

1989

John Call Engineering, Inc., a Utah corporation v.
Manti City Corporation, a municipal corporation :
Corrected Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DEPOSITED BY THE
STATE OF UTAH
AUG 17 1989

IN THE UTAH COURT OF APPEALS

JOHN CALL ENGINEERING, INC., a Utah
Corporation,

Plaintiff/Appellant,

v.

MANTI CITY CORPORATION, a
a municipal corporation,

Defendant/Respondent.

)
)
) CORRECTED
) BRIEF OF APPELLANT
)

) Case No. 8903484-CA
)

) Category 14b
)
)
)

APPEAL FROM A FINAL JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT
OF SANPETE COUNTY, STATE OF UTAH
HONORABLE DON V. TIBBS, JUDGE

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FILED

AUG 18 1989

IN THE UTAH COURT OF APPEALS

JOHN CALL ENGINEERING, INC., a Utah Corporation,)	
)	CORRECTED
Plaintiff/Appellant,)	BRIEF OF APPELLANT
)	
v.)	Case No. 8903484-CA
)	
MANTI CITY CORPORATION, a municipal corporation,)	Category 14b
)	
Defendant/Respondent.)	

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Appellant John Call Engineering, Inc. respectfully
submits Appellant's Brief.

I.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

John Call Engineering, Inc.

Plaintiff/Appellant

Manti City Corporation

Defendant/Respondent

II.

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IV.

STATEMENT OF JURISDICTION

The court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) and Rule 4A of the Rules of the Utah Supreme Court.

V.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

2. Did the Trial Court err in allowing Manti, on the day of trial and over the objection of Call, to amend its answer by alleging the unpled affirmative defense of mitigation of damages?

3. Did the Trial Court err in granting and then revoking a trial continuance to allow Call to address and prepare for Call's mitigation of damages defense?

4. Did the Trial Court commit reversible error when it failed to submit Call's jury instructions telling the jury how to calculate lost profits?

5. Did the Trial Court err in allowing Manti to inject irrelevant and prejudicial issues in the trial proceeding? Those issues include, but are not limited to,

whether the judgment would be paid out of the jurors pockets as taxpayers, and whether Call should he paid for work not performed?

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

7. Did the Trial Court err in not taxing as costs against Manti, the expert witness fees incurred by Call?

VI.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The relevant constitutional provisions, statutes, ordinances, rules and regulations are attached in plaintiff's addendum in the addendum to Appellant's Brief. They are:

Utah Rule of Civil Procedure 8; Utah Rule of Civil Procedure 15;
Utah Rule of Civil Procedure 50; Utah Rule of Civil Procedure 59;
and Article I Section 11 of the Utah Constitution.

VII.

STATEMENT OF THE CASE

This is an appeal from a final judgment of the Sixth Judicial District Court in and for Sanpete County awarding the

appellant John Call Engineering, Inc. ("Call") \$13,440 plus pre-judgment interest and costs against the respondent Manti City Corp. ("Manti") and a subsequent order denying Call's motion for judgment notwithstanding verdict, or in the alternative, motion to amend the judgment, or in the alternative, motion for a new trial.

VIII.

STATEMENT OF FACTS RELEVANT TO THE ISSUES
PRESENTED FOR REVIEW

1. John Call Engineering, sued Manti City for breach of an engineering services contract. The contract required Manti City to compensate Call according to the contract's schedule of rates. (R. 1, 12, plaintiff's exhibit 1.)

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

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

4. Thereafter, the parties conducted additional discovery. (R. 123.)

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

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

- a) Whether Call should be paid for work not performed.
- b) Whether the judgment would be paid out of juror and/or taxpayer's pockets.
- c) Whether Call mitigated his damages.

(R. 235-246.)

7. The Court denied the Motion in Limine and after the jury was impaneled, allowed Manti to amend its answer by alleging the unpled affirmative defense of mitigation of damages. (Transcript of Proceedings, January 12 & 13, 1989, p. 67-73, hereafter "Tr. p. ____.")

8. The Court understood the last minute amendment would prejudice Call, and offered Call a continuance of the trial. (Tr. p. 73.)

9. Manti's counsel informed the Court it had no objection to continuing the trial. (Tr. p. 75.)

10. However, when Call accepted the continuance the Court changed its mind and revoked the continuance. (Tr. p. 75-76.)

11. Thereafter, the Court allowed argument on

mitigation of damages, (Tr. p. 182) and approved a jury instruction on mitigation of damages. (Jury Instruction No. 21.)

12. Over the objection of Call's counsel, the following irrelevant and prejudicial arguments and issues were allowed to go to the jury:

- a) The contract was in dispute (Tr. p. 79-81). The Utah Supreme Court in Call, supra, had previously construed the contract in favor of Call.
- b) Call prepared a sewer system which was not acceptable to the State Board of Health. (Tr. p. 81).
- c) Call was paid for everything he did. (Tr. p. 81).
- d) Call was not allowed to proceed without written authorization from Manti City. (Tr. p. 210-211). The Utah Supreme Court in Call, supra, held the contract's authorization to proceed provisions did not excuse Manti's failure to pay Call.
- e) That taxpayer's would have to pay any judgment. (Tr. p. 318).

13. At trial, Call sought to recover lost profits. Call established his lost profits by expert opinion, past financial records, the opinion of the business owner, records of similar businesses and testimony of a similar business owner. (Plaintiff's Exhibits 1, 32-38, 42; Tr. p. 88-301.)

14. Defendant put on no case whatsoever, except for a few perfunctory questions to, David Thurgood, the engineer hired by Manti when Manti breached Call's contract. Call, supra; (Tr. p. 315, 316.)

15. The uncontradicted and unimpeached evidence at trial showed that John Call Engineering, Inc. was entitled to damages ranging from \$191,998 for a high to \$57,990 as set forth below.

<u>Evidence</u>	<u>Amount of damages</u>
John Call Contract, Testimony of John Call and Expert Testimony of Randy Peterson	<u>\$191,998.00</u>
OR	
The Expert testimony of Chuck Peterson, of Frank Stuart & Associates	<u>\$136,334.00</u>
OR	
Gross Receipts as Determined by Randy Peterson multiplied by the Average Profit Margin Taken from Call's Financial Records from 1981 through 1986	\$ <u>70,278.00</u>
OR	
Gross Receipts called for by the Call Contract multiplied by Thurgood's estimated Profit Margin	\$ 57,990.00

16. At the close of plaintiff's case, the plaintiff moved the Court for a directed verdict in the sum of not less than \$56,377. The Court denied plaintiff's motion without

prejudice but on the record, expressed its concern to counsel that Call had put on a thorough case consisting of financial records and expert testimony and evidence of similar business owners while Manti put on no evidence at all. (Tr. p. 316.)

17. The Court failed to present Call's proposed jury verdict form and instructions telling the jury how to calculate lost profits. (Tr. p. 303, 312; Call's proposed Jury Instruction Nos. 8, 12 and 12 amended.)

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

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

20. The Trial Court denied Call's motions and denied Call's request for expert witness fee costs. (R. 335-336.)

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

IX.
SUMMARY OF ARGUMENT

POINT I - THE LOWER COURT COMMITTED REVERSIBLE ERROR WHEN IT
ALLOWED THE DEFENDANT TO AMEND ITS ANSWER AND ALLEGE
THE UNPLED MITIGATION OF DAMAGES AFFIRMATIVE DEFENSE

The Court allowed Manti city to amend its answer to allege the unpled mitigation of damages affirmative defense.

