2001

Floyd A. Johnson and Floyd A. Johnson as guardian ad litem for Judith Johnson v. Jolene Jaye Simons and Dan C. Simons : Brief of Appellant

Utah Supreme Court

FLOYD A. JOHNSON and FLOYD A. JOHNSON as guardian ad litem for JUDITH JOHNSON, a minor,

Plaintiffs & Respondents,

-vs-

JOLENE JAYE SIMONS, a minor, and DAN C. SIMONS,

Defendants & Appellants,

Case No. 14326

BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
James S. Sawaya, Presiding

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INDEX OF CASES AND AUTHORITIES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

FLOYD A. JOHNSON and FLOYD A. JOHNSON as guardian ad litem for JUDITH JOHNSON, a minor, Plaintiffs & Respondents, -vs- JOLENE JAYE SIMONS, a minor, and DAN C. SIMONS, Defendants & Appellants,	Case No. 14326

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NATURE OF THE CASE

This is an action for damages and injuries suffered on January 13, 1973 when an automobile driven by defendant-appellant Jolene Jaye Simons struck Judith Johnson, a pedestrian.

DISPOSITION IN THE LOWER COURT

This matter was tried September 9 through 11, 1975, before a jury in Salt Lake City, Utah, Honorable James S. Sawaya of the Third Judicial District Court presiding. Judgment was entered on the jury verdict in favor of plaintiffs-respondents for $1,500 special damages and $35,000 general damages.

RELIEF SOUGHT ON APPEAL

Defendants-appellants seek reversal of the lower court judgment, or, in the alternative, an order remanding the case for a new trial.

STATEMENT OF POINTS RELIED ON

POINT I. THE TRIAL COURT ERRED IN FAILING TO GIVE DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 19.

POINT II. WHERE CONFUSION EXISTED CONCERNING WHETHER THE CASE WAS BEING TRIED UNDER PRINCIPLES OF CONTRIBUTORY NEGLIGENCE OR COMPARATIVE NEGLIGENCE, THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE ISSUES TO THE JURY ON A SPECIAL VERDICT.

POINT III. THE TRIAL COURT ERRED IN FAILING TO SUMMON THE JURY PANEL AS REQUESTED BY DEFENDANTS AND IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL.

POINT IV. THE TRIAL COURT ERRED IN FAILING TO READ JURY INSTRUCTION NO. 1-A TO THE JURY.

STATEMENT OF FACTS

On January 13, 1973, defendant-appellant Jolene Jaye Simons,* then 16 years old, while driving an automobile registered in the name of her father, Dan C. Simons, struck plaintiff-respondent Judith Johnson, a pedestrian, then also 16 years old. The pedestrian, through her father as guardian ad litem, brought an action for negligence against the driver and her father. Defendants denied the allegations of negligence and alleged sole or contributory negligence on the part of the injured pedestrian.

At trial the evidence showed that the collision occurred after dark at approximately 6:00 p.m. on Highland Drive at about 6350 South in Salt Lake County at a place where there were no sidewalks, curb, or gutter; no marked crosswalk, semaphore signal or other traffic control devices; and only very sparse street lighting. The street was wet but not frozen, and snow from

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*By the time of trial, Jolene Jaye Simons was married. In the trial transcript she is usually referred to as Mrs. McBride.

earlier snowfalls was evidenced by remaining snowbanks off the travelled portion of the street. Traffic was moderately heavy southbound, with cars travelling both immediately in front of and behind the collision vehicle.

The driver testified that she was travelling southbound on Highland Drive when she glanced briefly at the speedometer. As she again focused her eyes on the road she saw the pedestrian immediately in front of her right fender and was unable to avoid hitting her. The pedestrian came in contact with the car at a point approximately twelve inches from the right front side of the car near the right headlight. The pedestrian was thrown onto the hood, glanced off the right front windshield and top portion of the car, and came to rest to the west of and off the travelled portion of the roadway.

The driver immediately pulled off the road and then started backing up the street to where the impact occurred. A Deputy Sheriff who had been following either in the first or second car behind the accident vehicle, but who was unaware of the collision, stopped Miss Simons as she backed up the street. He was informed of the accident after which he walked back along the roadway, and after a few moments of searching, found the injured plaintiff near a snowbank west of the travelled portion of the road. (Tr. 13-32)

The only eye witnesses to the accident were Miss Simons' two

younger brothers (ages 14 and 11) who were seated in the front seat with her. At trial the driver testified that she was travelling about 30 miles per hour, that she was near the center line of the two lane roadway, and that the pedestrian was well into the travelled portion of the roadway at the point of impact.

