

1993

# Winton Aposhian v. Steve Quimby : Brief of Appellant

Utah Court of Appeals

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John Farrell Fay; Jim Mouritsen; Siegfried & Jensen; Attorneys for Winton Aposhian.

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IN THE UTAH COURT OF APPEALS

930601 CA

WINTON APOSHIAN,  
Plaintiff and Appellant,

vs.

STEVE QUIMBY

Defendant and Appellee.

Case No. 930601 CA  
920900339

Priority No. 15

BRIEF OF APPELLANT WINTON APOSHIAN

APPEAL FROM AN ORDER AND JUDGMENT ENTERED IN THE  
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE RICHARD MOFFAT PRESIDING


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**FILED**  
Utah Court of Appeals

  
Mary T. Noonan

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## JURISDICTION

This court has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2-2(3)(j) (1991).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**ISSUE I:** Did the trial court commit reversible error in granting defendant's motion for PIP set-off and ordering that \$3,000 be deducted from plaintiff's judgment where the jury found defendant to be 100% liable for causing the collision, yet awarded plaintiff only \$4,000 of his special damages, despite a stipulation that plaintiff had incurred \$7,815 of **reasonable medical charges which arose out of the injuries of this collision, which stipulation was presented to the jury in a jury instruction to the effect that \$7,815 had been incurred in accident related medical expenses?** As a question of law, more particularly a question of statutory interpretation involving the application of Utah Code Annotated § 31A-22-309 (6), this Court accords no deference to the conclusions of the lower court, but rather assesses the trial court's conclusions for correctness. State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990).

## DETERMINATIVE STATUTES AND RULES

The following statute is determinative of the question at issue in this appeal:

Utah Code Annotated § 31A-22-309:

(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 of Utah, 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.

#### STATEMENT OF CASE

##### Nature of the Case and Course of Proceedings

Plaintiff and appellant **Winton Aposhian** brought this action in the **Third Judicial District Court** to recover compensation for injuries he sustained as a result of an automobile collision. The trial resulted in a jury determination that Quimby was 100% at fault for the collision, and that Aposhian had suffered medical expenses in the amount of \$4,000 and general damages in the amount of \$5,000. (R. 205-206). On or about May 6, 1993, the trial court granted defendant's motion for a PIP set-off of \$3,000, representing the amount defendant was allegedly obligated to reimburse plaintiff's no-fault insurer, thereby allowing defendant to deduct this \$3,000 from the amount of the jury verdict. (R. 268-269). On or about May 7, 1993, plaintiff filed his notice of appeal from the trial court's ruling on the PIP set-off. (R. 272). On or about September 21, 1993 the Supreme Court poured this matter over to the Court of Appeals for disposition. (R. unnumbered as of

time plaintiff filed his brief, found at penultimate page of record.)

### **Statement of Facts and Disposition**

1. On or about November 30, 1990, the vehicle driven by plaintiff Winton Aposhian was struck from the rear by a vehicle driven by defendant Steve Quimby. (R. 3).

2. As a result of the collision of November 30, 1990, Aposhian suffered personal injuries which required medical care. (R. 3-4, 206).

3. Prior to the trial of this action, the parties stipulated to a summary of the reasonable charges for plaintiff's medical care incurred as a result of the subject collision. (R. 114).

4. At the trial of this action, an instruction was submitted to the jury to the effect that the parties had stipulated to "\$7,815 incurred in accident related medical expenses." (R. 174.)

5. On or about February 25, 1993, the jury returned its verdict, finding that the defendant was 100% negligent in causing the collision of November 30, 1990, that plaintiff had suffered injury as a result of the collision, and that plaintiff had sustained damage to the extent of \$4,000 for medical expenses and \$5,000 in general damages as a result of the subject collision. (R. 205-206).

6. On or about March 1, 1993, defendant made a post-trial motion for PIP set-off, claiming that he was required to pay \$3,000

to plaintiff's no-fault insurer, representing the amount paid to plaintiff as no-fault benefits. (R. 213, et seq.).

