CHRISTIAN W. NELSON [5771]
BRANDON B. HOBBS [8206]
SEAN C. MILLER [12169]
NELSON NAEGLE, PLLC
222 South Main Street, Suite 1740
Salt Lake City, Utah 84101
Email: cnelson@nelsonnaegle.com
bhobbs@nelsonnaegle.com
smiller@nelsonnaegle.com
Telephone: 385-292-4400

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

Joshua and **Jamie Terry**, individually and as the heirs of and on behalf of the Estate of **Kycie Terry**, deceased, Plaintiffs, vs. **Southwest Emergency Physicians,** LLC and **Michael O. Tremea, MD,** Defendants.	**Defendants' Responses and Objections to Plaintiffs' "Combined Motion in Limine and Memorandum in Support Re: Trial Evidence and Commentary"** Case No. 160907576 Judge Keith Kelly Tier 3

Defendants Southwest Emergency Physicians, LLC, and Michael O. Tremea, MD, through their counsel of record, hereby respond to Plaintiffs' "Combined Motion in Limine and Memorandum in Support re: Trial Evidence and Commentary" as follows:

Objection

Defendants object to Plaintiffs' opening statement concerning 21 separate matters (essentially, 21 separate motions in limine) in which Plaintiffs contend that the matters are

generally "immaterial, irrelevant, inadmissible and/or prejudicial." Such a statement does not target specific evidence, does not cite case law or evidentiary rule, or simply re-iterates matters already addressed by the Utah Rules of Civil Procedure or the Utah Rules of Evidence. Further, Defendants cannot adequately respond to an overly broad, general statement regarding twenty-one separate matters. The court should disregard Plaintiffs' opening statement as an overly vague, unsupported argument.

With regard to the separately numbered matters Plaintiffs contend that Defendants should not disclose to the jury, Defendants respond as follows:

Plaintiffs' Matter No. 1

Defendants stipulate to matter No. 1 as it is stated so long as any accompanying order binds Plaintiffs to the same limitations.

Plaintiffs' Matter No. 2

Defendants stipulate to Plaintiffs' Matter No. 2 as it is stated, with exception that Defendants reserve the right to question any witness who advised or recommended to Plaintiffs that they retain counsel for purposes of this action.

Plaintiffs' Matter No. 3

Defendants stipulate to matter No. 3 as it is stated so long as any accompanying order binds Plaintiffs to the same limitations, i.e., referring to defense counsel's experience or specialization in personal injury or medical malpractice cases.

Plaintiffs' Matter No. 4

Defendants oppose Plaintiffs' motion in limine as to matter No. 4 to the extent it seeks to prohibit Defendants from presenting evidence or comment concerning witnesses Plaintiffs do not call to testify at trial. Plaintiffs bear the burden of proof at trial, not Defendants, and Defendants must be allowed to present evidence or comment on any lack of proof. Defendants must also be allowed to present evidence and comment to the jury concerning witnesses who are unavailable to testify or who lodge a successful objection to a subpoena to appear at trial, or whose testimony is presented by transcript. Prohibiting Defendants from commenting on the lack of merits of Plaintiffs' claims has no basis in law, would confuse and mislead the jury, and would significantly prejudice Defendants. *See* U.R.E. 403.

Plaintiffs' Matter No. 5

Defendants stipulate to matter No. 5 as it is stated so long as any accompanying order binds Plaintiffs to the same limitations.

Plaintiffs' Matter No. 6

Defendants stipulate to matter No. 6 as it is stated so long as any accompanying order binds Plaintiffs to the same limitations.

Plaintiffs' Matter No. 7

Defendants stipulate to matter No. 5 as it is stated with the exception that Defendants reserve the right to present evidence and comment on the fact that Plaintiffs have settled their claims against Defendant Intermountain Healthcare dba IHC Life Flight. *See Slusher v. Ospital*, 777 P.2d 437, 444 (Utah 1989) (holding that trial court did not err in disclosing existence and

basic content of settlement agreement with dismissed party unless such disclosure creates substantial danger of undue prejudice, of confusing issues, or misleading jury), attached as **Exhibit A**; *see also* Defendants' response to Plaintiffs' Matter Nos. 14, 15, *infra*.

Plaintiffs' Matter No. 9

Defendants, in general, agree that collateral sources should not be disclosed to the jury. Defendants assert that such a rule governs Plaintiffs as well as Defendants.

Defendants, however, reserve the right to include any and all available collateral sources, including but not limited to payments made for Plaintiffs' or Kycie Terry's benefit from charitable organizations, churches, insurance, and so on in post-verdict motions to the court, pursuant to Utah Code § 78B-3-405.

Plaintiffs' Matter No. 10

Defendants stipulate to matter No. 10 as it is stated.

Plaintiffs' Matter No. 11

Defendants stipulate to matter No. 11 as it is stated.

Plaintiffs' Matter No. 12

Defendants stipulate to matter No. 12, as it is stated, with exception that Defendants reserve the right for their counsel and witnesses to comment on the merits of this lawsuit, Plaintiffs' claims, and the merits of the testimony from Plaintiffs' fact and expert witnesses. Prohibiting Defendant from commenting on the merits of this action has no basis in law, would confuse and mislead the jury, and would significantly prejudice Defendants. *See* U.R.E. 403.

Plaintiffs' Matter No. 13

Defendants oppose Plaintiffs' motion in limine as to matter No. 13 to the extent it seeks to prohibit Defendants from presenting evidence, opinions, and comments about whether Defendants provided good medical care and that such care met the applicable standard of care are admissible and appropriate. Other than a cursory citation to Rules 401, 402, and 403, Plaintiffs have not shown that such comments and opinions are inadmissible or prejudicial. Moreover, prohibiting Defendants from commenting on the care at issue and the applicable standard of care has no basis in law, would confuse and mislead the jury, and would significantly prejudice Defendants. *See* U.R.E. 403.

Plaintiffs' Matter No. 14

Defendants oppose Plaintiffs' motion in limine as to matter No. 14 to the extent that it seeks to prohibit Defendants from presenting evidence, opinions, or comment to the jury concerning Plaintiffs' claims against Defendant Intermountain Healthcare dba IHC Life Flight ("Life Flight"). Defendants timely filed their notice of intent to allocate fault to Life Flight, and Defendants must be allowed to present evidence and argument in support of that allocation of fault, including those claims Plaintiffs initially made against Life Flight. Prohibiting Defendants from presenting evidence or comment to the jury concerning Plaintiffs' claims against Life Fight has no basis in law, would confuse and mislead the jury, and would significantly prejudice Defendants. *See* U.R.E. 403. Defendants, however, agree that no evidence or comment concerning claims unrelated to this lawsuit should be disclosed to the jury, including other claims against these Defendants.

Plaintiffs' Matter No. 15

Defendants oppose Plaintiffs' motion in limine as to matter No. 15 to the extent that it seeks to prohibit Defendants from presenting evidence, opinion, or comment to the jury concerning Plaintiffs' claims against and settlement with Defendant Intermountain Healthcare dba IHC Life Flight ("Life Flight"). Defendants are allowed to present evidence and comment about the fact and existence of the settlement agreement with Life Flight. *See Slusher v. Ospital*, 777 P.2d 437, 444 (Utah 1989) (holding that trial court did not err in disclosing existence and basic content of settlement agreement with dismissed party unless such disclosure creates substantial danger of undue prejudice, of confusing issues, or misleading jury), attached as **Exhibit A**. There is no, if little, danger of undue prejudice, of confusing the issues, or of misleading the jury by such a disclosure. Indeed, the danger of undue prejudice results if Defendants are *not* allowed to disclose the fact to the jury that Plaintiffs settled their claims against Life Flight. Without such a disclosure, jurors will be left wondering why Defendant Life Flight is not at trial, despite Defendants' allocation of fault to that party. Defendants must be allowed to comment on why Defendant Life Flight is not present, that Plaintiffs chose to dismiss Life Flight upon settling their claims, and that Life Flight agreed to the settlement.

The Supreme Court of Utah endorsed this position long ago in *Slusher* when it concluded that a trial court had erred in not disclosing a settlement agreement with dismissed parties to the jury:

> "The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. To prevent such deception, we are compelled to hold that such agreements must be produced for

> examination before trial, when sought to be discovered under appropriate rules of procedure."

Id. at 442 (quoting *Ward v. Ochoa*, 284 So.2d 385, 387 (Fla. 1973)).

The *Slusher* Court also cited decisions from Arizona and Minnesota, reasoning that public policy supported disclosure of settlement agreements to the jury because "secret agreements between a plaintiff and defendant which, by their very secretiveness, may tend to encourage wrongdoing and which, at the least, may tend to lessen the public's confidence in our adversary system." *See id.* (citing *Mustang Equip. v. Welch*, 115 Ariz. 206, 210–11, 564 P.2d 895, 900 (Ariz. 1977) Also, undisclosed settlement agreements can "affect the motivation of the parties and the credibility of the witnesses and therefore the settlement must be brought into the open so trial can proceed in a fair manner." *Id.* (citing *Johnson v. Moberg*, 334 N.W.2d 411, 415 (Minn. 1983)).

Plaintiffs cite *Child v. Gonda*, 972 P.2d 425 (Utah 1998), attached as **Exhibit B**, for the proposition that the *Slusher* Court gave its blessing to a trial court limiting evidence concerning a settlement with a dismissed defendant. Plaintiffs misread *Child.* In that case, the Supreme Court of Utah reviewed a trial court's instructions to the jury concerning a settlement with a third party, stating to the jury that the plaintiff and the defendant had "resolved their differences." *Id.* at 428. On appeal, the plaintiff argued that such a disclosure violated Rule 408 of the Utah Rules of Evidence. Further, the plaintiff urged the Supreme Court to expressly limit its rule of *Slusher v. Ospital*.

The holding in *Child* is not as expansive as Plaintiffs suggest. Rather, the *Child* Court merely found that, because the trial court had not disclosed to the jury an offer or acceptance of

any valuable consideration between the plaintiff and the third party, Rule 408, U.R.E., did not apply, and the instruction was proper. *See id.* at 429. Further, the *Child* Court found that its rule in *Slusher* was inapplicable because the trial court had not disclosed to the jury the settlement agreement or its basic content. *See id.* Consequently, the *Child* Court made no analysis of *Slusher* or its application.

