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Norma Lois Cooper v. Lewis J. Evans et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

NORMA LOIS COOPER,
Plaintiff and Appellant,

vs.

LEWIS J. EVANS, EARL A.
EVANS, RAY V. EVANS, and CUL-
LIGAN SOFT WATER SERVICE
CO.,

Defendants and Respondents.

FILED
JUL 23 1953

Clerk, Supreme Court, Utah

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF CASES	1
STATEMENT OF POINTS	1-2
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I: HAVING FAILED TO EXCEPT TO THE GIVING OF QUESTION NO. 2 TO THE JURY, THE APPELLANT IS BARRED FROM ASSIGNING IT AS ERROR FOR THE FIRST TIME ON APPEAL.	4
POINT II: QUESTION NO. 2 STATES AS FACTS ONLY SUCH THINGS AS TO WHICH THERE IS NO CON- FLICT IN THE EVIDENCE, OR UPON WHICH AP- PELLANT HERSELF TESTIFIED.	5
POINT III: THE COURT SHOULD GIVE NO IN- STRUCTION UPON MATTERS UPON WHICH THERE IS NO CONFLICT IN THE EVIDENCE.	7
POINT IV: CONTRIBUTORY NEGLIGENCE IS A QUESTION FOR THE JURY.	9
POINT V: QUESTION NO. 2 WAS A CLEAR AND CONCISE STATEMENT OF FACT READILY UN- DERSTANDABLE BY THE JURY.	11
POINT VI: THE VERDICT OF THE JURY MAY NOT BE IMPEACHED BY AFFIDAVIT OF THE JURORS EXCEPT IN ACCORDANCE WITH PROVISIONS OF THE RULES OF CIVIL PROCEDURE.	13
POINT VII: IT WAS NOT ERROR TO REFUSE THE MOTION OF THE APPELLANT FOR A NEW TRIAL.....	14
CONCLUSION	14

TABLE OF CASES

Black v. Rocky Mountain Bell Tel. Co., 26 U. 451, 73 P. 514.....	13
Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415.....	5
Casciaro v. Great A. & P. Tea Co., 238 Mo. App. 361, 183 S.W. (2) 833	10
Caswell v. Maplewood Garage, 84 N. H. 241, 149 A. 746.....	6
Ceburri v. Rosner, 113 Conn. 683, 152 A. 584	10
Citizens Trust & Savings Bank v. Stackhouse, 91 S. C. 455, 74 S.E. 977	6
Collins v. Spragues Benson Pharmacy, 124 Neb. 210, 245 N.W. 602....	9
Clark v. Cleveland Drug Co., 204 N. C. 628, 169 S.E. 217.....	11

TABLE OF CONTENTS -- Continued

	Page
Dimmick v. Utah Fuel Co., 49 U. 430, 164 P. 872	4
Eichmann v. Muchheit, 128 Wis. 385, 107 N.W. 325.....	12
Gines v. T. C. Scherer Co., 218 Mass. 18, 106 N.E. 600.....	9
Hadra v. Utah National Bank, 9 U. 412.....	4
Hammer v. Liberty Baking Co., 220 Ia. 229, 260 N.W. 720.....	9
Hepworth v. Covey Bros. Amusement Co., 97 U. 205, 91 P. (2) 507	13
Hodge v. Weinstock L. & Co., 109 Cal. App. 393, 293 P. 80.....	10
Herstein v. Kemker, 19 Tenn. App. 681, 94 S.W. (2) 76.....	12
Kroger Grocery & Baking Co. v. Monroe, 237 Ky. 60, 34 S.W. (2) 929	11
Lancaster v. State, 3 Cold 339, 91 Am., Dec. 288.....	12
Long v. Bruener, 36 Cal. App. 630, 172 P. 1132.....	9
Louisville N. R. Co. v. Hall, 87 Ala. 708, 6 So. 277	12
Madegan v. Flaherty, 50 Ill. App. 393	9
McVeagh v. Bass, 110 Pa. Sup. Ct. 379, 171 A. 486.....	10
Missouri Pacific Ry. Co. v. Irvine, 81 Kan. 649, 106 P. 1063.....	13
Morgan v. Child Cole & Co., 61 U. 448, 213 P. 177	4
Neff v. City of Cameron, 111 S.W. 1139	12
Nelson v. F. W. Woolworth Co., 211 Ia. 592, 231 N.W. 665.....	10
Pansonetti v. Frosh, 15 Oh. L. Abs. 626.....	10
People v. Ritchie, 12 U. 180, 42 P. 209	13
Ralphs v. MacMarrstores, 103 Mont. 421, 62 P. (2) 1285.....	9
Shorkney v. Gr. A. & P. Tea Co., 259 Mich. 450, 243 N.W. 257.....	9
State v. Anderson, 75 U. 496, 286 P. 645.....	4
State v. Zimmerman, 78 U. 126, 1 P. (2) 962	4
Wendorff v. Missouri State Life Ins. Co., 318 Mo. 363, 1 S.W. (2) 99	6
West v. Boston & M. R. R., 81 N. H. 522, 129 A. 768.....	13

