

1989

John Call Engineering v. Manti City Corporation : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 89-0384 IN THE UTAH COURT OF APPEALS

JOHN CALL ENGINEERING, INC.,	:	
a Utah Corporation,	:	
	:	
Plaintiff &	:	
Appellant,	:	Case No. 890384-CA
	:	
vs.	:	Priority 14b
	:	
MANTI CITY CORPORATION,	:	
a Municipal Corporation,	:	
	:	
Defendant &	:	
Respondent.	:	

APPEAL FROM A FINAL JUDGMENT OF THE
SIXTH JUDICIAL DISTRICT COURT FOR
SANPETE COUNTY, STATE OF UTAH

Honorable Don V. Tibbs, Judge

BRIEF OF RESPONDENT

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DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

LIST OF PARTIES

The sole parties to this cause of action are John
Call Engineering, Plaintiff-Appellant, and Manti City
Corporation, Defendant-Respondent.

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STATEMENT OF JURISDICTION

This court has jurisdiction to hear this appeal pursuant to Utah Code Annotated, Section 78-2-2-(3)(j) and Rule 4A of the Rules of the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court follow the mandate of John Call Engineering, Inc., vs. Manti City Corp., 743 P.2d 1205 (Utah 1987)?

2. Did the trial court err in allowing Manti, on the day of trial and over the objection of Call, to amend its answer and allege mitigation of damages?

3. Did the trial court err by not granting Call a continuance?

4. Did the trial court commit reversible error when it failed to submit Call's jury instructions?

5. Did the trial court commit reversible error by allowing any irrelevant or prejudicial issues in the trial proceeding?

6. Did the trial court err in denying Call's motion for a directed verdict and in denying Call's motion for judgment notwithstanding the verdict, or in the alternative, motion to amend the judgment, or in the alternative, motion for a new trial?

7. Did the trial court err in not taxing as costs against Manti the expert witness fees incurred by Call?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS

The relevant constitutional provisions, statutes, ordinances, rules and regulations are attached in Respondent's addendum in the addendum to Respondent's brief. They are: Utah Rules of Civil Procedure 8; Utah Rules of Civil Procedure 15; Utah Rules of Civil Procedure 40; Utah Code Annotated, Section 21-5-4 1953 (as amended).

STATEMENT OF THE CASE

This is an appeal from a final judgment of the Sixth Judicial District Court in and for Sanpete County awarding the appellant John Call Engineering, Inc., ("Call") \$13,440 plus pre-judgment interest based on stipulation to run from January 1, 1984 and costs against the respondent Manti City Corp. ("Manti") and a subsequent order denying Call's motion for judgment notwithstanding verdict, or in the alternative, motion to amend the judgment, or in the alternative, motion for a new trial.

STATEMENT OF THE FACTS RELEVANT
TO THE ISSUES PRESENTED FOR REVIEW

1. John Call Engineering sued Manti City for breach of an engineering services contract.

2. After a non-jury trial, Judge Tibbs entered a judgment in favor of Manti. Call appealed. (R. 182, 183, 185 & 186.)

3. The Utah Supreme Court reversed Judge Tibbs' decision instructed him to determine Call's damages giving careful consideration to mitigation and enter judgment in favor of Call. John Call Engineering Inc., v. Manti City Corp., 743 P.2d 1205, 1210 (Utah 1987).

4. A second trial, this time before a jury, was held. (R. 247-261.)

5. Call made a Motion in Limine to limit or exclude evidence and argument to the following issues:

(a) Whether Call should be paid for work not performed.

(b) Whether the judgment would be paid out of juror and/or taxpayer's pockets.

(c) Whether Call mitigated his damages.

(R. 235-246.)

6. The court denied the Motion in Limine but indicated to counsel he could object during the trial. Manti amended its answer by alleging mitigation of damages. (Transcript of Proceedings, January 12 & 13, 1989 p. 67-73, hereinafter Tr.) The amendment did not prejudice Call.

7. The court initially offered Call a continuance of the trial. (Tr. 73.)

8. On reconsideration and upon case review the court determined the case would proceed. (Tr. 75.)

9. Thereafter, the court allowed the issue of mitigation of damages, (Tr. 182) pursuant to Supreme Court instruction.

10. The original contract was introduced into evidence by Appellant. (Tr. 211-212.)

11. The court instructed the jury on the measure of damages which included mitigation.

12. The court repeatedly admonished the jury they were only to consider the measure of damages to Appellant. (Tr. 81, 82.)

13. Appellants direct testimony ranged from \$57,900.00 to \$191,998.00 without consideration to any mitigation. This inconsistency was based on testimony offered by different witnesses.

