

1967

Bliss S. Elmer v. A. H. Mortensen, Dba A. H.
Mortensen Plumbing & Heating Company :
Respondent's Brief On Appeal

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IN THE SUPREME COURT OF THE STATE OF UTAH

BLISS S. ELMER,
Plaintiff and Respondent,

—vs.—

A. H. MORTENSEN, d/b/a
A. H. MORTENSEN PLUMBING
& HEATING COMPANY,
Defendant and Appellant.

Case
No. 10915

Respondent's Brief on Appeal

Appeal from the Judgment of the District Court
of Utah County, Utah

THE HONORABLE ALLEN B. SORENSEN, *Judge*

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FILED

OCT 2 - 1967

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	6
POINT I:	
THERE WAS NO PREJUDICIAL ERROR IN THE COURT'S INSTRUCTIONS TO THE JURY.....	6
POINT II:	
THERE WAS NO ERROR IN SEPARATING THE LOSS OF EARNING FROM THE OTHER GENERAL AND SPECIAL DAMAGES, NOR IS THERE ANY SPECIAL DAMAGES. NOR IS THERE ANY DUPLICATION IN THE JURY'S AWARD.....	12
A. DEFENDANT HAS NO STANDING TO ATTACK THE FORM OF THE VERDICT WHERE HE FAILED TO MAKE TIMELY OBJECTIONS THERETO	13
B. THERE WAS NO PREJUDICIAL ERROR IN THE FORM OF VERDICT, AND IT IS IMMATERIAL WHETHER LOSS OF EARNINGS IS AN ITEM OF GENERAL OR SPECIAL DAMAGES	16
POINT III:	
THERE WAS NO ERROR IN FAILING TO STATE A FORMULA TO REDUCE FUTURE DAMAGES TO PRESENT WORTH	22
CONCLUSION	23

Authorities Cited

Atchison v. Lee, 8 Kansas 24, 54 Pac. 4.....	20
Baker v. Cook, 6 Utah 2d 161, 308 P.2d 264.....	15
Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451.....	9
Bryant v. Stringham Stage Line, 60 Utah 299, 208 Pac. 541	12
Clovos v. Home Life Insurance Company of New York, 83 Utah 401, 28 P.2d 607.....	20
Ferguson v. Jongsma, 10 Utah 2d 179, 350 P.2d 404	8
Hales v. Peterson, 11 Utah 2d 411, 360 P.2d 882	9

TABLE OF CONTENTS — (Continued)

	Page
Hamilton v. Union Oil Company, 216 Oregon 354, 339 P.2d 440	9
Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564.....	17
Hays v. New York Central Railroad Company, 328 Ill. Appeals 631, 67 N.E.2d 215.....	22
Heywood v. D. & R. G. Railroad Company, 6 Utah 2d 155, 307 P.2d 1045.....	9
Hill v. Cloward, 14 Utah 2d 55, 377 P.2d 186.....	14
Jorgenson v. Gonzales, 14 Utah 2d 330, 383 P.2d 934.....	13
McKinley v. Wagner, 67 Idaho 104, 170 P.2d 796.....	9
Pace v. Parrish, 122 Utah 141, 247 P.2d 273.....	21
Reed v. Simpson, 32 Calif. 2d 444, 196 P.2d 888.....	9
Rhemke v. Clinton, 2 Utah 230.....	19
Solitz v. Ammerman, 16 Utah 2d 11, 395 P.2d 25.....	12
Taylor v. Johnson, 18 Utah 2d 16, 414 P.2d 575.....	9
Wardell v. Jerman, 18 Utah 2d 359, 423 P.2d 485.....	12
Weber Basin Water Conservancy District v. Nelson, 11 Utah 2d 253, 358 P.2d 81.....	21
Wentz v. T. E. Connally, Inc., 45 Wash. 2d 127, 273 P.2d 485	23
53 Am. Jur., Trial.....	17
88 C.J.S. Trial, Section 393.....	8
89 C.J.S. Trial, Section 525	15
Rule 47, Utah Rules of Civil Procedure.....	13
Rule 49, Utah Rules of Civil Procedure.....	17
Rule 61, Utah Rules of Civil Procedure.....	19

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Defendant and Appellant.

