

1957

Thalda L. Baker v. Archibald H. Cook and May K. Cook : 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.

Woodrow D. White; Mas Yano; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Baker v. Cook*, No. 8550 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2648

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.

OCT 31 1957

LAW LIBRARY

IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

JAN 21 1957

THALDA L. BAKER,
Plaintiff and Respondent,

— vs. —

ARCHIBALD H. COOK and
MAY H. COOK,
Defendants and Appellants.

Clerk, Supreme Court, Utah

Case
No. 8550

Respondent's Brief

WOODROW D. WHITE,
MAS YANO
Attorneys for Respondent

INDEX

	Page
STATEMENT OF THE CASE.....	1
STATEMENT OF POINTS.....	2
ARGUMENT	3
1. THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS OF LOSS OF EARNINGS	3
2. THE COURT DID NOT ERR IN SUBMITTING PROPOSITIONS ONE TO FOUR INCLUSIVE TO THE JURY, AND THE DEFENDANT, HAVING FAILED TO MAKE ANY TIMELY EXCEPTION THERETO, CANNOT NOW COMPLAIN	5
3. THE COURT'S RULING ON THE JURY'S ANSWER TO PROPOSITIONS TWO AND FOUR WAS NOT ERRONEOUS	11
4. THE COURT DID NOT ERR IN FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT'S THEORY OF THE CASE.....	13
5. THE COURT'S QUESTIONING OF THE JURY AFTER THEY HAD RETURNED THEIR ANSWER TO PROPOSITION NO. FIVE WAS NOT PREJUDICIAL ERROR	15
CONCLUSION	17

TABLE OF CASES

Cooper v. Evans, 262 P. 2d 278, 1 Ut. 2d 68.....	5, 7, 8, 11
Dimick v. Utah Fuel Co., 164 P. 872; 49 Ut. 430.....	6, 7
Employer's Mutual Liability Ins. Co. v. Allen Oil Co. (Utah) 258 P. 2d 445.....	6
Foemnel v. Mueller, 255 Wis. 277, 38 N. W. 2d 510.....	9
Goggan v. Wells Fargo & Co. (C.C.A. Tex. 1920) 227 S. W. 246	13
Hadra v. Utah Nat'l Bank, 35 P. 508, 9 Ut. 412.....	7
Hoffman v. Heinke, 268 Wis. 489, 67 N. W. 2d 871.....	9
Maas v. W. R. Arthur & Co., 239 Wis. 581, 2 N. W. 2d 238.....	9
Marks v. Thompson, 27 P. 6, 7 Ut. 421.....	6
McCall v. Kendrick, 274 P. 2d 962, 2 Ut. 2d 364.....	7
Mobley v. Garcia, (N. M.) 217 P. 2d 256.....	4
Morgan v. Child, Cole & Co., 213 P. 177, 61 Ut. 448.....	7
Schubach v. American Surety Co. of New York, 273 P. 974, 73 Ut. 332.....	7
Straka v. Voyles, 252 P. 677, 69 Ut. 123.....	7

STATUTES

Utah Rules of Civil Procedure, Rule 51.....	5
---	---

TEXTS

89 C. J. S. 247, Sec. 532.....	14
89 C. J. S. 347.....	8
89 C. J. S. 315, Sec. 559.....	12
53 Am. Jur 757.....	8
53 Am. Jur. 748, Sec. 1079.....	12
53 Am. Jur. 743, Sec. 1072.....	14
53 Am. Jur 739, Sec. 1067.....	17
15 Am. Jur. 500	4
76 A. L. R. 1145.....	12

IN THE SUPREME COURT OF THE STATE OF UTAH

THALDA L. BAKER,

Plaintiff and Respondent,

— vs. —

ARCHIBALD H. COOK and

MAY H. COOK,

Defendants and Appellants.

Case

No. 8550

Respondent's Brief

STATEMENT OF THE CASE

The appellant in her brief has made a statement of facts which is held to be sufficient for the purpose of this appeal, generally speaking. However, in the discussion which follows of the various points herein, we have marshalled pertinent facts in the nature of a supplement to appellant's statement. To avoid unnecessary repetition these facts are not set out under this heading.

