1971

Irvin A. Langton v. International Transport Inc., And Bob Haze Roberts : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

IRVIN A. LANGTON,
Plaintiff-Appellant,

v.

INTERNATIONAL TRANSPORT, INC., and BOB HAZE ROBERTS,
Defendants-Respondents.

BRIEF OF RESPO

Appeal From a Judgment of the
In and For Salt Lake C
The Honorable Douglas L. Co

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Case No. 12244

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

The statement of facts contained in plaintiff's brief is incomplete. On plaintiff's motion defendant Bob Haze Roberts was dismissed from the action on the morning of trial (R. 195). References to defendant herein refer only to defendant International Transport, Inc. The following statement of facts presents the facts most favorable to the jury's findings.

STATEMENT OF FACTS

On the morning of June 19, 1969 Bob Haze Roberts, an employee of defendant International Transport, Inc., was driving defendant's truck and flatbed trailer north on the Interstate I-15 collector road on the 1700 South overpass when the truck broke down (R. 218). Roberts pulled the truck over as far as he could to the right, turned on all

the lights (flashing lights and the headlights), set the brakes and got out to inspect the truck (R. 201). Roberts and Lloyd Behunin, a co-driver, examined the motor and found that the crankshaft had broken and the damper had gone through the radiator (R. 202, 226). Roberts told Behunin to go make a phone call to get the wrecker (R. 202). Behunin ran off the overpass to a business establishment to call a wrecker (R. 227). Behunin thought it was three to four minutes from the time he first got out of the truck until he was informed there had been an accident (R. 230). Roberts went around to get the flares out of the cab. He started walking south along the east side of the truck between the guard rail and the trailer to set the flares on the overpass (R. 203). As Roberts was walking toward the back of the truck the right front of the plaintiff's pickup truck collided with the left rear of the defendant's trailer (R. 210). Roberts testified that the truck was stalled three to five minutes before the accident happened (R. 353).

Plaintiff, a pipefitter for the Denver and Rio Grande Western Railroad, was driving his pickup from the Roper Yards (6th West and 2100 South) to the Salt Lake Union Depot at the time of the accident (R. 382, 387). He was on an emergency trip to repair a broken water pipe and a sewer in the cafe (R. 387).

Langton testified:

Q. (Mr. McRae) Okay. Then as best you can recall tell them what you do remember.

A. (Mr. Langton) I entered the collector road behind a semi and I stayed behind the semi until we got to the collector road itself off of the entrance road. I went from the right hand lane to the left hand lane to pass him; he signalled to come over, and I fell behind him and then I turned to pass him in the right hand lane and I remember nothing else. (382-383)

Lloyd Robbins, an eye witness to the accident, testified he was driving north on the collector road toward the 17th South overpass when he saw the plaintiff's pickup truck and another semi truck and trailer traveling north on the collector road (R. 338). This semi truck was traveling north in the right lane and the plaintiff's pickup was traveling north in the left hand lane (R. 333-334). All the vehicles were going approximately 50 m.p.h. (R. 333). The driver of the semi truck gave a signal and pulled into the left hand travel lane of the collector road (R. 334). Langton then drove his pickup truck into the right hand lane to attempt to pass the moving semi truck on the right (R. 339).

Robbins testified:

Q. (Mr. McRae) How could you describe this movement then of the pickup truck into the right land, did he signal and make a move or how did he make this move?

A. (Mr. Robbins) I don't recall seeing a signal. The impression that I received was the semi truck and trailer moved into the left hand lane. The panel truck or the pickup truck driver made a decision to pass that vehicle on the right and almost at the same time that the tractor trailer was moving into the left hand lane the pickup truck moved into the right hand lane behind him. It was almost as though the two were weaving.

Q. And then immediate impact?

A. Yes. There were not two discreet actions. The pickup truck did not move after the semi truck and trailer was completely in the left hand travel lane or happening at the same time, if I make myself clear. (R. 336)

Robbins observed the impact of the pickup truck on the left rear set of tandems of the defendant's trailer (R. 340).

