

1956

Margaret Reynolds v. W. W. Clyde & Co. and Fred Gray : Brief of Respondents

Utah Supreme Court

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Case No. 8405

IN THE SUPREME COURT
of the
STATE OF UTAH

MARGARET REYNOLDS,
Plaintiff and Appellant,

— vs. —

W. W. CLYDE & CO., a corporation,
and FRED GRAY,
Defendants and Respondents.

FILED
May 10 1906
Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS

**MORETON, CHRISTENSEN
& CHRISTENSEN**

Attorneys for Respondents

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IN THE SUPREME COURT of the STATE OF UTAH

MARGARET REYNOLDS,
Plaintiff and Appellant,

— vs. —

W. W. CLYDE & CO., a corporation,
and FRED GRAY,
Defendants and Respondents.

Case No. 8405

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The statement of facts set forth in the appellant's brief, recites many facts which we deem wholly irrelevant and immaterial to the issues raised by this appeal, and omits to mention certain facts favorable to the defendants to which we believe the attention of the court should be directed. We refer to the parties as they appeared in the court below.

The only real issue at trial was whether the accident happened as claimed by the plaintiff, or as related by

the defendant Gray. The facts out of which the case arises are as follows:

During the summer of 1953, the defendant W. W. Clyde & Co. (hereinafter referred to as Clyde) had a contract for certain road construction work west of U. S. Highway 91, near Beck's Hot Springs. (R. 4, 7, 144.) (Ex. 6.) In performing this work, it was necessary that Clyde's trucks haul dirt and fill material from the east side of the highway to the west side of the highway. (R. 145). By the terms of its contract, with the State Road Commission, Clyde was required to provide flagmen to protect traffic from the danger of accident presented by heavy trucks passing back and forth across U. S. Highway 91. (R. 146, Ex. 6)

Pursuant to this contractual requirement, Clyde employed the defendant Gray and one Harry Gallo to act as flagmen at the intersection. (R. 95-96, 112-113, 147). Gray was stationed on the east side of the highway and south of the intersection, and it was his duty to halt north bound traffic on Highway 91 when Clyde's trucks were approaching or crossing the highway. (R. 102, 148). Gallo was stationed on the west side of the highway, north of the intersection, and he had the duty of halting south bound traffic under the same circumstances. (R. 113). Their employment with Clyde commenced on August 3, 1953 (R. 95, 101).

During the summer of 1953, the plaintiff, who resided in Salt Lake City, was employed at a real estate office in Bountiful. (R. 16-17). It was her practice to

drive back and forth between Salt Lake and Bountiful and she made this trip at least twice, and some times four times a day, in traveling between her home and her office. (R. 18). She was thoroughly familiar with the highway, and with the fact that flagmen were stationed there to halt traffic when trucks were crossing the highway. (R. 18.)

On the morning of September 17, 1953, the plaintiff was involved in an accident with the flagman Gray (R. 20). According to the plaintiff's version of the accident, the plaintiff was proceeding in the most easterly lane of traffic in a northerly direction, and as she approached the flagman's position, and even before she could see him, she slowed down, anticipating that she might be flagged (R. 19). There was another car preceding her at a distance of three to four car lengths, in the same lane of traffic (R. 19). She observed the flagman waving a red flag in a plane parallel with the road or his body, and she observed the car preceding her pass by the flagman without event. (R. 20.) She construed the action of the flagman as a signal to proceed forward, and she started to accelerate (R. 20). As she passed the flagman, he raised his flag and violently struck the side window of her automobile, at the same time uttering a loud yell. (R. 20). This caused the glass to shatter, and the noise and excitement so confused the plaintiff, that she temporarily lost control of her car, during which interval, it crossed over the center of the highway and into the lane of traffic for south bound traffic. (R. 21). She recognized her position of peril, and swerved her

automobile back to the right side of the road. (R. 21). In so doing, she twisted her back in such fashion as to injure it quite severely.

Defendant Gray's version of the accident is entirely different. According to his testimony, he had halted the cars in the easterly lane of traffic, and had stepped in front of them, and approximately on the line separating the two lanes of north bound traffic, and was attempting to halt traffic in the number two lane, or the north bound lane nearest the center of the highway. (R. 105, 106, 110). His flag was held in his right hand and was waved up and down in a plane between his waist and his head. (R. 106). His left arm was also extended upward. While he was so engaged in signalling the north bound traffic, the plaintiff "run through my flag," and so close to him, that it was necessary for him to step back in order to avoid being struck by her car. (R. 106, 109, 110). He was not certain whether his flag came in contact with her car, but if it did, it was purely accidental and unintentional on his part. (R. 101, 106, 109).