7. Following submission of a memorandum in support, in opposition, and in reply, and after hearing oral argument, the trial court granted defendant's motion, ordering that \$3,000 be deducted from the amount of the judgment. (R. 268-269).

8. Plaintiff filed his notice of appeal on or about May 7, 1993. (R. 272).

#### **RELIEF SOUGHT ON APPEAL**

Plaintiff/appellant Winton Aposhian respectfully requests this Court to reverse the ruling of the Third District Court, honorable Richard Moffat presiding, ordering that the jury verdict be reduced by \$3,000, and reinstate the full jury verdict amount of \$9,000. The reason for this request is that the trial court erred in deducting a PIP set-off of \$3,000 where the jury reduced the amount of plaintiff's stipulated reasonable medical charges incurred as a result of the subject collision by \$3,815.

#### **SUMMARY OF ARGUMENT**

WHERE THE PLAINTIFF'S MEDICAL BILLS HAVE ALREADY BEEN REDUCED BY THE JURY MORE THAN \$3,000 BELOW THE STIPULATED REASONABLE MEDICAL CHARGES INCURRED AS A RESULT OF THE COLLISION, NO PIP SET-OFF SHOULD BE ALLOWED: While it is true that the generally accepted practice is to reduce plaintiff's award by the amount of the PIP payments, if plaintiff has recovered PIP payments as part of the jury verdict, it is equally true that no such reduction is proper where the plaintiff's stipulated reasonable charges incurred



as a result of the subject collision have been reduced more than \$3,000 by the jury's verdict.

### **ARGUMENT**

#### **POINT I.**

**THE SUBROGATION OWED BY DEFENDANT TO PLAINTIFF'S NO-FAULT INSURER SHOULD NOT BE DEDUCTED FROM THE PLAINTIFF'S RECOVERY, PARTICULARLY WHERE THE VERDICT HAS ALREADY BEEN REDUCED PLAINTIFF'S RECOVERY BY MORE THAN THE AMOUNT OF THE PERSONAL INJURY PROTECTION PAYMENTS**

Utah Code Annotated § 31A-22-309(6)(a) provides, in pertinent part, that "where the insured under the policy [which provides personal injury protection ("PIP") coverage] 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,...the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment". Further, the following sub-section of U.C.A. § 31A-22-309(6), part (b), provides that "the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers." Defendant's contention before the trial court, which that court agreed with in granting his motion, is that, although the above-cited statutes provide for resolution of the dispute between only the insurers, the tortfeasor is entitled to deduct from the judgment the amount of the PIP subrogation if the jury was not explicitly instructed that a portion of plaintiff's medical bills were paid by his no-fault insurer.

But where, as in the instant case, the injured party has received less than the amount of his damages, particularly less than the **stipulated** amount of his reasonable medical charges **arising out of the subject collision**, it is inequitable and manifestly unjust to then further reduce his recovery by the amount the tortfeasor's insurance company is obligated to pay to the victim's no-fault carrier. Not only is it unjust and inequitable, it is contrary to the pronouncements of the Utah Supreme Court on this issue to reduce the victim's recovery **twice**, first by the jury's verdict awarding him less than the stipulated reasonable medical charges incurred as a result of defendant's negligence, and then again by reducing the judgment.

The Utah Supreme Court addressed related issues in **Allstate Ins. Co. v. Ivie**, 608 P.2d 1197 (Utah 1980), in which a predecessor statute to the current no-fault insurance code was at issue. In **Ivie**, the Court held, where there has been a payment by a no-fault insurer to the tort victim, "[i]n order to present a completely factual picture to the jury, the injured party may wish to present evidence of all his medical bills or other economic losses." This procedure was followed here, both by presentation of evidence regarding plaintiff's damages and medical bills, as well as by jury instruction number 11, which informed the jury that:

The stipulated facts are as follows:

\$7,815.00 incurred in accident related medical expenses.

Since the parties have so agreed, you are to take these facts as true for purposes of this case. (R. 174).

The Ivie Court further held that the proper procedure in such a case is for

The court, by an appropriate instruction, ... [to] explain to the jury that these economic losses have not been included in the prayer for damages, because the injured party has previously received reparation under his own no-fault insurance coverage. Ivie at 1200.

