

1962

Paul Bairas v. Lanard Johnson and Norman Cram : Brief of Respondents

Utah Supreme Court

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MAY 2

MAY 11

IN THE SUPREME COURT
of the
STATE OF UTAH

PAUL BAIRAS,

Plaintiff-Appellant,

vs.

LANARD JOHNSON and
NORMAN CRAM, Co-Admin-
istrators of the Estate of
Philip G. Fulstow, deceased,

Defendants-Respondents.

Case No. 9599

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Sixth District Court for Kane County
Honorable Ferdinand Erickson, Judge

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Case No. 9599

BRIEF OF RESPONDENTS

The Appellant will be referred to as the Plaintiff and the Respondents as Defendants.

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries upon Plaintiff's Complaint and for wrongful death and property damage upon Defendant's Counterclaim.

The Defendants do not agree with the statement of facts of the Appellant and view it necessary to restate the facts rather than take specific exception to those advanced by Appellant.

DISPOSITION IN THE LOWER COURT

The court denied motions for continuance and

for change of venue filed and brought before the court for the first time on the morning of commencement of the trial (upon the third trial setting for this case) when the jury was present and the defendants ready with their witnesses to proceed (R. 50, 83).

Upon such denial the Plaintiff commenced presentation of evidence and offered a deposition of the Plaintiff as an exhibit (R. 87). Upon the court's ruling against introducing the deposition in totality and as an exhibit rather than publishing it subject to proper objections as provided by the Rules (R. 89), Plaintiff withdrew the proposed exhibit (R. 92) and refused to proceed further with the case calling no other witnesses (R. 90).

Upon motion of Defendants the Court dismissed the complaint, and upon motion of Defendants in order to conclude the entire action, dismissed their counterclaim without prejudice (R. 91).

RELIEF SOUGHT BY APPEAL

The Appellant does not so state in his brief, but we assume the appeal is from the rulings rather than from the dismissal. There was no evidence introduced at the trial.

STATEMENT OF FACTS

Plaintiff has stated the facts in the light most favorable to himself; has omitted many facts; and

has grossly overstated all those facts he believes favorable to him, particularly those found in the affidavits which have never been filed or served in time to allow contradicting or repudiating affidavits by the Defendants and which have been self-serving, conclusive, and largely hearsay. The facts must be viewed in light most favorable to Defendants; nevertheless, accepting them wholly and upon their face value, without any advantage to Respondents, they are as follows:

Defendants' intestate, Philip G. Fulstow, was killed in an automobile accident in Coconino County, Arizona, on July 5, 1960. Defendants were appointed his administrators and regularly published notice to creditors. On the next to last day allowed for presentation, Plaintiff filed a claim for \$500,000.00 for personal injuries. This was denied immediately by the administrators and on the next to last day permitted by the Statute of Limitations, Plaintiff sued. (Plaintiff's Brief Page 2). Except for this action all accountings in the estate of the decedant were, in November 1960, in a condition to be settled, estate and inheritance taxes paid, general creditors satisfied, and the heirs of the decedent distributed the residue (R. 22, 23). The defendants counter-claimed and the matter was at issue on March 27, 1961 (R. 8).

The Defendants admit that, as they are accused

in Plaintiff's brief, (Page 2), they asked for an early trial setting. The court fixed the trial date for June 15th. Reluctantly, counsel agreed to a postponement to accommodate Plaintiff's attorney until June 28th (R. 20-23).

The Plaintiff was hospitalized in Los Angeles at the time and there is no showing that his condition changed any from the time of filing the complaint and until this continuance or that it worsened between the time of this continuance and the one sought again on June 26th, or the one later sought on September 20th.

On June 22, 1961, there was served upon one of Defendant's attorneys, unsupported by any affidavit or showing except generalized statements of counsel, a motion for continuance upon the ground Plaintiff was unable to travel (R. 16, 17). The motion was set for argument at Richfield on June 26th by the Court in order to dispose of it prior to the jury trial set for the 28th (R. 24). Defendants filed an affidavit setting forth the reasons why they opposed and the prejudice that would result from any continuance (R. 20-23).

On the morning of the June 26th hearing, Defendants for the first time saw the affidavits supporting the motion for continuance (R. 25). Those affidavits assured the court that the Plaintiff would be able to travel and attend the trial in approxi-

mately three months (R. 19). Plaintiff was and is represented by counsel in Los Angeles who called the Judge and assured him that the Plaintiff could travel in TWO months (R. 27).

At the hearing on June 26, 1961, on the Plaintiff's motion for a continuance, it was stipulated by Plaintiff and Defendants that trial would be set on September 20, 1961 and the case would be tried on that date without any other continuance: (R. 28-29).

“The Court: September 20, 21 and 22 will be the trial dates with the understanding that if the Plaintiff is not physically able to be present, that the attorneys for the Plaintiff will in due season take, of course, his deposition, which deposition will be used at the trial, which is contemplated under the Rules. Now is that understood?

