

1970

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

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Joel M. Allred; Attorney for Respondent

Recommended Citation

Brief of Respondent, *Brown v. Johnson*, No. 11899 (1970).
https://digitalcommons.law.byu.edu/uofu_sc2/4978

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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

RESPONDENT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Leonard W. Elton, *Judge*

FILED

MAY 4 - 1970

JOEL M. ALLRED
610 East South Temple
Salt Lake City, Utah
Attorney for Respondent

Clerk, Supreme Court, Utah

HANSON & BALDWIN and
H. WAYNE WADSWORTH
702 Kearns Building
Salt Lake City, Utah
Attorneys for Appellants

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
MEDICAL FACTS	4
ARGUMENT	
POINT I	
THE TRIAL COURT DID NOT ABUSE ITS DIS- CRETION IN GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL	6
POINT II	
THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE THE DEFENDANTS' PROFFERED IN- STRUCTION NO. 21	10
POINT III	
THE TRIAL COURT PROPERLY APPLIED SET- TLED PRINCIPLES OF LAW IN DIRECTING THE JURY TO CORRECT ITS VERDICT	16
POINT IV	
THE PROCEDURES AT AND BEFORE THE HEAR- ING ON DEFENDANTS' MOTION FOR A NEW TRIAL WERE PROPER AND DID NOT PREJUDICE THE DEFENDANTS	21
CONCLUSION	24

ANNOTATIONS CITED

69 ALR2d 1271	14
---------------------	----

CASES CITED

Baldwin v. Erving, 69 Idaho 176, 204 P.2d 430	20
Big Cottonwood Tanner Ditch Co. v. Kay, 108 Utah 110, 157 P.2d 795	23
Blain v. Yockey, 117 Colo. 29, 184 P.2d 1915	20

TABLE OF CONTENTS (continued)

	Page
Bortek v. Philadelphia Rapid Transit Co., 13 A.856	27
Dornberg v. St. Paul City R. Co., 253 Minn. 52, 91 NW 178.....	14
Feruzza v. City of Pittsburgh, 394 Pa. 70, 145 A.2d 706.....	20
Holloway v. Evans, 55 N.M. 601, 238 P.2d 457	26
Holmes v. Nelson, 7 Utah 2d 435, 326 P.2d 722.....	7
Hyland v. St. Marks Hospital, 19 Utah 2d 134, 427 P.2d 736.....	9
In Re Richards Estate, 5 Utah 2d 106, 297 P.2d 542	12
Jorgensen v. Gonzales, 14 Utah 2d 330, 383 P.2d 934	18
King v. Union Pacific R. R. Co., 117 Utah 40, 212 P.2d 692.....	6
Mazzotta v. Los Angeles R. Corp., 25 Cal.2d 165, 153 P.2d 338.....	11
Moore v. Denver and Rio Grande Western Railway Company, 4 Utah 2d 255, 292 P.2d 849	11
Re Daniels Estate, 185 Ore. 642, 205 P.2d 167	23
Sang v. St. Louis, 262 Mo. 454, 171 SW 347	15
Savko v. Brooklyn and Queens Transit Corp., 1 N.Y.S. 2d 489, 166 Misc 84	20
Sparks v. Berntsen, 19 Cal.2d 308, 121 P.2d 497	20
Stack v. Kearnes, 118 Utah 237, 221 P.2d 594	7
Super Tire Market Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132	23
Wellman v. Noble, 12 Utah 2d 359, 366 P.2d 791	9
Wheat v. Denver and Rio Grande Western Railway Company, 120 Utah 418, 250 P.2d 932	24
Williams v. Ogden Union Ry. and Depot Co., (Utah) 230 P.2d 315	6

UTAH RULES OF CIVIL PROCEDURE CITED

Rule 47(r)	19
Rule 59(c)	22
Rule 61	15

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

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiff's action for damages for personal injuries incurred in rear-end collision.

DISPOSITION IN 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, before Judge Leonard W. Elton, the jury returned a verdict for the plaintiff in the amount of \$11,700.00. The defendants' motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

The plaintiff prays that the judgment entered on the jury verdict in the second trial be affirmed.