Plaintiffs also argue that disclosure of the settlement agreement would cause the jury to conclude that Life Flight bears some fault because it entered into a settlement agreement with Plaintiffs. Again, Plaintiffs' argument misses the mark, and potentially would mislead the jury to assume that, although Life Flight was dismissed from the case, Life Flight did not enter into a settlement agreement. This is exactly the issue *Slusher* addressed. By settling with Defendant Life Flight, Plaintiffs bear the risk of the jury's assessment of fault to the settling party. It is inherently unfair to prohibit Defendants from presenting the fact of settlement with Life Flight after Plaintiffs received the benefit of that settlement. Indeed, Defendants intend to allocate fault to Life Flight at trial, and it is not error for the jury to learn of a settlement between Plaintiffs and Life Flight "so that trial can proceed in a fair manner." *Slusher*, 777 P.2d at 442.

Finally, Plaintiffs argue that, should the Court allow disclosure about Plaintiffs' settlement with Life Flight, that any such disclosure should come only through a limited jury instruction. Plaintiffs' argument makes no sense. Without evidence or comment during trial about the settlement agreement, there would be no need for any instruction about the settlement. In fact, Plaintiffs' own expert witnesses—in addition to Defendants' experts—have rendered opinions critical of Life Flight, and Defendants must be allowed to elicit those opinions.

Plaintiffs' Matter No. 16

Defendants stipulate to matter No. 16 as it is stated.

Plaintiffs' Matter No. 17

Matter No. 17 is not the proper basis for a motion in limine. *See Smith v. Union Ins. Co.*, No. 3:15-CV-00162-MPM-RP, 2017 WL 5171855, at *1 (N.D. Miss. June 15, 2017) ("The purpose of motions in limine is not to re-iterate matters which are already set forth elsewhere in the Rules of Civil Procedure or Rules of Evidence, but, rather, to identify specific issues which are likely to arise at trial, and which, due to their complexity or potentially prejudicial nature, are best addressed in the context of a motion in limine."). Defendants agree to be bound by the applicable Utah Rules of Evidence and the orders and rulings of this Court concerning the admissibility of prior convictions or prior bad acts.

Plaintiffs' Matter No. 18

Matter No. 18 is not the proper basis for a motion in limine. *See Smith v. Union Ins. Co.*, No. 3:15-CV-00162-MPM-RP, 2017 WL 5171855, at *1 (N.D. Miss. June 15, 2017) ("The purpose of motions in limine is not to re-iterate matters which are already set forth elsewhere in the Rules of Civil Procedure or Rules of Evidence, but, rather, to identify specific issues which are likely to arise at trial, and which, due to their complexity or potentially prejudicial nature, are best addressed in the context of a motion in limine."). Plaintiffs' motion does not identify a particular subject or opinion to be excluded but, rather, takes a "shotgun" approach to limiting expert witness testimony at trial. Such motions in limine are also not proper. *See A.Hak Indus. Services BV v. Techcorr USA, LLC*, 2014 WL 12591895 (N.D. W. Va. December 18, 2014)

("District courts routinely deny a motion in limine that does not specify the evidence or argument to be excluded because such a motion is premature.") (citing *Huskey v. Ethicon, Inc.*, Civil Action No. 2:12-CV-05201, 2014 WL 3861778, at *1 (S.D.W. Va. Aug. 6, 2014) (denying motions in limine that did not specify evidence or argument as such a blanket exclusion was premature); *In re C.R. Bard, Inc., Pelvic Repair Sys. Products Liab. Litig.*, Civil Action No. 2:10-CV-01224, 2013 WL 3282926, at *2 (S.D.W. Va. June 27, 2013) (denying motions in limine because the court could not rule on them "without knowing the particular piece of evidence" at issue or the argument to be made and the context in which such evidence or argument would arise); *United States v. DesFosses*, Civil Action No. CR-11-065-E-EJL, 2011 WL 4104702, at *8 (D. Idaho Sept. 13, 2011) (denying motion in limine that only generally challenged evidence for lack of specificity); *Wells Fargo Bank, N.A. v. Siegel*, Civil Action No. 05 C 5635, 2007 WL 1118442, at *3 (N.D. Ill. Apr. 16, 2007) (denying motion in limine that did not identify specific evidence as "[s]uch a vague and generalized request" was "not appropriate for a motion in limine"); *Hanley v. Warburg Pincus Capital Co., L.P.*, Civil Action No. 96-390TUCFRZ, 2005 WL 6295802, at *1 (D. Ariz. Dec. 7, 2005) (finding it improper to make a "blanket preclusive ruling" requested by an "overbroad and vague" motion in limine); *Loera v. Nat'l R.R. Passenger Corp. (Amtrak)*, Civil Action No. 02 C 736, 2004 WL 2584786, at *3 (N.D. Ill. Nov. 10, 2004) (denying several motions in limine that did not seek to exclude specific evidence and noting "generalized requests have no place in a motion in limine"). Defendants agree to be bound by the applicable Utah Rules of Civil Procedure, Utah Rules of Evidence, and the orders and rulings of this Court concerning the presentation of expert testimony at trial.

Although Defendants agree, in general, that Rule 26 of the Utah Rules of Civil Procedure prohibits expert witnesses from testifying about opinions or subjects not previously expressed in a report or deposition, Rule 26 also is not so unyielding as to, in the case of a written report, preclude any and all opinions or subjects or to require a "verbatim transcript of exactly what the expert will say at trial" so long as the expert witness has "fairly disclose[d] the substance of and basis for each opinion the expert will offer." Utah R. Civ. P. 26, Advisory Committee Notes. Regarding depositions of experts, counsel is expected to ask "the necessary questions to 'lock in' the expert's testimony." *Id.*

Plaintiffs' Matter No. 19

Matter No. 19 is not the proper basis for a motion in limine. No. 19. *See Smith v. Union Ins. Co.*, No. 3:15-CV-00162-MPM-RP, 2017 WL 5171855, at *1 (N.D. Miss. June 15, 2017). Plaintiffs' motion does not identify a particular subject or opinion to be excluded but, rather, takes a "shotgun" approach to limiting expert witness testimony at trial. Such motions in limine are also not proper. *See A.Hak Indus. Services BV v. Techcorr USA, LLC*, 2014 WL 12591895 (N.D. W. Va. December 18, 2014); *see also* Defendants' response to Plaintiffs' Matter No. 18.

Defendants reserve the right to use or refer to any documents, photographs, "or any other tangible things" not previously disclosed for the purposes of impeachment. *See, e.g.,* Utah R. Civ. P. 26(a)(1)(A)(i); 26(a)(5)(a)(5)(A)(i); 26(a)(5)(A)(iii). Defendants also agree to be bound by the applicable Utah Rules of Civil Procedure, Utah Rules of Evidence, and the orders and rulings of this Court concerning the presentation of documents, photographs, "or other tangible things" at trial.

Plaintiffs' Matter No. 20

Defendants stipulate to matter No. 20 as stated so long as any accompanying order binds Plaintiffs to the same limitations.

Plaintiffs' Matter No. 21

Defendants stipulate to matter No. 21 as stated so long as any accompanying order binds Plaintiffs to the same limitations.

Objection to Plaintiffs' Requested Order

Defendants reassert their foregoing objections and opposition to Plaintiffs' motion in limine and assert that any order on matters applicable to Plaintiffs bind Plaintiffs to the extent the Court binds Defendants.

Dated this 19th day of April, 2021.

NELSON NAEGLE, PLLC

/s/ Brandon B. Hobbs
CHRISTIAN W. NELSON
BRANDON B. HOBBS
SEAN C. MILLER
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2021, I served the foregoing **Defendants' Responses and Objections to Plaintiffs' "Combined Motion in Limine and Memorandum in Support Re: Trial Evidence and Commentary"** on the persons identified below as indicated:

Colin P. King Peter W. Summerill Walter M. Mason DEWSNUP KING OLSEN WOREL HAVAS MORTENSEN 36 South State Street # 2400 Salt Lake City, Utah 84111 cking@dkowlaw.com, psummerill@dkowlaw.com wmason@dkolaw.com gmunoz@dkolaw.com mtabish@dkowlaw.com *Attorneys for Plaintiffs*	☐ ☐ ☑ ☐	U.S. Mail – Postage Prepaid Hand Delivery Electronic Filing Email

/s/ Ellen Harmon

Exhibit A

777 P.2d 437
Supreme Court of Utah.

Robert G. SLUSHER, Jr.
Plaintiff and Appellee,
v.
Todd Paul OSPITAL, by his personal representative John OSPITAL, and Kenneth W. Brooks, Defendants, Cross–Claimants and Appellees,
and
Curtis Campbell, Defendant and Appellant.

No. 19660.
|
June 23, 1989.

Synopsis
One of the defendants in a multiparty case arising from highway accident was found 100% responsible on plaintiff's claim and on another defendant's cross claim, following jury trial in the First District Court, Cache County, VeNoy Christoffersen, J., and defendant appealed. The Supreme Court, Orme, Court of Appeals Judge, held that: (1) trial court erred in not disclosing settlement agreement between plaintiff and one of the defendants, and (2) such error was not prejudicial.

Affirmed.

West Headnotes (5)

[1] **Compromise, Settlement, and Release** Settlement with fewer than all defendants; "Mary Carter" agreements

A classic "Mary Carter agreement" is a settlement accord with these features: (1) it limits the liability of the agreeing defendant, who remains a party to a pending action; (2) it is withheld from the nonsettling parties and/or judge and jury; and (3) it guarantees to the plaintiff a minimum recovery, notwithstanding the fact that the plaintiff may not recover a judgment against the agreeing defendant or that the verdict may be less than that specified in the agreement.

7 Cases that cite this headnote

[2] **Trial** Particular parties, separate trial as to

Bifurcation of multiparty case arising from highway accident was properly refused, as it was imperative that the issue of proportionate fault be litigated between all joint tort-feasors in the same action and be resolved by the same trier of the issues of fact.