Case
No. 10915

Respondent’s Brief on Appeal

STATEMENT OF THE KIND OF CASE

As was stated by appellant, this is an action for personal injuries suffered by plaintiff resulting from the negligence of defendant’s employee at a construction site in Springville, Utah on April 3, 1964.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury in the District Court of Utah County, and resulted in a verdict in favor of the plaintiff in the amount of \$45,000.00.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks that the jury verdict and judgment on the verdict be affirmed.

STATEMENT OF FACTS

Plaintiff agrees substantially with the statement of facts as set forth in appellant's brief, but wishes to add the following:

On the day of the accident, plaintiff was working with a crew of men pouring portions of the concrete slab floor on the construction project. Defendant and his employees were in another area of the building doing plumbing work. The cement pour on the day of the accident had been completed, and Marion Elmer, plaintiff's brother, was instructed to get the wire mesh ready for the next pour which was to be the following day (T-30). This necessitated cutting 32-foot strips from the heavy rolls of wire mesh. As indicated in appellant's brief, this was done inside the building in the area near the entrance, and the wire mesh was placed in layers on top of each other as they were cut. There were four lengths of wire cut and stacked on top of each other at the time of the accident.

Appellant states in his brief that plaintiff admitted that the wire could have been rolled out in another area. However, the record shows that the rolls weighed 250 lbs. and could not be easily moved by the man doing the cutting; that it was easier to do the work near the driveway because of the terrain; that no trucks were being

expected to use the driveway that afternoon, and that the entire operation of cutting wire would take only approximately one-half hour; and that even with the wire laid out, there was ample room for trucks to pass (T-39, 90, 91, 121, 122).

Defendant's truck was located inside the building, and apparently it became necessary for him to send one of the employees back to the shop for a plumbing part. As the truck approached the driveway area where the wire was stacked, plaintiff stood on the wire and held the corner down with a two-by-four. The purpose of doing this was to provide a marker for the driver to watch so he could avoid hitting the wire (T-102); also to hold the wire down so it wouldn't get caught by the truck in the event the truck got too close (T-116). Plaintiff then directed the driver who had stopped to "come over it slow".

At this point, the driver completely ignored the directions given him and revved his motor and accelerated. One eye witness described what happened as follows:

"Then it was fast. Before the truck moved, the wheels started to move and throw gravel. And then he revved the motor. The next thing I heard is Bliss holler, and as I looked at him, he was in the air higher than I could reach, and then he landed out here and was dragged with the wire before the truck stopped." (T-123)

The driver of the defendant's truck, after revving his engine, and spinning his wheels, drove onto the wire at a completely unreasonable speed, hooking the wire

and travelling a total distance of approximately three or four car lengths before stopping (T-47, 48, 124, 126, 128). The plaintiff described the driving of the truck as follows: "Well, he speeded it up, and in that gravel it spun the wheels, and he shot out of there like he was going to a fire." (T-39) The plaintiff had his feet jerked out from underneath him (T-282), had two rolls of wire wadded over him, and was dragged outside the building (T-124). The defendant's foreman, Clyde Mortensen, testified that he probably told the driver of the truck to hurry as he left to get the part that was needed by the plumbers (T-278). The foreman, Clyde Mortensen, further testified that he observed the truck leave the building, that it was loaded heavily with plumbing equipment, and observed the back of the truck bounce and settle at least 10 inches (T-281). He observed the truck bounce in this manner from his position in the northwest corner of the building about 100 feet away and saw the plaintiff's feet jerk out from underneath him and ran to the scene yelling at the truck driver, "Don't you know you have a man on the back of this truck?" (T-282, 284)

Appellant states in his brief that plaintiff admitted that he could have gotten a larger stick to hold the wire down, and therefore not have been required to stand on the wire at all. The evidence shows that he stood on the wire in order to hold both corners down, and that there were not any longer sticks in the immediate area (T-105, 106). The plaintiff, Mr. Elmer, did not believe it to be reasonably necessary to go to great lengths to take any further precautions (T-93) obviously because

had the driver done as directed and driven slow, there would have been no reason to anticipate any danger, even if the truck were to catch the wire.