The amendment occurred nearly 6 years after the litigation commenced and after the jury was impanelled.

The amendment prejudiced Call because Call was not given time to prepare the issue for trial.

Further, the amendment was contrary to the Utah Supreme Court's ruling in John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205 (1987).

Finally, by waiting until trial to move to amend, Manti waived any mitigation of damages issue.

POINT II - THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF THE UTAH SUPREME COURT

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

The trial court did not do that. Instead the trial court, over Call's objections, allowed irrelevant and prejudicial arguments and issues into the trial such as:

- 1) Whether the contract was in dispute;
- 2) Whether Call should be paid for something he had not done; and
- 3) Whether Call should have mitigated his damages.

POINT III - THE COURT ERRED IN FAILING TO CONTINUE THE TRIAL

Allowing Manti to amend its answer at trial prejudiced Call. The trial court knew Call was prejudiced and offered a continuance. Manti agreed to the continuance. But, when Call accepted the continuance, the court changed its mind. The trial court's abuse of discretion requires a new trial.

POINT IV - THE COURT FAILED TO GIVE CALL'S REQUESTED JURY INSTRUCTIONS TELLING THE JURY HOW TO CALCULATE CALL'S LOST PROFITS

The Court has a duty to tell the jury how to measure or calculate Call's damages. Call submitted jury instructions and a verdict form to assist the jury in determining Call's lost profits.

The trial court refused the instructions and the verdict form. Further, the trial court totally failed to instruct the jury on how to determine Call's damages. The jury was uninformed and allowed to use its imagination.

POINT V - THE COURT SHOULD HAVE DIRECTED A VERDICT IN FAVOR OF CALL FOR AT LEAST \$56,000 OR AWARDED A NEW TRIAL

Call established his lost profits by: 1) testimony of the business owner; 2) financial records; 3) expert testimony; 4) testimony of a similar business owner, and 5) records of a similar business owner.

Manti's case consisted of a few questions to one of

Call's witnesses. The court acknowledged that Manti's case was minimal. The uncontradicted evidence shows that Call was entitled to a judgment of at least \$56,377.

POINT VI - THE COURT ALLOWED MANTI TO PRESENT IRRELEVANT AND PREJUDICIAL ISSUES AND ARGUMENTS TO THE JURY

Over the objection of Call's counsel, the trial court allowed issues previously ruled upon by the Utah Supreme Court. The issues were prejudicial and confusing to the jury. In addition, the trial court informed Manti that the court would sustain objections to certain types of arguments. Nevertheless, Manti caused the following prejudicial arguments and issues to be conveyed to the jury:

- 1) The contract was in dispute. In fact, the Utah Supreme Court ruled that the only issue was damages.
- 2) Call should not be paid twice for work not performed.
- 3) Call could not proceed without written authorization. Contrary to Manti's argument, the Utah Supreme Court had ruled the written authorization clause of the contract was not an excuse for not paying Call.
- 4) The verdict would come out of taxpayers pockets.

Each of the foregoing arguments either was contrary to the Supreme Court's ruling and/or prejudicial to Call. Each requires a new trial.

POINT VII - CALL SHOULD BE AWARDED HIS EXPERT WITNESS FEE COSTS

Because establishing lost profits in a contract case is a complex process, Call needed expert testimony. That expert testimony was expensive. Previously, the Utah Supreme Court has allowed costs for expert testimony taken by deposition. It makes no sense to allow costs for expert deposition testimony but not allow costs for expert trial testimony.

X.
ARGUMENT

POINT I - THE LOWER COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE DEFENDANT TO AMEND ITS ANSWER AND ALLEGE THE UNPLED MITIGATION OF DAMAGES AFFIRMATIVE DEFENSE

A. Factual Background

Call's complaint was filed on March 17, 1983. Manti's answer was filed on April 7, 1983. The answer did not contain the mitigation of damages affirmative defense. (R. 19-20.) Mitigation of damages was not an issue in the first trial nor in discovery proceedings both before and after the first trial. Up to the date of the second trial, Manti never sought an order allowing it to amend its answer.

In summary, during the nearly six year period from the time Manti filed its answer up to the date of trial, Manti never sought nor obtained an order allowing it to amend its answer to plead mitigation of damages as an affirmative defense.

The Court, over Call's objections, denied plaintiff's Motion in Limine and granted defendant's motion to amend its answer by alleging the mitigation of damages affirmative defense. However, realizing that Call was prejudiced by the Court's ruling, the Court offered Call a continuance.

I'm going to grant the motion. . . Now if you want a continuance of the case and you feel that's proper, Counsel, I'll grant you a continuance.

(Tr. p. 73.)

Manti's attorney also realizing that Call was prejudiced had no objection to the trial being continued. (Tr. p.75). However, when Call's counsel explained that neither he nor Call were prepared to try the mitigation of defense issue and accepted the Court's continuance, the Court changed its mind.

I'm changing my thing. We are going forward and we're going to allow it [the amended answer]. . . it's my responsibility to go forward in the interest of judicial economy.

(Tr. p. 75-76.)

Thereafter, Manti was allowed to present the mitigation of damages issue to the jury.

Now the city's position is that once he [Call] was informed -- this would be the evidence that will be introduced -- once he was informed that he was no longer on the job then he had knowledge of what the situation was and was put in a position where he could take various corrective action to minimize the loss he would sustain by not doing this job, if any.

(Manti's counsel's opening statement tr. p. 83.)

The Court then allowed evidence on the mitigation of damages issue and followed up with the following jury instruction.

John Call upon his first notice of breach of contract on March 23, 1982 had a duty to mitigate any damage he may have sustained. This action requires a course of conduct on his part to cut his losses.

(Jury Instruction No. 21.)

B. Legal Analysis

After the first trial, the Utah Supreme Court limited the trial issue to one, the amount of Call's damages. John Call Engineering, Inc. v. Manti City Corp. 743 P.2d 1205, 1210 (1987).

This case is reversed and remanded to the trial court with instructions to determine plaintiff's damages and enter judgment in favor of Call.

Call, at 1210.

The Supreme Court instructed the Trial Court to determine Call's damages, not to determine whether Call should

have mitigated his damages. But the trial court, disregarded the instructions of the Utah Supreme Court.

The trial court's action was not only contrary to the Utah Supreme Court's ruling but also contrary to well settled case law.

U.R.C.P. 8 requires the party to set forth in his answer "any matter constituting an avoidance or affirmative defense." Mitigation of damages is an affirmative defense. e.g. Pratt v. Board of Education 564 P.2d 294 (Utah 1977). When a defendant fails to plead an affirmative defense, he waives the affirmative defense. Mabey v. Kay Peterson Construction Co., 682 P.2d 287 (Utah 1984).

In Gill v. Timm, 720 P.2d 1352 (Utah 1986) the Utah Supreme Court specifically held that the failure to plead mitigation of damages as an affirmative defense, waives any mitigation of damages issue at trial. Gill, at 1357.

Call's counsel made the Court aware of the Gill opinion. (Tr. p. 71.) However, the trial court disregarded Gill and disregarded the specific instructions imposed by the Utah Supreme Court. Instead, the court encouraged and allowed Manti to amend its answer after the jury had been impanelled.

