

1990

Grant Davidson v. Erwin M. Prince, Folken Brothers Trucking : Petition for Writ of Certiorari

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DUCKET NO. 900461-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

GRANT DAVIDSON,)
)
Plaintiff/Appellant,)
)
vs.)
)
ERWIN M. PRINCE, and)
FOLKENS BROTHERS TRUCKING,)
)
Defendants/Appellees.)

910321
Case No. 900461-CA

PETITION FOR CERTIORARI

PETITION FOR CERTIORARI TO THE SUPREME COURT OF
THE STATE OF UTAH

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Argument priority classification 16

FILED

JUL 17 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

GRANT DAVIDSON,)	
)	
Plaintiff/Appellant,)	
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Three issues are raised by this position. First, whether the Court of Appeals has departed from the accepted and usual course of judicial proceedings¹ by holding a jury instruction regarding the tax consequences of a personal injury judgment to be error but failing to remand the case to correct such error. Second, whether the Court of Appeals in deciding an important question of state common law² erred in excluding expert testimony which embraced an ultimate question of fact. Finally, whether the Court of Appeals erred in upholding the Trial Court's admission into evidence statements contained in a "demand or settlement letter" written by appellant in an early attempt to resolve the disputed claim.

OFFICIAL OPINION OF THE COURT OF APPEALS

The opinion issued by the Court of Appeals referred to herein is Case No. 900461-CA, filed June 18, 1991. See Addendum.

¹Please see Utah Rules of Appellate Procedure, Rule 46(c).

²Please see Utah Rules Appellate Procedure, Rule 46(d).

STATEMENT OF JURISDICTION

This is a civil action for personal injury. Jurisdiction of the Trial Court is based on Utah Code Annotated Section 78-3-4(1) (1953 as amended).

Jurisdiction of the Utah Supreme Court to hear this petition is based on Utah Rules of Appellate Procedure, Rule 45 et. seq.

Judgment of the Trial Court was entered on March 21, 1990. A Rule 59 Motion for New Trial was served on March 21, 1990 which was denied by a Memorandum Decision on May 10, 1990. Appellant filed a Notice of Appeal in response to this Memorandum Decision on May 23, 1990. Decision of the Appellate Court was entered on June 18, 1991.

DETERMINATIVE RULES

Utah rules of Appellate Procedure, Rules 45, 46

Utah Rules of Civil Procedure, Rule 59

Utah Rules of Evidence, Rule 408

Utah Rules of Evidence, Rule 704

(as set out verbatim in the addendum)

STATEMENT OF THE CASE

On or about May 28, 1986, the appellant, Grant Davidson, was injured by a cow or steer that escaped from a wrecked truck driven by appellee, Erwin M. Prince, who was in the employment of appellee, Folkens Brothers Trucking. (R. 1-2). On November 17, 1987, Davidson initiated suit in the Fourth Judicial District Court of Utah County, State of Utah. Judgment was entered on March 21, 1990, for Davidson and against the defendants in the sum of \$27,323.88, plus interest.

Davidson submits that three errors of law committed at the trial level prejudiced his rights and denied him a fair resolution of the action. To correct the three errors, on March 21, 1990, the appellant made a Motion for New Trial pursuant to Rule 59 of the Utah Rules of Civil Procedure. This motion was denied on May 10, 1990 in a Memorandum Decision setting out that if indeed the three errors had occurred, they were harmless errors and did not warrant a new trial. Appellant filed a Notice of Appeal in response to this Memorandum Decision on May 23, 1990. The Court of Appeals considered the matter and filed an opinion on June 18, 1991 denying appellant's request for a new trial. Appellant appeals this decision claiming the errors committed at the Trial Court level were indeed harmful and prejudicial, depriving the appellant a fair adjudication of the action.

STATEMENT OF FACTS

1. On or about May 28, 1986, the defendant/appellee, Erwin M. Prince, while acting in the course and scope of his employment for the appellee, Folkens Brothers Trucking, operated his motor vehicle at the location of approximately SF 15, in the curve from S.B. SF 15, in such a way so as to cause vehicle to overturn. (R. 1-2.).

2. As a proximate result of the accident, various animals that were being shipped in his truck were released on the highways and surrounding areas. (R. 2.).

3. Appellant was injured when an animal that had escaped from the appellee's vehicle attacked appellant. (R. 2.).

4. Appellant retained counsel and filed suit against the appellees, Erwin M. Prince and Folkens Brothers Trucking, for personal injury. (R. 1.).

5. During trial, expert opinion on the negligence of the defendants was excluded on the grounds that the question was an ultimate issue to be decided by the jury. (Partial Trial Transcript, Pages 22-23.).

6. Portions of a letter from appellant to appellee were admitted as evidence supporting the defense counsel's emphasis on the distance between the animal and the appellant. (Partial Trial Transcript, Pages 47-48, 64-70, and 73-74.).

7. The jury instructions contained information on the tax consequences of a personal injury judgment. (R. 225.).

8. The jury returned a verdict for the appellant. The jury found Grant Davidson 40% negligent, Erwin Prince 60% negligent, and awarded Grant Davidson \$27,323.88 (60% of total award of \$45,539.80), pre-judgment interest on special damages of \$2,980.38 and post-judgment interest of 12% per annum. (R. 242-244.).

9. The Court of Appeals affirmed the Trial Court's decision that expert opinion on the negligence of the appellees should be excluded on the grounds that the question was an ultimate issue to be decided by the jury. (Opinion of the Court of Appeals, 9.).

10. The Court of Appeals affirmed the Trial Court in holding that evidence out of a letter made between appellant and appellees supporting the defense counsel's emphasis on the distance between the animal and the appellant was admissible. (Opinion of the Court of Appeals, 13.).

11. The Court of Appeals reversed the Trial Court's ruling that the inclusion of the tax consequences of a personal injury judgment in jury instructions was not prejudicial, but it refused to grant a new trial because the "error was mitigated by the context in which the information was presented." (Opinion of the Court of Appeals, 7-8.).

ARGUMENT

POINT I

THE COURT OF APPEALS ERRED IN HOLDING THAT IT WAS IMPROPER FOR THE TRIAL COURT TO INSTRUCT THE JURY REGARDING THE TAX CONSEQUENCES OF A PERSONAL INJURY JUDGMENT BUT NEVERTHELESS FAILING TO CORRECT SUCH ERROR BY ORDERING A NEW TRIAL IN THIS MATTER.

