

1990

# Grant Davidson v. Erwin M. Prince, Folken Brothers Trucking : Brief of Appellant

Utah Court of Appeals

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**DOCKET NO.**

900461-01A

IN THE UTAH COURT OF APPEALS

**Defendants/Appellees.**

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Case No. 900461-CA

APPEAL FROM THE FINAL JUDGMENT OF THE FOURTH  
JUDICIAL DISTRICT, UTAH COUNTY,  
STATE OF UTAH  
HONORABLE RAY M. HARDING, JUDGE

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**FILED**

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COURT OF APPEALS



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### STATEMENT OF JURISDICTION

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

Jurisdiction of the Utah Supreme Court to hear this appeal is based on Utah Code Annotated Section 78-2-2(3)(j). This case has been poured-over to the Utah Court of Appeals pursuant to Rule 42 of the Utah Rules of Appellate Procedure.

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's Notice of Appeal was served and filed on May 23, 1990.

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

Three issues are raised by this appeal. First, whether the trial court commits error by instructing the jury regarding tax consequences of a personal injury judgment? Second, whether the trial court erred in precluding an expert witness from giving an opinion on whether or not defendant was negligent? Third, this appeal asks whether the district court erred in allowing into evidence statements which were contained in a letter of settlement?

### DETERMINATIVE RULES

Utah Rules of Civil Procedure, Rule 59

Utah Rules of Civil Procedure, Rule 61

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, while 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 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, did negligently operate his motor vehicle at the location of approximately SR 15, in the curve from S.B. SF 15, so as to cause vehicle to overturn. (R. 1-2.)

2. As a proximate result of appellee Erwin M. Prince's negligence, 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 and gored the appellant. (R. 2.)

4. The animal occupied the appellee's vehicle immediately prior to the accident and the animal's escape was a proximate result of the appellee's negligence in permitting his vehicle to overturn. (R. 2.)

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

6. 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.)

7. Portions of a settlement negotiation letter 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.)

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

9. 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.)

## ARGUMENT

### POINT I

#### THE DISTRICT COURT ERRED IN GIVING THE JURY INSTRUCTION REGARDING THE TAX CONSEQUENCES OF A PERSONAL INJURY JUDGMENT.

The appellee requested and the court instructed the jury, over the objection of appellant's counsel, on the tax consequences of a personal injury judgment. (Partial Trial Transcript, Page 73.) There is apparently no Utah decision which has addressed this issue. However, the vast majority of our sister states have considered this issue and have ruled that such instructions are improper and prejudicial.

This issue is addressed in 16 ALR 4th 589. A state by state review of the decisions concerning this issue is set forth. It was indicated there that the

appellate courts of the following states have ruled that the instruction is improper and prejudicial: Arizona, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri (has cases going both ways), Nebraska, New York, North Dakota, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wyoming.

In contrast, the ALR article indicated that the only states that have approved such an instruction as being proper are Delaware, Missouri (which has cases going both ways), and New Jersey. The article lists two states, Florida and Massachusetts, which have held that the instruction is discretionary.

The reasoning of those courts which have found that it is improper to instruct the jury on the tax consequences of personal injury judgments is founded on firm logic and fundamental fairness. Juries are not instructed that the amount awarded to an injured plaintiff will be reduced by the costs of bringing his action to trial, or the attorney's fees required to obtain his day in court. While the jury may certainly assume that such costs are inevitable, they might mistakenly believe that the court will award these costs in addition to compensation set by the jury. To instruct the jury, however, that there will be no taxes on the amount that they award to an injured plaintiff suggests that the plaintiff will be entitled to retain the whole of the amount awarded.

In the tort system of determining compensation the jury is asked to arrive at an amount which will fully compensate the plaintiff. To instruct the

jury that certain deductions will not be taken from the judgment, while failing to instruct them on the deductions which will reduce the amount ultimately received by the plaintiff is clearly prejudicial error.

Furthermore, the courts which have rejected such an instruction have also pointed out one other obvious fact. The future tax liability of personal injury judgments is a matter which is so speculative that the trial court may not even be instructing on a correct premise of law.