Mr. Burns: It is understood, Your Honor, and we will so comply.

Mr. Chamberlain: Could we have a provision in the Order that we be given at least ten days' notice of the taking of any deposition?

Mr. Burns: So stipuated.

The Court: Let the order so show. You will prepare the order.

Mr. Chamberlain: Yes, I will prepare the order.

The Court: You will be responsible for getting the information to your co-counsel?

Mr. Burns: Mr. Goller is in California.

The Court: With the understanding that this is a setting, for example, which the court will not [over]turn and if per chance the Plaintiff cannot be present, the deposition of the Plaintiff will be taken and counsel for the Defendants will be entitled to ten days' notice of the taking of that deposition, if it should be taken." (R. 28-29)

It should be noted at this point that prior to the hearing at Richfield on June 26th the Defendants had agreed to make themselves available in Los Angeles for taking of Plaintiff's deposition for use by him at the trial (R. 58). The Plaintiff acknowledges (R. 59) that a telegram was received offering them that opportunity (R. 58), which they nevertheless declined.

A discovery deposition (Exhibit 1) was taken by the Defendants on June 24, 1961, in Downey, California, and at that deposition all of the evidence which the Plaintiff could have produced by his own testimony at the trial was elicited. He was asked a number of questions by his own counsel (Deposition Pages 46-51) in the course of which Plaintiff's counsel made an intense effort to correct or change some damaging testimony regarding identity of the driver of the vehicle produced in interrogation of the Plaintiff on direct examination (Exhibit 1, Pg. 46, 47. cf. Pg. 27, Lines 2-20).

Between the first date set for trial (June 14, 1961) and the last date to which trial was continued (September 20, 1961) two witnesses for the Defendant, Harold I. Bowman, Jr., and Alvin Judd, died (R. 70).

On September 20, 1961 the Defendants with their witnesses were in Court and a jury summoned and in the box, ready for the trial (R. 83). For the first time there was filed a Motion for Change of Venue which had not been served on counsel (R. 50). Plaintiff's counsel admitted that they had obtained signed petitions on September 2nd to the effect that a travelling salesman visited service stations in and about the Kanab area and the individuals were to have said that Fulstow was killed and the Plaintiff, Paul Bairas, was the driver of the car and he, too, should have been killed (R. 62, 34-38). The court denied the Motion for Change of Venue on the ground that it had not been timely made or timely served (R. 62), and on the ground that the showing was insufficient (R. 62, 63). (A ruling justified by the ability to qualify and swear a jury shortly thereafter).

Plaintiff's counsel also moved the court for another continuance on the ground that the Plaintiff was still not physically capable of appearing in court (R. 65). This motion had not been previously filed nor had the motion or any accompanying affi-

davits been served upon counsel (R. 54, 55). Supporting the motion for a continuance was the affidavit of Dr. C. H. Imes who, very significantly, is the same physician upon whose affidavit the next previous continuance had been moved (R. 18-19), and who had stated that Plaintiff would be able to travel within two or three months. He was the doctor Plaintiff's counsel should have been looking to for information regarding the ability of the Plaintiff to travel. Instead they sought this same physician for a new affidavit to gain further continuances in disregard of their prior stipulation and contravention of the court's order of June 26, 1961.

Very significant and controlling language of this new affidavit of the physician is found in the following statement:

"The present condition of PAUL BAIRAS is one of improvement, however, affiant nor the hospital would accept responsibility for a trip by said PAUL BAIRAS at the present time inasmuch as his physical condition *still does not permit the rigors of transportation to Utah*. Further, surgery of a genitro-urinary nature is scheduled for Mr. Bairas this week which would further make his presence in Utah impossible from a medical standpoint." (R. 41).

Nowhere in the record is there shown any attempt on the part of counsel for the Plaintiff to inquire into the condition of the Plaintiff to determine whether or not his deposition should be taken.

This is evident from the affidavits his counsel drew for the Plaintiff himself (R. 109-111), and from the affidavit of Plaintiff's California counsel, Nathan Goller (R. 43-44).

After long discussion between the Court and counsel (R. 49-73), the trial court determined that the Plaintiff was not entitled to a further continuance; that the court's order of June 26th (stipulated by both sides) had not been observed nor had the slightest attempt been made to comply with it; that no diligence had been shown at all in attempting to obtain Plaintiff's testimony by deposition and that the motion for a third continuance should, in the exercise of the Court's discretion, be denied (R. 57, 58, 73).

A jury was examined on the voir dire of each individual and eight jurors were qualified having stated under oath that they could try the case fairly and impartially and that there were no associations, relationships, or pre-conceived notions which would prejudice their consideration, deliberation, and final verdict. (The voir dire examination of the individual jurors was not reported). A motion to strike the jury panel was made by the Plaintiff and denied by the Court (R. 80).

