1965

Flora Paull v. Zions First National Bank, Pamela B. Snow, Phyllis R. Snow and Melva B. Snow, Administrators of the Estate of Burke M. Snow, Deceased : Brief of Appellant

IN THE SUPREME COURT
OF THE STATE OF UTAH

FLORA PAULL,

Plaintiff and Appellant,

-vs.-

ZIONS FIRST NATIONAL BANK, PAMELA B. SNOW, PHYLLIS R. SNOW and MELVA B. SNOW, Administrators of the Estate of BURKE M. SNOW, deceased.

Defendants and Respondents.

Case No. 10412

BRIEF OF APPELLANT

Appeal From a Judgment of the District Court of Salt Lake [illegible]

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I N D E X

I N D E X - (Continued)

AUTHORITIES CITED

Cases

I N D E X - (Continued)

IN THE SUPREME COURT
OF THE STATE OF UTAH

FLORA PAULL, Plaintiff and Appellant, -vs.- ZIONS FIRST NATIONAL BANK, PAMELA B. SNOW, PHYLLIS R. SNOW and MELVA B. SNOW, Administrators of the Estate of BURKE M. SNOW, deceased. Defendants and Respondents.	)	Case No. 10412

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STATEMENT OF THE CASE

This is an action for personal injuries resulting from the care and treatment given Plaintiff by an orthopedic surgeon Dr. Burke M. Snow.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a

verdict and judgment for the Defendant, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Plaintiff is a fifty-four year old woman from Salt Lake City, Utah. At the time of the treatment complained of she was forty-eight. She is her sole support. (R.87) In July of 1960 she went to the Memorial Medical Center for treatment of bursitis in her right shoulder. (R.87) She was treated by Dr. Lenore Richards and Dr. Paul Keller who gave Plaintiff shots of cortisone in the shoulder. (R.87,88) On August 12, 1960 Dr. Paul Keller referred Plaintiff to Dr. Burke M. Snow since things weren't going "just the way they should". (R.205,209) At the time of trial Dr. Snow was deceased. Prior to

his death, Dr. Snow gave his deposition on November 21, 1962. (R.169)

Dr. Snow aspirated the shoulder on August 12, 1960 and extracted 40cc. of fluid at that time. During the period from August 12, 1960 to September 27, 1960, Dr. Snow aspirated Plaintiff's shoulder some thirteen times (R.95) removing from 40 to 10ccs. of fluid each occasion. (R.126,127) On September 29, 1960 Dr. Snow had Plaintiff admitted to the L.D.S. Hospital for "manipulation". (R.176) Dr. Snow testified that the whole reaction of Plaintiff's arm was beyond anything he'd seen in ten to fifteen years. (R.173) On September 3, 1960 Dr. Snow injected Plaintiff's bursa with penicillin. (R.173) Dr. Snow did not take a culture of the fluid withdrawn from the bursa. (R.173) Dr. Snow stated that had he been concerned about the Plaintiff having an infection

he would have put her in the hospital because "those things you move fast". (R.175) On August 26, 1960 Dr. Snow wrote a letter indicating that Plaintiff had chronic bursitis with subsequent infection. (Exhibit D-2)

After Plaintiff had been admitted to the hospital Dr. Snow changed his mind and on the evening of September 29, 1960 decided, in consultation with a Resident, to perform a surgical procedure on Plaintiff's shoulder rather than a manipulation procedure. (R.95) On the morning of September 30, 1960 a surgical operation was performed upon Plaintiff's shoulder by Dr. Burke M. Snow assisted by Residents Dr. D. J. Hahn and Dr. R. J. Toll. (Page 32 of Exhibit P-1) The operative procedure consisted of the removal of the bursal sac, the removal of approximately 1½ inches of bone from the tip of the acromion and the transplanting of the long head of the bicep tendon to the coracoid process. (Page 32,33 of

Exhibit P-1) During the operation "extreme care was taken not to break out the bursa", however, it was broken and 30ccs. of purulent fluid was evacuated from Plaintiff's shoulder. (Page 32 of Exhibit P-1)

