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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 : Respondent's Brief

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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.

RESPONDENTS' BRIEF

Appeal From a Judgment of the
District Court For Salt Lake
Honorable A. H. Ellett, Judge

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FILED

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Case No. 10412

RESPONDENTS' BRIEF

STATEMENT OF CASE

This is an action for physical impairment claimed by plaintiff to result from care and treatment given by an orthopedic surgeon, Dr. Burke M. Snow.

DISPOSITION IN LOWER COURT

Jury verdict returned and judgment entered in favor of the defendant.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmation of the judgment of the lower Court entered in his favor.

STATEMENT OF FACTS

On appeal the evidence and all reasonable inferences that fairly may be drawn therefrom will be viewed in the light most favorable to the jury verdict and the judgment entered thereon. *Gordon v. Provo* 15 U. 2d 287, 391 P. 2d 430; *Universal Investment Company v. Carpets, Incorporated,* 16 U. 2d 336, 400 P. 2d 564. It is, therefore, necessary to supplement the facts as stated by the appellant in order to set forth facts favorable to the position of the respondents.

Plaintiff was troubled with pain in her right shoulder commencing the latter part of June 1960. (R. 100) She was first treated by Dr. Lenore Richards July 15, 1960. (R. 87, Ex. P-2) Dr. Paul Keller assumed treatment on July 29, 1960. (R. 202, Ex. P-2) Dr. Keller advised plaintiff to keep the shoulder moving; (R. 205) that it was important to exercise in spite of the fact that it was painful; that it was necessary to keep moving the shoulder because lack of use of the shoulder results in loss of function. (R. 202, 203) In addition to frequent injections of xylocaine for pain, (R. 202) plaintiff was given pain pills, anti-inflammatory pills and sedatives to decrease the pain so that she would persist and use the shoulder more. (R. 204) Each time the shoulder was injected with xylocaine to relieve the pain, Dr. Keller manipulated her shoulder around to loosen it up. (R. 204) Dr. Keller was concerned that the plaintiff was not exercising her arm. When he would ask

her to move it, she was reluctant to do it and would not do it very much. The only time she moved it was after he injected it and then he pretty well manipulated it for her. (R. 208)

On August 4, 1960, Dr. Keller noted that plaintiff's shoulder had become immobile from disuse. (R. 203, Ex. P-2) It was apparent to him that because of the pain, plaintiff was not exercising the shoulder as well as he thought she should be. (R. 203) On August 5, 1960, Dr. Keller asked plaintiff to make an appointment with Dr. Snow, but she actually did not go to see Dr. Snow until August 12. (R. 204) Dr. Keller thought plaintiff was not exercising as much as was desired. He knew that in the long run this would have a profound effect. Anyone who has any ailment of the shoulder, if they don't use it, will end up with some lack of function of the shoulder. (R. 205) The condition was unusual, certainly more complicated than usual and didn't respond to usual treatment. (R. 209) At the time of trial Dr. Keller didn't think the plaintiff "uses any of the deltoid" muscle very much and stated that it could have been used if it had been exercised persistently all along. (R. 207)

When Dr. Snow first saw the plaintiff on August 12, 1960, there was limitation of motion and pain of movement of the shoulder. (R. 261) He stressed motion to the plaintiff (R. 159, Ex. P-2) and warned her that the shoulder might become frozen. (R. 104) Plaintiff cancelled appointments

with Dr. Snow on September 6 and September 24. (R. 263, Ex. P-2) Dr. Snow could only move plaintiff's arm to a set limit. It seemed to meet a physical block at that point and couldn't be raised even by someone else physically trying to raise it. (R. 103)