14. On cross examination numerous inconsistencies were revealed such as inspection fees, (Tr. 209) payment of taxes, (Tr. 229), amounts paid and costs. (Tr. 232)

15. Evidence was introduced showing net profits ranged from 3 to 36% but averaged around 6%.

16. Respondent called David Thurgood as an expert witness.

17. At the close of plaintiff's case, the plaintiff moved the court for a directed verdict in the sum of not less than \$56,377. The court denied plaintiff's motion.

18. The court properly instructed the jury on law to determine damages.

19. The jury returned a verdict in favor of Call for \$13,440. (R. 262.)

20. Call filed timely motions under Rule 50 and 59 of the Utah Rules of Civil Procedure amended judgment for a judgment notwithstanding the verdict, or in the alternative, motion for a new trial. (R. 276-294.)

21. The trial court denied Call's motion and denied Call's request for expert witness fee costs. (R. 335-336.)

22. Call appealed. (R. 339-340.)

SUMMARY OF ARGUMENTS

POINT I

THE TRIAL COURT FOLLOWED THE MANDATE OF THE UTAH SUPREME COURT

The Utah Supreme Court in John Call Engineering Inc. vs. Manti City Corp., 743 P.2d 1205 (Utah 1987) instructed the lower court to determine Call's damages and enter judgment in favor of Call.

The trial court instructed the jury on determination of damages and repeatedly admonished the jury to only

consider damages.

The contract was introduced into evidence by Call and consideration of the contract was essential in making a determination of damages.

POINT II

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ALLOWED THE DEFENDANT TO AMEND ITS ANSWER AND ALLEGE MITIGATION OF DAMAGES.

The court allowed Manti City to amend its answer to allege the unpled mitigation of damages defense. Likewise, the court allowed Call to amend pleadings to increase the amount of damages.

The amendment allowing consideration of mitigation merely followed remand instructions.

Such an amendment in no way prejudiced Call. Manti City's trial conduct and strategy of only calling David Thurgood as a witness and relying on cross examination of Call witnesses made no difference in Calls preparation for the mitigation defense. Call was on notice based on the remand instructions.

POINT III

THE COURT DID NOT ERR IN FAILING TO CONTINUE THE TRIAL.

Call was not prejudiced because there was really nothing for Call to prepare for.

Because Call was not prejudiced by the courts denying

the continuance there was no abuse of the courts discretion.

POINT IV

THE COURT DID NOT COMMIT REVERSIBLE ERROR
BY FAILING TO GIVE CALL'S REQUESTED JURY INSTRUCTIONS.

The court adequately gave the jury instructions that because Manti breached the contract, Call was entitled to the amount of damages that would place him in the same financial position as if he had completed the contract and had been paid in full.

The court further instructed the jury that lost profits could be awarded if they could be established from the evidence.

The jury was properly instructed.

POINT V

THE COURT DID NOT ALLOW MANTI TO PRESENT IRRELEVANT AND
PREJUDICIAL ISSUES AND ARGUMENTS TO THE JURY.

References by Manti City to the original contract were not irrelevant or prejudicial. The contract was introduced by Call. An examination of the contract was essential to determine damages. Amounts paid to Call were essential. The contract reference to inspection was essential to determine damages.

POINT VI

THE COURT SHOULD NOT HAVE DIRECTED A VERDICT
IN FAVOR OF CALL FOR AT LEAST \$56,000 OR
AWARDED A NEW TRIAL.

Calls evidence in attempting to establish damages was contradictory. Each witness called testified to a different amount. Cross-examination further exposed the lack of credibility of Calls witnesses. Calls witnesses failed to properly consider mitigation.

Call himself testified he did not know what the damages were because he had not had time to calculate it. The \$56,000 demand as a directed verdict does not give consideration to the jurys view of the percent of profit evidence.

POINT VII

CALL SHOULD NOT BE AWARDED HIS EXPERT WITNESS FEE COSTS.

Utah statutes set forth the amount of witness fees. Utah case law does not extend the award of witness fees to include high expert witness fees. Manti should not be required to pay deposition costs and expert witness fees of Calls own witnesses.

ARGUMENT

POINT I

THE TRIAL COURT FOLLOWED THE MANDATE OF THE UTAH SUPREME COURT

Appellant contends that the trial court failed to follow the mandate of the Utah Supreme Court in Call's post-appellate trial on damages. In reality, however, the court insured that the trial focused solely on the

issue of damages, and it expressly follow the directions of the supreme court by considering mitigation evidence. As noted below, the issue of mitigation in a contract cause goes exclusively to the issue of damages. Consequently, the court not only follow the supreme court's express mandate, it acted consistent with the rule that when damages are at issue, mitigation is always a factor to be considered. The jury was charged and instructed their only duty was to determine damages. Throughout the trial they were admonished only to consider and determine damages. (Tr. 81, 82)

POINT II

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ALLOWED THE DEFENDANT TO AMEND ITS ANSWER AND ALLEGE MITIGATION OF DAMAGES

Appellant contends that the trial court committed reversible error when it allowed Respondent to amend its answer at trial to allege mitigation of damages as a defense to Appellant's damages claim at trial. Appellant claims that Respondent's motion to amend was tardy and therefor should not have been granted. Under Rule 15 of the Utah Rules of Civil Procedure, however, the trial court has broad discretion to grant parties leave to amend their pleadings, and "leave shall be freely given when justice so requires." Utah Rules of Civil Procedure Rule 15(a).