Clearly, this procedure was not followed in the instant case, as the plaintiff did pray for the full amount of his medical bills, and no instruction was given informing the jury that a portion of the medical bills had been paid previously.

The Ivie Court also held, however, that the substantially similar predecessor statute to the current no-fault law did not confer "on the no-fault insurer a right of subrogation to the funds received by its insured for personal injuries." Id. at 1202. Rather, the Court held, the law

grants the no-fault insurer a limited, equitable right to seek reimbursement in arbitration proceeding against the liability insurer. [The no-fault law] cannot be deemed as conferring subrogation rights on the no-fault insurer, vis-a-vis its insured as to his recovery in a settlement or legal action. [Emphasis added]. Id.

Yet despite this clear pronouncement by the Supreme Court that the matter of subrogation for no-fault benefits is between the liability insurer and the no-fault insurer **only**, and is not to involve the tort victim, defendant is trying to do precisely what the Ivie Court forbade -- bring the no-fault insured, the plaintiff, into the matter and make him ultimately responsible for the subrogation.

The confusion in this case is understandable, because the facts of this case are slightly different than those in Ivie.

Here, despite the pronouncement of the Ivie Court, the trial court allowed plaintiff to prove and plead for, and in fact submit to the jury as stipulated, the full amount of his medical benefits (minus an amount which the court determined, prior to trial, did not represent necessary medical care arising from the collision).

Despite this proof, however, the jury deducted from its award for plaintiff's medical bill some \$3,815, in that it awarded only \$4,000, while the **stipulated reasonable medical charges arising from this collision** totaled \$7,815. In essence, the jury, whether by serendipity or because of some knowledge obtained independently of any instruction from the court, deducted from the **stipulated reasonable and necessary medical bills** an amount greater than the PIP payments which defendant now attempts to have deducted from the verdict amount.

The net effect of the jury's reduction of plaintiff's medical bills and the trial court's grant of defendant's requested PIP set-off is that plaintiff will recover only \$1,000 for his medical damages caused by defendant's negligence, when, by agreement and stipulation between the parties the full value of such damages totaled \$7,815. Far from a double recovery, plaintiff is being twice penalized, in that the jury reduced his recovery by \$3,815, and the trial court further reduced this amount by \$3,000.

The Utah Supreme Court addressed a similar issue in Laub v. South Central Utah Telephone Ass'n, 657 P.2d 1304 (Utah 1982), a case with a great deal of factual similarity to the instant dispute. In Laub, the trial court allowed plaintiff to plead for

amounts previously paid by the no-fault insurer. The jury in Laub, however, awarded the full amount of the medical damages, including those amounts previously paid as PIP coverage, to the plaintiff. The no-fault insurer, recognizing it had no right to proceed against its insured, after the holding in Ivie, sought and obtained recovery of the PIP amounts from the tortfeasor's insurer. The tortfeasor's insurer, after satisfying the full amount of the verdict by two checks, one to the tort victim and his no-fault insurer jointly for the PIP amount, and one to the tort victim individually for the remainder of the judgment, attempted by a Rule 60(b) motion, to reduce the judgment against them by the amount of the PIP payment. Id. at 1305-1306.

The principle differences between the Laub case and the instant dispute are: 1. the fact that the plaintiff recovered from the jury the full amount of his damages, including medical bills previously paid by PIP; and 2. the procedural posture of Laub, in that the defendant first satisfied the judgment, then, when ordered by an arbitrator to repay the no-fault insurer, attempted to reduce the already satisfied judgment. In the case now before this Court, the plaintiff did not receive the full amount of his stipulated reasonable and necessary medical bills incurred as a result of the collision caused by defendant, and the defendant followed a more procedurally correct course of attempting to resolve the PIP set-off dispute before satisfying the judgment.

Defendant relies on Laub for the proposition that

if a plaintiff does improperly plead for previously compensated damages and they are allowed to be included

in the judgment, the court should, at the conclusion of the trial, either on its own initiative or on motion of a party, reduce the judgment **by the amount of those previously compensated damages, and thereby prevent double recovery.** [Emphasis added.] Id. at 1307.

