

1993

Julia Lee Askew v. Paul Hardman : Brief of Appellee

Utah Court of Appeals

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Gary A. Dodge; Mark F. James; Kimball, Parr, Waddoups, Brown and Gee; Attorneys for Appellant.
Stephen G. Morgan; Mitchel T. Rice; Morgan and Hansen; Attorneys for Appellee.

Recommended Citation

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BRIEF

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930537CA

IN THE UTAH COURT OF APPEALS

JULIA LEE ASKEW,)	
)	Appeal No. 930537-CA
Plaintiff and Appellant,)	
)	
vs.)	Priority No. 15
)	
PAUL HARDMAN,)	
)	
Defendant and Appellee.)	

BRIEF OF APPELLEE

Appeal from the Orders/Rulings
of the Fourth Judicial District Court of Utah County, State of Utah
Honorable George E. Ballif (Retired); Honorable Lynn W. Davis


Gary A. Dodge
Mark F. James
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, #1300
P.O. Box 11019
Salt Lake City, UT 84147

Attorneys for Appellant

Stephen G. Morgan
Mitchel T. Rice
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, UT 84101

Attorneys for Appellee

SEP 16 1993


Mary T. Noonan
Clerk of the Court

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Salt Lake City, UT 84147

Attorneys for Appellant

Stephen G. Morgan
Mitchel T. Rice
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, UT 84101

Attorneys for Appellee

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IN THE UTAH COURT OF APPEALS

JULIA LEE ASKEW,)	
)	Appeals No. 930537-CA
Plaintiff and Appellant,)	
)	
vs.)	Priority No. 15
)	
PAUL HARDMAN,)	
)	
Defendant and Appellee.)	

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1992).

STATEMENT OF THE ISSUES

I. Did the trial court abuse its discretion by applying the multi-factored test mandated by the Utah Supreme Court in Gold Standard v. American Barrack Resources, Inc., 805 P.2d 164 (Utah 1990), in ruling that the insurer's claim file was prepared in anticipation of litigation? If so, has Askew demonstrated that the likelihood of a different outcome is sufficiently high as to undermine confidence in the verdict. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

II. Did the trial court abuse its discretion in excluding Robert Harmon as a witness where the probative value of the testimony was outweighed by the danger that insurance would be injected into the litigation, thereby prejudicing Hardman, and

where the testimony would be cumulative? If so, has Askew demonstrated that the likelihood of a different outcome is sufficiently high as to undermine confidence in the verdict. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

III. Did the trial court abuse its discretion by refusing to risk the injection of insurance and possibly a mistrial on the last day of trial by precluding Askew from introducing testimony that neither she nor her representatives took the photographs of the fence? If so, has Askew demonstrated that the likelihood of a different outcome is sufficiently high as to undermine confidence in the verdict. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES AND RULES.**

Utah Rule of Civil Procedure 26(b)(3), attached as Exhibit "N".

Utah Code Ann. § 41-6-38(3)(1988), attached as Exhibit "N".

STATEMENT OF THE CASE

The case was tried to a jury. The Order of Judgment entered after trial provided:

Interrogatory Number 1 of the special verdict asked the question, "Was the Defendant, Paul Hardman, negligent", to which the jury answered "No." The special verdict was signed and dated by the jury foreperson, Richard K. Johnson, January 15, 1993. The jury was polled and it was determined that their verdict was unanimous.

R. 1711-1712. The jury apparently concluded that the accident was caused by: (1) the criminal acts of unidentified trespassers combined with (2) the negligence of Kevin Butts in exceeding the speed limit, driving too fast for existing conditions, failing to heed the traffic signs, failing to keep a proper lookout, and failing to exercise due care under the circumstances.

STATEMENT OF FACTS

1. This case arose when an automobile in which Askew was riding as a passenger collided with a horse owned by Hardman on State Road 68 near Camp Williams, Utah County, State of Utah. The accident occurred on November 20, 1989, at approximately 7:20 p.m.

2. The horse that was involved in the collision was being kept in Hardman's winter pasture with approximately 13 to 14 other horses owned by Hardman. (Hardman Transcript, p. 61, Exhibit "G") Hardman's winter pasture is located over one mile to the northeast of his home across State Road 68. (Id. at pp. 6-9, 38; See Defendant's Exhibit #6, Exhibit "P" (Hardman's home is outlined in red marker just to the west of S.R. 68. The winter pasture is outlined in red to the northeast of Hardman's home.)) The winter pasture is separated from State Road 68 by Camp Williams, a military camp operated by the Utah National Guard, and a 30 acre hayfield. (Hardman Depo., pp. 17-18, 104-05, Exhibit "E"; Exhibit "P"). The winter pasture is approximately 80 acres in size.

size. (Hardman Depo., p. 47, Exhibit "E"). The feed in the winter pasture was plentiful in late November of 1989 when this accident occurred. (Hardman Transcript, pp. 119-122, Exhibit "G").

3. Hardman moves his horses to the winter pasture every fall and keeps them fenced in the winter pasture until about February of the following year. (Hardman Depo., p. 16, Exhibit "E"). The fences of the winter pasture are inspected and mended before the horses are put in the pasture each fall. (Hardman Transcript, p. 96, Exhibit "G").

4. In the fall of 1989, Hardman moved his horses into the winter pasture about three weeks before the accident of this case. (Id. at 65; Hardman Depo., p. 39, Exhibit "E"). Before moving his horses into the pasture, Hardman hired two men, Doug Smith and Darrell Allred, to reconstruct and/or repair the barbed wire fence and posts which surrounded the pasture. (Hardman Transcript, p. 24, Exhibit "G"; Smith Transcript, pp. 4-5 and 14, Exhibit "J"). This work was performed approximately one to two weeks before the horses were moved into the pasture. (Hardman Depo., pp. 39 and 182, Exhibit "E"). Smith spent two full days repairing the fence to the winter pasture. (Smith Transcript, p. 5, Exhibit "J"). When the work was finished, the fence surrounding the winter pasture was in good repair and adequate to fence Hardman's horses. (Hardman Transcript, pp. 53 and 124, Exhibit "G"; Smith Transcript p. 6,

Exhibit "J"). When Smith and Allred completed the fencing work, the height of the top wire on the north side of the pasture was from 3 1/2 to 4 feet and the lower wire was from 18 inches to 2 feet in height. (Smith Transcript, p. 8, Exhibit "J").

5. The fence along the north side of the pasture in the area where the horses escaped was a two strand barbed wire fence. (Hardman Transcript, pp. 14, 26, 28, Exhibit "G"). Hardman used more than two strands, three to five strands, of barbed wire in sections of the fence where there were canals, hills or the contour of the ground otherwise required that more than two strands be used to fill in gaps in the fence line. (Id. at pp. 12-13, 78 and 80-81).

6. Hardman's horses have never escaped from his pastures as a result of stepping over, jumping over, or pushing through his barbed wire fence. (Id. at 112; Hardman Depo., pp. 10, 69-85, Exhibit "E"). In the 15 years that Hardman has kept horses, there have only been two occasions where his horses have escaped from the winter pasture. (Hardman Transcript, pp. 11-13 and 24-25, Exhibit "K"; Hardman Depo. pp. 10, 69-85, Exhibit "E"). The first occasion was in 1987 or 1988 when the river that adjoins the winter pasture was being dredged allowing the water to drop and the horses to escape through the river bed. (Hardman Depo., pp. 10, 69-85, Exhibit "E"). The other occasion was in the fall of 1989,

approximately two weeks before the accident, when a section of fence along the winter pasture was torn down by poachers. (Hardman Transcript, pp. 11-13 and 24-25, Exhibit "K"). On both of these occasions, the horses that escaped the pasture were found in the field directly north of the winter pasture; the horses did not find their way onto State Road 68. (Id. at 11-13, 24-25; Hardman Depo., pp. 10, 69-85, Exhibit "E").

