

1979

Jerald L. Kilpack v. LaMark Wignall and David Wignall : Brief of Respondents

Utah Supreme Court

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and as Counsel for
JES ALLEN KIRK

Plaintiffs

vs.

LEMARK WICKALL and DAVID WICKALL

Defendants.

BRIEF OF DEFENDANTS

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JERALD L. KILPACK, individually
and as Guardian Ad Litem for
JESS ALLRED KILPACK,

Plaintiff,

vs.

LaMARK WIGNALL and DAVID WIGNALL,

Defendants.

Case No. 16175

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an action in tort for personal injuries alleged to have been caused the Plaintiff-Appellant, Jess Kilpack, in a farm accident on June 21, 1976, in Payson, Utah. Plaintiff-Appellant claims that Defendants-Respondents negligently caused the injuries complained of in the Complaint.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury in the Fourth Judicial District Court on October 2, 3, and 4, 1978. The issues were submitted to the jury on a Special Verdict form and the jury found that the Defendants-Respondents were not negligent and determined Plaintiff-Appellants special damages at \$5,594.63, but indicated by a dash ("---") that there were no general damages. Pursuant to the answers to the Special Verdict form, the Court entered judgment in favor of Defendants-Respondents and against Plaintiff-Appellants, no cause of action. The Court subsequently denied Plaintiff's Motion For a New Trial or in the Alternative For a Judgment Notwithstanding the Verdict.

RELIEF SOUGHT ON APPEAL

Defendants-Respondents seek to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

On June 21, 1976, at about 3:00 p.m., Jess Kilpack was injured in a farm accident at his Uncle Mark Wignall's farm in Payson, Utah. Visiting at the Wignall farm on the day of the accident were two sisters, Edna Kilpack and 6 of her 10 children and Rhea Wilson and her 4 children. The Wignalls had 6 children. After the three sisters, Mrs. Kilpack, Mrs. Wilson and Mrs. Wignall had gone shopping, taking some of the younger children with them, of those that remained, 5 children, Denny Wilson, age 9, Joel Kilpack, age 9, Jess Kilpack, age 7, Dennis Wilson, age 6 and Debbie Wilson, age 5, asked Uncle Mark Wignall if they could go to the hay field with him. Uncle Mark Wignall consented. The 5 children got into the bed of the truck and were driven 1-2 miles to the hay field, where a ferris wheel loader was hooked onto the truck. Uncle Mark Wignall told the children that "they would either have to get in the cab or clear out away from the truck into the field." (Tr. 77).

"Q. After the truck arrived at the field what, if any instructions or directions did you give to the children regarding what they should do or where they should ride?

A. When we stopped the truck in the field and the Ferris Wheel was being hooked up, I told them that they could not ride in the back, since hay would be coming in there and that they would either have to get in the cab or clear out away from the truck into the field." (Tr. p. 77:16-24).

The 2 older boys went out into the field and the 3 other children got into the cab.

David Wignall, age 20, drove the truck and traveled down the field at about 5 m.p.h. (Tr. 61 and 81).

"Q. How fast in terms of miles per hour was the truck traveling, other than the times it stopped for bale jumps as it proceeded down the field back and forth?

A. Five miles an hour." (Tr. p. 61:23-26)

As the ferris wheel loader picked up the bales of hay about every 5-10 seconds (Tr. 86), Mark Wignall took them off and placed them in the bed of the truck.

About 5 minutes into the haying baling operation, the 3 children in the cab climbed out the window on the passenger side and down onto the running board. David told the children to "get back in the cab." (Tr. 60)

"Q. Did there come a time when the smaller children departed out the cab climbing through the window?

A. Yes." (Tr. p. 59:29-30, p. 60:1)

* * * * *

"Q. And did you say something to them about getting back in?

A. Yes, I did.

Q. What did you say?

A. I told them to get back in the cab.

Q. And that was at what point? After they were out or --

A. After they was out." (Tr. 60:10-17)

The two younger children, Dennis Wilson, age 6, and Debbie Wilson, age 5, obeyed and got back in the cab. (Tr. 60). Jess Kilpack did not obey and stayed on the running board. (Tr. 60).

"Q. And did any of them get back in the cab?

A. Yes, two of them got back in, the two Wilson kids, and Jess stayed back out, stayed out on the running board." (Tr. p. 60:18-21)

While David Wignall did not enforce his request, it was apparently stern enough to have an effect on the two younger children, although not Jess Kilpack.

"Q. Did you say anything else to those three little kids, other than just 'get back in'?"

A. No.

Q. Did you make any effort to really enforce it?

A. No." (Tr. p. 61:18-22).

David Wignall could only see Jess Kilpack's head and thus, he did not know what he was doing on the running board.

"Q. Could you see Jess Kilpack riding on the running board, hanging on out there prior to the time he jumped?

A. Yes.

Q. How much of his body was visible through the passenger window?

A. Oh, just his head." (Tr. p. 63:12-18)

Jess Kippack remained on the turning board for about 15 minutes and then apparently jumped off onto a bale of hay, slipped and fell back under the right rear dual

wheels of the truck, which ran over him.

"Q. 'How long was it after they went out the window, from that point to the time of the accident? You had been out in the field twenty minutes?'

'Probably about fifteen minutes or so.'"
(Tr. p. 63:26-29)

David Wignall observed the two older boys out in the field away from the truck straightening bales of hay and "on an occasion or two" (Tr. 58), they returned to the truck and jumped off the running board and went back out in the field to straighten bales of hay again. (Tr. 58).

"Q. Okay. What happened after you started down through the field relative to the activity of Joel and Jess? Did you observe them come back to the truck on an occasion or two?

