1965

Randy Rivas v. Pacific Finance Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RANDY RIVAS, by JOE RIVAS, his Guardian ad Litem,

Plaintiff-Appellant,

vs.

PACIFIC FINANCE COMPANY, a corporation,

Defendant-Respondent.

Case No. 10,155

RESPONDENT'S BRIEF

Appeal from the District Court of
Salt Lake County, Utah
Honorable Ray Van Cott, Jr., Judge

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NATURE OF THE CASE

This is an action for personal injuries sustained by the minor plaintiff when struck by defendant's automobile as he was riding a sled on a Salt Lake County street.

DISPOSITION IN LOWER COURT

The case was tried before a jury, which returned a verdict for defendant, and after denial of his Motion for New Trial, plaintiff appealed.

PRELIMINARY STATEMENT

The parties will be designated as they appeared in the trial court. All references to the record refer to the pages numbered in red and the typed page numbers in the transcript of testimony are ignored.

The statement of facts in plaintiff's brief is not accepted by the defendant and should not be favorably considered by this court, in view of the rule reiterated in *Reynolds v. W. W. Clyde & Co.*, (1956), 5 Utah 2d 151, 298 P.2d 531:

> "Plaintiff presents her case on appeal by reciting facts tending most favorably to prove her claim. The opposite approach must be adopted, and it hardly bears repeating that in a case like this the factual situation will be reviewed on appeal in the light most favorable to the party prevailing below."

Defendant presents, in the following Statement of Facts, the evidence the jury reasonably could have believed and the inferences which the jury could have fairly drawn therefrom, in arriving at its verdict. *In Re. Richards Estate*, (1956) 5 Utah 2d 106, 297 P.2d 542.

STATEMENT OF FACTS

This accident occurred on a snow-covered street in a residential area of southwest Salt Lake County (R. 69). At the time of the accident the plaintiff, then age 5

years 8 months, was on his stomach on a sled in the westbound lane of traffic, in which lane defendant's car was traveling (R. 73). His position was such that he could not be seen by an automobile driver approaching from the east until at a point 50 to 75 feet from the ultimate point of impact (R. 80), because the boy on the sled was in a "blind spot" caused by a canal running under the road and creating a hump in the road east of the point of impact. A driver coming from the east and toward the point of impact was required to go up the eastern side of the hump, cross its top and then come down the west side (R. 80). The nature and extent of the hump, the grades before and after it and the effect upon a westbound driver's vision are all illustrated by the photographs that were placed in evidence (Exhibits 4, 5, 6).

The investigating deputy sheriff testified that he got in his automobile, during the investigation, and attempted to retrace the route of the automoble that struck the plaintiff. As he did so, he noted the blind spot and testified that a driver of a car coming from the east probably could not have seen the point of impact, and thus the child lying on his stomach on the sled in the westbound lane of travel, until the car was "right on top of the rise" or about 50 to 75 feet away (R. 80, 82, 139).

While the road was snow covered, it was much more slick than it appeared. The investigating officer said

it was very slick underfoot but "we didn't realize how slick it was until we started walking" (R. 78). It was "hard to stand up" (R. 75). The road was so slick that after the impact it was difficult for the defendant driver and a witness to push and back the automobile away from the child who was then lodged under its front end (R. 96).

The defendant's driver testified he was traveling at about 15 to 20 miles per hour, observed some children about a block or a block and one-half away on his left but saw nothing else on the road (R. 131, 132). He was not aware of the extent of the blind spot, since his only previous travel on the road had been in the opposite direction about 15 to 20 minutes earlier. On his return trip, going west, he drove up the east side of the hump and as he reached its top, and started across it and down the other side, he saw the child, attired in a bright red coat, lying on the sled in front of the car, in the west-bound lane of traffic. He immediately jammed on his brakes. The boy got up on his hands and tried to move toward the driver's left, so the driver swerved to his right, but "there was no time left" and "the car was on him" (R. 133, 134).

The driver testified that while it now might have been better to turn the other way, he reacted instantaneously, by reflex, and without time for reflection because of the emergency. As he put it, "'. . . . I did the best I

could. It may not have been the best, but it was the best I could do at the time" (R. 190).

A witness called by Plaintiff, Mrs. Janice Wilkerson, testified she had been driving east on the road, at a point some distance west of the impact, and saw the child lying face down on his sled in the roadway (R. 95). Her testimony and the investigation of the investigating officer established the fact the defendant's driver was not traveling at an excessive speed.

