

1964

Verneta Cornia v. Albertson's : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERNETA CORNIA,

Plaintiff-Appellant,

— vs. —

ALBERTSON'S, a Corporation

Defendant-Respondent.

APR 2

1964

Supreme Court, Utah

Case

No. 10062

APPELLANT'S BRIEF

Appeal From the Judgment of the
Third District Court for Salt Lake County
HON. A. H. ELLETT, *Judge*

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APR 29

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries arising out of a fall due to a slippery substance on the floor of one of the Albertson's supermarkets in Salt Lake City, in which the plaintiff suffered injury to her back, requiring two operations.

DISPOSITION IN LOWER COURT

This case was tried to a jury. The court submitted a special verdict to the jury in the form of five questions and upon the basis of answers given to the special verdict, the court ordered the clerk to enter judgment, no

cause of action, which was accordingly done. Plaintiff made motion for new trial which was thereafter denied, from which plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the judgment in the court below and a new trial.

STATEMENT OF FACTS

This appeal is based exclusively upon the conduct of the court after the case had been submitted to the jury; however, it will be helpful to this court for a summary to be made of the evidence pertaining to the negligence of the defendant, particularly with respect to the error of the court in unduly emphasizing a portion of the direct testimony of one of the defendant's witnesses. Throughout this brief the appellant will be referred to as the plaintiff and the respondent will be referred to as the defendant.

Plaintiff, accompanied by her brother, Lon W. Rigby, went to the Albertson store on North Temple July 8, 1962, at about 6:30 p.m., to buy groceries. (R. 94) As she was entering the aisle of the produce department she slipped on a slippery substance and fell. (R. 97)

“It was some sort of produce. It was a slicky or slick, slimy sort of a substance . . . I took it to be either part of a tomato or some grapes or something of that type produce.”

This substance was intermingled with grime and dirt. (R. 99) The witness, *Verneta Cornia*, further described the substance as

“... a slick, slimy substance with an accumulation of dirt over it.” (. 178)

The witness *Lon W. Rigby* testified that he had paid particular attention to the condition of the floor of the store, and had particularly noticed that it was rather dirty, even at the front near the checking stands. (R. 187) He described the substance the plaintiff slipped on as follows:

“Well, I would describe it as very dirty, slimy substance that occurred from falling objects and falling produce and that had been on it some time and that — and it was mingled in with a lot of dirt and grime and things from the slimy produce and things that was there, and I noticed that generally around the whole thing, and then there was also an area which appeared — I could see below where they had also been mopping and some of — appeared to me that actually some of the water hadn’t reached that area, but as one had stepped on it, it could have been some of the water left tracked up to that area mingled in with that debris and things that had been on the floor.” (R. 189)

The problem on the floor did not appear to be just due to a single item of a cherry or a piece of tomato. (R. 189) He could not identify the type of vegetable or fruit involved because of the dirt which was mingled in with the substance and other things around that particular area. The slimy, slippery dirty condition of the store was

not confined to the point where plaintiff fell. The witness definitely observed that throughout the store the floor was about as dirty as any chain store he had ever been in up to that time. (R. 190) The witness testified that a person working at the checking stand could have seen the floor area where plaintiff fell, as she fell right close to one of the checking stands. (R. 196)

Ronald P. Sartori, a former employee of the defendant, testified that the floor had been swept about 20 minutes to half an hour before plaintiff fell. (This certainly gave store employees an opportunity to observe the condition of the floor at that time and indicates a negligent sweeping.) (R. 211) It was the policy of the store to clean up any accumulations of dirt or filth to keep the store clean at all times. (R. 213)

As a stock clerk, the witness Sartori would be in the aisle several times during the course of the day and would be in a position to observe whether the aisles were clean or dirty. (R. 216) There are certain items of grime and dirt that get onto supermaarket floors that do not come up with a broom and quite a bit of spot mopping has to be done, especially at the close of the day. (R. 217) There were areas around the produce department that needed to be spot mopped. (R. 218)