Langton was in the hospital two days (R. 395). He went back to work on the 15th day of July, 1969 (R. 396).

Dr. Nusbaum testified that Langton had a brain concussion (R. 249). The doctor also stated that Langton had a fifty-fifty chance of a complete recovery from the accident.

The jury returned a 6-2 verdict in favor of the plaintiff and against the defendant as follows:

> We the jurors impaneled in the above case find the issues in favor of the plaintiff and against the defendant and assess damages as follows:
>
> | | |
> |---|---|
> | General Damages | None |
> | Special Damages | $ 868.25 |
> | Property Damages | 600.00 |
> | Total | $1,468.25 (R. 169) |

Plaintiff filed a motion for a new trial on the issue of damages or in the alternative for an additur (R. 143). Defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial on all issues (R. 144). At the time of hearing on the motions, defendant moved to amend its motion to allow the verdict returned by the jury to stand. The trial court allowed the amendment giving counsel for both parties an opportunity to file briefs (R148-149). The trial court ruled the verdict of the jury would be allowed to stand (R. 170).

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY VERDICT TO STAND.

Judge Douglas Cornaby, Layton City Judge sitting pro tem, denied plaintiff's motion for a new trial on damages only or for an additur and allowed the jury verdict to stand stating:

> ". . . The jury found for the plaintiff and gave him an award for damages for those listed under specials and those listed under property damages, but were not persuaded that plaintiff had suffered further damage and so said 'none' under general damages. The proof of permanent injuries was not so conclusive that the court could say as a matter of law that the jury was wrong. To then insist that a whole new trail is necessary because they failed to know they should list at least $1.00 under general damages is incredulous. The jury didn't ignore generals or leave it blank; they inserted 'none'." (R. 171)

This court has previously held that a trial court has wide discretion in granting or denying a motion for new trial. *Bowden v. Denver & Rio Grande Western Railroad Co.*, 3 Utah 2d 444, 286 P.2d 240 (1955); *Beck v. Dutchman Coalition Mines Co.*, 2 Utah 2d 104, 269 P.2d 867 (1954).

This court has further held that it is reluctant to interfere with the ruling of a trial court on a motion for a new trial and will do so only if there is a clear abuse of discretion. *King v. Union Pacific Railroad,* 117 Utah 40, 212 P.2d 692 (1949).

If there is substantial evidence, together with fair inferences that may be drawn therefrom to support the jury verdict then it should be sustained.

See *Gordon* v. *Provo City,* 15 Utah 2d 287, 391 P.2d 430 (1964) where this court held:

> The purpose of a trial is to afford the parties a full and fair opportunity to present their evidence

> and contentions and to have the issues in dispute be tween them determined by a jury. When this objec tive has been accomplished, *and the trial court ha given its approval thereto by refusing to grant a new trial, the judgment should be looked upon with some degree of verity.* The presumption is in favor of its validity and the burden is upon the appellant to show some persuasive reason for upsetting it. *Under the cardinal and oft-repeated rule of review, we will not disturb the jury's finding so long as it is supported by substantial evidence that is, evidence which, together with the fair inferences that may be drawn therefrom reasonable minds could conclude as the jury did;* and we will not reverse the judgment entered thereon unless in arriving at it substantial and prejudicial error was committed in the sense that in its absence there is a reasonable likelihood that there would have been a different result. (emphasis added)

Plaintiff claims the jury failed to follow the instruction of the court because they failed to award general damages.

The trial court's instruction on damages (No. 26) gave the jury discretion to find *no* general damages. It stated:

> If you find the issues in favor of the plaintiff Irvin A. Langton, and against the defendant, Inter national Transport Incorporated, it will be your duty to award the plaintiff such damages, *if any,* as you may find from a preponderance of the evidence will fairly and adequately compensate him for any injury and damage he has sustained as a proximate result of the defendant's negligence complained of by him. (R. 130) (emphasis added)

Plaintiff took no exception to this instruction (R. 430-432).

