

1968

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

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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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

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## RESPONDENT'S BRIEF

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Appeal from Order of the Fourth Judicial District  
Court, Utah County, State of Utah

THE HONORABLE JOSEPH E. NELSON, *Judge*

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**FILED** STRONG & HANNI  
By LAWRENCE L. SUMMERHAYS  
604 Boston Building  
Salt Lake City, Utah

JAN 25 1968

*Attorneys for Defendant  
and Respondent*

Supreme Court, Utah

HOWARD & LEWIS  
By JACKSON B. HOWARD

Delphi Building  
10 East 300 North  
Provo, Utah

*Attorneys for Plaintiff  
and Appellant*

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## RESPONDENT'S BRIEF

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### STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff against defendant to recover damages for injuries arising out of an automobile accident in Provo, Utah, on November 10, 1964. The vehicle being operated by the plaintiff was struck in the rear by a vehicle operated by defendant, Oneita S. Wolfe, now deceased, but not as a result of the accident. The action is against her administrator.

### DISPOSITION IN LOWER COURT

The case was tried before the Honorable Joseph E. Nelson, Judge, sitting with a jury in Provo, Utah. The

trial judge directed a verdict against defendant with respect to liability. The jury brought in a verdict for the sum of \$500.00 special damages and \$1,000.00 general damages. Plaintiff filed a motion for a new trial or in the alternative for an additur in the sum of \$9,500.00. The trial court granted an additur of \$700.00 and plaintiff has appealed from this order.

## RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks a new trial on this appeal on the ground that the court erred in failing to give an instruction requested by plaintiff.

## STATEMENT OF FACTS

On November 10, 1964, plaintiff, Mrs. Phillips was involved in a rear-end collision at 4th South and State Street, in Provo, Utah, while driving a 1959 Plymouth station wagon. At that time and place Oneita S. Wolfe, a resident of Wyoming, ran into the rear of the station wagon operated by plaintiff and caused damage thereto and some injury to plaintiff. (See Exhibits 12 and 29 for damage to plaintiff's car).

She saw her family doctor the day after the accident who had one X-ray taken of her neck (R. 140), and prescribed rest and a muscle relaxant for her. (R. 112). She saw Dr. Parker about five times and in January of 1965 she was taking a load of dry cleaning out to Norge Dry Cleaners when something caught in her arm and she could not move it. Dr. Parker then sent her to Dr.

Eugene Chapman, an orthopedist in Provo. (R.115). She was admitted to Utah Valley Hospital on January 20, 1965, where she took therapy treatments and was discharged improved on January 27. (Defendant's Exhibit 11). She had been hospitalized many times before for other things. (R. 140, 153). When she was discharged, the doctors prescribed therapy for her and advised her to return to his office in one week for further advice on activity. (R. 184). She did not return to the doctor one week later nor did she start the therapy he directed at that time. (R. 185, and plaintiff's Exhibit 5). She did not see the doctor again until March 12, 1965.

On March 11, 1965, she was involved in another accident when she backed into a telephone pole at a market. The day following the accident she saw Dr. Chapman again and shortly after that she began to take physical therapy treatments. (R. 150).

She said that at the time she hit the pole she didn't feel pain in her neck but did feel anger for hitting the pole because she knew she was going to be teased by her husband and a few friends, because there were a few people that knew that it happened. (R. 148).

She started taking therapy treatments on April 2, 1965, and continued with them for a long time without consulting the doctor. His records show that she saw him on the 12th of March, 1965, after the accident and then did not see him again until August 29, 1966. (Exhibit 8) (R. 165).

She was examined by him on this occasion and among other things he found a diminished sensation to pin prick of both hands and the right forearm which he had not observed at any previous time. (R. 65, 66). He had her hospitalized in September of 1966 for the purpose of having a myelogram which he claimed showed a disc degeneration in the cervical spine with protrusion in the mid-cervical region (R. 167) but which Dr. Milligan testified showed no evidence of any disc protrusion or defect. (R. 229, 230). Dr. Milligan also testified that at the time of his examination of Mrs. Phillips she complained of a sensory loss to pin prick below the elbow on the right side. (R. 216, 217) and had other complaints that were not consistent with any injury to the cervical area and he found that she had no objective evidence of any residual injury at all. (R. 233). His examination (R. 216-234) reflected that her complaints were psychosomatic. (R. 234). He also testified that a cervical sprain ordinarily heals from three weeks to as long as six months. (R. 234).