A review of the decisions which have addressed this issue is illustrative:

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.

Scallon v. Hooper, 293 S.E.2d 843, 845 (N.C.App. 1982)

The court in Barnette v. Doyle, 622 P.2d 1349, 1367 (Wyo. 1981), sets out that:

Similarly, whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tort-feasor has no interest in such question. And 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.....Following the lead of the majority of state courts that have decided the issue, we do not believe a trial judge is required to instruct a jury that an award will not be subject to federal income taxes. We so hold because we do not believe that such an instruction is material to the proper determination of damages; nor do we believe that a jury should be instructed on federal taxes when it is not also instructed as to the effect of the cost of attorneys fees, the costs incurred in preparing the case or the various types of insurance that may be involved.

The court in Paducah Area Public Library v. Terry, 655 S.W.2d 19, 25 (Ky.App. 1983) stated:

To inject the incidence of the ever changing tax scheme, federal or state, into a jury damage trial would lead the jury into a hopeless quagmire of confusion and conjecture. Since our test is one's destroyed power to earn money, matters such as marital status and personal consumption items such as debts, insurance (savings), and general living expenses have been held irrelevant. We think it logically follows that a tax debt to the government is also irrelevant. We believe this rule is supported by sound reasoning and ample authority. 22 Am.Jur.2d, Damages S.88 and Death S. 154 (1965). There appears to be no reason for abating damages in favor of a wrongdoer by deducting tax payments solely for his benefit. . . . We hold that in personal injury actions such as the case at hand the tax liability of claimant is not relevant to the case. It can neither be inquired into on cross-examination or submitted to the jury for consideration in making the award.

Similarly, the court in Dehn v. Prouty, 321 N.W.2d 534, 538-39 S.D. 1982) quoting McWeeney v. New York, New Haven & Hartford R. R. Co., 282 F.2d 34, 37-38 (2d Cir. 1960), states:

We know of no evidence in this case or empirical data demonstrating that this jury or 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. Furthermore, if a cautionary instruction should be given the jury to dissuade it from improperly increasing an award for income tax purposes, then perhaps other cautionary instructions should also be given on other collateral matters which conceivably affect the amount of damages awarded by a jury. For example, a jury might be instructed not to increase or decrease an award because one or both of the parties must pay attorney's fees in the action.

It is respectfully submitted that an examination of the cases cited shows that the better rule is the majority rule. "The 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 (S.D. 1982). See also, Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984);

Kirk v. Ford Motor Company, 383 N.W.2d 193 (Mich. App. 1985); Rivera v. Philadelphia Theological Seminary, 474 A.2d 605 (Pa.Super. 1984); Anderson v. Teamsters Local 116 BLDG. Club, 347 N.W.2d 309 (N.D. 1984); Maricle v. Spiegel, 329 N.W.2d 80 (Neb. 1983); Hall v. County of New Madrid, 645 S.W.2d 149 (Mo.App. 1982); Young v. Environmental Air Products, Inc., 665 P.2d 88 (Ariz.App. 1982); Terveer v. Baschnagel, 445 N.E.2d 264 (Ohio App. 1982); W.M. Bashlin Co. v. Smith, 643 S.W.2d 526 (Ark. 1982).

The fact that personal injury awards may not be taxable, while true, is irrelevant to the jury's determination. As appellant's counsel indicated in his objection to this instruction, the court will not instruct on other facts involving the damage award, despite the fact that they are also true, because they prejudice the jury's decision. For example, the jury is not instructed that one-third of the eventual award, minus costs, will go as attorney's fees. The jury is also not instructed that liability insurance is available to satisfy the judgment. While all of these factors are true, they are irrelevant to the jury's decision and serve to unduly prejudice the jury in making its determination.

## POINT II

### **THE DISTRICT COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF APPELLANT'S EXPERT CONCERNING THE APPELLEE'S NEGLIGENCE.**

During the presentation of appellant's case in chief, Mr. Newell Knight, an accident reconstruction expert, was called to testify to 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.

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. Appellant would therefore contend that this error in law should be corrected by the granting of a new trial.

