

2000

Geraldine Kay Harding v. Carl T. Bell, M.D. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

GERALDINE KAY HARDING,
Plaintiff/Appellant,

v.

CARL T. BELL, M.D.,
Defendant/Appellee.

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**BRIEF OF APPELLEE
CARL T. BELL, M.D.**

Priority 15

Supreme Court No. 20000766-SC

**APPEAL FROM JURY VERDICT AND JUDGMENT ENTERED BY THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY,
THE HONORABLE FRED D. HOWARD PRESIDING**

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FILED

OCT 31 2001

**CLERK SUPREME COURT
UTAH**

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GERALDINE KAY HARDING,
Plaintiff/Appellant,

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996).

ISSUES ON APPEAL

I. Did the trial court commit reversible error by failing to remove three prospective jurors for cause, when an impartial jury was empaneled and no prejudice resulted?

Standard of review: A trial court's determination of whether to excuse a prospective juror for cause should not be reversed absent an abuse of discretion and a showing of actual prejudice. State v. Wach, 2001 UT 35, 24 P.3d 948.

II. Was there sufficient evidence presented at trial to support the jury's verdict?

Standard of review: Reversal of a jury verdict for insufficiency of the evidence is proper "only when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, [the appellate court finds] that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." State v. Silva, 2000 UT App 292, 13 P.3d 604. A party seeking reversal of a jury verdict on the grounds of insufficiency of the evidence must "marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." State v. Boyd, 2001 UT 30, ¶2, 25 P.3d 985.

DETERMINATIVE RULES OR STATUTES

Rule 47 of the Utah Rules of Civil Procedure, a copy of which is attached hereto as Addendum A.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiff/appellant Geraldine K. Harding (“Harding”) filed this medical malpractice action on or about December 10, 1997, alleging defendant/appellee Carl T. Bell (“Dr. Bell”), a physician specializing in family medicine, failed to diagnose and treat her coronary artery disease (“CAD”) and timely refer her to a cardiologist. Harding claims that earlier diagnosis of her CAD would have prevented a heart attack she suffered on January 26, 1997.

B. COURSE OF PROCEEDINGS AND DISPOSITION

A six-day jury trial was held on March 7, 8, 9, 10, 14, and 15, 2000, before the Honorable Fred A. Howard. The jury returned a special verdict determining that Harding was 55 percent negligent and Dr. Bell was 45 percent negligent.

C. STATEMENT OF FACTS

When reviewing a jury verdict, this court must “examine the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict.” State v. Kruger, 2000 UT 60, ¶12, 6 P.3d 1116. Dr. Bell recites the facts accordingly.¹

1. On or about January 4, 1997, Harding, who was then 49-years old, experienced severe chest pain, left arm numbness, sudden nausea, dizziness, profuse sweating and severe sternal pressure, while at a truck stop with her husband in Salt Lake City, Utah. (R. at 1414 pp. 71-76.)

¹ Dr. Bell objects to Harding’s Statement of Facts for failure to recite the facts “in a light most favorable” to the jury verdict, as is Harding’s burden. Instead, Harding re-argues her theory of the case. “This approach is inappropriate.” Beesley v. Harris, 883 P.2d 1343, 1349 (Utah 1994).

2. Harding's symptoms abated after about 30 minutes, except her left shoulder and arm stayed numb for about an hour. (R. at 1414 p. 76.)

3. Harding described the chest pain and symptoms she experienced on January 4, 1997, at the truck stop to her mother and best friend, who were concerned and prompted Harding to seek medical care. (R. at 1414 pp. 77-78.)

4. On or about January 6, 1997, Harding called Dr. Carl T. Bell's office and scheduled an appointment for January 13, 1997. (R. at 1414 pp. 78-79.)

5. At the January 13, 1997, office visit, Harding informed Dr. Bell of her January 4, 1997, chest pain and symptoms, and stated that she had been without chest pain or other symptoms since that time. (R. at 1414 p. 83; R. at 1422 Def.'s Ex. A p. 7.)

6. During this January 13, 1997, exam, Dr. Bell performed an in-office EKG, which was interpreted as normal by Dr. Bell. The EKG was "over-read" by Dr. Von Welch, a board-certified internist, who confirmed that the EKG was normal. (R. at 1414 pp. 84-86; R. at 1413 p. 43; R. at 1422 Def.'s Ex. A p. 14.)

7. Also on January 13, 1997, Dr. Bell had blood drawn and a CPK test performed to determine whether cardiac enzymes indicative of heart muscle damage were present. Laboratory tests confirmed that Harding's CPK level was normal. (R. at 1413 p. 43; R. at 1422 Def.'s Ex. A. pp. 9-10.)

