

2002

Victor Price v. Utah Power and Light Company : Reply Brief

Utah Supreme Court

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DOCKET NO. 20568

IN THE SUPREME COURT
OF THE STATE OF UTAH

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VICTOR PRICE, :
Plaintiff-Respondent, :
vs. : Case No. 20568
UTAH POWER & LIGHT COMPANY, :
a Utah corporation, and :
DAVID ZSERAI, :
Defendants-Appellants. :

---oooOooo---

REPLY BRIEF

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

---oooOooo---

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FILED
OCT 28 1985

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OF THE STATE OF UTAH

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vs.	:	Case No. 20568
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

In addition to the issues raised by Utah Power in its Brief of Appellants, Price has raised issues in his Brief of Respondent. The issues are:

1. Is this Court precluded from reviewing a denial of a motion for a new trial based upon the failure of the trial court to submit an additional voir dire question to the jury panel where the movant made a reasoned request that a specific question be asked, the trial court denied the request, and the movant later filed a timely Rule 59 motion based on that denial?

2. Is this Court precluded from reviewing a denial of a motion for a new trial based upon the insufficiency of the causation evidence to justify the verdict where the movant filed a timely Rule 59 motion based on that ground?

Utah Power also replies to Price's arguments on the issues initially raised by Utah Power:

3. Did the plaintiff, who called no doctor to testify, present adequate evidence to make a prima facie case of medical causation between an 8-10 second mule ride and the nerve entrapments in his neck and elbow, and did the trial court abuse its discretion in failing to grant a new trial on this issue?

4. Did the trial court commit prejudicial error in refusing to question jury panel members about possible prejudice against

Utah Power from layoffs and unemployment in the coal mining industry and in refusing to grant a new trial on this issue, and did such errors violate Utah Power's constitutional right to due process in a civil jury trial?

STATEMENT OF THE CASE

Utah Power respectfully disagrees with certain factual statements made by Price in the Brief of Respondent:

1. Price states that chiropractor Thayn, who treated Price for neck problems before the mule incident, diagnosed his condition as a "thorasic sprain" (Brief of Respondent, p. 3). In fact, the complete diagnosis was much more serious, encompassing the nerve problems shown by the grip test: "traumatic cervical thorasic (sic) sprain, severe, with brachial neurology, (sic) bilaterally" (Tr. 211) (emphasis added).

2. While discussing the treatment given to Price by chiropractor Sanders before the mule incident (Brief of Respondent, p. 4), Price fails to mention that the spinal manipulations given starting in July of 1978 were meant "to re-establish normal joint motion" in the neck (Tr. 163) (emphasis added).

3. Price states that in December of 1981 (2½ months after the mule incident), a deterioration of his right hand was noted by chiropractor Sanders (Brief of Respondent, p. 4-5). This is true. Price also suggests incorrectly that there was a connection between the condition complained of on 16 September 1981 and the deterioration noted in December. There is absolutely no support for this in the transcript. In fact, Sanders was asked by counsel for Price:

Q. Did you have any opinion as to the cause of that condition?

A. I did not. I was wanting to -- That's why I was referring him (Tr. 176).

4. Price asserts:

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 (Brief of Respondent, p. 6).

This is simply not true. X-rays taken of the right elbow just before the February 1982 surgery showed degenerative joint disease with arthritic changes and deformity consistent with old trauma. See Addendum, pp. A4 and A6. Also, the discharge summary from the 1977 horse-kick accident (Addendum, p. A3) clearly states that the right ulna was fractured, although Utah Power has previously conceded this may be in error.

5. Price states that there was a jury panel of 38 (Brief of Respondent, p. 6). It is true that the court may have summoned 38 for jury duty, but only 25 panel members were paid, indicating that only 25 appeared for the trial. This list has now been made a part of the record (R. 267-68). See Addendum, pp. A7, A8. This number is consistent with the trial court's comments about running out of jurors (Tr. 34). It took 24 of the 25 panel members to seat the jury -- the 20 that appear on the jury list (R. 124) plus the four Utah Power-related people (Ryan, Lancaster, Block and Mathie) who were excused before the names were read for the jury list (Tr. 5, 6).