STATEMENT OF FACTS

The collision, giving rise to this claim, occurred in Emigration Canyon on January 11, 1968. The plaintiff, a student at the University of Utah, was proceeding in a westerly direction when struck from the rear by the defendant Johnson driving a Royal Baking Company truck. Johnson, a route salesman for the bread company, had been a commercial driver for 20 years and had driven the canyon route more than 1,000 times (R. 767-769). The agency of the defendant Johnson was admitted (R. 230).

Prior to the collision the defendant Johnson was following the plaintiff, before attempting a passing maneuver, at a distance of from 15-20 feet (R. 798, Second Trial, R. 418) on icy, snowpacked roads (R. 773-774) at a speed of 30 miles per hour (R. 790). No emergency stop was made before the collision (R. 790) and no horn was sounded (R. 795). The passing maneuver was attempted at the most densely populated area in the canyon (R. 786-787). The defendant admitted that he was "tailgating" the plaintiff (Second Trial, R. 421) and that he was "too close" (Second Trial, R. 422).

When the defendant attempted to pass the plaintiff, his front wheels were on the passing lane, almost to the plaintiff's back wheels, while his back wheels, or

one of them, were still in the right-hand or west bound lane of traffic (R. 781, 793). Observing the plaintiff's brake lights come on the first time, the defendant attempted to pull back into the westbound lane without completing the passing maneuver (R. 781). Upon pulling back in line, the defendant's truck was following the plaintiff at a distance of from two to three feet (R. 784). When the plaintiff braked a second time, the collision occurred. The plaintiff did not cross the center line (R. 789) and the defendant could have uninterruptedly continued his passing maneuver, but for the fear that the plaintiff would skid on the slick roads, (R. 789), or turn left, (R. 781). The plaintiff gave no left-turn signal (R. 784). There was no place to make a left turn for a substantial distance from the point where the collision occurred (R. 785).

Prior to the collision the plaintiff was proceeding down Emigration Canyon at a speed of 20-25 miles per hour (R. 774). Rounding a curve, he observed a small puppy walking along the side of the roadway (R. 551) which turned as if to cross (R. 547). The plaintiff braked, slowing to approximately 10 miles per hour (R. 547). Then, to avoid striking the puppy, the plaintiff slowed his vehicle a second time to approximately five miles per hour (R. 548). The brake lights came on two separate times prior to the impact (R. 549, 781) with a time interval between. The impact occurred while the plaintiff's vehicle was still moving, as the plaintiff, his foot off the brake, prepared to accelerate (R. 548).

The record shows that the defendant was following the plaintiff at a distance of 200 feet (R. 776) on curved mountain highway; that the plaintiff had looked out the rear view mirror on the way down the canyon without observing the defendant (R. 549); and that his attention was on the puppy when the impact occurred (R. 552). The weather was cold and the road was covered with ice and snow (R. 550). The plaintiff's window was rolled up and there was no time to give a hand signal (R. 551). The defendant admitted that he observed the plaintiff's brake lights lit on two separate occasions. (R. 781).

MEDICAL FACTS

The plaintiff, an outstanding wrestler (R. 558-567), was taken to the University Hospital on the day the collision occurred. The initial examination showed tenderness in the cervical spine, pain with motion, and muscle spasms (R. 613). A preliminary diagnosis, based primarily on the x-ray findings, determined that the plaintiff had suffered a subluxation (partial incomplete dislocation) of the 4th and 5th cervical vertebrae (R. 614-615) and an avulsion fracture of the 2nd cervical vertebra (R. 616).

Subsequent x-rays showed a decrease in the height of the 4th and 5th, and 5th and 6th vertebral bodies (R. 620). Other symptoms of a ruptured disc included a decrease in sensation in the area supplied by the 5th and 6th cervical nerves, as well as a decrease in sensa-

tion in the biceps reflex (R. 619). The latter symptoms were neurological findings, objectively diagnosed, which evidenced nerve injury (R. 620).

After additional examinations and x-ray findings, the treating physician concluded that the plaintiff had a ruptured disc (R. 620). The doctor testified that there was soft tissue involvement and ligamentous damage (R. 643). Approximately eleven months after the injury, the Plaintiff was having tension headaches, requiring medication, and suffering the effects of traumatic arthritis (R. 644, 645-646).

The plaintiff's physician testified that it would be inadvisable for the plaintiff to further participate in contact sports, including wrestling (R. 649); that he had a 30 per cent permanent partial disability of the cervical spine and a 10 per cent permanent partial disability of the total body as a result of the collision (R. 652).

