

FILED
SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 96952-3

SUPREME COURT
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KRISTINE GODFREY, husband
and wife and their marital community composed thereof,

Plaintiffs-Respondents,

v.

STE. MICHELLE WINE ESTATES, LTD. dba
CHATEAU STE. MICHELLE, a Washington Corporation;
and SAINT-GOBAIN CONTAINERS, INC.,

Defendants-Petitioners,

AND

ROBERT KORNFELD,

Additional Appellant.

**PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES
FOLLOWING ORAL ARGUMENT**

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*Attorneys for Petitioners Ste. Michelle Wine Estates Ltd.,
and Saint-Gobain Containers, Inc.*

Under RAP 10.8, Petitioners Ste. Michelle Wine Estates Ltd., and Saint-Gobain Containers, Inc., (collectively “Petitioners”) hereby submit the following additional authorities.

1. Meaning of “Arrangement of the Calendar”. Regarding whether the “arrangement of the calendar” has historically been understood to refer to a trial court’s authority to arrange the cases before it for trial (as opposed to changing deadlines set by an initial case schedule order, with which the parties to an individual case must comply), Petitioners submit the following authorities:

- *State ex rel. Sperry v. Superior Court for Walla Walla County*, 41 Wn.2d 670, 671, 251 P.2d 164 (1952) (*per curiam*) (“It is the trial court's responsibility to arrange its trial calendar and to determine in what manner the cases can be most expeditiously and fairly tried in order that justice can be given to all of the parties.”)

- *Stockwell v. Crawford*, 21 N.D. 261, 130 N.W. 225, 228 (1911) (“We know of no matter on which there is so wide an opportunity for the exercise of discretion pertaining to litigation as in the setting and arrangement of causes for trial by the district court, and, in view of the immeasurably superior opportunities for intelligent judgment in such matters possessed by the district judge, it must in effect be left practically to his sense of the needs, relations, and necessities of the parties and the public.”)

- *Kula v. Sitkowski*, 395 Ill. 167, 69 N.E.2d 688, 171 (1946) (“A trial court is vested with judicial discretion in the arrangement of

cases on the trial calendar, and in determining their priority, and so long as there is no abuse of that discretion its action will not be changed by a court of review.”)

- *Monroe, Ltd. v. Central Tel. Co.*, 91 Nev. 450, 538 P.2d 152, 156 (1975) (“Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court.”).

- 9 Corpus Juris 1117 (N.Y. 1916) “CALENDAR” (“[A] list or enumeration of causes arranged for trial in court”)

2. Interpreting words and phrases with an established legal meaning when used in a statute. Regarding whether it should be presumed that when the Legislature uses a word or phrase with an established legal meaning the Legislature intends for that word or phrase to be given that meaning, Petitioners submit the following authority:

- *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530 (1976) (“A familiar legal term used in a statute is given its familiar legal meaning” (citations omitted)).

Copies of these authorities are attached for the Court's convenience.

Respectfully submitted this 18th day of September, 2019.

CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE
LLP

CARNEY BADLEY SPELLMAN, P.S.

By: MBK y for #14405
Emily J. Harris, WSBA 35763
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Attorneys for Petitioners Ste. Michelle Wine Estates Ltd., and Saint-Gobain Containers, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the *Petitioners' Statement of Additional Authorities in Support of Petition for Review* on the below-listed attorney(s) of record by the method(s) noted:

Via Appellate Portal to the following:

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DATED this 18th day of September, 2019.

Patti Saiden, Legal Assistant

KeyCite Yellow Flag - Negative Treatment
Distinguished by Hawley v. Mellem, Wash., September 2, 1965

41 Wash.2d 670
Supreme Court of
Washington, Department 1.

STATE ex rel. SPERRY et ux.

v.

SUPERIOR COURT FOR
WALLA WALLA COUNTY et al.

No. 32334.

|
Dec. 18, 1952.

Synopsis

Original application for writ of certiorari. The trial court denied petitioners' motion for consolidation of three separate actions for trial. The Supreme Court, Per Curiam, held that trial court's refusal to consolidate three separate actions involving multiple causes of actions and defenses all arising from series of automobile collisions on dust clouded highway, was not an abuse of discretion.

Denial of motion for consolidation of actions affirmed; alternative writ of certiorari quashed.

West Headnotes (3)

[1] Action

↔ Power to Consolidate

Consolidation of cases for trial is matter within discretion of trial court and its decision is final unless there has been a clear abuse of discretion.

5 Cases that cite this headnote

[2] Trial

↔ Trial Dockets or Calendars in General

Arrangement of trial **calendar** and determination of manner of providing expeditious and fair trials of cases is trial court's responsibility.

2 Cases that cite this headnote

[3] Action

↔ Affected by Parties Involved

Trial court's rejection of motion to consolidate for trial three separate actions involving numerous causes of action and defenses and all arising from series of automobile collisions on dust clouded highway, was not a clear abuse of discretion.

3 Cases that cite this headnote

Attorneys and Law Firms

*670 **165 Cameron Sherwood and Robert A. Comfort, Walla Walla, for relators.

Tuttle & Luce, Walla Walla, for respondent Judge, Ewers and Jaymar Co. Inc.

Minnick & Hahner, Walla Walla, for respondents Lloyd.

Moulton, Powell, Gess & Loney, Kennewick, for respondents Gorton.

Opinion

PER CURIAM.

This matter arose out of a series of automobile collisions which occurred in a dust cloud on a highway in Walla Walla county. A motor vehicle operated by A. L. Johnson stopped on the main traveled portion of the highway in the dust cloud. The motor vehicle of George T. Rudd collided with the rear of the Johnson vehicle, following which the motor vehicle operated by Martin R. Ewer attempted to pull the Rudd vehicle off the highway. While so engaged, R. C. Lloyd's automobile collided with the Rudd vehicle. Then the following collisions occurred, one immediately after the other: the motor vehicle of Edward Sperry collided with the Lloyd vehicle; the motor vehicle of Uno J. Juhola collided with the Sperry vehicle; the motor vehicle of Ralph P. Gorton collided with the motor vehicle of Juhola.

As a result of these collisions, three separate actions were filed. Cause No. 38095, in which Martin R. Ewer is plaintiff named nine parties defendant, involves three collisions, contains *671 four causes of action by way of complaint, one cause of action by way of cross-complaint, and eight separate and affirmative defenses. Cause No. 38456 in which R. C. Lloyd is plaintiff and Edward Sperry is defendant, contains two causes of action by way of complaint and four separate and affirmative defenses. Cause No. 38480, in which Edward Sperry is plaintiff, is against fourteen parties defendant, contains seven causes of action by way of complaint, one

cause of action by way of cross-complaint, and fourteen separate and affirmative defenses.

Relators applied to the superior court for Walla Walla county to have the three cases consolidated for trial. After considering the matter, the trial court denied the motion for consolidation. Relators then applied to this court for an alternative writ of certiorari, which was granted, specifying the return day of November 28, 1952, and directing respondents to comply with the writ, or in the alternative to show cause why they should not do so. The record of all proceedings was sent to this court and reviewed by us.

[1] [2] Whether or not cases should be consolidated for trial is a matter within the discretion of the trial court. We do not feel inclined to interfere with the method in which a trial court handles its own affairs, unless there has been a clear abuse of discretion. It is the trial court's responsibility to arrange its trial calendar and to determine in what manner the cases can be most expeditiously and fairly tried in order that justice can be given to all of the parties.

[3] Our examination of the record fails to convince us that there was an abuse of discretion by the court in this matter.

The order of the trial court denying the motion for consolidation of actions is affirmed, and the alternative writ of certiorari heretofore issued by this court is quashed.

All Citations

41 Wash.2d 670, 251 P.2d 164

21 N.D. 261
Supreme **Court** of North Dakota.

STOCKWELL
v.
CRAWFORD, District Judge.

Feb. 27, 1911.

**225 Syllabus by the Court.*

Generally mandamus does not lie to control the exercise of judicial discretion.

Under the facts disclosed by the record in this case, the action of the defendant as judge of the district **court** of Billings county, set forth in the opinion, in adjourning a term of the district **court** of that county without trying the case in which the plaintiff herein was a party, was an exercise of judicial discretion.

Affidavits of prejudice directed at the judge of the district **court** and not filed before the commencement of the term at which the case is to be tried are of no effect and do not deprive *226 the judge of the right or power to try the action in which such affidavits are filed during term time.

Under the circumstances and proceedings surrounding the act of the judge in this case, it is *held*, that his attempts to secure the judges of other districts to sit in the **trial** of the case in his place were purely voluntary, and that mandamus will not lie to compel him to reconvene the term of **court** and call in another judge, by reason of his not having made every effort possible to secure another judge to sit in

the **trial** of the cause in which the plaintiff was a party.

The discretion of a judge of the district **court** pertaining to the setting of causes for **trial**, the order of their **arrangement** on the **calendar**, and the adjournment of terms of his **court**, is almost unlimited, and oftentimes the rights of a litigant must give way to the superior rights of the public and the necessities of the occasion, as governed by the duties of the judge and the terms and business of the several counties of his district.

Synopsis

Mandamus by Leonard Stockwell against W. C. Crawford, District Judge of the Tenth Judicial District. Writ quashed.

West Headnotes (4)

[1] **Courts**

↳ Adjournment of Terms

Where, when a case was called for **trial** on January 23d, the **court** acted within his discretion in adjourning **court** sine die at 5 o'clock p. m. on that day without trying the case, where it appeared that the presiding judge was in a district of 10 counties and obliged to hold about 20 terms of **court** each year; that a term of **court** was called in another county for January 30th, and in a third county for February 7th; and that an outside judge could not be procured to try the case without exchanging places with him, which would be

impossible in view of the work-what constitutes delay within declaration of right providing that justice shall be administered without delay or denial being a relative question depending largely on the circumstances, and the work imposed on the judge, etc., who is endowed with large discretion in the arrangement of the cases in his district and in determining when he must adjourn a term of **court**.

2 Cases that cite this headnote

[2] Judges

⚡ Time of Making Objection

Rev.Codes 1905, § 7045, requires affidavits of prejudice as a basis of application for a change of judge to be filed after issue joined and before the opening of the term at which the case is to be tried. Held, that such affidavits not filed until after commencement of the term are of no effect and do not deprive the judge of the power to try the case.

2 Cases that cite this headnote

[3] Mandamus

⚡ Matters of Discretion

While mandamus may be invoked to compel the discretion of a **court** body, or officer in a judicial or quasi judicial act to be exercised, it does not lie to control or review the exercise of the discretion.

