

1960

Johnson Ready-Mix Concrete Co. v. United Pacific Insurance Co. : 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.

Preston and Harris; Attorneys for Plaintiff and Respondent;

Recommended Citation

Brief of Respondent, *Johnson Ready-Mix Concrete Co. v. United Pacific Insurance Co.*, No. 9247 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3662

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.

In the Supreme Court of the State of Utah

JOHNSON READY-MIX CONCRETE
COMPANY, a corporation,

Plaintiff and Respondent

—VS.—

UNITED PACIFIC INSURANCE
COMPANY, a corporation,

Defendant and Appellant.

FILED

SEP 10 1960

Supreme Court, Utah

No. 9247

UNIVERSITY OF UTAH

BRIEF OF RESPONDENT

JUL 10 1967

LAW LIBRARY

PRESTON and HARRIS
*Attorneys for Plaintiff and
Respondent*

Cache Valley Bank Bldg.,
Logan, Utah

CONTENTS

	Page
Statement of Facts	1
Statement of Points	7
Point I. The question of whether or not Johnson Ready-Mix had notice of the accident was properly submitted to the jury	7
Point II. Instruction No. 9 was properly submitted to the jury	20
Point III. The record clearly establishes that the jury determined the issues in favor of the plaintiff	21
Point IV. Any error in the instructions would not have affected the final result and would therefore be harmless	21

Index to Cases

Fox v. Taylor (Utah 1960) 350 P. 2d 154	21
Hoffman v. Employers, etc. (Ore.) 29 P. 2d 557	14
Holland v. Morton (Utah 1960) 353 P. 2d 989	21
Latses v. Nick Floor, Inc. 99 Ut. 214, 104 P. 2d 619	15
Munz v. Standard Life, etc. 26 Ut. 69, 72 P. 2d 182	18
Nye v. Louis Ostrove, etc. (O. App.) 43 N.E. 2d 103 18 ALR 2d 475	17
Olsen, et al. v. Warwood, et al. 123 Ut. 11, 255 P. 2d 725	13
Shafer v. U.S. Casualty Co., (Wash.) 156 P. 861	20
Startin v. Madsen, 120 Ut. 631, 237 P. 2d 834	22
Woolverton v. Fidelity, etc. (N.Y.) 82 N. E. 745	14

Authorities

18 ALR 2d 475	16
Rule 61, URCP	22

In the Supreme Court of the State of Utah

JOHNSON READY-MIX CONCRETE
COMPANY, a corporation,
Plaintiff and Respondent,

—VS.—

UNITED PACIFIC INSURANCE
COMPANY, a corporation,
Defendant and Appellant.

No. 9247

BRIEF OF RESPONDENT

RESPONDENTS ADDITIONAL STATEMENT OF FACTS

Since the statement of facts contained in appellant's brief are not considered sufficient to give the court a clear and concise picture of the proceedings below, this additional statement of facts is submitted.

For some years the plaintiff carried a public liability Insurance Policy with the defendant United Pacific

Insurance Company. On May 12, 1954, one Blazer while working as a cement finisher received a bump on his back against one of plaintiff's concrete mixer trucks. The matter was considered to be a trivial one by all the persons present at the time and neither Johnson or his office manager knew anything about it until May 14, 1957, when Johnson received a letter from Attorney Charles Olsen stating that Mr. Blazer had a cause of action for personal injuries growing out of the May 12th accident. Johnson then promptly reported the matter to the defendant insurance company and attorney Olson brought suit against Johnson for Blazer. The Insurance Company declined to defend the Blazer action, Johnson employed his own council and eventually paid a judgment against him in that action. This is an action on Johnson's Insurance policy against the defendant Company for damages for failure to defend the Blazer action and to pay the judgment in that case as required by the terms of the policy. The case was tried to a jury where the plaintiff had a verdict and judgment against the defendant for the amount of the judgment paid by him plus attorneys fees.

No complaint is made here as to the amount of the verdict the only errors assigned being as to the instructions of the court which submitted to the jury the question of whether defendant Johnson had notice of the accident and (2) whether it reasonable appeared

to be so trivial as not to require reporting to Insurance Company.

