1972

Mary Pauley v. Carol Zarbock : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY PAULEY,
Plaintiff and Appellant,

vs.

CAROL ZARBOCK,
Defendant and Respondent.

Case No. 12807

RESPONDENT'S BRIEF

Appeal From The Third Judicial District Court
In And For Salt Lake County, State of Utah
Honorable D. Frank Wilkins

KIPP AND CHRISTIAN
D. GARY CHRISTIAN
520 Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant and Respondent

ELDON A. ELIASON
Delta, Utah 84624
Attorney for Plaintiff and Appellant

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STATEMENT OF THE KIND OF CASE

This is an action by plaintiff-appellant against defendant-respondent for elleged personal injuries which she claims to have sustained as the result of a minor accident wherein the two vehicles involved merely touched one another at time of impact. The parties hereto were the drivers of the respective vehicles involved.

DISPOSITION IN THE LOWER COURT

This case was tried to a jury before the Honorable D. Frank Wilkins, one of the judges of the District Court of Salt Lake County. The trial judge instructed the jury that defendant was negligent as a matter of law but left the question of causation of bodily injury alleged to have been sustained by plaintiff up to the jury for resolution. As a result of its deliber-

ations the jury found that the accident in question did not cause the injuries claimed by plaintiff and returned a verdict of no cause of action in favor of defendant.

Subsequently plaintiff made Motions for Judgment Notwithstanding the Verdict (R 118, 119) and for New Trial (R 123) both of which Motions were denied by the Trial Court.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks to have the Order of the Trial Court affirmed which denied plaintiff-appellant's Motions for Judgment Notwithstanding the Jury Verdict and for New Trial and further seeks to have the Jury Verdict in this matter left undisturbed.

STATEMENT OF FACTS

On or about December 5, 1967, plaintiff, Mary Pauley, was stopped at the drive-in window to make a deposit at the Valley Bank and Trust Company, Cottonwood Branch (R 1, 150-151, T 9-10). While she was sitting there in her car defendant, Carol Zarbock, approached the drive-in window in her car also in anticipation of transacting some business at the bank (R 297, T 161). As she approached the place she would stop in line behind plaintiff's vehicle the front of defendant's car came in contact with plaintiff's car. Plaintiff, Mrs. Pauley, describes the impact as a "terrific jolt" (R. 151, T 10). While defendant, Carol Zarbock, described the impact as follows: "Well, I could feel that I had touched her car. I could feel that I had" (R 300, T 164). Defendant also stated that she was traveling between one and two miles per hour when her

vehicle touched plaintiff's automobile (R 300, T 164). Defendant introduced photographs of both vehicles as they appeared immediately after the impact. Exhibit 2-D shows the front end of the vehicle defendant was driving and also shows it as it appeared immediately after impact (R 303, T 167). Exhibits 4-D and 5-D both show the vehicle Mrs. Pauley was driving at the time of the accident with 5-D showing the rear of the Pauley vehicle (R 304, 168). A cursory examination of the photographs reveals that neither car sustained any damage in the accident and in fact it is impossible to tell where the two vehicles came in contact with one another. Indeed, neither plaintiff nor any other person made claim for any damage to the Pauley vehicle and no evidence was introduced to show that it sustained any damage in the accident. Certainly, the Zarbock vehicle was not damaged.

After the accident and before plaintiff reached home she states that she developed a lump the size of an egg which was painful on the right side of her neck (R 153, T 12). She contacted and saw Dr. Clifford Cutler relative to this. Dr. Cutler was not called as a witness by plaintiff in order to describe to the jury what his examination of plaintiff revealed or about his prescribed course of treatment.

Plaintiff was subsequently examined and treated by Dr. LaVerne Erickson, a neurosurgeon in Salt Lake City, who did testify in plaintiff's behalf (R 194, T 54; R 233, T 94).

Dr. Erickson first saw plaintiff on March 22, 1968 (R 196, T 56) at which time she complained of pain on the left side of her neck which pain went down into her shoulder. Plaintiff had a migraine headache problem prior to her accident

with defendant and Dr. Erickson felt that her problems were a combination of her prior problems and any injury received in the accident with defendant. On that occasion Dr. Erickson did a brief general neurological examination of plaintiff and the only positive findings being some mild difference in the reflexes. In that regard the left upper extremity was less active than the right (R 198, T 59). There was no positive findings at the time of trial and for some time prior thereto (R 198, T 59). Plaintiff had submitted to two myelograms but neither of them showed any significant abnormality (R 199, T 60).

