

1949

Jess Jimenez v. Ray O'Brien and Boyd Byron Broadwater : Brief of Appellant, Boyd Byron Broadwater

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Jimenez v. O'Brien*, No. 7264 (Utah Supreme Court, 1949).
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**In the Supreme Court
of the State of Utah**

JESS JIMENEZ,

*Plaintiff and
Respondent,*

vs.

**RAY O'BRIEN and BOYD BYRON
BROADWATER,**

*Defendants and
Appellants.*

Case No.
7264

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FILED

MAR 2 1949

CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACTS

The Statement of Facts contained in the brief of Appellant is not complete and does not fairly present to the court the complete factual picture. We, therefore, desire to supplement the statement of the Appellant with the following additional facts:

The accident in which the Appellant was injured occurred on July 9, 1945. Appellant was first taken to the Salt Lake General Hospital and within a few hours was removed to St. Mark's Hospital in Salt Lake City. Jimenez was treated by Dr. Stewart A. Wright, a Neuro-Surgeon. (R. 245). At the time Dr. Wright first examined Jimenez, which was on the day of the accident, Jimenez was unconscious. (R. 245). Mr. Jimenez's injury was diagnosed as "a brain contusion severe in type." (R. 246). Jimenez remained unconscious for a period of from two to two and one half weeks. The length of his period of unconsciousness is indicative of the severity of the injury which he sustained. (R. 248).

Although Jimenez gradually improved after the eighth or tenth day, he was not fully recovered when he left the hospital on August 14th. It was the opinion of Dr. Wright that Jimenez had sustained a permanent brain injury. The basis of this opinion was that Jimenez remained unconscious from two to two and one half weeks. Dr. Wright explained that nerve cells of the brain were destroyed and when a certain part of them are destroyed, they are not replaced by others and "scar tissue forms; that the nerve cells which carry on the primary function of the brain do not re-generate or reproduce." (R. 250-251). As to the ability of Jimenez to reason on August 14, 1945, Dr. Wright testified that he did not think the man was able to reason normally; that if he had been able to reason normally he would not have over-ridden the Doctor's objection to his leaving the hospital after a severe brain injury. (R. 136).

Mrs. Loy, a friend of Jimenez, testified that after Jimenez was taken to St. Mark's Hospital, it was between two and three weeks before he knew anybody or could recognize anyone. (R. 266). She further testified that after Jimenez regained consciousness, sometimes he was very rational and recognized his friends and at other times he would not recognize his friends and would not recall their having visited him. During these irrational periods, Jimenez would accuse his friends of having neglected him even though they might have visited him earlier on the same day. (R. 226).

Physical appearance of Jimenez was bad and he had a hard time talking, stammering and stuttering. (R. 227). On several occasions he told Mrs. Loy that he had a gun under his bed and had shot some pigeons. He told her to take the pigeons home. He also thought that the doctor and the hospital were trying to run his bill up to make more money. He wasn't even able to feed himself, but he still thought he was well and should go home.

After Jimenez was out of the hospital and while he was still a sick man, he insisted on calling on Mrs. Loy, instead of remaining home in bed. His appearance and manner were considerably changed. His dress was untidy and he was generally unkempt, whereas, prior to the injury he had been neat in his dress and appearance. He had bought three copies of the same issue of a magazine and he bought clothes which were far too small for him to wear. (R. 230).

After he was out of the hospital, Jimenez was unable to walk in a normal manner; walking in a stagger, similar to that of a drunken person. His nerves were badly frayed and he could not stand noises of any sort. He was depressed, changeable and moody. Frequently he changed his plans between going away to a distant state and remaining in Salt Lake City. (R. 231). The same changeability was manifested in Jimenez's opinion of his children. On one day he would think them completely bad and on the next day would think them the most wonderful children in the world. He was also very emotional at this time and easily provoked to weeping and crying, and his memory was very bad after the accident, as compared to what it had been before.

Dr. Garland H. Pace, a physician specializing in Neurology and Psychiatry testified that Jimenez suffered a permanent brain damage from his accident and permanent damage to his personality structure.

We also invite the court's attention to the fact that Jimenez signed both of the releases, that is, the release of August 14, 1945 and that of September 5, 1945, Exhibit Numbers 5 and 6, as "Gimenez." In other words, Jimenez did not even correctly spell his own name on the day he signed the releases.

