

1941

H. M. Gribble v. Emma Cowley : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

H. M. GRIBBLE,

Plaintiff and Appellant,

vs.

MRS. EMMA COWLEY,

Defendant and Respondent.

No. 6224

Appeal from Seventh District Court of Sanpete County,
Utah, Honorable John A. Hougard, Judge.

BRIEF OF RESPONDENT

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Attorney for Plaintiff and Appellant.

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Defendant and Respondent.

No. 6224

BRIEF OF RESPONDENT

The plaintiff has appealed this action relying upon two assignments of errors, namely, 1. That the evidence is insufficient to justify the verdict in the particulars as set forth in detail therein, and 2. Misconduct of the jury in the particulars as set forth in detail therein.

Under these assignments of errors the appellant has submitted a lengthy argument contending that the court erred in denying the plaintiff's motion for a new trial in this action.

POINT "A"

Under point A as argued by the appellant the fact is not disputed by defendant that if contributory negli-

gence is relied on that it must be plead, but in this action the defendant did not rely on contributory negligence as a defense. To the complaint filed by the plaintiff charging the defendant with negligence causing the death of William Hale Gribble, this defendant entered an answer denying any negligence on her part for the injury and death of the said William Hale Gribble.

The material allegations of the plaintiff's complaint in this action were in substance: That Mrs. Cowley, the defendant, was operating an automobile in a northerly direction upon the public highway at about the hour of 3:15 P. M. on the 13th day of December, 1937, at a point within Gunnison City on which is known as the San Pitch Bridge, that she was driving said automobile carelessly and negligently in the following manner: That she was going in excess of 40 miles per hour; that she carelessly and negligently failed to keep a careful or any lookout for persons along and upon said highway; that she failed to have said automobile under her control and negligently and carelessly drove and operated said automobile to the extreme east edge of the paved portion of said bridge and failed to operate said automobile with sufficient clearance to the left of the deceased, and failed to give any signal whatsoever of her intention to pass said deceased upon his left; that the deceased, was then and there travelling on a bicycle in a northerly direction along and upon the east portion of the said highway crossing the San Pitch Bridge approximately in the center and about one foot West of the East edge of the paved portion of the Highway on the said bridge, and was then

and there exercising due care and caution for his own safety. That the defendant, by reason of her aforesaid negligence, caused said automobile to strike upon and against the bicycle of the deceased and his body which resulted in the injury from which he later died.

The testimony of the defendant, relating to the court and the jury the detail of how this accident occurred (Ab. 35-38) and on cross examination (Ab. 39-50) did not disclose any negligence on her part but was to the effect that she was travelling upon the highway, using due care, that she had her car under control, that she was travelling about 25 miles per hour as she approached the San Pitch Bridge, that she was keeping a careful lookout for persons along and upon the highway, and that this boy darted out on his bicycle and she sounded her horn as she approached to pass him turning her car over to the west side of the highway so as to pass him and that he turned his bicycle into her car and she whirled to avoid him but could not.

Her testimony was not refuted. Nor was there any evidence introduced by the plaintiff which in any way proved any negligence on her part.

Then there is the testimony of the defendant's witness, Mildred McIff, an eye witness to the accident (Ab. 50-51) whose testimony was to the effect that she saw the boy on his bicycle, saw the car approach, and saw the boy turn his bicycle into the car.

This undisputed evidence that the deceased turned his bicycle into the defendant's car went into the record without objection by the plaintiff. And it is this evidence

that plaintiff is stressing as being evidence of contributory negligence and therefore being improper evidence for the jury to consider. But plaintiff alleged as a material allegation in his complaint that the deceased was travelling upon his bicycle upon said highway exercising due care and caution for his own safety, which allegation was denied by the defendant in her answer, and certainly any evidence which would tend to disprove the plaintiff's material allegations was certainly admissible under the pleadings.

Under defendant's answer of denial, which specifically denied each and all of the plaintiff's allegations of negligence set up in his complaint, defendant contends that she had the right to introduce evidence that would defeat the plaintiff's claims.