Dr. Erickson saw plaintiff about nine times in all and did discover that she had had an injury in December, 1966 where she injured her neck (R 197, T 57).

Plaintiff was examined by Dr. Chester B. Powell, a neurosurgeon of Salt Lake City, who also testified at the trial. He examined plaintiff at the request of counsel for defendant (R 260, T 124). Dr. Powell first saw plaintiff on December 30, 1969. At that time he gave her a neurologic exam and also reviewed reports of the examinations and findings of other doctors and examined x-rays of plaintiff (R 261, T 125). After taking a history from plaintiff and then examining her Dr. Powell found plaintiff's physical condition to be normal. He testified that when he saw Mrs. Pauley she was in no apparent difficulty and was in good health. She wore a cervical collar at the time, but when it was removed she had normal spontaneous movements of the head and neck without any apparent limitations. He further stated that she had good posture and had good range of motion at all levels of the spine (R

262, T 126). After stating that the results of his neurologic exam of plaintiff was fully normal (R 264, T 125) Dr. Powell stated his diagnosis of Mrs. Pauley's condition as follows:

> First, in taking the history she gave me, the history of three separate injuries, so my impression was, first, that she had this history of injuries with possible sprain of the neck or aggravation of sprain from a previous injury and possibly in view of a complaint of some discomfort in her left shoulder, some irritation of the nerve root. However, in the second place, I could find no evidence by the examination, by the tests and x-rays which I reviewed of any specific disorder of which we could make a diagnosis, accounting for the symptoms other than the possibility of sprain.

The record also reveals that plaintiff had an accident in December, 1966 when she slipped on the ice and hurt herself in the parking lot of her employer, General Appliance Company. She was hospitalized as a result of that accident and was treated by both Dr. Cutler and Dr. Bernson (R 177, T 37). Plaintiff had an onset of headaches which finally became so bad she couldn't stand it (R 178, T 38). She was hospitalized for about one week (R 178, T 38), where she underwent traction (R 179, T 39) and had physical therapy treatments for about two months (R 179, T 39).

Plaintiff also admitted that she was involved in another automobile accident subsequent to the one with defendant. She was driving an automobile that was struck from the rear by a car driven by a Grace Harrington in July, 1969 (R 184, T 44). She stated that she had never been free of pain from the time of the accident with defendant up to the time of trial (R 190, T 50). However, defendant called as a witness Mr. John Ware, an adjuster for Nationwide Insurance Company, the liability

insurance carrier of Grace Harrington (R 290, T 154; R 291, T 155). He stated that in settlement negotiations with plaintiff and her attorney on the Harrington accident that plaintiff's physical condition had been discussed as that related to any injury received in the accident with defendant (R 292, T 156). In discussing this matter Mr. Ware said at R 293, T 157:

> Mrs. Pauley said to me that she had been released by her physician as it relates to injuries received prior to the accident of July, 1969. She said that she had physical problems directly related to an accident occurring in July of 1969 for which she was making claim against Nationwide.
>
> Q. (by Mr. Christian) Was there anything else to the conversation?
>
> A. She told — she described herself for me as a sports enthusiast. She told me that since the accident of July, '69 that her abilities to participate in the sports which she liked to follow was greatly curtailed. She also told me that she, prior to that — immediately prior to that accident, she told me that she had felt good, and, of course, related as I said, certain treatments and expenses which were directly related to an accident occurring in July of '69.

After the parties had rested their case; the Court gave the jury 21 instructions for their guidance in deciding the case. Several of the pertinent and significant instructions were Instructions 3, 4, 5 and 9 which as given by the Court are as follows:

INSTRUCTION NO. 3

> You are the exclusive judges of the believability of the witnesses and the weight of the evidence. In judging the weight of the testimony and believability of the witnesses, you have a right to take into consideration their bias, their interest in the result of the suit,

or any probable motive or lack thereof to testify fairly if any is shown. You may consider the witnesses' conduct upon the witness stand; the reasonableness of their statements; their apparent frankness, or the want of it; their opportunity to know; their ability to understand, and their capacity to remember. You should consider these matters together with all of the other facts and circumstances which you may believe have a bearing on the truthfulness or accuracy of the witnesses' statements.

