

2002

Victor Price v. Utah Power and Light Company, a Utah corporation, and David Zserai : Brief of Respondent

Utah Supreme Court

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BRIEF

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DOCKET NO. 20568 **IN THE SUPREME COURT**

OF THE STATE OF UTAH

VICTOR PRICE, :
Plaintiff-Respondent, :

vs :

UTAH POWER & LIGHT COMPANY, :
A Utah Corporation, and
DAVID ZSERAI, :

Defendants-Appellants.: Case No. 20568

BRIEF OF RESPONDENT

Appeal from Judgment and Orders of the Seventh
Judicial District Court of Emery County, The Honorable
Judge, Boyd Bunnell, Presiding.

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SEP 30 1985

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IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR PRICE, :
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DAVID ZSERAI, :
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BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

- POINT I - WHETHER THIS COURT ON APPEAL IS
PRECLUDED FROM HEARING ISSUES
RAISED FOR THE FIRST TIME IN A
POST JUDGMENT MOTION.
- POINT II - WHETHER THE TRIAL COURT ABUSED ITS
DISCRETION BY IT'S DENIAL OF MOTION
FOR NEW TRIAL WHICH WAS BASED ON
GROUNDS OF INSUFFICIENCY OF EVIDENCE
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CASE.
- POINT III - WHETHER THE TRIAL COURT COMMITTED
PREJUDICIAL ERROR IN DENYING
DEFENDANTS MOTION FOR NEW TRIAL
WHICH WAS BASED ON DENIAL OF
DEFENDANTS REQUEST TO FURTHER
VOIR DIRE THE JURY WITH REGARD TO
POSSIBLE PREJUDICE.

STATEMENT OF THE NATURE OF THE CASE

Respondent claimed damages for injury suffered as a result of Appellants' negligence.

DISPOSITION IN THE LOWER COURT

Trial was held to a jury November 27 and 28, 1984. Judgment in the amount of \$140,715.00 plus interest and costs was entered upon verdict of the jury in favor of Respondent. (Addendum 1). Appellants moved for judgment notwithstanding the verdict or, in the alternative, motion for new trial. Following submission of memoranda and oral argument by the parties the trial judge ruled by memorandum decision denying Appellants' motions. (Addendum 8). This appeal followed said decision.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order from this court affirming the judgment and order of the trial court.

STATEMENT OF FACT

Plaintiff-Respondent, Victor Price, hereinafter referred to as Mr. Price, claimed damages against Defendants-Appellants Utah Power & Light Company and David Zserai, hereinafter referred to as U.P.&L. for personal injury suffered by Mr. Price as a result of U.P.&L.'s negligent operation of a

a piece of heavy equipment which frightened the animal which Mr. Price was riding causing it to bolt. In an attempt to control the animal Mr. Price braced himself on the saddle with his right arm, pulled the rein with his left to turn the mule into a circle. Mr. Price suffered a nerve injury resulting in loss of use and shriveling of his right arm. (Trans. 62, 67, 68, 81). Jury trial was held November 27 and 28, 1984. The jury decided that U.P.&L. was 90% negligent in the operation of heavy equipment on September 15, 1981. (Addendum 1). Negligence of U.P.&L. is not raised as issue on appeal and therefore will not be treated by Respondent in Statement of Fact. The jury also found that U.P.&L.'s negligence was the proximate cause of damages sustained by Mr. Price. (Addendum 1).

Prior to his injury Mr. Price had been a self-employed rancher for 45 years. (Trans. 45). Mr. Price had been treated through the years by chiropractors. Mr. Milton K. Thayn, chiropractor, first saw Mr. Price in January 1978. Mr. Price was complaining of a stiff neck. (Trans. 207), Dr. Thayn took x-rays, (Trans. 208), and gave a grip test (Trans. 210) finding weakness in both arms but found the right arm had more strength than the left. (Trans. 211). He diagnosed a thorasic sprain (Trans. 211) meaning injury to a muscle, ligaments and connective tissue. (Trans. 212). Following treatment which ended May 8, 1978 (Trans. 215) Dr.

Thayn noticed a general improvement in all conditions previously noted in Mr. Price. (Trans. 215). Dr. Thayn did not feel Mr. Price's treatment required referral to a neurologist and gave no tests for neurological damage other than the grip tests earlier referred to. (Trans. 216). Dr. Thayn testified that in his opinion subsequent trauma would aggravate Mr. Price's condition (Trans. 216) and that a ride on a bolting mule such as Mr. Price had, would cause injury to the neck. (Trans. 217).

Mr. Price saw Ronald B. Sanders, Chiropractor in July 1978 (Trans. 154) tested Mr. Price's neck flexion and found it limited (Trans. 158-159) and examined x-rays previously taken (Trans. 161) and diagnosed tight neck muscles. (Trans. 163). Dr. Sanders treated Mr. Price with soft tissue and spinal manipulation (Trans. 163) until September 1979 (Trans. 166) and did not see him again until August 20, 1981 when he treated Mr. Price by pulling and stretching his neck. (Trans. 167) Similar treatment was given four times between August 20 and September 9, 1981. (Trans. 168).

On September 16, 1981 Mr. Price saw Dr. Sanders, told him of the incident on the mule. (Trans. 169). At no time during his treatment of Mr. Price did Dr. Sanders feel that his condition was such as to require medical treatment until December 1981 (Trans. 175) when the condition complained of on September 16, 1981 had not responded to treatment and

deterioration of Mr. Price's right hand was noted. (Trans. 176). Dr. Sanders testified that a severe strain or twist could aggravate the weakness in the cervical spine. (Trans. 177). Appellant cites two hospitalizations as proof that Mr. Price had a pre-existing neurological or cervical problem in support of his argument that something other than the incident of September 15, 1981 cause Mr. Price's injury. The facts are as follows:

In 1968 Mr. Price was admitted to Carbon Hospital for treatment of fracture of ribs, left chest and contusion of left leg as per discharge summary and discharge record. (Addendum 2, Defendant Exhibit 24). There is no evidence of any injury to neck, spine, arm or head. (Addendum 2, Defendant Exhibit 24).

In 1977 Mr. Price was again hospitalized. He was treated for multiple contusions, laceration of scalp and broken left arm. There was "no deformity" of back and no neurological problems noted. (Addendum 3, Defendant Exhibit 23). His right arm was not treated, nor any injury noted, he was not treated for any injury to neck or back, although x-ray was taken of cervical, thoracic and lumbar spine. (Addendum 4, Defendant Exhibit 23).

Mr. Price was admitted into the hospital again in January 1981 for prostate surgery. Condition of his back was noted as "no deformity" and neurological condition was noted

as "reflexes are normal." (Addendum 5, Defendant Exhibit 25). This examination was only nine months prior to the incident on Spetember 15.

Other than Appellant's repeated reference to injury to Mr. Price's right arm there is no evidence that his right arm was injured, diagnosed as injured or treated for injury prior to September 15, 1981.

Dr. Demman, who was Mr. Price's treating physician and who referred Mr. Price to Dr. Guafin, Neurologist, died shortly before trial. Dr. Demman was obviously not available to testify. Dr. Gaufin's reports were admitted into evidence by stipulation of Counsel. (Trans. 66). Mr. Price testified that immediately after the incident with the mule he was sore through the shoulders and neck (Trans. 55) and the next day he could tell he was hurting, getting sore and feeling dizzy. (Trans. 56). He testified that two or three days later he saw Dr. Sanders because his hip was hurting real bad, his neck was hurting, his chin was numb and his hand was numb. Dr. Sanders referred Mr. Price to Dr. Demman, who referred him to Dr. Gaufin.

On November 11, 1984 U.P. & L. requested a jury trial in the case on appeal herein (Addendum 6). Bias was anticipated by U.P. & L. as evidenced by their questions on voir dire. (Trans. 31, 32, 42). There was no motion for change of venue made by U.P. & L. From a panel of 38 (Trial Record),

a jury was selected from the first twenty names called. (OTrial Record p. 124). Four employees or spouses of employees of U.P. & L. were excused by the court prior to the initial call for fourteen jurors. (Trans. 5, 6).

Juror Wilson was excused by the court because he felt his experiences with U.P. & L. through Emery Mining would possibly bias his decision. (Trans. 33). His excuse was a result of voir dire question proposed by counsel for Appellant. (Trans. 32).

Juror Jensen was excused because she felt she would be biased in favor of a farmer. (Trans. 32).

Juror Leamaster was excused by the court because her brother was involved in litigation against U.P. & L. (Trans. 20, 21).

Juror Lake was excused by the court because his association with Mr. Price could possible influence him. (Trans. 17).

Juror Gregersen was excused by the court because he was a neighbor of Mr. Price. (Trans. 36 37).

Juror Cox was excused by the court because she knew Mr. Price had been an employee of U.P. & L. at the time of incident and had heard about the case. (Trans. 37).

