

1971

# Lloyd E. Lish, Jr. v. Utah Power & Light Company, A Maine Corporation : Appellant's Reply Brief

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LLOYD E. LISH, JR.,

*Plaintiff-Respondent,*

vs.

UTAH POWER & LIGHT  
COMPANY, a Maine corporation,

*Defendant-Appellant.*

Case No.  
12474

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## APPELLANT'S REPLY BRIEF

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Appeal from the Judgment of the Second Judicial  
District Court in and for Weber County, State of Utah  
Honorable Calvin Gould, Judge

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## APPELLANT'S REPLY BRIEF

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### REPLY TO RESPONDENT'S POINT IV

Plaintiff contends in Point IV of Respondent's brief that the amount which the jury awarded to plaintiffs as special damages over and above medical expenses should be added to the jury award for general damages. Defendant respectfully submits that the facts and the law do not support such a contention.

The case was submitted to the jury and a verdict was returned awarding plaintiff \$32,500.00 in general damages and \$17,500.00 in special damages (T. 319). The court noted to both parties that the special damages exceeded the limit it had placed on the jury of \$3,424.44 which limit was contained in the jury instruction number 6 (T. 21). The court suggested that the error could be corrected by motion and to that both parties agreed (T. 319, 320).

The court then asked both parties whether either of them had any objection to the discharge of the jury. Neither party objected and the jury was discharged (T. 320).

A motion was made by defendant that the verdict as to special damages be amended to conform to the special damages pleaded and stated in the jury instructions (T. 320).

Plaintiff thereafter moved that the pleaded special damages as reflected in jury instruction number 6 be amended by increasing it by \$400.00 to include the cost of a future medical procedure testified to during trial. The addition of this sum brought the special damage figure pleaded and stated in the jury instructions to \$3,824.44, and defendant stated that it had no objection to this amendment (T. 320, 321).

The verdict as to special damages was then amended from \$17,500.00 to \$3,824.44. Thereafter the following exchange took place between the Court and counsel:

“THE COURT: Then I will amend by interlineation the special damage figure to \$3,824.44.

MR. KIPP: We make no objection to that.

THE COURT: The verdict may be filed.

MR. CHILD: Showing a total verdict of what, then, your Honor?

THE COURT: \$32,500.00 plus \$3,824.44.

MR. KIPP: Correct.

THE COURT: Anything further for the present time, counsel?

MR. KIPP: We have nothing further, your Honor.” (T. 321).

Subsequently, plaintiff made a motion to reform the verdict by adding the sum of \$13,675.56 to general damages (R. 27); this motion was denied by the trial court (R. 30).

Plaintiff is apparently contending that it was the intent of the jury to award plaintiff an additional \$13,675.56 in general damages. Obviously, at this point it is impossible to tell what the intent of the jury may have been.

Rule 47(r) of the Utah Rules of Civil Procedure provides for the correction of an insufficient or incorrect jury verdict:

“Correction of Verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or *the jury may be sent out again.*” (Emphasis added.)

After the jury verdict was returned, defendant not only failed to request that the court apply the provisions of Rule 47 (r) of the Utah Rules of Civil Procedure, but also agreed to the dismissal of the jury without so much as even raising the issue of an increase in general damages. Instead plaintiff stipulated that the correct verdict was \$32,500.00 in general damages and \$3,824.44 in special damages (T. 321).

In the case of *Jorgensen v. Gonzales*, 14 Utah 2d 330, 383 P.2d 934 (1963), the jury brought back a verdict for plaintiff in the amount of \$368.49 in special damages and \$1,131.51 in general damages. The odd amounts prompted the court to question the jury foreman about the possibility of a quotient or chance verdict. Under such questioning it was revealed that the jury had improperly considered one element of general damages. Thereupon, the court instructed the jury to go out and reconsider its verdict. The jury returned with a different verdict for general damages. This court held that such a course of action was not only within the prerogative of the trial court under Rule 47 (r), but entirely proper and discreetly handled.