Plaintiff was admitted to the L.D.S. Hospital on September 29, 1960, and told by Dr. Hahn that they would have to operate. (R. 95) Dr. Snow was listed as attending physician on the hospital admission. (R. 167) The surgeon performing the surgery was Dr. Hahn, the first assistant was Dr. Snow and the second assistant was Dr. R. J. Toll. (R. 161) In the course of the operation the surgeon is faced with the decision as to whether to quit or continue. (R. 255) Dr. Snow, during the course of treatment prior to surgery, did not think actual infection was present notwithstanding change in color of fluid and injection of penicillin on September 3, 1960. (R. 173, 174) There was no concern regarding infection after September 8, 1960. (R. 175) The plaintiff had no fever on admission to the hospital. (R. 243) Had plaintiff had a serious infection, it would have been likely that she would have had a temperature. (R. 244) Laboratory report on culture of specimen of fluid taken from bursal sac during course of surgery was returned on the day following surgery. (R. 245) This report indicated only that there was a presence that could live in the human body and could cause infection. (R. 268) The report on the culture was useful in prescribing post-operative medications. (R. 246)

Dr. Toll, a practicing orthopedic surgeon (R. 236) in Tucson, Arizona, at the time of the trial, (R. 237) testified that the procedures that were followed in the course of the operation conformed to the standard of care followed by orthopedic surgeons in this area. He stated that all procedures calculated to protect the axillary or circumflex nerve of the right deltoid muscle were followed. (R. 248)

After her release from the hospital, plaintiff was followed in the outpatient clinic at the hospital (R. 250) rather than by Dr. Snow. (R. 199) The clinic arranged for physiotherapy. (R. 250) Plaintiff was asked to come to the outpatient clinic from time to time. She came infrequently and would break routine clinic appointments. (R. 250) Upon release from the hospital plaintiff was told to return for five or six weeks of therapy. (R. 96) Therapy was daily, Monday through Friday, except for her cancellations. (R. 97) Plaintiff received twenty therapy treatments between the dates of October 21 and November 25, 1960. (R. 235) The therapist did not tell the plaintiff to discontinue coming. In his opinion she would have continued to benefit with respect to improved motion of her right arm had she continued to come for therapy after November 25. (R. 227) The plaintiff acknowledged that from the time she started therapy until the last visit to the therapist there was a trend of improvement and that she was not told to discontinue therapy. (R. 117)

Dr. Toll testified that in the course of follow-up they were satisfied that she was making slow but

steady progress both in strength and range of motion. (R. 252) The therapist, Steve Hucko, testified that at the time of plaintiff's first visit to therapy there was active motion of the right arm. Plaintiff was at that time able to move her shoulder without any substitution patterns in the forward, lateral and posterior movements. (R. 222) There was a gradual process of improvement from the first time he saw her. (R. 223)

Plaintiff saw Dr. Snow ten or twelve times while she was in the hospital. (R. 96) In December 1960 plaintiff saw Dr. Snow at the country club and told him she was fine and showed him how she was exercising her arm. (R. 98) There is no evidence that he examined her at that time. She made an appointment with Dr. Snow and showed him her shoulder on February 21, 1961. (R. 107, 271)

Dr. Snow by deposition testified:

> ". . . Her post-op recovery was good . . . We had her get physical therapy, and the physical therapist was quite elated about the progress she was making. She was beginning to get her abduction back. The shoulder seemed to be functioning better. She was getting her strength back. And then she disappeared. . . . The next time I saw her why her shoulder was as it is now. . . . As far as I know, the deltoid muscle was functioning well, the anterior and lateral part which is now not functioning was working at that time. So that in my own mind I've eliminated

any potential of having injured the muscle in some way in surgery." (R. 270, 271)

Dr. Snow said that having participated in the surgery and seen the patient post-operatively he would rule out surgical trauma as a cause of plaintiff's condition. (R. 179)

Following therapy and at the time of trial, plaintiff's shoulder has greater movement than was present prior to surgery. (R. 110, 111) The pain in the hospital following surgery was considerably less than prior to surgery and since leaving the hospital, she has not required any further medications for pain. (R. 112)