STATEMENT OF POINTS

POINT ONE

THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS OF LOSS OF EARNINGS.

POINT TWO

THE COURT DID NOT ERR IN SUBMITTING PROPOSITIONS ONE TO FOUR INCLUSIVE TO THE JURY, AND THE DEFENDANT, HAVING FAILED TO MAKE ANY TIMELY EXCEPTION THERETO, CANNOT NOW COMPLAIN.

POINT THREE

THE COURT'S RULING ON THE JURY'S ANSWER TO PROPOSITIONS TWO AND FOUR WAS NOT ERRONEOUS.

POINT FOUR

THE COURT DID NOT ERR IN FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT'S THEORY OF THE CASE.

POINT FIVE

THE COURT'S QUESTIONING OF THE JURY AFTER THEY HAD RETURNED THEIR ANSWER TO PROPOSITION NO. FIVE WAS NOT PREJUDICIAL ERROR.

ARGUMENT

POINT ONE

THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS OF LOSS OF EARNINGS.

As a result of the injuries suffered by the plaintiff on August 20, 1953, it was necessary for her to have two operations on her back. (R. 56, 57, 65) The first operation was performed on October 20, 1953 and consisted of doing what is known as a lamenectomy. (R. 57) The second operation was performed on December 16, 1954 (R. 59) and consisted of a fusion of the spine. (R. 63) Dr. Burke M. Snow, the orthopedic surgeon that operated on the plaintiff, testified that this type of surgery was very painful and that it usually takes approximately three months following the surgery before light work can be done and from six months to a year before heavy work can be done. (R. 71) The doctor further testified that the plaintiff, as a result of the injury and resulting operations suffered a 20 per cent permanent partial disability. The plaintiff testified that she was unable to even do her housework from the period from the date of the injuries, August 20, 1953, to her first operation (R. 39), and that between the two operations, October 20, 1953, and December 16, 1954, she was not able to do any work of any kind. (R. 41) The plaintiff further testified that at the time of the trial she was still having difficulties with pain and numbness in her back and legs, which restricts her working ability, and requires her to wear a metal brace

on her back all the time, except when she is in bed. (R. 42, 43)

The plaintiff testified at length about her employment record and the type of work she had done, commencing with her first job in 1938 up to the time of her injury. (R. 13, 21) This testimony revealed that although the plaintiff had a variety of jobs, she had been fairly continuously employed from 1942 (R. 14, 15) up to the time of the injury. In order to establish a basis for an award to the plaintiff for the loss of earnings that she has suffered as a result of her injuries and operations, the plaintiff testified that her average annual income for the three years preceding her injuries was about \$2300.00 a year. (R. 12, 23) This evidence is, of course, entirely proper and frequently used as a basis for such an award. See 15 Am. Jur. 500.

Defendant contends that "in view of her own statements as to having been unemployed for three months preceding the accident, such yearly income figures are without probative value as to her loss of income since the accident." This would seem to imply that unless a person has been continuously employed, no loss of earnings would ever be proved. This, of course, is not the law. In the case of *Mobley v. Garcia*, (N. M.) 217 Pac. (2d) 256, the court sustained an award for loss of earnings to the plaintiff, although she was not working at the time of the injury, having temporarily quit her employment for personal reasons. Furthermore, the plaintiff did not so testify. She testified that her last steady work prior to her injuries had been at the Master Cleaners and that she

left there May 30, 1953, but that she did housework for various people following her employment at the Master Cleaners up to August 20, 1953, the date of the injury. In fact, she had placed an ad in the paper to obtain more work (R. 97)

Defendant cites only two cases under her Point No. 1, both Utah cases, which state that if a finding is so plainly unreasonable as to convince the court that no jury acting fairly and reasonably could make the finding, it cannot stand. It is submitted that the evidence of plaintiff's history of her varied, yet continuous employment for many years, the severe nature of her injuries, and her testimony of her annual average income for three years before the injury, clearly provide substantial evidence to support the award of \$2500.00 for loss of earnings from August 20, 1953, to March 28, 1956, the date of the trial.

