

2005

Venna M. Swalsberg Lange, Trustee of the Carl A. Swalsberg Family Trust v. David Eby : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VENNA M. SWALSBERG LANGE,
TRUSTEE OF THE CARL A.
SWALSBERG FAMILY TRUST,

Plaintiff-Appellee,

vs.

DAVID EBY,

Defendant-Appellant.

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Case No. 20050040

BRIEF OF APPELLANT DAVID EBY

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
Judge Deno G. Himonas

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Stephen B. Mitchell (2278)
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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS
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ORAL ARGUMENT REQUESTED

PARTIES

Plaintiff: Venna M. Swalsberg Lange, Trustee of the Carl A. Swalsberg Family
Trust.

Defendants: David Eby; Geary Construction, Inc., a Utah corporation; and DOES
1-10.

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JURISDICTIONAL STATEMENT

David Eby's appeal is from a final order¹ entered by the Third Judicial District Court of Summit County, State of Utah. That court is a "court of record." UTAH CODE ANN. § 78-1-2.1(3) (1988). Therefore, the Utah Supreme Court has original appellate jurisdiction over the final order of that court. UTAH CODE ANN. § 78-2-2(3)(j) (2001); Utah R. Civ. P. 3 and 4. The Utah Supreme Court transferred this appeal to the Utah Court of Appeals which also has appellate jurisdiction over cases transferred from the Supreme Court. UTAH CODE ANN. § 78-2-2(4) (2001) and § 78-2a-3(2)(j) (2001). Therefore, jurisdiction is proper in this Court. In fact, this Court already has expressly ruled that it has jurisdiction over this appeal. *See Order Partially Dismissing Appeal And Denying Stay*, entered in this matter on April 5, 2005, page 2.

STATEMENT OF ISSUE AND STANDARD OF APPELLATE REVIEW

A. Issue

Did the trial court err in not granting Defendant David Eby relief, pursuant to Utah R. Civ. P. 60(b), from the judgment entered against him which did not give him the benefit of a credit for Plaintiff's settlement with Co-defendant Geary Construction, Inc. Plaintiff's settlement with Co-defendant Geary Construction, Inc. was for an amount far in excess of the amount of that Co-defendant's share of liability and even was in excess

¹This Court has ruled that an order denying relief under Utah R. Civ. P. 60(b) constitutes a final appealable order. *See Order Partially Dismissing Appeal And Denying Stay*, entered in this matter on April 5, 2005, page 2 (citing *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 970 (Utah Ct. App, 1989)).

of the Plaintiff's total damages as determined by the jury. UTAH CODE ANN. § 15-4-3 (1953) provides that the amount or value received by a tort obligee from one tort obligor "shall be credited" against the obligation of all co-obligors. Unless Section 15-4-3 is invalid, the trial court erred in not granting Defendant David Eby relief from a judgment that did not give him the credit mandated by that statute. In determining the validity of Section 15-4-3, this Court will have to decide if that statute was **implicitly** repealed by the enactment of UTAH CODE ANN. §§ 78-27-37 *et seq.* (1986, as amended).²

B. Standard of Review

Usually, a ruling on a motion for relief from judgment will not be disturbed absent an abuse of discretion. *Birch v. Birch*, 771 P.2d 1114, 1117 (Utah Ct. App. 1989). However, that is because of the factual nature of many of the reasons for such relief. Utah R. Civ. P. 60(b) (such fact intensive reasons include inadvertence, surprise, excusable neglect, newly discovered evidence that could not be discovered earlier, misrepresentation, misconduct, etc.). *E.g.*, *Birch*, 771 P.2d at 1117-18 (no abuse of discretion where divorce decree was based on the fact of the parties' stipulation). However, when the ruling results from a misinterpretation of law, the proper standard of review should be correction-of-error. *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994) ("the effect of a given set of facts is a question of law and, therefore, one on which an appellate court owes no deference to a trial court's determination"). In the case at bar, the trial court's ruling is predicated upon its interpretation of the law. The specific fact of

²These pertinent statutes are included in the Addendum.

Plaintiff's receipt in settlement from one tort obligor of more than the total damages the jury determined she sustained is not disputed. The trial court denied relief from the judgment which had provided no credit for the settlement only because the trial court decided that the statute requiring such a credit (UTAH CODE ANN. § 15-4-3) had been implicitly repealed by the enactment of UTAH CODE ANN. §§ 78-27-37 *et seq.* (1986, as amended). The correction-of-error standard applies to this case because the interpretation and application of a statute is a question of law. *Taylor v. Johnson*, 1999 UT 35, ¶6, 977 P.2d 479,480; *A.K. & R. Whipple Plumbing and Heating v. Aspen Construction*, 1999 UT App 87, ¶10, 977 P.2d 518, 521. *See also Jorgensen v. Aetna Casualty & Surety Co.*, 769 P.2d 809, 811 (Utah 1988) (the proper allocation of payments made to a judgment creditor is a question of law).

C. Preservation of Issue Below

This issue of a credit for the Geary Construction settlement was raised below at several times in different ways. It was raised first in Eby's Motion For Admission Of Evidence Regarding Remediation And, If Necessary, For Short Continuance Of Trial For Remediation To Be Completed. R. 777-789. As explained below, the trial court did not rule on this legal issue before trial. Consequently, the trial court was reminded of this issue after trial in Defendant David Eby's Objections To Plaintiff's Proposed Judgment. R. 1170-77. The issue was further briefed in Eby's Motion To Be Credited With Geary Construction, Inc.'s \$140,000 Settlement With Plaintiff. R. 1181-92, 1238-42. When the judgment was entered before a ruling on this legal issue, it was raised again in Eby's

Motion For Relief From Judgment. R. 1193-1209, 1229-34.

