

2002

Linda Gillman v. Lowell H. Isom : Brief of Appellee

Utah Court of Appeals

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Duane H. Gillman; McDowell and Gillman, P.C.; Attorneys for Plaintiff/Appellant.

Robert H. Henderson; Attorney for Defendant/Appellee.

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IN THE UTAH COURT OF APPEALS

LINDA GILLMAN,

Plaintiff and Appellant,

vs.

LOWELL H. ISOM,

Defendant and Appellee.

Third District Case No. 000907532

Appeal No. 20020755-CA

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT ENTERED ON A JURY SPECIAL
VERDICT IN THE THIRD JUDICIAL DISTRICT COURT, THE
HON. JUDGE WILLIAM B. BOHLING PRESIDING

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FILED
Court of Appeals

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LINDA GILLMAN,

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1. List of all Parties

All parties to the proceeding are identified in the caption.

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4. Statement of Jurisdiction

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

5. Statement of Issues and Standard of Review

First Issue: is Gillman entitled to a double recovery for the \$3,565.47 in medical no-fault, personal injury protection (“PIP”) benefits she had already received from her own automobile insurance company prior to the trial?

Standard of Review for First Issue: a trial court’s conclusion of law in a civil case is reviewed for correctness. *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 885 (Utah 1993).

Second Issue: may a litigant recover costs under Rule 54 of the Utah Rules of Civil Procedure if one has not complied with Rule 54?

Standard of Review for Second Issue: two standards of review apply to this issue. First, correctness, as in the First Issue. Second, even if the trial judge was incorrect that costs may not be awarded as a matter of law in the absence of timely compliance with Rule 54, did the judge abuse his discretion in declining to award costs? *Lyon v. Burton*, 5P3d 616, 637 (Utah 2000).

Third Issue: should the sanctity of the jury deliberation room be violated based on mere speculation and in the absence of any facts remotely approaching

Bishop v. Gen Tec Inc., 48 P.3d 218 (Utah 2002)?

Standard of Review for Third Issue: whether a trial court should grant a post-trial motion to amend a judgment is discretionary, and the standard of review is abuse of discretion. *Gillmor v. Wright*, 850P.2d 431, 434-36 (Utah 1993); *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982)

6. Constitutional Provisions, Statutes, Ordinances, Rules and Regulations

Rule 54(d)(2) of the Utah Rules of Civil Procedure is determinative on the issue of costs. It states:

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 . . .

7. Statement of the Case

A. Nature of the Case, Course of Proceedings, and Disposition Below

Gillman was involved in a motor vehicle intersection accident with defendant Isom. Gillman received minor injuries. Gillman had her own automobile insurance policy that provided the no-fault Personal Injury Protection (“PIP”) benefits required by the State of Utah. Gillman treated with medical care providers of her choice, and Gillman duly received \$3565.47 in PIP benefits from

her own insurer. Gillman then sued Isom. The case was tried to a jury. The trial judge allowed Gillman to put into evidence all of her medical special damages evidence, including the \$3565.47. After a three day trial, the jury returned its Special Verdict finding Gillman 10% at fault, and awarding her \$5126.00 in medical special damages and \$10,000.00 in general damages. Pursuant to Isom's motion, and also pursuant to the agreement of Gillman's trial lawyer, the judge then reduced the medical special damage award by the \$3565.47 in PIP benefits Gillman had already received. The judge also reduced the Special Verdict by 10% for Gillman's 10% comparative fault as determined by the jury, resulting in the entry of a Judgment in the amount of \$10,047.93. Gillman failed to file a timely verified memorandum of costs, fatal under Utah law to any award of costs, and the trial judge did not award costs. Gillman appealed.

B. Statement of Facts

Gillman was involved in a motor vehicle intersection accident with defendant Isom. R.,1-3. Gillman received minor injuries, had her own automobile insurance policy that provided the no-fault PIP benefits required by the State of Utah, treated with medical care providers of her choice, and duly received \$3565.47 in PIP benefits from her own insurer. R. 140-148. Gillman then sued Isom. The case was tried to a jury. The trial judge allowed Gillman to put into

evidence all of her medical special damages evidence, including the \$3565.47.

After a three day trial, the jury returned its Special Verdict finding Gillman 10% at fault, and awarding her \$5,126.00 in medical special damages and \$10,000.00 in general damages. R.,273-275. Pursuant to Isom's motion, and also pursuant to the agreement of Gillman's trial lawyer, the judge reduced the medical special damage award by the \$3565.47 in PIP benefits Gillman had already received.