A. Yes.

Q. Climb up on the running board?

A. Yes.

Q. Ride for a period of time, then jump off again?

A. Yes." (Tr. p. 58:12-20)

* * * * *

"Q. Okay. You observed them straightening hay bales, then returning to the truck, jumping up on the running board riding and off again and running and straightening hay bales again.

A. Yes." (Tr. p. 58:27-30, p. 59:1)

Mark Wignall observed the two older boys out in the field away from the truck, but "didn't observe anything" with regard to their coming back to the truck. (Tr. 79).

"Q. Prior to the accident, what did you notice respecting the activities of the two nine year old boys, since you indicated they had gone out ahead of the truck to straighten up hay bales?

A. I noticed the two older boys out away from the truck some distance into the field." (Tr. p. 78:30, p. 79:1-5)

* * * * *

"Q. What did you observe regarding the activities thereafter relative to coming back to the truck?

A. I didn't observe anything." (Tr. p. 79:8-10)

Mark Wignall did not see the children climb out of the window, but he did notice at some point that some children, he doesn't recall which ones, were on the running board.

"Q. Did you observe anything with respect to the activities of the children in the -- who were initially in the cab as you were loading hay onto the back prior to the time the accident occurred?

A. Yes.

Q. What did you notice? What did you observe?

A. I noticed they were on the running board.

Q. Do you recall which ones you noticed out there on the running board?

A. No, sir.

Q. Do you remember them -- do you remember seeing them actually in climbing activity out of the window onto the running board?

A. No, sir." (Tr. p. 79:13-26)

Because of the height of the siding on the truck, it was "difficult for him to see what was going on on the running board." (Tr. 85). "Relative to the time of the accident happening, he did not observe anything at all before the time Jess got run over." (Tr. 85).

"Q. At line 15, the question was asked: 'Do you recall, though, that your vision became obstructed as to what the kids were or were doing before the accident.' Can you read your answer?

Answer: 'Yes, it was necessary for me to go back. The Ferris Wheel delivers the bale in approximately the middle of the truck and it was necessary for me to take the bale from there and place it. In placing them at the front, I would be going up and back and it would make it difficult for me to see because of the height of the bed. Difficult for me to see what was going on on the running board.'

Question: 'Relative to the time of the accident happening did you observe anything at all before the time Jess got run over?'

Could you read your answer?

Answer: 'No.' (Tr. p. 85:13-29)

There was no screaming or yelling by the children prior to the accident.

"Q. Did you hear anything relative to children

screaming or yelling prior to the time Jess was

run over?

A. No." (Tr. p. 81:19-20)

The truck had been in the field about 20 minutes prior to the accident.

"Q. How long had the truck been in the field gathering bales before the accident?

A. I don't know. I would guess probably twenty minutes.

Q. Had the truck -- at what speed, average speed, was the truck traveling in gathering bales on that occasion?

A. Average would probably be from five to eight miles an hour, I would guess." (Tr. P. 31-9-16)

Mark Wignall and David Wignall had been on 2-3 prior trips to the hay field that day before the accident. They were not in any particular hurry to get the work done. (Tr. 87). Danny Wilson, age 9, had been out on prior trips and David Wignall thought Joel Kilpack, age 9, had been out on a prior trip. (Tr. 66). The children had not gone out to assist the Wignalls in any way.

"Q. Were the children going out to the hay field to assist you in any way?

A. No." (Tr. p. 85:5-7)

Jess Kilpack testified that his parents had told him "it was dangerous to be around moving cars and moving trucks." (Tr. 40) As soon as they got to the hay field, David and Mark told Jess to "get into the cab" (Tr. 46) and to "be careful." (Tr. 45-46). Jess had been on a merry-go-round before and knew it would be dangerous to jump off before it stopped. (Tr. 42). He jumped off the running board so he could go play with Joel and Danny, but he didn't know why he jumped onto the bale of hay instead of onto the ground. (Tr. 42). The truck would stop from time to time when a bale of hay would get stuck in the loader (Tr. 69). No one saw him jump and he doesn't know if anyone was aware that he was going to jump. (Tr. 43-44). After he jumped onto the bale of hay, he fell backwards towards the truck. (Tr. 36). The bales of hay in height were about even with the height of the running board, were anywhere from against the running board to 3-4 feet away and were dry and very hot slippery. (Tr. 68-70)

Elna Kilpack, Jess' mother, testified that they had visited the Wignall farm with their children on three prior occasions, and she and her husband had participated in a "hay gathering operation." She acknowledged that "a farm per se has many places on it where children could get in trouble", but didn't recall giving any instructions to Joel and Jess on this occasion. She knew "Mark and his boys had been involved in the hay gathering operation earlier in the day." When she and her two sisters left to go on an errand, she left Joel and Jess "in the care of DeLynn", her 14-year-old daughter, who was there visiting the 16-year-old Wignall girl. (See Exhibit B included herein).

In regard to Jess Kilpack's injuries, his mother, Elna Kilpack, testified as follows:

"Q. Could I get you to turn to page 14 of your deposition, particularly line 21. This was a question asked on January 8, 1977, by me.

Question: 'As far as getting along now with the normal affairs of life, physically speaking, how is he doing?'

What was your answer?

Answer: 'He does fine. He looks a little crooked, but he is really doing fine.'

Question: 'Looks crooked? In what way does he look crooked?'

Read your answer.

Answer: 'His body looks a little crooked. It looks like one leg is -- he is a little twisted right in the buttocks area.'

Question: 'Physically, what else have you noticed about him in terms of what he can or can't do now?'

Answer: 'He can do pretty near everything.'

Question: 'He mentions he doesn't run as fast. Do you have a comment in that regard?'

Answer: 'Well, he doesn't, but he does run. I am grateful that he even runs. He is more of a nervous type child than he ever was before. Any little thing -- he just screams in a high pitched tone and all the other kids complain that he is spoiled. He doesn't have any patience for taking anything.'

