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Hilda Crellin v. Noelleen Thomas : Brief of Defendant and Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HILDA CRELLIN,
Plaintiff and Appellant,

— vs. —

NOELLEEN THOMAS,
Defendant and Respondent.

Case No. 7763

BRIEF OF DEFENDANT AND RESPONDENT

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INDEX

	Page
STATEMENT OF CASE	1
ARGUMENT	3
POINT I. POINT ONE THAT THE COURT ERRED IN GIVING THE LAST SENTENCE OF INSTRUCTION NUMBER FOUR AND IN REFUSING TO GRANT A NEW TRIAL FOR SUCH ERROR.	3
POINT II. POINT TWO THAT THE COURT ERRED IN GRANTING A NEW TRIAL AFTER THE FIRST TRIAL HAD RESULTED IN A VERDICT IN FAVOR OF THE PLAINTIFF.	14
CONCLUSION	17

CASES CITED

Bowers v. Gray, 99 Utah 336, 106 Pac. (2) 765	16
Cafferty v. Frier Pub. Co., 226 N.Y. 87	13
Chicago & Eastern Illinois R. R. Co. v. Kneirim, 152 Ill. 458, 43 American State Reports 260	7
Commonwealth v. Lavery, 93 Atl. 276 M. 277 M. 248 Penn. 787.....	9
Flechenstein v. Freidman, 266 N.Y. 19, 193 N.E. 537-538	13
Glazier v. Cram, 71 Utah 465, 267 Pac. 188	16
Greco v. Gentile, 88 Utah 255, 53 Pac. 2, 1155	16
Hamilton v. Swagact Coal Mine, 59 Wyo. 485, 183 P. 2nd 203, 149 A.L.R. 998	15
Henderson v. Edwards, 191 Iowa 871, 183 N.W. 583, 16 A.L.R. 1090	15
Hornyak v. Heart Corp., 66 N.Y. S. 2nd 848	13
Jensen v. Howell, 75 Utah 64, 282 Pac. 1034	16
Kershaw v. Schafer, 88 Kans. 691, 129 Pac. 1137	6
King v. Consolidated Products Co., 159 Kan. 608, 157 P. 2nd 541, 158 A.L.R. 1248	15
Mullong v. Mullong, 178 Iowa, 159 N.W. 994	15
Nelson v. West Coast Dairy Co., 5 Wash. 2nd 284, 105 P. 2nd 76, 130 A.L.R. 606	15
Saltas v. Affleck, 99 Utah 381, 105 P. 2nd 176	16
State v. Zimmerman, 60 N.D. 256, 233 N.W. 845, 79 A.L.R. 816.....	15
State v. Rice, 56 Iowa 431	11
Southern Pacific Land Co. v. Dickerson, 65 Cal. App. 722, 225 P. 2	6
Shafer v. Keeley Ice Cream Co., 65 Utah p. 46 234 P. 300.....	7
Misao Yoshimura Kurata v. Los Angeles News Pub. Co., Cal. 40 Pac. 2d 520, 4 Cal. App. 2nd 224	12

AUTHORITIES CITED

	Page
3 Am. Jur. 639 Sec. 1122	6
14 Ruling Case Law 815 Sec. 74	7
17 Am. Jur. 109 Sec. 7	9
Am. Law Ins. Restatement to Law of Torts, p. 308 Sec. 617.....	10
Am. Laws Ins. Restatement to Law of Torts Ch. 25 Sec. 582	10
53 C.J. 225 Sec. 137	12
Sutherland on Damages Vol. 3, P. 2626	13

IN THE SUPREME COURT of the STATE OF UTAH

HILDA CRELLIN,
Plaintiff and Appellant,

— vs. —

NOELLEEN THOMAS,
Defendant and Respondent.

