

1993

# Julia Lee Askew v. Paul Hardman : Response to Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS  
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CKET NO. 930537 CA

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IN THE UTAH COURT OF APPEALS

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

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**JULIA LEE ASKEW'S RESPONSE TO PETITION FOR REHEARING**

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Fourth Judicial District Court  
Honorable George E. Ballif (Retired); Honorable Lynn W. Davis

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**FILED**  
Utah Court of Appeals

NOV 14 1994

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Plaintiff Julia Lee Askew, through her counsel of record, respectfully submits this Response in Opposition to Defendant Paul Hardman's Petition for Rehearing.

## **INTRODUCTION**

Defendant Paul Hardman ("Hardman") has requested a rehearing in connection with this Court's opinion issued on October 11, 1994. Hardman's petition should be denied. Despite Hardman's assertion that this Court misapprehended virtually every legal principle related to the Court's opinion, there simply is no basis for Hardman's petition or his unfounded assertions. Every issue that Hardman raises in his Petition was either briefed by the parties, raised in oral argument before this Court, or is irrelevant. Moreover, this Court's decision is entirely consistent with the majority of courts that have addressed the discoverability of insurance files, as well as the modern trend of courts that are facing this issue for the first time. More importantly, this Court's opinion comports with principles articulated by the Utah Supreme Court relating to the work product doctrine--principles that were thoroughly treated in the parties' briefs and in this Court's opinion.

Defendant Hardman also requests rehearing regarding this Court's remand of the case for a new trial. This issue was fully briefed and argued, and this Court's opinion fully and properly addresses the issue of prejudice as well as justice's mandate of a new trial. In any event, Julie Askew suffered clear prejudice as a result of having been denied access to crucial evidence.

Finally, defendant seriously overstates the breadth of this Court's ruling and the purported impact of the ruling on insurance claim practices in Utah. When the rhetoric is set aside, the arguments of the defense boil down to a claim that insurance companies and their

insureds should enjoy special discovery protections not afforded anyone else. Such unique protections simply do not and should not exist. This Court should deny the Petition for Rehearing.

## DISCUSSION

### **I. THIS COURT APPLIED THE APPROPRIATE STANDARD OF REVIEW AND ITS DECISION IS ENTIRELY CONSISTENT WITH STATE v. PENA.**

Hardman asserts that this Court failed to consider the Utah Supreme Court's decision in State v. Pena, 869 P.2d 932 (Utah 1994). Hardman, however, does not articulate a single reason why application of the Pena analysis would impact this Court's decision. In fact, this Court's decision is entirely consistent with Pena.

#### **A. A "De Novo" Standard of Review Applies to the Trial Court's Articulation of the Work Product Doctrine.**

At the most fundamental level, there are only two types of questions that an appellate court must decide in reviewing a lower court decision--those of fact and those of law. Pena, 869 P.2d 935. A trial court's determination of fact will not be overturned unless "clearly erroneous." Id. at 935-36. This standard is wholly inapplicable in this appeal because the decision at issue did not involve the resolution of any disputed facts.

Questions of law are reviewed by the appellate court for "correctness." Id. at 936. "Controlling Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." Id. Nevertheless, Pena establishes that "a de facto grant of discretion" is inherent in some questions of law, permitting "the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal." Id. Thus, with respect to questions

party "was unhappy with the way the project had ended up from their standpoint, and was threatening litigation." Gold Standard, 805 P.2d at 170. The Gold Standard court clearly disregarded the preparer's subjective state of mind, however, and focused instead on objective evidence that demonstrated that, while litigation was possible--even vaguely threatened, there was no specific threat demonstrating the opposing party's intent to pursue litigation or that such litigation was imminent. Id. The court held that "a letter whose tone is 'threatening' but does not state an intent to pursue litigation is insufficient to allow a party to invoke work product protection to protect an in house report prompted by the letter." Id. To this end, the court also noted that "[t]he mere possibility that litigation may occur or even 'the mere fact that litigation does eventually ensue' is insufficient to cloak material with the mantle of work product protection." Id.

Hardman, who did not even prepare the disputed evidence, has produced no evidence that his fear "of being sued" was founded upon anything more than the possibility that litigation might follow from the accident. Moreover, Hardman's insurer can point to no more than the mere possibility of litigation as the motivating force behind its recording of Hardman's statements. Litigation was not pending, impending, or even threatened when Hardman made the statements recorded by his insurer. Hence, the requested documents were not prepared "in anticipation of litigation" as that requirement is clearly articulated in Gold Standard. A contrary holding would effectively cloak every document created in every investigation of every accident (whether or not by an insurance investigator) with a work product privilege--a result clearly rejected by this Court and the Utah Supreme Court.