The witness *Andreason* was the store employee who designated Mr. Coburn to do the sweeping and mopping. Regardless of the numerous trips he made through the store on inspection, he did not request any spot mopping or brooming prior to the time they were about ready

to close the store. When the need existed, spot mopping was not left to the end of the business day. (R. 233) The witness acknowledged that sometimes objects get stepped on before they are picked up and they get intermingled with the grime that might be on the floor and the dust which makes a rather slippery dangerous floor. He could not say that any spot mopping was done in the vicinity of the vegetable counter or the fruit display until about closing time. (R. 234) There were several areas in the store that needed spot mopping when he told Mr. Coburn to do it, but he doesn't know at what time of day they first needed to be spot mopped. (R. 235)

The witness, *Timothy D. Coburn*, testified that he was employed by Albertson's in July of 1962. (R. 220) That he was down at the end of the produce aisle mopping at the time Mrs. Cornia fell. He had previously swept the whole floor. He stated:

"Well, the produce aisle has to be thoroughly swept because there is a ledge underneath the produce aisle where the lettuce and that are kept, where they can be wet down, and you have to particularly get under there because something can roll under there that you can't see, and you have to make sure it is clean because the produce are slippery." (R. 221)

Coburn was asked by the witness Ronald Sartori to mop up a mess and he observed what looked like a cherry. There was a pit and a maroon skid mark. The skid mark was about nine to twelve inches. Coburn cleaned up the mess and went back to work. There was no water on the floor at that point. He did not notice any produce

or other items on the floor in this area. Coburn's assignment was to make sure that the floor was clean and spot mop it where it needed to be mopped. He had swept the aisle where Mrs. Cornia fell about twenty to thirty minutes prior to the time she fell. (R. 222)

After the matter had been submitted to the jury and they had retired for their deliberations, they were called into court. At the request of the juror Pearce the court ordered the reporter to read the direct testimony of the witness Coburn down to the point where he mentioned sweeping the aisle where Mrs. Cornia fell about twenty to thirty minutes prior to the time she fell. (R. 254 — R. 258)

The cross examination of the witness Coburn was not later read to the jury, but upon cross examination witness Coburn qualified his direct testimony by stating that there were areas around the produce counter in the vicinity of where Mrs. Cornia fell that needed to be spot mopped. After he had swept the floor down some twenty to thirty minutes earlier he intended to return with the mop and clean those areas up. There had been things on the floor that the cart had made marks in, intermingled dirt and moisture and possibly from other produce that had fallen and been picked up or things of that nature. That all grocery stores in spots will be grimy, particularly around the produce department. (R. 224) The store is always dirtier towards the close of the day and this was a pretty busy store. (R. 225) He had been spot mopping for about fifteen minutes when the incident happened. He was almost through. (R. 226)

Some of the water gets intermingled with the dirt and the grime there and helps to create a problem requiring spot mopping. The residue of whatever lettuce leaves or tomato or fruit or cherry or whatever it is that might have fallen on the floor becomes mingled with water and dirt and has to be spot mopped, but the witness claimed there was no water on the floor at that time. The produce manager freshened the vegetables on that day prior to 4:00 o'clock. (R. 227)

Howard L. Andreason testified that he was the third man or third manager of the store. (R. 229) He designated Mr. Coburn to sweep and mop the floor on the day of the accident. He did not recall requesting any sweeping or mopping prior to 6:00 o'clock on that day. Despite the numerous trips which he claimed to have made through the store on inspection, he required no spot mopping or brooming prior to the time they were ready to close. (R. 233) Customers going by a display of cherries or grapes knock them off the table onto the floor, sometimes these objects get stepped on before they are picked up and they get intermingled with the grime that might be on the floor and it makes rather a slippery, dangerous floor. Does not recall whether any spot mopping was done in the vicinity of the vegetable counter or fruit display until just about closing time. (R. 23) There were several areas in the store that needed spot mopping when Mr. Coburn was told to do it, but the witness did not know what time of day they first needed to be spot mopped. At any rate, the spot mopping was not assigned until about 6:00 o'clock so that there

may have been areas in the store at 2:00 o'clock in the afternoon that should have been spot mopped. (R. 235)