Jurors were called from the panel to replace the six excused for cause as they were excused. County for U.P. & L. challenged no juror for cause. Counsel for U.P. & L. did not object to the Court's denial of his request to ask if

connection between U.P.& L. and Emery Mining layoffs would affect the jurors impartiality. (Trans. 42). Counsel for U.P.& L. at no time objected to the panel's size nor construction. Counsel for U.P.& L. passed the jury for cause (Trans. 43). The final panel of fourteen was constituted as follows:

1. Hannert - An employee laid off from Emery Mining. (Trans. 10).
2. Burnside - Husband laid off IPP. (Trans. 11).
3. Nelson - Employee of Emery County Road Department, (Trans. 11, Defendant preempt #2, Addendum 7).
4. Justesen - An employee of Emery Mining. (Trans. 12).
5. Humphry - Employee of Emery County Road Department. (Plaintiff's preempt #1, Addendum 7).
6. Adams - Coal miner at Plateau Mine. (Trans. 12).
7. Shorts - Hardware store owner. (Trans. 12).
8. Spigarelli - School teacher, husband disabled Emery Mining. (Trans. 13). Counsel for U.P.& L. directed voir dire to her regarding bias. (Trans. 42, Plaintiff preempt #2, Addendum 7).
9. Staley - Employed Emery Mining. (Trans. 13).
10. Fuller - Employee of Nelson Construction. (Trans. 13, Plaintiff preempt #3, Addendum 7).
11. Allred - Employee of Emery Mining. (Trans. 18).
12. Rasmussen - Retired pipe fitter. (Trans. 21).

13. Ekker - Employed Green River Medical Center;
husband, self-employed. (Trans. 37, 38).
14. Hayward - Laid off Emery Mining. (Trans. 38,
Defendant preempt #1, Addendum 7).

Of the eight jurors selected, the only jurors connected with U.P.& L. or Emery Mining were three jurors who were presently actively employed by Emery Mining Company.

At the close of Plaintiff's case, Defendant moved for a directed verdict on the sole ground of insufficiency of the evidence with respect to negligence. (Trans. 110). Said Motion was denied. (Trans. 112).

On January 21, 1985, U.P.& L. filed Motion for Judgment Notwithstanding the Verdict or, alternatively, Motion for New Trial. (Trial Record p. 176-177). The issue of insufficiency of evidence of causation was raised for the first time in Motion for Judgment Notwithstanding the Verdict.

The issue of insufficiency of evidence and jury bias were raised for the first time as issues in Motion for New Trial.

Memoranda of Points and Authorities in support of said motions was filed by U.P.& L. (Trial Record p. 180-215). Plaintiff's objection and supporting Memorandum was filed January 30, 1985 (Trial Record p. 219-238). Argument was heard by the court on February 13, 1985 (Trial Record p. 239) and the court took the matter under advisement; entering its findings in Memorandum Decision entered February 28, 1985.

(Trial Record p. 240-244, Addendum 8). Said decision denied Motion for Judgment Notwithstanding Verdict and Motion for New Trial. This appeal followed.

SUMMARY OF ARGUMENT

The issues raised by Appellant on appeal were not timely raised before the trial court, therefore, this court is precluded from hearing the appeal.

There was, as the trial court found, sufficient evidence of causation to support the jury verdict in favor of Plaintiff.

There was no error in the trial court's denial of Defendants request that voir dire include an additional query regarding prejudice against Defendant and, if there was error, it was harmless.

ARGUMENT

POINT I

WHETHER THIS COURT ON APPEAL IS PRECLUDED FROM HEARING ISSUES RAISED FOR THE FIRST TIME IN A POST JUDGMENT MOTION.

Appellant requested the jury, anticipated bias, made no motion for change of venue, did not object to the courts' denial of its request to voir dire the jury regarding bias as a result of lay offs at Emery Mining, and challenged no individual juror for cause. It is obvious that any possible jury bias was known to Appellant upon conclusion of voir dire.

Appellant passed the jury for cause.

Appellant did not raise the issue of insufficiency of the evidence with regard to causation at any time during the trial. Appellants' Motion for Directed Verdict rested solely on the issue of negligence; the only issue of law reserved for later determination. (URCP 50, Addendum 9). It is obvious that the issue of insufficiency of evidence, if any, would have been apparent to Appellant at the close of Plaintiff's case. It was not raised.

In post judgment proceedings, Appellant raised the issues of jury bias and sufficiency of the evidence regarding causation for the first time; in its Motion for New Trial.

This court has held in Barson v. E. R. Squibb & Sons, Inc., 682 P2d 832 (Utah 1984):

In order to preserve a contention of error on appeal, the party claiming error in admission of evidence must raise the objection to the trial court in clear and concise terms and in a timely fashion calculated to obtain a ruling thereon. Where there was no clear and definite objection on the basis of hearsay, that theory cannot now be raised on appeal. Squibb did raise a hearsay objection after judgment was entered in the case. However, issues raised for the first time in post-judgment motions are raised too late to be review on appeal. Therefore, we are precluded from addressing this assertion of error on the merits. at 837, citing.

Barson deals with timely objection to admissibility of

1. U.R.E. 4; Cook Assocs. Inc. v. Warnick, Utah, 664 P2d 1161 (1983). State v. Malmrose, Utah 649 P2d 56 (1982). Franklin Financial v. New Empire Dev. Co., 659 P2d 1040 (Utah 1983).

evidence.

The Supreme Court of Arizona, in a case like the case at bar wherein a Motion for New Trial on the grounds of insufficiency of the evidence was made after a jury verdict, finding that the issue in question involved a Constitutional right, (eminent domain) the court agreed to hear the matter, but said:

It is the general law that:

"... a question or objection may not be raised for the first time on a motion for new trial, and a party may not speculate on the verdict by failing to raise a matter as to which he has knowledge and then raise it for the first time on a motion for a new trial." 66 C.J.S. New §13b, p.104.

In our own state, we have the following pronouncement from our Supreme Court:

"Parties may not sit by and allow error which is not fundamental, to be committed without protesting and asking the trial court to correct the error at the time, and then later, when the judgment goes against them, ask for a new trial on that ground." (Emphasis Added). Southern Arizona Freight Lines v. Jackson, 48 Ariz. 590, 518, 63 P2d 193, 197 (1936).²

In the case of Agranoff v. Morton, 340 P2d 811 (1959), a case involving failure to take exception to jury instruction, the Washington Court said:

It is the duty of counsel for all parties to promptly call the court's attention to any error in the trial. Counsel may not secretly nurture an error, speculate upon a favorable verdict, and then, in the event it

2. Deer Valley Industrial Park Dev. & L. Co. v. State, Ariz. 5, Ariz. App. 150, 424 P2d 192, (1967).

is adverse, bring forth the error as a life preserver on a motion for a new trial.

The supreme court of Pennsylvania recently held:

"... The rule has been stated over and over again that a party may not remain silent and take his chance on a verdict and then, if it is adverse, complain of some inadequacy which could have been quite easily corrected. See Susser v. Wiley, 1944, 350 Pa. 427, 39 A.2d 616; Rastmus v. Pennsylvania R. Co., 1949, 164 Pa. Super. 635, 639, 640, 67 A.2d 660; Stadham Co. v. Century Indemnity Co., 1950, 167 Pa. Super. 268, 275, 74 A.2d 511..." Bodine v. Boyd, 383 Pa. 525 119 A.2d 54, 276.

This specific problem was dealt with in Weinrob v. Heintz, 346 Ill. App. 30, 41, 104 N.E. 2d 534, 539, as follows:

"...An objection to the submission of the issue of fact to the jury must be made before the case is given to the jury. After the case has been submitted to the jury and a verdict has been returned it is too late to make or for the court to rule on the objection. Such objection, made for the first time on a motion for a new trial, is of no avail. A party is not permitted to lie by and speculate on his chances for a verdict and then raise objections which should have been raised during the trial. Goldschmidt v. Chicago Transit Authority, 335 Ill. App. 461, 467, 82 N.E.2d 357."

Respondent's counsel made no request for a direction on the issue of liability. Had such a request been seasonably made, it would have been granted without objection. Had it been denied, respondent would have been in a position to urge it upon a motion for a new trial and, if necessary, then upon appeal. But he may not remain silent when

it is time to speak, and then urge
it for the first time on a motion
for a new trial.

The issues raised on this appeal were or should have been apparent to Appellant at least by mid-trial. They were not raised in motion for directed verdict. Appellant chose to await the jury verdict, which did not weigh in his favor, before raising the issues by way of Motion for New Trial, the same issues now raised on appeal.

Respondent raised the issue of untimeliness at hearing on February 13, 1983 on Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. (Trial Record). The issues raised by Appellant were untimely raised before the trial court and preclude consideration by this court.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY IT'S DENIAL OF MOTION FOR NEW TRIAL WHICH WAS BASED ON GROUNDS OF INSUFFICIENCY OF EVIDENCE OF CAUSATION TO ESTABLISH A PRIMA FACIE CASE.