He also observed that the plaintiff drove down the road a short distance, stopped on the right hand edge, and got out of her car. (R. 107, 109). The plaintiff and Gray agree that nothing was said by either to the other. (R. 77, 105, 107). Admittedly neither the plaintiff nor her husband ever made any complaint to Clyde (R. 79), and the first notice that it ever received of the claimed accident was when suit was filed.

The plaintiff commenced her action in three counts.

(R. 1-5). Her first count was based on the theory of assault, (R. 1-2); her second count was based on the theory of negligence on the part of the defendant Clyde in employing a person of known vicious propensities, (R. 2, 4-5); and the third count was based on simple negligence in conducting the flagging operations. (R. 2-3). During the trial of the case, the plaintiff's attorney abandoned the first and second counts, and it was stipulated that they might be withdrawn from the consideration of the jury (R. 117). The case was submitted to the jury on the issue of the defendants' negligence (third count), and the plaintiff's contributory negligence, and the jury returned a verdict favorable to the defendants, no cause of action, (R. 203), upon which judgment was duly entered. (R. 204).

The only eye witnesses to the accident who testified at the trial, were the plaintiff and the defendant Gray. The plaintiff called other witnesses who testified as to the manner in which Gray had signalled at various times not involved in this suit, and in rebuttal the defendants called witnesses to testify as to the manner in which he had performed his duties as a flagman during the fall of 1953. Essentially all that is involved, and all that the jury had to determine, was whether it believed the testimony of the plaintiff, that the defendant deliberately struck the window of her automobile after signalling her to proceed forward; or whether it believed the testimony of the defendant Gray, that the plaintiff ran through his flag at a time when he was signalling for her to halt. The conflict in the testimonies of the two witnesses was

sharp and clear. Each was a party to the action, and interested in its outcome. The jury observed the appearance and conduct of both of them, from which it determined either:

(a) That the evidence was in equipoise, and therefore the plaintiff had failed to sustain her burden of proof of negligence on the part of the defendants; or

(b) That the testimony of Gray was the more credible, and that the defendants were not guilty of any negligence; or

(c) That plaintiff was negligent in attempting to drive through or past Gray's signal flag.

The verdict being in favor of the defendants, they are entitled to have the evidence, and all reasonable inferences therefrom, considered in the light most favorable to them.

STATEMENT OF POINTS

POINT I.

THERE WAS A CONFLICT IN THE EVIDENCE WHICH CREATED A QUESTION OF FACT FOR DETERMINATION BY THE JURY.

POINT II.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL.

ARGUMENT

POINT I.

THERE WAS A CONFLICT IN THE EVIDENCE WHICH CREATED A QUESTION OF FACT FOR DETERMINATION BY THE JURY.

Plaintiff contends that the evidence compels a finding in her favor. In other words, *as a matter of law*, the defendants were guilty of negligence which proximately caused the plaintiff's injuries, and the plaintiff was herself, *as a matter of law*, free of contributory negligence. Significantly, the plaintiff has failed to cite a single authority—, statute, case or text,—in support of her position. The law to the contrary is so well settled as to be axiomatic. It finds its origin in the ancient common law, the Constitution of this State, and an unbroken line of decision from this Court, extending back to territorial days. It would be a work of supererogation, even to cite all of the decisions of this court dealing with the question. Suffice it to say, that the rule has been reiterated countless times, and while the rule is almost as old as the jury system itself, it lives today not only with undiminished vitality, but perhaps in unsurpassed vigor. The following quotations from some very recent decisions of this court, suffice to illustrate:

The language of Mr. Justice Crockett, speaking for the court in the case of *Weenig Bros., Inc., v. Manning*, (Ut.), 262 Pac. 2d 491, is particularly apropos to the facts of this case:

“In order to upset the judgment and command one in its favor, the first obstacle plaintiff

must overcome is to demonstrate that the evidence shows with such certainty that reasonable minds could not differ thereon that the defendant was guilty of negligence which proximately caused the collision. In the absence of such degree of proof we could not direct that such finding be made and reverse decision of the lower court. The defendant having prevailed, on conflicting matters the evidence is viewed in the light most favorable to him."