### **III. THIS COURT DID NOT MISAPPREHEND THE IMPACT OF ITS DECISION UPON INSURANCE CLAIM PRACTICES.**

The defendant argues that this Court's ruling will have a major impact on insurance claim practices in Utah, but the rhetoric is without substance. The defense simply wants insurance companies to enjoy special discovery protections not afforded to anyone else.

Hardman asserts that this Court's decision, when read in connection with its decision in Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130, 138 (Utah Ct. App. 1992), "creates a fundamental inconsistency." In short, Hardman argues that an insurer's obligation to produce an investigative report is "fundamentally inconsistent" with an insurer's duty to defend its insured. In fact, Hardman goes so far as to suggest that requiring an insurer to produce its investigative reports makes the insurer the agent for the third-party claimant. Hardman's argument is ill-founded and unpersuasive.

The existence of a fiduciary relationship does not exempt a party from the obligations of discovery, nor does it render application of the rules of discovery unfair.<sup>4</sup> A fiduciary-insurer is not required to produce anything more than the rules of discovery require of the principal-insured. As demonstrated in Gold Standard, discovery rules require a principal-party to produce investigative reports that are not prepared "in anticipation of litigation." Excepting the fact that the investigative report in this case was prepared by a representative instead of the principal, it

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<sup>4</sup> If the existence of a fiduciary relationship is sufficient to exempt a party from discovery, then an investigative report prepared by a party's business partner would also be protected by the work product doctrine because of the fiduciary nature of that relationship, regardless of whether the report was prepared in anticipation of litigation. Where the "anticipation of litigation" standard is not satisfied, neither the rules of procedure governing work product nor the case law extends special work product protections to fiduciary relationships, including attorney-client relationships. See, e.g., Rule 26(b)(3).

is no different than the internally generated investigation at issue in Gold Standard. See id. at 171. Thus, it warrants no special protection. Like the investigative reports at issue in Madsen v. United Television, Inc., 801 P.2d 912 (Utah 1990), an insurer's investigation is "undertaken not in anticipation of litigation but rather as a routine practice," id. at 917, for without such an investigation an insurer can neither evaluate a claim nor determine coverage. An insurer simply cannot claim that its initial investigative reports are "material that would not have been generated but for the pendency or imminence of litigation" as required under Madsen. Id.

In short, this Court's ruling does no more than establish that a principal-insured may not avoid the burdens of discovery because the preparation of the investigative report is accomplished by a fiduciary-insurer. The law simply does not favor those who have a fiduciary to do their bidding over those who do not.<sup>5</sup> Defense efforts to secure special discovery protections to insurers is painfully evident in the claimed distinction between first-party and third-party insurance claims. Relying upon Weitzman v. Blazing Pedals, Inc., 151 F.R.D. 125 (D.Colo. 1993), Hardman asserts that third-party claims should be treated differently with respect to the work product doctrine. According to the Weitzman court, this distinction is required because of "the adversarial nature of the relationship between an insurer and a third party claimant . . . ." Id. at 126. The "adversarial nature" of a relationship, however, does not

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<sup>5</sup> Rule 26(b)(3) of the Utah Rules of Civil Procedure does not dictate a different result, for its protection extends only to those items that are "prepared in anticipation of litigation." Where that standard is met, the protections of the work product rule are extended, regardless of whether the item was prepared by the party or its attorney, insurer, or agent. Utah R. Civ. P. 26(b)(3). Where, as here, that standard is not met, the item must be produced.

inform the "anticipation of litigation" inquiry. The principles of subrogation themselves dictate that an insurer can be no more adverse to a third-party claimant than its insured. Yet, Hardman argues that an insurer, because of its role as a fiduciary, is entitled to "work product" protection that would be unavailable to its insured--protection that would shelter communications between an insurer and its insured regardless of whether those communications were in "anticipation of litigation." Such protection is more akin to the attorney-client privilege than the work product doctrine, and it should not be extended through an over-reaching application of an otherwise narrow exception to the rules of discovery.<sup>6</sup>

#### **IV. THIS COURT PROPERLY APPLIED THE BURDEN OF PROOF.**

Hardman argues that this Court misapprehended the burden of proving harmless error. His petition, however, virtually ignores the substantial portion of this Court's decision, including the cases cited by this Court, that addresses that very issue.<sup>7</sup> This Court thoroughly and properly analyzed and applied the legal principles on burden of proof. Hardman's Petition for Rehearing brings nothing new to this issue.