Bancroft Code Pleading, Volume 4, page 3550, Sec. 2046, states :

“Answer generally—In an action based upon negligence the defendant may, of course, plead any defense which he has, even though they be not wholly consistent, as in case of a denial of negligence and an allegation of contributory negligence, subject to the general limitations elsewhere discussed. Matters of affirmative defense must be specially pleaded, such as an act of God, but this is not necessary with respect to matters which are covered by denials of the facts alleged. Thus a denial of any negligence on the part of the defendant warrants proof that the injury was solely due to the negligence of the plaintiff, without the necessity of a plea of contributory negligence.”

In support of this is the case of *Hughes v. Warman*

Steel Casting Company, a case decided by the Supreme Court of the State of California reported in 163 Pacific, page 885, in which it was held that defendant having in its answer denied all negligence on its part, this plea, though denominated a special defense, is simply an affirmative charge of negligence on the part of the plaintiff which was available under the general issue without special plea, and the evidence respecting it would have to be considered with all the other evidence in the case in determining whether it justified a verdict for the plaintiff, which the jury, of course, did.

See also *Cargil v. Atwood*, 18 R. I. 303, 27 Atl. 214, to the effect that the general issue puts plaintiff upon proving his whole case, and entitles defendant, without special notice, to give evidence of anything which shows that plaintiff ought not to recover.

And in the case of *Smith vs. Ogden & N. W. R. Co.*, 33 Utah, 129; 93 Pac. 185, the case cited by appellant in his brief is directly in support of the defendant's contentions in this case, to-wit:

“That the plaintiff is required to allege and prove negligence on the part of the defendant, and that such negligence, as a natural and direct result, occasioned the injury.”

and further:

“Under the general issue, the defendant may introduce any evidence which tends to disprove the negligence charged against him, or which tends to disprove the casual connection of his negligence and the injury.”

There was no testimony or evidence introduced in this case that brought out any negligence on the part of the defendant. While on the other hand there was evidence introduced which showed that the deceased turned his bicycle into the defendant's car, tending to show that the deceased was not using due care as plaintiff had alleged, and further tending to show the defendant's freedom from negligence in the matter. We contend that defendant had a right in proving her freedom from negligence to introduce any evidence showing how the accident occurred, and such evidence and testimony did go into the record without objection by the plaintiff or his counsel.

It is well settled as frequently stated by the courts that under a general denial in an answer that the defendant may make any defense that will defeat plaintiff's claim. While on the other hand a person pleading contributory negligence thereby admits his own negligence in the case and seeks to avoid responsibility by reason of the claim that the other party contributed to his own negligence. That, however, was not the case at all before the court. The evidence of the defense in this case all the way through, showed absolutely that the injury and death of the boy in this case was purely accident as it were as far as the defendant is concerned. That was unavoidable and no responsibility could be placed upon the defendant by reason thereof. And this was the verdict reached by the jury in this case when they returned a verdict in favor of the defendant of no cause of action.

POINT "B"

Under point B, appellant has submitted argument on the duty of the jury to follow the court's instruction. We do not contend that it was not the duty of the jury to follow the court's instruction, and certainly the appellant has not presented any evidence to show that the jury in this action did not follow the instructions of the court.

The Appellant has cited the case of Moulton vs. Staats, et al., reported in 83 Utah 197, 27 Pac. (2nd) 455. This is an action where the jury were instructed that if the issues were found against the plaintiff and in favor of defendant, that all the defendants would be entitled to was on their counterclaim in the sum of \$886.50. And that if they found in favor of the plaintiff and against defendants, the defendants would be entitled to a set-off in the sum of \$886.50. The jury returned their verdict in favor of the plaintiff in the sum of \$2500.00. However, it was the intention of the jury to render a verdict for the defendant on their counterclaim of \$886.50, same to be offset against the \$2500.00, leaving a balance of \$1614.00 for plaintiff. And the Jury showed by affidavit that it was an oversight on their part to fail to find a verdict for the defendants on their counterclaim.