This court repeatedly held that the trial court has extensive discretion when granting or denying a new trial on the grounds of sufficiency of the evidence.

The established standard for appellate review provided:

...This court cannot substitute its discretion for that of the trial court, and this court will not interfere with such rulings, unless the abuse of, or failure to exercise, discretion on the part of the trial judge is clearly shown. If, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to material issues of fact in the case relative to which the insufficiency is alleged, this court must hold as a matter of law that no abuse of discretion is shown.

... If the evidence, taken as a whole, be reasonably susceptible of opposite conclusions as to the existence or nonexistence of an ultimate fact depending upon inferences to be drawn therefrom, or the weight to be given to the testimony of this or that witness, or set of witnesses, we must conclusively presume the fact to be such as will support the ruling which we are called upon to review; but if, after giving due consideration to the fact that the trial judge is better able to weigh conflicting evidence, the evidence be such nevertheless as to impel but one reasonable conclusion, and that as to a fact adverse to the ruling, it would be our duty as an

appellate court to so declare,
notwithstanding there might be
some conflict in the evidence.
[Citations Omitted].³

This rule was further refined by this court in the
case of Nelson v. Trujillo, 647 P2d 730 (Utah 1982) as
follows:

Where the trial court has denied the
motion for a new trial, its decision will
be sustained on appeal if there was "an
evidentiary basis for the jury's decision
..." The trial court's denial of a
motion for a new trial will be reversed
only if "the evidence to support the
verdict was completely lacking or was
so slight and unconvincing as to make
the verdict plainly unreasonable and
unjust." McCloud v. Baum, Utah, 569 P2d
1125, 1127 (1977); Pollesche v. Transamerican
Insurance Company, 27 Utah 2d 430, 497
P2d 236 (1972).

The trial court in its Memorandum Decision (Addendum
8, p.3) citing Lindsay v. Gibbons & Reed, 27 Ut.2d 419,
497 P2d 28 (19__), found:

...[T]he court feels that there was
sufficient evidence presented from
which reasonable minds could conclude
that there is a greater probability that
the conduct relied upon was a proximate cause
of Plaintiff's resulting injuries.

When, at trial, there exists a jury question with regard

3. Pollesche v. Transamerican Insurance Company, 27 Utah 2d 430,
497 P2d 236 (1972); See also, Egbert & Jaynes v. R. C. Tolman
Const., 680 P2d 746 (Utah 1984); Schmidt v. Intermountain
Health Care, Inc., 635 P2d 99, (Utah 1981), citing, Smith v.
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Lembach v. Cox, 639 P2d 197 (Utah 1981); Smith v. Vivcich,
8UAR5, (Utah 1985), citing Bundy v. Century Equipment Company
slip.op. 18270, filed November 2, 1984, McCloud v. Baum, 569
P2d 1125 (Utah 1977).

to an ultimate fact in issue it is not error for the trial court to deny a Motion for a New Trial based on a claim of insufficiency of the evidence.⁴

The trial court below found there was sufficient evidence to support the jury's verdict.

In this case as in Robinson v. Hreinson, 17 Utah 2d 261, 409 P2d 121 (Utah 1965):

The parties have had what they were entitled to: a full and fair opportunity to present their contentions and the evidence supporting them to the court and jury. When this has been done all presumptions are in favor of the validity of the verdict and judgment. at 125.

The trial court in its Memorandum Decision outlined the evidence presented at trial which the court found supportive of that decision. (Addendum 8, p.3,4).

Rule 701 of the Utah Rules of Evidence provides that lay testimony is admissible if the layman's inferences or opinions are rationally based on the perception of the witness and are helpful to a clear understanding of his testimony or to a determination of the fact in issue. (Addendum 10). Rule 702, Utah Rules of Evidence provides that experts may testify but does not provide for any situation in which such testimony is mandatory. (Addendum 10).

In Roods v. Roods, 645 P2d 640 (Utah 1982), the Utah Supreme court held that lay opinion regarding the human

4. Moore v. James, 5 Utah 2d 91, 297 P2d 221 (Utah 1956).

gestation period was proper even though expert testimony would be admissible with respect to the issue.

In the case at bar, Plaintiff also was in a position to observe and perceive his injuries; when and how they occurred. Plaintiff testified at trial that the accident on September 15, 1981 caused his mule to bolt. Mr. Price testified that, attempting to turn the mule and thus stop him, he twisted his body and exerted a tremendous amount of force. He pulled on the reins with his left hand and pushed on the saddle with his right hand so forcefully that at the end of the ordeal the bit in the mule's mouth was bent. Plaintiff observed, and testified, that subsequent to this accident he experienced severe pain and numbness in his arm, his muscles shriveled and he lost the use of his right hand. None of these symptoms were apparent, diagnosed or treated prior to the accident.

In A. E. Egede Nissen v. Crystal Mountain, Inc., 93 Wash. 2d 127, 606 P2d 1214 (1980), the Washington court found no abuse of discretion in the trial court's allowing Plaintiff to testify concerning the causal relation between injuries suffered in an accident and back problems suffered during a subsequent pregnancy. It said:

In direct examination, plaintiff was asked if, during pregnancy, she had problems resulting from the ski lift accident. Arguably, the challenged question called for a medical conclusion by a law witness. Plaintiff should not be foreclosed, however, from

comparing the pregnancy and birth of her first child, prior to the accident, with the pregnancy and birth of her second child, subsequent thereto. Under properly formulated questions, plaintiff is qualified to explain differences in pain or discomfort in the two births. at 1221.

In this case, Mr. Price was likewise qualified to explain the differences in his condition before and after his injury.

Appellant, in the case at bar, made no objection to Mr. Price's testimony. In the case of Barnett v. Richardson, 415 P2d 987 (Okla. 1966) the court held that where an injury is patent, objective rather than subjective, the Plaintiff is competent to testify as to the injury, the treatment received therefore, and the reaction of such treatment and that the testimony is sufficient for the jury to render a verdict and that no expert medical testimony is necessary. The time of Mr. Price's injury, the onset of his pain and discomfort, his shriveled arm and the loss of use of that arm, were patent and objective indices of injury.

In Marsh v. Irvine, 22 Utah2d 154, 449 P2d 996 (1969), a personal injury action resulting from an automobile collision, the court held that the trial judge should be allowed reasonable latitude of discretion both as to the necessity for expert testimony and as to the qualification of the witness to give it.

Plaintiffs' testimony and records of his medical history revealed that although Mr. Price was extensively examined by medical doctors there was no prior medical diagnosis of the type of injury from which he suffered after the incident of September 15, 1985. This evidence was sufficient to allow the jury to infer that the accident in question was the cause of the injuries Plaintiff suffered.

It is proper to establish causation through circumstantial evidence.⁵ When a jury can draw correct inferences from the facts, expert opinion is not necessary.⁶

At trial Plaintiff introduced evidence from which a jury could find causation. Defendant, on the other hand, attempted to prove a pre-existing injury from which the jury could infer the absence of causation.

The fact that the Defendants introduced the testimony of chiropractors regarding pre-existing injury and Plaintiff's evidence consisted of his own testimony augmented by documentary evidence does not require that the jury attribute more weight to the chiropractors' testimony.

In Dixon v. Stewart, 658 P2d 591 (1982), the court held that:

[N]o matter how arcane the subject matter or how erudite the witness, the jury is not required to accept the experts' testimony as conclusive. The jurors may give such testimony any weight they choose, including no weight at all. p.597.

5. Lindsay v. Gibbons & Reed, supra: at p.

6. Daz v. Lorenzo Smith & Son, Inc., 17 Utah2d 221, 408 P2d 186 (1965).

The court in Hurler v. The Industrial Commission, 13 Ariz. App. 66, 474 P2d 73 (1970) held that if the medical opinion conflicts with the inescapable legal conclusion gleaned from the facts, the former must give way to the latter. Medical testimony is not, therefore, conclusive. Given this fact and given the fact that lay testimony is sufficient in the instant case to enable the jury to find causation, medical testimony is not required.

Unless the doctor is a witness to an accident he must rely on his patient's statement of history to determine causation. Medical reports in evidence refer to Mr. Price's accident. (See Gaufin letter of May 10, 1982. (Plaintiff Exhibit 4, Addendum 11).

No reports admitted indicated any question that the incident of September 15, 1981 resulted in the injury for which they treated Plaintiff. This letter was introduced into evidence, by stipulation. Defendant neither disputed nor rebutted it's contents.