The phrase, *if any,* clearly gave the jury the prerogative of denying general damages, if they were not proved by a preponderance of the evidence.

The jury was also instructed that they were the exclusive judges of the credibility of the witnesses and the weight of the evidence.

> You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses you have a right to take into consideration their bias, their interest in the result of the suit, or any probable motive or lack thereof to testify fairly, if any is shown. You may consider the witnesses' deportment upon the witness stand, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider these matters together with all of the other facts and circumstances which you may believe have a bearing on the truthfulness or accuracy of the witnesses' statements. (R. 112)

It is clear that the testimony of a witness is no stronger than left on cross examination. *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P.2d 986 (1954).

The jury was entitled to believe the statements made by Dr. Nusbaum on cross examination accurately described the plaintiff's condition.

> Q. (Mr. Nebeker) Referring down to the bottom paragraph, and this is from the letter that you wrote to Dr. Howard, I guess after he has—Mr. Langton had been referred to you by Dr. Howard.
>
> A. (Dr. Nusbaum) Yes.
>
> Q. You stated that '*Examination today neurologically is intact,*' is that correct? Down at the bottom paragraph, is that your statement to Dr. Howard?

A. That is one of the sentences in that paragraph, yes. (R. 261-262)

* * *

Q. In your examination you state you, 'Repeat examination today in the office,' and state that, '*demonstrates no definite abnormalities,*' is that correct?

A. *That's right.* (R. 264)

* * *

Q. Okay. Then you go on to say that, 'That the *brain scan* obtained at the Holy Cross Hospital on September 12, 1969, and includes reports which I am sending you *was,* also, *essentially negative.*' Is the brain scan the same things as the EEG?

A. Yes.

Q. And you say that in September that *was essentially negative?*

A. *Essentially negative.* Do you mind if I refer to the report on that? (R. 265)

* * *

Q. Then reading back on that letter of September 16, you said quote—on the next to the last paragraph, '*I do not believe we have any neurological or persisting neurological complications to Mr. Langton's recent injury.*' Is that your statement to Dr. Howard?

A. *That was my opinion at that time.*

Q. *You advised him simply to use up the rest of his dramamine and then discontinue it and that with*

the passage of time all of the symptoms should resolve spontaneously?

A. *That was my opinion at the time.*

Q. That was in September of 1969?

A. Yes. (R. 266-267)

* * *

Q. Then on February 26 you wrote another letter to Dr. Howard and stated, 'I admitted Mr. Langton . . .' and you say, 'tomorrow—briefly to the Holy Cross Hospital for angiogram study because of the persisting symptomotology,' and says, '*this study was unrevealing and I would look for a continued study and improvement for Mr. Langton, a fairly near term complete recovery,*' is that correct?

A. *That was my opinion, yes.*

Q. *That was written about four months ago?*

A. Uh-huh.

Q. To Dr. Howard?

A. *Yes.* (R. 268)

* * *

Dr. Nusbaum testified that in his opinion the plaintiff has a fifty-fifty chance of a complete recovery.

Q. (Mr. Nebeker) But we have to rely on your guess because you know more about it than the rest of us, and it would be your testimony—

A. (Dr. Nusbaum) *Well if I say fifty-fifty it's hard to be really wrong, if I say that. I think he could go either way.*

Q. You don't want to be held to this absolutely either, right?

A. Right.

Q. Saying he could get better or he might not?

A. That's right, and I really don't know which one to say. (R. 271)

The jury was also entitled to infer that since the plaintiff had been on the job continuously from the time he returned except for the one day he went to the hospital for an angiogram test (which was normal) that he was not entitled to general damages.

The plaintiff testified:

Q. (Mr. Nebeker) And you have been on the job continuously since that time except for the one day that you went to the hospital for this angiogram test? And this was in June of this year?

