

1996

Lorin Pennington v. Allstate Insurance Company,  
Burns Chiropractic, Dr. David R. Trimble, D.C., Dr.  
Dale Bennet, D.C., Dr. Bryson Smith, Dr. Joan  
Balcombe, St. Benedict's Hospital, Associates in  
Radiology : Brief of Appellee

Utah Court of Appeals

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UPREME COURT

BRIEF

DOCKET NO. 960524

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IN THE UTAH SUPREME COURT

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LORIN PENNINGTON,	)	BRIEF OF APPELLEE
	)	ALLSTATE INSURANCE CO.
Plaintiff and Appellant,	)	
	)	
vs.	)	
	)	
ALLSTATE INSURANCE COMPANY,	)	
BURNS CHIROPRACTIC,	)	
DR. DAVID R. TRIMBLE, D.C.,	)	
DR. DALE BENNETT, D.C.,	)	
DR. BRYSON SMITH,	)	Appellate Court No. 960524
DR. JOAN BALCOMBE,	)	
ST. BENEDICT'S HOSPITAL,	)	Priority Classification No. 15
ASSOCIATES IN RADIOLOGY,	)	
	)	
Defendants and Appellee.	)	

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APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH  
Judge Roger S. Dutson

---

JAN 22 1998  
CLERK SUPREME COURT  
UTAH

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IN THE UTAH SUPREME COURT

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Defendants and Appellee.	)	

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APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT  
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## JURISDICTION OF THE UTAH SUPREME COURT

Utah Supreme Court has original jurisdiction per Utah Code Ann. §78-2-2(3)(j).

### STATEMENT OF THE ISSUES

1. In viewing the facts and all reasonable inferences drawn therefrom in a light most favorable to Allstate Insurance Co., did the trial court err in granting attorney fees and costs to Allstate Insurance Company?

The standard of review for questions of facts is a clearly erroneous standard; the standard of review for “without merit” or a Utah Rules of Civil Procedure, Rule 11 violation is a question of law reviewed for correctness. Barnard v. Sutliff, 846 P.2d 1229, 1234 (Utah 1992), Jeschke v. Willis, 811 P.2d 202, 203-204 (Utah App. 1991).

2. In viewing the facts and all reasonable inferences drawn therefrom in a light most favorable to Allstate Insurance Co., did the trial court err in refusing to grant plaintiff’s second Motion for Summary Judgment when the law of the case was a factual dispute existed as to the reasonableness of expenses charged and the necessity of Mr. Pennington’s treatment?

The standard of review for denial of a motion for summary judgment is whether the pleadings, depositions, affidavits and admissions submitted in the case established a genuine issue of material fact. Ross v. Schackel, 920 P.2d 1159, 1161 (Utah 1996); Snyder v. Merkley, 693 P.2d 64, 65 (Utah 1984).

3. In viewing the totality of the facts and the trial court’s advantaged position to observe the testimony of the witnesses first hand, are the trial court’s findings of fact against the clear weight of the evidence such that this Court reaches a firm conviction a mistake has been made?

The standard of review of a trial court's findings of fact is whether the findings of fact are clearly erroneous and are against the clear weight of the evidence such that the appellate court reaches a firm conviction a mistake has been made. Utah Rules of Civil Procedure, Rule 52(a); ProMax Development Corp. v. Mattson, 943 P.2d 247 (Utah App. 1997); State v. Goodman, 763 P.2d 786 (Utah 1988).

4. On Cross Appeal, did the trial court err in reducing Allstate's attorney's fees when Pennington did not dispute the reasonableness inasmuch as his attorney charged more per hour and had more time invested in the lawsuit.

The standard of review is a trial court discretion in an award of attorney fees must be based on an evaluation of the evidence. Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988).

#### DETERMINATIVE LAW

The determinative law in awarding attorney fees and costs is as follows:

Utah Code Ann. § 78-27-56. Attorney's fees--Award where action or defense in bad faith—Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Utah Code Ann. § 78-27-56.5. Attorney's fees--Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Utah Code Ann § 78-33-10 Costs (regarding Declaratory Judgments)  
In any proceeding under this chapter the court may make such award of costs as may seem equitable and just

Utah Rules of Civil Procedure, Rule 11 Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee

For awarding costs, the determinative law is Utah Rules of Civil Procedure, Rule 54, which is set forth fully in Addendum A

For awarding attorney fees and costs on appeal, the determinative law is Utah Rules of Appellate Procedure, Rule 33, which is set forth fully in Addendum B

The determinative law in reviewing the trial court's findings of fact is Utah Rules of Civil Procedure, Rule 52(a) which provides

(a) Effect In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A, Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses

The determinative statutes regarding Personal Injury Protection (PIP) benefits are Utah Code Ann §31A-22-307 (1953 as amended) located in Addendum C, and Utah Code Ann §31A-22-309 (1953 as amended) located in Addendum D

## STATEMENT OF THE CASE

### A. Nature of the Case.

On January 24, 1994, Attorney Dan Wilson filed a complaint for his son-in-law Lorin Pennington against Allstate Insurance Company (hereinafter referred to as “Allstate”), Burns Chiropractic, Dr. David R. Trimble, D.C., Dr. Dale Bennett, D.C., Dr. Bryson Smith, Dr. Joan Balcombe, St. Benedict’s Hospital and Associates in Radiology (R. 001-005). The complaint alleged Allstate had failed to pay the required \$3,000 Personal Injury Protection (hereinafter referred to as “PIP”) benefits to Pennington or his medical providers (the other named defendants) arising from an automobile accident on June 18, 1993, as required by statute and contract. Pennington claimed the bills were past due and prayed for judgment against Allstate; or in the alternative, judgment against the defendant medical providers in the event the services rendered were determined by the court to be unreasonable and/or unnecessary (R. 001-005).

Mr. Pennington, pursuant to his complaint, requested the trial court to determine the treatment he received and resulting expenses incurred after the accident were reasonable and necessary in relationship to the injury he received in the motor vehicle accident. If the court so determined (or if \$1 not paid by Allstate was determined to be reasonable and necessary), Pennington demanded he be awarded attorney fees, costs and interest. In the alternative, he requested judgment against the medical providers claiming they provided him with unnecessary or unreasonable treatment and charges, and he had no obligation to pay their bills.



Under the insurance contract between Allstate and Pennington, Allstate had paid \$1,694.59 of Mr. Pennington's medical expenses incurred after the accident. The amount in controversy was \$1,305.41 (R. 006-007).

B. Course of the Proceedings.

(1) Prior to filing suit. Prior to the automobile accident of June 18, 1993, Pennington entered into a contract of insurance with Allstate. Pursuant to the contract Allstate agreed to pay \$3,000 of **reasonable and/or necessary** medical expenses **caused** by an accident covered under the policy. The contract was drafted in accordance with Utah Code Ann. §31A-22-307(1)(a)(1953 as amended) (R. 372-399, Exhibit D-33, Addendum E). Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for **treatment of the injury**, including fees for an excessive number, amount, or duration of medical services. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services (R. 372-399, Exhibit D-33, p.11; R. 1089, Addendum E).

Under the insurance contract, Pennington must notify his company, Allstate, if he files a third party complaint. He may be required to take medical examinations by physicians Allstate chooses. He was to cooperate with Allstate in the investigation, settlement and defense of any claim or lawsuit. If Pennington voluntarily took any action or made any payments other than for covered expenses, Allstate would not be bound (R. 372-399, R. Exhibit D-33, p.12-13, Addendum E).

Mr. Pennington was injured in an automobile accident on June 18, 1993, in Ogden, Utah, suffering injury of an uncomplicated cervical strain (R. 1090; Vol. 2 T.

1439). He sought treatment the next day from his treating physician, Dr. Paul Taylor. Dr. Taylor's examination of Pennington revealed he had full range of motion. Dr. Taylor did not feel it necessary to take any x-rays or administer any further tests on that visit and told the plaintiff to follow a treatment plan of flexion exercises, ice, heat and rest and Ibuprofen. Mr. Pennington was told to report back if the problem was not resolved over the following weekend. Dr. Taylor mentioned the possibility of x-rays if the problem did not resolve but stated he ". . . doubted this will be necessary" (R. 1090; Exhibit P-1, Addendum F).

The following Monday, June 22, 1993, Pennington returned to his primary care physician, Dr. Taylor, who prescribed more neck and shoulder exercises, ice and heat and a muscle relaxant, Flexeril (R. 1090; Exhibit P-1, Addendum F).

Pennington never returns to his primary care physician, Dr. Taylor. On July 1, 1993, Pennington goes to the Emergency Room at St. Benedict's Hospital and was examined by Dr. Joan Balcombe, an emergency physician. Pennington has full range of motion in his neck. Dr. Balcombe's diagnosis is likewise a cervical strain. Because of the Emergency Room setting, x-rays are ordered, which are normal. Dr. Balcombe ordered physical therapy for Pennington and told him to specifically call the next day to arrange for physical therapy (R.1093; Vol. 1 T. 1230-1237).

Pennington did not call the next day to arrange for physical therapy. On July 6, 1993, Pennington receives another examination, by Dr. Trimble at the Burns Chiropractic Clinic. Now, Mr. Pennington is diagnosed with "an acute traumatic acceleration/deceleration injury to the cervical spine resulting in myofascities with bilateral occipital neuralgia and grade II radiculopathy of the right upper extremity and an

acute traumatic lumbosacral sprain/strain resulting in myofascitis.” Mr. Pennington seeks treatment from Burns Chiropractic seven times during the next eight days and receives manipulative treatment to his entire spine, hip and ribs. He receives x-rays from Burns Chiropractic—normal thoracic spine, two views with an interpretation; normal lumbar spine, four views with an interpretation (R. 1093-1094; Exhibit D-44).

Attorney Dan Wilson, Pennington’s father-in-law, then suggested he go to his, Attorney Wilson’s, personal chiropractor and long-time acquaintance, Dr. Dale Bennett, at Bennett Chiropractic. On July 15, 1993, Mr. Pennington received a fifth physical examination from Bennett Chiropractic. His diagnosis is now “Acute, Moderate to Severe, Constant” (1) “Brachial Radicular Neuralgia,” (2) “Cervical Hyperflex/Hyperext. Inj.,” (3) “Multiple Cervical Subluxation,” (4) “Thoracic Subluxation Unspec.,” and (5) “Lumbar Subluxation Unspec.” (R. Exhibit D-45). He goes to Bennett Chiropractic 20 times during the next 30 calendar days receiving spinal manipulations and adjustments to treat problems to his thoracic spine, his hips, his ribs, his lumbar spine, and cervical spine (R. 1093; Exhibit P-6).

On July 23, 1993, Pennington receives a manipulation from Dr. Bennett of the anterior ribs, the cervical 1, the sacroiliac 1, and the thoracic 6, 4, and 1. On July 24, 1993, Pennington reports to Dr. Val Rollins, an emergency room physician, claiming he had been experiencing severe back pain for two days. Dr. Rollins finds no swelling or other objective symptoms, but because of plaintiff’s self-reported persistent complaints of pain and the normal x-ray previously taken in the Emergency Room, he refers him to Dr. Bryson Smith for a neurological consultation (R. 1094, Vol. 1 T. 1249, Exhibits, P-5, 6).

Dr. Bryson Smith saw Pennington, and based on plaintiff's subjective complaints (Vol. 2 T. 1488) and treatment history, he ordered an MRI scan (R.1094). Dr. Smith's objective finding of Pennington was his cervical spine had full range of motion (Vol. 2 T. 1513).

The MRI scan was performed at St. Benedict's Hospital on about August 3, 1993, and was normal. Physical therapy was again recommended, and this time Pennington went to physical therapy six times along with massage therapy about three times (all of the massage therapy occurred on the same day as the physical therapy). During this period of time, Pennington also continued chiropractic treatment, some on the same day as the physical therapy. All treatment was completed by about August 26, 1993, and Pennington had achieved his goal of exceeding the \$3,000 cap on medical expenses so he could pursue a claim against the other driver (R. 1094-1095).

From June 18, 1993, until August 26, 1993, Pennington saw at least four different medical doctors, about five different chiropractors, involved an x-ray technician and MRI technician and at least two medical doctors were apparently involved in the reading of those results, two physical therapists and a massage therapist, for a minimum of 12 different medical providers (R. 1095).

On July 30, 1993, Pennington came to the Ogden Allstate Claim Office. He met with Clay Hamblen on that day in the lobby. Mr. Pennington claimed to have a cervical strain and a back strain. Mr. Hamblen situated himself in such a way that Pennington had to move in full range of motion to talk with him. Mr. Hamblen observed he had no guarded movement. He observed him sit, stand, walk, and run to his car and bring something back in the office, without any difficulty (R. 1096, Vol. 3 T. 1688-1689).

Because Mr. Pennington had seen so many different providers and seem determined to see additional providers, and because he did not appear injured in any manner, Mr. Hamblen, with his manager, Hal Palmer, decided Mr. Pennington, under his insurance contract with Allstate, should undertake an independent medical examination (R. 1096, Vol. 3 T. 1691-1692, Vol. 4 T. 1882).

Mr. Hamblen indicated to Pennington he needed to submit to an independent medical examination. Shortly thereafter, on August 13, 1993, Attorney Wilson called Mr. Hamblen. Attorney Wilson was very antagonistic in regard to an independent medical examination, and he refused to have his client submit to the independent medical examination. He informed Mr. Hamblen he had convinced Pennington to not see so many providers. Attorney Wilson engaged in other tactics which made it difficult to obtain an independent medical examination by Allstate until September 28, 1993 (R. 852, 853, 1096, Vol. 3 T. 1696-1698).

When Dr. Nord examined Mr. Pennington on September 28, 1993, his spine was normal (Vol. 2, T. 1438). Dr. Nord determined Mr. Pennington had sustained an uncomplicated acute cervical strain as a result of the motor vehicle accident of June, 1993 (Vol. 2, T. 1439). He involved too many players with this injury. He unnecessarily went from practitioner to practitioner which was not conducive to good care (Vol. 2, T. 1440). Other than continuation of a home exercise program already established and follow-ups as needed with his primary care physician, Dr. Paul Taylor, no further treatment or medical follow-up was indicated (Vol. 2, T. 1441, Addendum G).

Attorney Wilson filed this lawsuit against all defendants on January 21, 1994. Rather than structuring the lawsuit in accordance with Utah Code Ann. §31A-22-

309(5)(d), Attorney Wilson sued Allstate and all health care providers which had not been paid. Pursuant to that lawsuit, Attorney Wilson sent letters, dismissal agreements, and acceptance of service to each one of the named defendants (but not his client's own insurance company, Allstate) (see example, Addendum H, letter, Addendum I, Dismissal Agreement and Acceptance of Service, R. 708-710). In these letters, Attorney Wilson informed the health care providers the lawsuit against them was a sham in that he was personally going against Allstate Insurance Company for the **attorney's fees** and costs and not against the medical providers. He stated he knew the dispute was, in reality, between the health care providers and Allstate. However, Attorney Wilson stated he was intending on pursuing this law suit against Allstate. Attorney Wilson stated: "However, my experience is that because of the cost, the health care providers never pursue the case and the insurance company gets away without paying the bills. **This doesn't make me very happy so I don't plan to do that in this case. Instead I plan to press this matter to trial.**" (Addendum H, letter).

The Agreement, drafted by Attorney Wilson, provided that if the court deemed the charges of the provider were reasonable and necessary, he would collect the money from Allstate and pay the money over to the health care providers (even though more money was owing to the health care providers than the remaining PIP benefits). In exchange, if the health care provider would sign the dismissal agreement and acceptance of service, and the court determined the charges were not reasonable or not necessary, the health care provider would not pursue Mr. Pennington (R. 1102-1103, Addendum I).

Attorney Wilson did not inform the health care providers in the dismissal agreement sufficient funds were not left under the remaining policy PIP benefits to pay

each health care provider if the court determined the charges were reasonable and necessary (R. 1103, Addendum I).

Attorney Wilson went further than sending the letters and dismissal agreements to the health care providers. He contacted specifically Dr. Bryson S. Smith and informed him that Allstate had determined his treatment was not medically necessary in regard to the injuries Mr. Pennington had sustained (although he did not inform him of all the various health care providers that had been seen by Pennington prior to Dr. Smith). Attorney Wilson asked Dr. Smith permission to do “whatever was necessary to obtain reimbursement from the insurance company for his client.” Attorney Wilson “explained carefully to me that he did not believe that any of the medical care given by the various providers including myself, was in any way inappropriate. Nevertheless, he wanted to name me as a defendant in the suit claiming inappropriate care. He felt this maneuver might motivate the insurance company to pay the claim.” Finally, Attorney Wilson “assured me that he did not believe my care of this patient had been inappropriate. He offered that, should this go to trial, he **had a friend in town who would be willing to defend me at no charge.**” (R. Vol. 2 T. 1501, Exhibits D-16, D-17, Addendum J).

On February 3, 1994, Attorney Wilson then wrote a letter to Hal Palmer indicating Allstate was required to pay the additional \$1,305.41 or else he would bring suit for and on behalf of Lorin Pennington under Utah Code Ann. §31A-22-309(5)(d) (he already had filed the suit and served Allstate in Salt Lake). He threatened Mr. Palmer that if Allstate refused to pay this additional amount which Allstate had deemed was unreasonable and unnecessary, pursuant to the statute, if he recovered \$1, he, being Attorney Dan Wilson,

would be entitled to full payment of attorney's fees and costs (R. 001, 018, 1101, Exhibit P-52, Vol. 4 T. 1938).

(2) After suit was filed. Allstate initially filed a Motion to Dismiss or in the alternative a Motion to Appoint a Medical Panel on the basis plaintiff's claim for relief was not ripe for decision under contract law, tendered the remaining \$1,305.41 under the PIP statute and contract with Pennington to the court for decision as to whether any was owing, and requested the court to appoint a medical panel, pursuant to Utah Code Ann. §31A-22-307(2)(d) to determine the reasonableness and the necessity of the claimed charges and tender the remaining amount either to the providers or back to Allstate depending upon the medical panel's decision (R. 006-016). The Motion was denied, and Allstate filed an Answer (R. 024-025, 043-047).

On February 19, 1994, Attorney Wilson filed a third-party complaint against Brad Beasley for the injuries Mr. Pennington allegedly received on June 18, 1993 (R. 1099). Attorney Wilson did not send a copy of the complaint to Allstate although his client was required to do so under his insurance contract with Allstate (R. 1089, 1099).

On March 17, 1994, Attorney Wilson had his client enter into a release with Brad Beasley and others releasing any and all claims, damages, actions, causes of actions or suits of any kind or nature whatsoever on account of injuries Pennington received in the automobile accident of June 18, 1993. A copy of the release and notice of the settlement was never sent to Allstate (R. 1100).

In this suit, the defendant, St. Benedict's Hospital, filed an Answer and a Counterclaim against Pennington on June 11, 1994 (R. 058-073). Defense was tendered to Allstate, and Allstate settled the counterclaim against its insured, Pennington, and



Pennington's complaint and St. Benedict's counterclaim were dismissed with prejudice (R. 1118-1119).

The defendant, Dr. Joan Balcombe, filed a Motion to Dismiss on the basis Dr. Balcombe was an employee of St. Benedict's and did not bill Pennington for any services (R. 091-93, 074-089). The trial court granted the Motion, and Dr. Balcombe was ordered dismissed with prejudice (R. 234-236).

Defendant Associates in Radiology filed an Answer to complaint and Counterclaim against Pennington (R. 241-250). Defense was tendered to Allstate, and Allstate settled the counterclaim against its insured, Pennington, and Pennington's complaint and Defendant Associates in Radiology's counterclaim were dismissed with prejudice (R. 1127-1128).

Defendant Dr. Bryson Smith was served on May 11, 1994. A Default Certificate was entered on August 29, 1994 (R. 162-165). On July 31, 1995, counsel for Pennington and counsel for Allstate stipulated to dismissal of Dr. Smith (R. 505). An Order of Dismissal was signed by the trial court on August 24, 1995 (R. 613-614, Addendum K). Attorney Wilson argues now on appeal Dr. Smith should have had a default judgment entered against him. Inasmuch as Pennington agreed to the dismissal, this argument is moot.

Defendants Burns Chiropractic, Dr. David Trimble, D.C., and Dr. Dale Bennett, D.C. were served with the summons and complaint (per representation of Attorney Dan Wilson) and signed the dismissal agreement (per representation of Attorney Dan Wilson) (R. 712). Per stipulation of the parties, an Order of Dismissal was signed by the trial

court on August 24, 1995, dismissing with prejudice Burns Chiropractic, Dr. David Trimble, D.C. and Dr. Dale Bennett (R. 613-614, Addendum K).

During the discovery phase, numerous requests for hearings and numerous motions were filed by Pennington. On August 16, 1995, documents filed by Attorney Wilson for Pennington consisted of 77 pages (R. 532-609). Numerous hearings were conducted, and the same issue argued numerous times (for example the Associates in Radiology \$30 charge was argued at least three separate times) (see trial court index).

On May 22, 1995, Attorney Wilson sent a letter and his time records to Hal Palmer of Allstate with a copy to Allstate's attorney indicating he would be willing to resolve the matter at \$100 per hour for 74.7 hours. This would have amounted to \$7,470 (R. 663-678). He later informed counsel his hourly charge was \$125. By extrapolating his fee through the end of trial, Attorney Wilson would have incurred \$51,027 in attorney fees which he wanted Allstate to pay to him (R. 1034).

When trial commenced on February 22, 1996, Pennington was not exposed to any medical providers in that all defendants had been dismissed. The only reason the trial continued was an effort by Attorney Wilson to get Allstate to pay his attorney fees for his filing the action against Allstate for his son-in-law (Vol. 1 T. 1169).

Trial was held on this matter on February 22, 23, 26, 27, 1996 (R. 797-815). The trial court actively participated in trial and reviewed volumes of evidence, kept extensive personal notes, reviewed all the exhibits in evidence as well as documents filed by each side, including numerous memorandum, and carefully observed the demeanor of the witnesses during their testimony and reached conclusions as to the truthfulness and untruthfulness of the witnesses (R.1081).

Closing arguments were originally scheduled for February 28, 1996, but were continued to March 1, 1996, because of a conflict in scheduling by the court (R. 815). Attorney for Allstate did not get word the closing arguments were scheduled on March 1, 1996, and was in the hospital on that date running tests (Vol. 4 T. 1941-1942). (Attorney Wilson argues the trial court should have awarded Pennington attorney fees because of this miscommunication. Such an award is not justified under the facts or law of this case). Written notice was then sent by the court for closing arguments on March 15, 1996 (R. 819). On March 15, 1996, Attorney Dan Wilson called Dr. Trimble as a rebuttal witness. Closing arguments were heard in the afternoon, and Pennington did not attend (Vol. 5 T. 2040). Attorney Wilson read the newspaper during closing argument (Vol. 5 T. 2075).

C. Disposition at Trial Court (Addendum L, M, N)

The trial court determined the lawsuit was filed with a **lack of good faith** and was an **abusive use of the courts** (R. 1100). The court found Pennington had an uncomplicated cervical strain, and the treatment plan by Dr. Taylor was a standard and proper treatment (R. 1091). The court further found that if Pennington would have followed Dr. Taylor's recommendations, his injury would have been resolved as soon, or possibly sooner, (because of unnecessary and apparently damaging stressful chiropractic manipulations) as if he had not obtained treatment from numerous other medical providers (R. 1091-1092).

The court further found the purpose of the numerous other medical providers was so Pennington could incur medical expenses above the \$3,000 PIP in order to sue the other driver (R. 1092). Further, Allstate paid several claims submitted to it for

unnecessary and unreasonable treatment but should not be punished for these payments because Pennington was somewhat successful in deceiving Allstate (R. 1099).

The court also awarded attorney fees to Allstate based in part on Attorney Wilson's questionable conduct in attempting to obtain releases from medical providers and at least implying to those medical providers he would protect their interests even though he was suing them (R. 1101). The court also found Attorney Wilson attempted to force Allstate to pay unnecessary and unreasonable expenses incurred by Pennington and threatened Allstate with the fact he would recover several thousands of dollars in attorney's fees under the PIP statute for bringing this action while he knew or should have known most of the medical expenses and treatment were unreasonable (R. 1101).

Finally, the court awarded judgment for attorney's fees in the amount of \$15,000 because of the misconduct in bringing this "spurious action" which was "without merit and not in good faith" (R. 1083).

## ARGUMENT

### I. The Trial Court Did Not Err in Granting Attorney Fees, Costs and Expenses Against Dan Wilson and His Son-in-Law, Lorin Pennington

The trial court was extremely concerned about the motivation of Attorney Dan Wilson and his son-in-law, Lorin Pennington in bringing this lawsuit (R. 1100). The court found Pennington engaged in intentional conduct of incurring unnecessary medical treatment and engaged in conduct to run up unnecessary medical bills and force Allstate to pay for those bills (R. 1100). Specifically, the trial court, from his advantaged position of observing the demeanor of the witnesses and in review of the exhibits, found (1) Mr. Pennington willfully failed to follow his treating physician's properly prescribed

treatment plan; (2) chose to 'shop' for other medical providers with the intent of creating unnecessary medical bills; (3) utilized Attorney Dan Wilson's personal chiropractor and long time acquaintance as one of those unnecessary medical providers; (4) willfully exaggerated his symptoms in order to make his injury seem more severe than it was; (5) intentionally created medical bills for the purpose of exceeding the \$3,000 PIP cap under Utah law in order to pursue a personal injury claim and thereby wrongfully receive a several thousand dollar's settlement against the other driver; (6) never was diagnosed with any objective findings to support any injury or treatment beyond Dr. Taylor's original diagnosis and treatment; (7) the plaintiff or his attorney's failed to notify Allstate of the filing of the complaint against the other driver, and the resulting settlement against the other driver as required by the insurance contract and attorney ethics; (8) questionable conduct by Attorney Wilson in attempting (and in some instances succeeding) to obtain releases from medical providers and implying to those providers he would protect their interests as much as they could expect their claims to be protected by their own attorney even though he was the attorney representing the party suing them; (9) an attempt by Attorney Wilson to force Allstate to pay unnecessary and unreasonable expenses incurred by the plaintiff; (10) obstructionist conduct by Attorney Wilson to avoid or delay medical examination by Allstate's doctor; and (11) Attorney Wilson's strong assertion throughout the case that he was entitled to several thousands of dollars in attorney's fees under the PIP statute for bringing this action while he knew or should have known, most of the medical expenses and treatment were unreasonable (R. 1085-1111).

A. Attorney Fees Were Properly Awarded Against Pennington Under Utah Code Ann. §78-27-56 (1981 as amended).

The first basis for the award of attorney fees against Pennington was under Utah Code Ann. §78-27-56 (1981 as amended)(R. 1082). Utah Code Ann. §78-27-56 (1981 as amended) provides as follows:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

(1) Lack of Good Faith. The trial court in the Judgment and Findings of Fact found this lawsuit was not brought in good faith (R. 1083, 1088, 1092-1096, 1098-1104). “This lack of good faith turns on subjective intent, and for purposes of the statute is synonymous with a finding of “bad faith.” Jeschke v. Willis, 811 P.2d 202, 204 (Utah App. 1991). “While there may be a distinction between bad faith and “lack of good faith” in other areas of the law, for purposes of U.C.A. 1953, Sec. 78-27-56, the two terms are synonymous.” Cady v. Johnson, 671 P.2d 149, 152 (Utah 1983).