Moreover, there is nothing wrong with moving to amend pleadings at trial to conform to the evidence. Utah Rules of Civil Procedure Rule 15(b). Appellant itself, took advantage of this rule to move to amend its complaint, even later in the trial, to increase the amount of damages prayed for. (Tr. 312) Mutuality and justice demand equal treatment of both sides. Consequently, Appellant should not be able to attack Respondent's motion to amend while advocating its own. It was well within the trial court's discretion to grant Respondent's motion to amend its answer to include the issue of mitigation, particularly when the trial focused solely on the question of damages and the Utah Supreme Court had directed the trial court to consider mitigation. John Call Engineering Inc. vs. Manti City Corp., 743 P.2d 1205, 1210, (Utah, 1987) (Orme, J., concurring) (specifically directing the trial court to carefully scrutinize Appellant's damages, including evidence of mitigation.)

Call claims that mitigation of damages is a defense which must be affirmatively pled under Rule 8 of the Utah Rules of Civil Procedure. Appellant cites several cases to support its conclusive proposition that failure to affirmatively plead mitigation in the first instance waives a defendant's right to assert the defense foreverafter.

Appellant places the greatest emphasis on Gill vs. Timm, 720 P.2d 1352 (Utah, 1986). Counsel claims that in Gill, the Utah Supreme Court specifically held that the failure to plead mitigation of damages as an affirmative defense, waives any mitigation of damages issue at trial. (Appellant's brief p. 14). Not only does counsel misconstrue the holding in Gill, he completely ignored the case of Price-Orem Inv., Co., vs. Rollins, Brown & Gunnell, 713 P.2d 55 (Utah, 1986), in which the court specifically held that failure to plea mitigation does not result in an automatic waiver of the defense. See Price-Orem 713 P.2d at 59. Moreover, Gill can be distinguished from the instant case because it involved a pure tort claim instead of a contract dispute or even a contract-like dispute. More importantly, in both Gill and Pratt vs. Board of Education, 564 P.2d 294, (Utah, 1977), (another case relied upon by Appellant), not only did the defendants fail to plead mitigation as a defense, they also failed to introduce any evidence on that issue at trial. The Gill court specifically noted that despite the defendant's failure to plead mitigation, if he had presented evidence or argument on that issue at trial "he might have been entitled to a post-trial amendment to his answer under Rule 15(b) to include mitigation

of damages as an affirmative defense," in accordance with the court's earlier ruling in Price-Orem. Gill vs. Timm, 720 P.2d at 1354 (citing Price-Orem, 713 P.2d at 58-59; other citations omitted) (emphasis added).

In this case Respondent moved to amend its Answer to include the affirmative defense of mitigation prior to the trial on damages. Respondent concedes that it did not assert the issue of mitigation at the first trial -- concerning the contract's validity -- because damages were not at issue. Mitigation is not a defense to contract validity. Evidence of mitigation goes strictly to the issue of damages; it is not used to dispute or undermine the validity of a contract. Hence, because the trial court found the contract invalid, it would have been illogical for Respondent to address mitigation at the first trial. Because damages were not at issue, and Respondent had not need to counter Call's damage claim with a mitigation argument.

Appellant claims that it was prejudiced when the trial court granted Appellant's motion to amend, because Call was surprised and had insufficient notice and opportunity to prepare for that defense. Plaintiffs in Price-Orem made a similar argument. The court found, however, that the claims of surprise and lack of notice were without merit because both the pleadings and opening statements showed that plaintiff was "clearly aware that the issue

of damages was the central one." Price-Orem 713 P.2d at 59, supra. The court held that under such circumstances defendant was not precluded from introducing evidence on mitigation. In this case Appellant obviously knew (or had reason to know) that the Respondent might assert mitigation as a defense to Call's damages claim. That fact is clearly evidence by Call's own Motion to Limine to exclude argument and evidence on mitigation. Moreover, the supreme court's opinion and directions clearly put Call on notice that mitigation would be considered on remand. See John Call Engineering vs. Manti City Corp., 743 P.2d at 1210 (Orme, J., concurring) (emphasis added). Such obvious constructive notice should preclude Appellant from claiming surprise or prejudice.

