

1940

George Saltas v. David A. Affleck and Kenneth Butte : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Harry G. Metos, Samuel Bernstein; attorneys for respondent.

Recommended Citation

Brief of Respondent, *Saltas v. Affleck*, No. 6190 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/529

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

GEORGE SALTAS,

Plaintiff and Respondent

vs.

DAVID A. AFFLECK. doing business under name and style of D.
A. AFFLECK GROCERY,

Defendant

KENNETH BUTTE,

Defendant and Appellant.

RESPONDENT'S BRIEF

H. G. METOS,

SAMEUL BERNSTEIN,

Attorneys for Respondent.

INDEX TO AUTHORITIES

	Page
American Fork City v. Charlier, 43 Utah 231, 134 P. 739.....	29
American Rairlway Express Co. vs. Lancaster, 251 S. W. 670	31
Ashby v. Va. Ry. & Power Co., 122 S. E. 104	31
Balle v. Smith, 81 Utah 179, 17 P. (2d) 224	15
Berry v. Dewey, 172 P. 27	12
Bright v. Thatcher, 215 S. W. 788	13
43 C. J., p. 579	27
46 C. J., p. 207	11
Christiansen v. Devine, 210 Ill. App. 253	31
Duckwell v. Davis, 142 N. E. 113	31
Eagan v. O'Malley, 21 P. (2d) 821	16
El Paso Ry. Co. v. Buttery, 216 S. W. 897	12
Gibson v. Geo. G. Doyle & Co., 37 Utah 21, 106 P. 512	32
Gibson v. Wineman, 106 So. 826	12
Hunter v. Wm. M. Roylance Co., 45 Utah 135, 143 P. 140	32
Klinge v. Southern Pacific Co., 89 Utah 284, 57 P. (2d) 367	9
Louisville Ry. Co. v. Smith, 263 S. W. 29	13
McMahon v. Flynn, 191 N. W. 902	13
Neary v. Northern Pacific Ry. Co., 110 P. 226	28
Pierre v. Powell Box Co., 77 So. 945	11
Pulos v. D. & R. G. Co., 37 Utah 238, 107 P. 224	31
Reid v. Owens, (Utah) 93 P. (2d) 680	23
Roper v. Greenspon, et al, 198 S. W. 1107	27
Skidmore v. Seattle, 224 P. 545	12
Stewart, Stewart-Morehead Co. v. Bibb Mfg. Co., 124 S. E. 64.....	29
Thomas v. Frost, 83 Utah 207, 27 P. (2d) 459	31
Wirth v. Alex Dussell Iron Works, 74 So. 551	12

In the Supreme Court of the State of Utah

GEORGE SALTAS,
Plaintiff and Respondent

vs.

DAVID A. AFFLECK, doing busi-
ness under name and style of D.
A. AFFLECK GROCERY,
Defendant

KENNETH BUTTE,
Defendant and Appellant.

Case No. 6190

RESPONDENT'S BRIEF

STATEMENT

The appellant charges counsel for respondent with bad faith, deliberate misconduct and with a systematic plan of procedure to obtain an unjust verdict through reference to the fact that the appellant is protected by an insurance company.

Before going into the questions raised in appellant's brief, we desire to state that counsel for the appellant have deliberately overlooked matters which would cure any defect in single instructions claimed to be erroneous,

and have based much of their brief on a deliberate misquotation of the record. For instance, counsel for appellant in their brief on page 53 claim that counsel, in his closing argument to the jury stated: "on the day of the accident or soon thereafter an investigator or an *adjuster* was out at the scene of the accident." Counsel have deliberately added the words, "or adjuster" to the sentence (Tr. 321), and based upon such misquotation devote a good portion of their argument for new trial. Appellant also complains about certain of the Court's instructions as being erroneous, but he fails to mention admissions in the pleadings and record, and the instructions which would cure all objections raised by the appellant.

It is elementary that the trial court's instructions, although separately given, are to be construed as a whole, yet, counsel for the appellant ingeniously omitted and failed to recognize this fundamental rule. We make these opening remarks so that this Court will get the proper perspective upon the appellant's argument and that this case will be decided in accordance to what appears in the entire record, and not as to what the appellant would like to have the record show.

The respondent will argue the questions involved in this case in the order raised by the appellant.

The trial court has the power and authority to grant

a new trial when in its discretion it deems the verdict of the jury inadequate or unjust and such action will not be interfered with, except where there is a clear abuse of discretion.

The plaintiff brought this action to recover damages for the death of his son, who was killed in an automobile collision at the intersection of Third Avenue and "K" Street in Salt Lake City, Utah.

At the time of the collision, plaintiff's son was riding as a passenger in an automobile driven by one Gerald Franz when the defendant Kenneth Butte drove his truck against the Franz automobile when the same was almost over the intersection, and fatally injured Mr. Saltas.

