

2002

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

Utah Court of Appeals

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BIVEL

IN THE UTAH COURT OF APPEALS

LINDA GILLMAN,
Plaintiff/Appellant,

vs.

LOWELL H. ISOM,
Defendant/ Appellee

Appellate Court No. 20020755-CA

BRIEF OF APPELLANT

APPEAL FROM THE AUGUST 13, 2002 ORDER OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY UTAH DENYING PLAINTIFF'S
MOTION TO AMEND JUDGEMENT, HONORABLE WILLIAM L. BOLDING,
DISTRICT JUDGE CIVIL NO. 00907532

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JURISDICTION

This case is on appeal from a final order entered August 13, 2002 by Judge William L. Bohling, Third Judicial District Court in and for Salt Lake County, State of Utah. Jurisdiction of this appellate Court is appropriate under Utah Code Ann. §78-2A-3(2)(j)(2001). The Supreme Court of Utah transferred these proceedings to the Appeal Court by order dated October 23, 2002, pursuant Utah Code Ann. §78-2-2(4)(2001).

ISSUES PRESENTED FOR REVIEW

1. Under the governing language of Utah Code Ann. §31-A-309(1)(b)(1985), did the trial Court err by refusing to grant Appellant's motion to amend judgment by eliminating the offset of personal injury protection [PIP] benefits against the special damages award?

Standard of Review:

The trial Court's ruling allowing the PIP benefit offset against the special damages award is a decision on statutory construction which must be reviewed by the Court of Appeals for correctness, for which the trial Court's conclusions of law are given no difference. *See Newspaper Agency Corp. v. Audit Division*, 938 P.2d 266, 267 (Utah 1997).

2. Did the trial Court err in refusing to grant Appellant's motion to amend the judgement to eliminate the double application of the 10% reduction for contributory

negligence from Plaintiff's award of damages, where evidence substantiated the jury had already applied the reduction?

Standard of Review:

This issue presents mixed questions of law and fact that must be reviewed for abuse of discretion in applying the law to the facts. *See Woodhaven Apartments v. Washington*, 942 P.2d 918, 920 (Utah 1997).

3. Did the trial Court err in refusing to grant Plaintiff's costs?

Standard of Review:

The trial Court decision regarding costs is reviewed under an abuse of discretion standard. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 432 Utah Adv. Reporter 44-P.3d-(Utah 2001).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE TO THE APPEAL

The prevailing statutory basis in this case is the no-fault section of the insurance code. Previous case law precedent was based on the original no-fault statute adopted by the Utah Legislature in 1973. The entire insurance code, including its no-fault provisions, was repealed in 1985 and replaced with the current code. Changes in the current no-fault provisions of the insurance code dissolved the statutory basis for treatment of personal injury protection [PIP] benefits, a core issue in this case. Both the 1973 code (repealed) and the 1985 code, as subsequently amended, are quoted below for ease of comparing the differences.

Previous Insurance Code

Utah Code Ann. § 31-41-9(2) (1973)

(1) No person for whom direct benefit coverage is provided for in this act shall be allowed to maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident except where there has been caused by this accident any one or more of the following:

- (a) Death;
- (b) Dismemberment fracture;
- (c) Permanent disability;
- (d) Permanent disfigurement;
- or,
- (e) Medical expenses to a person in excess of \$500.

(2) The owner of a motor vehicle with respect to which security is required by this act who fails to have such security in effect at the time of an accident shall have no immunity from tort liability and shall be personally liable for the payment of the benefits provided under section 6 of this act.

Current Insurance Code

Utah Code Ann §31A-22-309 (2001)

(1)(a) 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 caused by an automobile accident, except where the person has sustained one or more of the following:

- (i) death;
- (ii) dismemberment;
- (iii) permanent disability or permanent impairment based upon objective findings;
- (iv) permanent disfigurement;
- or
- (v) medical expenses to a person in excess of \$3,000.

(b) Subsection (1)(a) does not apply to persons making an uninsured motorist claim.

(2)(a) An insurer issuing personal injury protection coverage under this part may only exclude . . . & *etc.*

Neither the language nor the substance in paragraph 2 (above) of the 1973 no-fault code appears anywhere else in the current insurance statute.