The issue of bad faith is a question of fact to be ascertained by the trier of fact and is reviewed under the “clearly erroneous” standard. Id.; see also Topik v. Thurber, 739 P.2d 1101, 1104 & n. 5 (Utah 1987); Broadwater v. Old Republic Sur., 854 P.2d 527, 534 n. 3 (Utah 1993); Coalville City v. Lundgren, 930 P.2d 1206, 1211 (Utah App. 1997). The trial court must have found one of the following elements was lacking in order to determine the suit was brought in bad faith: “(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3)

no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others.” Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983), quoting from Sparkman and McLean Co. v. Derber, 481 P.2d 585 (Wash. App. 1971).

From the facts and evidence introduced at trial, the trial court determined: “it was plaintiff’s purpose to deceive the medical providers as well as the insurance carrier. . .” (R. 1099, par. 41). Specifically, the trial court found Pennington willfully failed to followed Dr. Taylor’s properly prescribed treatment plan (R. 1100, par. 46). Pennington intentionally created unnecessary medical bills by shopping for other medical providers in order to exceed the \$3,000 PIP limit so he could sue the other driver and willfully exaggerated his symptoms in order to make them seem more severe than they were (R. 1092, par. 23, 1100, par. 46).

In regard to Attorney Wilson’s actions, the trial court determined his conduct was questionable in suing medical providers while at the same time telling the providers the lawsuit against them was a sham and implying he would protect their interests (R.1101). Further, Attorney Wilson failed to tell the medical providers if they signed the dismissal agreement, sufficient funds were not available from Allstate to pay each defendant. In addition, Attorney Wilson offered to provide the very defendants he was suing, an attorney, for free, if the matter went to trial (R. 1103). Attorney Wilson further threatened employees at Allstate that if Allstate refused to pay medical expenses and treatment when he knew or should have known it was unreasonable, he would recover all his attorney’s fees and costs in the lawsuit. Attorney Wilson informed Allstate employees he had convinced Pennington to not see so many health care providers; yet, he thereafter informed the health care providers he felt their services were reasonable and necessary.

Attorney Wilson further, even inappropriately, indicated to these defendants he wanted to get at Allstate for not paying the PIP benefits to the extent of providing them free legal service to fight Pennington's own insurance company (R. 1103-1104).

Any one of these actions would satisfy one or all of the elements which establish a lack of good faith on Pennington's part in bringing the law suit. The trial court, with the opportunity to view and assess the demeanor of witnesses and attorneys first hand, found the requisite facts to sustain a finding of lack of good faith. A reading of the record likewise can lead this Court to the conclusion his determination of those facts was not "clearly erroneous."

(2) Without Merit. Under Utah Code Ann. §78-27-56 (1981 as amended), the trial court must also make the determination the case was brought "without merit." "To prove that a claim is "without merit" under the statute, the party asserting an award of attorney fees must first demonstrate the claim is "frivolous" or "of little weight or importance having no basis in law or fact." Jeschke v. Willis, 811 P.2d 202, 203 (Utah App. 1991), quoting from Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). In Cady, the Utah Supreme Court further explained:

The dictionary definition of "frivolous" is "of little weight or importance having no basis in law or fact." While there may be some distinction between these two terms in other areas of the law, for purposes of this statute we believe the terms are synonymous. While this definition may lack some of the nuances found in common law definitions, it adequately serves the purpose of the statute before us and is clearly understood.

Id. "The "without merit" determination is a question of law. . ." and is reviewed for "correctness." Jeschke v. Willis, 811 P.2d 202, 203 (Utah App. 1991).



Based upon the facts presented to the trial court, Pennington had no legal claim for any of the funds he sought from Allstate. He was in violation of his contract with Allstate at the time of his lawsuit against Allstate. Pennington clearly had no legal basis for recovery of any additional expenses which were incurred by him solely for the purpose of having enough medical expenses (\$3,000) to bring his third party claim. The trial court correctly applied the legal standard to the facts, and the requirements of Utah Code Ann. §78-27-56 (1981 as amended) for awarding attorney's fees were completely satisfied. Attorney fees against Pennington, and Attorney Wilson should be affirmed.

B. Attorney Fees and Costs Are Proper Under Utah Code Ann. §78-27-56.5 (1986 as amended).

The trial court also opined attorney fees may also be proper under Utah Code Ann. §78-27-56.5 (1986 as amended)(R. 1082). Utah Code Ann. §78-27-56.6 provides as follows:

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

The insurance contract between Pennington and Allstate in regard to Personal Injury Protection (PIP) benefits adopts by specific reference the Utah Insurance Code (R. 372-399). Under Utah Code Ann. §31A-22-309(d) (1953 as amended), an insured, who believes he has been wrongfully denied payment of PIP benefits, is to sue his insurance carrier under his contract for those benefits. The Insurance Code provides as follows: (d) The person entitled to the benefits may bring an action in **contract** to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any

overdue benefits and interest, the insurer is also required to pay a **reasonable attorney's fee** to the claimant (emphasis added).” Under the writing of the statute, adopted by the contract, the reciprocal right is also true. If an insurer, Allstate, has been wrongfully sued by its insured, the insured, Pennington, should likewise be required to pay a reasonable attorney’s fee to the insurer, Allstate.

The statute also awards costs and expenses which were properly awarded by the trial court.

C. Other Legal Basis’ for Awarding Attorney Fees and Costs.

Although not specifically cited by the trial court, attorney fees could have been awarded by the trial court against Attorney Dan Wilson and Pennington on several other legal theories argued in the lower court (R. 1019-1053). As this Court has stated in Limb v. Federated Milk Producers Ass’n, 23 Utah 2d 222, 461 P.2d 290, 293 n. 2 (1969):

The appellate court will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court."

(quoting 5 C.J.S. Appeal & Error § 1464(1)).

(1) Violation of Utah Rules of Civil Procedure, Rule 11. Utah Rules of

Civil Procedure, Rule 11, provides as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is **well-grounded in fact** and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for **any improper purpose**, such as to harass or to cause unnecessary delay or **needless increase in the cost of**

**litigation.** . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon **the person who signed it, a represented party, or both**, an appropriate sanction, which may include an order to pay to the other party or parties the **amount of the reasonable expenses incurred** because of the filing of the pleading, motion, or other paper, including a **reasonable attorney's fee**.

(emphasis added). “The determination of whether conduct violates Rule 11 is made on an objective basis.” Taylor v. Estate of Taylor, 770 P.2d 163, 171 (Utah App. 1989). Utah courts have great leeway under Rule 11 to tailor the sanction to fit the requirement of the particular case. Id.

The trial court made several factual findings supporting a finding of a Rule 11 violation including the frivolous filing of the lawsuit by Attorney Wilson, the filing of the lawsuit against medical providers while telling them the filing was a sham and Attorney Wilson would provide an attorney to represent them on the suit free of charge, bringing a lawsuit against Dr. Joan Balcombe without a legal basis, needless filings of motions to harass and increase the cost of litigation, and filing an action for inflated attorney fees on an action which could have been filed in Small Claims Court and settled in one day.

What is interesting to note is Attorney Wilson recently filed an appeal on another case involving damages less than \$1,500 (including attorney fees) against an insurance company. See Castillo v. Atlanta Cas. Co., 939 P.2d 1204 (Utah App. 1997). His awarded attorney fees in that case were only \$300 (a far cry from the extrapolated \$51,027 in attorney fees he wanted in this case).

The trial court specifically found Attorney Wilson and Pennington brought this suit in bad faith and as an abusive use of the courts. Accordingly, under Utah Rules of Civil Procedure, Rule 11, the attorneys fee award should be upheld. Further, under Utah

Rules of Civil Procedure, Rule 11, the costs awarded are also entirely appropriate as reasonable expenses incurred by Allstate, which in justice, Pennington and his attorney should pay because of their conduct.

(2) The Lawsuit Was Brought as a Declaratory Judgment Which Allows a Trial Court to Award Attorneys' Fees and Expenses. Under the case of Western Casualty Insurance Company v. Marchant, 615 P.2d 423 (Utah 1980), this Court established that attorneys' fees may be awarded under a declaratory judgment action. Utah Code Ann. §78-33-10 (1953 as amended) provides that "a court may make such award of cost that may seem equitable and just." The Supreme Court in the Western Casualty case stated:

The basic rule which this Court has declared and long adhered to is that attorneys' fees are not to be allowed unless they are provided for by contract or by statute or where they are a legitimate item of damages caused by the other party's wrongful act. As an extension of the latter proposition, we have no doubt that the statutory authorization to award such "costs as may seem equitable and just" may include an award of attorneys' fees if they were necessarily incurred because of litigation which was not resorted to in good faith, but was merely spiteful, contentious or obstructive.

The trial court has specifically entered the factual finding that Pennington's purpose was to deceive the medical providers and Allstate (R. 1099). The court found the lawsuit was spurious, without merit and not in good faith (R. 1083). Accordingly, attorney fees could have been properly awarded under the Declaratory Judgment Act. Inasmuch as the Act specifically allows the award of equitable costs, the trial court's award of costs likewise should be upheld.

(3) Pennington's Breach of Duty of Good Faith with Allstate Warrants an Award of Attorney Fees and Costs. Pennington had an insurance contract with Allstate. Pennington ignored the insurance contract provisions. Pennington ignored his duties and

obligations under his insurance contract with Allstate. The trial court found the action was not brought in good faith. According to the insurance contract and contract law relating to insurance and breach of good faith, attorneys' fees and costs should be awarded. Beck v. Farmers Insurance Exchange, 701 P.2d 795, 801 (Utah 1985).

(4) Attorney fees and costs are proper under the Utah Supreme Court's Rationale in Barnard v. Wassermann. The Utah Supreme Court has long adhered to the rationale that attorneys and their clients should be sanctioned where cases are brought because of the inappropriate behavior of plaintiff's counsel and plaintiff. In this litigious society with overcrowding of the courts, frivolous lawsuits should be sanctioned. Attorneys who bring lawsuits for the wrong reason, along with their clients, should bear the burden of paying for their wrongful actions. The party wrongfully sued should not. Attorney fees are proper in this action "to compensate for time lost and inconvenience occasioned by" Attorney Wilson's behavior and that of his client. Barnard v. Wassermann, 855 P.2d 243, 248 (Utah 1993). In the Barnard case the Utah Supreme Court stated:

Rather, the court was properly exercising its inherent power to enforce compliance with its rules. As we noted nearly a century ago:

"It is undoubtedly true that courts of general and superior jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt, to make, modify, and enforce rules for the regulation of the business before the court, ... to recall and control its process, to direct and control its officers, including attorneys as such, and to suspend, disbar, and reinstate attorneys. Such inherent powers of courts are necessary to the proper discharge of their duties.... [Absent legislative limitations] a constitutional court of general and superior jurisdiction may exercise such inherent powers and summary jurisdiction as the necessity of the case may require, and in [a] manner comporting with a proper discharge of its duties in the premises. . .

The summary jurisdiction which the court has over its attorneys as officers of the court ... is inherent, continuing, and plenary ... and ought to be assumed and exercised ... not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process, and to rebuke interference with the conduct of its business, but also to control and protect its officers, including attorneys.”

In re Evans, 42 Utah 282, 130 P. 217, 224-25 (1913) (emphasis added); see also In re Barclay, 82 Utah 288, 24 P.2d 302, 303 (Utah 1933) (noting inherent power to discipline attorneys in discussion of court's power to suspend attorneys from practice); In re Burton, 67 Utah 118, 246 P. 188, 199 (1926) (describing court's inherent power to deal with its own officers, including attorneys).

As we suggested in In re Evans, courts of general jurisdiction, such as the district court in this case, possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court. 130 P. at 224; see also Jean E. Maess, Annotation, Authority of Trial Judge to Impose Costs or Other Sanctions Against Attorney Who Fails to Appear at, or Proceed with, Scheduled Trial, 29 A.L.R.4th 160 (1984). Similarly, trial courts in the federal system have such inherent power. Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); see also Debra T. Landis, Annotation, Inherent Power of Federal District Court to Impose Monetary Sanctions on Counsel in Absence of Contempt of Court, 77 A.L.R.Fed. 789 (1986). This inherent power of trial courts is separate and distinct from the contempt powers they may exercise in appropriate cases.

A court's power to enforce its rules implies the existence of a mechanism for enforcement. That mechanism may take a variety of forms, one example of which is the **assessment of attorney fees**. Without sanctions, the power to enforce would be meaningless. As well as being consistent with our precedent in this area, this result also comports with the trial court's statutory authority to control proceedings before it. Utah Code Ann. Secs. 78-7-5, 78-7-17.

Id. at 248-249.

This case falls under the trial court's power to impose attorney fees on a meaningless misuse of the courts by the filing of a frivolous lawsuit. Sanctions, in terms of attorney fees and costs and expenses, were warranted to impress upon the attorney of record, Wilson, and his client that Utah courts will not abide by being used as vehicles of harassment, bribery, or other unlawful or wrongful purposes.

D. The Trial Court Did Not Err in Not Granting Sanctions Against Allstate's Attorney in Regard to Pennington's Motions to Compel.

On February 19, 1994, Pennington filed an action against the driver of the other vehicle. This action was settled on March 17, 1994. Counsel for Allstate believed this minor case would thereafter be dismissed because research indicated under the case of Jones v. Transamerica Insurance Company, 592 P.2d 609 (Utah 1979), Pennington was now attempting a double recovery of his medical expenses. Allstate, through counsel, presented this analysis to Pennington's counsel. When it began apparent, Pennington was seeking a double recovery, the interrogatory answers and documents were provided (R. 193-201).

Pennington also filed a Motion to Compel on Pennington's Third Set of Interrogatories. Counsel for Allstate was experiencing severe health difficulties of which Attorney Wilson was aware. Numerous courtesies have been extended to Attorney Wilson on this appeal because of health problems; however, Attorney Wilson filed a Motion to Compel while Allstate's counsel was ill. The trial court was aware of the health difficulties, and no order to compel was issued.

In reviewing the trial court's action, this Court needs to make a finding the trial court abused its discretion by not imposing sanctions. W. W. & W. B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977). A mere filing of a motion to compel does not justify automatic imposition of sanctions. Utah Rules of Civil Procedure, Rule 37(a)(4) provides the trial court need not award expenses when "the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." The trial court refused to grant sanctions given the

circumstances of the entire case, as well as the misconduct of plaintiff's counsel in the case. The trial court's decision should be upheld.

E. The Trial Court's Award of Costs Was Proper.

The lower court awarded costs to Allstate in the amount of \$6,148.15 (R. 954, 1054-1056). Allstate initially requested costs in the amount of \$7,185.55 (R. 913-916). Plaintiff did not, pursuant to Utah Rules of Civil Procedure, Rule 54(d)(2), file a motion to have the bill of costs taxed by the court. Instead, plaintiff objected to the costs. Allstate filed a memorandum in support of the costs (R. 944-952). The court reviewed the memorandums on file and ruled the costs of \$6,148.15 were properly awarded against the plaintiff (R. 954, 1054-1056).

The Utah Supreme Court has stated: "[t]he determination to award taxable costs is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 460 (Utah 1993). Further, the Utah Supreme Court has stated: "[t]he trial court may exercise reasonable discretion in awarding taxable costs," Cornish Town v. Koller, 817 P.2d 305, 316 (Utah 1991). The trial court reviewed the costs and necessary disbursements in the action incurred because of the plaintiff and the plaintiff's attorney's actions and made the determination as to which costs were appropriate. This Court should uphold his decision.

Pennington complains some inappropriate expenses were included. Pennington complains of deposition costs being taxed. Allstate requested only the expense it incurred in obtaining a transcript of depositions taken by Pennington. Pennington took the depositions and cannot now argue he really did not need those to prepare for his case. Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980). Pennington complains Allstate



necessarily incurred costs to call expert witnesses to refute his unfounded accusations. A trial court may award costs of any expert witness which is indicated might be called at the time of trial. Ames v. Maas, 846 P.2d 468 (Utah App. 1993). The expert witness fees were properly awarded.

Finally, the costs and expenses awarded are proper if they can be awarded under any legal ground or theory presented in the lower court. Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 461 P.2d 290, 293 n. 2 (1969). As indicated, such costs and expenses are appropriate under Rule 11, Declaratory Judgment Act, Pennington's breach of duty of good faith, or a Barnard v. Wassermann analysis. The trial court's award of costs should be upheld.

## II. The Trial Court Did Not Err in Denying Plaintiff's Second Motion for Summary Judgment.

This Court has consistently held summary judgment is only proper when the pleadings before the trial court establish no genuine issue of material fact. Ross v. Schackel, 920 P.2d 1159, 1161 (Utah 1996); Snyder v. Merkley, 693 P.2d 64, 65 (Utah 1984). As stated by this Court in the Snyder case:

Summary judgment is proper only if the pleadings, depositions, affidavits, and admissions submitted in a case show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. It should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail.

### Id.

The complaint filed by Mr. Pennington asks the trial court for an evidentiary hearing on whether the medical services received by him and medical expenses incurred were reasonable and necessary for the treatment of injuries received by him (R. 004). The

issue before the trial court was the treatment viewed in its entirety not in isolation. See also Utah Code Ann. §31A-22-307 (1953 as amended), “personal injury protection coverages and benefits include (a) The reasonable value of all expenses for necessary medical . . . services.” A party moved against need only to demonstrate some factual disputes are in question. The defendant need not establish and prove his legal theory, he only need establish and show facts exist which controvert the facts stated in the moving parties’ affidavits. Salt Lake City Court v. James Constructors, 761 P.2d 42, 47 (Utah App. 1988). The trial court ruled a factual dispute existed as to the reasonableness and necessity of the Associates in Radiology \$30 charge in view of the entire issues for trial. The trial court also determined at trial the Associates in Radiology charge was not necessary (as well as all additional treatment sought by Mr. Pennington beyond that recommended by Dr. Taylor) (R. 1081-1111).

A. The Law of the Case Was a Factual Dispute Existed as to the Reasonableness and Necessity of the \$30 Associates in Radiology Charge Prior to Mr. Pennington’s Filing His Second Motion for Summary Judgment.

Mr. Pennington, through his attorney, Dan Wilson, filed a Motion for Partial Summary Judgment on December 8, 1994, requesting the court to grant partial summary judgment against Allstate for its refusal to pay for claimed “reasonable and necessary” charges from Burns Chiropractic, Bennett Chiropractic, St. Benedict’s Hospital and Associates in Radiology.

To dispute the reasonableness and necessity of the charges, Allstate Insurance Co. had filed with the court the following information: (1) an affidavit of Clay Hamblen, the Allstate Ogden claims adjuster who had direct control of the matter (R. 014-015). His

affidavit stated Allstate denied payment for the medical expenses because an independent medical provider determined the expenses were not reasonable and also determined the medical providers' services were unreasonable and unnecessary.

The record before the trial court also included (2) an affidavit of Jay Marks, the Unit Claims Manager over the Personal Injury Protection (PIP) claims for Allstate's Ogden office (Mr. Hamblen's supervisor) (R. 292-294). His affidavit indicated the payments not made were based upon the independent medical provider's review that any further payments would not be reasonable given the minor injury to Mr. Pennington and the unreasonableness and excessive treatments of the providers (R. 292-302).

In opposition to the motion, Allstate also filed (3) an affidavit of Dr. Nathaniel M. Nord with accompanying exhibits (R. 303-313, Addendum G). Dr. Nord stated: "My review of the medical reports, medical expenses, medical treatment, and in speaking to and personally examining Mr. Pennington, has led me to the conclusion that Mr. Pennington sustained no more than a cervical strain as a result of the motor vehicle accident on June 18, 1993. After that accident, Mr. Pennington generated undue personal concern as to his condition which led to the involvement of an excessive number of practitioners. This undue personal concern led to his generating some duplicative treatment and expenses which were not necessary." Further, in Dr. Nord's report attached as an exhibit to his affidavit, he stated: "Other than the continuation of a home exercise program already established, and follow-ups as needed with his primary care physician, Dr. Paul Taylor, no further treatment or medical follow is indicated."

Specifically in regard to the x-rays, Dr. Nord testified: "Further, Mr. Pennington received numerous x-rays in relationship to this motor vehicle accident, including x-rays

taken on July 1, 1993, at St. Benedict's Hospital (which were normal); x-rays taken on July 6, 1993, at the Burns Chiropractic Clinic (which were normal); x-rays taken on July 15, 1993, at the Bennett Chiropractic Clinic (which were normal except for a mild thoracolumbar scoliosis); and a cervical MRI scan taken August 3, 1993, at St. Benedict's Hospital (which was also normal). This further reflects Mr. Pennington's undue solicitation of various providers and services" (R. 304-305, Addendum G).

In support of the motion for summary judgment, plaintiff only submitted an affidavit of Paul R. Jensen, M.D., who was an employee of Associates in Radiology, who testified the charges were reasonable (R. 274-276). However, the affidavit specifically declined to address the issue of necessity.

Oral argument occurred on the motion for summary judgment on March 13, 1995 (R. 450-451). The minute entry states: "Daniel Wilson is requesting the Court grant Summary Judgment as to Associates in Radiology, in the amount of \$30.00 for the X-Ray, as to Burns Chiropractic, and as to Bennet (sic) Chiropractic." The court thereafter denied the motion on March 29, 1995, because a question of fact existed which needed to be resolved by an evidentiary hearing (R. 454).

Thereafter, plaintiff filed another partial motion for summary judgment on the identical Associates in Radiology \$30 charge (R. 452). No new evidence was filed in support of the motion. (Mr. Pennington did resubmit a prior affidavit of Dr. Balcombe which had been filed in support of her Motion to Dismiss (see R. 285-288; 464-467). Dr. Balcombe's affidavit only stated the "emergency room" standard of care was to take x-rays. She did not testify in relation to medical necessity and reasonableness of the x-rays in light of Mr. Pennington's excessive treatment and excessive x-rays. The trial court

summarily denied the Motion stating factual issues still needed to be resolved (R. 504-506, 679-680). Attorney Wilson somehow convinced the trial court to again rehear the argument on August 31, 1995. The trial court again denied the Motion on September 13, 1995 (R. 768-769). The court also refused to grant another rehearing requested by Attorney Wilson on the second Motion for Partial Summary Judgment filed October 19, 1995 (R. 956).

When the trial court ruled factual issues existed in relation to Associates in Radiology \$30 charge in regard to Pennington's Motion for Partial Summary Judgment on March 29, 1995, that decision became the "law of the case" as to Associates in Radiology \$30 charge. Once the trial court had entered the law of the case, the trial court did not have any further obligation to reopen the issue. Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44-46 (Utah App. 1988).

In Thurston this Court defined the law of the case doctrine as follows:

The "law of the case" is a legal doctrine under which a decision made on an issue during one stage of a case is binding in successive stages of the same litigation. Plumb v. State, 809 P.2d 734, 739 (Utah 1990). The doctrine was developed in the interest of economy and efficiency to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case. Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977); State v. O'Neil, 848 P.2d 694, 697 (Utah Ct.App.), cert. denied, 859 P.2d 585 (1993); see also 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478 (1981) [hereinafter Wright]; 1B James W. Moore et al., Moore's Federal Practice ¶ 0.404 [hereinafter Moore].

Id. The law of the case terminology justifies "a trial court's refusal to reconsider matters in a continuing proceeding. . ." Id. at 1034.

Once the trial court judge determined factual issues existed in relationship to the \$30 Associates in Radiology charge, the trial court judge had no obligation or responsibility to allow continued argument on the issue. The trial court judge did not have any responsibility to reopen an issue he had already decided. As stated by this Court in Thurston:

Under this branch, a court is justified in refusing to reconsider matters it resolved in a prior ruling in the same case for reasons of efficiency and consistency. The doctrine is not a limit on power but, "as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided." Messenger v. Anderson, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912); see also Arizona v. California, 460 U.S. 605, 618-19 & n. 8, 103 S.Ct. 1382, 1391-92 & n. 8, 75 L.Ed.2d 318 (1983). It rests on " 'good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards.' " In re Department of Energy Stripper Well Exemption Litig., 821 F.Supp. 1432, 1434 (D.Kan.1993) (quoting Wright § 4478, at 790).

Id. at 1038-1039.

A lower court may reopen an issue only if exceptional circumstances are present. These exceptional circumstances are narrowly defined to "(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." Id. The law of the case doctrine is especially applicable "when, in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new, material evidence is introduced." Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah App. 1988); see also, Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984); Richardson v.

Grand Central Corp., 572 P.2d at 397; Hammer v. Gibbons & Reed Co., 29 Utah 2d 415, 510 P.2d 1104, 1105 (Utah 1973).

In reviewing the lower court's record, no new authority was cited in Pennington's Second Motion for Summary Judgment to justify the court reopening the issue of the \$30 Associates in Radiology charge. Pennington cited no new evidence. No reason was given to justify reopening the issue.

In response to Pennington's second motion, defendant Allstate also filed an additional affidavit stating the \$30 bill had not been received (R. 400-403). The affidavit was unnecessary in that the court had already ruled from the facts presented a factual issue existed as to the reasonableness and necessity of the charge. Thereafter, counsel for Allstate reviewed the original file on September 1, 1995, and found the bill in Allstate's file but never entered in Allstate's computer record. Counsel for Allstate immediately informed the court by memorandum and also indicated Dr. Nord had the bill in his initial evaluation (R. 720-723). With this information, the court again denied plaintiff's Motion (R. 768-769).

The trial court consistently followed the law of the case regarding the disputed reasonableness and necessity of Associates in Radiology charge. No additional hearing was required or necessary. "The purpose of [this] doctrine is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same propositions in the same case." Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977). The trial court allowed Pennington three different times to argue his motion and consistently

ruled a question of fact existed. Under the law of the case doctrine, the trial court did not have any responsibility to grant another hearing on the same issue.

B. Pennington's Motion to Reconsider Was Appropriately Denied.

Under the Utah Rules of Civil Procedure, a motion to reconsider is not expressly available. Peay v. Peay, 607 P.2d 841, 843 (Utah 1980). The rationale for not allowing multiple motions to reconsider was precisely addressed by this Court in Drury v. Lunceford, 415 P.2d 662, 663 (Utah 1966) as follows:

When this has been done and the court has ruled upon the motion, if the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not be other party who is now ruled against be permitted to make a motion for re-re-consideration, asking the court to again reverse himself? Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically a judge could go on reversing himself periodically at the entreaties of one or the other of the parties ad infinitum. This reflection brings one to realize what an unsatisfactory situation would exist if a judge could carry in his mind indefinitely a state of uncertainty as to what the final resolution of the matter should be.

Mr. Pennington's counsel persuaded the trial court to listen to argument on the \$30 Associates in Radiology charge three different times. Every time the trial court ruled against Mr. Pennington. His continued litigious requests cost the court and Allstate time and expense. No additional time should have been spent by the trial court on another motion to reconsider.

