

1990

Grant Davidson v. Erwin M. Prince, Folkens Brothers Trucking : Brief of Appellee

Utah Court of Appeals

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H. James Clegg; Robert C. Keller; Snow, Christensen and Martineau; Attorneys for Appellees.

Ray H. Ivie; R. Phil Ivie; Ivie and Young; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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900461 -CA

IN THE UTAH COURT OF APPEALS

GRANT DAVIDSON,

Plaintiff/Appellant,

vs.

Case No. 900461-CA

ERWIN M. PRINCE, and FOLKENS
BROTHERS TRUCKING,

Defendants/Appellees.

Priority #

BRIEF OF APPELLEES

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

RAY H. IVIE
R. PHIL IVIE
IVIE & YOUNG
48 North University Avenue
P. O. Box 672
Provo, Utah 84603
Attorneys for Appellant

H. JAMES CLEGG
ROBERT C. KELLER
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P. O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Appellees

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Mary T. Noonan
Clerk of the Court

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RAY H. IVIE
R. PHIL IVIE
IVIE & YOUNG
48 North University Avenue
P. O. Box 672
Provo, Utah 84603
Attorneys for Appellant

H. JAMES CLEGG
ROBERT C. KELLER
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P. O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Appellees

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STATEMENT OF JURISDICTION

Appellees Erwin M. Prince and Folgens Brothers Trucking ("Prince") do not dispute the Statement of Jurisdiction of Appellant Grant Davidson ("Davidson").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's instruction to the jury that a personal injury judgment is not subject to federal income tax constitutes any reversible error. Standard of review: de novo. See, Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988) (legal issues will be reviewed for correctness).

2. Whether the trial court's refusal to allow Davidson's expert to give an opinion on the ultimate issue of whether or not Prince was negligent constituted any reversible error. Standard of review: clearly erroneous. See, State By and Through Utah State Dept. of Social Services v. Woods, 742 P.2d 118 (Utah App. 1987) (decision whether to admit expert testimony lies within the sound discretion of trial court and ruling will be sustained unless clearly erroneous).

3. Whether the trial court's admission of evidence of factual statement contained in a demand letter constituted any reversible error. Standard of review: clearly erroneous. See, Fisher v. Trapp, 748 P.2d 204 (Utah App. 1988) (trial court's rulings regarding admissibility of evidence will not be disturbed unless it clearly appears that court was in error).

DETERMINATIVE RULES

Rule 61 of the Utah Rules of Civil Procedure:

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 grounds 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.

Rule 103 of the Utah Rules of Evidence:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .

Rule 408 of the Utah Rules of Evidence:

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.

STATEMENT OF THE CASE

Although Prince does not dispute Davidson's general description of the course of the proceedings below, Davidson's Statement of Facts is incomplete, and contains a number of inaccuracies and irrelevancies. Accordingly, pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, Prince submits the following Statement of Facts:

1. During trial in the court below, Davidson called an expert accident reconstructionist to testify concerning certain opinions held by the expert. (Partial Trial Transcript ["PTT"] at pp. 3-23.)

2. Pursuant to questions by Davidson's counsel, the expert presented his opinion to the jury as to, inter alia: (i) the reason Prince's truck overturned while going around a curve; (ii) whether the truck was travelling too fast for the curve; (iii) what the speed of the truck was as it went through the curve; (iv) what the speed limit was at the curve; (v) whether a person hauling livestock should be concerned with his load and what the concerns should be; and (vi) whether a person hauling livestock could foresee the possibility of injury if the truck overturned. (PTT at pp. 14-22.)

3. After eliciting such opinions, and others, Davidson's counsel asked whether the expert was also of the opinion that Prince was "negligent in the operation of his motor vehicle at the time this accident occurred". When Prince's counsel

objected, the court did not allow the expert to testify as to the ultimate issue of negligence. (PTT at p. 22.)

4. One of the theories presented to the jury by Prince's counsel was that Davidson was contributorily negligent in causing his own injuries because when Davidson saw the steer that had been released from Prince's truck laying beside the railroad tracks in an area bounded by a right-way fence, Davidson approached too closely to the animal, causing the animal to choose to get to its feet and chase him. (Supplement Partial Trial Transcript ("SPTT") at pp. 50-51.)

5. During depositions and at trial, Davidson testified to a number of different distances from which he first approached the steer. Davidson stated variously, for example, that the distance was forty feet, thirty feet, twenty-five feet, twenty-two feet and twenty feet. (PTT at pp. 45-46.)

6. Davidson had also written a demand letter to Prince's insurer stating that the distance from which he had approached the steer was actually ten feet. The trial court allowed Prince's counsel to refresh Davidson's recollection, or to impeach Davidson's credibility, solely with the ten-foot statement contained in the letter. (SPTT at pp. 47-48.)