7. Before the accident of this case, Hardman repaired the section of fence on the north side of the winter pasture two to three times in the fall season of 1989 because of trespassers and vandals knocking the fence down. (Hardman Transcript, pp. 10, 11, Exhibit "K"). Horses were not in the winter pasture the first time the fence in that area was observed down. (Id. at 14). As previously stated, the horses walked out of the winter pasture on only one of the two or three occasions when the fence was vandalized. (Id. at pp. 11-13 and 24-25).

8. During the time that his horses are in the winter pasture, Hardman and his wife, Lora, check the horses to determine their location at least twice a day from their home using binoculars. (Hardman Depo, pp. 95-96 Exhibit "E"; Deposition of Lora Hardman, pp. 38-39, Exhibit "O"; R. 735-739.) Hardman also physically went out and inspected the fences surrounding the winter pasture

everyday in the two weeks before the accident. (Hardman Transcript, p. 150, Exhibit "G").

9. In a further effort to discourage trespassing, Hardman and his wife report incidents of trespassing to the County Sheriff. (Hardman Depo., pp. 119-120, 224, Exhibit "E"). "No trespassing" signs are posted on the fence to the winter pasture, and "no hunting" signs are posted prior to hunting season. (Hardman Transcript, pp. 22, 130, 148, Exhibit "G"). The gates of the winter pasture are kept closed and locked, and trespassers are asked to leave the premises whenever they are found on Hardman's property. (R. 700-701.)

10. The only access to the property next to the winter pasture is through a guard gate at Camp Williams. (Hardman Transcript, pp. 129-30, Exhibit "G"). Camp Williams posts a guard at the gate 24 hours a day and will allow the public to enter Camp Williams' property to go fishing on the Jordan River if they register with the guard. (Id.). On several occasions before the accident, Hardman and his wife contacted personnel from Camp Williams to make them aware of trespassing and to request that they take measures to discourage trespassing. (Id. at 19; Hardman Depo., p. 22-26, Exhibit "E"). Camp Williams has orders to stop anyone attempting to enter its property through the guard gate and

to notify persons of the boundaries of Camp Williams property and that they are not to enter private property. (Id.).

11. The other three roads that lead to the winter pasture are closed to traffic with gates that are kept locked. (Hardman Transcript, pp. 21 and 128-30, Exhibit "G"; Exhibit "P"). A deep cement ditch runs through the hayfield to the west of the winter pasture which prevents vehicles from driving through the hayfield to the winter pasture. (Id.)

12. At approximately 4:30 p.m. on the day of the accident, within three hours of when the accident occurred, Hardman visually inspected the section of fence that had been let down on the north side of the winter pasture and observed that the fence was in good repair and adequate to hold the horses in the pasture. (Hardman Transcript, pp. 150, 155, Exhibit "G"; Hardman Transcript, Rebuttal Testimony, pp. 2-4, 6; Exhibit "R"). Hardman also saw at that time that his horses were in the pasture. (R. 736).

13. Hardman learned of the accident when he arrived home on the evening of November 20 and saw police cars and ambulances on S.R. 68 near his home. (Hardman Depo., p. 57, Exhibit "E"). When Hardman learned that his horse had been involved in the accident, he communicated to the investigating police officer that hunters or poachers had probably let his fence down which allowed his horses to escape from the winter pasture. (Hardman Transcript, p. 4,

Exhibit "K"). Hardman's comment to the investigating officer was based on his prior experience with trespassers vandalizing his fences and his knowledge that his horses were securely fenced in the pasture and could not escape unless vandals tore down the fence. (Id. at 4-5).

14. On the morning following the accident of this case, at approximately 7:00 a.m., Hardman went down to the winter pasture to determine where his horse escaped from the pasture. (Hardman Transcript, p. 9, Exhibit "G"; Hardman Deposition, pp. 94-95, Exhibit "E"). Hardman observed that a section of the fence on the north side of the pasture had been let down. (Hardman Transcript, pp. 15-16, Exhibit "G"). Upon closer inspection, Hardman observed that the strands of barbed wire on the north fence line had been unwound from three of the fence posts near the northwest corner of the winter pasture and were lying on the ground on the inside of the pasture. (Id. at 15-16 and 151-52; Hardman Deposition, pp. 108-09 and 112-114, Exhibit "E"). The wires of the fence were not broken or cut. (Hardman Depo., p. 106, Exhibit "E"). Hardman also observed deer entrails (the "guts" of a deer) that had recently been killed and several magpie birds feeding on the entrails in the area very near where the fence had been let down. (Id.; R. 736). Hardman further observed tire tracks located between two of the

fence posts on the north side of the pasture where the fence had been let down. (Hardman Transcript, pp. 91-93, Exhibit "G").

15. Based on his observations, Hardman determined that the fence had been let down by unidentified trespassers, possibly deer poachers, since there was a recent deer kill and tire tracks. (R. 736.) The fact that the fence had been unwound, not cut or broken, and was lying on the inside of the pasture was another clear indication to Hardman that unidentified trespassers let down his fence and allowed the horses to escape. (Hardman Depo., pp. 106-114, Exhibit "E").

16. After Hardman saw that the fence had been let down, he immediately reported the incident to the Utah County Sheriff's office. (R. 311-312; Hardman Depo., pp. 111-12, Exhibit "E"). Jerry Monson is the Deputy from the County Sheriff's office who responded to Hardman's call. (Monson Transcript, p. 5, Exhibit "L"). Monson prepared a detailed report for the Sheriff's office of the incident. (R. 311-312.) Monson noted in his report that Hardman had reported "hunters knocking down his fence, causing his horses to get out on the highway." (Id.) Monson further reported that he "responded to scene with the RP [Reporting Party/Hardman] and observed where the fence was down." (Id.) The report also stated that "[i]t appeared someone had knocked the fence down with a full size pick-up, as there was old tire tracks near the fence."

(Id.). Monson testified that he observed a pile of deer entrails in the vicinity of where the fence was down. (Id.; Monson Transcript, p. 12, Exhibit "L"). The fact that the entrails were on the ground for Monson to observe, and had not been eaten by other animals, indicated to Monson that the deer had recently been poached. (Id. at 11-12).

17. Under the section of his report regarding action taken, Monson wrote, "RP [Reporting Party/Hardman] wanted to show R/D [Reporting Deputy] the fence because he is afraid of being sued [sic] for having his horse cause an accident." (R. 311-312.) Monson testified at trial about how Hardman told him the morning after the accident that the cause of the accident was not Hardman's fault. (Monson Transcript, p. 18, Exhibit "L").

18. In addition to reporting the incident to the Utah County Sheriff's office, Hardman also reported the incident to Robert Harmon, an insurance adjuster from Utah Farm Bureau Insurance Company, on the morning following the accident. (Hardman Depo., p. 112, Exhibit "E"). On that same morning, Robert Harmon drove to the winter pasture in the area where the fence had been let down. (Harmon Depo., p. 6, Exhibit "Q"). Harmon testified in his deposition that he observed in the pasture next to the fence that had been let down deer entrails from a recent deer kill. (Id. at 7, 10-12). He also testified to observing barbed wire from the

fence near the northwest corner of the pasture lying on the ground toward the inside of the pasture. (Id. at 7, 8, 33). Harmon took photographs which showed that section of the fence that had been let down, the location of the wires and posts, and the condition of the fence. (Id. at 13, 20-35). He testified that the remainder of the fence line was secure other than the area he photographed. (Id. at 37).

19. The automobile in which Askew was riding as a passenger was being driven by Kevin Butts. (Butts' Deposition, pp. 12 and 13, Exhibit "S" (Kevin Butts' deposition was read to the jury at trial.)) Kevin Butts passed a 55 m.p.h. speed sign and a sign warning of deer "next two miles" on S.R.68 about one mile prior to impact. (Id. at 10). Kevin Butts estimated that he was travelling 65 m.p.h. at the time of the collision. (Id. at 20). Jim Brierly was the investigating officer for the Utah Highway Patrol who was asked to calculate the speed of Butts' vehicle at the time of the collision. (Brierly Depo., p. 7, Exhibit "T"). Brierly conducted a highway drag analysis based on Butts' skid marks and determined Butts' speed at the time of the collision at 72 m.p.h. (Id. at 19).