A. (Mr. Langton) Yes.

Q. You have had a good work record at your present employment, I presume?

A. As far as I know, yes.

Q. That is you haven't had any periods of long illness where you have been off work for a long time?

A. No.

Q. Are you receiving the same rate of pay now that you were receiving at that time, or have you had a cost of living increase?

A. We have had an increase. (R. 396)

The plaintiff admitted that he drove his car every day.

Q. (Mr. Nebeker) During the average week do you leave the Roper yards would say every day during your employment, or is it less often than that?

A. (Mr. Langton) I would say I leave it every day.

Q. You leave it every day in your truck?

A. Yes.

Q. And you either drive north or south to some specific assignment?

A. That's right. (R. 413)

The jury could infer from this fact that the plaintiff had not sustained an injury which prevented him from "pursuing the ordinary affairs of life."

The only evidence offered with regard to lost wages was the plaintiff's own testimony. If the jury was not convinced by a preponderance of the evidence that the plaintiff suffered any disability as a result of the accident they could also conclude that he was not entitled to any lost wages.

In *Efco Distributing, Inc.* v. *Perrin*, 17 Utah 2d 375, 412 P.2d 615 (1966) where the jury found the issues in favor of the plaintiff and against the defendant and assessed damages in the sum of "none", this court stated:

". . . *It is fundamental that it is the exclusive prerogative of the jury to judge the credibility of witnesses.* This focuses attention upon the testimony of plaintiff's president-manager, who of course had a high degree of self-interest.

In the recent case of Holland v. Brown the plaintiff's claim for recovery likewise was based upon the testimony of the plaintiff-manager. We stated therein,

> *His self-interest may be a sufficient basis for (the jury) rejecting it; and furthermore, they are entitled to judge it in the light of their experience in the everyday affairs of life. This may well have included some legitimate doubts as to the loss of profits plaintiff claims to have sustained* * * *. It is plainly apparent that they were not satisfied by the necessary preponderance of evidence that plaintiff suffered any actual loss and consequently awarded him damages of only $1.00. Considering all of the attendant factors, this appears to be within the limits of what reasonable minds might conclude under the circumstances . . ." (emphasis added)

Defendant respectfully submits there is substantial evidence, together with fair inferences that may be drawn therefrom, to support the jury verdict. The trial judge did not abuse his discretion in allowing the verdict to stand.

POINT II

THE TRIAL COURT COMMITTED ERROR IN FAILING TO GRANT DEFENDANT'S MOTION FOR A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT BUT DEFENDANT REQUESTS THIS COURT TO LET THE VERDICT STAND.

At the conclusion of the plaintiff's case defendant moved for a directed verdict (R. 415-517). After the jury

verdict was returned defendant moved for judgment notwithstanding the verdict or in the alternative for a new trial on all issues, or to allow the verdict returned by the jury on June 24, 1970 to stand (R. 148-149). Defendant contends the trial court committed error in failing to grant its motions for a directed verdict or judgment N. O. V. because there was no evidence from which the jury could find the defendant negligent and the evidence clearly shows the plaintiff was contributorily negligent as a matter of law. However, defendant requests this Court to let the jury verdict stand.

Defendant's truck was disabled from three to five minutes before the accident happened (R. 353). Stopping a disabled truck on the emergency stopping lane on the overpass would not constitute negligence. See Instruction No. 16 (Section 41-6-101 U. C. A.) which provides:

> "41-6-101 Utah Code Annotated, 1953, as amended. Stopping or parking on highway outside of business or residential district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway."
>
> *"This section shall not apply to the driver of any vehicle which is disabled while on the paved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."* (emphasis added) (R. 120)

Failure to place the flares on the overpass within three to five minutes after the truck was disabled would not consti-

tute negligence. Even if the element of time was a question for the jury, defendant contends the failure to get the flares on the highway could not possibly have been a proximate cause of the accident. The testimony of the plaintiff and Floyd Robbins conclusively established that the plaintiff crossed the collector road from the left hand lane to the right hand lane behind the moving semi truck and trailer. When the plaintiff changed lanes there was immediate impact with the rear of the defendant's disabled truck. Even if the flares had been placed to the rear of the disabled truck, the plaintiff obviously would not have seen them in time to bring his pickup truck to a stop.