R.,140-148, 277-279, and 430, pp. 11-12. The judge also reduced the Special Verdict by 10% for Gillman's 10% comparative fault as determined by the jury, resulting in the entry of a Judgment in the amount of \$10,047.93. R.,277-279.

Gillman failed to file a timely verified memorandum of costs, fatal under Utah law to any award of costs, and the trial judge did not award costs. R., 287-288.

8. Summary of Argument

More than twenty years of Utah no-fault PIP cases clearly establish that Gillman is not entitled to a double recovery from Isom for the no-fault PIP benefits she has already received from her own automobile insurance policy.

Failure to file a timely verified memorandum of costs is fatal under Utah law to any award of costs, and Gillman's memorandum was untimely. In any event, the trial judge did not abuse his discretion in declining to award costs.

Gillman fails to approach the *Bishop v. Gen Tec* rationale for invading the

sanctity of the jury deliberation room. Gillman, unlike Bishop, has not produced an iota of evidence that the Special Verdict reflects anything other than exactly what the jury meant to award Gillman

9. Argument

POINT I

GILLMAN IS NOT ENTITLED TO A DOUBLE RECOVERY FOR THE \$3565.47 IN NO-FAULT PIP BENEFITS SHE PREVIOUSLY RECEIVED.

Allstate Insurance Co. v. Ivie, 606 P.2d 1197 (Utah 1980), held that a tortfeasor is not personally liable to the no-fault injured insured for special damages previously compensated by PIP benefits from the no-fault insurer, and that the injured party should, therefore, not be allowed to plead for those damages against the tortfeasor.

In *Bear River Mut. Ins. Co. v. Wall*, 937 P.2d 1282, 1287-1291, (Utah App. 1997), the Court discussed thoroughly the basic anti double recovery proposition of *Allstate* and the numerous cases that reaffirmed it including, for example, *Dupuis v. Nielson*, 624 P. 2d 685, 686 (Utah 1981), and *Laub v. South Cent. Utah Tel. Ass'n* 657 P.2d 1304 (Utah 1982). The holding of *Allstate* is “predicated upon the proposition that a basic principle of the No-Fault Act is to prevent double recovery

by the no-fault insured,” (*Dupuis, supra*, at 686), and “thus to avoid increased costs of insurance coverage” (*Laub, supra*, at 1309).

Laub 657 P.2d 1304 (Utah 1982), not only vigorously reaffirmed the holding of *Allstate*, it also strenuously emphasized that an injured plaintiff “should therefore not be allowed even to plead for (special damages previously compensated by PIP benefits from the no-fault insurer),” (*Laub* at 1307), and that pleading for previously compensated damages is improper and that a judgment should never include the previously compensated benefits.

Now, on appeal, Gillman argues, for the first time, that the 1985 revision of the insurance code overrules *Ivie* and its progeny. Gillman argues that the pre 1985 subparagraph (2) of old Section 31-41-9 does not appear in the 1985 reenacted Section 31A-22-309, and that, according to Gillman, this somehow reverses twenty years of appellate court decisions. Gillman’s argument ignores the fact that the very subparagraph (2) of old Section 31-41-9 upon which Gillman’s argument relies still appears in the reenacted insurance code at Section 41-12a-304. Moreover, it is troubling that Gillman’s new argument now ignores specific language of *Bear River v. Wall*, a case Gillman cited to the trial judge in Gillman’s Memorandum in Support of Motion to Amend Judgment, R.,301. In fact, *Bear River v. Wall*, cited by Gillman below, but not here, addresses and rejects the very argument Gillman now

makes.

First, at footnote 6 on page 1287, *Bear River v. Wall* points out that the old subparagraph (2) of old Section 31-41-9 now appears, substantially identical, in Section 41-12a-304.

Second, at footnote 3 on page 1285, *Bear River v. Wall*, a 1997 case, specifically states that supreme court cases following the 1985 reenactment of the No-Fault Insurance Act “have not interpreted the current provisions of the statute at issue differently from the former provisions.”

Third, at page 1291, in 1997, 12 years after the 1985 reenactment of the insurance code, the *Bear River v. Wall* court still recognized the principle that the tortfeasor is not personally liable for PIP benefits, and that the purpose of the no-fault statute is to prevent double recovery.

