

1964

## Verneta Cornia v. Albertson's : Brief of Respondent

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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**VERNETA CORNIA,**

*Plaintiff-Appellant,*

**vs.**

**ALBERTSON'S, a corporation,**

*Defendant-Respondent.*

**Case No.  
10062**

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**BRIEF OF RESPONDENT**

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**Appeal from the Judgment of the  
Third District Court for Salt Lake County  
Hon. A. H. Ellett, Judge**

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**FILED**  
JUN 29 1964  
Supreme Court,

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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VERNETA CORNIA, <i>Plaintiff-Appellant,</i>	}	Case No. 10062
vs.		
ALBERTSON'S, a corporation, <i>Defendant-Respondent.</i>		

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BRIEF OF RESPONDENT

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STATEMENT OF THE KIND OF CASE

Plaintiff brought this action against the defendant claiming injuries as the result of an alleged fall in one of the defendant's markets in Salt Lake City. Plaintiff claimed that the fall was caused by an unknown slippery substance on the floor.

## DISPOSITION IN LOWER COURT

The issues of fact were submitted to the jury in the form of a special verdict. The answers given by the jury found that the defendant was not negligent in any manner. Based upon the jury's answers, the court directed that judgment on the verdict be entered in favor of the defendant and against the plaintiff, no cause of action on her complaint. Thereafter, plaintiff filed a Motion for a New Trial and argued the same before the trial court, Honorable A. H. Ellett presiding, who denied plaintiff's motion. Plaintiff thereafter filed this appeal.

## RELIEF SOUGHT ON APPEAL

Defendant-respondent seeks affirmance of the judgment based upon the jury's verdict rendered in the court below.

## STATEMENT OF FACTS

Appellant bases her appeal exclusively upon the conduct of the court after the case was submitted to the jury. (Appellant's Brief, Page 2). The jury found the issues of fact in favor of the respondent. The appellant does not take exception to the jury's findings and, therefore, all issues of fact and reasonable inferences arising therefrom will be viewed in a light most favor-

able to the respondent. *Toomer's Estate vs. Union Pacific Rail Company*, 121 Ut. 37, 239 P. 2nd 163.

Respondent will limits its statement of facts to those commencing from the time the jury was returned to the courtroom immediately prior to its taking a recess for dinner. There is no useful purpose to be served in making a lengthy recitation of the facts surrounding the issues of liability since the jury's findings as to liability are not under attack. (Appellant's Brief, Page 2). There appears an obvious effort on the part of the appellant to invoke the sympathy of this court by setting out testimony of witnesses on issues not raised on appeal. (Appellant's Brief, Pages 2 to 7, 22 and 23).

While the jury was deliberating, the court advised counsel that he was going to have the jury returned to the courtroom to see if they desired to go to dinner. The jury returned to the courtroom at 6:31 P.M. The court then stated:

"The Court: Officers of court, Lady and gentlemen, and the parties here are getting hungry, and we were wondering whether we would have time to eat and what the status of your matter and appetite is. I told you you would be your own boss, and you are, but we kind of could work our program in with yours if we knew how you were standing. Have you answered some of the questions?"

"MR. OAKASON: Yes, sir, we have." (R. 249).

The court then went on to ask the foreman of the jury, Mr. Oakason, to pass the questions to the sheriff so that the court could see the answers that they had made .The foreman informed the court that although some of the questions had been answered, there were no signatures to the verdict. The court then informed the foreman that the signatures would not be necessary but he would like to look at the answers they had put on the questions submitted to them. The answers were then viewed by the court. At this point the foreman of the jury was attempting to inform the court how the jury stood but was not allowed to do so by direct order of the court. The foreman stated:

“MR. OAKASON: 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 you do it in the jury box?”

“MR. OAKASON: Sure, we are down to one question.”

“THE COURT: Okey. You do what you can, and then let me take a look at it.” (R. 250).

The verdict was then returned to the foreman of the jury, who filled in the answers to the questions that the jury had already decided. The verdict was then returned to the court. After looking at the verdict a second time the court inquired of the foreman as follows:

“Now, for the two answers that are here, would more than six jurors sign that?”

“MR. OAKASON: 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. Oakason." (R. 250).

The verdict was then returned to the foreman of the jury, who circulated the verdict among the jurors for the signatures and then returned the same to the court. At this point the court viewed the verdict and stated as follows:

**"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 . . ." (R. 250).

The court then went on to read the first two questions and answers, and in doing so polled the jury by a showing of hands as to whether or not the answers of the persons signing the verdict, of which they all agreed. (R. 250 and 251). When the court reached Question Number 3 and before reading the question the court said:

**"Question—**There are only five that signed Question Number 3. Is there somebody else that signed—five can't find that. Is there somebody who didn't sign Number 3?"