Roberts was required by regulation to place the flare 100 feet behind the disabled truck (R. 121).

The plaintiff testified at the trial he was going fifty to sixty miles per hour just prior to the accident (R. 394) and admitted that he had testified to fifty-five to sixty-five miles per hour at his deposition (R. 394). At fifty miles miles per hour the plaintiff's stopping distance would be over 175 feet. If the flares had been on the highway, the plaintiff would not have seen them in time to stop because of the manner in which he attempted to pass the moving semi truck and trailer.

The absence of flares on the highway was not a proximate cause of the accident.

Defendant also argued to the trial court in its motions for directed verdict and judgment N. O. V. that the plaintiff was contributorily negligent as a matter of law for driving into the rear of a disabled truck in broad daylight (R. 415-417).

In *Hillyard* v. *Utah By-Products Co.* 1 Utah 2d 143, 263 P.2d 287 (1953) an action was brought for the death of an *automobile passenger* who was killed when the car in

which he was riding crashed into defendant's truck which was parked so that its rear end extended five feet onto the paved portion of the street. Judgment was entered for the plaintiff and defendant appealed. This Court affirmed holding that *the prior negligent parking of defendant's truck could reasonably be found to be a concurring proximate cause with the negligence of the driver of the automobile in which the plaintiff was riding as a passenger.*

In the *Hillyard* case, supra, this Court was confronted with a question of proximate cause. This Court held:

> In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with *a later act of negligence* causing an injury, the courts have drawn a clear-cut distinction between two classes of cases. The first situation is where one has negligently created a dangerous condition (such as parking the truck) and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who *negligently* failed to observe the dangerous condition until it is *too late* to avoid it. In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor. This is based upon the reasoning that it is not reasonably to be foreseen nor expected that one who *actually becomes cognizant* of a dangerous condition in ample time to avert injury will fail to do so. On the other hand, with respect to the second situation, where the second actor fails to see the danger in time to avoid it, it is held that a jury question exists, based on the rationale that it can reasonably be anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to escape it. The distinction is basically one between a situation in which the second actor has sufficient time, after being charged with knowledge of the hazard, to

> avoid it, and one in which the second actor *negligently* becomes confronted with an *emergency* situation. (emphasis added)

This Court further stated that the second actor would be negligent for getting into the emergency situation and a jury question would exist as to whether the prior negligent parking of the truck was a *concurring* cause of the accident. This statement infers that the negligence of the second actor would be a concurring proximate cause.

In the *Hillyard* case, supra, this Court referred to the case of *Kline v. Moyer* 191 A. 43 (Penn. 1937), a case involving a similar question of proximate cause.

In the *Kline* case the Supreme Court of Pennsylvania stated:

> ". . . Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability because the condition created by him was merely a circumstance of the accident and not its proximate cause. *Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties.* (emphasis added)

In the instant case we do not have an *innocent passenger* trying to hold one of two negligent actors responsible for his injuries. *The plaintiff is the second actor, who, through his own negligence created the emergency situation.* The plaintiff's negligent act was trying to pass the moving semi truck and trailer as it moved into the left lane to pass

the defendant's disabled truck. As the driver of the moving semi truck drove to the left, the plaintiff should have known that the truck driver was passing another vehicle. The plaintiff attempted to pass the moving semi truck on the right by driving into the right lane when he couldn't see what was ahead.

Plaintiff's negligence was a concurring proximate cause of the accident as a matter of law.

Defendant's motions for a directed verdict or for judgment N. O. V. should have been granted by the trial court. Nevertheless, defendant asks this Court to let the verdict stand.

POINT III

PLAINTIFF HAS WAIVED HIS RIGHT TO CLAIM ANY ERROR IN THE VERDICT.

