1969

Lawrence W. Brown v. Charles Fred Johnson and Royal Baking Company : Appellants' Brief

IN THE SUPREME CO
OF THE STATE OF U

LAWRENCE W. BROWN,
Plaintiff-Respondent,

vs.

CHARLES FRED JOHNSON and
ROYAL BAKING COMPANY,
Defendants-Appellants,

APPELLANTS' B

Appeal from the Judgm
Third Judicial District Court for
Honorable Leonard W. El

HANSON
H. WAYN
702 Kearn
Salt Lake C
Attorney

JOEL M. ALLRED
311 Newhouse Building
Salt Lake City, Utah
Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

LAWRENCE W. BROWN,
Plaintiff-Respondent,

vs.

CHARLES FRED JOHNSON and ROYAL BAKING COMPANY,
Defendants-Appellants,

Case No. 11899

APPELLANTS' BRIEF

NATURE OF CASE

Action by plaintiff to recover damages for personal injuries sustained in an automobile accident.

DISPOSITION IN THE LOWER COURT

The jury returned a verdict of no cause of action in the first trial. The court, Judge Marcellus K. Snow sitting, granted plaintiff's motion for a new trial. In the second trial, the jury returned an erroneous verdict in favor of the plaintiff, which the court, Judge Leonard W. Elton sitting, did not accept until revised. Judgment was subsequently entered on the revised verdict of the second jury and the court denied defendant's motion for a new trial.

RELIEF SOUGHT ON APPEAL

Defendants pray for reversal of the judgment entered by the trial court on the second jury verdict and for reinstatement of the judgment of no cause of action entered on the first jury verdict; or in the alternative, defendants pray that the case be remanded and the trial court ordered to grant defendants a new trial with direction that the issue of damages relating to possible future surgery be eliminated from the jury's consideration.

STATEMENT OF FACTS

(*The following statements of facts as to liability are from the first trial.*)

The collision out of which this action arises occurred January 11, 1968. Plaintiff was driving a Corvair automobile down Emigration Canyon. The defendant Johnson was driving a step-van bread truck in the course of his employment with the defendant Royal Baking Company and had followed plaintiff's automobile for approximately one mile down the canyon before the accident occurred (R. 738). Mr. Johnson had plaintiff's automobile in view most of the time as both vehicles were proceeding down the canyon (R. 739), but the plaintiff never saw the bread truck at any time prior to the collision (R. 595). As the vehicles entered a straight section of road where passing was permitted (Exh. P-1), Mr. Johnson started to pass plaintiff's automobile since there was no oncoming traffic approaching (R. 596). There was no intersections in the area, no automobiles ahead of plaintiff, or any other circumstance, according to plaintiff, which would

have indicated to anyone following the plaintiff that he might suddenly decelerate (R. 596).

When the front of the bread truck was about even with the rear of plaintiff's automobile, plaintiff applied his brakes and swerved somewhat to the left (R. 740). Mr. Johnson then decided not to complete his pass because he was afraid plaintiff might lose control of his automobile and skid into the bread truck (R. 785). As he was getting back into the right-hand lane, plaintiff applied his brakes the second time (R. 740) without signaling, (R. 601), and apparently without observing to the rear through his rear-view mirror (R. 595).

Plaintiff's deceleration was abrupt enough to raise the rear end of his automobile at least two and one-half inches in order that the rear bumper of the Corvair could come over the front bumper of the bread truck (R. 702-703) and damage the right front fender of the truck above the bumper (R. 741).

Plaintiff's deceleration was made because of a small dog walking along the right side of the roadway (R. 596) which never crossed the road or darted out in front of him before he applied his brakes (R. 598).

(*The following statement of facts regarding the issues of injury and damages are from the second trial.*)

As a result of the accident, plaintiff sustained various injuries to his neck for which he was treated by Dr.

Thomas E. Soderberg. Plaintiff was also examined by Dr. John N. Henrie four months after the accident at the request of plaintiff's attorney (R. 434) and by Dr. Reed S. Clegg seventeen months after the accident as an independent medical examiner appointed by the court (R. 84-85). Dr. Henrie anticipated no permanent disability as a result of the accident at the time of his examination made four months after the accident (R. 440 & Exh. D-10) and Dr. Clegg at the time of his examination made seventeen months after the accident felt the healing process had been completed (R. 468) and that plaintiff could continue with his wrestling activities at the University of Utah, if he so desired (R. 455).