Indeed, *Bear River*, at footnote 13 on page 1290, quotes *Laub* at 1307:

the injured party should therefore not be allowed even to plead for [PIP benefits]. However, if a plaintiff does improperly plead for previously compensated damages and they are allowed to be included in the judgement, the court should . . . reduce the judgment by the amount of those previously compensated damages, and thereby prevent double recovery.

Given *Allstate* and its progeny, the trial judge was quite correct in not allowing Gillman a double recovery for the \$3,565.47 in PIP benefits that she had

undisputedly received.

Gillman is in a bad equity position to complain. The trial judge gave Gillman a break by allowing her to put on evidence of the \$3565.47, which undoubtedly drove up the pain and suffering, general damages award, before the judge reduced the verdict by the \$3565.47 in special damages. Gillman's trial lawyer lodged no objection to the specific verdict reduction recitals in the proposed Judgement on Special Verdict before it was entered, nor is there any evidence from Gillman's trial lawyer that this was not the way the judge and counsel agreed to handle the matter. R., 430 at pages 11-12. (Gillman's lawyer on appeal, her husband, did not participate in the trial as a lawyer, but, rather, as a witness for his wife.) The trial judge was perfectly free to grant the set off at any point, and the Judgement on Special Verdict reflects precisely what the judge did, as does the Order Denying Plaintiff's Motion to Amend Judgment.

POINT II

GILLMAN IS NOT ENTITLED TO
COSTS BECAUSE GILLMAN DID NOT
COMPLY WITH RULE 54 (d)(2). IN ANY
EVENT, THE TRIAL JUDGE DID NOT ABUSE HIS
DISCRETION IN NOT AWARDING COSTS.

Rule 54(d)(2) of the Utah Rules of Civil Procedure is the applicable rule. It

requires a party who claims costs to, within 5 days of Entry of Judgment (the trial judge signed the Judgment on April 26, 2002 and the Judgment was entered on April 29, 2002) “file with the court [a memorandum of costs] duly verified” (emphasis added). In this case, no verified memorandum was filed until well after the 5 day window provided by Rule 54(d)(2). Indeed, on May 13, 2002, Isom filed a Memorandum in Support of Motion to Have Costs Taxed By Court (R., 340-343) that stated:

POINT I

PLAINTIFF IS NOT ENTITLED TO ANY
COSTS BECAUSE PLAINTIFF HAS NOT
COMPLIED WITH RULE 54(d)(2).

Although Gillman’s’s initial offering was captioned “Verified,” it was not verified, nor was there an “affiant” as required by the rule. R., 287-288; Addendum Exhibit 2. Moreover, Gillman admitted to the trial court she had not complied with the rule when, on May 21, 2002, Gillman, in her Reply in Support of Motion to Amend Judgement, told the judge she had “amended the Verified Memorandum of Costs . . . to add a verification page. An oversight was made in the original . . . which has since been corrected.” R., 377. It was only after May 13, long after the 5 day window closed, that Gillman belatedly complied with the rule. Therefore, having failed to timely comply with the applicable rule, Gillman was not entitled to

any costs. *Lyon v. Burton*, 5 P. 3d 616 (Utah 2000), held that compliance with the rule is mandatory and leaves no discretion to the trial judge.

Finally, in any event, it has long been the rule that even if there has been compliance with Rule 54(d)(2), the awarding of costs is discretionary with the trial judge. *Lyon v. Burton* at 637. Gillman has presented no evidence that the trial judge abused his discretion. At pages 21-22 of her Brief, Gillman argues Isom did not dispute any of her costs except the mediation. This simply ignores the record, not only what is mentioned above, but also the transcript of the hearing on the post trial motions, R., 430, wherein, at page 10, Isom made both the Rule 54 (d)(2) argument and opposed deposition costs.

POINT III

GILLMAN'S *BISHOP V. GEN TEC* ARGUMENT
IS INCORRECT. THERE WAS NO DOUBLE
REDUCTION FOR GILLMAN'S OWN FAULT.
GILLMAN'S CLAIM THAT THE JURY REDUCED
HER DAMAGES BY HER 10% COMPARATIVE
NEGLIGENCE IS PURE SPECULATION.