The 21-year-old plaintiff required complete rest for five week, wore a cervical collar for five months, and lost two quarters of school and eleven weeks work.

The defendants did not contend that the plaintiff's injuries had any pre-existing cause (R. 584). Although the medical facts were disputed by the defendants, each of the doctors found substantial injury. (See summary of medical testimony, plaintiff's argument, R. 485-488).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL.

The defendants' brief concluded that the jury verdict in the first trial was supported by substantial evidence. It presumed that the jury correctly weighed controverted evidence and that there was no misapplication of the law which operated to cause a miscarriage of justice (Apps. Brief, 21). The granting of a new trial, the defendant argued, was an abuse of the trial court's discretion.

These arguments were considered in part by Justice Wolfe in *King v. Union Pacific R. R. Co.*, 117 Utah 40, 212 P.2d 692.¹ The trial judge in the *King* case contended that certain evidence was "uncontroverted." This court did not agree. "However," said Justice Wolfe, ". . . it is not necessary that the evidence be uncontroverted in favor of the moving party before the trial court can grant a new trial." (Emphasis added). Further, the evidence before the court in the *King* case was sufficient to support a verdict for the plaintiff or the defendant. The court concluded that where competent evidence would support a verdict for the plaintiff, "Nothing more need appear." Most importantly,

¹See also: *Williams v. Ogden Union Ry. and Depot Co.* (Utah) 230 P.2d 315, citing the *King* case. The trial court granted the defendant a new trial after the jury had returned a verdict for the plaintiff. This court affirmed where ". . . there was competent evidence which would have supported a verdict for the defendant."

in contrast to the defendants' argument in the instant case, the court concluded that,

“The defendants contention that a trial judge in most cases should not grant a new trial *when the verdict is supported by substantial competent evidence* cannot find support in the authorities.” (Emphasis added)

Were this not so, as this court has noted elsewhere,² the court's function with respect to weighing the evidence would be limited to interfering only when it is required to do so as a matter of law.

Stack v. Kearnes, 118 Utah 237, 221 P.2d 594, posed a set of procedural facts on appeal nearly identical to those in the instant case. In the *Stack* case the plaintiff at the first trial received a verdict of no cause of action. Plaintiff's counsel then made a motion for a new trial which was granted by the trial court. The second trial resulted in a verdict for the plaintiff which was then appealed on the theory that the action of the trial court in granting the new trial constituted an abuse of discretion. Four grounds had been cited as supporting plaintiff's motion for the new trial, the two most prominent of which were the insufficiency of the evidence to justify the verdict and the claim that the verdict was against the law.

The trial court in the *Stack* case did not specify the ground or grounds upon which it based its order. The defendant in *Stack* contended that the ground upon

²See concurring opinion, *Holmes v. Nelson*, 7 Utah 2d 435, 326 P.2d 722.

which the plaintiff relied in argument, which apparently influenced the court in reaching its conclusion, was that the evidence was insufficient and the verdict, therefore, contrary to law.³ This was denied by the plaintiff.

This court affirmed the decision of the trial court to grant a new trial, assuming that the basis for the court's decision was, as contended by the defendant, the single ground that the evidence was insufficient to justify the verdict. The court, citing *King v. Union Pacific R. R. Co.*, *supra*, stated simply that,

"... where there appears in the record competent evidence which would support a verdict in favor of the party moving for a new trial, there is no abuse of discretion on the part of the trial court in granting a new trial upon that ground." (i.e. the insufficiency of the evidence)⁴

³Note that this was the plaintiff's argument in the instant case and that the defendants denied that "insufficiency of the evidence," without more, justified setting aside the verdict and granting a new trial. (Apps. Brief, 6, 10).

⁴See concurring opinion, *Holmes v. Nelson*, *supra*, cited by appellant (Apps. Brief, 10), where Justice Crockett comments that the prior decisions of the court,

"... reflect the sound principle that the matter (i.e. the granting of a new trial) should rest pretty much within the sound discretion and good conscience of the trial judge. Supporting this view is the fact that Rule 59(a), giving the court power to grant new trials for insufficiency of the evidence, must impart something more than the mere authority to do so when the proof is so lacking that there should have been a directed verdict. In the latter instance it is the court's imperative duty not only to set aside the verdict but to dismiss the action. Therefore, if any meaning is to be given to the provision that a new trial may be granted for insufficiency of the evidence it must mean something more than the obvious duty just referred to, i.e. it must repose some discretion in the trial court to grant new trials for insufficiency of the evidence to sustain the verdict, even where there is more than the amount necessary to make out a *prima facie* case."