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Case No. 7937

RESPONDENTS' BRIEF

STATEMENT OF POINTS

I.

HAVING FAILED TO EXCEPT TO THE GIVING OF QUESTION NO. 2 TO THE JURY THE APPELLANT IS BARRED FROM ASSIGNING IT AS ERROR FOR THE FIRST TIME ON APPEAL.

II.

QUESTION NO. 2 STATES AS FACTS ONLY SUCH THINGS AS TO WHICH THERE IS NO CONFLICT IN THE EVIDENCE, OR UPON WHICH APPELLANT HERSELF TESTIFIED.

III.

THE COURT SHOULD GIVE NO INSTRUCTION UPON MATTERS UPON WHICH THERE IS NO CONFLICT IN THE EVIDENCE.

IV.

CONTRIBUTORY NEGLIGENCE IS A QUESTION FOR THE JURY.

V.

QUESTION NO. 2 WAS A CLEAR AND CONCISE STATEMENT OF FACT READILY UNDERSTANDABLE BY THE JURY.

VI.

THE VERDICT OF THE JURY MAY NOT BE IMPEACHED BY AFFIDAVIT OF THE JURORS EXCEPT IN ACCORDANCE WITH PROVISIONS OF THE RULES OF CIVIL PROCEDURE.

VII.

IT WAS NOT ERROR TO REFUSE THE MOTION OF APPELLANT FOR A NEW TRIAL.

STATEMENT OF FACTS

The facts in so far as Appellant has stated them are correct. However, Respondents wish to add that after the matter had been submitted to the jury the trial court asked counsel if there were exceptions to the instructions (Tr. 110). Both parties then excepted to portions of the instructions and after argument thereon the court

corrected one of the instructions previously given to the jury (Tr. 111-112). Appellant took no exception to the submission of Question No. 2 to the jury, and since those exceptions which were taken are not now urged, presumably appellant has waived them.

When appellant perfected her appeal herein, she designated only portions of the Court reporter's transcript as being the record on appeal, and subsequently, respondents designated the entire transcript of proceedings on the trial, as being the record on appeal, together with what had previously been designated by appellant. Consequently there are on file herein two transcripts—one containing only the testimony of the appellant, and the other containing all of the testimony and other proceedings which occurred upon the trial. To eliminate confusion, all references to pages in the transcript throughout this brief will be to the complete transcript, which bears on its cover the stamp "FILED April 30, 1953 Clerk, Supreme Court, Utah."

ARGUMENT

This appeal raises only one question, i.e., whether or not there was error in giving question No. 2 of the special verdict, which appellant considers under three points in her designated "Statement of Points". We shall follow the presentation as set forth in our "Statement of Points".

I.

HAVING FAILED TO EXCEPT TO THE GIVING OF QUESTION NO. 2 TO THE JURY THE APPELLANT IS BARRED FROM ASSIGNING IT AS ERROR FOR THE FIRST TIME ON APPEAL.

The one matter which has been completely ignored by appellant, the respondents feel to be controlling of the result on this appeal. Nowhere in the transcript of proceedings on the trial of this case does it appear that appellant objected to the submission of Question No. 2 to the jury. After the jury had retired the Court asked appellant's counsel if he had objections to the instructions as given, and counsel replied that his objections went rather to the court's refusal to give requested instructions. (See tr. 110 and pages following where exceptions are set out in full.)

