people think preponderance essentially is we, the plaintiff, Mr. Claypoole, has just a little bit of a burden to show that the burden that we're going to show you, that we're a little bit more right than wrong. Some people disagree with that, think that's unfair to the defense that we only have to show a little bit more right than wrong. Is there anyone of you that is in a camp where the people feel that that

is not fair? Or on the other hand, is there anyone that feels that that is fair burden for us to only have to prove a little bit more right than wrong? Thank you.

Another question that I would like to have answered is to make sure that the harms or the losses that we're going to be asking you about, can only be compensated by award of money. That's the way our system is and that the money must solely be decided on the basis of the harms and losses that we're claiming that the defense caused. Is there anyone here that feels that that is unfair or is there anyone here that is all right that? Is there anyone here that feels that that is okay to...

THE COURT: Let's ask it another way. Ladies and gentlemen, are there any of you that feel that it would be unfair to award a money judgment as far as payment for damage in a case such as this? Thank you. R. 1621, 38:5 - 39:4.

17. Plaintiff used one of his peremptory challenges to excuse Ms. Sorensen from the jury. R. 1422..

18. On March 16, 2009, the case was given to the jury after having been instructed by the court. Prior to being instructed by the court, the parties met in chambers with the court and reviewed the jury instructions and the special verdict form. R. 1623 493:8 - 523:11.

19. Plaintiff took exception to the introductory paragraph of the special verdict form proposed by the court as being confusing regarding the wording "preponderates." R. 1621 517:14. The court rejected plaintiff's concern. R. 1621 517:21 and left the introductory paragraph stand as it was drafted by the court. R. 522:23 - 523:11.

20. The jury returned a verdict of no cause. In doing so the jury only answered question 1 on the special verdict form. R. 1417.

## **SUMMARY OF ARGUMENTS**

A parties' Seventh Amendment (U.S. Const. am. 7) and Utah Const. art. I, § 10's, right to a trial by jury, is meaningless, unless the litigants have a right to actively participate in selecting an unbiased jury. In order to be able to select an unbiased jury, the trial court should allow voir dire questions to cover areas of concern to the parties, preferably by having attorney conducted voir dire. If the trial court will not allow attorney conducted voir dire, it should allow a written jury questionnaire to be submitted to the jury as part of the voir dire process. Failure by the court in this case, to allow attorney conducted voir dire, or to allow a written jury questionnaire to be submitted to the jury venire, and instead conducting the jury voir dire himself, not accepting plaintiff's requested voir dire questions, caused the jury to become sensitized to follow up questions posed by plaintiff and no meaningful information was gleaned from the voir dire process. Consequently plaintiff was unable to intelligently exercise his peremptory challenges.

During the trial the court allowed defendants, over the objection of plaintiff, to introduce and refer to a settlement demand letter which plaintiff's attorney had sent to an insurance adjuster in a different case. The letter was consequently used by defendants to impeach plaintiff's witnesses. Defendants also made much of the letter and its context in their closing argument. The trial court erred in allowing defendants to use the letter in violation of Rule 408, Utah Rules of Evidence as is discussed in *Anderson v. Thompson*, 176

P.3d 464, 2008 UT App 3 (Utah App. 2008). The evidence of the letter and its context should have been excluded pursuant to Rule 403, Utah Rules of Evidence.

Plaintiff had requested a special verdict form to be submitted to the jury in its deliberations. R. 1381 and had submitted a proposed special verdict form along with his proposed jury instructions. The court submitted a special verdict form to the jury, R. 1417, however, the special verdict form submitted was one of the court's making and was unduly cumbersome and confusing to the jury.



## ARGUMENT

### POINT I

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY (A) NOT ALLOWING A WRITTEN JURY QUESTIONNAIRE, (B) FAILING TO ASK PROSPECTIVE JURORS APPROPRIATE PRELIMINARY QUESTIONS DESIGNED TO DETECT WHETHER ANY OF THE PROSPECTIVE JURORS HAD BEEN EXPOSED TO TORT REFORM PROPAGANDA, (C) FAILING TO ALLOW PLAINTIFF THE INTELLIGENT EXERCISE OF HIS PEREMPTORY CHALLENGES.**