STATEMENT OF THE CASE

A. INTRODUCTION

The complaint in this case, filed September 22, 2000, sought damages for the Plaintiff's suffering and medical expenses incurred in an August 28, 1997 automobile accident caused by the Defendant, who turned his automobile left in front of the plaintiff, failing to yield and causing the collision.

B. SUMMARY OF THE PROCEEDINGS BELOW

The case was tried to a jury April 2-4, 2000. The jury returned its special verdict, awarding special damages in the amount of \$5,126 and general damages in the amount of \$10,000. The Court first reduced both the special damages and general damages by 10% based upon the jury verdict assigning Plaintiff contributory negligence of 10%. The Court then offset the special damages by an additional \$3,565.47, the amount that the Plaintiff had received in PIP benefits. Judgement was ultimately entered on April 29, 2000 in favor of the Plaintiff and against the Defendant in the amount of \$10,047.93. On May 6, 2000 the Plaintiff filed a motion to amend the judgement. After briefing and oral argument, the trial Court denied the Plaintiff's motion to amend the judgement, pursuant to an order entered on August 14, 2002. The Plaintiff filed a notice of appeal on September 10, 2002.

C. STATEMENT OF THE FACTS

1. On August 28, 1997, Plaintiff was traveling west on 1300 South in Salt Lake City, Utah, approaching the 900 West intersection. Defendant was eastbound on 1300 South, positioned in the left turning lane at 900 West. Plaintiff had the right-of-way as she entered the 900 West intersection, but Defendant turned immediately in front of her, causing their vehicles to collide. Plaintiff sustained injuries; her car was a total loss.

2. At trial, Plaintiff established that she had incurred medical expenses of \$3,565.47. The Defendant, Lowell Isom, paid no portion of that amount.

3. On April 3, 2002, the jury received its instructions (Addendum, Exhibit 1), and the special verdict form (Addendum, Exhibit 2) from the Court.

4. At noon on April 4th, the jury submitted a note to the Court during deliberations, which said: "Do we account for the effect of joint negligence or does the Court?" (Addendum, Exhibit 3)

5. The Court answered this note, stating: "Please complete the special verdict form exactly as written in accordance with your answers as you proceed through the form." (Addendum, Exhibit 3).

6. The jury concluded its deliberations at approximately 1:10 p.m. on April 4th. The verdict divided comparative negligence between Defendant (90%) and

Plaintiff (10%). The Plaintiff was awarded \$5,126 in special damages and \$10,000 in general damages (see Addendum, Exhibit 2).

7. In the judgement, the Court applied a 10% reduction to the special damages award of \$5,126, decreasing the amount to \$4,613.40. The Court applied a 10% reduction to the general damages award of \$10,000, decreasing it to \$9,000.

8. The Court's judgement further reduced the special damages award by \$3,565.47, the amount of Plaintiff's PIP benefits, subtracting that amount from the \$4,613.40 to a final total of \$1,047.93.

9. The Court entered the judgment on April 29, 2003. Plaintiff filed a verified memorandum of costs May 3, 2001 in the amount of \$863.43.

10. After briefing and hearing, the Court denied Plaintiff's timely-filed motion to amend the judgement to recover the amount of PIP benefits in the special damages award and to recognize that the jury had already applied Plaintiff's 10% negligence allocation to its damages awards before the Court did so a second time. The Court also disallowed Plaintiff any costs.

SUMMARY OF ARGUMENT

In its ruling, the District Court relied upon the Utah Supreme Court's decision in *Allstate Insurance Company v. Ivie* 606 P.2d 1197 (Utah 1980) and the Supreme Court decision of *Dupuis v. Nielson* 624 P.2d 685 (Utah 1980). The substance of the Ivie decision allowed a grant of partial tort immunity to a tort-feasor, holding that

there was no personal liability for the PIP benefits paid by an insurer. Both decisions were based upon language of the insurance code that no longer exists. In 1985, the Utah Legislature repealed the former language of Section 31-41-9(2) of the Utah Code. The new language removed the section upon which the Court inferred in Ivie a comparable grant of partial immunity due the tort-feasor and provided no other statutory basis, either direct or implied, upon which this prior reasoning could be upheld. The Utah Legislature reversed the statutory basis of this decision. The District Court below must be reversed to conform likewise. There is no longer any foundation in the statute to justify reducing Plaintiff's special damages award by the amount of the PIP benefit.