At the conclusion of the evidence, the defendant made a motion for dismissal, claiming failure on the part of the plaintiff to establish a *prima facie* case and the court ruled that it was a jury question and denied the motion. (R. 240)

The jury were recessed from the court room at 4:21 p.m. to retire to the jury room and at 6:31 p.m. the court called them back to inquire as to the status of their deliberations and appetite. He asked the jurors if they had answered some of the questions and was informed by the foreman that they had. The court requested that the sheriff pass the incompleated special verdict up to him for examination, and was told by the foreman that the verdict had not been signed, whereupon the court said:

“THE COURT: You don't have to sign. If you have got an answer — you won't need to mark it. Let me take a little view of how we are going.

“MR. OAKSON: We have done more than we show here, Your Honor.

“THE COURT: Well, maybe if you would show what you (R. 249) have now done and let me see, it might be that we could save some time in this.

“MR. OAKSON: Can I tell you what—

“THE COURT: No, don't tell me yet. I don't want these fellows to know. I am leaguuing up with you, but if you can do it in that — can do it in the jury box?

“MR. OAKSON: Sure. We are down to one question.

“THE COURT: Okeh. You do what you can, and then let me take a look at it. Now, for the two answers that are here, would more than six jurors sign that?

“MR. OAKSON: Six, yes, sir, or more.

“THE COURT: Well, let's have six sign that, and then I believe I will have some help for you. And if six or more have signed each one, would you sign at the end thereof as foreman too, Mr. Oakson.

“MR. OAKSON: All right, sir. On each individual question?

“THE COURT: The answers are as follows, and I will let counsel know and ask you to show by the raising of your hand if you have agreed with this answer: ‘Did the plaintiff receive any injury as a result of any slip or fall which she (R. 250) sustained in the defendant's store?’ The answer is ‘Yes.’

“Those jurors who agreed and signed that answer please raise your hands. That is six hands up. The ones disagreeing with that would be Mr. Jordan and Mr. Lewis, yes.

“Question 2, ‘Did any employee of the defendant place any slick or slimy substance upon the floor which caused the plaintiff to slip or fall?’ The answer is ‘No.’

“That is signed by all eight jurors. If you agree with this answer, show your hand. That's all hands.

“Question — there are only five that signed question 3. Is there somebody else that signed —

five can't find that. Is there somebody who didn't sign No. 3?

"MR. UNDERWOOD: That is the one we are held up on.

"MR. LEWIS: That is the one we are held up on.

"THE COURT: I see. So we have no answer to 3.

"MR. OAKSON: That's right.

"THE COURT: Oh. Well, I can't help you. If the answer — if 3 had been answered, I could have saved a little time. So there really isn't an answer to 3 yet. So my — I was going by the answer, assuming that six had agreed. I was in error about that, and I would have to let you debate further on 3." (R. 251)

After informing the jury that he would send them out to dinner the court stated that if they had answered the first 4 questions there could be a possibility that it would not matter whether they answered 5 or not, depending on how the first 4 were answered, so he would keep the partial verdict locked up until they returned from lunch. (R. 252)

The juror Pearce told the court that he was deeply concerned about whether they were spot mopping the floor or whether it was a general mop. (R. 253)

The juror Pearce asked that the testimony of the witness Coburn be read, whereupon the court directed the reporter to read the testimony of the witness Coburn. (R. 254)

The reporter then proceeded to read from the direct testimony only of the witness Coburn pertaining to

the sweeping and mopping of the store and to the discovery of the substance which looked like a cherry in the area where the plaintiff slipped. The witness also testified to having swept the floor and having made sure that it was clean and that the floor was dry and that he had swept the aisle about twenty to thirty minutes prior to the plaintiff's fall. (R. 255 to R. 258)