A party's pleadings may be amended only in the sound discretion of the Trial Court. Wasechea v. Terra, Inc., 528

P.2d 802 (Utah 1974). However, if the Court abuses that discretion, the decision will be reversed Gillman v. Hansen, 26 Utah 2d 165, 486 P.2d 1045 (1971); Lloyd's Unlimited v. Nature's Way Markets, Ltd., 753 P.2d 507 (Utah App. 1988). It is an abuse of discretion to allow an amendment which prejudices the other party. Bekins Bar V Ranch v. Huth 664 P.2d 445 (Utah 1983).

Because last minute amendments asserting new issues almost always prejudice the other party, the courts routinely refuse to grant eve of trial amendments. See, Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc., 24 Utah 2d 271, 470 P.2d 257 (1974); Girard v. Appleby, 660 P.2d 245 (Utah 1983); Staker v. Huntington/Cleveland Irrigation Co., 664 P.2d 188 (Utah 1987).

C. Call was Prejudiced

In this case, Call was prejudiced in the following ways: First, pursuant to the mandate of the Utah Supreme Court, Call was entitled to have as the sole trial issue, the measure of damages sustained by Call. The trial court took that right away from Call. Second, Call was prejudiced because the amendment inserted a new issue into the proceedings in which Call was not prepared to try.

Call's counsel explained that Call was prejudiced.

I don't know what his theory is your honor and it hasn't been an issue that's gone through discovery. . .I haven't got the foggiest idea what questions he's going to ask my witness. And I would have prepared for it before coming to trial.

(Tr. p. 72.)

The Court knew that Call was prejudiced.

Counsel, I'll grant you a continuance. I don't want to, but I will, if you feel that you could reach and bring some more evidence in that would help you in this.

(Tr. p. 73.)

Manti's counsel also knew that Call had been prejudiced and agreed to the continuance.

I wouldn't have any objection to a continuance.

(Tr. p. 75.)

However, despite the fact that Call was prejudiced and the Court knew Call was prejudiced, the Court unilaterally revoked its offer to continue the trial, allowed the amendments, and forced the trial to begin, all of which prejudiced Call.

D. Conclusion

The Utah Supreme Court, in the first appeal determined that the sole issue to be tried was the measure of Call's damages. The trial court disregarded the ruling of the Utah Supreme Court. Further, the trial court disregarded the reported

decisions of the Utah Supreme Court and Court of Appeals and allowed the amendment inserting new issues into the trial. The record shows that Call was prejudiced. For these reasons, the Court should reverse the judgment entered in the lower Court and order a new trial.

POINT II - THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF THE UTAH SUPREME COURT

A. Factual Background

In this case, the mandate of the Utah Supreme Court was simple.

This case is reversed and remanded to the trial court with instructions to determine plaintiff's damages and enter judgment in favor of Call.

Call, at 1210.

The appellate Court's decision on all issues considered by the appellate Court is binding upon the trial court. Corbett v. Fitzgerald, 709 P.2d 384 (Utah 1985). When a judgment is reversed and remanded with specific instructions, the lower court is bound to follow the instructions and the case is treated as if a trial had not been held. Hidden Meadows Development Co. v. Mills, 590 P.2d 1244 (Utah 1979).

No new defenses existing at the date of the appellate Court's decision may be heard. 5 Am.Jur.2d Appeal and Error §992 at 419 (1962). The decision of the appellate Court is the

law of the case. Street v. Fourth Judicial District Court, 113 Utah 60, 191 P.2d 153 (1948).

In this case, the Court directly violated the mandate of the Utah Supreme Court. Rather than simply determining Call's damages, the Court allowed the jury to also determine whether Call should have mitigated his damages. The failure of the trial Court, to follow the mandate of the Utah Supreme Court, requires this Appellate Court, to either enter a judgment consistent with the Utah Supreme Court's mandate or order a new trial.

POINT III - THE COURT ERRED IN FAILING TO CONTINUE THE CASE.

A. Factual Background

After the trial court erroneously ruled that Manti could amend its answer almost six years after commencement of the litigation and immediately after the jury was impanelled, the Court offered plaintiff a continuance.

I'm going to grant the motion. . .if you want a continuance of the case and you feel that's proper, Counsel, I'll grant you a continuance.

(Tr. p. 73.)

Manti's counsel agreed that a continuance was warranted by Manti's amendment.

We wouldn't have any objection to a continuance.

(Tr. p. 75.)

When Call accepted the continuance, because he was not prepared to try the mitigation of damages issue, the trial judge changed his mind.

I'm changing my thing. We are going forward and we're going to allow it. . .it's my responsibility to go forward in the interest of judicial economy.

(Tr. p. 75-76.)

As set forth in Point I above, the jury was then allowed to consider the issue of mitigation of damages.

B. Legal Analysis

Rule 40 of the Utah Rules of Civil Procedure authorizes a continuance or postponement "upon good cause shown." The good cause in this case was the Court allowing the new mitigation of damages issue to be injected into the trial proceedings. Frequently, when courts allow a party to amend its pleading, the court will continue or postpone the trial to minimize the prejudice to the other party. See e.g., Commercial Credit Corp. v. Harris, 510 P.2d 1322 (Kan. 1973); Mitchell v. Mitchell, 545 P.2d 657 (Mont. 1976); Eagle River Mobile Home Park, Ltd. v. District Court in and for Eagle County, 647 P.2d 660 (Colo. 1982).

Whether a trial should be continued, is within the sound discretion of the trial court. Christenson v. Jewkes, 761

P.2d 1375 (Utah 1988). The decision will be reversed when there is an abuse of discretion. Bairas v. Johnson, 13 Utah 2d 269, 373 P.2d 375 (1967). An abuse of discretion occurs when a party is prejudiced. Malasarte v. Coleman, 393 P.2d 902 (Alaska 1964).

In Malasarte, the Trial Court, permitted the plaintiff to amend its breach of contract complaint to add a claim for negligence after the trial commenced. The defendant moved for a continuance. The continuance was denied. On appeal, the Court ruled that by allowing a new issue to be injected into the trial, the defendant was prejudiced requiring a continuance. The Court's failure to grant the continuance was reversible error requiring a new trial Malasarte v. Coleman, 393 P.2d 902, 907 (Alaska 1964).

Malasarte, is four square with the present action. Both cases involve a breach of contract case. After the trial commenced, the Court, in both cases, allowed both parties to amend and create new trial issues. The responding parties moved for a trial continuance to prepare for the new issues. The denial of the motions for a continuance prejudiced the responding parties. (See, Point I, above.) Denial of the continuance was reversible error and requires a new trial. Malasarte, supra.

C. Conclusion

The trial court prejudiced Call when it allowed Manti

to amend its answer. The remedy to lessen the prejudice caused by an amendment, is to postpone the trial. Call accepted the court's offer and requested a continuance. The Court's denial of the requested continuance, prejudiced Call and requires a new trial.

POINT IV - THE COURT FAILED TO GIVE CALL'S REQUESTED JURY INSTRUCTIONS TELLING THE JURY HOW TO CALCULATE CALL'S LOST PROFITS

A. Factual Background

From day one of this litigation, the issue was the amount of Call's lost profit as a result of Manti's breach of the engineering services contract. Furthermore, the trial judge knew that the only issue to be tried was the calculation of lost profits.