The only testimony presented at trial regarding whether or not plaintiff would require surgery in the future as a result of the accident in question was that of Dr. Soderberg when he testified that there was a chance that surgery would be required, but it was not likely. He estimated that there was only about a 15% chance of surgery becoming necessary at some later date (R. 368) and, conversely, an 85% possibility that future surgery would not be necessary (R. 394).

Defendants objected to the introduction of evidence relative to the surgical procedure, period of hospitalization and post operative care relative to a cervical fusion operation, but said objection was overruled (R. 369-371). Defendants also requested by their requested jury instruction No. 21 that the jury be instructed that they could not award damages for possible future surgery

expenses or disability resulting therefrom since there was no medical evidence admitted during the trial upon which it could be found by a preponderance of the evidence that such surgery would become necessary, but said requested instruction was refused (R. 211). Defendants thereafter excepted to the court's failure to give defendants requested instruction No. 21 (R. 499).

(*The following statement of facts regarding jury deliberations and verdicts is from the second trial.*)

The court specifically instructed the jury that if they found the issues of liability in favor of the plaintiff, the amount of special damages awarded could not exceed $377.50 (R. 234). Nevertheless, the jury returned a verdict of special damages of $10,000.00 and general damages of $1,700.00 (R. 503-504), making a total verdict of $11,700.00. The court declared the verdict erroneous (R. 502 & 513) and sent the jury out to re-deliberate with the additional instruction that they re-read the instructions, paying particular attention to the instructions regarding damages (R. 508).

The jury retired to re-deliberate at 4:35 p.m. (R. 508) and returned their second verdict into the courtroom at 4:41 p.m. (R. 510). The second verdict awarded special damages of $377.50 and general damages of $11,322.50 (R. 512), making a total verdict of $11,700.00, the same amount as awarded by the first verdict.

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF A NEW TRIAL.

Plaintiff's motion for a new trial following the first trial was made solely upon the factual basis that the evidence did not support the verdict of no cause of action returned in favor of defendants (R. 181). Plaintiff made no claim of legal error in the admission or rejection of evidence, in the giving of jury instructions, or in the conduct of the court or counsel.

The factual issues tried in this case were whether or not the defendant Johnson was negligent, whether or not plaintiff was contributorily negligent and whether or not the negligence of either was a proximate cause of the accident. This court has consistently held that the determination of negligence, contributory negligence and causation is the prerogative of the jury. *Singleton vs. Alexander, et al.,* 19 Utah 2d 292, 431 P.2d 126 (1967) and *Corbridge vs. M. Morrin & Son, Inc.,* 19 Utah 2d 409, 432 P.2d 41 (1967).

Defendants do not question the principle that motions for new trials are addressed to the sound discretion of the trial court in order to prevent manifest injustice, should it occur, but contend that such discretion should be exercised with restraint when the only grounds claimed for a new trial is "insufficiency of the evidence" on issues which are traditionally the prerogative of the jury to determine. Certainly one who attacks a jury verdict with a claim that it should be set aside and a new trial

granted should show some irregularity, indication of prejudice or some other fact which may have prevented the parties from having a fair trial. Plaintiff alleges no such fact in his motion for a new trial and defendants contend that none is shown in the record (R. 541-802).

Defendants readily agree with the principle set forth in *Hyland vs. St. Marks Hospital,* 19 Utah 2d 134, 427 P.2d 736 (1967) that the trial judge's role in overseeing the process of trial by jury with respect to ruling on motions for a new trial goes beyond merely determining whether or not the evidence will or will not support the verdict, but in the absence of any other contention and where the evidence is rather evenly balanced on the issues of negligence and contributory negligence, as will be referred to hereafter, the court's discretion to grant a new trial should be exercised very cautiously. Indeed, the standard as set forth in the *Hyland* case, *supra,* should be followed:

> "Consistent with the purpose just discussed, whenever what has transpired in the proceeding is so offensive to the trial court's sense of justice that he believes the desired object of affording the parties a fair trial has failed, he has both the prerogative and the duty to grant a new trial."

In the *Hyland* case, the plaintiff was seriously injured while being catheterized by an orderly of defendant hospital. There was no question of contributory negligence on the part of the plaintiff, the defendant allowed a relatively untrained person to perform a rather sophisticated procedure, and the orderly admitted inflating the balloon of the catheter before obtaining urine as he knew

from instructions and previous experience should occur when the catheter entered the bladder, which should take place before the balloon was inflated. A verdict of no cause of action on such facts is without question against the weight of the evidence and offensive to one's sense of justice.

