1974

Dona R. Bullock v. Herbert John Ungricht : Brief of Appellant

Utah Supreme Court

J. Anthony Eyre; Attorney for Respondents.
Orrin G. Hatch; Winston Langlois; Attorneys at Law; Attorneys for Appellants.

[redacted] COURT

OF THE

STATE OF UTAH

DONNA R. BULLOCK, et al.,
Plaintiffs-Appellants,
vs.
HERBERT JOHN UNGRICHT, et al.,
Defendants-Respondents.

Case No. 13697

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
Honorable Bryant H. Croft, Judge

ORRIN G. HATCH
WINSTON LANGLOIS
Attorneys at Law
420 Continental Bank Building
Salt Lake City, Utah
Attorneys for Appellants

J. ANTHONY EYRE
Attorney at Law
520 Boston Building
Salt Lake City, Utah
Attorney for Respondent

LORRAINE PRESS 1397 SOUTH MAIN STREET SALT LAKE CITY

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

CASES CITED

TABLE OF CONTENTS—Continued

AUTHORITIES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DONNA R. BULLOCK, et al.,
Plaintiffs-Appellants,

vs.

HERBERT JOHN UNGRICHT, et al.,
Defendants-Respondents.

Case No.
13697

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Donna R. Bullock, appeals from a judgment for the Defendant-Respondent, on a personal injury accident by the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The trial was held on Appellant's claim for personal injury which she suffered when her automobile was struck

in the rear by Defendant-Respondent's station wagon just east of Highland Drive on 3300 South Street, Salt Lake County, State of Utah, and a jury award of no cause of action rendered April 4, 1974, before the Honorable Bryant H. Croft, District Judge, of the Third Judicial District, Salt Lake County, State of Utah, on which a motion for new trial was heard and denied by Judge Croft on the 18th day of April, 1974. Upon said judgment and the denial of the motion for a new trial by the Court, adverse to Plaintiff, this appeal was filed in the Supreme Court.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the Third Judicial District Court below, and a new trial, based upon the admission by the Court of evidence of bankruptcy and two judgments attendant thereto. Such past bankruptcy and judgments were irrelevant to any legitimate issue involved in the trial and were inadmissible upon the issue of credibility, the trial judge's basis for admitting them. Such admission into evidence was prejudicial error.

STATEMENT OF FACTS

This is a case involving a rear end personal injury accident. The automobile Appellant was operating, a 1970 Maverick, was struck in the rear by Respondent's automobile, a 1970 Buick station wagon, operated by one of the Respondents, Herbert John Ungricht, son of the

owner. The accident occurred December 16, 1971 at about 9:00 o'clock p.m., at approximately 1435 East 3300 South Street, Salt Lake County, State of Utah. Plaintiff's car was stopped on 3300 South with the left signal blinking, the car positioned in the center-most eastbound lan of traffic on 330 South, waiting to make a left turn into the driveway directly east of an apartment building numbered 1435 East 3300 South.

The Respondent driver, with his entire family, had left the Hawaiian Restaurant on Highland Drive and was proceeding home after dinner, following route south on Highland Drive and thence east on 3300 South. While waiting to make her turn, Appellant noticed in the rear-view mirror headlights approaching rapidly. Shortly thereafter, there was an impact of the left front of the Respondent's station wagon to the right rear of the Appellant's Maverick. The resultant impact caused personal injury to the Appellant which was to eventually result in serious injuries including permanent injury to the sixth cervical nerve and necessitating the removal of two cervical dics.

There was conflict on the testimony as to what occurred immediately prior to impact, the Respondent's witnesses maintaining that Appellant was slowing and then moving ahead and slowing and moving ahead just prior to impact and the Appellant maintaining that she had pulled to a stop and was waiting for traffic to clear so that she could make her left hand turn just prior to impact. Appellant was examined by a family physician;

subsequently saw a Dr. Berntson and other experts and underwent surgery at Dr. Berntson's hand. There was conflict in the medical testimony as is usually the case in a hotly contested matter. The accident occurred nine (9) days before Christmas, it was dark, and traffic was heavy, both cars had their lights on. The area was generally well lighted being adjacent to Dee's Hamburger on the southeast corner of the intersection and floodlights for Dee's parking area had it fairly well lighted.