At the time of his death, the deceased was earning \$2000.00 a year as a machinist, was thirty years of age and had a life expectancy of thirty-five years; was in good robust health; lived with plaintiff and the other members of the family, and contributed most of his earnings to the plaintiff for his support and for the support of plaintiff's family. The plaintiff had been ill for some time and the deceased was giving him financial aid to keep the family going. That deceased throughout his life had worked with his father on a farm, and worked at Bingham Canyon, Utah, for the Utah Copper Company, and during the depression contributed practically

all of his check to the family. We make this statement because it has been omitted by the appellant in his Statement of the case.

The jury, in the first case against Kenneth Butte, the appellant herein, returned a verdict in favor of the plaintiff in the sum of \$800.00. The plaintiff filed a motion for a new trial, alleging the statutory grounds and asking for new trial upon the ground that, under the law and the evidence, the damages awarded by the jury were inadequate and that the verdict was rendered under misapprehension of the instructions, or under the influence of passion or prejudice. The motion was argued and at the conclusion thereof the court stated:

THE COURT: "I am inclined to think at this time that the verdict is too low; I do not mean to say that I will find it low, but the matter will be taken under advisement." (Tr. 430)

Thereafter the court made an order that plaintiff's motion for new trial be granted unless the defendant, Kenneth Butte, within twenty days after notice consent that the verdict of the jury be increased to \$2400.00, and judgment entered accordingly.

The defendant did not give his consent to such an increase and the case was set for trial for a second time. Upon the second trial, the jury returned a verdict in favor of the plaintiff in the sum of \$3,061.00.

The appellant argues that the order granting a new trial was void because there was no showing that there was a plain disregard by the jury of the instructions of the court or the evidence, and the trial court could not increase the verdict.

In answer to these contentions, all that need be said is that the function of a motion for a new trial in cases where the cause was tried before a jury is to give the trial court an opportunity to set aside any verdict which is the result of passion or prejudice or misunderstanding, or which is grossly unjust between the parties.

The trial court had heard the evidence and had before it the instructions and it was very apparent from the evidence that the decedent and Gerald Franz, the driver of the car which decedent had been riding as a passenger, were free from any contributory negligence, and that the appellant herein was guilty of the grossest kind of negligence in the driving and operation of his truck.

The case was submitted to the jury at 5:05 p. m. and the jury returned at 6:05 p. m.—within one hour. (Tr. 25) It was apparent to the court that the jury returned “a quick verdict” and that it did not go fully into the instructions and the evidence; and that the plaintiff, if he was entitled to any judgment at all, was entitled to

a substantial sum. The court's judgment in the case that plaintiff was entitled to a substantial sum is strengthened by the second verdict rendered in the case in the sum of \$3,061.00.

The fact that the trial court gave the appellant an opportunity to save himself a new trial by consenting to increase in the judgment, was certainly not harmful or prejudicial in any manner to his interests. He was not forced to accept the increase nor did he accept it; so, there is no reason for any complaint to be made on his part. If any of the parties were prejudiced by such an order it would have been the plaintiff, who would have been precluded from a new trial had the appellant consented to the increase of the judgment.

The appellant further argues that the court improperly granted a new trial because there is no statutory ground provided in motion for new trials based upon inadequate damages appearing to have been given by a jury under the influence of passion, prejudice, or misunderstanding. This contention has no merit. Section 104-40-7, Revised Statutes of Utah, 1933, reads as follows:

“The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been a plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict

was rendered under a misapprehension of such instructions or under the influence of passion or prejudice.”

In *Klinge vs. Southern Pacific Company*, 89 Utah 284, 57 Pacific (2nd) 367

This court, on page 373, stated:

“The court also within its descretion was justified and authorized to grant a new trial on the ground that the verdict was inadequate, in view of the undisputed evidence that the earning capacity of the plaintiff during the last 10 years prior to the accident was about \$2,000 a year, that since his disability he was unable to follow or be employed in his usual occupation of railroading or in any other employment of gain or profit or of any substantial remuneration, and since his injury he was unable to earn and had not earned anything. Under all the authorities, great latitude is accorded the trial court in such matter. Cases are cited by appellant where verdicts of \$10,000 or less for the loss of an arm were regarded as adequate compensation; but in most such cases the earning capacity of the injured plaintiff was much less than that of the plaintiff in the instant case. In such particular, each case is dependent upon its own facts, and what may be inadequate compensation in the one may be adequate in the other. Hence, a wide discretion is given the trial court in such matter and rarely is interfered with by an appellate tribunal whether the awarded compensation by the court below was held adequate or inadequate. In 46 C. J. 207, the rule is stated that inadequate