This court has consistently acknowledged the "broad" discretion of the trial judge with respect to the granting or denial of new trials. The trial judge's ruling on such motions should not be overturned unless it appears that it was "arbitrary," or that it "clearly transgressed any reasonable bounds of discretion,"⁵ or in the absence of "plain abuse."⁶ Furthermore, the test applied has a "high degree of subjective content"⁷ where the trial judge is concerned and must, on review, consider his "advantaged" position "with respect to the trial."

On this appeal, the evidence is viewed most favorably to the plaintiff.⁸ Applying the above principles, it is an incontestable fact that there is sufficient evidence on the record to support a verdict for the plaintiff.

The findings of the jury in the first trial were clearly against the weight of the evidence and the judge could not, in good conscience, permit them to stand.

⁵*Hyland v. St. Marks Hospital*, 19 Utah 2d 134, 427 P.2d 736. Cited in Appellant's brief at page 7.

⁶*Holmes v. Nelson*, *supra*.

⁷*Id.*

⁸See *Wellman v. Noble*, 12 Utah 2d 359, 366 P.2d 791, where the court stated,

"However since the trial judge has seen and heard the witnesses and had a first hand view of all the evidence, and the proceedings throughout the trial and has ruled on the admissibility of evidence, and instructed the jury on the law governing their verdict, and had opportunity of observing the tactics of the counsel throughout the trial and the jury's reaction thereto, his ruling on a motion for a new trial should not be overruled unless it clearly appears that he has abused his discretion."

⁹*Stack v. Kearnes*, *supra* at 595.

POINT II

THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE THE DEFENDANTS' PROFFERED INSTRUCTION NO. 21.

The defendants contend that the trial court erred in failing to instruct the jury not to consider damages for any disability or expense related to future surgery. Plaintiff responds as follows:

A. The Plaintiff Waived Any Claim for Such Damages.

It is true that the plaintiff's physician described the procedure required for the repair of a herniated disc. The plaintiff did not, however, present evidence at the second trial bearing on the value of hospital and medical expenses, or lost earnings, if future surgery was required. Such evidence was, over stringent objection, admitted at the first trial (R. 632-636). Failure to present such evidence a second time was, in effect, a waiver by the plaintiff of any claim for damages related to future surgery. In closing argument, plaintiff's counsel waived any claim for the value of delayed schooling; for future medical expenses, and for wages and expenses related to future surgery (R. 491).

B. The Instructions as Given By The Court Adequately Protected the Interests of the Defendant.

The accumulated instructions of the court adequately defined the jury's responsibilities (R. 215-253). They discussed proximate cause, preponderance of evi-

gence, and burden of proof (R. 218, 219, 221). They directed that no verdict could be based upon speculation or conjecture (R. 222) and expressly cautioned that the jury could not award speculative damages, meaning damages which, "*although possible*," were "remote, conjectural, or speculative." (R. 237) (Emphasis added). The court indicated that the jury was not bound by the opinions of expert witnesses, and that it could reject such opinions if they were unsound (R. 243). Last of all, the court required that the damages for doctors, medicines, x-rays, and hospital services were to be limited to those "actually" incurred not to exceed \$377.50 (R. 234).

Without proof of the value of any loss (including earnings) related to future surgery, and in the absence of an instruction specifically dealing with the subject of future surgery, it is assumed that the jurors, presumably persons of reasonable intelligence, could not fail to understand that no recovery for medical expenses incident to surgery could be had.¹⁰ Furthermore, on appeal, the court is "obliged to indulge the assumption" that the jurors followed the instructions as given by the court.¹¹

C. *The "Moore" Holding Did Not Require the Trial Court to Give Instruction No. 21.*

This court, in *Moore v. Denver and Rio Grande Western Railway Company*, 4 Utah 2d 255, 292 P.2d 849,

¹⁰See: *Mazzotta v. Los Angeles R. Corp.*, 25 Cal 2d 165, 153 P.2d 338.