The Trial Court gave the following jury instruction (#34):

When you have arrived at the amount of your verdict, should you determine that the plaintiff is entitled to a verdict, you must not add any sum of money to that amount for federal income taxes.

I instruct you that it is the law that the amount, if any, awarded to the plaintiff by your verdict is not income to the plaintiff within the meaning of federal tax law.

The Court of Appeals agreed with appellant that the Trial Court erred by giving a jury instruction regarding the tax consequences of a personal injury judgement. The Court announced its position by declaring: "[w]e, therefore, adopt the majority view that it is improper to instruct the jury as to the tax consequences of a personal injury or wrongful death award." (Please see the Opinion of the Court of Appeals, page 7.).

However, because the instruction had already been given, the court acknowledged that it now faced a different issue: whether the Trial Court committed reversible error by so instructing the jury. Rather surprisingly, the Court of Appeals determined that due to the context surrounding the issuance of the instruction, which was an admonishment to the jurors not to consider other collateral matters such as punishment or attorney fees

in making their determination of damages, the objectionable portion of the instruction was not likely to have affected the amount of damages awarded. Id. at 8.

The Court of Appeals made this determination while simultaneously acknowledging that "the effect of such instructions on the jury's ultimate damage award is extremely difficult, if not impossible, to determine." Id. at 8. It is difficult to understand how the court could determine the effect the tax instructions had on the jury, when, in its own words, it "is extremely difficult, if not impossible, to determine [the outcome]."

It is the appellant's contention that there is always a substantial risk of prejudicing the jury when tax consequences are admitted. The Appellate Court recognized this tendency when it espoused the majority position and cautioned the courts that an instruction as to the tax consequences of a judgment should not be given by trial judges. Id. at 8.

The end purpose of the rule is to obviously to prevent juror prejudice, but it achieves its purpose by making it grounds for reversible error if a jury instruction is given that even tends to mislead the jury. Knapstad v. Smith's Management Corp., 774 P.2d 1, 3 (Utah App. 1989) (citations omitted). The reasoning is simple: because it is so difficult to determine prejudice after the instruction has already been given, the instruction should be stopped before it ever reaches the jurors in the first place.

What occurred at trial is exactly what the rule was designed to prevent -- evidence that tends to mislead the jurors did in fact reach them. As appellant contended in his first appeal, and as the court in Knapstad has held, the mere admission of evidence with a tendency to mislead is reason enough to allow a new trial. Since the Court of Appeals knew of this tendency, which it outwardly acknowledged by cautioning the courts, it erred in not overturning the trial court.

In the present case, the Plaintiff sought a significant amount of special damages in the form of medical bills and loss of wages, and sought general damages which would bring the total even higher. It is appellant's contention that the jury was unduly influenced and prejudiced by the instruction given them on taxes. Had this instruction not been given, the jury members would have had (1) a clearer case, unenshrouded by complicated matters to consider, and (2) an unprejudiced view as to the amount the Plaintiff was entitled to recover.

Because evidence was entered that would tend to mislead the jurors, the decision of the Court of Appeals should be overturned and a new trial granted, where an unbiased jury can seriously consider and grant a fair and just amount of damages.

POINT II

THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S EXCLUSION OF APPELLANT'S EXPERT'S TESTIMONY CONCERNING APPELLEES NEGLIGENCE.

During the presentation of appellant's case in chief, Mr. Newell Knight, an accident reconstruction expert, was called to testify of appellee's negligence. Counsel for appellant asked Mr. Knight if he had an opinion, in light of his training, skill, and experience, as well as his investigation into the accident, on whether or not the defendant was negligent. Mr. Knight stated that he had an opinion. When asked to express that opinion, counsel for the appellee objected on the grounds that the question embraced the ultimate issue to be decided by the jury. The court sustained the objection over the exception of appellant's counsel. The Court of Appeals later affirmed this decision.

For many years an expert was not allowed to offer an opinion on the ultimate issue to be decided by the jury. However, that rule has long since fallen by the way side, first through appellate decisions and then through the Utah Rules of Evidence.

Rule 704 of the Utah Rules of Evidence provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

See Shurtleff v. Jay Tuft & Co., 622 P.2d 1168 (Utah 1980).

Appellant maintains that the improper exclusion of this testimony was indeed prejudicial. The testimony of Mr. Knight involved elements of physics and other

sciences which can be extremely difficult for a lay person to grasp. While it is certainly possible that some jurors possess sufficient education and understanding to comprehend the expert's testimony in this regard, other jurors may have more difficulty in understanding the substance of the testimony. It is therefore necessary in order to present a proper case to all jurors that expert testimony provide not only its scientific basis, but its fundamental conclusion. It is to be noted in this case the jury was not unanimous on the issue of liability, and it is very probable that the restrictions placed upon appellant's counsel in presenting his case on all levels denied appellant the right to a fair trial on this issue.

The Court of Appeals decision as presently written severely restricts the testimony of experts in civil cases. As stated, the rule will drastically alter the use of expert testimony in personal injury actions or other cases involving negligence or other legally cognizable breaches of duty. Appellant contends that in a society that is becoming increasingly complex in terms of technology and professional responsibilities, a broad interpretation of Rule 704 of the Utah Rules of Evidence is necessary in order to obtain a complete and fair hearing on complex factual issues at trial. Rule 704 itself, by its clear terms, recognizes the potential complexity of issues in civil cases, particularly causation and negligence or breach of other duties in allowing an expert to testify regarding his opinion even if it embraces the ultimate issue of fact. The Court of Appeals decision as written will severely limit potential expert opinions and as it stands

will bar much expert testimony in this state which would otherwise have been made available to jurors to assist in their fair resolution of the issues.

Appellant believes that the court's position should be corrected and that in this particular case Mr. Knight should have been allowed to testify regarding the issue of negligence and the matter should be remanded for a new trial.

POINT III

THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S ADMISSION OF STATEMENTS CONTAINED IN A SETTLEMENT DEMAND LETTER.

In addition to appellant's claim of error concerning evidence which went to the question of appellee's negligence, appellant also believes that error occurred in relation to evidence which addressed appellee's claim of appellant's contributory negligence. Appellee's theory at trial was that the appellant was negligent in cornering the animal which had escaped from the appellee's truck and eventually caused the injury in question.