The plaintiff resided at a point a block east of the scene of the accident, and although his mother was home she did not know he was out in the street. Because of the hump in the road she could not see the street where the boy was (R. 123). Both she and her husband had repeatedly admonished the child about the dangers of cars and to stay out of the roadway, and although the child was a bright, intelligent youngster, he apparently did not obey his parents. The jury verdict in favor of the defendant was unanimous. Plaintiff's timely motion for a new trial was argued to the court and denied. This appeal followed.

ARGUMENT

POINT I.

UNDER THE EVIDENCE, THE ISSUES OF DEFENDANT'S NEGLIGENCE AND PLAINTIFF'S CONTRIBUTORY NEGLIGENCE WERE CLEARLY FOR THE JURY TO DETERMINE AND THE COURT, THEREFORE, PROPERLY DENIED PLAINTIFF'S MOTION FOR A DIRECTED VERDICT.

Plaintiff's contention that a verdict should have been directed in his favor at the close of all the evidence ignores the basic principles which permit the invocation of that drastic procedure and conveniently disregards the principles which delineate the functions of judge and jury under our judicial system.

The tests which the evidence must meet in order to justify the granting of a directed verdict have been clearly and repeatedly set out by this Court in its decisions. As is stated in *Finlayson v. Brady,* (1952) 121 Utah 204, 240 P. 2d 491, 492, it is a fundamental rule that:

> "In directing a verdict, this court has held, as authorities generally hold, that the evidence is to be examined in a light most favorable to the party against whom the verdict is intended, and that it is not the province of the court to weigh or determine the preponderance of the evidence."

This fundamental principle was repeated in *Boskovich v. Utah Construction Co.,* (1953) 123 Utah 387, 259 P. 2d 885, and in decisions since so frequently as to require no further citation. And, that this rule governs not only claims asserted by a plaintiff, but also that it "applies with equal force to an affirmative defense by the defendant," as in the present case, is shown by *Nelson v. Brames,* (10th Cir., 1958) 253 F. 2d 381.

If a trial court has resolved every controverted fact in the evidence and every inference therefrom in a

light most favorable to the defendant, it still may not grant a directed verdict against a defendant unless there is no evidence to support any of the asserted defenses. As this Court stated in the recent case of *Charvoz v. Cottrell,* (1961) 12 Utah 2d 25, 361 P. 2d 516:

> "Certainly if there is a conflict in the evidence the question of negligence is not one of law, but one of fact to be determined by the jury. However, even if the facts are undisputed, if fair-minded men can honestly draw different conclusion from them, the issue of negligence should be settled by a jury. In other words, negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown."

The plaintiff here has made no attempt whatever to bring himself within the rules outlined above. Instead of resolving every conflict in the evidence and inference therefrom in favor of defendant, as he is required to do, he attempts to give himself the benefit of every bit and shred of evidence and every tenuous inference therefrom which he is able to extract from the record and which, even indirectly, tends to support his contention that children may have been in the general area fifteen or twenty minutes before the accident. From these unsupported and largely discredited bits and pieces of testimony which defendant's driver, Mr. George, directly, unequivocally and convincingly contradicted, plaintiff draws the totally unwarranted and patently self-serving conclusion that:

> "The only reasonable conclusion that can be drawn from the testimony . . . is that when Mr. George was eastbound on Crystal Avenue fifteen to twenty minutes before he struck the respondent (sic), *he had seen the child* playing in the same general area. He *knew where the child was and what he was doing.* When he returned westbound on Crystal Avenue *he knew that children had been playing in the area* where the accident occurred." (Emphasis added.) Plaintiff's Brief p. 6.

As this excerpt from this brief clearly shows, plaintiff seeks to have this Court cast aside applicable rules of law and permit him to stretch the facts and inferences therefrom beyond all reasonable limits despite a jury verdict against him. He seeks, on the basis of indirect, contradicted and discredited evidence in the record to have this Court hold, as a matter of law, that defendant's driver saw plaintiff 15 minutes prior to the accident and thus knew both where he was and what he was doing at the time of the accident. Such a patently absurd attempt to circumvent submission of that question to the jury cannot be sustained.