On the 12th day of May, 1954, when the injury occurred to Mr. Blazer, it is apparent from the record that no one, including Mr. Blazer, treated his injuries other than as a trivial matter. Mr. Blazer himself testified that he only missed two-days work in two months (R255).

According to his own testimony (R257), he states that he had informed someone he called, that "he had had a minor accident." He called on the third day after the accident to someone in Johnson's office, but he did not know to whom he was talking, but he said he asked for the bookkeeper (R258) and he couldn't remember what the person on the other end of the call said. And, it was not until counsel for appellant suggested that it was the bookkeeper (R258) that he said, "I think he said he was the bookkeeper." The bookkeeper, Mr. Quinney, denied that he ever talked to Mr. Blazer (R223). Mr. Blazer doesn't recall whether the party on the other end of the line did anything but answer the phone, as he could not recall anything that was said by that party (R259).

Mr. Olsen, the driver of the truck talked to him some time during the summer when he was again delivering concrete to Mr. Blazer and asked him how he was getting along, and Mr. Blazer replied that he was getting

along with his work and did not make any mention whatsoever about his injuries (R266). And upon cross-examination Mr. Olsen further stated (R267), and this was sometime in the summer of 1954, that Blazer told him that he thought he would be all right and he didn't think that it (the accident) had hurt him, and Olsen at the time of the accident tried to get him (Blazer) to let him (Olsen) take him to the doctor, but Blazer refused to go to the doctor (R263-264).

It should be borne in mind that the witness, Mr. Olsen, was called on behalf of the appellant and was not at the time of the trial working for Johnson; and when Mr. Olsen talked to Mr. Taggart, the batch plant man for Johnson, he testified on direct examination that he did not tell Mr. Taggart that Blazer had been hurt seriously (R268).

As further indication that Mr. Blazer himself treated the matter only as trivial, the record shows (R273-274-275) he never testified that he talked with Taggart about it. The very day after the accident (the word January is in error in the record and it should be the month of May) and on at least seven occasions shortly thereafter, Blazer ordered concrete personally from Taggart, and on none of these occasions did he say anything at all about his injury. Taggart testified that one time (R276) Blazer called him and told him that a truck had "bumped" him, but the record shows that Taggart had information, or at least believed, that Blazer was

suffering from a previous injury to his back (R277), and as counsel states in his brief, the matter was never brought to Mr. Quinney's attention according to the testimony of Taggart and Olsen (P. 3). Taggart's testimony is to the effect that at one time before the accident he called on Blazer (R277) at Blazer's home where he was crippled up with his back at the time; so that the verdict of the jury under the instructions of the Court would amount to the finding that all parties treated the matter as so trivial as not to require them to give notice to the insurance company.

Finally, the facts are that neither Johnson or any of the officers of his company, knew of this matter until they were served notice of the claim of Mr. Blazer against Johnson by the attorney for Mr. Blazer, Charles P. Olson on May 14, 1957 (Pl.'s Ex. No. 11). Thus, the matter rested, so far as Johnson or any of his employees were concerned, in complete silence from a few days after the accident until receipt of the Olson letter, during which time Mr. Blazer was undergoing medical and surgical treatment and hospitalization and incurring large bills, for which Johnson has fully paid and now claims reimbursement under the policy written by the appellant.

Johnson did everything possible to get the appellant to defend the suit under the terms of the policy, but it declined to defend the same, refusing on the grounds that it had not been notified as soon as practicable (See

Exhibits 3 to 13 inclusive). Johnson finally employed his own attorneys. These exhibits were not admitted in evidence, but their contents were stipulated to (R206).

The record and exhibits amply show that the matter was diligently pursued by Johnson after such notice was had from attorney Olson that the insurance company had every possible opportunity given it to take over the defense after it had made its complete investigation of the case.

Under the instructions of the Court given for and guidance upon a submitted general verdict, the jury has found that the matter was of such a trivial nature that a reasonable man would not be expected to report the matter and it would be an excuse for failing to notify the company, and further found apparently that under the circumstances, the notice to the company finally was within a reasonable time.

The record shows that the jury clearly had in mind the question of whether or not the insurance company had been notified as soon as practicable, because the jury returned to the courtroom wherein the following proceedings took place (R320).