III. THE TRIAL COURT'S FINDINGS OF FACT ARE CLEARLY  
SUPPORTED BY THE EVIDENCE

Mr. Pennington, through his counsel, Dan Wilson, mounts an attack against the trial court's detailed and precise findings of fact and claims these facts are against the clear weight of the evidence. In reality, the approach taken by Pennington and Attorney



Wilson on appeal is simply an attempt to reargue his position based on selective excerpts of evidence presented to the trial court. Pennington fails to establish the findings of fact are clearly erroneous. Utah Rules of Civil Procedure, Rule 52(a), "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."; see also, State v. Goodman, 763 P.2d 786 (Utah 1988), ProMax Development Corp. v. Mattson, 943 P.2d 247, 255 (Utah App. 1997), Sevy v. Security Title Co. of Southern Utah, 902 P.2d 629, 634 (Utah 1995), MacKay v. Hardy, 896 P.2d 626, 629 (Utah 1995), In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

As the Utah Court of Appeals explained in ProMax,

On the other hand, we review the trial court's findings of fact for clear error, reversing only where the finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made. See State v. Goodman, 763 P.2d 786, 786 (Utah 1988); Cummings v. Cummings, 821 P.2d 472, 476 (Utah.Ct.App.1991). To succeed in its challenge to findings of fact, ProMax may not simply reargue its position based on selective excerpts of evidence presented to the trial court. See DeBry v. Cascade Enters., 879 P.2d 1353, 1360 (Utah 1994) (rejecting sufficiency of evidence challenge where appellant "essentially reargue[d] the evidence as if [the] appeal were a trial de novo."); Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051, 1053 (Utah.Ct.App.1994) (noting appellant's argument was "nothing more than an attempt to reargue the case before this court--a tactic that we reject."). Instead, ProMax must "first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766, 773 (Utah 1995); accord Oneida/SLIC, 872 P.2d at 1052-53.

Id.

A. Pennington's Appeal Should Be Dismissed Because He Has Failed to Marshall the Evidence Supporting the Trial Court's Findings of Fact and Demonstrate This Evidence is Insufficient.

In support of the judgment the trial court's findings of fact include 20 pages of specific findings (R. 1085-1104). On appeal, Mr. Pennington must marshal all the evidence **supporting the findings**. He must then demonstrate to this Court that even viewing the findings of fact in a light most favorable to the court below, the evidence is insufficient to support the findings. Scharf v. BMG Corp., 700 P.2d 1068, 1069-1070 (Utah 1985). Charlton v. Hackett, 360 P.2d 176 (Utah 1961) This Court has consistently held:

An appellate court does not lightly disturb the verdict of a jury nor the findings of fact made by a trial court. If a challenge is made to the findings, an appellant must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.

Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991); see also Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

The Utah Rules of Civil Procedure, Rule 52(a) further emphasize the importance of the lower court's findings of fact. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless **clearly erroneous**, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" (emphasis added).

Pennington has spent considerable time marshaling the evidence supporting his arguments to the lower court. The trial court in his advantaged position rejected this evidence. He now attempts to reargue those facts on appeal to this Court. In doing so,

Pennington has failed to follow this Court's rule that he must first marshal the evidence in support of the trial court's findings of fact, and then show this Court this evidence (overwhelming in this case) is insufficient to support the trial court's findings of fact. Pennington has failed to do so, and this Court should assume the record supports the trial court's findings of fact.

B. The Trial Court's Findings of Fact are Supported by the Evidence.

In review of the lower court's findings of fact, deference should be given by this Court to the trial court's advantaged position to observe testimony first hand. Utah Rules of Civil Procedure, Rule 52(a). The lower court's record demonstrates the trial court judge actively participated in the trial and in judging and assessing the credibility of the witnesses (R. 1082, Judgment, "the court having reviewed the volumes of evidence produced, his extensive personal notes taken during several days of trials and hearings, all exhibits in evidence, documents filed by each side, including numerous memorandum, and having carefully observed the demeanor of witnesses during the testimony and having reached conclusions as to the truthfulness and untruthfulness of these witnesses. . ."). A review of the findings demonstrates immense support for the trial court's decision.

Specifically, Pennington argues findings of fact 21, 23 and 24 are not supported by the record. These findings are as follows:

21. The court further finds that the recommendations and treatment plan established by Dr. Taylor was a standard and proper treatment reasonable for this type of cervical strain injury and had Mr. Pennington followed Dr. Taylor's recommendation, this injury would have probably been resolved as soon, or possibly sooner, (because of unnecessary and apparently damaging stressful chiropractic manipulations) as if he had not obtained treatment from numerous other medical providers.

23. The court finds that rather than continue with Dr. Taylor, Mr.

Pennington chose to ‘shop’ for other medical providers for the purpose of increasing his medical expenses so he could exceed the \$3,000 PIP amounts in order to justify pursuing a personal injury claim against the other driver pursuant to Utah Code Ann. §31A-22-309 (1953 as amended).

24. The court finds that the further medical treatment obtained by plaintiff, beyond that recommended by Dr. Taylor, was not only unnecessary, but some of that treatment was given to areas of the body not injured in the accident, and certain treatment probably increased plaintiff’s pain and was the cause of increased discomfort, (if indeed, same was experienced) above that caused by the June 18<sup>th</sup> accident.

(R. 1091-1092).

The testimony at trial proved Mr. Pennington suffered injury of an minor, uncomplicated cervical strain in the motor vehicle accident of June 18, 1993 (T. Vol. 2, 1413 (testimony of Dr. Nord); T. Vol. 1, 1220 (testimony of Dr. Balcombe); T. Vol. 3, 1820 (testimony of Dr. Wakefield). A cervical strain is a strain of a muscle. Time is the healer of Mr. Pennington’s type of injury; any treatment is simply for pain purposes and not to cure the injury (T. Vol. 2, 1474). Physical therapy or non-manipulative chiropractic therapy may reduce the pain, but nature does the healing (T. Vol. 2, 1476-1477).

Mr. Pennington went to his primary care physician, Dr. Paul Taylor, the day after the accident (R. Exhibits, P-1). In accordance with a simple, uncomplicated cervical strain, Dr. Paul Taylor recommended “neck flexion exercises,” and “ice, heat, rest, and Ibuprofen.” (Id.) Mr. Pennington’s range of motion was “complete.” (Id.) He again saw Dr. Taylor on June 22, 1993, and Dr. Taylor simply recommended “doing more neck and shoulder exercises, ice and then heat and muscle relaxant.” (Id.)

Witnesses testified Dr. Taylor’s care was entirely appropriate (T. Vol. 2, 1411 (testimony of Dr. Nord); T. Vol. 3, 1801 (testimony of Dr. Wakefield). Other than the

continuation of the home exercise program established by Dr. Taylor and follow-ups as needed with his primary care physician, Dr. Paul Taylor, no further treatment or medical follow-up was necessary (T. Vol. 2, 1441).

Mr. Pennington does not return to his primary health care provider, Dr. Paul Taylor. His attorney argued the reason he did not return was because he did trust his primary health care provider. However, the evidence in the record before the court was Mr. Pennington still listed Dr. Taylor as his primary health care provider when he was seeing Bennett Chiropractic (Exhibit P-6). So in an effort to increase his PIP threshold limit, Mr. Pennington seeks a third physical examination from Dr. Joan Balcombe, an Emergency Room physician at St. Benedict's hospital. Dr. Balcombe's examination is consistent with Dr. Taylor's. However, she orders x-rays because an Emergency Room physician approaches a patient differently than a primary care physician in that they better be right the first time because they are not likely going to see the patient again (Vol. 2, T. 1419). The standard of care is different for an Emergency Room doctor than a treating physician (Vol. 2, T. 1418). Dr. Nord would not have ordered x-rays if no objective change was observed in Mr. Pennington's physical examination. Dr. Balcombe's physical examination had no objective change from Dr. Taylor's examination (Vol. 2, T. 1416-1417). However, Dr. Balcombe, as an emergency room physician, ordered the x-rays to avoid malpractice; and because the visit is usually a one-time basis, the emergency physician wants to be positive all possible injuries to that patient are covered (Vol. 1, T. 1234, 1239). The x-rays are normal. (Pennington separately argues the \$30 charge from Associates in Radiology was reasonable and necessary. The clear weight of the evidence was otherwise and supports Allstate's position that Dr. Taylor would not have ordered x-

rays. The reference to Dr. Nord's testimony is taken out-of-context. In an emergency setting, Dr. Nord testified the x-rays would be reasonable. However, he specifically testified in regard to this case, he would not have ordered x-rays as Mr. Pennington's treating physician (Vol. 2, T. 1415-1417)).

Mr. Pennington then receives a fourth examination on July 6, 1993, by Dr. Trimble at the Burns Chiropractic Clinic. Now, Mr. Pennington is diagnosed with "an acute traumatic acceleration/deceleration injury to the cervical spine resulting in myofascities with bilateral occipital neuralgia and grade II radiculopathy of the right upper extremity and an acute traumatic lumbosacral sprain/strain resulting in myofascitis" (R. Exhibit D-44). Mr. Pennington seeks treatment from Burns Chiropractic seven times. He receives x-rays from Burns Chiropractic—normal thoracic spine, two views with an interpretation; normal lumbar spine, four views with an interpretation.

On July 15, 1993, Mr. Pennington received a fifth physical examination from Bennett Chiropractic. His diagnosis is now "Acute, Moderate to Severe, Constant" (1) "Brachial Radicular Neuralgia," (2) "Cervical Hyperflex/Hyperext. Inj.," (3) "Multiple Cervical Subluxation," (4) "Thoracic Subluxation Unspec.," and (5) "Lumbar Subluxation Unspec." (Dist. Ct. Exhibits, D-45, Appendix C). He goes to Bennett Chiropractic 20 times receiving spinal manipulations and adjustments to treat problems to his thoracic spine, hips, ribs, lumbar spine, and cervical spine (R. Exhibits, P-6). Spinal manipulations or adjustments performed by chiropractors involve placement in a certain position with sudden forces applied to certain areas of the vertebral column. (Vol. 2, T. 1423-1427). Yet, Mr. Pennington's injury was to a muscle in the neck; the manipulations were to the bony processes.

Mr. Pennington again goes to the Emergency Room at St. Benedict's Hospital on July 24, 1993. On the day prior he received treatment from Bennett Chiropractic for his hips, his ribs, and thoracic pain (R. Exhibit P-6). Mr. Pennington's self report is his chief complaint is swelling and pain in the back, worsening the last two days. No evidence is given for the cause of onset of this increasing swelling and pain; no evidence ties it into the automobile accident. Dr. Rollins cannot figure out his problem, so he refers him to a neurologist, Dr. Bryson Smith. (Pennington separately argues Allstate should have paid for this visit as a normal office visit to Dr. Taylor. The fallacy of this argument is, according to other witnesses, Pennington probably did not need to seek Dr. Taylor again inasmuch as time is the healer of his injury. Further, Pennington had been receiving excessive chiropractic care which witnesses testified was not conducive to good care and may have caused additional problems).

Dr. Smith conducts an MRI, everything is normal, and Mr. Pennington stops treatment (although following Dr. Smith's first examination and before the last visit, Mr. Pennington continues chiropractic treatment, adds additional physical therapy and massage therapy, with some treatment overlapping days).

Dr. Nord conducted an independent medical examination of Mr. Pennington on September 28, 1993. He concluded from his examination and review of the medical records that:

The available medical evidence indicates that Mr. Pennington sustained no more than a cervical strain as a consequence of the motor vehicle accident of June 18, 1993, following which he generated undue personal concern which led to involvement of an excessive number of practitioners being involved. Other than the continuation of a home exercise program already established, and follow-ups as needed with his primary care physician, Dr. Paul Taylor, no further treatment or medical follow is indicated. The prognosis is

excellent, with complete resolution of symptoms a reasonable expectation.  
No activity restrictions are appropriate.

(R. Exhibits D-13, Addendum G).

Based on this evidence, and the opportunity of the court to determine the truthfulness of the witnesses who testified, the trial court determined the recommendations and treatment plan established by Dr. Taylor was a standard and proper treatment reasonable for this type of cervical strain injury (R. 1091). The plan of Dr. Taylor consisted of home exercise programs, ice, heat and muscle relaxant (Exhibit P-1). Any further treatment, thereafter, was unnecessary (R. 1092) and was sought for the purpose of increasing Mr. Pennington's medical expenses in order to exceed the PIP threshold to justify a personal injury claim against the other driver (R. 1092). The trial court found that Allstate had paid too much (R. 1099). However, payment by Allstate of palliative procedures does not establish medical necessity (R. 1099) (Pennington attempts to piece meal argue reasonableness and necessity of Bennett Chiropractic, Burns Chiropractic, physical therapy, and Dr. Smith. The clear weight of the evidence established nothing after Dr. Taylor's second examination was reasonable, and additional treatment was sought to inflate a personal injury claim (R. 1091-1092)).

The trial court, after listening to the testimony of all witnesses, including Mr. Pennington, specifically determined the x-rays taken at the Emergency Room were unreasonable and unnecessary and were part of the plaintiff's plan to build up the medical expenses for his ultimate benefit in pursuing his additional claim against the other driver (R. 1098).



A review of the trial court's rationale and findings of fact with the evidence adduced at trial establishes the trial court had sufficient evidence for its decision. This Court should not set aside the trial court's decision supported by the record.

#### CROSS APPEAL

Attorney Wilson filed proposed Findings of Fact and Conclusions of Law on March 6, 1996 (R. 821-830). In his Findings of Fact, Attorney Wilson stated: "Based on the evidence, a reasonable attorney fee is \$100 per hour for all time prior to July 15, 1995, and \$125 per hour for all time from and after July 15, 1995" (R. 828). Between November 30, 1993, and May 20, 1995, Attorney Wilson had spent 74.7 hours on this matter.

Allstate's counsel, Jan P. Malmberg, filed an affidavit in support of Allstate's request for attorney fees on December 19, 1996 (R. 997-1018). In her affidavit she stated:

7. Numerous pleadings, correspondence, orders, telephone calls and depositions were taken throughout the course of this action. By the time of trial, all defendants had been dismissed with the exception of Allstate. Plaintiff, himself, had no stake in the outcome of the lawsuit. The lawsuit was merely continued because the plaintiff's counsel, Dan Wilson, wanted this court to award his attorney fees to be paid by Allstate even though the entire lawsuit against Allstate was without legal basis (R. 997-998).

Her affidavit further recited that plaintiff's counsel, Dan Wilson, prepared 93 separate pleadings; she prepared 79 pleadings. Further, in support of her time, her affidavit recited the specific time spent (R. 1000-1017). Mrs. Malmberg billed at a rate of \$75 an hour. Between February, 1994, and May 20, 1995, she spent 55.6 hours.

The total attorney fees requested were \$27,575. In the memorandum in support of attorney fees, Allstate claims by extrapolating Mr. Wilson's charges through the end of

time, his bill would have been \$51,027 in attorney fees, nearly twice as much as Allstate's.

Pennington never filed any memorandum in opposition to the attorney fees claimed by Allstate. Pennington never submitted any objection to the reasonableness of those fees. Pennington never disputed his counsel had spent approximately \$51,000 in attorney fees.

Under Utah Rules of Judicial Administration, Rule 4-501, Pennington had 10 days to file any affidavits or other documents opposing the reasonableness of Allstate's attorney fees. Plaintiff did not file any opposition. For purposes of the record before the court at the time of ruling on the amount of attorney fees to be awarded, the trial court had no documentation to challenge any of the claimed attorney fees. Under Rule 52(c) of the Utah Rules of Civil Procedure, Pennington waived his right to challenge the attorney fees, and attorney fees should have been entered in accordance with the request filed by Allstate.

The Utah Supreme Court had held that while a trial court has discretion to determine an award of attorney fees, the exercise of that discretion must be based on an evaluation of the evidence. Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988). An evaluation of the evidence indicates Attorney Wilson's hourly rate was higher. Attorney Wilson's spent more hours on the case (at least through May, 1995) than counsel for Allstate. Attorney Wilson's total attorney fees would have been approximately \$51,000. Counsel for Allstate only claimed \$27,575.

The Utah Supreme Court has indicated the factors the court should analyze in awarding attorney fees. In Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1983), the Utah

Supreme Court said the following items should be addressed: “the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.” The trial court specifically found in this case serious collateral matters which made the litigation difficult, including the conduct of Attorney Wilson and the plaintiff’s misconduct (R. 1082). The trial court stated excessive time was spent by Allstate’s attorney, yet does not specifically identify what hours were excessive, especially in light of the evidence which indicated plaintiff’s counsel spent more. The fee charged by Allstate’s attorney was found to be less per hour than often charged by attorneys. Thereby, even utilizing the \$125 per hour charged by plaintiff’s counsel, with the 200 hours found reasonable, attorney fees should be at least \$25,000.

Finally, in light of the subject matter of this litigation, along with the conduct of plaintiff’s counsel with plaintiff, and the serious findings by the trial court of the misconduct of both in filing a spurious action, **all** fees incurred by Allstate should be awarded. To not award the full attorney fees incurred by Allstate in defending a frivolous action would allow Pennington and his attorney to claim victory in their methods in that Allstate was required to pay attorney fees and costs on a frivolous lawsuit filed in bad faith. Pennington and his attorney, not Allstate should be the party punished for wasting this court’s time, the lower court’s time, and causing Allstate to incur unnecessary attorney fees and costs.

## CONCLUSION

Pennington and his father-in-law and attorney, Dan Wilson, attempted to orchestrate a plan which would allow Pennington to bring a third-party action against the driver that hit his vehicle when, in reality, he was barely injured. To accomplish this goal, Pennington went shopping for various medical providers in an effort to build his case to be one over \$3,000 in medical expenses. He successfully accomplished his goal, sued the third-party, recovered and kept thousands of dollars to which he was not entitled.

Allstate Insurance Company became suspicious during the course of receiving bills from multiple providers on a case which appeared to be an uncomplicated cervical strain which would resolve, without treatment, within a few weeks. Allstate exercised its rights under its policy to verify its concerns through an independent medical examination. Plaintiff's counsel thwarted that attempt until after Pennington could incur his \$3,000 in medical expenses. Pennington was also successful in obtaining his settlement from a third-party by violating his insurance contract with his own provider and never notifying them of any lawsuit or settlement.

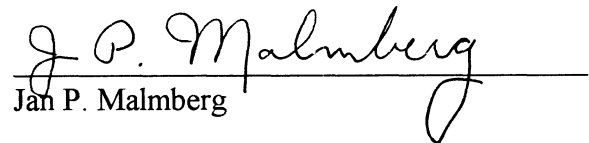
Successful in receiving money to which Pennington was not entitled, Pennington now threatened his own company for challenging his incurrence of unnecessary and unreasonable medical expenses. To avoid paying for those costs, a lawsuit was framed to sue Allstate and his medical providers while at the same time, attempting to convince those medical providers their treatment was reasonable and Pennington was representing their interests in the lawsuit, while, in reality, Pennington was attempting to avoid paying for those expenses.

When Allstate finally obtained the result sought by Pennington, i.e. all the medical providers being dismissed, Pennington still sought to force his own company to pay for his attorney fees. A trial was held. The trial court saw through the volumes of documents, pleadings, and arguments made by plaintiff's counsel, and found the lawsuit was not brought in good faith, was spurious, and was filed without merit. The trial court found Pennington and his attorney attempted to deceive Allstate and the medical providers, and entered judgment accordingly.

The trial record supports the decision of the trial court. This court should affirm the ruling of the trial court that this action was spurious, without merit and not in good faith. By affirming this conclusion, this Court should likewise award attorney fees in the amount claimed at trial (as per the Cross Appeal), costs, and attorney fees and costs on appeal under Utah Rules of Appellate Procedure, Rule 33(b).

DATED this 19<sup>th</sup> day of January, 1998.

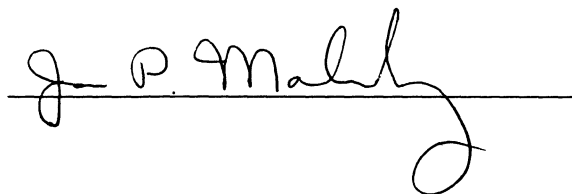
PERRY, MALMBERG & PERRY

  
Jan P. Malmberg

### CERTIFICATE OF MAILING

I hereby certify four true and correct copies of the foregoing Brief of Appellee was mailed, postage pre-paid, this 20<sup>th</sup> day of January, 1998, to the following parties through their counsel of record as follows:

Daneil L. Wilson  
Attorney for Pennington  
290 - 25<sup>th</sup> Street, #204  
Ogden, UT 84405

A handwritten signature in cursive script, appearing to read "J. P. Malby", is written over a horizontal line.

## ADDENDUM TO BRIEF

Addendum A—Utah Rules of Civil Procedure, Rule 54

Addendum B—Utah Rules of Appellate Procedure, Rule 33

Addendum C—Utah Code Ann. §31A-22-307 (1953 as amended)

Addendum D—Utah Code Ann. §31A-22-309 (1953 as amended)

Addendum E—Allstate Indemnity Contract with Pennington

Addendum F—Dr. Paul Taylor's notes

Addendum G—Affidavit of Dr. Nathaniel M. Nord; report of examination of Pennington

Addendum H—Letter of Attorney Wilson to Defendant Balcombe

Addendum I—Dismissal Agreement and Acceptance of Service Sent to Medical Providers

Addendum J—May 17, 1994, letter from Dr. Bryson Smith to Utah State Bar;  
July 13, 1994, letter from Dr. Bryson Smith to Utah State Bar

Addendum K—Order of Dismissal for Dr. Bryson Smith, Burns Chiropractic, David  
Trimble, D.C. and Dr. Dale Bennett

Addendum L—Memorandum Decision by Honorable Roger Dutson

Addendum M—Findings of Fact and Conclusions of Law by Honorable Roger Dutson

Addendum N—Judgment and Order of Dismissal (As to Liability), Attorney Fees  
and Costs

# **Addendum A**



## UTAH RULES OF CIVIL PROCEDURE

### PART VII. JUDGMENT

#### RULE 54. JUDGMENTS; COSTS

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims and/or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment.

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) Judgment by Default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) To Whom Awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) How Assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3) and (4) [Deleted.]

(e) Interest and Costs to Be Included in the Judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

# **Addendum B**

## UTAH RULES OF APPELLATE PROCEDURE

### TITLE V. GENERAL PROVISIONS

#### RULE 33. DAMAGES FOR DELAY OR FRIVOLOUS APPEAL; RECOVERY OF ATTORNEY'S FEES

(a) Damages for Delay or Frivolous Appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

#### Advisory Committee Note

Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages--single or double costs or attorney fees or both--is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v California*, 386 U S 738 (1967) and *State v Clayton*, 639 P 2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

# **Addendum C**

TITLE 31A. INSURANCE CODE  
CHAPTER 22. CONTRACTS IN SPECIFIC LINES  
PART III. MOTOR VEHICLE INSURANCE

§ 31A-22-307. Personal injury protection coverages and benefits

(1) Personal injury protection coverages and benefits include:

(a) the reasonable value of all expenses for necessary medical, surgical, X-ray, dental, rehabilitation, including prosthetic devices, ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person;

(b)(i) the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss, except that this benefit need not be paid for the first three days of disability, unless the disability continues for longer than two consecutive weeks after the date of injury; and

(ii) a special damage allowance not exceeding \$20 per day for a maximum of 365 days, for services actually rendered or expenses reasonably incurred for services that, but for the injury, the injured person would have performed for his household, except that this benefit need not be paid for the first three days after the date of injury unless the person's inability to perform these services continues for more than two consecutive weeks;

(c) funeral, burial, or cremation benefits not to exceed a total of \$1,500 per person; and

(d) compensation on account of death of a person, payable to his heirs, in the total of \$3,000.

(2)(a) To determine the reasonable value of the medical expenses provided for in Subsection (1) and under Subsection 31A-22-309 (1)(e), the commissioner shall conduct a relative value study of services and accommodations for the diagnosis, care, recovery, or rehabilitation of an injured person in the most populous county in the state to assign a unit value and determine the 75th percentile charge for each type of service and accommodation. The study shall be updated every other year. In conducting the study, the department may consult or contract with appropriate public and private medical and health agencies or other technical experts. The costs and expenses incurred in conducting, maintaining, and administering the relative value study shall be funded by the tax created under Section 59-9-105. Upon completion of the study, the department shall prepare and publish a relative value study which sets forth the unit value and the 75th percentile charge assigned to each type of service and accommodation.

(b) The reasonable value of any service or accommodation is determined by applying the unit value and the 75th percentile charge assigned to the service or accommodation under the relative value study. If a service or accommodation is not assigned a unit value or the 75th percentile charge under the relative value study, the value of the service or accommodation shall equal the reasonable cost of the same or similar service or accommodation in the most populous county of this state.

(c) This subsection does not preclude the department from adopting a schedule already established or a schedule prepared by persons outside the department, if it meets the requirements of this subsection.

(d) Every insurer shall report to the Commissioner of Insurance any patterns of overcharging, excessive treatment, or other improper actions by a health provider within 30 days after such insurer has knowledge of such pattern.

(e) In disputed cases, a court on its own motion or on the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify on the issue of the reasonable value of the claimant's medical services or expenses.

(3) Medical expenses as provided for in Subsection (1)(a) and in Subsection 31A-22-309 (1)(e) include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

(4) The insured may waive for the named insured and the named insured's spouse only the loss of gross income benefits of Subsection (1)(b)(i) if the insured states in writing that:

(a) within 31 days of applying for coverage, neither the insured nor the insured's spouse received any earned income from regular employment; and

(b) for at least 180 days from the date of the writing and during the period of insurance, neither the insured nor the insured's spouse will receive earned income from regular employment.

(5) This section does not prohibit the issuance of policies of insurance providing coverages greater than the minimum coverage required under this chapter nor does it require the segregation of those minimum coverages from other coverages in the same policy.

(6) Deductibles are not permitted with respect to the insurance coverages required under this section.

As last amended by Chapter 71, Laws of Utah 1994.



# Addendum D

TITLE 31A. INSURANCE CODE  
CHAPTER 22. CONTRACTS IN SPECIFIC LINES  
PART III. MOTOR VEHICLE INSURANCE

§ 31A-22-309. Limitations, exclusions, and conditions to personal injury protection

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability or permanent impairment based upon objective findings;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of \$3,000.

(2)(a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to his injury:

- (A) by intentionally causing injury to himself; or
- (B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because that person is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5)(a) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred.

(b) Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer.

(c) If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1- 1/2% per month after the due date.

(d) The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

As last amended by Chapter 4, Laws of Utah 1994.

# **Addendum E**

# INDEMNITY

UTAH AUTOMOBILE POLICY

**Allstate®**

**ALLSTATE INDEMNITY COMPANY**

AU143

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**Allstate Indemnity Company**  
**The Company Named In the Declarations**  
A Stock Company • Home Office • Northbrook, Illinois

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**GENERAL**

This policy is a legal contract between you and us. A coverage applies only when a premium for it is shown on the declarations page. If more than one **auto** is insured, premiums will be shown for each **auto**. If **you** pay the premiums when due and comply with the policy terms, **Allstate**, relying on the information **you** have given **us**, makes the following agreements with **you**.

**When And Where The Policy Applies**

**Your** policy applies only during the policy period. During this time, it applies to losses to the **auto**, accidents, and occurrences within the United States of America, its territories or possessions, or Canada, or between their ports. The policy period is shown on the declarations page.

**Insurance Coverage In Mexico**

Auto accidents in Mexico are subject to the laws of Mexico — NOT the United States of America. In the Republic of Mexico an auto accident can be considered a CRIMINAL OFFENSE as well as a civil matter.

In some cases, the coverage under this policy may NOT be recognized by Mexican authorities and **we** may not be allowed to provide any insurance coverage at all in Mexico. For **your** protection, **you** should seriously consider purchasing **auto** coverage from a licensed Mexican insurance company before driving into Mexico.

