

1990

# Grant Davidson v. Erwin M. Prince, Folkens Brothers Trucking : Brief in Opposition to Certiorari

Utah Supreme Court

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900461-CA

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GRANT DAVIDSON,

Plaintiff/Appellant,

vs.

Case No. 910321

ERWIN M. PRINCE, and FOLKENS  
BROTHERS TRUCKING,

Defendants/Appellees.

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APPELLEES' BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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Utah Court of Appeals Case No. 900461-CA

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### QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by not requiring a new trial in this case simply because the trial court instructed the jury that any personal-injury judgment awarded plaintiff would not be subject to federal income taxation;

2. Whether the Court of Appeals erred in upholding the trial court's decision to disallow expert testimony in the form of a legal conclusion; and

3. Whether the Court of Appeals erred in upholding the trial court's admission into evidence of a factual statement contained in a demand letter for purposes relating to credibility.

### REFERENCE TO OFFICIAL REPORT OF OPINION ISSUED BY THE COURT OF APPEALS

Davidson v. Prince, 163 Utah Adv. Rep. 58 (CA, 6/18/91).

### STATEMENT OF JURISDICTIONAL GROUNDS

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

### CONTROLLING STATUTORY PROVISIONS

Rule 61 of the Utah Rules of Civil Procedure:

No error in either of 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.

In addition, Prince adopts the statement of Determinative Rules set forth in Davidson's Petition for Certiorari and the addendum thereto.

#### STATEMENT OF THE CASE

For purposes of opposing this petition, Prince does not contest Davidson's recitation of the procedural history of this action. However, Davidson's Statement of Facts omits certain facts necessary to the Court of Appeals' decision, which Prince includes herein as follows:

1. Although the trial court did not allow Davidson's expert to express his legal conclusion that Prince was negligent, pursuant to questions by Davidson's counsel, the expert did present his opinion to the jury as to, inter alia: (i) the reason Prince's truck overturned while going around the curve; (ii) that the truck was traveling too fast for the curve; (iii) what the speed of truck was as it went through the curve; (iv) what the speed limit was at the curve; (v) that a person hauling livestock should be concerned with his load and what the concern should be; and (vi) that a person hauling livestock could foresee the possibility of injury if the truck overturned. (Partial Trial Transcript ["PTT"] at pp. 14-22.)

2. 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-of-way fence, Davidson approached too closely to the animal, causing the animal to get to its feet and chase him. (Supplemental Partial Trial Transcript ["SPTT"] at pp. 50-51.)

3. During depositions and at trial, Davidson had testified to a number of different distances from which he first approached the steer. He stated variously, for example, that the distance was 40 feet, 30 feet, 25 feet, 22 feet and 20 feet. (PTT at pp. 45-46.)

4. Davidson had also written a demand letter to Prince's insurer stating that the distance from which he had approached the steer was actually 10 feet. The trial court allowed Prince's counsel to refresh Davidson's recollection, or to impeach Davidson's credibility, solely with the 10-foot statement contained in the letter. (SPTT at pp. 47-48.)

5. 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 injuries complained of by plaintiff." (R. 221.)

6. 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 the 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 award by your verdict is exempt from federal income taxation.

(R. 225, 229.)

#### ARGUMENTS AGAINST ISSUANCE OF A WRIT

1. The Court of Appeals Did Not Err in Refusing to Remand This Case for a New Trial Simply Because the Trial Court Instructed the Jury That Any Personal-Injury Award Would Not Be Subject to Federal Income Tax.

Davidson's first argument that certiorari is necessary in this case is predicated on the assumption that the jury instruction at issue so "tends to mislead the jury" that it is grounds for reversible error under Knapstad v. Smith's Management Corp., 774 P.2d 1, 3 (Utah App. 1989). See Petition for Certiorari at pp. 6-7. In support of this argument, Davidson

relies wholly on the Court of Appeals' express determination that "the effect of [the instruction at issue] on the jury's ultimate damage award is extremely difficult, if not impossible, to determine.'" Id. citing Davidson v. Prince, Slip Op. filed 6/18/91, at p. 8.

Davidson's argument fails, however, simply because contrary to Davidson's conclusory assumption, there is absolutely no showing that the instruction at issue tended to mislead the jury in any respect whatsoever.<sup>1</sup> Rather, the jury was properly 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 simply does not and cannot contend that he was actually entitled to additional damages based upon the mistaken belief that a portion of the verdict would be used to pay taxes.

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<sup>1</sup>This is not in any way inconsistent with the Court of Appeals' determination. Obviously, there is a marked difference between an instruction whose effect is difficult or impossible to determine, which by its very description does not require the expense of a new trial, and an instruction that in fact tends to mislead the jury, which may require reversal.

Thus, the charge correctly reflected that Davidson was entitled to fair compensation for any injuries and losses caused by Prince's negligence. The instructions given, read together, merely serve to caution the jury to base its award on the evidence, not on speculation as to tax consequences, and it nowhere appears how the instructions given in this case adversely affected Davidson's substantial rights. Under the circumstances, the instruction did not in fact tend to mislead the jury, and thus did nothing to require reversal of the jury's verdict.