Because of the distinctions noted above, though, particularly the fact that the plaintiff here did not recover the full amount of his **stipulated medical damages**, the holding of the Laub Court is inapposite here. The key language in the passage cited above is that the judgment is to be reduced "by the amount of those **previously compensated damages, and thereby prevent double recovery.**" Here, the verdict did not award plaintiff amounts for which he had been "previously compensated," because the jury reduced his **stipulated reasonable medical bills incurred as a result of the collision** by more than the amount of PIP payments he had received. By the same logic, then, there has been no "double recovery," because plaintiff's recovery has been reduced by more than the amount of his PIP payments. It naturally follows that defendant has already, by the jury's verdict, received his "set-off," and the trial court improperly allowed him a second "set-off," which plaintiff respectfully requests this Court to return to him.

The clearest pronouncement by the Utah Supreme Court on this issue came in Dupuis v. Nielson, 624 P.2d 685 (Utah 1981), in which the Court held that

To the extent that plaintiff would receive **double recovery of a particular type of damage**, an adjustment of the judgment in this case was appropriate. However, the judgment **may only be reduced to the extent it specifically and identifiably included special damages of the same types as those for which no-fault benefits had**

**previously been received.** [Emphasis added]. Id. at 686-687.

Here, there is no dispute that, by the jury's verdict, plaintiff's damages have been reduced by more than the amount of the PIP payments he has received. He has not received "double recovery of a particular type of damage." To the contrary, he received less than his **stipulated reasonable medical damages resulting from defendant's negligence** minus the PIP payments. To again reduce his damages is to violate the Court's directive in Dupuis. Such double reduction has the effect of reducing his judgment beyond "the extent [to which] it specifically and identifiably included special damages of the same types as those for which no-fault benefits had previously been received." For this reason, the decision of the trial court is in error, and must be reversed.

The result sought by plaintiff does not violate Hill v. State Farm Mut. Auto Ins. Co., 765 P.2d 864 (Utah 1988), in which the Utah Supreme Court stated that

When the amount of damages incurred by the insured has been judicially ascertained, the extent of the subrogation right of the insurer is **usually undisputed**. The insured is not entitled to **double recovery**, and the [no-fault] insurer is equitably entitled to recover any amounts from the insured that the insured recovered from the tort-feasor. [Emphasis added]. Id. at 866.

It is important that the Hill Court stated that where the damages have been judicially ascertained, the extent of the subrogation right "is **usually** undisputed," and that the insured is not entitled to "**double recovery**." The instant dispute is one of the rare cases in which, even after judicial ascertainment of the amount of damages, the extent of the no-fault insurer's subrogation right to

plaintiff's recovery is disputed, because the judicial ascertainment of damages fell far short of the agreed, stipulated amount of damages actually suffered by plaintiff. For this reason, there is no chance that plaintiff will receive a "double recovery." Consequently, the trial court erred in further reducing plaintiff's award, and plaintiff respectfully requests this Court to reverse this error.

### CONCLUSION

This Court should reverse the trial court's order allowing a PIP set-off of \$3,000 from the judgment amount, because:

1. The jury failed to award the full amount of plaintiff's stipulated medical damages arising from defendant's negligence, but rather reduced the amount by \$3,815;

2. Plaintiff will not receive a "double recovery," because his damages have already been reduced by the jury's award;

3. Defendant will not have to pay the amount of the PIP subrogation twice, because the jury has already reduced the amount of plaintiff's medical damages by more than the PIP subrogation amount;



4. It would be inequitable, unjust, and contrary to Utah law, as stated in the Utah Code and by decisions of the Utah Supreme Court, to twice reduce plaintiff's recovery.

Respectfully submitted this 12 day of November, 1993.