Dr. R. J. Toll testified that he was present and assisted in the operation and that Dr. Snow had told the Residents assisting with the operation that he entertained the possibility of infection in the area. (R.243) Dr. Toll further testified that there were signs of infection present and that the possibility of infection was certainly present before the operation commenced. (R.243) The culture of the purulent fluid taken from Plaintiff's shoulder during the operation confirmed the fact that infection was present in Plaintiff's shoulder at the time of the operation. (R.246)

Dr. Toll further testified on direct examination that at the time of the trial he was a duly

licensed orthopedic surgeon and was familiar with the standard of care and skill followed by orthopedic surgeons in this area. (R.248) On cross examination by Plaintiff Dr. Toll testified that it would fall below the standard of practice in this area for orthopedic surgeons to operate without a culture if infection was suspected in an area. (R.254)

Dr. Jerome K. Burton, who was called as a witness for Plaintiff, also testified that it was below the standard of care to perform extensive operative procedures in the presence of infection. (R.132)

Plaintiff remained in the hospital for sixteen days. (R.249) After Plaintiff was discharged from the hospital she was followed by Dr. Toll (R.250) and took a course of physical therapy treatments at the L.D.S. Hospital through the major part of November. (R.251) Dr. Toll did not keep written records on

plaintiff while she was an outpatient and he didn't recall whether he ordered the therapy discontinued. (R.252) Mr. Stephen Hucko, the physical therapist, who treated Plaintiff, testified that he thought he had done all the good he could for Plaintiff when she stopped taking therapy. (R.227)

In November of 1960 Plaintiff went to work at the Salt Lake Country Club as a bookkeeper. She had to sit up real high on the chair to run the office machines because she couldn't raise her arm up. (R.98) Plaintiff saw Dr. Snow at the Country Club in December of 1960 and then again in January of 1961 during which time he talked with Plaintiff about her arm and shoulder. (R.98,99)

In the latter part of January 1961, Plaintiff noticed the bone becoming more prominent in her shoulder and realized her range of motion was not getting any better so she went to

see Dr. Snow in February of 1961. (R.99) Dr. Snow's notes indicate an office call on February 21, 1961 with the notation "atrophy of the deltoid with anterior dislocation of the shoulder. Very prominent." (R.271-272) Dr. Snow also saw Plaintiff when she was taken before the staff at the L.D.S. Hospital. He testified as to the reason for taking her before the staff. "And the reason for it was that she was having a lot of trouble and the Residents had talked to me about her and I said, 'Why don't you bring her up to the orthopedic conference, and let's see what they feel about it.'" (R. 272)

At the trial of the case Dr. Jerome K. Burton, an orthopedic surgeon from Boise, Idaho, testified that Plaintiff had lost the use of all but the posterior one-third of the deltoid muscle with the resulting loss of motion of her right arm, which Dr. Burton testified amounted

to a fifty percent permanent partial disability of Plaintiff's right arm with a permanent partial disability of Plaintiff's entire person of thirty percent. (R.138,139)

Dr. Burton testified that muscle atrophy is caused mainly from disuse or damage to the nerve. He further testified that in his opinion the atrophy of Plaintiff's deltoid muscle was caused by damage to or severance of the nerve supply to the muscle during the operative procedure. (R.136,137) Dr. Burton testified that such an injury would violate the standard of care and skill required of orthopedic surgeons in this area. (R.137) By way of explanation Dr. Burton testified that the nerve supply to the deltoid muscle comes from the rear of the muscle and that it would be impossible for this muscle to partly atrophy from disuse since a person cannot use only part of a muscle. (R.136) Quoting from the Doctor's testimony at R.136:

"Q. Now, Doctor, how can you tell, or can you tell whether or not a patient is faking in just telling you that the arm won't work?"

"A. It is simple enough. In a situation particularly like in shoulder atrophy, if that is something that somebody is trying to do by malingering, they are not going to get part of it. They are going to get all of it just by holding it still. You can't just wilfully get a muscle to partly atrophy. As long as you are going to use it or any part of it, it is going to keep its tone, its tension, and its volume."

"Q. Now, from your examination of Mrs. Paull and your study of the medical records and procedures that were followed, do you have an opinion as to whether or not her condition, that is, the atrophy of this deltoid muscle, was caused by disuse?"