Plaintiff produced sufficient evidence to warrant taking the issue of causation to the jury. The testimony of Doctors Thayn and Sanders support Plaintiffs' testimony and the medical evidence which was before the jury. The terms used by the doctors meets the standard established by this court;

The general rule regarding the certainty of an expert's opinion is that of the expert may not give an opinion which represents

a mere guess, speculation, or conjecture. See 2 Jones on Evidence, §14:29 (6th ed. 1972). Expert medical opinion evidence based on a probability, possibility, or likelihood has been admitted, however, where the witnesses expressed statements in language which sufficiently represented their own best judgment to a reasonable certainty. Jones on Evidence, supra, at 663-64, explains the distinction as follows: Although there are limits as to how uncertain an expert may be in his opinions there is still the question of how certain he may show himself to be with respect to them ... [T]he witness may use such language as expresses his actual state of mind on the matter, whether it be in terms of possibility, probability, or actuality. This is commonly described as testimony that a result might, could, or would follow from a given state of facts. [Citations Omitted].⁷

It is important to note the case of Rowe v. Maule Drug Company, 196 Kansas 489, 413 P2d 104 (1966) a case wherein the court held that the medical testimony objected to as mere possibility, was an honest expression of professional opinion of causal connection and also held that medical testimony of possibility plus lay testimony together are sufficient to establish a causal connection.

The case of Curtis v. General Motors Corp., 649 F2d 808 (10th Cir. 1981), cited by Defendants, is distinguishable in that it is a products liability case and therefore espouses a narrow rule of law within the confines of the crashworthiness doctrine. Whether or not this particular roof caused more

7. State v. Jarrell, 608 P2d 218, (Utah 1980).

injuries to Plaintiff than he would have otherwise suffered in a roll over accident is a question that centers on the kind and quality of roof - a subject about which jurors can only speculate. They cannot compare Plaintiff's injuries in this case with Plaintiffs' injuries in a roll over accident involving the crashworthiness of a vehicle roof. In the instant case, however, the jurors can compare Plaintiffs' injuries before and after the accident and logically infer causation. There was sufficient evidence introduced to take the case to the jury. The jury could infer from the evidence before it that the accident from which the case arises and Plaintiffs' injuries were causally related. Although, the evidence on issue of fact was disputed and reasonable people might arrive at different conclusions. The issue was decided by the jury. Their decision should not be disturbed on appeal.⁸

The trier of fact was thoroughly instructed, at Defendants request, on the issue of causation. (Instruction 18, 19, 25; Addendum 12, 13, 14).

Viewing the evidence in a light most favorable to Mr. Price, the established standard for appellate review,⁹ this Court should sustain the decision of the trial court¹⁰ and deny appellants request, on appeal, for a new trial.

8. Smith v. Vivcich, 8UAR 5, 1985.

9. Gustaveson v. Gregg, 655 P2d 693 (Utah 1982).

10. McCloud v. Baum, 569 P2d 1125 (Utah 1977); Egbert & Jaynes v. R.C. Tolman, supra; n.3, citing Charlton v. Hackett, 11 Utah 2d 389 360 P2d 176 (1961) and URCP 59(a)(6), Addendum 15, p. 1).

POINT III

WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR
IN DENYING DEFENDANTS MOTION FOR NEW TRIAL WHICH WAS BASED
ON DENIAL OF DEFENDANTS REQUEST TO FURTHER VOIR DIRE THE JURY
WITH REGARD TO POSSIBLE PREJUDICE.

Appellants claim of error and request on appeal that this court order a new trial is apparently grounded upon the size of the verdict which the jury returned in favor Respondent. URCP59(a)(5), (Addendum 15,p.1).

The recent case of Bennion v. Legrand Johnson Construction, 11 UARP 33 (Utah 1985) involved a claim on appeal that damages awarded were excessive and appeared to have been given under passion or prejudice. This court outlined applicable Utah law:

Obviously a jury must have some latitude in the exercise of its judgment in awarding damages. It has been stated that "juries are generally allowed wide discretion in the assessment of damages." A reviewing court will defer to a jury's damage award unless the award indicates that the jury disregarded competent evidence, or that the award is so excessive beyond rational justification as to indicate the effect of improper factors in the determination, or that "it clearly appears that the award was rendered under [a] misunderstnading." To justify a new trial for excessive damages under Rule 59(a)(5), Utah R. Civ. P., the damage award must be more than generous; it must be clearly excessive on any rational view of the evidence. at 36. [Citations Omitted].

The jury in this case was instructed thoroughly and correctly in the applicable law of damages. All instructions given on the damage issue were given at the request of Defendants. They were told that general damages could be awarded to Plaintiff which would fairly and adequately compensate him for mental and physical harm, its duration and severity, the extent he prevented from pursuing his normal affairs of life, loss of earning capacity and future damage of the same kind. (Instructions 20, 22, 23, 24, Addenda 16, 17, 18, 19). Instructions 26, 27, 28, 29, and 32, (Addenda 20, 21, 22, 23, and 24) cautions the jury with regard to limitations on their calculation of said damage.

As in Bennion the trial court in the case presently before this court found that there was adequate evidence of aggravation of Mr. Price's physical condition and loss of income to justify the damage award. (Addendum 8, p.2).

In the absence of any proof on the record of actual juror bias,¹¹ Appellant argues the possibility of juror bias allegedly transferring itself to Defendant, U.P.& L., as a result of lay offs at Emery Mining Company.

Several cases cited by Appellant to support its argument that the trial court committed prejudicial error in its voir dire of the jury require distinction.

In the case of Anderson v. Montgomery, 607 P2d 838, (Utah 1980), this court found that discovery after trial, of an

11. Hanson v. General Builders Supply Co., 15 Utah 2d 143, 389 P2d 61 (1964).

attorney client relationship between Defendant's counsel and juror did not materially affect Plaintiffs right to an impartial jury and did not constitute prejudicial error.

In Jenkins v. Parrish, 627 P2d 533 (Utah 1981) the case was reversed and remanded on three grounds; one of which was a statement by a juror on voir dire that she might be biased in favor of Defendant. Plaintiff's Motion for removal of this juror for cause had been denied.

State v. Ball, 685 P2d 1055 (Utah 1983), was a criminal case (driving under the influence of alcohol) which was vacated and remanded when the court would not further voir dire four witnesses whose answers indicated a possible bias against the use of alcohol which was a material issue in the case.

The trial court in this case excused on it's own Motion all those who indicated the slightest possibility of bias.

The trial judge has broad discretion in the manner in which voir dire is accomplished.¹² In this case the trial judge conducted extensive voir dire, excusing jurors on the court's motion for hints of bias that have, which in other cases have been found to fall outside the scope of the applicable rule. URCP 47(f). (Addendum 25). The trial court felt and stated on the record that the question proposed by Appellant had been adequately dealt with in another question (Trans. 42) in which the Court asked:

12. Utah State Road v. Marriott, 21 Utah 2d 238, 444 P2d 57 (1968), State v. Dixon, 560 P2d 318 (Utah 1977), State v. Lacy, 665 P2d 1311 (Utah 1983), Maltby v. Cox Const. Co., Inc., 598 P2d 336 (Utah 1979).

...Have any of you had any experiences whatsoever that might make you not consider the said advocated by Utah Power & Light or give it less weight or more weight because of some dealings you might have had, other than an open dispute...[Trans. 33, Emphasis Added].


The jury was thoroughly instructed by the court regarding impartiality. (Instructions 3, 9, 12, 23, 25, 29, Addendum 26, 27, 28, 18, 14, 23).

There is no basis to Appellant's claim that the trial court abused its discretion. The decision rendered below should be upheld on appeal.¹³

CONCLUSION

Judgment on verdict of the jury should be affirmed.

Respectfully submitted,


MARLYNN BENNETT LEMA
ATTORNEY FOR RESPONDENT,
VICTOR PRICE

13. Maltby, supra at N.12.

IN THE SUPREME COURT
OF THE STATE OF UTAH

VICTOR PRICE, : CERTIFICATE OF SERVICE
Plaintiff-Respondent, :
vs :
UTAH POWER & LIGHT COMPANY, :
A Utah Corporation, and :
DAVID ZSERAI, :
Defendants-Appellants.: Case No. 20568

Marlynn Bennett Lema, an attorney for Plaintiff-Respondent
108 North Fourth West, P.O. Box 1026, Price, Utah 84501, states
that she served the Brief of Respondent upon the following
parties by placing four true and correct copies thereof in
an envelope addressed to:

Robert Gordon
David A. Westerby
UTAH POWER & LIGHT COMPANY
1407 West North Temple
P.O. Box 899
Salt Lake City, Utah 84116
Attorneys for Defendants-Appellants

and mailing the same, postage prepaid, on the 25th day of
September, 1985.



MARLYNN BENNETT LEMA
ATTORNEY AT LAW

A D D E N D U M S

NOV 28 1984

BRUCE C. FUNK, Clerk
By K. B. C. A. L. Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

VICTOR PRICE,

Plaintiff,

vs.

UTAH POWER & LIGHT COMPANY,
a Utah corporation, and
DAVID ZSERAI,

Defendants.

SPECIAL VERDICT

Civil No. 4210

We, the jury, return our verdict in this case by answering the following questions, in accordance with the instructions of Judge Bunnell:

1. Were defendants David Zserai and Utah Power & Light Company negligent in the operation of heavy equipment in Emery County on 15 September 1981?