He's [Call] entitled to his benefit of his bargain, in my opinion. The benefit of the bargain is his profit on the deal and that's it. What he would receive, less his expenses, less the profit, that's what he's entitled to.

(Tr. p. 71.)

Call requested the following instructions. Jury Instruction No. 8 informed the jury of the rates Manti agreed to pay Call.

Jury Instruction No. 8:

You are instructed that the contract entered into between the plaintiff John Call Engineering, Inc., and defendant

Manti City, required Manti City to pay for engineering services at the following rates:

	<u>Hourly Rates</u>
Principal	48.00
Project Manager	39.00
Project Engineer	33.50
Design Draftsman	22.50
Senior Draftsman	24.00
Draftsman	20.00
Clerical	14.00
Two Man Survey Party	47.00
Three Man Survey Party	53.50
Four Man Survey Party	64.50
Computer Time	13.00

In addition, Manti was to pay the plaintiff a mileage allowance as follows.

Automobiles	.33/mile
Trucks	.43/mile

Jury Instruction No. 12 and Amended Jury Instruction No. 12 told the jury how lost profits are calculated.

Jury Instruction No. 12:

In deciding the amount of damages; you are to award John Call Engineering, Inc., you are to use the following formula:

First, determine the amount of money John Call Engineering would have received if Manti had allowed Call Engineering to fully perform the engineer service contract.

Next, subtract the expenses that Call Engineering saved by not having to perform the contract. In other words, determine what Call's costs to complete the contract would have been. In determining the expenses Call Engineering saved, you do not subtract fixed overhead expenses that did not decrease when Call was prevented from completing the contract.

The answer is the lost profits or damages that are to be awarded to Call.

Amended Jury Instruction No. 12:

In a business such as John Call Engineering, there are two general types of expenses. These may be referred to as variable expenses and fixed expenses.

Variable expenses are those expenses which can be saved if the contract is not performed. For example, the contract provided that John Call would be paid \$20 per hour for a draftsman. However, suppose the draftsman actually cost John Call \$12 per hour. When the contract was cancelled, John Call had a chance to save that \$12 because he did not have to hire or pay for the draftsman. Thus, \$12 would be a variable expense.

On the other hand, a fixed expense is an expense which cannot be saved if the contract is not performed. For example, the rent on John Call's office would remain exactly the same whether or not the Manti contract was cancelled.

In order to determine John Call's lost profits on the Manti contract, you should follow these steps:

1. Determine the full amount of money John Call would have received if Manti City had not breached its contract.
2. Subtract the variable expenses as that term has been explained to you.
3. Do not subtract fixed expenses, as that term has been explained to you.
4. The result of these calculations is referred to as "lost profits."

In addition, plaintiff proposed a verdict form which would assist the jury in calculating the lost profits. A copy is attached in the addendum. The court refused each of the jury instructions and the verdict form. Call's counsel objected that the court's verdict form allowed the jury to compute lost profits

in any which way that they could imagine. (Tr. p. 307). Call's counsel also explained that Jury Instruction No. 8 was necessary to assist the jury in calculating the gross revenues that Call would have received. (Tr. p. 308). Call's counsel also objected to the Court failing to use the formula set forth in Jury Instruction No. 12. Call explained that denying the jury instruction prevented the jury from receiving the information it needed to rationally calculate Call's lost profits.

The only instructions the Court gave the jury to assist them in calculating lost profits were Jury Instruction Nos. 15, 16 and 18:

Jury Instruction No. 15:

Because Manti City breached its contract to plaintiff John Call Engineering, Inc., plaintiff John Call is entitled to be awarded damages in the amount sufficient to place the plaintiff in as good a financial position as if the plaintiff had been allowed to perform the contract and had received payment in full from Manti City.

Jury Instruction No. 16:

Lost profits may be awarded John Call Engineering, Inc. if there is evidence from which the amount of lost profits can be established. Evidence include expert opinions, past financial records, subpoena of the business owners, the records of a similar business and the testimony of a similar business owner.

Jury Instruction No. 18:

You are instructed evidence of another experienced and comparable business may be used by you as evidence in computing plaintiff John Call Engineering, Inc.'s damages.

The jury came back with a verdict of \$13,144.

B. Legal Analysis

The idea of awarding breach of contract damages on the basis of lost profits, is not a novel nor new concept to the Utah Courts. A non-breaching party to a contract [Call] has always been entitled to an award of damages which would place him in as good a position as he would have been had the contract been fully performed. Miller Pontiac, Inc. v. Osborne, 622 P.2d 800, 803 (Utah 1981); Keller v. Deseret Mortuary Co., 23 Utah 2d 1, 455 P.2d 197 (Utah 1969).

To place the non breaching party in as good a position he would have been, absent the breach of contract, requires a verdict equal to the lost net profits. Sawyer v. FMA Leasing, Co. 722 P.2d 773 (Utah 1986).

In Cook Associates v. Warnick, 664 P.2d 1161-66 (Utah 1983), the Utah Supreme Court held that lost profits could be established by past earning records, evidence of subsequent earnings, and expert testimony of profit potential. The Utah Supreme Court has also set forth the formula for calculating

lost profits. Lost profits are determined by computing the difference between gross profits and the direct expenses which would be incurred in earning the profits. Id. Acculog Inc. v. Peterson, 692 P.2d 728 (Utah 1984), see, Holman v. Sorenson, 556 P.2d 499 (Utah 1976); Sawyer, supra. Breach of contract damages are the contract price less the reasonable costs of completion. See also, Covington Bros. v. Valley Plastering Inc. 566 P.2d 814 (Nev. 1977).

When the Utah Supreme Court directed the trial court to determine Call's damages (Call, at 1210), the only issue for the trial court to determine was Call's lost profits. Call submitted jury instructions informing the jury as to the types of evidence that could be used to determine lost profits, i.e. expert testimony, subsequent earnings, profits established by similar business. Those instructions were given.

However, Call also submitted Jury Instruction Nos. 8, 12 and Amended 12 to assist the jury in calculating those lost profits. Those jury instructions were based upon compelling Utah Supreme Court case law, i.e. Cook Associates, Inc. v. Warnick, 664 P.2d 1161 (Utah 1983); Acculog Inc. v. Peterson, 692 P.2d 728 (Utah 1984); Sawyer v. FMA Leasing Co., 722 P.2d 773 (Utah 1986); Holman v. Sorenson, 556 P.2d 499 (Utah 1976); Penelko v. John Price Associates, 642 P.2d 1229 (Utah 1982).

The court wholly failed to tell the jury how lost profits were to be calculated. When a Court fails to give a requested jury instruction, the inquiry to determine whether the case should be remanded for a new trial, is whether the issues of fact necessary to be determined and principles of laws applicable thereto were correctly presented to the jury in a clear and understandable manner. Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (Utah 1969). In this case, they were not. The jury was given the facts but they were not given any assistance by the Court in applying the law to determine the amount of damages. The jury did not know how to calculate damages. They were free to roam and ignore plaintiff's uncontested evidence and pay heed to irrelevant and prejudicial arguments.

It is the duty of the Trial Court to instruct the jury as to the proper measure of damages. City of Phoenix v. Wade, 428 P.2d 450 (Ariz. App. 1967). An instruction which says only that damages can be awarded, is inadequate and requires a new trial. Billings Leasing Co. v. Payne, 577 P.2d 386 (Mont. 1978).