DETERMINATIVE STATUTE

The validity of the following statute is determinative of the issue before this Court on appeal:

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

UTAH CODE ANN. § 15-4-3 (1953) (emphasis added).

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition Below

Plaintiff/Appellee, Venna M. Swalsberg Lange (“Lange”), is the trustee for the Carl A. Swalsberg Family Trust which owns real property near the National Forest in Summit County. R. 2; Plaintiff’s Exhibits P-21 and P-27. For at least fifty years that property has had a narrow dirt road extending through it for foot and vehicular traffic. R. 3. Defendant/Appellant, David Eby (“Eby”), also owns real property in Summit County further up the canyon from Lange’s property, and the dirt road through Lange’s property is, and has been used by Eby and the general public to get to and from their property and for access to National Forest lands. R. 3, 1326 (Tr. 18-41, 179-85); Defendant’s Exhibits 102 and 103.

Lange brought trespass and negligence claims for damage to her real property. R.

1-8; 1130-41. This resulted from Eby contracting with Co-defendant Geary Construction, Inc. (“Geary”) to have Geary widen the subject road in certain especially narrow locations, including some locations where that road went through Lange’s property. In those places, the road was widened from 10 feet to approximately 16 feet so that two vehicles safely could pass each other without one or the other backing up. R. 3, 1326; Plaintiff’s Exhibits P-3 and P-4. Eby had the work done by Geary, believing he had Summit County’s written permission to do so. R. 33-35, 45, 1326; Defendant’s Exhibits 100 and 101. Summit County was not brought into the suit by Lange, but Geary was a party and agreed just before trial to settle with Lange for what was determined to be a total value of \$140,000. R. 1083-84.³ Although Eby was the only defendant at trial, the question of the apportionate share of fault of both Summit County and Geary also was submitted to the jury. R. 1144-45.

Upon learning of the settlement, Eby filed a pretrial motion to be able to inform the jury of the remedial work Geary agreed to do on Lange’s property as part of the settlement, so that the jury would not award damages for remedial work that, pursuant to Geary’s agreement, no longer needed to be done. R. 777-89, 1046-49. The trial court denied Eby’s request and stated in its pretrial ruling: “If a verdict is rendered against Eby, the court will invite further argument and briefing on whether whatever award plaintiff receives from the jury as a verdict against Eby ought to be reduced by whatever is

³The amount of the value of this settlement, \$140,000, was obtained from DeAnn Geary during trial, out of the presence of the jury. It consisted of the payment of money and remedial landscaping work. R. 1081; Defendant’s Exhibit 104. This amount has not been disputed by Lange.

received from Geary in settlement The court believes that if a verdict is rendered against Eby the amount of that award can later be compared by the court with the settlement, including the value of remediation by Geary, to determine if indeed plaintiff is being compensated twice.” The trial court expressly ruled that it was not at that time ruling on the legal issue of whether Lange could recover more than Lange’s total damages as a result of the settlement. R. 1048-49.

During trial, the trial court ruled as a matter of law that the subject road was a public road. R. 1136. In making that ruling, the trial court further ruled that the width of that public road was “approximately ten (10) feet” in accordance with its historical use. *Id.* The trial court rejected Eby’s position that roads that become public through public use are deemed to be as wide as “reasonable and necessary to ensure safe travel,” per Utah Code § 72-5-104. R. 884-86. Indeed, Eby argued that in Summit County, the “minimum right-of-way width for a public road shall be sixty (60) feet.” Eastern Summit County Development Code, Chapter 6, § 6.60(B)(3). R. 605, 885. Nevertheless, the trial court allowed Lange to recover damages for any destruction of trees and shrubbery on her property that was outside that narrow road width of ten feet. R. 1136.

In this generous measure of damage context, the jury returned a special verdict that found Lange to have suffered only \$15,000 for damages to her trees and \$20,000 for other damages due to trespass, and an additional \$20,000 due to negligence. R. 1168. Eby was found to have been 85% at fault, with Geary 5% and Summit County 10%. R. 1169.⁴

⁴Lange also was awarded \$1,000 in punitive damages.

That verdict was entered July 8, 2004. R. 1157.

As contemplated by the trial court's pretrial ruling described above, Eby immediately began to prepare his motion on the issue of the credit to which he believed he was entitled because of the \$140,000 settlement Lange received from Geary.

On July 12, 2004, four days after the verdict, Lange filed and served her proposed form of judgment. R. 1165. **The trial court entered it the next day on July 13, 2004.** R. 1163-64. Not knowing the judgment had been entered by the trial court, Eby filed on July 15, 2004 his Objections To Plaintiff's Proposed Judgment. R. 1170-75. Therein Eby took the unequivocal position that "no judgment should be entered until the issues raised by these objections, and the issue of the credit to which Eby is entitled from Geary's settlement with Lange, is ruled upon by the Court." R. 1170.

Believing his objections to the proposed judgment had yet to be considered, and not knowing that the judgment had been entered, Eby then filed in support of his objections Eby's Motion To Be Credited With Geary Construction, Inc.'s \$140,000 Settlement With Plaintiff, and supporting memorandum. R. 1181-92. The issue of the credit to be given Eby is the issue the trial court previously ruled that it would consider should a verdict be entered against Eby. R. 1048-49. This motion was mailed to the trial court for filing on July 16, 2004. R. 1182, 1191.

