

1952

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

John H. Snow; Skeen, Thurman, Worsley & Snow; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Burton v. ZCMI*, No. 7854 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1755

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court

of the State of Utah

FILED

AUG 22 1952

Clerk, Supreme Court, Utah

Robert S. Burton, Administrator
of the Estate of ADELINE G.
BURTON, Deceased,

Plaintiff and Appellant,

vs.

ZIONS COOPERATIVE MERCAN-
TILE INSTITUTION, also known as
Z. C. M. I., a corporation,

Defendant and Respondent.

Case No. 7854

RESPONDENT'S BRIEF

JOHN H. SNOW

SKEEN, THURMAN, WORSLEY & SNOW

Attorneys for Respondent

INDEX

	Page
STATEMENT OF FACTS.....	3
STATEMENT OF POINTS RELIED UPON.....	4
WHERE, AS HERE, THERE IS NO PROOF SHOWING PREJUDICE TO APPELLANT OR ABUSE OF DISCRETION BY THE TRIAL COURT, THE DENIAL OF THE MOTION FOR A MISTRIAL SHOULD BE AFFIRMED.	
ARGUMENT	4
CONCLUSION	15

CASES CITED

Callahan vs. Simons, 64 Utah 250, 228 Pacific 892.....	11
Hepworth vs. Covey, 97 Utah 205, 91 Pacific 2nd 507..	11
Hudson, et al. vs. Roos, 76 Mich. 173, 42 N.W. 1099....	7
Lund vs. District Court, 90 Utah 433, 62 Pacific 2nd 278	11
Redd vs. Airway Motor Coach Lines, Inc., 104 Utah 9, 137 Pacific 2nd 374.....	6
Skeen vs. Skeen, 76 Utah 32, 287 Pacific 320.....	10

TEXTS CITED

46 A.L.R. 1509, et seq.....	8
73 A.L.R. 89	8
86 A.L.R. 929	12
Utah Rules of Civil Procedure, Rule 47 (f) (6).....	5
Utah Rules of Civil Procedure, Rule 47 (h).....	5

In the Supreme Court

of the State of Utah

Robert S. Burton, Administrator
of the Estate of ADELINE G.
BURTON, Deceased,

Plaintiff and Appellant,

vs.

ZIONS COOPERATIVE MERCAN-
TILE INSTITUTION, also known as
Z. C. M. I., a corporation,

Defendant and Respondent.

Case No. 7854

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The respondent agrees generally with the statement of facts by the appellant, except that it should be pointed out that after the discharge of the prospective

juror, Barker, the case proceeded to trial before a jury, duly sworn and regularly impaneled, and resulted in a judgment on a verdict in favor of the respondent of no cause of action (R. 15).

STATEMENTS OF POINTS RELIED UPON

WHERE, AS HERE, THERE IS NO PROOF SHOWING PREJUDICE TO APPELLANT OR ABUSE OF DISCRETION BY THE TRIAL COURT, THE DENIAL OF THE MOTION FOR A MISTRIAL SHOULD BE AFFIRMED.

ARGUMENT

Respondent has examined carefully the argument advanced by appellant in support of his appeal and has concluded that the entire argument is based upon unwarranted assumptions of fact and an inaccurate and incorrect application of the principles of law involved in this case.

Throughout appellant's brief it appears to be assumed, as a proven fact, that the jury was influenced by the statements made by the prospective juror, Barker, and that the jury which was ultimately selected to try the case must be presumed to have disregarded its oath and to have decided the case under the influence of elements outside the evidence presented to the jury for consideration. There is no support in the record for such an assumption.

It is submitted that this Court should not assume that the jury was prejudiced by any extrinsic matters unless there is some showing or some fact presented from which such prejudice may be inferred. To indulge in such an assumption without a showing of prejudice is, in effect, to nullify the regular and orderly proceedings utilized in the impaneling of a jury and to presume that the jury was selected without the usual safeguards employed by courts, and that after selection, the jury wantonly disregarded the oath administered under the provisions of Rule 47(h), Utah Rules of Civil Procedure.

Appellant asks this Court to indulge in this assumption although, from the record, it is worth noting that appellant did not object to the statements made by the prospective juror, nor did appellant request that the Court admonish the jury to pay no attention to such statement. It is likewise worth noting that the jury, having been finally impaneled, was passed for cause by appellant and no attempt was made to challenge any juror for cause or to inquire of individual jurors whether any of them possessed such a state of mind as would prevent him from acting impartially and without prejudice to the substantial rights of the appellant. The appellant had such a right under the provisions of Rule 47 (f) (6), Utah Rules of Civil Procedure, and since the record is silent, it must be presumed that appellant did not avail himself of the opportunities afforded under

that rule. While the record is silent on this point, it is a fact, as appellant knows, that the jury was passed for cause without comment by appellant.