INSTRUCTION NO. 4

A witness may be impeached by contradictory evidence or by evidence that on some former occasion, he or she made statements or conducted himself or herself in a manner inconsistent with his or her present testimony.

INSTRUCTION NO. 5

If you believe any witness has wilfully testified falsely as to any material matter, you may disregard the entire testimony of such witness, except as such testimony may have been strengthened or confirmed by other believable evidence.

INSTRUCTION NO. 9

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. One exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

After having instructed the jury that defendant was negligent as a matter of law, the trial court left the question of whether the injuries that plaintiff complained of were proximately caused by defendant's negligence (Instructions 14, R 68).

The jury decided that they were not and accordingly returned its verdict in favor of defendant and against plaintiff no cause of action.

ARGUMENT

POINT I

THE JUDGMENT AND PROCEEDINGS IN THE LOWER COURT ARE PRESUMED BY THE REVIEWING COURT ON APPEAL TO BE CORRECT

The cases are legion supporting the general proposition of law stated in Point I, and especially as it applies to the instant case. No cases have been found by respondent stating a contrary position.

Not only is there a presumption of validity on appeal of the judgment and proceedings in the lower court, but the burden is on the appellate affirmatively to demonstrate error, and in the absence of such the judgment must be affirmed by the reviewing court. *Leithead v. Adair,* 10 U.2d 282, 351 Pac. 2d 956; *Coombs v. Perry,* 2 U.2d 381, 275 Pac.2d 680. Again, on appeal the judgment of the trial court is presumptively correct and every reasonable intendment must be indulged in by the appellate court in favor of it. *Burton v. Zions Co-operative Mercantile Institution,* 122 U. 360, 249 Pac.2d

514; *Nagle v. Club Fontainbleu,* 17 U.2d 125, 405 Pac.2d 346; *Petty v. Gindy Manufacturing Corporation,* 17 U.2d 32, 404 Pac.2d 30.

This proposition of law is correct and is binding upon the appellate court whether the proceedings in the lower court are before a judge only or a judge and jury. And the rule seems to have even more weight in the latter instance. When the trial court has given its approval to the determination by the jury by refusing to grant a new trial to the losing party, the appellate court will look upon the judgment of the trial court with some degree of verity with a presumption in favor of its validity, and again the burden is upon the appellate to show some persuasive reason for upsetting it. *Gordon v. Provo City,* 15 U.2d 287, 391 Pac.2d 430. In the same vein, it has been held that where a jury trial has been had and a motion for a new trial denied to the losing party, the presumptions are in favor of the judgment entered and the Supreme Court will not disturb that judgment unless the appellant meets the burden of showing error and prejudice which deprived it of a fair trial. *Lemmon v. Denver & Rio Grande Western Railroad Company,* 9 U.2d 195, 341 Pac.2d 215.

Other cases supporting this proposition are *Charlton v. Hackett,* 11 U.2d 389, 360 Pac.2d 176; *Universal Investment Company v. Carpets, Inc.,* 16 U.2d 336, 400 Pac.2d 564; *Taylor v. Johnson,* 15 U.2d 342, 398 Pac. 2d 382; *Wendelboe v. Jacobson,* 10 U.2d 344, 353 Pac.2d 178; *Hadley v. Wood,* 9 U.2d 366, 345 Pac.2d 197; *Daisy Distributors, Inc. v. Local Union* 976, *Joint Council* 67, *Western Conference of Teamsters,* 8 U.2d 124, 329 P.2d 414.

POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND THAT THE NEGLIGENT ACTS OF DEFENDANT PROXIMATELY CAUSED THE INJURIES COMPLAINED OF BY PLAINTIFF

It is Hornbook Law that even though there is negligence on the part of a tort feasor that negligence must be the proximate cause of the injuries sustained or complained of by the plaintiff before recovery can be had. *Hill v. Mathew Paint Company,* 149 Cal. App. 2d 714, 308 Pac.2d 865; *Mitchell v. Branch,* 363 Pac.2d 969 Hawaii; *Chatterton v. Pocatello Post,* 70 Idaho 480, 223 Pac.2d 389; *Mills v. State Automobile Insurance Association,* 183 Kan. 268, 326 Pac.2d 254; *Mahan v. Hafen,* 76 Nev. 220, 351 Pac.2d 617; *Duncan Brothers v. Robinson,* 294 Pac.2d 822 (Okla); *Schutt v. Hill,* 193 Ore. 18, 236 Pac.2d 937. And as a general rule defendant will not be liable for plaintiff's injuries unless his negligence proximately caused the said injuries. *Glen v. Gibbons and Reed Company,* 1 U.2d 308, 265 Pac.2d 1013. It is also uncontroverted and uncontrovertable that questions of negligence, contributory negligence and proximate cause in an automobile collision case are ordinarily for the jury. *Oflkman v. Jensen,* 218 Pac.2d 682 (Utah); *Earl v. Salt Lake and Utah Railway Corporation,* 109 U. 111, 165 Pac.2d 877; *Hayden v. Cedarland,* 1 U.2d 171, 263 Pac.2d 796; *Gibbs v. Blue Cab,* 249 Pac.2d 213 (Utah) rehearing, 259 Pac.2d 294.