POINT TWO

THE COURT DID NOT ERR IN SUBMITTING PROPOSITIONS ONE TO FOUR INCLUSIVE TO THE JURY, AND THE DEFENDANT, HAVING FAILED TO MAKE ANY TIMELY EXCEPTION THERETO, CANNOT NOW COMPLAIN.

This Court has held in the case of *Cooper v. Evans*, 262 Pac. (2d) 278, 1 Ut. 2d 68, that Rule 51 of the Utah Rules of Civil Procedure which require that an objection to instructions be made or no error thereon may be assigned applies also to special interrogatories. In that case the court did consider the interrogatory, although no objection had been made, because it was found that the complaining party did

not waive her objection as she had been afforded no opportunity to object to the interrogatory. In the present case the defendant did have such an opportunity to object and did not make any objection of any kind concerning the error claimed in appellants' Point Two. Prior to instructions from the court, and arguments of counsel, counsel for both sides agreed to take their exceptions after the jury had retired. (R. 171) Mr. Rex Hanson, counsel for the defendants, took a general exception to the court's submitting "the issue of the defendant's negligence to the jury under the special verdict," but he did not except in any way to the form or wording of the special verdict, nor did he specifically except to Proposition No. 1. (R. 178)

In *Dimick v. Utah Fuel Co.*, 164 Pac. 872, 49 Ut. 430, this court held that where an exception is taken to only a portion of an instruction, the court on appeal cannot consider complaints of other portions thereof. The reasons for the requirement, that a timely and sufficient objection be taken to the court's charge, are stated in the case of *Marks v. Thompson*, 27 Pac. 6, 7 Ut. 421, and *Employer's Mutual Liability Ins. Co. v. Allen Oil Co.* (Utah) 258 Pac. (2d) 445. This court there said that exceptions should be made and pointed out before the verdict of the jury is reached, so that the judge may have an opportunity to correct any errors which he may have inadvertently fallen into during the hearing and perplexities of the trial and that the objection should be specific enough to give the trial court notice of every error in the instruction which is complained of on appeal.

The rule that if no exception is taken to the giving of instructions, no error can be assigned thereon, has been repeatedly stated by this court. See *Hadra v. Utah Nat'l Bank*, 35 Pac. 508, 9 Ut. 412, *Dimick v. Utah Fuel Co.*, supra, *Morgan, v. Child, Cole & Co.*, 213 Pac. 177, 61 Ut. 448; *Straka v. Voyles*, 252 Pac. 667, 69 Ut. 123; *Schubach v. American Surety Co. of New York*, 273 Pac. 974, 73 Ut. 332. Although these cases all involve alleged error in instructions the court has indicated that the same rules would apply to special verdicts. See *Cooper v. Evans*, supra. The only exception to this rule, requiring a timely and sufficient objection, is where there exists in the case sure persuasive reason which invokes the discretion of the court to extricate a person from a situation where some gross injustice or inequity would otherwise result. See *McCall v. Kendrick*, 274 Pac. (2d) 962, 2 Ut. 2d 364, where this court recited this exception and stated that the burden of showing special circumstances which would warrant a departure from the rules rests upon the party seeking to vary it. It is submitted that the appellant herein has not met this burden in any manner. The special verdict form and wording of the special verdict were acceptable to the appellant at the time they were given and did not become unacceptable until it was determined that she was the losing party. If it was unacceptable to the appellant at the time and she believed that it was improper, it would seem that her silence and failure to object was for the purpose of having reversible error in the record as insurance against defeat. In either event, it would be unjust and inequitable to the plaintiff respond-

ent to permit the appellant to complain for the first time on appeal. See also 89 C. J. S. 347.

Assuming merely for the sake of argument that appellant has a right on appeal to complain about the special verdict on the two grounds set forth in her Point Two, it is submitted that there was no prejudicial error in the special verdict to justify a reversal. As to appellants' ground one, that Proposition 1 of the special verdict, as drawn, assumed facts in dispute, it is submitted that as the propositions called for a true or false answer, it was inevitable to assume facts in order to put forth this type of proposition. It must be admitted that Proposition No. 1 combined two questions of fact: (1) whether or not the defendants furnished a defective ladder and (2) whether or not the defendants were negligent in so furnishing a defective ladder. The jury found that both were true. The language of Proposition 1 is clear and concise and obviously requires such a conclusion.