The jury allocated to Plaintiff 10% of the negligence for the accident. The District Court failed to recognize from the evidence, that the jury had applied a 10% reduction to Plaintiff's general and special damages awards in its verdict. There are three elements to this evidence: (1) The trial Court had given the jury a clear instruction to comprehend contributory negligence in its calculation of damages awarded to Plaintiff; (2) The special verdict form followed the logical sequence of that explanation from the jury instruction; and, (3) During its deliberations, the jury sent the Court a note, specifically asking: "Do we account for the effect of joint negligence or does the Court?" The trial Court responded with this direction: "Please complete the special verdict form exactly as written, in accordance with your answers as you proceed through the form."

These are the sole elements of evidence on this issue. The jury instruction explained the principle of dividing negligence between Defendant and Plaintiff and provided a thorough example of how to calculate damages in the event of divided negligence. In its order of questions, the special verdict form provided the mechanism for the jury to determine and assign negligence on a percentage basis. Immediately following the question dividing negligence between Plaintiff (10%) and Defendant (90%) is the last question of the form: "What amount would fairly compensate plaintiff for the injuries proximately caused by the accident?" To this question, the jury filled in the amounts for special damages and general damages.

In the case of *Bishop v. GenTec, Inc*, 48 P.3d 218 (Utah 2002), the Supreme Court recognized appropriate circumstances in which a jury has already taken into account the reduction for comparative negligence in its award of damages. The jury in this case was preoccupied with its responsibility for applying the comparative negligence assigned to the Plaintiff in awarding damages. In answering the "fairly compensate Plaintiff" question of the special verdict form, the jury took into account the 10% reduction and hence under *Bishop, supra* the trial Court should not have reduced the award a second time.

The trial Court entered the judgment in Plaintiff's favor April 29, 2002. Plaintiff filed a verified memorandum of cost May 3, 2002. Included was a \$250 expense for mediation the trial Court had ordered. Defendant made no dispute of Plaintiff's costs except the \$250 for mediation. The trial Court heard argument

concerning the mediation cost at the hearing on Plaintiff's motion to amend the judgment for recovery of the PIP offset and the 10% reduction for comparative negligence. The trial Court ruled Plaintiff was not entitled to the \$250 mediation cost. In the order denying Plaintiff's motion to amend however, the Court disallowed Plaintiff all of her costs.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO AMEND THE JUDGEMENT TO ELIMINATE THE PIP OFFSET BECAUSE THE STATUTORY BASIS OF THE SUPREME COURT'S *IVIE* DECISION WAS REPEALED IN THE 1985 REPEAL OF THE INSURANCE CODE AND COMMON LAW CONFERRED NO RIGHT OF OFFSET TO DEFENDANT SINCE HE DID NOT PAY THE PIP BENEFITS.

In *Allstate Insurance Company v. Ivie*, 606 P.2d 1197 (Utah 1980) the Utah Supreme Court construed the then-existing Utah No-Fault Insurance Act to provide for the means whereby an insured tort-feasor, such as the Defendant, did not have any personal liability for payment of PIP benefits. The Court did so by the following language:

Section 2 of the act provides:

The purpose of this act is to require the payment of certain prescribed benefits in respect to motor vehicle accidents through either insurance or other approved security, but on the basis of no fault, preserving, however, the right of an injured person to pursue the customary tort claims where the most serious type of injuries occur. . .

(1) No person for whom direct benefit coverage is provided for in this act shall be allowed to maintain a cause of action for general damages arising out of personal injuries alleged to have been caused

by an automobile accident except where there has been caused by this accident anyone or more of the following:

- (a) Death;
- (b) Dismemberment or fracture;
- (c) Permanent disability; or
- (d) Medical expenses to a person in excess of \$500.