Question: 'What differences have you noticed about Jess after the accident that are different than what he was like before the accident?'

Answer: 'That's all, just those.'

Q. That was your testimony on that occasion?

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Q. Was it true?
A. Yes, but I still think we need to watch him and he still continues to have problems." (See Exhibit B included

ARGUMENT

Point I

REASONABLE PERSONS COULD REACH DIFFERING CONCLUSIONS AS TO WHETHER OR NOT DEFENDANTS WERE NEGLIGENT AND THUS, THE ISSUE WAS PROPERLY SUBMITTED TO THE JURY AND THERE WAS AN EVIDENTIARY BASIS FOR THE JURY'S VERDICT THAT DEFENDANTS WERE NOT NEGLIGENT

Plaintiff-Respondent does not question the court's instructions on the law in this case. Plaintiff-Respondent argues that the court was in error in failing to grant (1) a Motion For a Directed Verdict that Defendants were negligent as a matter of law and (2) a Motion For a New Trial or in the Alternative a Judgment Notwithstanding the Verdict. This court has recently stated the law with respect to reviewing the trial court's actions in Anderson v. Bradley, filed January 22, 1979, as follows:

"The law in Utah is clear that if reasonable minds could have found as the jury did from the evidence before it, then this Court cannot say that the trial court abused its discretion in denying a party's motion for a new trial on the ground of insufficiency of the evidence to support the verdict."

This Court also stated, in McCloud v. Baum, 569 P2d 1125 (Utah, 1977), as follows:

"In reviewing a trial court's rulings pertaining to motions for a directed verdict or judgment n.o. v., this Court reviews the evidence in the light most favorable to the non-moving party and to afford him the benefit of all inferences which the evidence fairly supports. If reasonable persons could reach differing conclusions on the issue in controversy, a jury question exists and the motion should be denied."

* * * * *

"In reviewing a trial court's exercise of discretion upon a motion for a new trial, this court examines the record to determine whether the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. If there be an evidentiary basis for the jury's decision, then the denial of the new trial must be affirmed."

Defendant-Respondents respectfully submit that based upon the facts of this case, "reasonable minds could reach differing conclusions on the issue

in controversy," i.e. Defendant's negligence and thus, the Court properly denied Plaintiff-Appellants' Motion For a Directed Verdict and Judgment Notwithstanding the Verdict.

Defendant-Respondents also respectfully submit that based on the facts of this case, there was an "evidentiary basis for the jury's decision", that Defendants were not negligent and thus, the Court properly denied Plaintiff-Appellant's Motion For a New Trial.

The Court instructed the jury that:

"Burden of proof means the burden of persuasion. A party who has the burden of proof must persuade you that his claim is more probably true than not true . . . In this case, the Plaintiffs have the burden of persuading you that the Defendant or either of them were negligent and that such negligence was a proximate cause of the injuries and the extent of damages, if any." (R. 50).

The Court then instructed with regard to negligence and Defendant's duty, as follows:

"Negligence is the lack of ordinary care. It is the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing." (R. 48).

* * * * *

"It is the duty of the driver of a motor vehicle to use reasonable care under the circumstances in driving that vehicle to avoid danger to himself and others and to observe and be aware of the conditions at the time and place and under the circumstances then existing.

In this connection it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, they often are thoughtless and impulsive, imposes a duty to exercise a degree of vigilance and caution commensurate with such circumstances in dealing with children."

(R. 51)

The jury considered the evidence and determined that Plaintiff-Appellants had failed to carry their burden of persuasion that it more probably was true than not true that Defendant-Respondents were negligent. Thus, on the Special Verdict form, the jury answered that Defendant-Respondents were not negligent.

It would be speculative to suggest what factors the jury relied upon in reaching their decision that Defendant-Respondents were not negligent. As this court has recently pointed out in Weeks v. Calderwood, filed January 25, 1979:

"There is no proper means by which we can presume to dissect the jury's deliberations and determine just what factors went into the composite of the verdict."

As additional support for the correctness of the jury's decision was the trial court's refusal to grant Plaintiff-Appellants Motion For a New Trial or Judgment Notwithstanding The Verdict. In this regard, this Court stated, in Weeks v. Calderwood, supra:

"Supplementary to what has just been said, and to be considered in combination therewith, it is the trial court's primary responsibility and prerogative to judge such an attack upon a jury verdict; and that when he has so considered and passed thereon, that adds some further solidarity to the verdict and judgment, and increases the reluctance of this Court to interfere therewith."

The only case cited by Plaintiff-Appellants in support of their argument that based on the facts, reasonable minds would not differ as to Defendants negligence, was Butler v. Sports Haven International, 563 P2d 1245 (Utah, 1977). However, in that case, the lower court had granted Defendant's Motion For Summary Judgment and the Supreme Court reversed holding that Plaintiff should be given the opportunity of presenting his case to a jury. The basis for the court's ruling was stated as follows:

"If there is doubt or uncertainty as to the questions of negligence, proximate cause, or contributory negligence, such that reasonable minds might conclude differently thereon, the doubt should be resolved in favor of granting the plaintiff the privilege of attempting to prove his right to recover on a trial."

The Court recognized that there are "hazards inherent in an open swimming pool, particularly where small children are about" and thus, ruled that "the proposition is sound that reasonable minds may differ as to whether what the Defendant did or failed to do . . . met the required standards of reasonable care under all the circumstances."

In the case at bar, Plaintiff-Appellants were "granted the privilege of attempting to prove their right to recover" to a jury, but the jury found that Plaintiff-Appellants had failed to persuade them that Defendants were negligent under the facts in evidence. A reasonably prudent person cannot always anticipate what a child may do and thus, cannot always protect children from the thoughtless and impulsive acts which children sometimes do, notwithstanding the exercise of vigilance and caution by a reasonably prudent person commensurate with the circumstances.

