1967

Mary Jane Reece Phillips v. Wendell Bennett, Adm. of the Estate Of Oneita S. Wolfe, Deceased : Appellant's Brief

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In the Supreme Court of the State of Utah

MARY JANE REECE PHILLIPS,
Plaintiff and Appellant,

vs.

WENDELL BENNETT, Adm. of the Estate of ONEITA S. WOLFE, deceased,
Defendant and Respondent.

CASE NO. 11010

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This appeal is taken by the Appellant from the judgment of the District Court of the Fourth Judicial District in and for Utah County, State of Utah.

RELIEF SOUGHT ON APPEAL

The appellant is of the opinion that the trial court erred in failing to instruct the jury to disregard payment

of plaintiff's medical expenses by a third party, and that such failure to instruct was prejudicial error. Appellant seeks a new trial.

QUESTIONS PRESENTED

Is it prejudicial error for a trial court to allow in evidence the payment of medical benefits by plaintiff's insurer and to refuse an instruction to the jury that such evidence must not be considered in evaluating plaintiff's damages?

STATEMENT OF FACTS

On November 10, 1964, appellant, Mrs. Phillips, a resident of Springville, Utah, was involved in an automobile collision at Fourth South and State Street in Provo, Utah. Respondent ran his automobile into the back of appellant's car causing damage to the car and personal injuries to appellant. The day following the accident, appellant reported to Dr. N. O. Parker of Springville for treatment of pain in her neck and back regions. After a series of visits by the appellant to his office, Dr. Parker referred appellant to Dr. E. H. Chapman, an orthopedic surgeon practicing in Provo, Utah, for further treatment. Dr. Chapman placed the appellant in Utah Valley Hospital, which hospitalization continued from January 20 to January 27, of 1965. Although released from the hospital, appellant continued to experience pain and suffering as a result of her injury.

On March 11, 1965, appellant was involved in a very minor accident in which she backed her automobile into a utility pole at a grocery store. She reported the accident

to Dr. Chapman at his office the next day. Mrs. Phillips testified that the second accident was of minor consequence, that while she had a temporary inflammation of her condition it shortly returned to the condition which prevailed before the second accident and that she continued at the plateau of recovery reached from her first injury (Page 20 of the Record). Dr. Chapman stated that he did not attach great significance to the second accident and that substantially all of the appellant's injuries occurred in the first accident (Page 62 of Record).

Counsel for the defendant in his argument to the jury emphasized the second accident. The substance of his argument was that one could not adequately apportion as between the first and second accident the damages occurring subsequent to the second accident. Consequently, he argued, the jury should award the appellant only those expenses and general damages sustained subsequent to the first, but prior to the second accident. It was his calculation that the appellant had sustained only damages of $410.54 as follows:

Exhibit #		
2	N. L. Parker, M.D. (Professional Services 11/11/64—1/13/65)	35.00
3	J. R. Monnahan, M.D. (X-Ray Services 11/18/64)	25.00
4	Utah Valley Hospital (Hospitalization 1/20/65—1/27/65)	263.50
8	E. H. Chapman, M.D. (Professional Services 1/14/65—1/27/65)	55.00
9	Deon's, Inc. (Cervical Pillow)	6.16

10	Deon's, Inc. (Traction Device)	25.88
		$410.54

Counsel for plaintiff, arguing that in view of the minor nature of the second accident all plaintiff's medical and hospital expenses should be included, calculated additional special damages as follows:

Exhibit #		
5	Utah Valley Hospital (Physical Therapy and Related Services 4/2/65—5/7/67)	$424.50
7	Utah Valley Hospital (Hospitalization 9/16/66—9/25/66)	372.25
8	E. H. Chapman, M.D. (Professional Services 3/12/65—6/30/67)	84.00
	Add Defendant's Calculation:	$410.54
		$1291.29

There were thus two theories of special damages given, respectively, $410.54 and $1291.29. Disregarding this evidence, however, the jury brought back a verdict of special damages in the amount of $500.00 (See page 73 of the Record).

ARGUMENT

POINT 1

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY WERE NOT TO CONSIDER

MEDICAL OR HOSPITAL BENEFITS PAID BY BLUE CROSS-BLUE SHIELD OR ANY OTHER THIRD PARTY.

During the course of the trial, it became necessary to introduce hospital records, which records had notations reflecting payment by Blue Cross (Exhibits 4, 5 and 7). At the time these records were introduced in evidence, appellant's counsel had an off the record conference with the court and respondent's counsel concerning the necessity of an instruction to the jury as to how to treat these records in the light of such notations The court requested counsel for the appellant to submit an instruction for its consideration, which was done at the beginning of the second day of trial.

After both sides had rested, counsel for the appellant argued the merits of submitting requested instructions relating to payments by a third party to the jury, but the court refused the request. It is submitted that this refusal was error on the part of the Judge and was so prejudicial in its nature that a new trial should be granted to the appellant.