However, when possible, protection will be afforded for those coverages for which a premium is shown on the declarations page for an insured **auto** while that **auto** is within 75 miles of the United States border and only for a period not to exceed ten days after each separate entry into the Republic of Mexico.

If loss or damage occurs which may require repair of the insured **auto** or replacement of any part(s) while the **auto** is in Mexico, the basis for adjustment of the claim will be as follows: any amount payable resulting from any loss or damage occurring in the Republic of Mexico shall be payable in the United States of America. **We** will not be liable for more than the cost of having the repairs or replacement parts made at the nearest point in the United States where the repairs or replacements can be made. The costs for towing, transportation and salvage operations of the **auto** while within Mexico are not covered under this policy.

**Changes**

**Premium Changes**

The premium for each **auto** is based on information **Allstate** has received from **you** or other sources. **You** agree to cooperate with **us** in determining if this information is correct, if it is complete, and if it changes during the policy period. **You** agree that if this information changes or is incorrect or incomplete, **we** may adjust **your** premium accordingly during the policy period.

Changes which result in a premium adjustment are contained in **our** rules. These include, but are not limited to:

- 
1. **autos** insured by the policy, including changes in use.
  2. drivers residing in **your** household, their ages or marital status.
  3. coverages or coverage limits.
  4. rating territory.
  5. discount eligibility.

Any calculation or adjustment of **your** premium will be made using the rules, rates, and forms in effect, and on file if required, for **our** use in **your** state.

#### Coverage Changes

When **Allstate** broadens a coverage during the policy period without additional charge, **you** have the new feature if **you** have the coverage to which it applies. The new feature applies on the date the coverage change is effective in **your** state. Otherwise, the policy can be changed only by endorsement. Any change in **your** coverage will be made using the rules, rates, and forms in effect, and on file if required, for **our** use in **your** state.

#### Duty To Report Policy Changes

**Your** policy was issued in reliance on the information **you** provided concerning **autos** and persons insured by the policy. To properly insure **your auto**, **you** should promptly notify **us** when **you** change **your** address or whenever any **resident** operators insured by **your** policy are added or deleted.

**You** must notify **us** within 30 days when **you** acquire an additional or replacement **auto**. If **you** don't, coverage will not be afforded under this policy.

#### Combining Limits Of Two Or More Autos Prohibited

The limits of liability applicable to any one **auto** shown on the declarations page will not be combined with or added to the limits of liability applicable to any other **auto** shown on the declarations page or covered by the policy, even though a separate premium is charged for each of those **autos**, regardless of the number of:

1. vehicles or persons shown on the declarations page;
2. vehicles involved in the accident;
3. persons seeking damages as a result of the accident; or
4. insured persons from whom damages are sought.

If two or more **autos** are shown on the declarations page and one of these **autos** is involved in the accident, the limits of liability shown on the declarations page for the involved **auto** will apply. If none of the **autos** shown on the declarations page is involved in a covered accident involving an insured **auto**, the highest limits of liability shown on the declarations page for any one **auto** will apply.

#### Transfer

This policy can't be transferred to anyone without **our** written consent. However, if **you** die, coverage will be provided until the end of the policy period for:

1. **your** legal representative while acting as such, and
2. persons covered on the date of **your** death.

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#### **Provisional Premium**

The coverages of this policy and the premium shown on the declarations page for these coverages have been established in accordance with the provisions of the Utah Insurance Code. If a court of competent jurisdiction declares or enters a judgment, from which there is no appeal, the effect of which is to render the provisions of such Code invalid or unenforceable in whole or in part, **Allstate** shall have the right to revise the affected coverages afforded by this policy. Also, **Allstate** shall have the right to recompute the premium payable for this policy.

#### **Payment**

If **your** payment of the initial premium amount due is by check, draft, or any remittance other than cash, such payment is conditional upon the check, draft, or other remittance being honored upon presentation. If such check, draft, or remittance is not honored upon presentation, this policy shall be deemed void from its inception. This means that **Allstate** will not be liable under this policy for any claims or damages which would otherwise be covered had the check, draft, or remittance been honored upon presentation.

#### **Termination**

If **we** offer to renew **your** policy and **your** required premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate on the expiration date of the then current policy period.

#### **Non-Renewal**

If **we** don't intend to renew **your** policy, **we** will mail **you** notice at least 30 days before the end of the policy period.

#### **Fraud or Misrepresentation**

**Your** policy was issued in reliance on the information **you** provided on **your** auto insurance application concerning **autos** and persons insured by the policy. **You** agree that if **your** policy was obtained through material misrepresentation, fraud or concealment of material facts, or if any material misrepresentation was made on **your** auto insurance application, **Allstate** has the right to void or rescind **your** policy. If the policy is deemed void from its inception, **we** will return the premium paid.

#### **Cancellation**

**You** may cancel this policy by writing **us** the future date **you** wish to stop coverage.

**Allstate** may cancel part or all of this policy by mailing notice to **you** at **your** last known address. If **we** cancel because **you** didn't pay the premium, the date of cancellation will be at least 10 days after the date of mailing. If **we** cancel for any other reason, and the notice is mailed to **you** within the first 59 days of the policy period, the date of cancellation will be at least 10 days after the date of mailing. Otherwise, **we** will give **you** 30 days notice.

Proof of mailing the notice will be proof of notice. Any refund, if due, will be proportional to the time **your** policy has been in effect. Cancellation will be effective even if the refund is not made immediately.

After **your** policy has been in effect 59 days, **Allstate** won't cancel or reduce **your** coverage during the policy period unless:

1. **you** don't pay the premium when it's due;

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**you** or any other operator who either resides in **your** household or customarily operates the insured **auto** has had a driver's license suspended or revoked;

the policy was obtained through material misrepresentation;

there is a substantial change in the risk assumed by **us**;

there are substantial breaches of contractual duties, conditions, or warranties; or

**Istate** has mailed **you** a notice of cancellation within the first 59 days.

**Part I**

**Automobile Liability Insurance**

**Bodily Injury — Coverage AA**

**Property Damage — Coverage BB**

**Allstate** will pay those damages an insured person is legally obligated to pay because of:

1. **bodily injury** sustained by any person; and
2. damage to or destruction of property.

Under these coverages, **your** policy protects an insured person from liability for damages arising out of the ownership, maintenance or use, loading or unloading of an insured **auto**.

**We** will defend an insured person sued as the result of a covered **auto** accident, even if the suit is groundless or false. **We** will choose the counsel. **We** may settle any claim or suit if **we** believe it is proper. **We** will not defend an insured person sued for damages which are not covered by this policy.

**Additional Payments Allstate Will Make**  
When **we** defend an insured person under this part, **we** will pay:

1. up to \$50 a day for loss of wages or salary if **we** ask that person to attend hearings or trials to defend against a bodily injury suit. **We** won't pay for loss of other income. **We** will pay other reasonable expenses incurred at **our** request.
  2. court costs for defense.
  3. interest accruing on damages awarded. **We** will pay this interest only until **we** have paid, offered, or deposited in court the amount for which **we** are liable under this policy. **We** will only pay interest on
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damages not exceeding **our** limits of liability.

4. premiums on appeal bonds and on bonds to release attachments, but not in excess of **our** limit of liability. **We** aren't required to apply for or furnish these bonds.

**We** will repay an insured person for:

1. the cost of any bail bonds required due to an accident or traffic law violation involving the use of the insured **auto**. **We** won't pay more than \$300 per bond. **We** aren't required to apply for or furnish these bonds.
2. any expense incurred for first aid to others at the time of an **auto** accident involving the insured **auto**.

#### Insured Persons

1. While using **your** insured **auto**:
  - a) **you**,
  - b) any **resident**, and
  - c) any other person using it with **your** permission.
2. While using a non-owned **auto**:
  - a) **you**, and
  - b) any **resident** relative using a private passenger **auto** or **utility auto**.
3. Any other person or organization liable for the use of an insured **auto** provided:
  - a) the **auto** is not owned or hired by the person or organization,
  - b) the use is by an insured person as defined under 1. or 2. above, and
  - c) **we** cover only the insured person's acts or omissions.

#### Insured Autos

1. Any **auto** described on the declarations page. This includes the private passenger **auto** or **utility auto** you replace it with.
2. An additional private passenger **auto** or **utility auto** you become the owner of during the policy period. This **auto** will be covered if **we** insure all other private passenger **autos** or **utility autos** you own. **You** must, however, tell **us** within 30 days of acquiring the **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if we are not notified of the additional **auto**.
3. A substitute private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, being temporarily used with the owner's permission while **your** insured **auto** is being serviced or repaired or if **your** insured **auto** is stolen or destroyed.
4. A non-owned private passenger **auto** used by **you** or a **resident** relative with the owner's permission. This **auto** must not be available or furnished for the regular use of an insured person.
5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

#### Definitions

1. "**Allstate**", "**We**", "**Us**" or "**Our**" — means the company shown on the declarations page of the policy.

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2. **"Auto"** — means a land motor vehicle with at least four wheels designed for use principally upon public roads.
  3. **"Bodily Injury"** — means bodily injury, sickness, disease, or death.
  4. **"Resident"** — means a person who physically resides in **your** household and intends to continue residing there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
  5. **"Utility Auto"** — means an **auto** of the pick-up body, sedan delivery, or panel truck type. This **auto** must have a gross vehicle weight of 10,000 pounds or less, according to manufacturer's specifications.
  6. **"You"** or **"Your"** — means the policyholder named on the declarations page and that policyholder's **resident** spouse.

**Exclusions — What Is not covered**

**Allstate** will not pay for any damages an insured person is legally obligated to pay because of:

1. **bodily Injury** or property damage arising out of the use of **your** insured **auto** while used to carry persons or property for a charge, or any **auto** **you** are driving while available for hire by the public. This exclusion does not apply to shared-expense car pools.
2. **bodily Injury** or property damage arising out of auto business operations such as repairing, servicing, testing, washing, parking, storing, or selling of **autos**. However, coverage does apply to **you**, **resident** relatives, partners, or employees of the partnership of **you** or a **resident** relative when using **your** insured **auto**.
3. **bodily Injury** or property damage arising out of the use of a non-owned **auto** in any business or occupation of an insured person. However, this exclusion does not apply while **you**, **your** chauffeur, or domestic servant are using a private passenger **auto** or trailer.
4. **bodily Injury** to an employee of any insured person arising in the course of employment. This exclusion does not apply to **your** domestic employee who is not required to be covered by a workers compensation law or similar law.
5. **bodily Injury** to a co-worker injured in the course of employment. This exclusion does not apply to **you**.
6. **bodily Injury** or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person.
7. **bodily Injury** to any person who is related by blood, marriage, or adoption to an insured against whom claim is made if such person resides in the same household as such insured, to the extent that the limits of liability for this coverage exceed the limits of liability required by the Utah Financial Responsibility of Motor Vehicle Owners and Operators Act.
8. damage to or destruction of property an insured person owns, transports, is in charge of, or rents. However, a private residence or a garage rented by that person is covered.

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9. **bodily Injury** or property damage which would also be covered under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or any other such policy. This applies even if the limits of that insurance are exhausted.
10. **bodily Injury** or property damage arising out of the ownership, maintenance, or use of a motor vehicle with less than four wheels.
11. **bodily Injury** or property damage arising out of the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

#### **Financial Responsibility**

When this policy is certified as proof under any motor vehicle financial responsibility law, the policy will comply with the provisions of that law.

#### **Limits of Liability**

The limits shown on the declarations page are the maximum **we** will pay for any single accident involving an insured **auto**. The limit stated for each person for **bodily Injury** is **our** total limit of liability for all damages because of **bodily Injury** sustained by one person in any single accident involving an insured **auto**, including all damages sustained by anyone else as a result of that **bodily Injury**. Subject to the limit for each person, the limit stated for each accident is **our** total limit of liability for all damages for **bodily Injury** sustained by two or more persons in any single accident involving an insured **auto**. For property damage, the limit stated for each accident is **our** total limit of liability for

property damage sustained in any single accident involving an insured **auto**.

The liability limits apply to each insured **auto** as shown on the declarations page. The insuring of more than one person or **auto** under this policy will not increase **our** liability limits beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limits also won't be increased if **you** have other **auto** insurance policies that apply.

There will be no duplication of payments made under the Bodily Injury Liability and Uninsured Motorists Coverages of this policy.

An **auto** and attached trailer are considered one **auto**. Also, an **auto** and a mounted camper unit, topper, cap, or canopy are considered one **auto**.

#### **If There Is Other Insurance**

If an insured person is using a substitute private passenger **auto** or non-owned **auto**, **our** liability insurance will be excess over other collectible insurance. If more than one policy applies on a primary basis to an accident involving **your** insured **auto**, **we** will bear **our** proportionate share with other collectible liability insurance.

#### **Assistance and Cooperation**

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement, and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone who may be jointly responsible.

**We** can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for bail bonds or first aid to others.

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#### **Action Against Allstate**

No insured person may sue **us** under this coverage unless there is full compliance with all the policy terms.

If liability has been determined by judgment after trial or by written agreement among the insured, the other person, and **us**, then whoever obtains this judgment or agreement against an insured person may sue **us** up to the limits of this policy. However, no one has the right to join **us** in a suit to determine legal responsibility.

#### **Bankruptcy or Insolvency**

The bankruptcy or insolvency of an insured person or that person's estate won't relieve **us** of any obligation.

#### **Subrogation Rights**

When **we** pay, an insured person's rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we** have paid. The insured person must protect these rights and help **us** enforce them.

#### **Additional Interested Parties**

If one or more additional interested parties are listed on the declarations, the Automobile Liability Insurance coverages of this policy will apply to the parties as insureds.

**We** will provide 10 days written notice to the additional interested party if **we** cancel or make any change to this policy which adversely affects that party's interest. **Our** notice will be considered properly given if mailed to the address shown on the declarations.

The naming of an additional interested party does not increase that party's rights to recovery under this policy, nor does it impose

an obligation for the payment of premiums under this policy.

#### **What To Do In Case Of An Auto Accident Or Claim**

If an insured person has an **auto** accident, **we** must be informed promptly of all details. If an insured person is sued as the result of an **auto** accident, **we** must be informed immediately.



Part II  
Personal Injury Protection  
Coverage VA

~~Allstate will pay to or on behalf of an Injured person the following benefits subject to the limits as specified in the Limits of Liability provision.~~ Payments will be made only when **bodily Injury** is caused by an accident arising from the use of a **motor vehicle** as a **motor vehicle**.

1. Medical Expenses

All reasonable and necessary expenses incurred for necessary medical, surgical, X-ray, dental, rehabilitation services, including prosthetic devices, necessary ambulance, hospital, and nursing services, and any non-medical remedial care and treatment rendered in accordance with a recognized method of healing; however, it does not include expenses in excess of those for a semiprivate room unless more intensive care is medically required.

2. Work Loss

Loss of income and loss of earning capacity by the **Injured person** during his lifetime from inability to work during a period commencing three days after the date of the **bodily Injury** and continuing for a maximum of 52 consecutive weeks. If the **Injured person's** inability to work continues for more than a total of two consecutive weeks after the date of **bodily Injury**, the three day elimination period will not apply. Benefits end upon death of the **Injured person**.

3. Essential Services

Reasonable expenses incurred for services actually rendered or expenses incurred for services that, if he had not been injured, the **Injured person** would have customarily performed for his household. The allowance will commence three days after the date of the **bodily Injury** and continue for a maximum of 365 consecutive days. If the **Injured person's** inability to perform such services continues in excess of 14 consecutive days after the date of the **bodily Injury**, the three day elimination period will not apply. Benefits end upon death of the **Injured person**.

4. Funeral Expenses

Reasonable charges normally incurred for funeral, cremation or burial services.

5. Survivors' Loss

Compensation on account of the death of an **Injured person** payable to his or her heirs.

Definitions

1. "**Allstate**", "**We**", "**Us**" or "**Our**" — means the company shown on the declarations page of the policy.

2. "**Bodily Injury**" — means bodily injury, sickness, disease, or death.

3. "**Injured Person**" — means:

- (a) **you** or a **resident** relative who sustains **bodily Injury**:
  - (i) while in, on, getting into or out of a **motor vehicle**; or
  - (ii) when struck as a **pedestrian** by a **motor vehicle**.
- (b) any other person who sustains **bodily Injury**:
  - (i) while in, on, getting into or out

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- of the **Insured motor vehicle**; or
- (iii) when struck as a **pedestrian** by the **Insured motor vehicle** within the state of Utah.

**"Insured Motor Vehicle"** — means a **motor vehicle** with respect to which:

- (a) the bodily injury liability insurance of this policy applies and for which a specific premium is charged; and
- (b) **you** are required to maintain security under the provisions of the Utah Financial Responsibility of Motor Vehicle Owners and Operations Act, Title 41 Chapter 12a.

**"Motor Vehicle"** — means any vehicle which is required to be registered with the Division of Motor Vehicles of the Utah Tax Commission under Title 41, 1-19, Utah Code Annotated 1953 as amended, but excluding motorcycles, trailers and semi-trailers as enacted by Utah Insurance Code 31A-22-302(2).

**"Pedestrian"** — means any person not in, on, getting into or out of, or riding upon a **motor vehicle**; excluding, however, any person riding upon a motorcycle or in, on, getting into or out of a trailer or semi-trailer.

**"Resident"** — means a person who physically resides in **your** household and intends to continue residing there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

**"You"** or **"Your"** — means the policyholder named in the declarations page and that policyholder's resident spouse.

#### **Exclusions — What is not covered**

This coverage does not apply to **bodily**

#### **Injury:**

1. to **you** or a **resident** relative while in, on, getting into or out of any **motor vehicle** **you** own which is not an **Insured motor vehicle**.
2. to any person while operating the **Insured motor vehicle** without the expressed or implied consent of the insured or while not in lawful possession of the **Insured motor vehicle**.
3. to any **pedestrian**, other than **you** or a **resident** relative, when struck by an owned, but not **Insured motor vehicle**.
4. to any **pedestrian**, other than **you** or a **resident** relative, through the use of the **Insured motor vehicle** outside of the state of Utah.
5. to any person whose injury is self inflicted or is the result of an attempt to intentionally injure another person. If the injury is self inflicted and that person dies, Survivors' Loss benefits will not be paid.
6. to any person while committing a felony.
7. to any person resulting from the radioactive, toxic, explosive or other hazardous properties of nuclear materials.
8. to any person due to any act of war, insurrection, rebellion, or revolution.
9. to any person while in, on, getting into or out of a **motor vehicle** while located for use as a residence or premises.

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10. to any person, other than **you** or a **resident** relative while in, on, getting into or out of any **motor vehicle** operated by, but not owned by **you**.

#### Limits of Liability

The limits of **our** liability for Personal Injury Protection are stated on the declarations page. These amounts are the maximum **Allstate** will pay per **Injured person** for any **motor vehicle** accident, regardless of the number of vehicles insured under this or other policies.

1. The maximum amount payable for Medical Expenses will not exceed the amount shown on the declarations. The first \$3,000 of medical expenses caused by an accident covered by this section can be incurred at any time. If the amount shown on the declarations page for Medical Expenses is greater than \$3000, any additional Medical Expenses must be incurred within three years of the date of the accident to be payable.
2. The maximum amount payable for Work Loss is eighty-five percent (85%) of any loss of gross income and earning capacity, not to exceed \$250 per week for a maximum of 52 consecutive weeks.
3. The maximum amount payable for Essential Services is \$20 per day for a maximum of 365 consecutive days for an **Injured person's** inability to perform services for his or her household.
4. The maximum amount payable for Funeral Expenses shall not exceed \$1,500.

5. The amount payable for Survivors' Loss is \$3,000, and is payable only to the **Injured person's** heirs.

6. Any amount payable by **Allstate** for Personal Injury Protection benefits will be reduced by the amount paid, payable, or required to be provided on account of such **bodily Injury**:

- (a) under any workers' compensation plan or similar statutory plan; or
- (b) by the United States or any of its agencies because of the **Injured person** being on active duty in the military services.

#### Unreasonable or Unnecessary Medical Expenses

If the insured person incurs medical expenses which are unreasonable or unnecessary, **we** may refuse to pay for those medical expenses and contest them. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services.

Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number amount, or duration of medical services.

If the insured person is sued by a medical services provider because **we** refuse to pay contested medical expenses, **we will pay all defense** costs and any resulting judgment against the insured person. **We will choose** the counsel. The insured person must cooperate with us in the defense of any claim or lawsuit. If **we** ask the insured person to attend hearings or trials, **we** will pay up to \$50 per day for loss of wages or salary. **We** will also pay other reasonable expenses incurred at **our** request.

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**Claim Against Allstate**  
You may sue us under this coverage if there is full compliance with all the policy terms.

**Notice To Allstate**  
As soon as possible, the **Injured person** or one on that person's behalf must give us written notice of the accident. This notice must include the time, place and circumstances of the accident and the identity of the **Injured person**. If an Injured person or one on that person's behalf sues a third party to recover damages from anyone found responsible for the injury, a copy of the summons, complaint or other document must be sent to us as soon as possible.

**Proof of Claim; Medical Reports**  
As soon as possible, the **Injured person** or one on that person's behalf must give us written proof of claim. It must include all information we may need to determine the amounts payable. We may also require anyone making claim to submit to questioning under oath and sign the transcript.

**Injured person** may be required to take medical examinations by physicians we select, as often as we reasonably require. You must be given authorization to obtain medical reports and other records pertinent to your claim.

**Duplication of Benefits; Priority of Payments; Other Insurance**  
**Injured person** shall recover duplicate benefits for the same elements of loss under any other similar insurance including workers compensation, disability benefits, or other insurance. If two or more insurers or insurance companies are liable to pay personal injury protection benefits for the same elements of loss, the maximum benefit payable shall not exceed the highest limit of any one policy

providing benefits as required by the Financial Responsibility of Motor Vehicle Owners and Operators Act.

Primary personal injury protection coverage shall be provided by the policy insuring the **motor vehicle** occupied by the **Injured person** in use at the time of the accident. Excess personal injury protection coverage provided by this policy will be afforded when:

- (a) the benefits of the primary policy have been exhausted; and
- (b) the limits of this policy exceed the limits of the policy providing the primary coverage.

When two or more insurers are liable to pay personal injury protection benefits on the same level of priority, **Allstate** will not be liable for more than the proportion of our limit of liability under this coverage to the sum of our limit of liability of this coverage and that of any other applicable insurance for the same element of loss.

Any personal injury protection benefits payable by this policy with respect to **bodily injury** sustained by an **Injured person**, while in, on, getting into or out of a **motor vehicle** being operated by, but not owned by you, shall be excess over any other collectible personal injury protection benefits, and any other automobile medical payments insurance, or any similar insurance.

**Subrogation Rights**  
When we pay, an Injured person's rights of recovery from anyone else for damages we have paid become ours up to the amount we have paid. However, our rights of recovery only apply if the Injured person has been fully compensated for the loss. The Injured

person must protect these rights and help us enforce them.

#### Reimbursement and Trust Agreement

When we pay any person under this coverage:

1. we are entitled to repayment of amounts paid by us out of the proceeds of any settlement that person recovers from any legally responsible party or insurer. We are not entitled to repayment until after the person we have paid under this coverage has been compensated for all damages which that person is legally entitled to recover.
2. all rights of recovery against any legally responsible party or insurer must be maintained and preserved for our benefit.

Our rights under this provision are subject to any applicable limitations provided in the Utah Insurance Code.

#### Assistance and Cooperation

When we ask, an insured person must cooperate with us in the investigation, settlement and defense of any claim or lawsuit. If we ask, that person must also help us obtain payment from anyone else who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

### Part III Uninsured Motorists Insurance Coverage SS

#### Section I

#### Bodily Injury Caused By Uninsured Motorists

We will pay those damages which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of **bodily injury** sustained by an insured person. The **bodily injury** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured motor vehicle. We will not pay any punitive or exemplary damages.

If an insured person sues a person believed responsible for the accident without our written consent, we are not bound by any resulting judgment.

#### Insured Persons

1. you and any **resident** relative.
2. any other person while in, on, getting into or out of **your** insured **auto** with **your** permission.
3. any other person who is legally entitled to recover because of **bodily injury** to **you**, a **resident** relative, or an occupant of **your** insured **auto** with **your** permission.

#### An Insured auto is:

1. an **auto** described on the declarations page to which the bodily injury liability coverage of this policy applies. This includes the **auto** you replace it with. However, **you** must notify **us** within 30

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days of the replacement **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if we are not notified of the replacement **auto**.

an **auto** **you** become the owner of during the policy period. This additional **auto** will be covered if **Allstate** insures all other private passenger **autos** **you** own. **You** must, however, tell us within 30 days after **you** acquire the **auto**. **You** must pay any additional premium. Coverage will not continue if **we** are not notified of the additional **auto**.

an **auto** not owned by **you** or a **resident** relative, if being temporarily used while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed. The **auto** must be used with the owner's permission. It can't be furnished or available for the regular use of **you** or any **resident** relative.

an **auto** not owned by **you** or a **resident** relative, if being operated by **you** with the owner's permission. The **auto** can't be furnished or available for the regular use of **you** or any **resident** relative.

nsured **auto** is not an **auto** made  
lable for public hire by an insured person.

inInsured motor vehicle is:  
a motor vehicle which has no bodily  
njury liability bond or insurance policy in  
ffect at the time of the accident.

motor vehicle covered by a bond or  
nsurance policy which doesn't provide at  
east the minimum financial security  
equirements of the state in which **your**  
nsured **auto** is principally garaged.

3. a motor vehicle for which the insurer denies coverage, or the insurer becomes insolvent.
4. a hit-and-run motor vehicle which causes **bodily Injury** to an insured person. The identity of either the operator or owner of the hit-and-run vehicle must not be ascertainable. The accident must be reported within 24 hours to the proper authorities. **We** must be notified within 30 days.

If the hit-and-run **motor vehicle** causes the **bodily Injury** without physical contact with the insured person or the vehicle the insured person was occupying, then the insured shall show the existence of the other **motor vehicle** by clear and convincing evidence, which shall consist of more than the insured's testimony.

**We** shall have a right to inspect the insured **auto** or any **motor vehicle** the insured person was occupying at the time of the accident.

An uninsured motor vehicle is not:

1. an **auto** which is insured under Part 1 of this policy.
2. a **motor vehicle** that is lawfully self-insured.
3. a **motor vehicle** owned by any state, federal or local government or agency.
4. a **motor vehicle** or trailer operated on rails or crawler-treads.

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5. a farm-type tractor or equipment designed for use principally off public roads, except while actually on public roads.

**Exclusions — What Is not covered**

**Allstate** will not pay any damages an insured person is legally entitled to recover because of:

1. **bodily Injury** to any person who makes a settlement without **our** written consent.
2. **bodily Injury** sustained while in, on, getting into or out of, or when struck by an uninsured **motor vehicle** which is owned by **you** or a **resident** relative.
3. **bodily Injury** if the payment would directly or indirectly benefit any workers' compensation or disability benefits insurer, including a self-insurer.
4. **bodily Injury** while in, on, getting into or out of a **motor vehicle** **you** own which is insured for this coverage under another policy.
5. **bodily Injury** sustained while in, on, getting into or out of, or while operating a **motor vehicle** which is not an insured **auto** but is owned by, furnished or available for the regular use of **you** or a **resident** relative.
6. any punitive or exemplary damages or related defense costs, regardless of any other provision of this policy.
7. **bodily Injury** arising out of an insured person's ownership, maintenance or use of a **motor vehicle** with less than four wheels.