However, such is not the case in the present action. The jury could well have found the defendant Johnson acted as a reasonably prudent person in attempting to get back into the right-hand lane when he saw plaintiff's brake lights illuminate for some reason unknown to him and was afraid the plaintiff might skid into him (R. 785). Likewise, the jury could well have found the plaintiff contributorily negligent in failing to keep a reasonable lookout to the rear and in suddenly decreasing his speed without giving a signal of his intention to do so.

Although the canyon road was a winding road, the defendant Johnson was able to see plaintiff's automobile ahead of him most of the time as they traveled down the canyon together for approximately one mile before the accident occurred (R. 739). The jury might well have found that if plaintiff had glanced into his rear view mirror ocasionally as he traversed that last mile before the accident occurred, that at least on one occasion he would have seen defendant's bread truck and known that it was in the vicinity. Since plaintiff testified he never saw the truck at any time prior to the accident (R. 595), the jury may well have concluded that he did not look to the rear as often as he should have during that last mile. This court has previously held it to be a jury question

whether or not a forward driver is guilty of negligence in failing to observe traffic approaching from the rear. *Hayden vs. Cederlund,* 1 Utah 2d 171, 263 P.2d 796 (1953).

Also, Section 41-6-69(c), U.C.A., 1953, provides that:

> "No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal."

The trial court so instructed the jury (R. 152) and the jury could have found that plaintiff had time to at least flash his brake lights in advance of his deceleration, which he admittedly did not do (R. 601). The only signal he gave was the illumination of his brake lights made contemporaneously with his deceleration, which is not an appropriate signal of one's intention to decelerate since it gives no advanced warning of the contemplated deceleration. *United States vs. First Security Bank of Utah,* 208 F.2d 424 (10th Cir. 1953).

Admittedly, a jury or other trier of fact could reasonably have found to the contrary on all of the foregoing factual issues, but since the verdict returned was in favor of the defendants, the defendants were entitled to have the evidence and any inferences which could logically be drawn therefrom viewed in the light most favorable to them by the trial court in considering whether or not there was an insufficiency of the evidence to sustain the verdict rendered. In *Smith vs. Gallegos,* 16 Utah 2d 344, 400 P.2d 570 (1965) this Court reiterated this principle in stating:

> "It is elementary that where there is a dispute in the evidence, resolving the conflicts is for the jury under its prerogative as the exclusive finder of the facts. It is equally so because of the jury's verdict in his favor, we must accept the respondent Jones' version of the facts and review the evidence and all inferences fairly to be drawn therefrom in the light most favorable to him. Having done so, it appears that there is a reasonable basis therein upon which the jury could remain unpersuaded that the respondent Jones failed to perform his duty in yielding the right of way, as we have discussed herein. Accordingly, the trial court was well advised in rejecting appellant's contention that respondent Jones should be held guilty of contributory negligence as a matter of law and properly presented the issues to the jury for determination."

The evidence viewed in the light most favorable to the defendants is substantial and sufficient to sustain the verdict of no cause of action and since lack of sufficiency was the only ground claimed by the plaintiff in his motion for a new trial, the trial court abused its discretion in setting aside the verdict and granting a new trial. The proper rule with respect to how active a trial judge should become in setting aside verdicts and granting new trials is well stated by Justice Crockett in his concurring opinion in *Holmes vs. Nelson*, 7 Utah 2d 435, 326 P.2d 722 (1958) as follows:

> "The verdict, when supported by substantial evidence, should be regarded as presumptively correct and should not be interferred with merely because the judge might disagree with the result. The prerogative should only be exercised when, in view of the trial court, it seems clear that the

> jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence so that the verdict is offensive to his sense of justice to the extent that he cannot in good conscience permit it to stand."

This rule was later adopted by the entire court in the case of *Wellman vs. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961) wherein the court stated with respect to the granting of new trials when there has been substantial evidence introduced which would support the verdict:

> "Such action is warranted only when to the trial judge, it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence."