In the spring of 1961 plaintiff was asked by the hospital's orthopedic staff to see Dr. Madison Thomas, a neurologist, to test the nerve functions in her right shoulder and to determine whether the nerves were damaged. (R. 108, 109) She refused to submit to the test and has never done so. (R. 110)

Dr. Burton, an orthopedic surgeon practicing in Boise, Idaho, (R. 119) called on behalf of the plaintiff testified that Dr. Snow was negligent in two particulars:

(a) in completing the operation including the removal of the tip of the acromion process in the presence of infection observed when removing the bursal sac for fear when you open the bone you will develop a bone infection. (R. 131) He stated that this did not cause plaintiff's condition; (R. 165) and

(b) damaging the nerve supplying impulses to the deltoid muscle some time during the surgical procedure. (R. 137, 138)

Dr. Burton further stated that the atrophy of plaintiff's deltoid muscle took place as a result of nerve injury, that this injury occurred during surgery (R. 136) and that this damage to the axillary nerve was the sole cause of her present condition. (R. 148, 164) He acknowledged that muscle atrophy could be caused by damage to nerve supply or disuse. (R. 155) On further cross-examination he stated that in the event of damage to the axillary nerve in the course of the operation, you would expect immediate loss of nerve function. (R. 168) He was of the opinion that the surgical procedure should have been performed earlier. (R. 164) He didn't know what was done by the doctors by way of deviating from the standard of due care in the course of the surgery, other than proceeding in the presence of infection which did not cause plaintiff's condition. (R. 164, 165) He stated that as long as improvement continued post-operatively you would not discontinue therapy. (R. 167) He acknowledged that in the absence of negligence in surgery scar tissue could develop within a muscle following surgery and impinge upon and impair the nerve which impairment would come on gradually and be permanent unless the scar tissue were removed. (R. 157, 158)

Dr. Chester Powell, neurosurgeon, Salt Lake City, testified that some trauma occurs in every

operation. (R. 290) In the plaintiff's case the atrophy of the deltoid muscle was not associated with evidence of main peripheral nerve damage, (R. 289) and that in his opinion it was not possible that the axillary nerve could have been damaged in the course of the surgical procedure and produce this clinical picture. (R. 288)

On cross-examination by plaintiff's counsel Dr. Paul Keller testified that a culture is not required where one suspects infection, (R. 208) and in answer to question of plaintiff's counsel, objected to by counsel for defendants, he was permitted to say that he would have continued the same course of treatment as long as Dr. Snow did before putting plaintiff in the hospital. (R. 210) He said that only after a long course of conservative treatment would you consider any operative procedure. (R. 211) To correct the inference raised by plaintiff by the partial quote of Dr. Snow on the subject of delay appearing on page 18 of Appellant's Brief, we set forth the full statement:

> "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. But these are extremely rare cases. As I say, I haven't seen one for fifteen years like this. And with the drugs that we have, why, they usually will settle it down, and there isn't surgery needed. This just kept going on and on, and it wasn't until we knew for sure that this thing wasn't going to settle down that surgery seemed to me to be indicated. So I

don't know of any other course that could be taken. The only thing that I could see that might be criticized in this treatment is, oh, someone might say it should have been done earlier, surgery might have been done earlier. But I don't think that anyone would. That criticism has never been leveled at me. I don't know of any other way of handling it." (R. 265, 266)

ARGUMENT

POINT I

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE MATTER OF CONTRIBUTORY NEGLIGENCE.

There is ample evidence in the record and the inferences to be reasonably drawn therefrom to support a finding that plaintiff was negligent in exercising care and concern for her own welfare and that this negligence on her part was the cause of her present condition.