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<sup>6</sup> Notwithstanding the reliance on the fiduciary nature of an insurer's duty, the defense cannot escape the reality that insurers themselves frequently use information communicated by their insured "for purposes inimical to the interests of the[ir] insured," see Langdon v. Champion, 752 P.2d 999, 1003 (Alaska 1988), such as when they deny coverage in a third-party context. The insurer-insured relationship is thus dramatically different from that of attorney-client. Moreover, Askew submits that an insurer's fiduciary duty does not create an obligation to hide facts suggesting its insured's liability that are properly sought through discovery.

<sup>7</sup> Hardman claims he was not aware or advised that he had "the burden of proving 'harmless error' until [this Court] ruled in this case." [Petition for Rehearing at 10.] Such a claim could be made with respect to virtually every issue ever appealed. Both parties discussed the issue of harmless error in their briefs, and counsel for both parties responded to questions from the Court on this issue during oral argument.

**V. EVEN IF PLAINTIFF HAD THE BURDEN OF SHOWING PREJUDICE, SUCH A SHOWING COULD CLEARLY BE MADE.**

As this Court properly noted in its ruling, Askew could hardly be expected to prove prejudicial error because she was never given access to the disputed documents. Nevertheless, based on the incomplete disclosures contained in the Petition alone,<sup>8</sup> Askew could easily demonstrate significant prejudice to the preparation and presentation of her case even if such a showing were required.

For example, the failure to disclose the recorded statement deprived Askew of significant evidence of Hardman's negligence--that he had not inspected the fence for three to four days prior to the accident despite repeated incidents of horses escaping. The transcript indicates that on the morning following the accident Hardman stated:

Well, that fence was up last Thursday, which was 4 days ago UNCLEAR time I was over here plowing and see this UNCLEAR plowing on, I was over here plowing and checked the fence on Thursday and then of course they got out now.

....

Q. Okay, now you say ah, you were here last Thursday plowing this field and the wire, fence was up that day, that was just the previous Thursday, this being Tuesday and the accident happened Monday night okay.

A. So it would have been three days prior.<sup>9</sup>

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<sup>8</sup> After aggressively resisting disclosure of Hardman's recorded statement for years, Hardman has now appended a purported transcript of that statement to his Petition for Rehearing.

<sup>9</sup> Assuming Hardman checked the fences late in the evening on Thursday, four days -- not three -- passed between Thursday evening and the accident, which occurred the following Monday night at approximately 7:20 p.m.

Transcription Statement at 1-2.<sup>10</sup>

Hardman also told the insurance adjuster that "ever since the deer season we've had a lot of problems with hunters coming in over here on this north pasture" [Transcription Statement at p.1],<sup>11</sup> that his fence had been taken down four times that fall, three times before the evening of the accident [Transcription Statement at pp. 2, 4], and that his horses "got out about every time" the fence was down. [Id. at p.4.]

At trial, Hardman testified, inconsistent with the recorded transcript, that he had checked the fence at the location where his horses escaped at 4:30 p.m. on the evening of the accident [Trial Transcript at 150] and that he had checked the fence daily for two to three weeks before the accident [Id. at p. 152].<sup>12</sup> Askew had no ability to challenge that important testimony, and demonstrate the existence of key contrary evidence, because she was denied access to the recorded conversation.

Based on this evidence, Askew could have argued at trial, and the jury could have found, that Hardman was negligent in not inspecting his fences regularly and in allowing four days to

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<sup>10</sup> Because Askew has never had access to the recording, she does not know whether the transcript is complete or accurate or whether those missing portions of the transcription attached to Hardman's Petition, designated "UNCLEAR," could be provided by listening to the recording or by professional enhancement of the recording.

<sup>11</sup> The accident occurred on November 20, 1989. The general deer season in Utah started on the third Saturday in October, 1989. Additional special hunts continued in the state for several weeks after the general season ended. In fact, Paul Hardman had planned to leave on a deer hunting trip on the morning following the accident. See Paul Hardman Depo. (Vol. I) at 84-85.

<sup>12</sup> While the insurance adjuster apparently did not specifically ask Hardman whether he had checked the fence on the day of the accident, it is inconceivable that Hardman would tell the adjuster about a date four days prior to the accident while ignoring more recent inspections that would have been far more relevant.

go by without checking his fences, particularly in light of the time of the year, the fact that the pasture was still accessible by vehicle, and the three recent instances of the fence being down (in the same place it was down at the time of the accident) and his horses' prior escapes.