8. **bodily Injury** arising from the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

**Limits of Liability**

The coverage limit shown on the declarations page for:

1. "each person" is the maximum that **we** will pay for damages arising out of **bodily Injury** to one person in any one **motor vehicle** accident, including all damages sustained by anyone else as a result of that **bodily Injury**.
2. "each accident" is the maximum that **we** will pay for damages arising out of **bodily Injury** to two or more persons in any one **motor vehicle** accident. This "each accident" limit is subject to the limit for "each person."

These limits are the maximum **Allstate** will pay for any one **motor vehicle** accident regardless of the number of:

1. claims made;
2. vehicles or persons shown on the declarations page; or
3. vehicles involved in the accident.

The Bodily Injury Caused By Uninsured Motorists limits apply to each insured **auto** as shown on the declarations page. This means the insuring of more than one person or **auto** under this or other auto policies will not increase **our** uninsured motorists limit of liability beyond the amount shown for any one **auto**. Coverage on any **auto** on this policy may not be stacked or added upon the coverage of any other **auto** on this policy

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even though a separate premium is charged for each **auto**.

Subject to the above limits of liability, damages payable will be reduced by:

- a) all amounts paid by or on behalf of the owner or operator of an uninsured **motor vehicle** or anyone else responsible. This includes all sums paid under the bodily injury liability coverage or property damage liability coverage of this or any other auto policy.
- b) all amounts payable under any workers' compensation law, disability benefits law, or similar law, automobile medical payments insurance, or any similar personal injury protection coverage.

We are not obligated to make any payment for **bodily injury** under this coverage which arises out of an accident involving the use of an uninsured **motor vehicle** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlements.

#### Section II Property Damage Caused By Uninsured Motorists

We will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured **motor vehicle** because of **property damage**. The **property damage** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured **motor vehicle**. We will not pay any punitive or exemplary damages.

**Property damage** is covered only if: a separate limit is shown on the declarations page for Property Damage

Caused By Uninsured Motorists;

- b) the accident causing the **property damage** involves actual physical contact between the insured **auto** and an uninsured **motor vehicle**;
- c) the owner, operator, or license plate number of the uninsured **motor vehicle** is identified; and
- d) the insured or someone on his behalf reports the accident within 10 days to **Allstate**.

The insured person or other person making claim for **property damage** must allow us to inspect any damaged property.

If an insured person sues a person believed responsible for the accident without our written consent, we are not bound by any resulting judgment.

#### Insured Persons

1. you and any **resident** relative.
2. any other person who is legally entitled to recover because of **property damage**.

#### An Insured auto is:

1. an **auto** described on the declarations page to which the bodily injury and property damage liability coverage of this policy applies. This includes the **auto** you replace it with. However, you must notify us within 30 days of the replacement **auto**. You must pay any additional premium. Coverage will not continue after 30 days if we are not notified of the replacement **auto**.
2. an **auto** you become the owner of during the policy period. This additional **auto** will be covered if **Allstate** insures all other private passenger **autos** you own. You must, however, tell us within



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30 days after **you** acquire the **auto**. **You** must pay any additional premium. Coverage will not continue if **we** are not notified of the additional **auto**.

An insured **auto** is not an **auto** made available for public hire by an insured person.

An **uninsured motor vehicle** is:

1. a **motor vehicle** which is not covered under a liability policy at the time of the accident.
2. a **motor vehicle** covered by a bond or insurance policy which doesn't provide at least the minimum financial security requirements of the state in which **your** insured **auto** is principally garaged.
3. a **motor vehicle** for which the insurer denies coverage, or the insurer becomes insolvent.
4. a hit-and-run **motor vehicle** which causes **property damage** to the insured **auto** as a result of physical contact between the vehicles. **We** shall have a right to inspect the insured **auto** or any **motor vehicle** the insured person was occupying at the time of the accident.

An **uninsured motor vehicle** is not:

1. an **auto** which is insured under Part 1 of this policy.
2. a **motor vehicle** that is lawfully self-insured.
3. a **motor vehicle** owned by any state, federal or local government or agency.
4. a **motor vehicle** or trailer operated on rails or crawler-treads.

**Exclusions — What is not covered**  
**Allstate** will not pay any damages an insured person is legally entitled to recover because of:

1. **property damage** to any insured **auto** when an insured person makes a settlement without **our** written consent.
2. **property damage** to any **auto you** own which is not insured for Property Damage Caused By Uninsured Motorists under this policy.
3. **property damage** which is paid or payable under any other property insurance.
4. **property damage** if the payment would directly or indirectly benefit any insurer of property.
5. any punitive or exemplary damages or related defense costs, regardless of any other provision of this policy.
6. **property damage** arising out of an insured person's ownership, maintenance or use of a **motor vehicle** with less than four wheels.
7. **property damage** arising from the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

**Limits of Liability**

**Allstate's** limit of liability for Property Damage Caused By Uninsured Motorists is the lesser of:

1. the **actual cash value** of the insured **auto**;

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2. the amount necessary to repair or replace the insured **auto**; or
  3. the limit of liability shown on the declarations page for the insured **auto**.

Subject to the above limit of liability, damages payable will be reduced by:

1. all amounts paid by the owner or operator of the uninsured **motor vehicle**;
2. any deductible shown on the declarations page.

**We** are not obligated to make any payment or **property damage** under this coverage which arises out of an accident involving an uninsured **motor vehicle** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgment or settlements.

### Section III Common Provisions

#### Definitions

- **"Actual Cash Value"** — means the current replacement cost of the property new reduced by an allowance for depreciation.
- **"Allstate", "We", "Us" or "Our"** — means the company shown on the declarations page of the policy.
- **"Auto"** — means a land **motor vehicle** with at least four wheels designed for use principally upon public roads.
- **"Bodily Injury"** — means bodily injury, sickness, disease or death.

5. **"Depreciation"** — means the decrease in value of property due to age and wear-and-tear.

6. **"Motor Vehicle"** — means a land motor vehicle or trailer other than
- a) a vehicle or other equipment designed for use off public roads, while not upon public roads,
  - b) a vehicle operated on rails or crawler-treads, or
  - c) a vehicle while used as a residence or premises and not as a **motor vehicle**.

7. **"Property Damage"** — means damage to or destruction of the insured **auto** but does not include loss of use to the insured **auto** or damage to personal property contained in the insured **auto**.

8. **"Resident"** — means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

9. **"You" or "Your"** — means the policyholder named on the declarations page and that policyholder's **resident** spouse.

#### Non-Duplication of Benefits

No person will recover duplicate benefits for the same elements of loss under this or any other insurance, including approved plans of self-insurance.

#### Proof Of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine

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the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The insured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and copies of records.

#### **Assistance and Cooperation**

**We** may require the insured person to take proper action to preserve all rights to recover damages from anyone responsible.

#### **Legal Actions**

No one may sue **us** under this coverage unless there is full compliance with all policy terms.

If, at any time before **we** pay for the loss, an insured person institutes a suit against anyone believed responsible for the accident, **we** must immediately be given a copy of the summons and complaint or other process. If a suit is brought without **our** written consent, **we** aren't bound by any resulting judgment.

#### **If There Is Other Insurance**

If the insured person was in, on, getting into or out of a vehicle which is insured for this coverage under another policy, coverage under this policy will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, **we** will pay only the amount by which the limit of liability of this policy exceeds the limit of liability of that policy.

If more than one policy applies to the accident on a primary basis, the total benefits payable will not exceed the maximum benefits

payable by the policy with the highest limit for uninsured motorists coverage. **We** will bear **our** proportionate share with other uninsured motorists benefits. This applies no matter how many **autos** or auto policies may be involved, whether written by **Allstate** or another company.

#### **Trust Agreement**

When **we** pay any person under this coverage:

1. **we** are entitled to repayment of amounts paid by **us** and related collection expenses out of the proceeds of any settlement or judgment that person recovers from any responsible party or insurer.
2. all rights of recovery against any responsible party or insurer must be maintained and preserved for **our** benefit.
3. insured persons, if **we** ask, must take proper action in their name to recover damages from any responsible party or insurer. **We** will select the attorney. **We** will pay all related costs and fees.

**We** will not ask the insured person to sue the insured of an insolvent insurer.

#### **Payment Of Loss By Allstate**

Any amount due is payable to the insured person, to the parent or guardian of an injured minor, or to the spouse of any insured person who dies. However, **we** may pay any person lawfully entitled to recover damages.

#### **Subrogation Rights**

When **we** pay, an insured person's rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we**

have paid. You must protect these rights and help us enforce them.

#### **If We Cannot Agree**

If the insured person and we don't agree on that person's right to receive any damages or the amount, then upon mutual consent, the disagreement will be settled by arbitration. Arbitration will take place under the rules of the American Arbitration Association.

If either party objects to the use of the rules of the American Arbitration Association, the following alternative method of arbitration will be used. The insured person will select one arbitrator. We will select another. The two arbitrators will select a third. If they can't agree on a third arbitrator within 30 days, the judge of the court of record in the county of jurisdiction where arbitration is pending will appoint the third arbitrator. The written decision of any two arbitrators will determine the issues. The insured person will pay the arbitrator that person selects. We will pay the one we select. The expense of the third arbitrator will be shared equally. However, attorney fees and fees paid to medical and other expert witnesses, are not considered arbitration expenses. These costs are paid by the party incurring them.

Regardless of the method of arbitration, any arbitration award will be binding and may be entered as a judgment in a proper court.

#### **Part IV**

#### **Protection Against Loss To The Auto**

The following coverages apply when indicated on the declarations page. Additional payments, autos insured, definitions, exclusions, and other information applicable to all these coverages appear beginning on page 21.

#### **COVERAGE DD**

##### **Auto Collision Insurance**

**Allstate** will pay for direct and accidental loss to **your** insured **auto** (including insured loss to an attached trailer) from a collision with another object or by upset of that **auto** or trailer. The deductible amount won't be subtracted from the loss payment in collisions involving **your** insured **auto** and another **auto** insured by us.

#### **COVERAGE HH**

##### **Auto Comprehensive Insurance**

**Allstate** will pay for direct and accidental loss to **your** insured **auto** not caused by collision. Coverage includes but is not limited to loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, and riot or civil commotion. Glass breakage, whether or not caused by collision, and collision with a bird or animal is covered.

**Allstate** will pay up to \$2500 for loss to a **sound system** permanently installed in **your auto** by bolts, brackets, or other means, its antennas, or other apparatus in or on **your auto** used specifically with that system.

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By agreement between **you** and **Allstate**, the deductible amount will not be subtracted from a glass breakage loss if the glass is repaired rather than replaced.

#### COVERAGE JJ

##### Towing and Labor Costs

**Allstate** will pay costs for labor done at the initial place of disablement of **your** insured **auto**. **We** will also pay for towing made necessary by the disablement. The total limit of **our** liability for each loss is shown on the declarations page.

#### COVERAGE UU

##### Rental Reimbursement Coverage

If **you** have either collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will repay **you** for **your** cost of renting an **auto** from a rental agency or garage. **We** will not pay more than the dollar amount per day shown on the declarations page. **We** won't pay mileage charges.

If **your** insured **auto** is stolen, payment for transportation expenses will be made under the terms of paragraph 3. of "Additional Payments Allstate Will Make." However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make."

If **your** insured **auto** is disabled by a collision or comprehensive loss, coverage starts the day after the loss. If it is drivable, coverage starts the day after the **auto** is taken to the garage for repairs.

Coverage ends when whichever of the following occurs first:

1. if the **auto** is disabled by a collision or comprehensive loss, completion of repairs or replacement of the **auto**;

2. if the **auto** is stolen, when **we** offer settlement or **your auto** is returned to use; or
3. thirty full days of coverage.

#### COVERAGE ZA

##### Sound System Coverage

**Allstate** will pay for loss to a **sound system** permanently installed in **your auto** by bolts, brackets or other means, its antennas or other apparatus in or on **your auto** used specifically with that system.

Coverage ZA applies only if comprehensive insurance is in effect under this policy.

Coverage ZA provides coverage for **sound systems** in excess of the coverage provided under comprehensive insurance (Coverage HH). The limit of **our** liability is shown on the declarations page.

#### COVERAGE ZZ

##### Tape Coverage

**Allstate** will pay for loss to any tapes or similar items used with any **auto sound systems**. Coverage applies to tapes or similar items **you** or a **resident** relative own that are in or on **your** insured **auto** at the time of loss. The total limit of **our** liability for each loss is shown on the declarations page.

This coverage applies only if **you** have comprehensive insurance under this policy. Coverage ZZ makes tapes or similar items insured property under **your** comprehensive insurance.

#### Additional Payments Allstate Will Make

1. **Allstate** will pay up to \$200 for loss of clothing and personal luggage, including its contents, belonging to **you** or a **resident** relative while it is in or upon **your** insured **auto**. This provision does

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not apply if the insured **auto** is a **travel-trailer**.

This coverage applies only when:

- a) the loss is caused by collision and **you** have purchased collision insurance.
  - b) the entire **auto** is stolen, and **you** have purchased comprehensive insurance.
  - c) physical damage is done to the **auto**, clothing and luggage caused by earthquake, explosion, falling objects, fire, lightning, or flood and **you** have purchased comprehensive insurance.
2. **Allstate** will repay **you** up to \$10 for the cost of transportation from the place of theft or disablement of **your insured auto** to **your** destination, if
- a) the entire **auto** is stolen and **you** have comprehensive insurance under this policy.
  - b) the **auto** is disabled by a collision or comprehensive loss, and **you** have the coverage under this policy applicable to the loss.

This provision does not apply if the insured **auto** is a **travel-trailer**.

3. If **you** have comprehensive insurance under this policy, **Allstate** will repay up to \$10 a day but not more than \$300 for each loss for the cost of transportation when the entire **auto** is stolen. This coverage begins 48 hours after **you** report the theft to **us**, and ends when **we** offer settlement or **your auto** is returned to use.
4. If **you** have purchased collision or comprehensive insurance under this policy, **Allstate** will pay general average

and salvage charges imposed when **your insured auto** is being transported.

#### **Insured Autos**

1. Any **auto** described on the declarations page. This includes the private passenger **auto** or **utility auto** **you** replace it with if **you** notify **Allstate** within 30 days of the replacement and pay the additional premium. Coverage will not continue after 30 days if **we** are not notified of the replacement **auto**.
2. An additional private passenger **auto** or **utility auto** **you** become the owner of during the policy period. The **auto** will be covered if **Allstate** insures all other private passenger **autos** or **utility autos** **you** own. **You** must, however, tell **us** within 30 days of acquiring the **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if **we** are not notified of the additional **auto**.
3. A substitute private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used with the permission of the owner while **your insured auto** is being serviced or repaired, or if **your insured auto** is stolen or destroyed.
4. a non-owned private passenger **auto** used by **you** or a **resident** relative with the owner's permission. This **auto** must not be available or furnished for the regular use of **you** or any **resident**.
5. A trailer while attached to an insured **auto**. This trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a

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private passenger **auto** or **utility auto**. Home, office, store, display, or passenger trailers are not covered. **Travel-trailers** or **camper units** are not covered unless described on the declarations page.

#### Definitions

1. **"Allstate", "We", "Us" or "Our"** — means the company shown on the declarations page of the policy.
2. **"Auto"** — means a land motor vehicle with at least four wheels designed for use principally on public roads.
3. **"Camper Unit"** — means a demountable unit designed to be used as temporary living quarters, including all equipment and accessories built into and forming a permanent part of the unit. A camper unit does not include:
  - a) caps, tops or canopies designed for use as protection of the cargo area of a **utility auto**; or
  - b) radio or television antennas, awnings, cabanas, or equipment designed to create additional off-highway living facilities.
4. **"Resident"** — means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
5. **"Sound System"** — means any device within the insured **auto** designed for:
  - a) voice or video transmission, or for voice, video or radar signal reception; or
  - b) recording or playing back recorded

material; or  
c) supplying power to cellular or similar telephone equipment.

6. **"Travel-trailer"** — means a trailer of the house, cabin or camping type equipped or used as a living quarters.
7. **"Utility Auto"** — means an **auto** of the pick-up body, sedan delivery or panel truck type. This **auto** must have a gross vehicle weight of 10,000 pounds or less, according to manufacturer's specifications.
8. **"You" or "Your"** — means the policyholder named on the declarations page and that policyholder's **resident** spouse.

#### Exclusions — What Is not covered

These coverages don't apply to:

1. loss which may reasonably be expected to result from the intentional or criminal acts of **you** or any **resident**, or any other person using the insured **auto** with **your** permission or which is in fact intended by that person.
2. any **auto** used for the transportation of people or property for a fee. This exclusion does not apply to shared-expense car pools.
3. any damage or loss resulting from any act of war, insurrection, rebellion or revolution.
4. loss to any non-owned **auto** used in auto business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.
5. loss due to radioactive contamination.

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6. damage resulting from wear and tear, freezing, mechanical or electrical breakdown unless the damage is the burning of wires used to connect electrical components, or the result of other loss covered by this policy.
  7. tires unless stolen or damaged by fire, malicious mischief or vandalism. Coverage is provided if the damage to tires occurs at the same time and from the same cause as other loss covered by this policy.

8. loss, other than collision, to any **sound system** within **your auto** including any apparatus in or on the **auto** designed for use with that system.

If **you** have purchased Coverage HH, this exclusion will not apply to any **sound system** up to the limit stated in Coverage HH for **sound systems**. Losses in excess of the limit for loss to **sound systems** provided under Coverage HH will be covered if **you** have purchased Coverage ZA.

9. loss to any tapes or similar items, unless **you** have purchased Coverage ZZ under this policy.
10. loss to a **camper unit** whether or not mounted. This exclusion will not apply if the **camper unit** is described on the declarations page.
11. loss to appliances, furniture, equipment and accessories that are not built into and forming a permanent part of a **travel-trailer**.

12. loss to **your travel-trailer** while rented to anyone else unless a specific premium is shown on the declarations page for the rented vehicle.

13. any loss arising out of the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

14. loss due to conversion or embezzlement by any person who has the vehicle due to any rental, lien, or sales agreement.

#### **Right To Appraisal**

Both **you** and **Allstate** have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

#### **Payment Of Loss By Allstate**

**Allstate** may pay for the loss in money, or may repair or replace the damaged or stolen property. **We** may, at any time before the loss is paid or the property is replaced, return at **our** own expense any stolen property, either to **you** or at **our** option to the address shown on the declarations page, with payment for any resulting damage. **We** may take all or part of the property at the agreed or appraised value. **We** may settle any claim or loss either with **you** or the owner of the property.

#### **Limits Of Liability**

**Allstate's** limit of liability is the actual cash value of the property or damaged part of the



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property at the time of loss. The actual cash value will be reduced by the deductible for each coverage as shown on the declarations page. However, **our** liability will not exceed what it would cost to repair or replace the property or part with other of like kind and quality. The limit for loss to any covered trailer not described on the declarations page is \$500.

An **auto** and attached trailer are considered separate **autos**, and **you** must pay the deductible, if any, on each. Only one deductible will apply to an **auto** with a mounted **camper unit**. If unmounted, a separate deductible will apply to the **auto** and **camper unit**.

When more than one coverage is applicable to the loss, **you** may recover under the broadest coverage but not both. However, Coverage ZA, if purchased, will provide coverage in excess of the limit for loss to **sound systems** provided under Coverage HH.

#### **If There Is Other Insurance**

If there is other insurance covering the loss at the time of the accident, **we** will pay only **our** share of any damages. **Our** share is determined by adding the limits of this insurance to the limits of all other insurance that applies on the same basis and finding the percentage of the total that **our** limits represent.

When this insurance covers a substitute **auto** or non-owned **auto**, **we** will pay only after all other collectible insurance has been exhausted.

When this insurance covers a replacement **auto** or additional **auto**, this policy won't apply if **you** have other collectible insurance.

#### **Action Against Allstate**

No one may sue **us** under these coverages unless there is full compliance with all the policy terms.

#### **Subrogation Rights**

When **we** pay, **your** rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we** have paid. **You** must protect these rights and help **us** enforce them.

#### **Loss Payable Clause**

If a lienholder is shown on the declarations page, **we** may pay loss under this policy to **you** and to the lienholder as its interest may appear. The lienholder's interest will not be voided by:

1. any act or neglect of the owner of the **auto**; or
2. any change in title or ownership of the **auto** if the lienholder notifies **us** within 10 days.

If **you** do not pay the premium when due, the lienholder must, at **our** request, pay the premium; otherwise **we** cancel this policy.

The lienholder must notify **us** of any known increase in hazard. The lienholder must pay, at **our** request, the premium for any increase in hazard; otherwise this policy will be void.

**We** may cancel this policy according to its terms. Cancellation will also be effective with respect to the lienholder's interest. **We** may also cancel this clause of the policy. In either event, **we** will provide 10 days notice to the lienholder. **Our** mailing of notice will be proof of notice.

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If **you** do not submit proof of loss within the time specified in this part, the lienholder must do so within 60 days. Proof of loss must be submitted in the form and manner specified below. The lienholder will be subject to provisions relating to appraisal, time of payment, and bringing suit.

When **we** make payment to the lienholder for loss under this policy, **we** will be subrogated to the rights of the party **we** pay, to the extent of **our** payment. When **we** pay a lienholder for a loss for which **you** are not covered, **we** are entitled to the lienholder's right of recovery against **you** to the extent of **our** payment. **We** have the option to pay the lienholder the entire amount due or which will become due on the mortgage or other security agreement with interest and receive full assignment and transfer of the mortgage or security agreement. **Our** right to subrogation will not impair the lienholder's right to recover the full amount of its claim.

#### What You Must Do If There Is A Loss

1. As soon as possible, any person making claim must give **us** written proof of loss. It must include all details reasonably required by **us**. **We** have the right to inspect the damaged property. **We** may require any person making claim to file with **us** a sworn proof of loss. **We** may also require that person to submit to examinations under oath.
2. Protect the **auto** from further loss. **We** will pay reasonable expenses to guard against further loss. If **you** don't protect the **auto**, further loss is not covered.
3. Report all theft losses promptly to the police.

IN WITNESS WHEREOF **Allstate** has caused this policy to be signed by its Secretary and its President at Northbrook, Illinois, and if required by state law, this policy shall not be binding unless countersigned on the declarations page by an authorized agent of **Allstate**.

  
Secretary

  
President

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# **Addendum F**

C/L

\*LORIN PENNINGTON #47121 6-19-93 (LISA)

\*This is a new address: 367 W. 4900 S., Washington Terrace, 84405. Phone number: 476-9174.

- Lorin experienced automobile accident yesterday, 18th of June, about 1:30 P.M.
  - Said he was crossing Washington Blvd. at 12th Street and headed East. A car in front of him slowed down and he slowed down, the car behind him traveling about 30mph, struck him in the hind end. He was driving a Nissan pickup truck. It was a 1985 Ford Bronco that hit him from the back side. The Bronco was pretty well totaled and his Nissan is surviving the accident rather well. He had a high head rest, he said he was knocked forward and back, but because of the headrest, neck certainly wasn't whipped as far as it could have been. He was in a seatbelt. Had some headache last night. Today has some soreness to his neck, but particularly the areas of the left sternocleidomastoid insertion. ROM seems to be complete. Will start on some neck flexion exercises. Elected not to do x-ray of neck at this time.
  - Suggested ice, heat, rest, will use IBUPROFEN 800mg t.i.d. with food at Harmon's in Roy. Not allergic to any medicines. If pain isn't resolving over the weekend, will take a set of cervical spine films, but as of now, doubt this will be necessary.
  - \$30 OC \$8 AHC \$15 Accident PRT/dc
- ant

TANNER MEMORIAL CLINIC, LAYTON, UTAH

NAME <i>Lorin Pennington</i>		SS#	AGE	SEX	S A
SS	STREET	CITY	STATE	ZIP	PHONE
SPONSOR OR HEAD OF HOUSEHOLD		CURRENT DATE			
OCCUPATION OR PLACE OF WORK		REF. BY		PATIENT'S DOB	

LORIN PENNINGTON #47121 6-22-93

Follow up on neck pain. Automobile accident on the 18th of June, 1993. Whiplash or acceleration and deceleration injury. Will get him doing more neck and shoulder exercises, ice and then heat and muscle relaxant.

\$30 OC \$8 AHC PRT/dc

# **Addendum G**

Jan P. Malmberg, #4084  
PERRY, MALMBERG & PERRY  
Attorney for Defendant  
29 West 100 North  
P.O. Box 364  
Logan, UT 84323-0364  
(801) 753-5331

'95 JAN 4 PM 12 08

IN THE SECOND DISTRICT COURT, WEBER COUNTY

STATE OF UTAH, OGDEN DEPARTMENT

LORIN PENNINGTON,	)	AFFIDAVIT OF
	)	DR. NATHANIEL M. NORD
Plaintiff,	)	
	)	
vs.	)	
	)	
ALLSTATE INSURANCE COMPANY,	)	
BURNS CHIROPRACTIC,	)	
DR. DAVID R. TRIMBLE, D.C.,	)	
DR. DALE BENNETT, D.C.,	)	
DR. BRYSON SMITH,	)	
DR. JOAN BALCOME,	)	
ST. BENEDICT'S HOSPITAL,	)	Civil No. 940900042
ASSOCIATES IN RADIOLOGY,	)	
	)	Judge Roger S. Dutson
Defendants.	)	

JAN 4 1995

STATE OF UTAH )  
 :ss  
COUNTY OF SALT LAKE )

Dr. Nathaniel M. Nord, M.D., being first duly sworn, deposes and says as follows:

1. I am a medical doctor specializing in adult neurology and make this affidavit upon personal knowledge and belief.
2. On September 28, 1993, I met with Mr. Lorin Pennington in relation to a motor vehicle accident which occurred on June 18, 1993.

3. Mr. Pennington had been referred to me by Allstate Insurance Company for an independent medical examination.

4. On September 28, 1993, I performed an independent medical examination of Mr. Pennington.

5. In accordance with that medical examination, I have prepared a report as to my findings dated October 4, 1993. A copy of that report is attached hereto as Exhibit 1. I also prepared a follow-up report dated October 28, 1993, in response to inquiry as to any disability of Mr. Pennington. A copy of that report is also attached hereto as Exhibit 2.

6. My review of the medical reports, medical expenses, medical treatment, and in speaking to and personally examining Mr. Pennington, has led me to the conclusion that Mr. Pennington sustained no more than a cervical strain as a result of the motor vehicle accident on June 18, 1993. After that accident, Mr. Pennington generated undue personal concern as to his condition which led to the involvement of an excessive number of practitioners. This undue personal concern led to his generating some duplicative treatment and expenses which were not necessary.

7. Appropriate treatment for Mr. Pennington in relationship to the automobile accident of June 18, 1993, would have consisted of visits to his primary care physician, Dr. Taylor, home exercises, and physical therapy or non-manipulative chiropractic treatment for a period of eight weeks and professional evaluation, if not improved, after eight weeks.

8. Further, Mr. Pennington received numerous x-rays in relationship to this motor vehicle accident, including x-rays taken on July 1, 1993, at St. Benedict's Hospital (which were normal); x-rays taken on July 6, 1993, at the Burns Chiropractic Clinic (which were normal); x-rays taken on July 15, 1993, at the Bennett Chiropractic Clinic (which were normal except for a mild thoracolumbar scoliosis); and a cervical MRI scan taken August 3, 1993, at St. Benedict's Hospital (which was also normal).