Having thus attempted by mental sleight of hand to impute to Mr. George actual knowledge of plaintiff's presence in the area prior to the accident, when in fact none existed, plaintiff next attempts to couple that supposed "knowledge" with an inaccurate and, again, slanted version of events immediately preceding the accident to support his even more tenuous contention that defendant's driver was negligent, as a matter of law, in failing

to avoid the accident. Here again he attempts to rely upon controverted facts and inferences in the record which tend to support his position and completely disregard and ignore the great body of evidence which clearly rebuts any contention of negligence on the part of the defendant. Disputed facts and questionable inferences in the trial court do not mature into uncontradicted proof during their journey to the Supreme Court.

Plaintiff's contentions disregard, for example, the evidence that the roadway was snow packed and deceptively slick in the area of the accident; that defendant's driver was traveling at a slow and reasonable rate of speed prior to and at the time of the accident; that plaintiff could not be seen by Mr. George until he was almost upon him; that plaintiff's presence upon the highway in a prone position at the point of the accident was highly unusual and unexpected; and that the situation facing the driver when he first became aware of the peril was clearly an emergency to which he had to react instantaneously.

Plaintiff also contends, as he must, that there was no evidence of contributory negligence to submit to the jury. In support of this contention he once again picks out various portions of the evidence which tend to support his claimed freedom from fault and resolves all factual disputes and inferences in his own favor.

Certainly a jury question as to plaintiff's contributory negligence is presented where, as here, the plaintiff was lying on a sled in a prone position, out of the line of sight of west-bound vehicles, on the well-traveled but slick county road when the accident occurred.

The jury was instructed that defendant claimed as negligent conduct on the part of plaintiff only that he "was riding on his stomach on his sled on the highway along which defendant's driver was traveling and below the point of vision of defendant's driver due to a canal that raised the surface of the road" (R. 34). They were also instructed that a child is not held to the same standard of conduct as an adult but is required to exercise that degree of care which ordinarily would be used by children of the same age, intelligence and experience under the same or similar circumstances.

Being thus carefully limited and explained by the trial court, the issue of plaintiff's contributory negligence was properly submitted to the jury under the doctrine of *Mann v. Fairbourn,* (1961) 12 Utah 2d 342, 366 P.2d 603, 606, which, incidentally, also involved a 5 year old boy:

> "If the trial judge, after a consideration of the age, experience and capacity of the child to understand and avoid risks and dangers to which it was exposed in the actual circumstances and situation of the case, determines that fair-minded

> men might honestly differ as to whether the children failed to exercise that degree of care that is usually exercised by persons of similar age, experience and intelligence, the question of the child's contributory negligence should be submitted to the jury . . . ."

It is significant, we believe, that plaintiff concludes his attack on the refusal to direct a verdict in his favor with the statement that the "*weight* of the evidence establishes that Mr. George did have knowledge of the presence of appellant, and that he failed to take the precautions the law required under such circumstances." (Emphasis added). As this statement shows, he complains that the trial court did not weigh the evidence rather than submit it to the jury. Neither the trial court, nor this court on appeal, has that prerogative which, under our system, is reserved to the jury.

POINT II.

THE COURT PROPERLY INSTRUCTED THE JURY ON ALL ISSUES RAISED BY THE EVIDENCE, INCLUDING ALL ISSUES UPON WHICH PLAINTIFF WAS ENTITLED TO RELY.

Plaintiff contends that by its Instructions No. 1 and 2 the court in effect directed a jury verdict for defendant. Specifically, plaintiff objects to that portion of Instruction No. 1 which advised the jury that defendant's only claim of negligence on the part of plaintiff was that

he "was riding on his stomach on a sled on the highway along which defendant's driver was traveling and below the point of defendant's vision due to a canal that raised the surface of the road."

Plaintiff's objection to this explanation of the limited nature of defendant's claim of negligence on plaintiff's part is surprising in view of the fact that the court earlier in the same introductory instruction similarly explained plaintiff's claimed grounds of negligence against defendant (R. 33).

Plaintiff's objection to Instruction No. 2 is directed to that portion which requires plaintiff to prove each and every material element of his case as well as proximate cause by a preponderance of the evidence and which "entitles him to recover" upon doing so, unless barred by his own contributory negligence. Plaintiff does not mention the fact that this same instruction specifically required that the defendant establish contributory negligence by a preponderance of the evidence.