When Eby's counsel discovered on July 20, 2004 that Lange's proposed judgment in fact had been entered by the trial court before it even received Eby's objections and before it had more fully considered the issue of the credit, Eby immediately filed Eby's

Motion For Relief From Judgment. R. 1193-1209. That motion is dated and was mailed to the trial court for filing, and served on Lange, on July 20, 2004, only one week after the entry of the judgment which Eby sought through this latest motion to have vacated. *Id.* This motion was brought in accordance with Utah R. Civ. P. 60(b). This rule, Eby argued, should be applied to grant Eby relief from the judgment because the trial court had not applied the law pertaining to Eby's right to be credited with the \$140,000 settlement Lange received from Geary, and had not even allowed Eby to be heard on this issue. R. 1198-99.

On December 12, 2004, the trial court heard oral argument and ruled from the bench, denying Eby's Motion to be Credited with the Geary Settlement and the subsequent Motion for Relief from Judgment relating to the same issue. The trial court concluded that Eby was not entitled by law to be credited with any portion of Geary's \$140,000 settlement payment to Lange, adopting Lange's argument that the statutory provision that requires this credit was implicitly repealed by the Liability Reform Act. R. 1278-82. Lange's counsel was to submit proposed written orders. R. 1281. Because Utah R. Civ. P. 7(f)(2) requires proposed written orders to be submitted within 15 days after the Court's decision, Lange's counsel had until December 21, 2004 to submit proposed written orders to Eby. **That was not done.**

When the mandatory deadline for the submission of proposed written orders passed, Eby filed his Notice Of Appeal on December 27, 2004. R. 1287-89. Written orders finally were submitted to Eby and were entered by the trial court on January 6,

2005. R.1314-19. Eby now submits this brief on appeal in support of why the trial court should be reversed in its ruling as expressed in its Order Denying Eby's Motion For Relief From Judgment. That order should be reversed, and as a consequence the judgment should be vacated, for the reasons discussed herein.

This appeal does not include, because of this Court's April 5, 2005 Order Partially Denying Appeal And Denying Stay, a request that the trial court be reversed for its denial of Eby's motion to alter or amend the judgment. This appeal now only includes the request that the trial court be reversed in its denial of Eby's motion for relief from the judgment. The first motion was in the nature of a Utah R. Civ. P. 52(b) or 59(e) motion, and the latter a Utah R. Civ. P. 60(b) motion. Although the substance of both motions pertain to the credit to which Eby is entitled by law, this Court can fully rule on this issue and grant Eby relief from the judgment because of the trial court's denial of Eby's Rule 60(b) motion, the order that still is at issue in this appeal. The law requires Eby to be credited with Geary's settlement payment to Lange, and the judgment did not do this. The judgment can be ruled by this Court to be a judicial mistake, and that it has been satisfied, discharged or is void as a matter of law. This Court can also grant relief from this judgment for the reason that it is not equitable that it should have prospective application and for the miscellaneous reasons of subsection (6) of Rule 60(b).

Eby herein discusses the difference in his two motions and the trial court's two orders because of this Court's April 5, 2005 ruling wherein it denied having jurisdiction over the earlier, Utah R. Civ. P. 52(b) or 59(e), motion and order because Eby's Notice Of

Appeal was filed after the oral ruling but before the entry of the written order. This Court's ruling is based upon a technical reading of Utah R. App. P. 4(b) and (c) that does not extend the common sense provision of Rule 4(c) to motions filed pursuant to Rule 4(b). Eby proceeds to prosecute this appeal on the basis of what this Court expressly has allowed, *i.e.*, a review of "the grounds for denial of the rule 60(b) motion." See Order Partially Dismissing Appeal And Denying Stay, page 2.

B. Statement of Facts

Geary was a named defendant who was alleged to be a co-obligor with Eby for the same real property damage Lange claimed to suffer. All of Lange's tort claims for relief were alleged against both Eby and Geary. R. 1-8. In her prayer, Lange sought the same type and amount of damages from both Eby and Geary. R. 7. There never has been any claim or evidence that a surety relationship existed between Geary and Eby. Geary, on its own, settled before trial for a total value to Lange of \$140,000. R. 1083-84.⁵ The jury was informed that Geary settled but was not informed of the amount of remuneration received by Lange from Geary, including what was received through remedial work. R. 1145. Therefore, the jury determined the full extent of Lange's alleged damages, without knowing about and without making any reduction for any payment from or remedial work by Geary. The jury found that both Eby and Geary were at fault for Lange's real property damage and that the total amount she was entitled to receive to make her whole amounted to no more than \$57,000. R. 1155-56. On that verdict, a judgment was entered for Lange

⁵See *supra* note 3.

and against Eby for \$47,750 more than what Lange already had received from Geary. R. 1163-64. If Lange is allowed to recover from Eby on this judgment, she will receive a total of \$187,750, to compensate her for a judicially determined loss of \$57,000. She will receive a windfall of over 300%.

SUMMARY OF ARGUMENT

The trial court erred in denying Eby a credit for the Geary settlement that was above Geary's share of fault and even above Lange's total damages. There are good policy reasons for allowing the credit. Significantly, the failure to allow a credit promotes litigation without risk, or in other words a form of gambling that results in recoveries that exceed the amount of damages incurred. The law should remain what it always has been; it should limit plaintiffs to one recovery for their damages. The fact that some tort law has changed through tort reform has no applicability to the separate and independent "one recovery rule."

