

1949

Harry W. Kirchgestner v. The Denver and Rio Grande Western Railroad Company : Brief of Respondent

Utah Supreme Court

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Case No. 7370

IN THE SUPREME COURT
of the
STATE OF UTAH

HARRY W. KIRCHGESTNER,
Plaintiff and Respondent,

— vs. —

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,
Defendant and Appellant.

RESPONDENT'S BRIEF

FILED RAWLINGS, WALLACE,
BLACK & ROBERTS
JUL 7 1949 WAYNE L. BLACK
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CLERK, SUPREME COURT, UTAH

Attorneys for Respondent

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PANY, a corporation,
Defendant and Appellant.

Case
No. 7370

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

In this brief we shall designate the parties as they appeared in the trial court.

The appeal by the defendant is from a verdict and judgment of \$4,300.00 for injuries suffered by plaintiff to his back while employed in interstate commerce by

the defendant. This is an action under the *Federal Employers' Liability Act*. Defendant gave to plaintiff a mere \$135.00 within ten days after the injuries were suffered in settlement for these injuries. Defendant set up this release as a bar to the action and plaintiff by his reply alleged that the purported release had been entered into under a mutual mistake of fact.

It is to be noted that there are no matters presented on this appeal which in any way affect defendant's liability for its violation of the Safety Appliance Act in permitting one of its cars to be operated in interstate commerce with a defective grab-iron. The evidence of the existence of this defective grab-iron and the fact that plaintiff fell and was injured is uncontradicted, and although defendant makes some inferences in its brief questioning the happening of the accident we will not belabour the point but will only answer those things which are directly raised by the defendant in its brief.

It is also to be noted that there is no contention made by defendant that the verdict is excessive in this case and so it is established that the plaintiff has suffered injuries and damages in the sum of \$4,300.00. In connection with plaintiff's injuries defendant goes so far as to accuse the plaintiff of being a malingerer. However, this matter was fully argued before and determined by the jury and under the testimony of Dr. White it appears without any question that plaintiff was suffering at the time of trial from pains in his back which the doctor was able to confirm by the existence of a muscle

spasm (R. 86, 92, 93) and that the plaintiff was not "putting on" (R. 86).

STATEMENT OF FACTS

The Statement of Facts made by the defendant in this case is very brief and does not disclose in detail the testimony and evidence introduced on the matters of interest on this appeal. It is therefore necessary that we make a more complete statement of the testimony introduced in this case.

The plaintiff testified that in attempting to board one of the cars of the train on which he was working he took hold of the top rung of the ladder and that the rung or grab-iron came loose from the car and he rolled down the mountainside about 25 feet. He fell from the car backwards. He struck his back against a boulder (R. 101). The fall stunned him but he got back up and mounted the engine (R. 102). He continued to perform his duties as brakeman for the balance of the night; he thought he was "just kind of shook up and thought that was about all there was to it." (R. 103.) His shins were skinned. His injuries were received at 8:30 the night of June 26, 1948, and he quit work at 11:50 on that date at Salida, Colorado. On the morning of June 27th his back started bothering him and he described the condition as an ache in the small of his back (R. 104). He then went down to the Rio Grande Hospital at Salida, where he was examined by Dr. Smith and x-rays were then taken. Dr. Smith stated that he could find nothing

wrong with plaintiff and gave him some little pink pills. Plaintiff did not report for work on the 27th of June because he didn't feel like it. He at that time believed he was just shaken up from the fall (R. 104). About three or four days later he was examined by Dr. Hoover or Dr. Fuller at the same hospital in Salida and this doctor stated that he thought he would be all right (R. 105).

Mr. Merrill, the trainmaster's clerk at Salida sent plaintiff to Pueblo to see the defendant's Claim Agent, M. V. Sayger. This was on the 6th day of July (R. 107). Mr. Sayger had received information from the Trainmaster's office at Salida that plaintiff was coming to see him. Before plaintiff arrived Mr. Sayger called the hospital at Salida and talked with Dr. Fuller. He asked the doctor whether or not plaintiff was "physically qualified to return to work" and the doctor told him that plaintiff was (R. 161). When plaintiff arrived he told Mr. Sayger that he had come for a settlement of his case and that he felt he was able to return to work (R. 163). There was no discussion as to the extent of his injuries other than as could be implied from the fact that both plaintiff and the claim agent believed plaintiff was ready to go to work and was all right (R. 163).

There was a conflict in the testimony of Mr. Sayger and plaintiff concerning the manner in which the \$135.00 settlement was arrived at. In view of the jury verdict, the testimony should be taken most favorably to plaintiff. Plaintiff testified that after asking Sayger

to settle up with him the two sat down and figured up the time plaintiff had been off, which was ten days. Plaintiff's daily wage was \$12.54. Sayger stated that would figure about \$125.00 and plaintiff stated that he would take \$135.00, to which Sayger agreed, saying, "You drive a hard bargain" (R. 181).

Plaintiff testified that he told Sayger that he felt he could go back to work again and Sayger replied "Okeh." Plaintiff testified that he believed he could go back to work and that his injuries were over and that this was the basis upon which he made the settlement (R. 182).

Plaintiff testified that prior to the injury received on June 26th his health had been good and he had never been bothered with any pain in the area of his back (R. 140). During the month of July plaintiff was never relieved from the pain in his back. When he went back to work in August his back still ached but he figured that "it would come out of it all right now" (R. 108). During the time that plaintiff worked in August he stated that every night when he would get in off the road the pain in the small of his back would bother him severely. He had a dull pain all the time but in the mornings when he would start to work it did not bother him so much. The severity of the pain increased when he got tired. He described the pain after working all day as "sharp, shooting pains" (R. 109). He stated that when he was not working for the railroad during the last half of August that he stayed home and rested up and that this

rest helped him (R. 111). He worked again from September 1st to September 26th but during this time he still had the dull, aching pain in his back and it seemed to remain about the same. He explained that because of the pain in his back he doesn't believe he would have been able to work unless he had had a good reason for it and unless the conductor and other brakeman had performed about half of his work for him (R. 111).

Plaintiff was off work from the 26th day of September to the 27th of October and he then worked the last five days in October and five days in November until November 8th (R. 112).

During this period of time he had consulted with Dr. Delahanty and Dr. Hines, the latter of whom had prescribed a belt for his back (R. 114-15). The plaintiff testified that his back ached continually (R. 116). Plaintiff explained that as a brakeman he was required to stoop over for the purpose of coupling air hoses and to line "dwarf" switches. He testified that this stooping over caused pain in his back (R. 119-20). Climbing up and down ladders and getting on and off of boxcars also increased the pain in his back (R. 121).

The plaintiff's medical expert, Dr. White, could only find one place in his back that appeared to have any arthritic condition and stated that this was above the point where the plaintiff's pain was located (R. 79-80). However, the defendant's doctor, Dr. C. R. Fuller, testified that from his examination and the x-rays which he took it appeared that plaintiff had osteo-arthritis of

all the vertebrae of his back (R. 171). Plaintiff's doctor testified that an injury to the back might aggravate the arthritic condition if any existed there and that the healing process would probably be slower (R. 81).