Cases that cite this headnote

[4] Mandamus

⚡ Specific Acts

Where affidavits of prejudice against a presiding judge were filed too late to be considered, the attempts of the judge to secure judges of other districts to sit in the **trial court** were purely voluntary, and mandamus will not lie to compel him to reconvene the term and call in another judge on the ground of insufficient effort to secure a judge to sit in the cause in which plaintiff was a party.

1 Cases that cite this headnote

Attorneys and Law Firms

M. A. Hildreth, for petitioner. W. F. Burnett and T. F. Murtha, for defendant.

Opinion

SPALDING, J.

The plaintiff herein applied to this **court** for an alternative writ of mandamus directing the Honorable W. C. Crawford, judge of the Tenth judicial district, to immediately reconvene the district **court** for the county of Billings and proceed to the **trial** of the cause of Stockwell v. Haigh, by jury, without delay, and to fix some reasonable time and proceed to the **trial** of said cause, or to show cause for not obeying the command of the writ. The judge of that district made due return to the writ, and it rests upon us to determine whether the action of Judge Crawford in adjourning, sine die, the

regular January term of the district **court** of Billings county on the 23d day of January, 1911, furnishes ground for the relief demanded by plaintiff.

It appears from the showing made by the plaintiff that the district **court** in Billings county convened on the 10th day of January, last, and upon the call of the calendar the plaintiff, by his counsel, gave notice that he was ready to try and dispose of the case above referred to; that, in arranging the calendar of causes for **trial** upon a call thereof, plaintiff's case was set as the tenth case for **trial**; that he with his witnesses and counsel remained in attendance upon the **court** awaiting the disposition of cases having precedence over his, until the 23d of January, at considerable expense; that, after the criminal business was disposed of, the civil calendar was taken up on the 16th or 17th of January, and on the 21st of that month applicant's case was called for **trial**. Thereupon the defendant responded that he was unable to have his attorneys, Messrs. Ball, Watson, Young & Lawrence, present, by reason of the fact that Mr. Lawrence had been called out of the state on account of the serious illness of his mother. The **court** gave the defendant Haigh to understand that he must make arrangements for different counsel, and that said cause would have to be tried in its regular order. Thereupon said Haigh presented to the clerk, and offered for filing, his affidavit of prejudice against the judge, uncorroborated by any affidavit of counsel. Counsel for the plaintiff objected to the sufficiency of the affidavit, and the **court** indicated that it was insufficient and imperfect. Counsel also made the point that the application for a change of judges came too late, because not filed

on or before the first day of the term, as required by the statute. The 21st day of January was Saturday. The matter was held open until Monday, the 23d. Upon the latter day, and after the disposition of other business, the case was called for **trial**, and thereupon W. F. Burnett, Esq., of Dickinson, presented the affidavit offered on the 21st of January, with the required corroborating affidavit, when counsel for the plaintiff insisted that the cause should proceed at once to **trial**. The **court** after consideration stated that he felt great delicacy in trying the cause (the reasons given need not be stated here), and that he would grant the application for a change of judges. Thereupon he endeavored to secure the attendance of the judge of the Sixth judicial district, and, failing in that, the judge of the Third judicial district, but was unable to secure his attendance, and made no further effort. These proceedings occurred after noon, and at about 5 o'clock on the 23d day of January, over the objection of counsel, the judge refused to hold the term of **court** open until he could communicate and arrange with some other judge, but adjourned the term sine die.

Section 7045, Rev. Codes 1905, states the conditions upon which the judge of one district shall call in the judge of another district, by reason of prejudice, and it requires the affidavits of prejudice to be filed after issue joined and before the opening of the term at which the cause is to be tried. It is conceded by plaintiff that the affidavits in this case were ineffective by reason of their not having been filed on or prior to the opening of the term of **court**.

Great stress is laid upon the circumstances surrounding the case as indicating the bad faith of the defendant in filing the affidavits of prejudice, and it does appear very strongly that, finding himself at a disadvantage *227 by reason of his attorney being called away, he had resorted to this method to secure a continuance of the case. But we are dealing with the legal phase of the matter, and must consider the return of Judge Crawford, as the motive of the defendant is of less importance than the reasons given by the judge.

Judges Winchester and Pollock were the only judges residing on a direct line of railroad from Medora, the county seat of Billings county, and it appears from the return that Judge Crawford knew that Judge Coffey of the Fifth judicial district was engaged in a term of **court**, and Judge Crawford had cases set for **trial** at Dickinson, in Stark county, on the 25th and 26th days of January; that the Tenth judicial district is composed of 10 counties and he is required to hold about 20 terms of **court** in each year therein; that prior to the time mentioned a term had been called for Mott, in Hettinger county, for the 30th day of January, and another in Morton county, for the 7th day of February; that the Hettinger county term would continue one week, and the Morton county term probably two or three weeks, and that an outside judge could not be procured without exchanging places with him; and that by reason of the imminency of such terms of **court** and the **trial** of causes previously set at Dickinson it would have been impossible for him to exchange places with any other judge. He also sets out, what this **court** takes judicial notice of, that Medora is a small village near the western border of the state, and that any judge

other than those before named would have to travel a great distance to reach there, and it is also clear that, if any such judge had been able to arrange his pending business so as to have left his home on the 24th, he could not have reached Medora before the 25th or 26th of January.

It is shown that the case in question was on the calendar for the first time; that three other cases involving the same facts and requiring the attendance of the same witnesses were also on the calendar, one of which had been continued till the next term of **court**.

This is a greatly abridged statement of the conditions and facts; but it is sufficient for the purpose.

Great emphasis is placed upon the right of the plaintiff to have a speedy **trial**, and on other provisions of the Constitution; but it appears to us that the question is one of the proper or improper exercise of the discretion of the **court**.

For the reasons stated, the judge was under no legal obligation to call in another judge. This, we think, leaves the question, so far as we are called upon to deal with it, in the same position as though no affidavits of prejudice had been filed. By adjourning the term, sine die, at 5 o'clock on the 23d, when the judge had cases previously set for **trial** at Dickinson on the 25th, was the plaintiff deprived of a legal right for which we can, under the circumstances, furnish a remedy? The Declaration of Rights, found in the Constitution, provides that: "All **courts** shall be open and any man who has an injury done him in his lands, goods, person or reputation, shall have remedy by due process of

law, and right and justice administered without denial or delay.” But the question of delay is a relative question. What does or what does not constitute delay depends largely on the surrounding circumstances, the work imposed upon the judge, and other conditions. The judge of a district comprised of 10 counties, in which he is required to hold at least 20 terms of **court** per year, must necessarily be permitted to exercise a very large degree of discretion in the arrangement of the cases of his district, and in determining when he must adjourn a term of **court**, and when he should hear causes in the different counties. Aside from the jury terms, the **court** is open at all times for the **trial** or hearing of other causes and motions, and, if this **court** should arbitrarily say that all the other business of a large judicial district must be suspended at a given instant to permit the judge to try any particular cause, we should be supervising his acts with reference to matters of which we are often incapable of judging.

The affidavits of prejudice being invalid renders the attempt of Judge Crawford to secure another judge a purely voluntary act, and, being so, he could extend his efforts to all the district judges of the state, or make the request of only such as in his opinion might be able to attend and sit in his place without undue inconvenience or expense. The law relating to judges serving in districts other than their own is very inadequate to meet the situation. Every time a judge goes out of his district to accommodate another judge, or to preside where the local judge is disqualified, he must pay his own expenses going and coming, and during his attendance, and it in fact works a penalty upon the judge who is called upon to do so. Aside from the judges

named, no judge could have been reached in this state who would not have had to travel from 400 to 800 miles. Undoubtedly these matters were all considered. In fact, the return of Judge Crawford so indicates. Did, then, his adjournment of the term on the evening of the 23d, when he had previously set cases for **trial** in Dickinson for the 25th, constitute an abuse of discretion? Dickinson is 40 miles east of Medora. Only two trains each way per day stop at Medora, and it is quite possible that it would have taken Judge Crawford a considerable portion of the 24th to reach Dickinson; but, if there were a large number of witnesses present, as is indicated by the plaintiff, it is not at all probable that the case could have been completed on the 24th, and several days might have been consumed *228 in the **trial**, in which case it would certainly have interfered with the previous arrangements of the judge for the hearing of other causes.

We know of no matter on which there is so wide an opportunity for the exercise of discretion pertaining to litigation as in the setting and arrangement of causes for **trial** by the district **court**, and, in view of the immeasurably superior opportunities for intelligent judgment in such matters possessed by the district judge, it must in effect be left practically to his sense of the needs, relations, and necessities of the parties and the public. It must be a most clear and extraordinary violation of his duties to warrant this **court** in holding that he should reconvene a term which he has once adjourned, when he has business in other counties of his district requiring immediate attention.

We regret that the situation works a hardship to litigants, as it often does, and as it appears to

have done in this instance; but their rights must oftentimes give way to the superior rights of the public and the necessities of the occasion. The affidavits of prejudice being of no force, and the action of the judge in calling on the other judges having been purely voluntary, the matter rests on the exercise of the discretion of the district judge. Mandamus does not generally lie to control the exercise of judicial discretion. 26 Cyc. 188. Had he simply declined to act on an erroneous claim that he was disqualified, the

writ might lie; but the return shows the grounds set forth above.

The writ is quashed. All concur, except MORGAN, C. J., not participating.

All Citations

21 N.D. 261, 130 N.W. 225

395 Ill. 167
Supreme Court of Illinois.

KULA et al.
v.
SITKOWSKI et al.

No. 29451.
|
Nov. 20, 1946.

West Headnotes (6)

[1] **Wills**

↔ Right of action to contest or set aside will or probate

A right of action to contest will for mental incapacity and undue influence is statutory. Smith-Hurd Stats. c. 3, § 242.

1 Cases that cite this headnote

[2] **Wills**

↔ Right of action to contest or set aside will or probate

Wills

↔ Actions relating to wills or probate

In statutory will contest, the issue is whether writing offered as will of deceased is his last will, and no question can be raised as to whether will was properly or improperly admitted to probate, and there can be no contest unless there first was an order admitting will to probate. Smith-Hurd Stats. c. 3, § 242.

1 Cases that cite this headnote

[3] **Wills**

↔ Actions relating to wills or probate

Will contestant could not raise issue that judge of probate court did not preside in the hearing on probate of will and codicils of deceased, since will contest cannot be maintained in absence of order admitting will to probate. Smith-Hurd Stats. c. 3, § 242.

1 Cases that cite this headnote

[4] **Wills**

↔ Notice of hearing or trial and preliminary **proceedings**

The entry of final judgment in mandamus action nullifying order admitting will to probate would end plaintiff's right to proceed in will contest, but possibility of entry of such judgment did not necessitate continuance in will contest until mandamus action should be prosecuted to final judgment, where mandamus action and contest presented separate issues, and evidence which would establish a case in contest was not involved in mandamus action, and pendency of mandamus action did not prevent contestants from preparing the will contest for trial. Smith-Hurd Stats. c. 3, § 242.

