

1958

# James J. Milligan v. Capitol Furniture Co. : Brief of Appellant

Utah Supreme Court

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King and Hughes; Dwight L. King; Attorneys for Plaintiff and Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

MAY 26 1958

JAMES J. MILLIGAN,

*Plaintiff and Appellant,*

—vs.—

CAPITOL FURNITURE COMPANY,  
a Utah corporation, et al.,

*Defendants and Respondents.*

Clerk Supreme Court, Utah

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BRIEF OF APPELLANT

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KING AND HUGHES

By: DWIGHT L. KING  
*Attorneys for Plaintiff and  
Appellant*

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BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant will be referred to throughout this brief as he appeared below, namely, plaintiff. Respondent will be referred to by name where necessary, or simply as defendant. All italics are ours.

## STATEMENT OF FACTS

This appeal is from the order of the trial court entering judgment of “no cause of action” following the submission of plaintiff’s case to the jury on a special verdict.

The special verdict submitted seven questions to the jury for their answers. The questions and answers given were as follows:

*Question I.* Did the defendants maintain a downspout drainage system which was negligently constructed?

Answer: No.

*Question II.* Was the manner in which the downspout was constructed a proximate cause of plaintiff’s fall?

Answer: .....

*Question III.* Did the defendants negligently allow water from the down spout to run onto the sidewalk and form ice?

Answer: Yes.

*Question IV.* Was such negligence a proximate cause of plaintiff’s fall?

Answer: Yes.

*Question V.* Was plaintiff negligent in walking across the ice where he fell?

Answer: Yes.

*Question VI.* Was such negligence a proximate cause of plaintiff's fall?

Answer: No.

*Question VII.* As shown by a preponderance of the evidence in this case, what amount of money would fairly and adequately recompense the plaintiff for any and all injuries he sustained as a result of his falling on the ice as set forth in Instruction No. 15?

Answer: \$5,000.00.

The Jury verdict of \$5,000.00 did not take into account the special damages which were for medical and hospital expenses. The specials amounts to \$1123.00 (R. 148). The total judgment which the plaintiff would be entitled to is, therefore, \$6,123.00.

Following the return of the verdict of the Jury plaintiff moved the Honorable Court for the entry of Judgment on behalf of the plaintiff for \$6,123.00. Defendant moved the Court for entry of judgment on behalf of defendant "no cause of action." The matter was argued and the Court ordered Judgment "no cause of action" entered (R. 149-150). Thereafter, plaintiff filed a motion for entry of judgment, or in the alternative, for a new trial (R. 156-157). The motion was denied (R. 158). Plaintiff then perfected his appeal.

The evidence revealed during the trial that plaintiff at about 4:45 P.M. on the 5th day of February, 1956, while walking along on the south side of Second South Street, at approximately 561 West, attempted to cross over a sheet of ice covering the sidewalk; that as he started across the ice he fell and suffered a fracture of the ilium of his right leg and miscellaneous bruises and abrasions. For several months following the injury plaintiff was completely disabled and incurred the \$1123.00 in medical and hospital expenses.

The ice covering the sidewalk came onto the sidewalk as result of a drain pipe from the roof of the building at 561 West 2nd South Street, being clogged and permitting the melted water from the roof of the building to drain out onto the sidewalk.

The jury in the answer to Question No. 3 of the special verdict found that the defendants negligently allowed the water from the downspout to run onto the sidewalk and formed the ice. They also found that this was a proximate cause of plaintiff's fall.

The Rules of Civil Procedure specifically cover the right of the Court to submit to a Jury special verdicts. Rule 49 (b) covers the situation which exists when answers to interrogatories are inconsistent with the general verdict or with each other. That portion of Rule 49 (b) applicable reads as follows:

“When the answers are consistent with each other but one or more is inconsistent with the



general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

The basic question presented by this appeal is the proper course for the trial court to follow where the answers of the jury reveal that a party was negligent but that the negligence was not a proximate cause of his injury.

## STATEMENT OF POINTS

### POINT I.

JUDGMENT IN FAVOR OF PLAINTIFF SHOULD HAVE BEEN ENTERED ON THE SPECIAL VERDICT OF THE JURY.

### POINT II.

IF THE ANSWERS TO THE SPECIAL VERDICT QUESTIONS ARE INCONSISTENT A NEW TRIAL SHOULD HAVE BEEN GRANTED PLAINTIFF.

