

1966

Leone M. Evans, Ralph Evans, Bernice Evans Stuart, and Beth Evans Johnson v. Glen S. Stuart : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEONE M. EVANS, RALPH EVANS,
BERNICE EVANS STUART, and
BETH EVANS JOHNSON,
Plaintiffs and Respondents,

—vs.—

GLEN S. STUART,
Defendant and Appellant.

RESPONDENTS' BRIEF

Appeal From the Judgment of the District Court,
Davis County, Honorable Charles G. Cowley,
Judge

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	6
POINT I.	
THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT TO PLAINTIFFS	6
POINT II.	
THE JUDGMENT WAS NOT EXCESSIVE OR BASED UPON PASSION	17
CONCLUSION	19

AUTHORITIES

Cases

Baker v. Decker, 117 U. 15, 212 P. 2d 679.....	11
Beehive Security Company v. Bush, 16 U. 2d 328, 400 P. 2d 506	7
Best v. Huber, 3 U. 2d 177, 281 P. 2d 208.....	9
Charlton v. Hackett, 11 U. 2d 389, 360 P. 2d 176.....	7
Cheney v. Rucker, 14 U. 2d 205, 381 P. 2d 86.....	7
Glenn v. Gibbons & Reed Co., 1 U. 2d 308, 265 P. 2d 1013.....	11
Morby v. Rogers, 122 Ut. 15, 252 P. 2d 231.....	9
Morris v. Christensen, 11 U. 2d 140, 356 P. 2d 34.....	7
Nissula v. Southern Idaho Timber Protective Association, 73 Ida. 37, 245 P. 2d 400.....	15
Pauly v. McCarthy, 109 Ut. 431, 184 P. 2d 123.....	18
Ray v. Consolidated Freightways, 4 U. 2d 137, 289 P. 2d 196....	10
Sandberg v. Cavanaugh Timber Co., 95 Wn. 556, 164 Pac. 200....	10
St. Louis-San Francisco R. R. Co. v. Ginn (Okla. 1953) 264 P. 2d 351.....	12

TABLE OF CONTENTS — (Continued)

	Page
Statutes and Rules	
Utah Code Annotated, 1953	
Section 76-24-1.....	17
Utah Rules of Civil Procedure	
43 (b)	2
Texts	
42 A.L.R. 2d, page 488.....	12, 14
22 Am. Jur. FIRES, Section 40.....	12
35 Am. Jur. MASTER AND SERVANT, Section 320.....	14

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—vs.—

GLEN S. STUART,

Defendant and Appellant.

Case No.
10400

RESPONDENTS' BRIEF

NATURE OF THE CASE

This is an action by the surviving widow and children of Hugh Alva Evans, deceased, for damage sustained by Plaintiffs by reason of the wrongful death of said decedent caused by the negligent acts of the Defendant in connection with starting and maintaining a fire on Defendant's farm in Davis County, Utah, on March 7, 1963.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Charles G. Cowley, sitting without a jury, following which the Court entered judgment on April 20, 1965, in favor of Plain-

tiffs and against Defendant for the sum of \$9,000.00 general damages, \$870.55 special damages and Plaintiffs' costs.

Defendant's Motion for a New Trial was thereafter denied.

RELIEF SOUGHT ON APPEAL

The principal issue in connection with this appeal is whether the evidence supports the finding of the Court that Defendant was negligent, proximately causing the death of Hugh Alva Evans, and that the decedent was not contributorily negligent nor did he assume the risk of being burned in connection with his activities. Defendant further claims the award was excessive and given under the influence of passion.

STATEMENT OF FACTS

Defendant was the only person available at the trial who was an eye witness to what occurred. For this reason he was called by the Plaintiffs as an adverse party for interrogation under the provisions of Rule 43(b) U.R.C.P.

