

1994

# Khai Chanhmany v. Brian D. Bone : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KHAI CHANHMANY,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	Case No. 940036 CA
BRIAN D. BONE,	)	
	)	Priority No. 15
Defendant/Appellee.	)	

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REPLY BRIEF OF THE APPELLANT

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APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JOHN A ROKICH PRESIDING

---

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UTAH COURT OF APPEALS  
BRIEF

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DOCUMENT NO.

940036

Utah Court of Appeals

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## II.

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### III.

#### INTRODUCTION

This is an appeal from a final judgment and the lower court's subsequent denial of Chanhmany's Motion for an Additur or in the alternative a new trial. Chanhmany also appeals the lower court's order striking her general damages award. Although the uncontested evidence showed that Chanhmany sustained more than \$3,000 in medical expenses resulting from an automobile accident, the jury awarded only \$2,100 as reasonable compensation for her medical expenses.

In Chanhmany's opening brief, she argued that the lower court's denial of her motion for an additur or a new trial lacked a reasonable basis because: (1) Based on the uncontested and overwhelming evidence, reasonable minds could only conclude that Chanhmany sustained more than \$3,000 in medical expenses. (2) To award less than \$3,000 in medical expenses, the jury disregarded uncontested evidence. (3) The threshold statute does not justify striking the general damages award because whether Chanhmany met the medical expense threshold was not a trial issue. The threshold issue was not presented to the jury. In addition, Utah Code Ann. § 31A-22-307 provides the procedure for resolving a threshold issue dispute. Neither party followed the procedure because threshold medical damages simply was not a trial issue.

Chanhmany also said that her general damage award should not have been stricken because based on the evidence, reasonable

minds must conclude that Chanhmany is permanently disabled. Both sides medical experts testified that Chanhmany was permanently impaired. Chanhmany's medical expert concluded that she was disabled. Bone's medical expert did not challenge that conclusion. Chanhmany and her co-workers explained how the impairment restricted her work and lifestyle activities. At the conclusion of the evidence, the trial court judge was convinced Chanhmany was disabled and entitled to compensation. Thus, the jury was not instructed on the threshold issue of disability, nor were they asked to determine whether Chanhmany was permanently disabled.

In addition, Chanhmany showed that the verdict is a product of prejudice. The jury's disregard of the uncontested evidence coupled with the unreasonably low verdict and admissions by jurors on voir dire, all establish that the verdict was a product of prejudice against chiropractic treatment.

Finally, Chanhmany said the lower court denied her a constitutional right to a jury trial on the disability issue. Chanhmany noted the determination of disability is a question of fact and explained that the Court by not presenting the issue to the jury and then necessarily concluding that Chanhmany was not disabled when the court struck the general damages award, denied her the right of a jury trial on this important factual issue.

In response, Defendant Bone says that Chanhmany failed to plead and prove that she met the medical expense threshold set forth in Utah Code Ann. § 31A-22-309(e) and that the jury could and

did reasonably find that Chanhmany's necessary medical expenses were less than \$3,000 (Appellee's Brief pp. 11 - 13). Bone mistakenly relies on case law from Colorado, Pennsylvania and New York, states which have no fault statutes different than Utah's, for the proposition that whether threshold is met is a jury issue upon which the plaintiff has the burden of proof. Bone ignores Utah case law which inescapably leads to a different conclusion. Bone also ignores the procedural context of this case. That is, since neither party questioned whether Chanhmany sustained threshold medical expenses, they did not avail themselves of the procedure in Utah Code Ann. §31A-22-307. Nor was the jury instructed or asked to rule on any threshold issue.

Bone also says that Chanhmany failed to prove and plead permanent disability. (Appellee's Brief pp. 16 - 19). Again, in doing so, Bone ignores all the uncontested evidence which unquestionably requires a different conclusion. Bone also ignores the trial judge's conclusion arrived at prior to submitting the case to the jury that Chanhmany was disabled and entitled to compensation.

Finally, Bone says that Chanhmany cannot appeal the disability issue and her denial of a jury trial on the disability issue because she did not submit a jury instruction on permanent disability (Appellee's Brief, pp. 21 - 23).