She purchased a traction unit in February, 1965, (Exhibit 10) that she claimed (Exhibit 6) she slept in at night and sometimes in the daytime. (R. 123, 124). She claimed she slept in it every night. (R.128). She put it on in court to show the jury how it looked but had difficulty putting the harness on. (R. 125).

She testified that the exhibit consisting of her traction collar, etc., that she used at home was the original equipment purchased. (R. 260). Although she slept in it every night, it appeared new and little used.

As indicated in appellant's brief on page 4 medical bills in the amount of \$410.54 had been incurred by plaintiff up to the time of the second accident and plaintiff had an overall claim of \$1,327.79 for special damages as set forth in Instruction No. 7 (R. 37). This was all medical bills, there being no claim for automobile damages in the complaint. (R.3).

Plaintiff introduced into evidence Exhibits 4, 5 and 7 which were hospital bills. Exhibit No. 4 covered the period of January 20, 1965, to January 27, 1965, and Exhibit No. 7 the hospital bill for the hospitalization of September, 1966. Exhibit 5 is an out-patient bill for therapy treatments commencing in April, 1965, and actually has no reference on it with respect to Blue Cross making any payment thereon as do the other two exhibits.

Counsel for plaintiff submitted two requested instructions on the second day of the trial which are numbered 9 and 10 (R. 55, 57) which the court refused to give. On plaintiff's motion for a new trial or in the alternative for an additur Judge Nelson at time of argument stated he may have possibly been in error in refusing to give an instruction as requested and that he was going to give an additur of \$700.00 to take care of his failure in the event it was error for him not to give such an instruction and this was, therefore, done. (R. 83-88).

From the court's refusal to grant a new trial the plaintiff has appealed.



## ARGUMENT

### POINT I.

THE COURT DID NOT ERR 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.

Respondent recognizes and accepts the well settled rule of law that the amount recoverable by an injured person in a 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 the injured person's accident insurance. The question in the case at bar is whether under the particular facts of this case the plaintiff was prejudiced by the court's failure to give an instruction as requested by the plaintiff and whether or not the prejudice, if any, was corrected by the court's grant of an additur to the judgment of the plaintiff.

In the first instance it was the plaintiff and not the defendant who introduced into evidence the particular exhibits bearing information that Blue Cross was paying part of the medical bills. Counsel for defendant never did argue or mention in argument that any of the medical bills had been paid by insurance and that they were, therefore, not allowable for that reason. As a matter of fact, defendant's counsel argued that the plaintiff had substantially, if not fully, recovered from the effects of the first accident when the second accident

occurred because although the doctor requested she see him in a week, she failed to do so and also did not commence physical therapy as he recommended when she was released from the hospital in January, 1965. Not until after the second accident did she commence physical therapy. One of the exhibits bearing information pertaining to payment by Blue Cross was the hospital bill of the January 20-27, 1965, hospitalization. (Exhibit 4). The court had directed liability against defendant and defendant argued that this is one of the bills that plaintiff was entitled to recover. As defendant recalls, counsel for plaintiff argued the fact that though some of the bills had been paid for by insurance plaintiff was still entitled to recover them and the court advised him he could so argue. Defendant's counsel did not argue to the contrary. The court likewise gave an instruction to the jury that the jury could award such special damages as they found from a preponderance of the evidence that plaintiff was entitled to, not to exceed the sum of \$1,327.79 (R. 37) so that the jury was instructed to the effect that payment of the medical expenses by an insurance company did not preclude the plaintiff's recovery of them from the defendant.

It is the defendant's belief that the jury believed Dr. Milligan who testified that Mrs. Phillips did not have any residual injury and that her complaints were psychosomatic or functional. (R. 222). Although Mrs. Phillips testified she was still having difficulty and in fact was still using a harness at home for traction treatments, she showed no evidence in her actions in court

that she had any disability whatever, and the jury had an opportunity to observe her actions as did the trial judge. She also claimed she used the traction device and had been every night since she secured it and that Exhibit 6, which was withdrawn, was the original equipment she purchased on February 2, 1965. (R. 260). However, the jury and the court had an opportunity to see that the actual harness which fit under the plaintiff's chin and around her face was little worn and looked quite new. This was also pointed out to the jury in defendant's argument.

She testified that the second accident was a minor accident, but it must have been a fairly good bang because she said although she didn't feel any pain in her neck at the time of the accident she did feel anger for hitting the pole because she knew she was going to be teased by her husband and a few friends because there were a few people who knew it happened. (R. 148). If they knew it happened at the time of the accident, they must have seen or heard it and it must have been of sufficient severity to draw attention to it.