Plaintiff had requested that he be allowed to voir dire the jury venire directly in order to communicate with the jury and thus get a good feel for the biases, prejudices and attitudes held by the individual members of the venire. See Jackson Howard, *Lawyer-Conducted Voir Dire is a Seventh Amendment Right*, Voir Dire, Summer, 1995, [http://www.utahbar.org/sites/litigation/Howard\\_2.pdf](http://www.utahbar.org/sites/litigation/Howard_2.pdf) and for a discussion on how attorney conducted voir dire worked in practice, see Robert B. Sykes and Francis J. Carney, *Attorney Voir Dire and Jury Questionnaire: Time for a Change*, Utah Bar Journal, August, 1997, [http://www.utahbar.org/sites/litigation/Sykes\\_and\\_Carney.pdf](http://www.utahbar.org/sites/litigation/Sykes_and_Carney.pdf). The court rejected plaintiff's request. Plaintiff then requested numerous times, to be allowed to submit a voir dire questionnaire to the jury to help assist plaintiff in the selection of an unbiased and unopinionated jury. When the court denied the submission of a voir dire questionnaire, plaintiff submitted a detailed request for voir dire questions to be asked by the court. The court decided to do the voir dire himself and to allow the attorneys for the parties to ask follow up questions. The questioning of the jury venire by the court was inadequate to allow

plaintiff to gauge the attitude of the potential jurors as to tort reform, attitude towards attorneys bringing personal injury lawsuits and the awarding of damages. By the time that plaintiff was allowed to ask additional questions, the jury venire had been pretty well conditioned to not answer questions individually and no meaningful information was obtained to allow plaintiff to adequately exercise his for-cause or peremptory challenges.

The Utah Supreme Court addressed the issue of voir dire and the Constitutional right to it, in *Taylor v. State*, 156 P.3d 739 (Utah 2007) and indicated:

¶ 69 Under the Fourteenth Amendment to the United States Constitution, a defendant is entitled to question jurors about "the relevant subject area of potential bias." *State v. Piansiaksone*, 954 P.2d 861, 867 (Utah 1998) (citing *Mu'Min v. Virginia*, 500 U.S. 415, 431, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991)). Nevertheless, voir dire may be improper even if it satisfies the Fourteenth Amendment if it does not "enable[] litigants and their counsel to intelligently exercise peremptory challenges" and is not conducted in such a way that, to the extent possible, it "eliminate[s] bias and prejudice from the trial proceedings." *Id.* (quoting *State v. James*, 819 P.2d 781, 798 (Utah 1991)). "Indeed, the fairness of a trial may depend on the right of counsel to ask voir dire questions designed to discover attitudes and biases, both conscious and subconscious, even though [such attitudes] would not have supported a challenge for cause." *Id.* at 867-68 (internal quotation marks omitted).

¶ 70 "The scope and conduct of voir dire examination is within the discretion of the trial judge." *Id.* at 867. We have emphasized that "trial courts should be permissive in allowing voir dire questions and should exercise their discretion in favor of allowing counsel to elicit information from prospective jurors." *Id.* at 868. Nevertheless, "trial judges are not compelled to permit every question that ... might disclose some basis for counsel to favor or disfavor seating of a particular juror." *Id.* Nor do we think a defendant is entitled to "ask questions in a particular manner." *Id.* at 867 ("[A]s long as the relevant subject area of potential bias was covered, the Fourteenth Amendment was not violated by the failure to ask questions in a particular manner." (citing *Mu'Min*, 500 U.S. at 431, 111 S.Ct. 1899)). Thus, when we review a trial court's voir dire decisions to determine whether the court abused its discretion we ask "whether,

considering the totality of the questioning, counsel was afforded an adequate opportunity to gain the information necessary to evaluate jurors.'" Id. at 868 (quoting *State v. Bishop*, 753 P.2d 439, 448 (Utah 1988)).

*Taylor v. State*, 156 P.3d 739, 757-758 (Utah 2007).

Here, the totality of the questioning did not adequately explore the biases and prejudices of the potential jury in regard to attitudes about personal injury cases to allow plaintiff to intelligently exercise his for-cause and peremptory challenges.

At least in *Bee v. Anheuser-Busch, Inc.*, 204 P. 3d 204, 2009 UT App. 35 (Utah App. 2009) the court, prior to the start of the jury voir dire, reviewed the proposed questions with counsel. Here the court did not do that. As in *Bee*, supra, the court asked broad questions in regard to tort reform, but, did not ask individual and probing questions of the members, so that any response was more a joint response than a response which would allow plaintiff to ask intelligent follow up questions.