8. During the January 13th office visit, Dr. Bell also ordered an exercise treadmill test ("ETT"), to be performed at American Fork Hospital, and Dr. Bell's office scheduled Harding's ETT for January 22, 1997. (R. at 1414 pp. 86-87.)

9. The ETT was performed on January 22, 1997, at American Fork Hospital by an ETT technician, with Dr. Bell present. (R. at 1414 pp. 90-93.)

10. The ETT was initially over-read within 24-hours of administration by an internal medicine physician at American Fork Hospital, Dr. Marlan Hansen, who interpreted it as “suggesting ischemia.” Dr. Hansen did not recommend that any follow-up testing be done or medical care provided on an urgent basis. (R. at 1422 Def.’s Ex. A p. 67.)

11. Dr. Bell accordingly referred Harding to Dr. Ronald Asay, a cardiologist practicing in Provo, Utah, and scheduled an appointment for Harding with Dr. Asay on February 5, 1997. (R. at 1414 pp. 96-98.)

12. On January 24 and 25, 1997, Harding had recurrent chest pain, along with malaise, tiredness and exertional discomfort. (R. at 1415 pp. 67-68, 81; R. at 1422 Def.’s Ex. A. p. 114.)

13. Despite the fact that Harding knew of potential heart problems and had an appointment to be examined by a cardiologist, she sought no medical treatment for these symptoms. She did not go to an emergency room, call Dr. Bell or seek any other medical care on either of those two days. (R. at 1414 pp. 66-68, 75-78, 121; R. at 1415 pp. 67-68; R. at 1422 Def.’s Ex. A. p. 114.)

14. Dr. Kim Bateman, a board-certified family practice physician, testified at trial that if Harding had sought medical attention on January 24th or 25th for her chest pain and symptoms, she would have been admitted to the hospital where an angioplasty would ultimately have been performed, her CAD discovered and imminent heart attack prevented. (R. at 1416 pp. 26-27, 64.) Dr. Bateman also testified that Dr. Bell’s treatment met the medical standard of care.

15. On January 26, 1997, Harding experienced severe chest pain while cleaning horse stalls. She was taken to the American Fork Emergency Department by her husband, and shortly thereafter was transferred via ambulance to Utah Valley Regional Medical Center. (R. at 1414 p. 100-102; R. at 1422 Def.'s Ex. A p. 17-19, 34-35.)

16. An angiogram performed the following morning, January 27, 1997, disclosed Harding's CAD. That same day a coronary angioplasty was successfully performed by Dr. Douglas R. Smith. (R. at 1415 p. 64; R. at 1422 Def.'s Ex. A pp. 20-23, 34-35.)

17. Harding was discharged from Utah Valley Regional Medical Center three days later and has returned to full normal activity. (R. at 1414 pp. 108; R. at 1422 Def.'s Ex. A p. 54, 56, 61; R. at 1415 pp. 72-73.)

SUMMARY OF ARGUMENT

I. The trial court's refusal to grant Harding's requested "for-cause" challenges provides no basis for reversal of the jury verdict. The trial court appropriately exercised its discretion in determining that the potential jurors were qualified. Harding used her peremptory challenges to strike these same three jurors, and she cannot demonstrate that the jurors who heard the case were biased. Thus, even if the three potential jurors should have been dismissed for cause, plaintiff cannot demonstrate actual prejudice as required for reversal.

II. Harding has made no attempt to marshal the evidence supporting the trial court's decision, and for this reason alone this court need not consider Harding's challenge to the sufficiency of the findings. Additionally, there is more than sufficient evidence to support the jury verdict allocating 45 percent of fault to Dr. Bell and 55 percent of fault to

Harding. This verdict is well within the range of possible outcomes supported by the evidence presented, especially when viewed in the light most favorable to Dr. Bell. This court must accordingly defer to the jury's assessment of liability and affirm.

ARGUMENT

POINT I.

THE TRIAL COURT'S REFUSAL TO GRANT HARDING'S REQUESTED FOR-CAUSE CHALLENGES PROVIDES NO BASIS FOR REVERSAL.

A trial court's determination of whether to excuse a prospective juror for cause should not be reversed absent an abuse of discretion. State v. Wach, 2001 UT 35, ¶25, 24 P.3d 948. Utah appellate courts are constrained to review such decisions with deference because of the trial judge's "advantaged position in determining which persons would be fair and impartial jurors." Id. at ¶25.

Rule 47 of the Utah Rules of Civil Procedures provides that challenges for cause are appropriate when it is demonstrated:

(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statement in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Utah R. Civ. P. 47(f) (emphasis added).