"Do you have an opinion?"

"A. I have an opinion."

"Q. And what is your opinion with respect to that?"

"A. It is not caused by disuse. It was caused by nerve damage."

Dr. Chester Powell, who was called by Defendant, testified that in his opinion Plaintiff has an impairment of twenty-five percent of her right arm and fifteen percent impairment of total bodily function. He did not consider the fact that Plaintiff was right handed, nor did he consider cosmetic effect. (R.282,283) (The cosmetic effect is readily apparent on Exhibits P-7 and P-8) Dr. Powell further testified that in his opinion "I don't think it's possible that the nerve could have been damaged in its main portion in the axillary and to have produced this clinical picture". (R.288)

On cross examination Dr. Powell stated "this - - something happened during the procedure (operation)

apparently to affect the muscle fibres or their function".

. . . "I simply categorize this in terms of time at the time of the procedure and without being able to state specifically what the actual factor is that caused the damage". (R.291)

After being instructed, the jury retired to deliberate at 11:17 a.m. The jury came back in at 2:48 p.m. and requested to hear Dr. Snow's deposition over again or to take it into the jury room. In connection with this request the Court in the presence of the jury stated:

"THE COURT: Is there reasons why we shouldn't let them take it? It isn't permissible unless you both agree to it."

"MR. HANSEN: Well--"

"THE COURT: I haven't read it. I don't know what is in it."

"MR. HANSEN: I don't know. I suppose there are some things in there that the Supreme

Court would feel would be--"

"THE COURT: All right. Also--"

"MR. HANSEN: --beyond--

"THE COURT: --the Supreme Court will raise an objection on the ground that it's giving you evidence twice. It is bringing your particular attention to something when other testimony isn't being read to you, and it is frowned on for that reason; but if there is any particular part that you want to know, I think we would be within the bounds of propriety in having it read to you. What particular part was it that you had in mind?" (R.313)

The jury also asked that the term "malpractice" be clarified, and the rules covering malpractice. (R.310) After the Court orally instructed the jurors on malpractice, the foreman asked: "They wanted to know whether an error in judgment constitutes malpractice." To which the Court replied: "No, and I've told you that an

error in judgment would not unless it's that type of error that a reasonably prudent doctor of the orthopedic group here would not have done." (R.311)

The jury retired at 3:26 p.m. to deliberate further. At 5:36 p.m. the jury was summoned by the Court and when asked if a verdict had been reached the foreman replied: "No, your Honor. We are deadlocked on a five to three verdict." (R.320)

The Court then proceeded to poll the jury as to whether additional deliberations would be fruitful. Four jurors answered indicating they would be willing to spend more time, while four felt that further deliberations would be useless and would be an imposition on the jury. (R.322,323)

The Court instructed the jury to go to dinner and to deliberate further. (R.323)

At 9:04 p.m. the jury returned with a six to two verdict in favor of Defendant. (R.324,325)

ARGUMENT

POINT I

THE COURT ERRED IN INSTRUCTING THE JURY ON THE MATTER OF CONTRIBUTORY NEGLIGENCE WHEN THE EVIDENCE DID NOT RAISE A JURY QUESTION AS TO CONTRIBUTORY NEGLIGENCE.

Over Plaintiff's objection the Court gave Instruction No. 17 which reads as follows:

> "You are instructed that plaintiff must follow instructions and exercise such care and concern for her own welfare and physical condition commensurate with such medical instructions therefor as she receives in the course of medical treatment, or such as an ordinary prudent person would exercise under like circumstances and conditions. If you find from the preponderance of the evidence any one of the following: (1) that plaintiff failed to follow the exercises and instructions given her by the defendant, prior to the operation; or (2) that plaintiff failed to report unsatisfactory healing or loss of use of the arm or shoulder to the defendant after the operation, when an ordinary prudent person under such circumstances would have reported such; or (3) that plaintiff failed to follow the advice of doctors as to exercises and therapy after the operation -- and if you further find by a preponderance of the evidence that any one of the foregoing was a proximate cause of the condition from which plaintiff claims she now suffers, then you cannot award her damages for any injury sustained by reason of such failure on her part."