Trial commenced and the Plaintiff attempted to introduce in evidence in its entirety the deposition taken of the Plaintiff, Paul Bairas, at Downey, California, on June 24, 1961. Objection was made

by Defendants to proceeding in this manner, the Defendants claiming they had a right to make objection to inadmissible evidence in the deposition (R. 87). The court ruled that the deposition could be published and used in the manner provided by the Rules, subject to proper objections, but that it could not be used in its entirety as an exhibit (R. 89).

The Plaintiff called no witnesses (R. 90) and stated that:

Mr. Burns: "Your Honor, in the light of the fact that the only evidence before, or at the disposal of the Plaintiff is the deposition taken in behalf of the Defendants by Attorney Rex Hanson, and this is the only means of eliciting the testimony of the Plaintiff and in light of the court's ruling that the testimony so given is subject to all of the objections that were asked, the Plaintiff is unable to go on further and the Plaintiff rests." (R. 90)

Upon the Plaintiff resting, the Court, upon Defendants' motion, dismissed the Plaintiff's complaint with prejudice and at the request of the Defendants, dismissed their counterclaim without prejudice (R. 92).

The Court entered findings of fact, conclusions of law, and a judgment accordingly (R. 95-98), and after receiving and denying a motion for a new trial and hearing objections to the findings and partially granting some of the objections, entered amended findings, conclusions and judgment (R. 126-129).

ARGUMENT

POINT I (a)

THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION FOR CONTINUANCE WAS NOT IN ERROR BECAUSE:

(a) THE COURT ACTED WITHIN THE PROPER EXERCISE OF ITS DISCRETIONARY POWERS WHICH ARE NOT SUBJECT TO REVIEW UNLESS PATENTLY ARBITRARY.

Under the provisions of Rule 40 (b), Utah Rules of Civil Procedure, the following provision is contained relative to the postponement or continuance of a trial setting:

“Upon motion of a party, the court may, *in its discretion, and upon such terms as may be just*, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it . . .” (Emphasis added)

The provision cited has found frequent application. In the case of *Sharp vs. Gianulakis*, 63 Utah 249, 225 P. 337, the court stated.

“In the absence of any showing that the court abused its discretion (in denying a motion for a continuance) this court is not authorized to disturb those orders or to reverse the judgment by reason of the same.”

Similarly, in the case of *Lancino vs. Smith*, 36 Utah 462, 105 P. 914, a complaint had been filed in August of 1907, and during February of 1908 the case was set for trial April 2, 1908. On the 31st of March, by consent of the attorneys for both parties, the trial was postponed to April 10, 1908. On that date, the attorneys for the defense filed a motion, supported by an affidavit, for a further continuance. The affidavit, in substance, stated that the defendant was unable to attend the trial and that gross injustice would result if he were required to proceed to trial. The court granted the motion and continued the case until the 16th day of April. Again, the motion for a continuance was renewed on the same ground that existed at the prior hearing. The court denied a further continuance. On appeal the question was whether or not the District Court abused its discretion in denying the Motion for Continuance.

The trial court held that since there was no valid affidavit before it to sustain or support the second Motion to Continue, all that was before the court was the statement of the defendant's attorney. The prior affidavit had spent its force and was not effective to support the second motion. The Supreme Court in sustaining the trial court, determined that there was nothing tangible upon which a ruling could be properly founded, and further, defendant

had not exercised due diligence as required and necessary to entitle him to a further continuance.

“The right and power to postpone trials for cause, and to regulate the business of trial courts by the courts themselves so as to subserve public as well as private interests, must, in the nature of things, be to a very large extent at least, be left to their sound discretion.”

While the Supreme Court indicated that upon the record they may be “greatly inclined” to the view that the motion for continuance should have been granted it observed that:

“. . . this is far from saying that we would be justified in holding that the trial court abused the discretion vested in it by law, and unless we can say that it is clear that it did, then its judgment and not ours must prevail.”

See also the case of *McGrath v. Tallent*, 7 Utah 256, 258, 26 P. 574, where this court sustained a ruling of the trial court denying a continuance because the defendant was ill and unable to attend trial. A statement of counsel was not considered sufficient to require a continuance.

In the instant case, the plaintiffs moved for a third continuance of the case on the morning of trial without having previously filed and served a written motion or supporting affidavits as required by Rule 6(d), U.R.C.P. That rule provides:

“A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.”

The manifest purpose of the rule is salutary. It requires the filing of notice in sufficient time to permit the opposing party to prepare himself for hearing on the motion. It affords the opposing party an opportunity to verify the accuracy of the affidavits filed in support of the motion and to file counter-affidavits if found necessary. The defendants in this case were greatly prejudiced by the untimely filing of the motion because none of the safeguards anticipated by the rule were made available to them. There was no opportunity for the defendants to investigate the averments contained in the affidavits filed in support of the motion, and the right to file counter-affidavits, being the equivalent of cross-examination, was effectively denied. An affidavit which is untimely filed in support of a motion must be stricken. *Canning vs. Star Publishing Company*, 19 F. R. D. 281, (Del. 1956),

If the motion is stripped of the proposed affidavits, it stands unsupported. In this connection the case of *Lancino vs. Smith*, 36 Utah 462, 105 P. 914, is controlling, because affidavits which had been filed previously in support of a motion for continuance had "spent their force", and there was no basis upon which the court could properly found a decision to further continue the case. *McGrath vs. Tal-lent*, supra.