When a juror makes comments on voir dire that facially raises a question of the juror's partiality or prejudice, an abuse of discretion occurs "unless the challenged juror is removed by the court or unless the court or counsel investigates and finds the inference rebutted." Wach, 2001 UT 35, ¶25 (emphasis added). To rebut an inference of partiality, the trial court "must adequately probe [the] juror's potential bias," and receive, through its questioning, sufficient evidence that the juror will act impartially. State v. Boyatt, 854 P.2d 550, 551 (Utah Ct. App.), cert. denied, 862 P.2d 1356 (Utah 1993). Rebuttal is accomplished by showing that a juror would not "close the mind against the testimony that may be offered in opposition." Wach, 2001 UT 35, ¶27. If, after investigation into the juror's state of mind, the trial court is satisfied that the juror can act impartially, the trial court does not abuse its discretion by refusing to remove the prospective juror for cause. See Id. at ¶29.

A. HARDING CAN DEMONSTRATE NO ACTUAL BIAS.

Harding seeks reversal of the jury verdict in this case on the basis that the trial court erred in denying her challenges for cause to potential Jurors Nos. 7, 11 & 12. A careful review of voir dire and the follow-up investigation demonstrates no actual bias and further that there was sufficient evidence that each juror would act impartially.

Potential Juror No. 7

Harding contends the following facts elicited from potential Juror No. 7 during voir dire demonstrate bias: Potential Juror No. 7 lived in American Fork, took her daughter to dance lessons at Dr. Bell's home taught by Dr. Bell's daughter, and knew Dr. Bell's wife and children through the local elementary school. (Aplt. Br. p. 7.) Harding fails to point out that potential Juror No. 7 also stated to the court that she did

not know Dr. Bell, (R. at 1423), and that her acquaintance with Dr. Bell's daughter and wife were "brief." (R. at 1411, pp. 4-15; R. at 1423.) These facts do not demonstrate potential Juror No. 7 was partial. They are instead exactly the type of contact jurors in small Utah towns commonly have with parties at trial.

Nevertheless, even if voir dire had indicated bias, the trial court properly passed potential Juror No. 7 for cause because, after further questioning, it was assured of her impartiality. Harding takes issue with potential Juror No. 7 because she stated on voir dire:

Q: [The Court] Have you developed a social or friendship relationship with [Dr. Bell's family]?

A: [Potential Juror No. 7] No, just know who they are.

Q: In the event you were selected to serve as a juror, would that cause you to feel uncomfortable in any way in rendering some decisions?

A: I don't believe so. I don't think I could guarantee that.

(R. at 1411 pp. 4-5.)

Harding fails to mention, however, that potential Juror No. 7 was questioned in chambers after this statement was made and the following investigation occurred:

Q: [Mr. Ferguson] Not knowing how the case is going to turn out or how you would feel about it, whether you vote for the Plaintiff or the Defendant, would your relationship with Dr. Bell's family inhibit you in any way from making what you believe to be a fair determination of the case?

A: [Potential Juror No. 7] No, I don't believe it would inhibit me.

(R. at 1411 pp. 8-9.)

The trial court further probed into potential Juror No. 7's potential biases regarding lawyers and physicians:

Q: [The Court] But you do not have such sympathies [for physicians].

A: [Potential Juror No. 7] I don't believe I do.

. . . .

Q: You don't have a sympathy for either [the doctor or lawyers] then?

A: I don't think I do.

Q: Do you have a sympathy for physicians.

A: I don't believe I do. I think I could be just as loyal to either one.

(R. at 1411 p. 12.)

Given this testimony, it was well within the trial judge's discretion to determine potential Juror No. 7 could serve impartially and without prejudice and to decline to disqualify her for cause as a juror.

Potential Juror No. 11

Potential Juror No. 11's connection with Dr. Bell likewise raises no concerns of bias or impartiality. Harding challenges potential Juror No. 11 because she was a second cousin to one of Dr. Bell's expert witnesses, Dr. Kim Bateman, and who stated she was close to Dr. Bateman's mother. (Aplt. Br. pp. 5-6; R. at 1411 pp. 16-17.) These facts do not demonstrate that potential Juror No. 11 would be prevented from acting impartially or without prejudice.²

² Apparently Harding assumes that these facts would make potential Juror No. 11 biased in favor of Dr. Bateman. Common experience, however, allows us to assume that many family members exercise heightened caution to be neutral and objective when evaluating testimony of a relative. And, if potential Juror No. 11's familial relationship were indicative of bias, it is just as likely to operate against Dr. Batemen, as it is in favor of Dr. Bateman. The real issue is not the relationship per se, but the prospective juror's

Even if these facts were indicative of possible bias, potential Juror No. 11 repeatedly assured the trial court that she would be impartial:

Q: [The Court] If he were called to testify, would that pose a problem for you? If you were to serve as a juror would you tend to favor his testimony by virtue of your relationship?