**SIEGFRIED & JENSEN**

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John Farrell Fay  
Jim Mouritsen  
Attorneys for Plaintiff/Appellant,  
Winton Aposhian

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that four copies of the foregoing APPELLANT'S BRIEF were mailed, postage fully prepaid, this 12 day of November, 1993, to:

T.J. Tsakalos  
**CONDER, WANGSGARD & TSAKALOS**  
4059 South 4000 West  
West Valley City, Utah 84120

151

---

Jim Mouritsen

**EXHIBIT "A"**

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310 East 4500 South, Suite 620  
Salt Lake City, UT 84107  
Telephone: (801) 266-0999  
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WINTON APOSHIAN,  
Plaintiff,  
-vs-  
STEVE QUIMBY,  
Defendant.

STIPULATION TO SUMMARY  
OF MEDICAL CHARGES  
Civil No. 920900339 PI  
Judge Richard Moffat

The above-named parties, through their respective counsel, hereby stipulate that the summary of plaintiff's medical charges (a copy of which is attached as Exhibit "A") represent reasonable charges for medical services plaintiff Winton Aposhian incurred as a result of the subject collision, and that these amounts may be entered into evidence without the need of further foundation.

DATED this 26<sup>th</sup> day of January, 1993.

SIEGFRIED & JENSEN

John Farrell Fay  
Attorneys for Plaintiff

DATED this 19 day of January, 1993.

HANSON, EPPERSON & SMITH

T.J. Tsakalos  
Attorneys for Defendant

**EXHIBIT "B"**

INSTRUCTION NO. 11

Before the trial of this case, the Court held a conference with the lawyers for the parties. At this conference, the parties entered into certain stipulations or agreements, in which they agreed that facts could be taken as true without further proof. By this procedure, it is often possible to save much time.

The stipulated facts are as follows:

\$7,815.00 incurred in accident related medical expenses.

Since the parties have so agreed, you are to take these facts as true for purposes of this case.

**EXHIBIT "C"**

THIRD JUDICIAL DISTRICT COURT  
Third Judicial District

MAY - 6 1993

SALT LAKE COUNTY  
*K. Crutcher*  
Deputy Clerk

T. J. TSAKALOS (3289)  
of CONDER, WANGSGARD & TSAKALOS  
4059 South 4000 West  
West Valley City, UT 84120  
Telephone: (801) 967-5500

Attorneys for Defendant

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

WINTON APOSHIAN,	)	ORDER REGARDING SET-OFF
Plaintiff,	)	
vs.	)	
STEVE QUIMBY,	)	Civil No. 920900339 PI
Defendant.	)	Judge Richard Moffat

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The defendant's Motion for Set-off coming before the court for hearing of April 9, 1993, John Farrell Fay, appearing on behalf of the plaintiff and T. J. Tsakalos, appearing on behalf of the defendant, and the court having reviewed the memorandum filed by counsel and hearing oral argument of counsel,

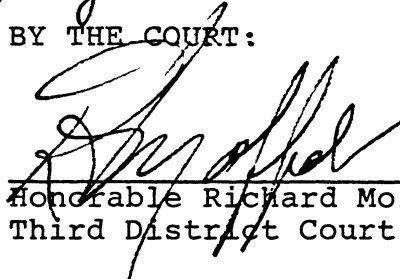
THE COURT HEREBY ORDERS, ADJUDGES AND DECREES THAT:

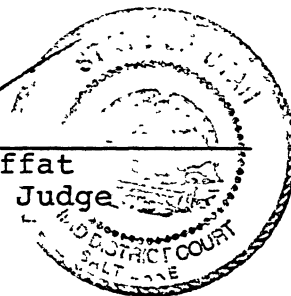
Defendant's Motion for Set-Off is granted and the verdict and ultimate judgment will be reduced by \$3,000.00, representing the P.I.P. subrogation claim of State Farm Insurance, the insurer for

plaintiff.

DATED this 6<sup>th</sup> day of May, 1993.

BY THE COURT:

  
Honorable Richard Moffat  
Third District Court Judge



CERTIFICATE OF MAILING

I hereby certify that on this 15 day of April, 1993, I mailed a true and exact copy of the foregoing ORDER REGARDING SET-OFF, postage prepaid, to the following:

John Farrell Fay  
SIEGFRIED & JENSEN  
310 East 4500 South, Suite 620  
Salt Lake City, UT 84107

  
\_\_\_\_\_