It is respectfully submitted that under the facts of this case, "reasonable minds might conclude differently" and thus, the Court properly submitted the issue of Defendants negligence to the jury and further, that the jury verdict that Defendants were not negligent was supported by the evidence.

Point II

SINCE THE JURY DETERMINED THAT DEFENDANT-RESPONDENTS WERE NOT NEGLIGENT, THE JURY DID NOT HAVE TO DETERMINE WHETHER OR NOT JESS KILPACK WAS NEGLIGENT NOR DID THE JURY MAKE ANY SUCH DETERMINATION AND IF JURY VERDICT WAS INSUFFICIENT, PLAINTIFF-APPELLANTS WAIVED THEIR RIGHTS TO OBJECT THERETO

On the Special Verdict form, the jury answered question No. 1 as follows:

"(1) Were the Defendants, Wignall, or either of them negligent at the time of the occurrence in question?

Answer: No
(Yes or No)

The jury was not required to answer question No. 2 concerning proximate cause because it stated:

"(2) If your answer to question No. 1 is yes, then answer the following question:" (Emphasis added).

The third and fourth questions were the same as the first and second questions, except they related to Jess Kilpack. The jury did not answer either of these questions. It is submitted that the reason they didn't answer the third and fourth questions was because they didn't feel it was necessary. The jury did not answer the fifth question concerning the percentage apportionment of fault between the parties either because it provided that:

"(5) If you have answered all the previous questions "yes" then, and only then are you to answer this question:" (Emphasis added).

Thus, while the answer to question No. 3 concerning whether or not Jess Kilpack was negligent may have been interesting, it was not necessary to determine once the jury determined its answer to question No. 1 that Defendant-Respondents were not negligent.

Rule 47(r) of the Utah Rules of Civil Procedure states:

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

The transcript of record, a copy of which is included herein, as Exhibit A, reflects the identical facts that existed in Weeks v. Calderwood, supra, where this Court stated those facts and ruled as follows:

"At the time the verdict was returned, it was read and taken cognizance of by the court; and the jurors were individually polled as to their agreement therewith. The court then thanked them for their service and excused them. Meanwhile, Plaintiff's counsel sat silently by and made no objection to the verdict until after the jury had left the courtroom. We have heretofore held that under such circumstances, the failure of a party to object to a jury verdict until after the jury has been dismissed, thus removing the possibility of having the jury sent out to further consider or correct its verdict, is the party's right to do so."

Therefore, it is respectfully submitted that Plaintiff-Appellants waived their rights to have the jury make any determination as to whether or not Jess Kilpack was or was not negligent. In addition, since the jury had already made a determination that Defendant-Respondents were not negligent, it really doesn't matter with respect to the final disposition of this matter whether Jess Kilpack was or was not negligent.

Point III

THERE WAS NO IRREGULARITY IN THE PROCEEDINGS OF THE JURY

Plaintiff-Appellants argue that the jury verdict was insufficient because the jury determined special damages, but made no determination with respect to general damages. In this regard, the answer to question No. 6 in the Special Verdict returned by the jury read as follows:

"(6) Without regard to any of the previous questions and your answers thereto, state the amount of damages sustained by the Plaintiffs as a result of the occurrence:

Special damage sustained
by Plaintiff, Jerald

Kilpack \$ 5,594.63

General damage sustained

by Plaintiff, Jess Kilpack \$ " (See Special Verdict)

The Court properly instructed the jury with respect to what special and general damages were and Plaintiff-Appellants do not contend otherwise. Plaintiff-Appellants contend that the jury "disregarded the courts instructions, particularly its instruction as to how to approach the damage question."

Again, however, Plaintiff-Appellant waived their rights to have the jury make a determination as to general damages. Weeks v. Calderwood, *supra*.

In both Cohn v. J. C. Penney Company, Inc., 537 P2d 306 (Utah, 1975) and Langton v. International Transport, Inc., 491 P2d 1211 (Utah, 1971) a similar occurrence took place. The respective juries, in both cases, returned verdicts for the

exact amount of the Plaintiff's claimed special damages, but for no general damages

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and in these two instances, the verdict forms did provide spaces for both general
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and special damages. Subsequent to the verdicts and the dismissal of the juries, counsel for both Plaintiffs filed motions for new trials.

In Cohn, this Court said:

"The verdict was deficient in form, and counsel had an opportunity to have the jury sent back for further deliberations. This he did not do, perhaps fearing that the jury might either award some nominal amount or even change the verdict and award nothing to the Plaintiff. It would be a smart trial tactic if he could have had a new trial on damages only before a jury, which would not be acquainted with the weakness of Plaintiff's cause of action. (At 311-12)."

In Langton, this Court said:

"If counsel be permitted to remain mute when a verdict is insufficient or informal, he gains an unfair strategic advantage.*** The silence of Plaintiff's counsel, upon hearing the verdict is comprehensible, he could reasonably have concluded that the jury was unsympathetic to his cause or parsimonious, and he would, of course, prefer a new jury. There must be reasonable rules to control the termination of litigation; if counsel has an opportunity to correct error at the time of its occurrence and he fails to do so, any objection based thereupon is waived. (At 1215)."

It is respectfully submitted that Plaintiff-Appellants counsel's failure to object, so as to have the jury sent back for further deliberations on the amount of general damages, waives any irregularity in the verdict. The damage issue has been determined by the jury and Plaintiffs-Appellants failure to timely object thereto constitutes a waiver and even assuming, arguendo, that this Court was to grant a new trial on the issue of liability, no new trial should be granted with respect to damages.