There can be no dispute that in the case above cited there was an apparant disregard by the jury of the instruction given by the Court. But this case is not in point with the case at bar. There is no evidence here that the jury disregarded the instruction of the court.

The testimony of the juror, Mr. Lowry, on Cross Examination (Tr. 142) was very definite that the jury

did follow the court's instructions, quoting from that testimony:

“Q. Mr. Lowry, did the jury follow and go over the court's instructions?

A. Yes, sir.

Q. And you arrived at your verdict from his instructions?

A. Yes, sir.

Q. And you accept the law as His Honor gave you?

A. Yes, sir.”

The jury had the right to consider the evidence introduced in determining whether Mrs. Cowley was negligent, and if her negligence was the proximate cause of the injury, as instructed by the court. Although it is clear from the evidence that the question of William Hale Gribble's negligence in comparison with any negligence of the defendant was not the issue upon which the Jury obtained their verdict, the evidence shows there was some discussion as to this. But the evidence also shows that the verdict was reached upon the question of whether or not the defendant was negligent, and the jury unanimously found that the defendant was not negligent, and, therefore, reached their verdict of no cause of action.

POINT “C”

On his point C, appellant contends that the trial court erred in refusing to grant the motion for new trial, which contention respondent must earnestly reject. This motion

was made on two grounds, namely, 1, Misconduct of the jury. 2. Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

Affidavits of the mother of the deceased and her sister-in-law were filed in support of such motion, attempting to show the alleged misconduct of the jury in the jury room. At the hearing of this motion the following evidence was brought before the court:

In the first place we have the evidence of Mrs. Gribble, the mother of the boy who was killed as stated in this action, saying that during the deliberation of the jury she and her sister-in-law were on the sidewalk in front of the court house, the jury room being upstairs, and that she heard a discussion of voices from the jury room, but could not recognize the voices. She could not positively testify that it was even one of the jurors whose voice she heard but she claimed that the effect of the statement or statements was upon the question of the relative negligence as between Mrs. Cowley and the boy who was killed in the accident. But that was all she claimed that she heard—nothing more. (Ab. 58-59.)

Her sister-in-law, Mrs. Gladys Nielson claimed that she heard practically the same thing but she could not say positively as to who made the statement or even whether it was a jurymen or somebody else. (Ab. 59-60-61.)

Now as an attempt to identify and bring to the court evidence as to such statements having been made in substance plaintiff called two of the jurors before the court in this case, namely, Mr. King and Mr. Lowry and questioned them upon a purported talk or discussion upon the

question of the relative negligence between the parties mentioned. One juror said there was a great deal of talk upon that, the other juror said there was a little conversation upon that but there was no vote taken upon that matter, no determination whatever resulted upon that phase of their discussion.

I quote from Mr. Lowry's testimony upon direct examination by Mr. Beatie (Ab. 62-63) :

“Q. I will ask you this then: Isn't it a fact that most of the time during the deliberations of the jury on that particular evening was the discussion as between the fact that William Hale Gribble was negligent, and that Mrs. Cowley was also negligent, and that William Hale Gribble was more negligent?

A. No, sir, that is not a fact.

Q. What would you say that was?

A. The most of the discussion was as to whether Mrs. Cowley was negligent or not.

Q. It is a fact, however, there was a discussion as to the negligence of William Hale Gribble?

A. A little discussion, but no ballots taken.”

If that constituted misconduct then under the law of this State it could not possibly and cannot possibly be received by the court in this action in support of the motion upon the positive and well attested law to the effect that a juror will not be permitted to impeach his own verdict.