Mr. Pearce stated that he had heard enough and none of the jurors indicated an interest upon hearing any more upon being questioned by the court. None of the cross-examination was read, which qualified considerably the testimony on direct. Another juror, Mr. Cornelius, said to the court that it seemed to him that the crux of the matter in question 3 was time, to which the court agreed, but the juror stated that in his opinion time wasn't the crux of it and he wanted to know if he could properly abstain from voting on this. The court then entered into a rather lengthy explanation of the duty of the store and as to what would constitute negligence on the defendant's part. (R. 258, R. 259)

Thereafter the juror Oakson reacted to the coercive comments of the court, suggesting that they ought to go to eat and come back to *give everybody a chance*, to which the court acquiesced. (R. 260) The coercive effect of the court's participation in the juror's deliberations in the courtroom was also felt by the juror Lewis who asked permission to make the following statement:

“MR. LEWIS: I think that on something like this, I don't think for all the parties involved there should be any trying to rush this idea of getting

home. Goodness only knows I have to go to the office, and I will be working tonight, and I am sure the rest of them will, but if we go in there for ten minutes, I know it is going to be in my opinion, just going to be a matter of trying to get a decision, and I think in fairness to both parties that it should be decided on a level of not rushing and taking the time.

“MR. PEARCE: Right.

“MR. JORDAN: Right.

“THE COURT: You get that anyway. If you bring your verdict in, the sheriff will take you.

“MR. LEWIS: The thing I am getting at is if we try to go in on ten minutes, I don't think it is a fair verdict.” (R. 261)

After the jury had been released to go to dinner and while they were continuing their deliberations, counsel for the plaintiff made the following statement into the record:

“MR. WHITE: Comes now the plaintiff and excepts to the proceedings interrupting the deliberations of the jury wherein the jury were called back into the courtroom, and during the course of inquiry as to whether they wanted to continue their deliberations or go to lunch, the court inquired as to the stage of the deliberations, and in the course of such inquiry suggested that the special verdict which had been handed to them for finding be shown to him with the view that he might assist in their deliberations, and that the verdict was in fact shown to him before it was arrived at, and discussion had been upon it and returned to the jury, and the jury deliberated on it in the courtroom and again returned to the court, and

the court made comment on it, read part of the verdict without reading all of it; and plaintiff excepts to this entire proceeding as being against law and irregular and interfering with the functions of the jury to independently arrive at a verdict; that it prejudiced the negotiations for settlement pending the deliberations of the jury; that it made an untimely revelation of the course of the deliberations which the jury's verdict was taking.

“Further objects to the reading of the testimony — the direct testimony of one witness at the request of one of the jurors to the jury. Excepts to the failure to read the cross examination on the ground that the portion read placed undue emphasis upon that part of the witness's testimony, and although it satisfied the juror that had made the inquiry concerning the matter, it may very well have operated to the prejudice of the plaintiff with respect to the other jurors who had not yet completed their deliberations; placed undue emphasis upon the direct examination of one witness only on a vital portion of the evidence about which there was other evidence elicited from other witnesses; and that the direct testimony was also modified by the cross examination, which was not read to the jury.” (R. 262, R. 263)

The plaintiff thereafter moved for a mistrial which the court denied. (R. 265)

Thereafter the jury returned to the courtroom and gave the court their special verdict in which 6 jurors agreed that the plaintiff had been injured by her fall in the defendant's store. All 8 jurors found that no employee of the store had placed any slick or slimy substance on the floor, and answering question 3, 6 of the 8 jurors found that the slick or slimy substance had not

been upon the floor for such a length of time as would have permitted employees of the defendant to have notice of it and remove it. Seven of the jurors agreed that the plaintiff was not contributorily negligent. (R. 266)

The court thereupon indicated judgment in favor of the defendant, no cause of action. (R. 267)

ARGUMENT

POINT 1.