Appellant makes a great deal of the fact that the trial court first granted a continuance, then changed its mind. (Appellant brief pp. 15-16, 18-21.) Appellant fails to explain why the court changed its mind. In an attempt to persuade the court not to grant the motion to amend during preliminary proceedings in chambers, Appellant's counsel handed the court a copy of the case Gill vs. Timm, 720 P.2d 1352, and asserted that it was dispositive of the issue at hand. (Tr. 67) After looking at the case, however, the court noticed that Gill is distinguishable

(as noted above), and therefore not controlling. More importantly, the court had taken the opportunity to refresh its understanding of the Utah Supreme Court's opinion and directions for remand in this case on its first appeal. John Call Engineering vs. Manti City Corp., 743 P.2d 1205 (Utah, 1987), (Tr. 72-76). After taking a closer look at the court's directions, the court reasonably concluded that the supreme court **specifically** directed him to look at all issues bearing on damages, including mitigations. (Tr. 76)

Although Appellant claims that the amendment prejudiced its position, Call could not have been prejudiced because instead of producing numerous witnesses or evidence of its own regarding mitigation, Respondent's trial strategy relied on cross examination of Appellant's own witnesses. It is difficult to conceive of anything else Appellant could have done to prepare for Respondent's case on mitigation. John Call testified about other jobs his company had after the contract was repudiated. (Tr. 242-258) Charles Peterson testified as to Call's potential capacity to generate revenue. (Tr. 268-82) The testimony of both witnesses should have been the same regardless of whether or not mitigation was at issue. Appellant's apparent

lack of preparation was manifest only with regard to the amount of actual damages incurred (Tr. 231-237); see also Appellant's brief at 6 (claiming either \$191,998 or \$136,334, or \$70,278 or \$57,990). Consequently, Call's claim of prejudice and lack of notice is groundless.

POINT III

THE COURT DID NOT ERR IN FAILING TO CONTINUE THE TRIAL

Call claims that the trial court erred in failing to continue the trial. Appellant is correct in noting that the general proposition that a continuance should be granted if substantial prejudice will result from going forward. As noted above, however, Appellant's assertion that Call was prejudice is hollow. Appellant anticipated the defense of mitigation, and had adequate opportunity to prepare for it. Moreover, based on Respondent's trial strategy more intense preparation would have been of little consequence.

Rule 40(b) of the Utah Rules of Civil Procedure grants trial courts substantial discretion in deciding whether or not to grant a continuance. See Christensen vs. Jewkes, 761 P.2d 1375, 1377 (Utah, 1988). Consequently, the standard of review is very high and the trial court's decision should be reversed only for clear abuse of discretion. See Id. at 1377. Call emphasizes the fact that the court seriously considered granting a continuance, then changed

its mind. As noted above, however, the court had good cause to change its mind after reading Gill vs. Timm, 720 P.2d 1352, re-examining the supreme court's instructions for remand in John Call Engineering vs. Manti City Corp., 743 P.2d 1205, and balancing the consideration involved in granting Respondent's motion to amend. See Tr., at 67, 72-76. The court clearly weighed the important factors, including adequacy of notice and potential for prejudice, as well as judicial economy, delay, and other concerns relevant to the decision of whether or not to grant a continuance, and acted with a reasonableness that was well within its discretion.

POINT IV

THE COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO GIVE CALL'S REQUESTED JURY INSTRUCTIONS

Appellant claims that the trial court erred in failing to give several of its requested jury instructions regarding calculation of damages. (Appellant's brief pp. 21-25.) The issue on review, however, should not be whether the trial court failed to give all of Appellant's instructions, concededly, all were not given. The issue is whether or not the instructions the court gave were adequate. In evaluating challenged jury instructions, the instructions must be considered as a whole. See Startin vs. Madsen, 237 P.2d 834, 836 (Utah, 1951). Even when a trial court

refuses substantively correct jury instructions, if the court covers the substance of the law in its own instructions viewed as a whole, they are adequate. See Hardman vs. Thurman 239 P.2d 215, 219 (Utah, 1951). Moreover, "[t]he instructions should not be susceptible of misconstruction as either comments on the evidence or arguments for either side of the case." Startin, 237 P.2d at 836. In this case, Appellant clearly attempted to provide commentary through several of its proposed jury instructions. The trial court reasonably denied them on the basis of argumentativeness and duplication. See Tr. at 307-11. Consequently, the court adequately discharged its duty to cover the theories of both parties and fairly present the issues to the jury.

Appellant claims that the trial court erred particularly in failing to give its special verdict form and requested instructions on calculation of lost profits. In a very recent case, however, the Utah Supreme Court, held:

"[s]pecial verdicts and interrogatories are both matters within a trial court's discretion. . . In the absence of a showing of abuse of discretion, the trial court's action will not be disturbed."

Canyon Country Store vs. Bracey, 112 Utah Adv. Rep. 19, 22-23 (1989), (citations omitted.)