Plaintiff-Appellants also contend that there was an "irregularity in the proceedings of the jury" in that since the jury "deliberated" for only "one hour to one hour and fifteen minutes" and such "deliberations were during the "jury's lunch period," that "the jury could not have sincerely and conscientiously considered the case and followed the court's instructions."

First it should be pointed out that the jury did not go out for lunch, since their lunch was brought in to them, they reportedly opened their deliberations with prayer, and they remained in the jury room from the time they were sent out, which the record does not reflect, although it was sometime before the noon hour, until they returned with a verdict, which according to the transcript included herein as Exhibit A, was "at the hour of 1:35 p.m." Thus, the jury was out for at least 1 1/2 hours and possibly up to two hours.

Second, regarding the length of time a jury deliberates, the Washington Supreme Court has held that a jury is not guilty of misconduct in a personal injury action merely because it returned a verdict for Defendants after deliberating only 40 minutes, where it could not be said that the issues in the case were so complicated that they could not be decided within 40 minutes. Burback v. Bucher, 355 P2d 981 at 985 (1960).

The issues in this case were fairly simple in that the jury had to determine whether or not either of the parties were negligent and the amount of damages suffered by Plaintiff-Appellants. The Court gave only 12 instructions, which though brief, were straight-forward, correct and adequately covered the law as it applied to the issues which the jury had to decide. The jurors are entitled to a presumption that they conscientiously performed their duties in accordance with their oath. As was stated by this Court in Weeks v. Calderwood, supra:

"The presumption is that jurors conscientiously perform their duties in accordance with their oath and have judged the case according to the evidence presented in Court and the law as stated in the instructions; and this presumption prevails in the absence of some definite and persuasive proof of misconduct from which there would be a substantial likelihood of a different result in the trial. Added to this is the principle that the deliberations of the jury are not ordinarily subject to impeachment."

Plaintiff-Appellants have presented no evidence of any misconduct on the part of the jury. It is not that the jury did not complete the Special Verdict form that concerns Plaintiff-Appellants. It is that the jury did not complete it the way Plaintiff-Appellants think that it should have been completed.

This Court, in Robinson v. Hreinson, 17 Utah 2d 261, 409 P2d 121 (1968), made the following appropriate statements concerning jurors:

"Adjudications upon the functioning of a jury cannot be based upon the assumption that jurors are dishonest or corrupt. . . . On the contrary the success and the merit of the system, which has so long stood the test of time, is necessarily grounded upon what we believe to be the sound premise: that for the most part jurors take their responsibilities seriously; that they attempt to judge the rights of their fellow citizens fairly; and to appraise damages honestly."

Plaintiff-Appellants also contend that there were "inadequate damages appearing to have been given under passion or prejudice", but cite nothing that was done in Court to support such a claim other than a dissatisfaction with the jury verdict. The jury may not have given the same effort to determining damages that they would have given had they determined that Defendant-Respondents were negligent, but Plaintiff-Appellants waived whatever rights they had with respect thereto by failing to object and request that the jury be sent out again to complete their verdict.

Finally, Plaintiff-Appellants simply restate prior arguments made in contending that there was an "insufficiency of the evidence to justify the verdict" and "an error at law." Although the position of Defendant-Respondents with regard to these claims has been previously stated herein, Defendant-Respondents would offer these additional observations. Plaintiff-Appellant argues that the evidence was insufficient and maintains that the Court erred as a matter of law, in submitting the issue of negligence to the jury, "because the evidence is so clear that reasonable minds could not differ as to the negligence issues." Assuming the Plaintiff-Appellant and Plaintiff-Appellant's counsel have reasonable minds, then obviously reasonable minds do differ because the jury found the Defendant-Respondents not to be negligent.

In addressing the issue of granting new trials, the Utah Supreme Court

has set forth the general rule, in Brunson v. Strong, 412 P2d 451 (Utah, 1966), that:

"When both sides have been given an opportunity to present their evidence and contentions to a jury, and a verdict has been rendered, all presumptions support its validity. Consequently, it must stand unless the Appellant shows that error was committed which had such an adverse effect upon the trial that there is a reasonable likelihood that the result would have been different in its absence."

* * * * *

"We do not question the sincerity of Plaintiff's belief that the award of only \$1,000.00 is inadequate compensation for the injury she claims to have suffered to her back. But it is something about which there is room for difference of opinion.*** Due to its acknowledge prerogatives, its advantaged position, and the desirability of safeguarding the integrity of the jury system, the Courts are and should be reluctant to interfere with a jury verdict and will not do so as long as there is any reasonable basis in the evidence to justify it."

In the case at bar, certainly no error "was committed which had such an adverse effect upon the trial that there is a reasonable likelihood that the result would have been different in its absence."

Plaintiff-Appellant further argues that the Court made "an error in the law" because it did not grant Plaintiff-Appellants' Motion For a Directed Verdict or Judgment Notwithstanding The Verdict. Plaintiff-Appellants, of course, maintain that the evidence is so overwhelming that the issue of the Defendant-Respondents' negligence should not have been submitted to the jury. In essence, Plaintiff-Appellants are stating: There was an accident and therefore, the Defendant-Respondents were negligent. Plaintiff-Appellant's whole argument assumes that because a child was injured, someone other than the child must be responsible for that injury. If such was the law, then, of course, there would be no reason to submit any child personal injury liability issues to a jury. But such is not the law. The issue being decided was not whether a child had been injured, but

whether the Defendant-Respondents exercised reasonable care under the circumstances. Defendant-Respondents are not to be judged on the basis of hindsight.

In this regard, the jury was properly instructed as to the duties and responsibilities of the parties in the instructions. The jury then applied these instructions to the facts of this case and found that Defendant-Respondents did not breach any of their duties and responsibilities. Since the question of whether or not Defendant-Respondents were negligent is one upon which reasonable minds can differ, it was properly submitted to the jury.