(2)The *owner* of a motor vehicle with respect to which security is required by this act who fails to have such security in effect at the time of an accident *shall have no immunity from tort liability and shall be personally liable for the payment of the benefits provided for under Section 31-41-6.* [Emphasis added]

Under this statutory plan, first party PIP benefits up to the amount provided in Section 6 are paid to an injured person without regard to fault. Furthermore, the injured party is precluded from maintaining an action to recover general damages (all damages other than those awarded for economic loss), except where the threshold requirements of Section 9(1) are met. Under Section 9(2), there are two consequences to the owner of a motor vehicle who fails to have the security required by Section 5: first, he has no immunity from tort liability; second, he is *personally liable* for the benefits provided under Section 6. The only logical inference is that if a party has the security required under Section 5, the no-fault insurance act confers two privileges: first, he is granted partial Tort immunity; second, his not personally liable for the benefits provided under Section 6. (See: *Ivie, supra* 606 P.2d at 1199-1200.)

The Supreme Court interpreted this statute with the only logical inference of the then-existing statutory language, that an insured tort-feasor would be free of personal liability for the PIP benefits. In the 1981 decision of *Dupuis v. Nielson*, 624 P.2d 685 (Utah 1981), the Supreme Court endorsed a method of handling the PIP benefits issue in a jury trial similar to that used by the trial Court below in this case.

Specifically, the Supreme Court refused to reverse the trial Court's decision to allow evidence of the total medical expenses to be presented to the jury, but then provided for an offset of the special damages by the amount of PIP benefits paid to the Plaintiff. The *Dupuis, supra*, decision, which was based upon the *Ivie* analysis, was proper under the then-existing statute.

In 1985 the Utah State legislature adopted a revision of the entire insurance code. In this revision, the statutory basis of *Ivie, supra*, was eliminated. Pursuant to that change, Utah Code Ann. 31-41-9(2)(1953) was replaced with the following language of Utah Code Ann. 31A-22-302(b)(1985):

**Utah Code Ann.
31-41-9(2)(1973)**

2) The owner of a motor vehicle with respect to which security is required by this act who fails to have such security in effect at the time of an accident shall have no immunity from tort liability and shall be personally liable for the payment of the benefits provided under section 6 of this act.

**Utah Code Ann.
1A-22-302(b)(1985)**

(b) Subsection (1)(a) does not apply to a person making an uninsured motorist claim.

In making this change, the Utah Legislature eliminated the language "*shall be personally liable for the payment of the benefits provided for under section. . .*" 31-41-6, which was the basis of the *Ivie, supra*, decision. The statutory revision took away the foundation of PIP benefit immunity for an insured tort-

feasor. The current language of the statute is unambiguous and therefore its plain language should be applied, a doctrine of interpretation the Utah Supreme Court has firmly entrenched. See *Blackner v. State*, 48 P.3d 949 (Utah 2001).

The trial Court overlooked this statutory change and the resulting dissolution of the Defendant's grant of tort-feasor partial immunity for PIP benefits that was reserved under the prior language. The trial Court should have recognized that without the statutory protection provided by the prior language, the Defendant, who did not personally pay any of Plaintiff's medical expenses, had no right of offset and was liable for these special damages awarded by the jury. The Supreme Court has devised definite criteria for grounding the right of subrogee offset. Defendant meets none of them. See *State Farm Mut. v. Northwestern Nat. Ins.*, 912 P.2d 983 (Utah 1996). In refusing to modify the judgement to set aside the offset, the trial Court erred and this Court should correct that error by reversing the trial Court's decision on the treatment of PIP benefits.

II. THE TRIAL COURT FAILED TO RECOGNIZE THAT THE JURY HAD ALREADY APPLIED THE 10% REDUCTION OF DAMAGES FOR THE PLAINTIFF'S COMPARATIVE NEGLIGENCE AND SHOULD NOT HAVE APPLIED A SECOND 10% REDUCTION.

The Utah Supreme Court in *Bishop v. GenTec Inc.*, 48 P.3d 218 (Utah 2002) recognized that under appropriate circumstances, a trial court should adjust a judgement to recognize that a jury has already applied the comparative negligence

award reduction and not reduce the award a second time. This is just such a case and the trial Court below committed error in not amending the judgement to account for the second reduction of the award. This Court must look to the evidence to determine the legitimate foundation of this issue. There are three parts to this evidence: (1) jury instruction; (2) the special verdict form; and (3) the content of a note exchanged between the judge and jury.