Gillman's claim here is, apparently, that based upon the jury's question, which was not objected to at the time, "Do we account for the effect of joint negligence or does the Court," that the jury somehow, on its own, contrary to the instructions that it had been given, reduced the plaintiff's award by 10% when it

answered the questions on the Special Verdict. This, however, is pure speculation. Before the jury started to deliberate, the judge instructed the jury with no objection from Gillman. When the jury sent out its question, the judge instructed the jury, again with no objection from Gillman, in response to the jury's question, "Please complete the Special Verdict Form exactly as written, in accordance with your answers as you proceed through the form." It is pure speculation that the jury reduced the damages by 10% when it answered the questions on the Special Verdict Form. It is more likely the jury followed the Court's instructions. The \$10,000 award evidences that the jury did not reduce by 10%. \$11,111 is an odd number, but if the jury had reduced by 10%, \$11,111.11 would have had to be the jury's number for the jury to, as Gillman now speculates, reduce by 10% on its own. This too, is pure speculation, but evidences the quagmire we venture into if we go by anything other than the Special Verdict.

Gillman fails to approach the *Bishop v. Gen Tec* rationale for invading the sanctity of the jury deliberation room. Gillman, unlike Bishop, produced not an iota of evidence that the Special Verdict reflects anything other than exactly what the jury meant to award Gillman.

Also, in our pending case, unlike *Bishop*, the mathematics defeat Gillman's wish for more money. In *Bishop*, the verdict form awarded Bishop \$750,000 for

general damages and found Bishop 25% at fault. Bishop's lawyer, Mr. Young, then came forward with affidavits from three jurors, including the foreperson, that the jury found Bishop's general damages to be \$1,000,000, and that the jury already reduced the general damages by 25% of fault, thus resulting in the \$750,000 the jury wrote in on the verdict form.

In our pending case, the jury awarded Gillman \$10,000 in general damages, and found her to be 10% at fault. Gillman, unlike Bishop, has not come forward with a single affidavit. The mathematics supported Bishop's argument. Not so for Gillman. For Gillman's argument to work that the jury already reduced Gillman's award for her percentage of fault and that the judge did it a second time, the jury's raw number for general damages would have to have been \$11,111.11, a very strange number for general damages indeed.

10. Conclusion Stating Precise Relief Sought

All of the arguments Gillman raises on appeal have no merit. The Judgment should be affirmed in all respects.

DATED this 6th day of MARCH, 2003.

By Robert H. Henderson
Robert H. Henderson
Attorney for Defendant and Appellee

Addendum

- A. Judgment on Special Verdict
- B. Verified(sic) Memorandum of Cost(sic)
- C. Order Denying Plaintiff's Motion to Amend Judgement

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ADDENDUM EXHIBIT 1

16th DISTRICT COURT
3rd Judicial District

APR 04 2002

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LINDA GILLMAN,	:	SPECIAL VERDICT
Plaintiff,	:	CASE NO. 000907532
vs.	:	
LOWELL H. ISOM,	:	
Defendant.	:	Judge William B. Bohling

MEMBERS OF THE JURY:

Please answer the following questions. If six of you are persuaded by the evidence in favor of the question presented, answer it "yes." If, on the question, six of you are not so persuaded, or if you are persuaded by the evidence against the question presented, answer it "no."

1. Was the defendant negligent?

ANSWER: Yes / No

(If you answered No. 1 above "no," then go no further and return to the courtroom.)

2. If you answered No. 1 above "yes," was such negligence a proximate cause of the accident?

ANSWER: Yes ✓ No

(If you answered No. 2 above "no," then go no further and return to the courtroom.)

3. Was the plaintiff negligent?

ANSWER: Yes ✓ No

4. If you answered No. 3 above "yes," was such negligence a proximate cause of the accident?

ANSWER: Yes ✓ No

5. If you answered "yes" to Nos. 1, 2, 3, and 4 above, then what percentage of the negligence should be allocated to defendant, and what percentage of negligence should be allocated to plaintiff?

Plaintiff 10 %

Defendant 90 %

(Total must equal 100%)

6. What amount would fairly compensate plaintiff for the injuries proximately caused by the accident?

Special Damages

\$ 2126⁰⁰

General Damages

\$ 10,000⁰⁰

Dated this 4 day of April, 2002.