Because the trial court did not tell the jury how to determine Call's lost profits, Call must have a new trial.

C. Conclusion

Breach of contract damages, are measured by lost

profits. The Utah Supreme Court, in a line of cases cited above, set forth the types of evidence that can be used to establish lost profits and the formula to be used in calculating lost profits. The trial court instructed the jury as to the types of evidence that can be used to establish lost profits but failed to provide the jury any guidance whatsoever to assist them in calculating Call's lost profits. The failure to properly instruct the jury reversible error and requires a new trial.

POINT V - THE COURT SHOULD HAVE DIRECTED A VERDICT IN FAVOR OF CALL FOR AT LEAST \$56,000 OR AWARDED A NEW TRIAL

A. Factual Background

The first trial and subsequent appeal conclusively established that: 1) Call and Manti entered into an engineering service contract for engineering services wherein Manti agreed to compensate Call according to a schedule of hourly rates; 2) Manti unlawfully breached the contract by hiring another engineering firm; and 3) Call was entitled to damages.

As set forth in Part IV of this brief, Call's damages were Call's lost profits.

At trial, Call established lost profits by: 1) expert opinions; 2) past financial records; 3) the opinion of the business owner; 4) records of similar businesses; 5) testimony of a similar business owner; all consistent with the cases cited in

Point IV of this brief.

Defendant put on no case whatsoever except for a few irrelevant questions to David Thurgood, the engineer who replaced Call. At the conclusion of all the evidence the court said:

I want to put on the record, though, Mr. Frischknecht [Manti's counsel], I am concerned about this that I'd just be blunt about it, you have no expert testimony at all in this case and I am a little concerned because you put the Court into this position. If you rest and offer no testimony and no expert position, expert testimony that if it were appealed, I don't know how the Supreme Court would treat it. And I don't know how else to say it, but I'm concerned about it, to be blunt about it, and I think in fairness to you I ought to tell you that, that I am concerned about it and I don't see anything you can do about it now. But I felt I'd put it blunt right now so you know what I thought at this point in the proceedings. I am concerned about it. The plaintiff has brought in experts. They put in everything. You've done nothing but pick them apart and you put nothing in the affirmative for yourself to indicate what your experts would do. What I'm saying is I think you put this Court in a very untenable position and if this case is appealed to the Supreme Court or the Court of Appeals, I think you put them in an untenable position and I thought I'd put it on the record so that depending on what happens it would be there.

Transcript, p. 315-316.

Judge Tibbs was correct, Manti put on no case whatsoever. The contradicted and unimpeached evidence showed the following:

1) In October of 1980, Call contracted with Manti to provide for engineering services. Phase one involved the preparation of preliminary report and sewer study suggesting several alternatives. Subsequent phases dealt with the design, supervision, installation and other sewer engineering services. Call v. Manti, at 1205.

2) The terms in the contract were clear and unambiguous. Call, at 1205.

3) Pursuant to the agreement, Manti agreed to compensate Call according to the contract's written fee schedule and to pay for costs and mileage. Plaintiff's Exhibit 1. The fee schedule and mileage are set forth in Part IV of this brief. The contract does not have a ceiling limiting the amount of money to be paid to Call. Plaintiff's Exhibit 1.

4) Plaintiff breached the contract by hiring another engineering firm, David Thurgood, who completed the project. Call, supra. (Tr. p. 90.)

Both David Thurgood, the replacement engineer, and John Call testified that the rates contained in the Call contract were reasonable.

Question: Mr. Thurgood, based upon your experience and training as a Consulting Engineer, do you have an opinion as to whether the rates contained on Table 1 were reasonable back in 1981?

Answer: They're reasonable.

(Tr. p. 107.)

Question: Mr. Call, based upon your experience and education as a professional engineer, do you have an opinion as to whether the rates, contained in your contract, were reasonable back in 1981, when the contract was entered into?

Answer: They were reasonable.

(Tr. p. 166.)

No contrary or impeaching evidence was presented by Manti to contradict the reasonableness of the fee schedule.

David Thurgood, the replacement engineer, then testified as to the number of hours each employee of Thurgood & Associates spent to complete the project. His time records were admitted into evidence. (Exhibit 3, Tr. p. 93.)

No one questioned that the hours put into the project by Mr. Thurgood's firm were reasonable. Prior to trial, Call had examined Thurgood's time records. (Tr. p. 170.) Mr. Call's opinion was that the hours expended by Thurgood were reasonable. (Tr. p. 171.) He further said that had his firm been allowed to complete the project, Call would have spent the same hours as Thurgood & Associates spent on the project.

Answer: They would be similar. There's going to be some variance, but it wouldn't be significant. . . Three to four percent.

(Tr. p. 171.)

There was no contrary testimony as to the number of hours of engineering services required to complete the contract. Call then calculated the amount of gross receipts he would have received had he been allowed to complete the project. That is, Call's hourly rates times Thurgood's hours. The total came to \$377,844.23.

Randy Peterson, a Certified Public Accountant, was called as an expert witness. He too calculated the amount that Call would have received by taking Thurgood's hours and applying Call's contract rates. He then added in the costs and mileage that Call Engineering would have received and came up with a total of \$386,600. (Exhibit 38, Tr. p. 150.) There was no contrary evidence offered by Manti.

Call then testified as to the amount of expenses he would have saved by not having to complete the contract. They totalled \$185,846. (Exhibit 42, Tr. p. 183-193.)

In summary, the uncontradicted, and unimpeached testimony established the reasonable hours necessary to complete the contract and the reasonableness of Call's contract rates. Multiplying the contract hours by the contract rates shows unquestionably that Call would have received at least \$377,844.23 in gross receipts. Call's firm would have saved \$185,846 by not

having to complete the contract. Call's damages were \$191,988.23. There was no contrary evidence offered by Manti.

Call also established his lost profits by testimony of an expert witness. Charles Peterson of Frank Stuart & Associates, an economic consultant, was qualified as an expert witness and allowed to testify. (Tr. p. 260-264.) He testified that had Call been allowed to complete the contract, Call's lost profits would have totalled \$136,334. (Tr. p. 271, plaintiff's Exhibit 44.) No contrary expert testimony was offered by Manti.

Finally, to establish lost profits, Call submitted into evidence his financial records for the years 1981, 1982, 1983, 1984 and 1986. (Plaintiff's Exhibits 35 and 36.) 1982 was the year that Manti breached the year of the contract. Call's financial records for 1985 were not available. In 1986, Mr. Call was seriously ill requiring hospitalization and absence from his business. Nevertheless, the financial documents showed that Call's profits margins averaged 11.96 percent. However, by eliminating 1982's loss of 18.27, the year that Manti breached the contract, the average profit margin for the remaining years averages 18.6 percent. Taking the gross receipts that Call would have received of \$377,844.23 times the average profit margin of 18.6 percent shows that Call sustained minimum damages of \$70,278 as lost profits.

At the conclusion of all the evidence, Call's counsel made a motion for directed verdict for \$56,377.60. The motion was based on the following figures: \$377,844 gross receipts which Call would have received, minus \$22,000 paid to Call, times Thurgood & Associates' profit margin rate of 15 percent for a total of \$56,377.60. The Court admitted that the defendant did not put on a case but nevertheless denied the motion.

Thereafter, Call made a motion for a judgment notwithstanding the verdict and/or a new trial. Those motions were denied by the Court also.