### POINT III.

THE EVIDENCE REVEALS THAT PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

## POINT IV.

THE COURT COMMITTED REVERSIBLE ERROR AND ABUSED HIS DISCRETION IN SUBMITTING THE SPECIAL VERDICT TO THE JURY.

## ARGUMENT

## POINT I.

JUDGMENT IN FAVOR OF PLAINTIFF SHOULD HAVE BEEN ENTERED ON THE SPECIAL VERDICT OF THE JURY.

The Special Verdict rendered by the Jury indicates that while there was something in the nature of negligence which plaintiff did, the Jury did not think that the negligence was the proximate cause of his injury. Just what the Jury had in mind as being negligence is a matter of pure speculation.

This Court will not be given the opportunity of seeing plaintiff. He was a large, tall disjointed type of person whose bodily movements were themselves such as would suggest a looseness of action. It may be that the jury thought that Mr. Milligan's gait, or manner of walking was a negligent manner of walking. Something, he alone is afflicted with in the nature of a personal idiosyncrasy. Whatever the Jury thought, if they followed the instructions of the Court, and it must be presumed that they did, they did not think it caused his fall. It is respectfully submitted that the Court is bound by the determination that whatever negligence he was guilty of did not cause his injuries.

The law seems to be clear to the effect that in order for negligence of a plaintiff to bar his recovery the negligence must be a proximate cause of the injury. An excellent case illustrating the law, *Friedman v. Pacific Outdoor Advertising Co.*, 74 C. Ap. 2d 946, 170 P. 2d 67. An additional California case, directly in point, is *Nelson v. Colbeck*, 94 C. A. 2d 792, 211 P. 2d 878.

The most recent Utah decision, discussing the kind of negligence necessary to bar recovery is *Ray v. Consolidated Freightways, Inc.*, 4 U. 2d 137, 289 P. 2d 196.

This Court placed the burden on the defendant to show not only plaintiffs negligence but that it was a substantial factor contributing to the injury and damage suffered. Whether the burden has been sustained must be left to the Jury for its determination. *Stickle v. Union Pacific Railroad Company*, 122 U. 477, 251 P. 2d 867.

To the same effect is the recent case of *McDonald v. Linick, et al.*, ..... N. M. ...., 265 P. 2d 132.

It is respectfully submitted that since the Jury found that the negligence of plaintiff was not a proximate cause of his injury judgment should have been entered for plaintiff for the amount of damages found.

## POINT II.

IF THE ANSWERS TO THE SPECIAL VERDICT QUESTIONS ARE INCONSISTENT A NEW TRIAL SHOULD HAVE BEEN GRANTED PLAINTIFF.

The answers to Questions 5 and 6 are not inconsistent one with another and are not inconsistent with the general verdict in favor of plaintiff and against defendant. Negligence may occur which does not cause injury.

The Trial Court considered the answers to questions 5 and 6 to be inconsistent with each other. It ruled as matter of law that the negligence found in Question No. 5 was the proximate cause of the injury to plaintiff. His ruling set aside the answer the Jury made to Question No. 6, that the negligence was not a proximate cause.

Rule 49(b) Utah Rules of Civil Procedure states:

“When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict the Court shall not direct the entry of judgment but may return the Jury for further consideration of its answers and verdict, or may order a new trial.”

The trial court did not return the jury for further consideration of its answers and did not order a new trial, but instead resolved the inconsistency in favor of the defendant.

Assuming for the purpose of this argument that the answers then are inconsistent one with another. Which answer shall the Court accept and enter judgment upon? It would appear obvious to plaintiff that to choose one of the answers and enter judgment on that answer would be to determine factual matters within the province of the Jury only.

There is nothing about the answers which would make the trial court's decision necessary. It is submitted that it could be equally reasonable for the Court to have held that the only negligence the evidence revealed that plaintiff could be guilty of would necessarily be a proximate cause. Therefore, the negligence found was not a proximate cause could only mean that the Jury found negligence not supported by evidence or negligence with no relationship to the damage and injury which the plaintiff suffered.

It is not within the province of the trial court to decide the facts where there is substantial evidence to support a jury finding. To resolve the inconsistent answers, if such they be, necessarily requires the trial court to make a finding on factual matters.

The reasons behind Rule 49(b) would seem to be that it would require the trial court to pass on factual matters where answers are inconsistent. Therefore, the trial court is not permitted to enter a judgment under such circumstances but must return the jury to consider its answers further, or order a new trial.