compensation for an injury sustained is generally ground for a new trial, and that a statute providing that 'the jury may give such damages as under all the circumstances of the case may to them seem just,' does not affect the court's right to grant a new trial where it deems the damages inadequate. In the case of *Dorset v. Chambers*, 187 Mo. App. 276, 173 S. W. 725, the court said that in tort cases the trial judge is as much a trier of facts as the jury and is charged with the final duty of doing justice between the parties. The question before him for solution where the plaintiff asks for a new trial on the ground of an inadequate verdict is not whether the assessment is so inadequate as to shock the judicial conscience and bespeak passion or prejudice on the part of the jury, but whether it is out of line with the evidentiary facts and circumstances as the judge sees and understands them.

That no abuse of discretion in the instant case was committed by the trial court. * * * The rule is well established that a presumption exists that a trial court did not err or abuse his discretion in granting or refusing a new trial, and that the burden is upon him complaining of the ruling to show a clear abuse of discretion. *Utah State Nat. Bank vs. Livingston*, 69 Utah 284, 254 P. 781; *Thomas v. Ogden Rapid Transit Co.*, 47 Utah 595, 155 P. 436; *Hirabelli v. Daniels*, 44 Utah 88, 138 P. 1172; *White v. Union Pac. R. Co.*, 8 Utah 56, 29 P. 1030; *Alt. v. Chicago & N. W. Ry. Co.*, 5 S. D. 20, 57 N. W. 1126, 1128; *Koch v. Imhof*, 315 Pa. 145, 172 Al. 672, 673; *O'Barr v. Pioneer Life Ins. Co.*, 172 S. C. 72, 172 S. E.

769; 4 C. J. 798. In the case of *Alt. v. Chicago, etc., Ry. Co.*, supra, that court, in a personal injury case, stated that: 'It requires a court as well as a jury to try causes of this nature, and, while the jury is the judge of the facts viewed in the light of the law, as a rule no verdict should stand when, in the sound judgment of the trial court, its operation as a wrong between the parties which might be remedied upon a retrial.'"

The foregoing holds that the court has the discretion, where it deems the verdict of a jury as inadequate to grant a new trial; and the burden is upon him who complains of the ruling to show a clear abuse of discretion. We cannot see any abuse of such discretion in this case.

In 46 C. J., p. 207, dealing with the question of inadequate damages, it is stated:

"While formerly at common law, it seems, a verdict in an action of trespass could not be set aside at all for inadequacy, now a new trial for inadequacy of damages is largely in the discretion of the court. That the damages recovered are clearly inadequate compensation for the injury sustained is generally ground for a new trial. And a statute providing that '*jury may give such damages as, under all circumstances of the case may to them seem just*,' does not affect the court's right to grant a new trial where it deems the damages inadequate."

In the case of *Pierre v. Powell Box Co.*, 77 So. 943,

a verdict of \$2500.00 was held inadequate and increased to \$7500.00 for the death of a laborer whose parents brought an action for his death for loss of prospective support, companionship and filial affection.

In *Gibson v. Wineman*, 106 So. 826, a verdict of \$500.00 for the death of a decedent 37 years of age and earning \$2.00 a day, was held to be so inadequate as to evince bias, passion and prejudice on the part of the jury.

In *Skidmore v. Seattle*, 244 P. 545, a verdict of \$1200.00 was increased to \$2500.00 for loss of the services of a son 15 years of age who earned 25 to 30 cents an hour, while working.

In *Wirth v. Alex Dussell Iron Works*, 74 So. 551, a verdict of \$3000.00 was increased to \$6000.00 for the death of the decedent who was 45 years of age.

In *Berry v. Dewey*, 172 P. 27, a verdict of \$5000.00 to the mother of decedent, where decedent was 33 years old and in good health and able to earn about \$1000.00 a year, was held not to be excessive.

In *El Paso Ry. Co. v. Buttery*, 216 S. W. 897, a verdict of \$10,000.00 to the mother of the decedent, where decedent was 24 years old, unmarried, and earned \$125.00 per month, and the mother was 54 years old, was held not to be excessive.

In the case of *Bright v. Thatcher*, 215 S. W. 788, a verdict of \$7500.00 to the mother of the deceased, where deceased was 49 years old and earned \$125.00 per month, and the mother was 74 years old, was held not to be excessive.

In *McMahon v. Flynn*, 191 N. W. 902, a verdict of \$5500.00 to the mother, who had a life expectancy of 12 years and decedent was 29 years old and earned \$110.00 per month, was held to be reasonable.

In *Louisville Railway Co. v. Smith*, 263 S. W. 29, a verdict for \$15,000.00 to the administrator of the estate of the decedent, who was 27 years old and had a life expectancy of more than 30 years and was earning \$300.00 per month, was held to be reasonable.