6. Price states that Utah Power failed to move for a directed verdict on the ground of insufficient causation evidence (Brief of Respondent, p. 9). Counsel for Utah Power, however, made his motion for a directed verdict with these words:

At this time the Defendants would move for a directed verdict on the basis of inadequate evidence to support a claim of negligence against either Mr.

Zserai or Utah Power and Light Company (Tr. 110)
(emphasis added).

Price's Complaint (R. 1-3), which can be described as a claim of negligence, contains elements of negligent conduct, causation, and damages. It is true that the argument that followed on the motion for directed verdict (Tr. 110-112) focused on the issue of negligent conduct, but the actual statement of the motion can be read broadly to cover inadequate evidence on all elements of a claim of negligence -- including causation.

SUMMARY OF ARGUMENTS

This Court is not precluded from reviewing the new trial issues presented on this appeal. Rule 46 of the Utah Rules of Civil Procedure does not require the taking of an exception to the trial court's ruling that refused additional voir dire questions. All that is required procedurally is a reasoned request for a specific question and a timely Rule 59 motion for a new trial based on the refusal of the request. This was done.

Utah law also does not require the making of a directed verdict motion to perfect a Rule 59(a)(6) motion for a new trial based on insufficiency of the evidence to support the verdict. Even if the motion for a directed verdict actually made here was not specific enough to cover the causation evidence, case authority in Utah says that for purposes of appellate review, the new trial motion is equivalent to a directed verdict motion. The new trial motion was made, and this Court has authority to consider the appeal on its merits.

Price's arguments on the merits fail to adequately refute these propositions:

1. Price needed expert medical causation testimony from doctors who could give their "best judgment to a reasonable certainty";
2. He did not present such testimony; and
3. Utah law requires the trial court to have been more diligent in screening the panel for bias where testimony from panel members demonstrated the potential for such bias in the community.

ARGUMENT

POINT 1

This Court Is Not Precluded from Reviewing
the Denial of the Motion for a New Trial Based
Upon the Failure of the Trial Court to Submit an
Additional Voir Dire Question to the Jury Panel Because
Utah Power Has Taken All Necessary Steps to Raise
the Issue, Including a Reasoned Request for a
Specific Question and a Timely Rule 59 Motion
Based on the Denial of that Request

Price claims, without supporting authority, that Utah Power had no right to seek a new trial based on the inadequate voir dire of the jury because Utah Power (1) requested a jury trial, (2) anticipated that some jurors would be biased, (3) made no motion for change of venue, (4) did not object to the trial court's rejection of the additional voir dire question, (5) challenged no individual juror for cause, and (6) passed the jury for cause. (Brief of Respondent, pp. 10-11). None of these items is a prerequisite for the making of such a new trial motion.

Generally speaking, Rule 59 (see Addendum, p. A11) of the Utah Rules of Civil Procedure provides that a new trial may be granted to any party for a number of specified grounds. No preconditions or prerequisites are attached, including those six enumerated above.

(1) Jury request. Price suggests that a party who requests a jury trial forfeits the right to seek a new trial if the first jury was not screened properly for bias. Such a rule makes no sense, attaches an unfair penalty for requesting a jury and is not required by Article I, Section 10 of the Utah Constitution

(trial by jury), section 78-21-1 of the Utah Code (right to jury trial), or Rules 38 (jury trial of right) or 59 (new trial) of the Utah Rules of Civil Procedure.

(2) Anticipation of bias. Price also suggests that if a party who requests a trial by jury anticipates that some members of the jury panel may be biased, he forfeits the right to seek a new trial if the trial court does not adequately screen for such bias. This suggestion suffers from the same defects as the first. After all, the voir dire process accepts bias as a fact of life and aims at substantially eliminating it.

(3) Change of venue. Price next suggests that a denied motion for change of venue is a prerequisite for seeking a new trial for a voir dire error. First, this presumes that the movant would have adequate proof to establish that "an impartial trial cannot be had in the county" Utah Code Ann. § 78-13-9(2) (1977), a difficult standard indeed. Second and more important, why should a party be penalized for believing that the trial judge can skillfully screen panel members for impartiality? Utah Power is not claiming that every juror was biased, only that the screening process was unfair and prejudicial. Nothing in the venue statutes or new trial rules requires a venue motion in this case.

