Agenda

Advisory Committee on Rules of Civil Procedure

May 26, 2004
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes.	Fran Wikstrom
Rule 101. Motion practice before court commissioners. Rule 106. Modification of divorce decrees.	Tim Shea
Rule 47. Peremptory challenges.	Frank Carney
Electronic discovery.	David Nuffer

Meeting Schedule

July 28
September 22
October 27
November 17 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 28, 2004
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Terrie T. McIntosh, Leslie W. Slaugh, Paula Carr, Thomas R. Lee, Virginia S. Smith, Thomas R. Karrenberg, Honorable Lyle R. Anderson (via telephone)

STAFF: Tim Shea, Judith Wolferts

EXCUSED: James T. Blanch, David W. Scofield, Janet H. Smith, R. Scott Waterfall, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable David Nuffer, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy

GUESTS: Matty Branch

I. APPROVAL OF MINUTES.

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the March 24, 2004 meeting were reviewed, and Thomas R. Lee moved that they be approved as written. The Motion was seconded by Terrie T. McIntosh, and approved unanimously.

II. RULE 51. INSTRUCTIONS TO JURY; OBJECTIONS.

Tim Shea has prepared two versions of a proposed amendment to Rule 51. The first version addresses only the issue raised in *State v. Reyes*, and clarifies that the reading of final instructions need not include those instructions already given during the course of the trial. The second version is in response to comments and observations made by Committee members during the previous two Committee meetings.

The Committee discussed the two versions. Mr. Wikstrom expressed a preference for the second version of the rule as being more comprehensive. Judge Lyle Anderson commented that it should be required that at least one copy of the instructions be in writing. After discussion, it was agreed that the rule should state that "wherever possible jury instructions shall be in writing."

After further discussion and suggestions for modifications, Thomas Karrenberg moved

that the second version be adopted as revised and discussed during today's meeting. Cullen Battle seconded the Motion, which was approved unanimously.

III. RULE 26: STANDARDS OF PROFESSIONALISM AND CIVILITY.

Mr. Wikstrom has suggested amending Rule 26 to require that the discovery plan identify those attorneys involved in the litigation who have pledged to abide by the recently implemented Utah Standards of Professionalism and Civility.

Some members expressed reservations or opposition to the proposed amendment, noting that it does nothing to address the real problem, *i.e.*, that all lawyers should abide by rules of professionalism and civility, and judges should require lawyers to abide by such rules. Comments were also made that rules of civility and professionalism are ineffective unless district court judges require and enforce civility in their courtrooms and during litigation, with concern being expressed this was not always being done.

Mr. Lee questioned whether including this provision in Rule 26 is the proper place to deal with the problem, since transactional lawyers and other lawyers who are not litigators should also be bound by civility standards. Mr. Battle suggested that Rule 11 might be a better place to include a reference to civility and professionalism standards, and Committee members discussed this suggestion.

After extensive discussion, Mr. Wikstrom commented that there is no set time frame for considering this proposed amendment, and that his purpose in bringing the proposal at this time was simply to make members aware of it and encourage dialog.

IV. RULE 73. ATTORNEYS FEES. FEE SPLITTING.

Mr. Shea stated that the Supreme Court has asked that the Committee look at Rule 73 and the issue of fee splitting once again. He referred members to his April 19, 2004, memorandum dealing with this issue,[1] and stated that the request was prompted by an appeal that is presently before the Court. The appeal deals with a relationship between a collection agency and an attorney which potentially has the appearance of being designed to evade the prohibition on fee splitting.

The Committee discussed ways to require an attorney to certify that there has been no fee splitting. Leslie Slaugh commented that the affidavit proposal appears to require providing the terms of the any agreement that might appear to be fee splitting. Mr. Lee expressed his opinion that a separate certification is not necessary.

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[1]This memorandum is included in the materials for the April 28, 2004 meeting.

After discussion, a motion was made that Mr. Shea's suggestions be adopted. The Motion was seconded and approved.

V. RULE 65B: EXTRAORDINARY RELIEF. REQUEST BY CLIFTON PANOS.

Mr. Clifton Panos has submitted a proposed amendment to Rule 65B. After discussion, the Committee declined the request for amendment.

VI. RULE 72. PROPERTY BONDS. REQUEST BY WALT MERRILL.

Mr. Walt Merrill has proposed that Rule 72 be amended to eliminate the requirement of providing a property security bond in expedited eviction actions where bond is set at less than $2000.

Mr. Slaugh, who has had experience in this area, expressed concern about landlords being able to obtain an expedited eviction without posting a property or other bond. Francis Carney agreed, and commented that he is also uncomfortable with recommending such an amendment without input from attorneys who represent tenants.

After discussion, a motion was made to reject the proposed amendment. The Motion was seconded and approved unanimously.

VII. PRESUMPTION OF DELIVERY.

Mr. J. Val Roberts has requested that the Committee consider his suggestion that the "presumption of delivery" contained in the rules be abolished or, alternatively, limited to mailings by return receipt requested. After discussion, a Motion was made that no action be taken on the proposed amendment since there is no such presumption in the Rules; it is a rebuttable presumption established by common law. The Committee felt that incorporating the proposal into the Rules would not be a good idea. The Motion was seconded, and passed unanimously.

VIII. ADJOURNMENT.

The meeting adjourned at 5:30 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, May 26, 2004, at the Administrative Office of the Courts.

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Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Method of service. Service of a motion and accompanying papers shall be in accordance with Rule 4 if they are filed more than 90 days after judgment. Otherwise, service of papers under this rule may be in accordance with Rule 5.

(c) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to new matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) The moving party shall file with the motion and the responding party shall file with the response records, forms, information and affidavits necessary to support that party's position. A party may attach a memorandum in support of or in opposition to a motion. Attachments for motions and responses regarding alimony shall include income verification and financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, financial declaration and child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party's position are not served with the motion, the responding party shall file and serve an objection to the defect with the response. If attachments necessary to support the responding party's position are not served with the response, the moving party shall file and serve an objection to the defect with the reply. The defect will be cured within 3 business days of notice of the defect or at least 2 business days before the hearing, whichever is earlier. Failure to object waives the right to claim sanctions for costs and attorney fees caused by the defect.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the deadline, the court commissioner may: hold or continue the hearing; impose costs and attorney fees caused by the failure and by the continuance; and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served with the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. The court shall issue an order to show cause only upon motion supported by affidavit or other evidence sufficient to show probable cause to believe a party has violated a court order. The court shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt.

(j) Motions under Rule 7. An ex parte motion, a motion under Rule 56 and a motion that would dispose of the action or any claim or defense in the action shall be filed under Rule 7.

Rule 106. Modification of divorce decrees.

(1) Commencement; service; answer. ~~Proceedings~~ Except as provided in Utah Code Section 30-3-37, proceedings to modify a divorce decree shall be commenced by filing a petition to modify the divorce decree. Service of the petition and summons upon the opposing party shall be in accordance with Rule 4. The responding party shall serve the answer within ~~twenty days after service of the petition~~ the time permitted by Rule 12.

(2) Temporary orders. The court may not order a temporary change in alimony. The court may order a temporary change in child support as part of a temporary change in custody. Upon motion of a party, the court may order a temporary change of custody or parent-time to address an immediate and irreparable harm, to ratify changes made by the parties, and to serve the best interests of the child.

Rule 47. Jurors.

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(b) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

(c) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

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(e) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule.

Supreme Court of Utah.

Stephen R. RANDLE, individually and as guardian for Nathan Randle,
Sarah Randle and Spencer Randle, minor children, Plaintiff and Appellant,
v.
Carl Hunter ALLEN, an individual, Utah Department of Transportation, State of
Utah, and Salt Lake County, Defendants and Appellee.

No. 900189.

Oct. 8, 1993.

Widower sued driver of truck, county, and Department of Transportation in action for wrongful death of widower's wife. Widower settled claims with county and Department on second day of trial. The Third District Court, Salt Lake County, Frank G. Noel, J., entered judgment for truck driver, and widower appealed. The Supreme Court, Stewart, J., held that: (1) exercise of separate peremptory challenges by county and Department was prejudicial error; (2) trial court erred in allowing parties to exercise peremptory challenges for alternate jurors against entire jury panel; (3) unavoidable accident instruction should not be given in negligence cases; (4) trial court properly excluded widower's requested instruction regarding right-of-way; (5) investigating officer could testify as expert; and (6) trial court erred in refusing to allow rebuttal evidence by widower's expert.

Reversed and remanded.

Howe, Associate C.J., filed concurring and dissenting opinion in which Zimmerman, J., concurred.

West Headnotes

[1] Jury 136(3)
230k136(3) Most Cited Cases

Coparties may exercise separate peremptory challenges only when "substantial controversy" exists between coparties; allowing additional challenges when there are multiple parties on one side of suit places opposing party at disadvantage. Rules Civ.Proc., Rule 47(c, e).

[2] Jury 136(3)
230k136(3) Most Cited Cases

To avoid favoring one side of lawsuit over another, trial judge must carefully appraise degree of adverseness among coparties and determine whether adverseness truly warrants giving one side more peremptory challenges than other side. Rules Civ.Proc., Rule 47(c, e).

[3] Jury 136(3)
230k136(3) Most Cited Cases

For purpose of granting separate peremptory challenges to multiple parties on same side of suit, "substantial controversy" exists when party on one side of suit has cross claim against coparty that constitutes, in effect, separate, distinct lawsuit from action existing between plaintiffs and defendants; however, when cross claim is merely derivative of original action, "substantial controversy" does not exist. Rules Civ.Proc., Rule 47.

[4] Jury 136(3)
230k136(3) Most Cited Cases

Truck driver was entitled to his own peremptory challenges where widower sued driver and others for wrongful death because "substantial controversy" existed between driver and other defendants; truck driver cross-claimed against other defendants on grounds similar to those pursued by widower, so driver was required to establish liability of other defendants to driver, and driver's interest in choosing jurors aligned him with both plaintiffs and other defendants. Rules Civ.Proc., Rule 47.