20. Kevin Butts, who was travelling south on S.R. 68, further testified that he did not see the horse prior to impact, even though the horse was hit in its left rear in the center of the

southbound lane as it was traveling south along State Road 68. (Butts' Depo., pp. 20, 23, Exhibit "S"; Guest Depo., pp. 20-27, Exhibit "U"). Amanda Hardman, Hardman's 20 year old daughter, testified as follows regarding Kevin Butts representations to her after the accident: "he had been driving down the road, and he looked up and saw horses or horses's hooves, I don't remember which, and then he collided with a horse." (Amanda Hardman Depo., p. 7, Exhibit "V"). Kevin Butts told his father on the night of the accident that he had been looking at Askew trying to calm her down as they were riding in his Camaro. (Larry Butts Depo., p. 18, Exhibit "W"). Askew was upset due to an argument she had with her mother before leaving her house with Kevin Butts. (Kevin Butts Depo., pp. 13, 19, Exhibit "S").

21. Askew settled her claims against Kevin Butts prior to trial. (R. 1646).

SUMMARY OF THE ARGUMENT

I.A. The proper standard of review is that "in matters of discovery a trial court has broad discretion which will not be disturbed absent a showing of abuse." Brown v. Superior Court In and For Maricopa Cy., 670 P.2d 725, 729 (Ariz. 1983).

I.B. The trial court properly ruled that the documents in the claim file were prepared in anticipation of litigation. The cases cited by Askew support a per se rule that a document cannot be

prepared in anticipation of litigation unless an attorney is involved. Thomas Organ v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill. 1972). However, the holding and apparent reasoning of Thomas Organ has been considered and rejected by the Utah Supreme Court. Gold Standard v. American Barrack Resources, Inc., 805 P.2d 164, 169 (Utah 1990).

The trial court properly applied the multi-factored approach mandated by the Utah Supreme Court in Gold Standard in ruling that Utah Farm Bureau's claim file was prepared in anticipation of litigation and was, therefore, protected. R. 290-291.

In the instant case, Utah Farm Bureau's insured, Hardman, anticipated litigation as evidenced by his call to the Utah County Sheriff's Office and his insurance agent on the morning following the accident. He reported a potential claim to his insurance company and wanted the Sheriff to observe the scene immediately so the Sheriff could later testify, if necessary, that trespassers knocked his fences down.

Utah Farm Bureau's claims agent, Greg Johnson, testified by affidavit that it was his experience that an accident between a vehicle and livestock typically results in litigation. (Affidavit of Greg Johnson, ¶ 3, attached as Exhibit "C"). The nature of this claim required that Utah Farm Bureau anticipate litigation from the date of the accident.

With respect to the statement of Hardman (Entries 3-4 of Exhibit "A"), the trial court properly considered that there must be heightened protection for statements taken by representative of an insurance company from its insureds. See Heidebrink v. Moriwaki, 706 P.2d 212, 216 (Wash. 1985).

The trial court also considered the fact that Utah Farm Bureau's attorney, Stephen G. Morgan, instructed Greg Johnson to take the statement from Hardman and create other documents to assist Mr. Morgan in defending this action.

The trial court did not abuse its discretion in protecting Utah Farm Bureau's statement from discovery. The court considered all the relevant facts, including: 1) the nature of the insurance industry; 2) the attorney involvement of Mr. Morgan; 3) the fact that the documents sought (the entire claim file) were not relevant to the litigation; 4) the fact that the insured, Hardman, anticipated litigation and immediately called his insurance agent to report the potential claim and called the Sheriff to preserve the evidence to prove that trespassers knocked his fence down; 5) the size and nature of Askew's claim suggested litigation was imminent; and 6) the testimony of Mr. Greg Johnson, who indicated that he anticipated litigation from the date of the accident. R. 110-113.

I.C. Askew has not demonstrated substantial need for the statement of Paul Hardman or the claim file. Paul Hardman testified at length about the condition of the fence the morning after the accident. R. 1804. (Deposition of Paul Hardman, pp. 108-110 attached as Exhibit "E"). Askew also introduced the report of Officer Jerry Monson of the Utah County Sheriff's Office prepared the morning after the accident at the request of Hardman. R. 311 (Attached as Exhibit "F"). Finally, Mr. Robert Harmon photographed the fence at approximately the same time he took the statement of Hardman the morning after the accident. These documents constitute the "substantial equivalent" of materials sought by Askew.

I.D. Askew also argues that Hardman waived the work product privilege by testifying about matters discussed in the statement during his deposition. Askew has provided absolutely no support for the proposition that one waives the work product privilege merely by discussing the matters contained in the protected documents during a deposition. The gist of Askew's argument is that the work product privilege is waived when one testifies about the same facts in a deposition as are in the protected statement. However, the principles of "subject matter waiver" are inapplicable to the work product privilege.

I.E. Assuming that the trial court erred in ruling that the claim file was prepared in anticipation of litigation and,

therefore, protected, any such error was harmless. Most of the documents in the claim file dealt with insurance company procedures or the establishment of reserves and were irrelevant to the legal issues in the matter. Moreover, many of the documents contained the mental impressions of the adjuster for Utah Farm Bureau and were therefore, absolutely protected. Askew was not harmed by her inability to obtain the statement of Hardman because the jury was well apprised of the condition of the fence by the testimony of Hardman, the report of Officer Monson, and the photographs of the fence the morning after the accident.

II. Askew properly concludes that she must establish that the trial court abused its discretion in excluding Robert Harmon as a witness. Fisher v. Trapp, 748 P.2d 204, 205-07 (Utah Ct. App. 1987), cert. denied 765 P.2d 1278 (Utah 1988). The trial court properly balanced the concern that insurance would be injected into the trial if Mr. Harmon was called as a witness against Askew's ostensible reason for calling Mr. Harmon.

III. Askew is proper in her assertion that she must establish that the trial court abused its discretion in prohibiting her from informing the jury that she did not take the photographs. A review of the trial court's ruling demonstrates that the trial court properly denied Askew's request. On the last day that evidence was taken (during Askew's rebuttal), Askew requested that she be

allowed to testify that neither she nor her representative took the photographs. Instead, she wanted to create the impression that the photographs were taken by a representative of Hardman. Askew's obvious purpose was to inject insurance into the litigation. Judge Davis properly refused to allow Askew to do so.

ARGUMENT

From the outset of this litigation, Askew has made a concerted and overt attempt to inject into this litigation the fact that Hardman was insured by Utah Farm Bureau. First, when discovery was initially commenced, Askew attempted to discover Utah Farm Bureau's entire claim file and the statement of Hardman (November 25, 1993). The trial court (Judge George Ballif (Retired)) ruled against Askew. Askew then filed a motion to reconsider the ruling, which was denied by Judge Ballif. Askew then filed an interlocutory appeal which was denied by the Utah Supreme Court. Then, near the close of discovery and shortly before trial, Askew sought to depose Robert Harmon, the adjuster for Utah Farm Bureau that took the statement of Hardman (November 16, 1992). Askew also asked the Court for a second time to allow discovery of the claim file, this time claiming "substantial need." The trial court (Judge Lynn Davis) allowed the deposition. Askew then sought to call Harmon as a witness at trial. This request was denied by the trial court on January 4, 1993. Finally, on the last day evidence was presented at

trial, during rebuttal testimony, Askew asked permission from the Court to inform the jury that a representative of Hardman had taken the photographs Askew entered into evidence.

The fact that the jury found Hardman not guilty of negligence is conclusive evidence that Hardman was free from fault. Askew's proof on the issues of negligent conduct and causation was so weak that her only prospect for recovery from Hardman was to inject insurance into the litigation and hope the jury would sympathize with her and award a substantial amount of money. Hardman respectfully asserts that the trial court properly guarded against Askew's relentless attempts to inject insurance into the litigation and upheld the law of this state which mandates "that the question of insurance is immaterial and should not be injected into the trial; and that it is the duty of both counsel and the court to guard against it [footnote omitted]." Robinson v. Hreinson, 409 P.2d 121, 123 (Utah 1965).

