

1952

# Robert S. Burton v. Zion's Cooperative Mercantile Institution : Brief of Appellant

Utah Supreme Court

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Owen and Ward; Attorneys for Appellant;

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7854

IN THE SUPREME COURT OF THE  
STATE OF UTAH

FILED

ROBERT S. BURTON, Administrator )  
of the Estate of ADELINE G. )  
BURTON, Deceased, )

JUL 28 1952

Utah Supreme Court, Utah

Plaintiff and Appellant, )

vs. )

Case No.

ZIONS COOPERATIVE MERCANTILE )  
INSTITUTION, a/k/a Z. C. M. I., )  
a corporation, )

7854

Defendant and Respondent. )

APPELLANT'S BRIEF

Owen and Ward  
Attorneys for Appellant

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INSTITUTION, a.k.a. Z. C. M. I., )  
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Defendant and Respondent.)

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This action was brought by appellant as administrator of the estate of Adeline G. Burton against the respondent, Zions Cooperative Mercantile Institution. The action arose out of the alleged wrongful death of deceased, resulting from the negligent acts of respondent's employee in respondent's store in either pushing a

cart into and against the deceased, or as a result of the deceased's stepping back into and against a cart that was negligently placed too close behind her (R. 1).

This case was tried to a jury. In the course of the voir dire examination of prospective juror, Hugh Barker, he made repeated statements and arguments as to the fairness of insurance companies in settling claims and as to his personal experience with them. In the course of his examination by the Court, he made the following statements and arguments:

"Judge, I had, I was threatened with a case of this kind at one time. My insurance company settled and action was not brought." (R. 17.)

"Well, Judge, I don't want to speak out of turn, but I write a lot of insurance and my experience with insurance companies is that they are very fair, and I probably. . . now, of course, I don't know anything about this case, but my experience is that as I say, they are very fair

and when there is a settlement due they make it. I know they did in my case." (R. 18.)

"Well, Judge, I might say this. I don't know whether I'm supposed to. My feeling on this matter, after writing insurance and carrying a lot of insurance for twenty-five years, I have yet to see a fair case where the insurance company haven't settled where there is a settlement due and I'm prejudiced, probably toward the insurance company in this matter." (R. 18.)

"That's right, sir, I don't know that they are insured. I think they probably are." (R. 18-19.)

"I have seen the customers I have had and the insurance I have written, the losses they have had and the fairness with which I have seen the company settle them. I am, if I might say, prejudiced towards the insurance company, if Z.C.M.I. are insured." (R-19.)

"I feel that practically, I have never seen one of my companies that would not be what I considered eminently fair and we haven't, in twenty-five years, had five people feel that they didn't have a fair settlement." (R. 19.)

"Well, I will say this. If Z.C.M.I. are insured and this has

undoubtedly been brought to the insurance company's attention and they refused a settlement. I feel that they would have some grounds for it." (R. 19-20.)

This particular person was ultimately excused. (R. 20.)

Prior to the presentation of the case by either side, appellant moved for a mistrial on the ground of the comments, argument, and conduct of prospective juror, Hugh Barker. The motion was denied. (R. 20.)

STATEMENT OF POINTS RELIED  
ON BY APPELLANT

It was prejudicial error for the Court to deny appellant's motion for a mistrial.

ARGUMENT

The question before this Court is whether or not the referred-to conduct of prospective juror Hugh Barker influenced

or may have influenced the jury adversely to the cause of the appellant. We submit that it did, and it was prejudicial error for the Court to deny appellant's motion for a mistrial.

The facts of this appeal present a precise point which apparently is one of first impression in this as well as other jurisdictions. We contend, however, the undisputed record alone dictates that the verdict must not stand.

This case is extremely unusual in that we have the insurance question brought into the case by a prospective juror with a reverse twist that was disastrous to the appellant's cause from the very inception of the case. There is no doubt that the conduct and argument of the prospective juror was calculated to and did influence the verdict of the jury. No



better evidence of this is needed than to point to the fact that counsel for the defendant and respondent made no objection of any kind, although by Mr. Barker's conduct the insurance question was blatantly and repeatedly brought before the prospective jurors. However, it is not the injection of the insurance idea that we complain of, but the manner in which it was done and the use to which it was put. It is almost inconceivable that counsel for a defendant would allow such emphasis on insurance to go unchallenged or unobjected to, at least by some motion made outside the hearing of the jurors, unless he knew that the conduct, statements, and arguments which bared the insurance question nonetheless definitely influenced the jury in his favor. In fact, through adroit advocacy, counsel

remained quietly by until the last ounce of advantage had been wrought from the unfortunate colloquy of the Court and prospective juror, and then he was able to ingratiate his cause further by pleasantly suggesting that this prospective juror be excused. We do not find counsel culpable in this regard, but nevertheless the entire process was exceedingly damaging to appellant's cause.

Any doubt about whether misconduct of a juror influenced a verdict should be resolved against the verdict. (73 A.L.R. 89, and cases there cited and summarized.)