In 53 Am. Jur. at page 757 it is said:

“A special verdict should be construed reasonably and fairly, without heed to slight defects and subtle and refined distinctions. . . . If taken as a whole, a finding legitimately supports the judgment, it will be upheld. However, the law favors special verdicts and will sustain them whenever it can be done consistently with the rules by which they are governed.”

As stated in *Cooper v. Evans*, supra, the interrogatories are to be understood in light of the instructions. The court in its instructions No. 10 and 11 carefully and properly defined negligence and the duties of the defendants in this case. Viewing Proposition No. 1 in light of

these instructions, it appears that the jury was fully informed and advised so that they could and did properly answer Proposition No. 1, which found that the defendants furnished a defective ladder to the plaintiff and were negligent in so doing.

The appellant relies on several Wisconsin cases to support her contention that the wording of Proposition No. 1 assumes facts in dispute. The leading case cited by appellant, *Maas v. W. R. Arthur & Co.*, 239 Wis. 581, 2 N. W. (2d) 238, was a case where the court inquired of the jury whether the defendant was negligent (a) in attempting to overtake and pass the car . . . at the intersection. This question called for a yes or no answer and was not an affirmative statement calling for a true or false answer as was the Proposition No. 1 submitted in this case. The Court held that the form of the question assumed the car was passing at the intersection was improper. The Court did not say that this was erroneous as amounting to a comment on the evidence, as stated in the appellants' brief, but did say that the question should have read "Was the driver negligent in respect to passing at an intersection."

In *Hoffman v. Heinke*, 268 Wis. 489, 67 N.W. (2d) 871, the statement on the question was dictum, because the appellant had not properly preserved the question raised by motions after the verdict. The *Foemmel v. Mueller* case, 255 Wis. 277, 38 N. W. (2d) 510, is another case where the court, as in the Maas case, supra, asked the jury for a yes or no answer; and according to the court, assumed by the form of the question the ultimate fact. The court stated that the lower court "should have sub-

mitted the direct question whether 'Mueller was negligent in stopping without placing such fuses or flares' and 'the direct question whether Mueller was negligent in failing to have clearance lights burning.' "

The appellant further complains that the real issue was not submitted to the jury, namely, whether the ladder introduced in evidence was the ladder used by plaintiff. It is submitted that this was not an ultimate issue at all, and that the only ultimate issues as far as the defendant was concerned were whether the defendant negligently furnished a defective or suitable ladder to the plaintiff. This was placed in direct consideration by Proposition No. 1.

As to defendant's second ground for objection to the four propositions, namely, that as drawn, the propositions enable the jury to evade their duty and still return answers to the questions, it is respectfully submitted that this is not at all the case. The trial judge in this case has done considerable pioneer work in this state in the use of special interrogatories and special verdicts. He has developed this third possible answer as a means to remove some of the problems and perplexities that face juries in deciding ultimate questions of fact. The court's Instruction No. 10 advised the jury that "unless such negligence is established by a preponderance of all of the evidence, you cannot find that it exists. The answer made was clearly intended to show a finding of a failure to prove the fact by the party having the burden thereon. It was so understood by court and counsel, and once again we point out that no timely

objection was made to such form of answer by appellant. All of the four propositions had the same three possible answers: true, false or unable to say. Thus the appellant was not prejudiced nor the respondent favored thereby. Under the court's instructions, the answer, "unable to say," did decide the issues and did constitute a finding sufficient to enable the court to properly render a judgment thereon.

POINT THREE

THE COURT'S RULING ON THE JURY'S ANSWER TO PROPOSITIONS TWO AND FOUR WAS NOT ERRONEOUS.

The special verdict submitted by the court to the jury as pointed out heretofore, provided that they could give one of three answers to each of the four propositions—True, False, or Unable to Say. The appellant was fully aware of the interpretation which the court intended to give to the answer "unable to say," namely, that the party having the burden of proof on the proposition so answered, had failed to sustain such burden and yet the appellant did not make any objection or exception to the submission of the special verdict in this manner until the jury had answered the propositions in a manner unfavorable to the appellant. As pointed out in respondent's Point II, the law requires that timely, sufficient exception be made to a special verdict the same as required to the court's instructions in order that an appeal can be taken thereon. See *Cooper v. Evans*, supra. The authorities cited in Point II, showing the necessity for a timely, suffi-

cient exception to a special verdict are also controlling here.