The pedestrian suffered retrograde amnesia and had no recollection of the events immediately before the accident. (Tr. 63-64) However, the pedestrian testified that she lived on the east side of Highland Drive; that she had been to the house of a friend on the west side of Highland Drive which was within walking distance from her own home; that she frequently walked home from her friend's house by following the same customary route; and that the place where the accident occurred was where she customarily crossed over to the east side of Highland Drive to get home. (Tr. 72-73)

Plaintiffs' expert witness, David Lord, testified that the probable point of impact was "some distance north of where the body actually came to rest and it would be on the west side of the road," and added, "Now, the exact position I would--I wouldn't even be able to make a wild guess." (Tr. 130) Newell K. Knight, called as an expert witness for defendants, testified that the evidence would just as easily support the conclusion that the pedestrian was well into the travelled portion of the highway when hit. (Tr. 149-155)

The court approved the right to make a record at a later

time of counsel's exceptions to the jury instructions given by the court. (Tr. 167 and Supplemental Transcript of Proceedings before the court on October 6, 1975, pages 29-30).

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO GIVE DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 19

Counsel for defendants-appellants asked the court to give its requested jury instruction No. 19 which states:

> Contributory negligence is negligence on the part of the person injured which, cooperating with the negligence of another, assists in proximately causing her own injury.
>
> One who is guilty of contributory negligence may not recover from another for any injury suffered because if both parties were at fault in negligently causing an accident, the degree of negligence cannot be weighed by the jury. (R. 92)

This is standard J.I.F.U. Instruction No. 15.5 and is customarily given to govern a contributory negligence issue. While counsel were considering jury instructions in chambers with Judge Sawaya, the judge said that the substance of defendants' requested instruction No. 19 would be included in stock instructions prepared by the judge and customarily given by him. He then noted in the lower right-hand corner of the instruction, in his own handwriting:

"9-11-75 given in substance JSS"

However, the critical phrase in defendants' requested instruction No. 19--namely, "One who is guilty of contributory negligence may not recover from another for any injury suffered..." --was never given by the court.

The first sentence of defendants' requested instruction No. 19 defining contributory negligence was covered in Jury Instruction No. 15 given by the court. (R. 142) The last part of the second sentence of defendants' requested Jury Instruction No. 19 was covered by Jury Instruction No. 17 given by the court as follows:

> The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of both the plaintiff and defendant, you are not to attempt to determine which was guilty of the greater negligence. (R. 144)

Still missing, however, is the heart of defendants' requested instruction No. 19 which would have advised the jury that upon finding the injured party was contributorily negligent, no award of damages should be made.

The law clearly requires the court to inform the jury of the legal effect of contributory negligence. 57 Am.Jur.2d Negligence, §§298, 299 (1971). For example, in Case v. Peterson, 17 Wash. 2d 523, 136 P.2d 192, 194 (1943), the court stated:

> When the court instructs a jury on a subject such as contributory negligence, it should define the term and then advise what effect it should give to a finding that contributory negligence existed as a guide to the verdict it should render. Gallup v. Pittsburgh Rys. Co., 295 Pa. 203, 145 A. 73; Pawnee Farmers' Elevator & Supply

Co. v. Powell, 76 Colo. 1, 227 P. 836, 37 A.L.R. 6; Frederick Cotton Oil & Mfg. Co. v. Traver, 36 Okl. 717, 129 P. 747. The trial court was in error in not so instructing the jury.

In Smith v. Chicago, Rock Island and Pacific Railroad Co., 498 P.2d 402, 405 (Okla. 1972), the court noted:

> Thus, the jury is to be clearly instructed that if they find and believe from the evidence that primary negligence and proximate cause have been established, then their verdict should be for the plaintiff; but if they do not so find, or do find from the evidence that plaintiff was contributorily negligent as defined in the instructions, then their verdict should be for the defendant. Whether the court uses the word "should" or "must" is not of great importance. . . Either word used in the contributory negligence instruction will inform the jury that plaintiff is not entitled to a verdict if they find and believe from the evidence that the plaintiff was negligent and that his negligence caused or contributed to his injuries.