The foregoing statement of facts presents the testimony in more detail than is contained in defendant's brief and as we proceed with the argument we shall quote from various material portions of the record.

SUMMARY OF ARGUMENT

POINT I.

THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE RELEASE WAS ENTERED INTO BECAUSE OF A MUTUAL MISTAKE OF FACT AND THE VERDICT VOIDING THE RELEASE AS A BAR TO THIS ACTION IS SUPPORTED BY THE EVIDENCE.

POINT II.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTION THAT THE BURDEN OF PROOF WAS UPON PLAINTIFF TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE PARTIES ENTERED INTO THE RELEASE UNDER A MUTUAL MISTAKE OF FACT.

POINT III.

THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING ITS INSTRUCTION NO. 10.

POINT IV.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT PLAINTIFF WAS ENTITLED TO COM-

PENSATION FOR ALL PAIN AND SUFFERING THAT HE WOULD PROBABLY ENDURE IN THE FUTURE.

POINT V.

THE TRIAL COURT DID NOT ERR IN PERMITTING PLAINTIFF TO TESTIFY TO TREATMENT PRESCRIBED BY DR. HINES.

POINT VI.

THE TRIAL COURT DID NOT ERR IN PERMITTING PLAINTIFF TO TESTIFY TO DIRECTIONS GIVEN HIM BY DEFENDANT'S TRAINMASTER'S CLERK, MERRILL.

ARGUMENT

POINT I.

THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE RELEASE WAS ENTERED INTO BECAUSE OF A MUTUAL MISTAKE OF FACT AND THE VERDICT VOIDING THE RELEASE AS A BAR TO THIS ACTION IS SUPPORTED BY THE EVIDENCE.

Defendant by its answer pleaded a release for \$135.00 as a bar to plaintiff's action. Plaintiff in his reply alleged that the release had been entered into under a mutual mistake of the parties. Defendant has at no time until this present appeal raised the question of the sufficiency of the plaintiff's reply. Facts sufficient to avoid the release are therein alleged. Evidence relating to the execution of the release and the issues of mutual mistake were introduced in evidence without objection of either side. The matter was fully presented to the

court and jury. The defendant requested an instruction setting forth its views of the law relating to the avoidance of the release by mutual mistake (See Defendant's Requested Instruction No. 2, R. 34). This instruction was adopted by the Court and given as the Court's Instruction No. 6 (R. 39), and to which no exception was taken. The only change made was that relating to the degree of proof which forms the basis of defendant's second point in its brief, and which will be answered hereafter. The Court's Instruction No. 6, as requested by the defendant, with that one exception, is as follows (R. 39):

“No. 6

“It is admitted that the plaintiff in consideration of the sum of One Hundred Thirty-five Dollars (\$135.00) paid to him by the defendant executed and delivered to the defendant a written release by the terms of which the plaintiff released and discharged the defendant from all liability on account of the accident and injuries described in the plaintiff's complaint in this action. You are, therefore, instructed that the burden rests upon the plaintiff to prove by a preponderance of the evidence that this release was executed under the belief of both plaintiff and defendant that the plaintiff had recovered from the injuries sustained by him in said accident and that both he and the defendant were mistaken in such belief. Unless the plaintiff has sustained this burden your verdict must be in favor of the defendant.”

We submit that this instruction was a correct statement of the law in its application to the issues of this

case. We believe it conforms to the rule adopted by the Federal courts, a brief statement of which is found in the case of *Callen v. Pennsylvania Railroad Company*, 332 U. S. 625, 68 S. Ct. 296, wherein the Court states:

“* * * One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.”

See also *Scheer v. Rockne Motors Corp.*, 68 F. 2d 942; *Steele v. Erie R. Co.*, 54 F. 2d 688, 54 F. 2d 690 (Cert. den.) 285 U.S. 546.

There can be no dispute that this instruction constitutes the law of the case and certainly where defendant's request on the subject is given and no exception is taken to the giving of such instruction, defendant cannot now claim the law is different than that expressed in the instruction. We submit that under the testimony no other verdict could have been rendered on the issue of mutual mistake than a verdict in favor of plaintiff. If the release was executed under the belief of both plaintiff and defendant that the plaintiff had recovered from the injuries sustained and they both were mistaken in that belief, the release should then be set aside and the verdict is supported by the evidence.

Plaintiff does not claim that there was any fraud attached to the execution of this release but does claim that both parties on the 6th day of July believed that the plaintiff's injuries were such that he could return to

work at that time and that his injuries would no longer prevent him from discharging his duties as a brakeman. As indicated in the statement of facts, plaintiff was sent to Pueblo to see defendant's claim agent. He had at that time been off work for ten days. Plaintiff's own testimony on the occasion of the execution of this release is as follows (R. 181-82):

"A. I went in and introduced myself to Mr. Sayger, right in the Pueblo depot down where his office is.

Q. What did he say?

A. He said, 'I am glad to know you'. Acknowledged the introduction. And I said, 'Well, Mr. Sayger, how about settling up with me?'

He said, 'Well, let's see what we can do.'

So we figured up day for day.

MR. BAGLEY: Just a moment. Tell us how you figured, how you went about it. What was said, just as near as you can.

A. Well, the rate of pay, I believe, is twelve dollars and something a day. Twelve dollars and something a day. Twelve fifty-four, I believe it is, somewhere around there.

Mr. Sayger said, 'Well, that would figure you about \$125.00, wouldn't it?'

I said, 'I will take one hundred thirty-five.' And that was all there was to it.

Q. What did he say?

A. He said, 'You drive a hard bargain.'

Q. Was anything else said?

A. No sir. He wrote me out a check. I went and cashed it and went on to Denver.

Q. Was anything said concerning you going back to work

A. No, not that I recall. He asked me how I felt. I said, 'I feel like I could go back to work again'. And he said, 'Okeh'.

Q. Did you believe you could go back to work?

A. I did.

Q. Did you feel that your injuries were over?

A. I did.

Q. Is that the basis upon which you made that settlement?

A. That is right."

The defendant's Claim Agent, M. V. Sayger, testified that he had learned from the Trainmaster's office at Salida that plaintiff was coming to see him. In preparation for this visit he had called Dr. Fuller and in this connection Sayger testified (R. 161-62):

"Q. And had you received any information as to the extent of his injuries?

A. I knew nothing about his injuries, except I had asked the doctor, after I received word that he was coming, if he was physically qualified to return to work, and was informed that he was.