There is no merit to plaintiff's contention that the effect of Instructions No. 1 and 2 was to tell the jury that if plaintiff was lying on the sled in the road that fact alone constituted contributory negligence. To begin with, the court specifically told the jury in Instruction No. 1 that it was merely summarizing "the contentions of the parties" (R. 34). Secondly, the term "contributory

negligence" is expressly defined in Instruction No. 3 as a want of ordinary care on the part of an injured person which proximately contributes to his own injury (R. 37). Thirdly, the standard of care expected of a child is set forth fully in Instruction No. 11 as that standard was enunciated by this Court in the recent case of *Mann v. Fairbourn, supra.* Thus, plaintiff wants this Court to hold that the jury failed to consider all of the instructions and all of the evidence and "reach such a verdict as will do justice between the parties" as it was instructed to do (R. 51).

Plaintiff's objection to that portion of Instruction No. 2 which requires for a finding of contributory negligence that the "negligence proximately contributed in *some* degree to his own injuries" likewise has no merit. (Emphasis added). His statement that there is no distinguishable difference between the phrase "in *some* degree" and "in *any* degree," disregards the basic dictionary definition of those terms. Thus, "any" is defined in Webster's Unabridged Dictionary as "indicating that which is considered, despite very great or slight quantity or extent" or "one part or individual without regard to which or how great or small." The word "some" on the other hand is defined as "that is of an unspecified but appreciable or not inconsiderable quantity, amount, degree, etc.; more than a little; that are in number at least, or more than a few." None of the words or phrases used

by Webster's in defining "some," indicate a slight or insignificant quantity or amount as is the case with "any" as noted above.

This difference in meaning between the terms "some" and "any" easily answers the contention made by plaintiff that he was prejudiced by the use of the word "some" in Instruction No. 2. The distinction has been repeatedly recognized by the decisions of this Court and others, where it has been said that "some" is neither the equivalent of "any" as used in *Taylor v. Johnson,* (1964) 393 P. 2d 384, Case No. 9874; *Johnson v. Lewis,* (1952) 121 Utah 218, 240 P. 2d 498; *Devine v. Cook,* (1955) 3 Utah 2d 134, 279 P. 2d 1073; *Ferguson v. Jongsma,* (1960) 10 Utah 2d 179, 350 P. 2d 404; and Annotation 87 A.L.R. 2d 1448-49, nor the equivalent of "however slight" used in *Devine v. Cook, supra; Johnson v. Lewis, supra; Wilson v. City & County of San Francisco,* (Calif., 1959) 344 P. 2d 828, cited in plaintiff's brief.

Even had the term "any" been used instead of "some," however, it is clear that under the facts presented no prejudice could have resulted to plaintiff since if he were found by the jury to have been contributorily negligent, there can be no doubt but that such negligence necessarily would have been a substantial contributing cause of his injuries in this case. The total effect of the court's instructions, moreover, contrary to what plaintiff now claims, was to present, fully and fairly, all

claims asserted by plaintiff as well as the defenses asserted by defendant and, on the whole, there can be no doubt but that plaintiff had a full and fair opportunity to present his case to the jury. And, although the use of the term "any" in the instructions would have been improper, such an error, on balance, would not have been prejudicial to the extent to require a reversal under all the facts.

The case of *Mack v. Precast Industries, Inc.*, (Mich., 1963) 120 N. W. 2d 225, as the excerpt therefrom at pp. 11-12 of plaintiff's brief clearly shows, has no application whatever to the present case. In that case the trial court erred in holding the plaintiff to a higher standard of care than that which he required of the defendant.

Instruction No. 4, to which plaintiff takes exception, is patterned closely after Jury Instruction Forms, Utah, Form No. 16.6. Although it would have been proper for the court to have been used instead plaintiff's requested Instruction No. 7, that instruction adds very little to the principle of the instruction actually given and would not materially aid the jury in resolving the issues of negligence. Rather, by referring to a specific statute it might have tended to confuse them.

The trial court of necessity must be given some leeway in selecting his instructions for the jury and cannot be required to accept every variation on a stand-

ard instruction, such as this one, which counsel can conjure up. Plaintiff is straining at a gnat in seriously suggesting that this instruction was prejudicial to him.

Plaintiff complains of that portion of Instruction No. 8 which advised the jury that

> " . . . extrordinary care was not required, and that while exceptional caution and skill are to be admired and encouraged the law does not demand them as a standard of conduct."

The challenged language is taken almost verbatim from J.I.F.U., Form No. 15-2, and while that fact does not insure its propriety, the instruction has received widespread use and is generally utilized in such cases by our trial courts. The portion of Instruction No. 8 relating to judging the driver's conduct by the then existing circumstances and not by hindsight, and Instruction No. 9, relating to proper lookout, are but simple statements of basic law. It is submitted that plaintiff's objection to these instructions demonstrates the inherent weakness of his appeal.