Respondent agrees fully with appellant's statement of facts relating to damages in that plaintiff suffered serious injuries to his back requiring lumbro-sacral fusions. He is 58 years of age and has received a 30% loss of body function. The injuries are permanent.

Actually four vertebrae were fused together beginning with L-3 to the sacrum, which means a total fusion and solid backbone from the plaintiff's waist to his sacrum (T-158). The orthopedic surgeon, Dr. Charles Smith, Jr., testified that a handful and a-half of bone chips were taken from the plaintiff's hip in order to fuse these several vertebrae together in an operation that required five hours (T-158-160). The successful fusion of the vertebrae results in total loss of movement in that part of the spine that is fused and eliminates nerve root irritation and pain (T-159). Unfortunately the plaintiff did not obtain a satisfactory or successful fusion in all areas. The attempted fusion between L-3 and L-4 vertebrae resulted in a failure of fusion or continued movement (T-166, 167). The result of the fusion failure leaves the same symptoms that necessitated the plaintiff to submit to surgery originally, namely, nerve root irritation, the continuation of pain, and a loss of function (T-167). The result of the failure to fuse left the plaintiff with pseudarthrosis, a false joint or an incomplete fusion (T-172). For this reason the plaintiff was given a whole body permanent disability rating of thirty (30%) percent and the doctor has

never been able to release the plaintiff to return to carpentry work (T-179). Dr. Smith further testified that he did not see how the plaintiff could escape the eventuality of having future additional surgery to correct the incomplete fusion (T-175). He estimated future medical and hospital expenses to be approximately \$2,000.00, with a future work loss of approximately six months (T-176).

Prior to the accident his income as a carpenter was \$7,000.00 per year. Because of his permanent injury, he cannot do carpentry work in the future. He has tried to seek other employment, and now earns \$4,800.00 per year, which is the highest paid job available to him. His loss of earnings to the date of the trial was \$10,550.00. Medical expenses prior to trial were \$2,473.50.

ARGUMENT

POINT I

THERE WAS NO PREJUDICIAL ERROR IN THE COURT'S INSTRUCTIONS TO THE JURY.

Appellant in his brief has cited numerous cases, all reciting and upholding the general principle that it is error for the trial court to instruct a jury in such a manner as to deprive a party of his theory of the case if said theory is supported by the evidence. Plaintiff and respondent takes no exception to this general principle, or to the holdings of any of the cases cited by counsel. These cases do not involve fact situations even

remotely similar to the instant case. None of them are applicable here; nor was defendant deprived of his theory of the case.

Defendant's specific objection goes to Instruction No. 11 wherein he claims said instruction "restricts defendant to two grounds of contributory negligence and in effect tells the jury that the standing on the wire while the truck was driven over it, as a matter of law, would not be sufficient evidence from which the jury could find that the plaintiff was contributorily negligent." Such an implication simply cannot be read into this instruction. Under Instruction No. 11, the jury was permitted to consider the issues of contributory negligence in any of the following:

"(a) In that he failed to remove the reinforcing wire from the entrance of the building before allowing the truck driven by Douglas Dwaine Paulson to proceed.

(b) In that he failed to maintain a proper lookout and exercise reasonable due care for his own safety."

Paragraph (b) above does not restrict in any sense, but on the contrary is a broad instruction permitting the jury in effect to consider any reasonable theory supported by the evidence. There is absolutely nothing in this language which says or even implies that the jury could not as a matter of law find contributory negligence from the plaintiff's standing on the wire while the truck was driven over it.