Assuming that the appellant had made a timely, proper exception to the answers provided for in the special verdict, it is respectfully submitted that the court's submission to the jury of the propositions with the third alternative answer of "unable to say" was not error. As admitted by the appellant, the weight of authority in this country is that when a jury answers an interrogatory as they did to Propositions Two and Four in this case, that the court finds, as was done in this case, that the party having the burden on the proposition submitted had failed to sustain the same. The authorities that so hold do so even when the jury is directed to return a true or false, or yes or no, answer to the proposition. See 53 Am. Jur. 748, Sec. 1079; 89 C. J. S. 315, Sec. 559, and 76 A.L.R. 1145.

It should be pointed out and clearly understood that the appellant's contention in her Point No. 3 is misleading and incorrect. The appellant contends that the jury failed to answer Propositions Two and Four. This was not the case, of course, for the jury answered these propositions with the third alternative answer provided by the court. They answered that they were unable to say that the affirmative propositions submitted were true or false. In other words that there had not been sufficient evidence presented in the case which afforded them a basis for saying that it was true that plaintiff was contributorily negligent and that such negligence proximately caused her injuries or that it was false. The

court's instruction No. 2 advised the jury upon the burden of proving negligence and contributory negligence and the effect of a failure to sustain this burden. This answer was clearly proper and in conformity with the law.

The appellant claims that courts in Texas have uniformly held in accord with her contention in Point No. 3 and cites certain cases. In all of these cases the court in its charge categorically directed the jury to return a yes or no answer to the questions. In all of these cases, except *Goggan v. Wells Fargo & Co.* (C. C. A. Tex. 1920) 227 S. W. 246, the jury reported that they were unable to agree on an answer, or else failed to make any answer. The other few cases cited by appellant were also cases where the court directed an affirmative or negative answer and the jury could not agree. As acknowledged by appellant these cases represent a minority view of even the situation where the jury fails to agree or does not answer. It is respectfully submitted that they are not in point and are no authority for the situation found in this case where the jury agrees on an answer authorized by the court in its charge.

POINT FOUR

THE COURT DID NOT ERR IN FAILING AND REFUSING TO SUBMIT TO THE JURY THE DEFENDANT'S THEORY OF THE CASE.

Appellant contends that plaintiff's injuries were due solely to her own negligence. Appellant admits that she does not have any knowledge as to what plaintiff's negligence consisted of and, of course, there was no evidence

in the trial of any specific negligent conduct by the plaintiff. It is submitted that the issue of negligence raised by the evidence was whether the defendant negligently furnished plaintiff a defective ladder with which to perform her work and if so was this a proximate cause of plaintiff's injuries. The appellant denied furnishing such a defective ladder and asserted that the plaintiff was herself negligent which caused in whole or in part her injuries. There was no evidence in the record that the plaintiff "slipped and fell" from the ladder or that "she failed to set the ladder up properly and it tipped over," thus no instructions or interrogatories could have been submitted on such contentions or theories.

Appellant contends that the court should have submitted interrogatories to the jury as requested in her requested Instruction No. 2, namely, as to whether the ladder introduced in evidence (defendant's Exhibit 24) was the ladder used by the plaintiff; and if it was, whether it collapsed. It is submitted that these are not ultimate facts, but are evidentiary facts, which if submitted would merely require the jury to give their views on the evidence. Such questions would not be proper. See 53 Am. Jur. 743, Section 1072 and 89 C. J. S. 247, Sec. 532. The ultimate fact was not what ladder was used and did a certain one collapse, but was the ladder furnished defective and did this defective condition cause the plaintiff's injuries. If these facts are found, together with the fact that the defendant knew or should have known of the defective condition, then the defendant could be responsible for any injuries suffered by the plaintiff as a result

thereof, unless she was contributorily negligent. Propositions One and Three properly submitted these ultimate facts to the jury and their answer resolved these facts in favor of the plaintiff.