In the case of *Welch et al. v. Bower*, 186 F. 2d 1002, the basic question was answered exactly as suggested by plaintiff. The holding reads as follows:

“(3) We cannot agree, though, that defendants were entitled to a judgment on the verdict and that the judgment should be reversed and here rendered for them. The answer to the special

issue is completely inconsistent with the general verdict. This being so, this is a case in which, under Rule 49, Fed. Rules Civ. Proc. 28 U.S.C.A. the answer to the special issue being inconsistent with the general verdict, the court could not enter a judgment on it, but must either return the case to the jury for further consideration of its answers, or grant a new trial. Since he did not return the case to the jury he should have ordered a new trial."

Plaintiff respectfully submits that if the answers are inconsistent and the trial court is correct in so determining, then the only course remaining to be followed is that the case be returned and a new trial ordered.

### POINT III.

THE EVIDENCE REVEALS THAT PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

The evidence concerning the care exercised by plaintiff in proceeding along the sidewalk in an easterly direction came only from himself and the witnesses, Louis Johnson and Alex Geros. Mr. Milligan stated as follows, concerning the condition which he observed prior to his fall:

- "Q. What did you notice, Mr. Milligan, about the sidewalk then when you—when its condition changed?
- A. Where I noticed the condition on the sidewalk, where the ice had piled up over the

—there was a big steel door there. The ice and snow was all up into there, and I had taken and walked down where I thought was a clean good walk, and just as quick as I hit that with my foot, it went right out just like that in a second before you could even think.

Q. What did you observe about the place that you actually stepped on? What was its condition?

A. Well, I thought at the time, I didn't know it was as slick as it was underneath. I couldn't see it was as slick as it was, but I thought it was a safe place to walk.

Q. And after you fell, did you discover something different about?

A. Well, I found I couldn't get up. I found underneath it was just as slick as glass underneath there. It was awfully slick.

Q. What made it slick?

A. It was the water down spout I imagine was run off there and turned real cold.

MR. HAYES: Just moment. I object to a conclusion of the witness as to what he imagines.

THE COURT: The objection will be sustained. You may tell us what you found, what you saw there.

A. Oh. Ice underneath the snow on the sidewalk was very slick, and I couldn't get up.

Q. Mr. Milligan, that ice, how far did it extend on the sidewalk?

A. I didn't measure that. I didn't measure it. I would imagine it was over the sidewalk, but I did not—

Q. Well, now, the word 'imagine' is a word that is very offensive in court. Imagination has no place. Tell us what you saw concerning the extent of ice that covered the sidewalk where you fell.

A. Well, I just saw the ice and little what I thought was a skiff of snow, and I went to go around on the other into the center of where the traffic looked like to me was safe, and as I went over that, I just stepped into that, and my foot went right out from under me, and I would say that it was, oh, space of about ten or twelve feet."

Witness Lewis Johnson, concerning the extent of ice on the sidewalk, stated as follows:

"Q. How much of the sidewalk was covered with ice?

A. Well, from the building out to the curb I would say approximately eight feet wide; could be more.

Q. Did you notice anything about the front of the building there and the down spout?

A. Yes. It was covered with ice.

Q. Where did the ice start on that down spout?

A. Well, it was up at the top. The front of the building was covered with ice all down by the spout." (p. 100)



Witness Alex Geros stated:

“Q. And where was the ice?

A. Right in the drain pipe.

Q. Around the drain pipe?

A. Around the drain pipe.

Q. And about how far out did it extend?

A. Well, I imagine—I got a stick just for fun, yard stick. There was two sticks square.

Q. Two feet square?

A. No, I don't know how far—about three feet. I don't know how far. How long is the stick, yard stick? Three feet supposed to be.

Q. Yard stick.

A. Yard stick.

Q. About three feet then?

A. Yes, must be three feet.

Q. Now, past the end of the yard stick was there ice, or was the sidewalk clear?

A. Clear.” (p. 117)

On Page 120:

“Q. Now, that ice that was three and a half inches deep was right against the building?

A. No, in the pipe, around the pipe.

Q. Around the pipe?

A. Around the pipe.

Q. And did the ice extend up the face of that building, do you remember?

A. The face, the pipe extend—

Q. The ice, did it come up the drain pipe, up the face of the building?

A. Yes, like I told you, yes.”

On page 122:

“Q. Can you see the iron doors there right under your thumb? You see the iron doors there?