Defendant in his request for instructions did not at any time request any instructions specifically setting

forth standing on the wire as a specific ground for contributory negligence. Had he done so, it is very likely that the trial court would have given such an instruction. Defendant's Requested Instructions No. 11 and 12 ask only that contributory negligence be considered in broad terms. Having requested the jury be instructed in broad terms, and never having requested that the court instruct on any specific theory, it would seem that defendant is in no position to complain because the court was not more specific in its instructions. So far as plaintiff has been able to determine, it is universally held by all courts that if instructions are correct as far as they go, but are deficient because of their generality or failure to reach all points of the case, a party desiring additional instructions must make a request therefore (88 C.J.S. Trial, Section 393).

In the case of *Ferguson v. Jongsma*, 10 Utah 2d 179, 350 P.2d 404, a defendant contended that it was error to submit the issue of reckless disregard by defendant for plaintiff's safety without also submitting the issue in defense of plaintiff's disregard for his own safety. There was no request made for submission of the latter issue. In rejecting the contention, the court stated as follows:

"Plaintiff in proposing an instruction on his theory of the case is not required to also propose instructions setting out all the possible defenses thereto. If defendant's desired instructions on defense to any ground which would allow plaintiff to recover, he should propose them."

See also *McKinley v. Wagner*, 67 Idaho 104, 170 P.2d 796; *Hamilton v. Union Oil Company*, 216 Oregon 354, 339 P.2d 440; *Reed v. Simpson*, 32 Calif. 2d 444, 196 P.2d 888; all holding that if a defendant desires an instruction on his theory of the case, he has a duty to so request the court.

The Utah Supreme Court has held time and time again that instructions must be considered altogether and viewed with tolerance and understanding to see whether the basic issues were fairly and intelligently presented for determination, and if that purpose is accomplished, that is all that is necessary, and no verdict should be nullified for minor errors or inconsistencies in the instructions. *Heywood v. D. & R. G. Railroad Company*, 6 Utah 2d 155, 307 P.2d 1045. One instruction should not be considered in isolation in order to predicate a claim of error upon it, but the instructions must be read and understood as a connected whole. *Taylor v. Johnson*, 18 Utah 2d 16, 414 P.2d 575. The issues should be presented in a fair and understandable manner with the least possible instructions. *Hales v. Peterson*, 11 Utah 2d 411, 360 P.2d 882. Instructions should be considered as a whole and in relation to facts shown by evidence. *Brunson v. Strong*, 17 Utah 2d 364, 412 P.2d 451.

With the above rules in mind, let us examine the whole of the instructions in the instant case. The court in its Instruction No. 2 set out in detail defendant's claims of contributory negligence, including the claim that plaintiff was contributorily negligent "in failing to exercise due care for his own safety, in that he stood

on the wire while the truck passed over it.” While it is true that Instruction No. 3, a stock instruction, advises the jury that the claims of the parties as set forth in Instruction No. 2 are not to be considered as a statement upon the part of the court as to what the facts are, there is absolutely nothing anywhere in the instructions to tell or imply to the jury that they cannot consider any of the contentions as so set forth; Instruction No. 3 must further be considered with Instruction No. 1 which explains to the jury that it is their exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. Instruction No. 6 properly defined contributory negligence. Instruction No. 11 instructed the jury that plaintiff would be precluded from recovery if the jury were to find contributory negligence in any of the particulars therein set out, including the broad grounds of lookout and failure to exercise due care.

Defendant has made further attack on Instruction No. 11 because paragraph (b) therein defines as a ground of contributory negligence the failure to maintain a proper lookout “and” exercise due care for plaintiff’s own safety; defendant says that the court should have used the word “or” rather than “and.” In this case, the claim of improper lookout is tied directly to the specific act of being on the wire. In other words, defendant claims that plaintiff should have maintained a proper lookout to reasonably observe that the truck was coming and thereby get off the wire. So far as respondent is aware, there was no other claim made for improper lookout.