Independent of other considerations, which will be presented hereafter, the trial court did not "clearly" abuse its discretion in denying a third continuance of the trial of this matter.

ARGUMENT

POINT I(b)

THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION FOR CONTINUANCE WAS NOT IN ERROR BECAUSE:

(a) * * *

(b) THE STIPULATION AND COURT'S ORDER OF JUNE 26, 1961, LEFT NO ALTERNATIVE BUT TO PROCEED WITH THE TRIAL AS AGREED BETWEEN COUNSEL AND AS ORDERED BY THE COURT.

A Demand for Jury Trial was made by plaintiff's counsel on the 15th day of May, 1961. The trial was set by the court on the 15th day of June, 1961, but on motion of plaintiff's counsel, and for the purpose of accommodating him, a stipulation was entered into whereby the date was continued

for approximately two weeks to the 28th day of June, 1961. During the intervening period, the plaintiff's deposition was taken by one of the attorneys for the defendant on the 24th of June, 1961, in Downey, California. Plaintiff's California attorney was present. The evidence was fully developed and plaintiff's attorney took the opportunity to examine his client fully and attempted to rehabilitate the testimony given by his client because he considered it damaging (Exhibit 1, Pages 46-47, 46-51). At the time of the argument on the Motion to Continue the Trial Setting a second time, which was held on the 26th of June, 1961, in Richfield, Utah, in order to dispose of the matter prior to the jury trial set for the 28th of that month, the defendants agreed to make themselves available in Los Angeles for taking of the plaintiff's deposition for use by him at the trial. The plaintiff acknowledged that a telegram was received for defendant's counsel affording them this opportunity (R. 59), but it was, nevertheless ignored.

Following the hearing of June 26, 1961, the Court granted a further continuance to September 20, 1961, with a condition that no further postponement would be permitted. In the event the plaintiff could not be physically present, his attorneys were ordered to arrange for the taking of his deposition to be used at the trial as contemplated under the

Rules of Utah Civil Procedure (See R. 28, 29). In view of two previous continuances, the conditions set by the court were reasonable and clearly within the contemplation of Rule 40 (b), Utah Rules of Civil Procedure. Mr. Burns, one of the attorneys for the plaintiff in response to the Court's inquiring concerning the conditions of the continuance, responded:

“It is understood, your Honor, and we will so comply.” (R. 28)

In support of the Motion to Continue the trial setting of June 28, 1961, an Affidavit signed by Dr. C. H. Imes, and dated June 26, 1961, was filed with the Court at the hearing wherein he expressed his opinion that:

“Mr. Bairas' physical condition would not, at this time, permit transportation . . . nor his extended presence in court or his residence in facilities unequipped to take care of his present condition. Affiant is of the belief that in approximately three months, Mr. Bairas will be in sufficient physical condition so as to permit transportation to Utah, his presence in court, and his residence outside of a hospital while in Utah.” (R. 19)

Even though the plaintiff's attorneys were aware of the precarious physical condition of their client, they did not take the minimum precaution of complying with the Court's order and obtain his deposition for presentation at the trial in the event

his health prevented him from personally attending. Plaintiff's attorneys knew their client was under penalty of having the case dismissed in the event they did not fortify themselves with plaintiff's deposition. This reasonable precaution was not taken. The case was continued to September 20, 1961, one week less than three months from the previous trial date. It is evident that the Court had given them the full measure of their request in postponing the trial date in accordance with their wish and as supported by the affidavit of Dr. Imes.

Dr. Imes, who signed the affidavit in support of the Motion of Continuance on the 26th of June, 1961, is charged with knowledge that a continuance of the June 28, 1961, trial date was granted, inasmuch as he claims to have been in direct supervision of the plaintiff. Even so, he scheduled an operation for plaintiff in the same week of the trial, which his own affidavit had assisted in establishing. Without giving notification to the Court, or to defendant's attorneys, Plaintiff's California counsel again secured an Affidavit from this same doctor which stated essentially the same facts he had previously attested to, and indicated that the physical condition of Mr. Bairas would not, in his opinion, permit his transportation to Utah. No claim was made by him that the surgery was of an emergency nature or that the trip could not have been made without it. Nor is there any showing that the sur-

gery could not have been performed at an earlier date, and in sufficient time to have permitted his scheduled attendance at the trial.

The second affidavit of Dr. Imes was made on the 18th day of September, 1961, only two days before the trial was to commence. It was not served upon the defendants until the day of Trial. This was in complete disregard of Rule 6(d) which requires that the affidavits be filed with the Motion not less than five days before the hearing on the Motion. No opportunity was presented to the defendants to have an independent doctor examine the condition of Mr. Bairas to determine whether or not the affidavits submitted by Dr. Imes were well founded. No opportunity was afforded to present countering affidavits of any sort. Indeed, the good faith of Dr. Imes and plaintiff's California counsel is thrown into serious question.