It was held in the case of *Metcalf v. Romano*, decided by the Supreme Court of California, and reported in 257 Pacific, Page 114, that expressions of individual juror

during deliberations prior to arriving at verdict, in action for death of seven year old boy struck by automobile, held not sufficient reason for setting aside verdict for plaintiff and granting new trial, as showing prejudice against defendant. From that case I quote :

“The action of the trial court in refusing to grant a new trial on account of the alleged prejudice of one of the trial jurors must be upheld. It does not appear from the transcript or briefs how many of defendant’s peremptory challenges were used, the record saying one or more was exercised. Whether or not the jury was polled on the rendering of the verdict does not appear. The motion was heard on the affidavits of two of the jurors and the attorney for defendants. If verdicts could be set aside because of the expressions of individual jurors during their deliberations prior to arriving at a verdict a procedure novel in the administration of justice would be introduced, for by a long line of decisions of the appellate courts of this and many other states it is held that verdicts cannot be impeached by the affidavit of jurors.”

In the case of *Skeen v. Skeen*, reported in 76 Utah, page 32, it was held that ordinarily, new trial is not granted for remarks in jurors’ hearing, where neither successful party nor jurors were at fault, unless remarks probably influenced verdict.

In the case of *Mast v. Claxton*, 290 Pacific 48, 107 Cal. 59, it was held that to justify new trial for misconduct of juror, it must be shown that prejudice resulted or that juror gave wilfully untruthful answer.

It is only where the verdict of a jury cannot be justi-

fied, upon any hypothesis presented by the evidence that it should be set aside on the ground that it is a compromise verdict. See *Woolsey v. Ziegler*, 123 Pacific 164; (Oklahoma Case).

LaFargue v. United Railroads of San Francisco, a California case reported in 192 Pacific, page 538, where a juror was guilty of violating the instructions of the court in asking certain questions and making statements, upon which it was charged that he thus openly prejudiced the case and expressed his criticism to his fellow jurors. Upon this matter the District Court of Appeal in deciding this case said:

“We are willing to concede that the juror was guilty of a violation of the instruction of the court and of his duty as a juror in making the statements. But we cannot go with appellant’s learned counsel to the extent of holding that the statements necessarily showed a prejudiced mind. Neither can we concede that the incident could have ultimately affected the minds of intelligent jurors, as we must assume the jurors who heard the statements to have been, to the prejudice of the defendant’s cause. The whole matter was passed on by the trial court on motion for a new trial, and it was warranted in holding that the conclusions of the juror thus hastily reached and expressed, based as it was upon an absolutely irrelevant fact, could not have operated to affect the juror’s mind in reaching a verdict.”

If that doctrine is applied which we believe will be applied in this case, then what do we have? We have the testimony of Mrs. Gribble and her sister-in-law that when they were on the sidewalk during the time that the jury

was deliberating in their room they heard some voices which they could not tell or identify, to the effect that the boy Gribble was more negligent or equally negligent as they stated, with the defendant, which certainly left at that stage cannot possibly be used by the court in support of the assignment on the ground of misconduct of a jury. It would be ridiculous, contrary to all precedent to allow and permit such flimsy testimony not identified as to the voices to be the basis of setting aside a verdict of a jury.

Now as a matter of law, however, even if defendant should admit the statements and that said statements and arguments were made by the jury, then the question would be as to whether or not that was misconduct that prejudiced the minds of the jury. There was no issue raised in this case as to contributory negligence. There was a general denial of the acts of negligence as set forth in the complaint. There was no claim whatever in this case to the effect that Mrs. Cowley was negligent but a direct denial of any acts of negligence in this matter and under that general denial the defense had a right absolutely to show to the jury just how the unfortunate accident happened and in that evidence there was brought forth an eye witness to the affair that absolutely showed that by reason of the fact that the decedent swung his bicycle into the automobile of Mrs. Cowley that the accident was absolutely unavoidable as far as the defendant was concerned. That immediately after the accident she stopped the car within a very short distance showing that she had complete control of the car and turned

around and came back to the scene of the accident. Surely in view of this and all of the evidence in the case the jury certainly would have a right to deliberate and talk about the evidence in the matter and in view of the fact that the defendant in this case proved to the satisfaction of the jury that she was innocent of negligence in this matter and further that the accident did not happen by reason of any error or negligent act of hers but was absolutely caused by the person who was victim of the sad affair.