(4) Objection to ruling denying request. Price states that Utah Power should have objected or taken exception to the trial court's ruling that denied Utah Power's request for a specific voir dire question. This is answered by Rule 46 (see Addendum, p. A9) of the Utah Rules of Civil Procedure which rejects an older, more formalized practice:

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his ground therefor

Utah Power satisfied Rule 46 by making known to the court the action it desired the court to take (ask jury panel a question about bias from layoffs at Emery Mining) and the ground therefor (layoffs at Emery Mining and connection between Utah Power and Emery Mining) at the time the ruling was sought (Tr. 42). To require an exception to the court's refusal to submit the voir dire question would be purposeless,¹ as well as time-consuming and argumentative.

(5) Challenge for cause. Price would also require a challenge for cause to all or some of the jurors before a new trial could be requested for improper bias screening. This is not required by Rule 47(f) (challenges for cause) or Rule 59 of the Utah Rules of Civil Procedure and also makes no sense. How can a party challenge a juror for an improper state of mind when the court has not allowed that mind to be adequately explored? There is no challenge for cause where an improper state of mind is only suspected of existing.²

(6) Passing jury for cause. Finally, Price contends that by passing the jury for cause, Utah Power waived its right to seek a new trial for improper bias screening. This is simply an extension of the previous claim and can be answered the same.

¹Commonwealth v. Holland, 298 Pa. Super. 289, 444 A.2d 1179 (1982).

²See Rule 47(f)(6), Utah Rules of Civil Procedure.

In conclusion, Rules 46 and 59 simply require a reasoned request for a specific voir dire question and a timely new trial motion based upon the denial of the request. These have been done, and this Court is not precluded from reviewing the order denying a new trial.

POINT 2

This Court Is Not Precluded from Reviewing
the Denial of the Motion for a New Trial Based
Upon the Insufficiency of the Causation Evidence
to Justify the Verdict Because Utah Power Has Taken
the Only Step Needed to Raise the Issue --
the Timely Filing of a Rule 59 Motion

Rules 50 and 59 (see Addendum, pp. A10, A11) of the Utah Rules of Civil Procedure do not require the making of a motion for a directed verdict in order to later move for a new trial on the ground of insufficiency of the evidence to support the verdict. The only consequence of failing to ask the judge to take the matter away from the jury is the inability to later request a judgment notwithstanding the verdict.³

It makes little sense to have a new trial dependent on a directed verdict motion because the two motions are based on different standards of justification.⁴ A directed verdict should be granted to a defendant only when the evidence is such that reasonable men could not arrive at a verdict for the plaintiff while viewing the evidence in the light most favorable

³Rule 50(b), Utah Rules of Civil Procedure. See Addendum, p. A10.

⁴11 Wright & Miller, Federal Practice & Procedure § 2806 (1973).

to the plaintiff.⁵ A much less stringent standard applies to the granting of a new trial on the ground of insufficient evidence to support the verdict. The court may properly grant such a motion if the record has substantial competent evidence to support a verdict for the defendant, even if reasonable men could arrive at a verdict for the plaintiff.⁶ Thus, a trial judge has the discretion to grant a defendant a new trial if a different jury might reasonably have decided in favor of either party, whereas the same judge, on the same evidence, would be precluded from directing a verdict for the defendant unless a verdict in his favor was the only reasonable conclusion.

Utah case law does not condition a new trial on the making of a directed verdict motion. Although old, the case of Foxley v. Gallagher⁷ squarely decides this issue with reasoning that has continuing vitality. Foxley was a personal injury action where the jury returned a verdict for the plaintiff. Several defendants appealed, based on the insufficiency of the evidence to justify the verdict, without having first moved for a nonsuit or a directed verdict. Their motion for a new trial had been denied. This Court reversed and remanded for a new trial with the following explanation:

Notwithstanding appellants omitted to move for a nonsuit or request a directed verdict, they did, nevertheless, move for a new trial on several grounds, one of which was insufficiency of the

⁵See Anderson v. Gribble, 30 Utah 2d 68, 513 P.2d 432, 434 (1973).

⁶See Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982).