The jury in this case below was given the following instruction for comprehending comparative negligence in its verdict:

If you find that the Defendant was negligent, you may decide if the Plaintiff was also negligent. If the Plaintiff was negligent, and the Plaintiff's negligence was a proximate cause of the Plaintiff's own injury, the Plaintiff's negligence must be compared to the negligence of the Defendant.

A Plaintiff whose negligence is less than 50% of the total negligence caused by Plaintiff's injury, may still recover compensation, but the amount will be reduced by the amount of Plaintiff's negligence. If the Plaintiff's negligence is equal to or greater than the negligence of the Defendant, then the Plaintiff may recover nothing. For example if you find the Plaintiff's negligence was 30% of all negligence causing the injury, then the Plaintiff's recovery would be reduced by 30%. On the other hand, if you find that the Plaintiff's negligence is 50% or greater, then the Plaintiff will recover nothing.

The special verdict form was simple and provided an uncomplicated mechanism to unambiguously develop the intent of this jury instruction for comprehending comparative negligence with its sequence of only six questions, which the jury answered as follows:

MEMBERS OF THE JURY:

Please answer the following questions. If six of you are persuaded by the evidence in favor of the question, 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 X 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 X No _____

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

3. Was the plaintiff negligent?

ANSWER: Yes X No _____

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

ANSWER: Yes X 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 \$ 5,126⁰⁰

General Damages \$ 10,000⁰⁰

The jury instruction explained the principle of dividing negligence between Defendant and Plaintiff by elucidating the option that the jury could find both the Plaintiff and the Defendant negligent in the “proximate cause of the Plaintiff’s own injury. . .”

The example furnished further reinforcement to the intent of ‘whether and how’ the jury was instructed to conform its verdict for comprehending comparative negligence in the amount, if any, of a damage award. The language of the jury instruction is specific. That specificity is germane to reasoning an accurate conclusion :

A Plaintiff whose negligence is less than 50% of the total negligence caused by the Plaintiff’s injury, may still recover compensation, **but the *amount* will be reduced by the amount of Plaintiff’s negligence.** [Emphasis added]

This sentence is evidence that the jury understood there was a direct relationship between the *percentage* of Plaintiff’s negligence and the compensation *amount* Plaintiff might recover.

If the Plaintiff’s negligence is equal to or greater than the negligence of the Defendant, then the Plaintiff may recover *nothing*. [Emphasis added]

This succeeding sentence is further evidence that it was the jury's duty to compare the negligence of the Plaintiff to the negligence of the Defendant and award the Plaintiff *nothing* if her percentage exceeded his. Hence, the *amount* of her award would be *nothing*. The jury instruction proceeds to confirm this understanding with a precise example of how the principle is applied:

For example, **if you find the Plaintiff's negligence was 30% of all negligence causing the injury, then the Plaintiff's recovery would be reduced by 30%.** [Emphasis added]

The example demonstrates again, with specific language, that it was the jury's duty to first establish negligence, then divide it on a percentage basis between Defendant and Plaintiff, then reduce Plaintiff's recovery by the percentage of negligence assigned her. The overall logical intent of the instruction example is bolstered by this last sentence:

On the other hand, **if you find that the Plaintiff's negligence is 50% or greater, then the Plaintiff will recover *nothing*.** [Emphasis added]

Evidence establishes that the substance of the jury instruction for calculating damages conferred upon the jury the responsibility for reducing Plaintiff's damage award by the percentage of comparative negligence assigned her.

The language is specific in relating the percentage of negligence to the amount of recovery, indicating that comparative negligence of 30% meant recovery was reduced by 30%, and finishing with the direction that if Plaintiff's negligence exceeded 50%, she would recover nothing, an *amount* of zero.