Case No. 7763

BRIEF OF DEFENDANT AND RESPONDENT STATEMENT OF CASE

This is an action brought by plaintiff and appellant herein to recover damages for an alleged slander. Plaintiff alleges that on the 5th day of October, A.D. 1949, defendant said of and concerning defendant as follows: "I told Mrs. Cummings that Mrs. Crellin had worked in a house of prostitution"; further plaintiff alleges defendant in the early part of April of 1949 said the following words of and concerning plaintiff, to wit: "Mrs. Crellin was a whore."

Defendant testified (Trans. 39) that while plaintiff and she were both working at the telephone office in Tooele, Mrs. Crellin, while working on the operator's "board" had said of another employee a single woman,

that she had been entertaining boys at her home for \$2.00 a night. Defendant testified that she then said "I thought she was the last person on earth that should make remarks if what I heard about her was true." (Trans. 40)

When asked by Barbara Cummings, one of defendant's witnesses defendant answered, "and I told her I had heard she came from a house of prostitution."

Defendant answered with a general denial and a further plea in mitigation of damages that the words, if any, were not spoken maliciously of and concerning plaintiff. The case was tried before a jury on the 14th and 15th days of November, A.D. 1950, and upon said latter date the jury returned a verdict in favor of plaintiff and against defendant, in the sum of \$500.00.

Thereafter defendant moved for a new trial on the ground of newly discovered evidence which could not be obtained and was not available to defendant by a diligent search prior to the time of the first trial, which motion was granted. Thereupon defendant amended her answer in which she denied the allegations of plaintiff's complaint and as a further and affirmative defense alleged that any words which were defamatory were true, that defendant had investigated the activities of plaintiff in about the year 1925 in Ely, White Pine County, State of Nevada; that she discovered that in about 1924 and 1925 plaintiff had worked in two houses of prostitution, which were then known as the "Green Lantern" or the "Big Four Dance Hall" and "Rhiney's Place" respectively; that said houses were located in Ely, in the State of Nevada, in the restricted Red Light District; that both

of said places were houses where lewd persons congregate for immoral purposes; that immoral women who worked in said houses of prostitution were known as "Dance Hall Girls" and "Crib girls."

The new trial thereafter came on for hearing before the court and jury on the 28th day of June, A.D. 1951; that said trial lasted into the 29th day of June, A.D. 1951; upon which date the jury returned a verdict in favor of defendant and against plaintiff, "no cause of action."

Plaintiff appeals from the verdict and judgment and also from the Court ruling setting aside the first verdict and granting to defendant a new trial. (Trans. p. 20)

ARGUMENT

POINT I.

AS TO POINT ONE THAT THE COURT ERRED IN GIVING THE LAST SENTENCE OF INSTRUCTION NO. 4 AND IN REFUSING TO GRANT A NEW TRIAL FOR SUCH ERROR.

As to point one that the Court erred in giving the last sentence of instruction No. 1 as follows:

"The Court charges you that truth is an absolute defense in action of slander, such as this case. If therefore you find from a preponderance of the evidence that plaintiff did at any time in her life, work in a house of prostitution in any capacity, then and in that event, your verdict must be in favor of defendant and against plaintiff, 'no cause of action.' "

In this case it was uncontroverted that the places in Ely, Nevada, where plaintiff worked were in an area set apart and designated by the City Counsel of that city as a restricted district or the red light district. Mr. Alfred Tamblyn, a resident of Ely, White Pine County, Nevada, testified that he had lived in that city since October, 1909; that during that time he had held many public offices and at the time of trial or on June 29, 1951, he was a County Commissioner of said county. (Trans. 79) The witness testified that he served as the Sheriff of White Pine County during the years 1918 and 1919; that he had been the Mayor of the City of Ely from May 23, 1923 to May 1931. (Trans. 79) He stated that the places known as the "Green Lantern" and "Rhiney's Place" were located in this restricted red light district which had been designated as such district by the city authorities so that they could have some control over it. (Trans. 80)