Q. When was it that you received this information?

A. In the forenoon.

Q. That he was coming?

A. Of the day he arrived.

Q. That would be the forenoon of the 6th of July?

A. That is right.

Q. And you called what Doctor?

A. Dr. Fuller.

Q. Dr. Fuller. And he is at the hospital where?

A. Salida.

Q. And you asked him concerning any injuries that Mr. Kirchgastner, that the plaintiff was suffering from?

A. No. I merely asked him if Mr. Kirchgastner was able to return to duty.

Q. And he told you that he was?

A. That is right."

Regarding the information which he had at the time of settlement, Sayger testified as follows (R. 162):

"Q. And then all the information you had before the plaintiff arrived, was that he was an individual who had been in some way entitled to some compensation from the railroad, and who was now in physical condition that he could return to work?

A. That is right."

Sayger knew that plaintiff was making the settlement under the belief that he was all right and ready to go to work. In this regard he testified (R. 163):

“Q. And he told you, at that time, that he was all over them, and everything was all right with him?

A. He said he felt he was able to return to work, but he wanted to go to Denver, then back to Salida, and he would be ready to go to work, his home being in Denver.

* * * * *

Q. Did you discuss his injuries with him?

A. Nothing any further than asked his condition, if he was able to return to work.

Q. He said he was all right?

A. He said he was all right.

Q. And ready to go to work?

A. That is right.”

We submit that the foregoing testimony is conclusive that both defendant's agent Sayger and the plaintiff made this settlement upon the belief that plaintiff's injuries were at an end and that he was able at that time to return to work. The evidence conclusively establishes that plaintiff continued to suffer from the injuries he had received on June 26th until the time of trial. The night before the date of trial plaintiff was examined by Dr. White (R. 76). The doctor found that plaintiff did have pain in the region of the lumbar sacral junction, both on pressure and movement (R. 77).

On cross-examination defendant's counsel attempted to get the doctor to testify that the doctor had relied entirely upon what the plaintiff told him in determining whether or not pain was present. The doctor, however, stated that from his examination he did not believe that plaintiff was faking pain, and testified that he found a muscle spasm in the area of the lumbar region of the back (R. 85). The doctor testified (R. 86):

“Q. But in the case of Mr. Kirchgastner, you couldn't tell whether that muscle spasm was voluntary or involuntary, could you?

A. Well, I would say that he impressed me, during his examination—

Q. All right.

A. As being very cooperative, and not trying to fool me, like some of them have tried in the past, which usually they don't. But he was cooperative, and I don't believe that he was putting on.

Q. He didn't have anything the matter with him, did he?

A. Oh, I wouldn't say that. He had some muscle spasm in his back which is giving him pain.”

In describing the location of the pain, the doctor testified (R. 89):

“Q. I believe I asked you, Doctor, but you ascribed this pain to a region lower than the region of this arthritis, did you not?

A. That is where his muscle spasm is, is one vertebra lower, and on the lower portion of it.

Q. Yes. It is not in the vertebra where the arthritic condition exists?

A. Not when you palpate him and manipulate him, that isn't where he complains of it."

He further testified (R. 92, 93):

"Q. And, of course, there is nothing in that examination of the lower part of the back, the muscle of that back, that would necessarily have caused this man any pain, is there?

A. Yes. Yes, I am afraid there is. Whenever we find muscle spasm, which we do find in his lower back, it is evidence that they are trying to guard something, voluntarily or involuntarily, and that is usually accepted as evidence of a painful condition in that region."

The doctor stated that plaintiff's pain was in the region of the lumbosacral joint, i.e., the fifth lumbar and first sacrum. He testified (R. 94):

"Q. You didn't find any evidence of any injury to the muscle, or to the tissue, either, did you?

A. Yes, I did."

On recross-examination the doctor stated (R. 94, 95):

"Q. Do you feel that that muscle spasm indicated any pain that would prevent him from working, carrying on his duties as a brakeman?

A. Had this been a private case of mine, I would have recommended conservative treatment with some physiotherapy. In other words, not having worked for maybe a matter of another two or three months, during which time he would have had that treatment; and I personally think that would have been almost sufficient to help him a lot so that he could have worked. But he hasn't had any of that treatment, from the story he gives me, from October, anyway.

Q. Are you trying to answer my question, Dr. White?

A. May I hear it again, please.

MR. BAGLEY: Will you read it to him?

(Reporter read last question.)

A. I would have to say yes."

As already indicated in the statement of facts plaintiff testified that he has suffered with a dull ache in his back ever since the injury and that in the discharge of his duties as a brakeman he was required to stoop and to climb on and off cars and that this caused pain in his back which became more severe the longer he worked. He testified that he would have been unable to perform the duties of a brakeman had he not had the help of the men on the crew.

We submit that the foregoing testimony clearly establishes that both the plaintiff and defendant were mistaken when they concluded that plaintiff was all right and was ready to return to work at the time the release was signed and executed.

Defendant, for the first time in all of these proceedings, contends on appeal that it was incumbent upon plaintiff to tender defendant the \$135.00 before he could attack the validity of the release. At the close of the case the defendant made a motion for a directed verdict, basing that motion upon seven grounds. Each one of the grounds related to the release. In no place did the defendant in that motion mention the subject of tender, its necessity or the fact that plaintiff had failed to make a tender of the \$135.00. Plaintiff's view on the law of the avoidance of a release was given by the Court in its Instruction No. 6. No statement or requirement was therein set forth that plaintiff was under the necessity of making a tender of the money paid to him pursuant to the terms of the release. Defendant asserted the validity of the release in its Answer and attempted to uphold its validity at every stage of these proceedings. We cannot help but wonder at defendant's good faith in now stating a tender should have been made. For what purpose? Merely for the purpose of permitting the defendant to refuse that tender? This Court certainly will not at this late date in these proceedings say that the verdict of the jury must be reversed so that plaintiff may perform the useless task of tendering to defendant the sum of \$135.00, which will certainly be rejected by the defendant. This is merely a technicality grabbed at by the defendant to save itself from the effects of a lost cause.

The courts have had something to say on this matter of tender and we believe that the cases clearly establish

that defendant's position is absolutely untenable. The courts have held that a defendant by its conduct in asserting the right to hold plaintiff to his purported bargain clearly shows an attitude that a tender would be useless. The law does not require the doing of a useless act. *Merrill v. Pike*, 94 Minn. 186, 102 N. W. 393; *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, 27 S. W. 648, 25 L.R.A. 514, 45 Am. St. Rep. 556; *St. Louis & S. F. R. Co. v. Richards*, 23 Okla. 256, 102 P. 92, 23 L.R.A., N.S., 1032; *Woods v. Wikstrom*, 67 Ore. 581, 135 P. 192; *Franklin v. Webber*, 93 Ore. 151, 182 P. 819.

In *Girard v. St. Louis Car Wheel Co.*, supra, the court labeled a contention similar to the one made by defendant here as a "sheer technicality."

In *St. Louis & S. F. R. Co. v. Richards*, supra, the court branded the requirement of a tender under facts similar to those in the case at bar as an "empty, vain ceremony."