The case of *Jensen v. Taylor,* 2 U.2d 196, 271 Pac.2d 838 (1954) was an action for damage sustained by plaintiff when an automobile in which he was riding as a guest passenger was struck by a fire truck driven by the defendant. The

evidence produced at the trial was apparently in conflict and the District Court, Judge A. H. Ellett, denied the Motion for Directed Verdict and submitted the case to the jury and thereto denied defendant's Motion for Judgment Notwithstanding the Jury Verdict and for New Trial and the defendant appealed. The Supreme Court, Judge Worthen, held that questions of negligence and contributory negligence and proximate cause in this case were properly submitted to the jury and the general rule is to that effect. See also, *Caperon v. Tuttle,* 100 U. 476, 116 Pac.2d 402.

Appellant in its Brief claims that the evidence adduced at the trial is so overwhelming and convincing that the trial court was in error in not instructing the jury as a matter of law that defendant's negligence was the proximate cause of the injuries complained of by plaintiff. With all due respect to the position of appellant in this matter it does not seem to be that clear to the respondent. Appellant asserts in Point II of his Brief in support of his position that proximate cause as a matter of law must be founded upon a stipulation by counsel for defendant on the medical bills incurred by the plaintiff. However, in examination of the record in this matter will indicate and show the following statement made by counsel for defendant in relation to that matter:

> MR. CHRISTIAN: I'll be happy to. [Stipulate.] If the proper persons were called to testify, they would testify that the charges I shall indicate were charges made for services performed for and on behalf of Mrs. Pauley, and that the charges so made were so reasonable. I do not stipulate, however, that the services performed were necessary, nor do I stipulate that we are responsible therefor. . . . (R 164, T 23).

It is obvious from what the record reveals in that regard, that the stipulation as related to the medical bills of plaintiff was not intended to be at the time it was made nor could it reasonably be inferred to be a basis for finding as a matter of law causation in this case and respondent respectfully asserts that appellant does violence to the facts as revealed in the record in this matter in attempting to make the stipulation form such a basis. Far more significant in consideration of this case, however, are the instructions which the Court gave to the jury. The jury was adequately and properly instructed in this case.

In the Court's Instruction No. 3, he advised the jury that they were the exclusive judges of the believability of the witnesses and the weight of the evidence and that they could take into consideration the witnesses interest in the lawsuit, motive or lack thereof to testify fairly. They could also consider the witnesses conduct on the stand, the reasonableness of their statements, apparent frankness, or want of it, their opportunity to know, etc.

The jury was also told in Instruction No. 5 that if they believed that if any witness testified falsely as to a material matter they could disregard the entire testimony of such witness, except as that testimony was strengthened by other believable evidence.

The record clearly shows that plaintiff claimed after the impact, while on the way home, she developed pain in her neck and a lump on the right side thereof about the size of an egg. She immediately contacted Dr. Cutler and went to him for examination and treatment and was treated and examined by

the doctor over a period of time. However, Dr. Cutler was not called to testify relative to his findings or plaintiff's condition immediately after the accident. Plaintiff also stated on the stand that she had not had one day free of pain from the time of the accident with defendant until the accident with Mrs. Harrington in July of 1969. However, over plaintiff's objection defendant was able to produce a witness, Mr. John Ware, whom plaintiff told that she had been released from her doctor, that she was feeling good prior to the accident of July, 1969, that she had been active and enthusiastic in sports but the accident of 1969 had curtailed her activities in that regard.