1 Cases that cite this headnote

[5] **Appeal and Error**

← Trial

Trial

← Trial Dockets or **Calendars** in General

A **trial court** is vested with judicial discretion in **arrangement** of cases on trial **calendar**, and in determining their priority, and so long as there is no abuse of that discretion its action will not be changed by a court of review.

2 Cases that cite this headnote

[6] **Wills**

← Withdrawal or dismissal of **proceedings** before trial

An order dismissing will contest for want of prosecution would not be vacated on plaintiffs' motion for plaintiffs' neglect in not serving summons on a minor named as party defendant, where minor had no interest in estate except by will, and dismissal was in minor's favor. Smith-Hurd Stats. c. 3, § 242.

Cases that cite this headnote

*168 **688 Appeal from Circuit Court, Cook County; Michael Feinberg, judge.

Synopsis

Suit to contest will and codicils by Lillian Kula and others against Mary Sitkowski, executrix of the estate of Maryanna Motzny, deceased, and others. From the decree, the plaintiffs appeal.

Affirmed.

Attorneys and Law Firms

David I. Lipman, Harry G. Fins, W. D. Belroy, and Louis Rosenthal, all of Chicago, for appellants.

Edwin A. Halligan, William C. Jaskowiak and Samuel M. Lanoff, all of Chicago, for appellees.

Opinion

MURPHY, Justice.

This is a companion case to People ex rel. Kula v. O'Connell, 394 Ill. 409, 68 N.E.2d 758, and the answers to the questions *169 raised here will, in a large measure, be an echo of what was determined in the former case. Maryanna Motzny died testate July 9, 1943. Her will and two codicils were admitted to probate September 23, 1943. The instrument disposed of real and personal property. On November 10, 1943, plaintiffs-appellants, who were heirs-at-law of said decedent, started this suit in the circuit court of Cook county to contest the will and codicils on the grounds of mental incapacity and undue influence. The answers of defendants-appellees were all filed prior to August 1, 1944.

On November 20, 1944, plaintiffs obtained leave to amend their complaint by adding four additional paragraphs, the same to be designated as a subparagraph to the complaint. Defendants moved to strike the amendment and on January 18, 1945, the motion was sustained. It is contended **689 that the court erred in striking the amendment.

The facts stated in the amendment were substantially the same as those pleaded in the petition for mandamus in *People ex rel. Kula v. O'Connell*, 394 Ill. 409, 68 N.E.2d 758. The argument made to sustain the filing of the amendment is in the main the same as was advanced by petitioner in the former action where the writ of mandamus was denied. In brief, the substance was that neither John F. O'Connell, Judge of the probate court of Cook county, nor any other judge authorized to exercise the power of judge of said court, presided in the hearing on the probate of the will and codicils of said decedent, but that the evidence of the witnesses to the will and codicils was heard by Richard P. Fredo, who was a deputy clerk of the probate court. It was stated that he, as a deputy clerk, had no authority to exercise the power of a probate judge in the hearing of evidence on the admission of a will.

[1] [2] Plaintiffs' right of action to contest the will on the grounds of mental incapacity and undue influence was authorized by section 90 of the Probate Act. (Ill.Rev.Stat.1945, chap. 3, par. 242.) Independent of a statute *170 no such right existed. *Selden v. Illinois Trust and Savings Bank*, 239 Ill. 67, 87 N.E. 860, 130 Am.St.Rep. 180; *Waters v. Waters*, 225 Ill. 559, 80 N.E. 337. In a case brought under the statute, the issue is as to whether the writing

offered as the will of the deceased is his last will and testament and no question may be raised as to whether the will was properly or improperly admitted to probate in the probate court. *Dowling v. Gilliland*, 275 Ill. 76, 113 N.E. 987. There can be no contest of a will unless there first be an order admitting the will to probate. *Sternberg v. St. Louis Union Trust Co.*, 394 Ill. 452, 68 N.E.2D 892; *Shelby Loan and Trust Co. v. Milligan*, 372 Ill. 397, 24 N.E.2d 157; *Research Hospital v. Continental Illinois Bank & Trust Co.*, 352 Ill. 510, 186 N.E. 170.

[3] If plaintiffs' proposed amendment were permitted to stand, any issue raised thereon would be inconsistent with the purpose and prayer of the complaint. If it should be given the effect contended for by plaintiffs, it would nullify the prerequisite which is necessary under the statute to maintain the action to contest the will. The amendment was properly stricken.

On September 11, 1945, the cause was placed on the trial calendar for trial on October 3. On the date set for hearing, plaintiffs moved for a continuance on the ground that on September 21 they had filed a petition for mandamus in the circuit court against Judge O'Connell. This proceeding was the one previously referred to, No. 29450. Plaintiffs contended that they could not go to trial with the mandamus proceeding pending, for until it reached a final judgment it could not be known whether the will had been admitted to probate by a court of competent jurisdiction. A copy of the petition filed in the mandamus action was attached as an exhibit to the motion. The motion was denied and the case was called for trial. Plaintiffs' counsel

announced that they were standing by their motion and, after making a full disclosure of their position with reference to the mandamus action, the court ordered the suit *171 dismissed for want of prosecution. The denial of the motion for continuance or a stay of the **proceedings** is assigned as error.

[4] [5] It is true that if the final judgment entered in the mandamus action had nullified the order admitting the will to probate, such conclusion would have ended plaintiffs' right to proceed in this action. But such possibility did not make it necessary to stay the trial in this action until the other was prosecuted to a final judgment. the two actions presented separate and distinct issues and the evidence which would establish a case in the instant action was in noway involved in the mandamus suit. Plaintiffs do not claim that the pendency of the mandamus action prevented them from preparing this case for trial or interfered in the protection of their client's rights. A **trial court** is vested with judicial discretion in the **arrangement** of cases on the trial **calendar**, and in determining their priority, and so long as there is no abuse of that discretion its action will not be changed by a court of review. For cases involving the same principle see **690

Benton v. Marr, 364 Ill. 628, 5 N.E.2d 466, and Condon v. Brockway, 157 Ill. 90, 41 N.E. 634.

[6] On November 1, 1945, after the cause had been dismissed on October 3, plaintiffs moved to vacate the order on the ground that it had recently been ascertained that a minor whom they had named as a party defendant had not been served with summons. There is no reason shown for the neglect of plaintiffs' counsel in not ascertaining at an earlier date that the minor had not been served with process. At any rate, the minor had no interest in the estate except by the will. The dismissal of the action for want of prosecution was in his favor and certainly plaintiffs cannot, under the circumstances, use their own neglect as a **means** to vacate the decree dismissing the case for want of prosecution.

The decree of the circuit court was correct and is affirmed.

Decree affirmed.

All Citations

395 Ill. 167, 69 N.E.2d 688

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Lacy v. Cox, Tenn., November 22, 2004

91 Nev. 450
Supreme Court of Nevada.

MONROE, LTD., a
corporation, Appellant,
v.
CENTRAL TELEPHONE
COMPANY, SOUTHERN NEVADA
DIVISION, et al., Respondents.

No. 7627.
|
July 10, 1975.

Synopsis

From order of the Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., denying plaintiff's motion for preferential trial setting and from order of such Court vacating order of voluntary dismissal and dismissing complaint with prejudice, plaintiff appealed. The Supreme Court, Batjer, J., held that entry of ex parte order granting plaintiff's motion for dismissal of action without prejudice, was error and vacating of such order was proper, that dismissal, with prejudice, of action which had been pending for more than five years was not abuse of discretion and that denial of plaintiff's application for preferential trial setting was not abuse of discretion.

Orders affirmed.

West Headnotes (12)

[1] Pretrial Procedure

↔ Motion or request and proceedings thereon
Words "at the plaintiff's instance" in rule providing that, except as provided in specified paragraph, an action shall not be dismissed at the plaintiff's instance save on order of court and on such terms and conditions as the court deems proper contemplate that plaintiff will present a motion to the trial court. NRCP 41(a)(2).

2 Cases that cite this headnote

[2] Motions

↔ Written motions in general

Motions

↔ Statement of grounds

Purpose of motions requiring that, unless motion is made during a hearing or trial, it must be in writing and state with particularity the grounds therefor is to guarantee that adverse party be informed not only of pendency of motion but also basis on which movant seeks the order. NRCP 7(b)(1).

Cases that cite this headnote

[3] Pretrial Procedure

↔ Discretion and leave of court

Pretrial Procedure

↔ Motion or request and proceedings thereon
Motion for dismissal under rule, which provides that, except as provided in specified paragraph, an

action shall not be dismissed at plaintiff's instance save upon order of court and on such terms and conditions as court deems proper, may not be heard ex parte, but is a matter for exercise of sound discretion by trial court to either grant or refuse on facts presented. NRCPC 41(a)(2).

Cases that cite this headnote

[4] Pretrial Procedure

⇌ Motion or request and proceedings thereon

Pretrial Procedure

⇌ Vacation

Entry of ex parte order granting plaintiff's motion for dismissal of action without prejudice was error and vacating of order was proper where motion had not been in writing and on notice. NRCPC 5(a), 7(b), 41(a)(2).

Cases that cite this headnote

[5] Motions

⇌ Vacating or Setting Aside Orders

Failure to comply with court rules is a valid ground for vacating an order.

Cases that cite this headnote

[6] Appeal and Error

⇌ Nature or Subject-Matter of Issues or Questions

Contention that rule, which provides that except as otherwise provided in

specified subsection of rule, "when any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of such cause, proceeding or motion" had been violated was not properly before Supreme Court where contention was not raised in district court. District Court Rules, rule 26.

Cases that cite this headnote

[7] Pretrial Procedure

⇌ Limitations as to Time for Proceeding

Dismissal of action pending for more than five years is mandatory in absence of written stipulation for an extension of time. NRCPC 41(e).

2 Cases that cite this headnote

[8] Pretrial Procedure

⇌ Length of delay in general

Dismissal, with prejudice, of action which had been pending for more than five years is not abuse of discretion, absent showing of circumstances excusing the delay. NRCPC 41(e).

1 Cases that cite this headnote

[9] **Pretrial Procedure**

↔ Limitations as to Time for Proceeding

Purpose of rule pertaining to dismissal of actions pending for more than five years is to compel reasonable diligence in prosecution of an action. NRCP 41(e).

