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IN THE SUPREME COURT
of the
STATE OF UTAH

DOUGLAS L. ROBINSON and
NELDA H. ROBINSON,
Plaintiffs and Respondents,

—vs.—

PAUL SINGLETON HREINSON,
Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from a Judgment entered [illegible]
the Fourth Judicial District Court
Hon. R. L. Tech[illegible]

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DOUGLAS L. ROBINSON and
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Case No. 10337

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

The Plaintiff brought this action to recover damages for personal injuries to Plaintiff Nelda Robinson, and property damage and loss of consortium to Plaintiff Douglas L. Robinson, arising out of an automobile accident occurring on December 7, 1963, on U.S. Highway 91, Pleasant Grove, Utah.

DISPOSITION IN LOWER COURT

The case was tried on the question of damages only, inasmuch as the Defendant admitted liability, and Judgment on the jury verdict was rendered in favor of the Plaintiffs as follows:

Douglas L. Robinson	
Automobile Damages	$ 258.00
General Damages for loss of consortium	742.00
Total	$ 1,000.00

Nelda H. Robinson	
Special Damages	$ 1,217.44
General Damages	10,000.00
Cost of household help	679.50
Total	$11,896.94

Defendant filed and argued a Motion for New Trial which was denied and this Appeal was then taken.

STATEMENT OF FACTS

The facts of the accident are immaterial and are not, therefore, reviewed.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Judgment, and a new trial.

ARGUMENT

POINT ONE

THE PLAINTIFF'S INTERJECTION OF "INSURANCE" BEFORE THE JURY, RESULTED IN AN UNFAIR TRIAL TO THE DEFENDANT.

The Plaintiff Nelda H. Robinson testified, on direct examination by her Attorney, concerning several persons who had assisted her with household help for several months following the accident and during the said testimony (T-89, 90) she testified as follows:

> "Q. Now, after Mrs. Hoops left, did you hire someone additonal?
>
> "A. Well, we really didn't hire my sister-in-law, but she had quit her job at the time and was coming down about three times a week and helping us out, and she is still doing this. This is Joanne Robinson. And I told her that I would be glad to pay her, and she said that if we got enough and it would be — if the insurance would pay for her wages, then she would accept payment. If not she wouldn't, because she was my sister-in-law and she wouldn't expect money."

A review of the Utah Supreme Court cases leaves no doubt that whether or not the Defendant was insured is immaterial and prejudicial.

In 1932 the case of *Balle -vs- V. S. Smith,* 81 Utah 179, 17 P 2d 224, the Court stated:

> "Courts have guarded jealously against the introduction of such evidence before the jury, not only because it is irrelevant to the issue, but be-

cause jurors are commonly thought to be prejudiced against insurance companies, and if the fact were known that the Defendant is insured, jurors would be less inclined to consider the case on the merits, and more inclined to render a verdict for Plaintiff and in a larger amount than if the Defendant . . . . . had to bear the loss alone."

In *Saltas -vs- Affleck,* 99 Utah 381, 105 P 2d 176, at 179 this Court, in discussing the problem stated:

> ". . . the Plaintiff's Counsel, knowing human nature and sympathies, leaning to relief when no direct imposition of punishment or hurt may be the direct result, is keen to get before the jury such information as will enhance the amount of the verdict. A *suggestion* that insurance exists is thought to furnish a motive or a temptation to trespass. Neither this Court nor the Trial Court is concerned about the question as to whether a Defendant carries insurance. Nor should the jury be so concerned. The cases indicate that this question, which should not be and is not a matter of concern, is often *interjected in indirect ways* upon this matter of insurance, giving rise to many cases."

In *Gitten -vs- Lundberg,* 3 Utah 2d 392, 284 P 2d 1115 (1955) this Court again holding that the Defendant's insurance is immaterial, states:

> "Generally speaking, reference to (insurance) for the purpose of getting it before the Jury is prejudicial. An exception to this is where a reference to insurance is so interwoven in an admission against interest that it is impractical to exclude it without destroying or impairing the benefit of the admission, to which the Plaintiff is entitled."