⁷55 Utah 298, 185 P. 775 (1919).

evidence to justify the verdict. That was equivalent to a request for a directed verdict and should have the same effect on appeal.

The Court rejected the holdings to the contrary from Oregon and Oklahoma.

The adoption of the Utah Rules of Civil Procedure bolsters Foxley because there is no express requirement of a directed verdict motion in the new trial provisions (Rule 59) (see Addendum, p. A11), only in the judgment NOV provisions (Rule 50(b)) (see Addendum, p. A10). Foxley has been cited as good authority in Montana when statutory new trial rules similar to our present rules were in effect⁹ and in Arizona under Rule 59 of Arizona's rules of civil procedure.¹⁰ No Utah case since Foxley has changed the rule.¹¹

⁸185 P. at 776-77.

⁹Adami v. Murphy, 118 Mont. 172, 164 P.2d 150, 154 (1945).

¹⁰Singleton v. Valianos, 84 Ariz. 51, 323 P.2d 697, 698 (1958).

¹¹The Court appears to have erred in footnote 1 of Pollesche v. Transamerican Insurance Co., 27 Utah 2d 430, 497 P.2d 236, 238 (1972), a case where the Court reviewed the trial court's denial of a plaintiff's motions for new trial and judgment NOV. The Court states that the failure of a party to make a motion for a directed verdict precludes the appellate court from reviewing the sufficiency of the evidence to sustain the verdict. In support of this, the Court cites Rule 50(b) (judgments NOV) and Brigham v. Moon Lake Electric Ass'n, 24 Utah 2d 292, 470 P.2d 393 (1970), a case where the plaintiff made neither a motion for directed verdict nor a motion for new trial. Despite its placement and some contrary language, the Court apparently intended footnote 1 to cover only motions for judgment NOV (one of the grounds of appeal) because it concluded the footnote with this sentence: "Consequently, plaintiff may not allege error on the part of the trial court in its denial of the motion for a judgment notwithstanding the verdict." (emphasis added). The Court continues after footnote 1 to devote itself to the merits of the new trial ruling. This would have been completely unnecessary if the Court were deciding that it was precluded from review.

Price's authorities do not hit the mark:

1. Barson v. E.R. Squibb & Sons, Inc.¹² -- A case involving the failure to object to evidence, a situation where the court could have taken corrective action if requested at trial. That situation is governed by different rules and is not analogous.

2. Deer Valley Industrial Park Development & Lease Co. v. State¹³ -- An Arizona Court of Appeals case that does not require a motion for directed verdict. It appears to be based on a claimed failure of the condemnees to object to certain jury instructions on the method of determining value. The preclusion language is dicta, the court having reviewed the denial of the new trial motion.

3. Agranoff v. Morton¹⁴ -- A Washington case apparently not decided under rules patterned after the Federal Rules of Civil Procedure. The case is contrary to Utah's Foxley decision and should be considered rejected just as the Oregon and Oklahoma cases were rejected in Foxley.

Moore suggests that Utah's approach is the better one for those jurisdictions following the federal pattern:

It is to be noted that a party who has not moved for a directed verdict at the close of the evidence is precluded from moving later for a judgment n.o.v. There is some authority for the proposition that having neglected to move for a directed verdict, the party is also precluded from relying on insufficiency of the evidence in a motion for a new trial. There is no more than scant textual authority for this holding, inasmuch as a motion for a new trial, not

¹² 682 P.2d 832 (Utah 1984).

¹³ 5 Ariz. App. 150, 424 P.2d 192 (1967).

¹⁴ 54 Wash. 2d 341, 340 P.2d 811 (1959).

coupled with a motion for judgment n.o.v., is governed by Rule 59 rather than Rule 50, and Rule 59 does not make a motion for a directed verdict a precondition to a motion for a new trial. Further, the requirement of this precondition in the case of a motion for judgment n.o.v. was derived from Seventh Amendment considerations not relevant to the motion for a new trial. The most recent court of appeals decisions have recognized that such a requirement should not be read into Rule 59 to preclude a just determination of the merits of a controversy because of a procedural mistake.¹⁵

Utah Power contends that it did move for a directed verdict on the basis of inadequate causation evidence because such was encompassed within the statement that the evidence to support a "claim of negligence" was inadequate (Tr. 110; see point 6, pages 4, 5). Even if this is considered inadequately specific to amount to a valid motion on the causation issue, the Utah rules, Utah case law, and better-reasoned authorities from other jurisdictions support the proposition that no such motion is required before making a Rule 59(a)(6) motion.