7. Although the letter speaks for itself and is attached in its entirety to Davidson's Brief, the Court should note that it contains no concession or offer, nor expresses any willingness

whatsoever to compromise Davidson's claim. (PTT at pp. 65-67.)¹

8. After the parties had rested, the trial court instructed the jury as to damages. The court informed the jury that its duty was, inter alia, to determine the amount of damages it found "from a preponderance of the evidence would fairly and adequately compensate the plaintiff for any injury and loss plaintiff may have sustained as a result of the accident and any injuries complained of by plaintiff." (R. 221.)

9. The court also instructed the jury it "was not permitted to award speculative damages, by which term is meant compensation for detriment which, although possible, is remote, conjectural or speculative." The court then stated in pertinent part 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 attorneys 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.

(R. 225, 229.)

10. After deliberations, the jury awarded Davidson total damages in the amount of \$45,539.80, and found Davidson forty

¹This is contrary to Davidson's Statement of Facts, which characterizes the letter as a "settlement negotiation letter." See, Davidson's Brief, at p. 4.

percent (40%) at fault for such damages. The jury found Prince sixty percent (60%) at fault. (R. 242-244.)

SUMMARY OF ARGUMENT

1. Where the jury in this personal injury action was instructed that it was to award damages measured by full and adequate compensation for any injuries caused by Prince's negligence, and that it was not to speculate, an instruction which correctly informed the jury that any judgment awarded was not subject to federal income taxes did nothing to impair Davidson's substantial rights.

2. Simply because the rules allow expert testimony on ultimate issues under certain circumstances, it does not follow that the trial court's decision to exclude such testimony in this case was improper where the trial court allowed ample testimony from which the jury could infer such negligence. Even if the exclusion was improper, it in no way affected Davidson's substantial rights where other evidence of negligence was before the jury and the jury in fact found Prince negligent.

3. The trial court's decision to allow Prince's counsel to impeach Davidson's credibility with an admission of fact contained in a demand letter in no way violates the rule prohibiting evidence of compromise because the letter neither expressed nor implied a willingness to compromise. Even if it had been a letter offering compromise, the evidence was not

offered to prove liability or validity of claim or its amount as prohibited by the rule.

ARGUMENT

POINT I

THE TRIAL COURT'S INSTRUCTION ON TAX CONSEQUENCES PROVIDES NO BASIS FOR OVERTURNING THE JURY'S VERDICT.

In Utah, a jury's verdict will be overturned only where any error committed in instructing the jury was so substantial and prejudicial that there is a reasonable likelihood that the result would have been different in the absence of such error. See e.g., Matter of Estate of Kessler, 702 P.2d 86 (Utah 1985). See also, Utah R. Civ. P. 61. Thus the instruction as to the federal tax consequences of any judgment does not require reversal unless it can be concluded that the jurors have been confused to Davidson's prejudice and/or mislead as to the law. See, State v. Ouzouian, 491 P.2d 1093, 1095-96 (Utah 1971) (no basis to support contention that instruction to which appellants excepted affected substantial rights so as to require reversal).

Courts addressing the question of whether a jury's verdict in a personal injury case must be reversed if the jury is instructed that its damage award is not subject to federal income taxes have held that while it would not be error for the trial judge to refuse to give such an instruction, such an instruction would nevertheless not justify reversal if given. For example,

in Bach v. Penn Central Transportation Co., 502 F.2d 117 (6th Cir. 1974), the court stated:

Notwithstanding our previous holdings that the refusal to give such a charge is not error, we are persuaded that neither is it reversible error in a personal injury actions involving awards exempt from federal taxation for the trial judge in the sound exercise of his discretion to advise the jury affirmatively that its award will not be liable to federal income tax.

502 F.2d at 1123. See also, Wickizer v. Medley, 348 N.E.2d 96 (Ind. App. 1976); and Nichols v. Marshall, 486 F.2d 791 (10th Cir. 1973). This rule is justified primarily because in a personal injury case like this one, the instruction does not require the jury to make complicated calculations, nor does it necessitate speculation. It merely gives the jurors an accurate statement of the tax law. Id.