### POINT III

#### **THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF STATEMENTS CONTAINED IN SETTLEMENT NEGOTIATIONS.**

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 the 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 very clearly a communication involving an offer or willingness to settle plaintiff's claim. The statement which was admitted was made in the letter of negotiation and according to the Rule is likewise not admissible.

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.

It is, of course, to be noted that this error was once again pointed out to the court immediately preceding closing arguments. The court having reviewed the Rules of Evidence instructed the appellee's counsel to make no reference to this testimony in his closing argument.

Nevertheless, appellant contends that this action did not cure the error, and directly resulted in the high percentage of negligence placed upon the appellant by the jury as well as the low damages which were awarded. Initially, appellant would contend that the evidence was already presented to the jury, and that its impact was significant because it was allowed in over the objection of counsel in the presence of the jury. Furthermore, appellee's counsel, while not directly alluding to the 10 foot distance referred to in that letter, nevertheless made several references in closing statement which would remind the jury of the damaging testimony. Counsel once referred to a "letter". When making his argument that the appellant had "cornered" the animal, he indicated that appellant had estimated other distances during the course of the proceedings. Of course, the only evidence as to other distances

in this case was the 10-foot estimation which the court had instructed counsel to refrain from addressing. (Supplemental Partial Trial Transcript, page number pending receipt of transcript.)

Therefore, appellee counsel's masterful use of innuendo obviously served to undermine any curative effect which the court's restrictions on closing argument may have had, and very clearly resulted in prejudice to the appellant in the ultimate decision of the jury.

The public policy supporting the exclusion of evidence contained in settlement negotiations is a strong one. The courts are provided to resolve disputes which cannot be otherwise resolved. However, the law should encourage the peaceful resolution of disputes without resort to the courts. Indeed, the courts would be crippled if the number of disputes currently resolved without trial were to drastically increase.

Undoubtedly, resolution of disputes without judicial process would become far more limited if statements made in settlement negotiations were to be admitted in the trial of those matters which are not resolved. While the critical admission in the present case went only to an opinion of facts in a letter which plaintiff wrote without careful reflection and before he had consulted with counsel, other settlement negotiations require for success candor in assessing one's potential liabilities. The necessary dialogue concerning the strengths and weaknesses of one's legal claims would surely be frustrated if any

inroads are permitted on the longstanding rule prohibiting the admission of evidence from settlement negotiations at trial.

#### POINT IV

#### **THE ERRORS WHICH OCCURRED IN THE TRIAL COURT ARE PREJUDICIAL AND SUBSTANTIALLY AFFECTED THE OUTCOME OF THE TRIAL.**

Appellant maintains that if the foregoing had not occurred, the issues of negligence and damages would have been ruled on differently. Utah case law establishes that in cases where errors occur, and most likely a different result or ruling would have been obtained if the errors had not occurred; those errors are prejudicial and a new trial is in order. However, the errors must be substantial and go to the heart of litigant's rights and the fair adjudication of the action. Pearce v. Wistisen, 701 P.2d 489, 491-92 (Utah 1989) states;

Nor is the fact alone that evidence was erroneously admitted sufficient to set aside a verdict unless it has "had a substantial influence in bringing about the verdict." Conversely, where evidence was shown to have supported only conjectural inferences which had little probative value, or where no evidence was adduced that showed that a fact had any causal connection with the plaintiff's injury, reviewing courts have reversed cases on grounds that the improperly admitted evidence could only have served to confuse and mislead the jury or to prejudice the outcome of the case. [citations omitted]

Conversely, Egbert & Jaynes v. R.C. Tolman Const., 680 P.2d 746, 747 Utah 1984) states that a ruling of a trial court will not be reversed if substantial evidence supports the ruling.

State v. Verde, 770 P.2d 116 (Utah 1989), defines the two types of errors that result in reversal. The first type is where the right for review is preserved in the trial court by making timely objections and motions raising the issues for review. The second type is where the issues have not been preserved in the court below, however, their "manifest injustice" requires their review.