POINT 3

The Plaintiff, Who Called No Doctor to Testify, Failed to Present Adequate Evidence to Make a Prima Facie Case of Medical Causation between the 8-10 Second Mule Ride and the Nerve Entrapments in his Neck and Elbow, and the Trial Court Abused its Discretion in Refusing to Grant a New Trial on this Issue

(A Reply to Respondent's Point II)

Utah Power accepts the fact that the standard of review of a denial of a new trial motion under Rule 59(a)(6) is a high one and that this Court will reverse 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."¹⁶ Because expert causation testimony should have been required in this case, the causation evidence was completely lacking or so slight and unconvincing as to make the verdict plainly unreasonable and unjust.

Utah Power agrees that certain lay testimony relating to injuries may be admissible; the real issue is whether such admitted testimony is sufficient to satisfy the causation element of the case. Price's cases on this issue do not help him here:

1. Barnett v. Richardson¹⁷ -- An Oklahoma case that simply says that a layperson is competent to testify about his pains and treatments.

2. Marsh v. Irvine¹⁸ -- A case that states there was no error in rulings on the admissibility of police testimony on certain accident reconstruction issues. The discretion of the trial court on the necessity of expert testimony, mentioned in dictum, should not extend to the failure to require medical causation testimony in Price's case.

3. Day v. Lorenzo Smith & Son, Inc.¹⁹ -- A case where the accident reconstruction testimony of a highway patrol officer was deemed inadmissible. The Court states: "There is no need for expert opinion with reference to facts involving commonplace

¹⁶Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982).

¹⁷415 P.2d 987 (Okla. 1966).

¹⁸22 Utah 2d 154, 449 P.2d 996 (1969).

¹⁹17 Utah 2d 221, 408 P.2d 186 (1965).

occurrences,"²⁰ without holding that the reconstruction testimony was unnecessary. The complex medical causation issue in Price's case cannot be considered a "commonplace occurrence."

Utah Power agrees that the jury was not bound to accept the testimony of any expert witness it did not believe, whether introduced by Price or Utah Power. Price had an obligation, however, to offer expert medical causation testimony, whether believed or not, in a complicated medical case such as this. A passing reference to an unspecified accident in a letter from Dr. Gaufin to Dr. Demman, without any statement of causation (Exhibit 4) certainly does not supply such causation testimony. Neither do the statements of possible connections between the mule incident and the injuries, made by chiropractors Sanders and Thayn on cross-examination. These were not expressions by these doctors "in language which sufficiently represented their own best judgment to a reasonable certainty," as required by Utah law.²¹

The auto accident case from Kansas of Rowe v. Maule Drug Co.,²² cited by Price, bears no resemblance to his own case. In Rowe, an orthopedic specialist called by the plaintiff was asked:

Q. Doctor, based upon the historical information you received from the patient at the time of your examination, based further on your physical findings and examination of the patient, can you state with any medical certainty that this man did receive at least some aggravation to his back condition as a result of the accident?

A. Yes, I believe I could make this statement. [reasons given] I would not say that the x-rays (sic) findings were a direct result of the accident but the

²⁰ 408 P.2d at 189.

²¹ State v. Jarrell, 608 P.2d 218, 230 (Utah 1980).

history is suggestive that the condition has worsened since the accident.

Q. And consistently began as a result of the accident?

A. Yes, I feel I could say that.²³

An osteopath, called later by the plaintiff, testified:

Q. . . . would it be consistent with your findings that the accident, which he complains about, was a considerable contributing factor to the disabilities which he suffers?