1 Cases that cite this headnote

[10] **Pretrial Procedure**

↔ Presumptions and burden of proof

Where defendant, who seeks dismissal of action, has made a prima facie showing of unreasonable delay, plaintiff must show circumstances excusing delay. NRCP 41(e).

Cases that cite this headnote

[11] **Appeal and Error**

↔ Trial

Trial

↔ Trial Dockets or Calendars in General

Setting trial dates and other matters done in **arrangement** of a trial court's **calendar** is within discretion of that court, and in absence of arbitrary conduct will not be interfered with by Supreme Court.

1 Cases that cite this headnote

[12] **Pretrial Procedure**

↔ Length of delay in general

Dismissal, with prejudice, of action which had been pending more than five years was not abuse of discretion, absent showing of circumstances excusing the delay. NRCP 41(e).

Cases that cite this headnote

Attorneys and Law Firms

***450 **153** Daryl Engebregson, Las Vegas, for appellant.

Neil J. Beller, Las Vegas, for respondents.

***451 OPINION**

BATJER, Justice:

Appellant filed a complaint against Central Telephone Company, Southern Nevada Division, hereafter referred to as respondent, and one other party on October 11, 1968. The other party settled and the action was dismissed as to it by ***452** district court order entered on December 2, 1968, pursuant to a stipulation. Respondent filed its answer on August 1, 1969. No other action was taken until September 12, 1973, when appellant filed a note for trial docket. On September 21, 1973, appellant moved for a trial setting before October 11, 1973, and attached to that motion an affidavit, in justification of the preferential setting, which explained that the five year period since the filing of the complaint would expire on October 11, 1973. NRCP 41(e). The motion for trial

setting was denied by Judge Compton on September 26, 1973.

1. Although the record does not include any written motion for dismissal filed by appellant, nor a certificate of service of such motion upon respondent, the ex parte order entered by Judge Compton on October 9, 1973, and filed on October 16, 1973, (NRCP 41(a)(2))¹ dismissing appellant's complaint without prejudice recites that it was entered on the motion of appellant.²

¹ NRCP 41(a)(2): 'Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.'

² Although the ambiguous phrase 'at the plaintiff's instance' is used in NRCP 41(a)(2), those words contemplate that the plaintiff will present a motion to the trial court. *Diamond v. United States*, 267 F.2d 23, 25, (5th Cir. 1959), cert. denied, 361 U.S. 834, 80 S.Ct. 85, 4 L.Ed.2d 75 (1959).

[1] On October 12, 1973, respondent filed a motion to dismiss the action, with prejudice, for appellant's failure to prosecute, and on October 17, 1973, respondent filed a motion to vacate Judge Compton's ex parte order of dismissal. Both motions were served by mail. Respondent's motions were heard and granted on October 24, 1973 by Judge Pavlikowski. This appeal followed.

****154** [2] NRCP 7(b)(1)³ requires that a motion shall be in writing ***453** unless made during a hearing or trial, and NRCP 5(a)⁴ mandates that every written motion other than

one that may be heard ex parte shall be served upon each of the parties. No hearing or trial was in progress involving this case on October 9, 1973, when the ex parte order was entered.⁵ The requirement of a written motion stating the grounds with particularity is intended to guarantee that the adverse party be informed not only of its pendency, but also the basis upon which the movant seeks the order.

³ NRCP 7(b)(1): 'An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.'

⁴ NRCP 5(a) provides in pertinent part: '... (E)very written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties....'

⁵ The type of hearing at which there is no need to reduce a motion to writing is one in which the proceedings are recorded. *Alger v. Hayes*, 452 F.2d 841 (C.A.8th 1972).

[3] A motion for dismissal under NRCP 41(a)(2) may not be heard ex parte, but is a matter for the exercise of sound discretion by the trial court to either grant or refuse upon the facts presented. *Wilson & Co. v. Fremont Cake & Meal Co.*, 83 F.Supp. 900 (D.Neb.1949); *Pratt v. Rice*, 7 Nev. 123 (1871); *Wright & Miller*, *Federal Practice and Procedure: Civil* s 912. Cf. *Larsen v. Switzer*, 183 F.2d 850 (8th Cir. 1950), cert. denied, 340 U.S. 911, 71 S.Ct. 291, 95 L.Ed. 658 (1951).

[4] Here respondent contends that it knew nothing of the motion until a copy of the ex parte order was received by mail several days after its entry. In *Maheu v. District Court*, 88 Nev. 26, 34, 493 P.2d 709, 714 (1972), we

reviewed this court's historical view of *ex parte* orders: 'For a century, our settled law has been that any 'special' motion involving judicial discretion that affects the rights of another, as contrasted to motions 'of course,' must be made on notice even where no rule expressly requires notice to obtain the particular order sought, except only when this requirement is altered to meet extraordinary situations such as those concerned in NRCP 65(b). Pratt v. Rice, 7 Nev. 123 (1871); NRCP 6(d). It is also fundamental that although an order's subject matter would lie within the court's jurisdiction if properly applied for, it is void if entered without required notice. Our authorities establishing this principle are as old as *454 Wilde v. Wilde, 2 Nev. 306 (1866), and as recent as Reno Raceways, Inc. v. Sierra Paving, Inc., 87 Nev. 619, 492 P.2d 127 (1971). It makes no difference that a void order may concern a matter committed to the court's discretion, such as 'discovery,' regarding which the court might have granted protective orders had a proper application been made. Cf. Checker, Inc., v. Public Serv. Commn., 84 Nev. 623, 446 P.2d 981 (1968); cf. Ray v. Stecher, 79 Nev. 304, 383 P.2d 372 (1963); cf. Whitney v. District Court, 68 Nev. 176, 227 P.2d 960 (1951); cf. Abell v. District Court, 58 Nev. 89, 71 P.2d 111 (1937).'

The failure of appellant to comply with the requirements of NRCP 7(b) and NRCP 5(a) deprived Judge Compton of authority to proceed to enter the order on October 9, 1973, dismissing the action without prejudice. The act of Judge Compton in entering the *ex parte* order was erroneous⁶ since the motion should have been in writing and on notice.

⁶ In F. C. Mortimer v. P.S.S. & L. Co., 62 Nev. 142, 145 P.2d 733 (1944), this court held an order invalid because

it had been made without notice and an opportunity for hearing. In *Luc v. Oceanic Steamship Company*, 84 Nev. 576, 579, 445 P.2d 870, 872 (1968), we said: 'The giving of notice is a jurisdictional requirement, and where a rule or statute prescribes the manner in which notice is to be given, that mode must be complied with or the proceeding will be a jurisdictional nullity.' In *Turner v. Saka*, 90 Nev. 54, 518 P.2d 608 (1974), we considered an 'Order to Show Cause' issued in the State of New Jersey void for want of notice.

****155** [5] In its motion to vacate the *ex parte* order, respondent alleged as grounds appellant's failure to file and serve a notice of motion and motion to dismiss. Failure to comply with court rules is a valid ground for vacating an order. See *In the Matter of the Estate of Powell*, 62 Nev. 10, 135 P.2d 435 (1943). Cf. *F. C. Mortimer v. P.S.E. & L. Co.*, supra, and *Luc v. Oceanic Steamship Company*, supra, footnote 6. Whether the *ex parte* order was void or voidable is not material to this opinion because it was properly vacated by Judge Pavlikowski.

[6] Appellant registered no objection to Judge Pavlikowski's presiding at the hearing on October 24, 1973. Now, for the first time, it contends that D.C.R. 26⁷ was violated and error *455 committed. It is unnecessary to decide this point as it was not raised in the district court and is not properly before us. *Eagle Thrifty Dr. & Mkts., Inc. v. Incline Village, Inc.*, 89 Nev. 575, 517 P.2d 786 (1973). Cf. *Cottonwood Cove Corp. v. Bates*, 86 Nev. 751, 476 P.2d 171 (1970).

⁷ D.C.R. 26: '1. Except as otherwise provided in subsection 2 of this rule, when any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request of the judge who shall have

first entered upon the trial or hearing of such cause, proceeding or motion.

'2. The judges in any judicial district having more than one judge shall adopt such rules as they deem necessary to provide for the division and disposal of the business of their judicial district.'

After Judge Pavlikowski vacated the ex parte order, the matter was before him on respondent's motion to dismiss for lack of prosecution. At that time the case was viable, pending and ripe for dismissal. NRCP 41(e).⁸

⁸ NRCP 41(e): 'The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended. When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have stipulated in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. A dismissal under this subdivision (e) is a bar to another action upon the same claim for relief against the same defendants unless the court otherwise provides.

[7] Dismissal of an action pending for more than five years is mandatory in the absence of written stipulation for an extension of time. *Lighthouse v. Great W. Land & Cattle*, 88 Nev. 55, 493 P.2d 296 (1972).

[8] [9] [10] Judge Pavlikowski did not abuse his discretion in dismissing with prejudice. The purpose of Rule 41(a)(2) is to compel reasonable diligence in the prosecution of an action. Where a *456 defendant has made a prima facie showing of unreasonable delay, the plaintiff must show circumstances excusing delay. *Hassett v. St. Mary's Hosp. Ass'n.*, 86 Nev. 900, 478 P.2d 154 (1970). Here appellant has failed to present a valid excuse.

2. In its challenge to the order of September 26, 1973, denying the motion for **156 preferential trial setting, appellant contends that Judge Compton erred. However, it was appellant who delayed filing its application for a trial until just before dismissal would have been required under NRCP 41(e). The diligence required on the part of appellant and its counsel is absent in this record. No valid reason or explanation was given for the pendency of this case for some four years after it had been at issue.

[11] [12] Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court. *Close v. Second Judicial Dist. Court*, 76 Nev. 194, 314 P.2d 379 (1957). Cf. *State ex rel. Hamilton v. Second Judicial Dist. Court*, 80 Nev. 158, 390 P.2d 37 (1964). We find no error or abuse of discretion by Judge Compton in his order denying appellant a preferential trial setting.

The orders of the district court are affirmed.

GUNDERSON, C.J., and MOWBRAY,
THOMPSON and GREGORY, JJ., concur.

All Citations

91 Nev. 450, 538 P.2d 152

End of Document

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CORPUS JURIS

BEING

A COMPLETE AND SYSTEMATIC STATEMENT
OF
THE WHOLE BODY OF THE LAW

AS EMBODIED IN AND
DEVELOPED BY

ALL REPORTED DECISIONS

EDITED BY

WILLIAM MACK, LL.D.

Editor-in-Chief of the *Cyclopedia of Law and Procedure*

AND

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Contributing Editor of the *American and English Encyclopædia of Law*
and the *Encyclopædia of Pleading and Practice*

The law is progressive and expansive, adapting itself
to the new relations and interests which are constantly
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must be by analogy to what is already settled.