In presenting his case, appellee's counsel placed great emphasis on the distance between appellant and the animal at the time the animal charged. Evidence was presented from the appellant's deposition that he estimated the distance to be approximately 40 feet. Further evidence was elicited at trial that the distance may have been approximately 22 feet.

However, at trial appellee's counsel attempted and succeeded in introducing a statement from a letter of compromise written to the appellee wherein the distance was

estimated at 10 feet. This testimony obviously provided far greater support to appellee's theory that appellant had "cornered" the animal.

Appellant's counsel objected to this testimony on the grounds that it was contained in a letter of settlement negotiation. The court overruled appellant's objection and allowed the statement to come in, and then went further to prohibit the remainder of the letter to be presented to the jury so that the context of the communication could be adequately understood.

Appellant respectfully submits that this ruling was in error in light of Rule 408 of the Utah Rules of Evidence. That Rule provides:

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

An examination of the letter in question (addendum) shows that it is unmistakably a communication involving an offer of willingness to settle appellant's claim. The letter is a response to a letter written by appellees indicating that they were not liable for the accident. In his letter, appellant briefly gives a rough account of the facts of the accident. However, contrary to the Court of Appeal's assertion, the letter was not

"merely an attempt to inform appellee as to the facts of the incident." (Please see the Opinion of the Court of Appeals, page 13.). Rather, it was an offer to compromise and settle the claim. In fact, the last sentence of the letter reads: "You may speak with us directly or we can send it to lawyers and to court, you decide." (addendum). This statement is clearly an offer to settle the claim, which gave the defendants the option to either (1) settle the matter without outside help or, (2) to take it all the way to court.

The Court of Appeals supports its theory that the letter was a demand by stating that "appellant in the letter demands payment in full of appellant's claim and its whole tenor is that appellant will not compromise one bit." (Please see the Opinion of the Court of Appeals, page 13-14). However, even though the letter contains strong language and is indeed demanding, it is nevertheless an offer to compromise or settle for an unspecified amount. As pointed out above, the last sentence is critical. It caps off the "whole tenor" of the letter by offering to compromise out of court.

Since the letter was a letter of compromise or settlement, the plaintiff's statement that he was ten feet away from the cow is not admissible. In the words of Utah Rule of Evidence 408, "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." [emphasis added]. Utah R. Evid. 408. Therefore, this statement was erroneously admitted.

The prejudicial effect of this testimony is obviously great in the present case. A person's conduct when confronted by a potentially dangerous animal at a distance of 40

feet would be different from the reasonable person's conduct at a distance of 10 feet. Because appellee's counsel placed this question in the context of whether the animal was "cornered", the distance is extremely important.

In its analysis, the Court of Appeals construes Rule 408 very loosely. The Court states in its analysis of the Rule that statements used in settlement negotiations can and should be admitted. (Please see the Opinion of the Court of Appeals, page 14.) This is contrary to the policy behind rule 408, and if such an interpretation were allowed to stand there would be no purpose for the rule.

CONCLUSION

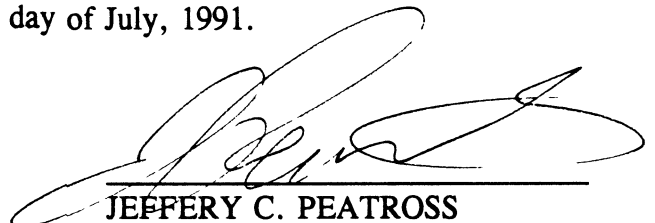
The Appellate Court's decision in this matter has touched upon three important issues in the civil common law: the instruction to the jury regarding the tax consequences of personal injury awards; the construction of Rule 704 of the Utah Rules of Evidence; and the construction of 408 of the Utah Rules of Evidence.

Appellant contends that the court has departed from the previously announced standard and in the case of the Rules of Evidence from the clear text of the Rules. Such departure has occurred first by the Court of Appeals correctly holding that the tax consequences of a personal injury judgment should not be disclosed to the jury and that they should not be instructed regarding such consequences, yet after announcing such rule failing to apply the rule in the present case by remanding the matter for a new trial.

Second, the Court of Appeals departed from the language of Rule 704 and the practice in this jurisdiction of allowing experts to testify to their opinion regarding negligence in a personal injury case when such opinion would be a helpful synthesis of the expert's testimony. Finally, the court rendered Rule 408 essentially meaningless by allowing the defense to offer portions of the letter written by a claimant to an insurance carrier demanding a settlement when such letter, even though couched in strong terms, was sent solely for the purpose of soliciting a settlement or offer to settle in the matter.

For these reasons appellant respectfully requests that his petition for certiorari be granted and that the Supreme Court of Utah exercise its authority to review the matter.

DATED AND SIGNED this 16th day of July, 1991.

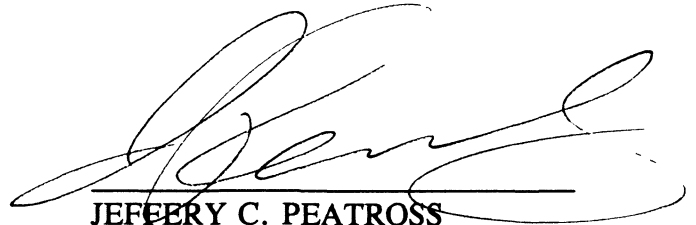
A handwritten signature in black ink, appearing to read 'Jeffery C. Peatross', is written over a horizontal line.

JEFFERY C. PEATROSS
IVIE & YOUNG
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Jeffery C. Peatross, hereby certify that on the 16th day of July, 1991, served four (4) copies of the foregoing Brief of Appellant, upon H. James Clegg, counsel for the appellees in this matter, by mailing to him by first class mail with sufficient postage prepaid to the following address:

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ADDENDUM

- I. COURT OF APPEALS OPINION
- II. DETERMINATIVE RULES
 - A. Utah Rules of Civil Procedure, Rule 59
 - B. Utah Rules of Evidence, Rule 408
 - C. Utah Rules of Evidence, Rule 704
- III. SETTLEMENT DEMAND LETTER

FILED

JUN 13 1991

Mary T. Noonan

Mary T. Noonan

Clerk of the Court

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Grant Davidson,)	OPINION
)	(For Publication)
Plaintiff and Appellant,)	
)	
v.)	Case No. 900461-CA
)	
Erwin M. Prince and Folkens)	
Brothers Trucking,)	F I L E D
)	(June 18, 1991)
Defendants and Appellees.)	