Although Defendant has endeavored to set forth the facts in his Brief, they appear to reflect somewhat Defendant's views as to the inferences he would like to draw therefrom rather than the facts as found by the Court. For this reason Plaintiffs submit the following additional facts which appear in the record, as testified to by the Defendant:

The winter preceding March 7, 1963 (the day on which the fire occurred) had been very dry. The wheat chaff and stubble had been left on the field along with a new growth of alfalfa which had grown about a foot and had not been fed off. All of this was very dry and brittle and highly flammable on March 7, 1963. (Tr. 24, 25) Hugh Alva Evans came to work for the Defendant about 1:00 p.m. on March 7th and was assigned by Defendant to take out a fence at the bottom of the field. (Tr. 25 — See, also, Exhibit A) While decedent was thus working on the fence, Defendant told him to start a fire so that Defendant could burn out the ditch. (Tr. 27) Deceased told Defendant there was a little breeze blowing, and Defendant realized that the wind was variable and at that time of the year likely to change at any moment. (Tr. 48)

The deceased started the fire as directed by Defendant and then went back to work on the fence, and Defendant undertook to keep the fire under control and let it burn where he wanted it to. (Tr. 30, 50) The fire started to spread a little into some light stubble so Defendant went back to his corral and got his small tractor to help control it. He returned and put out the fire which had started into the light stubble, but allowed it to burn along the ditch bank. (Tr. 30) Defendant did not want the fire to spread out into the area of the heavy alfalfa stubble (See Exhibit A) and knew that if it did so it would be hard to control. (Tr. 31) He, therefore, continued to watch it, sitting on his small tractor without the engine running, while the fire burned along the ditch bank approaching a corner of the field

where he was located. It took about fifteen to twenty minutes for the fire to reach the corner of the field where he intended to extinguish it. Although he had not checked the gasoline in the tractor for several days, he did not check it during this period of time. (Tr. 32, 33)

When the fire reached the corner where Defendant was located, it started to spread out into the stubble so he started the tractor and began to check it from spreading and had gone about twenty feet along the ditch bank when that tractor ran out of gas. Defendant then called to Rex Terkelson (another helper in the field) to take the pickup truck and go back to the yard for gasoline while Defendant kept the fire from catching on to the small tractor. He was successful in keeping the fire from burning the small tractor, but it spread out into the field, and as the wind changed it began spreading rapidly. (Tr. 35) Defendant was well aware that it was at that time of the year when they were subject to quite a bit of wind. (Tr. 35)

The fire spread out over a wide area as indicated by the Defendant on Exhibit A and proceeded up toward the home and gas tanks belonging to Defendant's son, Deon Stuart. The flames were from one to three feet in height; and Defendant was quite concerned and hollered to Terkelson as he was returning with gasoline to get Mr. Evans and some shovels. Mr. Terkelson did so, and he and Evans rode up toward the house in the pickup truck along a roadway on the south side of the field. (Tr. 37, 38) Defendant put some gasoline in his tractor, drove around the rear of the fire where he left the

tractor, and ran to the gas tanks. When he got there the fire was quite close to the tanks. (Tr. 39) All three took shovels and proceeded to try to put the fire out and hold it from being right up around the tanks. (Tr. 42)

In the mean time the fire had spread around the area of the home and a pile of lumber a few feet to the west so Defendant sent Evans over to the lumber pile telling him that Defendant Terkelson would be along in a few minutes. (Tr. 43, 44) In a minute or two he heard Evans call for help and called back that they would be there in a minute or two. Defendant then thought the fire was getting into the lumber. (Tr. 44) Defendant and Terkelson continued to work around the pumps to keep the fire from them; and he again heard deceased call for help so he sent Terkelson, but when deceased called for help the third time Defendant looked up and saw deceased on fire and rolling in the dirt. (Tr. 45, 46) Deceased was wearing some greasy coveralls belonging to Defendant which Defendant had told him to put on that afternoon. (Tr. 47) Defendant knew that the weather was unstable at that time of the year and that the wind was likely to change from one moment to the next. In fact it had increased considerably from the time the fire was first started up to the time it spread into the stubble when the tractor ran out of gas. (Tr. 48, 54)

On cross-examination by his own counsel Defendant was asked whether he felt the day of the accident was a safe day to burn and he answered. "Well, I suppose I

did or I wouldn't have had the fire started. But it probably wasn't." (Tr. 53) Defendant had no intention of permitting the fire to burn in the area near the home or the improvements because it was too dangerous. (Tr. 57) At the hospital afterwards he talked to decedent and asked him how he figured he got on fire, "and he didn't know, unless there was fire behind him in the lumber or in the grass, and stuff that was behind in the lumber, you see, or in the edges of the lumber." (Tr. 59)

Following the introduction of Plaintiff's evidence at the trial Defendant moved for a dismissal, which Motion was taken under advisement by the Court. Thereupon the Defendant rested without offering any testimony.