He further testified that he had made many official inspections of the places as a deputy sheriff and as the mayor, and he described them. (Trans. 82) He testified that the girls would dance with the patrons of the place and would solicit men to dance with them and buy them drinks of liquor; that sometimes the girls would go off the floor with these men whom they had solicited for drinks and to rooms adjoining or close by the dance floor. (Trans. 81) He testified further that both Rhiney's Place and the Green Lantern had the reputation of being houses of prostitution (Trans. 82); that in making his inspections as mayor of the City of Ely he observed that there were rooms or cribs adjacent to and adjoining the dance hall. (Trans. 82)

He testified further that all the girls who worked in the dance hall or in the cribs paid regular vagrancy fines and that the "dance hall girls" took men to their cribs or rooms. (Trans. 83)

The witness Harold Woods for defendant described in detail the practice and duties of a dance hall girl. He testified that as such they approached men who entered the dance hall and asked them to buy them a drink and dance with them for hire; that while dancing the man was solicited to go to the crib with her; that this was always the procedure and manner of conducting both the so called dance halls known as "Rhiney's Place" and the "Green Lantern," where plaintiff admittedly worked. (Trans. 51) He also testified that Rhiney's Place had the reputation and was known as a whorehouse. (Trans. 54) That the Green Lantern was also known as a house of prostitution. He testified further from his own experience that doors led off the dance hall and into rooms or cribs and that they were close to and adjoining the dance hall. (Trans. 49)

Now, Mrs. Crellin, on cross examination admitted working in Rhiney's Place as a dance hall girl and that she solicited dances from strange men. (Trans. 20) Further she admitted working at the Green Lantern, as a dance hall girl. (Trans. 22)

She also testified on cross examination that she would get paid by going to the bar after the orchestra had stopped playing and the man whom she had solicited would pay for the dance and would buy drinks; that she didn't know what he drank, but that she drank caramel

water, which was the color of whiskey, and that she received a percentage from the operator of the house for the sale of liquor.

“Rhiney’s Place” and the “Green Lantern” were admittedly located in the restricted Red Light District. (Trans. 29)

Under all of this evidence we submit that the plaintiff in no manner has been prejudiced by the instruction and that under the state of the record and the testimony a different verdict could not have been rightfully rendered. The fact that the dance halls were in the restricted red light district which was admitted and not in dispute, left the jury with only one common sense verdict; that the plaintiff worked there as a prostitute.

For the sake of argument, even assuming the instruction was error it certainly was harmless and under the circumstances we submit the instruction complained of in no manner affected plaintiff or her consideration with the jury.

An instruction which might be misleading but which has become immaterial by reason of the findings of the jury, is not a ground for granting a new trial. *Kershaw v. Schafer*, 88 Kan. 691, 129 Pac. 1137.

In *Southern Pac. Land Co. v. Dickerson*, 65 Cal. App. 722; 225 P. 5, the California Court held:

“Where it is clear that the jury have disregarded an improper instruction, a new trial will not be granted for the misdirection.”

3 *Am. Jur.* 639 No. 1122:

“The giving of an erroneous instruction is not

reversible error unless it results in prejudice to the appellant or plaintiff in error by injuriously affecting his material or substantial rights.” (Cases therein cited.)

See also *Shafer v. Keeley Ice Cream Co.*, 65 Utah, p. 46 (234 P. 300) 14 RCL 815 Sec. 74:

“It is only when an erroneous instruction has resulted in prejudicing the rights of the complaining party that the judgment will be reversed and it is the general rule that such action will not be taken by the appellate Court for error in giving or refusing to give instructions if the verdict is manifestly right, or if it appears from the evidence that no other verdict could have been properly returned by the jury under instructions that were entirely correct.”

We feel, however, the instruction was not error and properly given inasmuch as it was established that the places where plaintiff worked were in the restricted red light district and if the jury found that the place where plaintiff worked was a house of prostitution in view of the evidence as to her duties, the jury could not under any circumstances have come to any other conclusion.

In *Chicago & Eastern Illinois R.R. Co. v. Kneirim*, 152 Ill. 458, 43 American State Reports 260, the Court held:

“An instruction though erroneous will not require the granting of a new trial if it appears from the evidence that no other verdict could have been properly returned by the jury under the circumstances.”