I

THE DOCUMENTS CONTAINED IN THE INSURER'S CLAIM FILE WERE PREPARED IN ANTICIPATION OF LITIGATION AND WERE THEREFORE PROTECTED AS WORK-PRODUCT.

A. STANDARD OF REVIEW

The proper standard of review is that "in matters of discovery a trial court has broad discretion which will not be disturbed absent a showing of abuse." Brown v. Superior Court In and For

Maricopa Cy., 670 P.2d 725, 729 (Ariz. 1983) (case involved insurer claim file); see also Wakabayashi v. Hertz Corp., 660 P.2d 1309 (Hawaii 1983). "A ruling will be reversed only when the trial court reached a conclusion against the logic and natural inferences to be drawn from the facts and circumstances before the court." Burr v. United Farm Bureau Mut. Ins. Co., 560 N.E.2d 1250, 1254 (Ind. App. 1990) (case involved insurer claim file).

B. THE DOCUMENTS WERE PREPARED IN THE ANTICIPATION OF LITIGATION

Perhaps it is best to first state what is not the law before addressing the law of Utah. Askew cites several cases in support of a per se rule that a document cannot be prepared in anticipation of litigation unless an attorney is involved. Ballard v. Eighth Judicial Dist. Ct., 787 P.2d 406 (Nev. 1990); Hall v. Goodwin, 775 P.2d 291 (Okla. 1989); Henry Enter. v. Smith, 592 P.2d 915 (Kan. 1979). Each of these cases stems from Thomas Organ v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill. 1972), which Askew hails as the "leading case with respect to discovery of an insurer's claim file." (Brief of Appellant, P.26 n.12). Askew goes so far as to call the rule espoused in Thomas Organ the "majority rule." Other courts have found differently. For example, the District Court for the Middle District of Pennsylvania has found that "[t]he Thomas Organ view has been rejected by many courts as contrary to the intent of the 1970 Amendments" to the Federal Rules of Civil

Procedure. Basinger v. Glacier Carriers, Inc., 107 F.R.D. 771 (M.D.Pa. 1985).

Moreover, the holding and apparent reasoning of Thomas Organ have been considered and rejected by the Utah Supreme Court. Gold Standard v. American Barrack Resources, Inc., 805 P.2d 164, 169 (Utah 1990). The Utah Supreme Court stated:

Other courts have rejected the strict approach of Thomas Organ and have used attorney involvement as only one factor in a more fact-specific determination of whether material was prepared in anticipation of litigation. ... The rule that better effectuates the language of Rule 26(b)(3), and its underlying rationale, is that attorney involvement is only one factor to be weighed in determining the applicability of the work product privilege. See Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646 (N.D.Ga. 1988); 8 C. Wright & A. Miller, Federal Practice & Procedure, § 2024, at 207 (1970). **Moreover, the leading treatises have rejected the Thomas Organ approach.** 4 J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, ¶ 26.64[2], at 26-360 n.23 (2d ed. 1989); 8 C. Wright & A. Miller, Federal Practice & Procedure § 2024, at 205-06 (1970).

Id. at 169 (emphasis added). Thus, the cases relied upon by Askew have been rejected in Utah and the trial court properly refused to be bound by a rule which the Utah Supreme Court refused to accept.

The trial court properly applied the multi-factored approach mandated by the Utah Supreme Court in Gold Standard in ruling that Utah Farm Bureau's claim file was protected. R. 290-291 (The Court's ruling is attached as Exhibit "B"). First, the trial court considered the fact that these documents were prepared by an

insurance company in connection with Askew's potential claim.¹ The Court found persuasive the following language from the Eastern District of Missouri:

[T]he anticipation of the filing of a claim is undeniable once an accident has occurred and a person injured or property damaged. This is especially true in today's litigious society. Documents prepared at that time, therefore, are clearly prepared "in anticipation of litigation" and "by or for another . . . party's representative."

Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 92 (E.D.Mo.1980). Another statement of this principle was made by the Iowa Supreme Court, which stated:

In our litigious society, when an insured reports to his insurer that he has been in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case. Although a claim may be settled short of the institution of legal action, there is an ever-present possibility of a claim's ending in litigation. The recognition of this possibility provides, in any given case, the impetus for the insurer to garner information regarding the circumstances of a claim.

Ashmead v. Harris, 336 N.W.2d 197, 201 (Iowa 1983). Another landmark case in this area is Almaquer v. Chicago, Rock Island & Pacific R.R., 55 F.R.D. 147 (D.Neb.1972). In Almaquer, the District Court for the District of Nebraska held:

¹ Gold Standard did not involve an insurer's claim file, and, therefore, the Utah Supreme Court did not consider whether an insurer prepares its claim file in anticipation of litigation.

The anticipation of the filing of a claim against a railroad, when a railroad employee has been injured or claims to have been injured on the job, is undeniable, and the expectation of litigation in such circumstances is a reasonable assumption.

Almaguer, 55 F.R.D. at 149; see also Firemen's Fund Insurance v. McAlpine, 391 A.2d 84 (R.I. 1978). The Supreme Court of Alabama has stated that "[s]tate courts have generally taken the position of Almaguer." Ex Parte State Farm Mutual Auto. Ins. Co., 386 So.2d 1133, 1136 (Ala. 1980).

In the instant case, Utah Farm Bureau's insured, Hardman, anticipated litigation as evidenced by his call to the Utah County Sheriff's Office and his insurance agent on the morning following the accident. He wanted the Sheriff to observe the scene immediately so the Sheriff could later testify, if necessary, that trespassers knocked his fences down. That litigation was anticipated is further evidenced by his statement to the Sheriff:

Action Taken: RP [Reporting Party/Hardman] wanted to show R/D [Reporting Deputy] the fence because he is afraid of being suied [sic] for having his horse cause an accident.

R. 311. (Utah County Offense Report, Exhibit "F"). Moreover, at trial, Officer Monson testified:

Q. (BY MR. MORGAN) Do you recall him telling you that, "It's not my fault?"
A. Yes.

(Monson Transcript, p. 18, Exhibit "L").

Not only did Hardman anticipate litigation, but his insurer, Utah Farm Bureau, also anticipated litigation as soon as Hardman reported the potential claim on the morning following the accident. At the time, Askew was in a coma and her family was concerned for her survival. Hardman's insurance policy would have covered only a fraction of the anticipated medical expenses even if Hardman was found negligent. The initial investigation demonstrated that in Utah Farm Bureau's judgment, there was no liability on the part of Hardman because the actions of trespassers caused the horse to escape. Under these circumstances, Utah Farm Bureau would have been negligent in carrying out its duty to its insured if it failed to anticipate litigation.

These very factors led the Alabama Supreme Court to protect statements taken in anticipation of litigation. Ex Parte State Farm Mut. Auto Ins. Co., 386 So.2d 1133 (Ala.1980). There, a State Farm insured permitted another to use his vehicle. The permissive driver killed the plaintiff's decedent. As part of its investigation, State Farm's claim representative took seven statements from witnesses to the accident. The plaintiff sought to discover these statements. In denying plaintiff's request, the Supreme Court of Alabama perceptively noted:

In this case, State Farm's claims specialist testified, by affidavit, that from the very outset of his investigation, it was obvious to him that State Farm's insured was free from liability, and that he prepared all

of the documents for eventual litigation. Even though State Farm did not turn over its file to its attorney until after the lawsuit was filed in September, we opine, from the meager evidence in the record, that the investigation was conducted in anticipation of litigation. From the nature of the case, a death claim, State Farm's agent could have reasonably concluded that its insured would be sued. This was not the type of fender-bender where a settlement with the insured would likely occur without a lawsuit.

Id. at 1136 (emphasis added). Utah Farm Bureau was in a similar position. This Court should hold that an adjuster is warranted in investigating a claim in anticipation of litigation when every single fact and all of the adjuster's experience tells him that litigation should not only be anticipated, but is certain to occur.