There is evidence that the jury was preoccupied with the question of whether it was responsible for applying the comparative negligence reduction assigned to Plaintiff in calculating her damages. At noon on April 4th, the jury exchanged notes with the judge on the subject. The jury's note read: *"Do we account for the effect of the joint negligence or does the Court?"* The Court properly responded with the following additional instruction: *"Please complete the special verdict form exactly as written, in accordance with your answers as you proceed through the form."*

Evidence establishes the jury gave serious consideration to applying Plaintiff's 10% share of comparative negligence to the damage award, a question significant enough to prompt a note for clarification to the Court. The jury had been deliberating at least four hours before submitting the question. It apparently had already determined the comparative negligence division between Defendant and Plaintiff by that time and was in the process of computing damages, or the question would not have been prompted. The only remaining question for the jury to decide was the *amount* of Plaintiff's damages. Another 70 minutes elapsed before that decision was finalized and the jury notified the Court it had reached a

verdict. Evidence establishes the jury gave considerable time to ensuring the correct method of calculating Plaintiff's damages, which included their clear instruction to apply Plaintiff's percentage of comparative negligence to the *amount* of damages awarded. Absent other language to the contrary in the instructions, or evidence the jury followed another course, no other conclusion is reasonable.

Under such circumstances, the trial Court should not have made a second 10% reduction and should have amended the judgement when timely requested to do so. This Court should recognize the error of the trial Court and utilize the discretion given it by the *Bishop, supra* decision to reverse that error and instruct the trial Court to award judgement for the full \$5,126 in special damages and \$10,000 in general damages.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT PLAINTIFF'S COSTS.

The trial Court entered the judgment April 29, 2002. Plaintiff's verified memorandum of costs under Rule 54(d) of the Utah Rules of Civil Procedure was filed timely on May 3, 2002 in the amount of \$863.43. That total included \$250.00 for mediation costs, mediation the Court had ordered in advance of trial. This Court has previously held that an award of mediation as cost, is within the discretion of a trial court. *See: Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508 (Utah App. 1999) Defendant did not dispute any of Plaintiff's costs except the \$250 for mediation.

When Plaintiff filed the motion to amend the judgment to recover the PIP offset and the double application of the 10% comparative negligence reduction, the trial Court heard argument concerning only the \$250 mediation cost and denied granting Plaintiff this cost.

In its order denying Plaintiff's motion to amend the judgment, the trial Court denied Plaintiff all her costs, not just the mediation expense. This total denial of costs, both for court-ordered mediation and other undisputed costs, is an abuse of discretion which requires this Court to reverse the trial Court.

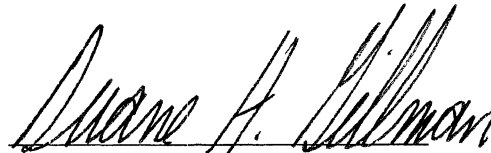
CONCLUSION

This Court should recognize that the 1985 change in the Insurance statute eliminated the statutory basis for the decision of the Utah Supreme Court in *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197 (Utah 1980) on the issue of PIP benefit/partial immunity for the Defendant. The trial Court's decision to allow an offset of the special damages was without a basis because there is no current statutory foundation for it. Further, since the Defendant did not pay the PIP benefits himself, he has no right of offset at common law or under Supreme Court precedent of *State Farm Mut. v. Northwestern Nat. Ins.*, 912 P.2d 983 (Utah 1996). This Court should reverse this error and direct the trial Court to amend the judgement accordingly.

This case is similar to *Bishop v. GenTec Inc.*, 48 P.3d 218(Utah 2002), in which it is clear from evidence in the record that the jury applied Plaintiff's comparative negligence to her damages awards. In such cases, the trial Court should not make a second reduction and the trial Court's refusal to amend the judgement and eliminate the second reduction was error. This Court should reverse that error and direct the trial Court to amend the judgement accordingly.

The trial Court below abused its discretion by not awarding the Plaintiff her costs, including costs of mediation.