[5] Jury 136(3)
230k136(3) Most Cited Cases

No "substantial controversy" existed between county and Department of Transportation in wrongful death suit by widower against truck driver, county and Department, so that county and Department were required to act jointly in exercising peremptory challenges; neither county nor Department made claim for damages against plaintiff, driver or each other, and cross claims by county and Department against driver and each other were derivative to other claims. Rules Civ.Proc., Rule 47.

[6] Appeal and Error 1045(1)
30k1045(1) Most Cited Cases

Trial court's error in granting county and Department of Transportation separate peremptory challenges required reversal in wrongful death suit by widower against truck driver, county and Department, where widower had only three peremptory challenges and defendants together had nine challenges but should have only had six. Rules Civ.Proc., Rule 47.

[7] Jury 135
230k135 Most Cited Cases

Trial court erred in allowing parties to exercise additional peremptory challenge, which was meant to be used against alternate jurors, against entire jury panel. Rules Civ.Proc., Rule 47(b).

[8] Negligence 1741
272k1741 Most Cited Cases
(Formerly 272k140)

Jury instructions on unavoidable accidents are not necessary, run the risk of misleading jury, and suggest that improper type of analysis might be used to decide case, and should not be given in negligence cases; overruling *Kusy v. K-Mart Apparel Fashion Corp.*, 681 P.2d 1232 (Utah 1984), *Anderson v. Toone*, 671 P.2d 170 (Utah 1983), *Anderton v. Montgomery*, 607 P.2d 828 (Utah 1980), *Stringham v. Broderick*, 529 P.2d 425 (Utah 1974), *Ellis v. Hathaway*, 27 Utah 2d 143, 493 P.2d 985 (1972), *Wagner v. Olson*, 25 Utah 2d 366, 482 P.2d 702 (1971), *Calahan v. Wood*, 24 Utah 2d 8, 465 P.2d 169 (1970), *Woodhouse v. Johnson*, 20 Utah 2d 210, 436 P.2d 442 (1968), *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961), *Porter v. Price*, 11 Utah 2d 80, 355 P.2d 66 (1960), *Steele v. Wilkinson*, 10 Utah 2d 159, 349 P.2d 1117 (1960), *Alvarez v. Paulus*, 8 Utah 2d 283, 333 P.2d 633 (1959), *Best v. Huber*, 3 Utah 2d 177, 281 P.2d 208 (1955).

[9] Automobiles 246(9)
48Ak246(9) Most Cited Cases

Widower who brought wrongful death suit against truck driver was not entitled to jury instruction regarding which driver had right-of-way in accident between truck driver and victim, where statute upon which instruction was based concerned typical intersections and not type of intersection involved in instant suit. U.C.A.1953, 41-6-73.

[10] Evidence 546
157k546 Most Cited Cases

Trial court has discretion in determining whether witness has adequate qualifications to testify as expert and in determining whether specific testimony offered by expert should be allowed or exceeds expert's qualifications.
[11] Appeal and Error 971(2)
30k971(2) Most Cited Cases

Appellate court will not disturb trial court's determination concerning whether witness has adequate qualifications to testify as expert absent abuse of discretion.

[12] Evidence 535
157k535 Most Cited Cases

[12] Evidence 536
157k536 Most Cited Cases

Formal training or education is not prerequisite to giving expert opinion, and witness may qualify as expert by virtue of witness' experience or training. Rules of Evid., Rule 702.

[13] Evidence 539
157k539 Most Cited Cases

Investigating officer could testify as expert in negligence suit arising from automobile accident, though officer could not calculate speed of vehicles on impact, where officer's testimony encompassed implications of lack of tire marks on road, distance between point of impact and point vehicles stopped, and description of intersection where accident occurred. Rules of Evid., Rule 702.

[14] Evidence 544
157k544 Most Cited Cases

Police office could testify as to who had right-of-way, in negligence suit arising from automobile accident, where officer had extensive experience in investigating traffic accidents.

[15] Appeal and Error 204(7)
30k204(7) Most Cited Cases

[15] Appeal and Error 237(2)
30k237(2) Most Cited Cases

Widower waived right to challenge admission of police officer's testimony regarding speed of vehicles involved in accident on basis that officer could not determine exact speed, where widower neither objected to lack of foundation on that issue nor moved to strike testimony after it became apparent that officer had no basis for speeds given.

[16] Trial 62(1)
388k62(1) Most Cited Cases

"Rebuttal evidence" is evidence tending to refute, modify, explain, or otherwise minimize or nullify effect of opponent's evidence.

[17] Trial 62(1)
388k62(1) Most Cited Cases

Widower of accident victim should have been allowed to present rebuttal evidence in form of expert testimony where opposing party presented expert who testified to matters not addressed by widower's expert and gave testimony contrary

to that of widower's expert on crucial issue.

[18] Trial 62(2)
388k62(2) Most Cited Cases
Testimony presented for purpose of rebuttal should generally be admitted, even if rebuttal is somewhat repetitive of testimony on issues addressed during case-in-chief.

***1331** Terry M. Plant, Salt Lake City, for Carl Hunter Allen.

Michael L. Deamer, Stephen R. Randle, Salt Lake City, for Stephen R. Randle.

STEWART, Justice:

Plaintiff Stephen R. Randle, individually and as guardian for his minor children, filed this action for the wrongful death of his wife, Rosan Randle, against the Utah Department of Transportation (UDOT), Salt Lake County, and Carl Allen. Randle settled his claims against UDOT and Salt Lake County on the second day of trial and proceeded against Allen. The jury returned a verdict finding Allen not negligent.

On appeal, Randle argues that the trial court erred in granting defendants too many peremptory challenges, in instructing the jury, and in making other evidentiary rulings. We reverse and remand for a new trial.

I. FACTS

In the early afternoon of March 13, 1985, Rosan Randle's 1983 Honda Accord collided with defendant Carl Allen's 3/4 -ton pickup truck in the intersection of Wasatch Boulevard and Interstate 215, located at approximately 4800 South in Salt Lake County. [FN1] The posted speed limit for north and southbound traffic on Wasatch Boulevard was 40 miles per hour. Northbound traffic on Wasatch could continue north at the intersection, turn right onto a side street, or veer obliquely to the left onto the I-215 on-ramp. The on-ramp descended off the crest of a small hill, and drivers turning onto the on-ramp could not see the drop-off until after reaching the top of the hill. A stop sign at the intersection required southbound traffic to stop so that northbound traffic could turn left onto I-215.

> FN1. On the date of the accident, Interstate 215 temporarily ended at this intersection. Interstate 215 has since been completed and no longer intersects with Wasatch Boulevard.

The accident occurred when Mrs. Randle was driving south on Wasatch and Mr. Allen, who was driving north, turned left toward the I-215 on-ramp. Allen first saw Mrs. Randle's car when she was approximately 150 feet north of the stop sign. He then turned his attention to the drop-off onto I-215 and did not see Mrs. Randle's car again until just before impact. He did not see whether she had stopped at the stop sign. Allen stated at trial that he had signaled to turn left but at his deposition had testified that he could not recall signaling.

Brett Ellis arrived at the intersection just a moment after the accident. He was driving a large truck in the southbound lane of I-215 when, at about 4400 or 4500 South, he noticed a Honda parallel to him traveling south on Wasatch Boulevard. As Ellis arrived at the intersection, he heard a noise like a shotgun blast. He looked to his side and saw the Honda and Allen's truck spinning before coming to rest. At trial, Ellis testified to the relative positions of his vehicle and the Honda just prior to impact. He also did not see whether the Honda had stopped at the stop sign.

***1332** Mrs. Randle was unconscious at the scene of the accident and died soon after from her injuries. Her husband, Stephen Randle, individually and as guardian for his three minor children, sued Allen for negligent operation of his vehicle and UDOT and Salt Lake County for negligently designing and maintaining the intersection. Allen counterclaimed for medical expenses, lost wages, and damage to his truck. Randle settled the claims against UDOT and the County on the second day of trial and proceeded against Allen. The jury returned a verdict finding Mrs. Randle eighty percent negligent, UDOT nine percent negligent, the County eleven percent negligent, and Allen not negligent. The jury awarded Allen $5,780.57 for the loss of his truck.

On this appeal, Randle asserts that the trial court erred in (1) granting each of the three defendants four peremptory challenges, (2) giving the jury an unavoidable accident instruction, (3) refusing to instruct the jury that Allen had a duty to yield the right-of-way to Mrs. Randle, (4) allowing one of Allen's witnesses to testify as an expert, and (5) not permitting plaintiff to adduce evidence rebutting one of Allen's expert witnesses. We address each of these challenges in turn.

II. PEREMPTORY CHALLENGES

The trial court permitted each party to exercise three peremptory challenges, the maximum number allowed under Rule 47(e) of the Utah Rules of Civil Procedure. Each party was also allowed to exercise against the entire panel the one additional challenge reserved by Rule 47(b) for

alternate jurors. As a result, the three defendants collectively exercised a total of twelve peremptory challenges, and plaintiff exercised four. The jury that sat consisted solely of men.

Randle claims that defendants used their additional peremptory challenges to exclude women from the jury because an all-male jury would tend to be less sympathetic to Mrs. Randle, a female driver, and more sympathetic to Allen, a male. Allen disputes this assertion and argues that an all-male jury might actually be more sympathetic to Randle, a man who has lost his wife.

[1] Rule 47(e) provides, "Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule." Subsection (c) states that "where there are several parties on either side, they must join in a challenge before it can be made." Prior to the promulgation of the Utah Rules of Civil Procedure, this Court construed almost identical statutory language to mean that co-parties are not deemed to be on the same side of a lawsuit if their interests are truly adverse. *Sutton v. Otis*, 68 Utah 85, 141, 249 P. 437, 457-58 (1926). In *Sutton*, one of the defendants practically admitted liability and cooperated with the plaintiff to establish the liability of the other defendant. In a separate lawsuit, the two defendants sued each other in federal court for damages arising out of the same set of facts. The trial court refused to allow one defendant to exercise a peremptory challenge because the other defendant refused to join in making the challenge. This Court held that it was prejudicial error to require co-parties to exercise their peremptory challenges together when their interests are clearly hostile and adverse. *Id.*

Allen relies on *Sutton* and argues that since the defendants in this case had separate counsel and filed separate answers and cross-claims against each other for indemnity or contribution, their interests were adverse. *Sutton* expressly held, however, that these factors by themselves do not establish the existence of adverse interests for purposes of the rule. Indeed, *Sutton* stated that extra peremptory challenges should be granted to multiple parties only if there is "a substantial controversy between them respecting the subject-matter of the suit." 68 Utah at 141, 249 P. at 457. Otherwise, parties on the same side of a lawsuit should join in exercising the allowed challenges. *Id. Sutton* held that a "substantial controversy" did not exist simply because co-parties were uncooperative and attempted to shift liability to the other. *Id.* at 144, 249 P. at 458.