This reply brief responds to each of Bone's arguments.

IV.

SUMMARY OF ARGUMENT

POINT I

CHANHMAN DOES NOT HAVE THE BURDEN OF PLEADING AND  
PROVING COMPLIANCE WITH THE STATUTORY THRESHOLD  
REQUIREMENTS

Chanhmany does not have the burden of pleading and proving threshold medical expenses for numerous reasons. The threshold statute is an affirmative defense. Allstate v. Ivie, 606 P.2d 1197, 1200 (Utah 1980). Bone has the burden of proving the elements triggering the limited immunity granted by the statute. In addition, threshold medical expenses was not a jury issue. The jury was not asked to find whether Chanhmany sustained medical expenses exceeding \$3,000, nor were they told what would happen if they found that she did not.

POINT II

BY NOT INSTRUCTING THE JURY ON THRESHOLD DAMAGES AND  
THRESHOLD DISABILITY, BONE WAIVED THESE AFFIRMATIVE  
DEFENSES

Bone correctly pled the threshold statute as an affirmative defense. However, he failed to submit his affirmative defense to the jury via a jury instruction or special verdict. By failing to present his defense theory to the jury, Bone waived the limited immunity defenses provided by Utah's Threshold Statute.

POINT III

CHANHMANY PLEAD AND PROVED THRESHOLD MEDICAL  
EXPENSES EXCEEDING \$3,000

Regardless of who has the burden of proof on the threshold damage issue, the trial evidence conclusively showed that Chanhmany sustained more than \$3,000 in medical expenses resulting from the auto accident. Bone's argument that a portion of the expenses may be due to Chanhmany's second pregnancy, is unsupported speculation and contrary to the direct testimony of all medical experts in this case.

POINT IV

CHANHMANY PLED AND PROVED THRESHOLD DISABILITY

Although Chanhmany does not have the burden of proving that she is permanently disabled as a result of the auto accident, she did so. Contrary to the argument in Bone's Brief, a permanent impairment is roughly equivalent to a permanent disability. Both medical experts testified Chanhmany was permanently impaired. In addition, there is uncontradicted testimony establishing how the auto accident altered Chanhmany's capacity to meet personal, social and occupational needs and requirements. Based on the evidence, the trial court concluded that Chanhmany was disabled and entitled to some compensation. For that reason only, the permanent disability issue was not presented to the jury.

POINT V

CHANHMAN Y DID NOT WAIVE HER RIGHT TO A JURY TRIAL  
ON THE THRESHOLD DISABILITY ISSUE

It is true that a failure to object to a jury instruction omission waives the litigants right to appeal the Court's failure to give the instruction. In fact, when Bone failed to object to no threshold disability instruction, the effect was that the limited immunity defense provided by the threshold statute was waived, and Chanhmany certainly has no objection to that. However, Chanhmany's appeal is not based on the Court's failure to instruct on the threshold disability issue. Rather, Chanhmany says that the following conduct deprived her of a jury trial on the disability issue: (1) Prior to instructing the jury, the Court concluded that Chanhmany was permanently disabled. (2) Since disability was no longer an issue, the Court correctly did not instruct the jury that it had to determine whether Chanhmany was permanently disabled. (3) When the Court subsequently struck the modest general damage award, the Court necessarily concluded that Chanhmany was not permanently disabled.

POINT VI

CHANHMAN Y DID NOT WAIVE HER RIGHT TO APPEAL A VERDICT  
RESULTING FROM PREJUDICE

Chanhmany did not waive her right to appeal the verdict on the basis that the verdict is a product of prejudice against chiropractic treatment. In voir dire, two jurors indicated some bias against chiropractors. However, Chanhmany did not move to

exclude the two jurors. Had Chanhmany based her appeal on the argument that it was improper for the two individuals to serve as jurors, Bone would be correct in arguing that Chanhmany waived her right to exclude them. However, passing a jury for cause does not waive a litigant's right to subsequently appeal a jury verdict based on jury prejudice.