It is a well settled rule of law that the amount recoverable by an injured person in a tortious personal injury case is not decreased by the fact that the injured party has been wholly or partly indemnified for the loss by proceeds from accident insurance. Anheuser-Busch, Inc. v. Staley, 28 Cal 2d 347, 170 P 2d 448, 166 ALR 198 (recognizing rule). Peri v. Los Angeles Junction Railroad Co., 22 Cal 2d 111, 137 P2d 441. This universally accepted rule, often called the "collateral source" rule, applies to virtually all types of insurance: Health and accident in-

surance, Farb v. Borsuk, 205 Misc 448, 128 NYS2d 413 (1954); Joiner v. Fort, 226 SC 249, 84 SE2d 719, (1954); Campbell v. Sutliff 193 Wis 370, 214 NW 374 (1927); Hospitalization, Gersick v. Shilling, 97 Cal App 2d 641, 218 P2d 583 (1950); Roth v. Chatlos, 97 Conn 282, 116 A 332 (1922); Workman's Compensation Insurance, Sheffield Co. v Phillips, 69 Ga App 41, 24 SE2d 834 (1943); Coker v. Five-Two Taxi Service, Inc., 211 Miss 820, 52 So 2d 356 (1951).

The above cited Gersick case was an automobile accident case, similar to the case at bar. On cross-examination defendant's counsel, over objection, was permitted to elicit from plaintiff the information that most of her hospital bills had been paid by Blue Cross, with whom she had a policy, and that she had drawn $460.00 from the United States Employment Service for disability. The Appellate Court held that it was error to have admitted this testimony. It further noted that total or partial compensation received by an injured party from a collateral source, wholly independent of the wrongdoer, does not operate to reduce the damages recoverable from the wrongdoer. The court then went on to note that in this particular case the Judge had remedied his error by fully, fairly and properly instructing the jury that if the jury found defendant liable, plaintiff was entitled to recover for all expenses incurred, and that the amount of damages should not be reduced by amounts paid by third parties in respect of the damage. **Gersick,** supra, 218 P2d at 589. This kind of instruction was refused in the case at bar, thus providing no safeguard against prejudicial use of the evidence by the jury.

The reasoning of the **Gersick** case was followed in the recent Hickenbottom v. Jeppeson, 300 P2d 689, 144

CA 2d 115. Therein the defendant was similarly allowed to elicit from the plaintiff upon cross-examination the fact that her insurance company had paid a large measure of her personal injury expenses. Again the Appellate Court stated, "THOSE QUESTIONS SHOULD NOT HAVE BEEN ALLOWED". (emphasis added). Again, however, serious prejudice was avoided by giving proper instruction to the jury that they were not to take into consideration the fact that plaintiff's insurance company had paid a percentage of her damages. Again, there is no such exonerating instruction to the jury in the case at bar. Consistent with the authorities there is but one recourse: that is to declare the admission of evidence of Blue Cross-Blue Shield coverage reversible error.

In her arguments to the court in respect to the appellant's requested instructions which were submitted to the court in the alternative, the appellant contended that the jury was likely to believe that the appellant had been reimbursed for the sum she sought as special damage and was seeking to recover twice. They would be prone to believe she was greedy and was deliberately misleading the court and jury by not advising them that she had been paid once, and that she was seeking to be paid twice for the same injury. In the absence of correct instruction, the jury might also conclude from the evidence as to payment by the insurer of special damages that appellant's claim for general damages was exaggerated and as a result significantly reduce general damages as well. Without benefit of the tendered instructions, the jury was almost certainly prejudiced against the appellant by the introduction of the hospital records indicating payment from a third source.

The fears expressed by counsel in arguing for the requested instructions are confirmed by the judgment. Appellant had conclusively proven that she had been severely injured, that she had sustained a 10 percent permanent disability as related to total body function and that her injuries were substantially the result of the first accident. It is, therefore, probable that the jury would have found substantially greater damages had they not been exposed to the evidence complained of, or had they received proper instruction.

POINT 2

THERE IS NO BASIS IN FACT FOR THE JURY TO HAVE RETURNED A VERDICT OF $500.00 AS SPECIAL DAMAGES.

A VERDICT IN THIS AMOUNT DEMONSTRATES THAT THE JURY FAILED TO CONSIDER THE EVIDENCE AND WERE MOTIVATED BY PASSION, BIAS AND PREJUDICE.

A comparison of the calculations of special damage by the parties reveals that the finding of the jury was unrelated to the proof submitted. The amount arrived at by the jury can neither be supported from the plaintiff's view of the facts, nor from the defendant's view of the facts. The verdict with respect to special damages must have been either $410.54 or $1291.29. By no rational calculation based on the evidence could the jury have arrived at the figure of $500.00. It is respectfully submitted that the figure was arrived at arbitrarily by the jury and probably represented a token offered to the plaintiff in view of payments by a third party. The amount given by the

jury appears to be somewhat related to the amount of expenses unpaid by Blue Cross-Blue Shield. It is not unlikely that the jury arrived at its figure by deducting from appellant's total special damages an amount equivalent to that which was paid by Blue Cross-Blue Shield.

CONCLUSION

Plaintiff-appellant respectfully urges the Court to grant her request for a new trial on the grounds: (1) that the trial court's refusal to give the requested instruction regarding payments by a third party was prejudicial and reversible error and (2) that there was no basis in fact for an award of special damages in the amount given.

Respectfully submitted,

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