Fourth District, Utah County
The Honorable Ray M. Harding

Attorneys: Ray H. Ivie, R. Phil Ivie, and Jeff Peatross,
Provo, for Appellant
H. James Clegg and Robert C. Keller, Salt Lake
City, for Appellees

Before Judges Billings, Orme, and Russon.

BILLINGS, Associate Presiding Judge:

Appellant Grant Davidson was injured by a cow or a steer that had escaped from a wrecked truck driven by Erwin M. Prince, an employee of appellee Folkens Brothers Trucking. Subsequently, Davidson filed a negligence action against Prince and Folkens. A jury found appellees sixty percent negligent and appellant forty percent contributorily negligent. Based on this verdict, the judge entered a judgment in favor of appellant in the amount of \$27,323.88 plus interest. Appellant moved for a new trial. The court denied this motion. Appellant appeals from the denial of his motion for a new trial. We affirm.

FACTS

On May 28, 1986, appellee was driving a truck containing animals. Appellee negligently overturned the truck, releasing

animals onto the highway and into surrounding area. Appellant was injured when he was attacked by a steer that had escaped from appellee's vehicle.

At trial, conflicting evidence was introduced regarding the proximity of appellant to the steer before the steer charged, ranging from forty feet to ten feet. Over appellant's objections, appellee's counsel introduced into evidence a statement from a letter written to the appellee wherein appellant estimated the distance as ten feet. Based on this evidence, appellee argued that appellant had cornered the steer and was therefore partly responsible for his injuries.

At trial, the jury awarded appellant total damages in the amount of \$45,539.80. The jury, however, found appellant forty percent at fault and accordingly, appellant was ultimately awarded a judgment of only \$27,323.88.

Appellant filed a motion for a new trial, contending the trial court had committed three errors of law. First, appellant argued the trial court erred in instructing the jury regarding the tax consequences of a personal injury judgment. Second, appellant contended the trial court erred in precluding his expert from testifying that appellee was negligent. Third, appellant claimed the trial court erred in admitting a statement made in a settlement letter.

The trial court denied appellant's motion for a new trial, concluding that even if error had occurred, it was harmless. Appellant appeals this decision, claiming the errors committed by the trial court were prejudicial.

I. JURY INSTRUCTION REGARDING THE TAX CONSEQUENCES OF A PERSONAL INJURY JUDGMENT

The trial court instructed the jury on the tax consequences of any award received by appellant as follows: "In determining the amount of damages you may not include in, or add to an otherwise just award, any sum for the purpose of punishing the defendants, or to serve as an example or warning for others. In addition you may not include in your award any sum for court costs or attorney fees. Neither may any sum of money be added to that amount for federal income taxes. I charge you as a matter of law, that the amount awarded by your verdict is exempt from federal income taxation." (emphasis added).

Appellant properly objected to the portion of this instruction stating that the verdict was exempt from federal taxation but his objection was overruled. On appeal, appellant contends the trial court erred by instructing the jury that any recovery received by appellant would not be subject to federal taxation. The propriety of the instructions given to the jury is a question of law and we therefore review the trial court's instructions for correctness. Knapstad v. Smith's Management Corp., 774 P.2d 1, 2 (Utah App. 1989).

Utah courts have yet to consider the propriety of instructing a jury on the tax consequences of a personal injury judgment. However, "[t]he majority view in this nation, by nearly a five-to-one ratio, is that income tax considerations should not be impressed upon a jury." Dehn v. Prouty, 321 N.W.2d 534, 538 (S.D. 1982). The overwhelming majority of state courts which have addressed this issue have held that, "as a general rule, it is improper to instruct the jury on the tax consequence of a personal injury judgment, and have upheld the refusal of trial courts to do so." Annotation, Propriety of Taking Income Tax Into Consideration in Fixing Damages in Personal Injury or Death Action, 16 A.L.R. 4th 595 (1982).¹

1. For cases condemning such an instruction in the context of a personal injury suit, see Combs v. Chicago, St. Paul, Minn. & Omaha Ry. Co., 135 F. Supp. 750 (N.D. Iowa 1955); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956); W.M. Bashlin Co. v. Smith, 277 Ark. 406, 643 S.W.2d 526, 532 (1982); Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974); Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 271 A.2d 94, 96 (1970); Kawamoto v. Yasutake, 49 Haw. 42, 410 P.2d 976 (1966); Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Spencer v. Martin K. Eby Const. Co., 186 Kan. 345, 350 P.2d 18, 24 (1960); Louisville & Nashville R.R. Co. v. Mattingly, 318 S.W.2d 844, 848 (Ky. 1958); Michaud v. Steckino, 390 A.2d 524, 535 (Me. 1978); Aaunti v. Payette, 268 N.W.2d 52, 55 (Minn. 1978); Amos v. Altenthal, 645 S.W.2d 220 (Mo. App. 1983); Steinauer v. Sarpy County, 217 Neb. 830, 353 N.W.2d 715, 726 (1984); Coleman v. New York Transit Auth., 37 N.Y.2d 137, 332 N.E.2d 850, 855, 371 N.Y.S.2d 663 (1975); Andersen v. Teamsters Local 116 Bldg. Club, 347 N.W.2d 309, 314 (N.D. 1984); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979); Crum v. Ward, W. Va. 421, 122 S.E.2d 18 (1961); Barnette v. Doyle, 622 P.2d 1349, 1367 (Wyo. 1981).

For cases holding similarly in the context of a wrongful death action, see Hansen v. Johns-Manville Prod. Corp., 734 F.2d 1036, 1045, reh'g denied, 774 F.2d 94 (5th Cir. 1984), cert. denied, 470 U.S. 1051 (1985); Vasina v. Crumman Corp.,

Courts following the majority view have based their decisions on varying grounds. Some courts have held that jury instructions concerning the tax consequences of a personal injury or wrongful death award are improper because they

(Footnote 1 continued)

664 F.2d 112, 118 (2d Cir. 1981); Johnson v. Huskey Indus., Inc., 536 F.2d 645, 650 (6th Cir. 1976); Canavin v. Pacific S.W. Airlines, 148 Cal. App. 3d 512, 196 Cal. Rptr. 82, 100 (1983); Richmond Gas. Corp. v. Reeves, 158 Ind. App. 338, 302 N.E.2d 795 (1973); Kirk v. Ford Motor Co., 147 Mich. App. 337, 383 N.W.2d 193, 198 (1985); Scallon v. Hooper, 293 S.E.2d 843, 845, petition denied, 295 S.E.2d 843 (N.C. 1982); Terveer v. Baschnagel, 3 Ohio App. 3d 312, 445 N.E.2d 264 (1982); Green v. Denney, 87 Or. App. 298, 742 P.2d 639 (1987); Rivera v. Philadelphia Theological Seminary, 326 Pa. Super. 509, 474 A.2d 605, 617 (1984); Stallcup v. Taylor, 62 Tenn. App. 407, 463 S.W.2d 416 (1971).