A. Yes, iron door here.

Q. When the ice collects on the sidewalk there at the bottom of the drain spout, it comes over on the iron door, does it?

A. Right here, yes.

Q. And then when it melts, does it run out across the sidewalk, Mr. Geros, out to the curb and off into the curb when that snow or when that ice at the bottom of the drain pipe melts?

A. Well, part is straight and together and part spreads all over.

Q. It spreads all over, does it, so that if there had been a little of that water melt, it would spread all over the sidewalk and would run off. You see this crack in the edge of the sidewalk there. Doesn't the water when it freezes around the bottom of the drain pipe and then melts run off and run off into the gutter about that point —

A. That is a drain sewer.

Q. —and across the top of the sidewalk? Doesn't the water when ice melts at the bottom of the drain pipe run out across the sidewalk and into the gutter?

A. If it is sewer, bound to be—run street.

Q. Well, I understand that that is Mr. Hayes' and Mr. Richards' theory, that the pipe under the sidewalk was blocked; but all I am concerned about is when there is ice collected on the sidewalk under the drain pipe and it melts, it runs across the sidewalk and into the gutter, doesn't it? Isn't that a fact?

A. Spreads all over.

Q. Spreads all over?

A. Spreads."

There was no evidence of any kind submitted to the Jury which would be the basis for a finding that Mr. Milligan, in observing the sidewalk, could have, as result of his observations, ascertain the fact that Mr. Geros says existed. Assuming for the purpose of this argument that Geros' testimony is correct and that both Milligan and Johnson are in error as to the amount of ice that was on the sidewalk. A person walking on the sidewalk is not required to see everything that could be observed. Mr. Geros conducted an expedition to measure the ice on the sidewalk. Milligan stated that there was a slight skiff of snow, and that the skiff of snow appeared to him to cover the whole sidewalk and that he walked on an area where it appeared that he could safely walk.

There is not the slightest amount of evidence contradictory to his statement. No person testified that this appearance did not exist, or that a reasonably prudent person walking along the same area would not likewise have thought as he thought that he could safely walk where he walked.

It is respectfully submitted that plaintiff was not negligent as a matter of law and that there was no evidence from which the Jury could have found that he did not exercise that degree of care which an ordinary prudent person, under all the circumstances, would have exercised.

#### POINT IV.

THE COURT COMMITTED REVERSIBLE ERROR AND ABUSED HIS DISCRETION IN SUBMITTING THE SPECIAL VERDICT TO THE JURY.

Plaintiff objected to the Court submitting the case to the Jury on a Special Verdict. Special Verdict form was not requested by the defendant but was given to the jury solely upon the Court's own responsibility.

The Statute allows special verdicts as a matter of discretion on the part of the court. Abuse of this discretion would, it is respectfully submitted, merit a reversal of the case now before the Court.

The case submitted to the Jury was not one of a complicated nature with numbers of factual propositions to be determined which could not be adequately and fully

understood by the Jury. The case is one of the kind which is normally submitted to juries for general verdicts.

The purpose of the trial court in declining to submit the case to the Jury on a general verdict was to restrict the normal functions of the Jury. He intended to cut down the realm in which the Jury historically, constitutionally and properly operates.

There has, during the past years among legal scholars, developed a very serious dispute concerning the value of special verdicts and interrogatories as against the use of the general verdict. Chief among the proponents of restricting the realm in which the jury is permitted to operate is Judge Frank, one of the United States Circuit Court Justices. He is joined in his campaign to restrict the Jury in its function by several respectable legal scholars who candidly state that they have no confidence in the Jury System of deciding factual matters and that as a consequence the Jury should be restricted in its functions. They recognize the impossibility of obtaining sufficient public support to abolish trial by jury and so seek by indirection to destroy a right held dear by all. See Moore Federal Practice, 2nd Ed. Vol. 5, Section 49.05, p. 2212 for a scholarly discussion of the dispute.

Moore points out that answers to the questions such as were propounded and submitted to the Jury by the trial Court in the present cast throw no more light on what the Jury found as to the facts than would the general verdict. He states:

“Like the general verdict answers to such questions are legal conclusions based on undisclosed facts. Furthermore, such questions might confuse the jury and certainly would increase the possibility of error and clerical mistake.