The requirement of the trial court that the plaintiff appear in person and testify concerning his claim or present his testimony by deposition was not unreasonable and is within the contemplation of the Utah Rules of Civil Procedure. This court held in the case of *Oberhansley vs. Traveler's Company*, 5 Utah 2d 15, 295 P. 2d 1093 (1956), that it is not prejudicial to a party to require him to present the evidence of a material witness upon deposition. There the court found that the defend-

ant had an opportunity to take a deposition of a material witness before trial, but failed to do so. He could not thereafter justifiably complain that the testimony was not available to him.

In this case the plaintiffs filed a lawsuit against the defendant for one-half million dollars, had made a demand for trial, and on their own motion had gained two previous trial dates. The court made reasonable conditions for a third continuance well in advance of the new trial date, which the plaintiff chose to ignore. It is not a sufficient answer, as contended by plaintiff's California attorney, that he anticipated Mr. Bairas would be well enough to attend the trial in September. This was also expected in June three months before. Minimum diligence was not being exercised in failing to follow plaintiff's physical condition and treatment close enough to advise the Court and the defendants in sufficient time to obtain his deposition. Defendant's attorneys had actually suggested this to Plaintiff and agreed to make necessary arrangements to be present in California for that purpose (R. 59). It would appear that defendants were more diligent in the plaintiff's cause than was his California counsel, since defendant's telegram suggesting these arrangements was ignored by him (R. 58-59).

In the Connecticut case of *Allen vs. Chase*, 71 A. 367, the plaintiff consented to a two day con-

tinuance on defendant's motion with the understanding that if the defendant was still prevented by illness from appearing in court, his counsel would take his deposition and the trial would proceed. When the trial resumed, the defendant's counsel moved for another continuance and when this was denied, he prepared an affidavit stating what he believed the defendant would testify to if he were present in court. The Supreme court held that there was no abuse of discretion in requiring the trial to proceed, there being no justifiable excuse for failing to keep the original agreement as to the taking of the deposition.

Similarly, in the case of *Roseberry vs. Scott*, 244 P. 1063, (Kansas, 1926), defendant's motion to **continue** the trial was denied in the absence of a showing that any effort had been made to take the defendant's deposition. It was shown that at the previous term of court the plaintiff had consented to a continuance on the defendant's stipulation that the cause could be tried in the next term.

In the Mississippi case of *Worsham vs. McLeod*, 11 So. 107, the plaintiff, who was ill at the time of filing the complaint was charged with the responsibility of procuring his testimony by deposition. His failure to do so and a resulting denial of his motion to continue was not found an abuse of discretion where it was shown he had an opportunity to obtain it.

The rule established in the *Oberhansley* case, which indicates that a party is not prejudiced in being required to present material testimony on deposition, considered with Plaintiff's responsibility of presenting his claim timely and on reasonable conditions, is a sufficient basis upon which to sustain the ruling of the trial court in denying plaintiff's motion for a further continuance. The plaintiff's failure to properly prepare himself for trial when viewed in the light of the prior continuances and the reasonable conditions placed thereon, left the court with no alternative but to deny a request for a further postponement of the inevitable.

POINT II.

IT WOULD HAVE BEEN ERROR AND AN ABUSE OF THE COURT'S DISCRETION HAD IT GRANTED THE MOTION FOR CONTINUANCE BECAUSE OF RESULTING SUBSTANTIAL PREJUDICE TO THE DEFENDANTS.

Material prejudice resulted to the defendants because of the previous continuances granted by the trial court. In his affidavit, opposing the motion for the continuance heard June 26, 1961, Ken Chamberlain, an attorney for defendants, testified that the estate of Phillip G. Fulstow, deceased was then in a condition to be closed, and had been for three months prior thereto, pending the disposition of this action (R. 22). General creditors of the deceased had not and could not be paid and distribution to the

heirs could not be made until disposition of this action. Interest and penalties for non-payment of taxes due under Inheritance and Estate Tax Laws began to accrue July 5, 1961 (R. 22). In addition, defendants have twice been put to the expense and inconvenience of preparing for trial.

However, even greater prejudice has resulted to defendants because of the repeated continuances of the trial. The testimony of two material witnesses has been lost. On June 28, 1961, defendants were fully prepared to proceed with trial; nevertheless, a continuance was granted to September 20, 1961, over the objection of defendants. During the intervening period, Mr. Alvin Jones, a policeman and material witness for defendants, who was at the scene of the accident, died. Also Harold Bowman, Jr., a defense witness who observed both plaintiff and deceased shortly before the fatal accident, passed away (R. 70). This testimony is now forever lost and serious prejudice has resulted to defendants. Further continuances would only increase the inconvenience, expense and prejudices which had already occurred.