Here, Utah Farm Bureau's claims agent, Greg Johnson, testified by affidavit that it was his experience that an accident between a vehicle and livestock typically results in litigation which must be prepared for:

3. As Claims Manager, I have established a procedure for handling claims involving livestock on the highway. It has been my experience that once a claim is reported that involves livestock on the highway which is allegedly owned by a Utah Farm Bureau insured, I anticipate from that time forward that a claim may be filed in connection with the accident by the insured, or the driver or occupants of the vehicle that came in contact with the livestock.

R. 112 (Affidavit of Greg Johnson, ¶ 3, attached as Exhibit "C"). This is in accordance with rule 26, which protects documents prepared "by or for that other party's representatives (including

his attorney, consultant, surety, indemnitor, insurer, or agent)." Utah R.Civ.P. 26.

With respect to the statement of Hardman (Entries 3-4 of Exhibit "A"), the trial court properly considered that there must be heightened protection for statements taken by an insurance company from its insured. The Supreme Court of Washington expressed the delicate public policy concerns which mandate heightened protection of statements between insureds and insurers as follows:

An insured is contractually obligated to cooperate with the insurance company. Such an obligation creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party. The insurer, on the other hand, has a contractual obligation to act as the insured's agent and secure an attorney. The insured cannot choose the attorney but can expect the agent to transmit the statement to the attorney so selected. Without an expectation of confidentiality, an insured may be hesitant to disclose everything known. Such non-disclosure could hinder representation by its selected attorney.

Heidebrink v. Moriwaki, 706 P.2d 212, 216 (Wash. 1985).

The trial court also considered the fact that Utah Farm Bureau's attorney, Stephen G. Morgan, instructed Greg Johnson to take the statement from Hardman and create other documents to assist Mr. Morgan in preparing to defend this action. In September, 1986, Mr. Morgan sent Utah Farm Bureau a letter instructing him to have the insured prepare certain documents and that Utah Farm Bureau should take any statements which it deemed necessary to

prepare Mr. Morgan for litigation. R. 115-119 (attached as Exhibit "D").

Askew claims that these letters should not be used to protect documents prepared three years later. Askew misses the point of these letters and their import in this matter. The documents which Mr. Morgan instructed Utah Farm Bureau to create are not created in the ordinary course of business. Instead, they are created to assist Mr. Morgan in his defense of the claim should the matter proceed to trial. The claim's adjuster is certainly able to resolve a simple claim without the use of these documents. However, when the matter proceeds to litigation, the attorney needs these documents in order to defend the claim.

Askew's proposed rule mandating attorney involvement ignores the realities of the insurance industry. From the date of the accident, the relationship between the claimant and the alleged tort-feasor's insurer is adversarial. The claimant will try to maximize his or her recovery. The insurer will try to limit its exposure. At any time, the claimant can sue the tort-feasor or the insurance company can force the claimant to sue by refusing to pay. Indeed, a liability insurance company is generally under no duty to settle or pay a claim until the tort-feasor is found negligent and a judgment entered against the insured.

The trial court did not abuse its discretion in protecting Utah Farm Bureau's statement from discovery. The court considered all the relevant facts, including: 1) the nature of the insurance industry; 2) the attorney involvement of Mr. Morgan; 3) the fact that the documents sought (the entire claim file) were not relevant to the litigation; 4) the fact that the insured, Hardman, anticipated litigation; 5) the size and nature of Askew's claim suggested litigation was imminent; and 6) the testimony of Mr. Greg Johnson, who indicated that he anticipated litigation from the date of the accident.

Recall that the original protective order was entered by Judge George Ballif (retired). At the close of discovery, Askew made a second motion to compel seeking the tape recording of the statement and claiming "substantial need." Judge Davis ruled:

Plaintiff's motion to compel, I believe frankly, that there is some expectation of confidentiality. I believe there's a public policy argument that's a persuasive one. I also believe that while it may not have been anticipated by Judge Ballif of a broad protective order that would go to the issue of the tape or transcript of the tape, it certainly appears that since that time there has been no additional --well, I'll state it as an inadequate showing of substantial need.

There is a work product involved that ought to be protected. Courts are granted broad discretion on these issues, weighing the facts involved and sort of the civil counterpart of a totality of the circumstances involved, and granted broad discretion under Rule 26(b)3 of the Utah Rules of Civil Procedure to weigh those facts and make a determination.

(Transcript of December 28, 1992, hearing, p. 3, attached as Exhibit "H"). Two trial judges, each applying their discretion and considerable experience gained from the bench, have considered Askew's request for the claim file and both have rejected the same.

Askew may not agree with the trial court's conclusion, but the ruling was not "against the logic and natural inference to be drawn from the facts and circumstances before the court." Burr v. United Farm Bureau Mut. Ins. Co., 560 N.E.2d 1250, 1254 (Ill.App.1990). The trial court's ruling should be affirmed.

C. ASKEW DID NOT HAVE A "SUBSTANTIAL NEED" FOR THE STATEMENT OF HARDMAN.

Askew claims that even if the statement of Hardman was prepared in anticipation of litigation, she was entitled to discover the statement because she had demonstrated "substantial need." The burden rests with Askew to show substantial need and undue hardship. Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 340 (6th Cir. 1988) (cited with approval in Gold Standard v. American Resources, 805 P.2d 164 (Utah 1991)).

The essence of Askew's argument is that only three witnesses observed the pasture and the fence the morning after the accident-- Robert Harmon, Officer Jerry Monson, and Hardman. It is claimed by Askew in order to advance her argument that neither of the latter two witnesses had a good recollection of the condition of the fence the morning after the accident, and that Mr. Harmon was precluded

from testifying by the trial court. Askew thus claims a substantial need for the "contemporaneous" statement of Hardman. However, as demonstrated in this brief, Askew was provided with a multitude of evidence which conclusively established the condition of the fence and surrounding area the morning after the accident.

First, Mr. Hardman testified at length and in great detail regarding the condition of the fence the morning after the accident. As an example, Mr. Hardman testified as follows in his deposition:

- Q. And you recall -- where I believe you testified that the wire had been taken off the corner?
- A. Yes.
- Q. And that was the same as a couple of weeks earlier the wire had been taken off the corner post?
- A. Yes.
- Q. How many wires had been taken off the corner post?
- A. Two.
- Q. Is that the number of wires that ran along the north fence?
- A. Yes.
- Q. When you put the fence up on the morning of the 21st of November, tell me how you did that?
- A. I just pulled it to the corner post and wired it on.
- Q. With your hands?
- A. Yes.
- Q. Did you wire --
- A. As I remember, I did.
- Q. Do you recall whether wired -- well, first, let me ask this. How much of the fence had been taken down?
- A. Probably three poles, two or -- from the corner, probably three steel posts. It was all drooping. But I mean, you know, laying on the ground, as I recall, there were maybe three poles.
- Q. Three posts along there?
- A. Yes. Three posts.
- Q. So the wire had been pulled off three posts?
- A. Yeah.

- Q. Would that be including the corner post or the corner post and --
- A. No. That doesn't include the corner post.
- Q. -- three more. Were the posts bent?
- A. No.
- Q. Did you observe whether the wire that had wired the barbed wire to the post had been cut?
- A. No I didn't.
- Q. Did you observe whether it had been undone?
- A. No. Didn't find that wire.
- Q. Did you look for it?
- A. No. Well, when I pulled that back, I looked for the wire to wire it back to the post, but I didn't --
- Q. You didn't see the wire lying there on the ground or anything?
- A. Did not see the wire lying on the ground, no.

R. 1804 (Hardman Depo., pp. 108-110, Exhibit "E"). Hardman had a very good recollection of the condition of the fence and the surrounding area the morning after the accident.

The second witness, Officer Jerry Monson, concededly could not recall the exact condition of the fence during his deposition. However, Officer Monson's detailed report completed the morning after the accident was produced to Askew. In his report, Officer Monson stated:

R/D responded to scene with the RP and observed where the fence was down. It appeared someone had knocked the fence down with a full sized pickup truck, as there was old tire tracks near the fence. Also, R/D observed where a deer had recently been poached on the RP's property.