B. Legal Analysis

The criteria for granting a judgment notwithstanding the verdict or a directed verdict is the same. Koer v. Mayfair Markets, 19 U.2nd 339, 431 P.2d 566 (1967). That is whether reasonable minds would not differ on the facts to be determined from the evidence presented. Management Committee v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982); Anderson v. Gribble, 30 U.2d 68, 513 P.2d 432 (1973). Call's uncontroverted and unimpeached evidence shows that the minimum amount of damages sustained by Call was \$56,377. There is no rational formula for calculating damages lower than that. To calculate a judgment for less than that requires a jury to totally disregard: 1) the testimony of the business owner John Call; 2) the expert

testimony of economic consultant Chuck Peterson and C.P.A. Randy Peterson; 3) the Call contract itself; 4) the testimony of the replacement engineer, David Thurgood; 5) the financial records of John Call Engineering; and, 6) the time records of David Thurgood. Unfortunately, that is exactly what the jury did. It ignored each and every piece of plaintiff's uncontroverted evidence. If there was ever a case where reasonable minds could not differ as to the minimum amount of sustained damages, this case is it.

Further, there was insufficient evidence to justify the minimal verdict entered by the jury. Each verdict must be supported by some competent evidence. Weber Basin Water Conservancy District v. Skeen, 8 U.2d 79, 328 P.2d 730 (1958). The criteria as to whether there is sufficient evidence to justify the verdict is essentially the same test as to whether a directed verdict or judgment notwithstanding the verdict should be granted; that is, whether reasonable men could draw different conclusions from conflicting evidence. Polleshe v. Transamerica Insurance Company, 27 U.2d 430, 497 P.2d 236 (1972). In the present case, the only evidence that was put in the trial was plaintiff's case. There was no conflicting evidence. It is impossible for reasonable men to draw different conclusions as to the minimum amount of Call's damages. It is impossible to

rationaly calculate damage at a figure less than \$56,377. It cannot be done.

New trials are to be awarded when there is insufficient evidence to justify the verdict or when there have been errors in law. In this case both elements are present. Call is entitled to a new trial.

POINT VI - THE COURT ALLOWED MANTI TO PRESENT IRRELEVANT AND PREJUDICIAL ISSUES AND ARGUMENTS TO THE JURY

A. Factual Background

Prior to the taking of testimony, Call moved to exclude evidence and argument on the following irrelevant and prejudicial issues:

- 1) Whether Call should be paid for work not performed;
- 2) Whether the judgment would have to be paid out of taxpayer's pockets; and
- 3) Whether Call should have mitigated his damages.

The Court denied Call's motion but noted that it would sustain objections to issues 1) and 2). (Tr. p. 66, 67, 71.)

During the trial, the following prejudicial issues and arguments were allowed into the trial over Call's objection:

- 1) The contract was in dispute. (Tr. p. 79-81.)
- 2) Call was paid for everything he did. (Tr. p. 81.)

- 3) Call could not proceed without written authority.
(Tr. p. 210-211.)
- 4) The taxpayer's would have to pay Call. (Tr. p. 318.)

B. Legal Analysis

The trial court has the obligation of controlling the argument and issues presented to the jury. Hales v. Peterson, 11 U.2d 411, 360 P.2d 822 (1961). Counsel is allowed only to argue the law as instructed to the jury and apply the instructions to the facts. Harmon v. Sprouse Reitz, Co., 21 Utah 2d 361, 445 P.2d 773 (Utah 1968). Counsel may not argue law that would not be correct jury instructions. Patton v. Heinkson, 380 P.2d 916 (Nev. 1963); Zelman v. Stauder, 468 P.2d 943 (Ariz. App. 1978); Williamson v. State Accident Ins. Fund, 487 P.2d 110 (Or. App. 1971).

Manti's argument that the contract was in dispute and that Call needed written authorization is contrary to the Utah Supreme Court's ruling in the first appeal of this case.

Manti's argument that taxpayers would have to pay Call's judgment was designed to elicit sympathy, appeal to passion and cannot be sanctioned by any court. c.f. Eager v. Willis, 17 Utah 2d 314, 410 P.2d 1003 (Utah 1966).

Arguments referring to how a judgment can be paid are clearly improper.

C. Conclusion

Manti injected improper and prejudicial arguments and issues into the proceedings requiring a new trial.

POINT VII - CALL SHOULD BE AWARDED HIS EXPERT WITNESS FEE COSTS

A. Factual Background

The jury awarded Call a judgment for \$13,440. Thereafter, Call filed a memorandum of cost totalling \$11,092.71. Of the \$11,092.71 requested, \$9,812.54 was spent for expert witness fees incurred in the two trials. Call submits that the costs were necessarily incurred in good faith and were essential to the development of Call's case. For these reasons, Call should be awarded his costs incurred.

At trial, Call sought lost profits caused by Manti's breach of an engineering service contract. Lost profits may be proven by: 1) expert opinion; 2) testimony of the business owner; 3) records of a similar business; 4) testimony of a similar business owner; 5) past financial records.

Call showed lost profits by comparing the records and contract of the engineering firm (Thurgood) that completed the sewer project with the Call contract rates. Because the Thurgood

contract and Call contract differed on their hourly rates, Call needed a witness who could correlate the hourly rates that Call would have received on his contract with the engineering work actually performed on the sewer contract. The witness was Randy Peterson. Randy Peterson compared the contracts, established the hourly rates and made the mathematical computations. For these reasons, the costs incurred for Randy Peterson were reasonable and necessary to Call's case.

In addition, Call showed lost profits through expert testimony. Lost profits equals anticipated gross receipts, less anticipated expenses to perform the contract. However, not all expenses are deducted from gross receipts. Fixed expenses which do not decrease with non-performance, are not deducted from the expected gross receipts. Call called Frank Stuart & Associates to identify and explain to the court and the jury those expenses that would be saved by Call not having to perform the contract, and those expenses which would still be incurred whether or not Call performed the contract. The testimony of Frank Stuart & Associates was not only necessary, it was crucial to Call's case. Without the testimony, Call could not establish a net profit figure to submit to the jury.

B. Legal Analysis

Utah Code Ann. § 21-5-4 provides that witnesses legally

required or in good faith requested to attend a District Court shall be paid \$14 per day plus \$.30 per mile for travel. This section, however, does not place a limit upon what an expert witness can be paid. Utah Code Ann. § 21-5-8 provides "the fees of a witness paid in a civil cause may be taxed against the losing party". Utah Code Ann. § 21-5-8 does not place a limit upon the amount of fees that can be paid an expert or that may be taxed to the other party. However, traditionally the Utah Courts held "that expert witnesses cannot be awarded extra compensation unless the statute expressly so provides". Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980).

In contrast, in the more recent case of Highland Construction Co. v. Union Pacific Railroad Corp., 683 P.2d 1042 (Utah 1984), the Utah Supreme court awarded costs exceeding \$2,300 incurred for deposing witnesses including expert witnesses. The court justified the award on the basis that the complexity of the contract case, and the theories of recovery sought, required the expenditure. Highland, at 1051, 1052. Similarly, in the present case, the complexity of the contract case and the theories of recovery, required expert testimony. It makes no sense to award expert witness deposition testimony costs and not expert witness trial testimony costs.