“ . . . some question about the meaning of the phrase ‘as soon as practicable’ means that the notice must be given within a reasonable time under the circumstances of the case. Instantaneous notice is not contemplated, but rather notice to be given with reasonable dispatch

and within a reasonable time in view of all the facts and circumstances of the case. Now maybe that may not be very helpful, but that is a legal definition.”

STATEMENT OF POINTS

POINT I

THE QUESTION OF WHETHER OR NOT JOHNSON READY-MIX HAD NOTICE OF THE ACCIDENT WAS PROPERLY SUBMITTED TO THE JURY.

POINT II

INSTRUCTION NO. 9 WAS PROPERLY SUBMITTED TO THE JURY.

POINT III

THE RECORD CLEARLY ESTABLISHES THAT THE JURY DETERMINED THE ISSUES IN FAVOR OF THE PLAINTIFF.

POINT IV

ANY ERROR IN THE INSTRUCTIONS OF THE COURT IN THIS CASE WOULD NOT HAVE AFFECTED THE FINAL RESULT AND WOULD THEREFORE BE HARMLESS.

ARGUMENT

Point I

THE QUESTION OF WHETHER OR NOT

JOHNSON READY-MIX HAD NOTICE OF THE
ACCIDENT WAS PROPERLY SUBMITTED TO THE
JURY.

The final issues submitted by the court to the Jury were as follows: (R148)

1. Was any notice of the accident ever received by the plaintiff corporation prior to May, 1957?

2. Did the accident appear so trivial or minor (even though plaintiff found out about it within a few days should you so find) as to not require that notice of it be given to the defendant?

3. (If the two above are resolved in favor of the plaintiff) How much should he recover?

As to these issues submitted to the Jury the court in Instruction No. 4 and No. 9 stated the respective parties theories in the alternative and left the matter for the jury.

The only testimony relied upon by the appellant to establish that Mr. Taggart had authority to receive notice of the accident was the testimony of Mr. Quinney that he had instructed Taggart that if he had knowledge of an accident to report it to the office (R224-225).

Mr. Taggart according to his own testimony only had authority to send drivers to different place, wherever the orders were called for (R270). According to Mr. Johnson's testimony speaking of Taggart's respons-

ibilities “he’d get orders for concrete, he’d dispatch the various trucks to different jobs (R246).

Counsel argues that the evidence was without conflict that Taggart had authority to receive notice of accidents involving Ready Mix truck drivers and *relay such Notice to Mr. Quinney*.

There is some confusion in the record growing out of the Courts sustaining the objection to the testimony of Mr. Quinney with respect to how claims in insurance cases were processed by the company that the claims were all processed through his (Quinneys) office and that he knew of no other or individual agent or employee that was authorized to process claims of this nature. (R215).

However Mr. Quinney did testify

Q. Do you know of any instance where any person other than through your office has ever processed a claim?

A. I don’t.

Q. Or how many claims — could you just tell me whether there have been a few or several claims made by your company against the United Pacific Insurance Company?

A. There have been several.

Q. And who processed those claims.

A. I did.

THE COURT (To Attorney Christensen): You admit that he (Quinney) took care of the insurance business for the Company.

MR. CHRISTENSEN: Yes, we admit that he handled, through Hatch Agency, the placing—

THE COURT: And communicated through to your company. He was the communicating officer.

MR. CHRISTENSEN: “Yes” (R217).

Then on cross examination Quinney at (R224) testified he as office manager instructed the employees including Taggart that they should report accidents to the office.

At page 225 of the record Quinney testified:

Q. (By Atty. Christensen): Did you give any instructions to Mr. Taggart with respect to telling the drivers what the procedure was in connection with reporting accidents?

A. Yes.

Q. And what did you tell Mr. Taggart in that regard?

A. That if we had an accident to report it.

Q. In other words, the truck drivers were to report any accidents of which they knew to who, to you or to Mr. Taggart?

A. Well to either one *as long as it got to the office*.
(Our emphasis).

Quinney testified that he was the only employe in the office except Mrs. Johnson helped him occasionally. (R223).

That Blazer never talked to him about the Blazer accident (R250), and he knew nothing of the accident until he received attorney Olson's letter in 1957 (R219).