1 Cases that cite this headnote

[3] **Compromise, Settlement, and Release** Particular Subjects, Claims, and Disputes

Settlement agreement between two parties in a multiparty case arising from a highway accident was not void as against public policy, where the agreement provided nothing more than that one party pay another a fixed sum in full satisfaction of the other's claim.

3 Cases that cite this headnote

[4] **Compromise, Settlement, and Release** Multiple or joint tortfeasors

Damages Mitigation or reduction of damages

Where an injured plaintiff and one or more, but not all, defendant tort-feasors enter into a settlement agreement, the parties must promptly inform the court and the other parties to the action of the existence of the agreement and of its terms, and where the action is tried by a jury, the court shall, upon motion of a party, disclose the existence and basic content of the agreement to the jury unless the court finds that, on facts particular to the case, such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. U.C.A.1953, 78–27–29, 78–27–30 (Repealed); Rules of Evid., Rule 408.

13 Cases that cite this headnote

[5] **Appeal and Error** Particular Types of Excluded Evidence

Trial court's error in not disclosing the existence and basic contents of settlement agreement between plaintiff and one of two defendants in multiparty case arising out of highway accident was harmless given the totality of circumstances in which it was made, where plaintiff's deposition was taken well in advance of the settlement and review of trial testimony of plaintiff did not indicate any material inconsistency to earlier testimony, counsel's statements and arguments to the jury helped to avoid prejudice, and trial court concluded that disclosure of the settlement agreement to the jury would not have had any effect on the outcome of the trial and court agreed with jury findings and would have so found had there not been a jury.

12 Cases that cite this headnote

Attorneys and Law Firms

***438** Wendell E. Bennett, Salt Lake City, for defendant and appellant.

W. Scott Barrett, Logan, for plaintiff and appellee.

L. Rich Humpherys, Salt Lake City, for Ospital.

Opinion

ORME, Court of Appeals Judge:

Curtis Campbell appeals from adverse judgments entered against him in this multiparty case arising from a tragic highway accident. The appeal is focused exclusively on the trial court's handling of a settlement entered into, shortly before trial, between plaintiff and one defendant. We conclude that the court erred in not disclosing the settlement to the jury. However, as we are not persuaded that this error was prejudicial, we affirm.

FACTS

Plaintiff Robert G. Slusher, Jr., was traveling in a six-van caravan on a two-lane highway through the Dry Lake area of Sardine Canyon in Cache County, Utah. Slusher was the driver of the last van. Campbell, who had been following the caravan, ***439** attempted to pass—or had just passed—all six vans. Todd Ospital, the driver of a small car coming the opposite direction, swerved onto the shoulder of the road, allegedly in an attempt to avoid Campbell. Ospital lost control of his vehicle and collided head-on with Slusher. Campbell's vehicle was unscathed. The cause of the collision was hotly disputed, with contradictory testimony concerning the speed of the Ospital and Campbell vehicles, whether Campbell had completely passed the caravan at the time Ospital lost control, and even whether another car which had passed the caravan might have precipitated Ospital's maneuvering.

Slusher was seriously injured in the collision and sued defendants for damages.[1] Ospital was killed in the collision, and his estate cross-claimed against Campbell on a negligence theory. Campbell cross-claimed against Ospital for contribution.

Prior to trial, Slusher's claim against Ospital's estate was settled for $65,000. The agreement did not affect Slusher's claim against Campbell, nor did it affect Ospital's cross-claim against Campbell.[2] Two days before trial, Campbell discovered that the settlement had been reached, although he had apparently been aware for several months that Ospital's estate was attempting to settle with Slusher. At the trial's outset, Campbell moved the court to do at least one of the following: (1) invalidate the settlement on public policy grounds, (2) bifurcate the proceeding so there would be separate trials on Slusher's complaint and Ospital's cross-claim, or (3) admit the settlement agreement into evidence. Campbell argued that Slusher and Ospital now had every incentive to show that Campbell was totally at fault, posing the risk of collusion at Campbell's expense. Accordingly, Campbell argued, the jury should be advised that Ospital and Slusher were no longer actually adversaries.

The trial court denied Campbell's requests. The court stated that advising the jury of the settlement would "place the jury in a position of looking at the agreement as an admission by Ospital of negligence and liability." Since the settlement was not an admission of negligence but merely an attempt to reduce the possible risk of a larger award, the court concluded

that Ospital would be unduly prejudiced if evidence of the settlement were admitted.

The jury, kept ignorant of the settlement, returned a verdict against Campbell, finding him 100 percent responsible on both Slusher's claim and Ospital's cross-claim. Pursuant to the jury's verdicts, the court entered judgment in favor of Slusher for $200,000 and in favor of Ospital's estate for $50,849. Slusher's judgment was reduced by $65,000, the amount he received from Ospital in settlement. *See* note 2, *supra.*

On appeal, Campbell assails the settlement as a *Mary Carter* agreement and contends that the trial court erred in not granting him one of the three remedies he requested. We first consider the contention that the settlement agreement is properly classified as a *Mary Carter* agreement.

MARY CARTER AGREEMENTS

As indicated, the terms of the settlement agreement included a provision requiring Ospital's estate to pay Slusher $65,000. However, Ospital's estate remained in the case so it could pursue its cross-claim against Campbell. Campbell contends that such an agreement changed the adversarial position of the agreeing parties and provided an incentive for them to collude against him. Campbell claims that this type of an agreement is a *Mary Carter* agreement and that while such agreements should perhaps ***440** be invalidated as against public policy, at a minimum, evidence of such agreements should be admitted for consideration by the jury. In this way, the jury can better assess the nature of the testimony offered by the agreeing parties, knowing that there now exists an incentive on their part to shift as much blame as possible onto their common adversary.

There is a legitimate basis for Campbell's concern. Initially, Slusher was motivated to show himself to be free of negligence, but he had no particular stake in the allocation of liability between defendants. However, after the settlement with Ospital's estate, Slusher had every incentive to characterize Campbell as solely responsible and exclusively liable. Ospital's estate, of course, wanted to focus responsibility on Campbell all along, but with the settlement, the estate had a motivated ally in Slusher. Although there is no evidence of fabricated testimony in the record before us, the potential for prejudice clearly existed, and Campbell argues that had the settlement agreement been disclosed to the jury, it may well have rendered a different verdict concerning the allocation of liability between Campbell and Ospital.

[1] It is against this background that Campbell condemns the settlement as a *Mary Carter* agreement. The term derives from a 1967 Florida case, *Booth v. Mary Carter Paint Co.,* 202 So.2d 8 (Fla.Ct.App.1967), *overruled in part by Ward v. Ochoa,* 284 So.2d 385, 388 (Fla.1973),[3] upholding the validity and nondisclosure of a secret agreement that limited the maximum liability of two out of three defendants. A classic *Mary Carter* agreement[4] is a settlement accord with these features: (1) it limits the liability of the agreeing defendant, who remains a party to a pending action; (2) it is withheld from the nonsettling parties and/or judge and jury; and (3) it guarantees to the plaintiff a minimum recovery, notwithstanding the fact that the plaintiff may not recover a judgment against the agreeing defendant or that the verdict may be less than that specified in the agreement. *General Motors Corp. v. Lahocki,* 286 Md. 714, 720–23, 410 A.2d 1039, 1042–43 (Ct.App.1980).

The notoriety surrounding *Mary Carter* agreements has increased in the last twenty years with the growing use of such agreements as a settlement device.[5] Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions,* 38 U.Fla.L.Rev. 521, 522 (1986). The perceived evils engendered by a *Mary Carter* agreement include undue prejudice against the nonsettling defendant, and therefore denial of a fair trial, and collusion among the settling defendants and the plaintiff. The most egregious characteristic of the *Mary Carter* agreement is secrecy:

> Secrecy is the essence of [a *Mary Carter* agreement], because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. By painting a gruesome testimonial picture of the other defendant's misconduct or, in some cases, by admissions against himself and the other defendants, he could diminish or eliminate his own liability by use of the secret "Mary Carter Agreement."
>
> ***441** *Ward,* 284 So.2d at 387. Such factors obviously tend to undermine the adversarial nature of a trial proceeding.

Ospital and Slusher argue that the settlement agreement between them was not a *Mary Carter* agreement and that it did not have any of the prejudicial effects of such agreements. They argue that the element of secrecy was not present, as Campbell had been informed by Ospital of the likelihood of

settlement and in fact learned of the settlement before the trial. The settlement was then disclosed to the trial court. Moreover, this particular settlement was for a fixed sum and fully compromised Slusher's claim against Ospital. Accordingly, it is not a *Mary Carter* agreement in a technical sense.[6] We think this is largely irrelevant, however, to the present case. The fact that the agreement might influence testimony but was kept secret from the jury is enough to trigger legitimate concern about whether Campbell received a fair trial.

VALIDITY OF AGREEMENT AND BIFURCATION

As noted, Campbell made three alternative requests to the trial court in response to his discovery of the settlement agreement shortly before trial: (1) to bifurcate the proceeding; (2) to void the agreement as contrary to public policy; or (3) to admit the settlement agreement into evidence so that the jury could more fairly weigh the testimony of the witnesses. We agree with the trial court's refusal to void the agreement or to bifurcate the proceeding.

[2] Of course, trial courts enjoy considerable discretion in deciding bifurcation and consolidation requests under rule 42 of the Utah Rules of Civil Procedure. *See, e.g., Coleman v. Dillman,* 624 P.2d 713, 716 (Utah 1981) (bifurcation under rule 42 may be accomplished for the convenience and at the discretion of the trial court); *Raggenbuck v. Suhrmann,* 7 Utah 2d 327, 329, 325 P.2d 258, 259 (1958) (absent prejudice to a litigant, the trial court has discretion to consolidate matters for trial); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2392 (1971) (appellate court leaves discretion to trial court in bifurcating trials). Bifurcation was properly refused in this case because "it is imperative that the issue of proportionate fault should be litigated between all joint tort-feasors in the same action and resolved by the same trier of the issues of fact." *Madsen v. Salt Lake City School Bd.,* 645 P.2d 658, 663 (Utah 1982); *see also* C. Wright & A. Miller, *Federal Practice and Procedure* § 2388, at 281 (1971) (If "separate trial of an issue will involve extensive proof and substantially the same facts as the other issues, or if any saving in time and expense is wholly speculative, a separate trial will be denied." (footnote omitted)).