Plaintiff-Appellants repeatedly speculate throughout their Brief as to the reasons why the jury decided that Defendant-Respondents were not negligent. All such speculation is couched in terms of alleged jury misconduct. Plaintiff-Appellants fail to recognize that the jury, after considering all the evidence and the Court's instructions, may have decided that Plaintiff-Appellants simply failed to carry their burden of persuasion that Defendant-Respondents were negligent, or the jury may have decided that Plaintiff-Appellant's accident was one that just happened without anyone's negligence. While the Court did not so instruct the jury, the law is clear that:

"The mere fact that an accident happened, considered alone, does not support an inference that (Defendant-Respondents) or any party, to this action was negligent." (J.I.F.U. 16.6)

The facts of this case are somewhat similar to a recent episode of the television show "Little House On The Prairie." Charles Engles' daughter, Lora, who is portrayed as 12 or 13, had a friend visiting the farm. The friend wanted to go swimming and Lora agreed to take the friend to the family's favorite swimming hole. While swimming, the friend either slipped on a rock or something, hit her head, and drowned. The friend's mother blamed Lora for the death of her daughter. Lora, of course, was heartbroken. Charles Engles, her father, went into his daughter's room and in an attempt to soothe her shattered feelings, put his arms around her, and shared with her his own bitter experience of his daughter's death.

"'Folks can't fortell the future. Sometimes things just happen. There's no one to blame for it.'"

In other words, some accidents are caused by someone's negligence, whereas, some other accidents just happen and there's no one to blame for it.

In order for the Court to have granted Plaintiff-Appellant's Motion For a Directed Verdict or Judgment Notwithstanding the Verdict, the Plaintiff-Appellant had the burden of proving, as a matter of law, that the Defendant-Respondents did not exercise reasonable care, which, in essence, means that Plaintiff-Appellant must prove that based on the evidence, viewed in the light most favorable to Defendant-Respondents, that reasonable minds could not differ that Defendant-Respondents were negligent. Plaintiff-Appellant failed to establish, as a matter of law, that the Defendant-Respondents did not exercise reasonable care under the circumstances and thus, the lower Court denied its Motion For a Directed Verdict and Plaintiff-Appellant's Motion For a Judgment Notwithstanding the Verdict, which denials are supported by the jury's finding that Defendant-Respondents were not negligent.

Point IV and Point V

WHETHER OR NOT THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A MISTRIAL AND IN DISCHARGING THE FIRST JURY IS IRRELEVANT AND IMMATERIAL TO THE SECOND TRIAL OF THIS CASE

It is respectfully submitted that what the Court did or did not do in the first trial is not relevant or material to this case. Notwithstanding what happened on the first trial, the Plaintiff-Appellants were given a full opportunity in the second trial of this case to fully present their case to the jury.

Plaintiff-Appellants argue that the Court erred in granting Defendant-Respondents' Motion For a Mistrial because of Plaintiff-Appellants obvious attempt to inject the issue of "insurance" into the trial. Two Utah Supreme Court cases,

C. R. Owens Trucking Corporation v. Stewart, 29 Utah 2d 353, 509 P2d 821 (1973)

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and Robinson v. Hreinson, *supra*, do not out-weigh the mere mention of insurance

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does not, in all cases, lead to the conclusion that a jury was prejudiced, or likely to be such an extent that a fair trial could not be had," and affirmed the lower court's denial of a Motion For a Mistrial. However, in another Utah Supreme Court case, Ivie v. Richardson, 9 Utah 2d5, 336 P2d 781 (1959) the Supreme Court reversed a lower court because of the injection of insurance (although this was just one of many circumstances preventing a fair trial) by reason of Plaintiff's lawyer's repeated attempts to identify a man as an insurance agent who had taken a statement from his client.

All three of these Utah Supreme Court cases, however, involved automobile accidents, unlike the case at bar, which involves a farm accident. While the answer to the question of whether or not the inadvertent injection of insurance into an automobile accident case is so prejudicial as to warrant a new trial may be questionable in light of the above referred to decisions, it is respectfully submitted that the deliberate injection of insurance into a non-automobile accident case is a different matter and under the circumstances of the case at bar, the lower court properly granted Defendant-Respondents' Motion For a Mistrial. Whether or not Defendant-Respondents had insurance in this case at bar is immaterial and Plaintiff-Appellants should not have been allowed to ask the jury questions that create an inference that Defendant-Respondents did have insurance.

Notwithstanding what was done, however in the first trial, Plaintiff-Appellants were provided a full and fair opportunity to present their case in a subsequent trial and with respect thereto, the same can be said as was concluded by the Court in Robinson v. Hreinson, supra, as follows:

"The parties have had what they were entitled to: a full and fair opportunity to present their contentions and the evidence supporting them to the Court and jury. When this has been done all presumptions are in favor of the validity of the verdict and judgment."

CONCLUSION

It is respectfully submitted that reasonable persons could reach different conclusions as to whether or not Defendant-Respondents were negligent and thus, the issue was properly submitted to the jury and there was an evidentiary basis for the jury's verdict that the Defendant-Respondents were not negligent and pursuant thereto, this Court should affirm the Judgment entered pursuant to the jury verdict in favor of the Defendant-Respondents and against Plaintiff-Appellants, no cause of action.

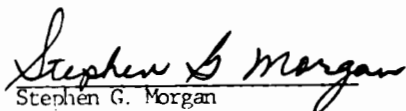
DATED this 23rd day of April, 1979.

MORGAN, SCALLEY & DAVIS


Stephen G. Morgan

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Respondents to David S. Cook, Esquire, Attorney for Plaintiff-Appellants, 85 West 400 North, Bountiful, Utah, 84010, postage prepaid, this 23rd day of April, 1979.