If we were to follow the theory of the plaintiff in this case defendant would not have been permitted even to show how this accident happened. Now, again we take up the matter to the effect that contributory negligence was not an issue in the case. Consequently the mere fact that there may have been some deliberation or talk by the jurors in this case as to the question of contributory negligence or the relative negligence as between the defendant and the decedent that would absolutely be immaterial under the law when as a matter of fact there is no evidence whatever to show that the mind of any juror was prejudiced thereby or that it resulted in or entered into the decision or verdict of the jury in this case.

In *Corpus Juris Secundum*, Volume 5, Sec. 1780, page 1173, upon the question of misconduct of jurors this doctrine is laid down:

“Misconduct of the jury or a juror may, like error in practically any other particular, be either material and harmful, or immaterial and harmless. Which it is to be determined on an examination by the appellate court of the entire record.

In order to authorize the setting aside of a verdict on account of misconduct, it must appear that such misconduct tended to result in a substantial injury to the party complaining. Although jealous to preserve the integrity of verdicts, the courts are not on the alert for pretext to set them aside and will not scrutinize the subjective mental processes of the jurors to ferret out prejudice from misconduct where none is apparent. Intermediate improprieties in the course of deliberation or discussion which obviously do not continue into or have any effect on the verdict finally reached are harmless; and on its appearing affirmatively that no juror was influenced by the improper conduct, no significance will be attached to such conduct by the reviewing court. Mere speculation, in the course of discussion, as to what a witness whose testimony was excluded would have testified to had it been admitted will not be deemed prejudicial.”

Referring to the question of what a juror may testify to after the decision in any matter, the appellant has cited the case of Ogden L. & I. Ry. Co. vs. Jones, et al., 51 Utah 62; 168 Pac. 548. In this case the alleged misconduct of a juror during the deliberations of the jury was attempted to be proved by the affidavit of the appellant and his counsel, in which it was shown that the juror admitted certain facts respecting his conduct, showing that the juror entertained strong bias or prejudice against appellant and his witnesses, and in view of that was disqualified to sit as a juror in the case.

Chief Justice Frick at page 70 of the Utah Report, says, as quoted by the appellant in the case at bar:

“If a juror is actually guilty of misconduct, one or more of the other jurors may testify to the facts

constituting the alleged misconduct, or the same may be proved by any witness who observed and knows the facts."

But the appellant did not quote the further statement of Justice Frick, to-wit:

"It is well settled, however, that the alleged misconduct of a juror may not be established by merely proving his declarations."

And quoting further from the same case, Chief Justice Frick says:

"It is elementary that a juror may not be heard to impeach his own verdict. If that were permitted, one, or perhaps more, of the jurors could be found in every case who, for the sake of appeasing the wrath or soothing the feelings of the losing party, would disclose something for which it could be claimed the verdict should be set aside. Indeed, a juror, or even a number of them, might agree to a verdict with that end in view. The law, therefore, wisely provides that a juror may not disclose facts which would go in impeachment of his verdict; and what a juror may not do directly may not be done indirectly by proving the declarations of a juror."

And the court in this particular case found that the evidence contained in the affidavits, was not admissible upon sound public policy.

In fact, the case of *Black vs. Rocky Mountain Bell Tel. Co.*, reported in 26 Utah 451, 73 Pac. page 514, it was decided that "Under Rev. St. 1898, 3292, subd. 2, providing that, when any one or more of the jurors, has been induced to assent to a verdict by resorting to the de-

termination of chance, such misconduct may be proved by the affidavit of any one of the jurors, misconduct other than that specified cannot be established on a motion for a new trial by the juror's affidavit."

Revised Statutes of Utah 1898, 3292 subd. 2, is substantially the same as Revised Statutes of Utah, 1933, 104-40-2, subd. 2. Under the ruling of this case it would seem well established that misconduct other than that where it appears that one or more of the jurors has been induced to assent to a verdict by resorting to chance, cannot be introduced by affidavit of a juror, and likewise the same rule would apply to the testimony of a juror.