The Utah Supreme Court has taken a similar position. In Smith v. Lenzi, 74 Utah 362, 279 P. 893, 896 (1929), the court noted:

> The jury should have been instructed that it was the duty of the plaintiff to yield the right of way to the defendant as the two approached the intersection if it would have reasonably appeared to a reasonable and prudent man under the circumstances existing and the relative speed at which they were driving that a collision was to be apprehended. The jury should also have been instructed that if, under such conditions, the plaintiff failed to yield the right of way, and that such failure on his part proximately contributed to the accident, he could not recover. (emphasis added)

Similarly, in Morgan v. Bingham Stage Lines Co., 75 Utah 87, 283 P. 160, 166-177 (1929), the Utah Supreme Court dealt with the specific issue of contributory negligence of a pedestrian and held:

> All that it is intended to hold is that defendant is entitled to have his theory of the case presented to the jury. Briefly, they were entitled to have the jury told, in substance, that, in crossing or attempting to cross a public street, it was the duty of the deceased to exercise due care and reasonable vigilance to discover approaching vehicles, and that, if the jury should find that as a matter of fact the deceased failed to do what due care required by suddenly, without looking, stepping out from the curb line between two parked cars directly into or in front of defendants' car at a time and under such circumstances that defendants' agent could not, by the exercise of ordinary care, have avoided the accident they might find such conduct to be negligent on the part of the deceased, and, if they further found that such negligence directly contributed to the accident, then plaintiff could not recover. (emphasis added)

As described more fully under Point II hereafter, this instruction was of critical importance because the court, in the course of impanelling the jury, had made confusing mention of the fact that a recent change in the law meant that this case would be tried under different principles than those which some of the prospective jurors may have applied in other cases during their term of jury service.

Furthermore, as described more fully under Point III hereafter, failure to instruct the jury that contributory negligence bars recovery by an injured party created not only possible confusion and error by the jury but actual confusion and error. Seven of the eight jurors concluded that the pedestrian was guilty of contributory negligence, yet awarded her damages. The dissenting juror believed the pedestrian was solely negligent. Two of the jurors thought there was a jury instruction saying that the plaintiff could not recover if she was contributorily

negligent; however, in searching the instructions furnished by the court, they found none to that effect, and therefore joined in approving an award to the plaintiff even though they believed she was also negligent. (R. 54; See also Appendix A and Appendix B to this brief).

POINT II

WHERE CONFUSION EXISTED CONCERNING WHETHER THE CASE WAS BEING TRIED UNDER PRINCIPLES OF CONTRIBUTORY NEGLIGENCE OR COMPARATIVE NEGLIGENCE, THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE ISSUES TO THE JURY ON A SPECIAL VERDICT

Because of the confusion injected into the trial of this case by a change in the law (from contributory to comparative negligence) after the date of the subject accident, and because of the court's confusing reference to that change while impanelling the jury, defendants-appellants requested that the issues be submitted to the jury on special verdict. (R.69-72) This request was denied (R.69) and the case was submitted to the jury on a general verdict. (R.65-66 and 165)

In January, 1973, the Utah State Legislature enacted the provisions now contained in Utah Code Annotated, Section 78-27-37, and related provisions, which took effect on May 8, 1973. The effect of this legislation was to preserve contributory negligence as a bar to recovery for injuries suffered before the effective date, but to adopt principles of comparative negligence

in awarding damages for injuries suffered after the effective date of this legislation. The accident which is the subject of this present action occurred in January, 1973, the month when the legislative change was enacted, but before the effective date of the change.

The prospective jurors summoned in this action were serving in the third and last month of their term which commenced July 1, 1975. During that term the court had tried injury cases which had arisen after May 8, 1973, and which were therefore tried under principles of comparative negligence.

In the presence of all prospective jurors and before the jury panel was selected and sworn, the following dialogue took place while the jury was being impanelled:

* * * * * *

THE COURT: Ladies and Gentlemen, as I have indicated--well, let me get a show of hands how many of you have served as Jurors before. That's generally most of you. Thank you.

How many of you have served on a case involving an automobile or an auto-pedestrian accident or any kind of vehicle accident where one party was suing to recover damages as the result of injury or property damage? Let me have a show of hands.

Mrs. Rasmussen, you appear to be the only one. Now, that's unusual. Tell me when that was, will you please?

IDA RASMUSSEN: It was under Judge Hall on the 15th of July.

THE COURT: During this Term?

IDA RASMUSSEN: Yes.