R. 311 (Utah County's Sheriff's Report, Exhibit "F"). Thus, while Mr. Monson may not have been able to recall the exact condition of the fence during his deposition, Askew has already been provided

with the prized "contemporaneous" statement of Mr. Monson in the form of his report.

Finally, Mr. Robert Harmon photographed the fence at approximately the same time as he took the statement of Hardman--the morning after the accident. Hardman testified at trial that the photographs fairly depict the condition of the fence as observed the morning after the accident. (Transcript of Hardman, pp. 68, Exhibit "G"). Hardman testified similarly with respect to other pictures taken the morning after the accident. The notes of the investigating officer, David Guest, dated December 7, 1989, which was 17 days after the accident, reflect the following concerning the photographs:

Called Paul Hardman--He said he hadn't heard anything yet and he said that the day after he went to the field where the horses were and the fence was down and he went home and called the sheriff's office. A Deputy came and found a fresh deer kill and took pictures of vehicle tracks crossing the fence.

R. 1818. These photographs qualify as the "substantial equivalent" of what Askew hoped to obtain from the statement of Hardman. The photographs show the exact condition of the fence the morning after the accident.

Judge Davis considered all of these elements in ruling that Askew had failed to demonstrate "substantial need":

There must be a showing of substantial need and the plaintiff is unable to obtain a substantial equivalent of the evidence contained within that particular recording.

This court is aware of the standard announced both in Mower and also the Gold Standard cases, and believes that there is a substantial equivalent. One, in the written record of deputy Jerry Monson, albeit somewhat abbreviated, and while he has no independent recollection of this date of some of the facts involved, there is a written record.

Secondarily, there has been a long deposition of the defendant involved that's been demonstrated somewhat in excess of 200 pages. The inquiry regarding quote unquote, "contemporary statements" made the following morning to a representative of the insurance adjuster are fairly detailed in the estimation of this court.

Despite that ruling, defendants have supplied plaintiffs with seven photographs that were taken on that particular morning.

(Transcript of December 28, 1992, hearing, pp. 37-38, attached as Exhibit "H"). Under Rule 26(b)(3), Askew is not entitled to exact information. Rather, Askew is entitled to the "substantial equivalent" of the materials she seeks. Gold Standard v. American Barrack Resources, Inc., 801 P.2d 909, 910 (Utah 1990). This is what she was provided.

Finally, Askew argues that she is entitled to the statement of Hardman because courts have "recognized that contemporaneous statements . . . constitute 'unique catalysts in the search for truth' and have accordingly ordered production of such statements." (Brief of Appellant, p. 36). Askew relies upon Professor Moore's treatise and the treatise of Professors Wright and Miller to support this proposition. However, Professors Wright and Miller have also stated that "it will be true that discovery of work

product material will be denied if the party seeking discovery can obtain the information he desires by taking the depositions of witnesses." 8 C. Wright & A. Miller, at § 2025 (1970). Likewise, in Hamilton v. Canal Bridge Co., 395 F.Supp. 975, 978 (E.D.La. 1974), a case relied upon by Askew, the Court held:

If a witness were available, the court might then require counsel to depose him and demonstrate to the Court with some specificity just why they expect his statement to supply information his deposition did not.

Id. Askew's own authorities suggest that while statements contemporaneous with the accident are important, production should not be required if the party is able to be deposed.

Essentially, Askew argues that statements should always be produced because of the close proximity between the accident and the statement. The trouble with this argument is that it would render Rule 26(b)(3) meaningless. A party would always be entitled to such materials even though they are protected as work product because the statement by its very "contemporaneous" nature will be taken prior to the deposition. As the Washington Supreme Court held:

Although the statement was taken two days after the accident, the passage of time alone is insufficient to allow discovery. Respondents have failed to show any other extenuating circumstances justifying disclosure. Hence, the passage of time in the instant case fails to carry the day. Rather the more important fact is that the statement in question is that of the Defendant. He is not unavailable; in fact it was in his deposition that

the conflict arose. There is no claim that he has no present recollection of the events in question.

Heidebrink v. Moriwaki, 706 P.2d 212, 218-19 (Wash. 1985). It has also been stated:

The unique value of contemporaneous statements has repeatedly been recognized. . . . Such statements have been referred to as "unique catalysts in the search for truth." . . . It is equally settled, however, that mere speculation or hope that the requested statement may prove to be contradictory or impeaching is not sufficient to overcome the limited privilege applicable to trial preparation materials. Stephens Produce Co., Inc. v. N.L.R.B., 515 F.2d 1373, 1377 (8th Cir. 1975); Hauger v. Chicago, Rock Island & Pacific R.R., 216 F.2d 501, 508 (7th Cir. 1954).

In balancing these conflicting considerations, this Court concludes that it is necessary for plaintiff to show more than the mere contemporaneousness of the requested statements.

Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 93 (E.D.Mo.1980).

Moreover, in making the substantial need determination, "attention is directed at alternative means of acquiring the information that are less intrusive to the lawyer's work and whether or not the information might have been furnished in other ways." Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 340 (6th Cir. 1988). Allowing Askew to depose Hardman, obtain the photographs taken of the fence, and receive Officer Monson's report were certainly less intrusive than requiring production of the statement and allowed Askew to obtain the information she sought. Askew was provided with the "substantial equivalent" of the

materials she seeks. Thus, Askew did not have a "substantial need" for Hardman's statement.

D. HARDMAN DID NOT WAIVE THE ATTORNEY WORK PRODUCT PRIVILEGE.

Askew also argues that Hardman waived the work product privilege by testifying about matters discussed in the statement during his deposition. Askew has provided absolutely no support for the proposition that one waives the work product privilege merely by discussing the matters contained in the protected documents during a deposition.

The gist of Askew's argument is that the work product privilege is waived when one testifies about the same facts in a deposition as in the protected statement. In other words, the principle of "subject matter" waiver applies equally to both the attorney-client privilege and the work-product privilege. This is contrary to established legal principles which hold:

Work product doctrine is a source of immunity separate and distinct from the attorney-client privilege, so that a waiver of the latter privilege does not necessarily mean that the protection afforded by the work product doctrine is also breached.

10 Fed. Proc., Discovery and Depositions, § 26:113 (1988). Additionally, it has been held that: "A waiver of the attorney-client privilege does not affect the protection against the disclosure of the "work product" of an attorney." Annotation,

Development Since Hickman v. Taylor of Attorneys "Work Product" Doctrine, 35 A.L.R.3d 412, 485 (1971).

More specifically, Askew's notion of "subject matter waiver" is inapplicable to the work product privilege. The general rule is that "the broad concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to work product materials." 10 Fed. Proc., Discovery and Depositions, § 26:114 (1988).

The Fourth Circuit Court of Appeals has likewise held:

Thus, to the extent that a concept of subject matter waiver is applicable to Rule 26(b)(3) . . . it does not extend to a case such as this where there has only been inadvertent or partial disclosure in response to specific inquiries, and in which no testimonial use has been made of the work product.

Duplan Corp. v. Deering Millikan, Inc., 540 F.2d 1215 (4th Cir. 1976). Thus, there is no support for Askew's contention that the work product privilege may be waived in the same manner that the attorney-client privilege is waived.

Rule 26(b)(3) would be rendered meaningless if Askew's proposed rule were accepted. If Hardman refused to testify about the factual matters he also testified to in the statement, Askew would have the "substantial need" she seeks and would claim an entitlement to the statement. But when Hardman testified about the matters in his deposition, Askew claimed waiver and an entitlement to the statement. Askew claims "substantial need" if Hardman is not

deposed, and waiver if he is. In order to give Rule 26(b)(3) full effect, a party must be permitted to protect a statement taken in anticipation of litigation and fully testify about his factual knowledge.²

Askew's position is not supported by any case law or other authority. Before Askew's argument is accepted as law, Askew should, at the very least, be required to show that her argument is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . ." Utah R. Civ. P. 11. The rules of procedure governing this state require no less.