Plaintiff attempts to demonstrate the claimed arbitrary action of the trial court in failing to grant a further continuance because the matter proceeded to trial with unusual speed. (Appellants' brief, Pages 8, 9, 11, 12, 16). He fails to point out, how-

ever, that the fatal accident occurred July 5, 1960, and the filing of the complaint was delayed until March 9, 1961, scarcely within the time permitted by law. A Demand for Jury Trial was then made by him, May 15, 1961. With this background, plaintiff's argument that the trial setting of September 20, 1961, justified a further continuance, after two previous requested continuances had been granted, rings hollow indeed.

Plaintiff has not suggested, however, that the trial dates precluded him from properly preparing his case for trial. His California attorney, whose office is only a short distance from Rancho Los Amigos, where plaintiff was receiving medical and hospital care, was fully aware of his physical limitations. There is no testimony in the record that plaintiff's condition is ever expected to be one of material improvement. But as early as June 24, 1961, Plaintiff's deposition was taken in Downey, California by one of defendant's attorneys where his testimony was recorded in 54 pages of certified transcript. If, as claimed by plaintiff that his condition has been one of improvement, he certainly was not less able to assist his own counsel in preparing his case for trial September 20, 1961. There is no evidence that a further continuance would substantially alter plaintiff's inability to personally attend trial. While his attorney may have pre-

ferred his personal presence at trial to that of his deposition, such is not a basis for assigning an arbitrary abuse of trial court discretion in denying a third continuance. The ideal of justice is a two way street and contemplates consideration of the defendants' rights as well as those of the plaintiff. Defendants were required to prepare and defend a lawsuit against a dead man. His testimony and the possibility of ever preserving it through deposition died with him. It has never been the attempt of the decedent's administrators to deny the plaintiff his statutory right to a fair opportunity to litigate his claim. Defendants, insofar as preparing and defending the claim is concerned, were prejudiced in preparing a defense, from the inception of this action. In addition, plaintiff's delay has resulted in the loss of two additional material witnesses through death. The previous continuances resulted in irreparable prejudice to the defendants, and plaintiff now urges that such be not only condoned by this court, but continued. It is submitted that plaintiff had been given fair and sufficient opportunity to present his case at trial and has failed to do so with required diligence. He should not now be permitted to continue his prejudicial delays in further derogation of defendants equal rights to justice.

POINT III(a)

THE COURT PROPERLY DISMISSED THE ACTION BECAUSE PLAINTIFF'S COUNSEL ADMITTED THAT HE HAD NO OTHER EVIDENCE OR WITNESSES AND:

(a) THE PLAINTIFF IS NOT A COMPETENT WITNESS UNDER THE PROVISIONS OF 78-24-2 (3) U.C.A., 1953.

Even were it determined by this court that the action of the judge in denying a further continuance was arbitrary, no prejudice can be shown thereby because the plaintiff is disqualified as a witness in the case under the provisions of Section 78-24-2, Utah Code Annotated, 1953. Plaintiff's testimony was objectionable whether tendered personally or by deposition. The pertinent provisions of the section indicated are as follows:

"The following persons cannot be witnesses:

* * *

"(3) A party to any civil action, suit or proceeding claims or opposes . . . or defends . . . as the executor or administrator of any deceased person . . . as to any statement by, or transaction with, such deceased . . . person, or matter of fact whatever which must have been equally within the knowledge of both the witness and such . . . deceased person, unless such witness is called to testify thereto by such adverse parties so claiming or opposing, suing or defending, in such action, suit or proceeding."

The Utah court has considered this statute on frequent occasions, but has not construed it as the same applies to claimed conversations between a surviving and deceased party concerning a fatal automobile accident. In the case of *Maxfield vs. Sainsbury*, 110 Utah 280, 172 P. 2d 122, 129, this court announced the purpose of the statute as follows:

“The purpose of the statute is to guard against the temptation to give false testimony in regard to a transaction, which a deceased person, by the surviving party, when the transaction is involved in a lawsuit and the death has sealed the mouth of the other party. Furthermore, the statute seeks to put the two parties upon terms of equality in regard to giving evidence of the transaction (Citing cases). It was never intended that this section should be used for the purpose of suppressing truth; on the contrary, the statute’s sole purpose is to prevent the proving by false testimony of claims against the estate of a deceased person.

* * *

“This section makes incompetent:

“(1) A witness who is a party to the action; . . . The prohibition of this statute, by its express wording, is limited to parties, whether plaintiff or defendant, who are opposing or suing the executor in the immediate action; that is, to those who are the parties in the suit adverse to the executor.”

The Court further held that the statute disqualifies the witness and not the testimony.

Justice Wolfe, in a concurring opinion, indicated that the purpose stated in the majority opinion was too limited, and that it is better expressed in the statement of the court to the effect that:

“The statute seeks to put the two parties upon terms of equality in regard to giving evidence in the transaction.”