Following a brief argument by counsel for the respective parties, the Court took the matter under advisement. Subsequently briefs were submitted by the respective parties and the Court later rendered its decision in favor of the Plaintiffs and against the Defendant. The Court made Findings of Fact and Conclusions of Law and entered judgment on April 19, 1965, following which Defendant moved for a new trial which, after argument thereon, was denied by the Court.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING
JUDGMENT TO PLAINTIFFS.

Because Appellants have referred to the parties as Plaintiffs and Defendant in his Brief, Respondents will likewise use such designation of the parties.

Defendant in his Brief had subdivided this Argument into three topics — in each of which the claim is made that the evidence does not support the findings of the trial court. Before proceeding to a discussion of each of Defendant's sub-topics, we call the court's attention to its numerous decisions in which it was held that in considering the soundness of the trial court's conclusion and judgment, "certain cardinal rules must be kept in mind: that the judgment is endowed with a presumption of validity; that the party attacking it has the burden of affirmatively showing that is in error; and that the evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to it." (*Cheney v. Rucker*, 14 U. 2d 205, 381 P.2d 86). See, also, *Charlton v. Hackett*, 11 U. 2d 389, P. 2d 176; *Morris v. Christensen*, 11 U. 2d 140, 356 P.2d 34; *Beehive Security Company v. Bush*, 16 U. 2d 328, 400 P.2d 506.

A. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT DEFENDANT WAS NEGLIGENT.

In claiming that he was not negligent, Defendant relies upon his interpretation of the evidence as set forth in his Brief. However, the evidence, as reviewed hereinabove and as apparently accepted by the court, clearly establishes negligent conduct on the part of the Defendant. The evidence is undisputed that decedent (while working as an employee of Defendant) was engaged in

removing a fence at the lower end of Defendant's field when he was asked by Defendant to start the fire. (Tr. 25) At that time he advised Defendant that it was somewhat windy, (Tr. 48) but nevertheless proceeded to carry out the order of his employer who took over the responsibility for maintaining and controlling the fire while decedent went back to his work on the fence. (Tr. 30, 50) Although the fire was initially started for the purpose of burning weeds and brush in a very limited area, Defendant allowed it to spread up the ditch bank with the idea in mind that he would control it at the time it reached a corner of the field. He was unable to do so because the tractor he intended to use to control the fire ran out of gas so that the fire spread across the field and up near the home and gasoline pumps of Defendant's son, who was also the son-in-law of the decedent. It was Defendant who required the decedent to join him in attempting to control the fire (Tr. 37); and it was Defendant who sent the decedent around to the rear of the home to keep the fire from the pile of lumber. (Tr. 43) Even after the decedent called for help twice Defendant ignored the call until after the third call when he observed the decedent's clothing burning. (Tr. 45, 46) Defendant even admitted that he was aware of the weather conditions, of the dry and flammable nature of the stubble in the field and of the variable winds blowing the particular day in March when the fire occurred. (Tr. 48) Under such circumstances there appears to be no question of the negligence of the Defendant. In fact, we believe the evidence discloses the Defendant was negligent as a matter of law.

This court has heretofore set out the criterion to be applied in determining whether the issue of negligence is to be determined by the trier of fact. In *Best v. Huber*, 3 U. 2d 177, 281 P. 2d 208 the following rule was reaffirmed:

“It has been frequently announced by this court that negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. *Shafer v. Keeley Ice Cream Co.*, 65 Utah 46, 234 P. 300, 38 A.L.R. 1523; *Lowe v. Salt Lake City*, 13 Utah 91, 44 P. 1050, 57 Am. St. Rep. 708; *Baker v. Decker*, 117 Utah 15, 212 P.2d 679. As was said in *Linden v. Anchor Min. Co.*, 20 Utah 134, 58 P. 355, 358:

“‘Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not the one of law, but of fact, and to be settled by a jury; and this whether, the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.’”