The one recovery rule is codified and that legislation has not been repealed by subsequent tort reform. Neither should the one recovery rule be deemed implicitly repealed. The rules of statutory construction require there to be irreconcilable conflicts between a recent statute and a former statute before there can be an implicit repeal. Statutes must be construed to be in harmony with each other. The more recent tort reform legislation is not in conflict, to any extent, with the codified one recovery rule. This Court should reject Lange's invitation, accepted by the trial court, to judicially legislate new law in Utah.

Since the trial court erroneously rejected statutory law, this Court should correct that legal error. That legal error is a judicial mistake. It resulted in the erroneous conclusion that Eby was not entitled to a credit and, therefore, that the judgment was not satisfied. It resulted in the erroneous legal conclusion that the judgment should be enforced thereby giving it prospective application until paid by Eby. It resulted in the grave injustice that Eby continues to be subject to a judgment that the legislature intended the law to disallow.

The trial court never should have entered the judgment in the first place. Doing so was legal error because it was entered before even allowing Eby time to object. It was entered despite an earlier ruling that the legal issue of the credit was to be resolved before any judgment on a verdict against Eby would be entered. It was entered before allowing the legal issue of the effect of the credit to be fully addressed. Despite these judicial mistakes and equitable reasons for relief, the trial court refused to grant Eby relief from the judgment.

This Court should reverse the erroneous ruling of the trial court and grant Eby complete relief from the judgment as a matter of law.

Should the judgment be affirmed, plaintiff will receive a windfall of over 300 percent of what the jury found to be her damages. She also will have the benefit of a wider, and safer, road. This Court should assure that justice and equity is applied in this case.

ARGUMENT

The trial court erred in denying Eby's Rule 60(b) motion. The trial court erroneously concluded that Eby was not legally entitled to be credited with any portion of Geary's \$140,000 settlement with Lange which Geary provided to compensate Lange for her real property damage. The underlying legal conclusion for the trial court's ruling should be corrected, and this Court now should assure that Eby is given the benefit of the credit required by law.

Utah law unequivocally requires Eby to be credited with Geary's settlement. UTAH CODE ANN. § 15-4-3 (1953). In this case, the settlement more than compensates Lange for all the damages the jury found she incurred. Certainly, Lange is entitled to the benefit of the favorable settlement she reached with Geary. Eby is not asking that she refund any money to Geary. However, if she had negotiated an unfavorably low settlement with Geary, the judgment against Eby would have been available to compensate her completely for damages attributable to Eby. Neither justice nor equity should allow Lange to both retain the value of a settlement over and above her actual total damages and then be entitled to a further windfall on top of that. Such a rule promotes greed and litigation by encouraging plaintiffs who have been fully compensated through settlements with some but not all defendants to seek more than they deserve from the non-settling defendants. Our laws should seek to resolve litigation, not promote it, and to provide a reasonable means for plaintiffs to be made whole, not to provide a risk free opportunity for plaintiffs to receive windfalls far above their actual damages.

If Lange is allowed to recover an additional \$47,750 from Eby on top of the \$140,000 previously received from Geary, she would receive a total of \$187,750 or over three times the actual damages the jury found she sustained. Even vacating the judgment because of the credit will result in Lange receiving two and one-half times her total damages just from the settlement. Lange has been made more than whole by the party who did the actual work to widen the road. She entered into a settlement that made her more than whole before going to trial against Eby. Yet, she still demands that Eby pay her “damages,” only reduced to his proportionate share of fault, despite her having received from Geary much more than the total amount of her damages. The law should not, and indeed does not, turn courts into casinos where a fully compensated plaintiff can take a risk free throw of the dice for a windfall verdict.

Courts exist to allow a peaceful way for citizens who are injured by others’ violation of the law to receive compensation for those injuries. The law previously allowed injured plaintiffs, who had proven multiple defendants to be liable under the law, to recover the full amount of recoverable damages from any single defendant or all defendants, jointly or severally. The defendants then had rights to seek contribution or indemnity from each other. Except for unusual circumstances, such as for punitive damages, the law never allowed an injured plaintiff to recover more than the amount needed to make that plaintiff whole.

In order to overcome the harsh effect of one defendant being forced through a judgment to pay a plaintiff for damages caused in part by other defendants, the law was

statutorily changed to what is called “comparative fault.” UTAH CODE ANN. § 78-27-37 *et seq.* (1986, as amended) (Utah Liability Reform Act or “LRA”). *See Nelson v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints*, 935 P.2d 512, 517 (Utah 1997). Now, plaintiffs only can recover from defendants the portion of damages corresponding to each defendant’s proportionate share of fault. **The law did not change to allow plaintiffs to recover more than what is needed to make them whole.** The development in the law through the LRA from joint and several liability to only several liability limited to proportionate share of fault does not evidence a paradigm shift from providing a means to make plaintiffs whole to providing a means to make plaintiffs richer than what is needed to be made whole. If anything, the statutory change in the law evidences the acceptance of a policy that makes it more difficult for plaintiffs to be fully compensated in favor of protecting defendants from liability for what they did not cause.⁶

Regardless of whether a plaintiff is compensated from one of multiple defendants that were jointly and severally liable or from one of multiple defendants only severally liable (to the extent of that defendant’s proportionate share of fault), the universal rule in Utah remains that a plaintiff may not recover twice for one wrong. *Green v. Lang Co.*, 206 P.2d 626, 627-28 (Utah 1949) (“It is well established that there can be but one satisfaction for injuries sustained in one wrong.”); *Dawson v. Bd. of Ed. of Weber County School Dist.*, 222 P.2d 590, 592 (Utah 1950) (same). *See also Brigham City Sand &*

⁶In general, plaintiffs no longer will be compensated for the wrongs of defendants who cannot pay their share of the damages.