THE COURT: All right. And that was a --

IDA RASMUSSEN: Automobile accident.

THE COURT: Two automobiles collided?

IDA RASMUSSEN: Automobile and a motorcycle.

THE COURT: And do you recall the date when that accident happened? I know that's asking you to--

IDA RASMUSSEN: Let's see. Sometime in July a year ago.

THE COURT: All right. In 1974?

IDA RASMUSSEN: Uh-huh.

THE COURT: Did you -- were you asked to return a verdict in this matter?

IDA RASMUSSEN: Yes.

THE COURT: And you did in fact return a verdict?

IDA RASMUSSEN: Yes.

THE COURT: Were you asked to answer certain questions with regard to the degree of negligence of the parties?

IDA RASMUSSEN: Yes, in per cent wise.

THE COURT: All right. Mrs. Rasmussen, this case will be somewhat different and I am going to try and

explain to you that the law changed in January of 1973 and accidents happening after that date we ask the Juries to apportion the negligence and with regard to accidents happening prior to that date we ask them not to apportion negligence.

IDA RASMUSSEN: Uh-huh.

THE COURT: Now, do you think that -- in other words, the law that I tell you will be different than the law that Judge Hall explained to you and do you believe that you could follow the law of the case as I state it and put out of your mind the fact that Judge Hall explained to you something different?

IDA RASMUSSEN: I think so.

THE COURT: All right. Is there anyone else?

MR. POELMAN: Just a minute. For clarification, the change in law was enacted in January of '73 but the effective day of that was May 8th. May 8th, 1973.

THE COURT: That's right. But in either case --

MR. POELMAN: The difference would be established, yes.

THE COURT: Fine. Is there anyone else that served as a Juror on a case involving an accident between two vehicles, auto-pedestrian, auto-motorcycle, any kind of accident case? All right. Thank you. The

record may show no other hands are raised.

(Transcript Page 2 line 30 through Page 4 line 27)

* * * * * *

Here the court made mention of a change in the law, said the law to be applied in this case would not permit the jury to apportion negligence between the parties, but did not say that contributory negligence by the injured party would bar recovery.

These comments injected several elements of confusion into the case. First, the court referred to the status of the law for accidents occurring before January, 1973, and after January, 1973, but did not clarify the status of the law for accidents occurring during January, 1973. Defendants' counsel requested the court to clarify the matter at that time, but the judge left the matter dangling with an unfinished sentence, leaving unresolved the timing and nature of that change as it would apply to this case.

Second, the court's comments implied that the only difference between the former law and the more recent modification was that the court now asks the jury to apportion negligence, whereas in the past it did not. Presumably, therefore, the jury could deliberate in the same manner under the old and new laws, the only difference being that the court would not require the jury to apportion negligence under the former law.

Third, the court at no time explained to the jury or prospective

jurors what is meant by "apportion negligence", a phrase that can only be understood in light of the real difference between contributory negligence and comparative negligence.

This dialogue could only serve to raise questions in the minds of the jurors which were never answered in the jury instructions or otherwise.

Although use of a special verdict will usually be deemed discretionary with the court, special circumstances such as were present in this case, may require the use of a special verdict rather than a general verdict. This court has previously noted in Baker v. Cook, 6 Utah 2d 161, 308 P.2d 264, 267 (1957):

> [G]reat care should be taken to submit questions to the jury so that they are as clear as possible. When a general verdict will best settle the issues, it should be used. When specific issues cannot be reached by a general verdict, the trial court should take advantage of special verdicts or special interrogatories.

Under these special circumstances the court erred or abused its discretion in failing to submit the issues on special interrogatories which would have prevented the jury from improperly awarding damages to one whom they found to be contributorily negligent.

POINT III

THE TRIAL COURT ERRED IN FAILING TO SUMMON THE JURY PANEL AS REQUESTED BY DEFENDANTS AND IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL

Appellants acknowledge the general rule that affidavits of

jurors are not admissible evidence for the purpose of impeaching the jury's own verdict, but the rule permits certain exceptions applicable in this case. One such exception was recognized by this Court in Moulton v. Staats, 83 Utah 197, 27 P.2d 455 (1933). In that case, the jury apparently disregarded an instruction given by the court, whereupon counsel moved that the jury's verdict be amended or modified, which motion was accompanied by supporting affidavits of the jurors. Opposing counsel moved to suppress the affidavits on the ground that the jury may not impeach its own verdict. In rejecting that motion, the court noted at page 459:

> The general rule, that the statements of jurors will not be received to establish their own misconduct, or to impeach their verdict, does not prevent the reception of their evidence as to what really was the verdict agreed on, in order to prove that, through mistake or otherwise, it has not been correctly expressed, as the agreement reached by the jury, and not the written paper filed, is the verdict; and a showing that the writing is incorrect is not an impeachment of the verdict itself.
>
> Affidavits of jurors are admissible to show that the verdict, as received and entered of record, by reason of a mistake, does not embody the true finding of the jury.