For additional cases holding similarly in both contexts, see Annotation, Propriety of Taking Income Tax Into Consideration in Fixing Damages in Personal Injury or Death Action, 16 A.L.R. 4th 595 (1982 & Supp. 1990).

Nevertheless, in Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490 (1980), the United States Supreme Court held that in a wrongful death action brought under the Federal Employer's Liability Act (FELA), the trial court erred in excluding evidence offered by the defendant to show the effect of income taxes on the decedent's estimated future earnings and in refusing to instruct the jury that their award to the plaintiff would not be subject to income tax.

Despite the Supreme Court's holding, most state courts addressing the taxation instruction issue subsequent to the Liepelt decision have maintained their prior position that it is improper to instruct the jury regarding the tax consequences of a personal injury or wrongful death award under state law limiting Liepelt to FELA cases. See, e.g., Canavin v. Pacific S.W. Airlines, 148 Cal. App. 3d 512, 196 Cal. Rptr. 82 (1983); Barnette v. Doyle, 622 P.2d 1349 (1981); Dehn, 321 N.W.2d at 538 (noting that Liepelt "dealt solely with federal law . . . as applied to a wrongful death action and has been generally limited to the particular facts arising thereunder"); Klawonn v. Mitchell, 105 Ill. 2d 450, 475 N.E.2d 857, 860 (1985) ("Although Liepelt has established that in FELA actions, juries, upon request, must be instructed that any damages awarded are not subject to taxation, this case involves purely State law, and Liepelt is not directly controlling.").

interject a collateral and irrelevant matter. See, e.g., Dehn, 321 N.W.2d at 539 ("income tax liability is a matter foreign to the award of damages in that it is not a pertinent issue bearing on the award thereof"); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956) (holding that taxability of award is collateral to the calculation of damages). According to these courts, if a jury were instructed regarding the tax consequences of a personal injury or wrongful death judgment, other cautionary instructions would also be required on other collateral matters which might affect the amount of damages awarded by a jury, such as the fact the injured party will have to pay attorney fees out of the judgment. See Dehn, 321 N.W.2d at 539. As noted by the Emblade court, if a jury is instructed on the tax consequences of an award,

what objection can there be for plaintiff's counsel to state that the expense of trial is not provided for in the instruction concerning damages, that the cost of medical witnesses is not paid by the defendant, that the expense of taking depositions, as well as court reporting at the trial, must be borne by the individual litigants, that the fees of plaintiff's attorney are not recognized as an element, [and] that the defendant can deduct any award it pays from its income and excess profits tax return.

Emblade, 298 P.2d at 1037-38.²

Other courts aligning themselves with the majority have done so to prevent unnecessary complication of trials. See, e.g., Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, 845 ("consideration of the taxation issue . . . would ordinarily involve abundant and intricate evidence and jury instructions on present and future tax and nontax liabilities") review denied, 306 N.C. 744, 295 S.E.2d 843 (1982); Emblade, 298 P.2d

2. Indeed, as noted by Justice Blackmun, "[i]t is also 'entirely possible' that the jury 'may' increase its damages award in the belief that the defendant is insured, or that the plaintiff will be obligated for substantial attorney's fees, or that the award is subject to state (as well as federal) income tax, or on the basis of any number of other extraneous factors." Liepelt, 444 U.S. at 503 (Blackmun, J., dissenting).

at 1038 (noting that interjecting this issue into the calculation of damages would unduly "complicate the trial by requiring an intricate discussion of tax and nontax liabilities"); Combs v. Chicago St. Paul, Minneapolis & Omaha Ry. Co., 135 F. Supp. 750, 757 (N.D. Iowa 1955) (noting that interjecting this issue into the calculation of damages "would probably give rise to more problems than it would solve"); Klawonn v. Mitchell, 105 Ill. 2d 450, 475 N.E.2d 897, 861 (1985) ("proof of pecuniary loss, not simple under the best of circumstances, should not be rendered more complex by injecting the question of income tax or other extraneous factors").³

Courts adopting the majority position also note that there is no evidence that juries increase damage awards because of a belief that such awards are taxable. See, e.g., Dehn, 321 N.W.2d at 538 (noting that there is "no evidence . . . or empirical data demonstrating that . . . juries in general regularly increase damage awards because of a mistaken belief that the state and federal governments share in the award through income taxes"); Klawonn, 475 N.E.2d at 860 (quoting Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 503 (1980) (Blackmun, J., dissenting)) ("'[t]here certainly is no evidence in this record to indicate that the jury is any more likely to act upon an erroneous assumption about any other collateral matter'").

A fourth reason given by courts which have adopted the majority position is that the taxability of the award is an issue which concerns only the recipient of the award and the Internal Revenue Service. See, e.g., Eriksen v. Boyer, 225 N.W.2d 66, 74 (N.D. 1974) (quoting Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E.2d 77, 86 (1955)) ("whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government'"). As noted by

3. In a wrongful death action, the finder of fact must consider the probable future income of the deceased in order to accurately calculate the plaintiff's damages. In contrast, calculation of damages in a personal injury action usually will not involve the future income of the plaintiff to the same extent. Introducing the issue of the tax consequences of a damage award, therefore, likely will complicate matters more in a wrongful death action than in a personal injury suit. The majority of jurisdictions addressing this issue, however, have applied one uniform standard to both types of cases, refusing to create two separate rules. We believe this is the sound approach.

the Eriksen court, "'if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified.'" Id.