¹¹*Moore v. Denver and Rio Grande Western Railway Company*, 4 Utah 2d 255, 292 P.2d 849.

reversed the trial court for failing to give an instruction, requested by the defendants, which removed the question of a disc injury from the consideration of the jury. The majority opinion held that the proof of the disc injury was not probative. It is this principle which defense counsel asserts is applicable to the instant case.

The plaintiff argues that this court did not intend its *Moore* decision to have the effect argued on appeal by the defendants. In *In Re Richards Estate*, 5 Utah 2d 106, 297 P.2d 542, it was argued that the testimony of an expert witness was so uncertain and vague that it should not have been submitted to the jury. The *Moore* case was cited as authority for this proposition. This court, finding the evidence admissible, held this to be an erroneous interpretation of the *Moore* holding. It stated simply that *Moore* held “*in the particular context*” that the experts’ qualifying phrases rendered the testimony “too insubstantial when standing alone to support the verdict.”¹² (Emphasis added)

D. *The Evidence Submitted by the Plaintiff on the Issue of Future Surgery was Probative.*

The trial court could not conclude that there was

¹²Note that the concurring opinion in the *Moore* case criticized the reasoning of the majority, concluding that,

“ . . . instead of succumbing to specious pretexts of ingenious counsel to avoid a distasteful result, judicial forthrightness requires recognition that the verdict was so excessive that it must have resulted from passion and prejudice, and the granting of a new trial on that ground.”

Counsel suggests that the main thrust of the cited portion of the concurring opinion refers to the argument that the evidence was not probative, and to the conclusion that failure to give the defendants instruction constituted reversible error. The concurring opinion also prophetically cited the legal “cliche” that “harsh cases make bad law.”

no medical evidence produced by which the jury could find that surgery would be required. If the evidence was probative, and if it posed an issue for the jury, then the proposed instruction was correctly denied.

The treating physician testified that there was a 15 per cent chance that surgery would be required. The defendants' argument, simplified, is that unless there is a 50 per cent chance, the jury could never find for the proposition by a preponderance of the evidence (R. 625-626). This, it is argued, is the legal effect of the holding in the *Moore* case. The logical extension of the defendants' argument is that proof of any condition, having a chance for surgery of less than 50 per cent, is not probative, and is, by means of an instruction, to be automatically removed from the consideration of the jury.

The application of this formula denies reality. It suggests that a jury cannot find, or consider, with the aid of the medical testimony and other proof, that which is in fact true. That is, that a plaintiff, as a result of his injuries and of the negligence which caused them has a 15 per cent, or, as the case may be, a 49 per cent chance of future surgery.

The plaintiff suggests that the correct formula is that a jury could find by a preponderance of the evidence that there is a 15 per cent chance of future surgery, and consider the fact accordingly. This appears to be the position taken by the majority of the cases that

have considered the matter.¹³ If the court agrees with the plaintiff on this point alone, all other considerations notwithstanding, the defendants' argument under Point II must fail. The defendants' proposed instruction was solidly based on the proposition that there was no medical evidence presented at the trial upon which a jury could find that surgery would be necessary. Given probative evidence, upon which a jury could predicate a finding, the instruction was clearly incorrect (R. 211).

Although these considerations become less significant given the plaintiff's waiver of any claim for such damages, and his failure to prove the value of any such loss or to pursue the matter in argument, the court properly denied the instruction.

E. The Court's Failure to Give the Requested Instruction Did Not, In Any Event, Constitute Prejudicial Error.

Analysis of Dr. Soderberg's testimony, and of the medical facts, demonstrates that the amount of the jury's verdict was fully justified by the plaintiff's injuries, future surgery notwithstanding. The defendant has essentially abandoned on appeal its contention that the damages were excessive although this was asserted, without argument, at the hearing on the Motion for a New Trial (R. 260). It is argued only that the amount of the verdict is "strong indication" that the jury found damages for future pain and suffering associated with

¹³See: *Dornberg v. St. Paul City R. Co.*, 253 Minn 52, 91 NW 178. Also: Annotation 69 ALR2d 1271.

a cervical fusion. *Nothing*, other than the amount of the award, is asserted to permit such an inference. As the Missouri Supreme Court stated in *Sang v. St. Louis*, 262 Mo. 454, 171 SW 347, it "would be trifling with justice to *suppose* that the jury allowed anything of substance on the issue of future medical services." (Emphasis added).