These and other facts available to the court and jury during the course of the trial were proper matters for the jury as well as the court to consider in determining who and what to believe and the weight to be given the evidence introduced. The jury was certainly justified in making the finding it did with respect to the damages.

Dr. Milligan testified that her complaints were psychosomatic or functional and that an injury which

she apparently had arising out of the first accident would ordinarily heal within a few weeks up to six months. The jury was not bound by any one witnesses' testimony and might very well have found that in addition to the bills incurred up to the time of the second accident only a small part of the additional bills were necessary or required for the plaintiff.

In the *Gersick* case, 218 P.2d 583 and *Hickenbottom v Jeppeson*, 300 P.2d 689, cited by the plaintiff the trial court erroneously allowed defendant's counsel to elicit from the plaintiff that the plaintiff's medical bills had been paid in part by plaintiff's insurance company and it was then that the court in each instance advised the jury that it should not take into consideration that fact when awarding plaintiff damages. In the case at bar the plaintiff was the one who introduced into evidence the medical bills having the insurance information on them. The cases are distinguishable from that standpoint and as has previously been set forth, the court did advise the jurors that they could award up to the sum of \$1,327.79 in special damages.

Respondent contends that if there was any error in the trial judge's failure to give plaintiff's instruction on the right of plaintiff to recover the medical bills despite the fact some of them had been paid by an insurance company, it was harmless error and did not affect the substantial rights of the parties. Under Rule 61, U.R.C.P., the court should disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. A refusal to give an in-

struction cannot be the basis for reversal unless the jury was insufficiently advised of the issue they were to determine, or it appears that they would have been confused or misled to the prejudice of the person complaining thereof. (*In Re Richards Estate*, 5 U.2d 106, 297 P.2d 542, 545). The jury was not misled because the court instructed them in the instruction on damages that they could find the full amount of the special damages demanded by the plaintiff, plaintiff's counsel argued that they should so find and that insurance payments did not affect the plaintiff's right of recovery and defendant's counsel made no mention of insurance payments in argument but in fact argued that one of the bills paid by an insurance carrier was one of those recoverable under the court's direction of liability by the plaintiff.

Plaintiff knew he was going to introduce the medical bills bearing the information pertaining to insurance and could have had the insurance information eliminated by covering the same over and making a new photocopy.

The fact that the jury gave her \$500.00 in medical bills is an indication that the jury was satisfied that plaintiff was substantially recovered from the first accident at the time the second one occurred.

## POINT II.

THERE WAS A BASIS IN FACT FOR THE JURY TO HAVE RETURNED A VERDICT FOR \$500.00 AS SPECIAL DAMAGES AND SUCH A FINDING DID NOT DEMON-

STRATE THAT THE JURY FAILED TO  
CONSIDER THE EVIDENCE OR WAS  
MOTIVATED BY PASSION, BIAS OR  
PREJUDICE.

There was no proof made or attempted to be made as to the amount paid by Blue Cross or Blue Shield. The jury had no way to determine that which was paid by the insurance company and that which was paid individually. While the jury may not have been able to arrive at a figure of \$500.00 by adding the totals of any particular group of bills together as presented, the jury was not required to find that all of the services on any particular bill was required as a result of the first accident or the second accident. As was stated in the case of *Gersick v. Shilling*, cited by appellant's counsel, supra, "The jury was not bound by the doctors' evaluation and necessity for their services." The jury had a problem determining the extent of the medical services reasonably required as a result of each accident. Doctors Monnahan and Chapman were the only ones appearing to testify for the plaintiff. The therapist did not testify nor did Dr. Parker. It is within the jury's province to determine what services were reasonably required and the amount thereof. The jury was not bound to find that either the sum of \$410.54 or \$1,291.29 was the only sum recoverable for special damages.

The question as to the amount of damages is a question of fact. In the first instance it is for the jury to fix the amount of damages and secondly for the trial judge on a motion for a new trial to pass on the question of adequacy. The appellate court has not seen or heard

the witnesses and has no power to pass upon their credibility. Normally the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to respondent must be considered. *Gersick v. Shilling*, supra.

The trial court has passed upon the question in any event and gave the plaintiff an additur to cover any possible error which may have been made.

## CONCLUSION

Respondent respectfully urges the court to deny the appeal of appellant for a new trial on the ground that there was no error in the first instance. That if there was any error the trial court corrected it by giving the plaintiff an additur.

Respectfully submitted,

STRONG & HANNI

By LAWRENCE L. SUMMERHAYS

604 Boston Building  
Salt Lake City, Utah

*Attorneys for Defendant  
and Respondent*