Finally, some courts have rejected jury consideration of income tax consequences because such instructions are too conjectural and speculative. See, e.g., Canavin v. Pacific S.W. Airlines, 148 Cal. App. 3d 512, 541, 196 Cal. Rptr. 82, 102 (1983) ("Income tax instructions are conjectural and open the door to intense speculation."); Scallon, 293 S.E.2d at 845 ("The reason courts adopt the majority view of refusing to take income tax consequences into consideration in awarding damages for wrongful death is that the amount of a recipient's future income tax liability is too conjectural or speculative a factor.").

We are persuaded by the aforesaid arguments supporting the exclusion of an instruction in a personal injury or wrongful death action informing the jury that the judgment will not be subject to taxation. We, therefore, adopt the majority view that it is improper to instruct the jury as to the tax consequences of a personal injury or wrongful death award. We do so, however, cognizant of the fact that most courts addressing this issue have done so in the context of deciding whether it was error for the trial court to refuse to give an income tax instruction. Most trial judges have exercised their discretion to exclude such instructions.

In the instant case, the trial court gave the requested tax instruction. Thus, we are faced with a different issue; did the trial court commit reversible error by instructing the jury as to the tax consequences of the plaintiff's award? Few courts have directly addressed this issue. The courts that have addressed the prejudice resulting from an income tax instruction have done so in the context of wrongful death actions and have held that "it is reversible error for the trial court to instruct the jury that damages awarded . . . are exempt from federal and state income taxes." Scallon, 293 S.E.2d at 845 (emphasis added); see also Klawonn, 475 N.W.2d at 857 (holding that instructing the jury that wrongful death award was not subject to taxation was reversible error).

Under Utah law, an improper jury instruction is grounds for "reversible error 'if it tends to mislead the jury to the prejudice of the complaining party.'" Knapstad v. Smith's

Management Corp., 774 P.2d 1, 3 (Utah App. 1989) (citations omitted). Where a jury is instructed on the tax consequences of a damage award, the effect of such instructions on the jury's ultimate damage award is extremely difficult, if not impossible, to determine. This in some ways supports a per se reversible error prophylactic rule. However, in the case before us, although the court did improperly instruct the jury as to the tax consequences of the judgment, this error was mitigated by the context in which the information was presented. The instruction at issue not only informed the jury about the tax consequences of the judgment, but also admonished the jury not to consider other collateral matters such as punishment or attorney fees. In fact, the first part of the instruction referring to taxes merely informed the jurors not to add any amount for the payment of taxes.⁴ In context, we cannot say that the objectionable portion of the instruction was likely to have affected the amount of damages awarded. However, we caution that an instruction as to the tax consequences of a judgment should not be given by trial judges as our conclusion concerning the prejudicial impact of such an instruction could be different in other factual contexts.

II. PRECLUSION OF EXPERT TESTIMONY

During the presentation of appellant's case in chief, Mr. Newell Knight, an accident reconstruction expert, was called to testify regarding appellee's negligence. Counsel for appellant asked Mr. Knight if he had an opinion regarding whether appellee was negligent. Mr. Knight responded affirmatively. When Mr. Knight was asked to express his opinion, counsel for appellee objected on the ground that the question pertained to an ultimate issue to be decided by the jury. The trial court sustained appellee's objection. On appeal, appellant argues the trial court committed prejudicial error by excluding Mr. Knight's testimony because such opinion testimony is expressly allowed under Utah Rule of Evidence 704.

4. We realistically note that juries often speculate as to collateral matters such as whether the plaintiff will have to pay attorney fees, costs and taxes from the judgment, as well as whether insurance will cover some portion of the damages. It may be useful to explicitly caution the jury not to speculate on any of these collateral matters, but only to decide the question of damages with reference to the evidence before them and the court's instructions.

In reviewing the admissibility of evidence at trial, we give deference to the trial court's advantageous position, and do not overturn the result unless it is clear the trial court erred. See Whitehead v. American Motors Sales Corp., 801 P.2d 920, 923 (Utah 1990); see also State v. Kinsey, 797 P.2d 424, 427 (Utah App.) ("It is generally held that the trial court has discretion to determine the suitability of expert testimony in a case."), cert. denied, 800 P.2d 1105 (Utah 1990).

Traditionally, an expert was not allowed to offer an opinion on an ultimate issue to be decided by the jury. See, e.g., Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). Expert testimony regarding ultimate issues, however, is now admissible under Utah Rule of Evidence 704.⁵ This rule reads: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Utah R. Evid. 704.⁶

The trial court's exclusion of this testimony, however, can be affirmed on the ground that it was a legal conclusion. Although Rule 704 abolishes the per se rule against testimony regarding ultimate issues of fact, it does not allow all opinions. "The Advisory Committee notes [to Rule 704] make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions."

5. This rule follows Federal Rule of Evidence 704 verbatim. The Utah Supreme Court has stated that "since the advisory committee generally sought to achieve uniformity between Utah's rules and the federal rules, [the Utah Supreme Court] looks to the interpretations of the federal rules by the federal courts to aid in interpreting the Utah rules." State v. Gray, 717 P.2d 1313, 1317 (Utah 1986). Accordingly, this court may look to federal law interpreting Federal Rule of Evidence 704 to aid in the interpretation of Utah Rule of Evidence 704.

6. See also Gaw v. State, 798 P.2d 1130 (Utah App. 1990) (noting that Utah Rule of Evidence 704 allows an expert to express opinion concerning ultimate issue in the case); 11 J. Moore & H. Bendix, Moore's Federal Practice § 704.10, at VII-64 (1989) ("Under rule 704, testimony of both lay and expert witnesses in the form of an opinion or inference otherwise admissible is not objectionable because it 'embraces an ultimate issue to be decided by the trier of fact.'").

Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983). Thus, an expert generally cannot give an opinion as to whether an individual was "negligent" because such an opinion would require a legal conclusion. See, e.g., Shahid v. City of Detroit, 889 F.2d 1543 (6th Cir. 1989) (holding that expert testimony was not admissible on ultimate legal conclusion of whether correctional officers were negligent in failing to provide necessary medical treatment to inmate); see also Specht v. Jensen, 853 F.2d 805, 808-09 (10th Cir. 1988) (holding that allowing legal expert to testify as to whether there had been a "search" in plaintiff's residence constituted reversible error; summarizing cases in which the second, fourth, fifth and sixth circuits held that expert witnesses may not give legal conclusions); Hogan v. American Tel. & Tel. Co., 812 F.2d 409 (8th Cir. 1987) ("Opinion testimony is not helpful to the factfinder if it is couched as a legal conclusion."); Smith v. Atlantic Richfield Co., 814 F.2d 1481, 1485 (10th Cir. 1987) (upholding trial court's exclusion of expert's opinion as to whether defendant's actions were "prudent mine practices" on the grounds that the question called for a legal conclusion).