The problem with not being allowed to either conduct voir dire in a way that individual meaningful follow up questions can be asked, or not to have answers to a jury questionnaire, as was suggested in *Alcazar v. University of Utah Hospitals*, 188 P.3d 490, 2008 UT App 222 (Utah App. 2008), footnote 1, is that plaintiff's Seventh Amendment and Utah Constitution, Article I, Section 10's, right to a trial by jury, becomes meaningless. This court has repeatedly set forth that voir dire of a jury panel serves two purposes: "1) to allow counsel to uncover biases of individual jurors sufficient to support a for-cause challenge and

2) to gather information enabling counsel to intelligently use peremptory challenges." *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah App.1993).

The trial court asked the jury venire closed ended questions and, in the case of Ms. Sorensen, tried to rehabilitate her by asking questions that would elicit positive responses. The court did exactly what the Supreme Court and the Court of Appeals have warned about:

" However, to say the question went far enough in eliciting the information Plaintiff was entitled to get "suggests an unwarranted naivety regarding human nature. . . . It is unrealistic to expect that any but the most sensitive and thoughtful jurors . . . will have the personal insight, candor and openness to raise their hands in court and declare themselves biased." *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984).

*Depew v. Sullivan* , 2003 UT App. 152, 71 p.3d 601 at ¶25.

As was indicated in *Depew*, supra, the questioning of the trial court was:

the all too prevalent practice of avoiding any real inquiry into possible bias by a trial judge's asking a prospective juror if he or she could decide the case fairly and follow the law given by the judge and then taking a prospective juror's affirmative answer as dispositive of the issue of bias.

*Depew*, 71 P. 3d 601 at ¶26.

Ordinarily, an Appellant must show that in the absence of error, a different outcome would have resulted. However, as was recognized in *Barrett v. Peterson*, the Utah Court of Appeals indicated:

An appellant claiming that the trial court's unreasonable limitation of voir dire substantially impaired his ability to exercise peremptory challenges simply cannot prove, in the traditional way, that prejudice resulted from the error. Appellant cannot show with any certainty that had certain questions been asked, particular responses would have been received; that certain jurors would then have been challenged for cause or peremptorily; and that particular, more

favorably predisposed jurors would have been seated instead, who would have deliberated to a different result. Accordingly, in this context, we apply the test enunciated in *Hornsby* [*Hornsby v. Corporation of the Presiding Bishop*, 758 P.2d 929, (Utah App.1988)]: Prejudicial error is shown if the appellant's right to the informed exercise of peremptory challenges has been "substantially impaired." 758 P.2d at 933.

*Barrett v. Peterson*, 868 P. 2d 96, 103 (Utah App. 1993).

Plaintiff in this case had the right to know what biases and prejudices the prospective jurors had so that he could intelligently exercise his for-cause and peremptory challenges. In *Barrett*, supra, the trial court had rejected plaintiff's requested jury voir dire designed to discover prospective jurors' exposure to negative reports of medical negligence cases. In the case at bar, plaintiff was unable to ascertain the attitude of the jurors on a variety of subjects. In *Barrett*, supra, the Utah Court of Appeals reversed the trial court judgment and in doing so, said:

We hold only that in cases such as this one, the plaintiff is entitled during voir dire to elicit information from prospective jurors as to whether they have read or heard information generally on medical negligence or tort reform, and to follow up with appropriate questions if affirmative responses are received.

The trial court's failure to ask prospective jurors threshold questions sufficient to elicit information on the jurors' possible exposure to tort-reform and medical negligence information prevented appellant from detecting possible bias and from intelligently exercising his peremptory challenges. The trial court's limitation of voir dire questioning substantially impaired appellant's right to the informed exercise of his peremptory challenges, and therefore constitutes reversible error. The judgment in favor of appellee is reversed, and the case is remanded for a new trial.

*Barrett v. Peterson*, 868 P. 2d 96, 104 (Utah App. 1993).

As in *Barrett*, supra, in the case at bar, the trial court rejected plaintiff's request for attorney-conducted voir dire, rejected the use of a juror voir dire questionnaire and did not ask most of the requested voir dire questions. The result was that an entire jury was allowed to sit in judgment of a personal injury case without plaintiff's having any knowledge of the juror's exposure to negative reports of and prejudice against personal injury cases. Plaintiff was unable to get a sense of the prospective jurors' attitude towards personal injury cases. The trial court's conduct was prejudicial to the plaintiff, because it substantially impaired plaintiff's right to meaningful voir dire and his ability to exercise his peremptory challenges in a meaningful fashion. The court should reverse the judgment of the trial court and remand this case for a new trial.