[3] Nor is the agreement void as against public policy. "The public policy is to encourage settlements." *Lahocki,* 286 Md. at 727, 410 A.2d at 1046; *accord, Alvin G. Rhodes Pump Sales v. Industrial Comm'n,* 681 P.2d 1244, 1248 (Utah 1984); *Rio Algom Corp. v. Jimco Ltd.,* 618 P.2d 497, 506 (Utah 1980). This agreement, which basically provided nothing more than that one party pay another a fixed sum in full satisfaction of the other's claim, did not contain the objectionable features which occasionally prompt courts to invalidate secretive settlement agreements. *See, e.g., Lum v. Stinnett,* 87 Nev. 402, 488 P.2d 347 (1971).

However, we disagree with the trial court's decision to keep the jury totally ignorant of the changed adversarial positions caused by the settlement. A review of recent cases suggests a more appropriate handling of the issue.

DISCLOSURE TO JURY: CURRENT CASE LAW

The current approach is to validate *Mary Carter* and similar agreements, so long as ***442** they are not void as against public policy,[7] but to require that they be fully disclosed to the court and, "under certain circumstances, to the jury." *Ratterree v. Bartlett,* 238 Kan. 11, 27, 707 P.2d 1063, 1074 (1985); *see* R. Eubanks & A. Cocchiarella, *In Defense of "Mary Carter,"* 26 For The Defense 14, 22–23 (1984).

The Florida Supreme Court adopted a similar position in *Ward,* 284 So.2d 385, when it overruled *Booth v. Mary Carter.* The court stated:

> The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial, when sought to be discovered under appropriate rules of procedure.

Id. at 387.

In *Mustang Equipment, Inc. v. Welch,* 115 Ariz. 206, 210–11, 564 P.2d 895, 900 (1977) (en banc), the Arizona Supreme Court adopted a rule which required disclosure of "Gallagher agreements" to counsel and the court.[8] The court stated that it is a better policy to require pretrial disclosure of such agreements to the court and to all concerned parties. "[W]e cannot condone secret agreements between a plaintiff and defendant which, by their very secretiveness, may tend to encourage wrongdoing and which, at the least, may tend to lessen the public's confidence in our adversary system." *Id.* at 211, 564 P.2d at 900.

In *Johnson v. Moberg,* 334 N.W.2d 411, 415 (Minn.1983), the Minnesota court held that a *Mary Carter* agreement could affect the motivation of the parties and the credibility of the witnesses and therefore the settlement must be brought into the open so trial can proceed in a fair manner. *Id.*

In California, the legislature has gone so far as to codify that state's rule regarding admission of "sliding scale recovery" agreements. The California statute requires that the court be informed of the agreement and that existence of the agreement, as well as its terms and provisions, be disclosed to the jury. *See* R. Eubanks & A. Cocchiarella, *In Defense of "Mary Carter,"* 26 For The Defense 14, 23 (1984).

DISCLOSURE TO JURY: POSSIBLE PROBLEMS

While disclosure may be the most commonly accepted approach to *Mary Carter* and related agreements, it is not without difficulty. Such agreements often contain self-serving statements and include the amount of the settlement, both of which could prejudice the nonagreeing defendant should the agreements be disclosed. *See Lahocki,* 286 Md. at 727, 410 A.2d at 1046. Furthermore, there are at least two generally recognized problems that may arise because of the potential for improper jury inferences. First, the jury may draw improper conclusions regarding the liability of the parties who settle. The jury may infer that the settling defendant must be the main culprit or he or she would not have settled. *See Slayton v. Ford Motor Co.,* 140 Vt. 27, 28, 435 A.2d 946, 947 (1981). Or, as is just as likely in this case, it may see the settling defendant as conciliatory and responsible and the nonsettling defendant as recalcitrant and irresponsible. We believe that such concerns can largely be ameliorated through an appropriate instruction to the jury.[9]

Second, if told of a settlement the jury may be more likely to assume the availability ***443** of insurance coverage. *See Lum,* 87 Nev. at 411, 488 P.2d at 352 (counsel acknowledged agreement might prejudice jury because of references to insurance); *cf. Cox,* 594 P.2d at 359 (refusal to allow cross-examination of witness as to settlement with an insurer is error even though it incidentally discloses existence of insurance). This strikes us as being of only minimal concern. "[T]here is considerable authority to the effect that jurors today assume the presence of insurance." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2388, at 282 (1971). That jurors in Utah make such assumptions, at least in automobile accident cases, is especially likely in view of the virtual requirement that all vehicles registered in this state be insured. *See, e.g., Barber v. Farmers Ins. Exch.,* 751 P.2d 248, 249 (Utah Ct.App.1988).

Ospital and Slusher additionally argue in this case that Utah Code Ann. §§ 78–27–29 and –30 (1977) (superseded)[10] precluded introduction of the settlement agreement. Section 78–27–30 provided, with our emphasis: "No settlement, partial settlement or voluntary payment under section 78–27–29 shall be admissible in any action *as evidence* prior to judgment." The implication is that settlement and payment might nonetheless come in other than as evidence, such as for impeachment purposes. This conclusion is supported by the explicit reference in section 78–27–30 to the immediately preceding section. Section 78–27–29 provided as follows, with our emphasis:

> No settlement, partial settlement or voluntary payment of a claim against any party *shall be construed as an admission of liability* by that party or his insurer with respect to any claim arising from the same event or set of facts, whether that payment or settlement is made by the party, an insurer or any other person on behalf of the party or the insurer.

Taken together, the two statutes resulted in a rule not unlike Utah Rule of Evidence 408, now in effect.[11] In other words, they precluded introduction of the settlement for the purpose of establishing liability but not for purposes relating to credibility.[12]

Finally, Ospital and Slusher contend that Campbell should not be heard to complain about the settlement because he actually *benefited* from the settlement agreement. The jury found that Campbell was 100 percent at fault and assessed damages of $200,000 in Slusher's favor. Under the statutory scheme then in effect, *see* note 2, supra, the nonsettling joint tort-feasor was credited for any settlement made to the injured party by another joint tort-feasor.[13] ***444** Without the settlement, Campbell would be liable for 100 percent of $200,000; with the settlement, he was 100 percent responsible for $200,000 less $65,000. This contention misses the point. Campbell contends that had the jury been let in on the secret, it might have evaluated the testimony and arguments differently and apportioned responsibility differently. Taking the extreme case, if the "enlightened" jury had found Ospital instead of Campbell to be 100 percent responsible, Campbell would have no liability whatsoever to Slusher.

DISCLOSURE TO JURY: BALANCED APPROACH

[4] We believe the position of the Kansas Supreme Court in *Ratterree,* 238 Kan. at 27–30, 707 P.2d at 1074–76, reflects a modern view representative of the approach which should ordinarily be taken. Under this approach, where an injured plaintiff and one or more, but not all, defendant tort-feasors enter into a settlement agreement, the parties must promptly inform the court and the other parties to the action of the existence of the agreement and of its terms. Where the action is tried by a jury, the court shall, upon motion of a party, disclose the existence and basic content of the agreement to the jury *unless* the court finds that, on facts particular to the case, such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. *See id.*

The court should also determine whether explanation is sufficient, as we believe it would have been in this case, or whether admission of the document into evidence is appropriate and, if so, which portions of the agreement should properly be omitted. We believe instances would be rare when the amount of the settlement should be disclosed. However, the jury should be informed of the changed financial interest of the parties concerned and the realigned positions of the litigants. *See id.; see also* note 9, *supra.*

"[T]he potential for injustice is so great from the use of secret settlement agreements in any tort action where there are multiple defendants, whether under joint and several liability or comparative fault principles, that we believe a disclosure rule should be adopted." *Ratterree,* 238 Kan. at 29, 707 P.2d at 1076. Because it has not been shown that appropriate disclosure of the settlement in this case would have led to a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury, we believe the trial court erred in not disclosing the settlement to the jury.

LACK OF PREJUDICE

[5] Of course, the trial court's error does not necessitate reversal and the accompanying need for a costly and burdensome new trial if the error was harmless, i.e., if "there is no reasonable likelihood that the error affected the outcome of the proceedings." *State v. Verde,* 770 P.2d 116, 120 (Utah 1989); *see, e.g., State v. Knight,* 734 P.2d 913, 919 (Utah 1987); *Belden v. Dalbo, Inc.,* 752 P.2d 1317, 1319, 1321 (Utah Ct.App.1988); *see also* Utah R. Evid. 103(a); Utah R.Civ.P. 61. We conclude that the court's error was harmless given the totality of circumstances in which it was made.

First, well in advance of the settlement, Slusher's deposition was taken. Campbell draws to our attention no significant instance of discrepancy between Slusher's presettlement deposition testimony and his post-settlement trial testimony. Our review of his trial testimony indicates that the deposition was referred to in cross-examination but no material inconsistency was shown. The deposition served as a ***445** strong check on any inclination Slusher might otherwise have had to fabricate or tailor his testimony to accommodate any altered adversarial positions which existed as of trial.

Second, counsel's statements and arguments to the jury helped avoid prejudice. Slusher's counsel stated that "if anyone was at fault in this accident it wasn't Mr. Slusher, and either one or both of the other defendants are responsible and should respond in damages." Ospital's attorney characterized Slusher's position as, "[H]e feels both parties are responsible for the accident." Campbell's attorney, while precluded from expressly referring to the settlement, nonetheless argued to the jury that the other parties obviously had an arrangement of some sort to the effect, "I'll help you and you help me and let's stick Campbell."

Third, the trial court, who, like Campbell, was surprised by the settlement and articulated to counsel doubts about how best to proceed, permitted trial to go forward with the expressed attitude that he would watch carefully what developed and consider by way of post-trial motion any problems that might actually arise by reason of his decision to keep the settlement out.