Either by adding the words "In any capacity" or by leaving the words out of the instruction, the jury in this case could come to no other conclusion than that plaintiff had been a prostitute, in view of the record of the evidence.

The plaintiff's testimony that the dance hall was a legitimate business for customers in a lewd district where prostitutes were coralled and designated to stay, just does not make sense.

Further as to the Court's instructions as to the capacity, if plaintiff had testified that she worked there as a scrub woman, or any other capacity which was foreign to prostitution, plaintiff's objection to the instruction may have been well taken. However, the admitted business for which plaintiff worked in the district, that of a dance hall girl in a red light district where she solicited dances from strange men and after each dance took them to a bar where she made a percentage off the sale of liquor, is such a nefarious occupation, that the jury could not under any circumstances have arrived at any other verdict.

Prostitution, and the lewd conduct of prostitutes are of their very nature secretive and cannot be demonstrated in the open. That, of course is the reason for a community as the City of Ely designating a certain area for them to operate and thus limit this secretive and unwholesome occupation to a designated area. Therefore, under the state of the record and the admitted location of the business, the jury could not have found otherwise under any instructions.

In *Commonwealth v. Lavery*, 93 Atl. 276, 247 Penn. 787, the Court defines a prostitute as “a woman who has given herself up to indiscriminate lewdness.”

17 *Am. Jur.* 109 Sec. 7:

“In the prosecution for resorting to a house of ill fame for purposes of lewdness, however, it is not necessary to prove that more females than the proprietress illicit acts of intercourse.

“It is necessary that the persons resorting to such a house do so for the purpose of indulging in lews acts, such as having sexual intercourse.”

In the present case under the instruction and taking the testimony of plaintiff as to her capacity in the house of prostitution how can plaintiff complain if she is said to be a “whore.” Her capacity as she testified to, was that of soliciting men, promiscuously to dance with her (Trans. 21) for money and buy two drinks, hers being a drink that was camouflaged so that she would not become intoxicated, and called caramel water (Trans. 52, line 16) and she would get a commission from the sale (trans. p. 24).

Plaintiff testified that there were houses up and down the street from the dance hall and that girls stood in front of them and that these were known as “crib girls” and that they were working on the line.” Plaintiff testified that she well knew that these girls worked in these houses and that they either sat in the door way of the houses or in the windows. (trans. 26)

These were the admitted surroundings of plaintiff’s employment.

Now, when the jury, under the instruction found the place was a house of ill fame, plaintiff cannot be heard to complain that she was said to have been a "whore."

It is evident that the Court, by the words, "in any capacity" intended that the jury examine plaintiff's testimony as a dance hall girl, and if the place she was working was a house of prostitution she herself might be classified as a "whore under the circumstances." A "madam" or an operator of a house of prostitution, who does not have sexual intercourse with men for hire, certainly cannot complain if someone said of her that she was a "whore."

American Law Institute, Torts, p. 308, Sec. 617:

"Subject to the control of the Court whenever the issue arises the jury determines whether the defamatory matter was published of and concerning the plaintiff and whether it was true or false.

"*COMMENT* (a) The respective functions of Court and jury upon the issue of publication and the issue of truth are the same as upon ordinary issue of fact in other actions. The question whether the defendant has published the defamatory communications to a third person is ordinarily one for the jury or other trier of fact to determine. So too, it is ordinarily for the jury to determine whether the defamatory imputations are true. If, however, the evidence on either question is so overwhelming that any other conclusion would be unreasonable, the Court may direct the jury to make a proper finding."

And again A.L.I. Ch. 25. Sec. 582 P. 218:

"It is not necessary to prove the literal truth of the precise statement made. Slight inaccuracies

of expression are immaterial, provided the defamatory charge is true in substance. Furthermore, it is enough to establish the truth of the charge of a criminal offense by a preponderance of the evidence. It is not necessary if the person defamed were being prosecuted for the crime which he is charged with committing."