## **VI.**

### **ARGUMENT**

#### **POINT I**

#### **CHANHMAN Y DOES NOT HAVE THE BURDEN OF PLEADING AND PROVING COMPLIANCE WITH THE STATUTORY THRESHOLD REQUIREMENTS**

##### **A. The Defendant, Not Chanhmany, Has the Burden of Proof on a Threshold Damages Issue.**

The fundamental theme of Bone's Brief is that Chanhmany (the Plaintiff) and not Bone (the Defendant) has the burden of proof on threshold issues. Bone's theme is fundamentally wrong. Over 21 states have adopted no-fault automobile insurance statutes. Allstate v. Ivie, 606 P.2d 1197, 1199 (Utah 1980). Some of the statutes, such as those cited in Bone's Brief, hold that the "statutory threshold is an essential condition of a plaintiff's right to recover . . . and the plaintiff therefore has the burden of proving facts which establish that one of the threshold criteria has been met". E.g. Pinell v. McCrary, 849 P.2d 848, 850 (Colo. App. 1992) (cited in Bone's Brief, pp. 10-13, 16; See Grand v.

Durst, 482 A.2d 1008 (Pa. Supr. 1984) (cited in Bone's Brief, pp. 10, 12).

However, Utah's threshold statute, as construed by the appellate courts, does not create another element a plaintiff must prove to prevail on a negligence claim. Rather, if a defendant, like Bone, has no-fault insurance coverage he is granted limited statutory tort immunity. As explained in Allstate v. Ivie, supra at 1200:

[T]he no-fault insurance act confers two privileges: First, he is granted partial tort immunity. . . . He does, however, remain liable for customary tort claims . . . where the threshold provisions . . . are met.

Limited statutory immunity, like any other matter, constituting an avoidance, is an affirmative defense which must be pled and proved by a defendant, not the plaintiff. Bowman v. Ogden City, 33 Utah 196, 93 P. 561 (1908); (City court waived detailed nature of claim.) Green v. James, 473 F.2d 660 (9th Cir. 1973); Maul v. Costan, 928 F.2d 784, 786 (7th Cir. 1991). See also Shoreline Dev., Inc. v. Utah County, 835 P.2d 207 (Utah App. 1992).

Moreover, if the threshold requirement was a claim element a plaintiff must prove, then the Utah Court of Appeals could not have held as it did in Jepson v. State Dept. of Corrections, 846 P.2d 485, 487 (Utah App. 1993) that the statute of limitations for filing a notice of claim with a governmental entity begins to run when the accident occurs, rather than when the injured sustains \$3,000 medical damages. Ordinarily, a statute of



limitations begin to run when the last element of the tort claim occurs. E.g. Davidson Lumber Sales, Inc. v. Bonneville Inv. Inc., 794 P.2d 11 (Utah 1990). Hence, if the threshold requirement was a claim element with the burden of proof on the plaintiff, the statute of limitations in Jepson, would not have commenced running until the plaintiff sustained \$3,000 in medical expenses.

In addition, Bone in his pleadings admits that the threshold requirement is an affirmative defense. Bone plead in his answer the threshold statute as his "Sixth Defense" (R. 19 - 20).

In summary, Chanhmany does not have the burden of proving she sustained in excess of \$3,000 medical expenses. Bone has the burden of proving Chanhmany did not meet threshold requirements. As hereinafter shown in this brief and Point I of Chanhmany's opening brief, the proof was contrary to Bone's burden. The evidence is overwhelming that Chanhmany sustained more than \$3,000 in medical expenses. Thus, the lower court's failure to grant a new trial, or in the alternative, an additur, lacked a reasonable basis and must be reversed.

**B. Whether Chanhmany Sustained \$3,000 in Medical Expenses Was Not a Trial Issue.**

Another erroneous albeit companion theme of Bone's Brief is that whether Chanhmany met threshold requirements was for the jury to decide and the jury correctly decided against her.

In support of his argument, Bone again relies on cases from jurisdictions with no fault statutes different than Utah's.