The medical evidence indicated that after a lengthy evaluation, the problems of the Appellant were pinpointed. Dr. Berntson operated to remove her two cervical discs. Dr. Pettijohn of the University Hospital gave his expert medical testimony that the Appellant's injuries involved permenent nerve damage to the C-6 nerve route leaving loss of feeling and ability in a portion of the right arm. This injury is permanent and the Appellant can expect little improvement over her present condition. Respondent's medical experts testified contra to the above and one, Dr. Martin, expressed his opinion that Mrs. Bullock needed no surgery whatever. From the result of the four day trial, it is apparent that the jury did not reach the question of damages as they returned a verdict for the Defendant. The Court, upon motion of the Appellant for a new trial, denied the same.

In the course of cross-examination of Appellant, Respondent's counsel, after going into matters generally concerning her age, her family circumstances and a portion of her direct testimony concerning how the accident

occurred, proceeded to interrogate Appellant on her income tax which questions and answers commence at Page 395, Line 15 of the transcript. The Court's attention is drawn to the questions and answers from Page 395 through Page 436 of the transcript which includes questions by Respondent's counsel of the Appellant on cross-examination relative to a bankruptcy which was filed in April of 1971 by Appellant, the objections of the Appellant's counsel, and the ruling of the Court in relation thereto. The Court should particularly note Page 426 of the transcript where Appellant's counsel is objecting to the introduction of the bankruptcy and any additional material related to it. Counsel for the Respondent, in answering counsel for Appellant and his objections, indicates commencing at Line 30 on Page 415 of the transcript, "I recognize that counsel doesn't like it because" (then proceeding to Line of Page 426 of the transcript, the then next numbered page) (an error on the part of the record) and continues, "in my judgment, it will have an adverse effect and that is wy I am seeking to introduce it." The Court allowed the evidence of the bankruptcy into trial for purposes of impeachment of credibility.

Counsel for Respondent specifically referred to the filing of the Bankruptcy Proceeding and previous testimony that he elicited from Appellant thereabout, this particular argument having to do with whether or not additional exhibits or information related to it would be accepted by the Court.

Respondent claims for such information a probative value related to the injury of Mrs. Bullock and what emotional involvement there may have been to that bankruptcy filed eight (8) months prior to the date of the accident. There was some testimony from the medical witnesses that as a result of their examination, Appellant's doctors felt that Mrs. Bullock was emotionally upset at the time she was examined. Respondent's counsel urged on Court and jury that this could have been aggravated by the filing of the bankruptcy as a pre-existing condition.

Appellant urged, at that time, upon the Court and jury that the filing of a bankruptcy eight (8) months prior to an automobile rear end collision, as was the case before it, had little and really nothing to do with the case at bar.

The Appellant sought to withdraw any claim concerning lost wages after the ruling of the trial court below that the same were speculative. The Court denied said motion. Respondent insisted on the retention of the references to the bankruptcy and the examination recorded of the Appellant on the theory of credibility impeachment and relevancy to the issue of a lost earnings, though this issue was removed from consideration by the trial court below.

From the foregoing Statement of Facts, the Appellant respectfully submits her argument as follows:

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN ALLOWING DEFENDANTS TO INTRODUCE EVIDENCE OF SPECIFIC ACTS OF PRIOR ALLEGED MISCONDUCT TO IMPEACH PLAINTIFF'S CREDIBILITY.