Yes 0 1 2 3 4 5 ⑥ 7 8

No 0 1 ② 3 4 5 6 7 8

2. If "yes" (by 6 or more jurors), was such negligence of David Zserai and Utah Power & Light Company a proximate cause of the damages sustained by Victor Price?

Yes 0 1 2 3 4 5 ⑥ 7 8

No 0 1 ② 3 4 5 6 7 8

3. Was plaintiff Victor Price negligent in failing to properly care for his own safety while riding his mule on 15 September 1981?

Yes	0	1	2	3	4	5	⑥	7	8
No	0	1	②	3	4	5	6	7	8

4. If "yes" (by 6 or more jurors), was such negligence of Victor Price a proximate cause of the damages sustained by him?

Yes	0	1	2	3	4	5	6	⑦	8
No	0	①	2	3	4	5	6	7	8

5. This question is answered only if we have found above that both the defendants and the plaintiff were negligent in a way that proximately caused damages to the plaintiff. In other words, at least 6 of us have answered "yes" to each of the 4 questions above. Otherwise, we do not answer this question.

We now consider the negligence of the defendants and the plaintiff to total 100%. We allocate the 100% negligence between the defendants, on the one hand, and the plaintiff, on the other hand, by weighing the negligence of the defendants against that of the plaintiff and determining relative negligence. Our answer in percentages reflects our decision.

What part of the 100% negligence is attributable to:

Defendants David Zserai and Utah Power & Light Company	<u>90</u> %
Plaintiff Victor Price	<u>10</u> %
TOTAL	<u>100</u> %

Addendum 1
D. 62

6. Considering only the instructions and evidence concerning damages, and without being concerned with fault or negligence in answering this question, what amount of money would fairly and adequately compensate plaintiff, Victor Price, for any and all damages sustained as a result of the accident on 15 September 1981?

Special damage	\$	<u>6350</u>
General damage	\$	<u>150,000</u>
Total	\$	<u>156,350</u>

Jana T. Ekker

Jury Forman

DATED: 28 November, 1984

ADMITTANCE RECORD

00-29-97

Pac. Nat'l Life HOSPITAL NUMBER K-664

NAME Price, Mr. Victor

CODE Ins. SS. NO.

LOCAL

ADDRESS Castle Dale, Utah

PHONE 748-2443

PHYSICIAN A.R. Demman

BIRTH DATE 2-15-12 (56)	SEX M	RACE W	ROOM E	PT'S. EMPLOYER self	OCCUPATION rancher
ADM. DATE 3-17-68	TIME 6:30 PM	S.M.W.D. M	NEAREST RELATIVE OR FRIEND Mrs. Alice Price		RELATION wf
DIS. DATE 3-20-68	TIME	RELIGION LDS	ADDRESS OF RELATIVE OR FRIEND same		

SUMMARY AND DISCHARGE RECORD

Admission Diagnosis

① Chest pain ② Pain + Swelling of leg (left)

INDEX CODE

Final Diagnosis

fracture of ribs Left chest
Contusion of leg (left leg)

809.0
927

Complications

None

Treatment Rendered

☒ Surgery, including manipulation and/or reduction (specify)

Splinted chest

☐ Antibacterial (specify)

☒ Supportive Only

☐ Other

Blood Transfusions

DISCHARGE SUMMARY

CE, VICTOR
65, MALE, WHITE

ADMISSION: 9/ 6/77
DISCHARGE: 9/15/77

This 65 year old male was admitted on 9/6/77 and released on 9/15/77 following an injury when a horse bucked and ran right over him producing multiple injuries with a fracture of the right ulna and with a fracture of the left ulna and radius and also laceration of the scalp and multiple injuries.

PHYSICAL EXAMINATION: Temp: 99 Pulse: 80 Resp: 21 B.P.: 140/80

GENERAL: A well nourished, slight obese male admitted to the hospital following an accident when the horse went over him.

HEAD: Normal in appearance. No excoriations or dermatosis is present.

EYES: Round and symmetrical. The eardrums are intact. He has a laceration of the scalp. Pupils are round and equal and react to light and accommodation. There is no nasal obstruction.

THROAT: Throat is normal in appearance.

RESP: Equal expansion on both sides. Both sides symmetrical. He has marked pain due to breathing on the left side. Possible some fractured ribs.

HEART: No fluid, no rales, no consolidation.

RESPIRATORY: Normal sinus rhythm. No murmurs, no thrills, no arrhythmias. No deformity.

EXTREMITIES: He has a great deal of swelling and deformity of the left wrist. He has multiple contusions and also laceration of the scalp.

NEUROLOGICAL: No enlargement of the axillary or cervical lymph glands.

COURSE: All physiological reflexes are present.

LABORATORY: Uninvented. Reduction of the fracture was done. Urine, within normal limits with the exception of 4,5, to 7 white blood cells per high powered field. The WBC was 17,500. The hemoglobin 14.8 grs., hematocrit was 46%. Stabs. 13, Segs. 68, Lymphs. 16, Monos. 2.

5: Left wrist shows comminuted fracture of the distal radius with extension into the articular surface where there is a fracture of the ulnar styloid process at the base. Skull fracture, none present. Had a large laceration on the frontal area and a possible fracture of ribs on the left side. The reduction was done and views of the left wrist shows the fracture of the distal radius. The cast has been applied and shows a fracture relationship satisfactorily. Ulnar styloid fractures also noted. Cast was applied and after reduction under general anesthesia.

SIS: The patient will see me again in the future and the diagnosis was a fracture of the left wrist, multiple contusions and laceration of the scalp.

RD

EMMAN, M.D.

Addendum 3
Page 61

PRICE
77-246
-15-11
MEMO

1. 2. 3. 4.
TIVITY
Another brand of a generically equivalent product identical in dosage form and content of active ingredient may be administered unless checked.

WRITE OR IMPRINT
PATIENT INFORMATION BELOW

START
✓ Brown Cover This jar
✓ up in chair
✓ Rib Bender
✓ Arm sling

CTOR
DEHAM
MALE

RM. 2147B1

S. Gilbert L.P. N. A.R.D.

START
- Librium 5mg tid.

77-246
-12-12
VICTOR
DEHAM
MALE

RM. 2147B1

D. Bigdam W/c

S. Chouso A.R.N.

A.R.D.
2

START

X Ray Cervical }
Thoracic } Spine
Lumbar }
Remove Foley.
B.R.P.

77-246
-12-12
VICTOR
DEHAM
MALE

RM. 2147B1

A.R.D.

DISCHARGE SUMMARY

HOSPITAL #10520

PRICE, VICTOR
AGE 68, MALE, WHITE

ADMISSION: 1/7/81
DISCHARGE: 1/25/81

This 69 year old male was admitted to the hospital on 1/7/81 and released on 1/25/81.

GENERAL:	68 year old male, slight obese.
HEENT:	Head is round and symmetrical. Ear drums are intact. Pupils are round and equal, react to light and accomodation. No nasal obstruction. Throat is normal in appearance.
CHEST:	Equal expansion on both sides. Both sides symmetrical.
LUNGS:	No fluid, no rales, no consolidation.
CARDIOVASCULAR:	Normal sinus rhythm. No murmurs, no thrills, no arrhythmias.
ABDOMEN:	No masses, no tenderness, no rigidity.
BACK:	No deformity.
EXTREMITIES:	No varicosities. No dermatosis. No excoriations.
GENITALIA:	Normal externally.
RECTAL:	No internal, external hemorrhoids are present.
NEUROLOGICAL:	Reflexes are normal.

He was referred to Dr. Wally Snihurowych for T.U.R. He had a T.U.R. done in 1973 and at the present time he had an obstruction which was taken care of by a T.U.R. by Dr. Snihurowych. The course in the hospital was uneventful and the discharge condition was good.

DIAGNOSIS: 1) Right hydrocele which was repaired.
 2) T.U.R. which was done by Dr. H.M. Snihurowych,
 3) Benign hypertrophy of the prostate.

He will report to my office and also to Dr. Snihurowych when the time is designated for further instruction.

ARD
A.R. DEMMAN, M.D.

ARD/jj
1/25/81
1/26/81

Addendum 5

Page 1

Robert Gordon
David A. Westerby for
UTAH POWER & LIGHT COMPANY
P.O. Box 899
Salt Lake City, Utah 84110
Telephone: (801) 535-4265

Attorneys for Defendant
Utah Power & Light Company

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

VICTOR PRICE,

Plaintiff,

vs.

UTAH POWER & LIGHT COMPANY,
a Utah corporation, and
DAVID ZSERAI,

Defendants.

REQUEST FOR JURY TRIAL

Civil No. 4210

Defendants Utah Power & Light Company and David Zserai
hereby request a trial by jury on all factual issues in this
case.

The required fee of \$50.00 is enclosed herewith.