However, Utah's no fault statute does not require that the threshold issue be submitted to the jury. Instead, Utah's statute is unique. To create a uniform application of the statute throughout the state, section 31A-22-307 requires a relative value study of medical expenses and accommodations. Compensation Systems and Utah's No-Fault Statute, 173 Utah L. Rev. 383, 391. The statute then provides a formula for applying the study to a particular case. (Utah Code Ann. § 31A-22-307(2)(d)). If threshold damage is a disputed issue, the statute provides that the court or either party may move to designate an impartial medical panel of not more than three licensed physicians to testify. In this case, neither party or the judge requested the panel. Instead, they stipulated to the admission of Chanhmany's medical expenses totalling \$3,299.09. (R. 277, 289, lines 14 - 15). The parties' decision not to seek a medical panel and their stipulation of medical expense evidence shows that threshold medical expenses was not a trial issue.

**C. The Jury Was Not Asked to Determine Whether Chanhmany Met the Threshold Requirements of Utah Code Ann. § 31A-22-309(e).**

In this case, Chanhmany need not prove threshold medical expenses because the issue was never submitted to the jury. The one and only requirement or issue set forth in Section 31A-22-309(e) is whether the injured person "has sustained. . . (e) medical expenses . . . in excess of \$3,000." However, the jury was not asked to determine whether Chanhmany sustained more than \$3,000

in medical expenses, nor were they told what would happen if they did not find that she sustained more than \$3,000 in medical expenses. Instead, the jury was asked to determine a different issue, i.e., What amount should be awarded to reasonably compensate Chanhmany for her medical expenses? (Jury Instructions 28 - 29 R. 322, 323 Copy set forth in the addenda; Special Verdict R. 342 - 343).

Chanhmany's appeal is not based on the Court's failure to give a jury instruction or verdict requiring the jury to decide whether Chanhmany sustained more than \$3,000 in medical expenses. Instead, Chanhmany's appeal is based on the fact that whether an injured person meets the Section 309(e) threshold requirements was not a jury issue. The court's subsequent reliance on the jury's finding of a different issue to strike the general damage award lacks a reasonable basis and should be reversed.

## **POINT II**

### **BY NOT INSTRUCTING THE JURY ON THRESHOLD DAMAGES AND THRESHOLD DISABILITY, BONE WAIVED THESE AFFIRMATIVE DEFENSES**

As set forth in Point I of this reply brief, Utah's threshold statute grants automobile accident defendants a limited statutory immunity which must be pled and proved by the defendant. Bone plead the threshold issue (R. 19 - 20). However, he did not request the Court to submit a threshold defense jury instruction. Neither did he submit a verdict form which required the jury to determine whether Chanhmany was permanently disabled.

The purpose of jury instructions is to set forth the legal theories of both parties. E.g. Elkington v. Foust, 618 P.2d 37 (Utah 1980), if they are supported by the evidence. Powers v. Gene's Bldg. Materials, 567 P.2d 174, 176 (Utah 1977). Specifically, if a defendant wants the jury to consider an affirmative defense, he must tender a sufficient jury instruction. U.R.C.P. 51; Alta Mutual Ins. Co. v. Northington, 561 So.2d 1041, 1047 (Ala. 1990), (failure to instruct on punitive damages standards); C.F. John Call Engineering v. Manti City, 795 P.2d 682, 684 (Utah App. 1990) (mitigation defense instruction should have been withheld); Fuller v. Zinik Sporting Goods Co., 538 P.2d 1036 (Utah 1975), (plaintiff waived instruction on burden of proof).

In this case, Bone failed to present any instruction on threshold immunity. He did not present a threshold disability instruction. He did not present a threshold damages instruction. As set forth in Appellee's Brief pages 19 through 20, the failure to propose an instruction, waives the claim or defense.

### POINT III

#### CHANHMANY PLEAD AND PROVED THRESHOLD MEDICAL EXPENSES EXCEEDING \$3,000

##### **A. The \$3,000 Threshold Requirement.**

As set forth in Point I, the one and only requirement of Utah Code Ann. § 31A-22-309(e) is whether the injured person "has sustained . . . (e) medical expenses to a person in excess of \$3,000." The statute does not require that the expenses be

reasonable. If a party wishes to challenge the reasonable cost, he proceeds under Utah Code Ann. § 31A-22-307(2)(d). Moreover, the term "medical expenses" is broadly defined to "include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing." Utah Code Ann. § 31A-22-307(3).