Counsel for plaintiff was unable to impeach Mr. Ware in his testimony. It is certainly not beyond the realm of reasonableness that the jurors believed that in this regard the plaintiff was testifying falsely and she may well have been, and if they so believed they were instructed by the Court that they were entitled to disregard her entire testimony or any part thereof, which they may well have done. If they disregarded her testimony as to her injury or any part thereof, the jury may have honestly felt that Mrs. Pauley was not injured in the accident. Certainly such a finding would be supported by the evidence revealed in Exhibits 2-D through 5-D which were photographs of the two vehicles involved shortly after the accident and which showed the vehicles as they appeared immediately after the impact and there was no evidence of damage to either car nor was it possible to determine by examining the photographs where the two vehicles came in contact. To support this plaintiff made no claim for damage to her automobile. The fair inference from that being that the vehicle was not damaged in the accident.

The jorors who finally sat to hear this case were approved by both counsel for plaintiff and defendant. They were neither wild-eyed liberals nor were they brooding conservatives, but a group of plaintiff's peers who sat for two days, listened attentively to the evidence presented, listened attentively to the Court's Instructions and then retired to the jury room to there render a true and just verdict. It was their feeling, even after having been instructed by the Judge, that defendant was negligent, that plaintiff received no injury from the accident, even though she had incurred substantial medical bills. Interestingly enough, plaintiff sustained an injury in December of 1966 which required hospitalization, the alleged injury in December of 1967 and another injury in July of 1969. Considering all of this evidence coupled with plaintiff's doctor, Dr. LaVerne Erickson, that when he saw plaintiff the only positive findings after a neurologic examination of plaintiff's condition was a mild discrepancy in the reflexes of the left upper extremities.

Dr. Powell, who is also a neurosurgeon in Salt Lake City and who admittedly saw plaintiff considerably later than Dr. Erickson, stated that he found no objective signs or evidence of injury to plaintiff and in fact found his examination of her to be completely normal.

It should also be noted that the Instructions relative to believability of witnesses and false testimony are stock Instructions from Jury Instruction Forms for Utah, which instructions have been approved and adopted by the Courts in this state. If the jurors are not the exclusive judges of the credibility and believability of the witnesses and if the jurors are not entitled to believe any witness testified falsely or if the jurors

are not entitled to disregard the testimony of a witness they believe has testified falsely then the attorneys of the Trial Bar, the Bar Association and the Courts of this state make a mockery of the instructions which they give to the jury wherein they instruct them that they are the exclusive witnesses and that they may disregard the testimony of a witness who they have believed testified falsely.

Taking all of the evidence into consideration and considering the well established general rule that proximate cause is a jury question it is the contention of the respondent herein that the trial court acted properly in submitting that question to the jury for its resolution. And that since reasonable minds could differ as to whether or not plaintiff even suffered any injury, especially if one believes that she testified falsely on the stand, then the question was properly submitted to the jury and should not be overturned by the trial court or the appellate court.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT.

Respondent incorporates by reference into Point III hereof the facts, law and arguments made in Point II of this Brief.

In directing a verdict in favor of plaintiff and against the defendant in this matter, the Court was required to view and examine the evidence in a light most favorable to the defendant and it is certainly not the province of the Court to weigh or determine preponderance of the evidence. *Boskovich v.*

Utah Construction Company, 123 U. 387; *Finlayson v. Brady,* 121 U. 204, Pac.2d 491; *Nielson v. Hermanson,* 109 U. 180, 166 Pac.2d 536.

Again, in granting a Motion for Directed Verdict or for a Judgment Notwithstanding the Verdict, all testimony and all reasonable inferences flowing therefrom which tend to prove the case of the party against whom the verdict is to be directed or the Motion granted must be accepted as true and all conflicts and all evidence which tend to disprove that must be disregarded. *Koer v. Mayfair Markets,* 19 U.2d 339, 431 Pac.2d 566; *Smith v. Franklin,* 14 U.2d 16, 376 Pac.2d 541.

In the case on appeal herein, if the trial court had directed the verdict as plaintiff contends, they would have to have found the evidence as submitted by the plaintiff true and all reasonable inferences therefrom and totally disregarded any of the evidence produced by the defendant. And as a matter of fact the Court would have had to accept the testimony of plaintiff as being true while disregarding the significant testimony of Dr. LaVerne Erickson, her own doctor as not being true. It would have also required the Court to place itself in a position of being the exclusive judge of the credibility of the witnesses and would have deprived the jury of the right to believe or disbelieve any of the witnesses which testified. It also means that the Court would have to accept the testimony of plaintiff as being true as a matter of law.