Other than showing a conviction for a crime amounting to a felony for dishonesty or false statement, the Court below could not permit evidence that the Appellant-witness had committed wrongful acts or that she had "bad character". The Supreme Court of the State of Washington enunciated the general rule that evidence of specific acts of misconduct which tend to disgrace a witness cannot be elicited from the witness on cross-examination for purposes of impeaching him, or attacking his credibility. In the Washington case, *Warren* vs. *Hynes*, Wash. (1940), 102 P. 2d 691, an action by a minor through a guardian ad litem, for a personal injury sustained to the minor in an automobile accident, the trial resulted in a verdict for the Respondent. As part of the evidence, the trial court allowed a question relative to the occupation of the party, to which the answer was given "none". On further examination, it was apparent that the purpose of the question was disclosure of the fact that Defendant made his living in the past stealing automobiles as a means of livelihood or as one of his main activities. The Court states at Page 696:

> The mere query whether appellant's occupation had been that of an automobile thief, which question was not material to the issues in the cause, was intended to, and doubtless did, arouse the animosity of the jury toward appellant and he was thereby denied a fair trial. State vs. Tweedy, 165 Wash. 281, 5 P. 2d 335; State vs. Devlin, 145 Wash. 44, 258 P. 826. To further interrogate Warren, whose character was not an issue, as to whether he had "held up" the two men standing in the court room was additional reversible error.

Further, in the same case, the court held that the answer of a witness on cross-examination on collateral matters regarding specific acts which would show past conduct was reversible error.

The Utah Rules of Evidence provide for impeachment of a witness because a witness' character for truthfulness is always an issue. Utah Rules of Evidence 20 provides:

> . . . any party including the party calling him may examine him and introduce extrinsic evidence concerning any statement or conduct by him and any other matter relevant upon the issues of credibility.

For public policy reasons, Rule 20 was specifically made subject to Rules 21 and 22. Rule 21, the modern view, provides that conviction of a crime not involving dishonesty shall be inadmissible to impair credibility.

Rule 22(c) and (d) provide:

(c) evidence of traits of his character other truth, honesty, or integrity of their opposites, shall be inadmissible;

(d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

As can be seen, affecting the credibility of a witness, Rule 22(c) provides that evidence of traits of character other than truth, honesty, or integrity or their opposites, shall be inadmissible; and Rule 22(d), provides that evidence of specific instances of conduct relevant only as tending to prove a trait of character, shall be inadmissible. Such Rules are the limiting rules on impeachment of credibility by showing bad character.

Such evidence is admissible if it qualifies under Rules 46 and 47. For clarity, these rules are set forth in entirety as follows:

Rule 46. Character — Manner of Proof

When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of Rules 47 and 48.

Rule 47. Character Trait as Proof of Conduct

Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule

> 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character.

It is clear from the Utah Rules of Evidence that character is to be proven by reputation, opinion, or specific acts tending to prove conduct on a specific occasion. It was for the foregoing reasons that the Court in *Warren, supra,* held that the motorist's occupation was not material to issues in an action for a personal injury sustained in a collision and that examination thereon denied the motorist a "fair trial".

As can be seen from the trial transcript in the case at hand, the very right protected by the above Rules was breached. When Respondent attempted to introduce testimony of a bankruptcy, objection was made to such introduction (T. 396.9 and T. 396.25). The specific reason for such objection was given (T. 413.21).

Respondent thereupon pointed out that he sought to introduce such evidence to attack Appellant's credibility by showing her poor business ethics (T. 415.13-14) (T. 426.1-3).

Professor Phillip Schuchman, in his much quoted summary of the law, *An Attempt at a Philosophy of Bankruptcy*, 21 U.C.L.A. L.R. 403, 1971, points out that at law, the ethical position of bankruptcy, is that of simple, fairly conventional utilitarianism. By putting the entire question into its realistic context, we realize the fallacy, according to Professor Shuchman, of insisting by our Victorian notions, that the moral man will pay his debts regardless of business misfortune.

Bankruptcy, therefore, is not amoral or a "dirty word". Yet there is need to recognize the impact on the private citizen or the general member of the community. To him, bankruptcy is a "dirty word". Such a reality caused Professor Shuchman to point out that:

> (2) The process of personal bankruptcy need not be made unpleasant; and, in the absence of ethical consensus and more information on the psychological consequences of bankruptcy, should *not* be degrading and should *avoid stigmatizing*. *Id.* at Page 474. (Emphasis ours.)