The cases Davidson cites in his brief are not to the contrary, but simply state the general rule that it is not error to refuse to give such an instruction. See, Davidson's Brief, at pp. 4-8. With one exception the cases Davidson cites simply do not reach the issue presented here, whether, once an instruction is given, it is so prejudicial as to require overturning the jury's verdict. Cf., Barnett v. Doyle, 622 P.2d 1349 (Wyo. 1981) (instruction not given, no error in refusing); Paducah Area Public Library v. Terrick, 655 S.W.2d 19 (Ky. App. 1983) (instruction not given, no error in refusing); Vehn v. Prouty, 321 N.W.2d 534, 538-39 (S.D. 1982) (instruction not given, no error in refusing); Hansen v. Johns-Manville Products Corp., 734

F.2d 1036 (5th Cir. 1984) (instruction not given, no error in refusing); Kirk v. Ford Motor Co., 383 N.W.2d 193 (Mich. App. 1985) (instruction not given, no error in refusing); Ravera v. Philadelphia Theological Seminary, 474 A.2d 605 (Pa. Super. 1984) (instruction not given, no error in refusing); Anderson v. Teamsters Local 116 BLDG. Club, 347 N.W.2d 309 (N.D. 1984) (instruction not given, no error in refusing); Hall v. County of New Madrid, 645 S.W.2d 149 (Mo. App. 1982) (instruction not given, no error refusing); Young v. Environmental Air Products, Inc., 665 P.2d 88 (Ariz. App. 1982) (instruction not given, no error refusing).²

In the instant case, the jury was instructed that if Davidson was entitled to recover it should award damages that would "fairly and adequately compensate the plaintiff for any injury and loss plaintiff may have sustained as a result of the accident and injuries complained of by plaintiff." The jury was instructed that it was not permitted to award "speculative damages, by which term is meant compensation for detriment which, although possible, [was] remote, conjectural or speculative." Davidson does not contend that he was entitled to additional

²The only case Davidson cites which addresses the issue of whether an income tax instruction is so prejudicial as to require reversal is Scallon v. Hooper, 293 S.E.2d 843, 845 (N.C. App. 1982). Scallon, however, was not a personal injury action like this case, but was a wrongful death action, and the court specifically limited its holding to actions for wrongful death: "[The tax instruction] would unduly complicate a wrongful death action, which is already complicated by our statute"

damages based upon any mistaken belief that a portion of the verdict would be used to pay taxes.

Thus the charge correctly reflected that Davidson was entitled to recover fair compensation for any injuries and losses caused by Prince's negligence. The instructions given, read together, merely served to caution the jury to base its award on the evidence, not on speculation as to tax consequence, and it nowhere appears how the instructions given in this case adversely affected Davidson's substantial rights. Under the circumstances, any error in giving the instruction that a damage award was not subject to federal income taxes did not nothing to require reversal of the jury's verdict.

POINT II

THE TRIAL COURT COMMITTED NO ERROR
IN EXERCISING ITS DISCRETION TO
EXCLUDE DAVIDSON'S EXPERT OPINION
ONLY AS TO THE ULTIMATE ISSUE OF
DEFENDANT'S NEGLIGENCE.

Davidson correctly points out that the rules allow expert testimony in the form of an opinion that embraces an ultimate issue. See, Appellees' Brief, pp. 8-9. Davidson is mistaken, however, in assuming that simply because such testimony is possible, the trial court committed any error in not allowing such testimony in the instant case.

This is so primarily because the trial court did allow Davidson's expert to give his opinion as to, inter alia: (i) the

reason Prince's truck overturned while going around a curve; (ii) whether the truck was travelling too fast for the curve; (iii) what the speed of the truck was as it went through the curve; (iv) what the speed limit was at the curve; (v) whether a person hauling livestock should be concerned with his load and what the concerns should be; and (vi) whether a person hauling livestock could foresee the possibility of injury if the truck overturned. Contrary to the conclusory statement in Davidson's brief, none of these opinions were expressed to the jury in wholly technical terms or were impossible or even difficult for a lay jury to understand.

Under such circumstances, the expert's opinion on the ultimate issue of defendants' negligence was merely cumulative, and may easily have been so cumulative as to be more prejudicial than probative. The trial court correctly exercised its discretion in disallowing the opinion because such testimony was unnecessary.

Just as importantly, even if it were error not to allow the opinion in the conclusory terms sought by Davidson's counsel, it nowhere appears how Davidson was harmed by the error. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . . " Utah R. Evid. 103. Where there was substantial other evidence presented by the expert from which the jury could infer that Prince was negligent, and where the jury in fact did find Prince

negligent, there is no basis to overturn the jury's verdict simply because the expert could also have opined as to an ultimate issue.

POINT III

THE TRIAL COURT ADMITTED NO
EVIDENCE OF STATEMENTS MADE IN
COMPROMISE NEGOTIATIONS, AND EVEN
IF IT HAD, SUCH STATEMENTS WERE
EXPRESSLY ADMISSIBLE FOR PURPOSES
RELATING TO CREDIBILITY.