New trials were granted in both the *Holmes* and *Wellman* cases; but in the *Holmes* case, plaintiff was a three and one-half year old child (too young to be contributorily negligent) who ran into the street and was struck by defendant after the latter had been warned by his wife of the child's presence when he was 300 feet from the point of impact and in the *Wellman* case, the plaintiff was sitting in an automobile stopped behind a disabled truck and house trailer when struck by defendant, which according to some evidence, defendant should have seen for a considerable distance prior to impact.

In the instant case, there was no dispute in the facts upon which defendants claimed plaintiff was contributorily negligent since plaintiff admitted not seeing de-

court to set aside the verdict and grant a new trial.

* * *

"Consistent with that viewpoint, when the parties have had the opportunity of presenting their evidence and arguments concerning their disputes to the jury, the judgment of the jury should be allowed to swing through a wide arc within the limits of how reasonable minds might see the situation; and the court should not upset a verdict merely because it may disagree. If it did so, the right of trial by jury would be effectively abrogated and the trial may as well be to the court in the first place."

In the instant case, there is no claim that passion or prejudice influenced the verdict and there is no indication that the jury acted under a misconception of proven facts or misapplied or disregarded the law. To the contrary, it appears that the jury may have believed the defendant Johnson acted as a reasonable man in pulling back behind plaintiff's automobille after plaintiff applied his brakes the first time, or it may have found the plaintiff failed to keep a reasonable lookout to the rear and that if he had done so, he would have seen the defendant's bread truck and consequently not have attempted to stop suddenly when it was atempting to pass. Rather than having disregarded the law, it appears only that the jury may have applied the law of contributory negligence to the conduct of the plaintiff.

fendant's truck at any time prior to the accident when it was obviously traveling behind him for a distance of at least one mile. Therefore, in that regard, the jury could not have misinterpreted or misapplied the facts. The court instructed the jury regarding a forward driver's duty to keep a reasonable lookout to the rear and to give an appropriate signal of his intention to stop or suddenly decrease his speed if there was an opportunity to do so. Since the jury apparently applied this law, how can it be said that it misunderstood or disregarded the law? While recognizing that it is difficult to prove a negative, defendants most seriously contend that a reading of the trial transcript of the first trial will not offend anyone's sense of justice that a verdict was rendered in favor of the defendants, although they may not agree with it.

In *Etco Distributing, Inc. vs. Perrin,* 17 Utah 2d 375, 412 P.2d 615 (1966) this court affirmed the trial court's refusal to grant a new trial where the jury found the issues in favor of the plaintiff but awarded no damages. It stated the rule which should govern trial courts in awarding a new trial as follows:

> "If it clearly appears that there has been a miscarriage of justice because the jury has refused to accept credible, uncontradicted evidence where there is no rational basis for rejecting it, or it is plain to be seen that the jury has acted under a misconception of proven facts, or has misapplied or disregarded the law, or where it appears that the verdict was the result of passion and prjudice, it is both the prerogative and the duty of the

POINT II

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT NO DAMAGES COULD BE AWARDED AS COMPENSATION FOR POSSIBLE FUTURE SURGERY.

During the examination of Dr. Soderberg, plaintiff's counsel asked the doctor to describe how a ruptured disc is repaired. Defendants objected unless a foundation was laid that surgery was contemplated for the plaintiff (R. 362). The court overruled the objection (R. 363) and Dr. Soderberg described in some detail how an incision is made in the front of the neck, how the spine is opened up, how the disc material is removed and finally how bone is then taken from the pelvic bone and placed between two of the intervetebral bodies of the spine (R. 363). Later Dr. Soderberg was asked if he had an opinion as to whether or not surgery would be required for the plaintiff, to which he replied:

> "I think there is a chance that surgery will be necessary, but it is not likely.
>
> Q. How would you characterize that chance? Can you ascribe a percentage to it?
>
> A. Yes. I think Larry has about a 15% chance o requiring surgery. This is what we have found on the basis of studies of following people with similar injuries over a long period of time. Fifteen percent will eventually require surgery." (R. 368).

On cross examination, Dr. Soderberg readily admitted that the converse was true, i.e., that there was an 85% chance that surgery would not be necessary for the plaintiff (R. 394).

Plaintiff's counsel then asked what would be required by way of hospitalization if surgery was required (R. 369). Defendants again objected to the question since there had been no medical evidence introduced by which the jury could have found by a preponderance of the evidence that any surgery would be required for the plaintiff, but the objection was overruled (R. 370) and the doctor was allowed to state that if surgery was required, plaintiff would be hospitalized for a week to ten days and would be required to wear a neck brace for a period of from six weeks to three months (R. 370).