We also invite the court to compare the handwriting of Jimenez on the releases with his handwriting on Exhibit H, which is a sample of his handwriting taken in the court at the time of trial. Although counsel stipulated in open court that the signatures on the releases were those of Jimenez, Jimenez himself did not think he

signed the last name of the signature by reason of the mis-spelling thereof. (R. 230). He had no recollection of writing the words in his handwriting on the release form.

Jimenez could not even remember whether Mrs. Gounis, his ex-wife, was with him at the time the second release was executed. (R. 335.) Jimenez further testified that he did not recall ever having seen Mr. Ben Duncan while he was at the hospital, although Mr. Duncan had visited him numerous times and had procured his signature on the releases. Jimenez did remember the name, but not the person. Jimenez had no recollection of any conversations with Duncan but he did recall signing a paper but wasn't sure what it was. (R. 340). Jimenez had no recollection of a transcribed statement by him which was taken in question and answer form by Mrs. Pannier, shorthand reporter. (R. 345).

We also invite the court's attention to the fact that almost from the very date of injury, Ben Duncan, the insurance adjuster for the Farmers Inter-Insurance Exchange "camped" on the trail of Jimenez. The first time he called at the hospital was on July 13th, four days after the accident. The plaintiff, Jimenez, was under the influence of sedatives and incapable of carrying on a conversation (R. 382). However, Duncan called again a few days later and continued to call until he finally succeeded in obtaining from Jimenez a release, on August 14, 1945, the date when Jimenez was released from the hospital. All in all, Duncan made six or seven visits. (R. 383).

CROSS ASSIGNMENTS OF ERROR

The respondent cross assigns as error the following orders and rulings of the court:

1. The court erred in sustaining the defendant's objections to the following question to Dr. Stewart A. Wright, an expert medical witness:

Q. "Doctor, do you have an opinion whether or not on August 14, 1945, Jess Jimenez had the mental faculty or whether his mental faculties were so deficient or impaired that he did not have sufficient power to comprehend the subject of a contract, its nature, and its probable consequences, and to act with discretion with relation thereto, or with relation to the ordinary affairs of life?" (R. 225).

2. The court erred in sustaining the defendant's objection to the following hypothetical question to Dr. Pace, a medical expert:

Q. "All right, medically unconscious for a period of two to two and a half weeks: that upon losing his status of being medically unconscious that he was unable to feed himself for a short period thereafter in excess of a week; that he was kept and was medicated with opiates during the period; assuming that the spinal fluid was tapped and showed the presence of blood in the spinal fluid; assuming that he told his friends and relatives during the period of his consciousness that he had a gun under his bed and asked them to take the pigeons he had killed home; assuming that he complained of pain in his head upon regaining consciousness; assuming that he evidenced a desire to leave the hospital and assuming also that contrary to his physician's advice and against his physician's wishes he did

leave the hospital on August 14, 1945; assuming that after he left the hospital he was seen to walk in a manner indicative or comparable to the way a drunken man would walk; assuming he was upon occasion inclined to weep during the month immediately succeeding his release from the hospital, and he complained of dizziness, lack of sleep, extreme fatigue, headaches; do you have an opinion as an expert in pyschiatry, that is medically sound, in your opinion, and based further upon your examination of the patient, as you have stated, as to whether or not on the 14th day of August 1945, Jess Jimenez had the mental faculties to be aware of the meaning of an act of signing a release on that date; do you have such an opinion?"

3. The court erred in sustaining the defendant's objection to the hypothetical question to Dr. Pace, as follows:

Q. "Dr. Pace, I am going to ask you a hypothetical question, and for the purpose of it I wish you to adopt certain facts as being true. Those facts are as follows: Assume, Doctor, that a male, age 38, did on the 6th day of July, 1945, suffer a brain contusion as a result of an automobile accident; that he was hospitalized for such injury, and that the spinal fluid was tapped, showing the presence of blood; assume that this male was unconscious for a period of from two to two and a half weeks during which time he was fed through the veins; assume after that period he regained consciousness and was medicated with opiates and sedatives, and that for approximately two weeks after gaining consciousness he could not feed himself; that during his period in the hospital, after he had regained consciousness, he told a friend that he had a gun under his bed and