Fourth, and most important, is the trial court's conclusion made in response to just such post-trial motions. From his advantaged position of having presided over the trial knowing full well of the settlement and the potential problems it presented, the court concluded:

> As to any collusion, this court was present and observed the whole trial, observed no collusion between attorneys for Ospital and Slusher. In fact, Counsel for Slusher questioned all witnesses of both Campbell and Ospital as though adversary to his position that Slusher was not negligent, had no liability, and that he didn't know who was liable but it had to be one or the other defendant or both.

Cf. Sequoia Mfg. Co. v. Halec Constr. Co., 117 Ariz. 11, 24, 570 P.2d 782, 795 (Ariz.Ct.App.1977) ("After observing

the conduct of all counsel, their demeanor, their witnesses, and the overall atmosphere of the courtroom, the trial judge determined it unnecessary in this case to disclose the agreement to the jury. In an instance such as this, we invest the trial court with considerable discretion. We find no abuse of discretion."). Most tellingly, notwithstanding his own knowledge of the settlement and its possible ramifications on credibility, the trial court stated:

> This Court agrees with the jury findings and would have so found had there not been a jury. The only disagreement the Court would have had if he himself [had] participated in the jury results would be that the amount of damages [was] too small.

Accordingly, we are convinced that the disclosure of the settlement agreement to the jury would not have had any effect on the outcome of trial. The court's error in not disclosing the settlement therefore proves to have been harmless. The judgments appealed from are accordingly affirmed.

HALL, C.J., HOWE, Associate C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., does not participate herein; Gregory K. Orme, Court of Appeals Judge, sat.

All Citations

777 P.2d 437

Footnotes

1 Defendant Kenneth W. Brooks was the owner of the vehicle Ospital was driving. However, he was dismissed early in the course of the action and is not a party to this appeal.

2 The agreement, in contemplation of then-applicable law, recognized that any judgment by Slusher against Campbell would be reduced by the settlement amount and likewise mooted Campbell's claim for contribution against Ospital by providing for an appropriate adjustment in any judgment entered in favor of Slusher against Campbell. *See* Utah Code Ann. §§ 78–27–42, –43 (1977) (repealed by 1986 Utah Laws ch. 199, §§ 6, 7).

3 The term "*Mary Carter* agreement" was actually coined in *Maule Industries, Inc. v. Roundtree,* 264 So.2d 445 (Fla.Ct.App.1972), *modified,* 284 So.2d 389, 390–91 (Fla.1973).

4 Several courts have attempted to define the traditional or classic *Mary Carter* agreement. One court has even gone so far as to suggest requisite elements of a *Mary Carter* agreement. *See Cox v. Kelsey–Hayes Co.,* 594 P.2d 354 (Okla.1979). However, the *Cox* court also suggested that the "number of variations upon such agreements is limited only by the ingenuity of the mind of man." *Id.* at 357 (footnote omitted).

5 *Mary Carter* agreements have received considerable scholarly attention. Two articles are cited in the body of this opinion. There are many others. *See, e.g.,* Note, "*Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed,* 28 Univ. Miami L.Rev. 988 (1974); Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions,* 47 So.Cal.L.Rev. 1393 (1974); Note, *Mary Carter Agreements: A Viable Means of Settlement?,* 14 Tulsa L.J. 744 (1979); Comment, *Mary Carter Agreements: Unfair and Unnecessary,* 32 S.W.L.J. 780 (1978).

6 We accordingly have no occasion in the instant case to determine the status of *true Mary Carter* agreements in Utah. Such agreements pose additional problems, and mere disclosure to the fact finder may not be an adequate solution. *See* Entmann, *Mary Carter Agreements: An Assessment of Attempted Solutions,* 38 U.Fla.L.Rev. 521, 577–78 (1986).

7 For an example of an especially unsavory agreement, held to be void because it required unethical conduct, see *Lum,* 87 Nev. 402, 488 P.2d 347.

8 *Gallagher* agreements and *Mary Carter* agreements are virtually synonymous. The term "Gallagher" stems from *City of Tucson v. Gallagher,* 108 Ariz. 140, 493 P.2d 1197 (1972).

9 Such an instruction would emphasize that the settlement and resulting change in the adversarial alignment of the parties could be considered only in evaluating the credibility of testimony and not on the question of liability.

10 These sections were superseded by the 1983 enactment of rule 409 of the Utah Rules of Evidence, *see* Utah Code Ann. §§ 78–27–29 to –31 (1987) compiler's notes; Utah R.Evid. 409 advisory committee note, and it would seem, rule 408. *See also* Utah R.Evid. preliminary note (repealing effect of rules upon inconsistent statutes); Utah R.Evid. 101 advisory committee note (effect of rules).

11 Rule 408 provides that evidence of settlement "is not admissible to prove liability for or invalidity of the claim or its amount." The rule expressly provides that such evidence is not excluded when it is offered "for another purpose, such as proving bias or prejudice of a witness...."

12 Although the parties have not developed the issue, we note that it is doubtful that these statutory provisions were applicable in any event. As observed in note 10, *supra,* these sections were superseded by the Utah Rules of Evidence, which were promulgated subsequent to the accident giving rise to this dispute but prior to trial. Insofar as the subject of these sections, and the corresponding evidence rules subsequently promulgated, are deemed procedural in nature rather than substantive, *see, e.g., Stephens v. Henderson,* 741 P.2d 952, 953–54 (Utah 1987); *Docutel Olivetti Corp. v. Dick Brady Systems, Inc.,* 731 P.2d 475, 478 (Utah 1986), the Rules of Evidence, specifically rule 408, would control to the exclusion of sections 78–27–29 and –30. *See* note 11, *supra,* and accompanying text. Although not all evidentiary rules are necessarily merely procedural, *cf.* R. Boyce and E. Kimball, *Utah Rules of Evidence 1983,* 1985 Utah L.Rev. 63, 64–66, those relevant to this analysis seem to be. If, as therefore appears likely, rule 408 applied to the trial in this case, it even more clearly supports the conclusion we reach.

13 The statutory scheme has since been changed. Under Utah Code Ann. § 78–27–40 (1987), defendants are no longer entitled to contribution but are liable solely for that proportion of fault attributed to them. Section 78–27–40 provides:

> [T]he 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. No defendant is entitled to contribution from any other person.

See also Utah Code Ann. § 78–27–42 (1987) (release to one defendant does not discharge other defendant unless release so provides). If anything, concerns regarding secret settlement agreements apply more strongly under the present statutory scheme since joint tort-feasors have a more direct financial incentive to shift blame to the other defendants.

End of Document

Exhibit B

972 P.2d 425
Supreme Court of Utah.

Dale CHILD, Plaintiff and Appellant,
v.
Andria D. Newsom GONDA,
Defendant and Appellee.

No. 960249.
|
Oct. 13, 1998.
|
Rehearing Denied Feb. 4, 1999.

Synopsis
Administrator of estate of automobile passenger, who had been killed when southbound vehicle in which she was riding attempted left turn and was struck by northbound vehicle, sued driver of northbound vehicle. The Third District Court, Salt Lake Division I, Timothy R. Hanson, J., entered judgment on jury verdict for northbound driver. Administrator appealed, and the Supreme Court, Russon, J., held that: (1) jury was properly instructed that administrator had settled "differences" with southbound driver; (2) trial court did not abuse its discretion in determining that statement by northbound driver that administrator was suing to get more money did not warrant new trial; (3) evidence established as matter of law that southbound driver had been negligent; (4) instruction that violation of safety law "may be" evidence of negligence was proper; and (5) evidence supported jury finding that northbound driver had not been negligent.

Affirmed.

West Headnotes (24)

[1] **New Trial** Discretion of court

District court has broad discretion in deciding whether to grant or deny motion for new trial.

4 Cases that cite this headnote

[2] **Appeal and Error** Instructions

Appellate court reviews challenges to jury instructions under a "correctness" standard.

3 Cases that cite this headnote

[3] **Evidence** Compromise or settlement
Trial Issues and Theories of Case in General

Jury was properly instructed that administrator of estate of automobile passenger, who was killed in accident, had resolved "differences" with driver of automobile, in action brought by administrator against second motorist involved in collision; because court did not notify jury as to offer or acceptance of any valuable consideration, rule governing offers to compromise was inapplicable, and existence of settlement between administrator and driver, and its basic content, were not disclosed to jury. Rules of Evid., Rule 408.

[4] **Appeal and Error** For Errors or Irregularities

Trial court's determination as to whether irregularity in proceeding warrants new trial is reviewed under an abuse of discretion standard. Rules Civ.Proc., Rule 59(a)(1).

6 Cases that cite this headnote

[5] **Appeal and Error** Verdict, Findings, and Sufficiency of Evidence

Absent showing by appellant that trial outcome would have differed, every reasonable presumption as to validity of verdict below must be taken as true upon appeal from denial of motion for new trial.

3 Cases that cite this headnote

[6] **New Trial** Conduct of counsel

Trial court did not abuse its discretion in determining that statement by counsel for motorist, against whom action was brought by administrator of estate of passenger of second vehicle who was killed in collision,

that administrator was suing motorist to get more money, did not deny administrator a fair trial, and thus could not provide basis for new trial; while remark violated in limine order, no compelling argument was made that remark created irregularity in proceeding which would warrant new trial. Rules Civ.Proc., Rule 59(a)(1).

[7] **Appeal and Error** Defects, objections, and amendments

Claim that district court committed reversible error in allowing lay witnesses to give opinion testimony regarding supposed reasonableness of motorist's driving conduct was not adequately briefed, and would not be considered by Supreme Court, where appellant's brief did not contain witness's testimony regarding motorist's driving conduct, or any record citations to their testimony. Rules App.Proc., Rule 24(a)(9).

1 Cases that cite this headnote

[8] **Appeal and Error** Form and requisites in general

Appeal and Error Points and arguments

Supreme Court is not a depository in which appealing party may dump burden of argument and research. Rules App.Proc., Rule 24(a)(9).

1 Cases that cite this headnote

[9] **Appeal and Error** Sufficiency of evidence

Appeal and Error Preverdict motions; direction of verdict

Appellate court will reverse directed verdict when evidence, taken in light most favorable to nonmoving party, is sufficient to permit reasonable jury to find for nonmovant.