At the conclusion of the evidence, defendants requested that the jury be instructed that they could not award damages in compensation for any possible future surgery (R. 211) but said instruction was refused and a proper exception was taken by defendants (R. 499).

This court reviewed a very similar problem in *Moore vs. Denver & Rio Grande Western Railway Company,* 4 Utah 2d 255, 292 P.2d 849 (1956). In that case, there was medical evidence of nerve root irritation which was consistent with the existence of a disc injury, but the medical evidence indicated nothing more than that there was a possibility the plaintiff suffered from a disc injury, since this court on review observed:

> "Although the medical testimony indicated that the symptoms showed a nerve irritation, and that such symptoms were consistent with the existence of the disc injury, we cannot discover in the witnesses' words nothing more than their corollary that, under the circumstances, a disc injury was not impossible."

eration the issue of possible future surgery (R. 154). The same instruction should have been given in the second trial; and since it was not, the court should have granted defendant's motion for a new trial after the jury returned a verdict which strongly indicated it had awarded general damages for pain and suffering associated with possible future surgery.

POINT III

THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S REVISED VERDICT IN THE SECOND TRIAL.

The first verdict returned in the second trial was clearly erroneous since it awarded special damages of $10,000 (R. 255-A) when according to the court's instructions, special damages could not exceed $377.50 (R. 234). The court sent the jury out again to *re-deliberate* (R. 508). Such action was permissible under Rule 47(r), U.R.C.P., and *Jorgenson vs. Gonzalloes,* 14 Utah 2d 330, 383 P.2d 934 (1963). However, the jury did not *re-deliberate,* but merely made a mathematical calculation so as to add to general damages the amount they could not properly include in special damages. The jury retired the second time at 4:35 p.m. (R. 508) and returned into court at 4:41 p.m. (R. 510). Since it always takes two or three minutes to properly assemble the court personnel, counsel and the parties after the jury has informed the bailiff they are ready to return, the jury could have been in session only three or four minutes at most and obviously did nothing more than make a mathematical calculation to revise the verdict.

In the case at bar, there was less than the mere "corollary" that under the circumstances future surgery was not impossible. There was an 85% probability that it would not be necessary. As stated in the *Moore* case, the total evidence introduced must tend to show a probability upon which damages may be awarded as opposed to mere conjecture. In the instant case, Dr. Soderberg's opinion that there was a 15% chance the plaintiff would require future surgery was apparently based only upon the generalized observation of prior studies of people with similar injuries (R. 368). As to whether or not plaintiff would fall into the category requiring future surgery is pure conjecture. In fact, the conjecture was that there is an 85% chance he will not.

In the *Moore* case, it was held error not to have withdrawn all consideration of a ruptured disc from the jury. Whereas in the instant case, defendants requested only that the jury be instructed that it could not award damages as compensation for the expenses or disability associated with possible future surgery. As in the *Moore* case, there is a strong indication that the jury awarded damages for the consequences of future pain and suffering associated with cervical fusion operation, since they awarded general damages of $11,322.50 (R. 255-A), which would be an unusually high award of general damages when special damages amounted to only $377.50 and no surgery had been performed to date.

Upon the same medical evidence received in the first trial (R. 625-632), the trial court gave defendant requested jury instruction taking from the jury's consid-

The fact that the judy did not re-deliberate as instructed (R. 508), as evidenced by its return within six minutes, is evidence of misconduct and capriciousness in refusing to follow the court's instrutions. In *Ferruzzi vs. City of Pittsburgh,* 145 A.2d 706 (Penn. 1958), after one hour and 40 minutes of deliberation, the jury returned a verdict of $15,000 plus medical expenses and "all court costs and attorney's fees." The trial judge instructed the jury that they could not include in their verdict attorney's fees and court costs. The jury thereupon retired and five minutes later returned a verdict of $25,000 against the defendants. On appeal, the Pennsylvania Supreme Court held:

> "The jury's verdict, *five minutes later,* of $25,000 was a patent method of adding attorney's fees and court costs by indirection and was obviously capricious, excessive and unjustifiable." (Emphasis supplied by court).