GREENE, C.J., in *1 R. I. 356*.

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9 C. J.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Segura v. Cabrera, Wash., October 29, 2015

87 Wash.2d 516

Supreme Court of Washington, En Banc.

Stephanie RASOR, Respondent,

v.

RETAIL CREDIT
COMPANY, Appellant.

No. 43944.

Sept. 30, 1976.

Rehearing Denied Dec. 2, 1976.

Synopsis

Action was brought to recover against credit company on theory, inter alia, that such company, which had prepared a consumer credit report stating that plaintiff 'had a reputation of living with more than one man out of wedlock in the past' and 'her reputation has suffered because of out of wedlock living arrangements in the recent past,' had violated Fair Credit Reporting Act. The Superior Court, Spokane County, William J. Grant, J., entered judgment for plaintiff, and company appealed. After accepting certification by the Court of Appeals, the Supreme Court, Utter, J., held that report was a 'consumer report' within meaning of provision of Act defining a 'consumer report'; that instructions were not inconsistent with certain statutory provisions; that 'actual damages' allowable under Act are not limited to out-of-pocket expenses but, rather, generally encompass all the elements of compensatory awards; that evidence in regard to plaintiff's 'actual damages' was sufficient to support an award of \$5,000; that trial court could not

consider allegation that some jurors failed to follow one of court's instructions; that error in giving an instruction as to disclosure requirements under the Act did not entitle company to new trial; and that evidence on issue whether report was false was sufficient for jury.

Judgment affirmed.

Stafford, C.J., concurred in result only and filed opinion.

West Headnotes (21)

[1] Finance, Banking, and Credit

⇨ Liability for inaccurate or incomplete information

Purpose of Fair Credit Reporting Act is to protect an individual from inaccurate or arbitrary information about himself in a consumer report which is being used as a factor in determining individual's eligibility for credit, insurance or employment. Fair Credit Reporting Act, § 602 et seq., 15 U.S.C.A. § 1681 et seq.

3 Cases that cite this headnote

[2] Statutes

⇨ Plain Language; Plain, Ordinary, or Common Meaning

Words used in statute are to be given their ordinary meaning in absence of persuasive reasons to contrary.

Cases that cite this headnote

[3] Statutes

⇒ Plain language; plain, ordinary, common, or literal meaning

Where language of a statutory provision is clear, words employed are to be considered the final expression of legislative intent.

1 Cases that cite this headnote

[4] Finance, Banking, and Credit

⇒ Reports subject to regulation

Report, which credit company prepared for purpose of establishing person's eligibility for "insurance to be used primarily for personal * * * purposes" and which was prepared in connection with her application for health insurance, was a "consumer report" within meaning of Fair Credit Reporting Act provision defining a "consumer report," though report was subsequently used in connection with her application for the life insurance needed by her in order to obtain Small Business Administration loan. Fair Credit Reporting Act, §§ 602 et seq., 603(d, f), 604(3)(E), 616-618, 15 U.S.C.A. §§ 1681 et seq., 1681a(d, f), 1681b(3)(E), 1681n-1681p.

5 Cases that cite this headnote

[5] Finance, Banking, and Credit

⇒ Reports subject to regulation

For purposes of Fair Credit Reporting Act, character of a "consumer report" may not be changed by a subsequent use for business purposes. Fair Credit Reporting Act, §§ 602 et seq., 603(f), 15 U.S.C.A. §§ 1681 et seq., 1681a(f).

Cases that cite this headnote

[6] Finance, Banking, and Credit

⇒ Credit reporting

In action to recover on theory that defendant credit company, which prepared a consumer credit report stating that plaintiff's "reputation has suffered because of out of wedlock living arrangements in the recent past," had violated Fair Credit Reporting Act, instruction that damages allowable under Act were such as afforded fair and reasonable compensation to plaintiff for actual injury which plaintiff sustained "to her general reputation and good name in the community where known" and instruction that reputation was presumed to have been good at time any alleged violation of Act occurred, until the contrary was established, were not inconsistent with certain statutory provisions. Fair Credit Reporting Act, §§ 602 et seq., 610(e), 617, 15 U.S.C.A. §§ 1681 et seq., 1681h(e), 1681o.

2 Cases that cite this headnote

[7] Statutes

⇨ Legal terms; legal meaning

Familiar legal term used in a statute is to be given its familiar legal meaning.

8 Cases that cite this headnote

[8] Damages

⇨ Nature and theory of pecuniary reparation

Term “actual damages” is used to denote the type of damage award as well as the nature of injury for which recovery is allowed; thus, actual damages flowing from injury in fact are to be distinguished from damages which are nominal, exemplary or punitive.

7 Cases that cite this headnote

[9] Finance, Banking, and Credit

⇨ Credit reporting

“Actual damages” allowable under Fair Credit Reporting Act are not limited to out-of-pocket losses, but, rather, generally encompass all the elements of compensatory awards. Fair Credit Reporting Act, §§ 610(e), 617, 15 U.S.C.A. §§ 1681h(e), 1681o.

7 Cases that cite this headnote

[10] Finance, Banking, and Credit

⇨ Credit reporting

In action to recover against credit company on theory, inter alia, that such company, which had prepared a consumer credit report stating that plaintiff “had a reputation of living with more than one man out of wedlock in the past” and “her reputation has suffered because of out of wedlock living arrangements in the recent past,” had violated Fair Credit Reporting Act, evidence in regard to plaintiff’s “actual damages” was sufficient to support an award of \$5,000. Fair Credit Reporting Act, §§ 602 et seq., 610(e), 617, 15 U.S.C.A. §§ 1681 et seq., 1681h(e), 1681o.

1 Cases that cite this headnote

[11] Appeal and Error

⇨ Mistake, passion, or prejudice; shocking conscience or sense of justice

Fact that court would have assessed a smaller or larger amount than the jury is not a ground to interfere with verdict; Supreme Court will not disturb an award of damages made by a jury unless it is outside range of substantial evidence on the record, shocks Court’s conscience or appears to have been arrived at as result of passion or prejudice.

16 Cases that cite this headnote

[12] Damages

⇨ Mental suffering and emotional distress

To recover for injury to reputation, personal humiliation, mental suffering and similar harm, there need be no evidence assigning an actual dollar value to the injury.

8 Cases that cite this headnote

[13] Trial

⇨ Affidavits and evidence of jurors to sustain or impeach verdict

Trial court could not consider allegation, within two jurors' affidavits, that some jurors failed to follow one of court's instructions.

3 Cases that cite this headnote

[14] Trial

⇨ Affidavits and evidence of jurors to sustain or impeach verdict

Allegations of jury misconduct which inhere in the verdict may not be considered by the court.

5 Cases that cite this headnote

[15] Appeal and Error

⇨ Arguments and conduct of counsel

Defendant failed to preserve claim of error in regard to statements made by plaintiff's counsel during closing argument where, though defendant objected to such statements, defendant failed to request a corrective instruction.

Cases that cite this headnote

[16] New Trial

⇨ Instructions or failure or refusal to instruct

Error in giving an instruction does not justify granting a new trial unless party can establish that he was prejudiced thereby and the error affected jury's conclusion.

2 Cases that cite this headnote

[17] Appeal and Error

⇨ Particular Cases or Issues, Instructions Relating to

In action to recover for violations of Fair Credit Reporting Act, error in giving an instruction as to disclosure requirements under the Act did not entitle defendant to a new trial where evidence that it had complied with such requirements was uncontroverted. Fair Credit Reporting Act, §§ 602 et seq., 609, 15 U.S.C.A. §§ 1681 et seq., 1681g.

1 Cases that cite this headnote

[18] Judgment

⇨ Matters admitted by motion

Trial

⇨ Hearing and determination

Challenge to sufficiency of the evidence in form of either a motion for directed verdict or for judgment notwithstanding the verdict admits, for purposes of the motion, the truth

of the nonmoving party's evidence and all reasonable inferences drawn therefrom.

10 Cases that cite this headnote

[19] Judgment

⇌ Evidence and inferences that may be considered or drawn

Judgment

⇌ Where there is no evidence to sustain verdict

Trial

⇌ "No" evidence; total failure of proof

Trial

⇌ Inferences from evidence

Trial

⇌ Hearing and determination

In ruling on a motion for directed verdict or for judgment notwithstanding the verdict, evidence must be considered in light most favorable to nonmoving party with no element of discretion vested in trial court, and the motion shall be granted only in instances in which it can be held as a matter of law that there is no competent evidence, nor reasonable inferences, which would sustain a jury verdict in favor of nonmoving party.

12 Cases that cite this headnote

[20] Trial

⇌ Inferences from evidence

If there are justifiable inferences from the evidence on which

reasonable minds might reach conclusions that would sustain verdict, the question is for the jury, not for the court.

1 Cases that cite this headnote

[21] Finance, Banking, and Credit

⇌ Credit reporting

In action to recover against credit company on theory, inter alia, that such company, which had prepared a consumer credit report stating that plaintiff "had a reputation of living with more than one man out of wedlock in the past" and "her reputation has suffered because of out of wedlock living arrangements in the recent past," had violated Fair Credit Reporting Act, evidence on issue whether report was false was sufficient for jury. Fair Credit Reporting Act, § 602 et seq., 15 U.S.C.A. § 1681 et seq.

Cases that cite this headnote

Attorneys and Law Firms

*517 **1043 Witherspoon, Kelley, Davenport & Toole, E. Glenn Harmon, Spokane, for appellant.

Layman, Mullin & Etter, John G. Layman, Frank J. Gebhardt, Spokane, for respondent.

Opinion

UTTER, Associate Justice.

This court accepted certification by the Court of Appeals to review a jury verdict and judgment in favor of plaintiff Rasor in her suit alleging violations of the Fair Credit Reporting Act, 15 U.S.C. s 1681 Et seq. (1970), by defendant Retail Credit Company.¹ Defendant's assignments of error raise questions involving the scope of the act and the elements of damages recoverable under the act. In support of other assignments of error, defendant argues that the trial court erred in certain of its rulings on the admissibility of evidence and in certain of its instructions to the jury. Defendant also asserts that alleged misconduct *518 by the jury and by plaintiff's counsel require reversal. We find no error and affirm the judgment entered below.

¹ At oral argument, counsel informed this court that since the time of trial appellant's corporate name has changed to Equifax, Inc.