## **POINT II**

### **THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PLAINTIFF'S SETTLEMENT DEMAND LETTER FROM A PREVIOUS CIVIL CASE INTO EVIDENCE, WHICH THE DEFENDANT THEN USED FOR IMPEACHMENT PURPOSES.**

Plaintiff had been involved in a motor vehicle crash, in January, 2000, approximately 13 months prior to the crashes which were the subject of this lawsuit. Plaintiff was negotiating with the adverse insurance carrier in the 2000 crash. This negotiation carried on after he was involved in the subject crash in 2001. In the process of negotiation, plaintiff's counsel sent a settlement demand to the adverse insurance carrier, by way of a letter directed to the adverse insurance carrier's adjuster. The court allowed defendants in the case at bar to refer to this letter and to quote from it extensively, over the objection by plaintiff. R. 1621, 80:4, R. 1622,

315:3. This letter was then used to impeach plaintiff's witnesses and was allowed to be referred to by defendants in the closing argument of their counsel. R. 1623, 544:10, 11.

As was set forth in *Anderson v. Thompson*, 176 P.3d 464, 2008 UT App 3 (Utah App., 2008), "Under rule 408 of the Utah Rules of Evidence, "[e]vidence of conduct or statements made in compromise negotiations is . . . not admissible." Utah R. Evid. 408. *Anderson*, 176 P.3d 464, ¶29. Clearly, the letter in another case, was sent in the process of compromise negotiations. *Anderson*, *supra*, goes on to indicate:

Rule 408, however, "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness...." *Id.* Thus, although generally statements made during settlement negotiations are inadmissible under rule 408, there are exceptions, one of which allows for the admission of statements made during settlement negotiations if offered for another purpose, such as proving bias or prejudice.

*Id.*

However, in the case at bar, the use of the letter was not for the showing of bias or prejudice of a witness, or other allowable reason. The sole purpose was to prejudice the jury against plaintiff because, of a statement in the letter describing his condition. As footnote 3 in *Anderson*, *supra*, says:

the negotiations must still be relevant. See R. Collin Mangrum Dee Benson, *Mangrum & Benson on Utah Evidence* 183 (2006-07 ed.) (noting that a party seeking to admit evidence over a rule 408 objection must show that the evidence is relevant). Indeed, under rule 403 of the Utah Rules of Evidence, any relevant evidence, including impeachment evidence under rule 408, "may be excluded if its probative value is substantially outweighed by the, danger of

unfair prejudice." Utah R. Evid. 403; see also id. R. 401 (defining "relevant evidence").

Here the negotiation was in a different case, thus not relevant to the case at bar. Even if it is assumed that there is relevance, the probative value of the statement is substantially outweighed by the danger of unfair prejudice and should not have been allowed to be referred to by defendants. Further, assuming the statement introduced was relevant and was not subject to Utah R. Evid. 403 exclusion, the statement introduced, was made by plaintiff's counsel and not by plaintiff and therefor should not have been allowed to be referred to as a statement made by plaintiff.

*Anderson*, 176 P.3d 464, goes on to discuss Rule 408 of the Federal Rules of Evidence and indicates that "in 2006, rule 408 of the Federal Rules of Evidence was amended to state that evidence of settlement negotiations is not admissible "to impeach through a prior inconsistent statement or contradiction." *Anderson*, supra, at ¶31 and adopts the "rationale behind the current trend among courts to exclude evidence of settlement negotiations even for purposes of impeachment." *Anderson*, supra, at ¶32. Any evidence related to the letter and its contents should have been excluded. The trial court's failure to exclude it, was an abuse of discretion and unduly prejudicial to plaintiff warranting a new trial.



### **POINT III**

#### **THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUBMITTING A CONFUSING SPECIAL JURY VERDICT FORM TO THE JURY.**

The Utah Supreme Court has recommended that jury instructions are phrased using plain English and has formed an advisory committee for that purpose. The charge is simple, although the execution seems to have been more difficult. The charge to the advisory committees from the Utah Supreme Court is to develop plain language jury instructions that juries can easily understand. The Supreme Court's charge is set forth in the minutes of the Committee, for example See MINUTES, Advisory Committee on Model Civil Jury Instructions, April 15, 2003, <http://www.utcourts.gov/committees/muji/archives/2003-04-15.pdf>.

In the case at bar, the court gave the jury a special verdict questionnaire which was confusing. Plaintiff objected that the terms preponderance and preponderates, are unduly confusing to the jury and that plaintiff's proposed special verdict form was more clear and should be used. R. 1621 517:14. The court rejected plaintiff's concern. R. 1621, 517:21 and left the introductory paragraph stand as it was drafted by the court. R. 1621, 522:23 - 523:11.