In *Franklin v. Webber*, supra, where the jury had determined the issue of fraud in the procurement of the release in favor of plaintiff, the court held that it would be a profitless proceeding to return the case for a new trial in order that defendant might have an opportunity of refusing a tender of the consideration paid for the release.

In *Woods v. Wikstrom*, supra, the court stated (pp. 199-200 of 135 P.):

"It is certain from the pleadings and the evidence in this case that if the plaintiff had ten-

dered to the defendant the \$30, either before or after he begun this action, the defendant would have refused to accept it. He obtained said release to be used as a defense to any action that the plaintiff might bring for damages, and he pleaded it as a separate defense, and relied on it as a defense throughout the trial in the court below. If the plaintiff had actually offered him said sum as a tender, and he had accepted it as such, said offer and the acceptance thereof would have operated as a rescission of said release, and he could not then have relied on the release as a defense. To tender him the \$30, therefore, would have been a vain thing, as manifestly, the offer would have been rejected.”

The courts have also held that a failure to raise the lack of tender in the trial court precludes the overthrow of the verdict in the appellate court. *Robertson v. Fuller Constr. Co.*, 115 Mo. App. 456, 92 S. W. 130; *Mandeville v. Jacobson*, 122 Conn. 429, 189 Atl. 596.

The Court in the latter case stated:

“* * * It is unnecessary to determine in the instant case whether an allegation of tender was required and the effect of the absence of such an allegation. As we have pointed out, the pleadings did not raise any such question and, as far as appears, no such point was raised at the trial and there were no requests to charge made of the court. ‘If a reply of fraud is made to a plea of release, and no objection is at any time, by pleading or otherwise, made to the sufficiency of the plaintiff’s case for failure to tender or return the fruits of such release, and the defendant insists on its validity as a defense, he thereby waives

the necessity for a tender, especially when the fruits of a release are restored to him by the judgment and there is no prejudicial error in the omission to allege or prove an offer to return those benefits, even if such offer were otherwise necessary to avoid the release.' 23 RCL 415; *Girard v. St. Louis Car Wheel Co.* (1894) 123 Mo. 358, 27 S.W. 648, 25 LRA 514, 517, 45 Am. St. Rep. 556 (supra). The charge as given was adapted to the issues raised by the pleadings and sufficient for the guidance of the jury, and the trial court was not bound to instruct the jury as to a possible defense which was not raised by the pleadings or otherwise claimed at the trial."

The courts have unanimously agreed that the defendant's rights are fully protected where deduction of the consideration for the release is made and that no reversible error is committed under such circumstances. *Franklin v. Webber*, 93 Ore. 151, 182 P. 819; *Marple v. Minneapolis & St. L. R. Co.*, 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D 1082; *Malmstrom v. Northern P. R. Co.*, 20 Wash. 195, 55 P. 38.

In *Franklin v. Webber*, supra, the court stated (p. 822 of 182 P.):

"* * * it is unnecessary to return or tender the consideration paid for a release obtained by fraud as a requisite of the maintenance of an action for damages resulting from a personal injury, since it is sufficient if the amount received upon the release is deducted from the verdict if one is obtained. * * *"

In *Marple v. Minneapolis & St. Louis R. Co.*, supra, the Court stated:

“* * * There are many cases in other states which hold to the doctrine that substantial justice is secured and the spirit of the rule followed where no return or offer to return is made in the pleadings, but where the money received on the settlement is deducted from the amount of the recovery, in case there be a recovery for a greater sum. Some cases hold this on the ground that where plaintiff was entitled to the money irrespective of the contract, it is inequitable that he should be required to pay it back as a condition of rescission; others, on the ground that equity will not compel the doing of a useless act, and will not permit a mere technicality to defeat justice. But the real ground of all the cases, we think, is that there is no reason for the strict application of the rule when substantial justice can be meted out in the final disposition of the case. * * * It is not strictly logical to say that plaintiff was entitled to retain the money paid because it was due him by virtue of the original liability, because the question of defendant's liability was not then determined. But we are of the opinion, and so hold, that it was not necessary for plaintiff to do a useless act, that all that is required by equity is that substantial justice be done, that this is done when the amount received on the settlement is credited on the verdict, and that it would be a profitless proceeding to send this case back for a new trial in order that defendant may have an opportunity to refuse an offer of plaintiff to return the money received. The offer is nothing. It is the actual return of the money received that is the material thing. This has been done by the verdict. * * *”

Defendant also argues that the mutual mistake even if proven played no part in the formation of the contract embodied in the release. We are at a loss to understand how defendant can argue any such proposition. It conclusively appears that the plaintiff and defendant's claim agent believed that plaintiff was able to return to work and that he was all right. Certainly a question of fact was presented to the jury by the evidence above quoted and upon which the jury could determine that the parties to this release would not have settled an injury worth \$4,300.00 for \$135.00.

We submit that under the evidence above indicated and upon the authorities herein cited that there was conclusive evidence in the record to support the jury's finding that the release was entered into under a mutual mistake of fact and for that reason it should be held not to bar the plaintiff's action.

POINT II.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTION THAT THE BURDEN OF PROOF WAS UPON PLAINTIFF TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE PARTIES ENTERED INTO THE RELEASE UNDER A MUTUAL MISTAKE OF FACT.

Defendant, in its request on the subject of avoidance of the release, asked the court to instruct the jury that the plaintiff had the burden of establishing mutual mistake of fact by clear and convincing evidence. The court struck out this requirement and instructed the jury that the burden was upon plaintiff to prove the

mutual mistake of fact by a preponderance of the evidence. Defendant cites cases under this point of his brief wherein the courts have stated that the degree of proof in such cases is clear and convincing evidence. However, none of those cases were cases in which instructions to the jury were considered. We have been unable to find any case which holds that an instruction requiring plaintiff to prove his case by a preponderance of the evidence in a case such as the one at bar constitutes error, let alone prejudicial error.

In the case of *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913, the action was one in equity to set aside the release and the court was not considering an instruction.

In the other two cases cited by defendant, *Merwin v. N. Y., N. H. & H. R. Co.*, 62 F. (2d) 803, and *Callen v. Pennsylvania Railroad Co.*, 162 F. (2d) 832, the courts did not consider the giving of an instruction on the degree of proof and hence are not in point for the contention now made by the defendant.