Chas. B. Zipes
JURY FOREPERSON

ADDENDUM EXHIBIT 2

Duane H. Gillman, #1194
Leslie J. Randolph, #5009
McDOWELL & GILLMAN, P.C.
Twelfth Floor
50 West Broadway, Suite 1200
Salt Lake City, UT 84101
Telephone (801) 359-3500

Attorneys for Plaintiff

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LINDA GILLMAN,)	
Plaintiff,)	VERIFIED MEMORANDUM OF COST
)	
v.)	
)	
)	Case No. 00907532
LOWELL H. ISOM,)	
Defendant.)	The Honorable Judge W. Bohling
)	

STATE OF UTAH)
 ss
County of Salt Lake)

I, Leslie J. Randolph, being first duly sworn, depose and state as follows:

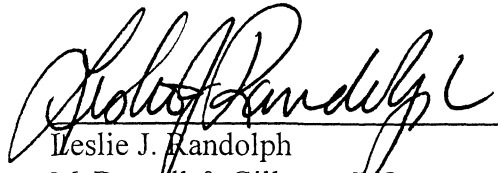
1. I am an attorney duly admitted to the Bar of the State of Utah and am a member of the Law Office of McDowell & Gillman, P.C., attorneys for the plaintiff in this action.
2. I am informed and believe that the following costs and disbursements are correct

and have been necessarily incurred in this action:

- (a). Filing Fees (complaint) \$120.00
- (b). Jury Demand Fee \$50.00
- (c). Constable Service Complaint \$35.00
- (d). Deposition Transcript \$384.35.
- (e). Witness fee & Mileage (Dr. States) \$24.11
- (f). Court Ordered Mediation \$250.00

TOTAL \$ 863.43


DATED this 3rd day of May 2002.


Leslie J. Randolph
McDowell & Gillman, P.C.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2002, I did deliver by U.S. Mail, first class postage prepaid, a true and correct copy of the foregoing motion to the following person(s):

Robert H. Henderson
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145


McDowell & Gillman, P.C.

ADDENDUM EXHIBIT 3

ROBERT H. HENDERSON (A1461)
Attorney for Defendant
191 North Canyon Road
Post Office Box 112350
Salt Lake City, Utah 84147
Telephone (801) 355-1574
Facsimile (801) 355-1582

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

LINDA GILLMAN, Plaintiff,

vs

LOWELL H. ISOM, Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION TO AMEND JUDGEMENT**

Judge William L. Bohling

Civil No. 000907532

Plaintiff's Motion to Amend Judgment came on regularly for a hearing on July 25, 2002. The parties were represented by their counsel of record. The court had reviewed the memoranda and fully heard the argument of counsel. The court is of the opinion that a plaintiff may not "double dip" for no-fault benefits previously received, that there is no evidence the jury applied the 10% reduction for plaintiff's fault to its damage award, and the court uses its discretion to deny any award of costs in this case. Based thereon, now, therefore, it is hereby ordered that the Motion to Amend Judgment be, and hereby is denied.

Dated this 13th day of August, 2002.

BY THE COURT.

/s/_____

District Court Judge

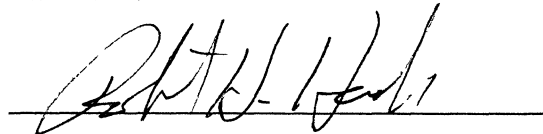
MAILING CERTIFICATE

I hereby certify that I served the attached **Order Denying Motion To Amend Judgement**
(Case Number 907532, in the Third Judicial District Court in and for Salt Lake County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Duane H. Gillman

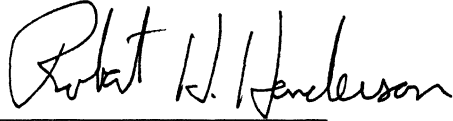
McDowell & Gillman, P.C.
Twelfth Floor
50 West Broadway
Salt Lake City, Utah 84101
Attorneys for Plaintiff

and mailed first class, postage prepaid, on the 25th day of July, 2002.

A handwritten signature in black ink, appearing to read "Duane H. Gillman", is written over a horizontal line.

HAND DELIVERY CERTIFICATE

I, Robert H. Henderson, hereby certify that on March 6, 2003 I personally hand delivered two true and correct copies of the forgoing BRIEF OF APPELLEE to counsel for appellant by personally delivering them to his office in an envelope addressed Duane H. Gillman, counsel for Linda Gillman, at 50 West Broadway, Suite 1200, Salt Lake City, Utah 84101.

A handwritten signature in black ink, reading "Robert H. Henderson". The signature is written in a cursive style with a large initial "R" and "H".

ROBERT H. HENDERSON
Attorney for Defendant/Appellee