DATED: March 3, 2003

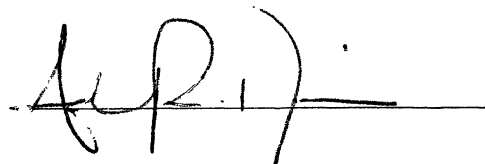


Duane H. Gillman
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 2003, I caused to be placed in the United States Mail, via first class, postage prepaid, two true and correct copies of the within and foregoing Brief of Appellant to:

ROBERT H. HENDERSON
Post Office Box 112350
Salt Lake City, Utah 84147



ADDENDUM EXHIBIT 1

INSTRUCTION NO. _____

If you find that the defendant was negligent, you must decide if the plaintiff was also negligent. If the plaintiff was negligent and the plaintiff's negligence was a proximate cause of the plaintiff's own injuries, the plaintiff's negligence must be compared to the negligence of the defendant.

A plaintiff whose negligence is less than 50 percent of the total negligence causing the plaintiff's injuries may still recover compensation, but the amount will be reduced by the percentage of the plaintiff's negligence. If the plaintiff's negligence is equal to or greater than the negligence of the defendant, then the plaintiff may recover nothing. For example, if you find the plaintiff's negligence was 30 percent of all negligence causing the injuries, then the plaintiff's recovery will be reduced by 30 percent. On the other hand, if you find the plaintiff's negligence is 50 percent or greater, then the plaintiff will recover nothing.

INSTRUCTION NO. ____

If you find the issues in favor of the plaintiff and against one or both defendants, then it is your duty to award the plaintiff such damages, if any, that you find, from a preponderance of the evidence, will fairly and adequately compensate the plaintiff for the injury and damage sustained. The amount of such award may include the following:

A. “Special Damages,” or the reasonable value of medical care required for treatment of the plaintiff, as well as plaintiff’s lost wages and out-of-pocket expenses.

B. “General Damages,” for pain, discomfort, and suffering both mental and physical.

ADDENDUM EXHIBIT 2

THIRD JUDICIAL DISTRICT COURT
Third Judicial District

APR 04 2002

[Signature]
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 Y 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 \$ 5126⁰⁰

General Damages \$ 10,000⁰⁰

Dated this 4 day of April, 2002.

C. Susan B. Zipes
JURY FOREPERSON

ADDENDUM EXHIBIT 3

Forced 7/1/04
12 courts

... we ...
for the effect of
Joint Negligence
or does the car

Please complete the special verdict
form exactly as written, in accordance
with your answers as you proceed
through the form.

WBB

FILED DISTRICT COURT
Civil Judicial District

177. 04, 2002

SALTD 2002

By

NOTES TO DECISIONS

ANALYSIS

Limitation of policy covering driver
 Motorcycle driven by insured
 Out-of-state incidents
 Cited

Limitation of policy covering driver.

Passenger in an automobile driven by insured's son but owned by another person was not entitled to personal injury protection (PIP) coverage under a policy covering the driver *McCaffery v Grow*, 787 P2d 901 (Utah Ct App 1990)

Motorcycle driven by insured.

The coverage described in § 31A-22-307 was applicable to an insured killed while riding a motorcycle involved in an accident in this state

with a motor vehicle, there is no requirement that the insured must be operating or occupying the motor vehicle to be subject to coverage, but only that he be in an accident involving a motor vehicle *Coates v American Economy Ins Co*, 627 P2d 92 (Utah 1981)

Out-of-state incidents.

In light of language limiting application of former provisions to accidents in this state, insurance commissioner's regulation making no-fault insurance coverage applicable to incidents occurring outside the state was in error *LML Freight, Inc v Ottosen*, 538 P2d 296 (Utah 1975), *Neel v State*, 889 P2d 922 (Utah 1995), overruled on other grounds

Cited in *Pennington v Allstate Ins Co*, 973 P2d 932 (Utah 1998)

COLLATERAL REFERENCES

A.L.R. — What constitutes "entering" or "alighting from" vehicle within meaning of insurance policy, or statute mandating insurance coverage, 59 A L R 4th 149

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

- (1) (a) 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:
 - (i) death;
 - (ii) dismemberment;
 - (iii) permanent disability or permanent impairment based upon objective findings;
 - (iv) permanent disfigurement; or
 - (v) medical expenses to a person in excess of \$3,000.
- (b) Subsection (1)(a) does not apply to a person making an uninsured motorist claim.
- (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 ½% 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 created under Chapter 33, 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.