In the recent case of Taylor v. Johnson, [illegible], the question of contributory negligence instructions was very ably stated in the concurring opinion of Justice Jarrett. Following is a quote from that opinion:

> "There is always a keen awareness on the part of counsel before any specific issue as to plaintiff's negligence is submitted to the jury there must be a reasonable basis in the evidence which would support such a finding. This is a fair, reasonable and proper rule. But, in what impresses me as overzealousness of defense, the corollary is often lost sight of: that before any specific issue of fact as to the plaintiff's contributory negligence should be submitted to a jury, there must be a reasonable basis in the evidence to support such a finding. In fairness the rule should be applied with the same force to protect the rights of the plaintiff as the defendant."

It is submitted that there was no reasonable basis in the evidence to support such a finding as referred to in Instruction No. 17 and it is further submitted that there is no evidence in the record to support the causation element required for such a defense.

Plaintiff will compare the propositions contained in Instruction No. 17 with the evidence in the record.

With respect to Item (1) . . . "that the plaintiff failed to follow the exercises and instructions given her by the defendant, prior to the operation" . . ., of course the Instruction is obviously in error since the defendants are the administrators of the decedent Doctor's Estate. But assuming for purposes of argument that the Instruction had referred to Dr. Snow, there is nothing in the record to indicate that Dr. Snow ever gave instructions or exercises that the Plaintiff didn't follow prior to the operation. Dr. Snow in his testimony doesn't claim that Plaintiff failed to follow instructions and in fact Dr. Snow said he didn't even know what caused Plaintiff's condition. Quoting from Dr. Snow's testimony at R. 181:

". . . I think the result is very unusual. I wish I had an explanation for it. I haven't any. I say that sincerely because I just don't know what caused it."

Later on the Doctor does indicate that perhaps he waited too long before operating. Quoting from the Doctor at R. 265:

"I really don't know of any other way to handle it. I think possibly you might say we delayed too long in recommending surgery."

Nowhere does Dr. Snow indicate that Plaintiff did anything or failed to do anything prior to the operation that resulted or in anyway contributed to Plaintiff's present condition.

With respect to Item (2) of Instruction No. 17 "that plaintiff failed to report unsatisfactory healing or loss of use of the arm or shoulder to the defendant after the operation, when an ordinary prudent person, under the circumstances, would have reported such . . ." the record indicates that Plaintiff took therapy through November 25, 1960, (R. 235) and that during this time she saw Dr.

Toll. She saw Dr. Toll on her last therapy treatment and after she completed her therapy she saw Dr. Hahn and Dr. Capel on a couple of occasions. (R. 182)

She saw Dr. Snow in December of 1960 and January of 1961 out at the Country Club, where she was employed, and showed him how she was exercising her arm. (R. 98,99) Dr. Snow admits to seeing her there and that she was complaining about her shoulder then. (R.272) In the latter part of January, 1961 Plaintiff noticed the bone becoming more prominent in her shoulder (R. 99) and on February 21, 1961 she saw Dr. Snow.

It would seem that Plaintiff did everything that could reasonably be expected of a patient who certainly would be unfamiliar with the healing processes of an operation such as she had been through. Dr. Snow admits in his testimony that he turned her over to a Resident after she left the hospital to be followed in the outpatient

clinic. (R.271) However, he does admit that he saw Plaintiff at the Country Club (which would have been prior to the February 21, 1961 visit). (R.272) The Doctor also testified that the Residents who were following Plaintiff had told him that she was having lots of trouble and that he suggested that they bring her up to the Orthopedic Conference. (R.272) This must have been prior to February of 1961 since he had seen Plaintiff in his office by February of 1961.

Thus, it is submitted that there is no evidence that Plaintiff failed to report to the "defendant" and in fact Dr. Snow himself was aware of her condition even though he had left her in the care of Residents.

With respect to Item (3) of Instruction No. 17 . . . "that plaintiff failed to follow the advice of doctors as to exercises and therapy after the operation" . . . once again the record

fails to disclose any basis for this instruction.