In the earlier case of *Morby v. Rogers*, 122 Ut. 15, 252 P.2d 231 the court discussed the nature of the evidence which might be used to establish negligent conduct. We quote:

“It is not a new or novel principle that acts of negligence may be proved by circumstances. Certainly, in many cases, particularly where the only eye witnesses are parties having an interest in the action, such circumstances are the only means by which certain facts may be discussed. In such cases it is proper that such circumstances should be evaluated by the jury in whose province lies

the power to believe or disbelieve the testimony and evidence, to observe the demeanor of the witnesses, and to draw such reasonable conclusions from the whole record as may be warranted."

See, also *Sandberg v. Cavanaugh Timber Co.*, 95 Wn. 556, 164 Pac. 200, where, in an action for damages from destruction of property by fire the Supreme Court affirmed the following instruction to the jury:

"It was the duty of the defendant to exercise that care and diligence which a person of ordinary prudence would exercise to extinguish or control any fire started by it upon its premises and to protect the property of plaintiff against loss on account thereof, in view of the nature and extent of the fire, the material on the ground, the weather conditions prevailing, the means at hand, and all the surrounding circumstances, and the failure of the defendant to exercise such reasonable care would be and constitute negligence upon its part."

We submit that the evidence in this case is more than adequate to sustain a finding that Defendant was negligent proximately causing the death of Hugh Alva Evans.

B. and C. DECEDENT'S ALLEGED CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

What has been said above applies equally as well on the issue of contributory negligence and assumption of risk. As stated by this court in the case of *Ray v. Consolidated Freightways*, 4 U. 2d 137, 289 P.2d 196:

"At the outset the mind of the fact trier is presumably in equipoise on the question of whether the plaintiff was contributorily negligent.

The burden is upon the defendant to overcome this balance and to impel his mind toward a conclusion. If no evidence is presented, the burden is not met, and the finding is that the plaintiff was not guilty of contributory negligence; likewise, if the evidence is insufficient to convince by a preponderance of the evidence, the finding is that the plaintiff was not guilty of contributory negligence. Such finding, therefore, may be based either on an entire lack of evidence, or upon insufficient evidence. Obviously, it is not necessary that such finding be supported by 'substantial evidence.' Therefore, if there is any reasonable basis, either because of the lack of evidence, or from the evidence and the fair inferences to be derived therefrom, taken in the light most favorable to the plaintiff, upon which any reasonable mind could conclude that is was not convinced by a perponderance of the evidence either (a) that the plaintiff was guilty or contributory negligent or (b) that such negligence proximately contributed to cause the injury, then the refusal of the trial court to find plaintiff contributorily negligent must be sustained. It would only be when such refusal did such violence to common sense as to convince the court that no fact trier, acting fairly and reasonably, would refuse to make such finding, that it would be reversed."

In *Glenn v. Gibbons & Reed Co.*, 1 U. 2d 308, 265 P.2d 1013, this court held that where more than one inference can be drawn as to what a reasonably prudent man would do under the circumstances the question of contributory negligence is for the trier of the fact. See, also, *Baker v. Decker*, 117 U. 15, 212 P.2d 679.

Defendant has cited several cases from other jurisdictions in support of his contention that decedent was

guilty of contributory negligence. We submit that not one of these cases is in point. Neither of these cases involves a fire or a situation where the relationship of employer-employee exists. Under circumstances similar to these involved in the instant matter the law is well settled that the matter of negligence, contributory negligence, or assumption of risk is one for the trier of the fact. As stated in 22 *Am. Jur. FIRES*, Section 40:

“One whose property is exposed to danger by fire by another’s negligence or wrongful act is justified, whether or not he is bound, to make such an effort as an ordinarily prudent person would make to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effort of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. In many cases, no distinction is made as to the ownership of the property in danger. If the attempt to save the property is not deemed, in and of itself, the proximate cause of the injuries, the mere fact that the property belonged to some person other than the plaintiff will not of itself prevent a recovery.”