[objection overruled]

A. Yes, I think it would have a bearing on it.²⁴

The Rowe court did not agree to characterize this as "mere possibility" testimony:

We think this testimony amounted to an honest expression of professional opinion that there was a causal connection between the collision and the condition complained of. That is all that is or ought to be required.²⁵

The Rowe medical testimony is far removed from Price's cross-examination of the chiropractors called to supply evidence of preexisting conditions:

1. Dr. Sanders said it was possible that a severe strain or twist can aggravate a preexisting weakness (Tr. 177).

2. Dr. Thayn, who had last treated Price in 1978 and who did not testify to any examination of Price or his records since well before the mule incident, testified hypothetically of a possible connection between a mule ride and a neck injury. (Tr. 216-17).

²³ 413 P.2d at 106.

²⁴ Id.

²⁵ 413 P.2d at 109.

Such testimony does not meet the Jarrell²⁶ "best judgment to a reasonable certainty" standard.

POINT 4

The Court Committed Prejudicial Error and Violated Due Process in Refusing to Question Jury Panel Members about Possible Prejudice Against Utah Power from Layoffs and Unemployment in the Coal Mining Industry and in Refusing to Grant a New Trial on this Issue

(A Reply to Respondent's Point III)

Utah Power does not argue on appeal the excessive nature of the \$156,350 jury verdict rendered against it. No appeal is taken from the denial of its Rule 59(a)(5) motion (new trial for excessive damages). Utah Power's complaint with the jury is the screening process employed. The judge did not ask enough questions on voir dire to adequately probe potential bias against Utah Power. Several of Price's arguments, therefore, miss the point.

It is true that the extent of voir dire is within the sound discretion of the trial court; but the exercise of this discretion should be viewed in light of the simplicity by which the problem could have been cured -- by asking the panel one brief, additional question.²⁷ A party should not be forced to use its peremptory challenges without adequate knowledge of the panel members.

Price suggests that because the judge excused some of the panel members on his own accord, he was not required to continue

²⁶State v. Jarrell, 608 P.2d 218, 230 (Utah 1980).

²⁷See Jenkins v. Parrish, 627 P.2d 533, 536 (Utah 1981).

to screen the rest with skill and care. That might be true if the judge's duty were satisfied by dismissing an arbitrary number of panel members for bias, but in our system of justice, we expect all seated jurors to be relatively free of bias and known well enough to enable counsel to exercise peremptory challenges intelligently.

CONCLUSION

The trial court clearly abused its discretion in failing to grant a new trial on the issues of deficient voir dire and inadequate causation testimony. This Court is not precluded from ordering a new trial and should do so for the sake of substantial justice.

UTAH POWER & LIGHT COMPANY


David A. Westerby

Date: 29 October 1985

A D D E N D U M

Time Line

Victor Price

1968

17-20 March

Carbon Hospital. Fell from horse. Broken ribs, bruised leg

1977

6-15 Sep

Hospitalized. Horse bucked. Kicked in head. Ran over him. Fractured arm. Lacerated scalp. Pain and soreness in head, back, and neck. Fairly advanced degen. disc disease. 9 days in hospital.

1978

16 Jan

8 May

M.K. Thayne, D.C. First visit. Poor neck movement. Irritated nerve roots C4-C7. Weak hands from inadequate nerve supply. Diagnosed traumatic cervical thoracic sprain, severe, with brachial neuropathy bilaterally. Treatments started.

Last treatment by Dr. Thayne (26 total)

1978

7 July

11 July

Truck hits ditch.

R.B. Sanders, D.C. First visit. Driving into ditch reinjures neck. Poor neck movement. Neck, shoulder, head, base of skull hurt. Numb chin. Traumatic cervical torticollis. Treatments start.

29 Sep

Third neck injury.

Dec

End of Sanders' treatment for awhile.

1979

June

1979

25 Sep

Fell out of pickup.
Traumatic thoracic
pain. Sanders
starts treating
again for a few months

7-25 Jan

1981

Prostate
Surgery.
Spinal Injury
Recognized.