In the case of *Green vs. Equitable Life Assurance Society*, (Ut.), 284 Pac. 2d 695, this court, speaking through Mr. Justice Worthen, stated the rule thusly:

"This being a law action the question is not whether the evidence would have supported a judgment in favor of appellant but whether the judgment entered by the trial court finds support in the evidence.

"The trial judge saw and heard the witnesses and was in a better position than we to properly evaluate it and to pass on their credibility."

Mr. Justice Wade, speaking for this court in the case of *Gibbons & Reed Co. v. Guthrie*, (Ut.), 256 Pac. 2d 706, said:

"It needs no citation of authority that this court will not redetermine facts found by the fact finder in the lower court in law cases if in the light most favorable to the respondent the evidence is sufficient to sustain such findings."

And in the recent case of *Coombs v. Perry*, (Ut.), 275 Pac. 2d 580, again speaking through Justice Crockett, this court said:

“The plaintiff having won a judgment below, the verdict is protected by a bulwark of rules firmly established in our law. First, by the general proposition that the judgment and proceedings in the lower court are presumptively correct with the burden upon defendant to show error. Second, where a trial judge has passed upon a question and a jury, presumably fair and impartial, has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored in reviewing the situation and attempting to see, as objectively as possible, whether reasonable minds might so conclude. Third, that the court must review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the plaintiff, and similarly, must consider any lack or failure of evidence in the same light, which we do in reviewing the facts here.”

Reasons for the rule were further amplified in the case of *Gittens v. Lundberg*, (Ut.), 284 Pac. 2d 1115, where this court said:

“It is the duty of this court to leave the question of credibility of witnesses to the jury or fact trier and we have quite consistently adhered to that policy. As has often been said, the jury is in a favored position to form impressions as to the trust to be reposed in witnesses. They have the advantage of fairly close personal contact; the opportunity to observe appearance and general demeanor; and the chance to feel the impact of personalities. All of which they may consider in connection with the reactions, manner of expression, and apparent frankness and candor or want of it in reacting to and answering questions on both direct and cross-examination in determin-

ing whether, and to what extent, witnesses are to be believed. Whereas, the appellate court is handicapped by being limited to a review of an impersonal record.

“ * * * The jury may evaluate the testimony of witnesses and accept those parts which they deem credible, even though there be some inconsistencies. An examination of the record here does not show that facts testified to would be impossible in the light of known physical facts, or so contradictory or uncertain as to justify a conclusion that any of the witnesses were entirely ‘unworthy of belief’ as plaintiff contends.”

The principles above stated are illustrated and reiterated in the following recent decisions of this court:

Farrington v. Granite State Fire Ins. Co., of Portsmouth, (Ut.), 232 Pac. 2d 754; *Garret Freight Lines v. Cornwall*, (Ut.), 232 Pac. 2d 786; *Lowder v. Holley*, (Ut.) 233 Pac. 2d 350; *American Scale Mfg. Co. v. Zee*, (Ut.), 235 Pac. (2d) 361; *Beagley v. U. S. Gypsum Co.*, (Ut.), 235 Pac. 2d 783; *Morris v. Russell*, (Ut.), 236 Pac. 2d 451; *Toomer's Estate v. U. P. R. Co.*, (Ut.), 239 Pac. 2d 163; *Seybold v. U. P. R. Co.*, (Ut.), 239 Pac. 2d 174; *Poulsen v. Manness, et al.*, (Ut.), 241 Pac. 2d 152; *McCollum v. Clothier*, (Ut.), 241 Pac. 2d 468; *M. S. T. & T. Co. v. Consol. Freight Ways*, (Ut.), 242 Pac. 2d 563; *Tuttle v. P. I. E. Co.*, (Ut.), 242 Pac. 2d 764; *Gen. Ins. Co. of Am. v. Lewis*, (Ut.), 243 Pac. 2d 433; *Buckley v. Cox*, (Ut.), 247 Pac. 2d 277; *Great Am. Indem. Co. v. Berryessa*, (Ut.), 248 Pac. 2d 367; *Parkinson v. Amundson*, (Ut.), 250 Pac. 2d 944; *Watkins v. Ut. Poultry &*