While hundreds of cases can be cited on this question, such cases are only for persuasive purposes and are not in any way binding on the court, because the court has the discretionary power to deal with each case upon its own merits.

The reason that it is necessary, where a jury passes upon questions of fact, to file a motion for a new trial is to give the court the opportunity to set aside any judgment which is the result of passion or prejudice or misunderstanding or which is grossly unjust between the

parties. We submit that the verdict in the first case was inadequate and the result of bias and prejudice on the part of the jury, and was properly set aside and a new trial granted.

There was no error relating to insurance indemnification.

Before the jury was drawn, counsel for the appellant stated:

MR. STEWART: If your Honor please, at this time I wish to offer in evidence Policy Number AU 206787, issued by the Northwest Casualty Company, on the 28th day of September, 1937, and effective from that date until the 28th day of September, 1938, and covering the period when this accident occurred, being a policy issued to D. A. Affleck doing business as Affleck Grocery, which has been identified as "Exhibit 1," the same being offered for the purpose that I am about to mention, and for no other purpose, and particularly paragraph 5, on page 2, defined the insured, which paragraphing reads as follows:

"V. DEFINITION OF 'INSURED'

"The unqualified word * * *

MR. METOS: I object to him reading anything, you Honor.

MR. STEWART: I offer it in evidence and particularly this paragraph. (Tr. 18-19)

The appellant claimed that he introduced the policy of insurance to show that he was not covered under it. The policy was received into evidence upon the insistence of appellant's counsel and over the objection of the plaintiff. It was received as an exhibit for the court and not for the jury.

The appellant complains that the plaintiff committed error in the voir dire examination of the jury because they were interrogated as to whether or not they were officers, agents, or stockholders of the Northwest Casualty Company, the insurance company, which issued the policy of insurance that was introduced into evidence. Appellant says that it was apparent that asking each juror individually those questions was to "tell them" of the existence of liability insurance.

Contrary to what the appellant states in his brief, it appears from the examination that jurors Langton and Wilson were agents of a casualty company. Certainly, where it is shown that a casualty company is interested in the action by reason of the issuance of a policy, it is an interested party, and plaintiff is entitled to interrogate the respective juror if they are connected with such a company as officers, agents, or stockholders, *Balle vs. Smith*, 81 Utah 179, 17 P. (2d) 224.

The fact that some of the jurors were not engaged in the insurance business does not necessarily mean that they might not be interested in casualty companies. Liability insurance is a common business, and people in the various walks of life may be interested in it as stockholders or otherwise. In this day and age it is not uncommon for widows, farmers, workmen, professional men, and other people engaged in various occupations to invest their money in insurance companies.

In *Eagan vs. O'Malley*, (Wyo.) 21 P. (2d) 821, counsel in that case complained that by reason of the fact that most of the jury panel was composed of ranchers or farmers, it was bad faith on the part of counsel for the plaintiff to interrogate the jurors as to whether they were interested in a casualty insurance company, the court stated:

“The examination of jurors on voir dire, when properly conducted, as all members of the profession know, serves a useful purpose in selecting triers of fact. Among other things, it enables both parties, plaintiff and defendant alike, to know the relationship, if any, existing between any juror and a party who, though he may not appear so of record, is still a party in interest . . .

“As a result of an extended examination of the cases dealing with the question, we consider it easily deducible that the great weight of authority and the better reasoning alike sanction the view that counsel for the plaintiff is entitled in good faith to inquire whether any juror is interested

in or connected with any insurance or casualty company that may be interested in the case as an insurer of the defendant's liability. See 35 C. J. 394, 56 A. L. R. 1454, note; 74 A. L. R. 860, note. Some of the more recent cases approving this rule—all decided during the year 1932—are: *Morton v. Holscher* (S. D.) 243 N. W. 89; *Halbrook v. Williams*, 185 Ark. 885, 50 S. W. (2d) 243; *Jenkins v. Chase* (Mo. Sup.) 53 S. W. (2d) 21; *Wack v. F. E. Schoenberg Mfg. Co.* (Mo. Sup.) 53 S. W. (2d) 28; *Pate vs. Pickwick Stages System* (Cal. App.) 14 P. (2d) 174; *Balle v. Smith* (Utah) 17 P. (2d) 224.

“In the case at bar, nothing appears in the record that we can see which would indicate that counsel was not propounding the inquiry quoted above in good faith. . . . The fact that most of the jury panel was composed of ranchers or farmers does not make the possibility of finding one interested in liability insurance so remote as to indicate bad faith on counsel's part. Liability insurance is a common business and people in many walks of life are more or less interested in it.”