“The reason why it is not always feasible to plead facts apply also to the formulation of questions of fact to be submitted to the jury.” (p. 2217)

This Court, in a very recent case, discussed an instance of the jury's intentions and desires being defeated by special verdicts they did not understand. See *Cooper v. Evans*, 1 U 2d 68, 262 P. 2d 278.

Moore concludes as follows concerning this attempt by certain radical elements to abolish or restrict the use of the general verdict:

“Also, the general verdict, at times, achieves a triumph of justice over law. The Jury is not, nor should it become, a scientific fact finding body. Its chief value is that it applies the ‘law,’ often-times a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthly fashion that comports with ‘justice’ as conceived by the masses, for whom after all the law is mainly meant to serve. The general verdict is the answer from the man in the street. If on occasion the trial judge thinks the jury should be quizzed about its overall judgment as evidenced by the general verdict, this can be done by interrogatories accompanying the general verdict. But if there is sufficient evidence to get by a motion for directed verdict, then the problem is usually best solved by an overall, common judgment of the jurors—the general verdict.

“The general verdict is not simply a device for defeating logic and the law. It is a medium through which the people effectively express themselves and individually participate in their government. While the special verdict does not constitute an infringement of the constitutional guarantee of a jury trial it is a mode of quizzing the jury, and a means of limiting the role of juries in the administration of justice. The general verdict is founded upon faith in the judgment of fellowmen. Furthermore the notion that issues of ‘fact’ are easily framed is unsound.”

Two of the greatest scholars that American Jurisprudence has known have also, in published articles, commented upon the drive being made to restrict and ultimately abolish trial by jury.

“See Wigmore, *A Program For the Trial of a Jury Trial* (1929) 12 *Am. Jud. Soc.* 166, 170: ‘Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only take account of broadly typical conditions, and is aimed on average results, law and justice every so often do not coincide. Everybody knows this, and can supply instances. But the trouble is that *Law cannot concede it*. Law-the-rule-*must* be enforced-the exact terms of the rule, justice or no justice . . . Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. . . . That is what jury

trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. And that flexibility could never be given by judge trial. The judge (as in a chancery case) must write out his opinion, declaring the law and the findings of fact. He cannot in this public record deviate one jot from those requirements. The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.'

"See Pound, *Law in Books and Law in Action* (1910) 44 Am. L. Rev. 12, 18: 'Jury lawlessness is the great corrective of law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers. . .'"

From an examination of the authorities and the experience in the case now before this Court, it would appear that while this Court is strongly committed to the preservation of the jury trial and to its promotion in all of its historic and constitutional range, some of the trial courts are equally committed to the encroachment upon the constitutional right of trial by Jury to the point where, ultimately, that right will become weak, puny and ineffectual.

This Court, in *Stickle v. Union Pacific Railroad Co.*, 122 U. 477, 251 P. 2d 867, clearly, unequivocally and in language which could not be misunderstood, reaffirmed its position in regards jury trial and the protection of it in all of its aspects:



"In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Both our constitutional and statutory provisions assure trial by jury to citizens of this state.

"Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary power in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people. Of course, the rights of litigants should not be surrendered to the arbitrary will of juries without regard to whether there is a violation of legal rights as a basis for recovery. The Court does have a duty and a responsibility of supervisory control over the action of juries which is just as essential to the proper administration of justice as the function of the jury itself. Nevertheless, we remain cognizant of the vital importance of the privilege of trial by jury in our system of justice and deem it our duty to zealously protect and preserve it."

It is respectfully submitted that this type of legal action is not one which is susceptible to the use of special verdicts or special interrogatories. That the obvious

purpose of the trial court without request by any party and over the protest of plaintiff in submitting special verdicts was to restrict the constitutional right of the plaintiff to a trial by jury. If this court approves the trial court's conduct in this respect, further inroads on the constitutional rights of the citizens of the State of Utah will be inevitable. Eventually the right of trial by jury will be eroded away until it will be insignificant, unimportant and may vanish completely. If the jury trials are to be abolished, certainly it should be directly, openly, honestly and fairly, and not by indirection and erosion.

### CONCLUSION

It is respectfully submitted that this Court should:

1. Order the trial court to enter judgment in favor of plaintiff and against the defendant for the sum of \$6,123.00 or,
2. If it is determined that the answers to questions 3 and 4 are inconsistent that the case be returned for a new trial.

Respectfully submitted,

KING AND HUGHES

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