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Debra Lynn Martineau v. Elliot J. anderson and Mary Christine anderson : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DEBRA LYNN MARTINEAU,

Plaintiff-Appellant,

vs.

ELLIOT J. ANDERSON and MARY CHRISTINE ANDERSON,

Defendants-Respondents.

No. 16923

REPLY BRIEF OF APPELLANT

Appeal from the Judgment
of the Third Judicial District
Court in and for Salt Lake County
The Honorable Jay E. Banks
District Judge

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ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FILING A VERDICT WHICH IS LEGALLY INSUFFICIENT, NOT SUPPORTED BY THE EVIDENCE, AND WHICH SHOWS JURY CONFUSION OR MISCONDUCT.

Respondents in their brief have made numerous assertions and speculations which are not supported by the facts of this case. In addition, respondents' authorities do not assist them in the peculiar problem which occurred in this verdict.

Respondents admit that the Jorgenson v. Gonzales case cited by both parties requires a court to resubmit a verdict to a jury if it appears irregular on its face. Naturally, Appellant agrees with this characterization of the Jorgenson case by Respondents.

In the instant case there were three irregularities appearing on the form of the first verdict which were reviewed solely by the trial judge and not with counsel for either party. First, the verdict form awarded zero general damages and $940 special damages. The court noted this problem and instructed the jury that it had to assess general damages when special damages were found.

Second, however, the special damage section stated: "$20 annually for 47 years -- total $940." This clearly should have alerted the lower court that the jury misconstrued the nature of special damages and a further instruction or direction as to this problem should also have been given. It should be noted from the Affidavit of Mr. Wheeler, plaintiff's attorney, that such a request was made by him and rejected by the lower court. (Supplemental record.)

Third, the total shown on the verdict form was $1,144 whereas the total of general damages equally zero and special damages equalling $940 obviously did not compute to this grand total. Thus, the deficiency appeared as to whether the missing $204 was allotted as special damages or as general damages. Again, the court failed to make any instruction or comment upon this error.

Respondents incorrectly state the contents of the first verdict. Respondents say, "The jury did make an error in form, however. The $204 should have remained in the special damages category with the $940 being removed to the general damage section." (Respondents' brief, pp. 11-12). And again

Respondents state, "The verdict form shows the amounts awarded to each category was merely switched; the $204 being put in the general damages rather than the special damages. This would leave the $940 as a compensation for some future general damages." (Respondents' brief, p. 12).

An examination of the first verdict form clearly shows that Respondents' statements are in error. The original verdict form returned by the jury showed zero dollars as general damages and $940 as special damages. The $204 spoken of by Respondents was not listed as a general damage and was not listed specifically in any way. Only by subtracting $940 from the total could this figure be computed. However, it is just as likely that the $204 figure was intended as special damages but at that it had not been specifically listed with the $940.

In this instance, therefore, the jury could just as easily have intended to award $1,144 in special damages and zero dollars in general damages. In such a case an obvious error occurs since there are no general damages awarded and all damages are listed as special damages. This verdict is clearly insufficient under Utah law.

The second alternative is to assume that the $204 was meant by the jury to be general damages. Under this theory, the jury corrected the second verdict form to reflect their intention. They therefore listed $204 as general damages and $940 as special damages with the explanation that this money

was $20 annually for 47 years. Since the jury obviously was confused as to this $940 it should have been properly placed in the general damage section. In this instance, then, the $1144 would have been general damages with no award being made for special damages. Because Plaintiff produced uncontroverted medical testimony as to the expenses she incurred as a result of the accident, the failure to award any special damages would also have been insufficient under Utah law.

As in the Brown case cited by Respondents (Respondents' brief, p. 10), the jury was obviously confused or did not understand the difference between the terms "general damages" and "special damages." While in Brown, the jury was able to correct this misunderstanding after being informed by the trial court as to the error, in the instant case the jury was still confused and still misunderstood its obligation to separate the damages as is evidenced by the second jury verdict form.

This is not a case similar to those cited by Respondents from the Supreme Court of Oregon. (Respondents' brief, pp. 14-15; 17-19). In both the Moore and Locatelli cases, it was impossible for the court to ascertain whether the damages had been correctly characterized by the jury since only the figures themselves were listed in the verdict forms. Appellant does not dispute the proposition that when special damages are susceptible to conflicting evidence and where general damages are also subject to conflicts that the jury is free to arrive

at any figure it desires to compensate the plaintiff. See also Weeks v. Calderwood, (Utah, January 25, 1979, No. 15671).

In this case, however, there is no question that the jury misconstrued special damages with general damages, as evidenced by the notation concerning the 47 years annuity. Had the amounts themselves been inserted at $204 and $940 it would have been only speculative for this Court or the parties to ascertain how the amounts were arrived at on the verdict form. But when the comments of the jury obviously show a direct misconception of the court's instructions the verdict is on its face insufficient and requires correction. Jorgenson, supra.