1 Cases that cite this headnote

[10] **Automobiles** Manner of turning

Evidence established as matter of law that motorist whose vehicle was struck by oncoming vehicle as he made left turn off highway, resulting in death of passenger, had been negligent; nothing in record supported any conclusion other than that motorist had not seen what was there to be seen.

[11] **Appeal and Error** Relation Between Error and Final Outcome or Result

Reviewing court will not reverse judgment merely because there may have been error; reversal occurs only if error is such that there is reasonable likelihood that, in its absence, there would have been a result more favorable to complaining party.

3 Cases that cite this headnote

[12] **Negligence** Violations of statutes and other regulations

"Negligence per se", which usually results from violation of statute, is conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to particular surrounding circumstances.

3 Cases that cite this headnote

[13] **Evidence** Weight and Conclusiveness in General

"Prima facie evidence" is that quantum of evidence that suffices for proof of a particular fact until fact is contradicted by other evidence; once trier of fact is faced with conflicting evidence, it must weigh prima facie evidence with all other probative evidence presented.

3 Cases that cite this headnote

[14] **Negligence** Weight and Sufficiency

Prima facie evidence of negligence is evidence which would be sufficient to submit question of negligence to jury and support verdict of negligence; however, such evidence would not require jury to return such a verdict.

3 Cases that cite this headnote

[15] **Automobiles** Requirements of statutes and ordinances in general

Automobiles Duties of Forward Vehicle

Driver who reasonably increases his speed in attempt to avoid being rear-ended by runaway truck on canyon road is not negligent per se, even though by increasing his speed he has violated speed limit statute; in fact, failure to reasonably increase speed to avoid accident under such circumstances may itself constitute evidence of negligence.

[16] **Negligence** Violations of statutes and other regulations

Negligence Violations of statutes and other regulations

Violation of statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence; violation may be regarded as prima facie evidence of negligence, but is subject to justification or excuse if evidence is such that it reasonably could be found.

6 Cases that cite this headnote

[17] **Automobiles** Violation of statute or ordinance in general

Instruction that violation of safety law "may be" evidence of negligence was proper in action arising from automobile accident, in which plaintiff alleged that defendant motorist had violated statute requiring use of headlights under certain conditions.

[18] **Appeal and Error** Denial of new trial

Where trial court has denied motion for new trial on basis that evidence was insufficient to justify verdict, or that verdict was against law, its decision will be sustained on appeal if there was an evidentiary basis for jury's decision, and will be reversed only if evidence to support verdict was completely lacking, or was so slight and unconvincing as to make verdict plainly unreasonable and unjust. Rules Civ.Proc., Rule 59(a)(6).

6 Cases that cite this headnote

[19] **Appeal and Error** Sufficiency of Evidence

Appeal and Error For Insufficiency of Evidence

To support insufficiency of evidence claim on appeal, party challenging verdict must marshal evidence in support of verdict, and then demonstrate that evidence is insufficient when viewed in light most favorable to verdict.

5 Cases that cite this headnote

[20] **Appeal and Error** Jury as factfinder below

Appeal and Error Jury as factfinder below in general

It is exclusive function of jury to weigh evidence and to determine credibility of witnesses, and so long as some evidence and reasonable inferences support jury's findings, reviewing court will not disturb them.

9 Cases that cite this headnote

[21] **Automobiles** Vehicles crossing

Evidence supported jury finding that northbound motorist was not negligent in connection with collision with southbound vehicle, which was attempting left turn; northbound motorist testified that she was not speeding, passenger in northbound vehicle, and driver of trailing vehicle, testified that northbound motorist had not had time to react, and expert witness testified that northbound motorist had not had time to brake prior to collision and had nowhere to go to avoid collision.

[22] **Appeal and Error** Province of, and deference to, lower court in general

In reviewing claim of insufficiency of evidence, reviewing court does not, and will not, reweigh evidence and determine where it preponderates.

1 Cases that cite this headnote

[23] Appeal and Error Statement of evidence

Appellant who, while setting forth a great deal of evidence, so slanted it in his favor that in many instances he had inaccurately represented record, failed to comply with marshaling requirement in connection with challenge to sufficiency of evidence to support jury finding.

[24] Appeal and Error Statement of evidence

It is an absolute requirement of marshaling of evidence, which must be performed by party who challenges sufficiency of evidence to support finding, that party state fully and accurately all of the evidence on issue and then show, as matter of law, that evidence does not support verdict.

2 Cases that cite this headnote

Attorneys and Law Firms

***427** Peter C. Collins, Salt Lake City, for plaintiff.

Donald J. Purser, Darci Dow, Salt Lake City, for defendant.

RUSSON, Justice.

INTRODUCTION

Dale Child appeals a district court's final judgment and order in favor of Andria Newsom Gonda. Child sued Gonda for wrongfully causing the death of his daughter, Mindy Child, in an automobile accident. The jury found that Gonda was not negligent. Child then moved the district court for a partial judgment notwithstanding the verdict and for a new trial, but that court denied his request.[1] We affirm.

BACKGROUND

On April 17, 1991, Mindy Child was killed in a two-vehicle collision on U.S. Highway 89 in Davis County. She was a passenger in a Volkswagen "Beetle" driven by her 16–year–old friend, Jesse Deller. Deller, who had been driving south on Highway 89, was attempting to make a left-hand turn. According to one eyewitness, Deller waited for approximately twelve seconds for the northbound traffic to clear. However, Deller did not see Gonda's vehicle, which was traveling north in the right-hand lane, and his Volkswagen was broadsided when he turned in front of the oncoming vehicle. Mindy died instantly, and Deller was knocked unconscious.

Child settled with Jesse Deller, his parents, and the Dellers' insurance carrier, American States Insurance, without consulting legal counsel. The settlement was for the total amount of the policy limits—$50,000. Thereafter, Child retained counsel and brought the instant action against Gonda in district court. The court granted Gonda's motion for summary judgment on the basis of a "broadform release" which purported to release, in addition to the Dellers and American States, "all other persons, firms and corporations." We reversed the lower court's grant of summary judgment and remanded the case for further proceedings in *Child v. Newsom,* 892 P.2d 9 (Utah 1995).[2]

***428** This case was then tried in November of 1995. Prior to trial, Child brought a motion in limine requesting the district court to preclude all references to the fact that Child had settled his claim against Deller. Gonda opposed that motion, seeking permission to notify the jury of the settlement. The court ruled that the jury was entitled to know that Child and Deller had "resolved their differences," that it would so inform the jury, and that counsel could not mention anything about the settlement.

Child also moved the court to issue an order precluding Gonda's witnesses from offering lay opinion testimony regarding the reasonableness of Gonda's driving conduct. The court denied that motion and allowed the witnesses to offer their opinion at trial to the effect that Gonda's driving conduct was reasonable.

At trial, Gonda's counsel in his opening statement suggested to the jury that Child was suing Gonda to "get paid some more money." Then, in his closing argument, counsel on several occasions referred to the fact that Child and Deller had resolved their differences.[3]

At the close of Child's case, the court granted Gonda's motion for a directed verdict on Deller's negligence and on the proximate cause connection between that negligence and Mindy's death. Before submitting the case to the jury, the court instructed the jury, over Child's exception, that violation of a safety law "may be" (rather than "is") evidence of negligence. The jury then answered the first question on the jury form, regarding Gonda's negligence, in the negative. It answered no further questions, and the district court entered judgment in Gonda's favor. Child then moved for partial judgment notwithstanding the verdict and for a new trial, which the court denied.

On appeal, Child argues that he is entitled to a new trial on the basis of any of the following individual or combined trial court errors: (1) allowing the jury to hear anything about the settlement with Deller; (2) refusing to promptly censure Gonda's counsel before the jury for flagrantly violating the court's pretrial order prohibiting references to the settlement—a violation which constituted an "irregularity in the proceedings"; (3) allowing Gonda's witnesses to testify regarding the reasonableness of Gonda's driving conduct; (4) granting Gonda's motion for a directed verdict on Deller's negligence and the proximate cause connection between that negligence and Mindy's death; and (5) instructing the jury that violation of a safety law "may be" (rather than "is") evidence of negligence. Child also claims that he is entitled to a new trial because the jury's verdict is not supported by the evidence or, alternatively, is "against law" pursuant to rule 59(a)(6) of the Utah Rules of Civil Procedure.

STANDARD OF REVIEW

[1] A district court has broad discretion in deciding whether to grant or deny a motion for a new trial. *See State v. Harmon,* 956 P.2d 262, 265–66 (Utah 1998); *State v. Pena,* 869 P.2d 932, 938 (Utah 1994). However, because Child raises several subissues involving different standards of review, we will set forth the proper standard as we address each issue.

ANALYSIS

I. JURY INSTRUCTION REGARDING RESOLUTION OF DIFFERENCES BETWEEN CHILD AND DELLER

[2] The first issue is whether the district court[4] erred in instructing the jury that Child and Deller had "resolved their differences." Specifically, Child claims that rule 408 of the Utah Rules of Evidence proscribed any reference to the Child–Deller settlement. He further urges this court to expressly limit the rule of ***429** *Slusher v. Ospital,* 777 P.2d 437, 444 (Utah 1989), where under the facts of that case, we allowed the disclosure to the jurors of the existence and basic content of a settlement agreement between the plaintiff and one of the named defendants. We review challenges to jury instructions under a "correctness" standard. *See Steffensen v. Smith's Mgmt. Corp.,* 862 P.2d 1342, 1346 (Utah 1993).

Rule 408 provides in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, *a valuable consideration* in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Utah R. Evid. 408 (emphasis added). The clear language of rule 408 indicates that the rule is very narrow: it only proscribes evidence regarding an offer or acceptance of "valuable consideration" in compromising a disputed claim.