Stephen G. Morgan

ORIGINAL

1 IN THE DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

2

3 JERALD L. KILPACK, individually
and as Guardian ad litem for
4 JESS ALLRED KILPACK, a minor,

Civil No. 45462

5 Plaintiff,

PARTIAL TRANSCRIPT

6 vs.

7 LAMARK WIGNALL and DAVID WIGNALL,

8 Defendants.

9

10

11 October 4, 1978

12 County Building

13 Provo, Utah

14

15 BEFORE: Hon. Allen B. Sorensen
and a Jury

16

17

APPEARANCES:

18

For the Plaintiff: David S. Cook, Esq.
85 West 400 North
Bountiful, Utah 84010

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For the Defendants: Stephen G. Morgan, Esc.
345 South State Street,
Suite 200
Salt Lake City, Utah 84111

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Subscribed and sworn to before me
this 4th day of October
1978 at Provo, Utah

1 (Kilpack v. Wignall)

October 4, 1978
at the hour of 1:35 p.m.

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4 THE COURT: Ladies and Gentlemen
5 of the Jury, have you arrived at a verdict?

6 JURY FOREMAN: Yes.

7 THE COURT: Hand it to the bailiff.

8 (Verdict was handed to the bailiff, and then to
9 the court.)

10 The Clerk will read the verdict.

11 THE CLERK: We the jury find
12 the following answers to questions submitted to us by
13 the court: (1) Were the defendants Wignall or either
14 of them negligent at the time of the occurrence in question?
15 Answer: No. (2).

16 THE COURT: Now they haven't answered
17 2, 3, 4, 5, And 6, read it.

18 THE CLERK: Number 6: Without
19 regard to any of the previous questions and your answers
20 thereto state the amount of damages sustained by the
21 plaintiffs as a result of the occurrence: Special damage
22 sustained by plaintiff Jerald Kilpack: \$5,594.63.
23 General damages sustained by plaintiff Jess Kilpack none.
24 Dated--

25 THE COURT: It doesn't say "none".
26 It's blank.

27 THE CLERK: I can't read the
28 foreman's name.

29 JURY FOREMAN: Gary Stone.

30 THE COURT: Do you wish the jury

1 polled, Mr. Cook?
2 MR. COOK: Yes, I would appreciate it.
3 THE CLERK: Ladies and Gentlemen,
4 would you please answer yes or not to this question:
5 Was this and is this your verdict: Anna Kempton?
6 JUROR KEMPTON: That was my verdict.
7 THE CLERK: Louise Jensen?
8 JUROR JENSEN: That was my verdict.
9 THE CLERK: Donna Points?
10 JUROR POINTS: Yes.
11 THE CLERK: Rex Taylor?
12 JUROR TAYLOR: Yes.
13 THE CLERK: Glade Schwartz?
14 JUROR SCHWARTZ: Yes.
15 THE CLERK: Juanita Mellor?
16 JUROR MELLOR: Yes.
17 THE CLERK: Gary Stone?
18 JUROR STONE: Yes.
19 THE CLERK: And Charlyn Birrell?
20 JUROR BIRRELL: Yes.
21 THE COURT: Ladies and Gentlemen,
22 for your information the law protects absolutely and
23 completely the deliberations of the jury. You are even
24 precluded from testifying about what transpired in the
25 jury room. Sometimes the parties or attorneys or
26 spectators might wish to ask you about those deliberations.
27 You are completely free if you wish to discuss them, but
28 you are completely within your rights to refuse to talk
29 about it.
30 Are these people--

1 THE CLERK: Just on call.

2 THE COURT: On behalf of everyone
3 concerned I thank you for your services here today, and
4 you are on call. You are excused now.

5 (Whereupon, the jury left the courtroom.)

6 I suppose under the statute all I need do now is
7 direct the clerk to enter a verdict of no cause of action,
8 is that correct?

9 MR. COOK: I suppose we will be
10 making a motion.

11 THE COURT: You have ten days to do
12 that.

13 MR. COOK: Correct.

14 THE COURT: Do you want to argue it
15 now?

16 MR. COOK: I have made my argument before
17 the jury, Your Honor.

18 THE COURT: Any other matters to come
19 before the court?

20 We will be in recess.

21 (Court was ordered in recess.)

22

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REPORTER'S CERTIFICATE

I, Stanley C. Roundy, certify that I am an official court reporter in the Fourth Judicial District Court of the State of Utah; that I was present during the proceedings in the case of Kilpack vs. Wignall; that thereat I reported the proceedings in shorthand; that thereafter I caused a portion of my notes thus taken to be transcribed into typewriting; that said transcript is set forth in the foregoing pages numbered from 1 to 4, inclusive; that said partial transcript is a true record of that portion of my notes thus transcribed.

Dated November 7, 1978.



Official Court Reporter

CSR

CROSS-EXAMINATION

1
2 BY MR. MORGAN:

3 Q Mrs. Killpack, as I understand it you had
4 visited the Wignall farm on numerous occasions before the
5 accident?

6 A Not this particular farm, but I had been down
7 there numerous times.

8 Q How many times have you visited this particular
9 farm prior to the accident?

10 A Probably around three.

11 Q And on those occasions would you take your
12 children?

13 A Sometimes I would take part of them. Sometimes
14 I would take all of them.

15 Q On one occasion you and your husband apparently
16 went down and participated in a hay gathering operation?

17 A Yes.

18 Q So you were familiar with what that operation
19 entailed?

20 A Yes.

21 Q At that particular time did Mark and his boys
22 also participate in that hay gathering operation?

23 A At the time we went out?

24 Q Yes.

25 A No, we just went out, but we didn't unload it.
26 I don't know who unloaded it.

27 Q Did you go out and get one load?

28 A We just went out and got one load and brought it
29 back.

30 Q Was that kind of to help them out?

Elina Killpack-C

1 A Yes and it was fun.
2 Q Now would you agree that a farm per se has
3 many places on it wherein children could get in trouble?
4 A Yes.
5 Q More so than maybe at your home?
6 A Yes.
7 Q Knowing that did you ever give any instructions
8 to your children prior to the time you went down to the
9 Wignall farm as to what they should do to be careful?
10 A I don't think so.
11 Q Now once you got down to the farm there came a
12 time apparently when you and your two sisters were going to
13 leave and take your three younger children and leave your
14 other three children on the farm, correct?
15 A Yes.
16 Q Now when you decided to leave apparently you
17 left the three or the two younger children in the care of
18 your fourteen year old daughter Delynn?
19 A Yes.
20 Q And in terms of leaving the children in the
21 care of Delynn what did you say to Delynn, other than
22 "I am leaving"?
23 A "Watch the kids."
24 Q That's it?
25 A (Witness nodded head in the affirmative.)
26 THE COURT: Answer audibly so he can
27 write it down.
28 A "Watch the kids".
29 THE COURT: He doesn't record shakes
30 of the head.

Elina Killpack-C

- 1 Q (By Mr. Morgan) Were the kids there where they
2 could hear you giving that instruction to Delynn?
- 3 A No.
- 4 Q So they wouldn't have known whether you were
5 leaving or in whose care they had been left, would they?
- 6 A They usually know a sister is watching them.
- 7 Q If you're not there?
- 8 A Yes.
- 9 Q They wouldn't have known that by reason of you
10 saying anything to them or Delynn saying anything to them
11 of which you are aware?
- 12 A Well on previous occasions. On this particular
13 time I didn't.
- 14 Q Did you feel comfortable in leaving those two
15 children, a seven year old and a nine year old, in the care
16 of your fourteen year old daughter on the farm?
- 17 A Yes.
- 18 Q And had your fourteen year old daughter been to
19 the farm before?
- 20 A Yes.
- 21 Q She had a friend there I believe, a sixteen
22 year old Wignall girl?
- 23 A Uh-huh.
- 24 Q And were they involved in doing some things
25 together at the time you left?
- 26 A They weren't in any activities, but just visiting,
27 that type of thing.
- 28 Q Visiting in the house?
- 29 A Yes.
- 30 Q So you left giving instruction to Delynn that

Elina Killpack-C

1 you're leaving, "Watch the kids"?

2 A Yes.

3 Q As to whether or not she watched the kids you
4 don't know?

5 A (Witness nodded head.)

6 Q That is correct, isn't it?

7 A Yes.

8 THE COURT: You have to speak up.

9 Q (By Mr. Morgan) And you had never instructed
10 your children what not to do down on the farm, correct?

11 A Well, I had given them instructions here and
12 there about safety all the time, but not that I recall on
13 this particular time.

14 Q You knew that Mark and David and his boys had
15 been involved in the hay gathering operation earlier in the
16 day?

17 A Yes.

18 Q Were you aware that Danny had gone out on prior
19 occasions with Mark and David?

20 A No.

21 Q Was Danny a friend of Joel and Jess?

22 A Danny and Joel are one month apart in their
23 age.

24 Q Now you have testified relative to observations
25 you have made concerning Jess and what he could do before
26 the accident versus what he could do since the accident,
27 have you not?

28 A Yes.

29 Q Could I have Ellna Killpack's deposition
30 published?

Ellna Killpack-C

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THE COURT: You may.

(Whereupon, the deposition was published.)

Q (Continuing by Mr. Morgan) Do you recall your deposition being taken in about -- or on January the 8th, 1977?

A Yes.

Q I call your attention to the end of the deposition. Is that your signature? (Indicating)

A Uh-huh.

Q Does that appear below a statement that you have read the foregoing deposition and that you know the contents thereof and that the same are true of your own knowledge, except as corrected?

A Yes.

Q Could I get you to turn to page 14 of your deposition, particularly line 21. This was a question asked on January 8, 1977 by me.

Question: "As far as getting along right now with the normal affairs of life, physically speaking, how is he doing?"

What was your answer?

Answer: "He does fine. He looks a little crooked, but he is really doing fine."

Question: "Looks crooked? In what way does he look crooked?"

Read your answer.

Answer: "His body looks a little crooked. It looks like one leg is -- he is a little twisted right in the buttocks area."

Question: "Physically, what else have you noticed

Eilna Killpack-C

1 about him in terms of what he can or can't do now?"

2 Answer: "He can do pretty near everything."

3 Question: "He mentions he doesn't run as fast.
4 Do you have a comment in that regard?"

5 Answer: "Well, he doesn't, but he does run. I am
6 grateful that he even runs. He is more of a nervous type
7 child than he ever was before. Any little thing -- he just
8 screams in a high pitched tone and all the other kids complain
9 that he is spoiled. He doesn't have any patience for taking
10 anything."

11 Question: "What differences have you noticed about
12 Jess after the accident that are different than what he was
13 like before the accident?"

14 Answer: "That's all, just those."

15 Q That was your testimony on that occasion?

16 A Uh-huh.

17 Q Was it true?

18 A Yes, but I still think we need to watch him,
19 and he still continues to have problems.

20 MR. MORGAN: That's all.

21 THE COURT: Mr. Cook, anything further
22 with this witness?

23 MR. COOK: Just a couple of questions,
24 Your Honor.

25
26 REDIRECT EXAMINATION

27 BY MR. COOK:

28 Q Regarding Delynn, this is the daughter that
29 was fourteen years old at the time?

30 A Yes.

Elina Killpack-RD