Farmers Coop., (Ut.), 251 Pac. 2d 663; *Stickle v. U. P. R. Co.*, (Ut.), 251 Pac. 2d 867; *Seamons v. Anderson*, (Ut.), 252 Pac. 2d 208; *Nichols v. Wall*, (Ut.), 253 Pac. 2d 355; *Thirteenth & Wash. Sts. Corp v. Neslen*, (Ut.), 254 Pac. 2d 847; *Gibbs v. Blue Cab, Inc.*, (on rehearing), (Ut.), 259 Pac. 2d 294; *Lodder v. Western Pac. R. Co.*, (Ut.), 259 Pac. 2d 588; *Hoyt v. Wasatch Homes, Inc.*, (Ut.), 261 Pac. 2d 927; *Chamberlain v. Montgomery*, (Ut.), 261 Pac. (2d) 942; *Beck v. Jeppsen*, (Ut.), 262 Pac. 2d 760; *Hillyard v. Ut. By-Products Co.*, (Ut.), 263 Pac. 2d 287; *Roche v. Zee*, (Ut.), 264 Pac. 2d 855; *Scofield v. Sprouse-Reitz Co.*, (Ut.), 265 Pac. 2d 396; *Wilson v. Oldroyd*, (Ut.), 267 Pac. 2d 759; *Hodges v. Waite*, (Ut.), 270 Pac. 2d 461; *Jensen v. Taylor*, (Ut.), 271 Pac. 2d 838; *Nasser v. Burton*, (Ut.), 272 Pac. 2d 163; *Kimball Elevator Co., Inc., v. Elevator Supplies Co., Inc.*, (Ut.), 272 Pac. 2d 583; *Staley v. Grant*, (Ut.), 276 Pac. 2d 489; *John C. Cutler Assoc. v. DeJay Stores Inc.*, (Ut.), 279 Pac. 2d 700; *Upton v. Heiselt Constr. Co.*, (Ut.), 280 Pac. 2d 97; *Best v. Huber*, (Ut.), 281 Pac. 2d 208; *Rogalski v. Phillips Petroleum Co.*, (Ut.), 282 Pac. 2d 304; *Lawrence v. Bamberger R. R. Co.*, (Ut.), 282 Pac. 2d 325; *Jensen v. Mower*, (Ut.), 294 Pac. 2d 683; *Sprague v. Boyle Bros. Drilling Co.*, (Ut.), 294 Pac. 2d 689; *Winchester v. Egan Farm Service, Inc.*, (Ut.), 288 Pac. 2d 790; *Ray v. Consol. Freightways*, (Ut.), 289 Pac. (2d) 196; *Gaddis Inv. Co. v. Morrison*, (Ut.), 289 Pac. 2d 730; *Price v. Price*, (Ut.), 289 Pac. 2d 1044; and *Malstrom v. Consolidated Theatres, Inc.*, (Ut.), 290 Pac. 2d 689.

Perhaps no principle has been better settled, or

more often reiterated by this court within the past five years, than that ordinarily questions of the defendant's negligence and plaintiff's contributory negligence are for the jury. Only where all reasonable minds must agree, can it be held as a matter of law, that either party is either free of, or guilty of, negligence, or that a verdict should be directed in favor of either party. The principle is further illustrated by the following: *Compton v. Ogden Union Ry. & Depot Co.*, (Ut.), 235 Pac. 2d 515; *Wright v. Maynard*, (Ut.), 235 Pac. (2d) 916; *Martin v. Stevens*, (Ut.), 243 Pac. 2d 747; *Gibbs v. Blue Cab, Inc.*, (Ut.), 249 Pac. 2d 213; *Morby v. Rogers*, (Ut.), 252 Pac. (2d) 231; *Glenn v. Gibbons & Reed Co.*, (Ut.), 265 Pac. 2d 1013; *Bates v. Burns*, (Ut.), 281 Pac. 2d 209; *Hewitt v. Gen. Tire & Rubber Co.*, (Ut.), 284 Pac. 2d 471; and *Covington v. Carpenter*, (Ut.), 294 Pac. 2d 788.

In light of the above principles we proceed to a consideration of the contentions made by the plaintiff on this appeal.