In the instant case, the trial judge determined that the jury would wonder why Deller was not a defendant in the lawsuit. The judge therefore concluded:

> I will advise the jury that in this case they will likely be asked to compare the responsibility for the accident of both the defendant and the driver of the vehicle in which the deceased was riding ... and that Mr. Deller is not a party to this lawsuit. *Mr. Child and Mr. Deller have resolved their differences and they needn't concern themselves about that fact.* They just need to concern themselves about the responsibility of the people who were involved, the drivers, period. That's all I'm going to tell them. And there's no reason to go any further than that in discussing the matter at all.

(Emphasis added.)

[3] In light of the fact that the court did not notify the jury as to an offer or acceptance of any valuable consideration between Child and Deller, rule 408 does not even apply. Therefore, we hold that the court did not err in instructing the jury that they had resolved their differences. Because the court did not disclose the existence of the settlement agreement or its basic content, the rule set forth in *Slusher* likewise does

not apply. We therefore decline Child's invitation to limit that rule.

II. "IRREGULARITY IN THE PROCEEDINGS" REGARDING COUNSEL'S REFERENCES TO THE CHILD–DELLER SETTLEMENT

Child next argues that during opening and closing statements, Gonda's counsel flagrantly violated the district court's pretrial order prohibiting reference to the Child–Deller settlement. These violations, he maintains, constituted an "irregularity in the proceedings" entitling him to a new trial pursuant to rule 59(a)(1) of the Utah Rules of Civil Procedure, which provides that a new trial may be granted if, by reason of the irregularity, "either party was prevented from having a fair trial."

[4] **[5]** Because the grant of a new trial is ordinarily left to the sound discretion of the trial court, we will review the court's decision in this regard under an abuse of discretion standard. *See Rukavina v. Triatlantic Ventures, Inc.,* 931 P.2d 122, 126 (Utah 1997) (citing *Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 804 (Utah 1991)); *Goddard v. Hickman,* 685 P.2d 530, 532 (Utah 1984) ("A trial court has broad latitude in granting or denying a motion for a new trial, and will not be overturned on appeal absent a clear abuse of discretion."). Moreover, we have stated that absent a showing by the appellant that the trial outcome would have differed, every reasonable presumption as to the validity of the verdict below must be taken as true upon appeal. *See Leigh Furniture & Carpet Co. v. Isom,* 657 P.2d 293, 301 (Utah 1982).

Child claims that Gonda's counsel made no fewer than three references to the Deller settlement during opening and closing argument. In particular, he asserts that Gonda's counsel, during his opening statement, referred to the settlement and then stated that Child was suing Gonda to "get paid more money."

Initially, we note that the record citations in Child's brief indicate that Gonda's counsel ***430** during closing argument referred not to the settlement but to the fact that Child and Deller had resolved their differences. As we have already stated, such references do not even trigger rule 408's application because they do not constitute evidence of an offer or acceptance of "valuable consideration." Therefore, the only "irregularity" that may have occurred was counsel's remark during opening statement that Child was suing Gonda to get paid more money.

[6] While we agree with Child that Gonda's counsel's remark violated the trial court's in limine order, Child has failed to present any compelling arguments that convince us that the offending remark denied him a fair trial. Indeed, Child asserts in his brief that "there is simply no way of knowing precisely what effect Ms. Gonda's counsel's remarks had on the jury." For this reason, we must give great deference to the trial court, which is in a much better position than this court to evaluate the parties' conduct, the context in which the irregularity occurred, and the jury's reaction to the statement.

In denying Child's motion for judgment notwithstanding the verdict, the trial court stated:

> The statements of defense counsel regarding settlement with the driver of the vehicle in which [Ms.] Child was riding at the time of the accident were not so prejudicial so as to require this Court to grant a new trial on that basis. This is particularly true in view of the curative instruction given by the Court at the conclusion of the evidence on that issue.[5]

While Child argues that "the instruction given by the District Court ... was, contrary to Ms. Gonda's contention, not sufficient to cure her counsel's misconduct," he provides no reasons or support for his assertion. Moreover, instead of providing argument for the proposition that there is a reasonable likelihood that the trial outcome would have been different absent the error, Child merely asserts that "the only effective sanction for Ms. Gonda's counsel's direct and repeated violation of the District Court's ruling is to grant a new trial." Trial courts will not grant a new trial every time an error occurs here, and neither will this court. *See* Utah R. Civ. P. 59(a) & 61. Therefore, in the absence of any compelling arguments to the contrary, we hold that the trial court did not abuse its discretion in denying Child a new trial on the basis of the irregularity in the proceedings.

III. LAY OPINION TESTIMONY REGARDING THE REASONABLENESS OF GONDA'S DRIVING CONDUCT

[7] Child next argues that the district court committed reversible error in allowing, over Child's objection, lay witnesses to give opinion testimony regarding the supposed reasonableness of Gonda's driving conduct. However, we decline to address his argument because Child has failed to

adequately brief the issue. *See State v. Thomas,* 961 P.2d 299, 304–05 (Utah 1998).

[8] Child's brief does not contain the witnesses' testimony regarding Gonda's driving conduct or any record citations to their testimony. Our rules of appellate procedure require that the argument in the appellant's brief "contain the contentions and reasons of the appellant with respect to the issues presented ... *with citations to the authorities, statutes and parts of the record relied on.*" Utah R.App. P. 24(a)(9) (emphasis added). As we have stated, this court is not " 'a depository in which the appealing party may dump the burden of argument and research.' " *State v. Bishop,* 753 P.2d 439, 450 (Utah 1988) (quoting ***431** *Williamson v. Opsahl,* 92 Ill.App.3d 1087, 48 Ill.Dec. 510, 416 N.E.2d 783, 784 (Ill.App.Ct.1981)).

Our decisions often turn on subtleties and nuances of fact and law. Therefore, it is not enough that Child asserts that several witnesses testified "to the effect that, in their opinion, Ms. Gonda's driving was reasonable in the circumstances." To adequately address the trial court's decision to admit such testimony, we must be provided the testimony that was admitted, with citations to the record so that we may evaluate the testimony in its context. Because Child's brief is wholly inadequate in this regard, we do not address this issue.

IV. DIRECTED VERDICT REGARDING DELLER'S NEGLIGENCE

[9] Child next argues that the district court erred in granting Gonda's motion for a directed verdict that Deller was negligent and that his negligence was a proximate cause of Mindy's death. "We reverse a directed verdict when the evidence, taken in a light most favorable to the nonmoving party, is sufficient to permit a reasonable jury to find for the nonmovant." *Nay v. General Motors Corp.,* 850 P.2d 1260, 1263 (Utah 1993) (citations omitted).

[10] Child argues that the evidence presented at trial was sufficient for reasonable jurors to have concluded that Deller was not negligent. Specifically, he refers to the following evidence in support of his argument: (1) Deller waited at the intersection for approximately 12 seconds before turning into Gonda's path; (2) it was raining; (3) Gonda did not have her lights on; (4) the driver of the vehicle following Gonda testified that she (the driver) probably had her lights on; and (5) an expert witness testified that the vehicle following Gonda's may have created a "haloing" effect, making it difficult for Gonda's vehicle to be seen.

In granting the directed verdict motion, the trial judge stated:

> There is nothing in this record that would support any conclusion other than Mr. Deller did not see what was there to be seen ....
>
> I intend to instruct this jury that they are to consider the conduct of Mr. Deller [and Ms. Gonda], and if they find both of them responsible in any degree, then they are to compare those two, the respective conduct, and give me a percentage, and based upon that, I will determine whether or not there will be an award for the plaintiff.... But clearly, Mr. Deller, in pulling out in front of an immediate hazard, there to be seen, there isn't one ... shred of evidence that would support anything other than failure to be seen.... I understand this haloing effect, but that's not going to get over that hurdle.

We agree with the trial court. While the evidence Child offers may help to explain his actions, it does not show that Deller was not negligent. Therefore, even if the trial court had considered all of the evidence Child presented as uncontroverted fact, Child offered no evidence that would convince any reasonable jury that Deller was not negligent.

[11] Nevertheless, even if the court erred in granting Gonda's directed verdict motion, Child admits in his brief that the court's determination in this regard "did not likely constitute reversible error." As we have stated, we will not reverse a judgment merely because there may have been error; reversal occurs only if the error is such that there is a reasonable likelihood that, in its absence, there would have been a result more favorable to the complaining party. *See Lee v. Mitchell Funeral Home Ambulance Serv.,* 606 P.2d 259, 261 (Utah 1980). In light of the fact that Child has not even attempted to meet this burden, we cannot grant him a new trial on the basis of the court's alleged error.

V. JURY INSTRUCTION REGARDING VIOLATION OF SAFETY LAW

Child next argues that the court committed reversible error in instructing the jury that a violation of a safety law "may be," as opposed to "is," evidence of negligence. A court's jury instructions are legal determinations, which we will review for correctness. *See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.,* 850 P.2d 447, 452 (Utah 1993).

***432** The safety statute to which Child refers requires drivers to use automobile headlights under certain conditions and is essentially embodied in jury instruction 31, which reads:

> The traffic laws of the State of Utah [provide] that every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet ahead, shall use headlights.

The court further instructed the jury that "[v]iolation of a safety law may be evidence of negligence."

According to Child, under *Gaw v. State,* 798 P.2d 1130, 1135 (Utah Ct.App.1990), violation of a safety law *is* evidence of negligence. Child thus asserts in his brief:

> The District Court was apparently confused, thinking that its statement that a violation of the law in question was *evidence* of negligence would be tantamount to a statement that it was negligence.... The "may be" evidence of negligence standard, settled upon by the District Court is simply too vague, is contrary to settled Utah law, and does not let the jury know that violation of a safety law *is* evidence of negligence, even if the jury decides that it does not, standing alone, constitute negligence.

[12] **[13]** **[14]** The above-quoted passage from Child's brief clearly indicates that the real issue has eluded him. The issue in *Gaw* was whether violation of a statute or an ordinance constitutes "per se" negligence or "prima facie" evidence of negligence. *Gaw,* 798 P.2d at 1134–35. Negligence per se, which usually results from the violation of a statute, is defined as "[c]onduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances ...." *Black's Law Dictionary* 1035 (6th ed.1990). In contrast, prima facie evidence is "[t]hat quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented." *Id.* at 1190. Therefore, prima facie evidence of negligence is evidence which would be sufficient to submit the question of negligence to the jury and support a verdict of negligence. However, such evidence would not require the jury to return such a verdict.