More recently, this Court in Brown v. Johnson, 24 Utah 2d 388, 472 P.2d 942 (1970), has followed the Moulton exception. When confronted with an affidavit from one of the jurors explaining that the general verdict submitted was inconsistent with the intended verdict by the jury, the court noted at page 946 n.1:

> While jurors may not by affidavit or otherwise impeach their verdict, they may give proof to explain it.

The court quoted at length from the Moulton decision to support the proposition that an affidavit by the juror may be used to explain the intended verdict of the jury rather than the verdict entered on paper.

This court has twice declared that finding the jury "misunderstood or disregarded the law" is a proper ground for a new trial. In Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701, 703-04 (1961) this court held:

> The trial judge should not grant a new trial, merely because in his opinion the amount of the award was insufficient or excessive. Such action is warranted only when to the trial judge, "it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence. . ." (emphasis added) (citing Mr. Justice Crockett's concurring opinion in Holmes v. Nelson, 7 Utah 2d 435, 326 P.2d 722, 752-26 (1958).

Whether the jury "misunderstood or disregarded the law" can best be determined from affidavits of the jurors or, where indication of such misunderstanding or disregard exists, through an examination of the jurors by the court.

The affidavits presented in the instant case clearly show and explain that the real verdict reached by the jury was that both parties were negligent. Nevertheless, because of the confusion surrounding the legal consequences of contributory negligence and failure by the trial court to provide a clear instruction

to dispel that confusion, the jury arrived at a recorded verdict which was clearly inconsistent with their factual findings.

Furthermore, the general rule prohibiting a jury from impeaching its own verdict has been rejected in recent cases where its application would bring about unjust results. For example, in Hunter v. Smallwood, 328 N.E.2d 344 (Ill. App. 1975), the court recognized the use of affidavits by jurors in a case where the jury became confused by the verdict form submitted to them by the court. The court remarked:

> By a long established rule in this State, affidavits of jurors would not be admissible to impeach a duly rendered verdict. . . . This is a salutary rule, designed to prevent jury tampering and to "suppress the dissatisfied juror.". . .
>
> But there are some exceptions to the general rule. Where the record itself shows that the jury is hopelessly confused, or the affidavits tend to show that the verdict rendered and recorded was not the one agreed upon by the jurors, then we believe that the affidavits may be considered. . . .
>
> [I]t must be remembered that jurors are laymen and not accustomed to legal language. . . . The affidavits of the four jurors is fairly persuasive that the verdict rendered was not the one which was reached by the jury. It is not simply a case of one juror's affidavit to the effect that he did not agree with the verdict or participate in the decision.
>
> Obviously the time has long since passed when the original jurors may be brought back into court and questioned concerning the verdict. As a result of the apparent prejudice to appellant, it is clear that some remedy should be forthcoming. We conclude that a new trial should be granted.

Appropriate exceptions to the general rule which prohibits use of juror's affidavits to impeach a jury verdict must be

viewed in relation to the reasons for the rule. The purpose of the rule is not to favor finality of a verdict at the expense of justice. As stated in Hunter v. Smallwood, supra, the rule is designed to prevent jury tampering and to suppress the dissatisfied juror.

Although abuse of the procedure could be damaging and cannot be condoned, it is fully appropriate and customary for counsel to talk with jurors after the verdict has been rendered. Indeed, Rule 59(a)(2) of the Utah Rules of Civil Procedure contemplates as grounds for a new trial, matters which can only be determined by counsel speaking with jurors after the verdict is rendered.

In the present case, the affidavit of Juror Gaylen R. Coles (R. 53; also see Appendix A to this brief) arose from the juror's own later realization that the jury had misapplied the law and from his own request that defendants' counsel contact him to discuss the error. Rather than burdening each of the other jurors with a request that they sign an affidavit attesting their common error (which might have raised a suspicion of jury tampering), defendants' counsel submitted his own affidavit describing the conversation he had with each juror and informing the court that each juror believed the plaintiff was contributorily negligent.