In summary, therefore, it is appellant's contention that the three errors made on the face of the first verdict form and the one error made on the face of the second verdict form showed that the jury did not understand the general - special damage distinction and that it is only speculation on the part of Respondents and Appellant as to what the jury believed or disbelieved in the evidence.

To say that the jury would have reached the same result had it understood the distinction in damages is as speculative and unsupported as for Appellant to say that the jury would have reached a different result had it understood the court's instructions. Since it cannot be said that this confusion would have resulted in the same verdict and would be harmless error, a new trial must be ordered by this Court to correct this extremely prejudicial error. Brunson v. Strong, 412 P.2d 451 (Utah 1966).

POINT II

THE TRIAL COURT ERRED IN FAILING TO GIVE PLAINTIFF'S COUNSEL AN OPPORTUNITY TO EXAMINE THE VERDICT FORMS BEFORE THEY WERE RESUBMITTED TO THE JURY AND BEFORE THE JURY WAS DISMISSED AND PLAINTIFF'S COUNSEL DID NOT WAIVE ANY DEFECT IN THE FORM OF THE VERDICT.

Respondents assert that Plaintiff's counsel waived any defect in the jury form by not objecting to it at the time it was delivered. As noted in Appellant's brief, in chief, there is no doubt that an attorney for a client can waive an irregularit in the verdict form if a proper objection is not timely made. However, the facts in the instant case and those in the Langton and Cohn cases are decidedly different.

In the instant case the record shows that when the verdict was returned the trial court examined it, determined it was insufficient, and called counsel to a side-bar conference. (Tr. 236-237). As is typical in Utah courts, the conference was not reported. It is undisputed, however, that the trial court did not offer to show the verdict to either counsel. The jury was then told that special damages could not be awarded in the absence of general damages and told to deliberate once again. (Tr. 237). Mr. Wheeler's suggestion for a further instruction on special and general damages was rejected by the court. (Supplemental record).

Five minutes later the new verdict was returned and the court stated that the verdict could be published. The record shows that " the verdict was published by the clerk and the jury was Polled." (Tr. 238). Plaintiff contends that at

the time the clerk read the jury verdict the language referring to the annuity was omitted. The court then received the verdict and ordered it filed. It then excused the jury and it was not until this point that the actual form was shown to Plaintiff's counsel.

Thus, since Respondents do not dispute the manner of reading the verdict by the clerk it can be assumed for purposes of this appeal that the verdict form was read without the annuity language contained in the special damage section. Without hearing this language Plaintiff's counsel had no way of knowing that the jury had incorrectly placed an item of general damages in the special damage section, thereby making the verdict erroneous on its face and erroneous for failing to find any special damages.

In both Langton and Cohn there was no question raised that the attorney representing the plaintiff was aware of the exact language contained in the verdict form. In both not only did plaintiffs' counsel receive the verdict form before the jury was dismissed but the trial court specifically asked plaintiffs' counsel if there was anything further counsel wished to bring before the court.

In the instant case, however, Plaintiff's counsel properly assumed that the verdict form as read by the clerk contained all of the information written by the jury. When the clerk failed to read the critical language concerning the annuity it can hardly be said that Plaintiff's counsel waived an opportunity to object to the form of the verdict.

Since a heavy burden is placed upon counsel at the time

a verdict is returned and since a waiver can easily be assessed against the counsel's client, it is Appellant's position that this Court should formulate a rule in the state of Utah making it mandatory for the trial court to allow both counsel to examine the verdict form before it is read by the clerk and entered by the court.

Such a rule would allow counsel to bring to the court's attention any error in the verdict form before the verdict is entered and would clearly establish that counsel was aware of the exact language contained in the form and therefore that any irregularity was waived.

In the alternative, this Court should formulate a requirement that the court reporters of the state report the exact language read by the clerk when the verdict is being published and that the trial court, as in Cohn, specifically give counsel an opportunity to bring matters before the court while the jury is still empaneled.

It is obvious that in any type of a "waiver" situation it is fundamental that the party who is waiving his right must know of the rights which he is waiving. In the absence of being able to see the entire scheme of the first and second verdict and being able to see the comments made by the jury it cannot be said that Plaintiff's counsel waived any defect in the form. On the other hand, the lower court which saw both the first and second verdict allowed the verdict to be published when it contained an obvious defect on its face which should have required resubmission to the jury and clarification to the jury as to general and special damages.

It is fundamentally unfair to forgive a lower court for its errors in allowing an erroneous verdict to be entered and punishing the attorneys for failure to bring such errors to the court's attention while at the same time not requiring the court to give the counsel a sufficient opportunity to examine the verdict and make the proper objections before the jury is excused.

For this reason, Appellant respectfully suggests that the failure to show counsel the two verdict forms at the time they were entered constituted error in this case and that a new rule should be formulated for all future cases in the state of Utah to prevent similar confusion and injustice.

POINT III

THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF A NEW TRIAL IN THAT THE JURY AWARDED INADEQUATE DAMAGES NOT BASED UPON THE UNDISPUTED EVIDENCE AT THE TRIAL.