The questions propounded to the jurors were made in good faith and in conformity with the rules laid down in the *Balle vs. Smith* case, *supra*. In this case there is no question that the Northwest Casualty Company is an interested party in the action. Its policy is one of the exhibits in this case. It was an unorthodox procedure for the appellant to offer such policy into evidence, and it seems to plaintiff that the appellant was laying a ground work for an appeal by introducing such

policy, so that in the event of an adverse judgment he could predicate an argument that the jury brought a verdict against him because he was backed by an insurance company, and by grasping here and there at unavoidable statements, some of which the appellant has stretched beyond recognition, and so urges this court to grant him a new trial.

The appellant further complains that counsel committed misconduct by asking one of the appellant's witnesses, Norma Chamberlain, who was riding in the truck with the appellant at the time of the accident, if she "gave a statement to a man by the name of Parkinson, who is an adjuster for an insurance company." This witness had testified on direct examination that she saw the Franz car before it entered the intersection and that, in her opinion, it was traveling at the rate of *40 miles per hour*. (Tr. 192).

Counsel for plaintiff called her attention to the fact that she had previously testified in the case of *State vs. Kenneth Butte*, and at that trial stated that the first time she saw the Franz coupe "was when it loomed right in front of you." (Tr. 196)

The witness answered: "I don't remember."

Q. And do you remember making this statement, that the first time that you saw the Ford coupe was when it loomed right in front of you?

A. I don't remember.

Q. Do you remember making such a statement, to the effect that the first time you saw it was when the Ford Coupe loomed right in front of you?

A. I don't know exactly what it was —

Q. You were - - -

MR. STEWART: What were you going to say?

A. I want to say that the car loomed in front of me, I saw it before it came in front of us.

Q. (By Mr. Metos) In other words, as I understand you, you want to say you saw this car prior to the time it entered the intersection, is that what you want us to believe, or did you see it just as it got in front of you, a few feet away?

A. Well, I saw, then it was right in front of me.

Q. Did you see it right in front of you. That is what I mean. You saw it when it was in front of you, for the first time?

A. I don't remember.

Q. Now, let me call your attention to this. Right

after the accident you made out an affidavit to—you gave a statement to a man by the name of Parkinson, who is an adjuster for an insurance company?

MR. STEWART: Just a moment.

MR. METOS: I want to know.

MR. STEWART: Just a moment, if your Honor please; I assign that as prejudicial misconduct. *Mr. Parkinson is associated with me.* I take an exception to counsel's statement and at this time I ask that the jury be discharged; prejudicial misconduct of the worst kind, and counsel there knows it is, or should know it.

THE COURT: The objection is overruled.

Q. (By Mr. Metos) You made a statement to him, did you not?

A. Yes.

Q. And you stated to him, when he took your statement, that when you saw the Ford car it was going *thirty-five miles an hour*, didn't you?

A. Yes, about that.

Q. And on cross examination on April 4th, you stated right here in this court room that you didn't see

the car, and that the statement you made, going thirty-five miles an hour, wasn't true. Do you recall that?

A. I don't remember saying that.

Q. You stated that in this statement you made, that you had made a mistake as to the speed when you saw this car. That is right, isn't it?

A. I don't recall making—saying that I didn't know, I couldn't judge the speed of the car.

Q. I didn't ask you about judgment the speed of the car, I asked you if you didn't make a statement to Parkinson to the effect when you saw the Ford car it was going thirty-five miles an hour, and later on, on cross examination here, by Marion Romney, you admitted that you did not make such a statement, although it already appeared in your statement or affidavit or whatever you want to call it. That is right, isn't it?

A. I don't remember.

Q. You wouldn't say you didn't make it, would you?

A. I don't remember making it.

Q. What is that?

A. I don't remember making it.

Q. You don't remember making it, but would you say you did not make it, positively?

MR. STEWART: I have her statement here if you want to see it, the original affidavit that she signed, if you want to see it. If you want to see it, I will be glad to let you have it.

MR. METOS: That isn't the one.

MR. STEWART: That is the affidavit she made to Mr. Parkinson—the statement she made to him on January 28, 1938. (Tr. 196-198)

The plaintiff had the right to examine the witness as to any prior inconsistent statement that she may have made to any person. Her statement on direct examination that she saw the Franz car before it entered the intersection, traveling 40 miles per hour was pertinent to the issues in this case. The witness kept hedging the question by stating, "I don't remember," when asked if it was a fact that she did not see the Franz car until it was directly in front of her. It was important to show that the witness had previously told Parkinson and the officers that she had never seen the car until it loomed right in front of the car she was riding in.