After the verdict was returned, the following exchange occurred between Court and counsel while the jury was still impaneled:

> "The Court: Anything counsel wants to present to the Court?
>
> Mr. Nebeker: Nothing at this time, Your Honor.
>
> The Court: Okay, anything?
>
> Mr. Hatch: Not at this time?
>
> The Court: Based on the verdict of the jury the Court will order that a judgment be entered in the record in this matter granting a judgment in favor of the plaintiff and against the defendant, International Transport, Inc., in the amount set forth in the verdict and the total amount let me see it again and read the amount, $1,468.25 . . ." (R. 440-441)

Defendant claims that the failure of counsel for plaintiff to object to the jury verdict at the time it was announced precludes him from claiming there was error in the verdict.

Rule 47 (r) of the Utah Rules of Civil Procedure provides:

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

Counsel for either party could have asked the court to send the jury out again to deliberate further on the ground the verdict as rendered was insufficient. *Neither counsel requested the jury be sent out again.* The failure to make such a request while the jury was still impaneled prevents the plaintiff from now objecting to the insufficiency of the verdict.

Although we have been unable to find any Utah cases dealing with waiver of alleged error in a jury verdict, this Court has held that a party who either leads the court into error or by his conduct approves error committed by the court cannot later take advantage of such error. In *Ludlow v. Colorado Animal By-Products Co.*, 104 Utah 221, 137 P.2d 347 (1943) an action was brought to enjoin the defendant from constructing its rendering plant on the grounds the plant was operated as a nuisance. The lower court awarded plaintiffs damages for impairment of the market value of their property and the defendant appealed. One of the questions on appeal was whether or not the trial court deprived the defendant of a jury trial. This Court held the defendant's contention that it was deprived of a jury trial should be rejected because the defendant had resisted the plaintiff's demand for a jury trial. This Court stated:

"It is also urged that by allowing all plaintiffs to join and assert different claims for damages in the same action instituted originally for injunctive relief, the court deprived defendant of a jury trial. The contention must be rejected by reason of the position taken by defendant itself when plaintiffs requested a jury trial. Not only did the defendant fail to demand a jury trial, but the minutes show that on October 2, 1939, when plantiffs demanded a jury for determination of the question of damages, the defendant resisted such demand. *A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error in procedure. . .*" (emphasis added)

A number of courts have held that a party who fails to object to the sufficiency of the verdict at the time it is returned is thereby precluded from claiming error in the verdict.

In *Fischer v. Howard,* 271 P.2d 1059 (Ore. 1954), plaintiff sued defendant for assault and battery on two counts. The jury awarded plaintiff no damages on his first count and awarded $35.00 in specials, $1.00 in punitive damages and $1.00 in general damages on the second count. *When the verdict was returned both counsel were present, but neither made any objection to the verdict nor asked that the jury be sent out again.* The Supreme Court of Oregon held that where the plaintiff's attorney was acquainted with the verdict and made no objections to its receipt and no motion that the cause be recommitted to the jury, he waived any objections he might have to the verdict and was precluded from moving for a new trial on grounds of an irregular verdict. The court observed:

We are satisfied that when counsel has adequate opportunity, before the discharge of the jury, to familiarize himself with the verdict, but makes no objection to the filing of the verdict or moves that the cause be

> *remanded to the jury, he cannot later, by a motion for a new trial, assail the verdict upon the ground that it is irregular, ambiguous or informal.* His failure to have employed the procedure warranted by §5-319, (Similar to Rule 47(r) U.R.C.P.) supra, constitutes a waiver upon his part of all objections which could have been made on account of irregularity, informality or ambiguity in the verdict. After the discharge of the jury, there remains nothing to be done except to construe the verdict. (emphasis added)

The court summarized its holding as follows:

> "We are satisfied that when the plaintiff, after acquainting himself with the verdict, made no objections to its receipt and no motion that the cause be recommitted to the jury, he waived the objections now under analysis. Having waived them, they were unavailable as the basis for a motion for a new trial." *Id.* at 1075