In the case of *State v. Rice*, 56 Iowa 431, the Court held it was not for the Court to say that sexual intercourse is or is not sufficient to establish a woman to be a prostitute. The Court:

"It is certainly true, we think, that a woman may be a prostitute and carry on the business as such if she holds herself out to carry on the business of such, and if she holds herself out to the world. The houses may be designated by a sign as to make this clearly apparent. She may upon the street or in other public or private places, so conduct herself, as to make it clear she is a prostitute therefore that Mary Royce should have submitted herself to illicit sexual intercourse with various persons and that 'inconsistent with one or two persons would not be sufficient to show she was a prostitute.'

"We think it is for the jury to say whether this would be sufficient, taking into consideration the circumstances and the acts and conduct of Mary Royce, at the time and before the sexual intercourse took place."

In other words, the accompanying circumstances are important and it is not for the Court to say the sexual intercourse alone is, or is not sufficient to establish the woman to be a prostitute.

53 C.J.S. 225 Sec. 137 :

“In order to constitute a complete defense truth pleaded in justification must meet the precise charge and be as broad as the defamatory accusation substantial truth is sufficient.

“While matter of justification by means of a plea of the truth to be of any avail, must meet and answer the substance of the defamatory charge it need not meet absolutely the letter and form of the charge, or every word thereof, nor need it be literally true, substantial justification or truth that is truth in all material subjects, being sufficient.”

In *Masao Yoshimura Kurata v. Los Angeles News Pub. Co.*, Cal. 40 Pac. 2nd 526; 4 Cal. App. 2nd 224; Court stated (at page 522*) this rule as follows:

“It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified and if the gist of the charge be established by the evidence, the defendant has made his case. A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would.”

Sutherland on Damages, Vol. 3, p. 2626:

“It is not the mere fact that difference exists between the published report of what the complaint in the proceeding charged and what was actually alleged in the complaint, but rather in the difference of a substantial character and does it produce a different effect.”

Hornyak v. Heart Corp., 66 N.Y.S. 2nd 848, the rule was stated:

“In determining the sufficiency of a defense of publication a workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded proof would have produced.”

“When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words passed out of the ordinary usage to sustain a charge of libel, no legal harm has been done.” (Citing *Flechenstein v. Freidman*, 266 N.Y. 19; 193 N.E. 537, 538.)

See also *Cafferty v. Fier, Pub. Co.*, 226 N.Y. 87.

Counsel commences his argument on page 17 of appellant's brief as follows:

“Granted for sake of argument that the jury found that either the ‘Green Lantern’ or ‘Rhiney’s Place’ was a house of prostitution, the plaintiff’s action was removed from the consideration of the jury.”

However, the instruction complained of required that the jury must find the place where plaintiff worked was a house of prostitution. We submit further the part in “any capacity” referred specifically to a “dance hall

girls" "percentage girl" "bee girl" or any other name given to women in this district engaged in the unsavory work which plaintiff admitted that she did. Therefore her capacity was established by the plaintiff, and the Court, we submit, rightfully instructed the jury that if they found these facts to exist, then they must find the issues in favor of defendant and against plaintiff, "no cause of action."

POINT II.

NOW AS TO POINT TWO THAT THE COURT ERRED IN GRANTING A NEW TRIAL AFTER THE FIRST TRIAL HAD RESULTED IN A VERDICT IN FAVOR OF THE PLAINTIFF.

Counsel in his brief argues that due diligence was not exercised on the part of the defendant in discovering this evidence, because she may have discovered it had she taken the deposition of plaintiff or served her with written interrogatories; and in view of the fact that the defendant did neither, but just stumbled on to all of the evidence which she later found, she should later be precluded from offering it.

The defendant at the time of the first trial had no means of knowing that the rumor she had heard and had repeated of and concerning plaintiff, stemmed from plaintiff's activities in Ely, Nevada. In this case there has been no showing of lack of diligence merely because defendant did not take the deposition of plaintiff, or serve written interrogatories on her. We submit that in this regard a wide discretion is given the trial court in view of all the circumstances of each case.