It is a long established rule in this state that exceptions to an instruction must be made before verdict, otherwise it may not be reviewed on appeal. *State v. Zimmerman*, 78 U 126, 1 P (2) 962; *State v. Anderson*, 75 U 496, 286 P 645; *Morgan v. Child, Cole & Co.*, 61 U 448, 213 P 177; *Dimmick v. Utah Fuel Co.*, 49 U 430, 164 P 872. In so early a case as *Hadra v. Utah National Bank*, 9 U 412, the court said:

“An examination of both the abstract and transcript discloses the fact that no exception was ever taken either at the trial or afterwards to the court's refusal to give these instructions, nor was there any exception ever taken to the charge as

given. It is very clear therefrom that we cannot consider these matters here; this rule is so well established that it requires no citation of authorities to support it.”

Respondents respectfully submit therefore that under the rule uniformly followed by this Court, the appellant’s objections to Question No. 2, raised for the first time on this appeal, are not entitled to be heard at this late date.

II.

QUESTION NO. 2 STATES AS FACTS ONLY SUCH THINGS AS TO WHICH THERE IS NO CONFLICT IN THE EVIDENCE, OR UPON WHICH APPELLANT HERSELF TESTIFIED.

The appellant urges in effect that it was error for the court to instruct the jury that a fact which plaintiff herself testified to — the only testimony given on this question — was true. However, as said by the Supreme Court of the United States in *Boardman v. Reed*, 6 Pet. 328, 8 L Ed 415:

“Where from the evidence the existence of certain facts may be doubtful, either from want of certainty in the proof or by reason of conflicting evidence, a court may be called upon to give instructions in reference to a supposed state of facts. But this a court is never bound to do where the facts are clear and uncontradicted.”

Or as said in *Wendorff v. Missouri State Life Ins. Co.*, 318 Mo. 363 1 SW (2) 99:

“When the proof is documentary, or the defendant relies on the plaintiff’s own evidential showing (or evidence which the plaintiff admits to be true), and the reasonable inferences therefrom all point one way, there is no issue of fact to be submitted to the jury.” (Citing cases.)

See also, *Citizens’ Trust & Savings Bank v. Stackhouse*, 91 S.C. 455, 74 SE 977, wherein the court held in a situation where there was only the testimony of a single witness upon a question of fact:

“. . . if there is no evidence, direct or circumstantial tending to impeach the witness the court would do as it did in this case, direct the verdict, instead of inviting a verdict based upon caprice or prejudice by submitting an issue to the jury when there really is none in the evidence. Courts . . . should not impliedly sanction a verdict which is not supported by evidence by submitting an issue to a jury when only one reasonable inference can be drawn from the evidence.”

To the same effect see *Caswell v. Maplewood Garage*, 84 N.H. 241, 149 A 746. It would appear therefore, that the court properly did not give an instruction on the question of whether appellant saw the crating upon which the merchandise was resting.

Appellant also urges that the lower court compounded the error referred to above by then asking the jury to

draw a conclusion of law after having instructed them as to the facts. Looking at this contention for a moment, respondents are inclined to agree with appellant, that perhaps the court should not have submitted question No. 2 to the jury at all, but instead, should have granted respondents' motion for a directed verdict. Appellant admits that she did not see the crating over which she alleges that she tripped, and as we have demonstrated under Point III, it was clearly and easily observable if plaintiff had used her faculties as any normally prudent person would have done.

III.

THE COURT SHOULD GIVE NO INSTRUCTION UPON MATTERS UPON WHICH THERE IS NO CONFLICT IN THE EVIDENCE.

The appellant states that the court erred in failing to put two separate questions of fact to the jury — whether Mrs. Cooper made observation of the floor and abutting objects, and whether she failed to see the objects which were there to be seen. Upon neither of these questions was there a conflict in the evidence. The only testimony on these questions was that of Mrs. Cooper herself, and she said that she observed the floor, but did not see that the merchandise on display there was sitting on platforms until after she had fallen (tr. 7-9). Upon this state of the record there was no question of fact to be submitted to the jury, and the court rightly instructed that plaintiff did not see the platforms.