A case in point, which sustains the action of the trial judge in so instructing the jury, is the case of *Kansas City Southern Ry. Co. v. Sanford*, 182 Ark. 484, 31 S. W. 2d 963, 966 (Writ of Certiorari denied in 283 U. S. 825, 75 L. Ed. 1439, 51 S. Ct. 347). That case was an action under the Federal Employers' Liability Act to recover for personal injuries suffered by a railroad em-

ployee. The railroad relied upon a release to defeat plaintiff's cause of action. The Court stated:

“The court submitted the foregoing question to the jury under proper instructions, but on the degree of proof required gave the following instruction: ‘The jury are instructed that if they find that the settlement entered into between the plaintiff and defendant was not based upon false misrepresentation or mutual mistake, you will find for the defendant, and the burden devolves upon the plaintiff to prove by a preponderance of the evidence that such misrepresentations were made or mutual mistake existed.’ The appellant earnestly insists that the giving of this instruction was error in that it authorized a verdict for the plaintiff on a bare preponderance of the evidence, and that in this kind of a case it was not sufficient for the plaintiff to establish his case by mere preponderance of the evidence, but that the jury should have been instructed that the burden was upon the plaintiff to establish its allegations of fraud or mistake ‘by evidence clear, cogent and convincing,’ and relies upon the case of *Chicago, etc., Ry. Co. v. Wilcox* (C.C.A.) 116 F. 913, and the case of *Wallace v. Skinner*, 15 Wyo. 233, 88 P. 221, to support its contention.

“It will be noted that the first-named case was a suit in equity to cancel a written release, and in that case the court held that a release might not be rescinded for fraud or mistake unless the evidence of fraud or mistake is clear, unequivocal, and convincing. This is likewise our rule in equity cases where fraud or mistake is pleaded and affirmative relief sought. *Ogle-tree v. Smith*, 176 Ark. 597, 3 S.W. (2d) 683. But the instant case is a suit at law and the alle-

gation of fraud or mistake is defensive only, no cancellation of the written instrument being asked, but its consequence merely sought to be avoided. The Wyoming case, *supra*, was an action at law for a recovery of damages, and the defense of fraud or mistake was offered in avoidance of a release pleaded in bar to the cause of action. In that case the court laid down the clear perponderance rule, but we have been unable to find any support for this case, but think the weight of authority and the decisions of our own court are to the contrary. This view is supported by the case of *Capital Traction Co. v. Sneed*, 58 App. D. C. 141, 26 F. (2d) 296, page 303; *Lumley v. Wabash Ry. Co.* (C.C.A.) 76 F. 66; *St. L., I. M. & S. R. Co. v. Phillips* (C.C.A.) 66 F. 35, while in this state the mere perponderance rule has been uniformly given to juries without any question raised and considered by this court without criticism, and tacitly approved. *Industrial Mut. Indemnity Co. v. Thompson*, 83 Ark. 575, 582, 104 S. W. 200, 10 L.R.A. (N.S.) 1064, 119 Am. St. Rep. 149; *St. L., I. M. & S. Ry. Co. v. Hambright*, 87 Ark. 614, 113 S. W. 803; *St. L., I. M. & S. R. Co. v. Carter*, 93 Ark. 589, 594, 126 S. W. 99; *F. Kiech Mfg. Co. v. James*, 164 Ark. 137, 142, 261 S. W. 24; *St. L. S. F. Co. v. Cox*, 171 Ark. 103, 283 S. W. 31; *Sun Oil Co. v. Hedge*, 173 Ark. 729, 293 S. W. 9.

“In the case of *Rice-Stix Dry Goods Co. v. Montgomery*, 164 Ark. 161, 261 S. W. 325, 329, the issue was whether the maker of the note sued on was induced to execute the same through fraud and misrepresentation. In that case it was argued that the burden of proof was on the maker the same as if he was asking in equity to rescind his contract and cancel the note. A number of cases were cited to sustain that view.

In referring to those cases this court said: 'But the rule in these cases, to wit, that before equity will cancel, set aside, or reform a deed or instrument for fraud, the proof of the alleged fraud must be clear, convincing, and unequivocal, has no application to actions like this at law. Here no affirmative relief of cancellation or reformation of an instrument is sought, but the defense is simply that of nonliability because of deceit and fraud in procuring the instrument which is the foundation of the action. While fraud at law, as well as in equity, is never to be presumed and must be proved yet in actions at law one who has the burden of proof to establish fraud meets the requirements of the rule when he proves the fraud only by a preponderance of the evidence.' "

The courts of Iowa have also held that it is unnecessary to instruct a jury in a civil case that a party must prove a proposition by clear and convincing evidence. In other words, such courts have held that the rule which prevails in equity is not applicable to trials by jury. See *Holt v. Brown*, 63 Ia. 319, 19 N. W. 235; *McAnulty v. Seick*, 59 Ia. 586, 13 N. W. 743.

In *Holt v. Brown*, *supra*, the court stated:

"***But it has been held that the rule which prevails in equity is not applicable to trials by jury * * *. In such actions the rule is that the issue must be determined by a preponderance of the evidence."

We submit that instructing a jury that the evidence must be clear and convincing would mean little or noth-

ing to the jury. We have been unable to find any cases where a failure or refusal to instruct on such degree of proof has been held error.

The Utah court in *Picino v. Utah-Apex Mining Co.* et al., 52 Utah 338, 173 Pac. 900, has indicated a tendency to place all civil matters upon a common basis and all issues in a civil case should be presented to a jury under instructions requiring the parties to prove their respective contentions by a preponderance of the evidence.

In any event we submit that the evidence established without contradiction that the parties were laboring under a mutual mistake of fact on the proposition of whether or not the plaintiff was physically able to return to work and as to the fact that plaintiff had recovered from the effects of any injuries suffered by him on June 26th. We refer to the discussion of the evidence as set forth under Point I of this brief.

We submit that the defendant could not possibly have been prejudiced even if error were present in this instruction.

POINT III.

THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING ITS INSTRUCTION NO. 10.

Instruction No. 10 is quoted at length on page 21 of appellant's brief. By that instruction the jury was

told that plaintiff was entitled to all damages, if any, resulting from the defective grab-iron, even though his injuries were more serious and of longer duration because of the preexisting arthritis to which the defendant's medical expert testified.

Defendant's criticism of this instruction is unrealistic. It claims that it concerns a subject upon which there was no evidence and about which there was no issue. Plaintiff had been in good health and had suffered no back pains prior to his injury on June 26th. Since that time he has continually been bothered with such pains, the severity of which increased with stooping and climbing off and on cars and when he becomes tired from work. Plaintiff's medical expert testified that he found evidence of arthritis on only one vertebra, that being the fourth lumbar vertebra. His testimony in that regard is found at R. 79 and 80, wherein he testified:

“Now, the only thing that we notice abnormal here is that on the top of this 4th lumbar vertebra there is a little bit of roughening. For instance, compare it with this 3rd lumbar vertebra, and you see this is a little rough here, and a little rounded at that end. That is evidence of an osteo-arthritis involving his 4th lumbar vertebra. However, most of his pain is down a little bit lower than that, which makes you think it is soft tissue injury rather than bony injury that is giving him his pain.”

Plaintiff's expert was then asked concerning the effect which arthritis might have upon an injury and he testified (R. 81):

“Q. In your opinion, Doctor, could a condition of arthritis such as you observed in the exhibits here, have been caused or created by a blow in the nature of a fall in which a man lands on his back?

A. Well, these pictures were taken in October, and my recollection was his injury was in June. I wouldn't want to go on record as saying that would cause an arthritic process to develop in that length of time. He may have had an arthritic process that was aggravated by his injury, but to say the injury itself caused the arthritis, I wouldn't want to say that.