had killed pigeons with it and during that period he remonstrated with the friend for not coming to see him, when the fact was that the friend had visited him daily; assume, doctor, that during the period that this male of the age of 38 was in the hospital and that on the 14th day of August; assume, doctor, he did leave the hospital against the specific advice of his physician; assume further, doctor, that after he left the hospital and until the month of November, 1945, he was observed by a friend to walk with a stagger, to weep easily; that this man complained of noise, dizziness and inability to sleep and easy and intense fatigue; that he presented an untidy appearance, and made purchases during this period of wearing apparel that obviously did not fit him; assume also, doctor, that on the 14th day of August, 1945, while still in the hospital he signed a release, given to an adjuster for an insurance company, the terms of which were to release the company, the person which that company insured from all liability for damages as a result of the accident and injury and that on September 15th of that year he executed another release;

THE COURT: September 5th:

Q. September 5th. Assume that he received a consideration of one thousand dollars on the execution of the first release, plus the payment of his hospital and medical expenses to that date; assume that he received as a consideration for execution of the second release the nominal sum, less than fifty dollars.

Do you have an opinion, doctor, which opinion is reasonably medically certain as to whether or not that person at the time he executed those releases had the mental faculty sufficient to un-

derstand the nature and consequences of his acts.”

4. The court erred in sustaining the defendant's objection to that portion of the deposition of Dr. Rosenbloom, wherein he was asked to state whether or not on August 14, 1945, Jimenez would have sufficient mental power to comprehend the subject of a contract and its nature and the probable consequences to his rights. (R. 358-359).

5. The court erred in excluding from evidence a portion from Page 15 of Dr. Rosenbloom's deposition. (R. 370-371).

6. The court erred in excluding from evidence those matters offered by the plaintiff and contained in their offer of proof. (R. 439-441, inclusive).

ARGUMENT

PRELIMINARY STATEMENT

As pointed out in the Appellant's brief, there is no question in this case as to the liability of the defendant to the plaintiff. The only issues before the court and the only ones to which we shall address ourselves are those relating to the validity of the releases executed by the plaintiff on August 14th and September 5th, 1945, and as to whether the plaintiff was under an obligation to refund or tender to the defendant the amount he had received under his release before commencing this action. We shall also treat briefly the question raised by our cross assignments of error, namely, whether the medical experts should have been permitted to give

their opinion as to the mental capacity of the plaintiff on the dates when the releases were executed.

POINT I.

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO JUSTIFY A FINDING BY THE JURY THAT ON AUGUST 14, 1945, AND ON SEPTEMBER 5, 1945, THE DATES WHEN THE RELEASES WERE EXECUTED, THAT JIMENEZ LACKED SUFFICIENT MENTAL CAPACITY TO UNDERSTAND WHAT HE WAS DOING, AND WAS INCOMPETENT TO ENTER INTO A VALID AND BINDING AGREEMENT OF ANY SORT.

We have, under our statement of facts, detailed considerable evidence omitted from Appellant's brief, relating to the capacity of the plaintiff at the time the releases were executed. Although the court refused to permit the various medical experts who were called by the plaintiff to give their expert opinions as to Jimenez's mental capacity on the dates when the releases were executed, we believe there is sufficient evidence, both medical and lay, to warrant a finding of incapacity on the part of Jimenez, at the time the releases were executed. We have no quarrel with the rule of *Anderson vs. O.S.L.*, 47 Utah 614, 155 Pac. 446, cited and quoted in the appellant's brief, Pages 11 and 12, to the effect that a settlement agreement is binding on the parties and in the absence of fraud or concealment the release must not be set aside. However, that is only a general rule, and the release, like any other contract, is voidable if one of the parties thereto lacked contractual capacity at the time the release was executed. Nor do we have any dispute with the rule stated in *Hatch vs. Hatch*, 148 Pac. 433, 46 Utah 218, wherein it is said that:

“In ordinary contracts the test is, were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?”