1981

20 Aug - 9 Sep 15 Sep

mid-Nov

Treatments by Sanders

20 Aug - neck adjustment and traction
27 Aug - same
3 Sep - same plus hip adjustment
9 Sep - same plus hip adjustment

MULE
INCIDENT
Saw Sanders
16 Sep

Therapy
begun

Jan

6 Feb

1982

Therapy
ended

Dr. Gaufin finds large extradural defect C5-6 and mild defect C6-7. X-rays show degenerative joint disease @ elbow with arthritic changes and deformity consistent with old trauma. At surgery, Gaufin removed anterior cervical disc, decompressed nerve root and fused C5-C6, and did external neurolysis on ulnar nerve at @ elbow. Diagnosis:

- 1) Acute and chronic cervical radiculopathy C5-6 @
- 2) Ulnar neuropathy with entrapment @ elbow
- 3) Degenerative arthritis

DISCHARGE SUMMARY

PRICE, VICTOR
AGE 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.

SKIN:

Normal in appearance. No excoriations or dermatosis is present.

HEENT:

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 is normal in appearance.

CHEST:

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

LUNGS:

No fluid, no rales, no consolidation.

CARDIOVASCULAR:

Normal sinus rhythm. No murmurs, no thrills, no arrhythmias.

BACK:

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.

LYMPHATICS:

No enlargement of the axillary or cervical lymph glands.

NEUROLOGICAL:

All physiological reflexes are present.

HOSPITAL COURSE:

Uninvented. Reduction of the fracture was done.

LABORATORY:

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.

X-RAYS:

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.

DIAGNOSIS:

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.

4 RD
A.R. DEMMAN, M.D.

ARD:sa

9/ 6/77

9/15/77

PRICE, VICTOR

MR. CAMERON

#125798

DATE OF ADMISSION: February 4, 1982

DATE OF DISCHARGE: February 10, 1982

HISTORY:

Mr. Price is a 69-year old gentleman who is a patient of Dr. Victor Price, Utah.

CHIEF COMPLAINT:

- 1) Weakness and atrophy and right arm muscles.
- 2) Pain in neck.

HOSPITAL COURSE:

The patient was admitted to the hospital. A myelogram was performed, there was a large, extradural defect at C5-6 on the right, an osteophyte formation was present at other levels but lesser degree. He also had evidence of other neurophy at the elbow.

The patient was taken to the operating room February 6, 1982 and an anterior cervical discectomy with nerve root decompression and interbody fusion C5-6 was performed. Following this operation and exploration with external neurolysis the ulnar nerve on the right was performed. Postoperatively the patient had 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 patient reported that he was feeling much better. His strength in the biceps, triceps and grip on the right were graded at 4-5. There is atrophy of the first dorsal and osseus muscle on the right. Sensory examination reveals mild hypalgesia over the fourth and fifth fingers right hand and over the D1, 2 of the right hand.

The sutures were removed on the day of discharge. From his neck, there was no cellulitis or infection present. Patient had a mild hoarseness of his voice.

LABORATORY DATA:

Hct. 45%, white count 6,800, normal; in normal. Uric acid, 4.5, 12.6 normal. SKK 12 normal. Chest x-ray normal. X-ray of the right elbow demonstrated some degenerative joint disease at the elbow, no fracture. Complete myelogram demonstrated prominent extradural defect on the right side at C5-6, some mild defect at C6-7 as there is degenerative disc disease at L5-S1. The EKG was within normal limits. Pathology report came back fragments of intervertebral disc and osteophyte.

DR. GAUFIN

CTOR

DIAGNOSIS:

- 1) Acute and chronic cervical radiculopathy, C5-C6, right.
- 2) Ulnar neuropathy with entrapment of right elbow.
- 3) Degenerative arthritis.
- 4) Arteriosclerotic cardiovascular disease with hypertension.

PLAN:

Discharge from the hospital.

Return to my office in two weeks for removal of sutures from right elbow.

Instructions were given regarding his activities, do's and don'ts. He was given a cervical frame and admonished not to flex his neck so as to reduce the chance of crushing the bone plug.

MEDICATIONS:

Multi-vitamin 1 tablet q d.

Darvocet N-100 1 tablet prn pain. disp. 30.

LMS/rra

dict: 2--10-82

trans: 2-11-82

Lynn H. Gaufin, M.D.