Q. What effect does the presence of arthritis in a person's spine have on injury, or is there a relationship there?

A. If a person with arthritis was injured, he would probably be a little slower in getting better; it might aggravate the arthritic thing so it would develop to a greater degree than it would otherwise.”

Under the foregoing testimony when plaintiff rested his case there had not been raised an issue as to the effect that arthritis might have upon the injuries and damage sustained by plaintiff. However, the defendant in its case then introduced testimony through its medical expert that the plaintiff's back was filled with arthritis. We pause to ask the question, If defendant contended nothing for this arthritic condition, why then did it in-

roduce such testimony in this case? The obvious answer is that defendant used this testimony for the purpose of attempting to impress on the jury both by evidence and by argument that any trouble that plaintiff was experiencing did not result from any injury suffered by him. Defendant contended that if plaintiff suffered any pain in his back it was due to an arthritic condition which had been in existence for at least ten years prior to the accident of June 26th. Defendant's medical expert had examined the plaintiff at the hospital in Salida on July 5, 1948 and had taken x-rays of plaintiff's back. He testified as follows (R. 171, 172):

“Q. Will you explain to the jurors anything unusual or abnormal about that spine, that you can observe?

A. Well, yes sir. He has osteo-arthritis of all of the vertabrae, including the lower dorsal and all of the lumbar.

* * * * *

“Q. The arthritic condition you have pointed to, on the different vertabrae is toward the front, is it not?

A. Yes sir. This is towards the abdomen, towards the front.

Q. Do you notice any arthritic condition at the surface of the spine as it surfaces near the back?

A. You have this lipping of the body of the vertebrae. You notice arthritic changes.

Q. When you say 'the lipping', are you indicating the little points that grow out on the vertebrae?

A. No. These are the points. That is the front surface. This is on the body of the vertebrae where, in between here, you have your pad of cartilage. The lipping of this also so denotes arthritis.

Q. In other words, there is an arthritic condition along that entire back?

A. Yes sir.

Q. In the area you have indicated?

A. Yes."

This doctor testified that the fifth lumbar vertebra was affected with arthritis (R. 174).

The defendant was very careful to point out that this arthritic condition found in plaintiff's back was a condition which had been present for a long period of time. The doctor testified as follows (R. 175):

"Q. I believe, Doctor, he was injured on the 26th of June, or claims to have been injured on the 26th of June, which would be approximately a little over a week before?

A. Yes sir.

Q. Would you say this arthritic condition which you demonstrated to the jurors existed prior to the time he claimed he was injured?

A. Sure.

Q. Could you give us an idea approximately how far before he was injured this condition existed?

A. Of course, I can't make an absolute statement on that. I presume it started ten years, at least, before. That would be the supposition.

Q. In other words, Doctor, the condition you have demonstrated to us in these x-rays is a condition which has grown in this man, and existed probably ten years prior to the time he claims his injuries?

A. Yes sir."

This medical expert also testified that he had come to the conclusion that there was no injury to the bones of the spine or to the lower back, and the doctor to bolster his testimony told of a series of studies that were made of backs of individuals coming in before him for examination. This study was made because of the numerous complaints of low back pains of individuals. He testified that while he wouldn't say that the average person over forty had back pains there were an awful lot of them that did (R. 176, 177).

The effect of defendant's testimony was that there was no injury to plaintiff's back and nothing wrong with it other than an arthritic condition which had existed for at least ten years. From this testimony defendant was able to argue and did argue that any pain suffered by plaintiff was related solely to a back condition which had existed for a long time prior to the injuries of June 26th. This testimony, however, also had

the effect of placing before the jury the proposition of whether or not the arthritic condition and resulting pain had been caused or aggravated by the fall suffered by plaintiff. Because of the arthritic condition existing in the back the jury could well have believed and determined that plaintiff's injury was of longer duration than it otherwise would have been. Such conclusion and determination is justified by the testimony of Dr. White above quoted to the effect that an arthritic condition would probably result in slower healing.

The cases cited by the defendant under Point III of its brief have nothing to do with the situation presented in the case at bar. They merely stand for the general principle that it is error to submit an issue on which there is no evidence.

In *Tyng v. Constant Lorraine Investment Co.*, 37 Utah 304, 108 Pac. 1109, and in *State Bank of Beaver County v. Hollingshead*, 82 Utah 416, 25 P. (2d) 612, the courts had before them actions sounding in contract.

In *Railroad Company v. Houston*, 95 U. S. 697, and in *Erie Railroad Co. v. Vajo*, 41 F. (2d) 738, the instructions were on the question of liability in negligence cases.

The defendant is in error when it states that there was no issue made by the pleadings relative to an aggravation of a preexisting latent osteo-arthritic condition of the back. In describing the injuries suffered by plain-

tiff due to the fall, in paragraph VIII, Subdiv. (b), found at R. 3, plaintiff's complaint alleges:

“(b) Severe shock and injury to the nervous system, activating and aggravating a latent osteo-arthritic condition of the back, hips, lumbar and sacroiliac joints.”

We submit that there was no error in instructing the jury that aggravation of a preexisting condition is recoverable. Such aggravation could consist of either greater pain or pain existing over a longer period of time.

POINT IV.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT PLAINTIFF WAS ENTITLED TO COMPENSATION FOR ALL PAIN AND SUFFERING THAT HE WOULD PROBABLY ENDURE IN THE FUTURE.

Defendant, under Point IV of its brief, contends that the jury should have been instructed that plaintiff was entitled to recover damages for only such future pain and suffering as the evidence establishes with reasonable certainty.

Defendant relies primarily upon the case of *Chicago, M. & St. P. Ry. Co. v. Lindeman*, 143 Fed. 946. This case is distinguishable from the case at bar in that the jury here was instructed that it could allow for only such pain and suffering as plaintiff “will probably endure in the future.” There was no such language contained in the instruction considered in the *Lindeman*

case. There plaintiff was permitted to recover for pain and suffering he "may in the future suffer."

The rule for future losses under the Federal Employers' Liability Act was raised in a much later case in the United States Supreme Court, i.e., *Chesapeake & Ohio Ry. Co. v. Carnahan*, 241 U. S. 241, 36 S. Ct. 594, 595. The second assignment of error by the railroad was that the instruction complained of permitted a recovery in damages not only for those that proximately resulted from the injury, but also its effect upon the future which involved a consideration of consequences which might be essentially speculative and remote. The court had before it for consideration the following instruction:

"The court instructs the jury that if they believe *from a preponderance of the evidence* that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of \$35,000, as to them may seem just and fair."