That rule has since been followed in many subsequent Utah cases. However, it is our contention that in this case, the evidence is sufficient to support a finding of fact that the mental faculties of Jimenez were, at the time the releases were entered into, so deficient and impaired that he lacked the mental power to comprehend the subject matter of the contracts, their nature, and their probable consequences, and to act with discretion in relation thereto or with relation to the ordinary affairs of life. In the leading case of *Union Pacific Railway Company vs. Harris*, 158 U. S. 326, 39 L. Ed. 1003, it was held that where in an action for personal injuries the defendant sets up a written release of all claims for damages, signed by the plaintiff, and the plaintiff, in denying its execution, sets up that it was signed by him in ignorance of its contents at a time when he was under great suffering from his injuries and in a state approaching to unconsciousness caused by his injuries, the case is one for the jury under proper instructions from the court.

As to whether the plaintiff had sufficient mental capacity at the time the release was entered into, in *Kennedy vs. Raby*, (Okla.), 50 Pac. 2nd, 716, the court

quoted with approval from *St. Louis and San Francisco Railway Company vs. Reed*, 37 Okla. 350, 132 Pac. 355, 358 as follows:

“Litigants who do not desire the good faith of their acts questioned should not use such unseemingly haste in their efforts to escape liability on account of admitted wrongful acts * * *.”

The court further said at page 710:

“As was intimated in the *Reed Case*, supra, when litigants visit the bedside of an injured party in order to settle with her (him) before the surgical dressing has been removed, they should not be surprised when the courts permit their methods to be investigated. We therefore hold that the question of the validity of said release was properly submitted to the jury.”

In *Jordan v. Guerra*, 23 Cal. 2d 469, 144 P. 2d 349, 352, the court said:

“It is the province of the jury to determine whether the circumstances furnished the opportunity for overreaching, whether the defendant or his agent took advantage of it, and whether the plaintiff was thereby misled. In reviewing the case the evidence must be regarded in the light most favorable to the jury’s conclusion.”

Further,

“‘And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity’.”

It is interesting to note that the insurance company which was involved in the Guerra case is the same one defending the case at bar.

In the recent Idaho case of *Estes v. Magee*, 109 P. 2d 631, the court said at page 635:

“Conceding appellant is correct that to overthrow the release the evidence must be clear, satisfactory and convincing, this court has held that nevertheless the court, sitting without a jury as the trier of fact is the one to determine the weight of the evidence as coming up to such standard, if there is competent evidence to that effect.”

“‘The trial court is the appropriate tribunal to weight the evidence, and determine whether it is convincing and satisfactory, within the meaning of the rule. It has been said that in such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in the appellate court’.” *Wright v. Rosebaugh*, Supra, (46 Ida. 526, 269 Pac. 98) (Sic). *O’reagan et al v. Henderson*, Supra (46 Ida. 761, 271 Pac. 423) (Sic). *Parks v. Mulledy*, 49 Ida. 546, 551, 290 Pac. 205, 207, 79 ALR 934.

The rules above stated have been followed by the Utah Court. In *McLaughlin v. Chief Consol. Mining Co. et al.*, 62 Ut. 532, 220 Pac. 726, 733, the court said:

“It is argued that the undisputed evidence shows conclusively that the release was valid in every way, and that no fraud was committed in its procurement. On this proposition the evidence was conflicting. It is not for us to judge its weight nor to pass upon the credibility of witnesses.”

And again:

“The jury passed upon the conflicting evidence, and, having by its verdict found in favor of plaintiff, that finding must be left undisturbed. When in a law case the evidence is conflicting and the court has denied a motion for new trial, the judgment must stand.”

The above statement of the rule was quoted with approval in *Brown v. Union Pacific Railroad Company*, 86 Ut. 475, 290 Pac. 759, and the court further said in that case:

“The evidence in this case was conflicting. It was the duty of the court to submit the case to the jury. The jury saw and heard all the witnesses and believed the plaintiff had been imposed on. The trial court, having seen and heard the witnesses, did not feel justified, although it had the power, to set aside the verdict because it was against the evidence. We, who have only read the record of the trial and proceedings, are asked to say that the jury and the trial judge did not do their duty. This we are unwilling to do. The appellant had a fair trial, and the trial court committed no errors. * * * The judgment must be sustained.”