There is no bright line between permissible questions under Rule 704 and those that call for overbroad legal responses. Here, however, the intended response when placed in context was an inadmissible one. Mr. Knight was allowed to give his opinion as to, inter alia, the reason appellee's truck overturned while going around a curve, that the truck was traveling too fast for the curve, what the speed limit was at the curve, whether a person hauling livestock should be concerned with his load and what the concerns should be, and whether a person hauling livestock could foresee the possibility of injury if the truck overturned. Indeed, the only evidence the trial court excluded was Knight's conclusion regarding whether appellee was negligent. Additionally, Knight's testimony was not technical or difficult to understand, but was expressed in lay terms. The trial judge did not err in excluding Mr. Knight's opinion testimony that appellee was negligent. The excluded testimony was an answer to a specific question which would appear on the verdict form, a question which must be answered based upon the judge's definition of a legal term "negligence." Questions which allow a witness to simply tell the jury what result to reach are not permitted.

Given that Knight's testimony was easily understandable and that Knight was allowed to testify as to everything except his final conclusion that appellee was negligent, the testimony

was properly excluded as the jury was capable of drawing its own conclusions from the evidence presented and after instruction from the court.⁷

III. ADMISSION OF STATEMENT IN "SETTLEMENT" LETTER

Finally, appellant contends the trial court erred in allowing into evidence statements he made in a letter to appellee. Appellee's theory at trial was that appellant was negligent in cornering the steer which had escaped from appellee's truck. In support of this theory, appellee emphasized the distance between appellant and the animal at the time the animal charged. As noted earlier, appellant in deposition testimony estimated the distance to be approximately forty feet. Additional evidence was presented at trial that the distance may have been approximately twenty-two feet. At trial, appellee's counsel introduced a statement from a letter written to appellee wherein appellant estimated the distance at ten feet, a distance which tended to support appellee's theory. Appellant claims the trial court erred in admitting this statement because it was made as part of settlement negotiations.

The admissibility of settlement negotiations is governed by Utah Rule of Evidence 408 which states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a

7. Furthermore, Rule 704 must be read in conjunction with the other rules of evidence. Thus,

while [Rule 704] permits expert opinion testimony on an ultimate issue, Rule 704 does not mean that all opinions are admissible into evidence. Rules 701 and 702 require, respectively, that the opinions of lay and expert witnesses assist the trier of fact. And Rule 403 provides for the exclusion of evidence which wastes time. Thus, if a witness's opinion will do little more than tell the jury what result to reach, it will be inadmissible.

10 J. Moore & H. Bendix, Moore's Federal Practice § 704.02, at VII-63 (1989).

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

Utah R. Evid. 408. This rule follows verbatim Federal Rule of Evidence 408 which was used as a model in drafting the Utah Rules. See Fed. R. Evid. 408. Accordingly, this court looks to federal law interpreting Federal Rule of Evidence 408 to define the contours of Utah Rule of Evidence 408. See Gray, 717 P.2d at 1317; see also note 5, supra.

"In order for the exclusionary rule to attach, the party seeking to have evidence of offers to compromise or statements made in the course thereof excluded must show that the discussions in question were made in 'compromise negotiations.'" 10 J. Moore & H. Bendix, Moore's Federal Practice § 408.04 (1988 & Supp. 1990).

The letter in question, from appellant and his wife to appellee, begins by reviewing the factual circumstances of the accident⁸ and it is in this factual recitation that appellant

8. This portion of the letter reads:

It appears you have been poorly informed as to Mr. Grant Davidson's injury claim.

Please allow us to clarify: Mr. Davidson while performing his job for the D & RGW Railroad, saw the injured cow sitting on the railroad. He stopped and got out some 10 feet from the animal. He made no move towards the injured cow but while standing still was charged. He fled

admits "he stopped and got out some 10 feet from the animal." Following this recitation of facts, the letter continues by stating, "[w]e don't intend to let you or that trucking company off, with a letter telling us that your [sic] not responsible." In conclusion, appellant's letter states, "[y]ou may speak with us directly or we can send it to lawyers and to court, you decide."

We believe the trial judge was correct in admitting the statement from the letter sent by appellant to appellee because the letter was not an offer to compromise appellant's claim, nor was it written as part of settlement negotiations. To the contrary, this letter is merely an attempt to inform appellee as to the facts of the incident. Furthermore, appellant in the

(Footnote 8 continued)

the cow, but it caught him, goring him in the back and sending him air born for approximately 20 feet where he landed on the rail on his knee.

The attack continued with the cow attempting to trample Mr. Davidson to death, as he lay stunned with a concussion on the ground he pushed the animal off and escaped to the safety of a rail car.

The cow continued to charge repeatedly and finally moved off. It then charged many others before it was killed.

Mr. Davidson did not pursue, chase or attempt to move the cow. As it (the cow) was injured in the accident, it became abnormally dangerous.

We have been advised by legal counsel that the contents of a truck, when they spill and are dangerous (as this case) are the responsibility of the insurer when those dangerous contents injure innocent people.

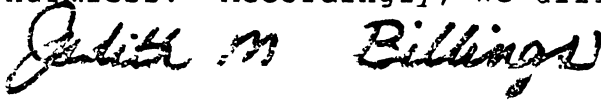
Mr. Davidson has a permanent knee problem, and must wear a brace while doing any work. He's had 16 years with this job, which is now jeopardized by this injury. He has lost wages, has great suffering and now is going to be disabled the rest of his life.

letter demands payment in full of appellant's claim and its whole tenor is that appellant will not compromise one bit.⁹