This further reflects Mr. Pennington's undue solicitation of various providers and services.

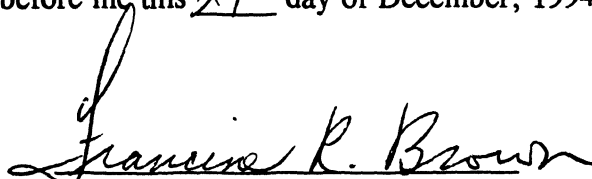
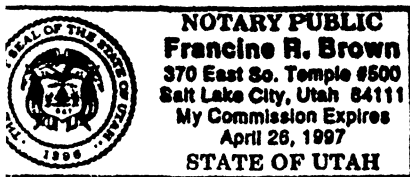
9. I have also reviewed the medical services of St. Benedict's Hospital and the medical services of Bennett Chiropractic and Burns Chiropractic. Mr. Pennington obtained excessive unnecessary treatment when he visited both his chiropractor and physical therapist on the same days.

Further, affiant saith not.



Dr. Nathaniel Nord

Subscribed and sworn to before me this 29<sup>th</sup> day of December, 1994.

  
Notary Public

My commission expires:

# CERTIFICATE OF MAILING

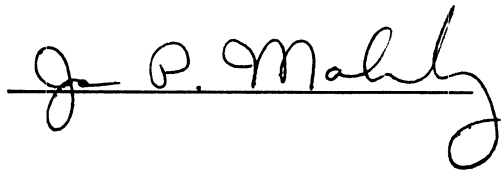
I hereby certify a true and correct copy of the foregoing Affidavit was mailed,  
postage prepaid, to the following individuals on this 29<sup>th</sup> day of December, 1994:

Daniel L. Wilson  
290 25th Street, Suite 204  
Ogden, UT 84401

Cynthia Campbell  
2485 Grant Avenue, Suite 200  
Ogden, UT 84401

Jaryl Rencher  
P.O. Box 2970  
Salt Lake City, UT 84110-2970

Elaine Monson  
P.O. Box 45835  
Salt Lake City, UT 84145-0385

A handwritten signature in cursive script, appearing to read "J. P. Mahly", is written over a horizontal line.

17 pennaff2

## **EXHIBIT 1**

*Nathaniel M. Nord, M.D., P.C.*

*Adult Neurology*

*370 East South Temple, Suite 300*

*Salt Lake City, Utah 84111*

---

*801-363-3777*

October 4, 1993

Mr. Clay G. Hamblen  
Senior Claim Representative  
Allstate Insurance Company  
P.O. Box 9988  
Ogden, UT 84409

Re: Lorin Pennington  
Claim Number: 6530551446 K15  
Date of Injury: 06/18/93

Dear Mr. Hamblen:

I met with Mr. Lorin Pennington on September 28, 1993.

He is 28 years of age, and reports that on June 18, 1993 he sustained a cervical injury as a consequence of a rear-end motor vehicle accident. He was slowing to a stop, and moving at approximately 2 mph, he reports, when his vehicle was rear-ended at a speed estimated to be 30 mph. Impact rocked him forwards and rearwards, and except for him striking his head against the head rest, he struck no portions of the interior of the vehicle, and remained seated. His vehicle was a Nissan pickup truck, and the vehicle which rear-ended him was a Ford Bronco. Seatbelt and chest restraint were being worn. As the accident was being investigated, Mr. Pennington experienced nausea and headache. He sought no medical attention that day, although later, in the evening, stiffness of the posterior neck region developed, which was more intense the following day, and prompted him to be seen at the Tanner Memorial Clinic.

Dr. Paul R. Taylor was seen at the Tanner Clinic the following day, at which time he reported soreness which involved the left sternocleidomastoid muscle in particular, with examination of the neck revealing no restriction of range of motion. No other examination findings were detailed. No x-rays were taken, and Mr. Pennington was advised to apply ice and heat, and take ibuprofen 800 mg three times daily. He returned

to Dr. Taylor on June 22<sup>nd</sup> when symptoms were not improved, and at that time exercises and Flexeril were prescribed.

Mr. Pennington indicated that symptoms continued to intensify, and as a consequence, he presented to the Emergency Room of the St. Benedict's Hospital on July 1<sup>st</sup>, for evaluation of neck pain and headaches, unaccompanied by other symptoms. With the exception of mild tenderness of the cervical paravertebral muscles, physical examination was normal. Cervical spine x-rays were obtained which were normal. An acute cervical strain was diagnosed for which Anaprox and physical therapy were prescribed.

One week later, on July 6<sup>th</sup> Mr. Pennington sought chiropractic treatments with Dr. David R. Trimble, reporting constant neck pain, intermittent headaches, intermittent numbness of the left upper extremity, intermittent low back pain, and constant mid-back pain. X-rays of the thoracic and lumbar spine were obtained after examination revealed areas of spinal tenderness and mild restriction of cervical and lumbar range of motion. Four treatments were received through the date of July 12<sup>th</sup>, at which time symptoms remained unchanged, and Mr. Pennington then transferred care to Dr. Dale J. Bennett beginning July 15<sup>th</sup>. Approximately 20 treatments were received through the date of August 12<sup>th</sup>. Mr. Pennington was placed on a total disability status from August 4<sup>th</sup> through August 18<sup>th</sup> by a Dr. Steve Taylor.

On August 3<sup>rd</sup> Mr. Pennington was seen for neurosurgical consultation by Dr. Bryson S. Smith, after he had returned to the St. Benedict's Hospital Emergency Department on July 24<sup>th</sup> for persisting pain and reports of areas of back swelling. Examination at that time was performed by Dr. Val Rollins who reported that areas of swelling were not evident, while range of motion was "fair". He recommended neurosurgical opinion. Physical examination by Dr. Smith revealed cervical paravertebral muscle tenderness, trigger points in the left trapezius and rhomboid muscles, reduced light touch and pinprick perception in the left upper extremity which extended to the shoulder and into the left trunk anteriorly and posteriorly, as well as into the neck and maxillary region. Hypesthesia was also reported in portions of the left lower extremity. Deep tendon reflexes were symmetrically present, there were no pathologic reflexes, strength and gait functions were normal. Dr. Smith diagnosed a probable cervical strain with myofascial syndrome, and because of the sensory findings on physical examination felt that a cervical MRI scan should be performed to exclude a cord injury. The study was accomplished on August 3<sup>rd</sup> at St. Benedict's Hospital, and was normal. Physical therapy at Health Works was recommended, began on August 5<sup>th</sup>, and concluded on August 18<sup>th</sup>, at which time headache was remitted and only occasional neck pain was reported, which was judged to be 1 on a scale of 10 with respect to severity. A self exercise program was being satisfactorily performed by Mr. Pennington at home, which was to be continued. A follow-up visit was made with Dr. Smith on September 8<sup>th</sup>, and

the improvements noted. He felt that the condition of cervical strain was resolving and that no further neurosurgical follow was required.

Mr. Pennington reports no prior symptoms of similar nature, or prior injuries to portions of his vertebral axis. He has not previously received chiropractic care. Past medical history otherwise reveals a remote appendectomy, no allergies to medication, while review of systems is negative for cardiovascular, respiratory, gastrointestinal, and genitourinary symptoms.

Current symptoms consist of low intensity dull posterior neck pain which extends to the upper dorsal spine, present principally when sitting and hyperextending the head, and otherwise not generally present, judged to be 1 on a scale of 10. Episodic mid and low backaches occur when driving, on a daily basis, for perhaps one to two hours duration. This symptom began approximately one week after the accident and then on occasions have been associated with areas of muscular swelling of the back. Exercises continue on a daily basis.

Several days of work were missed immediately after the motor vehicle accident, and two weeks upon the recommendation of his chiropractor. Since, Mr. Pennington has been working full time as a conveyor belt operator and mechanic.

Neurologic review reveals no impairments of vision, hearing, strength, coordination, and sensation.

Physical examination revealed blood pressure of 118/76. No tenderness involved occipital portions of the skull, cervical spinous processes and paravertebral muscles, as well as dorsal and lumbar spinous and paraspinous areas. Muscular spasm was not present in the paravertebral muscle regions. There was no evidence of TM joint dysfunction. Multiple teeth were missing. The oropharynx was otherwise clear. External examination of eyes and ears, including tuning fork examination of hearing was normal. No vascular bruit was heard on the right, while a soft, perhaps venous hum, was heard on the left. Heart rhythm was regular and no murmur was heard, and a grade 1/6 soft systolic ejection murmur was heard intermittently. Lungs were clear to auscultation. The abdomen was without palpable organomegaly. Extremity examination revealed no deformities of long bones or joints. A 10 cm scar associated with loss of some subcutaneous tissue was present in the extensor aspect of the left forearm. Median Phalen's and Tinel's signs were absent, and provocative maneuvers for thoracic outlet syndrome were negative. Cervical range of motion was measured at 40° left and 50° right lateral flexion, 60° forward flexion and extension, 70° left and 80° right rotation. Lumbar range of motion was 30° for extension, 60° for true forward flexion, 45° for left and right rotation of the thoracolumbar junction, and 25° left and 35° right lateral flexion. Straight leg raising was negative bilaterally to 90°. Heel and toe walking were accomplished without difficulty. Buttock tone was normal. Cranial nerves and fundi

were normal. Deep tendon reflexes were 2+ in the upper extremities and 2+ to 3+ in the lower extremities symmetrically, with Babinski responses absent. Language function was normal. Light touch, vibration, and pinprick perception were normally perceived. Cortical sensory function was normal. Tremor and ataxia were absent. Extremity and muscle tone was normal, and no weakness involved major muscle groups of upper and lower extremities, as well as intrinsic hand muscles. Routine gait mechanics were normal.

Cervical spine x-rays dated July 1, 1993 taken at St. Benedict's Hospital were normal. Dorsal and lumbar spine x-rays dated July 6, 1993, taken at the Burns Chiropractic Clinic were normal, with an incidental finding of an ectopic ossification center off the superior and anterior aspect of L4. Lateral cervical spine x-rays and full length AP views of the spine taken at the Bennett Chiropractic Clinic on July 15, 1993 were normal except for a mild thoracolumbar scoliosis. Cervical MRI scan dated August 3, 1993 performed at St. Benedict's Hospital was normal.

The available medical evidence indicates that Mr. Pennington sustained no more than a cervical strain as a consequence of the motor vehicle accident of June 18, 1993, following which he generated undue personal concern which led to involvement of an excessive number of practitioners being involved. Other than the continuation of a home exercise program already established, and follow-ups as needed with his primary care physician, Dr. Paul Taylor, no further treatment or medical follow is indicated. The prognosis is excellent, with complete resolution of symptoms a reasonable expectation. No activity restrictions are appropriate.

No permanent partial physical impairment should eventuate.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Nathaniel M. Nord", written in a cursive style.

NATHANIEL M. NORD, M.D.

NMN:pt-kb

# Addendum H



*DANIEL L. WILSON, J.D.*  
Attorney and Counselor-At-Law

Suite 204  
Creston Plaza Bldg.  
290 - 25th Street  
Ogden, UT 84401

Code 801  
-6119

April 14, 1994

Dr. Joan Balcome  
5475 South 500 East  
Ogden, Utah 84405

RE: Pennington vs. Allstate Insurance Co. et al

Dear Dr. Balcome:

Allstate Insurance Company has refused to pay for Lorin Pennington's treatment as a result of his collision of 6-18-93.

A lawsuit has been filed and a copy of the Complaint and Summons is enclosed. In order to fully represent my clients interest, the lawsuit alleges in the alternative that, (1) either the services received by Mr. Pennington were reasonable and necessary, and therefore Allstate must pay for them; or (2) the services were unreasonable or unnecessary and if Allstate doesn't have to pay, then Mr. Pennington is also not required to pay. In other words if those bills are to be paid, it is Allstate that must pay them. I have previously won cases on this theory. In fact, Mr. Pennington is entitled to Summary Judgement that would allow him to simply be released from this lawsuit and leave it between Allstate and the other health care providers as to whether or not any charges are to be paid. However my experience is that because of the cost, the health care providers never pursue the case and the insurance company gets away without paying the bills. This doesn't make me very happy and so I don't plan to do that in this case. Instead, I intend to press this matter to trial.

It is not our intent to cause you any trouble or inconvenience. The only reason you are named in the lawsuit is that I am required to represent my client's interests to the exclusion of all others. However, I can let you out of this

lawsuit and dismiss you from this case in exchange for your agreement to be bound by the court's ruling even though you are not a party. In other words, we will agree that if the court finds your charges to be reasonable and we collect the money from Allstate we will pay the money over to you. But, if the court finds that the charges were not reasonable or were not necessary and that Allstate doesn't have to pay, you must agree to write off those charges with absolutely no adverse effect to my client or his credit standing.

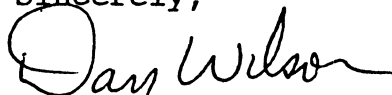
I encourage you to accept this offer. The outcome to you is the same whether or not you are a party. This way you avoid the inconvenience of being involved in this lawsuit. If you agree with this approach, please sign the enclosed agreement and return to me in the envelope provided.

If you don't want to agree to this and instead want to be a party to this lawsuit, enclosed for your convenience is <sup>an</sup> Acceptance of Service. I would appreciate it if you would sign the Acceptance of Service and return it to me in the envelope provided. This will avoid the necessity of having to have you served by a sheriff or process server.

An Affidavit concerning the treatment provided is also enclosed along with a separate letter explaining that.

Thank you for your consideration. Please contact me if you would like to discuss this matter further.

Sincerely,

A handwritten signature in cursive script that reads "Dan Wilson".

Daniel L. Wilson  
Attorney at Law

DLW/kha

Attachments:

- Agreement
- Complaint
- Summons
- Acceptance of Service
- Return Envelope
- Letter
- Affidavit

# Addendum I

**DISMISSAL AGREEMENT**

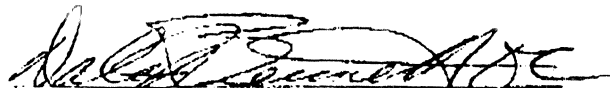
Plaintiff Lorin Pennington, through his attorney, Dan Wilson, and Defendant Dr. Dale Bennett hereby stipulate and agree that this Defendant will be dismissed from the case of Lorin Pennington vs. Allstate et al, Second Judicial District Court, Civil Number 940-900-042. In exchange for this dismissal, Defendant Dr. Dale Bennett hereby agrees to be bound by the Court's ruling as if they were a party. Plaintiff Lorin Pennington agrees that if the Court finds that Defendant Dr. Dale Bennett's charges were reasonable and necessary and if that amount of money is collected from Defendant Allstate, Plaintiff Lorin Pennington will pay that money to Defendant Dr. Dale Bennett. Defendant Dr. Dale Bennett agrees that if the Court finds that the charges were not reasonable or were not necessary and that Allstate doesn't have to pay, Defendant Dr. Dale Bennett will write off those charges with absolutely no adverse effect to Lorin Pennington or his credit standing.

\_\_\_\_\_  
Date

4-18-94

\_\_\_\_\_  
Date

\_\_\_\_\_  
Daniel L. Wilson  
Attorney for Lorin Pennington

  
\_\_\_\_\_  
Dr. Dale Bennett

p#10

Daniel L. Wilson, #4257  
Attorney for Plaintiff  
290-25th Street, Suite #204  
Ogden, Utah 84401  
Telephone: (801) 621-6119

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IN THE SECOND JUDICIAL DISTRICT COURT

WEBER COUNTY, STATE OF UTAH

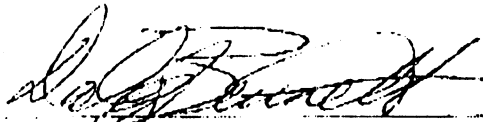
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LORIN PENNINGTON,	:	ACCEPTANCE OF SERVICE
Plaintiff,	:	
vs.	:	
ALLSTATE INSURANCE COMPANY,	:	
BURNS CHIROPRACTIC,	:	
DR. DAVID R. TRIMBLE, D.C.	:	
DR. DALE BENNETT, D.C.,	:	
DR. BRYSON SMITH,	:	
DR. JOAN BALCOME,	:	
ST. BENEDICT'S HOSPITAL,	:	
ASSOCIATES IN RADIOLOGY,	:	Civil No. 940-900-042 CN
Defendants.	:	Judge Stanton M. Taylor

---

The undersigned Dr. Dale Bennett, hereby accepts service of  
Complaint and Summons in this matter.

4-18-94  
Date

  
Dr. Dale Bennett

0#11

# **Addendum J**

**BRYSON S. SMITH, M.D., P.C.**

**Neurosurgery**

425 East 5350 South, Suite 315

Ogden, Utah 84405

Telephone: (801) 479-9119

May 17, 1994

Utah State Bar Association  
645 South 200 East  
Salt Lake City, Utah

RE: Lorin Pennington

Dear Ladies and Gentleman:

I am asking your assistance to help determine whether there has been a breach of ethics on the part of Daniel L. Wilson, an attorney practicing at 290 25th Street, #204, Ogden, Utah 84401. If you would kindly review the summary which follows, and advise me as to the appropriateness of Mr. Wilson's actions, I would be most appreciative.

This situation involves Mr. Lorin Pennington, a patient of mine, who was involved in a motor vehicle accident in mid 1993. He was initially evaluated in an emergency room and then referred to my office. I saw him on two occasions. On the first office visit I ordered an imaging study. By the second office visit the patient's symptoms had largely resolved, such that no further follow up was necessary by me, and he was discharged from my care.

In January 1994 I was contacted by Mr. Wilson, who introduced himself as Mr. Pennington's attorney. He informed me that payment for all medical services had been denied by the insurance company. [He asked my permission to do "whatever was necessary" to obtain reimbursement from the insurance company for his client. Mr. Wilson explained carefully to me that he did not believe that any of the medical care given by the various providers, including myself, was in any way inappropriate. Nevertheless, he wanted to name me as a defendant in a suit claiming inappropriate care. He felt that this maneuver might motivate the insurance company to pay the claim. Again, he assured me that he did not believe my care of this patient had been inappropriate. He offered that, should this go to trial, he had a friend in town who would be willing to defend me at no charge.]

My response was that I did not appreciate being named in a lawsuit, particularly one so contrived. He asked me to discuss this with my own attorney and then advise him further.

D16

Utah State Bar Association  
RE: Lorin Pennington

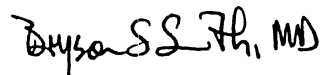
May 17, 1994  
Page 2

On January 25, after discussing this with my own attorney, M. Shane Smith, I returned Mr. Wilson's call. I told him in very certain terms that I would not cooperate with this scheme, and that I did not wish to have my name tarnished in such a fashion. I informed him that I had insurance and reimbursement specialists in my office, and that I would gladly make the services of those personnel available to him and his client, so that this matter, which is not atypical in my business, might be resolved in a more customary manner. His response was that the suit had already been filed and that I had no more say in the matter. He in fact told me that he wished I would not pursue reimbursement from the insurance company for my own services, as that might decrease the chances of his successful lawsuit.

I am not familiar enough with legal statutes to know whether Mr. Wilson's actions represent a breach of ethics. However, it seems very unusual, and in my opinion does not represent an honest use of the legal system. It will cost me both legal expenses and time away from my practice. Furthermore, I have real concerns about the potential negative impact on my professional stature in the community.

Once again, thank you in anticipation for your advice in this matter.

Sincerely,



Bryson S. Smith, M.D.

cc: M. Shane Smith  
Smith & Hannah  
311 South State Street, #450  
Salt Lake City, Utah 84111

BSS/gb



**BRYSON S. SMITH, M.D., P.C.**

**Neurosurgery**

425 East 5350 South, Suite 315

Ogden, Utah 84405

Telephone: (801) 479 9119

July 13, 1994

Utah State Bar  
Office of Attorney Discipline  
c/o Pamela Blevins  
645 South 200 East, #205  
Salt Lake City, Utah 84111-3834

Dear Ms. Blevins:

Thank you for your correspondence dated July 6, 1994 regarding my complaint against Daniel L. Wilson. You enclosed a copy of his letter to you dated June 29, 1994. I would like to respond briefly to his letter.

The overall context of this suit must be kept in mind. That is, the maximum liability of the no-fault insurance policy is \$3,000. According to Mr. Wilson's claim, roughly half of that amount was paid to various providers by Allstate. That leaves approximately \$1,400 at issue. The remaining unpaid medical bills total approximately \$2,300. Obviously, the insurance policy will fall short of the total cost of medical care for Mr. Pennington. Therefore, in fairness to the health care providers who have not been paid for their services, the best course of action would be that which most efficiently and equitably disburses what funds remain to those providers.

Mr. Wilson states that his plan is the only option in order for his client not to pay bills that are "not his obligation to pay." As stated in my previous letter, it is necessary to communicate medical information to third party payors so that they understand the medical necessity of the care they are being asked to fund. In my experience, this usually leads to a reasonable resolution of payment issues such as this one. This is a common practice, in fact almost the norm, and physicians are accustomed to providing such information in these cases. In a discussion with Mr. Hal Palmer at Allstate Insurance, which I had today, this communication issue arose. Mr. Palmer informed me that he requested such medical information from Mr. Pennington. Presumably, this information would have led to a greater understanding by the insurance company of the medical necessity of the treatment rendered to Mr. Pennington, and might very likely

TO: Utah State Bar  
July 13, 1994  
Page Two

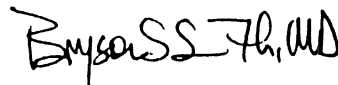
have resulted in a satisfactory resolution of this problem outside the legal arena. Mr. Palmer informs me that Allstate insurance never received any such information from Mr. Pennington regarding any of the care delivered by the various health care providers. Likewise, rather than encourage communication, Mr. Wilson in fact pleaded with me not to provide information or communicate in any way with the insurance company as it might weaken his legal position.

It appears to me that Mr. Wilson is not interested in facilitating an efficient and equitable reimbursement process. In fact, one wonders at his real agenda. Ostensibly, he may have some altruistic notion of effecting global insurance reform. After all, in his letter to Mr. Smith dated April 14, 1994, he comments that "if the insurance company gets away without paying the bills this doesn't make me very happy," and he makes repeated reference to the "scope" of the problem. However, his primary agenda, I believe, is self service. In a situation where there are insufficient funds to completely reimburse medical costs, he has blocked the customary process for disbursement of those funds to the providers. At the same time, he has positioned himself carefully to secure an award of attorney fees. He exploits the physicians and the insurance company to his benefit.

Putting Mr. Wilson's simplistic patriotic rhetoric aside, justice includes the concept that power and position should not be used maliciously or frivolously to exploit others. I certainly agree with our system of justice, and have frequently been a participant, usually as an expert witness. I appreciate very much your efforts to maintain the integrity of this system. My concern is that Mr. Wilson may have violated that integrity by abusing his position as an attorney at law.

Thank you again for your consideration in this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bryson S. Smith, M.D.", with a stylized, cursive script.

Bryson S. Smith, M.D.

BSS/gb

# **Addendum K**

~~OGDEN CIRCUIT COURT~~

~~AUG 18 3 48 PM '95~~

Jan P. Malmberg, #4084  
PERRY, MALMBERG & PERRY  
Attorney for Defendant  
29 West 100 North  
P.O. Box 364  
Logan, UT 84323-0364  
(801) 753-5331

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

LORIN PENNINGTON,  
  
Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,  
BURNS CHIROPRACTIC,  
DR. DAVID R. TRIMBLE, D.C.,  
DR. DALE BENNETT, D.C.,  
DR. BRYSON SMITH,  
DR. JOAN BALCOMBE,  
ST. BENEDICT'S HOSPITAL,  
ASSOCIATES IN RADIOLOGY,  
  
Defendants.

ORDER OF DISMISSAL  
WITH PREJUDICE

9409000 42

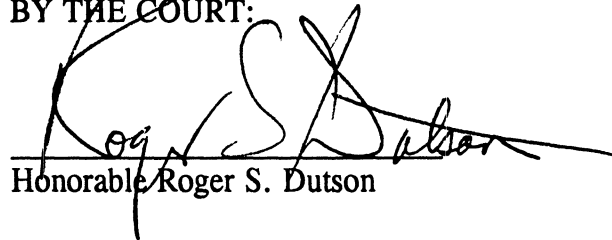
Civil No. 940003226

Judge Roger S. Dutson

Based upon the Stipulation of the plaintiff, Lorin Pennington, and the defendant, Allstate Insurance Company, and based upon the failure of Burns Chiropractic, Dr. David R. Trimble, Dr. Dale Bennett or Dr. Bryson Smith to appear in this lawsuit and answer the complaint herein, it is hereby ordered that the above-action of Lorin Pennington v. Burns Chiropractic, Dr. David R. Trimble, Dr. Dale Bennett, Dr. Bryson Smith, is hereby dismissed with prejudice each party to bear their own costs.

DATED this 24 day of August, 1995.

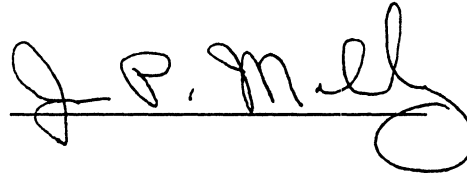
BY THE COURT:

  
Honorable Roger S. Dutson

### CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Order was mailed, postage prepaid, this 3rd day of August, 1995, to the following:

Daniel L. Wilson  
290 25th Street, Suite 204  
Ogden, UT 84401



21pennord2

# **Addendum L**

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IN THE SECOND JUDICIAL DISTRICT COURT  
WEBER COUNTY, STATE OF UTAH

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LORIN PENNINGTON,	:	MEMORANDUM DECISION
	:	
Plaintiff,	:	
vs.	:	Civil No. 940900042 CN
	:	Honorable Roger S. Dutson
ALLSTATE INSURANCE, et al,	:	
	:	
Defendant.	:	

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Trial in this matter before Judge Roger S. Dutson commenced on February 22, 1996, and continued on several different dates, finishing in mid-March, 1996. The trial was bifurcated to separate the issue of liability from the issue of attorneys fees. Trial was held on the issue of liability of Allstate Insurance Company. After numerous motions, stipulations, and court orders, the only parties remaining were Lorin Pennington, Plaintiff, and Allstate Insurance Company, Defendant.

On January 24, 1994, Attorney Dan Wilson filed a complaint in the Second District Court for his son-in-law, Lorin Pennington, against Allstate Insurance Company (Allstate), Burns Chiropractic, Dr. David R. Trimble, D.C., Dr. Dale Bennett, D. C., Dr. Bryson Smith, Dr. Joan Balcombe, St. Benedict's Hospital, and Associates in Radiology. The complaint alleged that on June 18, 1993, Lorin Pennington was involved in an automobile accident and that Pennington's insurance company, Allstate, had failed to pay the required \$3,000.00 Personal Injury Protection (PIP) benefits to Plaintiff or to the other named Defendants, (who were medical providers) pursuant to Utah Code Annotated, Sec. 31A-22-307 and the

contract of insurance. Plaintiff claimed the bills were past due and prayed for judgment against Allstate, or in the alternative, against the medical providers, in the event the services rendered were determined by the court as unreasonable and/or unnecessary.