**B. The Proof.**

Although Chanhmany doesn't have the burden of pleading and proving threshold medical expenses, she clearly proved she sustained medical expenses in excess of \$3,000. The evidence is marshalled in Pages 14 - 16 of Chanhmany's Brief. The only evidence offered at trial consists of copies of medical expenses totalling \$3,299.09 broken down as follows:

Gold Cross Ambulance	\$ 158.09
Holy Cross Hospital	256.00
FHP	469.00
Dr. Gary Whitley (Chiropractor)	<u>2,416.00</u>
TOTAL	\$3,299.09

(Summary Page of Exhibit P-3, copy attached in the addendum).

together with testimony of three witnesses, Chanhmany, Dr. Whitley (Chanhmany's medical expert) and Dr. Moress (Bone's medical expert). None of them testified that Chanhmany did not sustain in excess of \$3,000 in medical expenses. Quite the opposite. See Chanhmany's Brief pp. 14 - 16.

In response, Bone says that the jury could conclude differently because part of the chiropractic care could have been

necessitated by Chanhmany's subsequent second pregnancy and/or her failure to continue with exercises prescribed by Dr. Whitley. Bone concludes "The jury was free to assimilate this evidence . . . and determine that some or all of the treatments incurred were not related to the accident . . . [and] that plaintiff had not mitigated her damages." Bone's Brief pp. 14 - 15.

Thus, the narrow question is whether viewing the evidence in totality, could reasonable minds conclude that at least a portion of the chiropractic treatment expenses were incurred as a result of the pregnancy or failure to exercise? The uncontested testimony shows that they could not.

Chanhmany testified she does the exercises prescribed by Dr. Whitley. (Transcript of Proceedings April 27 - 29, 1993, p. 78 lines 11 - 15, hereinafter "Tr. p. \_\_"). When she subsequently testified that she did not do the exercises, she explained that she misunderstood the second question. (Tr. p. 89 lines 13 - 15).

Chanhmany testified that prior to the accident she had never had any neck or back pain despite an earlier pregnancy. (Tr. pp. 63 lines 20 - 21; 72 lines 12 - 22). She now has chronic back pain and a numbness in her shoulder. (Tr. pp. 73 - 76).

The medical notes of Dr. Penny, the FHP physician show that the reason chiropractic treatment was interrupted was because of Chanhmany's inability to compensate the chiropractor. (Tr. p. 355, lines 6 - 22). There is no conflicting testimony.

Dr. Whitley testified that on taking her medical history, examining her x-rays and conducting a physical examination, he diagnosed Chanhmany as having a sprained back together with ligament, muscle and nerve damage caused by the auto accident. (Tr. pp. 128 - 129). He testified that he treats a lot of these injuries. (Tr. p. 129 lines 17 - 18). When Chanhmany returned for treatment, she did not report any new trauma, and she explained that she still had pain from her injury. (Tr. p. 135). Although Dr. Whitley testified that pregnancy could aggravate Chanhmany's injuries, he concluded that the back pain and numbness experienced by Chanhmany was still due to the accident:

MR. WELLS: Q. Did you consider yourself still treating the original injury?

A. That was still what I felt was the reason why she still had the problem.

(Tr. p. 135, lines. 16 - 19).

\* \* \*

MR. WELLS: Q. Do you have an opinion as to whether or not the complaint Chanhmany has made over the period of time that you have treated her relate to a particular trauma.

A. I would say it would stem back to the car accident.

(Tr. p. 174, lines. 15 - 20).

Bone's medical expert, a neurologist, also testified in support of Dr. Whitley's conclusion. Moress testified that Chanhmany had lower back strain and shoulder numbness. (Tr. pp. 217 - 218). Based on these two injuries, he gave her a 6.8% impairment

rating. (Tr. p. 230). He testified that Chanhmany's impairment was due to the auto accident. He did not testify that it was due to a second pregnancy.

MR. WELLS: Q. Okay. And so in your opinion Khai Chanhmany is 6.8% less than normal.

A. That is correct.

MR. WELLS: Q. And that's because of the injury from the accident?

A. Yes.

(Tr. p. 235, lines. 19 - 21, 24 - 25; p. 236, ln. 1).