The various cases cited by the appellant are not in conflict with the rules above quoted. We think no useful purpose can be subserved by analyzing in detail the facts of those cases. As observed by Mr. Justice Thurman in the case of *Dovich v. Chief Consolidated Mining Company*, 53 Utah 522, 174 Pac. 627, 631, “Every case must be decided upon its own facts.” It may be said generally that all of the cases cited by appellant are

substantially different on their facts from the case at bar, and in all of them, entirely different questions were involved. It may also be observed that in practically all of those cases the person charged with mental incompetence was a person of advanced years, suffering from some degree of senility, and in most of those cases, incompetency was sought to be established largely on the basis of old age and defective memory. It is submitted that in the case at bar, the evidence is entirely different. The testimony of Jimenez himself, together with that of the doctor who attended him, and his friend, Mrs. Loy, who visited him frequently and regularly during his confinement in the hospital, shows that Jimenez was suffering from marked and serious mental aberration; and that he was under hallucinations and confused impressions, all as a result of the injuries sustained by him in the automobile collision.

It may be further said of the cases cited by the appellant that most of them were equity cases and hence subject to review on the facts as well as on the law by the reviewing court. There is no question in this case that the action was at law; and the verdict, being supported by credible evidence, must be sustained, even though the court might come to a different conclusion on the facts.

We invite the court's attention to the fact that the jury was very thoroughly and adequately instructed that the burden of proof was on the plaintiff to show by a preponderance of the evidence, and by evidence which was clear, convincing, and unequivocal that plaintiff lacked sufficient mental capacity at the time both releases

were signed. See instructions Numbers 4-10, inclusive. The jury was also very thoroughly instructed as to the nature of mental incapacity which would invalidate the releases. All of instructions Numbers 4-10 were very favorable to the defendant and presented defendant's theory to the jury in the best possible light. Particular attention is invited to the first paragraph of Instruction Number 7, which reads as follows:

“To avoid a release from liability for personal injuries, the plaintiff in this case, Jess Jimenez, has the burden of proving, by a preponderance of the evidence, the invalidity of each release by clear and unequivocal and convincing evidence; otherwise the releases and settlement are binding upon plaintiff and constitutes a complete defense.”

The evidence in this case is sufficient to support the finding of the jury and the judgment of the trial court should not be disturbed.

POINT II.

THE FACT THAT THE PLAINTIFF DID NOT RETURN TO THE INSURANCE COMPANY, NOR TENDER TO THE INSURANCE COMPANY, THE AMOUNT OF MONEY RECEIVED IN SETTLEMENT DOES NOT AMOUNT TO A RATIFICATION OF THE RELEASE.

The modern view as enunciated in the better reasoned cases is to the effect that a plaintiff who has executed a release of all claims need not return nor tender return of the moneys received by him when a release is void or voidable. To support their position appellants have resurrected from the musty tomes of the dead past, two ancient decisions which apparently support the posi-

tion contended for by them. The modern cases support the view that a plaintiff need not return moneys received by him. It is sufficient that any amount which he has received be deducted from the judgment. The modern view is well stated in *Atchison, Topeka & Santa Fe Railroad Company vs. Peterson*. (Ariz.) 271 Pac. 406:

“It is claimed, further, that a return of the \$1,000 paid for the release, or a tender thereof, was a condition precedent to appellee’s right to bring the action, and that, inasmuch as this was not done, the cause cannot be maintained. There is, it is true, a difference in the decisions on this proposition; but the weight of authority, as well as the better reasoning, is that, where the release was secured through fraud, repayment of the consideration therefor, or a tender thereof, is not a requisite to the maintenance of the action. Some of the decisions base their ruling upon the ground that it would be useless to require a tender where it would be refused, as in the case of the releasee who claims that the release is valid, while others place it upon the ground that the restoration of that which one is entitled to retain in any event, either as a result of the agreement sought to be set aside or of the original liability, is never required. Both of these grounds are applicable here, for the reason that appellant insists that the release given by appellee is valid, and the court gave it credit on the judgment for the \$1,000 paid therefor.”

The same view is followed in the later Arizona case of *Southern Pacific Co. v. Gastelum*, 283 Pac. 719. The Arizona case was also followed in *Estes v. Magee* (Idaho) 109 P. 2d 631, where the court said:

“Where, as in this case, the party rescinding would be entitled to retain the money received even though the settlement agreement be set aside, the law does not require the return of the money paid in settlement, since the same result can be accomplished by crediting the amount paid in partial satisfaction of the judgment.”