In her brief, appellant makes much of the fact that the court in its instruction used the words "observe and see" in the conjunctive, contending that the court thereby instructed the jury that she did not observe the floor, which is contrary to the record. We respectfully submit that the court's instruction is not reasonably capable of such an interpretation. Reading the instruction as a whole the meaning is clear and simple: "Was plaintiff negligent in failing to see the platforms upon which the merchandise was resting." Perhaps the use of the additional word "observe" was a redundancy, but taken in the context we respectfully submit that it meant nothing more than "see". Webster's unabridged dictionary gives as one definition of the word observe "to perceive or notice," which means nothing more or less than to see. The instruction when read as a whole appears to be clear. The question which the jury had to answer was merely whether in failing to see the platforms upon which the merchandise was resting, plaintiff made such observation as a reasonably prudent person would have made under the circumstances. The jury found that plaintiff did not make such observation, and there is ample evidence to support their finding in that regard. Plaintiff's sister, LaVera Summers, testified that when she came into defendant's place of business after the accident had occurred, she had in charge the plaintiff's children, and was naturally upset by what had occurred. Nevertheless, in spite of these distractions, she testified that she saw the platforms upon which the merchandise was resting

(tr. 40-42). That the crates were easily observable is also clearly demonstrated by Exhibit "B", a picture of the interior of Respondents' place of business showing an appliance resting upon such a shipping crate.

IV.

CONTRIBUTORY NEGLIGENCE IS A QUESTION FOR THE JURY.

While the law is clear that it is ordinarily a question for the jury whether plaintiff was guilty of contributory negligence — that is whether plaintiff exercised reasonable care for his or her own safety.

Long v. Bruener, 36 Cal App. 630, 172 P 1132;

Ralph Mac Mari Stores, 103 Mont. 421, 62 P (2) 1285;

Hammer v. Liberty Baking Company, 220 Ia. 229, 260 NW 720;

Shorkney v. Great A. & P. Tea Co., 259 Mich. 450, 243 N.W. 257.

It is also well established that plaintiff must make reasonable use of his own facilities to see and avoid danger.

Collins v. Sprague's Benson Pharmacy, 124 Neb. 210, 245 N. W. 602;

Gines v. T. C. Scherer Co., 219 Mass. 18, 106 N. E. 600;

Madigan v. Flaherty, 50 Ill. App. 393;

Pansonetti v. Frosh, 15 Oh. L. Abs 626;

Ceburri v. Rosner, 112 Con. 683, 152 A 584;

Casciaro v. Great A. & P. Tea Co., 238 Mo. App. 361, 183 SW (2) 833.

This of course is the question of fact which appellant chooses to ignore, and which the court submitted to the jury — whether under the undisputed facts, appellant's conduct was that of a reasonably prudent person. In accordance with the authorities set out above, this has been held to be a question for the jury.

Respondents respectfully submit that the court could have in all propriety and within the exercise of its sound discretion granted respondents' motion for a directed verdict, and held that under these undisputed facts the appellant was guilty of contributory negligence as a matter of law. In *McVeagh v. Bass*, 110 Pa. Sup. Ct. 379, 171 A. 486, the court held the plaintiff guilty of contributory negligence as a matter of law when she entered a store where she had never been before, started to walk forward when it was so dark that she could not see even the floor beneath her feet, and fell down an open stairway. A customer is bound to take ordinary or reasonable care for his or her own safety.

Hodge v. Weinstock L & Co., (1930) 109 Cal. App. 393, 293 P 80;

Nelson v. F. W. Woolworth & Co., (1930) 211 Ia. 592, 231 N. W. 665;

Kroger Grocery & Baking Co. v. Monroe, 237 Ky. 60, 34 SW (2) 929.

In *Clark v. Cleveland Drug Co.*, 204 N. C. 628, 169 SE 217, where plaintiff opened the wrong door and without looking stepped in, falling to the basement, it was held to be contributory negligence as a matter of law.

V.

QUESTION NO. 2 WAS A CLEAR AND CONCISE STATEMENT OF FACT READILY UNDERSTANDABLE BY THE JURY.

The burden of appellant's complaint is that Question No. 2 was misleading to the jury in that while the appellant testified that she observed the floor but did not see the crates the court instructed the jury that she did not either see or observe. As we have pointed out above we do not feel that the instruction can fairly be so construed. By appellant's own citation of authority, with which respondents agree, all that is necessary of an instruction is that it "be so clear and concise as to be readily understood by the jury" . . . ; and respondents submit that Question No. 2 complies with such standard. A reading of the question as a whole compels the conclusion that the court meant nothing more thereby than "was plaintiff negligent in failing to see the platforms?" The instruction being "clear and concise" the fact that one of the jurors was actually confused is not ground for reversal.