In summary, medical experts from both sides testified that Chanhmany's injuries were due to the auto accident. Neither expert concluded Chanhmany's second pregnancy necessitated treatment. The medical testimony coupled with Chanhmany's direct testimony and her medical history all conclusively show that she did not require chiropractic treatment as a result of her second pregnancy.

In summary, Bone's claim that part of the expenses incurred with Dr. Whitley could have resulted from the second pregnancy is nothing but unsupported speculation. Thus, the jury could not and did not find that a portion of her chiropractic treatment was due to her second pregnancy. The fact finder is not allowed to disregard unimpeached, uncontradicted testimony. Rowdin v. Stanley, 455 F.2d 482, 484 (10th Cir. 1972), Smith v. Idaho University Federal Credit Union, 760 P.2d 19 (Idaho 1988). Moreover, even if there is a smattering of evidence supporting a



finding, it will be reversed if an examination of the evidence in totality, leads the reviewing court to conclude that a mistake has been made. Anderson v. City of Bessemer, 470 U.S. 564 (1985), Cuddy v. Carmen, 762 F.2d 119, 124, (D.C. Cir. 1985).

In this case, taking the evidence as a whole leads to only one conclusion. The chiropractic treatments and expenses were sustained as a result of the auto accident. For this reason, the orders denying a new trial and striking the general damages each lacked a reasonable basis and should be reversed.

#### POINT IV

##### CHANHMAN Y PLED AND PROVED THRESHOLD DISABILITY

###### **A. Introduction - Appellee's Brief.**

Incredibly, Bone says that Chanhmany failed to prove a permanent disability. (Appellee's Brief, pp. 15-17). Bone admits that Chanhmany was permanently impaired but argues:

In this case, no evidence was ever introduced which attempted to correlate the medical findings of impairment with an assessment in [sic] their impact on Plaintiff's lifestyle, earning capacity or job functions (disability).

(Id. at 17).

Bone also says that no objective evidence of a disability was ever presented to the two medical experts or the jury.

As hereinafter demonstrated, there was overwhelming evidence that Chanhmany was disabled. There is no evidence that she was not. The Court's failure to submit the disability issue to

the jury was not due to a lack of disability evidence, but instead was due to the fact that disability was not a contested trial issue.

**B. The Threshold Disability Requirement.**

A person injured in an automobile accident may maintain a cause of action if he sustains a "(c) permanent disability" Utah Code Ann. § 31A-22-309(1)(c).

Utah's no fault statute does not define what a "permanent disability" is. However, Utah's appellate courts have defined the term. Although, this court would not know it from reading Bone's brief, the authority Bone cites holds that a permanent impairment is often the sole or real criteria of permanent disability. Northwest Carriers v. Ind. Commission, 639 P.2d 138, 140.fn.3 (Utah 1981) (cited in Appellee's Brief pp. 16 - 17).

Similarly, for threshold purposes other states have defined a permanent disability as a permanent injury. E.g. Elliott v. Simon, 385 A.2d 249, 250 (N.J. 1978).

AMA Guidelines define a disability as an alteration of an individual's capacity to meet personal, social or occupational demands or to meet statutory or regulatory requirements. (Appellee's Brief p. 17).

Finally, amended Utah Code Ann. §31A-22-309(c), treats permanent disability as equivalent to a permanent impairment based upon objective findings. An objective finding is what "you can

objectively look at in or measure it or feel it." (Tr. p. 138, lines. 4-5).

**C. The Only Reason the Jury was not Presented the Disability Issue Was Because the Parties' Medical Experts and the Court Concluded That Chanhmany Was Permanently Disabled and . The Only Dispute was the Extent of the Disability.**

Contrary to the unsupported assertion in Bone's brief, lack of disability evidence was not the reason the threshold disability issue was not presented to the jury. Rather, the jury was not asked to determine whether Chanhmany met threshold disability because the evidence of disability was so overwhelming that there was no cause to submit the issue to the jury. In a conference with counsel held well in advance of instructing the jury, the Court concluded that Chanhmany was injured, disabled, and entitled to compensation. The only issue left for the jury to decide was how much:

THE COURT: It has been established by both doctors that there's an injury . . . they both assigned a rate of disability. One is 5 percent and the other is 12 percent. The jury is to make the determination between five percent and twelve percent. . . .