During the course of the jury's deliberations the trial court erred to the prejudice of the plaintiff, in requiring the jurors to show him the special verdict form before their deliberations were completed; in requiring them to deliberate in open court in his presence and in the presence of the parties; in directing them to signify by raised hands how they were voting; in directing them to sign their names to the questions on the special verdict in open court; and in requiring them to make, through him, premature disclosure of their partially completed verdict.

The extent of the trial court's interference with the deliberations of the jury in this case seems to be without appellate court approved precedence in the history of trial by jury. We certainly respect the right of the trial court to recall the jury for the purpose of inquiring whether they were near a verdict or would like to go to dinner, but we feel that the trial court should restrain his curiosity and not probe into the details of the jury's deliberations to the point of requiring them to display to him

a partially completed special verdict form which led to his subsequent regrettable interference with the jury's fact-finding function. Rule 47 (L) provides that the officer in charge of the jury must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

In *Brasfield v. United States*, 71 L. Ed. 345, appears the following:

“The only errors assigned which are pressed upon us concern proceedings had upon recall of the jury after its retirement. The jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically and was informed by the foreman that it stood nine to three, without indicating which number favored a conviction.

“We deem it essential to fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend on circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence on the jury, from whose deliberations every consideration other than that of the evi-

dence and the law as expressed in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

“The failure of appellant’s counsel to particularize an exception to the court’s inquiry does not preclude this court from correcting the error . . . This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be sufficiently remedied by modification of the judge’s charge after the harm has been done. It is unnecessary to consider other assignments of error directed to the instructions given to the jury at the time of its recall.”

In *Kelsey v. United States*, 47 F. 2d 453, the court said:

“Because of the imputations of stubborn or worse which is likely to arise if the numerical division of the jury is publicly revealed, to require disclosure of it is held error per se in the courts of the United States, *Brasfield v. U. S.*, 272 US 448, 71 L. Ed 345.”

Although the court while speaking may not have been aware of it, the jury and counsel while listening felt that the court was actually participating in the factual deliberations of the jury and the court’s attempt to expedite those deliberations must have had some coercive influence upon the sixth juror who ultimately joined the other five in signing his name to interrogatory No. 3. He had witnessed, as had we, the jurors who had signed the questions while in the jury-box in open court so that it was apparent to him, as it was to us, which jurors were not concurring in that most important deliberation at that

point. This, in effect, was not only a numerical disclosure of how the jurors stood, but it was an identification of those who had not yet concurred. It is also reasonable to assume that the jurors who had indicated concurrence with the special interrogatories by raising their hands in open court, as well as by signing the special verdict, would feel reluctant to change their mind or their vote, whereas otherwise in the deliberations which followed they might have found it desirable or proper to do so. We suppose that this is one of the fundamental reasons that juries are instructed not to prematurely make up their minds before their deliberations in the jury room are concluded.

The jurors who had signed their names to the questions on the special verdict during their interrupted deliberations in the courtroom may very well have believed that it would not be permissible or proper for them to scratch out their names on the verdict form or in any manner change their position, that having once formally indicated their position they were precluded from amending or changing it. It would seem rather contradictory for the court to take pains in admonishing the jury to withhold their judgment until final submission of the matter to them and then during their deliberations place them in a situation where their expression of judgment is prematurely requested. Certainly the jurors who had already indicated how they stood in open court would not want the judge or the parties to think that they would vacillate or change their position, and this would render further deliberations nugatory and unproductive as far

as the modification of their expressed viewpoint was concerned.

An examination of the special verdict discloses that there was no change in the alignment of the jury and that the signatures placed on the special verdict in open court prior to the completion of the jury's deliberations were not disturbed or altered and this, despite the fact that the jury deliberated for approximately two hours after their return from dinner. Thus plaintiff's fear of judicial coercion eventuated into fulfillment.

The court, himself, had examined the partial verdict and noted the names of the five who had signed it and this very examination had occurred in the presence of the whole jury. This is a much stronger factual situation for a new trial than the federal cases just cited where only the numerical division of the jury was the matter about which inquiry had been made.