The jury may well have disregarded all of plaintiff's testimony by reason of inconsistent statements made by her to Mr. John Ware, the claims adjuster for Nationwide Insurance Company, and the statement made on the stand. Re-

spondent respectfully contends and asserts that the position advocated by the plaintiff in its Brief is untenable, unjust, inequitable and in error.

POINT IV

THE TRIAL COURT DID NOT ERR IN PERMITTING THE TESTIMONY OF JOHN M. WARE OVER OBJECTION OF PLAINTIFF'S COUNSEL

Under Point III of its Brief appellant spends considerable time relative to the cross-examination of plaintiff by counsel for the defendant and especially as that cross-examination related to medical expenses incurred by plaintiff from the automobile accident of July, 1969 and settlement negotiations which she had with Mr. John Ware also in relation to that accident. A canvas of the record in this matter shows that no objection was made by counsel for plaintiff to that line of questioning by defendant's attorney and plaintiff cannot now be heard to raise a belated objection thereto. In any event it cannot be seriously argued that counsel for defendant could not go into the matter of medical expenses incurred by plaintiff as a result of the second accident as probative of the extent of injuries received in the second accident when plaintiff claimed that those injuries were not in any way related to the injuries received in the accident with Mrs. Zarbock in December of 1967. None of the settlement negotiations which plaintiff and her attorney entered into with John Ware were brought out in the testimony of Mr. Ware. It will be recalled that Mrs. Pauley testified on cross-examination that she had never recovered or was never free from pain from the injuries received in the

accident with Mrs. Zarbock in December of 1967 up to the time of the accident with Mrs. Grace Harrington in July of 1969.

The plaintiff further testified, after having been given a chance to retract that statement, that she had never made any statement inconsistent with that or she did not recall such. Thereupon defendant called Mr. John Ware who had had discussions with Mrs. Pauley in the presence of her counsel relative to her condition as that related to the accident with Mrs. Zarbock. Mr. Ware testified that Mrs. Pauley had told him that she had been released from her doctor from any injury sustained in the accident with defendant herein and that she was feeling fine before the accident with his insured, Mrs. Grace Harrington, in July of 1969, that prior to the July, 1969 accident she had been a sports enthusiast and had certainly engaged in sports activities but her activities were greatly curtailed by reason of the subsequent accident.

Such testimony of Mr. Ware, if believed, puts the plaintiff in the position of making grossly inconsistent statements about what her condition was. She testified and wanted the jury to believe in the instant case that all of her medical problems were directly attributable to the accident with the defendant, Mrs. Zarbock. However, when she attempted to settle the claim she had against Mrs. Harrington with Mr. Ware she wanted to make him believe that she had completely recovered from any injuries sustained in the Zarbock accident, whatever they were, and that all of her problems after July of 1969 were directly caused by Mrs. Harrington.

Respondent respectfully asserts that plaintiff knowingly laid herself wide open for impeachment in this case and was effectively impeached. As has been previously indicated, the

jury may well have thought that she wilfully testified falsely because of her monetary interest in this case and that being so the jury was properly instructed that they could disbelieve any part of her testimony or reject it all. Such impeachment was consistent with the Court's Instruction No. 4, wherein the jury was advised that a witness may be impeached by contradictory evidence or by evidence that on some former occasion she made statements inconsistent with her testimonay at the time.

Appellant claims that Mr. Ware's testimony was prejudicial to her position in this case. With that position respondent certainly agrees if you take into consideration that plaintiff prejudiced her own position by the inconsistent contradictory statements which she made. If it is true that Mr. Ware's testimony was prejudicial to plaintiff in this case, it certainly was not improper.

POINT V

THE COURT DID NOT ERR AND ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FO RA NEW TRIAL

Respondent will attempt to meet the arguments contained in Points IV and V of appellant's Brief under this heading of the respondent's Brief.

It is of interest to note that plaintiff obviously thinks injustice was done in this matter because she did not win the lawsuit. All parties are generally wooed by their own position and feel that a travesty occurs if the merit of their position is not seen by others.