***1333** Some courts have been more liberal and have granted additional peremptory challenges to co-parties simply because their defenses or claims rested on different facts, *Lauman v. Lee*, 192 Mont. 84, 626 P.2d 830, 835 (1981), or different legal theories, *Distad v. Cubin*, 633 P.2d 167, 171 (Wyo.1981). That approach, however, would entitle co-defendants to extra peremptory challenges in a majority of multiple-defendant cases, thereby imposing a significant disadvantage on plaintiffs. Other jurisdictions have offset the advantage of giving co-parties extra challenges by giving the trial court discretion to adjust the number of challenges given to the other side. *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir.1984) (decided under 28 U.S.C. § 1870); *Schultz v. Gilbert*, 300 Ill.App. 417, 20 N.E.2d 884, 885- 86 (1939); *see also Ellenbecker v. Volin*, 75 S.D. 604, 71 N.W.2d 208, 209 (1955). We do not find that degree of discretion built into subsection (c) of Rule 47.

[2] Given the lack of discretionary language in Rule 47, we believe, in accord with *Sutton*, that extra peremptory challenges should be allowed only when a "substantial controversy" exists between the co-parties. While there may be some unfairness in requiring hostile co-parties to join in making their peremptory challenges, granting co-parties on one side of a lawsuit additional challenges places the opposing side at a disadvantage, particularly when, as here, there is a large disparity in the number of challenges allowed each side. *See Hunsaker v. Bozeman Deaconess Found.*, 179 Mont. 305, 588 P.2d 493, 501 (1978). To avoid favoring one side of a lawsuit over another, a trial judge must carefully appraise the degree of adverseness among co-parties and determine whether that adverseness truly warrants giving that side more challenges than the other.

[3] In our view, a "substantial controversy" exists when a party on one side of a lawsuit has a cross-claim against a co-party that constitutes, in effect, a separate, distinct lawsuit from the action existing between the plaintiffs and defendants. When, however, a cross-claim is merely a derivative of the original action, such as a cross-claim for indemnification or contribution, a "substantial controversy" does not exist for the purposes of Rule 47.

[4] In the instant case, an actual independent lawsuit existed between Allen and the two governmental defendants. Allen cross-claimed against UDOT and the County, alleging, as had Randle, that the negligent design and maintenance of the intersection proximately caused his injuries. Allen therefore not only had to defend against Randle's claim, but he also had to establish the liability of both UDOT and the County to him. Thus, Allen's interest in choosing jurors aligned him with both plaintiff and the other defendants.

[5] In contrast, no substantial controversy existed between the County and UDOT. Neither made a claim for damages against the other or against Randle or Allen. Both asserted

that Allen and Mrs. Randle were the proximate cause of the injuries. They cross-claimed against Allen and each other only for the purpose of indemnification or contribution in the event they should be found negligent. Thus, their cross-claims were not independent lawsuits, but were derived from and dependent on the negligence actions filed by Randle and Allen. In addition, although each asserted that the other was more negligent, they had common interests in defending against the claims against them. Both defenses involved the condition or design of the intersection, and both defendants asserted that it was the negligence of the drivers of the vehicles, not the design or condition of the intersection, that caused the collision. In light of their common interests, the acts of negligence alleged against UDOT and the County by Randle were not so different as to place them in an essentially adversarial position to each other.

Because UDOT and the County were on the "same side" in this controversy, the trial court should have required them to act jointly in exercising the three peremptory challenges allowed a side. The trial court ***1334** did not err, however, in allowing Allen to exercise three peremptory challenges separately because he was, practically speaking, on a different side from the two other defendants and Randle.

[6] Allen argues, however, that Randle is not entitled to a reversal and a new trial because he has not shown that he was prejudiced by defendants' receiving more peremptory challenges. A side that has additional peremptory challenges has the opportunity to shape the jury to its advantage. Although that self-evident statement does not itself show prejudice, the size of the disparity in the peremptory challenges allowed in this case was significant. Requiring a party to show prejudice in such circumstances is to require the impossible. " 'To show actual prejudice, the complaining litigant would be required to discover the unknowable and to reconstruct what might have been and never was, a jury properly constituted after running the gauntlet of challenge [s] performed in accordance with the prescribed rule of the game.' " *Blades v. DaFoe*, 704 P.2d 317, 322 (Colo.1985) (quoting *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, 590 S.W.2d 875, 877 (Ky.1979)). Accordingly, we hold that it was prejudicial error for the trial court to grant UDOT and Salt Lake County six peremptory challenges. That position is consistent, we note, with the rule that it is reversible error for civil or criminal litigants to be required to use peremptory challenges to remove jurors who should have been removed for cause. *State v. Bishop*, 753 P.2d 439, 451 (Utah 1988); *State v. Jones*, 734 P.2d 473, 474 (Utah 1987); *State v. Hewitt*, 689 P.2d 22, 27 (Utah 1984); *State v. Brooks*, 631 P.2d 878, 883 (Utah 1981); *State v. Bailey*, 605 P.2d 765, 768 (Utah 1980); *Crawford v. Manning*, 542 P.2d 1091, 1092 (Utah 1975).

[7] Randle also argues that the trial court erred in permitting Randle, UDOT, the County, and Allen to exercise the additional peremptory challenge allowed by Rule 47(b) against the entire panel. Rule 47(b) states, "If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates." Because an additional peremptory challenge under this rule may be used only against alternate jurors, and not against the entire panel, the trial court erred in allowing the additional peremptory challenges to be exercised against the whole panel.

Because the trial court erred in its rulings on peremptory challenges, we reverse and remand for a new trial. We proceed to address the other issues raised by plaintiff because they are likely to arise again in a new trial. *See* Utah R.App.P. 30(a).

III. JURY INSTRUCTIONS

A. Unavoidable Accident Instruction

At Allen's request and over Randle's objection, the trial court gave the jury the following unavoidable accident instruction:

> In the law we recognize what we term as unavoidable or inevitable accidents. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it.

Randle asserts that the unavoidable accident instruction is inherently misleading and should be abandoned and that, in any event, the evidence does not justify the instruction in this case. We agree that the instruction should be abandoned.

[8] The legal concept of unavoidable accident is a remnant of an earlier era of the common law when injuries to a person or property could be sued on in an action for trespass. At early common law, the plaintiff did not have to prove negligence in an action for trespass; liability could be imposed if a defendant merely caused an injury. The concept of an unavoidable accident ***1335** was an affirmative defense to an action for trespass that had to be pleaded and proved by the defendant. *See* 2 Fowler W.

Harper & Fleming James, Jr., *The Law of Torts*, § 12.2, at 747 (1956); *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500, 504 (1958); *Woodhouse v. Johnson*, 20 Utah 2d 210, 224-25, 436 P.2d 442, 453 (1968) (Ellett, J., dissenting).

Except for intentional torts and strict products liability, modern tort law does not generally impose liability for personal injury absent fault or negligence on the part of the defendant. To characterize an "accident" as "unavoidable" under modern negligence law is to say, in effect, that there is no liability for injuries caused by the "accident." The same result may be reached by a proper application of the elements of a cause of action for negligence. The unavoidable accident instruction, however, circumvents proper application of those elements and to that extent allows the jury to reach a result without following the principles set out in the usual negligence instructions. *See* *Woodhouse v. Johnson*, 20 Utah 2d 210, 219, 436 P.2d 442, 445 (1968) (Ellett, J., dissenting).

An unavoidable accident instruction creates a substantial potential for confusing and misleading the jury. The descriptive terms used in the instruction, "unavoidable" and "accident," can be misleading because of their commonly understood meanings. Webster defines "accident" as "a usually sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result (a traffic accident in which several persons are injured)." *Miller v. Alvey*, 246 Ind. 560, 207 N.E.2d 633, 636 (Ind.1965) (quoting *Webster's Third World International Dictionary*). A jury could rely on the general understanding that the term "accident" is simply an unfortunate and unavoidable injury-causing event for which there is no responsibility, even though under traditional tort concepts the accident was caused by negligence.

Compounding the confusion is the implication that "if proved, ... [a finding of an unavoidable accident] constitutes a second ground of nonliability." *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500, 505 (1958). The instruction "diverts the attention of the jury from the primary issue of negligence and necessarily creates the impression in the minds of the jurors of a second hurdle that plaintiff must overcome if he is to prevail." *Graham v. Rolandson*, 150 Mont. 270, 435 P.2d 263, 273 (1967). In other words, the instruction creates "a spurious additional issue in the case when in fact the sole issue is the presence or absence of negligence proximately causing the accident." *Id.*

As a result, a jury faced with complex, conflicting, and less than compelling evidence and the imprecise rules of proximate cause and comparative negligence may be tempted to abandon a rigorous application of the instruction on the elements of negligence and burden of proof and return a verdict based on the simple notion that an accident was unavoidable or inevitable. As the California Supreme Court observed, "The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding." *Butigan*, 320 P.2d at 505.

The instruction may be especially misleading when the alleged negligence occurs sometime prior to the injury-causing event. In such a case, a jury may focus on the immediate circumstances of the injury-causing event, instead of on acts that occurred sometime prior to the event. Thus, the instruction "may in some situations obscure the fact that a defendant *is* responsible for the results of his negligence which has created a situation in which disaster has *then*, too late, become unavoidable." *George v. Guerette*, 306 A.2d 138, 143 (Me.1973) (emphasis in original).

Apart from the inherent confusion in an unavoidable accident instruction, the instruction tends to reemphasize the defendant's theory of the case, that the defendant ***1336** was not negligent. To that extent, the instruction constitutes an inappropriate judicial comment on the evidence and could be viewed by the jury as a "you-should-find-for-the-defendant" type of instruction. *Fenton v. Aleshire*, 238 Or. 24, 393 P.2d 217, 222 (1964); *see also* *Butigan*, 320 P.2d at 505.

