

1968

Mary Jane Reece Phillips v. Wendell Bennett, Adm.  
of the Estate Of Oneita S. Wolfe, Deceased :  
Appellant's Petition For Rehearing, And Brief In  
Support Thereof

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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, de-  
ceased,

Defendant and Respondent.

**CASE  
NO. 11010**

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## **Appellant's Petition for Rehearing, and Brief in Support Thereof**

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### **Petition for Rehearing**

Pursuant to Rule 26 (e) (1) Utah Rules of Civ. Pro. Appellant respectfully petitions this Honorable Court for a rehearing, and as grounds therefor shows the following points of error:

#### **POINT I**

THIS COURT ERRED AS TO A MATERIAL FACT IN STATING THAT APPELLANT WAS GRANTED AN ADDITUR TO HER SPECIAL DAMAGES.

## POINT II

THIS COURT ERRED IN HOLDING THAT A VERDICT TAINTED BY PREJUDICIAL ERROR CAN BE CORRECTED BY GRANTING AN ADDITUR IN AN AMOUNT NOT CONSENTED TO BY PLAINTIFF.

WHEREFORE, Appellant prays that this petition be granted and that upon rehearing a new trial be granted in this cause.

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## **Brief in Support of Petition for Rehearing**

## POINT I

THIS COURT ERRED AS TO A MATERIAL FACT IN STATING THAT APPELLANT WAS GRANTED AN ADDITUR TO HER SPECIAL DAMAGES.

At the conclusion of the trial in this case the jury returned a verdict in the amount of \$500.00 special damages and \$1,000.00 general damages. Plaintiff thereupon filed her "Motion for New Trial or in the alternative an Additur." The additur was requested in the amount of \$9,500.00. By its "Amended Judgment" the court granted an additur of \$700.00 with consent of the defendant. Plaintiff did not

accept the additur and brought this appeal, requesting a new trial.

There is absolutely no indication whatsoever in the record that the additur granted by the trial court was an addition to the \$500.00 awarded by the jury as **special** damages. To the contrary, in light of the fact that **special** damages were proven only in the amount of \$1,219.29, plaintiff's request for an additur of \$9,500.00 clearly intended an increase in **general** damages.

The opinion of this Court reasons from the erroneous factual premise that the trial court "granted an additur of \$700.00 to the \$500.00 awarded as special damages" and concludes that "he did not feel that the verdict needed any adjustment so far as general damages were concerned."

The error so committed is material and fundamental since the courts have generally been more willing to permit additur where the amount of damage is liquidated or otherwise certain than where the amount is uncertain. In the latter case it is held inappropriate "to arbitrarily order the entry of a judgment in a definite amount." *Shirley v. Merritt*, 147 Colo. 301, 304 P.2d 192, 195 (1961).

## POINT II

THIS COURT ERRED IN HOLDING THAT A VERDICT TAINTED BY PREJUDICIAL ERROR CAN BE CORRECTED BY GRANTING AN ADDITUR IN AN AMOUNT NOT CONSENTED TO BY PLAINTIFF.

As this Court recognized in its opinion in this case, the trial court committed "error in refusing to instruct on the 'collateral source' rule", thereby probably leaving the jury with the false impression that the plaintiff in an excess of

greed was wrongfully attempting to be compensated twice for the same injury, once by the insurer and once by the defendant.

Although recognizing the existence of prejudicial error, this Court held that the additur granted by the trial court corrected the error and affirmed the judgment as amended by the additur. Appellant contends that the verdict could not be corrected by an additur in an amount less than plaintiff's request without her consent.

This Court, for sound reasons of policy, has chosen not to adopt the doctrine of *Dimick v. Schiedt*, 293 U.S. 474 (1935) in this jurisdiction. *Bodon v. Suhrman*, 8 Utah 2d 42, 327 P.2d 826 (1958). With that choice appellant does not quarrel. The rule established in **Bodon** is that **in the absence of prejudice** the remedy for an inadequate verdict is to grant defendant a choice between additur and a new trial. In such circumstances, this Court held, the plaintiff cannot complain because he did not consent to the amount of the additur. This Court specifically excepted from the rule in **Bodon** cases where "the whole verdict is so suffused with passion and prejudice that it should be entirely set aside." 327 P.2d 828-29.

The present case falls rather within the scope of *Porcupine Reservoir Co. v. Lloyd W. Keller Corp.*, 15 Utah 2d 318, 392 P.2d 620 (1964). In that case, as here, the trial court "predicated its denial of appellants' motion for a new trial on respondents accepting additurs." 392 P.2d 621. This Court reversed and remanded for new trial, finding in the record matter "suggesting passion or prejudice or a misunderstanding of the law or facts presented." **Ibid.**

The only distinction between the present case and *Porcupine Reservoir Co.* is in the source of the prejudice.

There it was suggested by the fact that the verdict was "unusually small." **Ibid.** Here it arises from the erroneous refusal to grant the requested instructions. Clearly, the difference is not material. Yet to permit the opinion in this case to stand is in effect to overrule Porcupine Reservoir Co. To so decide is to deprive this and future plaintiffs of essential protection in light of the broad power vested by **Bodon** in the trial court to disregard the verdict of the jury.

### CONCLUSION

In light of this Court's apparent misunderstanding of the facts and in view of its earlier decisions, plaintiff requests that this Court reconsider its opinion and grant appellant's request for a new trial.

Respectfully submitted,  
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