An extensive annotation on this subject is contained in 42 *ALR 2d* commencing at page 488. The case there annotated is *St. Louis-San Francisco R. R. Co. v. Ginn* (Okla. 1953) 264 P.2d 351. The syllabus of that case, as prepared by the Court, reads as follows:

“Where a railroad company negligently caused a fire, on its right of way, which endangered plaintiff’s meadow and plaintiff took his tractor

and plowed a fire guard around his meadow in an attempt to minimize the damage from the fire and then, when taking the tractor to a place of safety, he ran over a root or branch which flew up, striking and injuring his eye, he can recover damages for the injury, from said railroad company, provided he did not act unreasonably or recklessly and was not guilty of contributory negligence."

In the Ginn case the Court stated that there was no question but that the fire was started by one of the defendant's trains. The position and contention of the Defendant, however, was that the accident and injury was not caused by the setting of the fire since the plaintiff was injured in the operation of his tractor in attempting to prevent the fire from spreading. In analyzing this contention the Court stated that the plaintiff was required to use reasonable means to arrest the fire and prevent loss.

"He cannot stand idly by and permit the loss to increase and then hold the wrongdoer liable for the loss which he might have prevented. It is only incumbent on him, however, to use reasonable exertion and reasonable expense, and the question in such case is always whether the act was a reasonable one, having a regard to all of the circumstances in the case."

The court went on to say that the plaintiff in that case "was not in the place of injury by his own volition. He was not engaged in an act of his own choosing. He was discharging a duty owned by him to the defendant to minimize the loss, and this by reason of defendant's own negligence. Equitably, plaintiff should not be required to bear the loss resulting from his personal injur-

ies. Legally, the majority view is that the injuries flow from the fire rather than independently from the discharge of a duty imposed by the fire.”

While the annotation in 42 *ALR 2d*, page 488 does not cover the situation in which an employee is injured, it does review all of the other circumstances which are present in the instant case. As stated at page 509 of the annotation:

“Where the plaintiff received personal injuries while attempting to protect or save another person’s property from a fire, the courts have held that the one who negligently caused such fire is liable for the injuries suffered.”

With reference to the employer-employee situation, 35 *Am. Jur. MASTER AND SERVANT*, Section 320 states the following:

“Another exception to the rule of assumption of risk incident to employment is that servant does not assume the risk of injury incident to his employment when the work is being done under the command, order, and immediate direction and control of the employer or his representative. Where such evidence is produced, the issue as to responsibility or assumption of risk is held, ordinarily, to be one which is properly submitted to the jury.

It is the duty of an employee to submit himself to the reasonable demands of his employer, not only as to the work to be done, but as to the manner of doing it, and it is his right to assume that his employer will take the necessary precautions to secure safety and will not expose him to unnecessary danger. This obedience an em-

ployee properly may accord even where he is confronted with perils that otherwise should be avoided. In any case, but more plainly where a command is sudden and there is little or no time for reflection and deliberation, the employee may not set up his judgment against that of his recognized superiors; on the contrary, he may rely upon their advice, assurances, and commands, notwithstanding many misgivings of his own. It by no means follows that because he could justify disobedience of the order, he is barred of recovery for injuries received in obeying it. He is not required to balance the degree of danger and decide whether it is safe for him to act, on the contrary, he is relieved in a measure of the usual obligation of exercising vigilance to detect and avoid the danger." (Emphasis added.)

A recent case directly in point of this subject is the case of *Nissula v. Southern Idaho Timber Protective Association*, 73 Ida. 37, 245 P.2d 400. In the *Nissula* case the plaintiff owned a D-7 caterpillar tractor, which he used in logging operations. On August 28, 1949 a forest fire was reported near the plaintiff's operations. The plaintiff volunteered the use of his men and equipment and was directed by an agent of the defendant (the defendant being in charge of the operations against the fire) to take his tractor to the fire. The defendant compensated plaintiff for the use of the tractor on a regular hourly rate. Plaintiff was directed to take his tractor up a mountainside to push the brush back and dig a trench to prevent the spreading of the fire. He followed the tractor and its operator and after observing that "it was pretty rocky up there" stopped the driver and returned and complained to the supervisor that it was

not a fit place in which to operate the tractor. The tractor was then returned to safer ground, but subsequently as the fire became more intense the defendant's supervisor directed the operator to return the caterpillar to the mountain at which time, while engaged in clearing brush, it became lodged against a stump and exposed to sudden flareup of the fire so that it had to be abandoned by the driver and was severely damaged by the fire. At the conclusion of the evidence Defendant moved for a directed verdict which was granted by the trial court. However, the Supreme Court of Idaho reversed the lower court, holding that the issue of contributory negligence or assumption of risk should have been submitted to the jury. We quote from the Court's opinion as follows:

"The operator had been directed to take orders from Cross and there is evidence that in going up on the hillside the second time and in pushing brush and dirt at the point where the tractor became stalled, he acted upon specific directions from Cross. As to such acts he was under the control of, and was as to such acts the servant of, the defendant, although at the same time he was the servant of the owner in the manipulation of the machine itself. 1 Restatement of Agency Sec. 227. So if, under the circumstances, it was negligent to direct the operator to take the tractor up on the hillside and to push brush and dirt in the manner done, and the damage proximately resulted therefrom, then the defendant would be liable. These were questions of fact for jury."

On the matter of assumption of risk the Court further said:

"As to defendant's contention that the risks incident to this use of the tractor were assumed

by the plaintiff, it need only be said that one does not assume risks which he does not consent to assume and which are imposed upon him against his will. 56 C.J.S., Master & Servant, Sec. 357; 35 Am. Jur., Master & Servant, Sec. 320. The plaintiff protested against the use of his tractor upon the steep hillside and testified he had an understanding with Roberts that it would not be so used. As to whether that applied to the area where the tractor was burned, the evidence is not clear, but it is sufficient to say that it does not justify the conclusion that the plaintiff assumed the risks involved."

The Court also found that whether the driver of the tractor was guilty of contributory negligence was a question for the jury.

See, also, Section 76-24-1, Utah Code Annotated, 1935 which makes it a misdemeanor negligently or willfully to expose another's property to damage of destruction by fire.

POINT II

THE JUDGMENT WAS NOT EXCESSIVE OR BASED UPON PASSION.

It is hard to see how the trial court could be accused of being influenced by passion in making his award to Plaintiffs for the wrongful death of the husband and father. The case was tried on December 17, 1964, after which it was taken under advisement. (R. 23) Briefs were submitted by the respective parties; and the Court thereafter rendered its decision on March 26, 1965, more than three months later. (R. 35)

Although Defendant's brief makes some general statement to the effect that decedent was "not productive," the fact is that he was earning the maximum he was allowed to earn while drawing social security. According to the undisputed testimony the decedent was earning approximately \$100.00 per month, (Tr. 93) all of which income was lost by his untimely death. In addition, the Social Security benefits were reduced by \$55.00 per month and the Veteran's benefits by another \$30.00 per month, (Tr. 102) making a total loss of income of at least \$185.00 per month. On the other hand, the only expenses which have been eliminated by the death of Mr. Evans were his food evpense of about \$25.00 a month and his personal and clothing expense of approximately another \$15.00 per month (Tr. 108) so that the surviving widow has suffered a pecuniary loss by reason of his death of approximately \$150.00 per month. Since Mr. Evans' life expectancy was in excess of 12 years, the total loss from this source alone would be \$18,000.00. However, this does not compensate for all of the loss sustained, including the loss of comfort, society, companionship, and assistance, both to the surviving widow and the adult children who are Plaintiffs in this action.

Again, the Court has established the criterion for determining whether a verdict of a jury will be set aside as being excessive and a result of passion or prejudice. In the case of *Pauly v. McCarthy*, 109 Ut. 431, 184 P.2d 123, the Court stated that "the jury is allowed a great latitude in assessing damages for personal injuries."

On the issue of setting aside the verdict it held that:

“the facts must be such that the excess can be determined as a matter of law, or the verdict must be so excessive as to be shocking to one’s conscience and to clearly indicate passion, prejudice, or corruption on the part of the jury.”

CONCLUSION

We submit that the Findings of Fact, Conclusions of Law, and Judgment are supported by the evidence and should be **affirmed**.

Respectfully submitted

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