David A. Westerby

Date: 11 November 1994

NOV 23 1984

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR EMERY COUNTY, STATE OF UTAH

BRUCE C. FUNK,

Clerk

By K. Bean Deputy

VICTOR PRICE,

Plaintiff,

JURY LIST

v.

UTAH POWER & LIGHT COMPANY,
a Utah corporation, and
DAVID ZERAI,

Case No. 4210

Defendants.

1. ~~Ferdinand J. Hanner~~ D#3 DJ
2. ~~Sally J. Wilson~~ excused
3. ~~Kellie Jenkins Burnside~~
4. ~~Frank B. Nelson~~ D#2 DJ
5. ~~Hazel Ruth Jensen~~ excused
6. ~~Richard W. Justesen~~
7. ~~Del Leamaster~~ excused
8. ~~Thomas Dee Humphrey~~ FF #1 MBL
9. ~~John N. Adams~~
10. ~~Sarena R. Shorls~~
11. ~~Jackie L. Spigarelli~~ FF #2 MBL
12. ~~Bertell Lund~~ excused
13. ~~Victor Wayne Haley~~
- *14. ~~David Arthur Fuller~~ FF #3 MBL
15. ~~Steve Allred~~
16. ~~Arthur M. Rasmussen~~
17. ~~Fred Marcus Dregeisen~~ excused
18. ~~Sharon A. Cox~~ excused
19. ~~Lona J. Ekker~~
20. ~~Ward Hayward~~ D#1 DJ

Addendum 7

Page 1

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY,
STATE OF UTAH

VICTOR PRICE,)	MEMORANDUM DECISION ON
)	MOTION FOR JUDGMENT
Plaintiff,)	NOTWITHSTANDING THE
)	VERDICT OR, IN THE
v.)	ALTERNATIVE, MOTION
)	FOR NEW TRIAL
UTAH POWER & LIGHT COMPANY,)	
a Utah Corporation, and)	
DAVID ZSERAI,)	
)	
Defendants.)	Civil No. 4210

The defendants have filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The plaintiff has filed their objection to the motion and both parties have submitted their memorandums of points and authorities and the Court heard oral arguments on the motion and rules thereon as hereinafter stated.

The defendants base their motion for judgment notwithstanding the verdict on the following grounds:

1. The evidence was insufficient to establish a duty of care running from the defendants to the plaintiffs;
2. There was no evidence of causation in fact between the incident and the damages complained of.

They base their Motion for a new trial, in the alternative, on the same grounds stated above and on the further ground that the Court failed to ask prospective jurors as to the affect of lay-offs within their families that might have a bearing on their impartiality and, further, that damages were excessive.

Addendum 8

In considering the Motion, the Court must look at the evidence in its best possible light to see that a prima facie case has been presented and if there was sufficient believable facts presented so that reasonable jurors could reach the conclusion found by the jury.

The Court cannot find any prejudice for failure to ask the prospective jurors a question relative to lay-offs within their families. The jurors were adequately and thoroughly questioned about any prejudice against the defendant, Utah Power and Light Company, to insure impartiality in this regard and, therefore, the Court denies the Motion based upon this ground.

The jurors obviously believed the plaintiff's testimony that the defendant, Zserai, summoned and beckoned the plaintiff to come to his machine on his mule where the defendant Zserai was seeking directions and information from the plaintiff. When the plaintiff came to within three or four feet of the machine on his mule, a clear duty was present on the part of the defendant Zserai to operate the machine so as not to startle the animal on which the plaintiff was seated. The Court also denies the Motion based upon this ground.

The Court will not disturb the amount of damages as found by the jury since there was adequate evidence by way of aggravation of his existing physical condition that resulted in a shriveled right arm and loss of income to justify the jury's ultimate finding in this regard.

The question of causation has given the Court some problem because of the lack of direct expert testimony in this regard.

In Lindsay v. Gibbons and Reed, 497 P2d 28, 27 Ut2d 419, the Court stated:

"Jurors may not speculate as to probabilities; they may, however, make justifiable inferences from circumstantial evidence to find negligence or proximate cause. In such instances, circumstantial evidence is sufficient to establish a prima facie case of negligence, if men of reasonable minds may conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not."

In reviewing the evidence presented in this case, the Court feels that there was sufficient evidence presented from which reasonable minds could conclude that there is a greater probability that the conduct relied upon was a proximate cause of plaintiff's resulting injuries.

Although the plaintiff had a prior condition in his back and limbs that precipitated treatment by a chiropractor, there was testimony presented by the plaintiff that he experienced extreme pain in his hip, neck and shoulders, immediately after the incident that he had not experienced before. That the day following the incident, he had difficulty walking and felt dizziness, and there was further testimony that his friends noticed a marked change in his physical activities and appearance immediately after the accident.

There was further testimony that the plaintiff went to Dr. Sanders, a Chiropractor, who had treated the plaintiff in the past, the day after the accident, and told him of the incident and that he was feeling numbness in his limbs and had pain and discomfort in his back and hips. There was further testimony that Dr. Sanders attempted treatment without result, and then

referred the plaintiff to Dr. Demman, a physician, and that at that time, the plaintiff complained of head, hip and neck pain, and numbness of his limbs.

The plaintiff further testified that right after the accident his hand became useless, that his right arm began to shrivel and, because of these results, Dr. Demman commenced a series of therapy treatments at the hospital, without any noticeable result.

Then, in the early part of February, 1982, Dr. Demman referred the plaintiff to the neurologist who performed surgery on his vertebrae in February of 1982, at a time when he was complaining of the same symptoms, only greatly aggravated, that were present right after the accident occurred. The surgery improved his condition as far as relieving the pain and numbness, and he generally felt better.

Dr. Gaufin's report, introduced into evidence, states: "Post operatively the patient has done well with numbness in the fourth and fifth fingers of his right hand improved to almost normal. The aching that he had in his elbow was no longer present, patient's pain in his neck was significantly improved at the time of discharge from the hospital."

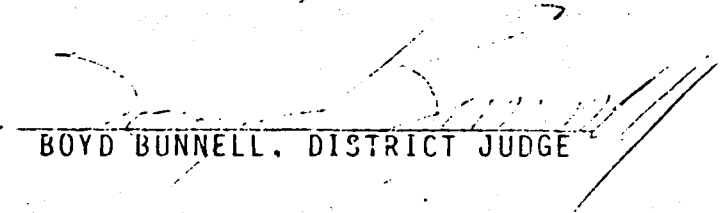
The Doctor's further reports indicate that after the operation, the symptoms present for the first time right after the accident were eliminated or improved substantially by the surgery.

In Dr. Gaufin's letter to Dr. Demman, dated May 10, 1982, he states as follows: "His right arm and hand strength is still weaker than it was before his accident, but it is significantly better than before his surgery."

Addendum 8
Page 4

Based upon this Finding, the Court denies the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a Motion for New Trial.

DATED this 25th day of February, 1985.


BOYD BUNNELL, DISTRICT JUDGE

*Entered
2-25-85*

CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing, MEMORANDUM DECISION ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, by depositing the same in the United States Mail, postage prepaid, to the following:

David A. Westerby
Robert Gordon
Attorneys at Law
Post Office Box 899
Salt Lake City, Utah 84110

Marlynn B. Lema
Attorney at Law
108 North 4th West
Post Office Box 1026
Price, Utah 84501

DATED this 28th day of February, 1985.


Secretary

rogatory. *Lignell v. Berg*, 593 P.2d 800 (Utah 1979).

Failure to request special interrogatory waives issue of fact. If a party fails to request that a fact issue be submitted to the jury on special interrogatory, he waives his right to trial by jury on that issue, and the court may make a finding consistent with the jury verdict. *Lignell v. Berg*, 593 P.2d 800 (Utah 1979).

Entering judgment on special interrogatories discretionary with trial court. The matter of entering judgment in accordance with the answers to special interrogatories is within the discretion of the trial judge. *Weber Basin Water Conservancy Dist. v. Nelson*, 11 Utah 2d 253, 358 P.2d 81 (1960).

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) *Motion for Directed Verdict; When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same; Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered.

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In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

I. General Consideration.

II. Motion for Directed Verdict.

III. Motion for Judgment Notwithstanding the Verdict.

I. GENERAL CONSIDERATION

Cited in *Smith v. Franklin*, 14 Utah 2d 16, 376 P.2d 541 (1962); *Hyland v. St. Mark's Hosp.*, 19 Utah 2d 134, 427 P.2d 736 (1967); *Koer v. Mayfair Mkts.*, 19 Utah 2d 339, 431 P.2d 566 (1967); *Collier v. Frerichs*, 626 P.2d 476 (Utah 1981); *Jepsen v. Tenhoeve*, 656 P.2d 427 (Utah 1982).