To hold otherwise would be to impose upon the trial court the burden of propounding instructions which could not possibly confuse any juror. This is not the law.

As said by the court in *Herstein v. Kemker*, 19 Ten. App. 681, 94 SW (2) 76:

“The instruction should be so framed as ‘to be readily within the comprehension of men such as jurors, who are not ordinarily educated in the law’ and ‘an instruction so worded that it might convey to the mind of an unprofessional man, of ordinary capacity, an incorrect view of the law applicable to the cause is erroneous.’ 14 RCL 770, *Lancaster v. State*, 3 Cold 339, 91 Am., Dec. 288.”

The office of the instructions is well stated by the court in *Eichmann v. Muchheit*, 128 Wis. 385, 107 NW 325, where the court said:

“The office of the charge is to state clearly and concisely to the jury the issues of fact, and the principles of law which are necessary to enable them to rightly solve these issues. The desideratum is that the issues be stated clearly, and the law applicable to each issue be stated logically and concisely, without unnecessary repetition and in such terms that a layman can understand it.”

To the same effect also is

Neff v. City of Cameron, (Mo. 1908) 111 SW 1139;

Louisville & N.R. Co. v. Hall, 87 Ala. 708, 6 So. 277;

Missouri Pacific Ry. Co. v. Irvine, 81 Kan. 649, 106 P. 1063;

West v. Boston & M. R. R., 81 N.H. 522, 129 A 768.

VI.

THE VERDICT OF THE JURY MAY NOT BE IMPEACHED BY AFFIDAVIT OF THE JURORS EXCEPT IN ACCORDANCE WITH PROVISIONS OF THE RULES OF CIVIL PROCEDURE.

As to appellant's attempt to impeach the verdict by an affidavit of one of the jurors, such practice was condemned by this Court in *Hepworth v. Covey Bros. Amusement Co.*, 97 U 205, 91 P (2) 507. It was there said:

"The weight of authority is that a verdict may not be impeached by affidavits of the jurors as to what was said or done in the jury room except as the statute permits such affidavits."

Citing:

People v. Ritchie, 12 U 180, 42 P. 209;

Black v. Rocky Mountain Bell Telephone Co.,
26 U 451, 73 P 514.

The court then goes on to point out that the Statute then in force, Sec. 104-40-2 RSU 1933, (which is now Rule 59 (a) paragraph (2) Rules of Civil Procedure) provided that proof of the jury's misconduct in arriving at a verdict by chance may be obtained through affidavits of

the jurors. The statute limits the use of such affidavits to the question of a chance verdict. We respectfully request the court therefore to disregard the affidavit of the juror, Mrs. Newlin, as being improper and contrary to the established practice of this jurisdiction.

VII.

IT WAS NOT ERROR TO REFUSE THE MOTION OF APPELLANT FOR A NEW TRIAL.

Under this subdivision of her brief appellant attacks the refusal of the lower court to grant her motion for new trial. The brief at this point contains a recital of certain occurrences in the hall adjoining the court room, and elsewhere, which are entirely outside of the record, and which respondents respectfully submit are wholly incompetent and improper. Respondents respectfully request the Court to disregard these statements for the foregoing reasons.

CONCLUSION

The only error committed by the trial court in submitting Question No. 2 to the jury was that in lieu thereof, the court should have granted the respondents' motion for a directed verdict in their favor. By all of the rules of construction of the English language and from a reading of the Question as a whole, its meaning is clearly and concisely stated: "Was the plaintiff negligent in not see-

ing”, and this was a question of fact clearly within the province of the jury, except under certain conditions wherein the plaintiff could be and in this case should have been held negligent as a matter of law.

Disregarding all else it is respondents’ contention that since the appellant seeks to raise objections to the instructions submitted to the jury for the first time on appeal, without having made exceptions thereto upon trial of the case, these objections are not timely, and not now entitled to be heard.

In conclusion, we submit that the record in this case discloses no reversible error of the trial Court and the judgment appealed from should therefore be affirmed with costs to the respondents.

Respectfully submitted,

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