Gravel v. Machinery Center, Inc., 613 P.2d 510, 511 (Utah 1980) (having elected to settle with some defendants for the value of the lost property, the dismissal of the plaintiff's claim against the non-settling defendant for the return of the property was affirmed." The doctrine of election of remedies, which prevents a party from recovering more than once for the same loss, is based upon principles of equity and justice."); *Western Steel Co. v. Travel Batcher Corp.*, 663 P.2d 82, 84 (Utah 1983) ("The law is well settled that an obligee is entitled to be paid in full but cannot exact double recovery To the extent that the release of claims satisfied the deficiency owing, it should be credited to all defendants . . . as required by U.C.A., 1953, § 15-4-3 which is part of the Uniform Joint Obligations Act adopted by our legislature in 1929."). Because of this "one recovery rule," anything received by Lange as compensation for her same damages inures to the benefit of all defendants, including Eby, and operates as a "payment pro tanto." See *Green*, 206 P.2d at 627.

Obviously, this "pro tanto ("as far as it goes") application of a compensatory payment to a plaintiff was applied to all defendants equally under the joint and several liability rule. Under the comparative fault rule, a settlement payment is applied first as a credit against the percentage of the damages attributable to the fault of the defendant *making the payment with only any excess being applied to the remaining defendants*. In either case, no co-defendant would have to pay what already has been paid to compensate the plaintiff, but non-settling defendants would be liable only for that part of their

⁷Black's Law Dictionary, 1100 (5th ed. 1979).

obligation for which the plaintiff has not been compensated.

The one recovery rule is separately codified. UTAH CODE ANN. § 15-4-3 (1953) (Uniform Joint Obligations Act or “JOA”). The one recovery rule, as legislatively mandated in Utah Code Section 15-4-3, has been judicially upheld in the context of the law as it existed before the LRA. The mere enactment of the LRA provides no reason now to reject that rule and implicitly repeal that statute. The LRA did not expressly abolish and did not even address the one recovery rule. There is no reason for this Court to depart from pre-LRA precedent. Section 15-4-3 of the JOA remains good law and must be enforced by this Court.

It first is necessary to review the fundamental principles of statutory construction before analyzing Lange’s contention that the LRA implicitly superceded and repealed Section 15-4-3 of the JOA.

The “primary objective in construing enactments is to give effect to the legislature’s intent.” *Gohler v. Wood*, 919 P.2d 561, 562 (Utah 1996). “The plain language of a statute is generally the best indication of that intent.” *Lyon v. Burton*, 2000 UT 19, ¶ 17, 5 P.3d 616, 622. “Therefore, ‘where the statutory language is plain and unambiguous, we do not look beyond the language’s plain meaning to divine legislative intent.’” *Id.* (citing *Horton v. Royal Order of the Sun*, 821 P.2d 1167, 1168 (Utah 1991).

Further with respect to legislative intent, statutes that have not been expressly repealed are to be construed to be in harmony with all other statutes so that every provision of all statutes, that are not in irreconcilable conflict, are given effect. The Utah

Supreme Court cited approvingly from 2A C. Sands, *Sutherland Statutory Construction*, § 51.02, at 290 (4th ed. 1973), as follows:

In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together.

Provisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purposes. Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them.

Statutes in pari materia, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature.

Murray City v. Hall, 663 P.2d 1314, 1318 (Utah 1983). “It is elementary that the repeal or over-riding of an existing law by implication is not favored and only occurs if the later statute is wholly irreconcilable with the former.” *Moss v. Board of Com’rs of Salt Lake City*, 261 P.2d 961, 965 (Utah 1953). “It is a rule of statutory construction that where there are two or more statutes dealing with the same subject matter they will be construed so as to maintain the integrity of both. Repeal by implication is not effected unless the terms of the later enacted law are irreconcilable with the former.” *State v. Judd*, 27 Utah 2d 79, 493 P.2d 604, 606 (1972).

Turning to the JOA, the legislature stated and, therefore, intended that “[t]he

amount or value of any consideration received by the obligee from one or more of several obligors . . . in whole or in partial satisfaction of their obligations **shall be credited** to the extent of the amount received on the obligation of **all** co-obligors . . .” UTAH CODE ANN. § 15-4-3 (emphasis added). “‘Obligee’ includes . . . a person having a right based on a tort.” Section 15-4-1(2). “‘Obligor’ includes . . . a person liable for a tort.” Section 15-4-1(3). “‘Several obligors’ means obligors severally bound for the same performance.” Section 15-4-1(4). “‘Severally’ is defined in Black’s Law Dictionary (5th ed. 1979) as follows: ‘Separate; individual; independent; severable. In this sense, the word is distinguished from ‘joint.’” *Id.* at p. 1232. The credit required by Section 15-4-3 clearly is intended to be applied in this case to the alleged tort obligations shared by Eby and Geary for the same wrong and compensating Lange for the same injury.

Eby and Geary were alleged by Lange and found by the jury to both be at fault for the same loss and destruction of vegetation on Lange’s property. Under the LRA, they are jointly liable but not jointly bound as to the amount of their liability because they each can be liable for Lange’s total damages only to the extent of their proportionate share of fault. The particular provisions of the JOA applicable here do not conflict with the LRA. Rather the JOA expressly addresses several liability for common tort damages, as now required by the LRA. The JOA and LRA can and must be harmonized to accomplish the clearly stated legislative intent of both acts. The JOA must not be held to be implicitly superceded by the LRA. That ruling would ignore legislative intent contrary to the powers of the Court.