A: [Potential Juror No. 11] I don't think so.

Q: Do you think you could be impartial?

A: Uh-huh (affirmative).

Q: . . . If you were to tend to discredit his testimony, and yet you had to see him in the future because of your relationship, do you think that would make you uncomfortable?

A: No.

Q: Do you think, irrespective of your family relationship of being a cousin, that you could treat his testimony fairly and impartially.

A: I think so, because I really don't see him; it's his mother.

(R. at 1411 pp.18-19.)

Further,

Q: [The Court] . . . If you were to serve as a juror do you think you could serve in this capacity fairly and impartially, knowing that you're a cousin, you have a relationship? Or do you think it would simply cause you to favor him if some other doctor came in taking a different opinion on the subject that Dr. Bateman was testifying on? You see? Would that tend to color the way in which you viewed their testimony by virtue of their relationship?

A: [Potential Juror No. 11] I don't think so by virtue of my relationship, because I'm just not that close to Kim. I don't know him as a person; I just know him as a name on a family list.

attitude.

(R. at 1411 pp. 22-23.) Following this colloquy, Harding's counsel challenged potential Juror No. 11 for cause and the trial court declined, stating "I'm persuaded she's qualified and I'll pass her." (R. at 1411 p. 28.) Given that potential Juror No. 11 repeatedly told the court in chambers that she did not know the witness except as a "name on a family list," and that she would be fair, objective and would not be biased in favor of Dr. Bateman's testimony, it was well within the trial court's discretion to decline to excuse her for cause.

Rather than demonstrate the requisite "actual bias" or abuse of discretion, Harding contends that the plurality opinion in State v. Saunders, 1999 UT 59, 992 P.2d 951, is "hauntingly similar" to the present case and requires this court to find the trial court abused its discretion in passing Jurors Nos. 11 and 7 for cause. (Aplt. Br. p. 22.) Harding claims that because the trial court abused its discretion in Saunders, the trial court must have abused its discretion in this case. (Aplt. Br. pp. 22-25.) Even a cursory reading of Saunders demonstrates it is factually dissimilar and has no application here. In Saunders, the prospective juror at issue stated she was "uncomfortable" deciding an attempted rape case because of her personal history with being a victim of incest and molestation. Id. at 964. The Utah Supreme Court determined that this juror should have been removed for cause because her statement that she would be "'uncomfortable' in deciding [the] case begs further investigation that the trial judge should have allowed." Id. at ¶50. Her comments and history of recent sexual abuse made clear she could not deliberate in a case for attempted rape and sexual abuse of a child without being "affected by a consideration extraneous to the facts and law of [the] case." Id. at 964. The concerns in Saunders are not present in this case: All potential areas of discomfort

expressed by potential jurors Nos. 11 and 7 were followed up on by the trial judge, and the judge determined that their deliberations would not be affected by facts extraneous to the case.

Potential Juror No. 12

Harding takes issue with potential Juror No. 12 because one of her “best friends has been a patient of Dr. Bell” and this friend liked Dr. Bell. (Aplt. Br. p. 8.) Despite these allegations, potential Juror No. 12 had no personal relationship with Dr. Bell and there is no indication of bias or impartiality on the part of Juror No. 12. Juror No. 12 was interviewed in chambers, where the following colloquy took place:

Q: [Mr. Vilos]: Would you be somewhat uneasy in rendering a decision against your best friend’s doctor?

A: [Potential Juror No. 12] No.

(R. at 1411 pp. 32-33.) Following this in-chambers investigation, the court declined Harding’s challenge for cause, satisfied that potential Juror No. 12 would listen to the evidence and decide the case based upon the evidence presented. (R. at 1411 pp. 35-38.) Given potential Juror No. 12’s statement that her friend’s association with Dr. Bell would not cause her to favor Dr. Bell or cause her difficulty in finding liability against Dr. Bell, this ruling was within the trial court’s broad discretion.

In sum, based on the totality of the exchanges between the judge, counsel and potential jurors, it cannot be said that the trial court abused its discretion in denying Harding’s request that potential Jurors Nos. 7, 11 & 12 be removed for cause. To the contrary, the Court aggressively questioned each juror in an attempt to illicit any bias, had an opportunity to view each juror’s demeanor, assess her or his credibility, and satisfied itself as to the juror’s impartiality. Indeed, in the seven hours spent examining the

prospective jurors in this case, the court eliminated many potential jurors for cause, demonstrating it had no hesitation to do so if it had any misgivings about a juror's ability to sit.³