Since it is clear that a bankruptcy has little to do with ethics, the obvious purpose was to lay a foundation for the introduction of specific acts of misconduct or misrepresentation connected therewith (T. 415.8) (T. 415.30) (T. 42 6.1 and 2).

The Court allowed the introduction of such evidence over Appellant's objection, because Appellant had introduced prior testimony of lost earnings (T. 429.22). However, after conversation with counsel, the Court re-

moved the issue of business earnings from the jury's determination, but still allowed the bankruptcy evidence and acknowledgment of Appellant as to the two judgments theron to remain (T. 433.17). In other words, the trial court was recognizing the fact that bankruptcy is a "dirty word" and that it could be used to question the Appellant's credibility.

Specific attention is directed to the court's direction on the allowance of the evidence (T. 432.21). The Court pointed out correctly that Rule 22(c) provides for admissibility of traits of character for truth, honesty or integrity, or their opposites. However, the Court failed to recognize the limitation placed upon (c) by considering (d):

> Rule 22(d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible."

For these reasons the ruling of the trial court was contrary to law, and beyond the judge's power of discretion, and the Court's ruling was error.

An additional case supports the above position. In *United States* vs. *John David Provoo*, (2 Cir., 1954), 215 F. 2d 531, the Court held that in the prosecution of a former army staff sergeant for treason alleged to have been committed while he was a Japanese prisoner of war, the District Court's permission to cross-examine the Defendant as to whether his homosexuality was the real cause of his confinements, to which he testified on direct

examination, was error prejudicial to the Defendant so as to require a reversal of his conviction. The Court held, stating the proposition as enunciated heretofore within the limits of the Rules of Evidence, that when a person takes the witness stand and subjects himself to cross-examination, held, like other witnesses, may have his credibility impeached. But this could not be done by introducing specific acts of misconduct by him, not resulting in his conviction for a felony or a crime of moral turpitude, and these were improper subjects of cross-examination for such purpose.

POINT II.

THE TRIAL COURT'S ADMISSION OF SPECIFIC ACTS OF PRIOR MISCONDUCT TO ATTACK PLAINTIFF'S CREDIBILITY PREJUDICED PLAINTIFF'S CASE AND RESULTED IN REVERSIBLE ERROR.

Below, the Respondent urged upon the Court the argument that the inclusion of the evidence of bankruptcy was germain to the issue of emotional upset of some sort of "overlay" on the theory that some of the complaints Appellant had were really the result of the alleged trauma she suffered as a result of her filing the bankruptcy eight (8) months earlier, and not solely as a result of the personal injury received in the accident.. However, Appelltnt testified of permanent nerve damage and removal of two cervical discs (T. 231, 232, 233). Such testimony was corroborated by Appellant's expert witnesses (T. 336.12)

(T. 336, 337, 338, 339) (T. 464, 465). One such expert verified that the medical condition of the Appellant were consistent with the nature of the rear end collision which occurred (T. 462).

The Court's error was to allow this evidence of bankruptcy to remain on the issue of credibility. That error was further compounded by the Court instructing counsel for the Respondent that he leeway to so argue to the jury when the Court, in fact, had ruled as a matter of law that any evidence concerning lost wages was going to to be excluded. This was prejudicial to the Appellant and denied her a fair trial.

A case that well evidences the danger of this kind of latitude being exercised by a trial court and the damage that can occur therefrom is *Champion* vs. *Brooks Transportation Company, Inc., Stoneberry* vs. *Same,* 77 U. S. App. D. C. 293, 135 F. 2d 652, (1943). This was a person injury action by the occupants of an automobile struck by the Defendant's truck. Evidence was introduced at trial that (1) the occupants of the car on perhaps a half dozen occasions had visited a specific night club in the greater metropolitan Washington, D. C. area, (2) that one of the occupants of the automobile had gambled at this night club and had in fact gambled there on the night of the accident, and (3) that the occupants of the car who were struck in the rear, were aware that the automobile they occupied was furnished to them by the night club owner. The Appellate Court says on age 655:

> The single issue on which we may take cognizance is the admissiblity of the evidence, over Plaintiff's objection, that they had on perhaps a half a dozen occasions visited the Maryland Athletic Club, apparently "Jimmie LaFontaine's Place": that one of the Plaintiffs had gambled thereon on those occasions and had gambled there on the night of the accident; and that the Plaintiffs were aware that the car occupied by them, which was returning them to the District, was furnished by "LaFontaine". The Court wisely states the General Rules of Evidence with counsel of such standing parading the name of "Jimmie LaFontaine's Place" through pages and pages of cross-examination, we assume the jury may have assumed that the "Maryland Athletic Club" and "Jimmie LaFontaine's Place" were synonymout terms . . . It might have been used and repeated to produce a disagreeable taste in the jury's mouth.

The Court further held that conviction of a gambling crime would not have been admissible on the witnesses' credibility, neither would the testimony of indecent exposure have permitted the introduction of evidence relative to a Defendant's credibility of prior illicit sex relations. The Court had held that a further case, *Sanford* vs. *United States*, 69 App. D. C. 44, 98 F. 2d 325, (1938), would not permit evidence of a mere charge of disorderly conduct or of an arrest for disorderly conduct to be admissible to effect credibility. The Appellate Court held that the admission of the contested evidence was prejudicial error compelling the reversal of the judgment and

the Court remanded the cases back to the trial courts for conformity with their opinion.

The Supreme Court of Pennsylvania further held in *Commonwealth* vs. *Truitt*, 39 Pa. 72, 85 A. 2d 425, 30 A. L. R. 2d 572, (1953), that admission of evidence of communistic connections in a criminal prosecution constituted reversible error. The Court, in this case involving assault, battery, resisting an officer and obstructing an arrest, stated on Page 527 as follows:

> In rebuttal the Commonwealth offered the testimony of Matt Cvetic, who styled himself "an undercover agent with the Federal Bureau of Investigation". His testimony was offered to attack the credibility of Defendant Truitt's testimony when he denied that he was a communist. An objection was then entered by the attorney for Defendants, which was overruled and an exception allowed.. The witness was permitted to testify that Truitt was an active communist, and gave testimony concerning Truitt's communist activities. This was clearly error. Truitt's testimony, on cross-examination, that he was not a communist was obviously upon a collateral matter. A witness cannot be contradicted on collateral matters to test credibility.

Secondly, the Court stated at 30 A. L. R. 2d 578:

> Defendant Truitt, without objection, was cross-examined concerning his membership in the Progressive Party, and whether or not such political party was "dominated by communists". Here again, such testimony was without the

> slightest probative or relevant value. If it had been objected to it ought to have been excluded.

In the instant case, evidence of a prior bankruptcy in a personal injury suit is evidence of prior specific acts. Aside from the fact that a bankruptcy does not show bad character under the law, the evidence could not be admitted under any exception to the general rules above set forth.

The consideration of two exceptions will complete the discussion on impeachment. In *People* v. *Hurlburt*, 166 Cal. App. 2d 334, 33 P. 2d 82, 75 A. L. R. 2d 500, (1958), the Court was confronted with a prosecution for lewd conduct. The Court first discussed an exception to the general rule above by saying, "In sex cases of various sorts, exceptions to its application have been recognized." Secondly, the Court stated:

> The rule contained in Section 2051 is a sound one, and exists in most jurisdictions. It is that, while a witness may be impeached "by evidence that his general reputation for truth, honesty, or integrity is bad", evidence of specific acts of bad character, except as to conviction of a felony, is generally not admissible. But where the issue goes beyond general reputation and involves the truthfulness of the basic fact in issue, evidence of particular wrongful acts may be admissible.

Additionally, *Hockaday* vs. *Redline, Inc.*, 85 U. S. App. D. C. 1, 174 F. 2d 154, (1949), a personal injury action, is supportive of this view. This Court denied an

appeal from a judgment after a jury verdict in favor of the Appellee, where a motion for a new trial was filed and denied. The specific issue was whether the conduct of the Appellee's counsel, both in a cross-examination and in argument, was calculated to prejudice the jury against the Appellant to the extent that a new trial would be warranted.