In *Reid -vs- Owens,* 98 Utah 50, 93 P 2d 680 at 685 the Court states:

> ". . . We would be closing our eyes to a fact well known to Trial Courts and Trial Lawyers were we to assert that the probability of any jury being influenced in determining the question of liability and the question of the amount of recovery by the fact that the insurance company would pay the damages assessed, is so remote as not to challenge judicial notices."

In the more recent case (1959) of *Ivie -vs- Richardson,* 9 Utah 2nd 5, 336 P 2nd 781, this Court, noting that the jury's verdict was $5,000.00 stated:

> "This, it is commonly known, is the limit of one type of insurance policy for personal injuries to one's person."

It will be noted in the case at bar, that the general verdict of $10,000.00 for the Plaintiff is the same basic requirement of the Utah Financial Responsibility Act (41—12-5 U.C.A., as amended), a fact commonly known by residents of Utah, and therefore juries.

Mrs. Robinson, while being questioned by her own Attorney, and in response to a question which had nothing to do with insurance, voluntarily, and we think purposely, made it clear to the jury that her sister-in-law intended to be paid if the Plaintiff received a high enough Judgment, or if the Defendant's insurance company settled the case and included that cost in the settlement.

Her answer left no doubt whatsoever but that that was the clear and unmistakable arrangement she had with her sister-in-law.

It will be noted that the Defendant, immediately, indicated to the Court that it had a Motion, and outside the presence of the jury, moved for a mistrial which was denied. Thereafter the trial proceeded with not even an admonition to the jury.

The Court indicated by his remarks that the Plaintiff had not indicated whether she was speaking of *her* insurance or the *Defendant's* insurance. (T90) Apparently, the Court saw nothing erroneous in allowing the jury to conjecture in the jury room on whose insurance was meant, as from the state of the Record, the Plaintiff's statement was, as far as the jury was concerned, part of the evidence which they had every right to consider.

If the Defendant actually had hopes that the above conjecture might fool the jury into believing Plaintiff meant her own insurance, he just wasn't thinking—as we always assume juries do.

1. *There is no insurance whatsoever that will pay Plaintiff's sister-in-law to help around the house*—maybe Registered Nurses under a doctor's order, but not household help. (We invite Respondent to deny that that is true.)

2. Plaintiff's alleged conversation with her sister-in-law took place about six months after the accident, and following several others who allegedly helped. That would be ample time to find out what her own insurance covered.

3. She was represented by eminently capable counsel who could advise her in a few minutes cursory reading of the policy that her policy (if any) did or did not cover her for that expense.

4. Her prior testimony was that she had paid prior help out of her own pocket—a peculiar thing, if she had insurance coverage, or even a possibility of coverage.

5. Her testimony was almost a year to the day following the accident. Was the jury to still guess that she still hadn't found out her own insurance coverage?

It is a simple solution to close our eyes and assume that the jury is composed of eight naive, uninformed and somewhat blase individuals, or that the remark, perhaps was not heard, maybe having been drowned out by the Christmas carols which were being played in the foyer of the Court House during the Plaintiff's testimony.

To consider the problem based upon the above, or some other assumption, is to "close our eyes" to reality.

When the Plaintiff unexpectedly, and without forewarning to Defendant's Attorney, blurts out "insurance", the Defendant in this and every law suit is placed in an untenable position, for the following reasons:

1. An immediate objection and a motion to strike, made in the presence of a jury, emphasizes the fact that the Defendant is insured; else no objection or motion would be made in the first place.

2. To allow the interjection of insurance to pass without objection, in the vain hope that the jury was asleep, would waive the Defendant's rights. (*Hill -vs- Cloward,* 14 Utah 2nd 55, 377 P 2nd 186.)

3. After the motion for mistrial has been denied, the Defendant's hands are completely tied, inasmuch as he cannot cross-examine the Plaintiff on the question of insurance in order to determine from her immediately which insurance she was referring to, as by the very question he would be waiving his objection to the answer, (which Defendant already knows) and at the same time the harm that had already been done would be aggravated, if that is possible.

4. The Defendant, certain that the interjection of insurance has prejudiced the jury, is forbidden to place in evidence such facts as the low limits of his policy; or the fact, perhaps, that the insurance company is defending under a reservation of rights and may not, after all, pay a judgment; or, if it be the case, that he really is not insured at all.