Dr. Toll said he didn't keep written records on Plaintiff while she was an outpatient and he didn't recall whether he ordered the therapy discontinued. (R.252) Mr. Stephen Hucko, the physical therapist, who treated Plaintiff testified that he could do nothing further for Plaintiff when she discontinued therapy. Quoting from Mr. Hucko's testimony at page 227 of the Record:

> "THE COURT: He wants to know had you done all the good for this woman that you thought you could when you last saw her."
>
> "A. I gave her adequate instruction for her ---"
>
> "THE COURT: Do you think you had done all the good you could?"
>
> "A. Yes."

Nowhere does the evidence suggest that Plaintiff failed to follow any instructions that were given and in fact the Record fails to disclose that there were any instructions given

with respect to exercises and therapy.

The other serious defect in Instruction No. 17 is that it presupposes the fact that had Plaintiff done the things which are indicated in said Instruction that it would have prevented the condition which she now has in her arm and shoulder. Once again if we look at the Record we find it absolutely devoid of any evidence whatsoever which would suggest this to be the fact.

The evidence is to the contrary. Even though Defendants' own witness, Dr. Powell, would not agree with Dr. Burton that the main nerve had been severed during the operation. He did testify that Plaintiff's injury occurred during the operative procedure. Quoting from his testimony at 291 of the Record:

> "A. Yes, This - - something happened during the procedure apparently to affect the muscle fibres or their function.
>
> Q. All right.

"A. I simply categorize this in terms of time at the time of the procedure and without being able to state specifically what the actual factor is that caused the change."

Certainly Plaintiff could not be charged with failing to fulfill a legally imposed duty while she was under anesthesia on the operating table.

As this Court has indicated on several occasions, the submission of issues involving contributory negligence where such issues are not supported by the evidence or have no application is prejudicial error. Johnson v. Hartvigsen, 13 U.2d 322, 373 P.2d 908. Siciliano v. Denver and Rio Grande Western R. Co., 13 U.2d 193, 364 P.2d 413.

The giving of Instruction No. 17 constituted prejudicial error.

POINT II

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT DR. BURKE M. SNOW WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

While the Plaintiff will readily admit that Plaintiff's witness, Dr. Jerome K. Burton, and Defendants' witness, Dr. Chester Powell, did not express the same opinion as to what precisely went wrong in the operative procedure, nevertheless, there is contained in the Record the uncontradicted testimony of Defendants' own witness, Dr. R. J. Toll, wherein he testified that it would be below the standard of care and skill for orthopedic surgeons in the Salt Lake area to commence a major surgical procedure, such as the one performed on Plaintiff, wherein infection was suspected without first taking a culture of the suspected infected area. Dr. Toll testified as follows on cross examination. Quoting from the Record at page 254:

> "Q. Wouldn't you say it is the usual standard of practice for orthopedic surgeons to acquire a culture to be taken of an area if they suspect an infection before general surgery, major surgery is attempted."
>
> "A. Yes. I think culture should be taken."

"Q. In this case there was no culture, was there?"

"A. I will have to check the doctor's notes, outpatient records."

"Q. All right."

"A. In patient prior to surgery, as far as I am aware, there was no culture taken. On an outpatient basis I will have to look and see."

"Q. Would you examine the report and see if--"

"A. No sir. As far as I am able to determine, a culture was not taken."

Dr. Toll testified that Dr. Snow had told the residents assisting with the operation that he had entertained the possibility of infection in the area. (R.243) Dr. Toll further testified that there were signs of infection present and that the possibility of infection was certainly present before the operation commenced. (R.243)

Plaintiff's witness, Dr. Burton, testified that in his opinion operating in the presence of infection would fall below the standard of care. Quoting from his testimony at page 132 of the Record:

"Q. Doctor, do you have an opinion as to whether or not proceeding with this type of an operative procedure, that is, the clipping of part of the acromion process and the transplanting of the long head of the biceps tendon there in the presence of infection, do you have an opinion as to whether or not this would fall below the accepted standard of care for orthopedic surgeons practicing in this community?"

"A. Well, frankly, I know very well that all of our basic training has been not to do any kind of extensive work in the presence of infection for --because of the danger of it spreading."

"Q. What would--"

"A. And I would say that it would be below our accepted standards."