Of course, accidents do occur which might be unavoidable or for which the defendant or defendants are not negligent. In such cases, if the state of the evidence warrants it, the trial judge should direct a verdict, or the jury, applying proper instructions on the elements of negligence and burden of proof, should find no liability.

Because an unavoidable accident instruction is not necessary, runs the risk of misleading the jury, and suggests that an improper type of analysis might be used to decide a case, more than one-third of the states have held that such an instruction should not be given. These courts have often reached this result by overruling well-established precedents to the contrary. *Maxwell v. Olsen*, 468 P.2d 48 (Alaska 1970); *City of Phoenix v. Camfield*, 97 Ariz. 316, 400 P.2d 115 (1965); *Oklahoma Tire & Supply Co. v. Bass*, 240 Ark. 496, 401 S.W.2d 35 (1966); *Butigan v. Yellow Cab Co.*, 49

Cal.2d 652, 320 P.2d 500 (1958); *Lewis v. Buckskin Joe's, Inc.*, 156 Colo. 46, 396 P.2d 933 (1964); *Andrews v. Forness*, 272 A.2d 672 (D.C.1971); *Schaub v. Linehan*, 92 Idaho 332, 442 P.2d 742 (1968); *White v. Evansville Am. Legion Home Ass'n*, 247 Ind. 69, 210 N.E.2d 845 (1965); *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265 (Iowa 1977); *Sloan v. Iverson*, 385 S.W.2d 178 (Ky.1964); *George v. Guerette*, 306 A.2d 138 (Me.1973); *Graham v. Rolandson*, 150 Mont. 270, 435 P.2d 263 (1967); *Dyer v. Herb Prout & Co.*, 126 N.H. 763, 498 A.2d 715 (1985); *Vespe v. DiMarco*, 43 N.J. 430, 204 A.2d 874 (1964); *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973); *Fenton v. Aleshire*, 238 Or. 24, 393 P.2d 217 (1964); *Camaras v. Moran*, 100 R.I. 717, 219 A.2d 487 (R.I.1966); *Hunter v. Johnson*, 178 W.Va. 383, 359 S.E.2d 611 (1987); *Cox v. Vernieuw*, 604 P.2d 1353 (Wyo.1980) (act of God defense not appropriate in negligence cases).

Heretofore, the law in Utah has been that an unavoidable accident instruction may be given under certain circumstances, but those circumstances have been ill-defined with no clear guidelines. *See* *Stringham v. Broderick*, 529 P.2d 425, 426 (Utah 1974). As demonstrated by this case, the instruction has been given when the evidence clearly establishes that one or more parties might be at fault. Because of the difficulties inherent in the instruction, we now hold that an unavoidable accident instruction should not hereafter be given in any case. Accordingly, we overrule our prior cases to the extent they approve the use of the instruction, even in limited situations. *See, e.g.*, *Kusy v. K-Mart Apparel Fashion Corp.*, 681 P.2d 1232, 1237 (Utah 1984); *Anderson v. Toone*, 671 P.2d 170, 174 (Utah 1983); *Anderton v. Montgomery*, 607 P.2d 828, 833 (Utah 1980); *Stringham v. Broderick*, 529 P.2d 425 (Utah 1974); *Ellis v. Hathaway*, 27 Utah 2d 143, 493 P.2d 985, 986 (1972); *Wagner v. Olsen*, 25 Utah 2d 366, 482 P.2d 702, 705 (1971); *Calahan v. Wood*, 24 Utah 2d 8, 465 P.2d 169 (1970); *Woodhouse v. Johnson*, 20 Utah 2d 210, 212-14, 436 P.2d 442, 444-45 (1968); *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701, 702 (1961); *Porter v. Price*, 11 Utah 2d 80, 82-84, 355 P.2d 66, 67-68 (1960); *Steele v. Wilkinson*, 10 Utah 2d 159, 349 P.2d 1117, 1119 (1960); *Alvarez v. Paulus*, 8 Utah 2d 283, 333 P.2d 633, 635 (1959); *Best v. Huber*, 3 Utah 2d 177, 281 P.2d 208, 209 (1955).

B. Right-of-Way Instruction

The trial court refused Randle's request to instruct the jury that a driver turning left must yield the right-of-way to any vehicle approaching from the opposite direction that is so close it poses an immediate hazard.

[9] Randle based his proposed instruction on Utah Code Ann. § 41-6-73, which states, "The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the ***1337** turning vehicle as to constitute an immediate hazard." That statute was intended to apply only to typical intersections where a person making a left-hand turn is required to yield to oncoming traffic. Here, the intersection had a stop sign that required southbound traffic to stop and yield to northbound traffic turning obliquely across it to enter the on-ramp to I-215. Northbound traffic was not required by a stop sign to yield the right-of-way to southbound traffic. The trial court properly refused to give Randle's proposed instruction.

IV. ADMISSION OF OPINION TESTIMONY

Randle argues that the trial court erred in qualifying Officer Daniel Haggin as an expert witness because he lacked sufficient background in accident reconstruction, as evidenced by his inability to calculate the actual speed of the vehicles on impact.

[10][11] A trial court has discretion in determining whether a witness has adequate qualifications to testify as an expert and in determining whether specific testimony offered by an expert should be allowed or exceeds the expert's qualifications. *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253 (Utah 1985); *State v. Clayton*, 646 P.2d 723, 726 (Utah 1982); *see also* *Edwards v. Didericksen*, 597 P.2d 1328 (Utah 1979) (foundation for testimony of accident reconstruction expert). An appellate court will not disturb the trial court's determination absent an abuse of discretion. *Lamb v. Bangart*, 525 P.2d 602, 607-08 (Utah 1974).

Officer Haggin was an investigating officer at the scene of the accident. He testified that prior to the accident he had completed approximately eighty hours of accident reconstruction training and that over a period of eleven years, he had investigated thousands and reconstructed hundreds of traffic accidents. He also testified on direct examination that although he had been unable to calculate the exact speed of the vehicles on impact, he believed that Mrs. Randle's vehicle was moving at forty miles per hour and that Allen's truck was proceeding at between twenty-five and thirty- five miles per hour. On cross-examination, Haggin admitted that he had no basis for this conclusion, other than his past experience in investigating other accidents.

[12][13] Rule 702 of the Utah Rules of Evidence provides that a witness may qualify as an expert by reason of his or her knowledge, skill, experience, training, or education to give opinion evidence regarding scientific, technical, or

other specialized knowledge. Thus, formal training or education is not a prerequisite to giving expert opinion, and a witness may qualify as an expert by virtue of his "experience [or] training." *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253 (Utah 1985); *see also State v. Eldredge*, 773 P.2d 29, 37 (Utah 1989). Given Officer Haggin's experience in investigating and reconstructing accidents, the trial court acted within appropriate discretion under Rule 702 in allowing him to testify as an expert witness on accident reconstruction.

Haggin is not disqualified as an expert merely because he could not calculate the speed of the vehicles on impact. His testimony was not limited to the speed of the vehicles on impact; he testified, based on his investigation, concerning other facts of the accident and their significance with respect to causation. For example, he testified that there were no tire marks on the road, indicating that the vehicles were not moving above a certain speed. He testified that Allen's truck stopped thirty feet from the point of impact, demonstrating that Allen's speed did not exceed forty miles per hour. Haggin also gave a detailed description of the intersection and his opinion that Allen had to slow down to negotiate the curve. Even though Haggin could not calculate the exact speed of the vehicles, that did not negate the value of the rest of his testimony that could have assisted the jury in understanding the cause of the accident.

[14] Randle also asserts that Haggin should not have been permitted to testify as to who had the right-of-way. In light of ***1338** Haggin's extensive experience as a police officer investigating traffic accidents, it was not an abuse of discretion to allow him to testify as to which vehicle should have yielded the right-of-way at the intersection.

[15] Finally, Randle argues that Haggin should not have been allowed to testify as to the speed of the vehicles because he was unable to produce an exact figure. Randle neither objected to the lack of foundation on that issue nor moved to strike the testimony after it became apparent that Haggin had no basis for the speeds given. Randle therefore waived his right to challenge the admission of this testimony.

V. REBUTTAL WITNESS

Finally, Randle challenges the exclusion of his expert's rebuttal testimony. During his case-in-chief, Randle called Dr. Reynold Watkins as an expert witness on accident reconstruction. Dr. Watkins testified that in his opinion, Mrs. Randle stopped at the stop sign before entering the intersection and was traveling approximately nineteen miles per hour at impact. After Randle rested his case, Allen presented the testimony of Mr. Newell Knight, who opined that Mrs. Randle did not stop before entering the intersection and that her speed at impact was approximately thirty-five miles per hour. When Randle recalled Dr. Watkins to rebut Mr. Knight's testimony, the trial judge refused to allow Dr. Watkins to testify further.

[16] Rebuttal evidence is evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence. *Board of Education v. Barton*, 617 P.2d 347, 349 (Utah 1980). Dr. Watkins' proffered testimony was proper rebuttal evidence because its purpose was to minimize the effect of Mr. Knight's testimony and undermine the bases of his conclusions.

[17] Randle sought to present evidence rebutting Mr. Knight's testimony for two reasons. First, Mr. Knight had testified to matters not addressed by Dr. Watkins, such as the angle at which Mr. Ellis was able to see Mrs. Randle's car from I-215. Second, Mr. Knight testified on the issue of whether Mrs. Randle stopped at the stop sign, a crucial point in determining the comparative fault of Mrs. Randle and Allen.

[18] Allen argues that the trial court properly excluded the rebuttal testimony as repetitive. As a general rule, testimony presented for the purpose of rebuttal should be admitted, even if the rebuttal is somewhat repetitive of testimony on issues addressed during the case-in-chief. *Workman v. Henrie*, 71 Utah 400, 266 P. 1033, 1036 (Utah 1928); *see also United States v. Chrzanowski*, 502 F.2d 573, 576 (3d Cir.1974); *Steward v. Atlantic Ref. Co.*, 240 F.2d 715 (3d Cir.1957); *State v. Hewitt*, 73 Idaho 452, 254 P.2d 677, 680 (1953). *See generally* Michael H. Graham, *Handbook of Federal Evidence* §§ 611.3, 611.13 (2d ed. 1986); 29 Am.Jur.2d *Evidence* §§ 251, 269 (1967). Here, the purpose of Dr. Watkins' testimony was to rebut Mr. Knight's testimony, not to rehash Dr. Watkins' previous testimony. Randle's initial questions, while covering some of the same material, were intended to provide the basis, and otherwise set the stage, for Dr. Watkins' rebuttal.