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

**"MR. LEWIS:** That is the one we are held upon."

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



**“MR. OAKASON:** 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. Now that I have broken into your affairs, do you want to do to dinner?” (R. 251).

The court then went on to inquire of the jury as to whether or not they desired to go to dinner or have dinner sent in. While the matter of going to dinner was being discussed a juror inquired of the court concerning further evidence. Mr. Pearce stated as follows:

**“MR. PEARCE:** Your Honor, I have one question. Is there any part of this that we could ask a question of you that might help us in our decision of this?”

**“THE COURT:** Well, I can talk to you about the law. You are the sole judges of the fact. If the law isn’t clear, I could rewrite it or maybe explain it. What did you have in mind?” (R. 252 and 253).

Then after further discussion, juror Pearce said:

**“MR. PEARCE:** My question is, your Honor, and the thing that’s been in my mind that I am concerned about deeply is they were mopping the floor admittedly, but were they spot mopping this, or was this a general mop?”

**“THE COURT:** Well, now, this is a question that the jurors themselves are going to have to

determine. I'm not permitted to comment on the evidence or tell you at all. You have to determine for yourselves from the evidence what it was, and no one can tell you what the fact is. Of course, if you don't follow the evidence, it would be my duty to give a new trial in the matter, so you are not permitted just to make up things. You have to follow the evidence as given. If there should be any question in your mind, a dispute that you can't settle amongst yourselves on a factual situation, I suppose the reporter might be able to help you by reading testimony to you."

"MR. PEARCE: This would be helpful. I would like it."

"MR. LEWIS: I think that——"

"THE COURT: Might solve your question?"

"MR. PEARCE: I think it will."

"THE COURT: Well, what witness did you want to know about?"

"MR. PEARCE: This would—this would have reference I think to the boy that was doing the mopping, Coburn."

"THE COURT: That would be—would it be Coburn, Timothy Donald Coburn?"

"MR. PEARCE: Yes."

"THE COURT: Miss Parker, can you find his testimony? You still will understand that you are the sole judges of the evidence and the fact that Miss Parker is reading to you what she took down is just to be of help to you. Still it is for you to decide what the evidence is and was."

**“MR. PEARCE:** Yes, I understand this, sir.”

**“THE COURT:** All right. Before you read it, let me say something else. The fact that we are reading this, one man’s testimony, isn’t to be understood as giving any extra emphasis to his testimony.”

**“MR. PEARCE:** Yes, sir.”

**“THE COURT:** That if there is any doubt about what some other witness said, you may have that read too.”

**“MR. PEARCE:** Okey.”

**“THE COURT:** All right.” (R. 253 and 254).

The reporter then commenced to read the testimony of the witness as requested by the juror. (R. 254 to 258). After a considerable portion of the direct testimony of the witness had been read the juror requesting this testimony said:

**“MR. PEARCE:** I have heard enough.”

**“THE COURT:** Does anyone want to hear more?” (R. 258).

No one requested any further reading of the testimony of this witness, and plaintiff’s counsel made no request or voiced any comment in respect to the reading of such testimony. (R. 258). The court then again discussed with the jurors their desires about going to dinner. It was decided that the jury would retire to a restaurant to have something to eat before further

deliberating on the case. Prior to leaving the courtroom juror Pearce stated:

“Your Honor, why don’t you give us ten minutes and see how we are coming, and then we will go eat.”

“THE COURT: All right. Do you want a recess—yes.”

“MR. CORNELIUS: Your Honor, in that question number three, it seems to me that the crux of it is a matter of time.”

“THE COURT: That’s right.” (R. 258).

The court then went on to briefly discuss the question of going to dinner and it was then indicated by some of the jurors that they did not want to further deliberate as suggested by juror Pearce. At this point witness Lewis stated that in fairness to both parties they should not decide the issue by rushing and they should take their time and go to dinner.

“MR. LEWIS: I think dinner is the answer.”

“THE COURT: Generally it is.” (R. 261).

After the jurors returned from dinner, they resumed deliberations, and at 10:17 P.M. the jurors returned to the courtroom stating to the court that they had answered all but the last question. The court examined the questions and answers affixed thereto and announced the findings and directed that a judgment be entered in favor of the defendant based upon the jury’s verdict. (R. 265 to 268).

## POINTS URGED FOR AFFIRMANCE

### POINT I

THE COURT DID NOT ERR IN INQUIRING OF THE JURY AS TO THE STATUS OF THEIR DELIBERATIONS, NOR DID THE COURT REQUIRE THE JURY TO DELIBERATE IN OPEN COURT.

### POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING THE REQUEST OF A JUROR TO HEAR TESTIMONY OF ONE OF THE WITNESSES.

### POINT III

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MIS-TRIAL OR IN DENYING APPELLANT'S SUBSEQUENT MOTION FOR A NEW TRIAL.

## ARGUMENT

### POINT I

THE COURT DID NOT ERR IN INQUIRING OF THE JURY AS TO THE STATUS OF THEIR DELIBERATIONS, NOR DID THE COURT REQUIRE THE JURY TO DELIBERATE IN OPEN COURT.

The record clearly reflects that the court, prior to the dinner recess, asked the foreman of the jury whether or not they desired to go to dinner and incidental thereto, whether or not they had made any progress in their deliberations. (R. 249). At no time did the court request that the foreman divulge the numerical division of the jurors voting on any particular question until the foreman indicated to the court that six or more of the jurors had approved of the answers to all but one of the questions. In fact, the court interrupted the foreman of the jury and admonished him not to reveal the division of the jury on the answers given at that time. (R. 250). The court was told in its discussion with the foreman of the jury, that six or more of the jurors had concurred in the answers that were made to the interrogatories. Upon privately reading the answers to the questions submitted to the jury, it was apparent to the court that the jurors had found that the defendant was not negligent and therefore not liable to the plaintiff. In the interest of time, the court then handed the interrogatories back to the foreman of the jury for signatures.

Appellant, in her brief, infers that the court inquired of the jury as to the numerical division prior to being told that they had answered all but one question and that the court was making unnecessary inquiries that were coercive. The record clearly shows that such inquiry was made only after the court had been told that the jury had answered all but one of the questions. (R. 250).

In the case of *Railway Express Agency vs. Mackay*, 181 Federal 2nd 257, 19 ALR 2nd 1248, the United States Circuit Court of Appeals (8th Circuit) discussed the question of the court's authority to ascertain if the jury is making any progress in their deliberations. In its opinion, the court quotes from the case of *Allis vs. United States*, 155 U.S. 117, 15 Supreme Court 36, 39 Lawyers Edition 91, wherein the Supreme Court of the United States said:

"It is a familiar practice to recall a jury, after they have been in deliberation for any length of time, for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment."

This view is also supported by other authorities. See 53 *American Jurisprudence*, Page 651, Section 904, wherein the author states:

"It is not error, however, for a trial judge to communicate with a jury after they have been in deliberation for any length of time, for the purpose of ascertaining whether they have agreed, or as to the reason for their disagreement."

Counsel for appellant has cited two Federal cases wherein the courts disapproved of the practice of the trial judge asking the jury as to the numerical division of the jury prior to its arriving at a decision. It should be noted that the cases cited by the appellant are crimi-

nal cases requiring a unanimous verdict. Obviously, no useful purpose could be served in asking the jury, prior to a decision, what number stood for conviction and what jurors were for acquittal. In these cases, a unanimous verdict is required and no useful purpose is served in inquiring about the numerical division. In a civil case requiring less than a unanimous verdict, the court, of necessity, must inquire of the jury whether or not at least three-fourths of the jurors have arrived at a verdict. Otherwise, the court could not be of assistance to the jury when assistance was needed. In any event, in the instant case, the court did not make any inquiry of the jurors until the foreman represented to the court that at least six or more of the jurors had agreed to the answers placed on the questions. (R. 249-250).

It should be observed that no deliberations of any nature occurred while the jurors were present in the courtroom. The record is absolutely silent as to any deliberations but reflects only the fact that the answers to the questions were signed by the jurors while in the courtroom. Rules 47 (q) and (r) of the Utah Rules of Civil Procedure provides that if a verdict 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 the instant case, the foreman of the jury told the court they had arrived at answers to all but one question but had not signed the verdict.

On page 18 of appellant's brief, opposite counsel claims that the jurors indicated a coercive impact by



stating that they did not wish to rush their deliberations. The court did not attempt to rush the deliberations of the jury but in fact, to the contrary, advised them that perhaps going to dinner would give them more chance to consider the matter and to resolve their problems. The trial court said:

“THE COURT: Well, we can do a little better than that. I suppose we can have the chicken—Harman’s to send over chicken dinners with coffee if you wanted it. If coffee would serve, it would take about as much trouble to get the coffee as the whole dinner. *It wouldn’t take you much longer to go eat, and it might do you good if you are having problems.*” (R. 251). (Emphasis ours).

The court then attempted to encourage the jurors to take all the time they needed by further saying:

“THE COURT: If you got out and aired and forgot about your problem, maybe when you came back you would have a little different attitude. What do you think about that? Would that be wise?” (R. 252).