The affidavit of defendants' counsel was not submitted to the court as conclusive evidence of the matters set forth therein,

but was submitted to alert the court that justice had miscarried, and to show substantial cause why the trial court itself should have examined the jurors to determine their correct findings concerning the issue of contributory negligence. Consideration of these affidavits does not in any way threaten the sanctity of jury verdicts, but rather strengthens trial by jury in providing a remedy for an injustice imposed upon defendants which is clearly contrary to applicable Utah law.

If the jurors were not properly instructed on the issue of contributory negligence, then the court should have granted a new trial on that issue. If the jurors failed or refused to apply the correct law to that issue, then they violated their jurors' oath, which constitutes misconduct by the jury and is ground for a new trial. Where the likelihood of error or misconduct was so clearly established by the affidavits before the court, which affidavits were unopposed, the trial court erred and abused its discretion in failing to grant a new trial and in withholding its aid in preventing a miscarriage of justice.

How can a government of laws, in the name of compliance with its procedural or evidentiary rules, allow a verdict to stand which each juror acknowledges is inconsistent with the unanimous findings of the jurors and is inconsistent with the law which should have been applied? If such were the result, we surely would have reached the stage in the disintegration of our legal system where rules originally designed to promote justice have

now become deadly tools to obstruct and prevent it.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO READ JURY INSTRUCTION NO. 1-A TO THE JURY

Jury Instruction No. 1-A states:

> You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action. (R. 128)

This is a standard jury instruction designated as J.I.F.U. Instruction 1.5. When counsel met with Judge Sawaya in chambers to discuss jury instructions, defendants' counsel requested this instruction (R. 82), which request was granted by the judge who noted his approval thereon. (R. 82)

The court did not furnish to counsel for the parties a complete set of the jury instructions in the order in which they were given. Counsel for the parties had three sets of jury instructions: those requested by the plaintiff, those requested by the defendant, and those standard instructions which the court said it would give in addition to certain designated instructions requested by the parties.

Through a clerical oversight, Instruction No. 1-A was not included in the instructions read by the court to the jury. This omission was not observed by defendants' counsel until plaintiffs' counsel had commenced his highly emotional argument through most

of which plaintiff, Judith Johnson, sat at the counsel table in tears. At one point, when speaking of the accident and the plaintiff's injuries, plaintiffs' counsel became emotional, choked up, asked the jury's indulgence while he paused, withdrew a handkerchief from his pocket and wiped away the tears from his own eyes. (Tr. 169.; See also Supplemental Transcript of Proceedings on October 6, 1975, pp. 3 and 4)

As soon as plaintiff's counsel concluded the opening portion of his closing testimony, the court ordered a brief recess, whereupon counsel for the parties met with Judge Sawaya in chambers. The court acknowledged that defendants' requested Jury Instruction No. 9 had been inadvertently omitted from the jury instructions given. The court expressed reluctance, however, about highlighting that instruction by reading it separately to the jury at that stage. To help minimize the damage done by such omission, defendants' counsel agreed to read Instruction 1-A during his closing argument without reference to the fact that it had not been read by the court. The omitted instruction was assigned its No. 1-A and a copy was placed in the compilation of jury instructions sent with the jury to the jury room. (See Supplemental Transcript of Proceedings on October 6, 1975, pp. 3 and 4)

Because the jury did not receive directly from the judge the contents of the omitted instruction, any effort by defendants' counsel to supply the contents of that instruction was insuf-

ficient to instill in the jury the importance of the instruction since it lacked the explicit authoritative approval by the court.

While it is impossible to know whether the jury thought that Jury Instruction No. 1-A had been read to them by the judge or whether they thought defendants' counsel was usurping the prerogatives of the court by giving instructions not included with those given by the court, the irregularity in failing to give such a basic, standard instruction, especially in view of the emotion demonstrated in the courtroom by plaintiffs and their counsel, was of substantial prejudice to the defendants and a proper ground meriting reversal or a new trial.