The case of *Hamilton v. Snyder*, 182 Wash. 688, 48 Pac. (2nd) 245, which the appellant has cited, was a case where on affidavit of some of the jurors it was shown the jury took an informal ballot, resulting in 11 for defendant and 1 for plaintiff. Following this the jury requested that the court's instructions be read and a formal ballot taken. The foreman signed the verdict for the defendant and announced there was no need for the jury to consider the case further. Protests were made by some of the jurors who announced they would vote differently on a formal ballot. Other jurors joined in the request for a formal ballot which the foreman refused, and the verdict was returned into court. The jury was then polled and 10 of them answered that the verdict was their verdict, while two answered no. The court in this case assumed that the attitude and actions of the foreman were dictatorial, dogmatic, and wholly improper but Justice Tolman on page 246, said :

“We have little actual knowledge of what takes place within the jury room, but it is not going too far, we think, to say that frequently the strong characters dominate the weaker ones and to open the door to testimony showing such practices would be to imperil every verdict hereafter rendered and make jury trials most uncertain in their results.”

Lastly the appellant has cited the case of *Jensen vs. Utah Ry. Co.*, 72 Utah 366 at page 400; 270 Pac. 349, 362, attempting to show by a brief citation from this case, that where the committed error is of such nature or character as calculated to do harm, or on its face as having the natural tendency to do so, prejudice will be presumed, until the record is affirmatively shown that the error was not or could not have been of harmful effect.

But where in the case at bar has the appellant shown committed error?

The court in the above cited case further said quoting from page 400 of the Utah Report:

“The burden, of course, is on the appellant to show, not only error, but prejudicial effect as well. But how may he show that? It often has been broadly stated that all errors are presumed to be prejudicial. We think the better rule is that not all committed errors in the trial of a case are presumptively or *prima facie* prejudicial, for some committed errors are merely abstract, or on their face immaterial, or otherwise are not in and of themselves calculated to do harm. Still the party against whom the error was committed may show by the record that it resulted to his prejudice in some substantial right.”

The appellant in the case at bar certainly has not shown committed error or misconduct of the jury prej-

udicial to him, and it is the contention of respondent that the trial court did not abuse its discretion in failing to grant the motion for new trial.

POINT "D"

Appellant by his last point D, seeks to show that the last vote of the jurors was influenced by the information sent to the jury by the judge in this case. The jury sent a request to the judge for further instructions while deliberating their verdict and plaintiff contends that the word sent back by the judge influenced the jury to such an extent that immediately a ballot was taken to get rid of the case. The judge refused to give any additional instruction and sent word back to the jury to read the instructions given and decide the case thereon. I do not see how plaintiff can contend that any prejudicial error resulted from this. If the plaintiff felt that the jury needed more instructions it was his duty to have raised such issue when the verdict was returned. The plaintiff not having done so, this issue cannot be raised before the court at this time.

The case of Harlan v. Taylor, decided by the Supreme Court of California, and reported in 33 Pacific (2nd) page 422, states:

“Where jury requested additional instructions, but court at time was engaged in trial of another case and offered to comply with request as soon as convenient, and jury, without receiving additional instructions, returned verdict, plaintiff, not having raised point regarding additional instructions when

verdict was returned, held to have waived irregularity, if any.”

Abbott’s Trial Brief, Civil Jury Trials, Second Edition, on page 484, states :

“But after the jury have retired, the judge is not bound to comply with a party’s request to give additional instructions upon a point not covered by a request of the jury; nor to comply with a party’s request to give the jury further instructions by way of explanation or modification of those already given; for it is a matter within the discretion of the court.”

And there are other numerous cases in support of this contention.

CONCLUSION

Respondent submits that the plaintiff has utterly failed to produce or bring forth to the court any evidence whatsoever that would show any errors committed by the jury in this action, prejudicial to the plaintiff, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

J. VERNON ERICKSON,
Attorney for Defendant and Respondent.