IN Bracey, the defendants (like the Appellant in this case) argued that the complexity of the case "mandated the use of specific interrogatories or verdicts in order

to help the jury enter a rational verdict." Id. at 23.

The court observed, however, that:

"[a] jury does not necessarily have to state directly how it resolved every important issue in a case to arrive at a rational and fair verdict." Id. at 23.
(citations omitted)

the court further observed that while the case was complex in some respects (involving breach of an insurance contract and resultant damages), the jury did not appear to be overwhelmed by issues and evidence "as might have been the case in a convoluted antitrust or securities regulation matter." Id. The court therefore held that their instructions were not prejudicial, but rather adequately assisted the jury in sorting out the issues. In this case, Appellant's special verdict form was likewise unnecessary.

Moreover, Appellant's proposed instructions were unduly lengthy, complex and repetitive. While Respondent concedes that calculation of damages was inherently difficult (based on Call's confusing evidence), compounding the complexity with complex jury instructions was not necessarily the solution. In many cases, everyday common sense is more valuable than complex, incomprehensible formulas. One need look no further than the testimony of Appellant's legion of experts for a good illustration of this point. The supposed purpose of expert testimony is to assist the jury in resolving the issues before it. In this case,

however, the experts' testimony was of arguably little assistance in this regard because although they all used complicated mathematical formulas, margins and percentages, they arrived at substantially different figures, ranging from \$57,900 to \$191,998. (Appellant's brief, p. 6.) The jury could not have avoided being confused by the experts' testimony and that confusion would have only been compounded by Appellant's requested jury instructions. Furthermore, if, as asserted above, consideration of mitigation was proper, Appellant's requested jury instructions on calculation of damages included no provision for taking it into consideration. Appellant steadfastly maintains that the only correct measure of damages in this case is Call's lost profit on the project at issue. (emphasis added) E.g. Appellant's brief at 21-28. In reality, lost profits or expectation damages constitute the very most liberal recovery possible in any contract action. This rule is a matter of hornbook law, so elementary that reference to supporting authority is unnecessary.

In Utah Farm Production Credit Assn. vs. Cox, 627 P.2d 62, 64 (Utah, 1981), the court said:

"Where a contractual agreement had been breached by a part thereto, the aggrieved party is entitled to [only] those damages what will put in as good

as position as he would have been had the other party performed pursuant to the agreement. . . the aggrieved party may not, either by action or inaction, aggravate the injury occasioned by the breach, but has a duty to mitigate his damages." Id. at 64.

By seeking to preclude consideration of mitigation, and basing the measure of damages in this case solely on the profits lost on this project, Appellant attempts to recover a windfall. (emphasis added) Because Manti breached the contract Call was undisputedly able to accept and earn profits from other projects which Call in fact did. Appellant is not satisfied with the position it would have been in if the contract had not been breached, however. It seeks to recover the profit it might have earned on this project as well as retain the profits earned on other projects. While Appellant is quick to cry "prejudice" to its own cause, it is more than willing to impose prejudicial burdens on Respondent. Appellant's position is therefore grossly unreasonable and should not be condoned.

POINT V

THE COURT DID NOT ALLOW MANTI TO PRESENT IRRELEVANT AND PREJUDICIAL ISSUES AND ARGUMENTS TO THE JURY

Appellant contends that the trial court allowed Respondent to present irrelevant and prejudicial issues and arguments to the jury. Call claims that Respondent presented evidence that the contract was in dispute; that Call was paid for everything he did; that Call could not proceed without

written authority; and that the taxpayer's would have to pay Call. (Appellant's brief p. 27.) These assertions are completely baseless, however. In response to Respondent's attempted to present evidence that even approached these issues Appellant vigorously objected, and the court repeatedly sustained Appellant's objections and carefully instructed the jury as to the evidence. Call introduced the contract into trial. Some consideration of the contract was essential to the determining of damage such as what had been paid to Call and the inspection provision of the contract. The record is devoid of prejudicial statements that taxpayers would have to pay.

POINT VI

THE COURT SHOULD NOT HAVE DIRECTED A VERDICT
IN FAVOR OF CALL FOR AT LEAST \$56,000 OR
AWARDED A NEW TRIAL

Appellant claims that the trial court either should have directed a verdict for at least \$56,000 or awarded a new trial. Appellant bases this argument on the fact that the jury disagreed with its asserted damage figures and awarded Call even less than the least amount calculated by any of Call's witnesses. This should not have come as a complete surprise, however, because the jury was instructed to take mitigation into consideration, while Call's witnesses did not. Assuming, (pursuant to the

discussion presented above), that mitigation evidence was appropriate for the jury's consideration, the jury could have very reasonably taken the \$56,000 figure, subtracted the \$22,000 which Call had already received from Respondent, coupled with a deduction for mitigation to arrive at \$13,440 verdict.