At the time of trial, respondent Rasor was a 53-year-old resident of Sandpoint, Idaho, a community of approximately 5,000 persons. There she operated two businesses, including a motel. In the fall of 1972, respondent applied for health insurance with Bankers Life & Casualty Company, with which she had other health insurance policies. The prospective insurer requested appellant Retail Credit Company to prepare a consumer credit report on respondent. On November 7, 1972, a field representative employed in appellant's Spokane, Washington office, traveled to Sandpoint to conduct an investigation of respondent and ten other persons. Appellant's

employee made the 11 investigations in 4 hours or less one afternoon and spoke with a total of three persons, two partners in a service station and the manager of another service station, in the preparation of his **1044 report on respondent. Based on information from these sources, appellant's report, prepared on November 8, stated in part, '(respondent) has had a reputation of living with more than one man out of wedlock in the past' and '(h)er reputation has suffered because of out of wedlock living arrangements in the recent past.' The document also commented on respondent's drinking habits and concluded this '(i)nfornation was carefully confirmed by several long-time residents, in this area, who are businessmen and neighbors.' Although identified on its face as a 'HEALTH REPORT', the report contained only two items dealing directly with respondent's health. The questions 'Do you learn of any illness, operation, or injury, past or present?' and 'Did you learn of any member of applicant's family (blood relation) having had heart trouble, cancer, diabetes, tuberculosis or mental trouble?' were both answered 'No.'

On November 14, respondent applied for a Small Business Administration loan to complete the addition of units to her motel. Approval of the loan was conditioned upon the acquisition of life insurance by respondent to serve as *519 security for the loan. Accordingly, respondent applied through a local agent for a policy from Guardian Life Insurance Company. The local insurance agent gave written notice to respondent that 'a routine report may be obtained which will provide applicable information concerning character, general reputation, personal characteristics and mode of living', See s 1681d, and the

prospective insurer requested from appellant an investigative report on respondent. Appellant made no new investigation of respondent and mailed a copy of the November 8 report obtained for health insurance purposes to the insurance company. Following receipt of the report, Guardian Life declined to issue a policy to respondent 'due to extensive criticism from inspection which must remain confidential.'

After notification from Guardian Life that she could inquire about the report which influenced its decision at appellant's Spokane office, See s 1681m(a), respondent traveled to Spokane on December 20, 1972. She was not allowed to read the report but was informed of its contents, See s 1681g(a), which she found 'shocking.' With permission from respondent, appellant's employee informed respondent's insurance agent of the substance of the report. The agent then applied for the insurance required to obtain the Small Business Administration loan from two other insurers who offered to issue a policy, but only at a higher premium rate.

On January 9, 1973, respondent made a second trip to appellant's Spokane office and there stated several specific objections to information contained in the November 8 report. As a result, on January 11, an employee of appellant performed a reinvestigation of respondent, See s 1681i(a), contacting ten residents of Sandpoint during the course of an almost day-long inquiry. A second report, based on the reinvestigation, stated in part:

Your applicant has been married and divorced three times and is presently divorced. She has a boyfriend and stated that they each have their own

homes and businesses and do not live together, although she admitted he stays overnight occasionally if he is too tired to go home. *520 Sources state that both maintain their own living quarters but are known to stay with each other overnight on an occasional basis. There is no current criticism of this living arrangement.

The new report was sent to the three insurers which had received the November 8 report, with notice that the second report 'supplant(s) any previous information we have reported,' See s 1681i(d). On February 26, Guardian Life notified the local agent that respondent's case was being reopened in light of the new report. In April 1973, respondent received the policy requested but at an additional premium, calculated by the local agent to be \$16.66 per \$1,000 of coverage.

**1045 Respondent commenced this suit in March 1973 in Superior Court. See 15 U.S.C. s 1681p; *Ruth v. Westinghouse Credit Co.*, 373 F.Supp. 468, 469 (W.D.Okla.1974). After 5 days of trial, the court granted appellant's motion to strike respondent's claims for invasion of privacy and libel. The court instructed the jury that if it found the first credit report prepared on November 8 substantially true, the verdict should be for appellant. Alternatively, if the jury found the report substantially false, the verdict should be for appellant if it had followed 'reasonable procedures' to assure compliance with the Fair Credit Reporting Act.

A verdict in favor of respondent for \$5,000 was returned.

I

[1] The Fair Credit Reporting Act was adopted 'to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment.' Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174, 176 (S.D.N.Y.1973). This important federal program for the protection of consumers was a Congressional response to documented abuses in the previously self-regulated credit reporting industry. See, e.g., Hearings on Commercial Credit Bureaus Before a Subcomm. on Invasion of Privacy of the House Comm. on Government Operations, 90th Cong., 2d Sess. (1968); Hearing *521 on Retail Credit Co. of Atlanta, Ga., Before a Subcomm. on Invasion of Privacy of the House Comm. on Government Operations, 90th Cong., 2d Sess. (1968); Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. (1969); Hearings on H.R. 16340 Before a Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 1st Sess. (1969). The members of the industry trade association and the two largest credit reporting corporations possess a total of over 180 million files on American citizens. Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. 19—20, 61, 126 (1973). As Senator Proxmire, the chief sponsor of the act, stated in

presenting the fair credit reporting legislation to the Senate, '(f)ew individuals realize that these credit files are in existence. However, such a file can have a very serious effect on whether a man (or woman) gets employment or insurance. It can have a disastrous effect, as our hearings show it has had a disastrous effect, on some individuals.' 115 Cong.Rec. 33408—09 (1969). To compensate victims for the harm which may flow from improper preparation or use of such files, the Fair Credit Reporting Act provides for private enforcement of its requirements. 15 U.S.C. ss 1681n, 1681o (1970). 'The general purpose of the FCRA is to protect the reputation of a consumer, for once false rumors are circulated there is not complete vindication. See O. Holmes, *The Common Law III* (M. Howe ed. 1963).' Ackerley v. Credit Bureau of Sheridan, Inc., 385 F.Supp. 658, 659 (D.Wyo.1974).

The threshold question presented is the scope of the Fair Credit Reporting Act. There is no dispute that appellant is a 'consumer reporting agency' to which the act applies. See 15 U.S.C. s 1681a(f) (1970); Hoke v. Retail Credit Corporation, 521 F.2d 1079, 1081 (4th Cir. 1975). However, appellant contends that the November 8 report was not a 'consumer report' within the meaning of s 1681a(d) because respondent learned of the inaccurate report only *522 when her application for business-related insurance was denied. In view of the clear language of the statute, decisions applying this provisions, and administrative interpretation under the act, we conclude that the protections of the act are fully applicable to the November 8 investigatory report.

[2] [3] [4] A 'consumer report' is defined as follows:

any written, oral, or other communication of any information by a consumer **1046 reporting agency . . . which is Used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes . . .

(Italics ours.) 15 U.S.C. s 1681a(d) (1970). Words use in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. *Burns v. Alcala*, 420 U.S. 575, 580—81, 95 S.Ct. 1180, 43 L.Ed.2d 469 (1975); *State v. Jones*, 84 Wash.2d 823, 830, 529 P.2d 1040 (1974). Where the language of a provision is clear, the words employed are to be considered the final expression of legislative intent. *Federal Trade Comm'n v. Manager, Retail Credit Co.*, 169 U.S.App.D.C. 271, 515 F.2d 988, 995 n. 14 (1975). *Canteen Serv., Inc., v. State*, 83 Wash.2d 761, 763, 522 P.2d 847 (1974). The November 8 report prepared by appellant contained information 'used . . . expected to be used (and) collected' for the purpose of establishing respondent's eligibility for 'insurance to be used primarily for personal . . . purposes.' That report was prepared in connection with respondent's application for health insurance. It was not then associated with any business purpose of respondent. Appellant conducted no new investigation in connection with respondent's

application for life insurance needed to obtain the Small Business Administration loan, but simply submitted the November 8 report.

This conclusion finds support in several federal cases giving a broad interpretation to the statutory term. In *Belshaw v. Credit Bureau of Prescott*, 392 F.Supp. 1356, 1359—60 (D.Ariz.1975), the court held that "consumer report' *523 must be interpreted to mean any report made by a credit reporting agency of information That could be used for one of the purposes enumerated in s 1681a.'

The Act cannot be interpreted as applicable to the activities of credit reporting agencies only when the consumer applies for credit, insurance, or employment, leaving them otherwise free to continue the very practices the Act was designed to prohibit. The Act would afford little protection for the privacy of a consumer if it only regulated credit reporting agencies in the area of their legitimate business activities but left them free to continue their clandestine activities in other areas.

Belshaw v. Credit Bureau of Prescott, supra at 1359. Similarly, in other cases it has been held that information about a consumer which a reporting agency knows or expects will be used 'in connection with a business transaction

involving the consumer,' See s 1681b(3)(E), is a 'consumer report' under the act. *Greenway v. Information Dynamics, Ltd.*, 399 F.Supp. 1092, 1095 (D.Ariz.1974); *Beresh v. Retail Credit Co.*, 358 F.Supp. 260 (C.D.Cal.1973). Other decisions construing s 1681a(d) are distinguishable from the present case on their facts. *Wrigley v. Dun & Bradstreet, Inc.*, 375 F.Supp. 969 (N.D.Ga.1974) (credit report issued on construction company in connection with extension of commercial credit only); *Sizemore v. Bambi Leasing Corp.*, 360 F.Supp. 252 (N.D.Ga.1973) (plaintiff conceded that the purpose of application was to secure commercial as opposed to personal credit); *Fernandez v. Retail Credit Co.*, 349 F.Supp. 652 (E.D.La.1972) (application for insurance required for business loan named corporation as beneficiary).

[5] In addition, administrative interpretation of the term 'consumer report' makes it clear that the character of such a report may not be changed by its subsequent use for business purposes. The Federal Trade Commission, charged with enforcement of the Fair Credit Reporting Act, s 1681s, has given the following guidance with respect to this matter:

Question: Is a report on an individual obtained in *524 connection with the extension of BUSINESS CREDIT or writing of business insurance a 'consumer report'?

**1047 Answer: No. . . . if a report is obtained on an individual for the purpose of determining his eligibility for business credit or insurance, it is not a 'consumer report'. However, when the information contained in the report was Originally collected in whole or in part for consumer purposes, it is a consumer report

and it may not be subsequently furnished in a business credit or business insurance report.

(Italics ours.) F.T.C., *Compliance with the Fair Credit Reporting Act* (2d ed. May 7, 1973), 5 CCH Consumer Credit Guide 11,314, at 59,815.

A business credit or business insurance report on an individual would be exempt from the Act provided that the information contained in the report was specifically collected for that purpose. However, if the information was originally collected for consumer purposes and then was subsequently used in a business credit or business insurance report, then such a report would become a consumer report as defined in the Act.

We make this distinction because certain large consumer reporting agencies have a substantial quantity of information on individuals which was originally collected for consumer purposes. Congress in passing the legislation did not intend for this information to be used in business reports without being subject to the protective provisions of the Act.