Allen finally contends that the trial court properly excluded the rebuttal testimony because it should have been presented during Randle's case-in-chief. That, however, was not possible because Randle heard Mr. Knight's testimony for the first time after he had rested his case.

Reversed and remanded for a new trial.

HALL, C.J., and DURHAM, J., concur.

HOWE, Associate Chief Justice, concurring and dissenting:

I concur in all parts of the majority opinion except in part IIIA, dealing with the unavoidable accident instruction. As to that portion, I partially dissent. I cannot now join the holding that it is never proper to give an unavoidable accident instruction or in the wholesale overruling of all of our cases which hold otherwise.

***1339** Neither party has adequately briefed this particular issue on appeal. Utah R.App.P. 24(a)(9); *see Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 461 (Utah 1993). The briefs include only short, superficial statements as to the appropriateness of the instruction. Even appellants do not argue that the instruction should never be given. In view of that void, it seems hasty to reach the majority's sweeping conclusion. While I agree that the giving of the instruction in this case was erroneous for the reasons stated by the majority, there may be cases where it would be proper if there is evidence supporting a theory of unavoidable accident.

The majority concedes that sometimes accidents do happen without the negligence of anyone. In those cases, it would seem to me that an unavoidable accident instruction might well be of assistance to the jurors in clarifying their options as they deliberate. This issue should be left open for another day when it has been thoroughly briefed and argued.

ZIMMERMAN, J., concurs in the concurring and dissenting opinion of Associate Chief Justice HOWE.

862 P.2d 1329

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Supreme Court of Utah.

Shirley CARRIER, Plaintiff and Respondent,
v.
PRO-TECH RESTORATION dba Stone Carpets, William Roger Smith, and The City of Pleasant Grove, Defendants and Petitioners.

No. 960118.

Aug. 8, 1997.

Eastbound motorist who was injured in collision with southbound motorist brought negligence action against southbound motorist, company that employed him at time of accident, and city. The Fourth District Court, Utah County, Ray M. Harding, Sr., J., entered judgment on jury verdict holding plaintiff 60 percent negligent, southbound motorist 40 percent negligent, and city not negligent to any extent. Plaintiff appealed. The Court of Appeals, 909 P.2d 271, Orme, P.J., reversed and remanded, holding that trial court granted excessive number of peremptory challenges to defendants. Granting certiorari, the Supreme Court, Zimmerman, C.J., held that: (1) trial court should have limited discretion in its decisions with respect to whether coparties may exercise separate sets of peremptory challenges; (2) there was no substantial controversy between southbound motorist and his former employer so as to warrant granting them separate sets of peremptory challenges; (3) rule that prejudice is presumed when trial court grants one side too many peremptory challenges remains good law; (4) rule requiring that coparties jointly exercise peremptory challenges unless substantial controversy exists between them does not deny those coparties' rights to due process or equal protection under Federal Constitution and does not violate provision in State Constitution requiring uniform operation of laws of a general nature; and (5) plaintiff waived objection to the granting of separate set of peremptory challenges to city.

Decision of Court of Appeals affirmed.

Russon, J., concurred in the result.

West Headnotes

[1] Certiorari 63.1
73k63.1 Most Cited Cases

On certiorari, Supreme Courts reviews decision of court of appeals, not of trial court.

[2] Certiorari 64(1)
73k64(1) Most Cited Cases

On certiorari, Supreme Court reviews court of appeals' decision for correctness and gives its conclusions of law no deference.

[3] Certiorari 64(1)
73k64(1) Most Cited Cases

Correctness of court of appeals' decision, as determined by Supreme Court on certiorari review, depends initially upon whether it applied appropriate standard of review to trial court's decision.

[4] Jury 136(3)
230k136(3) Most Cited Cases

In deciding whether coparties are entitled to separate sets of peremptory challenges, the trial court must determine whether a substantial controversy exists between them; determination is a mixed question of fact and law, requiring trial court first to make fact findings as to the nature of any controversy between coparties and then to determine whether those facts meet legal standard of substantial controversy. Rules Civ.Proc., Rule 47.

[5] Appeal and Error 946
30k946 Most Cited Cases

Four factors should be considered in determining the appropriate grant of discretion to trial court in applying legal rule: complexity and variety of facts underlying rule, extent of Supreme Court's experience applying legal principle and its ability to anticipate and articulate outcome-determinative factors, extent to which trial judge has observed facts relevant to application of the law that cannot be adequately reflected in record, and strength of any policy considerations supporting narrow discretion.

[6] Jury 136(3)
230k136(3) Most Cited Cases

Trial court should have limited discretion in its decisions with respect to whether coparties may exercise separate sets of peremptory challenges; on spectrum of discretion, running from de novo on the one hand to broad discretion on the other, appropriate discretion on this issue lies close to, although probably not at, the de novo end. Rules Civ.Proc., Rule 47.

[7] Jury 136(3)
230k136(3) Most Cited Cases

Conflict between employer and former employee, as to

whether company advised former employee to lie about collision involving employee and company van on other driver did not constitute "substantial controversy" so as to warrant granting separate sets of peremptory challenges to employee and employer in negligence action by other driver; those defendants both asserted as defense that plaintiff was more responsible for causing accident than they, neither filed cross-claim against the other, and there was no separate, related litigation between them. Rules Civ.Proc., Rule 47.

[8] Jury 136(3)
230k136(3) Most Cited Cases

Fact that employer and former employee were represented by separate counsel in negligence action against them arising from collision that occurred as employee was driving employer's van did not constitute "substantial controversy" so as to warrant granting separate sets of peremptory challenges to employee and employer. Rules Civ.Proc., Rule 47.

[9] Appeal and Error 923
30k923 Most Cited Cases

Menzies decision, holding that prejudice would no longer be presumed when party is compelled to use peremptory challenge on jury panel member who should have been removed for cause, did not overrule *Randle* decision holding that prejudice is presumed when trial court grants one side too many peremptory challenges.

[10] Courts 89
106k89 Most Cited Cases

Those asking Supreme Court to overturn prior precedent have substantial burden of persuasion.

[11] Courts 85(3)
106k85(3) Most Cited Cases

Supreme Court begins with presumption that a rule of civil procedure is constitutional, and it resolves any reasonable doubts in favor of constitutionality; therefore, party challenging rule's constitutionality bears burden of demonstrating that rule is unconstitutional.

[12] Constitutional Law 313
92k313 Most Cited Cases

[12] Jury 136(3)
230k136(3) Most Cited Cases

Rule requiring that coparties jointly exercise peremptory challenges unless a substantial controversy exists between them does not deny those parties' federal constitutional right to due process. U.S.C.A. Const.Amends. 5, 14.

[13] Constitutional Law 209
92k209 Most Cited Cases

[13] Statutes 67
361k67 Most Cited Cases

Equal Protection Clause of Fourteenth Amendment to United States Constitution and the uniform operation of laws requirement in Utah Constitution embody same general principles. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 24.

[14] Constitutional Law 213.1(2)
92k213.1(2) Most Cited Cases

If no fundamental right or suspect class is involved in equal protection challenge, Fourteenth Amendment requires only that classification in question be rationally related to a valid public purpose. U.S.C.A. Const.Amend. 14.

[15] Statutes 71
361k71 Most Cited Cases

When reviewing constitutionality of a rule of procedure under State Constitution's provision requiring uniform operation of all laws of a general nature, Supreme Court determines whether the classification in question is reasonable, whether objectives of rule are legitimate, and whether there is a reasonable relationship between the classification and rule's purposes. Const. Art. 1, § 24.

[16] Jury 136(3)
230k136(3) Most Cited Cases

[16] Statutes 74(2)
361k74(2) Most Cited Cases

Rule requiring that coparties jointly exercise peremptory challenges unless a substantial controversy exists between them does not violate provision of State Constitution requiring uniform operation of laws; grouping of coparties is reasonable in that it preserves natural adversarial division of plaintiffs versus defendants, rule has legitimate objective of maintaining balance between plaintiffs and defendants, and requiring coparties to join in exercising peremptory challenges is not an unreasonable way to maintain equality of opposing sides. Const. Art. 1, § 24; Rules Civ.Proc., Rule 47.

[17] Jury 142
230k142 Most Cited Cases

Motorist who brought personal injury action arising from automobile collision against other driver, that driver's employer at time of accident, and city waived objection to granting of separate set of peremptory challenges to city, where plaintiff motorist's counsel stated that he would not dispute that city had disparate interests from those of other driver and driver's former employer. Rules Civ.Proc., Rule 47.

[18] Appeal and Error 1177(2)
30k1177(2) Most Cited Cases

Equities of case required that city, which was found free of fault in first trial of negligence action arising from automobile collision, be subject to suit in new trial necessitated by improper granting of separate sets of peremptory challenges to city's two codefendants, even though plaintiff had waived any error in granting of separate set of peremptory challenges to city; erroneous grant of separate challenges to codefendants undermined the neutrality and balance which peremptory challenges were designed to create, and presence of all potentially liable defendants in new trial would aid fact finder in assessing fault. Rules Civ.Proc., Rule 47.
***349** Lynn C. Harris, Provo, and Vicki Rinne, Highland, for Carrier.

M. Dayle Jeffs, Provo, for Pro-Tech Restoration and Stone Carpets.

Robert L. Moody, Provo, for Smith.

John M. Chipman, Salt Lake City, for Pleasant Grove.