9. Even if appellant's letter was construed to be a statement made in settlement negotiations, courts construing Federal Rule of Evidence 408 and similar state rules have held that evidence of statements made in settlement negotiations can and should be admitted for purposes of impeachment. For example, in United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949 (5th Cir. 1990), the court held that the trial court had properly acted within its discretion under Rule 408 when it admitted evidence of a settlement that was offered to impeach the plaintiff's earlier deposition testimony. In so holding, the court stated that Federal Rule of Evidence 408 "permits settlement evidence for any purpose except to prove or disprove liability or the amount of the claim. Id. at 956 (citing Belton v. Fibreboard, 724 F.2d 500, 505 (5th Cir. 1984)). Similarly, in County of Hennepin v. AFG Indus., Inc., 726 F.2d 149 (8th Cir. 1984), the court allowed evidence of a settlement to impeach. The court stated that although Rule 408 excludes evidence of a settlement to prove liability, it "'does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness . . . ,' " adding that "[t]he Rule codifies a trend in case law that permits evidence of a settlement to impeach." Id. at 152-53 (citing Reichenbach v. Smith, 528 F.2d 1072, 1075 (5th Cir. 1976)). Furthermore, in Slusher v. Ospital, 777 P.2d 437 (Utah 1989), the Utah Supreme Court stated, albeit in dicta, that under Utah Rule of Evidence 408, evidence of compromise is admissible for impeachment purposes. In Slusher, the court was considering the effect of two statutes which were superseded by the Utah Rules of Evidence, Utah Code Ann. §§ 78-27-29 and -30 (1977). The court stated that "[t]aken together, the two statutes resulted in a rule not unlike Utah Rule of Evidence 408, now in effect. In other words, they precluded introduction of the settlement for the purpose of establishing liability but not for the purposes relating to credibility." Id. at 443 (emphasis added); see also id. n.12 (in which the court stated that if Rule 408 applied to the trial in Slusher, "it even more clearly supports the conclusion we reach [that evidence of compromise should be allowed for impeachment purposes].").

Thus, even if appellant's letter to appellee were to be construed to have been made as part of settlement discussions, it could be admitted to impeach appellant's prior testimony regarding the distance between himself and the steer prior to the accident.

In sum, we conclude that the trial judge did not err in excluding appellant's expert testimony that appellee was negligent. Such testimony was a legal conclusion and did not assist the trier of fact and, therefore, was properly excluded. Additionally, the trial judge did not err in admitting a statement in which appellant estimated that the distance between himself and the steer prior to the accident was ten feet. The statement was not made in the course of settlement negotiations. Finally, although we conclude the trial judge erred by instructing the jury regarding the tax consequences of the plaintiff's award, we find the error harmless. Accordingly, we affirm.



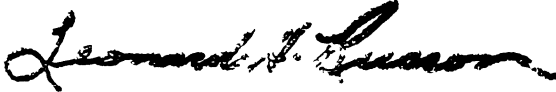
Judith M. Billings,
Associate Presiding Judge

I CONCUR:



Gregory K. Orme, Judge

I CONCUR IN PARTS II AND III AND IN THE RESULT ONLY IN PART I:



Leonard H. Russon, Judge

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 in 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.

Rule 408. Compromise and offers to compromise.

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

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable to Rules 52 and 53, Utah Rules of Evidence (1971) but is broader to the extent that it excludes statements made in the course of negotiations.

Cross-References. — Offer of judgment, Rules of Civil Procedure, Rule 68.

Release or settlement of personal injury claim, rescission or disavowal of, § 78-27-32.

NOTES TO DECISIONS

ANALYSIS

Settlement agreement.
Cited.

Settlement agreement.

When an injured plaintiff and one or more, but not all, defendant tortfeasors enter into a settlement agreement, the parties must promptly inform the court and the other parties to the action of the existence of the agreement and of its terms. If the action is tried by a

jury, the court shall, upon motion of a party, disclose the existence and basic content of the agreement to the jury unless the court finds that, on facts particular to the case, such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. *Slusher v. Ospital*, 111 Utah Adv. Rep. 18 (1989).

Cited in *Hector, Inc. v. United Sav. & Loan Ass'n*, 741 P.2d 542 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 629 et seq.

C.J.S. — 31A C.J.S. Evidence § 285.

A.L.R. — Admissibility of admissions made in connection with offers or discussions of compromise, 15 A.L.R.3d 13.

Admissibility of evidence showing payment, or offer or promise of payment, of medical, hospital, and similar expenses of injured party by opposing party, 65 A.L.R.3d 932.

Key Numbers. — Evidence ◀ 213.

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Advisory Committee Note. — This rule is the federal rule, verbatim, and comports with Rule 56(4), Utah Rules of Evidence (1971). See

Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979).

NOTES TO DECISIONS

ANALYSIS

In general.
Cited.

In general.

The expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced must be established before an expert's

opinion is admissible as to an ultimate issue. Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979) (referred to in Advisory Committee Note).

Opinion testimony of expert witness was not rendered inadmissible by fact that it may have embraced the ultimate factual issue to be decided by the jury. Shurtleff v. Jay Tuft & Co., 622 P.2d 1168 (Utah 1980).

Cited in Shurtleff v. Jay Tuft & Co., 622

P.2d 1168 (Utah 1980); American Concept Ins. Co. v. Lochhead, 751 P.2d 271 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Journal of Contemporary Law. — Comment, Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Consti-

tutional Implications, 15 J. Contemp. L. 81 (1989).

October 1, 1987

To whom it may concern
Re; injury claim

Gentlemen:

It appears you have been poorly informed as to Mr. Grant Davidson's injury claim.

Please allow us to clarify: Mr. Davidson while performing his job for the D & RGW Railroad, saw the injured cow sitting on the railroad. He stopped and got out some 10 feet from the animal. He made no move towards the injured cow but while standing still was charged. He fled the cow, but it caught him, goreing him in the back and sending him air born for approximately 20 feet where he landed on the rail on his knee.

The attack continued with the cow attempting to trample Mr. Davidson to death, as he lay stunned with a concussion on the ground he pushed the animal off and escaped to the safety of a rail car.

The cow continued to charge repeatedly and finally moved off. It then charged many others before it was killed.

Mr. Davidson did not persue, chase or attempt to move the cow. As it (the cow) was injured in the accident, it became abnormally dangerous.

We have been advised by legal counsel that the contents of a truck, when they spill and are dangerous (as this case). Are the responsibility of the insurer when those dangerous contents injure innocent people.

Mr. Davidson has a permenate knee problem, and must wear a brace while doing any work. He's had 16 years with this job, which is now jepordized by this injury. He has lost wages, has great suffering and now is going to be disabled the rest of his life.

We don't intend to let you or that trucking company off, with a letter telling us that your not responsible.

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You may speak with us directly or we can send it to lawyers
and to court, you decide.

Very sincerely,

Grant S. Davidson

Sandy J. Davidson