Portions of *Fischer* were apparently overruled in the subsequent decision of *Stein v. Handy*, 319 P.2d 935, 938-939 (Ore. 1957), however, the language of *Fischer* heretofore cited (page 1075) was followed in *Edmonds v. Erion*, 350 P.2d 700 (Ore. 1960), where the jury awarded plaintiff special damages on two causes of action, but allowed no general damages. Counsel for plaintiff was present when the verdict was announced, but made no objections to it at the time it was rendered. The court held:

> "Consonant with the rights reserved to litigants by the constitution and laws, there must be reasonable rules for bringing litigation to an end. *We hold that the right to object to a verdict because it allows special damages not supported by an allowance of general damages may be waived, and that such right was waived by the plaintiff in the case." Id,* at 702. (emphasis added)

In *DeWitty v. Decker*, 383 P.2d 734 (Wyo. 1963), an automobile collision case, plaintiff was awarded special

damages for hospital and medical expenses, but no general damages for pain, suffering or disability. The Wyoming Supreme Court held that the right to a new trial based upon irregular and an allegedly improper verdict had been waived by the plaintiff's failure to object to an instruction which gave the jury full discretion to grant or deny general damages and *by plaintiff's failure to object when the verdict was returned.* The court stated:

> "The matter of waiver is grounded, among other things, on the proposition that jury trials are time-consuming and costly proceedings and while a litigant is entitled to a fair trial, certain it is that he has responsibilities to assist the trial court in bringing about such a result. *It will not do to permit a litigant to remain mute and speculate on the outcome of a jury trial on the record made with knowledge of irregularities or improprieties therein that might readily and easily have been corrected during the trial and then, when misfortune comes his way, to attempt to set the invited result aside by way of a new trial because of such matters. It is not fitting for the trial court or this court knowingly to reward or condone such conduct."* (emphasis added)

The court further stated:

> ". . . on a record such as we have here, . . . we must say to appellant that despite the demonstrated reluctance of the jury to accept your extensive claims at face value, it was incumbent upon you at least to attempt to see that a verdict in proper form was returned by the jury, and not having done so we are not at liberty to grant the relief requested. . . . Apparently the trial court was satisfied that the total award made by the jury was adequate compensation to the appellant." *Id.* at 740.

In *Brown v. Regan,* 10 Cal. 2d, 519, 75 P.2d 1063 (Cal. 1938) the Supreme Court of California in considering a

verdict somewhat similar to the verdict in the instant case, said:

> ". . . The proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation. Kerrison v. Unger, 135 Cal.App. 607, 611, 27 P.2d 927. There can be no doubt, in view of the record presented on appeal, that had the jury been required by the trial court to retire for further deliberation under proper instructions, a proper verdict would have been returned. *It is well established by numerous authorities that, when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its formality or uncertainty to be corrected. . . .*" (emphasis added)

In *Hamilton v. Wrang*, 221 A.2d 605 (Del. 1966), an action for personal injuries and property damages arising out of an automobile accident, the jury verdict was for car damages only. On appeal, plaintiff stated that the verdict was void because it failed to award damages to plaintiff in a stated amount. It appeared that during the trial the parties had stipulated that the amount of damages to the car was $511.00. The plaintiff made no objection to the form of the verdict at the time it was announced and the jury was thereafter discharged. The Supreme Court of Delaware affirmed the lower court decision upholding the jury verdict stating:

> "The failure of the plaintiffs to object to the form of the verdict is fatal to their contention in this appeal that it is a nullity because of its allegedly defective form. *It is necessary in order to take advantage of a supposed defect in the form of a verdict that the aggrieved party take exception to it prior to the discharge of the jury, and the failure to do so amounts to a waiver*

of the point. [citation] The reason for the rule is that upon timely objection the trial judge prior to the jury's discharge can instruct it to correct a faulty verdict." *Id.* at 606 (emphasis added)