A further examination of the Utah “Dead Man Statute” authored by Justice Wolfe, appears in 13 Rocky Mountain Law Review, 283, 292 (1941), and is republished in 13 Utah Bar Bulletin (July-August, 1941). In determining those parties to whom the prohibition applies the following language is pertinent:

“The test is not whether the deceased and survivor would have had the same impressions or understanding of the transaction or retain the same memory. That would depend on their faculties. *The test is, were they equally exposed to the transaction, or equal participants in it?* And the statute cancels off the survivor when death cancels off the other, even though there may be others neither parties nor interested who witnessed the transaction.”

The author concludes:

“Only those witnesses are disqualified who are either a party, a person directly interested, or one through whom such party or interested person derives his interest. The party can be either plaintiff or defendant . . .

“All statements and transactions are

within the qualification if within the knowledge of both deceased and the surviving party . . . 'equally with the knowledge of survivor and decedent' does not mean that it must be within their exclusive knowledge. Others may have been witnesses and testify unless they come within the rule as to incompetency." (Emphasis supplied)

"Transaction" as used in the section cited, has been held by those courts considering similar provisions to include within that term, automobile accidents. In the case of *Stephens vs. Short*, 285 P. 797, 798, (Wyo., 1930), the Supreme Court of Wyoming applied the prohibition to a plaintiff who was the survivor of an automobile accident.

"The word 'transaction' as used in such a statute is a very broad term and has been used to embrace 'every variety of affairs which can form the subject of negotiations, interviews or actions between two parties, and includes every method by which one party can derive impressions or information from the conduct, condition or language of another.'" (Citing Authority).

Similarly, the Nevada court in the recent case of *Zeigler vs. Moore*, 335 P. 2d 425, 429, 430 (Nev., 1959), followed a similar construction. In that case plaintiff brought suit against one Christ for damages allegedly resulting from the latter's negligent operation of his automobile. Before the trial, the defendant died, and his administrator was substituted as party defendant.

In construing a statute similar to the Utah provision, the court stated:

“The overwhelming weight of authority supports the rule that the dead man’s statute applies to actions ex delicto and that such actions are embraced within the statutory use of the word ‘transaction’ ”. (Citing authority).

“ . . . (T)he term ‘transaction’ is considered broader than ‘contract’ and broader than ‘tort’ although it might include either or both.”

The purpose of the rule is to:

“Prevent the living from obtaining unfair advantage because of the death of the other . . . Nor shall the living be entitled to the undue advantage of giving his own uncontradicted and unexplained account of what transpired beyond possibility of contradiction by the decedent (Citing cases). The whole object of the code provision is to place the living and dead on terms of equality, and, the dead not being able to testify, the living shall not.” (Citing cases)

“The object of the statute is to prevent one interested party from giving testimony when the other party’s lips are sealed by death (Citing authority).”

The Court held that the limits within which a party can testify concerning the “transaction” must be drawn by the trial court in applying the provisions of the statute. The “equal knowledge provision” would not appear to preclude a plaintiff’s

description of her own actions “prior to the point when within limitations of time or space the decedent could have contradicted her testimony of his own knowledge.” See also *In re Mueller’s Estate*, 89 NW 2d 137 (Neb. 1958), wherein a full discussion of this matter is contained.

It is submitted that the purpose of the Dead Man’s Statute as contained in the Utah law, as stated in the *Maxfield Case*, is consistent with the views expressed by the Nevada and Wyoming courts, and also by the majority of other courts, which have considered the question.

In the instant case, the application of this doctrine becomes important because the plaintiff’s attorney admitted that the only testimony or evidence supporting the plaintiff’s claim was that of the plaintiff (R. 90).

The statute does not preclude the presentation of other testimony by witnesses who are not disqualified under the provisions of the Utah Statute where such is available; however, the wisdom and equity of the statute under consideration is brought into focus by the facts of the instant case. Were the plaintiff permitted to testify to the “transaction” between himself and the deceased, which was equally within their knowledge, his testimony would be uncontradicted because death has sealed the lips of Dr. Fulstow, who was the only person who could chal-

lenge the veracity of any statement made or claimed. The statute is not unfair, but merely places the plaintiff under the same burden to presecute as the defendants are under to defend.

Accordingly, the plaintiff, in any event would have been precluded from testifying concerning the events of the accident, which were equally within the knowledge of both parties and which were essential to the establishment of his case. Therefore, Plaintiff could not have been prejudiced in any event by the court failing to grant a further continuance of the trial date.

POINT III(b)

THE COURT PROPERLY DISMISSED THE ACTION BECAUSE PLAINTIFF'S COUNSEL ADMITTED THAT HE HAD NO OTHER EVIDENCE OR WITNESSES AND:

(a) * * *

(b) PLAINTIFF'S CASE WOULD HAVE BEEN DISMISSED WITHOUT "COMPETENT SATISFACTORY EVIDENCE" SUPPLEMENTAL TO THE PLAINTIFF'S OWN TESTIMONY.