2. The Court of Appeals Did Not Err in Upholding the Trial Court Exclusion of a Legal Conclusion by Plaintiff's Expert.

Davidson also argues that certiorari is necessary here because the Court of Appeals' decision will somehow "drastically alter the use of expert testimony in personal injury actions or other cases involving negligence or other legally cognizable breaches of duty." See Petition for Certiorari at p. 10. Davidson states in support of this argument that the world is increasingly complex and the testimony of his expert involved elements of physics and other sciences which "can be extremely difficult for a lay person to grasp." Id.

There is no reason for certiorari here, however, because again there is no showing to support Davidson's conclusory assertions. First, the exclusion of a legal conclusion under the circumstances of this case in no way alters the common law of

this state or restricts the use of proper expert testimony. In fact, as the Court of Appeals notes, Davidson's expert was allowed to give his opinion as to, inter alia, the reason Prince's truck overturned while going around the curve, that the truck was traveling too fast for the curve, what the speed of truck was as it went through the curve, what the speed limit was at the curve, that a person hauling livestock should be concerned with his load and what the concern should be, and that a person hauling livestock could foresee the possibility of injury if the truck overturned. All the expert was not allowed to do was give a legal conclusion.

Under such circumstances, the exclusion does not alter Utah law in the slightest. "[W]hile [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 . . . 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.'" Davidson v. Prince, 163 Adv. Rep. at 63 n. 6 citing J. Moore Moore's Federal Practice § 704.02 (1989).

With regard to the bald assertion that the testimony presented was difficult for a lay person to grasp, the Court of Appeals expressly noted that:

Indeed, the only evidence the trial court excluded was [the expert's] conclusion regarding whether appellee was negligent. Additionally, [the expert'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 the appellee was negligent.

See Davidson v. Prince, 163 Utah Adv. Rep. 58, 61 (CA, 6/18/91).

Not surprisingly, Davidson cites no portions of the record to dispute this statement. In fact, the opinion testimony was presented in terms that were very easy to understand pursuant to questions from Davidson's own counsel.

3. The Court of Appeals Did Not Err in Upholding the Trial Court's Admission into Evidence of a Factual Statement in a Demand Letter For Purposes Relating to Credibility.

Finally, Davidson argues that certiorari is necessary because he disagrees with the Court of Appeals' determination that a factual statement admitted into evidence was not part of any offer to compromise his claim so as to be barred by Rule 408 of the Utah Rules of Evidence. See Petition for Certiorari at p. 11-14. Davidson's argument fails, however, because the Court of Appeals correctly determined that the letter at issue did not contain any offer to compromise which might be construed as an admission by the fact finder. Even if it did, it was offered for purposes relating credibility and was thus not barred by Rule 408.

For example, as pointed out by the Court of Appeals, the policy underlying Rule 408 is grounded on 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 trial. See Davidson v. Prince, 163 Utah Adv. Rep. at 62, citing 10 J. Moore, Moore's Federal Practice § 408.04 (1988 & Supp. 1990). 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.

Davidson points to the last sentence of the letter as that portion of the communication fulfilling this requirement. The last sentence reads: "You may speak with us directly or we can send it to lawyers and to court, you decide." Davidson completely fails to show, however, how this statement offers to compromise Davidson's claim for less than all that is due. In fact, the sentence simply offers alternatives between voluntarily paying every bit of Davidson's claim by direct communication with Davidson himself, or being forced to pay by "lawyers" and "court, you decide." There is simply no compromise of Davidson's claim offered in the letter, and neither the letter or statements contained therein are protected by Rule 408.

Even if the letter or the statement contained therein were within the purview of Rule 408, however, which they are not,

Prince's counsel did not offer the 10-foot statement contained in the demand letter "to establish liability or invalidity of a claim" as prohibited by the rule. Rather, Prince's counsel offered the 10-foot statement to impeach Davidson's testimony as to the distance from which he first approached the steer. The trial court allowed the 10-foot statement into evidence solely for that purpose. Accordingly, Rule 408 does not prohibit the evidence in any event.

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 properly acted within its discretion under Rule 408 when it admitted evidence of a settlement 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.

This Court has also 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


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 purposes of establishing liability but not for purposes relating to credibility." Id. at 443 (emphasis added); see also Id. n. 12 (where 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].").

#### CONCLUSION

Prince respectfully submits that for the reasons stated above the decision of the Court of Appeals was in no way erroneous, and does not require additional appellate review by this Court after an already lengthy appellate review process. Prince requests that the Petition for Certiorari be denied.

DATED this 7<sup>th</sup> day of August, 1991.

SNOW, CHRISTENSEN & MARTINEAU

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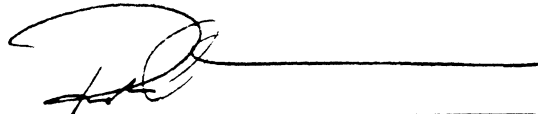
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CERTIFICATE OF SERVICE

I, Robert C. Keller, attorney for defendants/appellees Erwin M. Prince and Folkens Brothers Trucking, hereby certify that on the 7th day of August, 1991, I mailed four (4) copies of the attached APPELLEES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by United States mail, postage prepaid to the following:

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A handwritten signature in dark ink, appearing to be 'R. C. Keller', is written over a horizontal line.

Robert C. Keller