It will be noted that the Virginia Court, from whose decision the railroad prosecuted its appeal, did not require the jury to find future pain and suffering by any degree of proof, but only required them to find such future pain and suffering by a *preponderance of the*

evidence. The court then in discussing the Virginia Court's decision stated as follows:

“The supreme court expressed the view that the speculation of future results which the railway company professed to apprehend was not left by the instruction for the jury to indulge, nor did the instruction commit the amount of damages to the conjecture of the jury independently of the evidence in the case. The contention made here was explicitly rejected, viz., that the instruction permitted the jury to take into consideration the ‘possible future physical effects from the injury, such as future suffering in the absence of evidence as to the probability of such.’ The court remarked that it would be a strained construction of the language of the instruction ‘to hold that it referred to future suffering, and that damages not the proximate result of the injuries received were included under’ it, and that, besides, such conclusion was precluded by an instruction given at the request of the railway company, which was ‘*that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant.*’

“The comment of the court is accurate and we can add nothing to it. The principle is established that when the evidence in a case shows that there will be future effects from an injury, *an instruction which justifies an inclusion of them in an award of damages is not error.* Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner), 147 U. S. 571, 37 L. Ed. 284, 13 Sup. Ct. Rep. 557; McDermott v. Severe, 202 U. S. 600, 50 L. Ed. 1162, 26 Sup. Ct. Rep. 709.

“It is also objected that the instruction ‘allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of \$35,000, and allowed the jury to give such sum as damages as to them might ‘seem just and fair’ without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of.’

“The objection is untenable. As we have seen, the court explicitly enjoined upon the jury that there must be a *proximate and causal relation* between the damages and the negligence of the company, and the reference to the sum of \$35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 119, 57 L. Ed. 1096, 1100, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.”

The instruction given to the jury in the case at bar was an instruction which has been approved by this Court in the case of *Picino v. Utah-Apex Mining Co.*, 52 Utah 338, 173 P. 900, 901, 902. The same contention was made by defendant in that case as is now made by the defendant in the case at bar. The instruction considered in the *Picino* case was as follows:

“‘If, under the evidence and the instructions given you by the court, your verdict is in favor of the plaintiff, you will assess his damages, and in doing so you have the right and should take into consideration his age and his earning capacity, before and after the injury, the nature and extent of his injury, and whether permanent or

not, the physical pain and mental anguish suffered and endured and that he will probably hereafter endure by reason and on account of said injury, the time lost and that he will probably hereafter lose, as may appear from the evidence, by reason of and as a direct result of such injury, such expense, if any, as he will hereafter incur in the treatment of the injury, together with all the facts and circumstances in evidence in the case, and after doing so you will assess the damages at such sum as from the evidence you may deem proper, not exceeding the amount claimed by plaintiff in his complaint.' "

The court stated defendant's contention as follows:

"In support of this assignment appellants concede that damages may be allowed in cases of this kind for future pain and suffering and for future loss of time; but they insist that the jury should be limited in awarding the damages for such future pain and suffering or loss of time as is reasonably certain from the evidence the plaintiff will suffer in the future. They object to the jury speculating as to the pain and suffering he will probably hereafter endure and the time he will probably hereafter lose * * *."

In answering defendant's contention the court stated:

"* * * The rule invoked by appellants calls for a higher degree of certainty than is ordinarily required in civil cases. It is quite true the jury should not be permitted to indulge in mere speculation in endeavoring to determine the rights of litigants. It does not follow, however, that be-

cause they cannot demonstrate their conclusions with mathematical precision that therefore, their conclusions are invalid. Even in attempting to determine the damages already sustained in cases of this kind, jurors, in the very nature of things, are confronted with more or less uncertainty. That which is most likely, or that which is probable in the light of all the evidence, is oftentimes the only practical guide. If a higher degree of certainty than this is required, it is manifest that great hardship and injustice will result in many cases. Of course, the probability here referred to should not be a mere conjectural probability, but one based on evidence. The jury, whose duty it is to ascertain and declare the truth from conflicting testimony, should accept that which is probably true as against that which is less probable. In doing so the juror keeps within the law applicable to civil cases. He should accept that which he believes to be true, notwithstanding it may be more or less uncertain."

The court quoted from 8 R. C. L. at page 544 as follows:

" 'It is a well-settled general rule that, in assessing the amount of damages in an action for a personal injury, the jury may make an allowance for the pain and suffering which the person injured is reasonably certain to undergo in the future in consequence of the injury, including also an allowance for mental suffering. Pain and suffering which are merely possible and speculative are, of course, not to be considered. All that is required under this rule is that there be sufficient evidence from which the jury may fairly derive the conclusion that the chances that the plaintiff

will endure future pain and suffering preponderate over those that he will not. Such preponderance denotes probability or likelihood, and that is sufficient.' "

Referring to this latter authority and the many other cases, including cases from the Federal courts, the Utah Supreme Court concluded as follows:

"These authorities sustain the position of respondent. The doctrine they enunciate is in harmony with our own views and with the practice generally which prevails in the trial of civil cases. If jurors are made to understand that their conclusions must be based upon substantial evidence actually introduced (and they generally are so instructed), we see no reason why a distinction should be made as to the degree of certainty between a case of this kind and any other ordinary civil case. Appellant's exception to the instruction is not sustained."

Instructions which permit the jury to award damages for probable future pain and suffering have been held not to allow the jury to give speculative damages and that such instructions are proper and the words "reasonably certain" need not be used therein. See *Coppinger v. Broderick*, 37 Ariz. 473, 295 P. 780; *Gallamore v. City of Olympia*, 43 Wash. 379, 75 P. 978. In this latter case the Court in discussing the similarity between the words "probable" and "reasonably certain" stated as follows:

" * * * The word 'probable' is defined in Webster's International Dictionary as 'having more

evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely'; and in common acceptation the word implies, when applied to a condition which may be supposed beforehand, that we know facts enough about the condition supposed to make us reasonably confident of it, or, at the least, that the evidence preponderates in its favor. In civil actions it is a general rule, to which there are but few exceptions, that the jury may find according to the preponderance of the evidence. We know of no reason why an exception should be made in this instance, and we do not think the court's applying the term 'reasonably certain' to supposed future conditions meant any more than this, but that each of them would have approved an instruction to the effect that the jury might return damages *for future pain and suffering if they found by a preponderance of the evidence that such pain and suffering would ensue*. However, the charge of the court is not without direct authority in its support. In Sedgwick on Damages (8th Ed.) vol. 1, p. 249, the author, speaking of prospective losses, after stating the rule to be that such losses must be reasonably certain to ensue, uses this language: 'This 'reasonable certainty' does not mean absolute certainty, but reasonable probability'; citing *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775, and *Feeney v. L. I. R. R. Co.*, 116 N. Y., 375, 22 N. E. 402, 5 L. R. A. 544, where it was held not error to permit answers to questions put to an expert medical witness concerning the probability of the injured party suffering in the future from his injuries. In *Hamilton v. Great Falls S. R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, the court said: 'The court charged, among other things, that damages

could be awarded for 'such consequences as are reasonably likely to ensue in the future'; and again, 'plaintiff may recover for all pain and suffering which she has sustained, or in reasonable probability will hereafter sustain,' etc. The appellant now contends that damages can only be awarded when it is rendered reasonably certain from the evidence that damages will inevitably and necessarily result from the original injury. In this case all testimony as to future disability consisted of expert medical opinions. *Certainty of future effects was impossible, and reasonable probabilities were necessarily the bases of the opinions expressed.* Therefore to say that she could recover for suffering which she would in reasonable probability sustain was practically to say that she might recover for suffering which she was reasonably certain to sustain. *The degree of proof would be the same in either case.'*

The other cases cited by defendant under this point of its brief do not involve the giving of instructions similar to the one here criticized.