The Utah Legislature places a restriction upon the evidence necessary to establish recovery under a wrongful death action. Section 78-11-12 U.C.A., 1953, provides:

“Causes of action arising out of physical injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer,

and the injured person, or the personal representative or heirs of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoers; provided, however, that the injured person or the personal representatives or heirs of one meeting death shall not recover judgment except upon some competent satisfactory evidence, other than the testimony of said injured person.

In the instant case, the plaintiff admitted to the court (R. 90), that he had no further evidence except that of the plaintiff's personal testimony to substantiate his claim against the defendant administrators. In view of the statute and the restrictions placed upon recovery under the wrongful death provision of the statute, the plaintiff's action was properly dismissed for lack of "competent, satisfactory evidence other than the testimony of" the plaintiff.

Accordingly, it is respectfully submitted that the plaintiff could not have been prejudiced by the court's refusal to grant a third motion for trial continuance, because the nature of his evidence would have precluded a recovery in any event.

POINT IV.

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR A CHANGE IN VENUE.

The plaintiff assigns as error the failure of the trial court to grant a Motion for Change of Venue.

The plaintiff cannot validly complain that he was prejudiced by such a denial because the case was never submitted to a jury for determination.

In any event it is within the sound discretion of the trial court to determine whether or not a fair and impartial trial can be had in the county designated in the complaint. *State vs. Certain Intoxicating Liquors*, 53 Utah 171, 177 P. 235; *Anderson vs. Johnson*, 1 Utah 2d 400, 404, 268 P. 2d 427 (1954). The following language is taken from the latter opinion:

“The sufficiency of evidence to justify a change of place of trial is a matter that lies in the discretion of the trial court and will not be disturbed or set aside unless the record discloses a clear and positive abuse of discretion . . . A trial court’s ruling on such a matter will not be considered to have been an abuse of discretion unless the court acted unfairly, or by whim or caprice or practically denied justice in the case.

“Our statute is so worded that it necessarily is left to the option of the trial court, in all cases involving prejudice of the people locally, to decide whether conditions are such that the requirement of justice would be best served by a change.

“The necessities for the promotion of justice require that a wide latitude should be allowed the trial court in passing upon an application for a change of place of trial on the grounds of bias or prejudice in the community.

“ . . . the burden is upon the party who assails the ruling of the court to establish it as error, and as prejudicial, and the matter is one strictly within the court’s discretion. . . .”

It was the plaintiff who selected the forum in which this action was to be tried, even though other forms were available to him. Although the case had been previously continued on two occasions, the plaintiff for the first time filed a Motion for Change of Venue on the morning of trial, September 20, 1961. The motion had not been previously served on counsel (R. 50). Plaintiff’s counsel admitted that a signed petition had been procured on September 2nd, nearly three weeks before the trial date. The petition stated in effect that a certain traveling salesman had visited service stations in and about the area and that certain individuals had stated that Dr. Fulstow was killed and the plaintiff was the driver of the car and he, too, should have been killed (R. 62, 34-38).

The motion was not timely made in accordance with the provisions of Rule 6(d) U.R.C.P. Defendants had no opportunity to investigate the allegations contained in the “petition” which the plaintiffs had filed in support of the motion. Further, the petition did not meet the requirements of an affidavit, which Rule 6(d) contemplates being filed in support of such a Motion. Under the provisions

of Rule 56(e), U.R.C.P., which deals with Summary Judgment, the form of an affidavit filed in support thereof is set out. The requirement is as follows:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . .”

The following is quoted from Rule 43 (e) U.R.C.P.:

“When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respected parties, . . .”

The petition which was filed in support of this motion for change of venue contained hearsay of the most flagrant kind. The statements were not based upon personal information of anyone who would have been competent to testify in court. None of the petitioners were produced in court in support of the document. Even were it established that some of the individuals whose names appeared in the petition had something material or competent to say concerning the matter under consideration, the form of the petition prevented its proper presentation because by the petition each presumed to testify on oath concerning exactly the same facts

as every other petitioner. That 28 people could so testify challenges the understanding of even the most gullible.

The plaintiff's assignment of error that a fair jury could not be had in Kane County is most effectively countered by the fact that a jury was in fact impaneled following voir dire examination. The fact that an unbiased jury was impaneled after objection is most eloquent proof that a fair trial could have been had in the county. *Chamblee vs. Stokes*, 9 Utah 2d 342, 244 P. 2d 980 (1959).

It is submitted that no error was committed in failing to grant the Motion of Change of Venue because:

1. The motion was untimely made.
2. It was not supported by proper affidavits.
3. There was no showing that prejudice would result by proceeding with the trial in the County.
4. An impartial jury was in fact impaneled.
5. The case was not submitted to the jury for determination and no possible prejudice could have resulted to the plaintiff.

CONCLUSION

It is submitted that the Court did not abuse its discretion in failing to grant the motion requesting a third continuance of the trial of the above entitled cause, or in failing to grant the plaintiff's untimely motion for change of venue.

Respectfully submitted,

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