The mere juggling of amounts between special and general damages as a substitute for re-deliberation has also been held to constitute misconduct of the jury. In *Hall vs. Cornett,* 240 P.2d 231 (Ore. 1951), the jury's first verdict for the plaintiff was in the sum of $1,006.40 special damages and $1.00 general damages. The trial court considered the $1.00 general damages award as inadequate under the circumstances and sent the jury back out to re-deliberate. The jury then returned a second verdict of $300.00 general damages and $707.40 special damages, reaching the same total amount. The trial court set aside the second verdict and granted a new trial. Considering such action on appeal, the Oregon Supreme Court held:

> "We turn to the second assignment of error which relates to the setting aside the second verdict and granting a new trial. In returning that verdict, the jury was guilty of misconduct. The record conclusively shows that they merely juggled the figures which they had adopted in their first abortive verdict."

That is exactly what was done in the incident case, the jury merely deducted $9,622.50 from the special damages award of the first verdict and added it to the $1,700.00 general damages award, making a general damages award of $11,322.50 in the second verdict. The total award of $11,700.00 in the second verdict is the same total sum awarded in the first verdict. Consequently, it is clear there was no re-deliberation as ordered by the court but merely a mathematical juggling of the first verdict.

Similarly, in *Flansberg vs. Paulson,* 399 P.2d 356 (Ore. 1964) it was held to be grounds for a mistrial where the jury was returned to correct an erroneous verdict which awarded only special damages and the second verdict merely transferred all the specials to general damages. The court considered this a "stubborn adherence to an invalid verdict" and the refusal to follow the trial court's instructions was grounds for a mistrial.

Also, the increase in the general damage figure was clearly excessive in view of the original general damage figure. Plaintiff attempted to justify the increase in the general damage award by submitting affidavits of jurors to the court in advance of the hearing of defendant's motion for a new trial which prevented the court ruling upon

their admissibility before they were made part of the record of this action. (R. 261-266). Such procedure was highly improper and may have been prejudicial to the defendant's position in their motion for a new trial. The principle prohibiting such conduct and procedure is set forth in *Wheat vs. Denver & Rio Grande Western Railway Company,* 120 Utah 418, 250 P.2d 932 (1952) as follows:

> "The rule prohibiting jurors from impeaching their verdict is founded on sound reasoning and has long been recognized. In *People vs. Flynn,* we said:
>
> > 'It is well settled that affidavits of jurors will not be received to impeach or question their verdict, nor to show the grounds upon which it was rendered, nor to show their misunderstanding of fact or law, nor that they misunderstood the charge of the court, or the effect of their verdict, nor their opinions, surmises, and processes of reasoning in arriving at a verdict.'
>
> The policy behind this statement applies with equal cogency to the oral evidence of jurors proffered upon a hearing of a motion for a new trial. To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would open the door to inquiry into all matter of things which a losing litigant might consider improper: misconceptions of evidence or law, offers of settlement, personal experiences, prejudice against litigants or their causes or the classes to which they belong. It would be an interminable and totally impractical process. Such post-mortems would be productive of no end of mischief and render service as a juror unbearable."

CONCLUSION

The verdict of no cause of action returned in the first trial was supported by substantial evidence and nothing appears in the record to indicate that the jury either disregarded uncontroverted evidence or misapplied the law so as to cause a miscarriage of justice; and in the absence of such a showing, it was an abuse of discretion for the trial court to set the verdict aside and award a new trial.

Defendants were prejudice in the second trial in the following particulars: (1) by the court allowing the jury to consider as an element of damages the consequences of possible future surgery when no medical testimony had been introduced from which the jury could have found by a preponderance of the evidence that future surgery would be necessary, (2) by the jury's failure to abide by the court's instructions in awarding special damages in its first verdict, (3) by the misconduct of the jury in failing to re-deliberate and merely juggling amounts between special damages and general damages in returning its second verdict, and (4) by the misconduct of opposing counsel in filing affidavits of jurors in the record before the admissibility of such could be ruled upon by the trial court at the hearing of defendants' motion for a new trial.

WHEREFORE, appellants and defendants below pray that the judgment of the trial court in favor of the plaintiff be reversed and that the judgment of no cause of action entered on the first jury verdict be reinstated;

or in the alternative, that defendants be awarded a new trial in the consequence of the prejudicial error committed in the second trial.

Respectfully submitted,

HANSON & BALDWIN
H. Wayne Wadsworth
702 Kearns Building
Salt Lake City, Utah
Attorney for Appellants