An additional instruction on contributory negligence was given in Instruction No. 12. Instruction No. 12 provides that "it was the duty of the plaintiff, Bliss S. Elmer, to use reasonable care under the circumstances to prepare the driveway so that the truck could proceed across it pursuant to his instructions and to maintain a proper lookout for the safety of himself and others as the truck thus proceeded. The failure of the plaintiff thus to conduct himself in accordance with any of the foregoing requirements of law would constitute contributory negligence on his part." Under Instruction No. 12 it seems clear that if the plaintiff failed to so prepare the driveway so that the truck could not pass over it without causing injury to himself, then the injury caused by standing on the wire would be attributable to plaintiff's contributory negligence. It is thus apparent that when all of the instructions are considered as a whole, the issues were in fact fairly and intelligibly presented to the jury.

Even if it were to be assumed that the defendant was deprived of the jury considering his theory of the standing on the wire as an issue of contributory negligence (which the instructions when considered as a whole clearly show he was not), it is difficult to see how any prejudice could result. In reaching its verdict, the jury necessarily was required to find by a preponderance of evidence that the defendant's agent was negligent in racing the truck across the wire. The evidence is undisputed that the driver was specifically told to drive slow. The plaintiff had no legal duty whatsoever to anticipate any sudden outbreak of negligence on the

part of the driver. See *Solitz v. Ammerman*, 16 Utah 2d 11, 395 P.2d 25; *Bryant v. Stringham Stage Line*, 60 Utah 299, 208 Pac. 541. Had the driver done as directed, there is nothing in the record to show how the plaintiff could possibly have been injured, even if the truck caught the wire. The evidence could not support a finding of contributory negligence for standing on the wire or a finding that such action on the part of the plaintiff could have been a proximate cause of the injury. Plaintiff has cited no cases whatsoever which under these circumstances would support the view that such a finding could be made.

This court has stated that a verdict will not be overturned in the absence of a showing of error which is prejudicial in the sense that in its absence there is a reasonable likelihood that there would have been a contrary result. *Wardell v. Jerman*, 18 Utah 2d 359, 423 P. 2d 485. In the case at bar, defendant had a fair trial in every respect. Defendant presented the issues raised on this appeal to the trial court on a motion for new trial. The judge who tried the case found no merit in his contentions and denied the motion. This court should likewise affirm the verdict.

POINT II

THERE WAS NO ERROR IN SEPARATING THE LOSS OF EARNING FROM THE OTHER GENERAL AND SPECIAL DAMAGES, NOR IS THERE ANY DUPLICATION IN THE JURY'S AWARD.

A. Defendant has no standing to attack the form of the verdict where he failed to make timely objections thereto.

Defendant complains on appeal because the trial court submitted a verdict form to the jury wherein the jury was asked by the trial court to make separate assessments for general damages, special damages and loss of earnings. Defendant now claims that the form of verdict was improper because it permitted a separate finding for loss of earnings, when such should have been included either as part of the general or special damages. Yet at no time during the trial did defendant make any objection to the form of the verdict; nor did he object to the damage instructions of the court on the ground that the instructions would permit a duplication of damages.

Rule 47(r) Utah Rules of Civil Procedure provides: "If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again." In interpreting this rule, the Utah Supreme Court in the case of *Jorgenson v. Gonzales*, 14 Utah 2d 330, 383 P.2d 934, stated as follows:

"The general and well established rule is that so long as the jury is functioning as such in the course of the trial and until it is discharged, it is subject to directions and instructions from the court to the end that the issues be fully tried, deliberated upon and a correct verdict rendered. And where it is apparent that there is some patent error in connection with the verdict, the court may, of course, call the matter to their attention

and direct them to redeliberate. In that regard it has been held, sensibly and properly, that where an amount is erroneously included, the court may direct the jury to retire and correct it."

It would seem that if there was any question on the part of the defendant as to the form, or the proper amount of the jury verdict, or any question of duplication, counsel could and should have requested any such matter to be clarified under proper directions and instructions from the court before the jury was discharged. Having made no such request, and having sat back and permitted the court to discharge the jury after three days of trial, defendant is not now in a position to raise any objection.