As Davidson points out, rule 408 of the Utah Rules of Evidence excludes 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 disputed claim, and evidence of statements made in such "compromise" negotiations, if the evidence is offered to prove liability or invalidity of the claim or its amount. See, Utah R. Evid. 408. The policy underlying the rule is grounded in the recognition that willingness to compromise a claim for less than all that is due might be construed as an admission of weakness, and settlement overtures might be adversely affected if compromise efforts that failed were subsequently admissible at any trial. See, J. Moore, Moore's Federal Practice § 408.02 (1989 and Supp. 1990).³

³The text of Utah R. Evid. 408 follows the federal rule, verbatim. Thus in the absence of Utah case law counsel has cited authorities interpreting the identical federal rule.

This Court should note, however, that the language of the rule is specific and expressly defines the limits of the exclusion. In order for the exclusionary rule to apply, the party seeking to have evidence excluded must show that the discussion or statements in question were made in "compromise" negotiations. Id. at § 408.03. An offer or willingness to compromise, which in turn could be construed as an admission, is the sine qua non of any communication protected both by the rule and the policy underlying the rule. Id.

The letter at issue in the instant case, however, makes no offer and exhibits no willingness whatsoever to compromise Davidson's claim, either for "valuable consideration" or otherwise. It simply demands payment in full of Davidson's claim and its whole tenor is that Davidson will not compromise one iota. Thus the letter and the statements contained therein are not inadmissible under rule 408, nor would admission of such statements have any chilling effect on "compromise" negotiations. See e.g., Gallagher v. Vikings Supply Corp., 411 P.2d 814 (Ariz. App. 1966) ("We agree that a statement which is in the nature of a settlement proposal or offer should be excluded. However, a letter which demands an amount for an alleged claim cannot be excluded under this theory. . . . [The letter] in no wise purports to concede a fact solely for purposes of settlement. Its tenor is unequivocal and precise."). See also, Factor v. C.I.R., 281 F.2d 100 (9th Cir. 1960) ("Despite the use of the

term 'settlement meetings' by counsel in the case, there is nothing in the record to indicate that, at any time during these conferences, the taxpayer made an offer to pay any amount, conditioned upon a denial of liability, which is essential to a true offer of compromise. Nor does the record of the conferences, as testified to in court, disclose any 'compromise' items considered by the taxpayer.").

Perhaps more importantly, even if the letter did contain some offer to compromise, which it does not, Prince's counsel did not offer the ten-foot statement "to establish liability or invalidity of a claim or its amount" as prohibited by rule 408. In United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949 (5th Cir. 1990), the court held that the trial court properly acted within in its discretion under rule 408 when it admitted evidence of a settlement that was offered to impeach the plaintiff's earlier deposition testimony. The court stated as follows:

We are persuaded that the district court did not abuse its discretion in admitting evidence of settlement to show the change in [plaintiff's] position since his deposition was taken. Fed. R. Evid. 408 permits settlement evidence for any purpose except to prove or disprove liability or the amount of claim. The district court has broad discretion in determining whether to admit evidence of settlement for another purpose and we will not disturb that decision lightly.

896 F.2d at 956.

The Utah Supreme Court has indicated, in dicta, that this same exception obtains under rule 408 of the Utah Rules of

Evidence. In Slusher v. Ospital, 777 P.2d 437 (Utah 1989) the court stated as follows:

Taken together, the two statutes [superseded sections 78-27-29, -30, Utah Code Ann.] resulted in a rule not unlike Utah Rule of Evidence 408, now in effect. In other words, they precluded introduction of the settlement for purpose of establishing liability, but not for purposes relating to credibility.

777 P.2d at 443. See also, Id. at n. 12 ("If, as therefore appears likely, Rule 408 applied to the trial in this case, it even more clearly supports the conclusion we reach [that "settlement and payment might nonetheless come in other than as evidence, such as for impeachment purposes"].").

In this case, Davidson had testified as to a number of different relevant distances. Prince's counsel offered the ten-foot statement contained in the demand letter to refresh Davidson's recollection as to the actual distance, and/or to impeach Davidson's testimony on that point. The trial court allowed the ten-foot statement into evidence solely for that purpose. Under the circumstances, and according to the principles cited above, the evidence was in no way barred by rule 408.

CONCLUSION

For the reasons stated above, Prince respectfully submits that the trial court committed no errors which would require this Court to overturn the jury's verdict and remand for a new trial.

Thus the jury's verdict should be upheld and Davidson's appeal denied.

DATED this 16th day of January, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By



H. James Clegg
Robert C. Keller
Attorneys for Appellees
Erwin M. Prince and Folkens
Brothers Trucking

RCK455

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 1991, I caused four copies of the foregoing Brief of Appellees to be mailed, first class, postage prepaid, to the following:

Ray H. Ivie
R. Phil Ivie
IVIE & YOUNG
Attorneys for Appellant
48 North University Avenue
P. O. Box 672
Provo, Utah 84603