ON CERTIORARI TO THE UTAH COURT OF APPEALS

ZIMMERMAN, Chief Justice:

Defendant Pro-Tech Restoration ("Pro-Tech") seeks review of the court of appeals' decision ordering a new trial because the trial court had incorrectly determined that Pro-Tech and defendant William Smith had sufficiently disparate interests to warrant separate allocations of peremptory challenges under rule 47 of the Utah Rules of Civil Procedure. *See Carrier v. Pro-Tech Restoration*, 909 P.2d 271 (Ct.App.1995), *cert. granted*, 920 P.2d 1194 (Utah 1996). Pro-Tech argues that the court of appeals applied the wrong standard of review and incorrectly presumed that allocating too many peremptory challenges to defendants prejudiced plaintiff Shirley Carrier. Pro-Tech further argues that rule , as interpreted by the court of appeals, violates constitutional guarantees of due process and equal protection under the Fifth and Fourteenth Amendments of the United States Constitution, respectively, and the constitutional guarantee of uniform operation of the laws under article I, section 24 of the Utah Constitution. Defendant Pleasant Grove City joins in Pro-Tech's challenge and additionally argues that the court of appeals erred in concluding that all three defendants presented a united front against plaintiff. We affirm.

We begin with a brief review of the facts before addressing the appropriate standard of review and our analysis. This case arose out of an automobile accident between plaintiff Carrier and defendant Smith in Pleasant Grove, Utah. At the time of the accident, Smith was working for Pro-Tech, driving one of its vans south on 500 East as he approached the intersection of 1100 North and 500 East. This intersection was usually controlled by a stop sign on 500 East, but the stop sign was missing on the day of the accident. Carrier, who was driving east on 1100 North, collided with Smith as he crossed the intersection.

Carrier brought a negligence action against Smith, Pro-Tech, and Pleasant Grove City. She sued Smith on the basis of his alleged negligent operation of the van, Pro-Tech on the theory of respondeat superior, and Pleasant Grove on the basis of its alleged negligent failure to maintain the stop sign. Each defendant answered Carrier's complaint by asserting that she was more at fault in causing the accident than they.

Initially, Smith and Pro-Tech were represented by the same attorney. During the early stages of the litigation, Smith left Pro-Tech's employ for reasons unrelated to the instant case. Later, Smith testified at his deposition that Pro-Tech had instructed him to provide false information regarding the accident to place more blame for the accident on Carrier. Pro-Tech denied this charge. Eventually, this dispute with Pro-Tech led Smith to obtain separate counsel.

Prior to trial but after the dispute between Smith and Pro-Tech arose, Carrier moved to limit the number of peremptory challenges to be allotted to defendants under rule 47 of the Utah Rules of Civil Procedure. In her memorandum in support of this motion, Carrier argued that rule 47 requires that co-parties be awarded only one set of peremptory challenges. The trial court denied Carrier's motion and granted each defendant three peremptory challenges for the selection of the main jury panel and one challenge for selecting the alternate juror. Carrier disputed the accuracy of the trial court's ruling as to ***350** Smith and Pro-Tech [FN1] and requested that the trial court place the

reasons for its ruling on the record. In response, the trial court stated, "[T]hey are disparate enough just by the nature of the case to permit [allocating separate sets of peremptory challenges]." Though the trial court relied upon "the nature of the case" to justify its decision, there were no cross-claims between any of the defendants and no counterclaims against plaintiff. Furthermore, "[t]here was no separate, related litigation between any of the defendants." *Id.* at 272.

> FN1. As to the trial court's decision regarding Pleasant Grove, Carrier's attorney stated, "I clearly will not dispute Pleasant Grove [ ] City has disparate interests...."

The case was then tried before a jury. The jury returned a verdict finding Carrier sixty percent negligent, Smith forty percent negligent, and Pleasant Grove free of fault. Carrier moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court denied these motions. Subsequently, Carrier moved for relief from judgment, arguing that under a recent case issued by this court, the trial court had erred by granting separate sets of peremptory challenges to Smith and Pro-Tech. *See Randle v. Allen*, 862 P.2d 1329 (Utah 1993). The trial court denied this motion.

Thereafter, Carrier filed a notice of appeal and then sought summary disposition from this court. We declined to summarily reverse but instead deferred our ruling "until plenary presentation and consideration of the case." *See* Utah R.App. P. 10(f). After the parties submitted their briefs, we poured the case to the court of appeals.

The court of appeals reversed the trial court's decision to allocate separate peremptory challenges to Smith and Pro-Tech. *Carrier*, 909 P.2d at 276. The court reasoned that under rule 47 and our cases interpreting that rule, there was not a "substantial controversy" between Smith and Pro-Tech, [FN2] stating:

> FN2. The court of appeals did not reach the issue regarding Pleasant Grove because the court concluded that Carrier had waived her objection to giving Pleasant Grove its own set of peremptory challenges. *Carrier*, 909 P.2d at 275.

> At the time the trial court ruled on plaintiff's pretrial motion, it knew no cross-claims had been asserted, had no indication whatsoever that Smith intended to file an independent suit against Pro-Tech, and had no reason to think there was fundamental incompatibility among defendants in terms of the theories each would advance. On the contrary, defendants jointly urged a single defense: plaintiff was more negligent than Pro-Tech's employee, Smith.

Id. at 274-75. Pro-Tech filed a petition for rehearing, which was denied by the court of appeals. Pro-Tech then filed a petition for a writ of certiorari with this court, and we granted the petition. 920 P.2d at 1194.

[1][2] We now address the appropriate standard of review. On certiorari, we review the decision of the court of appeals, not of the trial court. *Butterfield v. Okubo*, 831 P.2d 97, 101 n. 2 (Utah 1992). "We review the court of appeals' decision for correctness and give its conclusions of law no deference." *Newspaper Agency Corp. v. Auditing Div.*, 938 P.2d 266, 267 (Utah 1997) (citing *State v. Christensen*, 866 P.2d 533, 535 (Utah 1993)).

[3] The correctness of the court of appeals' decision depends initially upon whether it applied the appropriate standard of review to the trial court's decision. *Id.* The court of appeals characterized the standard of review as follows:

> This appeal turns on the interpretation of Rule 47 of the Utah Rules of Civil Procedure and, thus, presents a question of law. "[W]e accord conclusions of law no particular deference, but review them for correctness."

Carrier, 909 P.2d at 272 (quoting *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985)) (additional citation omitted). We conclude that this is a mischaracterization of the effective standard of review: first, because this case does not turn on a single interpretation of the rule's language, but upon a determination of the legal effect of a set of facts; and, second, because in reviewing such a determination, an appellate court must address the appropriate level of discretion that should be ***351** granted to the trial court's ruling as to the legal effect of those facts. The precise issue presented is one we have not addressed before. Therefore, in the interest of analytical clarity for future cases, we think it important to explicitly discuss it.

[4] To explain: The issue presented to the court of appeals was the correctness of the trial court's decision under rule 47 of the Utah Rules of Civil Procedure to allocate separate sets of peremptory challenges to defendants. Rule 47(e) provides, "Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule." Utah R. Civ. P. 47(e). Subdivision (c), the focus of the instant dispute, states in relevant part, "Either party may challenge the jurors, but *where there are several parties on either side, they must join in a challenge* before it can be made." *Id.* R. 47(c) (emphasis added). This language appears to give no discretion to the trial court and would

therefore seem a pure law question, as the court of appeals suggested. However, in *Sutton v. Otis Elevator Co.*, we construed this language to mean that co- parties are not on the same side of a lawsuit if "there is a *substantial controversy* between them respecting the subject-matter of the suit." 249 P. 437, 457 (Utah 1926) (emphasis added). Under *Sutton*, in deciding whether co-parties are entitled to separate sets of peremptory challenges, the trial court must determine whether a "substantial controversy" exists between them. This determination is a mixed question of fact and law. [FN3] The trial court must make fact findings as to the nature of any controversy between co- parties and then determine whether those facts meet the legal standard of "substantial controversy." While this ultimate conclusion is one of law and therefore is reviewed for "correctness," *State v. Pena*, 869 P.2d 932, 936 (Utah 1994), that does not answer the question of whether the trial court has any discretion in reaching its conclusion and, if so, how much. For as we explained in *Pena*, recognizing that a determination of the legal effect of a specific set of facts is reviewed for "correctness" only begins the analysis as to the operative standard of review. *See id.* at 937.

> FN3. Consequently, the court of appeals erred by characterizing the issue as only a matter of rule interpretation, which is a pure question of law.

> At this point, we must attempt to determine when the articulated legal rule to be applied to a set of facts--a rule that we establish without deference to the trial courts--embodies a de facto grant of discretion which permits the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal.

Id. We have never addressed the question of the discretion allowed a trial court in determining the presence of a "substantial controversy" for rule 47 purposes.

[5] In *Pena*, we set forth four factors to determine the appropriate grant of discretion: (i) the complexity and variety of facts underlying the legal rule; (ii) the extent of our experience applying the legal principle and our ability to anticipate and articulate outcome-determinative factors; (iii) the extent to which "the trial judge has observed 'facts[ ]' ... relevant to the application of the law that cannot be adequately reflected in the record"; and (iv) the strength of any policy considerations supporting narrow discretion. *Id.* at 939. We consider these factors in turn.

We begin with the first *Pena* factor stated in terms of this case: the complexity and variety of facts underlying the rule that co-parties are considered to be on the same side for purposes of allocating peremptory challenges unless there is a "substantial controversy" between them. We find that the facts in a peremptory challenge case are not particularly complex or varying. Indeed, in terms of the *Pena* metaphor, we have fenced off many scenarios that might arise in such cases. *See id.* at 937-38. For example, we stated in *Sutton* that in "cases where defendants are joined, in which one seeks to blame the other for the wrong or injury of which the plaintiff complains[,] ... there is no substantial reason why the defendants, for purposes of a peremptory challenge, should not ***352** be considered as being on the same side." 249 P. at 458. Additionally, we listed several scenarios in *Randle* that will not meet the "substantial controversy" standard. This list, which incorporated the principles announced in *Sutton*, includes separate answers, separate counsel, uncooperativeness, liability shifting, different defenses or claims resting on different facts or legal theories, and derivative cross-claims. 862 P.2d at 1332-33. This list leaves only a few scenarios that can constitute a "substantial controversy." [FN4] Moreover, the possible scenarios that might meet the "substantial controversy" standard are not particularly complicated. For example, a co-party either has or has not filed a nonderivative cross-claim. *See id.* at 1333. Because the fact patterns in rule 47(c) cases are relatively straightforward and limited, the first *Pena* factor militates for providing the trial court with only limited discretion.