Plaintiff was instructed by Dr. Snow to keep her shoulder moving prior to surgery. (Ex. P-2, R. 104, 159) Plaintiff failed to retain the use and mobility of her shoulder by adequate exercise during treatment prior to surgery; (R. 203, 205, 207, 208) she failed to keep scheduled appointments with Dr. Snow prior to surgery; (R. 263, Ex. P-2) with the physical therapist subsequent to surgery; (R. 97) and with the outpatient clinic of the L.D.S. Hospital

after release from the hospital (R. 250); she went to the outpatient clinic of the hospital infrequently, (R. 250) saw Dr. Snow only twice casually at the country club after leaving the hospital and told him only that she was fine. (R. 98) After admittedly observing shoulder impairment in January 1961, the plaintiff didn't bother to visit Dr. Snow at his office until February 21. (R. 107, 271) When offered the facilities of a neurologist for the purpose of testing and evaluating nerve function of the shoulder in April of 1961, (R. 108, 109) plaintiff refused and has not since submitted to such tests. (R. 110) Plaintiff could have had the use of her right deltoid muscle had she exercised persistently (R. 207) as per instructions. (R. 205, 159, Ex. P-2)

Considering the evidence, plaintiff's counsel belatedly offered an unnumbered requested instruction on contributory negligence but withdrew it in view of the instruction the Court proposed giving. (R. 63) The claimed error of referring to the deceased, Dr. Snow, as the defendant in the Court's instruction No. 17 pointed out by the appellant is certainly not prejudicial so as to merit a reversal. As announced by Justice Crockett, speaking for the Utah Court in *Bowden v. Denver and Rio Grande R.R.*, 3 U.2d 444, 286 P.2d 240:

> ". . . nor should a judgment be disturbed merely because of error. Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it

should error be regarded as sufficient to upset a judgment or grant a new trial."

POINT II

THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT DR. BURKE SNOW WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

Dr. Snow said that there was no concern regarding infection after September 8, 1960, twenty-two days before surgery. (R. 175) Plaintiff had no fever on admission to the hospital on September 29, 1960. (R. 243) There is no evidence that Dr. Snow suspected the presence of infection at the time of commencing the operation. A culture taken during surgery upon which a report was received a full day after the operation (R. 245) merely established the presence of a bug which could cause infection. (R. 268) The fluid could be cloudy or purulent without infection being present. (R. 256) Plaintiff attempts to equate "entertained the possibility of infection" with "suspected the presence of infection". Obviously infection in some form is always possible, but one does not necessarily "suspect" the presence of that which is "possibly" present. Having entertained the possibility of infection the specimen of the fluid taken during surgery was sent to the laboratory and the subsequent report thereon was helpful in post-operative treatment. (R. 246) The only evidence in the record of any causal connection between possible infection and plaintiff's damages was the testimony

of plaintiff's witness, Dr. Jerome K. Burton, to the effect that operating in the presence of infection did not cause plaintiff's damage. (R. 148, 164, 165)

POINT III

THE COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION CONCERNING CIRCUMSTANTIAL EVIDENCE.

Plaintiff relies upon the case of *Riley v. Layton,* (CCA 10) 329 F.2d 53 (1964) as authority for his claim that his offered instruction must have been given to the jury. Plaintiff's requested instruction was very similar to the one in question in the *Riley* case. It must be remembered that the instruction referred to in the *Riley* case was being considered by reason of the objections raised by the appellant therein that the said instruction did not correctly state the law. The circuit court did not approve the instruction, but said:

> "*It may be conceded that the instructions referred to are subject to some question* when considered separately and apart from the remainder of the charge. But in reviewing the instructions given to a jury we must consider them as a whole and not piecemeal. . . . When the instructions here are so considered we think they gave the jury a correct understanding of the questions which it was to decide and the pertinent principles of law to guide it in that decision which is all that is required." (Emphasis added)

So in this case the jury was adequately instructed as to circumstantial evidence in the instructions as a whole and particularly in instructions 3, 5 and 11. As suggested by the circuit court the plaintiff's requested instruction is "subject to some question" that it properly states the law in Utah. If in fact the plaintiff's requested instruction on circumstantial evidence were accepted as the standard of proof it would completely alter the laws of evidence of negligence in malpractice cases in the State of Utah. See *Marsh v. Pemberton*, 10 U.2d 40, 347 P.2d 1108, and cases there cited.