The case of *Brown v. Johnson*, 24 Utah 2d 388, 472 P.2d 942 (1970), involved an issue almost identical to the one presented before this court. In that case the court instructed the jury that special damages could not exceed \$377.50. The jury returned a verdict of \$10,000.00 for special damages. When the court saw the obvious error, it gave further directions to the jury and sent it

back out to redeliberate. The jury returned with a verdict of \$11,322.50 in general damages and \$377.50 in special damages. This court held that this was a proper procedure under Rule 47(r).

Plaintiff was free in the case at bar to request that the trial court send the jury back to redeliberate in accordance with Rule 47(r) of the Utah Rules of Civil Procedure. Instead the plaintiff chose to reduce the special damages by stipulation and to have the jury discharged. The failure to make such a request while the jury was still impaneled prevents plaintiff from now objecting to the insufficiency of the verdict. The trial court judge could not nor can this court know now what might have been the intent of the jury.

A number of courts have held that a party who fails to object to the irregularity of the verdict at the time it is returned is thereby precluded from claiming error in the verdict.

In *Brown v. Regan*, 10 Cal. 2d 519, 75 P.2d 1063 (1938) the Supreme Court of California in considering a verdict which could have been corrected by the jury, stated:

“ . . . The proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation. *Kerrison v. Unger*, 135 Cal. App. 607, 611, 27 P.2d 927. There can be no doubt, in view of the record presented on appeal, that had the jury been required by the trial court to retire for further deliberation under proper

instructions, a proper verdict would have been returned. *It is well established by numerous authorities that, when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its formality or uncertainty be corrected. . . .*" Brown at 1065, 1066. (Emphasis added.)

In *Hamilton v. Wrang*, 221 A.2d 605 (Del. 1966), an action for personal injuries and property damages arising out of an automobile accident, the jury verdict was for car damages only. On appeal, plaintiff stated that the verdict was void because it failed to award damages to plaintiff in a stated amount. It appeared that during the trial the parties had stipulated that the amount of damages to the car was \$511.00. The plaintiff made no objection to the form of the verdict at the time it was announced and the jury was thereafter discharged. The Supreme Court of Delaware affirmed the lower court decision upholding the jury verdict stating:

"The failure of the plaintiffs to object to the form of the verdict is fatal to their contention in this appeal that it is a nullity because of its allegedly defective form. *It is necessary in order to take advantage of a supposed defect in the form of a verdict that the aggrieved party take exception to it prior to the discharge of the jury, and the failure to do so amounts to a waiver of the point.* [citation] The reason for the rule is that upon timely objection the trial judge prior to the jury's discharge can instruct it to correct a faulty verdict." Hamilton at 606. (Emphasis added.)

In a motion to reform the verdict, plaintiff had a hearing before the trial court on this very question. There plaintiff had an opportunity to present his arguments and have the court consider them. After so doing, this motion was denied.

As plaintiff pointed out in Point I of his brief, there is a presumption of validity on appeal of the judgment and proceedings in the trial court. This being the case it must be presumed that the judgment which was rendered in the trial court and agreed to by plaintiff is correct. The case of *Gordon v. Provo City*, 15 Utah 2d 287, 391 P.2d 430 (1964), cited by the plaintiff states that the burden is on the moving party to demonstrate some persuasive reason for upsetting the judgment. Since plaintiff cites no authority for his Point IV, it must be presumed that he has not met the burden placed upon him.

To the contrary, it would appear that the weight of authority forbids the court to increase the amount of a jury verdict:

“As a general rule where the determination of the amount of recovery is exclusively within the province of the jury, the court has no power to amend the verdict by increasing the amount found by the jury; \* \* \*” 89 C.J.S., Trial, Section 517 (1955).

Finally, plaintiff claims that it is clear that the jury intended this to be compensation for lost income. It is submitted that it is not at all clear that the figure of \$13,675.56 represents what the jury intended to be

awarded for lost income. It is to be noted that the figure itself is a most curious amount which does not correlate to any evidence or amounts that were presented at trial. It is further to be noted that plaintiff's complaint only prayed for lost income in the approximate sum of \$7,000.00. The figure now being sought is almost double the amount for which plaintiff prayed. In short, it is impossible to know at this point what, if anything, the figure of \$13,675.56 represented to the jury.

Respectfully submitted,

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