II. MOTION FOR DIRECTED VERDICT

Court to view evidence in light most favorable to nonmovant. Upon a motion for a directed verdict, the trial court is obliged to view the evidence in the light most favorable to the party against whom it is directed. *Anderson v. Gribble*, 30 Utah 2d 68, 513 P.2d 432 (1973).

Error in judge's weighing evidence not reversible where decision correct. Although in passing on a motion for directed verdict it is not proper for the trial court judge to weigh evidence, that he does so in a case does not result in prejudicial error where the party is not entitled to succeed in any event. *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608 (Utah 1982).

Appellate court to view evidence in light most favorable to nonmovant. Upon review of a directed verdict, the court must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed

verdict cannot be sustained. *Management Comm. of Graystone Pines Homeowners Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc.*, 652 P.2d 896 (Utah 1982).

And sustain grant of motion only if no different conclusion possible. The Supreme Court will sustain the granting of a motion for a directed verdict only if the evidence was such that reasonable men could not arrive at a different conclusion. *Anderson v. Gribble*, 30 Utah 2d 68, 513 P.2d 432 (1973).

A directed verdict pursuant to subdivision (a), upon the ground that the evidence fails to show that defendant is negligent, is tantamount to granting a motion for a nonsuit, and on appeal must be reversed if the evidence is such that reasonable men could arrive at a different conclusion. *Rhiness v. Dansie*, 24 Utah 2d 375, 472 P.2d 428 (1970).

III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The trial court can enter a judgment notwithstanding the verdict for only one reason — the absence of any substantial evidence to support the verdict. *Koer v. Mayfair Mkts.*, 19 Utah 2d 339, 431 P.2d 566 (1967).

Rules for deciding motion for directed verdict applicable. In passing on a motion for judgment notwithstanding the verdict, the court is governed by the same rules as it is when passing upon a motion for a directed verdict. *Koer v. Mayfair Mkts.*, 19 Utah 2d 339, 431 P.2d 566 (1967).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

COMMITTEE NOTE

This Rule is the federal rule, verbatim, and is substantially the same as Rule 19, Utah Rules of Evidence (1971). Rule 56(1), Utah Rules of Evidence (1971) contained similar language.

period. The admission of a mother's testimony on the subject of gestation period of her pregnancy is not error. *Roods v. Roods*, 645 P.2d 640 (Utah 1982).

I. GENERAL CONSIDERATION

Mother may testify as to her gestation

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

COMMITTEE NOTE

This Rule is the federal rule, verbatim. Rule 56(2), Utah Rules of Evidence (1971) was substantially the same.

I. GENERAL CONSIDERATION

Question as to whether witness qualifies as expert is for judge. The trial judge has the primary responsibility for determining whether a particular witness qualifies as an expert. *Shurtleff v. Jay Tuft & Co.*, 622 P.2d 1168 (Utah 1980).

Qualification. The matter of qualification of an expert witness lies in the discretion of the court. *State v. Locke*, 688 P.2d 464 (Utah 1984).

Facts or data used by a properly qualified expert in forming an opinion need not be in evidence if they are of a type reason-

ably relied on by experts in the witness's field of expertise. *Barson ex rel. Barson v. E.R. Squibb & Sons*, 682 P.2d 832 (Utah 1984).

Trial court did not err in allowing an expert's testimony relating to drug experience reports not in evidence. *Barson ex rel. Barson v. E.R. Squibb & Sons*, 682 P.2d 832 (Utah 1984).

Opinion of expert witness based on evidence presented at trial. Expert's testimony was properly excluded where witness was unable to give his opinion based upon data made known to him at trial, as, absent personal knowledge of the facts, this was the only ground on which the evidence could have come in. *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984).

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Diplomate, American Board
of Neurological Surgery

May 10, 1982

A. R. Demman, M.D.
P.O. Box 749
Helper, Utah 84526

RE: PRICE, Victor

Dear Dr. Demman:

I saw Mr. Price in the office today on 5/10/82 for a follow-up visit. The patient is coming along nicely following his surgery. He no longer has the severe right neck, shoulder and arm pain. He does continue to have numbness in the right fourth and fifth fingers. His right arm and hand strength is still weaker than it was before his accident, but it is significantly better than before his surgery.

Examination today revealed right upper extremity strength to be: Biceps and triceps, 5-/5; grip 4+/5. The patient is unable to oppose the right thumb and little finger. There is hypesthesia over the right fourth and fifth digits.

An X-ray of his cervical spine reveals fusion to be taking place nicely at C5-6.

IMPRESSION:

- 1) Satisfactory course following anterior cervical discectomy with nerve root decompression and interbody fusion at C5-6.
- 2) Status post external neurolysis with decompression of the ulnar nerve at the right elbow, 2/6/82.

RECOMMENDATIONS:

- 1) I have instructed Mr. Price on appropriate activities. I feel his strength will continue to improve over the next 18 to 24 months. The numbness will just have to be observed. Frequently this too resolves over a period of about 1 1/2 years.
- 2) I have asked him to continue to check with your office. If you would like to have me re-evaluate him at any time, I would be happy to do so.

Sincerely yours,

Lynn M. Gaufin, M.D.

LMG:lr

Addendum 11
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INSTRUCTION NO. 18

The proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury, and without which the result would not have occurred. It is the cause that necessarily sets in operation the factors that accomplish the injury. For one person's negligence to be a proximate cause of an injury, that negligence must be a substantial or material factor in bringing about the injury.

Addendum
Page 1

INSTRUCTION NO. 19

A plaintiff, such as Victor Price, may also be negligent with respect to his own injuries. Such negligence of a plaintiff may cooperate with the negligence of another in proximately causing his own injury. If you determine that David Zserai and Utah Power & Light Company were negligent and that such negligence was a proximate cause of the plaintiff's injuries, you will also be asked to determine whether Victor Price was also negligent in bringing about his own injuries.

Addendum 13

INSTRUCTION NO. 25

You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question, not by a condition or accident that occurred before. If you find that Victor Price suffers or did suffer from some abnormal condition that has not been proximately caused by Utah Power or David Zserai, even though it may invite your sympathy, you may not assess any damages against Utah Power or David Zserai for that condition. However, if negligence of Utah Power or David Zserai has been a proximate cause of aggravating such a condition, that should be considered in fixing damages.

Addendum

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satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) *Filing Transcript of Satisfaction in Other Counties.* When any satisfaction of a judgment shall have been entered on the judgment docket of the county in which such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

I. GENERAL CONSIDERATION

Cited in Utah C.V. Fed. Credit Union v. Jenkins, 528 P.2d 1187 (Utah 1974).

Rule 59. New Trials; Amendments of Judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

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Addendum 15

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(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; Time for Filing.* When the application for a new trial is made under subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

I. General Consideration.

II. Grounds.

- A. In General.
- B. Misconduct of Jury.
- C. Accident or Surprise.
- D. Newly Discovered Evidence.
- E. Excessive or Inadequate Damages.
- F. Insufficiency of Evidence.
- G. Decision Against Law.

III. Time for Motion.

IV. Affidavits.

V. On Initiative of Court.

I. GENERAL CONSIDERATION

The Supreme Court cannot consider a motion for a new trial since that is a matter addressed to the trial court. *Jennings v. Stoker*, 652 P.2d 912 (Utah 1982).

A motion for a new trial is not properly addressed nor may it be filed with the Supreme Court. *Corbet v. Corbet*, 24 Utah 2d 378, 472 P.2d 430 (1970).

An order granting a new trial is not a final judgment; it only sets aside the verdict and places the parties in the same position as if there had been no previous trial. *Haslam v. Paulsen*, 15 Utah 2d 185, 389 P.2d 736 (1964).

Remedies for questioning grant of a new trial. If a trial court's authority with respect to a motion for a new trial is exercised arbitrarily, the proper redress is either in a petition for interlocutory appeal, which may be granted in a proper case, or in the preservation of error for review, if necessary, upon the final outcome of the case. *Haslam v. Paulsen*, 15 Utah 2d 185, 389 P.2d 736 (1964).

A timely motion under this Rule terminates the running of the time for appeal of

a judgment, and time for appeal does not begin to run again until the order granting or denying such a motion is entered. *Hume v. Small Claims Court*, 590 P.2d 309 (Utah 1979).

Standard for review. When a new trial is granted based on the weight of the evidence, the standard for reviewing the trial court's ruling is much narrower than the trial court's standard in granting the new trial. *Goddard v. Hickman*, 685 P.2d 530 (Utah 1984).

A trial court has a wide latitude of discretion with respect to a motion for a new trial, in conformity with the general supervisory powers which it necessarily has over the verdicts of juries in the interest of the administration of justice. *Haslam v. Paulsen*, 15 Utah 2d 185, 389 P.2d 736 (1964).

The broad discretionary power of the trial court in the granting or denying of new trials is well established. This discretion is necessary to allow the court an opportunity to cause reexamination or correction of jury verdicts or findings which it believes to be in error, or where there is substantial doubt that the issues were fairly tried. *Page v. Utah Home Fire Ins. Co.*, 15 Utah 2d 257, 391 P.2d 290 (1964).