[15] **[16]** To illustrate, a driver who reasonably increases his speed in an attempt to avoid being rear-ended by a runaway truck on a canyon road is not negligent per se, even though by increasing his speed he has violated the speed limit statute. In fact, a failure to reasonably increase speed to avoid an accident under such circumstances may itself constitute evidence of negligence. Nevertheless, whether the statute was violated and whether such violation constitutes evidence of negligence is for the jury to determine. As we have previously stated, "[T]he violation of a statute does not necessarily constitute negligence per se and *may be* considered only as evidence of negligence .... [The violation] *may be* regarded as 'prima facie evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found.' " *Intermountain Farmers Ass'n v. Fitzgerald,* 574 P.2d 1162, 1164–65 (Utah 1978) (emphasis added) (quoting *Thompson v. Ford Motor Co.,* 16 Utah 2d 30, 33–34, 395 P.2d 62, 64 (1964)); *see also Dixon v. Stewart,* 658 P.2d 591, 600–01 (Utah 1982) ("Although the provisions of the negligent homicide statute scarcely seem to qualify as a 'safety standard,' the same principle should apply, namely, that criminal culpability generally constitutes only evidence of negligence in a civil action, rather than negligence per se as a matter of law.").

[17] In the instant case, the trial court instructed the jury that violation of the automobile headlight statute "may be" evidence of negligence. While the court did not use the term "prima facie," use of that term was unnecessary because the court adequately instructed the jury that if it determined that Gonda violated the headlight statute, it could find—but was not required to find—that she ***433** was negligent. If the court's instruction was prejudicial in any way, it was prejudicial to Gonda, because it did not notify the jury that her alleged violation was subject to justification or excuse. We therefore hold that the trial court did not commit error that prejudiced Child in any way when it instructed the jury that violation of a safety law "may be" evidence of negligence.

VI. INSUFFICIENCY OF THE EVIDENCE AND/OR VERDICT WAS "AGAINST LAW"

Child's final argument is that this court should grant a new trial pursuant to rule 59(a)(6) of the Utah Rules of Civil Procedure, because the evidence was not sufficient to support the jury's verdict that Gonda was not negligent or, alternatively, because the verdict was "against law"—i.e., the

law set forth in the jury instructions. Rule 59(a) gives the trial court discretion to grant a new trial on a number of grounds, including "[i]nsufficiency of the evidence to justify the verdict or other decision, or that it is against law." Utah R. Civ. P. 59(a)(6).

[18] **[19]** **[20]** Our standard of review on this issue has been stated as follows:

> Where the trial court has *denied* the motion for a new trial, its decision will be sustained on appeal if there was "an evidentiary basis for the jury's decision ...." The trial court's denial of a motion for a new trial will be reversed *only if "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.*"

Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982) (second emphasis added) (quoting *McCloud v. Baum,* 569 P.2d 1125, 1127 (Utah 1977)). To support an insufficiency of the evidence claim on appeal, "the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *McCorvey v. State Dep't of Transp.,* 868 P.2d 41, 44 (Utah 1993) (quoting *Crookston,* 817 P.2d at 799). However, with this in mind, we emphasize that " '[i]t is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses.' " *State v. Booker,* 709 P.2d 342, 345 (Utah 1985) (quoting *State v. Lamm,* 606 P.2d 229, 231 (Utah 1980)). So long as some evidence and reasonable inferences support the jury's findings, we will not disturb them. *See id.*

[21] The evidence that Child marshals in support of the jury's verdict may be summarized as follows: Gonda testified that she remembers slamming on her brakes when she saw the Volkswagen immediately in front of her and that she was probably traveling between 50 and 55 miles per hour because she always travels the speed limit in rainy weather. Gonda's passenger testified that it was daylight at the time of the collision, that he observed no activity on the part of Deller's vehicle that caused him to think it might enter the roadway, and that there was no alternative Gonda could have taken to avoid the collision. The driver of the vehicle following Gonda testified that she (the driver) didn't have time to put her brakes on until Deller's vehicle was "right there" and that she thought Deller's vehicle, as soon as it started to move, would be hit by Gonda's vehicle because there was not "enough room for anybody to do anything." The driver heading north on Highway 89, who was in the left turn lane just opposite Deller, testified that it was daylight at the time of the collision, that in his judgment there was no need for automobile lights to be on at the time the collision occurred, and that Deller's turning movement was very abrupt and very quick. Finally, Child's expert witness testified that Gonda had between two and three seconds to react in order to avoid the collision, and Gonda's expert witness testified that Gonda had nowhere to go between the time Deller's vehicle started moving and the time of the collision and that there was no time for Gonda to brake prior to the collision.

[22] Notwithstanding this evidence, Child asserts that the jury rejected the "overwhelming weight of the direct and circumstantial evidence" presented concerning Gonda's negligence. He then attempts to demonstrate the insufficiency of the evidence in favor of the jury's verdict by marshaling all of the evidence that he maintains is ***434** against the verdict. His approach, however, fails for two reasons. First, as we have previously stated, it is the exclusive function of the jury to weigh the evidence and determine the credibility of the witnesses. Child ignores this principle, because he asks this court in his brief to "[weigh the evidence in support of the jury's verdict] against the avalanche of evidence [against the verdict]" and conclude that the jury was wrong in finding that Gonda was not negligent. This court does not, and will not, reweigh the evidence and determine where it preponderates.[6]

[23] Second, in challenging the jury's verdict, Child has failed to fully comply with our marshaling requirement. While setting forth a great deal of evidence, he has so slanted it in his favor that in many instances he has inaccurately represented the record. For instance, he states that the evidence showed that Gonda was not wearing her eye glasses at the time of the accident and that at the time her deposition was taken a year later, her driver's license required her to wear glasses. However, he fails to state that the evidence also showed that (1) her glasses had been prescribed only for reading; (2) her visual acuity without corrective lenses was 20/25 in one eye and 20/30 in the other; and (3) her license had the eye glass restriction on it simply because she had worn her glasses when she took her driver's license test, but she later obtained a new license that does not require her to wear glasses. Moreover, Child fails to indicate that the court instructed the jury that Utah law requires drivers of private vehicles to have uncorrected visual acuity of at least 20/40. The jury therefore could have rejected any implication that Gonda was negligent in not wearing glasses at the time the accident occurred.

Child also cites Gonda's testimony that she did not know the direction she was traveling at the time of the accident, the path she had driven prior to the accident, or where she was going. However, Child fails to cite the evidence from the record indicating that Gonda did not know the direction "on a compass" in which she was traveling, that she could not remember the path she had driven from her friend's house in Kearns, Utah, to the accident site, and that she did not know where she was going because she was taking her friend on an errand to pick up a part from a business and he had been giving her instructions on how to get there.

[24] It is an absolute requirement of marshaling that the party state *fully and accurately* all of the evidence on an issue and then show, as a matter of law, that the evidence does not support the verdict. Child has failed to meet this requirement. Moreover, the "avalanche of evidence" that Child has marshaled against the verdict raises questions of weight and credibility, which are matters within the exclusive province of the jury. Because Child has failed to meet his burden of showing that the evidence supporting the verdict was completely lacking or so slight and unconvincing as to make the verdict plainly unreasonable and unjust, we reject Child's argument that the evidence was insufficient to support the jury's verdict.

As a final issue, Child argues that the jury's verdict was "against law"—i.e., against the law set forth in the jury instructions. Specifically, Child cites to the law set forth in the following jury instructions regarding a driver's duty to (1) exercise reasonable care at all times to avoid placing others in danger; (2) observe others using the road; (3) keep a proper lookout; and (4) refrain from heedlessly relying on the right-of-way.

However, even if Child's evidence may have created an inference that Gonda violated one or more of the aforementioned duties, when we view the evidence in the light most favorable to Gonda, we are satisfied that the evidence was clearly sufficient to support the jury's verdict that Gonda was not negligent. Therefore, we hold that the jury's verdict was not "against law" as Child claims.

*435 CONCLUSION

In light of the foregoing, we hold that because Child is not entitled to a new trial, the district court did not abuse its discretion in denying Child's motion for a new trial.

Judgment affirmed.

Chief Justice HOWE, Associate Chief Justice DURHAM, Justice STEWART, and Justice ZIMMERMAN concur in Justice RUSSON'S opinion.

All Citations

972 P.2d 425, 354 Utah Adv. Rep. 21

Footnotes

1 Child appeals only the district court's denial of his motion for a new trial.

2 Andria Newsom married after the accident. Both parties refer to her as "Ms. Gonda" in their briefs. We refer to her as "Gonda" throughout this opinion.

3 Although Deller did not testify at the trial because he was out of the country, he claimed in his deposition that he could remember virtually nothing about the accident. His deposition had been videotaped and was played to the jury during the trial.

4 Because the district court presided over all phases of this case, including the trial, we use the terms "district court" and "trial court" interchangeably throughout this opinion.

5 The jury instruction regarding the error reads:

> As has previously been mentioned, Mr. Child and Jesse Deller have resolved whatever differences they may have had over the death of Melinda Child. The law encourages resolution of disputes, and there was nothing improper or inappropriate about Mr. Child resolving whatever differences he may have had with Jesse Deller prior to the time this lawsuit was initiated.
>
> In your deliberation in this case, you are not to concern yourself with the question of whether Mr. Child received funds from any source in connection with the role that Jesse Deller played in the collision in question. Your sole job is to concern yourself with the questions involving responsibility for the collision and the resultant death of Melinda Child, and the amount of the damages suffered by Mr. Child as a result of his daughter's death.

6 For example, if nine eyewitnesses testify that the stop light was red and one eyewitness testifies that it was green, the jury may choose to believe the one eyewitness. The fact that the jury chose to believe the one instead of the nine is not enough to establish that the verdict was " 'completely lacking or so slight and unconvincing as to make the verdict plainly unreasonable and unjust.' " *Nelson,* 657 P.2d at 732 (quoting *McCloud,* 569 P.2d at 1127).

End of Document