In the case of *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186, a party litigant claimed prejudicial error because insurance was mentioned during the trial. No objection had been made by either party in the trial court. In a unanimous decision written by Justice Crockett, the court stated as follows:

"But there is an insuperable difficulty with the plaintiff's position. His counsel let the incident pass without objection and without a request to rectify any harm he thought had been done. Fair play and good conscience require that he do so at the earliest opportunity. It would be manifestly unjust for a party to sit silently by, believing that prejudicial error had been committed, proceed with the trial to its completion, and allow the jury to deliberate and reach a verdict, to see if he wins, then if he loses, come forward with a claim that such an error rendered the verdict a nullity. If this could be done, proceedings after such an oc-

currence would be in vain and thus an imposition upon the court, the jury and all concerned. The court will not countenance any such mockery of its proceedings. If something occurs which the party thinks is wrong and so prejudicial to him that he thereafter cannot have a fair trial, he must make his objection promptly and seek redress by moving for a mistrial, or by having cautionary instructions given, if that is deemed adequate, or be held to waive whatever rights may have existed to do so."

The above principle has been held to apply to claimed errors at any stage of the proceedings, and particularly to claimed defects in a jury verdict as is defendant's claim here. This basic principle is set forth at 89 C.J.S. Trial, Section 525, as follows:

"An error or defect in the form of a verdict is waived by the failure to make timely objections. Objection to irregularity or informality in a verdict must be taken at its rendition or time of return, at the term at which the verdict is rendered, and before the jury are discharged, otherwise the objection will be deemed to have been waived."

In the case of *Baker v. Cook*, 6 Utah 2d 161, 308 P.2d 264, a defendant neither objected nor excepted to the forms of questions submitted in a special verdict. On appeal it was held that he could not later raise this as an issue and claim that the questions in the verdict were drawn so as to confuse the jury.

Based on the above principles of law, the record in this case clearly shows that defendant has waived any objection to the form of verdict.

B. There was no prejudicial error in the form of verdict, and it is immaterial whether loss of earnings is an item of general or special damages.

Defendant in his brief has cited many cases in an attempt to define whether damages for loss of earnings are general or special damages. These cases deal primarily with the question of pleading, and are not material here. In the cases cited by counsel, the distinction becomes important under rules of procedure that require items of special damages or permanence of injuries to be specifically pleaded. As properly stated at page 30 of appellant's brief, the purpose of requiring such pleading is to give notice to the defendant of the nature and extent of the claim so that he might properly prepare his defense and not be taken by surprise.

In the instant case, there is no claim of improper pleading, nor of any surprise on the part of defendant. Plaintiff's amended complaint alleges that he has suffered lost wages and will continue to suffer loss of income; the deposition of plaintiff which was taken by defendant prior to trial and published at the time of trial leaves no doubt as to the nature of plaintiff's claims; and the pre-trial order specifically states that "it is understood that plaintiff will present testimony concerning future loss of wages."

In analyzing the Utah cases dealing with the definition of general and special damages, it is apparent, as appellant has pointed out, that there has been some confusion as to whether loss of earnings is general or special damage. Because of this uncertainty it has been

the practice of many trial courts throughout the state to have the jury consider loss of earnings as an item separate and apart from the other elements of damage. This is what was done in the instant case. Certainly it cannot be contended that loss of earnings, both past and future, if shown with reasonable certainty, is not a proper element of damages in an action for personal injuries.

Regardless of whether loss of earnings are general or special damage, it would not be improper for the trial court to request the jury to make a separate finding on this question as was done here. This would merely have the effect of being a special verdict which is proper under Rule 49, Utah Rules of Civil Procedure. Rule 49(a) specifically provides that the trial court "may use such method of submitting the issues and requiring the written findings thereon as it deems most appropriate." The language of this rule clearly gives wide discretion to the trial court in determining the form of verdict. In the case of *Hanks v. Christensen*, 11 Utah 2d 8, 354 P.2d 564, this court has stated that "it is elementary that there is no impropriety in submitting special interrogatories if the court so desires."