In *Cobb v. Cosby,* 416 S. W.2d 222 (Mo. App. 1967), an action to recover personal and property damages arising out of a rear-end collision, it appeared that the jury had awarded plaintiff a lump sum verdict which did not state separately the amounts allowed for property damage. The court held that the lump sum verdict did not conform to the Missouri rule providing that the damages should be stated separately. However, the court further held that the defendant waived his right to object to the verdict form where he first asserted his objections to the verdict at the time of his motion for new trial. The court stated:

" 'If the defendant had called the attention of the trial judge to any infirmity in the verdict at the time the verdict was returned, as it had the right to do so***, he could have returned the jury to its room to further consider the verdict. * * * [I]*t must be remembered this appeal is legally a charge that the circuit judge committed error prejudicial to the defendant. Manifestly it would be unfair to convict such a judge of an error on account of a ruling to which the defendant did not object at the time.*'

* * *

" 'It is the duty of a trial court to examine the verdict when it is returned; and, if such verdict is found to be insufficient as to form, ambiguous, or inconsistent, the court should require the jury to correct it * * *. *Needless to say, it is counsel's duty to call the attention of the court to any inconsistency or irregularity in such verdict.*' " *Id.* at 225-226 (emphasis added)

The court went on to hold:

> "Having failed to make timely objection, defendant cannot wait until judgment has been entered upon the verdict and then raise the question for the first time in his motion for new trial." *Id.* at 226.

The weight of authority supports the proposition that the right to object to a verdict because it allows special damages not supported by an allowance of general damages may be waived.

In the instant case the trial judge specifically asked counsel if they requested anything further from the jury. Plaintiff's counsel responded by stating: "Not at this time." (R. 440).

The language of the Supreme Court of Wyoming in the *DeWitty* case, supra, appropriately summarizes defendant's position.

> *". . . but having in mind the plain purpose of our statute to afford a jury the right to correct its own mistakes, our previous pronouncement in the Innes case, supra, and the convincing authority from other jurisdictions, we do not think it harsh or unreasonable to require a litigant, when an opportunity is afforded during the trial, timely to bring a matter such as here to the attention of the trial court in order that it might be corrected, and failing in this that he shall not be heard here to complain. To hold otherwise would seem unfair to the jury, to the trial court, and to the other litigants, to say nothing of the unnecessary loss of time and expense."* (emphasis added)

POINT IV

IF A NEW TRIAL IS GRANTED, IT SHOULD BE GRANTED ON ALL ISSUES.

Defendant earnestly contends that this Court should let the verdict returned by the jury and judgment entered

thereon stand without any modifications. If this Court determines that a new trial should be granted, then in fairness to both sides it should be granted on all issues.

In *Wellman v. Noble,* 12 Utah 2d 350, 366 P.2d 701 (1961), an action was brought for personal injuries resulting from a collision between defendant's truck and plaintiff's automobile, which was stopped on the highway. The trial judge granted a new trial on the issue of damages and defendants appealed. This Court held that under the circumstances the granting of a new trial was not an abuse of discretion but that a new trial on all issues would be ordered. This Court stated:

> "Although the order granting a new trial on damages only is permitted by our Rules of Civil Procedure, we think that justice and fairness in this case require a new trial on all the issues and not merely on the amount of damages. It is so ordered. No costs awarded."

CONCLUSION

The jury awarded plaintiff judgment against the defendant in the sum of $1,468.25. Judge Cornaby was satisfied that the total award made by the jury was adequate compensation to the plaintiff. The trial judge did not abuse his discretion in allowing the jury verdict to stand as there is substantial evidence in the record to support the verdict.

Plaintiff waived his right to complain about the verdict by failing to ask the trial court to have the jury deliberate further on damages. As Judge Rossman in *Fischer v. Howard, supra,* succinctly stated: "A loser should not by design get 'two bites at the cherry.' "

Although defendant takes the position that it was not

negligent and that plaintiff was contributorily negligent as a matter of law, it respectfully urges this Court to affirm the judgment of the lower court.

Respectfully submitted,

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