In the present situation the issues were preserved below and therefore are analyzed accordingly. The standard as set out in Verde establishes that for review, "... there is a reasonable likelihood that the error affected the outcome in the trial court." Id. at 121, 770 P.2d 116. Redev. Agcy. of Salt Lake City v. Tanner, 740 P.2d 1296, 1303-04 (Utah 1987) also states, "the exclusion of evidence is harmless unless the excluded evidence would probably have had a substantial influence in bringing about a different finding."

In Ashton v. Ashton, 733 P.2d 147, 154 (Utah 1987) the court required that the error be "substantial and prejudicial in that the appellant was deprived in some manner of a full and fair consideration of the disputed issues by the jury." Ashton also quotes Rule 61 of the Utah Rules of Civil Procedure as stating:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The three errors complained of in the present case went to the heart of the jury's determination. Davidson brings the present appeal because he complains both that the amount of the damages awarded were too low, and the percentage of negligence assigned to him was too high. The court's instruction on the tax consequences of a personal injury judgment clearly invites the jury to reduce their award, just as they would be inclined to increase their award if they were instructed that the amount given will be reduced by a one-third contingent fee to the plaintiff's attorney and any costs incurred in pursuing the action. Likewise, 40% contributory negligence assigned to plaintiff was obviously based on defendant's argument that Davidson had cornered the animal which had escaped from defendant's truck. This argument found its greatest support through a statement contained in a letter of settlement negotiation which was improperly admitted. Finally, appellant maintains that a greater amount of negligence would have been assigned to the defendant (and hence a lesser amount of negligence assigned to plaintiff) had plaintiff's expert not been restricted from providing the jury with his conclusions from his scientific investigation of the accident.

Appellant respectfully submits that the errors, defects, or omissions of the trial court substantially affected his rights and hindered a fair adjudication of his action and therefore, is inconsistent with substantial justice. Appellant also respectfully submits that had these errors, defects, and omissions not

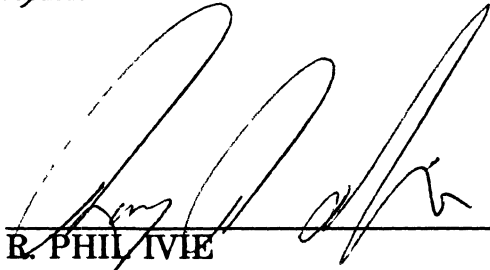
occurred, the confusion regarding negligence and damages would not have occurred, and the verdict would reflect an accurate and judicially fair result.

### CONCLUSION

The instruction concerning tax aspects of damage awards ran contrary to the general weight of authority in our sister states, and served to unduly prejudice the jury's determination on damages. The two errors concerning admission of evidence going to the issue of each party's negligence appear to have a direct impact on the fact finder's determination that the negligence should be split 60-40. In addition, when examining the amount of stipulated special damages, in light of the 60-40 split of negligence, it is clear that the jury's findings as to damages were directly tied to their findings of negligence.

Accordingly, appellant would respectfully request the court to cure these errors by remanding for a new trial on all issues where proper evidence as to appellee's negligence may be admitted and where improper evidence concerning appellee's allegations of appellant's contributory negligence will be excluded.

DATED AND SIGNED this 15<sup>th</sup> day of November, 1990.

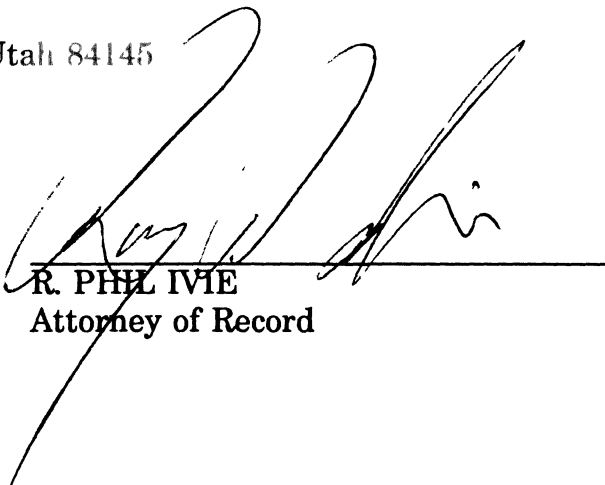


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**CERTIFICATE OF SERVICE**

I, R. Phil Ivie, hereby certify that on the 15<sup>th</sup> day of November, 1990, I 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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Attorney of Record