5. The Defendant dare not ask the Court to admonish the jury "Forget that the Plaintiff said 'insurance' ", or words to that effect. This writer is of the unchangeable belief that as soon as the Court pinpoints a remark to the jury, he brings it into high focus, and his admonition to the jury, to then forget it, make it that much more impossible for them to comply with the admonition. The Defendant, therefore, in order not to again aggravate, dwell upon or enlarge the wound caused by the Plaintiff's thrust, has only one recourse and that is to suffer in silence.

Whether the Plaintiff's remarks concerning insurance, in the presence of the jury, was purposeful or un-

intentional, should have no bearing on the obvious fact that it was still highly prejudicial to the Defendant.

In 4 ALR 2d 816 there is an Annotation in which some Courts seem to feel that an inadvertent remark by the Plaintiff, innocently made, seems to make some difference to the Defendant, even though it is an obvious fact that the jury nevertheless, was prejudiced.

In the first place, it is impossible to conceive how any Supreme Court can determine long after the trial, whether the remark was "innocent" or designedly made with malice aforethought, without pure, unadulterated conjecture in the wildest form, and *without ever having even seen the Plaintiff in person.*

The Oklahoma Supreme Court in an excellently reasoned opinion, has faced the problem squarely.

In *Pratt -vs- Womack* 359 P 2d, (1961), wherein the Plaintiff's husband, while testifying under direct examination by Plaintiff's Attorney, made the statement "I was very sure that they carried compensation".

Defendant's Attorney immediately moved for a mistrial, which was denied, and the Trial Court admonished the Jury not to give the remark any consideration.

Inasmuch as the language of the Oklahoma Supreme Court squarely sets out the Appellant's position herein, we quote at length from it, at Page 225:

> "The Courts admonition does not cure the prejudice." *Dolliver -vs- Lathrom,* 183 Okl. 329, 82 P. 2d 675.

In *Redman -vs- McDaniel,* Okl., 333 P 2d 500, we held that prejudice results as a matter of law when it is made to appear that Defendant is covered by liability insurance.

At Page 503 of the opinion, we said: In some of our former decisions where Plaintiffs informed the jury that Defendants were protected by insurance, we refused to reverse the Trial Court because we could not say that a new trial would result in a different finding, or result in a smaller verdict. Stated another way, we refuse to reverse because we were unable to say that the improper conduct had any prejudical influence upon the jury.

These decisions are not realistic. They are in conflict with the view that prejudice results when the jury knows that an insurance company will have to pay the Judgment. It permits the Plaintiff to deliberately inject beneficial prejudice into the case, which experience permits a Plaintiff to retain that larger recovery for the simple reason that it is difficult ,if not impossible, for this Court to segregate and identify the harm done. *This type of decision encourages improper conduct*1 (emphasis added)

Since we are of the view that knowledge of insurance coverage will cause a jury to render a larger verdict and in some cases render a verdict in favor of Plaintiff when otherwise it would not, it becomes the duty of this Court to compensate for the harm done by appropriate action. In some cases this may be done by directing a remittitur. In other cases it may be necessary to grant a new trial."

In the case at bar, the jury took to the jury room, as evidence, the fact that the Defendant was insured. They

had not even been admonished by the Court, or instructed, that the evidence concerning insurance was immaterial.

> "Having been objected to and having been ruled in, the jury were given to understand that they were to use it for some purpose. The fact that the incompetent testimony is laid before the jury under favorable rulings by the Court . . . tends to increase rather than diminish its prejudicial effect." *Rojas -vs- Vuocolo,* 142 Tex. 152, 177 S.W. 2d 962 cited in *City of New Cordell -vs- Lowe,* Okl., 389 P. 2d 103 (1963).

If we are concerned with whether the Defendant had a fair trial, and we are "realistic," as suggested by the Oklahoma Supreme Court, and keep our "eyes open," as suggested by this Court, then Plaintiff's voluntary interjection of Defendant's insurance before the jury, obviously prejudiced the jury, with the only conclusion that the trial was not fair.

How the Plaintiff prejudiced the jury, whether with a secret design or an inadvertent remark which only Plaintiff herself knows, seems immaterial.