In summary, the Plaintiff requested this court determine that Plaintiff's treatment and expenses were reasonable and necessary pursuant to UCA 31A-22-307, for judgment against Allstate for unpaid reasonable and necessary medical expenses plus attorneys fees and costs because of Allstate's failure to pay under the statute and contract of insurance. In the alternative, Plaintiff requested judgment against the medical providers he sued for unnecessary or unreasonable treatment and charges. Prior to trial the medical providers had been dismissed from the case by stipulation though the court reserved the right to revisit that issue if after factual findings such was determined to be justified.

Defendant asserted, among other things, full accord and satisfaction, full payment of reasonable and necessary medical expenses, Plaintiff's release of all claims, Plaintiff's noncompliance with the PIP statute, breach of the insurance contract, as well as a general denial.

After reviewing the evidence presented during several days of trial, the court finds the following facts:



1. The Plaintiff, Lorin Pennington, was injured in an automobile accident on June 18, 1993, in Ogden, Utah, suffering injury which was an uncomplicated "cervical strain".

2. Mr. Pennington was not treated for any injuries on the date of the accident but went to the Tanner Clinic and was seen by Paul R. Taylor, M. D. the next day, Friday, June 19, 1993.

3. Mr. Pennington complained of soreness of neck though examination revealed Plaintiff had full range of motion. Dr. Taylor did not feel it necessary to take any X-Rays or administer any further tests on that visit but told the Plaintiff to follow a treatment plan of flexion exercises, ice, heat and rest and Ibuprofen, 800mg, and advised him to report back if the problem was not resolved over the following weekend. Dr. Taylor mentioned the possibility of X-Rays if problem did not resolve but stated he "...doubted this will be necessary."

4. The following Monday, June 22, 1993, Mr. Pennington went back to Dr. Taylor and he prescribed doing more neck and shoulder exercises, ice and then heat and a muscle relaxant, Flexeril.

5. The court finds that the recommendations and treatment plan established by Dr. Taylor was a standard and proper treatment reasonable for this type cervical strain injury and had his recommendation been followed, this injury would have probably been resolved as soon, or possibly sooner, (because of unnecessary and apparently damagingly stressful chiropractic manipulations) as if

had he not obtained treatment from numerous other medical providers.

6. The court finds that rather than continue with Dr. Taylor, Mr. Pennington chose to 'shop' for other medical providers for the purpose of increasing his medical expenses so he could exceed the \$3,000.00 PIP amounts in order to justify pursuing a personal injury claim against the other driver pursuant to UCA 31A-22-309.

7. The court finds that the further medical treatment obtained by Plaintiff, beyond that recommended by Dr. Taylor, was not only unnecessary, but some of that treatment was given for areas of the body not injured in the accident and certain treatment probably increased Plaintiff's pain and was the cause of increased discomfort, (if indeed, same was experienced) above that caused by the June 18th accident.

8. The court finds that Plaintiff obtained the following treatment after he decided not to continue with Dr. Paul Taylor's reasonable treatment plan:

a. About one week after last seeing Dr. Taylor, Plaintiff appeared at the Emergency Room at St. Benedicts Hospital and saw Dr. Joan Balcombe, an emergency physician, who responded to Plaintiff's subjective complaints of neck pain and headaches and upon physical examination and responses given by Plaintiff, she felt there was mild tenderness of cervical muscles and because of his persistent and continued complaint of pain, coupled with

pursuit of the complaint in the Emergency Room setting, X-Rays were ordered, and though found to be normal, Anaprox medication and physical therapy were prescribed.

b. Instead of following the Emergency Room Dr. Balcombe's treatment recommendations, which were similar to Dr. Taylor's previous recommendations, within four days after going to the Emergency Room, Plaintiff began an intensive Chiropractic treatment plan by his own choice. This chiropractic treatment included manipulations. He first saw a Dr. Trimble at Burns Chiropractic and started that treatment on about July 6, 1993, and had treatment during about 6 of the next 8 days.

c. Attorney Wilson, his father-in-law, then suggested he go to his, Attorney Wilson's, personal Chiropractor and long-time acquaintance, a Dr. Bennett, where he first received treatment about 10 days after he started chiropractic treatment with Burns Clinic. Plaintiff then was treated by Bennett chiropractors on 20 of the next 30 calendar days.

d. In the meantime, Plaintiff made another trip to the Emergency Room at St. Benedicts and saw Dr. Val Rollins, M.D., who found no swelling or other objective symptoms, but because of Plaintiff's persistent complaints of pain and the normal X-Ray previously taken in the E.R., he was referred by the E.R. doctor to Dr. Bryson Smith for a neurological consultation.

e. Dr. Smith saw Plaintiff and based on Plaintiff's subjective complaints and treatment history with the normal E.R. X-Ray and some new complaints, which, if they truly existed, the court now finds probably were the result of unnecessary chiropractic treatments, Dr. Smith ordered an MRI scan to determine if there was a possible spinal cord injury.

f. The MRI scan was performed at St. Benedicts Hospital on about August 3, 1993, and was normal. Physical Therapy was again recommended and this time Plaintiff did go to physical therapy six times along with massage therapy about 3 times. Some of this time period Plaintiff was also continuing chiropractic treatment. All treatment was completed by about August 26, 1993, and Plaintiff had now achieved his goal of exceeding the \$3,000. cap on medical expenses so he could pursue a claim against the other driver.

g. From the time of injury in mid-June, 1993, until treatment was completed about August 26, 1993, Plaintiff saw at least four different medical doctors, about five different chiropractors, involved an X-Ray technician and MRI technician and at least two medical doctors were apparently involved in the reading of those results, two physical therapists and a massage therapist, for a minimum of 12 different medical providers.

9. Normal treatment for an injury such as was sustained by Plaintiff is exercise, rest, ice and heat, a pain medication and/or muscle relaxant medication, and possibly massage therapy and/or physical therapy, and possibly a special pillow. This type injury usually resolves itself in about six to ten weeks and time is probably the most important factor in this healing process. Most of the treatment normally recommended by doctors is to help the patient feel better during the healing process and does not contribute greatly to the rapidity of healing the injury.

10. Towards the end of July, 1993, Clay Hamblin who worked with claims for Allstate observed what he considered to be normal physical movement and appearance of Plaintiff in the insurance office and because of the extensive claims being filed by Plaintiff, he became suspicious of the reasonableness and necessity of the treatment Plaintiff had received and after consultation with Hal Palmer, his boss, he informed Plaintiff that Allstate was going to require an independent medical examination. Attorney Wilson subsequently contacted the insurance carrier and was very antagonistic towards having the requested examination, including the claim that it was too soon for such an examination. Attorney Wilson engaged in tactics which made it difficult to obtain a medical examination by their own doctor, as requested by Allstate, though ultimately, towards the end of September, 1993, an

examination was conducted by Dr. Nathaniel Nord, the doctor designated by Allstate.

11. Dr. Nord conducted an examination of Plaintiff on September 28, 1993, and reviewed his treatment history, for the Insurance Company. He found no physical ailments relating to the accident of June 18, 1993. He concluded there had been an uncomplicated cervical strain which appeared fully resolved. The court is persuaded that the medical examination and testimony of Dr. Nord, although hired by Allstate, was objective, professionally supported and of substantial value to the court in this case.

12. The court found that the testimony of Dr. Don Rick Wakefield, who was hired by Allstate to perform a 'utilization review', was interesting but not of great value to the court in this case. Though very well qualified and trained in the utilization review process and other areas, he is not a medical doctor. His theories relating to the concept of necessary or unnecessary medical treatment and expenses were somewhat helpful, but the court did not rely on his testimony to any great extent. He was found to be somewhat biased in favor of the insurance carrier.

13. The court finds that the Emergency Room doctors which attended Plaintiff, provided treatment in a somewhat different manner than a regular doctor in a medical office would, in that they do not have the continuity with the patient as does a regular

doctor and were attempting to insure they did not miss a diagnosis and therefore were somewhat more aggressive in ordering X-Rays and referring to specialists. Based on the continued return visits to the Emergency Room (even though symptoms given by Plaintiff were subjective) and his continued complaints of pain, they readily ordered an X-Ray and referred to the neurologist, whereas an 'office' doctor would not likely order such tests so quickly. It was in this manner that the X-Ray and MRI were obtained by Plaintiff through the emergency room. The court finds those tests were unreasonable and unnecessary in this case and were part of the Plaintiff's plan to build up the medical expenses for his ultimate benefit in pursuing his additional claim against the other driver.

13. The physical therapy and massage therapy obtained by Plaintiff were relaxing and comforting to Plaintiff, but were not necessary medical treatment as it related to resolution of symptoms arising from the accident. These types of treatment are often prescribed for this type of injury, but again, are not essential to a speedy recovery, even though normally paid for by insurance carriers. The chiropractic treatment was unnecessary treatment in this case. The only treatment the court finds reasonable and necessary was that recommended by Dr. Paul Taylor, the first doctor to treat Plaintiff, and Plaintiff failed to follow up with that doctor's recommendations.

14. The fact that Allstate paid several claims submitted to

them for unnecessary and unreasonable treatment is not considered by the court as estoppel, acquiescence, or agreement that those expenses were necessary and reasonable. In this case, it was Plaintiff's purpose to deceive the medical providers as well as the insurance carrier and just because he was somewhat successful some of the time, the insurance carrier should not be punished for paying more than they should have, and Plaintiff should be estopped from having those medical providers claims against him set aside.

15. The court has a great deal of concern about the motivation of Attorney Wilson, Plaintiff's father-in-law, and motivation of Plaintiff in intentionally incurring unnecessary medical treatment and engaging in conduct to run up unnecessary medical bills and have Allstate pay those bills. The court finds this lawsuit was filed with a lack of good faith and was an abusive use of the courts. The events that support this finding include: (a) Plaintiff's willful failure to follow a properly prescribed treatment plan initially recommended by Dr. Paul Taylor, (b) Intentional creation of unnecessary medical bills by shopping for medical providers and jumping around to numerous medical providers, (c) Inclusion among the many medical providers, a Chiropractor who happens to be Attorney Wilson's personal chiropractor and a long time acquaintance, (d) Willful exaggeration of symptoms in order to make Plaintiff's injury seem more severe than it was, (e) Intentionally 'creating' medical bills for the purpose of exceeding



the \$3,000 PIP cap under Utah Law in order to then pursue a Personal Injury claim and thereby receive several thousand dollars settlement against the other driver, (f) Lack of objective findings to support any injury or treatment beyond that originally diagnosed and recommended by Dr. Taylor, (g) Failure of the Plaintiff or Attorney Wilson to notify Allstate of the filing and settlement of the claim against the other driver, as required by the insurance contract and attorney ethics, (h) Questionable conduct by Attorney Wilson in attempting to obtain releases from medical providers and at least implying to those medical providers that he would protect their interests as much as they could expect their claims to be protected in a lawsuit, even though he was suing those same medical providers. The court finds there was an attempt by Attorney Wilson to force Allstate to pay unnecessary and unreasonable expenses incurred by Plaintiff, (i) Obstructionist conduct by Attorney Wilson to avoid or delay medical examination by Allstate's doctor, (j) Attorney Wilson's strong assertion throughout this case that he was entitled to several thousands of dollars in attorneys fees under the PIP statute for bringing this action, while he knew or should have known most of the medical expenses and treatment were unreasonable.

The court has reviewed volumes of materials including extensive notes taken by the court during several days of trial and hearings, including all exhibits and evidence. The court has

intentionally restrained from including details of much of that material herein, as the record is clear in support of these findings and the attorney drafting orders shall include details from the record in support of these findings. The court notes that it carefully observed the demeanor of witnesses during their testimony and reached conclusions concerning truthfulness and untruthfulness. The court finds that although the amounts claimed under the PIP statute are relatively small, there are some serious collateral issues involved in this case and therefore, subsequent to trial the court has given the facts of this case much thought and deliberation before preparing these findings. As indicated, one issue which has been of great concern has been the conduct of Attorney Wilson as well as Plaintiff's misconduct.


Plaintiff's claims should be dismissed and Defendant Allstate is entitled to judgment and costs. Although Dr. Wakefield's testimony was somewhat biased in favor of insurance carriers, Allstate was required to present as much evidence as it could to counter the misconduct of Plaintiff and therefore the costs for Dr. Wakefield should be included. Evidence of charges for the experts and professionals called by Allstate is accepted by the court as reasonable charges and should be included as costs payable by Plaintiff.

The court reserved some issues on motions by Plaintiff and all those issues should be resolved by the findings herein.

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Memorandum Decision  
Pennington v. Allstate  
940900042 CN

Defendant Allstate is directed to draft clear and factually supported Findings, Conclusions and Order of Judgment consistent herewith.

DATED this 31<sup>st</sup> day of May, 1996.

  
\_\_\_\_\_  
ROGER S. DUTSON  
DISTRICT COURT JUDGE PRO-TEM

CERTIFICATE OF MAILING

I HEREBY certify that I mailed a true and correct copy of the foregoing Memorandum Decision by first class mail, postage prepaid, to the following parties this 3rd day of <sup>July</sup>~~May~~, 1996:

DANIEL L. WILSON  
Attorney for Plaintiff  
290 25th Street  
Suite 204  
Ogden, UT 84401

JAN P. MALMBERG  
Attorney for Defendant  
29 West 100 North  
Logan, UT 84321

Diane Wood  
DEPUTY COURT CLERK

# **Addendum M**

Jan P. Malmberg, #4084

PERRY, MALMBERG & PERRY

Attorney for Defendant Allstate

14 West 100 North

P. O. Box 364

Logan, UT 84323-0364

(801) 753-5331

SECOND DISTRICT COURT

~~SECOND DISTRICT COURT~~  
~~'96 DEC 19 AM 11 59~~

97 JAN 24 PM 2 30

IN THE SECOND JUDICIAL DISTRICT COURT

JAN 27 1997

IN AND FOR WEBER COUNTY, STATE OF UTAH

LORIN PENNINGTON,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,

et. al.

Defendant.

) FINDINGS OF FACT AND

) CONCLUSIONS OF LAW

) (AS TO LIABILITY)

) Civil No. 940900042

) Judge: Roger S. Dutson

The above-entitled matter came on regularly for trial pursuant to notice on February 22, 1996, and continued on several different dates until the trial was concluded in mid-March, 1996. The plaintiff, Lorin Pennington, was represented by his father-in-law, Daniel L. Wilson. The defendant, Allstate Insurance Company, was represented by Jan P. Malmberg. After numerous motions, stipulations, and court orders, the only parties remaining in the lawsuit at the time of trial were Lorin Pennington, plaintiff, and Allstate Insurance Company, defendant. Pursuant to stipulation, the trial was bifurcated to separate the issue of attorney's fees for the plaintiff pursuant to Utah Code Ann. §31A-22-

309(5)(d) (1953 as amended) from the issue of liability of Allstate Insurance Company.

## BACKGROUND

On January 24, 1994, Attorney Dan Wilson filed a complaint in the Second District Court for his son-in-law, Lorin Pennington, against Allstate Insurance Company (Allstate), Burns Chiropractic, Dr. David R. Trimble, D.C., Dr. Dale Bennett, D.C., Dr. Bryson Smith, Dr. Joan Balcombe, St. Benedict's Hospital, and Associates in Radiology. The complaint alleged that on June 18, 1993, Lorin Pennington was involved in an automobile accident and that his insurance company, Allstate, had failed to pay the required \$3,000 Personal Injury Protection (PIP) benefits to plaintiff or to the other named defendants, (who were medical providers) pursuant to Utah Code Ann. §31A-22-307 and the contract of insurance (indemnity) between Lorin Pennington and Allstate. Plaintiff claimed the bills were past due and prayed for judgment against Allstate, or in the alternative, against the medical providers, in the event the services rendered were determined by the court to be unreasonable and/or unnecessary.

In summary, the plaintiff requested this court determine that plaintiff's treatment and expenses were reasonable and necessary pursuant to Utah Code Ann. §31A-22-307 (1953 as amended) and pursuant to the contract between Mr. Pennington and Allstate, and for judgment against Allstate for unpaid reasonable and necessary medical expenses plus attorney's fees, costs and interest because of Allstate's failure to pay under the statute and contract of insurance. In the alternative, plaintiff requested judgment against the medical providers

he sued for providing to the plaintiff unnecessary or unreasonable treatment and charges. Prior to trial the medical providers had been dismissed from the case by Order and Stipulation although the court reserved the right to revisit that issue if after factual findings such was determined to be justified.

Allstate initially filed a Motion to Dismiss or in the alternative a Motion to Appoint a Medical Panel on the basis plaintiff's claim for relief was not ripe for decision under contract law, tendered the remaining \$1,305.41 under the PIP statute and contract with plaintiff to the court for decision as to whether any was owing and requested the court pursuant to Utah Code Ann. §31A-22-307(2)(d) to appoint a medical panel to determine the reasonableness and the necessity of the claimed charges and tender the remaining amount either to the providers or back to Allstate depending upon the medical panel's decision. The court, through the Honorable Stanton M. Taylor, denied the Motion to Dismiss and dismissed the medical panel idea on the basis the costs of such a procedure would probably exceed the amount in controversy.

Allstate thereafter filed an Answer and asserted, among other things, full accord and satisfaction, full payment of reasonable and necessary medical expenses, plaintiff's release of all claims, plaintiff's noncompliance with the PIP statute, a breach by plaintiff of the contract of insurance with Allstate, as well as a general denial.

This Court reviewed the volumes of evidence produced as well as reviewed his extensive notes taken during several days of trial and hearings, including all exhibits and evidence and after review of all the documents filed by each side, including numerous memorandums. This Court also personally and carefully observed the demeanor of witnesses



during their testimony and reached conclusions as to their truthfulness and untruthfulness. Although the amounts claimed under the PIP statute were relatively small, there were serious collateral issues involved in this case and therefore, subsequent to trial this Court gave the facts of this case much thought and deliberation, especially one issue of great concern which had been the conduct of Attorney Dan Wilson as well as the plaintiff's misconduct, and this Court, therefore, being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

1. Prior to June 18, 1993, the plaintiff, Lorin Pennington, entered into a contract with Allstate Indemnity Company.

2. Pursuant to that contract of insurance Allstate promised to pay Personal Injury Protection (PIP) to Lorin Pennington, regardless of fault, the first \$3,000 of reasonable and/or necessary medical expenses caused by an accident covered under the policy.

3. Pursuant to that contract and pursuant to Utah Code Annotated §31A-22-307 (1953 as amended), the contract between Lorin Pennington and Allstate Indemnity Company mandated that Allstate only pay Lorin Pennington "the reasonable value of all expenses for necessary medical, surgical, x-ray, dental, rehabilitation, including prosthetic devices, ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person." (Utah Code Annotated §31A-22-307(1)(a) (1953 as amended)).

4. "Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services."

5. "Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services."

6. Under the contract between Lorin Pennington and Allstate Insurance Company, Allstate Insurance Company had an affirmative duty to Lorin Pennington to not pay unreasonable and unnecessary medical expenses. This affirmative duty is to protect Lorin Pennington and to preserve those benefits for him as he recovers from his injuries.

7. Under the contract between Lorin Pennington and Allstate Indemnity Company, Mr. Pennington must send to Allstate a summons, complaint or other document relating to a third party claim as soon as possible.

8. Under the contract between Lorin Pennington and Allstate Indemnity Company, Mr. Pennington may be required to take medical examinations by physicians Allstate chooses, as often as Allstate reasonably requires.

9. Under the contract between Lorin Pennington and Allstate Insurance Company, Mr. Pennington was to cooperate with Allstate in the investigation, settlement and defense of any claim or lawsuit. If Allstate asked, Mr. Pennington must also help Allstate obtain payment from anyone else who may be jointly responsible.

10. Under the contract between Lorin Pennington and Allstate Insurance Company, Allstate cannot be obligated if Mr. Pennington

voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

11. The Plaintiff, Lorin Pennington, was injured in an automobile accident on June 18, 1993, in Ogden, Utah, suffering injury of an uncomplicated "cervical strain".

12. Mr. Pennington was not treated for any injuries on the date of the accident but went to the Tanner Clinic and was seen by Paul R. Taylor, M.D. the next day, Friday, June 19, 1993.

13. Mr. Pennington complained of soreness of neck though examination revealed plaintiff had full range of motion. Dr. Taylor did not feel it necessary to take any x-rays or administer any further tests on that visit but told the plaintiff to follow a treatment plan of flexion exercises, ice, heat and rest and Ibuprofen 800mg, and advised him to report back if the problem was not resolved over the following weekend. Dr. Taylor mentioned the possibility of x-rays if the problem did not resolve but stated he ". . . . doubted this will be necessary."

14. The following Monday, June 22, 1993, Mr. Pennington went back to Dr. Taylor, and he prescribed doing more neck and shoulder exercises, ice and heat and a muscle relaxant, Flexeril.

15. Dr. Nord performed an independent medical examination on Lorin Pennington, on September 28, 1993, and reviewed his treatment history, for the insurance company. He found no physical ailments relating to the accident of June 18, 1993. He concluded there had been an uncomplicated cervical strain which appeared fully resolved.

16. Dr. Nord testified that Dr. Taylor's treatment of Lorin Pennington was reasonable.

17. Dr. Nord would not order x-rays when range of motion is not restricted; no visual abnormalities are present; and, in Mr. Pennington's case, no reports of symptoms of spinal cord dysfunction were present.

18. Dr. Nathaniel M. Nord graduated from the University of Utah in medicine in 1965. From 1965 until 1970, Dr. Nord obtained a speciality in neurology. In 1970 to 1971 he spent one year as Assistance Chief of Neurology at the Salt Lake Veteran's Administration Hospital. Since 1971 Dr. Nord has been in the private practice of neurology. He is board certified in neurology by the American Board of Psychiatry and Neurology. He has served as a Department Chairman of Medicine at Holy Cross Hospital. His practice has been of general neurology dealing with adolescence and adults.

19. The majority of Dr. Nord's practice is involved in seeing patients in his office on a continuum basis or patients which have been referred for consultation and treatment by other physicians.

20. The court finds and is persuaded that the medical examination and testimony of Dr. Nord, although hired by Allstate, was objective, professionally supported and of substantial value to the court in this case.

21. The court further finds that the recommendations and treatment plan established by Dr. Taylor was a standard and proper treatment reasonable for this type of cervical strain injury and had Mr. Pennington followed Dr. Taylor's recommendation, this injury would have probably been resolved as soon, or possibly sooner, (because of unnecessary and apparently damaging stressful chiropractic

manipulations) as if he had not obtained treatment from numerous other medical providers.

22. Mr. Pennington, thereafter, does not seek treatment for nine days. ~~during which time he continues to work as a laborer.~~ He does not return or consult with his primary care physician, Dr. Paul Taylor.

RSD

23. The court finds that rather than continue with Dr. Taylor, Mr. Pennington chose to 'shop' for other medical providers for the purpose of increasing his medical expenses so he could exceed the \$3,000 PIP amounts in order to justify pursuing a personal injury claim against the other driver pursuant to Utah Code Ann. §31A-22-309 (1953 as amended).

24. The court finds that the further medical treatment obtained by plaintiff, beyond that recommended by Dr. Taylor, was not only unnecessary, but some of that treatment was given to areas of the body not injured in the accident, and certain treatment probably increased plaintiff's pain and was the cause of increased discomfort, (if indeed, same was experienced) above that caused by the June 18th accident.

25. The court finds that plaintiff obtained the following treatment after he decided not to continue with Dr. Paul Taylor's reasonable treatment plan:

a. On July 1, 1993, plaintiff appeared at the Emergency Room at St. Benedict's Hospital and saw Dr. Joan Balcombe, an emergency physician, who responded to plaintiff's subjective complaints of neck pain and headaches and upon physical examination and responses given by plaintiff, she felt there was mild tenderness of cervical muscles and because of his self-reported persistent and

continued complaint of pain, coupled with pursuit of the complaint in the Emergency Room setting, x-rays were ordered, and though found to be normal, Anaprox medication and physical therapy were prescribed.

b. Dr. Balcombe specifically ordered physical therapy for Mr. Pennington. She testified she explained specifically what was considered physical therapy. She also told him to recheck with her on July 12 to assess improvement.

c. Although he was told to specifically call the next day to arrange for physical therapy, Mr. Pennington did not call the next day to arrange for physical therapy; he did not return to see Dr. Balcombe on July 12.

d. Instead of following the Emergency Room Dr. Balcombe's treatment recommendations, which were similar to Dr. Taylor's previous recommendations, within four days after going to the Emergency Room, plaintiff began an intensive Chiropractic treatment plan by his own choice. He first saw a Dr. Trimble at Burns Chiropractic and started that treatment on about July 6, 1993, and had treatment during about 6 of the next 8 days.

e. Attorney Dan Wilson, his father-in-law, then suggested he go to his, Attorney Wilson's, personal Chiropractor and long-time acquaintance, a Dr. Dale Bennett, where he first received treatment about 10 days after he started chiropractic treatment with Burns Clinic. Plaintiff then was treated by Bennett chiropractors on 20 of the next 30 calendar days.

f. No matter what the charge was for the office visits and the spinal manipulation and additional manipulations by these

chiropractors, none of those charges were medically necessary in that they did not lead to a resolution of Mr. Pennington's cervical strain.

g. Dr. Burns and the chiropractors at Bennett Clinic were providing manipulative treatment on Mr. Pennington's entire spine, hip, and ribs. They were not providing non-manipulative care whatsoever.

h. In the meantime, plaintiff made another trip to the Emergency Room at St. Benedicts and saw Dr. Val Rollins, M.D., who found no swelling or other objective symptoms, but because of plaintiff's self-reported persistent complaints of pain and the normal x-ray previously taken in the Emergency Room, he was referred by the Emergency Room doctor to Dr. Bryson Smith for a neurological consultation.

i. Dr. Bryson Smith saw plaintiff and based on plaintiff's subjective complaints and treatment history with the normal Emergency Room x-ray and some new complaints, which, if they truly existed, the court now finds probably were the result of unnecessary chiropractic treatments, Dr. Smith ordered an MRI scan to determine if there was a possible spinal cord injury.

j. The MRI scan was performed at St. Benedicts Hospital on about August 3, 1993, and was normal. Physical therapy was again recommended and this time plaintiff did go to physical therapy 6 times along with massage therapy about 3 times (all of the massage therapy occurring on the same day as the physical therapy). During this period of time plaintiff was also continuing chiropractic treatment, some on the same day as the physical therapy. All treatment was completed by about August 26, 1993, and plaintiff had now achieved his goal of

exceeding the \$3,000 cap on medical expenses so he could pursue a claim against the other driver.

k. From the time of injury in mid-June, 1993, until treatment was completed about August 26, 1993, plaintiff saw at least four different medical doctors, about five different chiropractors, involved an x-ray technician and MRI technician and at least two medical doctors were apparently involved in the reading of those results, two physical therapists and a massage therapist, for a minimum of 12 different medical providers.

26. Normal treatment for an injury such as was sustained by plaintiff is exercise, rest, ice and heat, a pain medication and/or muscle relaxant medication, and possibly massage therapy and/or physical therapy, and possibly a special pillow. This type of injury usually resolves itself in about six to ten weeks, and time is probably the most important factor in this healing process. Most of the treatment normally recommended by doctors is to help the patient feel better during the healing process and does not contribute greatly to the rapidity of healing the injury.

27. Clay Hamblen is an experienced claims personnel at Allstate who has been trained through various training seminars and through handling of hundreds of claims. He has the expertise and ability to make visual observation of a claimant with a claimed injury to determine if the claimed injury fits with the symptoms of the injury and the mechanism of the injury.