Appellant cites several cases under Point IV of its Brief relating to the power of the Courts to increase an inadequate award. Respondent respectfully contends that the cases cited by appellant are not in point. Those cases relate to findings by the jury where the plaintiff was entitled to an award of some kind and that based on the evidence as to what the injury was, supported by the juries finding that an award should be made, then in that event the Courts are able to determine the inadequacy of the award. However, in the instant case the jury, after hearing and weighing all of the evidence, decided that plaintiff was not entitled to any award. It goes without saying that the Court cannot review the inadequacy of that award since the jury found that the plaintiff was not injured in the automobile collision with Mrs. Zarbock and therefore not entitled to anything.

Respondent does not contend that different people may not have different viewpoints about the jury's verdict in this case. But does strongly argue that reasonable people could well differ as to what the evidence meant and also as to whether or not Mrs. Pauley had any injury in the accident with Mrs. Zarbock and to the extent thereof. It is for this reason that reasonable minds could differ and that the jury verdict must be left undisturbed.

A trial court is without power to change a jury's verdict or render a judgment for a greater or lesser amount than that specified in the verdict unless the prevailing party consents to the reduction, or the losing party consents to the increase. *Bourne v. Moore,* 77 U. 184, 292 Pac.2d 1102.

Motion for new trials are alawys addressed to the sound discretion of the Court and whether granted or denied the discretion of the trial court will be presumed to have been properly exercised and will be so held unless the contrary be made clearly to appear. *Lehi Irrigation Company v. Moyle,* 4 U. 327, 9 Pac. 867.

It is axiomatic in this state that the granting or refusing of Motions for New Trial is a discretionary matter. *Uptown Appliance and Radio Company, Inc. v. Flint,* 122 U. 298, 249 Pac.2d 826.

A court that vacates a verdict and grants a new trial by merely setting up his opinion or judgment against that of the jury ursurps the judicial power and prostitutes the constitutional trial by jury. *Uptown Appliance and Radio Company, Inc. v. Flint, supra.*

The above cited cases clearly show that the granting or refusing to grant a new trial is a discretionary matter with the trial court and that appellant must show clearly that the trial court abused such discretion. Respondent believes that no such showing has been made or can be made in this case. Certainly, the trial judge in this matter has disposed of plaintiff's Motions on what he knew the law to be in this state — that on the question of damages in a tort action the parties are entitled to the unprejudiced judgment of a jury and the trial court may not set up its own view as to the amount of damages a party is entitled to recover as against a verdict of the jury. *Bourne v. Moore, supra.*

The trial of cases by jury still have some validity in our system of jurisprudence and hopefully that condition will remain. The trial judge in this case elected not to prostitute that time honored system by substituting his judgment for the jury

even though he may have disagreed with the jury's verdict. Respondent does not mean to imply that the trial judge did disagree with it however.

If, however, as plaintiff contends that jury verdicts are good, just and true so long as they square with plaintiff's desires or with that of a trial judge then the time for trial of jury cases in our system is long since gone. Obviously, the trial judge in this matter felt that the jury having heard the testimony of all the witnesses, seen and examined the exhibits introduced into the evidence, listened to the trial court's instructions, heard and considered the argument of counsels, was well aware of the facts of this case as it related to negligence, proximate cause, causation, injury and damages, if any. The jury having given of their time, having been attentive during the course of the trial and diligent in achieving a true and just verdict which they swore to do rendered a verdict of no cause of action in favor of defendant and against plaintiff, which verdict was unanimous as far as the jurors were concerned.

Respondent respectfully takes the position that had the trial court set aside the jury verdict or granted a new trial, that a grave miscarriage of justice would have been done. And further contends that the appellate court herein must affirm the trial court in this matter and leave the jury verdict undisturbed if justice is to be achieved.

CONCLUSION

It is abundantly clear that the question of proximate cause, nature and extent of injury and damages were properly submitted for the jury's determinations, and that such questions

were for the jury's determinations since reasonable minds could differ as to whether or not the plaintiff was injured at all in the accident with defendant and, if so, to what extent she was injured.

Having properly submitted those questions to the jury and the jury having found in favor of the defendant, the trial court refused to grant plaintiff's Motion for New Trial. The evidence from the record justifies the action taken by the Court and the jury.

Based upon the foregoing facts, authorities and argument defendant urges this Court to affirm the judgment of the trial court upon the jury verdict and its order denying plaintiff's Motion for Judgment Notwithstanding the Jury Verdict and for New Trial.

Respectfully submitted,

D. GARY CHRISTIAN
KIPP AND CHRISTIAN
520 Boston Building
Salt Lake City, Utah 84111
Phone: (801) 521-3773