As already indicated the witness stated in her direct

examination that she saw the car traveling at 40 miles per hour. Upon cross examination concerning the statement she gave to Parkinson she stated that the car was traveling at 35 miles per hour. We see nothing wrong in asking a witness if she talked to a certain person who took a statement from her as a representative of a company. Any sting that the question has was offset by counsel for the appellant who promptly stated that "Mr. Parkinson is associated with me." There is no indication that the verdict in this case was in any way influenced by the question complained of. The question was asked in good faith. Any error in this statement was cured by the court's instruction number 29 which instructed the jury not to consider the question of insurance. (Tr. 316) The re-direct examination of Miss Chamberlain concerning her statement to Parkinson clearly indicated that she had made a statement and it was certainly relevant and competent to call her attention to any prior inconsistent statements she may have made to Parkinson.

In the case of Reid vs. Owens, (Utah) 93 P. (2d) 680, this court stated:

"Despite the general rule which excludes testimony showing liability insurance, it nevertheless may be received in evidence when an allusion to insurance is part of an admission of liability or responsibility. Tanner v. Smith, 97 Mont. 229, 240, 33 P. (2d) 547; Smith v. Baggett, 218 Ala. 227, 118 So. 283; O'Connor v. Sioux Falls Motor

Co., 57 S. D. 397, 232 N. W. 904; Herschensohn v. Weisman, 80 N. H. 557, 119 A. 705; 28 A. L. R. 514; Curcic v. Nelson Display Co., 19 Cal. App. (2d) 46, 57, 64 P. (2d) 1153, 1159; Rowe vs. Rennick, 112 Cal. App. 576, 585, 297 P. 603; Potter v. Driver, 97 Cal. App. 311, 317, 275 P. 526; Nichols v. Nelson, 80 Cal. App. 590, 596, 252 P. 739; and annotation in 56 A. L. R. 1418, 1448; 74 A. L. R. 849, 856, 95 A. L. R. 388; 105 A. L. R. 1319, 1326. See, also, Balle v. Smith, 81 Utah 179, 192, 17 P (2d) 224.

“To hold it reversible error to permit allusions to insurances, though such allusions are in themselves admissions, would be to reject otherwise competent testimony, material to the issue—indeed, perhaps the only material evidence on a vital issue—on the assumption that the jury would disregard its plain duty and resolve the question of defendant’s liability, not on the evidence relative to his wrong, but on that respecting who would ultimately have to pay.”

In the above case the reference was to the effect that the defendant carried liability insurance. In this case there is nothing to indicate that Butte carried insurance.

The appellant further claims that counsel for the plaintiff in his argument to the jury stated “on the day of the accident or soon thereafter, an investigator or *adjuster* was out at the scene of the accident.” We have already pointed out that this is a deliberate misquotation of the record because counsel have added the words

or *adjuster* to the quotation. (Tr. 321) Counsel also claims it was error to state that the "defendant secured an attorney who spends all his time in the defense of this class of cases." The record shows this objection or complaint was made after the arguments to the jury were closed and "*when the jury left the court room.*" The objection, if you can call it that, should have been made when the purported statements were alleged to have been made to the jury so that the court could have corrected counsel in the presence of the jury. The objection, not being timely, should not be considered. If it is to be considered there is no merit to the same because it is not in accordance to what appears in the record and not of a prejudicial nature.

There were no erroneous instructions given to the jury, and any error in any instruction was waived by the appellant by virtue of admissions and by requesting similar instructions.

The appellant states that the court's instruction No. 11 was erroneous because it "failed to take into consideration the right of the defendant to assume that all persons would lawfully use the highway and would exercise reasonable and ordinary care until put upon notice to the contrary."

The court's instructions, particularly Nos. 22 and 23, overcame this objection and quoting from the latter

instruction, the court instructed as follows: "You are further instructed that the defendant, in driving his automobile was not an insurer of the safety of Spero Saltas, or, in fact, of any person * * * And was not bound to anticipate unexpected acts of others, but had a right to assume that all other persons using the highway and particularly driving automobiles would use reasonable and ordinary care and would not violate the law unless and until defendant became advised to the contrary * * * And had a right to assume that the said Gerald Franz would keep a proper look-out and exercise reasonable and ordinary care for his own safety and for the safety of Spero Saltas." (Tr. 311)