In *Southwest Brewery Co. v. Schmidt*, 226 U. S. 163, 33 S. Ct. 68, the criticism of the instruction had nothing to do with the lack or presence of the term "reasonably certain". The *Lindeman* case was referred to but the court only stated that with regard to future pain the judge did not go beyond the conservative rule laid down in that case. It cannot be determined just what the court meant by this statement but there is nothing in the case which helps us in the determination of the question here discussed.

In *Daigneau v. Grand Trunk Ry. Co.*, 153 F. 593, a district judge wrote an opinion on a motion for a new trial wherein he allowed plaintiff to either accept a remittitur or he would grant a new trial. He did not consider instructions which should be given to the jury on this subject.

In *Kennon v. Gilmer*, 131 U. S. 22, 9 S. Ct. 696, the only question to which the Supreme Court addressed itself was whether or not there could be recovery for mental suffering.

We submit that under the foregoing authorities no error was committed by instructing the jury that plaintiff could recover for those damages which he would probably endure in the future.

POINT V.

THE TRIAL COURT DID NOT ERR IN PERMITTING PLAINTIFF TO TESTIFY TO TREATMENT PRESCRIBED BY DR. HINES.

The plaintiff was permitted to testify that one of the doctors he consulted directed him to get a belt for his back (R. 115). Defendant contends that this testimony is hearsay. There is no narrative statement of any facts contained in this direction of the doctor.

The cases cited by defendant as sustaining its position that this testimony was inadmissible are readily distinguishable from the case at bar.

In *United States v. McCreary*, 105 F. (2d) 297, the statements introduced in evidence were to the effect that the plaintiff was unable to work; that the doctor didn't think plaintiff could work because he hadn't been able to in the past and he could see no reason why he could in the future; that duodenal ulcers never heal; that the complaint that worried the doctor was the condition of plaintiff's heart; and that plaintiff had never been able to do a day's work. These statements are nothing like those which were introduced in evidence here. The doctor here did not state as to what plaintiff had been able to do in the past or would be able to do in the future. He merely stated that plaintiff should get a belt for his back (R. 115).

In *Bucher v. Equitable Life Assurance Society*, 91 Utah 179, 63 P. (2d) 604, the plaintiff introduced in evidence statements made by doctors to him for the purpose of fixing the time when the fact of permanent disability was made known to plaintiff so he could file due proof of his claim under an insurance policy. The court determined that this question was not material and further stated that the statements made by the doctors were hearsay. The statements there were to the effect that plaintiff was through and that he was not able to do anything, etc.

The testimony of plaintiff here criticized related to the treatment he had sought and obtained for his injuries, the doctors he had consulted concerning his injuries and the things prescribed for their treatment. He testified to an examination by Dr. Delahanty and testi-

fied without objection that this doctor gave him some little pills and said that plaintiff's trouble was all nerves. He then testified that Dr. Hines examined him and told him to get a belt for his back.

Plaintiff was under a duty to obtain medical attention. 25 *C. J. S.* 508, *Damages*, Section 36. The testimony that he consulted these doctors was admissible for this purpose. Then, as stated in 25 *C. J. S.* 800, *Damages*, Section 150, it was proper as bearing on the extent of his injuries to show that he received medical treatment. Testimony concerning what Dr. Hines prescribed establishes that he received medical treatment for his injuries.

In *Townsend v. Keith*, 34 Cal. App. 564, 168 P. 402, it was held proper for plaintiff to prove that he returned to a hospital a second time under the direction of his physician.

We submit that these were mere statements by the doctors directing the plaintiff what he should do for his back and they are not in the nature of narrative statements and are not subject to the objection that they are hearsay.

POINT VI.

THE TRIAL COURT DID NOT ERR IN PERMITTING PLAINTIFF TO TESTIFY TO DIRECTIONS GIVEN HIM BY DEFENDANT'S TRAINMASTER'S CLERK, MERRILL.

Defendant, in its brief at page 3, states that plaintiff went to Pueblo, Colorado, and contacted the claim

agent of the defendant. In its brief, under Point I, the defendant takes the position that the plaintiff was the one who sought defendant's claim agent for the purpose of making a settlement of his case. The record discloses that plaintiff was sent to the claim agent by defendant's trainmaster's clerk, Mr. Merrill. Plaintiff so testified at R. 107. Defendant's claim agent testified on behalf of the defendant and stated that he was informed by defendant's trainmaster's office at Salida that the plaintiff was coming to his office (R. 161). In preparation for this visit the claim agent called the doctor to determine whether or not plaintiff was physically qualified to work (R. 161).

The foregoing testimony discloses that the trainmaster's clerk certainly was the agent of the defendant and forwarded the information that plaintiff was coming to see the claim agent. This testimony was relevant to show the reason for plaintiff contacting the defendant. We submit that the testimony of the release from the board could not possibly have prejudiced defendant in this case. The record, as quoted by defendant in its brief on pages 27 and 28, discloses that the effect of the testimony which was eventually obtained through the maze of questions and objections and comments by the Court was that plaintiff was sent to Pueblo to see the claim agent, Sayger, by the trainmaster's clerk, Mr. Merrill. Here again the cases cited by defendant have nothing to do with the problem presented. Both of the cases cited by defendant involved contract actions and do not even remotely resemble the case at bar.

An examination of the record quoted by defendant discloses that the trial judge in effect ruled with the defendant on its contention that reason for plaintiff's release from the board was a conclusion and following the court's suggestion plaintiff was asked and stated what took place at his meeting with Merrill. This could not be error. A mere direction could not be hearsay. There was no narrative statement of fact.

We submit that there was no prejudicial error in the rulings of the Court attacked and criticized under Point VI of defendant's brief.

CONCLUSION

We respectfully submit that the plaintiff was entitled to recover for the injuries which he received and that the verdict for \$4,300.00 is an unassailed determination of the damages suffered by him as a result of his injuries. There were no errors committed in the trial of this case and in any event there certainly were no prejudicial errors committed by the trial court.

Section 104-14-7, Utah Code Annotated, 1943, provides as follows:

“The court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.”

and *Section 104-39-3, Utah Code Annotated, 1943*, provides as follows:

“No exception shall be regarded, unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting.”

Under the foregoing authorities and arguments the judgment in this case should be affirmed.

Respectfully submitted,

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