INSTRUCTION NO. 20

Without being concerned about fault or negligence, it will be your duty to determine the plaintiff's damages, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate him for any injury and damage he has sustained as a proximate result of the accident.

INSTRUCTION NO. 22

In awarding such damages, you may consider the nature and extent of the injuries sustained by him; the degree and character of his suffering, both mental and physical, its probable duration and severity, and the extent to which he has been prevented from pursuing the ordinary affairs of life as enjoyed by him before the accident; and any disability or loss of earning capacity resulting from such injury.

You may also consider whether any of the above will, with reasonable certainty, continue in the future, and if you so find, award such damages as will fairly and justly compensate the plaintiff therefor.

INSTRUCTION NO. 23

In fixing damages, the law allows you to fix a sum that will reasonably compensate plaintiff for any past physical pain, as well as pain that is reasonably certain to be suffered in the future as a result of the defendant's wrongdoing.

There are no objective guidelines by which you can measure the money equivalent of this element of injury; the only real measuring stick, if it can be so described, is your collective enlightened conscience. You should consider all the evidence bearing on the nature of the injuries, the certainty of future pain and the likely duration thereof.

In this difficult task of putting a money figure on an aspect of injury that does not readily lend itself to an evaluation in terms of money, you should try to be as objective, calm and dispassionate as the situation will permit, ~~and not be unduly swayed by considerations of sympathy.~~

INSTRUCTION NO. 24

In assessing damage, you may determine if plaintiff has lost, or is reasonably likely to lose, profits from the interruption or destruction of an established business, and that the amount of such loss or future losses can, from the evidence, be estimated with reasonable certainty, you may include this loss in determining the damage, if any, to be awarded. Ordinarily, unless the business was an established business at the time of the wrong, this item should not be considered because the possibility of any such profits would be too speculative and conjectural to be reasonably susceptible of evaluation; the evidence should be enough to show that the business had been successfully operated for a time long enough to give it recognition as a profitable entity and that these profits can be estimated with reasonable certainty.

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INSTRUCTION NO. 26

The amount of damages for any loss to be suffered in the future would not be the present payment of the total of such damages, but must be discounted to the present cash value of such future benefit. Therefore, in determining the present value of any future loss, you should calculate the same on the basis that any sum you might award will be invested with reasonable wisdom, and that all of it, except the amount currently needed to compensate for the loss sustained will be kept so invested as to yield the highest rate of interest consistent with current interest rates and reasonable security. The present value will be the sum which, when supplemented by such income from it, will equal the total of lost future benefits.

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INSTRUCTION NO. 27

In awarding damages, if any, in this case, you should be aware that the recovery of damages by the plaintiff in this case would not be taxed as income under federal or state tax laws.

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INSTRUCTION NO. 28

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for detriment which is remote, conjectural or speculative.

Addendum 22
Page 1

INSTRUCTION NO. 29

In this case you may not include in any award to plaintiff any sum for the purpose of punishing the defendants for the public good or to prevent other accidents. Such damages would be punitive rather than compensatory, and the law does not authorize punitive damages in this action.

INSTRUCTION NO. 38

The law forbids you to determine any issue in this case by resort to chance. If you should decide that any party is entitled to recover, in discussing the amount of damages to be awarded, you properly could ascertain from each juror his own independent judgment as to what the amount should be -- if you should so wish to do -- whereupon, it would be your duty to thoughtfully consider the amounts so suggested, to test them in the light of the law and the evidence, and, after deliberation thereon, to determine which, if any, of such individual estimates was proper. But it would be unlawful for you to agree in advance to take the independent estimate of each juror, then total such estimates, draw an average from the total, and to make such average the amount of your award.

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I. GENERAL CONSIDERATION

Parties have a right to make objections to instructions so as to preserve challenges to their accuracy. *Hanks v. Christensen*, 11 Utah 2d 8, 354 P.2d 564 (1960).

But refusal of right harmless if instructions are correct. If the instructions are

correct, any error which prevents counsel from making objections thereto is harmless error. *Hanks v. Christensen*, 11 Utah 2d 8, 354 P.2d 564 (1960).

Cited in *Watters v. Querry*, 626 P.2d 455 (Utah 1981).

Rule 47. Jurors.

(a) *Examination of Jurors.* The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

(b) *Alternate Jurors.* The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

(c) *Challenge Defined, By Whom Made.* A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

(d) *Challenge to Panel; Time and Manner of Taking; Proceedings.* A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the officer to summon one or more of the jurors drawn. It must be taken before the juror is sworn. It must be in writing or be noted by the reporter, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) *Challenges to Individual Jurors; Number of Peremptory Challenges.* The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under subdivisions (b) and (c) of this rule.

Addendum.
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(f) *Challenges for Cause; How Tried.* Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water power, light or other services rendered to such resident.

(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Any challenge for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of such challenge.

(g) *Selection of Jury.* The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, in the order called, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(h) *Oath of Jury.* As soon as the jury is completed an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and a true verdict rendered according to the evidence and the instructions of the court.

(i) *Proceedings When Juror Discharged.* If, after the impanelling of the jury and before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) *View of Jury.* When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(k) *Separation of Jury.* If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) *Deliberation of Jury.* When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) *Papers Taken by Jury.* Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

(n) *Additional Instructions.* After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into the court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the reporter.

(o) *New Trial When No Verdict Given.* If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) *Court Deemed in Session Pending Verdict; Verdict May Be Sealed.* While the jury is absent the court may be adjourned from time to time in respect to

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other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(q) *Declaration of Verdict.* When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is his verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(r) *Correction of Verdict.* If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

- I. General Consideration.
- II. Examination.
- III. Challenges for Cause.
- IV. View By Jury.
- V. Deliberations.
- VI. Papers Taken By Jury.
- VII. Additional Instructions.
- VIII. No Verdict.
- IX. Declaration of Verdict.
- X. Correction of Verdict.

I. GENERAL CONSIDERATION

Cited in *Arellano v. Western Pac. R.R.*, 5 Utah 2d 146, 298 P.2d 527 (1956); *Johnson v. Maynard*, 9 Utah 2d 268, 342 P.2d 884 (1959); *Brown v. Johnson*, 24 Utah 2d 388, 472 P.2d 942 (1970); *State v. Pace*, 527 P.2d 658 (Utah 1974).

II. EXAMINATION

Trial judge has wide discretion in conduct of voir dire. A trial judge has considerable latitude of discretion as to manner and form in which he will conduct a voir dire examination to determine the qualifications of jurors. *Utah State Rd. Comm'n v. Marriott*, 21 Utah 2d 238, 444 P.2d 57 (1968).

III. CHALLENGES FOR CAUSE

Acquaintance with or engaging in same business as party not grounds for challenge. Challenges for cause on the grounds that jurors were either acquainted with the defendant or engaged in same business pursuits as

defendant did not fall within the grounds specified in subdivision (f) and were properly denied. *C.R. Owens Trucking Corp. v. Stewart*, 29 Utah 2d 353, 509 P.2d 821 (1973).

Requiring use of peremptory challenges instead of granting challenge for cause affects rights. Forcing a party to use his peremptory challenges to strike jurors who should have been stricken for cause denies the litigant a substantial right. *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981).

IV. VIEW BY JURY

In an eminent domain action, jury may view property even though there were substantial changes to the property during construction, to see how the property was situated with respect to its surroundings. *Utah State Rd. Comm'n v. Marriott*, 21 Utah 2d 238, 444 P.2d 57 (1968).

V. DELIBERATIONS

Jury verdict not impeachable on basis of deliberations. Generally a jury's verdict may

INSTRUCTION NO. 3

This case must not be decided for or against anyone because you feel sorry for anyone or angry at anyone. It is your sworn duty to decide this case based on the facts and the law without regard to sympathy, passion, or prejudice.

Addendum 2
Page 1

INSTRUCTION NO. 9

Remember, the lawyers aren't on trial. Your feelings about them should not influence your decision in this case.

It is the duty of the attorney on each side of a case to object when the other side offers evidence which the attorney believes is not admissible. You should not speculate as to the reason for the objections, nor should you show bias against a party because his attorney has made objections. When objections are made, the court is called upon to determine whether the offered evidence might be properly admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible or not is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given to such evidence, nor does it pass on the credibility of the witness. These are matters for your determination. However, you are not to consider evidence offered but not admitted, nor any evidence stricken out by the Court. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection since these are matters of law not properly within your consideration.

Addendum 27
Page 1

INSTRUCTION NO. 12

By a preponderance of the evidence, as that term is used in these instructions, is meant that which to your minds is of the greater weight. The evidence preponderates to the side which, to your minds, seems to be the most convincing and satisfactory. The preponderance of the evidence is not alone determined by the number of witnesses, nor the amount of the testimony, but the convincing character of the testimony weighed by the impartial minds of the jury.