> FN4. One such situation is "when a party on one side of a lawsuit has a cross-claim against a co-party that constitutes, in effect, a separate, distinct lawsuit from the action existing between the plaintiffs and defendants." *Randle*, 862 P.2d at 1333.

We next address the second *Pena* factor: the extent of our experience applying the "substantial controversy" principle and our ability to predict and state outcome-determinative factors. We first note that *Sutton*, which announced the "substantial controversy" standard for allocating peremptory challenges, was decided in 1926. This legal standard, therefore, is not new to the appellate courts. Second, as discussed above, we have already listed and resolved the outcome of many possible scenarios in rule 47(c) cases, although certainly not all. Consequently, this factor supports granting relatively limited discretion to the trial court.

We now turn to the third *Pena* factor: the extent to which the facts necessary to determine whether a substantial controversy exists involve considerations "that cannot be adequately reflected in the record available to appellate courts." *See Pena*, 869 P.2d at 939. The decision to award additional sets of peremptory challenges under rule 47(c)

occurs before the trial begins. Our prior cases indicate that the factual considerations relevant to this decision are those "manifest from the very nature of the case." *See* Sutton, 249 P. at 458. These considerations should be adequately reflected in the record, enabling an appellate court to scrutinize closely whether the facts satisfy the legal standard "substantial controversy." We have fenced off other possible scenarios such as expressed hostility or uncooperativeness between co-parties. *See* *Randle*, 862 P.2d at 1332-33. As these types of scenarios are irrelevant to the decision whether to award additional sets of peremptory challenges, the trial court is not placed in the position of having to evaluate the credibility of witnesses or make other decisions that will not be adequately reflected in the record. Therefore, this factor favors providing the trial court with limited discretion.

Finally, we consider the fourth *Pena* factor: whether any policy considerations support narrowing the trial court's discretion in allocating separate sets of peremptory challenges. Our prior discussion addressing this issue suggests that we think there are strong factors arguing for narrow discretion. Peremptory challenges are a powerful tool for shaping the jury that hears the case and ultimately determines which side prevails. Therefore, the trial court should avoid lightly giving one side additional challenges. As we noted in *Randle*, "[G]ranting co-parties on one side of a lawsuit additional challenges places the opposing side at a disadvantage." *Id.* at 1333. Consequently, we advised trial judges to "carefully appraise the degree of adverseness among co-parties and determine whether that adverseness truly warrants giving that side more challenges than the other." *Id.* Because allocating additional peremptory challenges to one side of a lawsuit gives that side such a clear advantage in shaping the jury in its favor, and because detecting the actual impact of any specific peremptory is virtually impossible, there is a need to establish uniformity on what situations merit awarding additional peremptory challenges. *See* *Pena*, 869 P.2d at 939. This interest in establishing uniformity is particularly strong where, as here, the underlying fact patterns are sufficiently manageable that we are able to articulate uniform rules with ***353** enough clarity for other courts to follow. For these reasons, this fourth *Pena* factor suggests that the trial court should have only limited discretion.

[6] All of the *Pena* factors, to one degree or another, support close appellate review of trial court decisions under rule 47(c) of the Utah Rules of Civil Procedure. We conclude, therefore, that the trial court should have limited discretion in its rule 47(c) decisions. On "the spectrum of discretion ..., running from 'de novo' on the one hand to 'broad discretion' on the other," the appropriate discretion on this issue lies close to, although probably not at, the "de novo" end. *See* *Pena*, 869 P.2d at 937. For this reason, the functional difference between the court of appeals' articulation of the standard of review and the correct standard of review is not substantial, although it certainly could make a difference in a close case. After reviewing the facts, however, we find that this is not a close case.

The trial court decided to allocate separate sets of peremptory challenges to Smith and Pro-Tech. When Carrier challenged this ruling and requested that the trial court explain what it was about Smith and Pro-Tech that made them sufficiently disparate to allocate the additional peremptory challenges, the court responded, "I feel that they are disparate enough, just by the nature of the case, to permit it." The court of appeals correctly noted that co-parties will be considered to be on different sides only if a "substantial controversy" exists between them. *Carrier*, 909 P.2d at 273. Without any additional facts in the record, the court of appeals could only surmise why the trial court concluded that Smith and Pro-Tech were not on the same side of the lawsuit for purposes of rule 47(c).

[7][8] The obvious conflict between Smith and Pro-Tech regarding whether Pro-Tech advised Smith to lie, does not, as a matter of law, constitute a "substantial controversy." Nor does the fact that Smith and Pro-Tech were represented by different attorneys. Defendants presented a united front against Carrier--they both asserted that she was more responsible for causing the accident than they. Furthermore, neither Smith nor Pro-Tech filed a cross-claim against the other or a counterclaim against Carrier, and there was no separate, related litigation between Smith and Pro-Tech. Viewed most favorably to the trial court, these facts fall far short of supporting a finding that a "substantial controversy" existed between Smith and Pro-Tech. Therefore, the court of appeals correctly concluded that the trial court erred by allocating separate sets of peremptory challenges to Smith and Pro-Tech.

We next decide whether the court of appeals correctly concluded that the trial court's error prejudiced Carrier, warranting a new trial. The court of appeals relied upon our discussion of prejudice in *Randle* as a basis for presuming that the trial court's erroneous allocation of peremptory challenges resulted in prejudice. *Id.* at 276. In *Randle*, we stated:

> A side that has additional peremptory challenges has the opportunity to shape the jury to its advantage. Although that self-evident statement does not itself show prejudice, the size of the disparity in the peremptory challenges allowed in this case was significant[, twelve for the defendants and four for the plaintiff]. Requiring a party to

> show prejudice in such circumstances is to require the impossible. " 'To show actual prejudice, the complaining litigant would be required to discover the unknowable and to reconstruct what might have been and never was, a jury properly constituted after running the gauntlet of challenge[s] performed in accordance with the prescribed rule of the game.' " *Blades v. DaFoe*, 704 P.2d 317, 322 (Colo.1985) (quoting *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, 590 S.W.2d 875, 877 (Ky.1979)). Accordingly, we hold that it was prejudicial error for the trial court to grant [the defendants] six peremptory challenges.

862 P.2d at 1334; *see also* *Sutton*, 249 P. at 458 (stating, without analysis, that trial court's denial of defendant's right to exercise separate peremptory challenges "was prejudicial error"). We then noted that our position of presuming prejudice was consistent with the line of cases originating with *Crawford v. Manning*, 542 P.2d 1091 (Utah 1975), ***354** which announced "the rule that it is reversible error for civil or criminal litigants to be required to use peremptory challenges to remove jurors who should have been removed for cause." *See* *Randle*, 862 P.2d at 1334 (citations omitted); *see also* *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994), *cert. denied*, 513 U.S. 1115, 115 S.Ct. 910, 130 L.Ed.2d 792 (1995); *Crawford*, 542 P.2d at 1093.

[9] Pro-Tech argues that in light of our decision in *Menzies*, which overruled *Crawford*, the court of appeals erred by relying on the quoted portion of *Randle* and presuming prejudice flowed from the trial court's decision to give additional peremptory challenges to defendants. It is true that on the facts of *Menzies*, we rejected *Crawford*'s automatic reversal rule. *Menzies* concluded that the presumption of prejudice was inappropriate where "a party is compelled 'to exercise a peremptory challenge to remove a panel member who should have been stricken for cause.' " 889 P.2d at 398 (quoting *State v. Bishop*, 753 P.2d 439, 451 (Utah 1988), and citing *Crawford*, 542 P.2d at 1093). We further noted that over the years, this court's doubts about the policy justifications for the application of the *Crawford* rule in the for-cause error situations resulted in our "straining against [*Crawford*'s automatic reversal] requirement by upholding trial courts' questionable for-cause determinations." *Id.* at 400. For this reason, *Menzies* concluded that in such situations, it was best to formally reject *Crawford*'s rule.

In *Menzies*, we made no mention of *Randle* or *Sutton* or the presumption of prejudice those cases said applies where there has been a misallocation of peremptory challenges. Pro-Tech argues, however, that the present case "should be no different[ ] [and that] [t]he conclusion of the Court of Appeals that the *Menzies* court overruling *Crawford* did not overrule *Randle* is an improper analysis of the reasoning of this court in *Menzies*." We disagree. The differences between the issues in *Menzies* and those in *Randle* lead us to conclude that *Menzies* did not overrule *Randle*.

Menzies concerned whether prejudice should be presumed when a party is compelled to use a peremptory challenge on a panel member who should have been removed for cause. On the other hand, *Randle* presumed prejudice when a trial court grants one side too many peremptory challenges, giving that side the power to shape the jury to its advantage. Though analogous, in the *Randle* situation the harm is likely greater because of the number of jurors affected. And unlike the *Menzies* situation, the complaining party has no opportunity to correct the consequences of the trial court's error and no grounds for arguing that any of those seated are actually removable for cause. This makes a much stronger case for a presumption of prejudice.

As a fallback, Pro-Tech argues that even if *Menzies* did not directly overrule *Randle*, we should follow the reasoning of *Menzies* and now overrule *Randle*. Pro-Tech asserts simply that "[t]he court in *Menzies* returned to the [*People v. Hopt*, 4 Utah 247, 9 P. 407 (1886), *aff'd*, 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708 (1887),] rule which requires proof by appellants of the prejudice from the erroneous use of peremptory challenges. This case should be no different." [FN5]

> FN5. We note that Pro-Tech has stated the holding of *Hopt* too broadly. *Hopt* held that prejudice will not be presumed where a trial court fails to remove a juror for cause when the defendant who still has a peremptory challenge does not exercise that challenge to remove that juror. 9 P. at 408.

[10] "Those asking us to overturn prior precedent have a substantial burden of persuasion." *Menzies*, 889 P.2d at 398 (citing *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986)). ProTech's cursory briefing of the overruling question is inadequate to satisfy this burden. Pro-Tech merely provides a short summary of our decision in *Menzies* and then ends with the conclusory statement, "This case should be no different." Pro-Tech wholly fails to present any argument concerning the specific issue in this case: why prejudice should not be presumed when one side is erroneously given substantially more peremptory challenges than the other. Pro-Tech does not explain why presuming prejudice in this situation is unworkable, creates ***355** improper incentives for either trial courts or appellate courts, runs counter to public policy, or is significantly problematic for any other reason that justifies overruling *Randle*. We will not make

Pro-Tech's arguments for it. Pro-Tech's request that we overrule *Randle* fails. *See* *Monson v. Carver*, 928 P.2d 1017, 1024 (Utah 1996).