A search on Utah courts' website for the term "plain English" brings up a number of references, apparently used by the committee. For example, in Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, he indicates:

Thus, one of the most basic principles of comprehensible jury instructions is to use understandable vocabulary.

Most legal terms, however, are unknown to the general public. And some — like *estoppel*, *lis pendens*, *per stirpes*, *tortfeasor*, *quitclaim*, and *quash* — are completely mystifying to ordinary speakers of English. In one sense, these words are the easiest to deal with. Because they are so obviously technical terms, everyone realizes that we should avoid using them in jury instructions. To take another example, in most jurisdictions proof by a *preponderance of the evidence* means that it is more likely than not that something is true. So if Jill must prove that Jack is her father, it is simpler to say that *Jill must prove that it is more likely than not that Jack is her father*, rather than *Jill must prove by a preponderance of the evidence that Jack is her father*. In this way, the unfamiliar legal term is eliminated entirely.

Tiersma, *supra*, [http://www.utcourts.gov/committees/muji/Communicating with juries.pdf](http://www.utcourts.gov/committees/muji/Communicating%20with%20juries.pdf), at p. 5.

He gives a detailed explanation of the difference between using preponderates and preponderance and using plain English. In doing so, he states:

No doubt some of the previous discussion has seemed a bit abstract. In an effort to be more concrete, I'd like to present some before-and-after examples of actual jury instructions.

I will draw on the new civil instructions (known as CACI) and compare them to the previous instructions (called BAJI). The CACI instructions were approved by the California Judicial Council in 2003. I'll try to give a selection of instructions that might, roughly speaking, be used in an actual negligence trial.

Tiersma, *supra*, [http://www.utcourts.gov/committees/muji/Communicating with juries.pdf](http://www.utcourts.gov/committees/muji/Communicating%20with%20juries.pdf), page 22.

He then sets forth the jury instructions from before the change and after the change.

BAJI 2.60

## Burden of Proof and Preponderance of Evidence

• • •

“Preponderance of the evidence” means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

Tiersma, *supra*, [http://www.utcourts.gov/committees/muji/Communicating with juries.pdf](http://www.utcourts.gov/committees/muji/Communicating%20with%20juries.pdf),

P. 22

He then says:

Obviously, explaining who has the burden of proof and the nature of that burden is extremely important. But research suggests that jurors often poorly understand or confuse standards like preponderance of the evidence and proof beyond a reasonable doubt.

The definition of the preponderance standard in BAJI 2.60 starts off well enough by stating that the evidence must have more convincing force than the opposing evidence. But the next sentence is pretty bad, especially the use of the verb *preponderate*. The noun form, *preponderance*, does occasionally occur in highly formal nonlegal contexts. But the verb *preponderate* is extremely rare. I’m not sure that I’ve ever heard it in ordinary spoken English.

CACI 200

Obligation to Prove — More Likely True Than Not True

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is sometimes referred to as “the burden of proof.”

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

He then states the obvious:

In my view, this instruction is considerably more understandable than the BAJI version. It states the burden clearly: whether something is *more likely than not* to be true, a phrase that is common in everyday speech. Gone are *preponderate* and *preponderance*. The instruction also does something that can be useful for jurors: it addresses a possible misconception head-on by distinguishing this standard from the criminal burden of proof.

Tiersma, *supra*, [http://www.utcourts.gov/committees/muji/Communicating with juries.pdf](http://www.utcourts.gov/committees/muji/Communicating%20with%20juries.pdf),

P. 22.

Although we would like to think that juries don't get confused, as the above clearly illustrates, juries do get confused and where they are given instructions on special verdict forms which are couched in legalese, they are more likely to be confused. The trial court committed error in failing to follow the Utah Supreme Court's guideline regarding plain English jury instructions and not phrasing the special verdict form in plain English.

### CONCLUSION

The court should reverse the judgment of the trial court and remand the case for a new trial, since the trial court committed prejudicial errors in not allowing plaintiff to utilize a written jury voir dire questionnaire, in failing to ask the jury venire appropriate questions

designed to detect whether any of the prospective jurors had been exposed to tort reform propaganda, and to deny plaintiff to conduct his own jury voir dire, to discover prospective jurors' exposure to tort reform, negative reports of personal injury cases and their prejudice against such cases. The trial court also committed prejudicial error in allowing defendants to refer to and discuss a settlement letter which was used in an unrelated case. And, the trial court committed prejudicial error in submitting a confusing special verdict form to the jury, rather than one that comports with the plain English directive of the Utah Supreme Court.