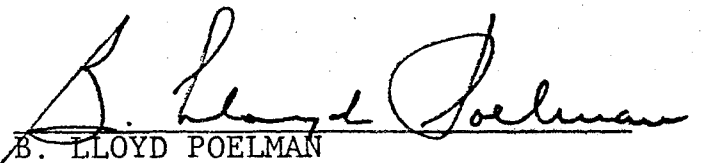
CONCLUSION

Because the court (1) failed to instruct the jury that a finding of contributory negligence would bar an award of damages to the plaintiff, (2) failed to submit the issues to the jury on a special vereict where great confusion existed concerning a change in the law and what law was applicable to the present case, (3) failed to summon the jury panel and rectify the miscarriage of justice which was apparent from unopposed affidavits and (4) omitted reading to the jury a standard instruction that they must weigh and consider the case without regard to sympathy, prejudice or passion for or against any party to the action, the court should either have entered a judgment notwithstanding the verdict or granted defendants' motion for a new trial.

Accordingly, the judgment of the trial court should be reversed or the case remanded for a new trial.

Respectfully submitted,

POELMAN, FOX, EDWARDS & OSWALD

By 

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Served two (2) copies of the foregoing Brief on Respondents by delivering them to E. H. Fankhauser at 430 Judge Building, Salt Lake City, Utah, this 1st day of March, 1976.

APPENDIX A

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IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

FLOYD A. JOHNSON and FLOYD A. JOHNSON as guardian ad litem for JUDITH JOHNSON, a minor,

Plaintiffs,

vs.

JOLENE JAYE SIMONS, a minor, and DAN C. SIMONS,

Defendants.

AFFIDAVIT

Civil No. 216,731

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

The undersigned Galen R. Coles, being first duly sworn on oath deposes and says:

1. I am one of the jurors which was selected as part of the panel which heard the above-entitled case on September 9 through September 11, 1975, having voted in favor of the verdict which was entered on September 11, 1975.

2. Shortly after entering the jury room and selecting a foreman, a poll was taken by the jurors to determine whether they believed that either the defendant Jolene Simons or the plaintiff Judith Johnson was negligent in causing the automobile-pedestrian accident on June 13, 1973. The results of that poll were that all jurors stated that they believed the plaintiff Judith Johnson was negligent and all of the jurors except George S. Davis stated that they believed the defendant Jolene Simons was negligent.

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3. Having so determined, the jurors then proceeded to determine what damages should be awarded to the plaintiff.

4. It is my clear understanding and firm belief that at the time the award was made and the verdict entered all of the members of the jury panel, myself included, believed that at the time of the accident the plaintiff Judith Johnson was standing in the roadway and that she was negligent in being there rather than remaining off to the side of the roadway until it was safe for her to cross or otherwise move upon the roadway.

5. I further firmly believe that none of the jurors understood that if we found the plaintiff to be contributorily negligent then no award of damages should have been made.

6. I have read the foregoing and declare the content thereof to be true of my own knowledge except as to matters set forth upon information and belief and as to such matters I believe them to be true.

Galen R. Coles

GALEN R. COLES
4458 Honeywood Lane
Salt Lake City, Utah

Subscribed and sworn to before me this 18TH day of September, 1975.

S. Lynn Pedersen

NOTARY PUBLIC
Residing at Salt Lake City, Utah

My commission expires:

9-25-77

STRONG, PUGSLEY, WEIR, ...
THE BENEFICIAL LIFE TOWER
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IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

FLOYD A. JOHNSON and FLOYD A. JOHNSON as guardian ad litem for JUDITH JOHNSON, a minor,

Plaintiffs,

vs.

JOLENE JAYE SIMONS, a minor, and DAN C. SIMONS,

Defendants.

A F F I D A V I T

Civil No. 216,731

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

The undersigned B. Lloyd Poelman, first being duly sworn on oath deposes and says:

1. I am counsel for defendants in this action and I am familiar with the proceedings herein.

2. On September 11, 1975, after two days of evidence and testimony, the above entitled court submitted the issues in this action to the panel of eight jurors, namely George S. Davis, Helen Dille, Robyn Johanson, Wayne Croft, Galen R. Coles, Faline L. Beal, Gerald J. Facer, and Karen L. Cannon.

3. The case was submitted upon instructions requiring the jury to find of favor of the defendants if they found that the plaintiff Judith Johnson was contributorily negligent in causing the accident and the injuries suffered on January 13, 1973. The jury returned its verdict in favor of the plaintiff and awarding judgment against the defendants in the sum of $1,500 for special damages and $35,000 general damages.