On page 5 of appellant's brief the statement is made that "... the conduct and argument of the prospective juror was calculated to and did influence the verdict of the jury." On page 13, it is claimed that the record seems to indicate that "he had more than a passing interest in the case." Nowhere in the record can there be found any basis for such bald assertions. No claim was ever presented to the lower Court that prospective juror Barker, designedly, or with "calculation," made his remarks for the purpose of influencing the jury in favor of the respondent. Nowhere can an iota of proof be found to show that Barker knew anything about the case, or that he knew which insurance company was involved, or that he had any connection with the case. Appellant, having presented no proof and having made no attempt to develop facts in search of proof, now seeks to supply the elements which he lacks by resort to sweeping assertions and thinly-veiled innuendo. Appellant, by such argument, cannot escape the fundamental rule of law that where "the possibility of prejudice is not even vaguely discernible, it will not be presumed." *Redd vs. Airway Motor Coach Lines, Inc.*, 104 Utah 9, 137 Pacific 2nd 374.

The only case brought to the attention of this Court by the appellant as bearing on this question is the case of *Hudson, et al*, vs. *Roos*, 76 Mich. 173, 42 N.W. 1099 (not 1049, as cited by appellant). That case is not even remotely in point in this action. It was a case decided in 1889 by the Supreme Court of Michigan, and the principal point arose when counsel for plaintiffs, in examining the jury, made a long speech in which he outlined thoroughly the full particulars of the plaintiffs' claim and then, in the words of the court, "took it upon himself to give his version of the defense that would be set up." Counsel commented upon every fact in the case and was able to do so with familiarity because of the fact that the case had been tried once before. He minimized the effect of defendant's claims and dwelt at length upon the facts favorable to plaintiffs and upon the virtues of plaintiffs' claims. In deciding the case, the Court stated:

"By this practice the counsel for the plaintiffs was enabled to get four arguments to the jury—one before they were sworn and three afterwards, at least one more than he was entitled to. This should not have been permitted by the Court. 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."

It is submitted that the *Hudson* case and the refer-

ences to annotations in A. L. R., as submitted by appellant, are not in point. The A. L. R. annotations are found at 46 A. L. R. 1509, et seq., and 73 A. L. R. 89, and the cases therein discussed are concerned either with "chance" verdicts or with misconduct of jurors after they have been sworn and impaneled to try the case, and usually the fact situations involved related to the attempts by jurors to influence the verdict by bringing personal experience to bear upon the facts of the case which had been submitted to them. Thus, wherever the practice of the Court allowed affidavits of jurors to impeach the verdict of the jury, the courts have held that such conduct on the part of a sworn juror was an obvious interference with the function of the jury in that it brought new elements to bear upon the facts and evidence which had been admitted in the case for their consideration.

In contrast to this situation, however, is the case at bar. Here the prospective juror admittedly knew nothing of the facts of this case, and his statements about the fairness of insurance companies in dealing with claims were nothing more than general comments of an insurance salesman about the practices of insurance companies and could not, by any stretch of the imagination, be said to have applied to the facts of this case. The jury might have received just such comments by an examination of articles or advertisements in maga-

zines or newspapers, or by hearing or seeing advertisements on radio or television. To say that such information, whether received in court or out of court, would effect the minds of a jury and cause them to violate their oaths and to disregard the evidence submitted to them in the case is to say that the oath of a man is worthless and that the orderly procedures of courts in the administration of justice are a sham and a mockery.

We submit that since appellant has made no showing of any kind of prejudice resulting from the statements complained about, this court should not indulge in the unwarranted assumption made by appellant that prejudice was intended to result and did, in fact, result.

However, even if it be said, for the sake of argument, that the statements by Mr. Barker were prejudicial to appellant's case, the question of whether or not a mistrial should have been granted necessarily is determined by the question of whether or not the Trial Court abused its discretion. It has been the uniform rule that in matters relating to the conduct of the trial, the Trial Court has a wide discretion. It is usually referred to by appellate courts as "the sound discretion" of the Trial Court, and unless such discretion is clearly abused, courts have always been reluctant to reverse the ruling of an inferior court.

There have been cases in Utah which presented situations analogous, in legal principle, to the case at bar. Most of these cases have been concerned with the problem of whether or not a new trial should have been granted because of misconduct of a juror or because of a claim of undue influence upon the jury. It is submitted, however, that the basic and guiding principles of those cases are applicable to the case at bar.

In the case of *Skeen vs. Skeen*, 76 Utah 32, 287 Pacific 320, a person not officially connected with the trial, but who obviously was a close associate of plaintiff and plaintiff's counsel, made derogatory remarks concerning the defendant, which remarks were claimed to have been made in the presence of some members of the jury. The remarks were such that, had they been believed, they would have adversely affected the chances of the defendant in the case inasmuch as they reflected upon his integrity and character which were interwoven in the issues presented to the court.