B. HARDING FAILS TO DEMONSTRATE ACTUAL PREJUDICE.

Even if Harding could demonstrate that potential Jurors Nos. 7, 11 & 12 were in fact biased and that they should have been stricken by the trial court for cause, it would nevertheless be error to reverse the jury verdict on this basis because Harding cannot demonstrate "actual prejudice" resulted. To obtain a new trial for failure to dismiss a prospective juror for cause, "a party must prove that the trial court's failure to dismiss a juror for cause resulted in actual prejudice to the party." State v. Russell, 917 P.2d 557, 560 (Utah Ct. App.), cert. denied, 925 P.2d 963 (Utah 1996); accord State v. Menzies, 889 P.2d 393, 400 (Utah 1994), cert. denied, 513 U.S. 1115 (1995). Mere use of a peremptory challenge is alone insufficient. To demonstrate prejudice, Harding must:

show that as a result of the loss of his peremptory challenge [she] was not able to remove another subsequently summoned juror who ultimately sat on the jury, and who was "partial or incompetent."

³ Harding suggests that the trial court should have excused for cause each of these potential jurors simply to err on the side of safety, contending "[t]here were plenty of other jurors in the pool to fill out the required eight jurors." (Aplt. Br. p. 22.) Notwithstanding the fact that the existence of a large jury pool is not the standard for excusing potential jurors for cause, Harding's contention is not supported in the record. When Harding's counsel raised this issue during the in-chambers investigation of potential jurors, the trial judge stated in response: "Let me backup and say, right now we're just about fifty percent. We're striking a lot of people. We do not have a large amount." (R. at 1411 p. 37).

Wach, 2001 UT 35, ¶35 (quoting State v. Baker, 935 P.2d 503, 506 (Utah 1997)). This determination is within the sound discretion of the trial court. State v. Woolley, 810 P.2d 440, 442 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991).

Harding fails to demonstrate that any of the jurors who actually sat were “partial or incompetent,” as is her burden on appeal. Instead, Harding circumvents the relevant inquiry and merely concludes that “[o]bviously, using all three peremptories to strike jurors who should have been stricken for bias was prejudicial to plaintiffs.” (Aplt. Br. p. 25.) This unsupported declaration is not demonstrative of either partiality or competence, and falls far short of demonstrating actual prejudice. Indeed, given that the jury apportioned a high percentage of fault to Dr. Bell, any argument that the jury was biased in his favor is facially untenable. All Harding can show is she used a peremptory challenge to remove a panel member whom she claims should have been stricken for cause. This does not amount to prejudice sufficient to reverse a jury verdict under Utah law. See State v. Menzies, 889 P.2d 393, 400 (Utah 1994), cert. denied, 513 U.S. 115 (1995).

Harding’s only contention of prejudice is that “[h]ad the three challenged jurors been appropriately stricken for cause, plaintiff’s peremptory strikes would have made this panel more fair.” (Aplt. Br. p. 28.) It is, foremost, rank speculation for Harding to opine that she could have empaneled a “more fair” jury if she had the three peremptory challenges at issue. More importantly, Utah law only requires an impartial jury, which Harding received in this case. Utah law does not require reversal of a jury trial merely because Harding now perceives she could have constructed a jury more favorable to her position.

Significantly, to support her claim of prejudice, Harding ignores current Utah law and relies on overturned precedent. Harding represents to this court that “[f]ailure to excuse a juror for cause in a medical malpractice case, when cause exists, which forces the plaintiff to use a peremptory challenge to strike that juror, is reversible error,” citing Jenkins v. Parrish, 627 P.2d 533 (Utah 1981). (Aplt. Br. p. 22.) This portion of Jenkins has, however, been expressly overruled by State v. Menzies. See State v. Wach, 2001 UT 35, ¶124 n.2 (specifically stating Menzies overturned Jenkins). The rule that guides us is, as stated above, that “to obtain reversal a defendant must demonstrate prejudice, viz., show that a member of the jury was partial or incompetent.” Menzies, 889 P.2d at 400. Harding fails to do this.

POINT II.

THE JURY VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE REVERSED.

Harding briefs the denial of her Motions for JNOV and for New Trial as separate issues. (Aplt. Br. pp. 29 & 45.) However, because her arguments are essentially the same for each issue, they are treated together herein. The gravamen of Harding’s contention is that there was insufficient evidence to support the jury’s finding of Harding’s comparative negligence.

An insufficiency-of-the-evidence based challenge to a denial of either [a JNOV or new trial] motion is governed by one standard of review: we reverse only if, viewing the evidence in the light most favorable to the party who prevailed, we conclude that the evidence is insufficient to support the verdict.

Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988). Review of the jury’s verdict places “a difficult burden on the challenging party.” Selvage v. J.J. Johnson & Assoc., 910 P.2d

1252, 1257 (Utah Ct. App. 1996). All reasonable inferences are drawn in favor of the verdict and, if the evidence supports the verdict, it must be affirmed. Id.; accord Steenblik v. Lichfield, 906 P.2d 872, 875 (Utah 1995).