We believe that to condone an unfair trial to this Defendant, on the grounds of a wild assumption that the Plaintiff's remark was "innocent," will open the doors very wide to future unscrupulous Plaintiffs. If these future Plaintiffs are poor actors, practice will help, and if they are semi-accomplished actors, the "inadvertent" dropping of the word "insurance" will be a cinch. They need only keep an innocent, surprised expression going while the Defendant's Attorney writhes and fumes, and

sometimes lets out strange noises. The actor should not say "Defendant's insurance" — and he need not. Any immediate action by Defendant's Counsel will take all doubt out of the jury's mind. And if the Defendant's Attorney just sits there, sallow-complexioned and stunned, then the act has worked wonderfully, and the certain larger verdict gathers 8% interest, while untenable objections are made to the Supreme Court, because Defendant's Attorney has waived his objections by silence.

On whose shoulders should the risk of such an improper remark lie? Certainly not the Defendant.

Furthermore, it is not an answer to this appeal that the Judgment rendered was reasonable in light with subjective complaints claimed by the Plaintiff, and the testimony of her doctor.

The real unfairness of the trial is found in the probability that the jury, knowing that the Defendant was insured, and assuming that the verdict for the Plaintiff would not "hurt" the insurance company, were thereby led away from giving proper and adequate consideration to the medical testimony produced by the Defendant, which showed that there was nothing wrong with the Plaintiff. It was the contention of the Defendant, and amply supported by evidence, that the Plaintiff was only injured to a minor extent. Had "insurance" not been interjected and the jury unprejudiced, the jury verdict, despite the admission of liability, reasonably could have been expected to be nominal in comparison with the verdict rendered.

For these reasons, Defendant is entitled to a reversal, and a fair trial.

POINT TWO

THE TRIAL COURT ERRED IN ALLOWING THE SPECULATIVE TESTIMONY OF DR. WAYNE M. HEBERTSON AS TO THE FUTURE MEDICAL TREATMENT THE PLAINTIFF MAY REQUIRE AND INSTRUCTING THE JURY THAT THEY COULD CONSIDER THE NEED FOR FUTURE MEDICAL TREATMENT IN MAKING AN AWARD.

At the trial, the Plaintiff called Dr. Wayne M. Hebertson, a neurologist (T-54). Dr. Hebertson testified that he examined Mrs. Robinson and gave her several neurological tests (T-55, 56). As a result of his examination, he diagnosed Plaintiff as having suffered severe strain of the neck and spine and radiculitis of the nerve roots of the neck (T-57). He also originally felt that the Plaintiff may have sustained a herniated disc in the neck area (T-57). The x-ray examination of the Plaintiff did not show any abnormal condition of the vertebrae of the Plaintiff's spine (T-61). Dr. Hebertson stated that the Plaintiff's complaints were all subjective (T-73), and his diagnosis was dependent upon the symptoms and history supplied by the Plaintiff (T-69-72).

Over the Appellant's objection, Plaintiff's Counsel was allowed to elicit from Dr. Herbertson his opinion as to the need for future surgical treatment. Dr. Herbertson stated that the Plaintiff could probably get along in her present condition without surgical treatment but for her condition to improve, she may need surgery (T-63). Dr. Hebertson indicated that if surgery was to be done in

the future, it would probably involve a two step operation with a spinal fusion being done in the lumbar region and a cervical disc extraction and interbody fusion in the neck area (T-64, 65). Dr. Hebertson indicated that whether an operation would be necessary would depend upon whether the Plaintiff improved within the next six month period (T-70) and felt that an observation period of between twelve and eighteen months would be necessary before he would definitely recommend surgery (T-70). If the Plaintiff's condition improved, there would be no necessity for surgery (T-71). Dr. Hebertson had performed a myelogram on the Plaintiff which was negative (T-71).

It is submitted that the testimony of Dr. Hebertson as to the need of the Plaintiff to undergo surgery was speculative and anticipatory and not proper for the jury to consider. That testimony when considered with the fact that the trial court instructed the jury that they could consider the need for future medical attention in making their award constituted error.