In the same Utah case which confined the *Moore* decision to its own particular facts,¹⁴ the trial court refused to give an instruction to the effect that the burden of showing lack of testamentary capacity was upon the contestants in a will contest. That this was the law was undisputed. It was indicated on the instruction by the trial judge that the charge was "given by implication." This court held on appeal that while it might have been desirable to give the requested instruction, and would not have been error to do so, failure to do so did not justify a reversal. Only when the jury was insufficiently advised of the issues to be determined, or confused or misled to the prejudice of the complaining party, did the refusal to give an instruction constitute the basis for a reversal.

Rule 61 of the Utah Rules of Civil Procedure expressly provides that if there is error, no new trial shall be granted or judgment be disturbed, unless refusal to take such action appears "inconsistent with substantial justice." Nothing so appears in the instant case.

¹⁴In *Re Richards Estate*, 5 Utah 2d 106, 297 P.2d 542.

The defendants' proffered instruction did not specifically purport to cover damages related to pain and suffering. It was limited by its terms to damages for "possible future disability" or expenses of "surgical treatment."¹⁵ Had the instruction been given, it would have furnished the jury with no guidance with respect to the issue of damages for pain and suffering.

POINT III

THE TRIAL COURT PROPERLY APPLIED SETTLED PRINCIPLES OF LAW IN DIRECTING THE JURY TO CORRECT ITS VERDICT.

Plaintiff's counsel argued in concluding the plaintiff's case that the plaintiff had expended \$377.50 for medical expenses, \$65.00 for air fare to Norfolk, Virginia, and that he had lost \$1,255.00 in earnings as a result of his injuries (R. 490-491). The total of the above items was \$1,697.50. Counsel made a per diem argument with respect to damages for pain and suffering (R.492-494). The court, without discussion of air fare and lost earnings, had instructed the jury that the total amount of special damages should not exceed the sum of \$377.50, the amount of the medical specials (R. 234).

The jury returned with a total verdict of \$11,700.00, \$1,700.00 of which was characterized as general damages and \$10,000.00 of which was characterized as spe-

¹⁵This is also the interpretation earlier placed on the instruction by defense counsel (R. 526).

cial damages (R. 255-A). During a conference in chambers to discuss the error, plaintiff's counsel called to the attention of the trial court the fact that the air fare, the medical expenses, and the lost earnings totalled roughly \$1,700.00 (R. 504). Counsel also, before the return of the jury, called to the court's attention the fact that the jury had inadvertently inserted the special damage item in the general damage section of the verdict form and vice versa (R. 509).¹⁶

After the conference in chambers, the court asked the jury to return to the jury room and reconsider its verdict in light of the court's earlier instructions, particularly those having reference to the issue of damages (R. 508).

The jury, following the court's advice, returned to the jury room, discussed the matter and corrected the verdict to read \$377.50 special damages and \$11,332.50 general damages. The amount of the verdict, \$11,700.00, remained constant.

The defendants' Motion for a New Trial was primarily based upon the alleged irregularity of the proceedings as above described (R. 259). The transcript of the defendants' argument on its Motion for a New Trial reflects the following interchange:

COURT: "What is your comment on Rule 47R and Jorgensen versus Gonzales? What have you got to say about about those two items?"

¹⁶See also counsel's comments in the Record at 504.

MR. WADSWORTH: "I don't know. I'd have to read them." (R. 532)

The Judge then concluded that *Jorgensen v. Gonzales*, 14 Utah 2d 330, 383 P.2d 934 (1963), with rule 47(r) of the Utah Rules of Civil Procedure, was "decisive" of the issues raised by the defendants' motion (R. 533).

Despite the especial significance attached to the *Gonzales* case by the trial court, and to Rule 47(r), these authorities have been again ignored by the defendants on appeal.¹⁷

Rule 47(r) indicates:

"*Correction of Verdict.* If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again."