A. HARDING FAILS TO MARSHAL THE EVIDENCE.

Because Harding's challenge to the denial of her motions attacks the sufficiency of the evidence, it is Harding's burden on appeal "to marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." State v. Boyd, 2001 UT 30, ¶12, 25 P.3d 985; Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998). Harding fails to demonstrate that the evidence was insufficient to support the jury's verdict. For this reason alone, this Court can affirm the jury verdict without considering Harding's challenge to the sufficiency of the findings. Tanner v. Carter, 2001 UT 18, ¶33, 20 P.3d 332; Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

This is a medical malpractice action and the defense was substantially mounted through expert witnesses. In her brief, Harding fails to cite to the testimony of either of defendant's experts. (Aplt. Br. pp. 29-49.) Instead, Harding recites her own trial testimony and portions of the trial testimony of Dr. Bell and her subsequent treating physician, Dr. Smith, that arguably support her position. (Aplt. Br. pp. 31-33, 39-44.) Harding did not even request transcription of the trial testimony of Dr. Ganellen, one of Dr. Bell's expert witnesses on the issues of negligence and causation. (R. at 503-504.) Nor did she have transcribed the testimony of plaintiff's expert witnesses, Dr. Daniel L. Icenogle and Dr. Bertram P. Rosenthal, both of whom testified favorably for the defense on cross-examination. (See R. at 499-500, 923.) The testimony of Dr. Ganellen,

Dr. Icenogle and Dr. Rosenthal is accordingly not even part of the record on appeal. Harding cannot be said to have fulfilled her marshaling burden when omitting the trial testimony of one of Dr. Bell's chief expert witnesses and the testimony of plaintiff's experts favorable to the defense.

B. THE JURY VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Even if Harding had satisfied her burden to marshal the evidence, the jury verdict is nevertheless beyond reproach because it is supported by substantial evidence. It is well established in Utah jurisprudence that "the jury serves as the exclusive judge of both the credibility of the witnesses and the weight to be given particular evidence." State v. Workman, 852 P.2d 981, 984 (Utah 1993).

The jury found that Harding was more at fault in failing to seek prompt medical treatment for her symptoms than was Dr. Bell in failing to diagnose unstable angina. The evidence regarding whether Dr. Bell's care met the medical standard of care is accordingly as relevant to the "insufficiency of evidence" argument as the evidence of Harding's negligence. In her appellate brief, Harding has failed to marshal evidence on both issues. There is substantial evidence sufficient both to exonerate Dr. Bell and implicate Harding. At trial, Dr. Bell had two expert witnesses testify that Dr. Bell complied in every respect with the standard of care: Kim Bateman, M.D., a family practitioner, and Edward Ganellen, M.D., a board-certified cardiologist. (R. at 1416 pp. 11-12, 20-21, 23-25.)⁴

⁴ As stated above, Dr. Ganellen's trial testimony is not part of the record and accordingly cannot be cited to. Citation can only be made to Dr. Bateman's testimony and Harding's medical records. Some of Dr. Ganellen's testimony was summarized by defense counsel in closing argument. (R. at 1412 pp. 8-9.)

There is also ample evidence of Harding's comparative fault. The evidence is that on January 24 and 25, 1997, two days before Harding suffered a heart attack which she claims Dr. Bell should have prevented, Harding had recurrent chest pain, accompanied with incidents of malaise, tiredness and exertional discomfort. (R. at 1415 pp. 67-68; R. at 1422 Def.'s Ex. A. p. 114). Harding did not go to an emergency room or seek medical care on either of those two days. (R. at 1416 pp. 26-27). She did not seek medical treatment during two days of chest pain and other ominous symptoms, despite the facts that: she had a family history of heart disease, with her father having had bypass heart surgery four times and who died of a heart disease at age 48; she had a 30-plus year history of smoking; she had a history of high blood pressure; she was being treated by Dr. Bell to determine the cause of her January 4, 1997, chest and arm pain; and, she had been referred to and had an appointment with a cardiologist, Dr. Asay, to rule out coronary artery disease. (R. at 1414 pp. 66-67, 75-78, 121; R. at 1415 pp. 67-68; R. at 1422 Def.'s Ex. A. pp. 17, 114.) Dr. Bateman and Dr. Ganellen testified at trial that had Harding sought medical attention on January 24th or 25th, Harding would have been admitted to the hospital and treated, preventing her January 26th heart attack. (R. at 1416 pp. 26-27, 64.)

This evidence is more than sufficient to support the jury verdict allocating 45 percent of fault to Dr. Bell and 55 percent of fault to Harding. This verdict is well within the range of possible findings based upon the evidence presented, especially when viewed in the light most favorable to Dr. Bell. This court must accordingly defer to the jury's assessment of liability.