It is not without significance that no motion for a directed verdict was made by the plaintiff at the trial of this case. The first time the plaintiff ever contended, or even suggested, that she was entitled to a directed verdict was upon her motion to set aside the verdict or for a new trial. On this appeal she asserts that the jury must have found either that there was no incident at all, or else that the appellant herself was guilty of contributory negligence. The first suggestion deserves but brief attention. In view of the fact that both parties

admitted that an incident occurred, it certainly may not be presumed that the jurors disregarded all of the evidence and their oaths of office, and made a finding wholly unsupported by the evidence. However the jury might well have found plaintiff guilty of contributory negligence, which finding is well supported by substantial evidence. As indicated in our statement of facts, the verdict of the jury may be sustained on either of the following three theories: (1) The plaintiff failed to sustain her burden of proving that the defendants were guilty of negligence; (2) the jury were convinced by the evidence that the accident was not caused by any negligence on the part of the defendants; (3) that the plaintiff was guilty of contributory negligence.

The plaintiff failed to offer any evidence whatsoever, of negligence on the part of the defendants. Her testimony, if believed, would prove an assault or battery, but not negligence. But this theory was abandoned by the plaintiff during the trial. She did nothing to carry her burden of proof of negligence. The only evidence on this subject came from the defendant Gray. According to his testimony, he signalled the plaintiff's automobile to stop, by waving a red flag in an arc from the height of his shoulder to a point over the top of his head, at the same time extending his left hand upward. The jury could well have believed that such a signal was clear, unambiguous and given in a prudent and proper manner, free of any negligence whatsoever.

With respect to the problem of contributory negli-

gence, the jury might well have believed that the plaintiff was guilty of contributory negligence, even though they believed her own testimony. As she approached the scene of the accident, she anticipated that she might be flagged. When the flagman Gray came into view, he was standing at the edge of the road and waving his flag. On previous occasions when she had passed by this point, if the flagman did not intend to halt traffic, he stood away from the road with his flag down. In this instance, he was standing on the edge of the road and waving his flag. In view of past experience, this, in itself would be some indication that it was his intention to halt traffic. The jury might well have believed that under such circumstances, the plaintiff should not have proceeded by the flag until certain that it was the intention of the flagman that she should proceed. Of course, if the jury believed the testimony of the defendant Gray, as they were entitled to do, they could hardly escape finding the plaintiff guilty of contributory negligence since according to Gray's testimony, she "run through my flag."

It may be conceded that the evidence would permit a finding in favor of the plaintiff. That is not the issue here. The jury found for the defendants, and the defendants are entitled to have the evidence, and every reasonable inference therefrom, viewed in a light most favorable to them. If there is any evidence in the record, upon which reasonable minds could find as the jury did in this case, then the verdict may not be set aside by this court. The jury had the opportunity, as this Court

does not, of seeing the witnesses, noting their appearance and demeanor, and manner of testifying. From these observations the jurors concluded that the defendants were not liable. The trial judge having had the same opportunity for observation, refused to set aside the verdict.

The position of defendants respecting Point I may be well summarized by quoting from the opinion of Mr. Justice Wade in the case of *Horsley v. Robinson*, (Ut.), 186 Pac. 2d 592, where it was said :

“Under a general verdict we cannot be assured what facts the jury found or that they found the facts necessary to sustain their verdict. So it is universally held under the common law system, as it must be in order to give stability to jury verdicts, that the appellate court must sustain the verdict where the evidence is sufficient to support a finding of the necessary facts to do so. Otherwise, the appellate court would be required to reverse every verdict where in its opinion the great preponderance of the evidence is against a finding of the necessary facts to support it, even though the evidence is such that reasonable minds might conclude from the evidence that such necessary facts happened. To do so would be to review the evidence no matter what we call it. The question of what were the facts and where is the preponderance of the evidence is for the jury and not for the court to determine. Our problem is only to determine whether there is sufficient evidence to sustain the verdict. In doing so our standard is: Could a reasonable mind be convinced by the evidence of the necessary facts to support the verdict? If so, it must be

sustained.

“That this court is not authorized to review the facts found by the jury is expressly provided by our Constitution, Article 8, Section 8, where it is provided ‘In cases at law the appeal shall be on questions of law alone.’ Since we cannot review the facts, whatever we think of where the preponderance of the evidence is, is immaterial. If we were to review the evidence and reverse this case because we think the preponderance of the evidence on a material issue is against the plaintiff, we do so in violation of that constitutional provision.”