It is unquestionably the law as quoted by the appellant, that it is the duty of the trial court to cover the theories of both parties in his instructions, provided, of course, that the theories have been properly raised by the pleadings and the evidence. It is respectfully submitted that the court's instructions No. 11 and 12, together with the propositions propounded in the special verdict, adequately and properly covered the issues in this case and the theories of the parties which were supported by the evidence.

POINT FIVE

THE COURT'S QUESTIONING OF THE JURY AFTER THEY HAD RETURNED THEIR ANSWER TO PROPOSITION NO. FIVE WAS NOT PREJUDICIAL ERROR.

The defendant claims that the trial court "by adroit cross-questioning led the jurors," and by commenting on questions which counsel for the defendant wished to have asked, the court nullified the effect of such questions before asking them, thereby making "the result a foregone conclusion." This implication, that the trial court favored the plaintiff over the defendant and in effect maneuvered and led the jury into giving the plaintiff a verdict, is false and completely untrue.

The defendant points to certain questions of the court to the jury found on pages 186 to 192 of the rec-

ord. This portion of the record covered proceedings after the jury had returned from answering all of the propositions, including No. 5 on damages. In order to get the complete picture of the court's absolute fairness and impartiality in his questioning of the jury it is necessary to examine the record on pages 181 to 185 as well as 186 to 192, the pages pointed out by the defendant. The plaintiff respectfully submits that the court's question to the jury as to whether there was a preponderance of the evidence on the question of plaintiff's contributory negligence, so that they could answer true or false to Proposition Two, was absolutely fair and completely clear. (R. 182 and 183)

In effort to nullify the findings in favor of the plaintiff, the defendant's counsel objected to the court's interpretation of the jury's answer to Proposition two, namely, that they were unable to say from the evidence whether the plaintiff was guilty of contributory negligence. Defense counsel suggested that this answer did not necessarily indicate that the jury found that the defendant had not sustained her burden of proof, but that it might mean that they did not understand the wording of the question. It is submitted that from the court's prior questioning and the jury's answers thereto, no such contention was justified. (R. 181, 182, 183) Despite the remoteness of any possibility that defendant's contention was justified, the Court to be absolutely fair and careful, proceeded to question the jurors again concerning this remote possibility, on their return from answering Proposition No. 5 relative to damages. It is to

this portion of the court's questioning that defense counsel takes exception.

It is respectfully submitted that an examination of the trial court's questions to the jury (R. 181, 192) clearly shows that the court was careful, prudent, fair and impartial. The court has, in its discretion, the right to examine the jury on its answers to a special verdict. See 53 Am. Jur. 739, Sec. 1067. This practice is proper with or without the consent of the parties, provided that it is done with caution.

Defendant complains that by commenting on questions which counsel for the defendant wished to have asked, the Court nullified the effect of such questions before asking them. (R. 190) It is respectfully submitted that this was not the case. Written answers to interrogatories cannot be modified by oral answers to questions put to the jury by the Court, nor is the Court bound to receive every fact which the jurors desire to state, 53 Am. Jur. 739, Section 1067. Thus the Court was entirely in order in limiting the jurors' comments to the question which he put to them.

The careful impartiality of the trial judge is also clearly apparent at page 180 of the record where he answered the jury's question concerning the legal effect of certain answers to the propositions presented to them.

CONCLUSION

The plaintiff in conclusion earnestly submits that the judgment of the District Court was lawful and proper for the following reasons.

One: There is sufficient competent evidence to support the jury's finding of loss of earnings.

Two: The Court did not err in submitting Propositions One to Four, inclusive, to the jury and the defendant having failed to make any timely exception, thereto, cannot now complain.

Three: The Court's ruling on the jury's answer to Propositions Two and Four was not erroneous and the appellant because of her failure to make a timely objection to the special verdict cannot now complain.

Four: The Court did not err in failing to submit the defendant's theory of the case as set forth in defendant Point IV.

Five: The Court's questioning of the jury after they had returned their answer to Proposition No. 5 was not error.

For the foregoing reasons, it is most respectfully urged by the respondent that the judgment of the District Court entered on the jury's special verdict be affirmed.

Respectfully submitted,

WOODROW D. WHITE,

MAS YANO

Attorneys for Respondent