It is submitted that the procedure outlined is a reasonable method of proceeding to get the information to the one officer in the organization who could then notify the insurance company in orderly manner, he being acquainted with the practice in processing such matter, and that it surely does not establish as a matter of law that the knowledge of Taggart was knowledge to the company of the Blazer accident.

It is respectfully submitted that this evidence is a far cry from undisputed evidence that Taggart was such an officer of the Company that notice to Taggart was notice to the Company. All it really establishes that Taggart like the other employes including the drivers were instructed to report any accident coming to their knowledge to Mr. Quinney at the office.

The court apparently interpreted this evidence to present a jury question not as to whether Taggart knew of the bump but

1. Was Taggart such an agent or officer of the Corporation that notice to him was notice to the corporation?

2. If Taggart did receive notice of the accident, whether he properly concluded that the accident was so trivial that it need not be reported.

The first question, now complained of by appellant might well have been decided by the court that there was insufficient evidence of Taggart being an authorized officer of the Corporation that notice to him was notice to the corporation. The court left the matter to the jury which action was in appellants favor and ought not to be complained of now. The jury very properly interpreted the evidence to establish that Taggart was a batch mixer and dispatcher of cement and not an officer of the corporation to receive notice of accidents and report the same to the insurance company. While there may not have been direct disputes in the evidence as to Taggart's duty to report the accident to the office the court apparently felt that the evidence was such that more than one interpretation of the evidence was possible and for that reason submitted the question to the jury, as follows:

“If the jury believes that the witness Taggart was a supervising agent or a person authorized to accept notice for and on behalf of the plaintiff, then whatever

notice Taggart had of the accident is notice to the plaintiff.

If, on the other hand, you find that Taggart was a mere batch plant operator with authority to mix the cement, receive orders for cement and dispatch the haulers to the respective customers with no supervisory or other such authority or power in the conduct of the business of the corporation then notice to Taggart would not be notice to the plaintiff'' (Inst. No. 9 R155).

It is submitted this instruction is most favorable to the appellant and one about which he can have no just complaint. The jury had a right to find and by the great preponderance of the evidence could only find that the secretary and office manager, Quinney, was the person who was to receive notice of all claims and process them (R240-217). There was no error in submitting the questions to the jury.

Counsel cites the case of *Olsen, et al., v Warwood, et al.*, 123 Utah 11, 255 P.2d 725 (1953). In that case complaint was made of an instruction that in weighing evidence pertaining to the drivers alleged negligence it was the jury's duty to consider it under all the facts and circumstances existing at the time of the accident and not to consider it as a jury would in looking back on the events from a later date. The instruction was approved by the court and while the court there stated that there must be evidence upon which to base and instruction, it

said at page 728, "It is manifest however, that a jury may find any fact which must reasonably and of necessity flow from other facts which were in evidence". This case does not support appellants proposition that the instruction in this case is in error.

The case of *Woolverton v. Fidelity and Casualty Company of New York*, (N.Y., 1907) 82 N. E. 745, cited by appellant held that knowledge of a driver who caused an accident is not imputed to the insured, and the case is distinguishable from the case at bar in that there is no evidence that Taggart was authorized in the natural conduct of business to receive reports of accidents, other than to report them to the office. (R225).

The Oregon case of *Hoffman v. Employers Liability Assur. Corp., Ltd.*, (Ore., 1934) 29 P.2d 557, cited by the appellant with extensive quotes, was a somewhat similar case as to this case. The portions quoted in appellants brief are not the parts of the decision that controls the case and a judgment in that case in favor of the plaintiff and against the insurance company was affirmed. The trial court in the case at page 564 found that agent Donaca's information as to the happening of the accident was so indefinite and uncertain in its nature as to constitute no notice to the plaintiff that an accident covered by the policy had happened. The case was decided by a divided court but the majority concluded that the insured had not received notice of sufficient facts to give notice to the insurance company.

The last case cited by the appellants under this point was *Latses v. Nick Floor, Inc.*, 99 Utah 214, 104 P.2d 619 (1940) has no bearing upon this case. The question was whether notice of improvements on the owners premises by the tenant was imputable to the owner for the purpose of establishing that the owner acted in bad faith and it was held not evidence of bad faith. The facts in this case have no application to establish any rule applicable to the law in the case at bar.