With access to Hardman's recorded statement, Julie Askew also reasonably could have argued that the fence was down up to four days before the accident. This argument would have been corroborated by a statement in Officer Jerry Monson's report that he observed "OLD TIRE TRACKS" in the vicinity where the fence was down [Utah County Offense Report at p.1 (attached as Exhibit "B" to Hardman's Petition)] and Hardman's testimony that he could not say the tracks had not been made on some prior date (Paul Hardman Depo. (Vol. I) at 117), and that the deer entrails he observed approximately one-fourth of a mile from the place where his horses escaped the pasture were almost gone, having been eaten by magpies, when he first observed them early on the morning following the accident [Hardman Depo., Vol. I, at 106-107]. Instead, when Hardman's counsel argued at trial that "trespassers" broke down the fence on the very evening of the accident and scared the horses out of the pasture, Askew had no effective way to counter this argument.

Similarly, Askew was deprived of an important source of key impeachment evidence. At trial, Hardman testified inconsistently with his deposition testimony regarding problems with trespassers in the weeks preceding the accident. When Askew's counsel attempted to impeach Hardman with his contrary deposition testimony, Hardman explained the inconsistency by stating that the testimony elicited in his deposition came after long hours of cross-examination at a time

when he was tired and not thinking sharply. Hardman's statements made the morning after the accident constitute important impeachment evidence of which Askew was deprived.<sup>13</sup>

As have other courts, this Court properly recognized that, under the circumstances of this case, Askew should not bear the burden of showing prejudice as a result of her being deprived of key evidence. Even if she bore that burden, however, Askew can easily demonstrate far more than the "colorable indication" of prejudice requested in Justice Orme's dissent.

**VI. HARDMAN HAS VASTLY OVERSTATED THE BREADTH OF THIS COURT'S RULING.**

Hardman argues that this Court's ruling requires the production of all documents in an insurance adjuster's files, including documents containing the mental impressions of adjusters and/or documents created after the date Askew filed her claim. To the contrary, the Court and the parties focused on the investigative file, including particularly the recorded statement. Specifically, this Court held:

Defendant has therefore failed to demonstrate that the documents were prepared to assist in pending or impending litigation. At most, defendant has demonstrated that the documents were prepared in the course of an accident investigation. Adjuster Harmon's report is therefore not entitled to work-product protection and the trial court erred by refusing to compel its production.

[Opinion at 7.]

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<sup>13</sup> As recognized by this Court's opinion, Askew did not have the burden of proving prejudicial error on appeal. Moreover, because she was denied access to the transcript of the conversation on the morning following the accident, she was precluded from establishing actual prejudice resulting from the denial of relevant discovery. Accordingly, those portions of the trial transcript that reflect these inconsistencies in Hardman's testimony are not part of the record designated on appeal.

To the extent the insurance file contains other documents that are in fact protected, such as communications with counsel or an insurance adjuster's mental impressions regarding pending or impending litigation, the ruling does not require the production of such documents. This Court responded to--and properly rejected--the trial court's blanket, per se work product ruling protecting from disclosure every document contained in the insurance file. This Court's ruling does not, however, mandate the production of every document in the file. Rather, it places the burden on Hardman to demonstrate that other documents in the insurance file are in fact protected by privilege.

### CONCLUSION

This case was fully and adequately briefed, argued, and decided by this Court. This Court did not misapprehend the law or the facts. To the contrary, as explained in detail in the opinion itself, this Court's statement of the law is entirely consistent with the majority of the courts that have addressed the issue. More importantly, the Court's decision correctly applies Utah law.

This Court's application of the law to the facts not only is legally correct, it also is just. Irrespective of who bears the burden of showing the existence of nonexistence of prejudice, Askew has demonstrated clear prejudice resulting from the trial court's erroneous denial of Askew's access to highly relevant evidence.

There is no ground for reconsideration. Insurance companies and their insureds do not, should not, and, in accordance with Utah law, cannot, enjoy special discovery immunities not accorded anyone else. This Court's opinion is well-reasoned, well-articulated, and correct. Defendant Hardman's request for reconsideration should be denied.



DATED this 11<sup>th</sup> day of November, 1994.

KIMBALL, PARR, WADDOUPS, BROWN & GEE  
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Mark F. James, Esq.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing "JULIA LEE ASKEW'S RESPONSE TO PETITION FOR REHEARING" was served by U.S. mail, first class postage prepaid, this 11<sup>th</sup> day of November, 1994, addressed to the following:

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