Jorgensen v. Gonzales, *supra*, is dispositive of the issues raised by Point III of the appellant's brief, both as governing precedent and as a logical proposition. In *Gonzales*, an automobile collision case, the jury returned a verdict of \$368.49 special damages and \$1,131.51 general damages. The odd amounts of the damages caused the court to question the jury foreman about the possibility of a quotient or chance verdict. Discussion disclosed that the jury had considered the plaintiff's travel expense from California to Utah as an item of general damage. The defendant asserted and the plain-

¹⁷See Appellants Brief, page 17. Appellant refers to Rule 47(r) and to *State v. Gonzales* without analysis, except to say that they served as authorization for the trial judge's decision to direct the jury to reconvene.

tiff conceded that this was incorrect. The court directed the jury to go out and reconsider its verdict. After reconsideration, the jury returned with a second corrected verdict of \$368.49 special damages and \$1,200.00 general damages. Note that, unlike the instant case, the amount of the total verdict was increased adversely to the interest of the defendant-appellant.

This court, in referring to Rule 47(r) of the Utah Rules of Civil Procedure, concluded that,

“The general and well-established rule is that so long as the jury is functioning as such in the course of a trial and until it is discharged, it is subject to directions and instructions from the court to the end that the issues be fully tried, deliberated upon, and a correct verdict rendered. And where it is apparent that there is some patent error in connection with the verdict, the court may of course call the matter to their attention and direct them to redeliberate. In that regard it has been held, sensibly and properly, that where an amount is erroneously included the court may direct the jury to retire and correct it. The trial court appears to have acted not only within its prerogative but properly and discreetly in handling the situation.”

The principle of the *Gonzales* case is widespread. It is applicable when a verdict is “informal,” “insensible,” “repugnant,” “not responsive to the issues submitted,” or “in disregard of the instructions of the court.” Although, counsel asserts, none of these elements were present in the instant case, the practice of permitting a jury to reconvene to reconsider is merely an application of the “settled rule” that “until the

verdict has been recorded, or the jury have been discharged as unable to agree, their connection with the case has not come to an end." *Blain v. Yockey*, 117 Colo. 29, 184 P.2d 1915. See also: *Bortek v. Philadelphia Rapid Transit Co.*, 13 A 856, *Baldwin v. Erving*, 69 Idaho 176, 204 P.2d 430, *Sparks v. Berntsen*, 19 Cal.2d 308, 121 P.2d 497, *Holloway v. Evans*, 55 N.M. 601, 238 P.2d 457, *Sacko v. Brooklyn and Queens Transit Corp.*, 1 N.Y.S.2d 489, 166 Misc 84.

The defendant makes much of the point that the jury did not redeliberate, that it merely retired, made a mathematical calculation and returned. Nothing in the record substantiates such a conclusion, other than the fact that the second retirement was brief. How brief, is difficult to determine from the record which is ambiguous and confused on the point.¹⁸ Cases such as those cited in the appellants' brief¹⁹ which involve juries which stubbornly refuse to follow the instructions of the court on matters involving substantive change, are markedly unhelpful when considering corrections involving matters of form.

A jury verdict that, "We find for the plaintiff, no cause of action," is easily corrected. It requires no substantial reconsideration. To gauge the validity of the

¹⁸Note that the record, p. 508, indicates that the court returned and requested the jury to reconsider its verdict at 4:43 p.m. and the record, p. 510, indicates that the jury returned with the corrected verdict at 4:41 p.m.

¹⁹See especially *Feruzza v. City of Pittsburgh*, 394 Pa. 70, 145 A.2d 706, where the jury, without adequate deliberation, defied the judge, adding attorney fees, court costs, and additional damages by "indirection," correctly called by the court "capricious" and "unjustifiable."

correction in terms of the time required to effect it, would stretch credulity. When a jury considers the elements of damage correctly, even though confusing such concepts as general and special damages and reflecting them incorrectly as to form on the verdict, a mere mechanical change or mathematical calculation is indicated. Restating the language of the *Gonzales* case, “. . . where an amount is erroneously included the court may direct the jury to retire and correct it.”

Furthermore, Rule 47(r) provides that an informal or insufficient verdict “may be corrected by the jury *under the advice of the court, or the jury may be sent out again.*” (Emphasis added). The rule then provides, alternatively, that such matters may be resolved and necessary corrections made by a jury reconvened at the direction of the court, or by a jury operating in open court with the judge’s assistance, *without redeliberation.*

POINT IV

THE PROCEDURES AT AND BEFORE THE HEARING ON DEFENDANTS’ MO- TION FOR A NEW TRIAL WERE PROPER AND DID NOT PREJUDICE THE DEFEND- ANTS.