It is well established that before a Plaintiff may recover for future medical expenses or future medical treatment, the likelihood of the treatment must appear with reasonable certainty. *Sang -vs- City of St. Louis,* 262 Mo. 454, 171 S.W. 347 (1914); *McCormick, Damages,* p. 324. The jury will not be allowed to speculate as to the possibility of future treatment. In 69 A.L.R. 2d 1261, 1263, it is stated:

> "Before an allowance for the cost of future medical care can be made, there must, of course,

> be evidence sufficient to support a finding that any such care will be necessitated by the injury forming the basis of the action."

In *Carraco Oil Co. -vs- Morhain,* 380 P. 2d 957 (Okla. 1963), the Oklahoma Court reversed an award for the Plaintiff in an automobile accident on the grounds that the Court erred in giving an instruction allowing the jury to consder the likelihood of a future operation. The physician who testified said he could not be certain as to the prognosis since he did not know how long the injured Plaintiff would continue to use his limb and what recovery could be expected. The Court held the instruction, although properly framed, was erroneous because of the speculative nature of the evidence. It observed:

> "There is no evidence in the record that Plaintiff will probably have further surgery. The testimony on this point is unsatisfactory and inconclusive, rendering speculative whether such an operation will probably be necessary to the preservation of Plaintiff's life or health. In the absence of any testimony that Plaintiff at some time in the future will probably have to undergo an operation on his hip, there is no legal basis for assessing against Defendants the cost of such an operation which may not occur."

In *Condron -vs- Harl,* 374 P. 2d 613 (Haw. 1962), the Supreme Court of Hawaii reversed on the grounds that the Court erred in submitting the issue of a future operation to the jury where it appeared the Plaintiff was attempting to get along without surgery. The Court observed:

> "The testimony was to the effect that Plaintiff, on medical advice, was seeking to live with his disability, rather than to be operated upon. Surgery, it was testified, was an alternative to be considered 'at such time as he felt that living with it was too burdensome.' There was insufficient evidence to show with reasonable certainty that Plaintiff's condition would, in future, call for an operation. Accordingly it was error to submit to the jury the matter of an award for the expenses incident thereto (citing cases)."

To the same effect are *Fairley -vs- St. Louis Public Service Company,* 362 S.W. 2d 549 (Mo. 1962) and *Madison -vs- Southern Farm Bureau Casualty Ins. Co.,* 120 So. 2d 342 (La. App.).

Applying the facts of the instant case to the rules and situations of the above cases, it is apparent that the trial court committed reversible error. Dr. Hebertson's testimony was to the effect that Plaintiff's x-rays did not show any abnormal condition and that the Plaintiff's complaints were generally subjective. Dr. Hebertson's diagnosis was principally based upon the history and the subjective evidence offered by the Plaintiff. Dr. Hebertson indicated the Plaintiff could probably get by in her present condition, but that if she desired improvement, surgery may be necessary, however he could not determine whether or not surgery would in fact be warranted for a period of twelve to eighteen months. Under these circumstances, it is apparent that Dr. Hebertson's testimony was speculative as to the need of the Plaintiff for future surgery, and although speculative or remote, evidence is a matter principally for the trial court's

consideration; Witkin, *California Evidence,* p. 135; McCormick, *Evidence,* p. 132. By allowing the jury to receive such speculative evidence and then give an instruction that future medical expense and treatment could be considered in making an award, the jury was allowed to return a speculative verdict which was reversible error. The facts and evidence in the instant case are similar to those in the *Condron* (supra) case where the Hawaiian Supreme Court noted that whether or not an operation would take place would be dependent upon whether the Plaintiff at some future time felt corrective surgery was necessary. A similar situation in the *Morhain* (supra) case, manifests that the evidence in the instant case and the accompanying instruction should not have been considered by the jury. In *Moore -vs- D&RGWRR Co.,* 4 Utah 2d 255, 292 Pac. 2d 849 (1956), this Court recognized that in determining whether or not a Plaintiff was entitled to recover for an injury, the context of a medical testimony must be considered as a whole, and if it appears that the plaintiff's damages are mere possibilities or speculative, the Plaintiff is not entitled to have the jury consider the issue. It is submitted that because the operation which the jury was allowed to consider in the instant case was tentative, speculative and uncertain, this Court should reverse.

Respectfully submitted,

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