28. On July 30, 1993, Lorin Pennington came to the Ogden Allstate Claim Office. He met with Clay Hamblen on that day in the lobby. On that day, he claimed to Mr. Hamblen that he had a cervical



strain and a back strain. Mr. Hamblen situated himself in such a way that Mr. Pennington would have to move in a full range motion to talk to Mr. Hamblen and discuss the claim. Mr. Hamblen observed Mr. Pennington at that time did not have any guarded movement whatsoever. In fact, he determined Mr. Pennington appeared to have a full range of motion of the full spine.

29. Mr. Hamblen at this point in time was very suspicious of the reasonableness and necessity of the treatment Mr. Pennington had been receiving. Mr. Pennington had gone to numerous providers and seemed determined on seeing additional providers. Because of his concern he spoke with the Casualty Claim Manager, Hal Palmer, and the decision was made that Mr. Pennington should undertake an independent medical examination.

30. Mr. Hamblen indicated to Lorin Pennington that he needed to submit to an independent medical examination. Following that conversation he received a phone conversation from Mr. Dan Wilson on August 13, 1993. Mr. Wilson represented himself as Lorin Pennington's attorney and father-in-law. Mr. Wilson was very antagonistic in regard to having Mr. Pennington submit to an independent medical examination. He stated that it was too soon for an independent medical examination to occur, and he refused to have his client submit to it at that time.

31. Attorney Wilson engaged in tactics which made it difficult to obtain a medical examination by their own doctor, as requested by Allstate, though ultimately, towards the end of September, 1993, an examination was conducted by Dr. Nathaniel Nord, the doctor designated by Allstate.

32. Dr. Don Rick Wakefield performed a utilization review of the treatment received by the various providers of Lorin Pennington. He was qualified by this court as an expert in utilization reviews and in chiropractic care.

33. Dr. Wakefield is qualified to perform utilization reviews and as a chiropractor. He received a Physician Associate degree from the University of Florida. He then was selected to attend Yale University School of Medicine in a P.A. Surgical Residency Program (equivalent to a Master's degree). He later obtained a Chiropractor degree from Life Chiropractic College and has also graduated from John Marshal Law School.

34. Dr. Wakefield has held many faculty positions. He was a Clinical Instructor at Yale University as well as the Clinical Coordinator of the Physician Assistant's program at Yale University School of Medicine/Norwalk Hospital P.A. Residency program. He was also in clinical practice from 1977 to 1981 while at Yale University. Dr. Wakefield has also taught at Emory University (as well as being on the admissions committee), in the Physician Assistance Program. He has held instructor faculty positions at George Washington Medical School and Hanaman Medical School in Pennsylvania.

35. In the chiropractic arena, he was a full time Associate Professor from 1983 to 1989. Since 1985 to the present he serves on the Life Chiropractic College, Post Graduate Education Faculty. Dr. Wakefield personally had a clinical chiropractic practice from 1984 through 1989.

36. Since 1984, Dr. Wakefield has been the Medical Director of International Healthcare Consultants. He is certified in all states which

require certification to perform utilization reviews and also performs utilization reviews across the United States in other states which do not officially have a certification requirement

37. The court finds Dr. Wakefield very well qualified and trained in the utilization review process and other areas. However, he is not a medical doctor. His theories relating to the concept of necessary or unnecessary medical treatment and expenses were somewhat helpful, but the court did not rely on his testimony to any great extent. He was found to be somewhat biased in favor of the insurance carrier.

38. The court finds that the Emergency Room doctors which attended plaintiff, provided treatment in a somewhat different manner than a regular doctor in a medical office would, in that they do not have the continuity with the patient as does a regular doctor and were attempting to insure they did not miss a diagnosis and therefore were somewhat more aggressive in ordering x-rays and referring to specialists. Based on the continued return visits to the Emergency Room (even though symptoms given by plaintiff were subjective) and his continued complaints of pain, they readily ordered an x-ray and referred to the neurologist, whereas an 'office' doctor would not likely order such tests so quickly. It was in this manner that the x-ray and MRI were obtained by plaintiff through the Emergency Room. The court finds those tests were unreasonable and unnecessary in this case and were part of the Plaintiff's plan to build up the medical expenses for his ultimate benefit in pursuing his additional claim against the other driver.

39. The physical therapy and massage therapy obtained by plaintiff were relaxing and comforting to plaintiff, but were not necessary medical treatment as it related to resolution of symptoms arising from the accident. These types of treatment are often prescribed for this type of injury, but again, are not essential to a speedy recovery, even though normally paid for by insurance carriers. The chiropractic treatment was unnecessary treatment in this case. The only treatment the court finds reasonable and necessary was that recommended by Dr. Paul Taylor, the first doctor to treat plaintiff, and plaintiff failed to follow up with that doctor's recommendations.

40. The court finds the fact that Allstate paid several claims submitted to them for unnecessary and unreasonable treatment is not considered by the court as estoppel, acquiescence, or agreement that those expenses were necessary and reasonable.

41. The court finds in this case, it was plaintiff's purpose to deceive the medical providers as well as the insurance carrier and just because he was somewhat successful some of the time, the insurance carrier should not be punished for paying more than they should have, and the court finds plaintiff should be estopped from having those medical providers claims against him set aside.

42. On or about February 19, 1994, Mr. Wilson for and on behalf of the plaintiff, filed a third-party complaint against Brad Beasley for the injuries Mr. Pennington allegedly received on June 18, 1993.

43. No copy of this complaint was ever sent to Allstate Insurance Company.

44. On March 17, 1994, plaintiff entered into a release with Jane Beasley, Pharol Beasley, and Bradley Beasley releasing any and all persons or corporations from any and all claims, damages, actions, causes of actions or suits of any kind or nature whatsoever on account of injuries Mr. Pennington received in the automobile accident of June 18, 1993. The release expressly indicated the release was a full and final compromise and settlement of any and all claims disputed or otherwise on account of injuries and damage above mentioned.

45. A copy of the release and notice of the settlement was never sent to Allstate Insurance Company.

46. The court has a great deal of concern about the motivation of Attorney Wilson, plaintiff's father-in-law, and motivation of plaintiff in intentionally incurring unnecessary medical treatment and engaging in conduct to run up unnecessary medical bills and have Allstate pay those bills. The court finds this lawsuit was filed with a lack of good faith and was an abusive use of the courts. The events that support this finding include: (a) Plaintiff's willful failure to follow a properly prescribed treatment plan initially recommended by Dr. Paul Taylor, (b) Intentional creation of unnecessary medical bills by shopping for medical providers and jumping around to numerous medical providers, (c) Inclusion among the many medical providers, a Chiropractor who happens to be Attorney Wilson's personal chiropractor and a long time acquaintance, (d) Willful exaggeration of symptoms in order to make Plaintiff's injury seem more severe than it was, (e) Intentionally 'creating' medical bills for the purpose of exceeding the \$3,000 PIP cap under Utah Law in order to then pursue a Personal Injury claim and thereby receiving a several thousand dollar's settlement against the

RSD

other driver, (f) Lack of objective findings to support any injury or treatment beyond that originally diagnosed and recommended by Dr. Taylor, (g) Failure of the plaintiff or Attorney Wilson to notify Allstate of the filing and settlement of the claim against the other driver, as required by the insurance contract and attorney ethics, (h) Questionable conduct by Attorney Wilson in attempting to obtain releases from medical providers and at least implying to those medical providers that he would protect their interests as much as they could expect their claims to be protected in a lawsuit, even though he was suing those same medical providers. The court finds there was an attempt by Attorney Wilson to force Allstate to pay unnecessary and unreasonable expenses incurred by plaintiff, (i) Obstructionist conduct by Attorney Wilson to avoid or delay medical examination by Allstate's doctor, (j) Attorney Wilson's strong assertion throughout this case that he was entitled to several thousands of dollars in attorney's fees under the PIP statute for bringing this action, while he knew or should have known most of the medical expenses and treatment were unreasonable.

[1] Some specific examples of Mr. Wilson's conduct include that on February 3, 1994, Dan Wilson wrote a letter to Hal Palmer indicating that Allstate was required to pay the addition \$1305.41 or else he would bring suit for and on behalf of Lorin Pennington under Utah Code Annotated 31A-22-309 (5)(d). He threatened Mr. Palmer that if Allstate refused to pay this addition amount which Allstate had deemed was unreasonable and unnecessary, pursuant to the statute if he recovered \$1, he, being Dan Wilson, would be entitled to full payment of attorney's fees and costs.

[2] Rather than structuring the suit against Allstate in accordance with Utah Code Annotated 31A-22-309 (5)(d), Mr. Wilson for and on behalf of Lorin Pennington sued Allstate and all health care providers which had not been paid. Pursuant to that law suit, Lorin Pennington, by and through his attorney Dan Wilson, sent letters, dismissal agreements, and acceptance of service to each one of the named defendants (but not his own insurance company, Allstate).

[3] In the letters to each of the health care providers, Mr. Wilson acting as an agent of his client, merely indicated the law suit against them was in reality a sham in that he was personally going against Allstate Insurance Company for the attorney's fees and costs and not against the medical providers. He stated to these medical providers that he recognized the dispute was, in reality, between the health care providers and Allstate Insurance Company. However, Mr. Wilson stated that he was intending on pursuing this law suit against Allstate Insurance Company. He stated: "However my experience is that because of the cost, the health care providers never pursue the case and the insurance company gets away without paying the bills. This doesn't make me very happy so I don't plan to do that in this case. Instead I plan to press this matter to trial."

[4] Rather than having a law suit as provided by statute between the plaintiff and his insurance company, Mr. Wilson attempted to enter into an agreement with the health care providers that if the court deemed the charges were reasonable and necessary, he would collect the money from Allstate and pay the money over to the health care providers (even though more money was owing to the health care providers than the remaining PIP benefits). In exchange, if the health

care provider would sign the dismissal agreement and acceptance of service, and the court determined that the charges were not reasonable or not necessary, the health care provider would not pursue Mr. Pennington.

[5] Mr. Wilson failed to mention to the health care providers in the dismissal agreement sufficient funds were not left under the remaining policy PIP benefits under Mr. Pennington's policy to pay each defendant if the court determined the charges were reasonable and necessary.

[6] Mr. Wilson went even further than sending the letters and dismissal agreements to the health care providers. He contacted specifically Dr. Bryson S. Smith and informed him that Allstate had determined that his treatment was not medically necessary in regard to the injuries Mr. Pennington had sustained (although he did not inform him of all the various health care providers that have been seen prior to him). Dr. Smith testified: "He asked my permission to do "whatever was necessary" to obtain reimbursement from the insurance company for his client. Mr. Wilson explained carefully to me that he did not believe that any of the medical care given by the various providers including myself, was in any way inappropriate. Nevertheless, he wanted to name me as a defendant in the suit claiming inappropriate care. He felt this maneuver might motivate the insurance company to pay the claim. Again, he assured me that he did not believe my care of this patient had been inappropriate. He offered that, should this go to trial, he had a friend in town who would be willing to defend me at no charge."

[7] Mr. Wilson had informed Mr. Hamblen that Lorin Pennington had seen too many health care providers; he thereafter informed the



health care providers that he felt their services were reasonable and necessary but failed to inform them they would not receive full payment if the court deemed all the medical expenses were reasonable and necessary; he went even further to <sup>inappropriately</sup> indicate he was suing these defendants ~~inappropriately~~ on the basis he wanted to get at the insurance company for not paying the \$1305.41 in PIP benefits which had been denied because the services were not reasonable and not necessary. He even offered so far as to provide an attorney to the other defendants free of charge, to fight his, Lorin Pennington's own insurance company. RSD

[8] At the time this matter went to trial, Mr. Pennington was not obligated to pay any healthcare provider. The only purpose for the lawsuit was for Mr. Wilson to attempt to collect attorney's fees and costs on this matter. When Mr. Pennington was asked as to what relief he expected to get from the lawsuit, he indicated that all he expected was for Allstate to pay their part of the deal and affirmatively stated that there is really nothing under the deal for which Allstate could be responsible. He also affirmed that in June of 1993, he had certain obligations under his insurance contract with Allstate which he was required to perform.

BASED upon the foregoing Findings of Fact, this Court hereby enters the following:

#### CONCLUSIONS OF LAW

1. On June 18, 1993, Lorin Pennington was involved in an automobile accident where he sustained a simple cervical strain injury.

2. The court concludes that on that date, the plaintiff had a valid insurance contract with Allstate Indemnity Company.

3. Pursuant to that contract of insurance Allstate promised to pay Personal Injury Protection (PIP) to Lorin Pennington, regardless of fault, the first \$3,000 of reasonable and/or necessary medical expenses caused by an accident covered under the policy.

4. Pursuant to that contract and pursuant to Utah Code Annotated §31A-22-307 (1953 as amended), the contract between Lorin Pennington and Allstate Indemnity Company mandated that Allstate only pay Lorin Pennington "the reasonable value of all expenses for necessary medical, surgical, x-ray, dental, rehabilitation, including prosthetic devices, ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person."

5. "Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services."

6. "Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services."

7. Under the contract between Lorin Pennington and Allstate Indemnity Company, Mr. Pennington must send to Allstate a summons, complaint or other document relating to a third party claim as soon as possible. Plaintiff sued Brad Beasley, the driver of the car which struck his vehicle, and never informed Allstate of the lawsuit as required by contract. Plaintiff further never informed Allstate of the settlement of the lawsuit with the third party.

8. Under the contract between Lorin Pennington and Allstate Indemnity Company, Mr. Pennington may be required to take medical examinations by physicians Allstate chooses, as often as Allstate reasonably requires. The court concludes Attorney Wilson engaged in obstructionist conduct to avoid or delay the medical examination by Allstate's doctor.

9. Under the contract between Lorin Pennington and Allstate Insurance Company, Mr. Pennington was to cooperate with Allstate in the investigation, settlement and defense of any claim or lawsuit. If Allstate asked, Mr. Pennington must also help Allstate obtain payment from anyone else who may be jointly responsible. Plaintiff failed to even inform Allstate by written notice of the time, place and circumstances of the accident thereby extinguishing Allstate's ability to fully investigate the accident and the treatment being received by Mr. Pennington.

10. Under the contract between Lorin Pennington and Allstate Insurance Company, Allstate cannot be obligated if Mr. Pennington voluntarily takes any action or makes any payments other than for covered expenses.

11. The court concludes that the expenses charged by Dr. Taylor were appropriate, and the recommendations and treatment plan established by Dr. Taylor was a standard and proper treatment plan reasonable for this type of cervical strain injury and had his recommendation been followed, this injury would have probably been resolved as soon, or sooner, (because of unnecessary and apparently damagingly stressful chiropractic manipulations) as if he had not obtained treatment from numerous other medical providers.

12. The court concludes that the normal treatment for Mr. Pennington's injury would have been exercise, rest, ice and heat, a pain medication and/or muscle relaxant medication, and possibly massage therapy and/or physical therapy, and possibly a special pillow.

13. The court specifically concludes that this type of injury usually resolves itself in about six to ten weeks, and time is probably the most important factor in this healing process.

14. The court further concludes that the further medical treatment obtained by plaintiff, beyond that recommended by Dr. Taylor, was not only unreasonable and unnecessary, but some of that treatment was given for areas of the body not injured in the accident, and certain treatment probably increased plaintiff's pain and was the cause of increased discomfort, (if indeed, same was experienced) above that caused by the June 18th accident.

15. Dr. Nord performed an independent medical examination on Lorin Pennington, on September 28, 1993, and reviewed his treatment history, for the insurance company. He found no physical ailments relating to the accident of June 18, 1993. He concluded there had been an uncomplicated cervical strain which appeared fully resolved

16. Dr. Nathaniel M. Nord is a qualified expert to testify concerning neurology having over 25 years of experience in neurology. This court concludes his medical examination and testimony, although hired by Allstate, was objective, and professionally supported

17. Dr. Nord testified that Dr. Taylor's treatment of Lorin Pennington was reasonable.

18. The court concludes that rather than continue with Dr. Taylor, Mr. Pennington chose to 'shop' for other medical providers for

the purpose of increasing his medical expenses so he could exceed the \$3,000 PIP amounts in order to justify pursuing a personal injury claim against the other driver pursuant to Utah Code Ann. §31A-22-309 (1953 as amended).

19. From the time of injury in mid-June, 1993, until treatment was completed about August 26, 1993, plaintiff saw at least four different medical doctors, about five different chiropractors, had x-rays taken which involved an x-ray technician and had a MRI performed which involved a MRI technician and at least two medical doctors were apparently involved in the reading of those results, two physical therapists and a massage therapist, for a minimum of 12 different medical providers. With the exception of the medical treatment obtained by the plaintiff from Dr. Paul Taylor, the treatment, x-rays, and MRI, received from these additional health care providers was unreasonable and unnecessary treatment received by the plaintiff (which may have caused increased discomfort and harm and included treatment unrelated to the cervical strain) by which the plaintiff incurred unnecessary medical expenses.

20. This court concludes that because Allstate paid several claims submitted to it for unnecessary and unreasonable treatment, those payments are not considered by the court as estoppel, acquiescence, or agreement that those expenses were necessary and reasonable.

21. The court further concludes that in this case, plaintiff's purpose was to deceive the medical providers as well as the insurance carrier and just because he was somewhat successful some of the time, Allstate will not be punished for paying more than they should have.

22. Further, the court concludes plaintiff is estopped from having those medical providers claims against him set aside.

23. Lorin Pennington had a contract of insurance with Allstate Insurance Company. Lorin Pennington breached his contract and filed this lawsuit with a lack of good faith, and because of his breach of duty of good faith and fair dealing which he has towards his insurance company, his claims should be dismissed, and defendant Allstate should be entitled to judgment and costs.

24. This Court also has a great deal of concern about the motivation of Attorney Wilson, plaintiff's father-in-law, and motivation of plaintiff in intentionally incurring unnecessary medical treatment and engaging in conduct to run up unnecessary medical bills and have Allstate pay those bills. This Court finds that Attorney Wilson and plaintiff filed this lawsuit with a lack of good faith and the filing of this lawsuit was an abusive use of the courts.

25. The court concludes the evidence that plaintiff and his attorney filed this lawsuit with a lack of good faith and as an abusive use of the courts is supported in brief by the following findings (and others as set forth above): (a) Plaintiff's willful failure to follow a properly prescribed treatment plan initially recommended by Dr. Paul Taylor, (b) Intentional creation of unnecessary medical bills by shopping for medical providers and jumping around to numerous medical providers, (c) Inclusion among the many medical providers, a Chiropractor who happens to be Attorney Wilson's personal chiropractor and a long time acquaintance, (d) Willful exaggeration of symptoms in order to make Plaintiff's injury seem more severe than it was, (e) Intentionally 'creating' medical bills for the purpose of exceeding the

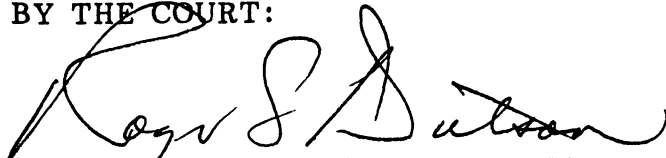
\$3,000 PIP cap under Utah Law in order to then pursue a Personal Injury claim and thereby receiving a several thousand dollar's settlement against the other driver, (f) Lack of objective findings to support any injury or treatment beyond that originally diagnosed and recommended by Dr. Taylor, (g) Failure of the plaintiff or Attorney Wilson to notify Allstate of the filing and settlement of the claim against the other driver, as required by the insurance contract and attorney ethics, (h) Questionable conduct by Attorney Wilson in attempting to obtain releases from medical providers and at least implying to those medical providers that he would protect their interests as much as they could expect their claims to be protected in a lawsuit, even though he was suing those same medical providers. The court finds there was an attempt by Attorney Wilson to force Allstate to pay unnecessary and unreasonable expenses incurred by plaintiff, (i) Obstructionist conduct by Attorney Wilson to avoid or delay medical examination by Allstate's doctor, (j) Attorney Wilson's strong assertion throughout this case that he was entitled to several thousands of dollars in attorney's fees under the PIP statute for bringing this action, while he knew or should have known most of the medical expenses and treatment were unreasonable.

Accordingly, based upon this Court's Findings of Fact and Conclusions of Law, plaintiff's claims should be dismissed and Allstate entitled to judgment and Order of Dismissal with prejudice and costs. Evidence of charges for the experts and professionals called by Allstate is accepted by this Court as reasonable charges and should be included as costs payable by plaintiff.

This court reserved some issues on motions by plaintiff and all those issues are herewith resolved by these Findings of Fact and Conclusions of Law and Order of Judgment herein.

DATED this 22<sup>nd</sup> day of ~~December~~ <sup>January</sup> 1997.

BY THE COURT:

  
Honorable Roger S. Dutson  
Acting District Court Judge

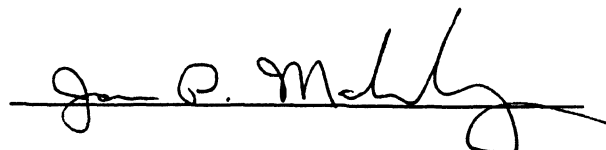
#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was mailed to the plaintiff's counsel on this 18<sup>th</sup> day of December, 1996.

Dan Wilson  
290 - 25th Street, Suite #204  
Ogden, UT 84401

Original to:  
Clerk of the Court  
SECOND JUDICIAL DISTRICT COURT  
2549 Washington Blvd.,  
Ogden, UT 84401

Courtesy copy:  
Honorable Roger S. Dutson  
SECOND JUDICIAL DISTRICT COURT  
2549 Washington Blvd.  
Ogden, UT 84401





# Addendum N

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**IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH  
WEBER COUNTY, OGDEN DEPARTMENT**

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SECOND DISTRICT COURT  
'97 JAN 24 PM 2 30

LORIN PENNINGTON,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,  
Et al.

Defendant.

JUDGMENT AND ORDER OF  
DISMISSAL (AS TO LIABILITY),  
ATTORNEYS FEES AND COSTS

Case No. 940900042 CN  
Honorable Roger S. Dutson

SECOND DISTRICT COURT  
'97 JAN 24 PM 2 30

JAN 27 1997

This action came on for trial before the above entitled Honorable Roger S. Dutson, District Judge of the above entitled court on February 22, 1996, and continued on several different dates, finishing mid-March, 1996. Trial was held on the issue of Allstate Insurance Company's liability to the plaintiff based upon Allstate's decision to not pay to their insured plaintiff or his medical providers a remaining amount available of \$1,305.41 under the PIP statute for treatment Plaintiff had obtained after an automobile accident. The plaintiff also sued the medical providers, asserting their treatment was unreasonable and expenses unnecessary. The plaintiff requested the court to determine if the plaintiff's treatment and expenses were reasonable and necessary pursuant to Utah Code Annotated Section 31A-22-307 (1953 as amended) and pursuant to the contract between Mr. Pennington and Allstate. The plaintiff prayed for judgment against Allstate for the unpaid reasonable or necessary expenses plus attorney's fees, costs, and interest because of Allstate's failure to pay under this statute and contract of insurance. In the alternative, the plaintiff asked for a judgment against the medical providers who treated him, alleging the treatment was unreasonable or the charges unnecessary.

The issue of attorney fees was bifurcated prior to trial. Subsequent to trial, Defendant Allstate filed a Motion for Summary Judgment for Attorneys fees, and after reviewing said motion and Plaintiff's response thereto, the court is awarding attorneys fees pursuant to UCA 78-27-56 and believes UCA 78-27-56.5 may apply as well.

Prior to the trial on this matter, the medical providers had been dismissed from the case by order and stipulation, though shortly after that was done, Plaintiff objected to the dismissal, claiming a substitute attorney from Plaintiff attorneys office should not have entered that stipulation, and the court reserved the right to revisit that issue if or after factual findings determined such to be justified.

The court having reviewed the volumes of evidence produced, his extensive personal notes taken during several days of trials and hearings, all exhibits in evidence, documents filed by each side, including numerous memorandum, and having carefully observed the demeanor of witnesses during the testimony and having reached conclusions as to the truthfulness and untruthfulness of these witnesses, has entered Findings of Facts and Conclusions of Law. The court has noted that although the amounts claimed under the PIP statute were relatively small, there were serious collateral issues involved in the case, including large claimed amounts for attorneys fees, the conduct of attorney Dan Wilson and the plaintiff's misconduct. The court is also concerned that although the court deliberated extensively in this case, because of it's complexity, it rendered it's Memorandum Decision on May 31, 1996, that substantial delays thereafter have been occasioned by Defendant's attorney. The court is aware that Attorney Malmberg has been in poor health, but there may still remain some issues to be resolved and

if Attorney Malmberg is unable to speedily respond to all matters requiring her response, she is directed to immediately notify her client or otherwise have substitute counsel respond in a timely manner.

Therefore, the court being fully advised in the premises:

**IT IS HEREBY ORDERED AND ADJUDGED:**

All Plaintiff's claims against Defendant Allstate are hereby dismissed with prejudice, and Judgment is entered in favor of Defendant Allstate, including costs.

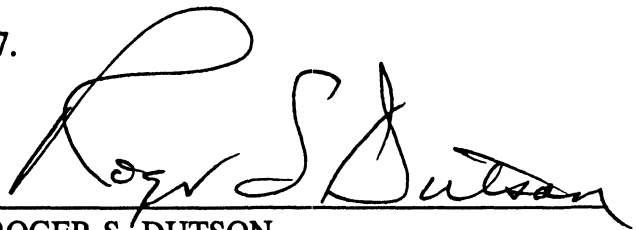
**IT IS HEREBY FURTHER ORDERED AND ADJUDGED** that because of Plaintiff Pennington's misconduct in bringing this spurious action, without merit and not in good faith, Defendant Allstate Insurance is awarded Judgment against Plaintiff for attorney's fees in the amount of \$15,000.00, which the court finds to be a reasonable amount for defending this action. The amount claimed is substantially reduced from the amount claimed by Defendant Allstate, as the court believes excessive time was spent by Attorney for Defendant Allstate on this matter, although it recognized the amount per hour claimed was less than often charged by attorneys. Additionally, there were some unnecessary motions and pleadings filed by the defendant and some work for research of the law and superfluous reviews of documents which should not be counted.

**IT IS FURTHER ORDERED AND ADJUDGED** that costs are hereby awarded in favor of Allstate Insurance Company as set forth in the Memorandum Decision of the court dated 10/3/97. Additional costs are claimed in the Amended Memorandum of Costs filed with the court on 12/19/97, and Plaintiff may have 10 days from the date of receipt of this Order to

object or such additional costs set forth therein will be granted.

IT IS FURTHER ORDERED AND ADJUDGED that all Motions, Objections and issues not previously ruled on, or that have heretofore been reserved, are ruled on by these Findings, Conclusions and Order.

DATED this 22<sup>nd</sup> day of January, 1997.

  
\_\_\_\_\_  
ROGER S. DUTSON  
DISTRICT COURT JUDGE

#### CERTIFICATE OF MAILING

I HEREBY certify that I mailed a true and correct copy of the foregoing Judgment and Order (as to liability), Attorney Fee's, and Costs by first class mail, postage pre-paid, to the following parties this \_\_\_\_ day of January, 1997:

DANIEL L. WILSON  
Attorney for Plaintiff  
290 25th Street  
Suite 204  
Ogden, UT 84401

JAN P. MALMBERG  
Attorney for Defendant  
29 West 100 North  
Logan, UT 84321

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DEPUTY COURT CLERK