(Italics ours.) (1969—1973 Transfer Binder) CCH Consumer Credit Guide 99,424, at 89,384—85. (Excerpt from FTC Informal Staff Opinion Letter of May 19, 1971, by Joseph Martin, Jr., General Counsel and Congressional Liaison Officer.)

Courts show great deference to the interpretation given a statute by the officers of agency charged with its administration, particularly when the construction is by persons

“charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.” *525 *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). See *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 381, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). Thus, we hold that the November 8 report prepared by appellant was a ‘consumer report’ entitled to the protections of the Fair Credit Reporting Act.

II

[6] Appellant argues the trial court erred in instructing the jury with respect to damages allowable under the Fair Credit Reporting Act. The pertinent instruction stated in part: These damages are such as afford fair and reasonable compensation to the plaintiff for the actual injury which the plaintiff has sustained to her general reputation and good name in the community where known, and for any injury which she has sustained by way of injuries to her feelings or to her credit standing, or any loss of income naturally resulting from such statements published by the defendant.

In determining to what extent a wom(a)n's reputation may have been injured by alleged violation of the act, you must first determine from the evidence what the reputation of the plaintiff was, as to the trait of character affected by such statement complained of, before the statement was made, and then determine to what extent such reputation was injured.

. . . In assessing the plaintiff's damages, you will take into consideration the mental suffering, if any, produced by such violation of the act.

You may further make such allowance for loss of credit standing or financial loss, if any, as the evidence establishes to a reasonable certainty was sustained by the plaintiff as a natural consequence of the alleged violation of the act.

****1048** In essence, appellant contends that damages recoverable under the act are limited to out-of-pocket losses and do not include harm to reputation, injury to feelings, or mental suffering.

Upon a showing of negligent noncompliance with its requirements, alleged by respondent here, See ss 1681*o*, *526 1681*e*(b), the act provides for the recovery of ‘an amount equal to . . . any actual damages sustained by the consumer as a result of the failure’ of the reporting agency to comply.² 15 U.S.C. s 1681*o* (1970); See 15 U.S.C. s 1681*n* (1970). The legislative history of the act contains no indication of the scope of the term ‘actual damages.’ See S.Rep. No. 517, 91st Cong., 1st Sess. (1969); Conf.Rep. 1587, 91st Cong., 2d Sess. (1970), U.S.Code Cong. & Admin.News 1970, p. 4410; 115 Cong.Rec. 33404—13 (1969); 116 Cong.Rec. 6200—01 (1970); 117 Cong.Rec. 35847—51 (1970); 117 Cong.Rec. 35937—43 (1970); 117 Cong.Rec. 36569—77 (1970); See generally McNamara, *The Fair Credit Reporting Act: A. Legislative Overview*, 22 J.Pub.L. 67 (1973). To date, the term ‘actual damages’ in the Fair Credit Reporting Act has been construed by two federal courts and both decisions support the

trial court's instruction in the present case. In *Millstone v. O'Hanlon Reports, Inc.*, 383 F.Supp. 269, 276 (E.D.Mo.1974), the court found that although the consumer did not lose wages or incur medical expenses as a result of the noncompliance of the reporting agency, he was actually damaged in the amount of \$2,500 'by reason of his mental anguish and . . . symptoms of sleeplessness and nervousness' and by having to contact the agency and leave his employment to meet with the agency on numerous occasions. *Johnson v. Credit Bureau of Nashville, Inc.*, No. 74—347—NA—CV (M.D.Tenn., Dec. 5, 1975), relied upon by appellant, is consistent with *Millstone*. *Johnson* was based solely on the lack of proof of any injury to the consumer. The court implied that harm to reputation would be compensable under the Fair Credit Reporting Act in proper circumstances, stating '(p)laintiffs' bare conclusory allegation that their reputation was injured is insufficient, without more, to establish Actual damage. Plaintiffs offered no compelling proof at *527 trial of any demonstrable damage in this regard.' *Johnson v. Credit Bureau of Nashville, Inc.*, supra at 3. See *Miller v. Credit Bureau, Inc.*, (D.C.Super.Ct.1972), (1969—1973 Transfer Binder) CCH Consumer Credit Guide 99,173 at 89,067—70.

² We note the court in *Ackerley v. Credit Bureau of Sheridan, Inc.*, 385 F.Supp. 658, 661 (D.Wyo.1974), stated 'actual damage is not required in an action to enforce any liability under the (Fair Credit Reporting) Act. (Section 1681n) does not speak in terms of requiring actual damages; rather, it refers to actual damages as only one portion of any award or relief that might be granted.'

Appellant argues that the term 'actual damages' was chosen by Congress as part of a formula to limit the liability of credit reporting agencies to damages less than those available under

common law libel rules. It is true that the Fair Credit Reporting Act embodies some limitation on liability, but it does not restrict a consumer's recovery as severely as appellant contends. The act precludes consumer actions 'in the nature of defamation' based on information disclosed under the act 'except as to false information furnished with malice or willful intent to injure such consumer.' 15 U.S.C. s 1681h(e) (1970). This provision suggests no more than that Congress intended to restrict the availability of defamation actions and the recovery of defamation damages. However, the trial court's instruction in this case did not contravene the letter or spirit of s 1681h(e) since it was Not an instruction on libel damages. The striking characteristic of common law libel damages is not that recovery is allowed for injury to reputation but that such injury is often Presumed. See, e.g., *Amsbury v. Cowles Publishing Co.*, 76 Wash.2d 733, 737, 458 P.2d 882 (1969); *Arnold v. National Union of Marine Cooks and Stewards*, 44 Wash.2d 183, 187, 265 P.2d 1051 (1954); *D. Dobbs*, **1049 *Handbook on the Laws of Remedies* s 7.2 (1973). As stated by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974):

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial

sums as compensation for supposed *528 damage to reputation without any proof that such harm actually occurred.

The trial court's instruction in the present case specifically referred to compensation only for 'actual injury,' did not suggest that harm was presumed to flow from appellant's acts, and thus did not misapply the 'actual damages' language of s 1681o in this respect.

The trial court's instruction on damages did state, '(t)he reputation of the plaintiff is presumed to have been good at the time any alleged violation of the act occurred, until the contrary has been established by the evidence.' However, this statement does not refer to presumed Injury, the element of recovery which s 1681h(e) was designed to eliminate in actions under the statute. It has reference only to a condition against which injury to reputation may be measured. This portion of the instruction, then, is also consistent with the act.

Moreover, the limitation of libel recovery embodied in s 1681h(e) does not suggest that 'actual damages' under the Fair Credit Reporting Act are limited to out-of-pocket losses. We agree with the reasoning of Justice Tobriner in *Weaver v. Bank of America Nat'l Trust & Savings Ass'n*, 59 Cal.2d 428, 30 Cal.Rptr. 4, 380 P.2d 644 (1963), where the court construed a statute restricting a drawer's recovery following wrongful dishonor by a bank to 'actual damages.' After reviewing the history of the statute, the court stated, at page 437, 30 Cal.Rptr. at page 10, 380 P.2d at page

650, '(a)ssuming the purpose of the statute to be the repeal of the common-law presumption of damages, such purpose would not be thwarted by recognition of compensatory damages for actual loss of reputation and impairment of health.' See also *Levy v. Fleischner, Mayer & Co.*, 12 Wash. 15, 17—18, 40 P. 384 (1895). Similarly, the intent of Congress in framing the Fair Credit Reporting Act was simply to limit recovery for presumed injury to instances of 'malice and willful intent' And to allow a fully compensatory award for actual injury in other cases of noncompliance with the act. The two objectives are compatible. The structure of the statute in no way suggests an intent to *529 limit recovery to pecuniary or out-of-pocket losses. A contrary conclusion would diminish much of the effectiveness of this remedial legislation. See *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967); *Roza Irrigation Dist. v. State*, 80 Wash.2d 633, 639, 497 P.2d 166 (1972).

[7] [8] [9] In reference to the type of harm suffered, the term 'actual damages' has a generally accepted legal meaning. Although it declined to define 'actual injury,' the United States Supreme Court recently noted the variety of harm which may result when damage is actually sustained.

Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the More customary types of actual harm inflicted by defamatory falsehood Include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of

course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz v. Robert Welch, Inc., supra 418 U.S. at 350, 94 S.Ct. at 3012. Accord, *Weaver v. Bank of America Nat'l Trust & Savings Ass'n*, supra; **1050 *Anderson v. Pantages Theatre Co.*, 114 Wash. 2d, 31, 194 P. 813 (1921). It is important to note that although *Gertz* was a defamation action, it is clear that the court's language is not limited to such cases. There is, therefore, no conflict with the restriction on libel actions in s 1681e(h). The statement quoted above describes a limitation on state remedies, in the form of the elimination of presumed damages, where knowledge of falsity or reckless disregard for truth was absent. *Gertz v. Robert Welch, Inc.*, supra 418 U.S. at 349—50, 94 S.Ct. 2997; See *Taskett v. KING Broadcasting Co.*, 86 Wash.2d 439, 447, 546 P.2d 81 (1976). The broad applicability of the language was suggested by the Supreme Court itself when, referring to 'actual injury,' it noted that 'trial courts have wide experience in framing appropriate jury instructions in tort actions.' *Gertz v. Robert Welch, Inc.*, supra 418 U.S. at 350, 94 S.Ct. at 3012. Violations of the Fair Credit Reporting Act *530 have been characterized as having a 'tortious nature.' *Ackerley v. Credit Bureau of Sheridan, Inc.*, 385 F.Supp. 658, 661 (D.Wyo.1974). The court's language is merely descriptive of the

type of actual damage likely to flow from the dissemination of false information about a person, as was alleged in the present case. A familiar legal term used in a statute is given its familiar legal meaning. *Bradley v. United States*, 410 U.S. 605, 609, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973); *New York Life Ins. Co. v. Jones*, 86 Wash.2d 44, 47, 541 P.2d 989 (1975). The construction of s 1681e embodied in the trial court's damage instruction is consistent with the generally accepted meaning of the term 'actual damages' described by the United States Supreme Court in *Gertz*.³ For these reasons, we hold that 'actual damages' under the Fair Credit Reporting Act are not limited to out-of-pocket losses, but encompass all the elements of compensatory awards generally, including those stated in the trial court's instruction in the present case.