POINT II.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING PLAINTIFF’S MOTION FOR NEW TRIAL.

Plaintiff’s position under her Point II is even weaker than her argument under Point I. In the early case of *Newton v. Brown*, 2 Ut. 126, this court laid down the rule of decision regarding motions for new trial, based on insufficiency of the evidence, which has been followed ever since. This court there said:

“When the motion for a new trial is founded upon the insufficiency of the evidence to support the verdict and judgment, a large discretion is vested in the court below, in refusing or granting the motion. It must plainly appear that this discretion has been abused before the Appellate Court will interfere with this action in granting the motion upon this ground.

“In the case before us, the record shows that the testimony was, to say the least, very conflict-

ing, and in such cases the granting or refusing of a new trial rests peculiarly in the discretion of the court. * * *

“There was no abuse of discretion in this case, and for this reason alone the judgment of the court below should be affirmed.”

In the later case of *White v. Union Pac. Ry. Co.* 8 Ut. 56, 29 Pac. 1030, this court said:

“One of the grounds assigned in the motion for new trial is that the evidence was insufficient to sustain the verdict. There was a manifest conflict in the evidence. If the plaintiff is to be believed, he was entitled to recover. * * * The rule is, when a motion is made for a new trial because of the insufficiency of the evidence, and the testimony is conflicting, the granting or refusing of a new trial is largely in the discretion of the trial court, and its act will not be overruled unless there is a clear abuse of discretion.”

The same principles were followed in *Anderson v. Salt Lake & O. Ry. Co.*, (Ut.), 101 Pac. 579, and *Lacino v. Smith*, (Ut.), 105 Pac. 914.

The rule was further expostulated in *James v. Robertson*, 39 Ut. 414, 117 Pac. 1068, in the following language:

“While *the district court*, in the exercise of a sound legal discretion, without basing his ruling upon any specific error of law may, under certain circumstances, *possess the authority to grant a new trial, yet we cannot do so, nor can we exercise the discretion which the district court might*, and in some cases perhaps ought to have exercised. In cases like the one before us, where

all other assignments fail, and the only available assignment is that the evidence does not justify the verdict of the jury, and where the trial court has refused to grant a new trial, all that we are authorized to do is to look into the evidence to ascertain whether there is any substantial evidence in support of every material element, which plaintiff is required to establish in order to recover. If there is such evidence, then, so far as we are concerned, the verdict must stand, although in our judgment if we passed on the facts, the verdict upon the whole evidence should have been to the contrary. *Nor can we, under the guise of reviewing an abuse of discretion by the trial court in refusing to grant a new trial upon the ground that the verdict is not supported by the evidence, pass upon the weight of the evidence.* What the district judge might, or even should have done in this regard we may not do for him, simply because he refused to do it.” (Italics ours.)

It was further discussed in *Valiotis v. Utah-Apex Mining Co.*, 55 Ut. 151, 184 Pac. 802, as follows:

“It is undoubtedly true, as counsel for appellant contends that the trial judge may and should set aside a verdict for insufficiency of the evidence and grant a new trial, whenever in his judgment the verdict is clearly and palpably against the weight of the evidence. Not to do so, would be an abuse of discretion. * * *

“But the trial judge ought not as a general rule to disturb the verdict if in his opinion there is substantial evidence to support it. To set aside the verdict in such case would be to invade the province of the jury, in whom is vested the power to decide all questions of fact and to whom all

evidence thereon is to be addressed.” (Italics ours.)

The court further said:

“One of the obvious reasons therefor is that the appellate court, limited to the examination of the record merely, has not the advantage that the trial judge has to judge such matters, having, as he does, the witnesses before him and being given the opportunity to see the witnesses, hear their testimony, and observe their demeanor while testifying. * * * To which we may add that, by constitutional provision of this state, appeals do not lie on questions of fact in law cases. *Whittaker v. Ferguson*, 16 Utah 240, 51 Pac. 980; *Harris v. Laundry Co.*, 39 Utah, 436, 117 Pac. 700 Ann. Cas. 1913E, 96; *Hill v. S. P. Co.*, 23 Utah, 94, 63 Pac. 814; *Hoggan v. Cahoon*, 31 Utah, 172, 87 Pac. 164; *Nelson v. S. P. Co.*, 15 Utah, 325, 49 Pac. 644; *Anderson v. Mining Co.*, 15 Ut. 22, 49 Pac. 126; *Connor v. Raddon*, 16 Utah, 418, 52 Pac. 765.