Plaintiff's requested Instruction No. 7, as noted above, adds nothing whatever to the court's Instruction No. 7 relative to the grounds upon which defendant could be found negligent. In fact, a careful analysis of Instruction No. 7, as given by the court, clearly shows that it was heavily weighted in plaintiff's favor. It told the

jury, for example, that defendant's driver had to "keep a proper lookout for Randy Rivas" "and to exercise reasonable care to anticipate the presence of said child," even though the evidence was wholly contradictory and largely discredited as to whether Mr. George knew or should have known that plaintiff was even in the general area.

Instruction No. 12, to which objection is made, is again taken from J.I.F.U., Form No. 16.1. While an instruction on unavoidable accident should not be given in every case, the doctrine is, nevertheless, particularly applicable where, as here, a reasonable person might conclude that neither party was negligent in that the roads were snow-packed and unexpectedly slick, the plaintiff was not visible until the vehicle was almost upon him, the plaintiff was in a prone position and at a point where he would not normally be expected and defendant's driver did what he could in the emergency to avoid the accident.

None of the cases cited by plaintiff on the unavoidable accident issue apply in the present case. The case of *Rodoni v. Haskin,* (Mont., 1960) 355 P. 2d 296, referred to in plaintiff's brief, involved a defendant who admitted knowing that the roads were slick and that he had failed to slow for a chuckhole with which he was familiar and which he knew "could throw" his car if he hit it, notwithstanding he had seen plaintiff's car approaching. The chuckhole threw his car into the opposite

lane of travel and it collided head-on with plaintiff's car. This case does not support plaintiff under the present facts. Rather, the court there stated that the unavoidable accident instruction was helpful to a jury and should be used in appropriate cases.

In the case of *Kreh v. Trinkle*, (Kan., 1959) 343 P. 2d 213, upon which plaintiff also relies, the defendant admitted that he did not see the other vehicle into which he collided at an intersection until just before impact although there was nothing which kept him from doing so. The court there held that an unavoidable accident instruction would be "peculiary appropriate" where "from the evidence the jury could reasonably conclude that there was neither negligence nor contributory negligence." Such is the state of the evidence in the present case.

In *Wellman v. Noble,* (1961) 12 Utah 2d 350, 366 P. 2d 701, this Court, as plaintiff notes, held that such an instruction is proper in an appropriate case. In *Porter v. Price,* (1960) 11 Utah 2d 80, 355P. 2d 66, 68, to which the *Wellman* case refers, this Court noted, in harmony with the *Kreh* case, *supra,* that:

> " . . . there are some situations where the evidence is susceptible of being so interpreted that an accident occurred without negligence on the part of anyone, and if it is reasonably susceptible of such interpretation, and a party requests it, the trial court commits no error in so advising the jury."

Clearly, this statements cover the situation presented by the evidence in the present case.

Plaintiff's objection to Instruction No. 13, covering the law applicable to a driver confronted with an emergency, is patently absurd. Again he seeks to impute to defendant's driver, as a matter of law, actual knowledge of plaintiff's presence and position, although the evidence is in conflict and wholly unsatisfactory on the point. Even assuming he had previously seen the child in the general area, however, and plaintiff is not entitled to claim in this Court that he did, that would be no basis upon which to predicate his fault, as a matter of law, in failing to anticipate that the boy would be in a prone position on the roadway and out of his vision until he was right upon him. The mere statement of that position reveals its transparency. Defendant's driver did not and could not reasonably have been expected to see or anticipate plaintiff's danger until he came into his view. Under those circumstances he was faced with the clearest kind of an emergency. Plaintiff's objection to that instruction is but a further twist of the facts to gain an advantage to which he is clearly not entitled under the law.

The basic purpose underlying plaintiff's wholly unsupportable fly-speck assault upon the claimed total effect of the Court's instructions, is to bring himself within the rule of *Taylor v. Johnson, supra*, with the

claim that the instructions so emphasized defense theories they prejudiced the jury against plaintiff and deprived him of a fair trial. A comparison of that case with the present one, however, readily demonstrates their dissimilarity and the propriety of the instructions given in this case.

At the outset it will be noted that the factual situations presented by these two cases are entirely dissimilar. In *Taylor,* moreover, 47 instructions were given, compared to 17 here.