3 The term 'actual damages' is also used to denote the type of damage award as well as the nature of injury for which recovery is allowed. In this sense, the term has a second, consonant and established meaning. "Actual' damages are synonymous with compensatory damages.' *Weider v. Hoffman*, 238 F.Supp. 437, 445 (M.D.Pa.1965); Accord, *United States v. State Road Dep't*, 189 F.2d 591, 596 (5th Cir. 1951); see 22 Am.Jur.2d Damages s 11 (1965); 1 Damages s 2.1 (Oregon State Bar CLE, 1973); Cf. *Estate Counseling Serv., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 533 (10th Cir. 1962) (securities act violation); *Schaefer v. First Nat'l Bank*, 326 F.Supp. 1186, 1193 (N.D.Ill.1970) (securities act violation); *United States v. Russell Elec. Co.*, 250 F.Supp. 2, 24 (S.D.N.Y.1965) (liability for 'excess costs'). Thus, actual damages, flowing from injury in fact, are to be distinguished from damages which are 'nominal,' 'exemplary' or 'punitive.' See D. Dobbs, *Handbook on the Law of Remedies* ss 3.1, 3.8 (1973); C. McCormick, *Handbook on the Law of Damages* ss 20, 21, 77 (1935). The trial court's instruction properly provided for such a compensatory award.

[10] [11] [12] We recognize, as stated in *Gertz v. Robert Welch, Inc.*, supra 418 U.S. at 350, 94 S.Ct. at 3012, that 'all awards must be

supported by competent evidence.’ In this case, respondent testified that as a consequence of the November 8 report her insurance premiums were increased, that the Small Business Administration loan was delayed, that time and expense were *531 expended in resolving the dispute with appellant, that the report damaged her personally and in her business reputation in the small community, and that she suffered emotionally from the experience. Much of this testimony was undisputed. An employee in appellant's Spokane office confirmed that respondent became upset when informed of the contents of the November 8 report. While we acknowledge that such evidence of ‘actual damages’ is not overwhelming, we find it sufficient to support the amount awarded by the jury here. ‘The amount of damages was a matter within the discretion of the jury. Neither the trial court nor any appellate court should substitute its judgment for that of the jury as to the amount of damages.’ **1051 *Cowan v. Jensen*, 79 Wash.2d 844, 847, 490 P.2d 436, 437 (1971); See *Adams v. State*, 71 Wash.2d 414, 432, 429 P.2d 109 (1967). The fact that the court would have assessed a smaller or larger amount than the jury is not a ground to interfere with the verdict. *Workman v. Marshall*, 68 Wash.2d 578, 582, 414 P.2d 625 (1966). This court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks our conscience, or appears to have been arrived at as the result of passion or prejudice. *Holdcroft v. Hahn Truck Co.*, 71 Wash.2d 410, 413, 429 P.2d 204 (1967); *Mitchell v. Lantry*, 69 Wash.2d 796, 798, 420 P.2d 345 (1966). No such ground for reversal exists in the present case. Moreover, we emphasize that in instances of injury to reputation, personal humiliation,

mental suffering, and similar harm ‘there need be no evidence which assigns an actual dollar value to the injury.’ *Gertz v. Robert Welch, Inc.*, supra 418 U.S. at 350, 94 S.Ct. at 3012. “The subject matter being difficult of proof, (the amount of damages) cannot be fixed with mathematical certainty by the proof.” *Adams v. State*, supra 71 Wash.2d at 432, 429 P.2d at 120; See *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wash.2d 784, 786, 498 P.2d 870 (1972).

III

[13] [14] In support of its motion for a new trial, appellant submitted affidavits of two jurors representing that some *532 members of the jury failed to follow one of the trial court's instructions. The trial court declined to consider such allegations of misconduct and denied the motion. It did not err in so doing. While appellant's argument is considerably more detailed and vigorous than we have set out, it is governed by the rule in this jurisdiction that allegations of jury misconduct which ‘inhere in the verdict’ may not be considered by the court. *Gardner v. Malone*, 60 Wash.2d 836, 841, 376 P.2d 651 (1962); See *State v. Gay*, 82 Wash. 423, 439, 144 P. 711 (1914). We have stated the fact that “one or more jurors Misunderstood the judge's Instruction” does inhere in the verdict. *Gardner v. Malone*, supra 60 Wash.2d at 841, 376 P.2d at 654; *State v. Gobin*, 73 Wash.2d 206, 211, 437 P.2d 389 (1968); *State v. McKenzie*, 56 Wash.2d 897, 355 P.2d 834 (1960); *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 P. 28 (1909). ‘(A) juror may not divulge what considerations entered into his deliberations or

controlled his actions in arriving at a verdict.’ *Coleman v. George*, 62 Wash.2d 840, 842, 384 P.2d 871, 872 (1963). See *Hendrickson v. Konopaski*, 14 Wash.App. 390, 393—94, 541 P.2d 1001 (1975). The facts of this case do not take it outside our general rule.

[15] Appellant further contends that four statements by respondent's counsel during closing argument constitute reversible misconduct. However, objections were sustained to each remark and counsel withdrew one comment. The statements were not so prejudicial as to require reversal. *Nelson v. Mueller*, 85 Wash.2d 234, 236, 533 P.2d 383 (1975). Even had they been sufficiently prejudicial, appellant failed to request a corrective instruction and, therefore, did not preserve its claim of error with respect to such statements. See, e.g., *Strandberg v. Northern Pac. Ry.*, 59 Wash.2d 259, 264, 367 P.2d 137 (1961); *Seth v. Department of Labor & Indus.*, 21 Wash.2d 691, 694, 152 P.2d 976 (1944); *Canfield v. Seattle Cornice Works*, 122 Wash. 318, 322, 210 P. 733 (1922).

IV

[16] [17] Appellant assigns error to the instruction of the trial court which quoted s 1681g as to disclosure requirements *533 under the Fair Credit Reporting Act. Error in giving an instruction does not justify granting a new trial unless the appellant can establish he was prejudiced thereby and the error affected the jury's conclusion. *Nelson v. Mueller*, 85 Wash.2d 234, 236, 533 P.2d 383 (1975). While there was insufficient evidence to indicate a violation of these statutory

duties by appellant, here, as in *Cameron v. Boone*, 62 Wash.2d 420, 423, 383 P.2d 277, 280 (1963), ‘the instruction **1052 was not prejudicial . . . (since) the evidence, which was uncontroverted, supported a finding of full compliance by appellant with this duty . . . it is difficult to conceive of confusion.’ See *Kelley v. Great Northern Ry.*, 59 Wash.2d 894, 904—05, 371 P.2d 528 (1962); *Schmitz v. Mathews*, 141 Wash. 278, 279—80, 251 P. 571 (1926). Other challenged instructions are either accurate statements of the law, supported by substantial evidence, or not properly before this court on appeal because inadequate exceptions were taken. See *Haslund v. Seattle*, 86 Wash.2d 607, 547 P.2d 1221 (1976); *Nelson v. Mueller*, supra 85 Wash.2d at 237—38, 533 P.2d 383.

Furthermore, the evidentiary rulings contested by appellant do not constitute grounds for reversal. Each of the rulings was within the discretion of the trial court and there was no abuse of that discretion. See, e.g., *Zillah Feed Yards, Inc. v. Carlisle*, 72 Wash.2d 240, 244, 432 P.2d 650 (1967) (business records); *Jacobs v. Brock*, 73 Wash.2d 234, 238, 437 P.2d 920 (1968) (relevancy); *Coleman v. Dennis*, 1 Wash.App. 299, 302, 461 P.2d 552 (1969) (remoteness).

[18] [19] [20] Finally, appellant maintains that the trial court erred in failing to grant its motions for a directed verdict and judgment notwithstanding the verdict inasmuch as the truth of the November 8 report was proved to a point where reasonable persons could not disagree as to its accuracy. It is well established that a challenge to the sufficiency of the evidence in the form of either of these motions admits, for purposes of the motion, the truth of the non-moving party's evidence

and all reasonable inferences drawn therefrom. *Moyer v. Clark*, 75 Wash.2d 800, 803, 454 P.2d 374 (1969). In ruling on such a motion, the evidence *534 must be considered in a light most favorable to the nonmoving party, there is no element of discretion vested in the trial court, and the motion shall be granted only in those instances where it can be held as a matter of law that there is no competent evidence, nor reasonable inferences, which would sustain a jury verdict in favor of the nonmoving party. *Shelby v. Keck*, 85 Wash.2d 911, 913, 541 P.2d 365 (1975). If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain the verdict, then the question is for the jury, not for the court. *Moyer v. Clark*, supra 75 Wash.2d at 803, 454 P.2d 374.

[21] In the present case, there was conflicting evidence as to the accuracy of appellant's investigatory report prepared on respondent. The most disputed portion of the November 8 investigatory report was changed in the second report to conform substantially to respondent's version of the circumstances. In fact, the second report relied on respondent herself as a source for the pertinent information. Moreover, there was a great deal of evidence which contradicted the report's assertion that respondent's reputation had suffered because of her living arrangements. Numerous witnesses, including the manager of a local bank, a previous employer of respondent, the Sandpoint Chief of Police, and longtime neighbors testified that respondent enjoyed a favorable reputation, contrary to the conclusion of the November 8 report. The trial court did not err in denying appellant's motions.

The issues presented in this case do not permit an exhaustive discussion of all facets of the Fair Credit Reporting Act; however, the act has been the subject of extensive commentary discussing the nature of the credit information industry, common law remedies for consumers, the operation of the federal act and its deficiencies. See, e.g., Feldman, *The Fair Credit Reporting Act—From the Regulator's Vantage Point*, 14 S.C. Lawyer 459 (1974); Koon, *Translating the Fair Credit Reporting Act*, 48 Denver L.J. 51 (1971); Note, *The California Consumer Reporting Agencies Act: A proposed Improvement on the Fair Credit Reporting Act*, 26 Hastings L.J. 1219 (1975); Note, *The Fair Credit Reporting Act*, **1053 56 Minn.L.Rev. 819 (1972); Comment, *The Impact of the Fair Credit Reporting Act*, 50 N.C.L.Rev. 852 (1972); Note, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act*, 47 S.Cal.L.Rev. 1070 (1974); *Protecting Consumers from Arbitrary, Erroneous, and Malicious Credit Information*, 4 U.C.D.L.Rev. 403 (1971); Note, *Protecting the Subjects of Credit Reports*, 80 Yale L.J. 1035 (1971); See also Annot., 17 A.L.R.Fed. 675 (1973).

Judgment affirmed.

We concur:

WRIGHT, HUNTER, HUMILTON,
BRACHTENBACH & HOROWITZ, JJ.,
concur.

STAFFORD, C.J., concurring in result only.

STAFFORD, Chief Justice (concurring in the result only).

I concur only in the result. I cannot accept such an overbroad treatment of 'actual damages.' The majority has opened new vistas of recovery for damages that are based on purely subjective feelings and complaints.

ROSELLINI, J., concurs.

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87 Wash.2d 516, 554 P.2d 1041

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