Respondents again resort to the familiar rule that the jury is entitled to weigh the evidence in arriving at damages for both special and general compensation. Again, Appellant has no disagreement with this rule. The corollary to this rule is, however, that when damages are undisputed the failure of a jury to award such damages constitutes an inadequate verdict.

While Respondents have conveniently placed the $204 in the special damage section by claiming that the jury became confused between general and special damages, as stated previously, there is no evidence except the speculation of Respondents that the jury intended the $204 to be special rather than general damages. Since in the first verdict the

jury found zero general damages it is more likely that the jury intended all $1144 to be special damages. In the second verdict, however, when it placed the $204 in the general damage section the jury obviously intended this amount of money to be included as general damages. Thus, if the $940 should have been included in the general damage section the result is simply that the $1,144 is deemed all general damages with no special damages.

A review of the evidence shows that even under the light most favorable to the defendants, Plaintiff incurred both medical expenses and loss of wages due to the accident. To find no special damages whatsoever is clearly an error on the part of the jury. This Court will note that many of the medical bills which were incurred by Plaintiff were completely undisputed by defendants as to their reasonableness and as to their connection with the accident. The jury was therefore not free to find no special damages whatsoever as to this undisputed evidence.

Finally, it should be again observed that the "47 year annuity at $20 a year" was a calculation arrived at entirely by the jury since neither side ever presented any similar type of evidence. This figure and calculation again points out the confusion on the part of the jury in making its damage award.

For these reasons, therefore, if the verdict form is construed as it must be with all general damages and no special damages it is apparent that the damage award for specials was totally inadequate and would require a reversal on this point alone.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO DIRECT LIABILITY AGAINST DEFENDANT SINCE THERE WAS NO EVIDENCE TO SHOW A FACTUAL QUESTION OF LIABILITY FOR THE JURY.

Respondents take a seemingly contradictory position in their brief. (Respondents' brief, p. 31-33). On the one hand they assert that since the jury found in favor of Plaintiffs and against Defendants as to liability that no error occurred by the failure of the court to direct liability against Defendants. On the other hand, however, they claim that this case should not be submitted back to the lower court as to damages only since the new jury "would not have all of the evidence before them and be able to see all the weaknesses of the plaintiff's position."

Thus, Respondents admit that the question of liability and the evidence adduced at trial concerning liability can directly or indirectly affect an award of damages.

If a plaintiff becomes confused as to the dates or events leading to a sequence of an automobile accident and therefore makes a poor witness on his or her own behalf as to the liability portion of a trial it is probable that a jury would conclude that the witness's testimony concerning damages is equally implausible. In effect, then, when a plaintiff is entitled to a directed verdict as a matter of law the failure to direct such a verdict places the plaintiff in jeopardy of not only having the jury erroneously decide liability but also having the damage portion of the verdict affected.

In the instant case there is no better example of when a directed verdict should be granted than where a passenger is the

plaintiff and is suing another driver. Why the trial court failed to direct a verdict on behalf of Plaintiff remains a mystery. However, the testimony of Plaintiff relating to liability and her fuzzy memory concerning distances, time, and events could have affected the jury's determination as to her credibility concerning her damages.

It cannot be said with any degree of certainty that the liability portion of this trial did not affect the damage portion by, as Respondents as stated, allowing the jury to see "all the weaknesses of the plaintiff's position." As such it was prejudicial error to require liability testimony in such a clearcut case mandating a directed verdict.

CONCLUSION

The jury verdict form in this case is unique. Whereas most incorrect forms contain one error the instant case contained three initial errors. While the lower court corrected one it failed to correct the other two and the verdict form as finally entered by the trial court contains a glaring error showing that the jury misconstrued the court's instructions as to special and general damages.

Since Plaintiff's counsel only heard that portion of the verdict read which is not inconsistent on its face and since the court did not allow Plaintiff's counsel any opportunity to examine the verdict form before excusing the jury, it cannot be said that plaintiff waived the objection to such form. On the contrary, this case illustrates the need to formulate a rule allowing counsel the "opportunity" to examine a verdict so that a waiver can either be properly asserted or so that

counsel can correct an error before the jury is excused.

Since it must be assumed that the jury awarded all general damages and no special damages the failure to find such special damages is clearly inadequate since the undisputed evidence showed that Plaintiff incurred both medical expenses and lost wages as a direct result of this accident.

Finally, the failure to direct a verdict on behalf of plaintiff was not harmless error in that the liability portion of the trial could easily have affected the damage award given to Plaintiff.

For these reasons, therefore, this case should be remanded for new trial as to damages only.

MAX D. WHEELER, ESQ.
and
CRAIG S. COOK, ESQ.

Attorneys for Plaintiff-Appellant

MAILING CERTIFICATE

This is to certify that two copies of the foregoing brief were mailed to Phil Fishler, attorney for Defendants-Respondents, 604 Boston Building, Salt Lake City, Utah, this ____ day of June, 1981.

_____