Nowhere in the LRA, or anywhere else, is the credit intended by Section 15-4-3 expressly repealed. In compliance with proper statutory construction, this section cannot be repealed by implication. In addition, the LRA itself stated, and at a minimum implies, there is not a repeal of the JOA. In Section 78-27-43, the legislature stated that nothing in the LRA “affects or impairs . . . statutory immunity from liability.” Section 15-4-3 certainly is a statute that renders defendants immune from liability should a co-defendant pay all of the plaintiff’s tort damages. *Nelson v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints*, 935 P.2d 512, 514-15 (Utah 1997) (if a jury finds damages to be less than what a settling defendant paid, the non-settling defendant will owe nothing, regardless of its liability, and in that sense is immune from liability).

The *Nelson* case, the principle Utah case relied upon by Lange and the trial court, exemplifies proper statutory construction in affirming that Section 15-4-3 of the JOA is not repealed by the LRA. In *Nelson*, personal injury tort damages were claimed against two defendants. Those defendants also were alleged to be jointly liable under the theory of respondeat superior, one defendant (the Church employer) being vicariously liable for the conduct of the other (the employee). The employee settled and the agreement stated that the plaintiff did not intend to release the non-settling Church that was claimed to be vicariously liable for the conduct of the settling defendant, and plaintiff reserved all claims against that remaining defendant. *Id.* at 512-13. The Church moved for summary judgment claiming the release of the tortfeasor employee released the vicariously liable employer regardless of the reservation of rights in the settlement agreement. *Id.* at 513-

14. Both parties relied on their interpretation of the LRA.

The Utah Supreme Court, however, turned to the JOA to resolve the dispute. In fact, the court expressly ruled that Section 15-4-4, which allows a reservation of rights, governed and thus the plaintiff could pursue his claims against the remaining vicariously liable defendant. Acknowledging that in an earlier decision (*Krukiewicz v. Draper*, 725 P.2d 1349, 1350 (Utah 1986)) the court ruled that the predecessor statute to the LRA, Section 78-27-42 of the Comparative Negligence Act, repealed Section 15-4-4 of the JOA, the court explained that now, to the extent the LRA addresses “regular co-defendants,” it too will repeal Section 15-4-4 but only to that limited extent.⁸ *Id.* at 514 n.3. The court stated that “since the LRA does not address vicariously (legally) liable parties, Section 15-4-4 now applies to those parties.” *Id.* at 514 n.3. Thus, the lesson from Nelson is that the LRA did not implicitly repeal the JOA *in toto*, but instead if there is a repeal it is to be narrowly limited to only irreconcilable provisions.

⁸“Regular co-defendants” was stated to mean those who are liable because of fault. *Id.* at 514 n. 3. The Comparative Negligence Act and LRA, which had similar provisions, both provide that a release does not discharge any other defendant unless the release so provides. See UTAH CODE ANN. 78-27-42 (“**Release to one defendant does not discharge other defendants.** A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.” Enacted by Chapter 199, 1986 General Session). Section 15-4-4 of the JOA was worded oppositely to require the release to expressly reserve the right to go against the non-settling defendant to avoid having that defendant discharged. The requirement of the LRA and of the JOA were incompatible. Thus, because the LRA only addresses the liability of defendants who bear fault, the Court applied the JOA in the context of that case where the plaintiff expressly reserved the right to continue the action against the non-settlement vicariously liable (factually fault free but legally liable defendant). The court’s reasoning had nothing to do with jointly versus severally liable defendants who each were at fault.

There is no provision in the LRA that addresses Section 15-4-3, the section at issue here. There is no irreconcilable conflict in provisions. Indeed, even *Nelson* expressly affirms the applicability of Section 15-4-3 in the context of that post-LRA case. The *Nelson* court stated: “Although plaintiff still has a claim against the [non-settling defendant], plaintiff may not recover a windfall by receiving more than his actual damages [U]nder Section 15-4-3 of the Joint Obligation Act, any amount received by one obligor is to be credited against any amount owed by the rest If the jury finds damages in an amount less than \$100,000 [the settlement amount paid by the settling defendant], the Church will owe nothing, regardless of liability.” *Id.* at 514-15. The fact that the defendants were alleged to be jointly liable under respondeat superior had nothing to do with the Court’s statements about the applicability of Section 15-4-3 of the JOA. There was no hint that the LRA would conflict with and implicitly repeal section 15-4-3 in cases involving only severally responsible defendants. To the contrary, *Nelson* leads to only one reasonable conclusion – Section 15-4-3 of the JOA is good law in the current LRA era.

Eby anticipates that Lange will rely on foreign cases having no precedential value, as she did below, in arguing generally that the mere existence of the LRA gives this Court the legislative power to repeal a statute. Those cases should be rejected. This Court should follow Utah case authority and statutory law on this issue. This Court should not accept Lange’s invitation to judicially legislate a departure from existing Utah law as it has been articulated by our state legislature.