The Appellant filed to recover damages for certain injuries sustained when the Defendant's truck was in a collision with the Plaintiff. The Court held that in a personal injury action, cross-examination as to a prior conviction of assault for impeachment purposes, was proper, but that further cross-examination to show revocation of a suspended sentence because of Plaintiff's failure to enter the military service, was prejudicial to the Plaintiff and constituted reversible error. The Court further stated that it is the duty of Court and counsel to prevent the jury from considering extraneous issues, irrelevant evidence and erroneous views of the law. That duty, the Court pointed out, extended to guarding the jury against influence of passion and prejudice so that the parties may obtain a fair and impartial trial. The Court further stated, that the failure of the Court or counsel to discharge this duty constitutes reversible error.

The 6th Circuit is in accord. In *Smith* vs. *U. S.*, (6th Cir. 1960), 283 F. 2d 16, the Defendant was convicted of telephoning a false bomb threat to an airport control tower. The Court held that without proper foundation, collateral matters were properly excluded. Thereupon,

the Court, in summarizing the rules set forth above, stated as follows:

> The type of questions permitted to impeach a witness are those which show that he committed a felony or crime involving moral turpitude.
>
> It would not be proper to show for impeachment purposes that the witness had been convicted of disorderly conduct, of violating the traffic law of either state or municipality or that he was convicted of crimes not involving moral turpitude.

The act of permitting testimony of a bankruptcy to remain in evidence after removing the issue of business earnings was one of allowing a collateral issue of a supposed specific misconduct to remain for the purpose of impeachment. As such, the ruling of the lower court should be held reversible error.

POINT III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN THAT WHEN APPELLANT SOUGHT TO OFFER EXPLANATORY EVIDENCE CONCERNING THE BANKRUPTCY THE TRIAL COURT ANNOUNCED THAT IF SUCH EXPLANATORY EVIDENCE WERE INTRODUCED, THE COURT WOULD PERMIT THE INTRODUCTION OF TWO DOCUMENTS WHICH HAD BEEN PROFFERED BY RESPONDENTS

AND MARKED "12D", BUT WHICH DOCUMENTS CONTAINED HIGHLY INFLAMMATORY MATERIAL DESIGNED TO PREJUDICE THE APPELLANT.

Counsel for appellant pointed out to the trial court that if the bankruptcy evidence were allowed to remain in, the appellant would have to come back with an explanation of the bankruptcy, all of which would unnecessarily consume the time of the trial court (T. 427.9-10) (T. 431.21-28) (T. 432.1-6). Rule 45 was emphasized to the court.

The trial court refused to allow appellant to offer any explanation for the bankruptcy without precipitating the admission of proffered Exhibit 12D into evidence (T. 434.1-17).

The ruling of the trial court in refusing to permit appellant to offer any explanation of the bankruptcy without effecting the introduction of the highly inflammatory proffered 12D into evidence placed the appellant in an impossible position and highly prejudiced the case of the appellant. This was truly error on the part of the trial court and said error deprived the plaintiff of a fair trial. The facts of the accident are quite simple and the testimony of the appellant, if believed by the jury, would require a verdict in her favor (T. 222-258). The jury was out approximately five hours wrestling the matter of liability. It is perfectly obvious that the problem was the credibility of the plaintiff which had been seriously

and erroneously damaged by the aforesaid errors of the trial court. The action of the trial court in holding proffered Exhibit 12D over her head and threatening to use it as a sword if she sought to explain why she took bankruptcy is almost incredible. Either 12D was proper evidence or it was not. We have demonstrated that it was not. The court, in referring to said proffered exhibit, said that it "suggests a dishonest thing" (T. 432.20 through T. 433.11). The respondents were, once again, seeking to destroy the credibility of the appellant by using a specific instance of her conduct to influence the jury to believe that the appellant was dishonest and not to be trusted. The threat of the trial court to allow this improper evidence to be received if the appellant sought to explain the reasons why she took bankruptcy and the reasons for the business failure was highly prejudicial and unfair to the appellant. There is no question about the fact that the appellant was highly prejudiced in the eyes of the jury.