As to the second question submitted to the jury to-wit:

2. Did the accident appear so trivial or minor (even though plaintiff found out about it within a few days, should you so find) as to not require that notice of it be given to defendant?" (Instruction No. 2, R.148).

The testimony of Mr. Taggart clearly indicates that he considered the bump to Blazer to be a trivial or minor matter. This is evident when he stated in answer to a question by Mr. Christensen (R.270).

Q. "When did you first hear anything at all about that (speaking of the accident).

A. It was within the next day or two. He called me on the telephone, placing an order. In doing so he mentioned that he had been bumped by one of the trucks."

Q. Now, I asked you what he said.

A. Well, that a truck had backed up and he had got bumped in the back some. He didn't say that he was hurt seriously or anything of the kind."

Q. Did you later make any follow up of that report by Mr. Blazer?"

A. "No. We made no follow-up. Well, we just thought it was a trivial matter, because he hadn't seemed very impressed about it, and there was nothing further said. We thought if he had been injured he'd certainly have let us know how badly" (R.271 see also R.272).

According to Mr. Taggart, Blazer never complained of the injury (R.272, R.278) and he never knew anymore about it until almost 3 years later (R.272). This even though Blazer placed numerous orders for cement commencing the day following the accident, May 13, 1954 and for several days thereafter throughout the year (R.275).

It is therefore apparent that the action of Blazer lead Taggart and all others who know of the accident to believe that this was a trivial matter and therefore the law does not require that notice of this sort of accident to be given. The rule is set forth in 18 ALR 2d 443,475 as follows:

"Since the requirement that notice of the occurrence of an accident be given refers only to accident which caused a loss covered by the policy, delay in giving notice is generally held excusable in case of an accident which is trivial and re-

sult in no apparent harm, or which furnishes no ground for the insured, acting as a reasonable and prudent man, to believe at the time that a claim for damage will arise. (See cases cited in annotation at page 475).

The test of this rule seems to be:

“When there has been such an occurrence or accident as would lead the ordinary prudent and reasonable man to believe that it might give rise to a claim for damages.” *Nye v. Louis Ostrove Shoe Co.* (1942 Ohio App) 43 N.E. 2d 103, 18 ALR 2d 475.

The annotation continues:

“Another case in which the doctrine of trivial occurrence has been defined with lucidity and clarity is *Phoenix Indem. Co. v. Anderson's Groves, Inc.* (1949. CA 5th Fla) 176 F. 2d 246, where the court stated that the duty of an insured under the provision of an automobile liability policy requiring him to give the insurer written notice of an accident “as soon as practicable” does not mean that every trivial accident that occurs should be reported, but only an accident that an ordinarily prudent individual acting reasonably would consider, under all the circumstances, as consequential and which could afford the basis of a claim. The court added the rule that not every trivial mishap or occurrence must be reported applies even though it may prove afterward that the occurrence originally thought to be trivial results in serious injury.” (ours)

Plaintiff contends that the Doctrine of Trivial occurrence as above set forth applies in this case. Knowledge that a claim would be presented did not come until

after 3 years had lapsed and immediately notice of this was given to the defendant. The requirement of notice under the policy was met by the giving of this notice.

The controlling issue in this case seems to be was notice of the accident given “as soon as practicable” as required by the policy? In this connection the jury returned to the Courtroom after deliberating for some time and inquired as to its legal definition. (R.320).

The Court: “Some question about the meaning of the phrase ‘as soon as practicable’ :”

“The phrase ‘as soon as practicable’ means that the notice must be given within a reasonable time under the circumstances of the case. An instantaneous notice is not contemplated, but rather notice to be given with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the case. Now maybe that isn’t helpful, but that is a legal definition” (R.321).

In *Munz v. Standard Life & Accident Ins. Co.* 26 Utah 69, 72 P. 182, 183, (1903) this court announced the rule:

“It does not, by any fair construction of the policy, mean instantly, but ‘immediate notice’ means notice within a reasonable time, under all the circumstances of each particular case . . . It would, however, be both an unreasonable and unfair interpretation to hold that, as used in the policy, the word ‘immediate’ required the doing of a thing impossible for the beneficiary to do.

Such provisions must receive reasonable construction in favor of the beneficiary.”