NAME PRICE, VICTOR (H) 743-6404
NO. 00 02 17 DATE 31001
AGE 67 OR Don't know

R.F.D. #2 - BOX 48
PRICE, UTAH 84501

Report of Roentgenological Examination

Amulatory ☐ Cart ☐ Wheelchair ☐ Room # Out Hospital # _____
PART TO EXAMINED Right Elbow
REASON FOR EXAM Injured

RADIOLOGY REPORT

VIEWS OF THE RIGHT ELBOW

Shows arthritic change and deformity consistent with old trauma.
There are arthritic changes in the joints base.
I don't see evidence of acute bony injury.
There is considerable soft tissue swelling posteriorly.

added next to names shown to
have been paid. Poor copy quality
makes it difficult to read

" ✓ those paid "

JURY LIST #5
SEVENTH JUDICIAL DISTRICT COURT

• ✓ 1. John N. Adams	Elmo, Utah
• ✓ 2. Steve Allred	Cleveland, Utah
3. Larry C. Byars	Ferron, Utah
4. Delmar Cammack	Clawson, Utah
5. Frank Perry Colete	Castle Dale, Utah
• ✓ 6. Sharon A. Cox	Castle Dale, Utah
• ✓ 7. Iona T. Ekker	Green River, Utah
• ✓ 8. David Arthur Fuller	Castle Dale, Utah
9. Marie N. Guymon	Huntington, Utah
• ✓ 10. Ferdinand J. Hannert	Huntington, Utah
• 11. Ward Hayward	Castle Dale, Utah
12. Ronald Val Hodson	Ferron, Utah
• 13. Thomas Dee Humphrey	Huntington, Utah
• 14. Hazel Ruth Jensen	Cleveland, Utah
• 15. Richard W. Justesen	Orangeville, Utah
• 16. Derrell June Lake	Castle Dale, Utah
• 17. Mason D. Lancaster	Castle Dale, Utah
18. Joyce Law	Orangeville, Utah
• 19. Del Leamaster	Huntington, Utah
20. Johnny Dale Leffler	Castle Dale, Utah
• 21. Henrietta Mathie	Huntington, Utah
• ✓ 22. Grant B. Nelson	Ferron, Utah
23. Larry Steven Pannell (m...)	Ferron, Utah
24. Claudette Powell	Huntington, Utah
25. Jesse T. Powell	Green River, Utah
• ✓ 26. Arthur M. Rasmussen	Huntington, Utah
• ✓ 27. James Lisle Ryan	Ferron, Utah
• ✓ 28. Sarena R. Shorts	Green River, Utah
• ✓ 29. Jackie L. Spigarelli	Elmo, Utah
• ✓ 30. Victor Wayne Staley	Orangeville, Utah
31. Donna Lynn Street	Ferron, Utah
32. William Grant Swasey	Castle Dale, Utah
33. Ken Leslie Wilberg	Castle Dale, Utah
• ✓ 34. Raymond Harold Winder	Huntington, Utah

- 36. William Anton Block
- 37. Kelly Jenkins Burnside
- 38. Fred Marcus Gregersen

Orangeville, Utah

Huntington, Utah

Castle Dale, Utah

Rule 46. Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his ground therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

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. 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.

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.

(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.

IN THE SUPREME COURT
OF THE STATE OF UTAH

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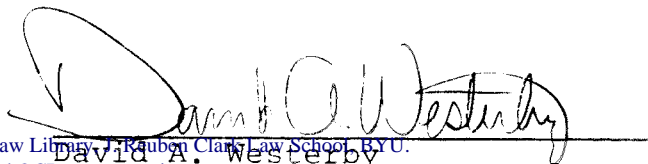
VICTOR PRICE, :
Plaintiff-Respondent, :
vs. : CERTIFICATE OF SERVICE
UTAH POWER & LIGHT COMPANY, : Case No. 20568
a Utah corporation, and :
DAVID ZSERAI, :
Defendants-Appellants. :

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David A. Westerby, an attorney for Utah Power & Light Company, 1407 West North Temple, Salt Lake City, Utah 84116, states that he served the corrected Reply Brief upon the following parties by placing four true and correct copies thereof in an envelope addressed to:

Marlynn B. Lema, Esq.
108 North 4th West
P.O. Box 1026
Price, Utah 84501
Telephone: (801) 637-2690
Attorney for Plaintiff-Respondent

and mailing the same, postage prepaid, on this 29th day of October, 1985.


David A. Westerby