4. I have spoken with all eight of the jurors. In each instance the jurors voluntarily stated to me that they found that both Judith Johnson and Jolene Jaye Simons were negligent in causing the accident and injuries. My first question to each of the jurors was why they awarded $1,500 in special damages rather than $6,774.83, which was the total of the invoices submitted. The jurors uniformly stated that they did so because they believed that insurance had probably paid 80% of the medical expenses incurred. My next question in each instance was where they believed Judith Johnson was standing when she was struck. All of the jurors reported that they concluded she was standing in the road. All of the jurors also stated that Judith Johnson was negligent in standing on the road rather than remaining off the road until the way was clear for her to proceed.

5. On September 13, 1975 at 1:30 o'clock p.m. I telephoned Robyn Johanson (484-9864), who stated "It was my own personal feeling that there was negligence on the part of both girls but that more fault fell on the driver." He also stated that the Johnson girl was on the street and that it was negligent for her to be there at the time of the accident. He stated that the jurors speculated on whether there was insurance and that is why they awarded only a part of the special damages.

6. On September 13, 1975 at 1:40 o'clock p.m. I telephoned Faline L. Beal (266-8763), who served as foreman of the jury. Mrs. Beal stated that she definitely believed that there was negligence on the part of both parties, that she assumed Miss Johnson was on the street at the time of the accident, and that the amount of the award which otherwise would have been made was lowered because Miss Johnson was also negligent.

7. On September 13, 1975 at 1:45 o'clock p.m. I telephoned Gerald J. Facer (299-0736), who stated that it was apparent from the invoice billings comprising Exhibit P-8 that Mr.

Johnson had insurance coverage, which the jurors assumed was with Aetna through his Federal Government employment. He said, "The reason we cut it (the award) down so far was that the group felt she was standing in the roadway and there was negligence on both girls." Mr. Facer also stated that all seven of the jurors who voted in favor of the verdict thought there was negligence on both parties. When I asked Mr. Facer whether he was aware that if the jury found Miss Johnson was contributorily negligent they should not have made a money award, he replied that the group felt that the greater negligence was on Jolene.

8. On September 14, 1975 at 2:45 o'clock p.m. I telephoned Karen L. Cannon (966-0346), who stated "I figured the accident was both of their fault." She said she concluded that the Johnson girl was on the road at the time of the accident and that she should not have been on the street. She said in her judgment the girls shared the blame 50-50. When I asked whether she was aware that no money award should have been granted if both parties were negligent, she said that she and one of the male jurors thought that was the instruction and asked about it; that the jury foreman looked through the instructions and couldn't find anything to that effect; and that consequently the seven jurors voted in favor of an award even though they believed Judith Johnson was also negligent.

9. On September 15, 1975 at 8:50 o'clock a.m. I telephoned Helen Dille (364-8264), who stated that the jury assumed there was insurance coverage and therefore they awarded only part of the special damages. She further stated that she believed both parties were at fault in causing the accident and that she was not aware that no award should be given if they believed Judith Johnson was also partly at fault in causing the accident.

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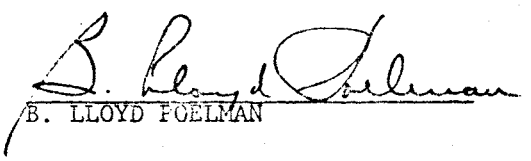
10. On September 15, 1975 I received a telephone message asking me to phone Galen R. Coles. I phoned him at home that evening and he said that he had come to the conclusion that the jury had not followed the instructions of the court and he felt terrible about it. He explained that shortly after retiring to the jury room and selecting a foreman, a straw poll was taken and all of the jurors except Mr. Davis stated their belief that both of the girls were negligent in causing the accident, but Mr. Davis believed only the pedestrian was negligent. Mr. Coles also stated his personal belief that Miss Johnson was standing in the roadway at the time of the collision and that she was negligent in being there.

11. On September 17, 1975 at 9:45 o'clock a.m. I telephoned Wayne Croft at his place of employment (486-1304). Mr. Croft stated that he believed Judith Johnson was standing in the roadway at the time of the accident and in so doing she was contributorily negligent. He further stated that he understood the instructions of the court to mean that if she was contributorily negligent no award of damages should be made to the plaintiffs, but that he disregarded that instruction and made an award of damages anyway because he knew that Miss Johnson had suffered a great deal.

12. I have read the foregoing and declare the content thereof to be true of my own knowledge except as to matters set forth upon information and belief and as to such matters I believe them to be true.



B. LLOYD FOELMAN