The cases from foreign jurisdictions also are distinguishable. For example, in *Gemstar Ltd. v. Ernst & Young*, 917 P.2d 222 (Ariz. 1996), cited below by Lange, the court did not construe the effect of a statute like Utah's Section 15-4-3 under subsequent tort reform legislation. It merely considered three policy reasons for why it believed a credit for a prior "settlement would undermine the policy justifications underlying several only liability." *Id.* at 237. The court never identified those underlying policy justifications for several liability, and the policies it came up with to justify its ruling have nothing to do with several only liability. First, that court reasoned, the plaintiff should have the benefit of his negotiated settlement. Second, it reasoned that a credit discourages settlement by other defendants. Third, it reasoned that settlement dollars are only a contractual estimate of liability. Those reasons do not justify denying a credit for only severally liable defendants in the face of a statute that clearly states such credits "shall be" made.⁹

Despite the *Gemstar* court's personal justification for its own agenda, a settling plaintiff always will retain the benefit of his or her bargain even if a credit is required. Nothing will have to be paid back by the plaintiff. The bargain the plaintiff accepted does not disappear where there is several liability.¹⁰ Also, it makes no sense to suggest that

⁹Interestingly, a subsequent court has pointed out that the *Gemstar* case is limited to where a plaintiff receives a partial settlement, not a full settlement that compensates the plaintiff for all damages as is the case in the instant action. *Wright v. Abbot Lab.*, 62 F. Supp.2d 1186, 1199 n.8 (D. Kan. 1999).

¹⁰At most, all that is different is that the plaintiff will have to consider before reaching a settlement the effect of the comparative fault law that may result in that plaintiff not being fully compensated should the settlement amount be less than that

only non-settling severally liable defendants will be discouraged from settling. If severally liable defendants are now discouraged from settling because of Section 15-4-3, so were jointly liable defendants under the law before the enactment of the LRA. In reality, allowing a credit merely precludes plaintiffs from being able to extort settlements from defendants who realize the particular plaintiff already has been sufficiently compensated. Allowing a credit will resolve litigation by encouraging plaintiffs to dismiss claims after being fully compensated. Disallowing a credit promotes frivolous or greed driven litigation by plaintiffs who no longer have suffered any loss. Further, settlements are entered and monies paid to compensate injured plaintiffs. They are a compromise that results from many factors, not just the settling defendant's estimate of his or her own liability. The factors include the extent of injury and damages suffered. Settlement amounts are far from an exact science. The goal is to offer sufficient compensation to be released from further litigation. This truth equally pertains to both severally liable defendants and jointly liable defendants.

As illustrated by this discussion, courts should *not* attempt to legislate and this Court should *not* pay any attention to foreign courts that have gone down that path. If the law is to be changed in Utah, it should be changed by the Utah State Legislature, after full

settling defendant's share of fault. Similar considerations existed under joint and several liability. For example, a plaintiff has to consider the fact that non-settling defendants may not be able to pay any judgment, again leaving the plaintiff less than fully compensated should the settlement amount be less than the amount of damages determined by the jury. Just because there may be different factors to consider in deciding whether to agree to the settlement, there is no difference in the nature of the ultimate bargain agreed to by the plaintiff. Settling plaintiffs always will retain the benefit of whatever bargains they reach.

consideration of all policy issues.

This Court now should apply Utah law to the specific facts at hand and vacate the current judgment. Rule 60(b), of the Utah Rules of Civil Procedure, expressly grants authority to “relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake . . . ; (4) the judgment is void; (5) the judgment has been satisfied . . . or discharged . . . or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.” Because the trial court reached an incorrect conclusion of law, *i.e.*, refused to apply a statute which expressly requires that Eby be credited with Geary’s settlement, the trial court erroneously refused to grant relief under this rule. This Court should reverse that ruling and grant Eby relief from the judgment.

The trial court committed a judicial mistake. A judicial mistake, for purposes of Rule 60(b), is one that pertains to the rendering of the judgment; it is a judicial error as opposed to a clerical error. *Richards v. Siddoway*, 24 Utah 2d 314, 471 P.2d 143, 145 (1970); *Atkin v. Parrish Oil Tools, Inc.*, 680 P.2d 401, 402 (Utah 1984). In this case, the trial court signed and entered the judgment immediately upon receipt of it and before Eby could object to it. The form of judgment should have been sent to Eby for review and the opportunity to object before it was even sent to the trial court. Moreover, the trial court should have known Eby was given no opportunity to object because the judgment was submitted and signed less than five week days after the verdict was rendered. *See* Utah R. Civ. P. 7(f)(2).

The trial court had previously ruled that it would consider the legal issue of the credit should a verdict be entered against Eby. It was a judicial mistake for the trial court to enter a judgment before considering and ruling on the legal issue of the credit and to do so without allowing Eby an opportunity to remind the trial court of its earlier decision to defer this ruling. Indeed, it was misleading for the trial court to defer a ruling before and during trial and tell Eby that he could be heard on this issue after trial and then rule contrary to Eby's interest without even giving him a chance to object. Such conduct by the trial court should constitute an abuse of discretion if not legal error, and Eby should be granted relief from the judgment erroneously entered against him.

Most importantly, the judgment resulted from a mistake because the trial court ignored and acted directly contrary to Utah law in failing to take into account a credit for the settlement amount in the judgment it entered. Section 15-4-3 mandates trial courts to credit settlement amounts against judgments. The trial court clearly did not do this and the Rule 60(b) motion gave the trial court the opportunity to grant Eby relief from this judicial mistake.

In addition to the judgment being the result of a mistake, it has been satisfied, discharged and rendered void through the payment and remedial work of Geary. Because *Lange* has been fully (in fact more than fully) compensated, it is not equitable that the judgment have prospective application against Eby. It should not be allowed to be enforced (prospective application). It should be vacated because *Lange* is not allowed by Utah law to recover the additional amount of the judgment on top of what she already has

received. The trial court has no discretion to refuse to vacate a judgment that more than compensates Lange for the total damages she was awarded by the jury. It is an abuse of the trial court's discretion and a legal error not to have granted Eby relief from that judgment in order to correctly comply with the law that entitles Eby to be credited with the overpayment Geary made to Lange.