In Utah, costs are closely examined for "the purpose

of guarding against abuse by those better financially equipped, lest the costs of seeking justice become prohibitive for the financially ill equipped". Highland, at 1051. Unless, plaintiffs, such as Call, are awarded their expert witness fee costs, the costs of seeking justice becomes prohibitive. For example in the present case, Call was awarded a judgment of \$13,440.00 plus pre-judgment interest \$6,832.00, but if attorneys fees (1/3 of the recovery) and costs incurred are both subtracted from the judgment, Call receives only about \$2,391.00. Seeking justice for Call and others like him becomes prohibitive in any complex contract case. The rights of Call as guaranteed by Article 1, Section 11 of the Utah Constitution become meaningless. Section 11 states:

All Courts shall be open and every person for an injury done to him in his person, property, or reputation shall have remedy by due course of law which shall be administered without denial or unnecessary delay and no person shall be barred from prosecuting or defending before any tribunal in this state by himself or counsel, any civil cause to which he is a party.

If Call is not awarded the costs for the expert witness fees, he is not provided a remedy for the breach of contract created by Manti. For these reasons and others, many states, award costs of expert witness fees either by statute or rule. e.g., Kaps v. Transport, Inc. v. Henry, 572 P.2d 72 (Alaska

1977) (rule); R. T. Nahas Co. v. Hulet, 674 P.2d 1036 (Idaho App. 1983) (rule); American Timber & Trading Co. v. Niedermeyer, 558 P.2d 1211 (Or. 1976) (statute); Blasdel v. Montana Power Co., 640 P.2d 889 (Mont. 1982) (statute); Mays v. Todaro, 626 P.2d 260 (Nev. 1981) (statute); Weaver v. Mitchell, 715 P.2d 1361 (Wyo. 1986) (statute). Call should be awarded costs for expert witness fees incurred.

XI.

CONCLUSION

After the Supreme Court decision in John Call Engineering, Inc. v. Manti City Corp, 743 P.2d 1205 (1987), Call was entitled to have a trial solely to determine the amount of lost profits sustained by Call as a result of Manti's breach of the engineering services contract.

On remand, the trial court allowed irrelevant and prejudicial issues to contaminate the second trial. Further, the trial court refused to instruct the jury as to how lost profits are calculated.

Further, Call was entitled to a directed verdict or a judgment notwithstanding the verdict in a sum of not less than \$56,377.00.

For these reasons, the Court should amend the judgment to \$56,377 or remand the case for a new trial on the issues of damages.

DATED this 14th day of February, 1990.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant

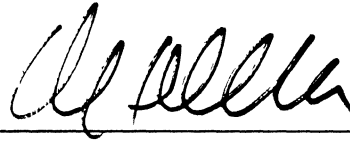
By: _____


DALE F. GARDINER
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I certify that on the 23 day of February, 1990,
I mailed 4 true and correct copies of the foregoing CORRECTED
BRIEF OF APPELLANT, (Call v. Manti) by depositing the same,
postage prepaid, U.S. Mail to:

Paul R. Frischknecht
Attorney for Defendant/Respondent
50 North Main Street
Manti, UT 84642



A handwritten signature in cursive script, appearing to read 'P. Frischknecht', is written over a horizontal line.

SP2A-035\jn

ADDENDUM

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

1896

Art. I § 11

Utah Constitution

JOHN CALL ENGINEERING, INC., a Utah corporation, Plaintiff,)	
)	SPECIAL VERDICT
vs.)	
)	Civil No. 8606
MANTI CITY CORPORATION, a municipal corporation,)	JUDGE DON V. TIBBS
)	
Defendant.)	

\$ _____

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COLLATERAL REFERENCES

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

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

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

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

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

Rule 8. General rules of pleadings.

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

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

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

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

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

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

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

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

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

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

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

Arbitration, § 78-31a-1 et seq.

Comparative negligence, § 78-27-38.

Counterclaim and cross-claim, Rule 13.

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

Defenses and objections, Rule 12.

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

Fellow servant defined, § 34-25-2.

Form of pleadings, Rule 10.

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

Forms of answers, Forms 21, 22.

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

Interpleader, Rule 22.

Motions, forms for, Forms 20, 23 to 24.

Numbered paragraphs, Rule 10(b)

One form of action, Rule 2.

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

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

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

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

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

Statute of frauds, sales, § 70A-2-201.

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

Third-party practice, Rule 14.

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

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

NOTES TO DECISIONS

ANALYSIS

Affirmative defenses

—Accord and satisfaction.

—Pleading

—Time limitation

—Consent

—Election of remedies

—Estoppel

—Failure to plead

—Failure of consideration

—Failure to plead

—Pleading

—Failure to plead.

—Affidavit opposing summary judgment.

—Denial

—Notice and opportunity

—Waiver of defense.

—Fraud

—Necessary allegations

—Mitigation of damages

—Failure to plead

—Pleading

—Mutual mistake

—Statute of frauds

—Motion to dismiss

—Pleading

—Statute of limitations.

—Applicability to plaintiffs.

—Pleading.

—Waiver

—Waiver

Claims for relief

—Amendment of pleading.

—Attorney fees

—Essential allegations.

—Alienation of affections

—Request for alternative relief

—Sufficiency of complaint

—Attachment of exhibit

—Found not sufficient.

—Found sufficient

—Liberal construction.

Consistency

—Double recovery.

—Election between claims

—Election of remedies under contract.

—Res judicata

—Separate claims

—Contract and quantum meruit

Defenses

—Lack of consideration.

Purpose of rules

Cited

COLLATERAL REFERENCES

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

Rule 15. Amended and supplemental pleadings.

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

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

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

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

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

NOTES TO DECISIONS

ANALYSIS

Amendments.

- After pretrial order.
- Alternative to dismissal.
- Payment of attorney fees.
- Prolix complaint.
- Amendment of response.
- Answer.
- To include counterclaim.
- Complaint.
- To defeat motion for summary judgment.
- To include damages.
- Considerations.
- Prejudice.
- Court's discretion.
- Abused.
- Not abused.
- Dismissal without opportunity to amend.
- Following dismissal.
- Late amendment.
- Day of trial.
- During or after trial.
- Reply amounting to amendment.
- Amendment to conform to evidence.
- Allowed.
- Alternative to dismissal.
- Amendment unnecessary.
- Consent to try issue.
- Evidence supporting findings.
- Issue raised by complaint.
- Consent to try issue.
- Not found.
- Construction of rule.
- Defense not pleaded.
- Affirmative defense.
- Issue tried by parties.
- Failure to object to evidence.
- Issues not pleaded.
- Mutual mistake.
- New cause of action.
- Child support.
- New theory of recovery.
- Not allowed.
- Notice.
- Prejudice.
- Restriction to matter pleaded or tried.
- Relation back of amendments.
- Adding or substituting parties.
- Statute of limitations.
- Untimely service of original complaint.
- Supplemental pleadings.
- Answers.
- Allowed.
- Not allowed.
- Cited.

Amendments.

—After pretrial order.

Trial court did not abuse its discretion in allowing defendant to amend his answer to in-

clude as a defense an issue that had been specifically excluded as a trial issue by a pretrial order, where the amendment was made long before trial, the opposing party had adequate opportunity to meet the additional issue raised, and neither party was placed in a position of any greater advantage or disadvantage or prejudice by virtue of the amendment to the pleading. *Lewis v. Moultrie*, 627 P.2d 94 (Utah 1981).