WHEREFORE, plaintiff Ken Claypoole, respectfully requests the Utah Court of Appeals to reverse the judgment of the trial court and remand the case for a new trial.

DATED AND SUBMITTED this 28<sup>th</sup> day of August, 2009.



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David Bert Havas, No. 1424  
DAVID BERT HAVAS, P. C.  
Attorney for Plaintiff/Appellant

## **ADDENDUM 1**

## **United States Constitution:**

### **Amendment VII**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

### **Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Utah Constitution:**

**Article I, Section 10.** [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

**Utah Code:**

**78A-4-103.** Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;



(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

## **Rules:**

### **Federal Rules of Evidence:**

#### **Rule 408. Compromise and Offers to Compromise**

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

## **Utah Rules of Evidence:**

### **Rule 401. Definition of "relevant 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.

### **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**

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.

### **Rule 408. Compromise and offers to compromise.**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

## **ADDENDUM 2**

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

FARMINGTON DEPARTMENT, STATE OF UTAH

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KEN CLAYPOOLE,

Plaintiff,

vs.

NEIL G, SKOUGARD and BOYD ROSS  
and WINWARD ELECTRIC SERVICE,  
INC., and MICHAEL WOOD,

Defendants.

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**SPECIAL VERDICT**

Civil No. 040700622

Judge Rodney S. Page

MEMBERS OF THE JURY:

Please answer the following questions.

1. Based on all of the evidence in this case, was defendant, Winward Electric Service, Inc./Wood, negligent?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

2. If you found defendant, Winward Electric Service, Inc./Wood, to be negligent, was that negligence a cause of Ken Claypoole's injuries?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

3. Based on all of the evidence in this case, was defendant, Neil G, Skougard/Ross, negligent?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

4. If you found defendant, Neil G, Skougard/Ross, to be negligent, was that negligence a cause of Ken Claypoole's injuries?

ANSWER: Yes\_\_\_\_\_ No \_\_\_\_\_

5. If you have answered either or both of Questions 2 and 4 "Yes," then answer the following question: Assuming the combined negligence of all parties to total 100%, what percentage of that negligence is attributable to:

A. Defendant, Winward Electric Service, Inc./Wood, \_\_\_\_\_%

B. Defendant, Neil G, Skougard/Ross, \_\_\_\_\_%

TOTAL 100%

6. If you have answered either or both of Questions 2 and 4 "Yes," state the amount of economic and non-economic damages, if any, sustained by Ken Claypoole as a result of his injuries. If neither question was answered "Yes," do not answer this question.

Economic Damages:

Past Medical Expenses \$ \_\_\_\_\_

Past earnings, Including Benefits \$ \_\_\_\_\_

Future earnings, Including Benefits \$ \_\_\_\_\_

Past Household Services Losses \$ \_\_\_\_\_

Future Household Services Losses \$ \_\_\_\_\_

Future Medical Expenses \$ \_\_\_\_\_

TOTAL ECONOMIC DAMAGES \$ \_\_\_\_\_

Non-Economic Damages:

Nature and extent of injuries \$ \_\_\_\_\_

Pain and suffering (mental and physical) \$ \_\_\_\_\_

Loss of pursuit of ordinary affairs \$ \_\_\_\_\_

Disfigurement \$ \_\_\_\_\_

Loss of enjoyment of life \$ \_\_\_\_\_

TOTAL NON-ECONOMIC DAMAGES \$ \_\_\_\_\_

TOTAL DAMAGES \$                     

DATED this \_\_\_\_\_ day of March, 2009.

\_\_\_\_\_  
Foreperson

References:

MUJI FORM 36.2 NEGLIGENCE – COMPARATIVE FAULT SPECIAL VERDICT  
FORM – MULTIPLE DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 28<sup>th</sup> day of August, 2009, a copy of the foregoing Appellant's

Brief was served in the manner indicated below upon the following:

Joseph E. Minnock	<input checked="" type="checkbox"/> US. Mail
Morgan, Minnock, Rice & James, L. C.	<input type="checkbox"/> Hand Delivered
Attorneys for Defendants Michael Wood and	<input type="checkbox"/> Overnight
Winward Electric Service, Inc.	<input type="checkbox"/> Email jminnock@mmrj.com
Kearns Building, Eight Floor	
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Salt Lake City, Utah 84101	



\_\_\_\_\_  
Legal Assistant