"Q. What would be the normal accepted procedure, Doctor, if you encountered infection such as this upon opening a shoulder for bursitis?"

"A. The only thing you can do that is truly conservative and safe is to drain it and get out. Then you resort to your heavy doses of antibiotics to clean it up. It makes the treatment of your patient longer, but it is by far safer."

The culture taken of the purulent fluid evacuated at the time of surgery confirmed the fact that there was infection present. (R.246)

No place in the Record is there testimony to contradict or explain the actions on the part of Dr. Snow in operating without first taking a culture to determine if infection was present, and also proceeding with major surgery in an infected area.

Based on the evidence in the Record, the Court should have instructed the jury that Dr. Snow was guilty of negligence as a matter of law and should have left only the question of causation in the damages for the jury.

POINT III

THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NUMBER THREE CONCERNING CIRCUMSTANTIAL EVIDENCE.

Proof in a malpractice case is difficult at best. Direct proof is most desirable, but the jury may also consider circumstantial evidence. Riley v. Layton, (CCA10) 329 F2d 53 (1964). There were many items of circumstantial evidence that could and should have been considered by the jury

in this case, such as, the nature of the infection and the resultant injury, and many others. Plaintiff requested the Court to give an instruction on circumstantial evidence (Plaintiff's Requested Instruction No. 3), but this was refused.

In the recent case of Riley v. Layton, (supra), the Circuit Court ruled on an instruction involving circumstantial evidence in a malpractice case and quoted the instruction in its opinion. Plaintiff requested the Trial Court to give this very instruction on circumstantial evidence.

The failure of the Court to give Plaintiff's Instruction No. 3 materially prejudiced Plaintiff, this being a malpractice case with the resultant problems of proof imposed upon the Plaintiff. The jury should have been made specifically aware that circumstantial evidence may be properly deliberated upon in determining whether a surgeon is guilty of negligence.

Plaintiff fairly apprised the Court of her

exception to its failure to give the Requested Instruction with the following language:

> "The plaintiff excepts to the refusal to give Requested Instruction No. 3 pertaining to circumstantial evidence in that it has recently been decided in the case of Riley v. Layton, 329 F.2d 53, that the instruction properly states the law with respect to the State of Utah and was, in fact, taken from that case verbatim, and further that the failure of the court to instruct the jury as to circumstantial evidence materially prejudiced the plaintiff, particularly in a malpractice case where opinion testimony is relied upon to such a degree, and particularly in the case now before the court wherein the defendant physician is deceased and plaintiff was prevented by rulings of the court from introducing into evidence conversations directly relating to the facts in the case between plaintiff and the defendant physician."

POINT IV

THE COURT ERRED IN INQUIRING OF COUNSEL IN THE PRESENCE OF THE JURY AFTER THE JURY HAD INTERRUPTED ITS DELIBERATIONS AS TO COUNSEL'S OBJECTION TO ALLOWING THE DEPOSITION OF DR. BURKE M. SNOW TO BE TAKEN INTO THE JURY ROOM.

Counsel in a jury trial are always concerned with objections they are required to make lest the jury get the impression that a side is

attempting to conceal evidence. It naturally follows that the more fervent the objection the more suspicious the jurors may become. The Trial Court should be aware of this problem and should not unduly force a side to voice his objection in front of the jury especially when the Court is aware or should be aware of the fact that there is inadmissible evidence contained in the deposition.

After the jury had been out some three hours, they returned to the Courtroom with the request that they have Dr. Snow's deposition reread to them or that they take it to the jury room, whereupon the Court inquired of counsel as follows:

"THE COURT: Is there reasons why we shouldn't let them take it? It isn't permissible unless you both agree to it."

"MR. HANSEN: Well--"

"THE COURT: I haven't read it. I don't know what is in it."

"MR. HANSEN: I don't know. I suppose there are some things in there that the Supreme Court would feel would be--"

"THE COURT: All right. Also--"

"MR. HANSEN: --beyond--"

"THE COURT: --the Supreme Court will raise an objection on the ground that it's giving you evidence twice. It is bringing your particular attention to something when other testimony isn't being read to you, and it is frowned on for that reason; but if there is any particular part that you want to know, I think we would be within the bounds of propriety in having it read to you. What particular part was it that you had in mind?" (R.313)

It is significant to note that the burden fell upon counsel for Plaintiff to refuse to allow the deposition to be taken into the jury room. While it may be noted from the quotation from the Record that the Judge addressed himself to both counsel, nevertheless, it fell to counsel for the Plaintiff to make his statement in front of the jury.