## **ADDENDUM**

### **I. DETERMINATIVE RULES**

- A. Utah Rules of Civil Procedure, Rule 59
- B. Utah Rules of Civil Procedure, Rule 61
- C. Utah Rules of Evidence, Rule 408
- D. Utah Rules of Evidence, Rule 704

### **II. LETTER OF SETTLEMENT NEGOTIATION**

**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  
Utah Code, § 21-2-2.

Harmless error not ground for new trial,  
Rule 6

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

Cited in *Goddard v. Bundy*, 121 Utah 299, 241 P.2d 462 (1952); *Board of Educ. v. Cox*, 16 Utah 2d 20, 395 P.2d 55 (1964); *Parker v. Rolfson*, 525 P.2d 612 (Utah 1974); *Dynapac, Inc. v. Innovations, Inc.*, 550 P.2d 191 (Utah 1976); *Olsen v. Cummings*, 565 P.2d 1123 (Utah 1977); *Pitts v. Pine Meadow Ranch, Inc.*, 589 P.2d 767 (Utah 1978); *Peay v. Peay*, 607 P.2d 841 (Utah 1980); *Miller Pontiac, Inc. v. Osborne*, 622 P.2d 800 (Utah 1981); *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981); *St. Pierre v. Edmonds*, 645 P.2d 615 (Utah 1982); *Kanzee v. Kanzee*, 668 P.2d 495 (Utah 1983);

*Pease v. Industrial Comm'n*, 694 P.2d 613 (Utah 1984); *Wiese v. Wiese*, 699 P.2d 700 (Utah 1985); *In re Estate of Chasel*, 725 P.2d 1345 (Utah 1986); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Myers v. Garff*, 655 F. Supp. 1021 (D. Utah 1987); *Wood v. Weenig*, 736 P.2d 1053 (Utah 1987); *Fackrell v. Fackrell*, 740 P.2d 1318 (Utah 1987); *Tripp v. Vaughn*, 747 P.2d 1051 (Utah Ct. App. 1987); *Blodgett v. Zions First Nat'l Bank*, 752 P.2d 901 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d Judgments §§ 200, 671 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 228 et seq., 237.

**A.L.R.** — Incompetence of counsel as ground for relief from state court civil judgment, 64 A.L.R.4th 323.

Relief from judicial error by motion under F.R.C.P. Rule 60(b)(1), 1 A.L.R. Fed. 771.

Propriety of conditions imposed in granting relief from judgment under Rule of Civil Procedure 60(b), 3 A.L.R. Fed. 956.

Construction of Rule 60(a) of Federal Rules of Civil Procedure authorizing correction of clerical mistakes and judgments, orders or other parts of the records and errors therein arising from oversight or omission, 13 A.L.R. Fed. 794.

Construction and application of Rule 60(b)(5)

of Federal Rules of Civil Procedure authorizing relief from final judgment where its prospective application is inequitable, 14 A.L.R. Fed. 309.

Independent actions to obtain relief from judgment, order, or proceeding under Rule 60(b) of the Federal Rules of Civil Procedure, 53 A.L.R. Fed. 558.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 A.L.R. Fed. 831.

Effect of filing of notice of appeal on motion to vacate judgment under Rule 60(b) of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 148.

**Key Numbers.** — Judgment ⇌ 294 et seq., 306, 307.

### Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

**Compiler's Notes.** — This rule is similar to Rule 61, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Admission of evidence.  
Amendment of pleadings.  
Burden of showing error.  
Exclusion of evidence.  
Instructions.  
Judgment presumed valid.

Judicial notice.  
Liability for costs.  
Notice of appeal.  
Party creating or approving error.  
Refusal to set verdict.  
Refusal to grant mistrial.  
Service of summons.  
Substantiality of error.

## 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.

Page Two  
September 29, 1987

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