“The granting or denial of a motion for new trial founded on the insufficiency of the evidence to justify the verdict, where the evidence is conflicting, rests in the sound legal discretion of the trial judge, and the question directly involved on appeal is whether or not that discretion has been improperly exercised or abused. As said in the case of *Harrison v. Sutter St. R. Co.*, 116 Cal. 161, 47 Pac. 1020:

“ ‘That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic

and requires no citation of authority in its support. ' "

The court concluded as follows :

"This court has repeatedly held that *the discretion of the trial court, exercised in granting or refusing to grant a motion for new trial, based on the insufficiency of the evidence to justify the verdict, cannot be interfered with when, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to material issues of fact in the case relative to which the insufficiency is alleged. In such a case this court must hold as a matter of law that no abuse of discretion is shown.* * * *

* * * *

"It was a case of the credibility of witnesses, substantially conflicting evidence and inferences to be drawn therefrom concerning which fair-minded men might reasonably entertain different conclusions. * * * The judgment of the trial court is therefore affirmed, with costs to the respondent." (Italics ours.)

To the same effect see *Thompson vs. Brown Live Stock Co.*, 74 Ut. 1, 276 Pac. 651.

In *Brown v. Union Pac. R. Co.*, (Ut.), 290 Pac 769, this court appropriately observed :

"The trial court, having seen and heard the witnesses, did not feel justified, although it had the power, to set aside the verdict because it was against the evidence. We, who have only read the record of the trial and proceedings, are asked to say that the jury and the trial judge did not

do their duty. This we are unwilling to do. The appellant had a fair trial, and the trial court committed no errors.”

See also *Jensen v. Logan City*, 89 Ut. 347, 57 Pac. 2d 708; *Chatelain v. Thackeray*, (Ut.), 100 Pac. 2d 191; and *Bowers v. Gray*, (Ut.), 106 Pac. 2d 765.

The authorities were extensively reviewed in *Moser v. Z. C. M. I.*, (Ut.), 197 Pac. 2d 136, in a comprehensive opinion wherein it was said:

“It is a matter now too well settled to admit of any serious dispute (and appellants do not contend otherwise) that the question of granting or denying a motion for new trial is a matter largely within the discretion of the trial court. *White v. Union Pacific Railroad Co.*, 8 Ut. 56, 29 P. 1030; *Van Dyke v. Ogden Savings Bank*, 48 Ut. 606, 161 P. 50; *Utah State National Bank v. Livingston*, 69 Ut. 284, 254 P. 781; *Thompson v. Brown Live Stock Co.*, 74 Ut. 1, 276 P. 651; *Jensen v. Logan City*, 89 Ut. 347, 57 P. 2d 708. This rule applies whether the motion is based upon insufficiency of the evidence or upon newly discovered evidence. See cases above cited and *Valiotis v. Utah Apex Mining Co.*, 55 Ut. 151, 184 P. 802; *Greco v. Gentile*, 88 Ut. 255, 53 P. 2d 1155; and *Trimble v. Union Pacific Stages*, 105 Ut. 457, 142 P. 2d 674. This court cannot substitute its discretion for that of the trial court. *James v. Robertson*, 39 Ut. 414, 117 P. 1068, 2 N.C.C.A. 782. We do not ordinarily interfere with rulings of the trial court in either granting or denying a motion for new trial, and unless abuse of, or failure to exercise discretion on the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained. *Lehi Irrigation*

Co. v. Moyle, et al., 4 Ut. 327, 9 P. 867; White v. Union Pacific Ry. Co., supra; Utah State National Bank v. Livingston, and Trimble vs. Union Pacific Stages, supra. * * *

“The rule in this jurisdiction, early laid down by this court, is that *where a motion for new trial is based upon insufficiency of the evidence to support the verdict, the trial court will not be held to have abused its discretion in denying the motion unless there is no substantial evidence in the record to support the verdict.* United States v. Brown, 6 Ut. 115, 21 P. 461; James v. Robertson, 39 Ut. 414, 117 P. 1068, 2 N. C. C. A. 782. Therefore, *if reasonable minds could have found as the jury did in this case, from the evidence before it, then we cannot say that the trial court abused its discretion in denying plaintiff’s motion for new trial on the grounds of insufficiency of the evidence to support the verdict.*” (Italics ours.)