In affirming the trial court's refusal to grant a new trial upon this ground, this Court said:

“The granting of a new trial upon this ground is within the sound discretion of the Trial Court, and it is generally held that a new trial will not be granted because of remarks about the case in the hearing of jurors by strangers to the litiga-

tion where neither the successful party nor the jurors were at fault, unless such remarks probably influenced the verdict.”

In *Callahan vs. Simons*, 64 Utah 250, 228 Pacific 892, the question presented was whether or not a new trial should have been granted by the lower court because of prejudice which existed in the mind of a juror against a class of tradesmen whose occupations were similar to that of one of the parties, and which prejudice had not been made known by the juror during his voir dire examination. This Court disposed of the question by stating:

“The question of whether a new trial should be granted upon the ground of misconduct of a juror or that he was prejudiced is a question that largely rests in the sound legal discretion of the Trial Court, and appellate courts cannot interfere unless it is *reasonably clear* that the Trial Court has abused its discretion in refusing a new trial upon that ground.” (Emphasis supplied.)

Other Utah cases following this rule are *Lund vs. District Court*, 90 Utah 433; 62 Pacific 2nd 278, and *Hepworth vs. Covey*, 97 Utah 205; 91 Pacific 2nd 507.

The general rule which has been followed by courts of most jurisdictions in the United States has been well

stated by the annotator in 86 A. L. R. 929, where it is said:

“There are many cases where the misconduct of the jury is sufficient to require an order of mistrial, but the misconduct must be such as reasonably to indicate that a fair and impartial trial could not be had under the circumstances. The better rule in such cases would seem to be that such questions be left to the sound discretion of the Trial Court, whose decision should be disturbed only in those cases where there has been a *plain abuse of discretion, resulting in palpable injustice.*” (Emphasis supplied.)

The reason for the rule is obvious. The Trial Court is in a position to observe the demeanor of the jury and to hear, at first hand, the statements which are alleged to have prejudiced the jury. He sees the manner in which the statements are made. He hears the inflection of voice, and, while the statements are being made, his attention is concentrated upon the other members of the prospective jury, and he is thus able to determine whether the statements appear to have any undue effect upon the other members of the panel.

So it was in this case. The Trial Court, being well aware that the question of insurance ordinarily should not be injected into a trial, was doing his best to cope with a situation which had been brought about through

the fault of neither party nor Judge. The Court was aware that the injection of insurance into a case ordinarily reacts to the detriment of the defendant. He was likewise aware that undue emphasis upon the remarks of Mr. Barker might cause the jury to take more note of the remarks than would ordinarily be the case. After hearing the matter carefully, and after hearing comments from counsel in chambers, it was his opinion, in the exercise of his sound legal discretion, that no harm had been done and that the trial should proceed.

As will be remembered by counsel for the appellant, the Trial Court, following his denial of the motion for a mistrial, made the comment that it was difficult for him to see how the remarks could have harmed one side of the case more than the other. We believe that counsel for appellant did not seriously believe that his cause had been harmed because, as has been pointed out heretofore, no request was made that the Court caution the jury about Mr. Barker's statements, and no questions were asked by counsel to determine whether or not the jury, as ultimately sworn, considered itself impartially capable of trying the case.

Appellant, in grasping for some semblance of proof of prejudice in this case, urges that his argument is supported by the fact that respondent made no objec-

tion to the statements by Barker. This claim has no more basis than appellant's other assertions.

Respondent did not object to the statements for the reason that it was felt, in view of all the circumstances, that any comment or objection would merely serve to give emphasis to Barker's statements and perhaps cause other members of the jury panel to give more attention to the colloquy than was then apparent. It was our belief then, as it is now, that no harm to either side resulted from Barker's statements.

Aside from legal principles, it appears to us that the logic of the situation requires affirmance of the ruling of the Trial Court. If courts should be required to grant a mistrial because of facts or arguments which are brought to the attention of the prospective members of a jury panel before a jury trial, there is no apparent place at which the line may be drawn. It would seem that the same sort of argument as made by appellant in this case could be made if members of the jury overheard similar statements in the corridor outside the courtroom before beginning of the court session, and if it could be then claimed that the statements heard in the corridor were favorable to an insurance company and that the legal and orderly proceedings of the trial court could be then nullified, there would seem to be

little purpose in the system of selection and impaneling of juries as it is now employed.

CONCLUSION

Since appellant has made no showing in this Court or in the Trial Court that the remarks of the prospective juror, Barker, were, in fact, prejudicial to the point of impairing the integrity of the verdict of the jury, and since there has been no attempt to show an abuse of the Trial Court's discretion in this matter, the ruling of the Trial Court should be affirmed.

Respectfully submitted,

JOHN H. SNOW

SKEEN, THURMAN, WORSLEY & SNOW

Attorneys for Respondent