This coercive impact is evident from the statement of the juror Lewis who did not like the atmosphere which had been created and who felt that they should not try to rush their deliberations with the view to getting home and who stated that he felt, in fairness to both parties, the matter should be decided on a level of not rushing and taking the time, and the foreman, Mr. Oakson, said that he thought the jury ought to go to eat and come back. Of course, the court acquiesced in this desire expressed by the jury, but the harm had already been done.

Moreover, it is always the policy of the court to encourage and favor the matter of settlement. Notwith-

standing the affidavit of the attorney for the defendant, there had been settlement discussion during the jury's deliberations in which counsel for the defendant had stated that he only had \$3,500.00 authority and counsel for the plaintiff had indicated a willingness to accept \$6,000.00. The premature disclosure of the jury's deliberations completely destroyed any settlement possibility, in that it was apparent to both parties that five of the jurors had indicated an answer resolving the issue in favor of the defendant because the court had made it clear in his comment that having answered the first three questions, it was unnecessary for them to consider question No. 4 which was the question regarding damages.

We do not think that it is part of the function of the trial judge to participate in the deliberations of the jury after the matter has been submitted to them under a thorough and proper charge, and we earnestly submit that the effect of the proceedings after the recall of the jury was to create an improper interference with the jury's function to the prejudice of the plaintiff, for which a new trial should have been granted.

In the recent case of *State of Utah v. Martinez*, 7 U. 2d, 387, 326, Pac. 2d 102, Mr. Justice Henriod in reversing the trial court for permitting jurors to ask questions of a witness after they had retired to deliberate, took note of the fact that counsel are placed in an embarrassing position where they are reluctant to invoke the displeasure of the jury by making objections under such circumstances. After the juror Pearce had made a re-

quest for the reading of the testimony of the witness Coburn at the time the jury was recalled, it may have prejudiced the plaintiff's position to object to the juror's request or to request the cross-examination to be read after the juror had indicated he was satisfied with what had been read. The court was in a much better position to explain to the juror why his initial request should be denied, and having erred in granting it, the trial court could have made some effort to have the court reporter read other evidence to the jury, and at least the cross-examination of the witness Coburn. The court was given a further opportunity to correct or minimize the impact of his error when the plaintiff moved for a mistrial, calling his attention to the failure to read the cross-examination of the witness and other evidence which substantially modified or opposed the direct testimony which had been read.

POINT 2.

The court erred to the prejudice of the plaintiff in directing the court reporter to read part of the direct testimony of the witness Coburn.

The court allowed the reading of part of the testimony of the witness Timothy W. Coburn at the request of one of the jurors and although the court cautioned that by reading it it was not intended that extra emphasis be given to his testimony, that was nevertheless the inescapable result. His testimony related to the very problem that the jury was encountering in answering interrogatory No. 3 which at that point had not been resolved by a sufficient number of jurors to establish a verdict.

The reading of a portion of the testimony of one witness to the jury after the matter had been submitted to them was held reversible error in the Utah case of *Jenkins v. Stephens*, 64 U. 307, 231 Pac. 112, from which we quote as follows:

“... Mr. Skeen was an important witness, testifying in rebuttal after the defendant had closed her case. It was, therefore, doubly important that if this witness’ testimony was to be selected and read separate from all other testimony bearing on that particular question, his entire testimony should have been read to the jury, notwithstanding the jury expressed themselves as satisfied with what had been read.

“The Court of Appeals of Colorado in *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 855, in considering the action of the trial court in permitting certain testimony to be read to the jury after the case had been submitted said: ‘But without regard to any question of legal effect of this testimony, it was serious error to permit it to be read to the jury after the case had been submitted to them. They thus heard a portion of the plaintiff’s testimony twice and the last time disconnected from all the other evidence, so that they went back to their room with their memories refreshed as to this; and having listened to it out of its connection, they would be liable to give it an importance to which it was not entitled and which they would not have given it otherwise.’