“One seeking a new trial for newly discovered evidence cannot be accused of lack of diligence when possesses no means of knowing that the evidence subsequently discovered was previously obtainable. *Henderson v. Edwards*, 191 Iowa 871, 183 N.W. 583, 16 A.L.R. 1090. The Court at page 1092: ‘The right to a new trial on the ground of newly discovered evidence is statutory, and a ruling upon the motion involves legal discretion, and ordinarily, the ruling of the trial court will not be disturbed on appeal unless a reasonably clear case of abuse or discretion is presented.’ Citing *Mullong v. Mullong*, 178 Iowa 552, 159 N.W. 994.”

“The granting or the denial of a new trial on the ground of newly discovered evidence is within the discretion of the trial court, and its discretion will not be disturbed except where there is a clear abuse of discretion.” *King v. Consolidated Products, Kan.* 608, 157 P. 2nd 541, 158 A.L.R. 1248.

“A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court and its exercise of that discretion will not be disturbed except for manifest abuse.” *Nelson v. West Coast Dairy Co.*, 5 Wash. 2nd 284, 105 P. 2nd 76, 130 A.L.R. 606.

See also *Hamilton v. Swigact Coal Mine*, 59 Wyo. 485, P. 2nd 203, 149 A.L.R. 998;

State v. Zimmerman, 60 N.D. 256, 253 N. W. 845, 79 A.L.R. 816.

This doctrine has been well established by this Honorable Court from time to time.

In *Glazier v. Cram*, 71 Utah 465, 267 Pac. 188, this Court held the granting or denying of a motion for a new trial on the ground of misconduct of the jury is a matter largely within the discretion of the trial court.

In *Greco v. Gentile*, 88 Utah 255, 53 P. 2nd 1155, this Court held:

“The motion for a new trial on the ground of newly discovered evidence was a matter wholly within the trial court’s discretion. As long as the discretion is not abused, this Court will not interfere.”

In *Jensen v. Howell*, 75 Utah 64, at p. 74 (282) p. 1034, this court held:

“In this jurisdiction the binding effect of findings of the trial Court in law cases is different from that in equity cases. In the former the findings as a general rule are approved if there is sufficient competent evidence to support them, and ordinarily, are not disturbed unless it is manifest that they are so clearly against the weight of the evidence as to indicate a misconception or not a on due consideration to it.”

In the present case the court first granted defendant’s motion for a new trial and thereafter set aside the order and referred it to Judge Ellett who held a special hearing and made findings upon them. (R. 13) After carefully considering the findings of Judge Ellett, Judge Jeppson then granted a new trial.

We think the two Utah cases cited by counsel in his brief, as to wit, *Saltas v. Affleck*, 99 Utah 381, 105 P. 2nd 176 and *Bowers v. Gray*, 99 Utah 336, 106 P. 2nd 765, are

not in point and cannot apply to this case.

In both of those cases this Court pointed out that it was reluctant to reverse a trial court for granting a new trial but that there was apparently no basis for the trial court's granting the new trial.

In the present case the entire newly discovered evidence was of such a nature that to have denied defendant's motion and refused the new trial could have been a denial of the ends of justice to say the least.

The new evidence was of such a nature that defendant presented an entirely different defense in the second trial, to wit, the truth of the alleged slanderous statements.

As counsel has pointed out he has found no cases holding that unless a party to an action either take the opponent's deposition or serve written interrogatories on opponent before trial, that he has not exercised such due diligence as would prevent the granting of a new trial upon the ground of newly discovered evidence.

We submit however, that in granting the new trial Judge Jeppson properly exercised his discretionary power and that there was no abuse thereof.

CONCLUSION

In conclusion we submit that the trial Court committed no error upon either point which would justify this Honorable Court in granting a new trial, or making

any order other than to affirm the judgment of the District Court.

Respectfully submitted,

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E. LeROY SHIELDS,

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