After the foregoing conversation took place the juror, Pearce, requested the court to read the testimony of witness Coburn. It was after the testimony of witness Coburn that Pearce wanted to speed up the deliberations by suggested that a ten-minute period of deliberations might be sufficient to resolve the matter still pending. (R. 258). In response to the suggestion of Mr. Pearce, it was then that juror Lewis stated that there was no need to rush the deliberations and that

he thought it was a good idea if they go to dinner. To this juror Lewis replied:

"I think dinner is the answer."

The court responded by saying:

"Generally it is." (R. 261).

The appellant, at page 19 of her brief, infers that settlement negotiations were being conducted by the parties while the jury was deliberating. The affidavit of counsel for the respondent completely refutes the allegations made by the appellant in this regard. (R. 71). Opposite counsel intends to mislead this court by such assertion for the reason that no offer of settlement was ever made by respondent's counsel during the course of the trial. In any event, such are not matters of record and have no place in a brief on appeal.

Appellant cites the case of State vs. Martinez, 7 Ut. 2nd 387, 326 P. 2nd 102, in support of her case. A review of the facts and law of the Martinez case indicates that it was a case concerning the propriety of permitting jurors to cross examine witnesses. The case is not in point with the instant case and need not be further discussed.

## POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING THE REQUEST OF A JUROR TO HEAR TESTIMONY OF ONE OF THE WITNESSES.

On page 20 of the appellant's brief, opposite counsel infers that the court directed the reporter to read only a portion of the testimony of one of the witnesses. This is not an accurate statement of the record as is clearly shown by the request of the court that the testimony be read. (R. 254). It was only after the juror indicated to the court that no further testimony was desired that the reporter discontinued reading her notes. The court then inquired:

“Does anyone want to hear more?” (R. 258).

Counsel for appellant made no request in connection with such testimony, and made no comment whatsoever in respect to the matter. (R. 258).

Appellant cites the case of *Jenkins vs. Stevens*, 64 Ut. 307, 231 P. 112, stating that it is improper and reversible error to allow the reading of a witness's testimony while the jury is deliberating. The facts in the *Jenkins* case show that the testimony was read to the jury without first notifying counsel for the parties, which was contrary to the statute. In the instant case, counsel for both parties were present in the courtroom when the request was made. Rule 47 (n) of the Utah Rules of Civil Procedure provides for the furnishing of the jury with the testimony of any of the witnesses where there is a disagreement. This court approved the reading of a witness's testimony by its opinion in the case of *State vs. Hines*, 6 Ut. 2nd 126, 307 P. 2nd 887, wherein this honorable court said:

"No authority is cited, and we are acquainted with none, which holds that the granting of such a request is error. On the contrary, the well-recognized general rule is that it is within the trial court's discretion to grant the jury's request to reread parts of the testimony."

See also an annotation on the subject at 50 ALR 2nd 176, wherein the author states:

" . . . in most instances the same general rules as to the right to have the reporter's notes read to the jury apply to criminal and civil cases alike. Thus, the vast majority of the cases, both criminal and civil, adhere to the view that it is proper to read such notes to the jury . . . "

Thereafter, appellant further argues Point II of her brief with testimony of witnesses concerning facts about the alleged injury. It is respectfully submitted that such testimony is immaterial and has no bearing in the matter as the jury found the issues of fact in favor of the respondent and the appellant has not taken exception in her brief to those findings.

### POINT III

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MIS-TRIAL OR IN DENYING APPELLANT'S SUBSEQUENT MOTION FOR A NEW TRIAL.

For the reasons set forth in the arguments of Points I and II, the trial court was correct in denying appellant's motions and the same will not be further argued by the respondent. Suffice it to say, appellant was not deprived of a fair trial. There was no error committed by the learned trial judge as will appear from the record heretofore cited.

## CONCLUSION

The jury found the issue of fact in favor of the respondent. Those findings are not in question on appeal. If the appellant slipped in the respondent's store as she alleged, such was not caused through any negligent act or omission of the respondent, and the jury so found. There was ample evidence in the record to show that appellant suffered no injury on the premises of respondent as she told her physician that she fell at work and injured her back. (R. 140 to 143, Exhibit 23, p. 4). The trial court did not err in inquiring as to the progress of the jury's deliberations or in permitting the reporter's notes of the testimony of one witness to be read to the jury at their request so as to assist them in their deliberations.

In the case of *Charlton vs. Hackett*, 11 Ut. 2nd 389, 360 P. 2nd 176, this honorable court stated:

“In considering the attack on the findings and judgment of the trial court it is our duty to follow these cardinal rules of review: To indulge

them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence."

We submit that no error was committed and the judgment of the trial court should be affirmed.

Respectfully submitted,

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