Appellant further complains that Instruction No. 12 (Tr. 303) is erroneous, in that the City Ordinance, Section 1382, contained in said instruction, was declared to be void in the case of *State v. Lingman* (Utah), 91 P. (2d) 457, as being contrary to the Utah Statute. The appellant, however, has waived and is estopped from questioning the validity of said ordinance in this case. Plaintiff's cause of action was predicated, among other things, upon a violation of Section 1382 (B), of the Salt Lake City Ordinances, and plaintiff alleged in Paragraph 5 of his complaint that said ordinance was, at the time of the accident, "in full force and effect." (Tr. 3, Ab. 6) Defendant in his answer admitted "that at the time and place described in said complaint there was in *full force and effect* certain ordinances of Salt Lake City

relating to traffic and travel upon the streets of Salt Lake City, *including the ordinances limiting the speed of automobiles in the residential district in Salt Lake City to 25 miles per hour.*" (Tr. 15, Ab. 12). The cases are uniform in their holding that one who desires to rely upon the invalidity of an ordinance must plead such fact, and allege facts showing it to be invalid. 43 C. J., page 579. In the case of *Roper v. Greenspon, et al*, (Mo.) 198 S. W. 1107, which was an action for damages for personal injuries, defendant, in his answer, alleged contributory negligence upon the part of the plaintiff by violating a certain city ordinance regulating speed; plaintiff's reply denied that he violated the said city ordinance. During the trial, the lower court, upon objection by plaintiff, refused to admit into evidence the ordinance pleaded in defendant's answer upon the ground that the ordinance was in conflict with the state statute. In holding that the trial court erred in refusing to admit the city ordinance into evidence, the Supreme Court said:

"It is true than an ordinance of a city which conflicts with a state statute is void, but if a party is relying upon the fact, such invalidity should be pleaded, where it appears, as here, that the adverse party had pleaded and is relying upon such alleged invalid ordinance. The invalidity of a statute or ordinance should be raised at the first opportune moment, and in this case that opportune moment was the reply. But the reply in this case proceeds upon the theory that the ordinance was valid, and specifically

denies that plaintiff was driving 'at a speed greatly in excess of and in violation of an ordinance of the city of St. Louis, Mo. at said time in force and known as section 1551.' From this it appears that plaintiff not only did not plead the invalidity, but on the contrary in his reply avers that said ordinance was 'at said time in force.' This amounts to a waiver of the alleged invalidity of the ordinance, and it comes too late, when it is urged for the first time, when the ordinance is offered into evidence. We take it that the invalidity of an ordinance, like the unconstitutionality of a law, must be brought in at the first open door under the orderly procedure in the case. If the cause of action be founded upon a pleaded ordinance, the answer would be the first open door. If the defense in its answer relies upon a pleaded ordinance, then the reply would be the first open door. So that we conclude, as both opinions of the Court of Appeals conclude, that the invalidity of this ordinance is not in this case."

In the case of Neary, et al, v. Northern Pacific Ry. Co., (Mont.) 110 P. 226, the plaintiff's complaint alleged that on the date of the accident there was "in force in the city of Billings" an ordinance regulating speed, which had been duly enacted; this allegation was not met by a general denial in defendant's answer. At the trial, the ordinance was offered in evidence over defendant's objection upon the ground that the ordinance was unreasonable and void. Defendants assign such ruling as error. HELD—Ordinance properly admitted.

"To us it seems clear that the denial in the

answer simply raises the question as to whether any such ordinance as that referred to in the complaint existed. The ordinance did in fact exist; it was offered into evidence. If for any reason the defendant's desire to take the position that, on account of peculiar physical conditions, it ought not to be considered in *force and effect* in a particular portion of the city, they should have set forth the facts upon which their claim of an exception from the operation of the ordinance was based."

See, also, *American Fork City v. Charlier*, 43 Utah 231, 134 P. 739, where, in a prosecution for violating a city ordinance, our Supreme Court held:

"One charged with violating an ordinance of a city punishing the illegal sale of liquor, who desires to assail the power of the city to pass it, should do so in the local court or in the district court on appeal, and he cannot raise the question for the first time in the Supreme Court on appeal, unless perhaps where it appears on the face of the ordinance that the city exceeded the power."

The courts apply the same rule where the pleadings admit the validity of a contract and deny the appellant the right to assail its validity for the first time on appeal.

See *Stewart, Stewart-Morehead Co. v. Bibb Mfg. Co.*, (Ga.) 124 S. E. 64.

In the main case, appellant not only admitted the

existence and validity of the ordinance in his pleadings, but stipulated during the trial that such was the fact. (Tr. 157 and 158). If appellant desired to establish the invalidity of the ordinance he should have alleged such fact in his answer and objected to the same when offered into evidence. The validity of an ordinance or statute cannot be attacked on appeal for the first time. It must be brought to the attention of the trial court in the first instance. It does not lie in appellant's mouth to take exception to an instruction based upon such ordinance and now claim that such instruction was erroneous.

In addition, appellant is estopped from asserting the invalidity of said ordinance and from attacking Instruction No. 12 upon the doctrine of invited error. A party has no right to complain of error in an instruction given for the opposite party, when like error appears in an instruction given at his own request. Appellant requested and the trial court submitted to the jury Instructions No. 16, 19, and 22 (Tr. 183, 184, 189, and 308) which instructed the jury, among other things, that if they found that Gerald Franz *was negligent in driving at a speed in excess of 25 miles per hour, or in violation of said ordinance*, and such act of negligence was the sole proximate cause of the accident, then their verdict must be in favor of the defendant. In requesting such instruction, appellant certainly did so in contemplation of the validity of said City Ordinance, Section 1382. One inviting error by asking an instruction erroneously declaring a rule of law,

cannot except to other instructions so declaring it. The cases are all to this effect.