E. THE FAILURE OF THE COURT TO ORDER PRODUCTION OF THE CLAIM FILE WAS HARMLESS ERROR.

Assuming that the trial court erred in ruling that the claim file was prepared in anticipation of litigation and, therefore, protected, any such error was harmless. Rule 61 of the Utah Rules of Civil Procedure mandates that this Court ignore any error which "does not affect the substantial rights of the parties." Utah

² Moreover, Askew's argument creates a tremendous weapon for the party seeking to prevent discovery. The attorney for that party could take statements from all material witnesses and then prevent those witnesses from giving their depositions or testifying about the same "subject matter" at trial in order to prevent waiver. Clearly, the goal of full factual discovery would be destroyed under Askew's proposed rule. To further all goals, the party must be allowed to protect the document but fully testify as to his or her factual knowledge.

R.Civ.P. 61. Interpreting this rule, the Utah Supreme Court has placed "upon an appellant the burden of showing not only that an error occurred, but that it was 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 v. Ashton, 733 P.2d 147 (Utah 1987).

The most important principle in this regard is that this Court should "exercise every reasonable presumption in favor of the validity of a general verdict." Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 301 (Utah 1982). The Utah Supreme Court has also stated that "an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

Preventing Askew from discovering the insurer's claim file did not undermine confidence in the verdict and did not affect Askew's substantive rights. Attached as Exhibit "A" is a detailed summary of the documents contained in the insurer's claim file. R. 121-122. This document was also presented to the trial court in connection with Hardman's motion for a protective order. Obviously, any documents created after the January 17, 1991, letter from Mark James, Askew's attorney, to Robert Harmon (Entry 23) are protected

under the anticipation of litigation doctrine. Thus, at issue are entries 1-22.

The vast majority of the documents are status reports and inter-office correspondence. (Entries 5, 7, 13, (11 & 15)³ 16-22). These documents contain the mental impressions, conclusions, and opinions of Utah Farm Bureau's claim's adjuster, Greg Johnson, and pursuant to Rule 26 of the Utah Rules of Civil Procedure, are absolutely protected. Mower v. McCarthy, 245 P.2d 224 (Utah 1952). See R. 111 (Affidavit of Greg Johnson, ¶ 6, attached as Exhibit "C").

The second class of documents were as easily obtainable by Askew as Utah Farm Bureau. They include:

6. Investigating Officer's report.
9. Copy of Utah Code Ann. § 41-6-38.
10. Copy of Utah Farm and Ranch Law--Animals on Highway.
12. Handwritten note on Horse with Certificate of Registration on Horse.

These documents could have been obtained by Askew at any law library or, in the case of the Investigating Officer's report, by contacting the appropriate governmental agency. As such, Askew cannot complain that she did not have the opportunity to discover these documents.

³ The reserve is the estimated amount needed by the insurer to resolve a contingent liability. The establishment of reserves necessarily involves an opinion and mental impression regarding the value of the case and the potential of prevailing at trial.

The final class of documents deal with insurance company computer documents and contain no facts relevant to this lawsuit:

1. Computer print-out on policy information
2. Report of Claim
8. Copy of Check
14. Copy of Check

It is doubtful that any of these documents would have been relevant to the issue of Hardman's negligence and most would not have been admitted at trial for the same reason. These documents also would not have been admitted because to do so would inject insurance into the litigation, thereby prejudicing Hardman.

Askew has the burden of demonstrating to this Court that but for the trial court's alleged error, she would have prevailed at trial. She has not even attempted to meet this burden in her Brief of Appellant.

The only other document in the claim file was the tape of the recorded statement (and subsequent transcription of the statement) which the insurance agent, Robert Harmon, obtained from the insured, Hardman, on the morning following the accident. Any error relating to the production of the tape and statement of Hardman was likewise harmless. Askew sought the tape and statement of Hardman for the purpose of injecting insurance into the trial and to show the jury the condition of the fence and surrounding pasture the morning after the accident. (Brief of Appellant, pp. 32-33). But the jury was already given an exact picture of the condition of the

fence the morning after the accident through the photographs taken the morning after the accident and Officer Jerry Monson's report, also completed the morning after the accident, both of which were entered into evidence. The report stated:

R/D [reporting deputy] responded to scene with the RP [reporting party] and observed where the fence was down. It appeared someone had knocked the fence down with a full sized pickup truck, as there was old tire tracks near the fence. Also, R/D observed where a deer had recently been poached on the RP's property.

R. 311 (Utah County Offense Report, Exhibit "F"). The photographs taken by Mr. Robert Harmon the morning after the accident showed the exact condition of the fence. Additionally, Hardman was cross-examined by Askew and he gave a detailed description of the condition of the fence the morning after the accident.

There was also testimony at trial as to the condition of the fence before the accident. Paul Hardman testified that he checked the fence on the very evening the accident occurred:

Q. Were the posts and wire in place on November 20, 1989, at 4:30 p.m. when you last saw it prior to the accident?

A. Yes, sir.

(Hardman Transcript, p. 4, Exhibit "R"). In addition, Doug Smith testified that he repaired the fence about four weeks before the accident:

Q. Were you asked to do some repairs to Paul Hardman's fence in 1989?

A. Yes, sir, I was.

Q. How long before that accident would it have been that you would have made the repairs to Mr. Hardman's fence?

A. Well, I don't know exactly. I don't remember the date exactly, but it was in latter part of October or early November.

Q. Did you do whatever you felt you needed to do to make it an adequate fence to contain horses?

A. I did.

Q. And in your opinion it was?

A. Yes, sir, it was. It was adequate before I repaired it. I don't think they could have ever got out.

* * *

Q. When you finished doing your work, what do you recall in terms of the height of the lower wire and the height of the upper wire along the north side of the pasture?

A. I would say that somewhere the lower wire is 18 inches to two feet, somewhere in that vicinity. The upper wire would have been three and a half to four feet.

Q. Do you know what kind of fence you need build in order to keep trespassers out?

A. There is no kind of fence you can build to keep trespassers out.

Q. Is a two strand barbed wire fence standard or normal in Utah County to contain horses?

A. Yes, it is. There's a lot of one wire also.

(Smith Transcript, pp. 7-8, 16-17, Exhibit "J").

The jury was well apprised of the condition of the fence the morning after the accident. Askew's counsel showed the jury time and again the condition of the fence the morning after the accident as depicted in the photographs. Her counsel questioned Hardman at length regarding the condition of the fence. Now Askew claims that she was denied a fair trial because she was not allowed to show the jury the condition of the fence for the "umpteenth" time. Simply put, a party is not denied a fair trial because she was only allowed to present the same evidence four times but not five.

Hardman respectfully asserts that the failure to admit the statement should not "undermine [this Court's] confidence in the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789, 796 (Utah 1991). Thus, the verdict should be upheld.

F. CONCLUSION

In the Brief of Appellant, Askew understates her burden, which is two-fold. First, she must establish that the trial court abused its discretion in ruling that the claim file was prepared in anticipation of litigation. This requires a showing that the trial court's holding was "against the logic and natural inferences to be drawn from the facts and circumstances before the court." Burr v. United Farm Bureau Mut. Ins. Co., 560 N.E.2d 1250, 1254 (Ind. App. 1990). Assuming she can carry this burden, she must still demonstrate that "the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

Askew has not even attempted to show that the trial court abused its discretion by applying the Gold Standard principles to the claim file, nor has she demonstrated that she would have prevailed at trial if she would have discovered the claim file.