In concluding the court said:

“And the jury having determined this question in plaintiff’s favor, and the trial court having denied defendants’ motion for new trial, *this court cannot say that the trial court abused its discretion unless there was no substantial evidence to support the verdict, or in other words, that all reasonable minds must agree that it was plaintiff and not defendant Rogers, who transgressed the center line of the highway.*” (Italics ours.)

See also *Toomer’s Estate v. Union Pac R. Co.*, (Ut), 239 Pac. 2d 163.

In *Uptown Appliance & Radio Co., Inc. v. Flint, et al.*, (Ut.), 249 Pac. 2d 826, this court said:

“Jury trials are a part of the fundamental tenets of our judicial system and where, as in this case a litigant has fully, completely, and without restraint been permitted to show his full grievance to a jury and they have conscientiously and without any showing of prejudice or other extraneous influences decided the matter there must be some basic and compelling reason so inherent in the evidence that the trial judge would be warranted in placing his judgment as to the result to be reached over and above that of the jury.

“ ‘ A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against that of the jury, but usurps judicial power and prostitutes the constitutional trial by jury.’ *Jensen v. Denver & Rio Grande Railroad Company*, 44 Ut. 100, 138 P. 1185, 1192.”

In *Wilson v. Oldroyd*, (Ut.), 267 Pac. 2d 759, this court said:

“Because of their [Jury’s] advantaged position courts are extremely reluctant to interfere with their verdicts. This is necessarily so in order that the right of trial by jury assured under our law be preserved. If the courts were prone to set aside jury verdicts and substitute their own judgments therefor, whenever they disagreed with the jury, the right would be abrogated and the jury system would be but a pretense. The concept of trial by jury necessarily presupposes that there is a wide area within which the pendulum of the jury’s deliberations may swing without interference from the court. And so long as they

remain within the boundaries of what reasonable minds could believe their findings should remain inviolate.

* * * *

“The validity of the verdict in the instant case is reinforced by the fact that the trial judge had given his approval by refusing to vacate or modify it. As we stated in *Geary v. Cain*, ‘ * * * in case of doubt, the deliberate action of the trial court should prevail. Otherwise, this court will sooner or later find itself usurping the functions of both the jury and the trial court, * * * ’ ”

The principles were reaffirmed in *Coombs v. Perry*, 275 Pac. 2d 580.

We have no quarrel with the decision of this court in *King v. U. P. Railroad Co.*, 221 Pac. 2d 892, cited in the plaintiff's brief at page 13. However, nothing therein contained adds anything to the position of the plaintiff. All that that case hold is (in conformity with well established precedent) that the trial judge may grant a new trial on grounds of insufficiency of the evidence to warrant the verdict, where the evidence is conflicting, and where, in the judgment of the trial judge, the weight of the evidence is against the verdict. But here the trial court refused to upset the verdict. And under the rules enunciated in the cases above cited and discussed, such ruling may not be held to be an abuse of discretion. On the contrary, the evidence being in conflict, as a matter of law the trial judge was not guilty of an abuse of discretion. We can conclude our argument under this point no better than by quoting the language of this court in its most recent expression of opinion on

the subject, in the case of *Bowden v. D. & R. G. W. R. R. Co.*, (Ut.), 286 Pac. 2d 240, where it was said:

“Ordinarily the trial court has a wide discretion in granting or denying motions for a new trial, with which this court is reluctant to interfere, and will do so only if there is a clear abuse of discretion. * * *

* * * *

“We reaffirm our commitment that ‘The right of jury trial * * * is * * * a right so fundamental and sacred to the citizen * * * (that it) should be jealously guarded by the courts’. But once having been granted such right and a verdict rendered, it should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of error.”

CONCLUSION

There was a conflict in the evidence, and the verdict of the jury is amply supported by substantial evidence in the record. There is no showing that the trial court abused his discretion in denying plaintiff’s motion for a new trial. The judgement should be affirmed.

Respectfully submitted,

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