The jury also may have reduced the verdict because of doubts as to the credibility of Call's witnesses and the figures they presented. It certainly would have been difficult to overlook the fact that there were substantial differences between each of the experts' figures. In addition to Call's confusing and contradictory evidence on damages, neither Call himself, nor any of his witnesses would establish that Appellant actually lost money during the relevant time period. See Tr. at 243, 285.7. In fact the jury easily could have drawn an inference from the evidence that despite Respondent's breach, Appellant went on to accept and do other work which put Call Engineering in just as good (or nearly as good) a position as it would otherwise have been. It clearly is within the prerogative of the trier of fact to assess credibility of witnesses and choose between conflicting evidence. See Sorensen vs. Sorensen, 769 P.2d 820, 830-31 (Utah App., 1989). Consequently, the jury reasonably may have concluded that Call's case was not as clear-cut as Appellant believed

it to be.

Appellant emphasizes the fact that Respondent put on very little affirmative evidence to rebut Call's damage figures and claims that its own evidence was uncontroverted. Even the trial court was concerned about this. (Tr. 315-16) In Dairyland Ins. Co., vs. Holder, 641 P.2d 136 (Utah, 1982), the plaintiff raised similar concerns. "It characterize[d] defendant's evidence as 'mere scintilla' based on speculation and inferences." Id. at 138. The court found, however, that the defendant's evidence "constituted more than 'mere scintilla' and the jury reasonably could have reached its verdict based on defendant's evidence, notwithstanding plaintiff's testimony concerning his actions and motives. Id. at 139. In the instant case, Respondent relied on the testimony of David Thurgood and rigorous cross examination to reveal inconsistencies in Appellant's evidence and challenge the credibility in assertions. If there is any evidence upon which the jury could reasonably base its finding, it should stand. See Dairyland, 641 P.2d at 138. Consequently, upon viewing the jury's verdict in light of reasonably inferences that can be drawn from the evidence presented at trial, the verdict must stand.

POINT VII

CALL SHOULD NOT BE AWARDED HIS EXPERT WITNESS FEE COSTS

Appellant argues completely contrary to Utah law

that Call should be awarded costs for his expert witness fees. Utah appellate courts, however, repeatedly have held that expert witness fees in excess of the statutory rates (U.C.A. 21-5-4), are not reimbursable "costs."

See Frampton vs. Wilson, 605 P.2d 771, 773-74 (Utah, 1980);

Sorensen vs. Sorensen, 69 P.2d 820, 832 (Utah, 1989);

Stevens vs. Stevens, 754 P.2d 952, 959 (Utah App. 1988).

Appellant concedes this and admits that its argument is contrary to current Utah law, but argues that the current law is illogical and should be overturned. (Appellant's brief p. 41.)

Appellant relied on Highland Construction Co., vs. Union Pacific Railroad Corp., 683 P.2d 1042 (Utah, 1984), to supports its fees at trial, because under the extraordinary circumstances of the Highland case, the court awarded costs for expert depositions. In Highland, the court found that aware justified because of the complexity of the case. While Appellant emphasizes the complexity of the instant case, it is not nearly as complex as Appellant tried to make it appear. Appellant also fails to recognize the difference between awarding costs for expert fees at trial, as opposed to deposition costs. In Highland the costs awarded did not exceed \$2,500 while in this case Appellant is claiming almost \$10,000. Appellant

duplicated expenses in this case by deposing its experts and calling them to testify at trial as well. Counsel was obviously aware of the added expense this would cause, as well as the near certainty that such expenses would not be recoverable as costs. Respondent should not be penalized for Appellant's inefficient handling of the case. It also should be noted that since Highland, the Utah Court of Appeals has emphasized that despite the necessity of incurring the expense of expert witness fees in the preparation of litigation, they are not chargeable as costs. See Stevens 754 P.2d at 959.

Appellant bemoans the fact that if costs are not awarded for expert witness fees almost all of its \$13,440 verdict will go to experts. An identical argument was asserted in a very recent Utah Court of Appeals case. See Redevelopment Agency of Salt Lake City vs. Dasakalas, 119 Utah Adv. Rep. 70, (Utah App. 1989). Plaintiffs in that case lost their property to condemnation. They argued that they had been deprived of constitutionally mandated just compensation:

"because they [had] been required to expend a considerable portion of their award which was founded on the fair market value of their property, for the services of expert witnesses and other reasonably necessary litigation expenses." Id. at 76.

In response, however, the court concluded that "expert witness fees are not reimbursable 'costs' and upheld

the trial court's refusal to award compensation for expert witness fees incurred to establish the value of the property. Id. at 77. Despite the court's apparent sympathy for plaintiffs' position, it deferred to the legislature for an adjustment of the law. See Id. Consequently, Appellant's fervent plea for an award of costs to cover its expert witness fees is unpersuasive. If the law should be rewritten, this certainly is not the case for it.