II

THE TRIAL COURT PROPERLY EXCLUDED ROBERT HARMON AS A WITNESS IN ORDER TO PREVENT THE INJECTION OF INSURANCE INTO THE ACTION

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Askew properly concludes that she must establish that the trial court abused its discretion in excluding Robert Harmon as a witness. Fisher v. Trapp, 748 P.2d 204, 205-07 (Utah Ct. App. 1988), cert. denied 765 P.2d 1278 (Utah 1988). However, she has not presented any facts which suggest that the trial court abused its discretion. The trial court properly excluded Mr. Harmon as a witness in order to avoid the danger of injecting insurance into the trial. The general rule that insurance covering the defendant should not be injected into the trial is so well accepted that it has been adopted as Rule 411 of the Utah Rules of Evidence. Reeves v. Gentile, 813 P.2d 111, 121 (Utah 1991); Tjas v. Proctor, 591 P.2d 438, 440 (Utah 1979).

The trial court properly balanced the concern that insurance would be injected into the trial if Mr. Harmon was called as a witness against Askew's ostensible reason for calling Mr. Harmon. Judge Davis stated as follows in ruling on the matter:

THE COURT: Well, then you're essentially opening up the flood gates so that you can subpoena any insurance agent or insurance adjustor or investigator for an insurance company and--

I believe a line of cases still support the fact that ultimately it can be prejudicial or may be, particularly in a case where we're not talking about an auto accident where there's some reasonable reflection upon insurance but liability insurance that attaches to a farmer with some property in a fairly remote area and

a variety of things that way. I think the reasoning may be more persuasive if we had two automobiles.

(Transcript of January 4, 1993, pp. 12-13, attached as Exhibit "H"). Judge Davis went on to state:

THE COURT: I'll grant your Motion to Quash. It's left with the sound discretion of the Court.

I believe that there's--the probative value is substantially outweighed by the possibility of prejudice or interjection of issues of insurance into the case, which ultimately can either elevate awards or at least may have that possibility.

It also appears to the Court that the testimony would be cumulative. Still have an officer or a trooper that was there--no. Let's see. Excuse me. It's a Deputy County Sheriff that was present on that morning, who made a report, plus a defendant himself who was present on that occasion. So I'll grant your Motion to Quash.

(Transcript of January 4, 1993, p. 14, Exhibit "M").

The trial court found that the danger of injecting insurance into the litigation was to be avoided at all costs. Askew's ostensible reason for calling Mr. Harmon was to confirm the condition of the fence the morning after the accident, a condition conclusively established by the testimony of Hardman, Officer Monson, and by the photographs taken by Mr. Harmon the morning after the accident.

Askew claims in her brief that Harmon's testimony concerning the condition of the fence was needed because it was inconsistent with the testimony of Hardman and, therefore, diminished the credibility of Hardman. (Brief of Appellant, note 25). However,

Askew did not demonstrate any difference in her brief between the testimony of Hardman and Harmon regarding the condition of the fence the morning after the accident. Indeed, the only alleged difference cited in Askew's brief dealt with the location of the deer "entrails," not the condition of the fence. Id. (Harmon testified in his deposition that the entrails were "inside" the pasture, which is essentially the same testimony given by Officer Monson who testified that the entrails were in the vicinity of where the fence was down; Hardman, on the other hand, testified that the entrails were a quarter mile from where the fence was down).

Since Mr. Harmon's testimony was cumulative and unnecessary, there was no need to risk the injection of insurance into the litigation. The trial court did not abuse its discretion in preventing Askew from calling Mr. Harmon as a witness.

B. EVEN IF IMPROPER, THE TRIAL COURT'S RULING WAS HARMLESS.

Moreover, even if erroneous, the failure to allow Askew to call Mr. Harmon as a witness was harmless error. The jury was well apprised of the condition of the fence the morning after the accident. Because the jury would have had the same impression of the fence even if Mr. Harmon testified, any error in excluding him as a witness was harmless. Askew has not shown that "the likelihood of a different outcome is sufficiently high as to undermine our

confidence in the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991). The verdict should be affirmed.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW ASKEW TO TESTIFY (1) THAT NEITHER SHE NOR HER REPRESENTATIVE TOOK THE PHOTOGRAPHS OR (2) ABOUT THE ORIGIN OR THE PHOTOGRAPHS TAKEN BY ROBERT HARMON.

A. THE TRIAL COURT DID NOT ERR IN EXCLUDING THE TESTIMONY.

Askew is proper in her assertion that she must establish that the trial court abused its discretion in prohibiting her from informing the jury that she did not take the photographs. But she does not attempt to meet this burden. Instead, she states in conclusory fashion that the ruling "was erroneous and prejudicial to Askew's case." For obvious reasons, such unsubstantiated statements should not form the basis for a reversal.

A review of the trial court's ruling demonstrates that the trial court properly denied Askew's request. On the last day that evidence was taken (during Askew's rebuttal), Askew requested that she be allowed to testify that neither she nor her representative took the photographs. Instead, she wanted to create the impression that the photographs were taken by a representative of Hardman. Askew's obvious purpose was to inject insurance into the

litigation.⁴ Judge Davis properly refused to allow Askew to do so.

The Court ruled as follows:

THE COURT: I thought I ruled on that. I said that it would be too prejudicial, and the issue of insurance--I don't want to risk a mistrial in this case seven days into the trial.

(Transcript of January 13, 1993, attached as Exhibit "I").

The identity of the individual taking the photographs was not relevant. What was material was that the photographs fairly depicted the condition of the fence on the morning after the accident. (Transcript of Hardman, pp. 68, attached as Exhibit "G").

As with other aspects of this litigation, the trial court did not abuse its discretion when it weighed the danger that insurance would be injected into the trial against Askew's minimal need to inform the jury that a representative of Hardman took the photographs. Judge Davis' consideration of this issue evidences a sincere effort to weigh the potential prejudice to Hardman if

⁴ Askew's desperate attempt to inject insurance into the litigation was apparent during rebuttal. Askew spent six days presenting her case to the jury. Hardman spent only a day and a half presenting his defense. Askew then sought to call some ten witnesses in rebuttal, including a second livestock expert which was never revealed to Hardman prior to trial. Askew realized before rebuttal that her case regarding liability was weak. To compensate for this weakness, Askew employed every conceivable device in an attempt to inform the jury of insurance. If, as Askew contends, the trial court took extreme steps to prevent the injection of insurance, it was only because such extreme steps were necessary to counter Askew's relentless attempts to inject insurance into the trial.

insurance was injected into the litigation against Askew's purported need for the testimony.

B. ANY ERROR IN EXCLUDING THIS TESTIMONY WAS HARMLESS.

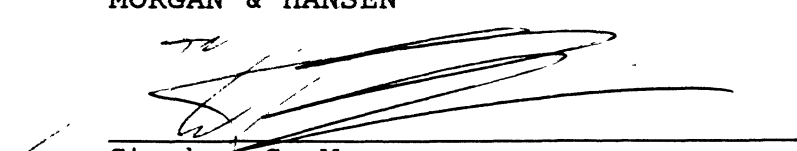
Again, Askew has the burden of showing that "the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991). Any error in this regard was harmless because the issue was not the identity of the photographer, but whether or not the photographs accurately depicted the condition of the fence. This was conclusively established at trial.

CONCLUSION

On the basis of the foregoing, Hardman respectfully requests that all rulings of the trial court and the jury verdict be affirmed.

DATED this 16th day of September, 1993.

MORGAN & HANSEN

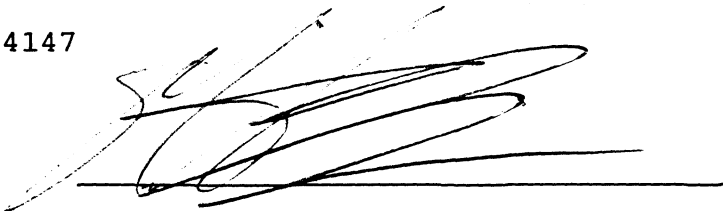


Stephen G. Morgan
Mitchel T. Rice
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 1993, I caused a true and correct copy of the foregoing BRIEF OF APPELLEE to be hand-delivered to the following:

Gary A. Dodge
Mark F. James
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, #1300
P.O. Box 11019
Salt Lake City, UT 84147

A handwritten signature in black ink, appearing to be "Mark F. James", written over a horizontal line.