We next address Pro-Tech's argument that our application of rule 47 violates constitutional guarantees of due process and equal protection under the Fifth and Fourteenth Amendments of the United States Constitution, respectively, and the constitutional guarantee of uniform operation of the laws under article I, section 24 of the Utah Constitution. We first address the federal due process argument before considering the federal equal protection and state uniform operation of the law claims.

[11] Regarding Pro-Tech's due process argument, we note at the outset that we begin with the presumption that a rule of civil procedure is constitutional, "and we resolve any reasonable doubts in favor of constitutionality." *See* *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993) (citing *In re Criminal Investigation*, 754 P.2d 633, 640 (Utah 1988); *Snow v. Keddington*, 113 Utah 325, 195 P.2d 234, 240 (1948)). Therefore, the party challenging the constitutionality of a rule of civil procedure bears the burden of demonstrating that the rule is unconstitutional. *See* *id.*

[12] Pro-Tech asserts two arguments in support of its contention that rule 47 violates its right to due process of law under the Fifth Amendment to the United States Constitution. First, Pro-Tech states that a plaintiff should not be permitted to name a defendant in a suit along with other defendants and thereby deprive that defendant of the same right to challenge jurors that the individual plaintiff may exercise; second, Pro-Tech contends that requiring defendants on the same side to jointly exercise peremptory challenges deprives a defendant of effective representation of an attorney. However, Pro-Tech does not cite to any federal due process case in support of its arguments. The only case relied upon by Pro-Tech is *Sutton*, but *Sutton* did not discuss any due process issues relating to peremptory challenges.

The cursory nature of Pro-Tech's arguments and the lack of support provided warrant little response. First, as to Pro-Tech's contention that the plaintiff should not be able to control whether a defendant gets the same right to exercise peremptory challenges as the plaintiff, the plaintiff does not have this power. *Sutton*, which Pro-Tech relies upon in support of this argument, explained that parties are not on the same side if a "substantial controversy" exists between them. If such a controversy exists, the plaintiff cannot stop the defendants from exercising separate challenges. Indeed, *Sutton* stated that denying separate challenges in this situation is prejudicial error. 249 P. at 458.

Second, Pro-Tech argues that requiring joint exercise of peremptory challenges deprives a party of effective representation of counsel. While exercising additional peremptory challenges certainly may make counsel more effective, due process does not require making counsel more effective at the expense of the opposing side if there is not a "substantial controversy" between co-parties. Pro-Tech has not pointed to any case or presented any argument that explains why it is unreasonable to deny co-parties without a "substantial controversy" the right to more peremptory challenges than the opposing side. Though sharing peremptory challenges may be difficult for some co-parties, we do not find that this difficulty for some co-parties to cooperate is unreasonable given the alternative of permitting one side substantially more peremptory challenges. For these reasons, we reject both of Pro-Tech's due process arguments and conclude that rule 47 of the Utah Rules of Civil Procedure does not violate Pro-Tech's federal constitutional right to due process.

[13][14] We now address Pro-Tech's federal equal protection and state uniform operation of the laws arguments. We begin with the observation that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the uniform operation of the laws requirement in ***356**article I, section 24 of the Utah Constitution embody the same general principles. *See* *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984). "Because no fundamental right or suspect class is involved in this case, the Fourteenth Amendment requires only that the classification be rationally related to a valid public purpose." *See* *Greenwood v. North Salt Lake*, 817 P.2d 816, 820-21 (Utah 1991). Under such a circumstance, the protection afforded by article I, section 24 is at least as rigorous as that provided by the United States Constitution. *See* *id.* at 821. Therefore, Pro-Tech's federal equal protection argument can add nothing to its separate state uniform operation of the laws argument. Consequently, we will address only whether rule 47 of the Utah Rules of Civil Procedure violates article I, section 24. *See* *Zissi v. State Tax Comm'n*, 842 P.2d 848, 855 (Utah 1992).

[15] Article I, section 24 states, "All laws of a general nature shall have uniform operation." When reviewing the constitutionality of a rule of procedure under this provision, we determine "whether the classification is reasonable, whether the objectives of the [rule] are legitimate, and whether there is a reasonable relationship between the classification and the [rule's] purposes." *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989); *see also* *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426

(Utah 1995). We begin by addressing the first question under the *Blue Cross & Blue Shield* analytical framework: whether the classification created by rule 47 of the Utah Rules of Civil Procedure is reasonable. Rule 47 treats co-parties differently than single parties in a lawsuit. A single party receives three peremptory challenges, but co-parties without a "substantial controversy" receive only three peremptory challenges to exercise jointly rather than three peremptory challenges each. We find nothing unreasonable about grouping co-parties. By grouping co-parties, rule 47 preserves the natural adversarial division in a lawsuit: plaintiffs versus defendants.

We now consider the second *Blue Cross & Blue Shield* question: whether the objectives of rule 47 are legitimate. Our prior cases interpreting this rule indicate that rule 47 is directed at maintaining the balance between the opposing sides in a lawsuit. As we stated in *Randle*, "A side that has additional peremptory challenges has the opportunity to shape the jury to its advantage." 862 P.2d at 1334. We find that maintaining the balance between the plaintiffs and the defendants is a legitimate objective.

[16] Having established both the reasonableness of the classification created by rule 47 and the legitimacy of its objectives, we proceed to consider the final *Blue Cross & Blue Shield* question: whether there is a reasonable relationship between creating a classification based on whether parties on the same side have a "substantial controversy" and wanting to maintain the balance between opposing sides in a lawsuit. We find that requiring co-parties to join in exercising the peremptory challenges allocated to a side is not an unreasonable way to maintain the equality of opposing sides. As we explained above, granting one side of the lawsuit additional peremptory challenges places the opposing side at a significant disadvantage. This problem is avoided by requiring co-parties to join in their peremptory challenges. Whenever a "substantial controversy" arises between co-parties, whether plaintiffs or defendants, the trial court must allocate additional peremptory challenges. In that instance, co-parties are considered to be on different sides. Thus, under rule 47 of the Utah Rules of Civil Procedure, all "sides" to a lawsuit retain an equal opportunity to shape the jury. On the basis of the foregoing, we find that there is a reasonable relationship between requiring co-parties to exercise their peremptory challenges jointly and wanting to maintain the balance between opposing sides in a lawsuit. We conclude, therefore, that rule 47 does not violate Pro-Tech's right to uniform operation of the laws or, consequently, Pro-Tech's right to equal protection. [FN6]

FN6. We note that our conclusion is consistent with our holding in *State v. Rivenburgh*, 11 Utah 2d 95, 355 P.2d 689 (1960), *cert. denied*, 368 U.S. 922, 82 S.Ct. 246, 7 L.Ed.2d 137 (1961). In that case, we upheld an analogous criminal peremptory challenge statute attacked under a similar equal protection argument. *See id.* 355 P.2d at 696-97. The statute at issue in that case allowed criminal defendants ten peremptory challenges in capital cases. *Id.* at 696. When two or more defendants were jointly tried, the statute required that they had to join in exercising the ten collective challenges. *Id.* We concluded that the statute applied equally to all defendants alike when tried jointly and therefore did not violate the defendants' right to equal protection. *Id.* at 697.

***357** [17] Finally, we address Pleasant Grove's contention that the court of appeals erred by stating that all of the defendants presented a united front against Carrier. We find this argument to be without merit. The court of appeals merely noted in dicta:

> Pleasant Grove might not have been entitled to its own set of peremptory challenges because no independent cause of action against it was asserted by either of its co-defendants nor was its defensive posture otherwise suggestive of a level of adverseness vis-a-vis the other defendants on par with non- derivative litigation.

Carrier, 909 P.2d at 275. The court of appeals' ultimate conclusion on the issue of Pleasant Grove's use of additional peremptory challenges was that Carrier had waived her objection. *Id.* We agree with the court of appeals that Carrier's counsel waived the objection on this matter when he stated, "I clearly will not dispute Pleasant Grove[ ] City has disparate interests, but I'm a little interested in how Smith and [Pro-Tech] have disparate interests." Because Pleasant Grove prevailed due to this waiver and because we find nothing inaccurate in the dicta to which Pleasant Grove objects, we find no reversible error in the court of appeals' statements.

[18] The court of appeals did not specifically address what effect, if any, Carrier's waiver of her objection to the separate allocation of peremptory challenges to Pleasant Grove will have on the new trial. Ordinarily, a party prevailing due to the waiver of the opposing party would not be subjected to a new trial. However, we conclude that the equities of this case require Pleasant Grove to be subject to suit in the new trial. All three defendants received separate sets of peremptory challenges. While Carrier waived her objection to the allocation of a separate set of peremptory challenges to Pleasant Grove, the fact remains that the erroneous allocation of peremptory challenges to Smith and

Pro-Tech undermined the neutrality and balance the peremptory challenge is designed to create. Moreover, the presence of all of the potentially liable defendants in the new trial will aid the fact finder in assessing fault. We instruct the trial court to ignore Carrier's waiver from the prior trial and to determine, on the basis of the principles set forth in this opinion, whether Pleasant Grove is entitled to a separate set of peremptory challenges.

In conclusion, we hold that the court of appeals correctly ruled that the trial court erred by granting separate sets of peremptory challenges to Smith and Pro-Tech. Furthermore, we hold that denying Smith and Pro-Tech separate sets of peremptory challenges does not violate Pro-Tech's federal constitutional right to due process and equal protection or state constitutional right to uniform operation of the laws. We also hold that the court of appeals correctly concluded that Carrier waived her objection to the granting of additional peremptory challenges to Pleasant Grove. Therefore, we uphold the decision of the court of appeals.

STEWART, Associate C.J., and HOWE and DURHAM, JJ., concur in Chief Justice ZIMMERMAN's, opinion.

RUSSON, J., concurs in the result.

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