Even if it were to be assumed that it is error for the trial court to permit a separate finding by the jury for loss of earnings, it could not possibly be prejudicial. The following sections from 53 Am. Jur., Trial, set forth the general law in this regard:

Section 1035. "The responsibility of returning a true verdict rests with the jury, and it is a matter of accommodation, and not a legal require-

ment, that the trial judge supply the jury with the proper forms in any given case. Any words which convey the meaning and intention of the jury are usually deemed to be sufficient. So long as the verdict manifests the intention and findings of the jury upon the issues submitted to them, it will not be overthrown because of defects of form merely. Certainly irregularities in the form of a verdict which do not affect the merits of the controversy constitute no ground for the reversal of the judgment based upon the verdict."

Section 1036. "Because inartificial expressions and words are sometimes employed in framing a verdict, the first object in the construction of a verdict is to learn the intent of the jury, and when this can be ascertained, such effect should be given to the verdict, consistent with legal principles and construing it as a whole, as will most nearly conform to the intent. The jury's intent is to be arrived at by regarding the verdict liberally, with all reasonable intendments in its support and with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings. In the interpretation of an ambiguous verdict, the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and for this purpose, reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted."

Section 1050. "Although defective in form, if a verdict substantially finds the question in issue in such a way as will enable the court intelligently to pronounce judgment thereon for one or the other party, according to the manifest intention of the jury it is sufficiently certain. As is the case generally, every reasonable construction should

be adopted for the purpose of working the verdict into form so as to make it serve. Further, if, by reference to the record, any uncertainty in the verdict can be explained, it is sufficient to sustain the appropriate judgment.”

If the above principles are applied to the instant case, the jury verdict must stand. It is only in the case of uncertainty, or in the case of the jury considering an improper item of damages, that prejudice could possibly result. As to the former, the itemizing of loss of earnings eliminates any uncertainty in that it shows how the jury arrived at the total verdict; as to the latter it has been shown that loss of earnings, both past and future, are proper items of damages.

Rule 61 Utah Rules of Civil Procedure deals with the question of harmless error and provides as follows:

“No error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is grounds for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

The harmless error rule has been applied to many jury verdicts by the Utah Supreme Court. In the case of *Rhemke v. Clinton*, 2 Utah 230, a verdict of \$40,219.26 was returned by a jury. The jury verdict was questioned as it contained a large award for interest and the verdict was also itemized. The court admitted that the

question of interest was a question of law and not fact, but considered the including of interest in the jury verdict as harmless error and stated "This question as to the verdict is one not of substance but of mere form. Under our system of pleading when substantial justice is done, the mere form should not defeat it."

The same result was reached in the case of *Atchison v. Lee*, 8 Kansas 24, 54 Pac. 4. The jury verdict appeared to contain a double award for pain and suffering. Damages were awarded for pain and suffering, and also awarded for mental suffering and distress and were itemized. Defense counsel in the case argued that there was a duplication of awards. The court held as follows:

"The two items will be treated as equivalent to a single allowance for mental and physical pain and suffering where the same is supported by the evidence as it was evident that the jury intended to allow an award for pain and suffering, both physical and mental."

Though the damages were awarded separately, there was no prejudicial error.

In the case of *Cloves v. Home Life Insurance Company of New York*, 83 Utah 401, 28 P.2d 607, the jury awarded a verdict by assessing the plaintiff's damage in the sum of \$20.00 per month commencing with September 15, 1930, and the jury did not state when the compensation should end. The allegation was made that the verdict was ambiguous and therefore prejudicial and defective. The court held that it was harmless error and stated that the court could look at the entire record and

pleadings and from these a judgment on the verdict should be entered for a fixed amount.