In *Taylor* the "instructions contained no direct concise statement of the main determinative issues of fact in the case," such as are set forth in Instructions No. 1, 2 and 7 here.

In *Taylor* at least ten different instructions "ended with a long, repetitious statement that such a finding required a verdict for the defendant" and three other instructions recited the same conclusions, whereas only Instruction No. 8 ended with that language here. Moreover, in *Taylor,* "such statements were . . . emphasized with repetitious and capital letters."

In *Taylor* at least three instructions were "based on an entirely different factual situation" which "had no application" to that case "and tended to mislead the jury." No such situation exists here.

In *Taylor*, also, "many other instructions" were given on the defense of contributory negligence and "emphasized fact situations which were not supported by the evidence." No such abuse is found in this record.

In short, plaintiff has shown no real prejudice here. His complaints are such as could be directed with equal force against almost any set of jury instructions which might be given in this type of case.

Plaintiff's final contention that he was prejudiced by the court's refusal to grant his requested Instructions No. 3, 5, 7 and 11 is also wholly without justification.

His request No. 3 which would require defendant's driver "to be aware of . . . persons" on the street incorrectly states the duty required of him, since the law does not require that he be aware of a person's presence on the street until he sees, or in the exercise of reasonable care he should see, the person. Even so, however, the Court's Instruction No. 7, which required Mr. George "to keep a proper lookout for Randy Rivas . . . and to exercise reasonable care to anticipate the presence of said child," in effect, imposes the same heavy duty sought to be imposed by plaintiff's request No. 3. The balance of request No. 3, relating to the duty to use reasonable care, was fully covered in Instructions No. 3, 7 and 10.

The contention that the failure to give plaintiff's requests No. 5 and 7 constitutes reversible error has already been discussed above.

Plaintiff's request No. 7, relating to the degree of care required toward children, assumes that the person charged with negligence was aware not only that a specific person is subject to foreseeable risk of harm but also that such person is a child and, hence, even more likely than an adult to be harmed due to his youthful propensities. In the present case, the driver was totally unaware of the presence of plaintiff in the area of the accident until he came into view. The fact that he was a child rather than an adult could have had no effect whatever upon Mr. George's reaction when he became aware of his peril. Request No. 3, therefore, has no proper application to the present facts and it was properly denied.

CONCLUSION

No claim of prejudice or impropriety has been made as to the court's conduct of the trial itself. The court's instructions are the target of plaintiff's attack.

There is an abundance of support in the record and in applicable law to uphold the instructions given by the court as well as the jury verdict in this case. As has been noted, plaintiff has cited neither authority nor

evidence which demands a different conclusion. Although there was evidence from which the jury could have found in plaintiff's favor under the instructions given, the great weight of the evidence, and the jury's verdict, were in favor of defendant.

Plaintiff had his day in court and the issues were found against him. He had his case fairly and fully presented to the jury. His many allegations of error are supported neither in the record nor by the authorities. The words of Justice Crockett in *Hales v. Peterson*, (1961) 11 Utah 2d 411, 360 P. 2d 822, 825-25 are particularly appropriate here:

> "We have heretofore recognized the importance of safeguarding the right of trial by jury. A necessary corollary to it is that there must be some solidarity in the result so that it can be relied upon. To the extent the verdict can easily be set aside by the court, the right to trial by jury is weakened. In order to give substance to the right, once the trial has been had and a verdict rendered, it should not be regarded lightly, nor overturned because of errors or irregularities unless they are of sufficient consequence to have affected the result.
>
> "Anyone acquainted with the practical operation of a trial by jury and the human factors that must play a part therein is aware that it would be almost impossible to complete a trial of any length without some things occurring with which counsel, after the case is lost, can find fault and,

> in zeal for his cause, all quite in good faith, magnify into error which to him and the losing parties seems blameable for their failure to prevail. However, from the standpoint of administering even-handed justice the Court must dispassionately survey such claims against the over-all picture of the trial, and if the parties have been afforded an opportunity to fully and fairly present their evidence and arguments upon the issues, and the jury has made its determination thereon, the objective of the proceeding has been accomplished. And the judgment should not be disturbed unless it is shown that there is error which is substantial and prejudicial in the sense that it appears there is a reasonable likelihood that the result would have been different in the absence of such error . . ."

This appeal is without merit. The judgment should be affirmed.

Respectfully submitted,

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