A reading of the initial pages of the Transcript clearly indicate the reasons why Plaintiff could not allow the entire deposition to be given to the jury. As the Record indicates, Plaintiff agreed in Chambers, prior to the commence-

ent of the trial, to dismiss out the Memorial Medical Center as a Defendant, provided no reference was made during the trial to the fact that Plaintiff was a Church Service patient. Of course, the deposition contained several references to Church Service and other prejudicial material. Therefore Defendants' counsel was willing to leave it to Plaintiff's counsel to do the refusing in front of the jury.

As was indicated by the Record quoted above, the Court should have realized the problem in view of the fact that Plaintiff had not requested to have the deposition admitted in evidence and the Court's question which forced the Plaintiff to refuse the jury's request in the presence of the jury resulted in material prejudice to Plaintiff.

POINT V

THE COURT ERRED IN INQUIRING OF THE JURORS CONCERNING THEIR PERSONAL FEELINGS WITH RESPECT TO CONTINUED DELIBERATIONS.

... of the most inviolate rules of the Court ... is that the jury should be free in its deliberations without any influence whatsoever from the Trial Judge. As the Court stated in the recent case of Cornia v. Albertsons, 16 U.2d ... 66:

> ...After the jurors have retired to deliberate, their privacy is sacrosanct. It is their exclusive prerogative to determine the facts in their deliberations. For this purpose the privacy of the jury room should be preserved from influence from outside sources or any semblance thereof.'

It is a clearly recognized principle of law that a Judge may not inquire of the jurors as to their numerical divisions. Brashfield v. ... States, 272 U.S. 446, 71 L.ed. 345, 47 Sup. Ct. 132. 53 Am. Jur., "Trial, Sec. 954.

Plaintiff is not here contending that the Court ask the jurors to report as to what their division was, however, after the foreman had spontaneously reported to the Court that they were deadlocked at a five to three verdict, we

[illegible] that it was improper for the Court to then proceed and ask each juror's opinion as to further [illegible] and whether or not the juror would be willing to continue. This conduct on the part of the Court was certainly the next step to [illegible] state their individual feelings on the issues and should not be condoned.

POINT VI

THE COURT ERRED IN REQUIRING THE JURY TO CONTINUE DELIBERATIONS AFTER AN EXPRESSION FROM THEM, "THEY WERE DEADLOCKED".

When the jury returned into the Courtroom at 5:56 p.m., the jury foreman announced that they were deadlocked on a five to three verdict and, as referred to in the preceding argument, the Court interrogated the jurors about the use of further deliberations. Several of the jurors spoke up and said that they were deadlocked, that the argument seemed repetitious. The effect of a Court sending a jury back at this time only served to coerce them into arriving at some result.

The jury had been deliberating for approximately six and one-half hours at the time that they had announced they were unable to agree. The case they were deliberating had only lasted two days. Certainly that period of time would indicate that the jury had carefully considered all of the evidence, and at this point it was only a matter of someone yielding his position as a matter of compromise. We recognize that the period of time jurors are required to deliberate is a matter largely resting within the sound discretion of the Trial Judge. See 53 Am. Jur. "Trial," Sec. 962, p. 677. It should be observed, however, that there is good authority to the effect that where the jury has reported an inability to agree, further deliberations ordered by the Trial Court amounts to coercion. See 85 A.L.R. 423, 53 Am. Jur. "Trial," Sec. 962, p. 677. It is submitted that the conduct of the Court in keeping the jury together after interrogating

and forcing each one to give his opinion only served to compound the error and obviously resulted in prejudice to the Plaintiff since the jury returned with a six to two verdict against her.

CONCLUSION

For the various reasons set forth herein Plaintiff respectfully submits that there is ample justification for this Court to reverse the judgment of the lower Court and to grant Plaintiff a new trial.

Respectfully submitted

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