The argument of defendant in this case that there is a duplication in the award is absurd. The jury found \$30,000.00 loss of earnings and \$12,500.00 in other general damages. If the general damage figure was meant to include the loss of earnings, the award for general damages could not have been \$12,500.00, but would have had to exceed \$30,000.00. The instructions given to the jury properly outlined all of the elements of damage for which they could permit recovery. It must be assumed that the jury consisted of intelligent individuals and that they followed the instructions of the court. In the case of *Weber Basin Water Conservancy District v. Nelson*, 11 Utah 2d 253, 358 P.2d 81, this court stated that presumptions and intendments cannot be indulged in to establish a contradiction or inconsistency in the findings or answers of a jury to special interrogatories, the presumption always being to the contrary. The same presumption must be given to the verdict reached by the jury in the present case. In the case of *Pace v. Parrish*, 122 Utah 141, 247 P.2d 273, it was again stated that whenever there is uncertainty or doubt in connection with the correlation of interrogatories with each other and their answers, they should be so interpreted as to harmonize with the findings of the jury if that can be done.

The award of \$30,000.00 for loss of earnings likewise was not unreasonable in light of the evidence. The court in its damage instruction instructed the jury on

past and future loss of earnings in the same paragraph, so naturally the jury considered these items together. The evidence established \$10,475.00 in past loss of earnings, and the balance of \$19,525.00 would constitute future loss of earnings. This amount is nominal in light of plaintiff's proven loss of earning capacity, his fixed bodily disability, his inability to return to his former type of employment, and his life expectancy. There is no reason or justification whatsoever to interfere with the verdict of the jury.

POINT III

THERE WAS NO ERROR IN FAILING TO STATE A FORMULA TO REDUCE FUTURE DAMAGES TO PRESENT WORTH.

Defendant claims error because the court failed to give JIFU instructions No. 90.34 and 90.35 relating to a reduction of future damages because of a present payment in cash. Again the difficulty with defendant's position is that he did not request these instructions to be given.

Defendant has cited two cases in support of his contention, neither of which is in point. In the case of *Hays v. New York Central Railroad Company*, 328 Ill. Appeals 631, 67 N.E.2d 215, the court granted a new trial on entirely different grounds. In doing so, the court commented on several of the jury instructions, among which was an instruction relating to the present value of future loss, stating that the court should have given a

formula whereby the jury could make the computation. The case was not reversed on this ground and the court did not say that this error was prejudicial. The question of waiver because of no request for an appropriate instruction was not even in issue.

The case of *Wentz v. T. E. Connally, Inc.*, 45 Wash. 2d 127, 273 P.2d 485, was not even a jury trial. In that case the court made detailed findings and the award was subsequently adjusted because the trial court had not taken into consideration the present value of a future loss. Again the question of waiver was not in issue.

In the instant case, it would seem that the same authorities as cited under Points I and II A. of this brief would now bar defendant from raising this objection on appeal.

CONCLUSION

Defendant was given a fair trial in this case and has shown no valid reason why the court should award a new trial or otherwise interfere with the verdict of the jury. The policy of the law is to bring litigation to an end and not to grant new trials merely because one of the parties is unsatisfied with the result.

As shown under Point I of this brief, the defendant was not deprived of his theory of the case. The instructions, when considered as a whole, show that all of the issues were fairly and intelligibly presented to the jury. Further, the defendant did not request the trial court to

instruct the jury on the specific ground of negligence of which he now claims to be deprived. Also, and in any event, the evidence would not support a finding of contributory negligence on the ground alleged.

As shown under Point II of this brief, defendant is barred from claiming any error in the form of verdict where he failed to make timely objections thereto. There was no error in the form of verdict, and even if there were error, it would be harmless and could not possibly be prejudicial.

Defendant has also waived his right to complain about additional instructions which he claims should have been given, but which he did not request.

Based upon all of the foregoing, plaintiff respectfully requests that the verdict of the jury and the judgment entered thereon be affirmed.

Respectfully submitted,

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