“Courts generally do not favor permitting any one witness’ testimony on a particular question, whether there is other testimony on the record bearing on the same question, to be read to the jury after a case has been submitted. . . .

“We need not determine whether the giving of the instruction and the reading of the testimony in the absence of counsel would of itself constitute reversible error in the absence of some showing that prejudice resulted by permitting or causing to be read to the jury the direct testimony of a witness without having the cross examination read, and in giving of an instruction which is in conflict with former instructions, are such error that in our opinion must of necessity result in a reversal of the judgment and a granting of a new trial.”

The above case was cited with approval in Justice Wolfe’s concurring opinion in *State v. Peterson*, 110 U. 413, 174 Pac. 2d 843.

On the cross-examination the witness Coburn qualified his direct testimony which alone was read to the jury, by admitting that there were areas around the produce counter where Mrs. Cornia fell that needed to be spot mopped; that after he had swept the floor down some twenty to thirty minutes earlier he intended to return with the mop and clean those areas up; that there had been previous things on the floor that the cart had made marks in, intermingled dirt and moisture and possibly from other produce that had fallen or things of that nature. (R. 224) Further on cross-examination Coburn testified that the produce manager freshened the vegetables on that day prior to four o’clock.

In further conflict with the portion of the witness Coburn’s testimony which was read to the jury in which he asserted that the plaintiff had apparently slipped upon

a cherry, was the testimony of the plaintiff who testified that the slippery substance upon which she fell was a slimy sort of substance which she took to be either part of a tomato or some grapes or something of that type which had been intermingled with grime and dirt. (R. 99) The witness Rigby stated that the problem on the floor where plaintiff fell did not appear to be just due to a single item of a cherry or a piece of tomato. (R. 189) He also stated that the slimy dirty condition of the store was not confined to the point where the plaintiff fell. That he could not identify the type of vegetable or fruit involved because of the dirt which was intermingled with it. (R. 190) The witness Sartori had testified that he had been in the aisle in question several times during the course of the day, (R. 216) and that there were areas around the produce department that needed to be spot mopped. (R. 218)

The witness Andreason testified that regardless of the numerous trips he had made through the store on inspection, he did not request any spot mopping or brooming prior to closing time and he acknowledged that there were several areas in the store that needed spot mopping when he told Mr. Coburn to do it and he did not know at what time of day they first needed to be spot mopped. (R. 235)

It was apparent during the postsubmission procedure in which the court directed, guided and participated in the jury's deliberations, that question No. 3 was the one which presented the most difficult problem to the jury

— the matter upon which they were then, despite the court's interference, unable to agree. This emphasizes the prejudicial impact of the court's reading a portion of the witness Coburn's testimony in which he claimed to have swept the store just twenty minutes prior to plaintiff's fall and that the plaintiff had apparently slipped upon a cherry which had subsequently been dropped on the floor in some unknown manner. Certainly it is fair to say that the jury having listened to such testimony out of its connection with the case and sans its subsequent modification by the witness himself would be likely to give to it an importance to which it was not entitled and which would not have been given it otherwise.

This probability was directly called to the trial court's attention by counsel for the plaintiff who excepted to the court's failure to read the cross-examination on the ground that the portion read placed undue emphasis upon that part of the witness's testimony, and it placed undue emphasis upon a vital portion of the evidence about which there was no other evidence elicited from other witnesses.

POINT 3.

The trial court erred in denying plaintiff's motion for mistrial and in denying plaintiff subsequent motion for a new trial.

For the reason set forth in the argument under Points 1 and 2, plaintiff was deprived of a fair trial, and the court erred in denying plaintiff's motion for a mistrial and for a new trial.

CONCLUSION

For the various reasons discussed in this brief, and for any other reasons which may occur to this court through careful consideration of this appeal, plaintiff earnestly contends that the judgment of the lower court should be reversed and plaintiff, in the furtherance of justice, should be granted a new trial.

Respectfully submitted,

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