—Alternative to dismissal.

—Payment of attorney fees.

Where, as a condition to filing their fourth amended complaint, appellants agreed to pay a \$150 attorney fee, it was neither coercive nor unfair to them and is not a ground for reversal regardless of whether or not the payment of such attorney's fees are authorized by the Rules. The alternative was to dismiss, and in granting a dismissal without prejudice the court could stay any new action that might be commenced until costs of the action that had been dismissed including attorney's fees had been paid. The appellants invited the court to impose such conditions in order to avoid a dismissal and the necessity of starting over again. *Tebbs & Tebbs v. Oliveto*, 123 Utah 158, 256 P.2d 699 (1953).

—Prolix complaint.

Where complaint was prolux rather than being a short, concise statement of a claim as contemplated by Rules 8(a) and 8(e)(1), it was reasonable to permit plaintiff to redraft pleadings rather than dismiss the action without prejudice. *McGavin v. Preferred Ins. Exch.*, 7 Utah 2d 161, 320 P.2d 1109 (1958).

—Amendment of response.

Whether a motion to amend a response to an amended complaint should be allowed more than ten days after the amended complaint was filed lies within the sound discretion of the trial court. *Wasescha v. Terra, Inc.*, 528 P.2d 802 (Utah 1974).

—Answer.

—To include counterclaim.

In personal injury action in which defendant's insurer was furnishing lawyer to defend insured and lawyer had not met defendant until just before taking his deposition and therefore did not know that defendant had injuries and believed plaintiff to have been at fault, refusal to allow amendment of answer to include counterclaim was an abuse of discretion since case was one where "justice requires" amendment. *Gillman v. Hansen*, 26 Utah 2d 165, 486 P.2d 1045 (1971).

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

Compiler's Notes. — This rule is identical to Rule 50, F R C P

NOTES TO DECISIONS

ANALYSIS

Directed verdict

- In general
- Appeal
 - After failure to seek directed verdict
- Directed verdict nunc pro tunc
- Evidence
- Findings and conclusions not required
- Instruction for directed verdict
- Judgment notwithstanding verdict
- Appeal
- Construction
- Evidence
- Motion foreclosed
- Ruling on reserved motion
- Splitting of negligence and damages issues

Cited

Directed verdict.

—In general.

In reality, ordering a directed verdict is an act of the court, the signing and entry thereof being formalities paying tribute to the history of the practice *Finlayson v Brady*, 121 Utah 204, 240 P 2d 491 (1952)

A directed verdict is only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented *Management Comm v Graystone Pines, Inc.*, 652 P 2d 896 (Utah 1982)

—Appeal.

Supreme Court's standard of review of a directed verdict is the same as that imposed upon the trial court the evidence must be examined 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 v Graystone Pines, Inc.*, 652 P 2d 896 (Utah 1982)

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)

—After failure to seek directed verdict.

Although party who does not move for directed verdict generally has no standing to ap-

peal on the basis that the evidence does not support the judgment, an exception exists where plain error appears in the record and would result in a miscarriage of justice *Henderson v Meyer*, 533 P 2d 290 (Utah 1975)

—Directed verdict nunc pro tunc.

Where court inadvertently ordered entry of judgment rather than a directed verdict, and through oversight the jury was discharged without signing a verdict, the court could properly vacate the judgment, and order a directed verdict nunc pro tunc *Finlayson v Brady*, 121 Utah 204, 240 P 2d 491 (1952)

—Evidence.

In directing a verdict, the court must examine the evidence in a light most favorable to the party against whom the verdict is intended, and it is not its province to weigh or determine the preponderance of the evidence *Finlayson v Brady*, 121 Utah 204, 240 P 2d 491 (1952)

In deciding a motion for a directed verdict, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every controverted fact in his favor *Boskovich v Utah Constr Co*, 123 Utah 387, 259 P 2d 885 (1953)

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)

Mere fact defendant's horses escaped from inclosure was not sufficient, under § 41-6-38 to justify submitting defendant's negligence to jury in action by motorist whose vehicle struck a horse, and thus directed verdict for defendant was proper *Rhiness v Dansie*, 24 Utah 2d 375, 472 P 2d 428 (1970)

In suit by wife for her personal injuries and husband's wrongful death in collision, wife's claim for injuries should have been submitted to jury since there was no evidence to establish any basis to impute alleged negligence of husband-driver to wife, wrongful death claim also presented question for jury since there were fact issues as to whether defendant's truck

NOTES TO DECISIONS

ANALYSIS

Court.

—Duty.

—Attachment.

Effect.

—Acceptance of full payment.

Owner or attorney.

—Vacation of satisfaction.

—Hearing.

Court.

—Duty.

—Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding. *Blake v. Farrell*, 31 Utah 110, 86 P. 805.

Effect.

—Acceptance of full payment.

When plaintiff voluntarily accepted full pay-

ment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated by the judgment. *Sierra Nev Mill Co. v Keith O'Brien Co.*, 48 Utah 12, 156 P. 943.

Owner or attorney.

—Vacation of satisfaction.

—Hearing.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. *Utah C V. Fed. Credit Union v. Jenkins*, 528 P 2d 1187 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 *Am. Jur. 2d* Judgments § 979 et seq.

C.J.S. — 49 *C.J.S* Judgments §§ 574 to 584.

A.L.R. — Voluntary payment into court of

judgment against one joint tort-feasor as release of others, 40 *A.L.R.3d* 1181.

Key Numbers. — Judgment ⇌ 891 to 899.

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

Compiler's Notes. — This rule is similar to Rule 59, F R C P

Cross-References. — Fee for filing motion for new trial, § 21-2-2.

Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

NOTES TO DECISIONS

ANALYSIS

Abandonment of motion
Accident or surprise.
Arbitration awards.
Caption on motion for new trial
Correction of insufficient or informal verdict.
Correction of record
Costs
Decision against law
Discretion of trial court
Effect of order granting new trial.
Effect of untimely motion.
Evidence.
—Sufficiency
Excessive or inadequate damages
Failure to object to findings of fact
Filing of affidavits
Incompetence or negligence of counsel
Misconduct of jury
Motion to alter or amend judgment
Motion to be presented to trial court
Newly discovered evidence
New trial on initiative of court.
Particularization of grounds for motion for new trial
Procedure for questioning grant of new trial.
Reconsideration of motion for new trial.
Settlement bars appeal.
Summary judgment

Time for motion.
Tolling time for appeal.
Waiver.
Cited.

Abandonment of motion.

Abandonment of motion for new trial must be intentional, and the facts must indicate this intention *Bailey v Sound Lab, Inc.*, 694 P 2d 1043 (Utah 1984)

Accident or surprise.

A "surprise" at trial which could have been easily guarded against by utilization of available discovery procedures may not serve as a ground for a new trial under Subdivision (a)(3) *Anderson v Bradley*, 590 P 2d 339 (Utah 1979)

Failure to interpose a timely objection to testimony challenged on the ground of surprise would be a sufficient reason to deny a motion for a new trial on that ground *Chournos v D'Agnillo*, 642 P 2d 710 (Utah 1982)

Plaintiff was not entitled to a new trial on the basis of surprise concerning testimony of the defendant's expert witness where the plaintiff failed to object to the testimony either before, or immediately after, it was given *Jensen v Thomas*, 570 P 2d 695 (Utah 1977)

Claim of error based on accident or surprise,