CONCLUSION

The only issue to be considered by the jury was to determine damages. The jury was admonished this was their only charge. The jury was properly instructed concerning damage determination.

Call was not prejudiced by either allowing amended pleadings to permit mitigation of damages given the supreme court's instructions or the court's failure to grant a continuance.

The trial on damages was not tainted with irrelevant or prejudicial issues or statements.

The evidence presented in its contradictory nature does not support a directed verdict, a judgment notwithstanding the verdict or a new trial.

Accordingly, this court should affirm the lower court.

DATED this 27th day of Nov., 1989.

Respectfully Submitted,

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PAUL R. FRISCHKNECHT
Attorney for Defendant/Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct
copy of the above and foregoing Respondent's Brief, four
copies thereof to the following, postage prepaid thereon
this 27 day of Nov, 1989, to the following:

Dale F. Gardiner, Esq.
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Robert J. Debry & Associates
4001 South 700 East, #500
Salt Lake City, Utah 84107

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PAUL R. FRISCHKNECHT

ADDENDUM

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am Jur 2d Motions, Rules, and Orders § 1 et seq., 61A Am. Jur 2d Pleading §§ 1 et seq., 238

C.J.S. — 60 C J S Motions and Orders § 1 et seq., 71 C J S Pleading §§ 63 to 210, 140 et seq., 211 et seq

A.L.R. — Proceeding for summary judgment as affected by presentation of counterclaim, 8 A L R 3d 1361

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A L R 3d 1113

Key Numbers. — Motions ⇌ 1 et seq.; Pleading ⇌ 38½ to 186, 187 et seq

Rule 8. General rules of pleadings.

(a) **Claims for relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; form of denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alter-

native and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

Compiler's Notes. — This rule is substantially the same as Rule 8, F R C P

Cross-References. — Amended and supplemental pleadings, Rule 15

Arbitration, § 78-31a-1 et seq

Comparative negligence, § 78-27-38

Counterclaim and cross-claim, Rule 13

Creditors, assignment for benefit of, § 6-1-1 et seq

Defenses and objections, Rule 12

Fee for filing cross-claim or counterclaim, §§ 78-3-16 5, 78-4-24, 78-6-14, Appx G, Code of Judicial Administration

Fellow servant defined, § 34-25-2

Form of pleadings, Rule 10

Forms intended to indicate simplicity and brevity of statement, Rule 84

Forms of answers, Forms 21, 22

Hearing of certain defenses before trial, Rule 12(d)

Interpleader, Rule 22

Motions, forms for, Forms 20, 23 to 24

Numbered paragraphs, Rule 10(b)

One form of action, Rule 2

Reply to answer, order for, Rule 7(a)

Security interest, enforceability of, § 70A-9-203

Special forms of pleadings and writs abolished, Rule 65B(a)

Statute of frauds, generally, § 25-5-1 et seq

Statute of frauds, investment securities, § 70A-8-319

Statute of frauds, sales, § 70A-2-201

Statute of frauds, Uniform Commercial Code, personal property not otherwise covered, § 70A-1-206

Third-party practice, Rule 14

Time for answer, Rules 3(b), 12(a)

Uniform Commercial Code, supplementary principles of law applicable, § 70A-1-103

NOTES TO DECISIONS

ANALYSIS

Affirmative defenses

—Accord and satisfaction

—Pleading

—Time limitation

—Consent

—Election of remedies

—Estoppel

—Failure to plead

—Failure of consideration

—Failure to plead

—Pleading

—Failure to plead

—Affidavit opposing summary judgment

—Denial

—Notice and opportunity

—Waiver of defense

—Fraud

—Necessary allegations

—Mitigation of damages

—Failure to plead

—Pleading

—Mutual mistake

—Statute of frauds

—Motion to dismiss

—Pleading

—Statute of limitations

—Applicability to plaintiffs

—Pleading

—Waiver

—Waiver

Claims for relief

—Amendment of pleading

—Attorney fees

—Essential allegations

—Alienation of affections

—Request for alternative relief

—Sufficiency of complaint

—Attachment of exhibit

—Found not sufficient

—Found sufficient

—Liberal construction

Consistency

—Double recovery

—Election between claims

—Election of remedies under contract

—Res judicata

—Separate claims

—Contract and quantum meruit

Defenses

—Lack of consideration

Purpose of rules

Cited

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties or indemnity from original tortfeasor, 20
§ 188 et seq. A.L.R.4th 338.
C.J.S. — 67 C.J.S. Parties §§ 72 to 84. **Key Numbers.** — Parties ⇌ 49 to 56.
A.L.R. — Defendant's right to contribution

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Compiler's Notes. — This rule is substantially identical to Rule 15, F.R.C.P.