History: C. 1953, 31A-22-309, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 160; 1988 (2nd S.S.), ch. 10, § 10; 1991, ch. 74, § 8; 1992, ch. 230, § 9; 1994, ch. 4, § 1; 2000,

ch. 222, § 5; 2001, ch. 59, § 3.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, substituted "Workers' Compensation Fund created under Chapter

LAWS
of the
STATE OF UTAH, 1973

Passed at the
FORTIETH REGULAR SESSION
of the Legislature

Convened at the Capitol in the City of Salt Lake

January 8, 1973
and Adjourned Sine Die on
March 8, 1973

Published by Authority

insurance coverages required by this act applicable, however, only to claims of the insured.

(5) Nothing contained in this act shall be construed to prohibit an insurance policy from providing coverage for any nonmedical remedial treatment rendered in accordance with a recognized religious method of healing.

Section 7. Application of coverage.

(1) The coverages described in section 6 of this act shall be applicable to:

(a) Personal injuries sustained by the insured when injured in an accident in this state involving any motor vehicle.

(b) Personal injuries arising out of automobile accidents occurring in this state sustained by any other natural person while occupying the described motor vehicle with the consent of the insured or while a pedestrian if injured in an accident involving the described motor vehicle.

(2) When a person injured is also an insured party under any other policy, including those complying with this act, primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose

(3) The benefits payable to any injured person under section 6 of this act shall be reduced by:

(a) Any benefits which that person receives or is entitled to receive as a result of an accident covered in this act under any workmen's compensation plan or any 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 of military enlistment, duty or service.

Section 8. Payment of benefits.

Payment of the benefits provided for in section 6 of this act shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if not paid within 35 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 35 days after such 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 35 days after such proof is received by the insurer. In the event the insurer fails to pay such expenses when due, the amount of these expenses shall bear interest at the rate of 1-1/2% per month after the due date, and the person entitled to such benefits may bring an action in contract to recover these expenses plus the applicable interest. If the insurer is required by such action to pay any overdue benefits and interest, the insurer shall also be required to pay a reasonable attorney's fees to the claimant.

Section 9. Exceptions to limitations on damage claims.

(1) No person for whom direct benefit coverage is provided for in this act shall be allowed to maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident except where there has been caused by this accident any one or more of the following:

(a) Death,

(b) Dismemberment or fracture;

- (c) Permanent disability;
- (d) Permanent disfigurement; or
- (e) Medical expenses to a person in excess of \$500.

(2) The owner of a motor vehicle with respect to which security is required by this act who fails to have such security in effect at the time of an accident shall have no immunity from tort liability and shall be personally liable for the payment of the benefits provided for under section 6 of this act.

Section 10. Exclusive benefits.

(1) Any insurer may exclude benefits:

(a) (i) For injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy, or (ii) for an 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.

(b) To any injured person, if such person's conduct contributed to his injury under any of the following circumstances:

- (i) Causing injury to himself intentionally; or
- (ii) While committing a felony.

Section 11. Conditions insurers to abide by.

(1) Every insurer authorized to write the insurance required by this act shall agree as a condition to being allowed to continue to write insurance in the State of Utah:

(a) That where its insured is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under this act have been paid by another insurer, including the state insurance fund, it will reimburse such other insurer for the payment of such benefits, but not in excess of the amount of damages so recoverable, and

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

Section 12. Departmental authorization.

The department is authorized to promulgate such rules and regulations as may be necessary for the purposes of this act.

Section 13. Violation a misdemeanor Security identification card — Enforcement.

(1) Any owner of a motor vehicle with respect to which a security is required under this act, who operates this vehicle or permits it to be operated on a public highway in this state without this security being in effect is guilty of a misdemeanor. Any other person who operates such motor vehicle upon a public highway in this state with the knowledge that the owner does not have such security in effect is also guilty of a misdemeanor.

(2) (a) Every person while driving a motor vehicle with respect to which a security is required under this act shall have in his possession evidence of such security being in effect, which evidence may be in the form of an identification card approved by the department for issuance by an insurer to its insured in respect to the motor vehicle. The driver shall display such eviden-