There is no question about the fact that it was error for the trial court to permit evidence of appellant's bankruptcy to be admitted. There is no question about the fact that said bankruptcy evidence was prejudicial to the credibility of the plaintiff. In fact, the court made it very clear that counsel for the respondents was free to argue to the question of credibility of the plaintiff as a result of the bankruptcy. It is obvious that the evidence of the bankruptcy shook the faith of the jurors in the appellant, particularly since since she was not allowed to offer any

explanation whatsoever for having taken the bankruptcy. She was prepared to offer an explanation which would have made her look much better before the jury. The court, however, used the threat of allowing improper evidence to come in to effectively prevent the appellant from giving such explanation to the jury. This was gross error of a highly prejudicial nature. It definitely deprived the appellant of a fair trial and, without question, affected the outcome of the trial. When a jury can spend five hours on the mere question of liability in a relatively simple rear-end automobile collision, it is obvious that they were concerned about the credibility of the appellant. Furthermore, the verdict, as the record will show was a split verdict, with only six voting in favor of the verdict. There is every reason to believe that the result would have been different had the aforesaid prejudicial errors not been committed.

POINT IV.

A NEW TRIAL SHOULD BE GRANTED PLAINTIFF-APPELLANT SINCE THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL BECAUSE EVIDENCE OF SPECIFIC ACTS WAS INTRODUCED TO ATTACK PLAINTIFF'S CREDIBILITY.

In *Woodhouse* vs. *Johnson*, 20 Utah 2d 210, 436 P. 2d 442, (1968), the Utah Supreme Court stated that on

appeal it is the duty of the Court to assume that the jury believed all the evidence that supports their verdict and for that reason the Court would review the evidence and whatever inferences can fairly and reasonably be drawn therefrom in the light most favorable to it.

Generally, a motion or other application for a new trial is directed to the sound discretion of the trial court, but as stated above, the presumption is that the trial court properly exercised its discretion. See 55 A. L. R. 2d 884.

The general exception thereto is well stated in 58 *Am. Jur.* 2d Page 443 as follows:

> However, the granting or refusal of a new trial on account of alleged errors of law occurring in the course of a trial, is not a matter of discretion and is fully subject to review by the appellate court.

The same section of 58 *Am. Jur.* 2d at Page 434 states:

> Ordinarily a motion or other application for a new trial is directed to the sound discretion of the trial court, and on appeal from an order entered by the trial court in the exercise of discretion the presumption is that the trial court properly exercised its discretion. However, the granting or refusal of a new trial on account of alleged errors of law occurring in the course of the trial is not a matter of discretion and is fully subject to review by the appellate court.

It would follow logically from the quoted material above, that on grounds other than errors of law, the material must be prejudicial, but the reverse is true, as to errors of law or mixed errors of law and fact. These need not be prejudicial to constitute reversible error.

Additionally, "where comments by a trial judge indicate that he misconceived his duty, the appellate court will not blindly affirm the judgment below because there is some evidence to support it." (*People* vs. *Robarge*, 41 Cal. 2d 628, 262 P. 2d 14, (1953); cf. *Ehrenreich* vs. *Shelton*, 213 Cal. App. 2d 375, 28 Cal. Rptr. 855, 1963); *Smith* vs. *Fetterhoff*, 140 Cal. App. 2d 471, 295 P. 2d 474, (1956); *Cosnell* vs. *Webb*, 60 Cal. App. 2d 1, 139 P. 2d 985, (1943).