Rule 40. Assignment of cases for trial; continuance.

(a) **Order and precedence.** The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) **Postponement of the trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) **Taking testimony of witnesses present.** If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32 (c)(3)(A) and (B)].

Compiler's Notes. — Following the amendment of Rule 32, effective January 1, 1987, the reference to Rule 32(c)(1) and (2), at the end of Subdivision (c), should now be to Rule 32(c)(3)(A) and (B).

Subdivision (a) of this rule is similar to Rule 40, F R C P.

Cross-References. — Amendment of pleadings to conform to evidence, continuance upon, Rule 15(b).

NOTES TO DECISIONS

ANALYSIS

Postponement

- Absence of party
- Discretion of court
- Inability of counsel to attend trial.
- Unavoidable absence
- New theory of case
- Procedural delays
- Supporting affidavits
- Unavailable witness
- Lack of diligence
- Need

Cited

Postponement.**—Absence of party.**

Continuance would not be granted because of absence of a party, unless he was a material witness, and, if so, the facts expected to be proved by him had to be stated under oath, unless the oath was waived. It was also neces-

sary that party had used due diligence to be present at the trial. *McGrath v Tallent*, 7 Utah 256, 26 P 574 (1891).

Refusal of trial court to postpone trial was not abuse of discretion where case was set down for trial, and had once before been continued because of absence of party who was principal witness, and second continuance was sought by attorney who was not of record in case. *Lancino v Smith*, 36 Utah 462, 105 P 914 (1909).

Refusal to grant continuance in personal injury case was an abuse of discretion where plaintiff was not able to attend the trial because of his physical condition, there was no evidence of malingering by the plaintiff, and the plaintiff's testimony was essential to his case. *Bairas v Johnson*, 13 Utah 2d 269, 373 P 2d 375 (1962).

—Discretion of court.

Denial of motion for continuance was within

separate line item appropriation contained in the appropriation to the Judicial Council.

(2) If expenses exceed the line item appropriation, the administrator of the courts shall submit a claim against the state to the Board of Examiners and request the board to recommend and submit a supplemental appropriation request to the Legislature for the deficit incurred.

History: C. 1953, 21-5-1.5, enacted by L. 1989, ch. 153, § 5. became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1989, Chapter 153

21-5-4. Witness fees and mileage.

(1) Every witness legally required or in good faith requested to attend a circuit or district court, or a grand jury, is entitled to \$17 per day for each day in attendance and if traveling 50 miles or more, 25 cents for each mile actually and necessarily traveled in going only.

(2) If a witness is attending from outside the state in a civil case, mileage for him is allowed at the rate of 25 cents per mile and taxed for the distance actually and necessarily traveled inside the state, in going only.

(3) If the witness is attending from outside the state in a criminal case, the state shall reimburse the witness under Section 77-21-3.

(4) If a witness is attending from outside the county but from within the state in a civil case or criminal case, mileage for him is allowed at the rate of 25 cents per mile and taxed for the distance actually and necessarily traveled, in going only.

(5) A prosecution witness or a witness subpoenaed by an indigent defendant attending from outside the county but within the state may receive reimbursement for necessary lodging expenses under rule of the Judicial Council.

History: R.S. 1898 & C.L. 1907, § 994; L. 1911, ch. 9, § 1; C.L. 1917, § 2545; L. 1925, ch. 96, § 1; R.S. 1933, 28-5-4; L. 1937, ch. 30, § 1; C. 1943, 28-5-4; L. 1951, ch. 41, § 1; 1977, ch. 98, § 1; 1988, ch. 152, § 10; 1989, ch. 153, § 6.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, divided the former section into Subsections (1) and (2); substituted "a circuit" for "upon a city" following "attend" in Subsection (1); added Subsection (3); and made minor stylistic changes.

The 1989 amendment, effective April 24, 1989, in Subsection (1), substituted "\$17" for "\$14" and substituted "if traveling 50 miles or more, 25 cents" for "30 cents"; inserted "at the rate of 25 cents per mile" in Subsection (2); and added Subsections (4) and (5).

A.L.R. — Requirements, under Rule 45(c) of Federal Rules of Civil Procedure and Rule 17(d) of Federal Rules of Criminal Procedure, relating to service of subpoena and tender of witness fees and mileage allowance, 77 A.L.R. Fed. 863.

21-5-4.5. Allocation of food allowance costs for jurors.

(1) Jurors serving in a criminal action in district and circuit court may be provided with reasonable food allowances at the expense of the state under the rules of the Judicial Council.

(2) When a jury in a criminal action in the district and circuit court has been placed in sequestration by order of the court, the necessary expenses for food and lodging shall be provided at the expense of the state under the rules of the Judicial Council.

(3) These provisions also apply to any jury trial held in the juvenile court.