To the same effect see *Kennedy v. Raby*, (Okla.) 50 P. 2d 716; *Farmers Bank & Trust Company v. Public Service Company of Indiana*, 13 Fed. Supp. 548; *Jordan v. Guerra*, 23 Cal. 2d 469, 144 P. 2d 349; *Thorne v. Columbia Cab Co.*, 3 N.Y.S. 2d 537. The same view has been followed by the Utah Court. *Coke v. Timby*, 57 Utah 53, 192 Pac. 624; *McLaughlin v. Chief Consol. Mining Co.*, 62 Utah 532, 220 Pac. 726.

In this case the defendant relies on the releases executed by the plaintiff and insisted and still insists that said releases are valid. It is apparent that any tender of repayment by the plaintiff would have been rejected and the law will not require a useless act. Moreover, plaintiff was entitled in any event to the amount which he had received under the terms of the release, and there was no reason for him to make a tender back. Defendant's insurance carrier has not been prejudiced since the amount paid at the time the releases were signed was deducted from the amount of the verdict.

POINT III.

THE COURT ERRED IN REFUSING TO PERMIT THE VARIOUS MEDICAL EXPERTS WHO TESTIFIED ON BEHALF OF THE PLAINTIFF TO GIVE THEIR EXPERT OPINION AS TO WHETHER OR NOT THE PLAINTIFF WAS MENTALLY SOUND AT THE TIME THE RELEASES WERE EXECUTED.

Under this point we shall discuss the issue reached by our cross-assignments of error. It is with the utmost reluctance that we treat this point at all. We are convinced that the position maintained by us under Point I and Point II is correct. And if the court rules as we contend it should under Points I and II, there is no need to consider Point III. However, in order to fully protect the rights of the plaintiff in this case, we feel that it is our duty to bring this issue to the attention of the court. We hope that our doing so will not be construed as a confession of weakness of our position on the merits of Points I and II.

It is, of course, a general rule that a witness may not give his conclusion as to the ultimate fact to be found by the jury. However, there is a well recognized exception to this rule in the case of experts, particularly medical experts. The doctors who testified for the plaintiff in this case would have testified, if permitted by the court, that the plaintiff was at the time the releases were executed, mentally unsound and that he did not have sufficient capacity to enter into, or understand the nature of the transaction into which he was entering.

In *Callahan v. Feldman* (Colo.), 11 P. 2d 217, a psychiatrist was permitted to base opinions that the testator was sane upon all evidence adduced at trial. To the same effect see *In Re Swan's Estate*, (Utah), 170 Pac. 452.

In *Wooten v. Dragon Consol. Mining Co.*, (Utah) 181 Pac. 593, it was held that an expert's opinion as to the fact in issue was not an invasion of the jury's province.

In *Helland v. Bridenstine* (Wash.), 104 Pac. 626, it was held that the fact that a hypothetical question asked of a medical expert witness embodied the very fact that was ultimately to be found by the jury, did not render the question incompetent. In the case at bar there is no dispute as to the qualifications of the medical experts. The necessary foundation for the questions was laid and the hypothetical questions stated were based upon facts in evidence at the trial. Nevertheless, the trial court refused to permit the witnesses to answer, and by so ruling, the trial court committed error prejudicial to the plaintiff.

In the event that the court should hold that the evidence admitted was insufficient to support a finding of mental incompetence on the part of the plaintiff at the time the releases were executed, then at least the plaintiff should have the opportunity for a new trial and the opportunity to have presented to the jury the expert opinions of the doctors.

CONCLUSION

From the foregoing argument we conclude:

1. That the question of whether or not plaintiff was competent at the time the releases were executed was a question of fact for the jury, and there is sufficient evidence in the record to support a finding that the plaintiff was mentally incompetent at the time the releases were executed.

2. The fact that the plaintiff did not return to the insurance company the amount of money paid in consideration of the execution of the releases did not amount

to a ratification of the release. Plaintiff was under no obligation to make tender of the money back, and the rights of the insurance company were adequately protected by deduction from the verdict of the amount paid by the insurance company.

There being no errors of law prejudicial to the defendant, the judgment of the trial court should be affirmed.

3. If, however, the court should be of the opinion that the evidence is insufficient to support a finding of mental incapacity on the part of the plaintiff at the time the releases were executed, then a new trial should be granted with directions to the trial court to permit medical experts, properly qualified, to testify as to their opinion of the plaintiff's mental capacity or incapacity at the time the releases were executed.

Respectfully submitted,

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