POINT IV

THE COURT DID NOT ERR IN INQUIRING OF COUNSEL IN THE PRESENCE OF THE JURY AS TO COUNSELS' OBJECTIONS TO ALLOWING THE DEPOSITION OF DR. SNOW TO BE TAKEN INTO THE JURY ROOM.

The court did not inquire as to plaintiff's objections, but merely asked counsel for both parties if there were reasons why the jury should not be allowed to take the deposition saying that it was not permissible unless both agreed. It must be noted that neither counsel agreed and that both raised negative comment although neither objected. In the eyes of the jury neither party was put in an embarrassing position nor given an advantage. (R. 313, 314)

The comment of Justice Crockett speaking for the court in *Universal Investment Company v. Carpets, Incorporated*, 16 U.2d 336, 400 P.2d 564 would seem to cover plaintiff's claim of error in this regard:

> "It is neither unusual nor infrequent that losing counsel is beset with fears that the jurors have been led astray or have disregarded their duty because of some comparatively inconsequential irregularity which counsel may conjecture as the reason the jury did not agree with him. But we believe that such apprehensions are largely unjustified."

POINT V

THE COURT DID NOT ERR IN INQUIRING OF THE JURY CONCERNING THEIR PERSONAL FEELINGS WITH RESPECT TO CONTINUED DELIBERATIONS.

The court without invading the jury's privacy merely inquired of the jury as to their willingness to deliberate longer and their feeling as to whether further deliberation might be useful and constructive.

In doing so the court did no more than its duty to see that the proceeding would result in a fair determination of the matter if reasonably possible. There was no attempt on the court's part to interfere with the jury's determination, to inquire into their position on the issues nor to coerce the jury. The

jury was cautioned also that they could and should stay with their principles. (R. 324)

Abstinence from interference with or coercion of the jury does not require the court to be inconsiderate. 53 Am.Jur., "Trial", Secs. 950-964; Annotation, 19 A.L.R.2d 1257.

POINT VI

THE COURT DID NOT ERR IN REQUIRING THE JURY TO CONTINUE DELIBERATIONS AFTER AN EXPRESSION FROM THEM, "THEY WERE DEADLOCKED."

When the jury was sent to dinner it was told:

> ". . . when a majority of you tell your foreman that you just think it is useless, then you come in and we will quit . . ." (R. 244)

The record is void of any objections raised by the plaintiff as to the length of time the jury deliberated. Surely a party should not be permitted to acquiesce in prolonged deliberations by a jury and then first raise an objection when the results of those deliberations prove to be adverse to that party's interests. A fair reading of the authorities compels one to observe that the trial court did not here abuse its discretion nor coerce the jury. 53 Am. Jur. "Trial" Secs. 950-964; Annotation 98 A.L.R.2d 627.

CONCLUSION

"The purpose of a trial is to afford the parties a full and fair opportunity to present their evidence and contentions and to have the issues in dispute between them determined by a jury. When this objective has been accomplished, and the trial court has given its approval thereto by refusing to grant a new trial, the judgment should be looked upon with some degree of verity. The presumption is in favor of its validity and the burden is upon the appellant to show some persuasive reason for upsetting it. Under the cardinal and oft-repeated rule of review, we will not disturb the jury's finding so long as it is supported by substantial evidence, that is, evidence which, together with the fair inferences that may be drawn therefrom, reasonable minds could conclude as the jury did; and we will not reverse the judgment entered thereon unless in arriving at it substantial and prejudicial error was committed in the sense that in its absence there is a reasonable likelihood that there would have been a different result. . . ." *Gordon v. Provo City*, 15 U.2d 287, 391 P.2d 430, 433

The judgment of the trial court should be affirmed.

Respectfully submitted,

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