In the case at bar, regardless of the court's belief that the issue and evidence of bankruptcy went to credibility, or was justified on the basis of previous testimony of evidence of prior earnings, it can manifestly be seen that the court misconstrued the situation and in fact allowed questions concerning a specific act, "bankruptcy", at a different time and for a different purpose than the matter at trial. This misconception on the part of the court is further buttressed by the inclusion of Instruction No. 20 as follows:

> At the beginning of this trial it was stated that Plaintiff was claiming as an element of damages, a loss of earnings of $1,000 per month from a company recently formed and about to commence business. During the trial, testimony has

> been given with respect to such alleged salary. Under the la wof the state of Utah, speculative damages are not recoverable and based upon the evidence presented during the trial the court has ruled as a matter of law that the claimed loss of earnings is too speculative to merit any consideration of the evidence presented concerning such claimed loss.
>
> Consequently, the testimony regarding the alleged loss of earnings is to be disregarded by you and should your verdict be in favor of the Plaintiff, you are not to make any award to her for such claimed loss of earnings and you are not to consider evidence relating thereto in determining what amount of damages, if any, should be awarded to Plaintiff (T. 659).

Just prior to this objection to Instruction 20, counsel for the Respondent, displayed his basic reason for eliciting this testimony by stating, "The only prior history which we have is in her prior business venture. She failed and a bankruptcy ensued" (T. 651).

Immediately thereafter, the court made the further statement showing its predisposition:

> But in addition to that, the positive evidence indicated that in the prior year or so in which Mrs. Bullock was engaged in a similar type of activity to be undertaken in the corporation, that she had in fact ended up in the bankruptcy court (T. 652).

It is clear that the Supreme Court will reverse an

order granting a new trial when the record shows that the trial court erred in an unmixed question of law. *Oklahoma City* vs. *Wilson*, 310 P. 2d 369, (1968).

Further, it is clearly stated as a matter of evidence relative to impeachment and credibility that acts of misconduct, not resulting in a conviction of a crime of dishonesty, are not proper subjects of cross-examination to impeach a witness. In *Packineau* vs. *United States*, 8th Cir., (1953), 202 F. 2d 681, a prosecution for violation of the white slave act, where evidence was in conflict, not overwhelming either way, it was held that the trial court erred prejudicially in permitting the Defendant to be cross-examined as to prior arrests for Mann Act violations and in permitting rebuttal testimony of an F. B. I. Agent when it was attempted to show that the Defendant had previously admitted such an arrest. The Court of Appeals of the 8th Circuit further stated the validity of the Rule that acts of misconduct, not resulting in conviction of a crime, are not proper subjects of cross-examination to impeach.

The same view was held by the Utah Supreme Court in *State of Utah* vs. *Cazda*, 14 Utah 2d 266, 382 P. 2d 406, (1963). The Court pointed out that details or circumstances surrounding felonies for which the accused has been convicted may not be inquired into upon cross-examination of an accused except under unusual circumstances, such as when inquiry would tend to show a scheme, plan or modus operandi. The Court in the con-

curring opinion mentions the case of *State* vs. *Hougensen*, 91 Utah 351, 64 P. 2d 229, (1936), as setting forth the areas of cross-examination and setting forth the do's and dont's related thereto. That, of course, included the opportunity to ask one on a cross-examination whether he had been convicted of a felony, but it is limited to that as properly pointed out by the Court.

In the case at bar, not only did counsel for the Respondent elicit information relative to Appellant's filing of bankruptcy, but further inquired relative to two judgments that were obtained against her as a result thereof, raising a question of alleged misconduct on the part of the Appellant. In light of the strict rules followed by this jurisdiction and most others, this was clearly error on the part of counsel and error on the part of the court to make such an inquiry because the inquiry was relative to specific acts and as such were not permitted for purposes of impeachment. Certainly, these errors account for the no cause of action verdict against the Appellant, who was merely sitting in her stopped automobile when the Respondent caused the rear end collision which resulted in Appellant's serious injuries.

CONCLUSION

In the case at bar, the Court allowed testimony of a specific act, a collateral matter, to attack the credibility of the Appellant. That was a clear breach of the Court's duty, was an error of law, and as such was not even required to be prejudicial, but was in fact, prejudicial to

a fair hearing on the part of the Appellant. Therefore, the Court's action was reversible error and a new trial should be granted.

Respectfully submitted,

HATCH & PLUMB

By .....
Orrin G. Hatch

By .....
Winston Langlois
Attorneys for Appellants