C. FACTS REGARDING HARDING'S CONDUCT PRIOR TO JANUARY 13, 1997, PROVIDES NO BASIS TO OVERTURN THE JURY VERDICT FOR INSUFFICIENCY OF EVIDENCE.

Rather than satisfy her burden to marshal the evidence, Harding makes the convoluted argument that the jury verdict is not supported by sufficient evidence because the jury should not have been allowed "to consider any factor for either negligence or causation which preexisted the January 13, 1997, visit to Dr. Bell," i.e., Harding's history of smoking and her failure to go to a doctor right away on January 4, 1997, after the truck stop incident. (Aplt. Br. p. 35.) According to Harding, her conduct prior to January 13, 1997, could not be a contributing factor in causing her injury and thus this evidence should not have been admitted and considered by the jury and, without this evidence, the jury could not have found any comparative negligence by Harding. (Aplt. Br. pp. 33-38.)⁵

Substantively, this is a challenge to the jury verdict based on the admission of evidence for consideration by the jury, not for insufficiency of the evidence. The record demonstrates Harding did not object to, and the trial court did not rule upon, the admissibility of evidence of facts existing prior to January 13, 1997. Indeed, it was Harding that introduced evidence of Harding's smoking, (R. at 1414 pp. 66-67), and her failure to see a doctor promptly after the January 4th truck stop episode. (R. at 1414 pp.

⁵ Harding's contention that the jury would have returned a verdict in her favor had the jury not been allowed to consider evidence of Harding's conduct prior to January 13, 1997, is pure speculation. It is not known how the jury calculated its apportionment of liability or what evidentiary components it considered in making this determination. Based solely on the evidence of Harding's conduct after January 13, 1997, the jury could easily have found Harding 55 percent negligent, given Harding's failure to seek medical attention after suffering two days of chest pain on January 24 and 25, 1997. See Discussion at Point II.C.

75, 77.) Harding has not properly preserved this issue for appellate review and has waived this contention absent plain error,⁶ which Harding has neither argued nor demonstrated. State v. Schreuder, 726 P.2d 1215, 1222 (Utah 1986); Utah R. Evid. 103(a). For this reason alone, this court should decline to address Harding's contention regarding the admission of evidence of facts existing prior to January 13, 1997.

Even if it were proper to entertain Harding's claim in this regard, it would nevertheless be unavailing. Evidence of Harding's smoking and other risk factors pre-dating January 13, 1997, was not introduced for the purpose of establishing comparative fault: This evidence was presented for the purpose of establishing damages and relevant medical issues. Harding claims that Dr. Bell failed to diagnose her CAD, causing her to suffer a preventable heart attack on January 26, 1997, which Harding claimed puts her at risk for a future heart attack and a shortened life span. (R. at 6 & 960.) Dr. Smith, Dr. Ganellen and Dr. Rosenthal each testified at trial that it is Harding's CAD which puts her at increased risk for future heart attacks and a shortened life span, not her January 26th heart attack. (R. at 923; R. at 1415 pp. 43, 60-61; See R. at 1412 p. 17.) Dr. Smith testified that "the fact she smoked significantly increased her likelihood of developing coronary artery disease." (R. 1415 p. 43.) Dr. Ganellen further testified that Harding

⁶ Harding's representation that "[p]laintiff made early objections to the consideration of Geri Harding's pre-existing conditions," (Aplt. Br. p. 36), is simply not true. The only portion of the record to which Harding cites in support of this assertion is her trial brief and the trial court's memorandum of the daily proceedings. (See Aplt. Br. pp. 10 & 26; R. at 952-53 & 1048.) This is insufficient. Rule 7 requires Harding to make application to the Court for exclusion of evidence, stating "with particularity the grounds therefor." Utah R. Civ. P. 7(b)(1). A careful review of the record demonstrates Harding failed to do this. She made no objection to the trial court at the time the evidence was presented and, accordingly, deprived the trial court of an opportunity to rule on any such objection.

suffered the January 26th heart attack because of CAD attributable to her 30-plus year smoking habit, not because she did not see a cardiologist sooner. (See R. at 924; R. at 1412 p. 17.)

Evidence that Harding waited nine days after she experienced chest and arm pain at the truck stop on January 4, 1997, before seeking medical treatment on January 13, 1997, was not admitted as evidence of Harding's comparative fault. Rather, it was admitted as relevant to medical issues relating to her diagnosis of CAD. Dr. Bateman and Dr. Ganellen testified that the fact Harding had no recurrence of symptoms during the nine days after the truck stop incident, removed her from the diagnosis of "unstable angina," making the diagnosis of CAD more difficult. (R. At 1416 pp. 18, 20, 21, 26, 29, 57-61; see R. at 1412 p. 8).