The defendants contend that plaintiff’s counsel acted improperly by submitting affidavits of jurors to the court in advance of the hearing on defendants’ Motion for a New Trial. The questioned documents are included in the record on appeal (R. 261-266). It is asserted that the affidavits should have been submitted

as exhibits to the plaintiff's rebuttal argument to the defendants' Motion for a New Trial. This would have permitted, counsel reasons, the court to have ruled on the issue of admissibility before the offending documents were made a part of the record. The advance submission of the affidavits is alleged to have been "highly improper" and possibly prejudicial to the defendants' position with respect to the Motion for a New Trial.

In providing counsel and the court with the proposed affidavits in advance of the hearing, the plaintiff was complying with the specific provisions of Rule 59(c) of the Utah Rules of Civil Procedure. The rule requires the moving party on a Motion for New Trial based upon subdivisions 1 through 4 of Rule 59 to support the motion by affidavit.²⁰ It further requires that the opposing party has 10 days, after service of the moving party's motion, within which to serve opposing affidavits. Had plaintiff's counsel waited until the morning of the hearing to produce the proposed affidavits, it is most likely that the court would have rejected them, not on their merits as it did, but on technical grounds, on defendants' motion, on the theory that they were untimely and took the defendants by surprise.

A careful reading of the record indicates that no question of the impropriety of counsel was raised by the defendants with the trial court when the affidavits' admissibility was discussed (R. 516-517). The court

²⁰Although the Defendants' motion, based in large part on Rule 59(a)(1), was unsupported.

concluded that the affidavits were filed to impeach the verdict of the jury (R. 517), that such use was not permitted by law (R. 517), and that it was not going to consider them (R. 516).

It is presumed on appeal that the court disregarded *improperly admitted* evidence in arriving at its decision. *Re Daniels Estate*, 185 Ore. 642, 205 P.2d 167. This court has recited frequently the proposition that a trial judge hearing a case without a jury is assumed to have superior knowledge as to the competency of and the effect to be given evidence. *Super Tire Market, Inc. v. Rollins*, 18 Utah 2d 122, 417 P.2d 132. It is presumed that the trial judge considered only the part of the testimony which was material, competent and relevant. *Big Cottonwood Tanner Ditch Co. v. Kay*, 108 Utah 110, 157 P.2d 795.

Note that the presumption that the trial court can "separate the wheat from the chaff" is most often indulged in situations where evidence is admitted and the record is silent as to the basis for the judge's decision. In the instant case, it is unnecessary to speculate as to the influence of the affidavits on the final decision. The judge was explicit, saying bluntly with respect to the documents, "I'm not going to consider them." (R. 516). It is difficult to conceive, under such circumstances, that the affidavits had any prejudicial effect, or that the attempt to use them constituted harmful error. The appellants have not attempted to articulate the basis for a claim of prejudice or to explain in what way the contents of the affidavits were offensive. The whole

matter is best considered as involving nothing more than a question of the admissibility of evidence,²¹ evidence which was rejected by the court and which had no bearing on its decision.²²

CONCLUSION

The trial court did not abuse its discretion in granting Plaintiff's Motion for a New Trial at the conclusion of the first trial. Further, a careful reading of the record of the second trial dispels the notion that any error was committed which would justify a reversal of the judgment of the trial court. The judgment should be affirmed.

Respectfully submitted,

JOEL M. ALLRED
610 East South Temple
Salt Lake City, Utah
Attorney for Respondent

²¹It would be incorrect to characterize the affidavits as an effort to "impeach" or "question" the verdict of the jury, something the plaintiff had no desire to do. It is possible, however, that insofar as they attempted to show the grounds for the verdict and the reasoning process of the jury, they were still inadmissible under the rule of *Wheat v. Denver and Rio Grande Western Railway Company*, 120 Utah 418, 250 P.2d 932. However, as an evidential matter, any potential "mischief" from such a "post mortem" was effectively foreclosed by the refusal of the trial court to consider the documents.

²²The trial judge, as previously indicated, called Rule 47(r) and *State v. Gonzales, supra*, "decisive" of the issues involved on the Motion for a New Trial.