Eby did everything he could to get the trial court to comply with the law and avoid allowing Lange a double recovery. He sought before trial to be allowed to tell the jury the truth about the remedial work Geary had agreed to do. The trial court decided to solve that issue by waiting to see if a verdict was entered against Eby and then to determine how to avoid a double recovery. But after the verdict, the trial court nevertheless entered a judgment that provided a double recovery before Eby even had a chance to oppose it. Thereafter, the trial court denied Eby's Motion for Relief from that Judgment. It is incumbent upon this Court to correct the legal errors below and now grant Eby relief from the improperly entered and legally satisfied judgment. This Court should enforce in the context of this case the rule of law that plaintiffs are entitled to one recovery only. The trial court's order should be reversed and the judgment accordingly vacated.

CONCLUSION

Eby respectfully requests that this Court reverse the Order Denying Eby's Motion For Relief From Judgment. That order was wrongfully entered upon an incorrect interpretation of the law pertaining to the one recovery rule as codified in Utah Code

Section 15-4-3. In compliance with the one recovery rule and pursuant to the removal of the trial court's order, it is further requested that the judgment against Eby be vacated.


Eby also requests his costs on appeal.

DATED this 6th day of July, 2005.

BERMAN & SAVAGE, P.C.

E. Scott Savage

Casey K. McGarvey


Attorneys for David Eby

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2005, I caused true and correct copies of the within and foregoing **BRIEF OF APPELLANT DAVID EBY** to be mailed, postage prepaid, to the following:

Richard D. Burbidge
Stephen B. Mitchell
Jefferson W. Gross
Jason D. Boren
J. Ryan Mitchell
Burbidge and Mitchell
215 South State Street, Suite 920
Salt Lake City, Utah 84111

A handwritten signature in black ink, reading "Daniel M. Lee". The signature is written in a cursive style with a horizontal line underneath.

ADDENDUM

1. UTAH CODE ANN. § 15-4-3 (1953)
2. UTAH CODE ANN. §§ 78-27-37 to 43 (1986) as amended)

Tab 1

15-4-3. Payments by co-obligor.

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

Tab 2

78-27-37. Definitions.

As used in Sections 78-27-37 through Section 78-27-43:

- (1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.
- (2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.
- (3) "Person immune from suit" means:
 - (a) an employer immune from suit under Title 34A, Chapter 2, Workers' Compensation Act, or Chapter 3, Utah Occupational Disease Act; and
 - (b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30d, Governmental Immunity Act of Utah.
- (4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

78-27-38. Comparative negligence.

- (1) The fault of a person seeking recovery may not alone bar recovery by that person.
- (2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).
- (3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.
- (4) (a) The fact finder may, and when requested by a party shall, allocate the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78-27-41(4) for whom there is a factual and legal basis to allocate fault. In the case of a motor vehicle accident involving an unidentified motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony.
- (b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

78-27-39. Separate special verdicts on total damages and proportion of fault.

- (1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78-27-41(4) for whom there is a factual and legal basis to allocate fault.
- (2) (a) If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and

reallocate that percentage or proportion of fault to the other parties and those identified under Subsection **78-27-41(4)** for whom there is a factual and legal basis to allocate fault in proportion to the percentage or proportion of fault initially attributed to each by the fact finder. After this reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated no fault.

(b) If the combined percentage or proportion of fault attributed to all persons immune from suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit may not be reduced under Subsection (2)(a).

(c) (i) The jury may not be advised of the effect of any reallocation under Subsection (2).

(ii) The jury may be advised that fault attributed to persons immune from suit may reduce the award of the person seeking recovery.

(3) A person immune from suit may not be held liable, based on the allocation of fault, in this or any other action.

78-27-40. Amount of liability limited to proportion of fault -- No contribution.

(1) Subject to Section **78-27-38**, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

(2) A defendant is not entitled to contribution from any other person.

(3) A defendant or person seeking recovery may not bring a civil action against any person immune from suit to recover damages resulting from the allocation of fault under Section **78-27-38**.

78-27-41. Joinder of defendants.

(1) A person seeking recovery, or any defendant who is a party to the litigation, may join as a defendant, in accordance with the Utah Rules of Civil Procedure, any person other than a person immune from suit alleged to have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

(2) A person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and all defendants. A person immune from suit is not subject to any liability, based on the allocation of fault, in this or any other action.

(3) (a) A person immune from suit may intervene as a party under Rule 24, Utah Rules of Civil Procedure, regardless of whether or not money damages are sought.

(b) A person immune from suit who intervenes in an action may not be held liable for any fault allocated to that person under Section **78-27-38**.

(4) Fault may not be allocated to a non-party unless a party timely files a description of the factual and legal basis on which fault can be allocated and information identifying the non-party, to the extent known or reasonably available to the party, including name, address, telephone number and employer. The party shall file the description and identifying information in accordance with Rule 9, Utah Rules of Civil Procedure or as ordered by the court but in no event later than 90 days before trial as provided in Rule 9, Utah Rules of Civil Procedure.

78-27-42. Release to one defendant does not discharge other defendants.

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

78-27-43. Effect on immunity, exclusive remedy, indemnity, contribution.

Nothing in Sections **78-27-37** through **78-27-42** affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Title 63, Chapter 30d, and the exclusive remedy provisions of Title 34A, Chapter 2, Workers' Compensation Act. Nothing in Sections **78-27-37** through **78-27-42** affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.