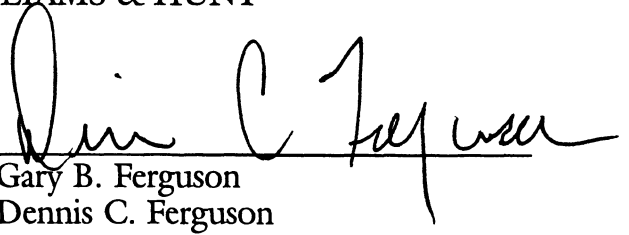
CONCLUSION

There is no basis to overturn the jury verdict in this case and it must be affirmed. The evidence in the record is that Harding received a fair trial from a non-biased and impartial jury, and the jury verdict is supported by substantial evidence. Harding's claims to the contrary are neither supported in fact or law and must be disregarded for what they are: an attempt to conjure up error where there is none.

DATED this 31 day of October, 2001.

WILLIAMS & HUNT

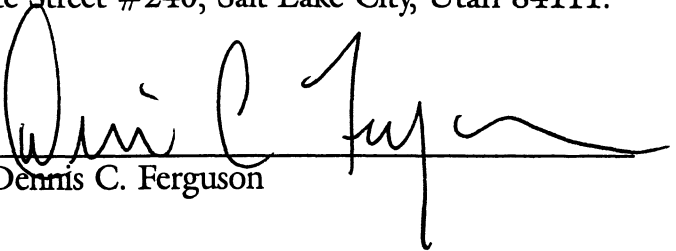
By



Gary B. Ferguson
Dennis C. Ferguson
Attorneys for Defendant Dr. Bell

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2001, two (2) true and correct copies of the foregoing **Brief of Appellee Carl T. Bell, M.D.** were mailed postage prepaid thereon, by first class mail in the United States mail, to Robert B. Sykes, Robert B. Sykes & Associates, 311 South State Street #240, Salt Lake City, Utah 84111.


Dennis C. Ferguson

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verdict form. *Martineau v. Anderson*, 636 P.2d 1039 (Utah 1981).

In general.

To preserve a question for appeal, an objection must be clear and concise and made in a fashion calculated to obtain a ruling thereon. *Doe v. Hafen*, 772 P.2d 456 (Utah Ct. App. 1989), cert. denied, 800 P.2d 1105 (Utah 1990).

Instructions.

—Right to object.

The parties have a right to make objections to the instructions to preserve challenges to their

accuracy; if counsel was prevented from making objections to instructions, he should, under this rule, be deemed to have done so. *Hanks v. Christensen*, 11 Utah 2d 8, 354 P.2d 564 (1960).

—Harmless error.

If the instructions are correct, any error which prevents counsel from making objections thereto is harmless error. *Hanks v. Christensen*, 11 Utah 2d 8, 354 P.2d 564 (1960).

Cited in *Watters v. Querry*, 626 P.2d 455 (Utah 1981); *Broberg v. Hess*, 782 P.2d 198 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appellate Review § 614.

C.J.S. — 4 C.J.S. Appeal and Error § 202 et seq.

A.L.R. — Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial, 76 A.L.R. Fed. 619.

Rule 47. Jurors.

(a) *Examination of jurors.* The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

(b) *Alternate jurors.* The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

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

(d) *Challenge to panel; time and manner of taking; proceedings.* A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

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

(f) *Challenges for cause; how tried.* Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident hereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness herein.

(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Any challenge for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of such challenge.

(g) *Selection of jury.* The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, in the order called, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(h) *Oath of jury.* As soon as the jury is completed an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and a true verdict rendered according to the evidence and the instructions of the court.

(i) *Proceedings when juror discharged.* If, after the jury is impaneled and before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) *View by jury.* When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on

(k) *Separation of jury.* If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) *Deliberation of jury.* When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) *Papers taken by jury.* Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

(n) *Additional instructions of jury.* After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(o) *New trial when no verdict given.* If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) *Court deemed in session pending verdict; verdict may be sealed.* While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(q) *Declaration of verdict.* When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is his verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(r) *Correction of verdict.* If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(Amended effective January 1, 1998.)

Amendment Notes. — The 1997 amendment, effective January 1, 1998, substituted “stated on the record” for “noted by the reporter” in the second sentence of Subdivision (d) and for “taken down by the reporter” at the end of Subdivision (n) and made stylistic changes.

rule is similar to Rule 47(a), F.R.C.P.

Cross-References. — Jurors generally, § 78-46-1 et seq.

Three-fourths of jurors may find verdict in civil case, Utah Const., Art. I, Sec. 10.

Witness in jury as § 78-24-3, U.R.E. 606