This prospective juror authoritatively injected for the consideration of the jurors his personal experience and the results of the same. The law is clear in this regard to the effect that a new trial will be granted because of discussion

or consideration of personal experiences of jurors bearing on issues in a civil case. 46 A.L.R., 1509-12, and cases cited and summarized here.

"Although the statement of a juror which is alleged to constitute misconduct is not directly associated with every fact in issue, yet, if the consequence is to influence the judgment of other jurors in arriving at their verdict, then the substantial rights of the party whose cause is unfavorably affected by the statement are disregarded, and a new trial should be awarded." 46 A.L.R. 1510.

In the case before the Court Mr. Barker not only injected his personal experience for the consideration of the jurors, but in effect argued the case for respondent. The prospective juror did not and was not restricted in his answers as to whether he would have difficulty acting in an unbiased manner, but he was allowed to and did make strong and repeated arguments to the other

prospective jurors.

We here have an unusual circumstance where a prospective juror argues the case to the prospective jury. It has been held that it is in error for counsel to argue the case in the examination of persons drawn as jurors. We submit it is greater error and more damaging to allow a prospective juror to do so. In the case of Hudson, et al., vs. Roos, 76 Michigan 173, 42 N.W. 1049, where counsel argued the case in his examination of the persons drawn as jurors, the Court said:

" . . . there were errors which necessarily must have affected the disposition by the jury of all the issues or may have done so, and we are satisfied that because of such errors the case must go back for a new trial. . . ."

"The first error and the one affecting the whole case, was in the conduct of counsel for the plaintiff in his examination of the persons drawn as jurors on their voir dire.

Against the objection of defendant's counsel, he was permitted by the Court under the pretense of ascertaining whether or not the jurors knew anything about the case, to really open his case to them."

In this same case counsel contended that he did not overstep his bounds and that he said no more than what was absolutely necessary in order to ascertain whether the juror was unprejudiced and impartial in the case. The court in this regard stated:

"We think he said much more than was necessary, and that he went a great way beyond his privilege, and that the effect was to prejudice and bias the persons sitting in the jury box, before they were sworn in the case, and that an objection to the whole panel would have been a good one, at the close of his remarks, if it had been made by defendant's counsel, unless a re-examination would have shown that the counsel's speech had had no effect upon them. We do not say that the counsel intended to affect the jury, or to get an extra argument in favor of his client, but that is what it amounted to . . ."

" . . . The attention of the circuit judge was called to it in the beginning and his failure to keep the counsel within bounds was prejudicial error."

In the case before this Court, if counsel had made the commentary and argument made by prospective juror Barker, it would undoubtedly have been prejudicial error. Our contention is that the conduct of this fellow juror was even more damaging than if counsel had done it, and he certainly repeatedly drove his points home through the relation of personal and long years of experience. From the inception he endeavored to stamp the case as being improperly brought and based upon false and unreasonable claims. To support such a contention he stated he had never seen an insurance company refuse to settle a fair claim. Noting his 25 years' experience with insurance companies,

Mr. Barker further argued:

"I have yet to see a fair case where the insurance company haven't settled where there is a settlement due."

"I don't know that they (the respondent Z.C.M.I.) are insured. I think they probably are."

"If Z.C.M.I. are insured and this has undoubtedly been brought to the insurance company's attention and they refused a settlement, I feel that they would have good ground for it." (R. 19-20.)

The record (R. 19) shows this prospective juror even got the Court to talking about the "kind" of case the appellant had.

The record (R. 19) shows that Mr. Barker represents and sells insurance for the United States Fidelity and Guaranty Company. The record does not show it, but it is a fact that said United States Fidelity and Guaranty Company was the insurance company defending the re-

spondent in this action.

We do not know, but the vehemence and strength with which prospective juror Barker stated his contentions would seem to indicate he had more than a passing interest in the case. At the very least, his conduct colored the case adversely for the appellant from the start. If this had not been the result of Mr. Barker's conduct, appellant's counsel might have rather welcomed the injection of insurance into the case, instead of objecting to the conduct which brought it in. Appellant's motion for a mistrial, if granted, would have nullified this advantage. Counsel for appellant felt that strong about the conduct of Mr. Barker. Our contention is supported by something even stronger--counsel for the defending insurance company made no



objection.

Lest we be misunderstood, it is not the insertion of the insurance question into the case by Mr. Barker that we complain of. It is the manner in which it was done and the use to which it was put. The failure of defendant's counsel to object to this unusual emphasis on insurance merely gives additional credence to our contention. In short, it was the entire conduct of prospective juror Barker that initially and permanently prejudiced the cause of the appellant. It was, therefore, prejudicial error to deny appellant's motion for a mistrial. The granting of this motion would merely have required the calling of new persons for the prospective jury, at a time when neither party had yet proceeded with its evidence.

### CONCLUSION

In the final analysis this case must stand on the facts as presented by the record. There can be no dispute on the law involved. It is evident the persons drawn for the jury were influenced, or may have been influenced, against the appellant's cause by the conduct of prospective juror Barker; and it was prejudicial error for the Court to deny appellant's motion for a mistrial.

Respectfully submitted,

OWEN AND WARD  
Attorneys for Appellant