In the case of *American Railway Express Co. v. Lancaster*, (Ky.) 251 S. W. 670, the court stated:

"It is first insisted that the court erred in assuming in its instructions that the violation of the traffic ordinance of Cincinnati was negligence, without any proof that such was the law of Ohio. Though it may be true that the legal effect of the ordinance, as applied to the facts, was not properly pleaded, there was no objection to the pleading on that score, and it is apparent, from all that occurred on the trial, that both parties not only relied on the ordinance in question, but assumed that a violation of its provisions would constitute negligence. Indeed, appellant offered the ordinance into evidence, and asked an instruction based upon its provisions. While this instruction was not given, another instruction embodying the same provisions was given. Therefore, if it be conceded that the court erred in the respect complained of, it is clear that the appellant was responsible for the error, and is not now in a position to complain."

See also:

Ashby v. Va. Ry. & Power Co., 122 S. E. 104
Christiansen v. Devine, 210 Ill. App. 253
Duckwall v. Davis, (Ind.) 142 N. E. 113
Thomas v. Frost, 83 Utah 207, 27 P. (2d) 459
Pulos v. D. & R. G. R. Co., 37 Utah 238, 107

P. 241

Gibson v. Geo. G. Doyle & Co., 37 Utah 21,
106 P. 512

Hunter v. Wm. M. Roylance Co., 45 Utah 135,
143 P. 140.

We submit therefore, that by reason of the foregoing, appellant cannot claim that Instruction No. 12 is erroneous.

Complaint is made of the court's instruction No. 14 to the effect that it is misleading, in that it failed to define what constituted a first entry into the intersection. The court's instructions from 20-A to 26 (Tr. 309-14) fully answers all the objections of the appellant as they clearly instruct on the duty of drivers when two vehicles are approaching the intersection at the same time; and these instructions when considered together, fully and correctly state the law concerning the right-of-way at intersections. These instructions obviate all objections made by the appellant to the court's instructions Nos. 15 and 17.

We understand that its a recognized rule that the court's instructions, although separately stated, are to be construed as a whole. This is a stock instruction of all courts and was given by the trial court in this case in its instruction No. 31 when it stated: "These instructions, though numbered separately, are to be considered by the jury and construed as one connected whole. Each

instruction should be read and understood with reference and as a part of the entire charge and not as though any one instruction were intended to present the whole law of the case upon any particular point." (Tr. 316)

There was no error committed in refusing appellant's requested instructions.

As to the contention that the court erroneously denied appellant's requested instructions, we see no particular instruction which was denied that would in any way prejudice the rights of the appellant. The court fully, and more than fairly, instructed the jury as to the theory of appellant's defense and the matters that appellant complains about in the denial of his requests were either covered by the instructions given by the court or were not proper under the evidence, and thereby denied.

There were no errors in rulings on the evidence.

We cannot see any error committed by the court on rulings on the evidence claimed in appellant's assignments of error 28 to 33; the rulings were proper under the issues in this case. We feel that an examination of the evidence appearing in the record in this case justifies our statement that there were no errors committed by the court in rulings on the evidence; and we feel that citations on the points raised by the appellant would be a useless encumbrance upon the time of this court.

CONCLUSION

While the appellant has raised every possible semblance of an error in his brief and has cited numerous authorities, such authorities have no application in this case, and therefore no particular analysis of them is necessary. We feel, however, that the cases cited in respondent's brief clearly uphold the position of the respondent that there was no error committed of such a prejudicial nature that would entitle appellant to a new trial. He is certainly not entitled to have the first verdict reinstated because the court was justified in exercising its discretion in granting a new trial, as was shown by the verdict of the jury in the second trial. There is nothing in the size of the verdict to indicate that the jury were influenced by any allusions by references to insurance. The plaintiff proved a plain case of gross negligence on the part of the appellant in driving his truck. Plaintiff suffered a great injury in the loss of his son, not only from a financial point of view, but from a standpoint in the loss of his son's society, comfort and companionship which no pecuniary benefits can replace. There is nothing more precious than life, and no court should interfere with a judgment which was fairly rendered unless the wrong-doer has been prejudiced in his rights. We submit that there is no error in the record

in this case and that the judgment of the trial court should be affirmed.

Respectfully submitted,

H. G. METOS,
SAMUEL BERNSTEIN,
Attorneys for Respondent