The court continues:

“May, in his work on Insurance, Vol 2 Section 462, says: ‘If the notice be required to be forthwith, or as soon as possible’ or ‘immediately’ it will meet the requirement if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the JURY ARE ORDINARILY TO BE THE JUDGES (emphasis added). To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud.”

The delay in this case was the fault of Blazer and not of the plaintiff.

The jury therefore, in considering all of the evidence in this case properly concluded that notice was given “as soon as practicable” and the verdict should not be reversed by this court which did not hear all of the evidence and witness the demeanor of the witnesses who were called to testify. The appellant is merely speculating when it concludes that the jury verdict was based upon an erroneous instruction. The important question is whether or not notice was given to the defendant “as soon as practicable” and the jury by its verdict concluded that it was, and also concluded that the matter was of such a trivial nature as it appeared to plaintiff that no notice was required until the letter from attorney Olsen was received 3 years later.

Point II

THERE WAS NO ERROR IN GIVING INSTRUCTION NO. 9.

This instruction is fully set forth in appellants brief. The major portion of this instruction was prepared from the case of *Shafer v. U.S. Casualty Co.*, Wash. 1916, 156 P. 861.

It is contended by the respondent that this instruction is fair and proper and a correct statement of the law. It is favorable to the appellant in the portion not requested by the plaintiff viz: that the witness Quinney was at all times an officer of the corp and that any notice received by Quinney would be notice to the corp. R155.

The evidence referred to in point No. 1 and the portions of the record therein cited furnish ample evidence that should justify the court in giving instruction No. 9. Without this instruction or a similar instruction covering the proposition envolved the jury would have had no guidance whatever with respect to plaintiff's theory of the case. Instructions as a whole were a fair presentation of the theories of both parties and the jury under the instructions properly determined that the technical defense by the insurance company, that the company did not have notice, was not well taken.

With respect to the contention that the instruction contains improper comments on the evidence the appel-

lant cites the case of *Fox v. Taylor* (Utah 1960) 350 P. 2d 154. In that case, as here, the so called comment complained of was in the instructions. The rule recognized in the quote in the brief page 17 was not applied in the case. In the next sentence the court decides that there was no offensive comment in the instruction and says:

“Yet it must be realized that it is quite impossible to frame instructions applicable to a given case without making some reference to facts and sometimes evidence. The court elsewhere told the jury that it was their prerogative to determine the facts and they should do so solely upon the basis of the evidence.”

This case is an authority that the appellant's complaint against instruction No. 9 is not well taken.

Point III

THE JURY PROPERLY DETERMINED THE ISSUES IN FAVOR OF THE PLAINTIFF.

If there is any evidence and every reasonable inference fairly to be drawn therefrom in the light most favorable to the plaintiff the verdict will not be interfered with on appeal *Holland v. Moreton* (Utah 1960) 353 P.2d 989 and a long line of earlier cases.

Point IV

HARMLESS ERROR.

Without conceding any error in the record and for

the purpose of argument only if it be assumed that the court erred in submitting question No. 1 to the jury, it would clearly appear that such error is entirely harmless under the peculiar facts of this case. Assuming that it was the duty of the plaintiff to give notice of the facts in this case such notice could have been nothing more than that Blazer had bumped his back on the plaintiff cement truck. That he stated at the time that he had not been injured and that the matter did not amount to anything. That he continued at work the next day and for several days thereafter without complaint and on several occasions he talked to Mr. Taggart without complaining to him. If the insurance Company argues that this information would have permitted a nominal settlement with Blazer because he and all others concerned believed the accident to be trivial, it is contending that insurance is for the purpose of making nominal settlements. Failure to give notice of these trivial facts could in no way have prejudiced the rights of defendant Rule 61, URCP, see also *Startin v. Madsen*, (120 Ut. 631) 237 P2d 834.

CONCLUSION

The court properly submitted the case to the jury on all questions of fact. Under the evidence the Jury not only properly decided the issues in favor of the plaintiff but it was their duty to do so. The judgment should be affirmed at appellants' costs.

Dated September 10, 1960.

Respectfully submitted,

PRESTON & HARRIS,

*Attorneys for Plaintiff and
Respondent*

Cache Valley Bank Bldg.,
Logan, Utah