(Tr. p. 269 lines 2 - 8).

If the Court or the parties had any question of whether Chanhmany was disabled, the threshold disability issue would have been presented to the jury. The fact that the Court did not do so, and the parties did not request the court to do so shows that at the conclusion of the evidence, there was no dispute as to whether Chanhmany was disabled.

**D. The Disability Proof.**

**1. Evidence of an alteration in Chanhmany's capacity to meet personal, social and occupational demands.**

Contrary to the unsupported allegations in Bone's brief, there was plenty of evidence showing that the accident injury altered Chanhmany's ability to meet personal, social and occupational demands. Chanhmany testified that she was no longer able to lift 50 pound totes at work. (Tr. pp. 76, 77). Her co-workers said the same thing. (Tr. p. 260). She was transferred to a different job. (Tr. pp. 76 Ins 19 - 24, 90 lines 20 - 25). Chanhmany has difficulty in lifting laundry and groceries. (Tr. p. 77). She can no longer participate in sports. (Tr. p. 79 lines 21 - 25). Exercises are difficult. She cannot do sit ups. (Tr. p. 78 lines 3 - 10). There was no contrary testimony. It is impossible therefore to marshall any conflicting evidence because there is none, the foregoing evidence clearly establishes that Chanhmany has had an alteration of her capacity to meet personal, social and occupational demands.

**2. Evidence of a permanent impairment or injury based on objective findings.**

As set forth in Chanhmany's opening brief, there is no question that Chanhmany is permanently impaired. Chanhmany's medical expert gave her a 12 percent whole person impairment rating. (Tr. p. 148 - 150). Bone's medical expert assigned a permanent impairment rating of 6.8 percent. Bone apparently concedes that Chanhmany is impaired but grumbles that there was no

objective evidence upon which the permanent impairment ratings were based so Chanhmany was not permanently disabled. (Appellee's Brief p. 21). In making this argument, Bone is playing with semantics. As stated in Northwest Carrier v. Ind. Commission, 639 P.2d 138 140 (Utah 1981), a "permanent impairment, is in fact the sole or real criterion of permanent disability far more often than readily acknowledged". More importantly, however, the record discloses that Bone's argument is factually incorrect. Applying the AMA Guidelines, Dr. Whitley objectively measured Chanhmany's range of motion and concluded that it was restricted. (Tr. pp. 109, 110 and 144). In addition, after conducting a battery of medically objective tests, Dr. Whitley concluded that Chanhmany's impairment was 12.8 percent. (Tr. pp. 138, 139, 143 - 148 and 149).

#### POINT V

##### CHANHMANY DID NOT WAIVE HER RIGHT TO A JURY TRIAL ON THE THRESHOLD DISABILITY ISSUE

Bone, in his brief, argues that Chanhmany waived her right to a jury trial on the disability issue because she did not propose a jury instruction or a verdict containing the threshold disability issue. (Appellee's Brief, p. 23).

There are at least three reasons for rejecting Bone's argument. First, threshold damages is an affirmative defense which was waived when Bone failed to submit a jury instruction or verdict containing the threshold damages issue. (See Point II).

Second, the only reason a threshold disability jury instruction wasn't proposed was because the Court concluded prior to instructing the jury that Chanhmany was disabled and entitled to compensation. Hence, there was no threshold damage issue to submit to the jury.

Finally, Bone misconstrues Chanhmany's appeal. Chanhmany is not arguing that a new trial should be awarded because the judge failed to give a jury instruction. What Chanhmany does contend and Bone fails to acknowledge, is that if the threshold disability affirmative defense is going to be considered, the defense should have been considered by the jury. The Court can not take from the jury the disability issue by concluding that Chanhmany was disabled, not instructing the jury on the disability issue, and then subsequently changing its mind after the jury renders its verdict. Plainly and simply put, the threshold disability affirmative defense was not an issue, but if it was an issue, it was an issue for the jury to decide.

#### POINT VI

#### CHANHMAN Y DID NOT WAIVE HER RIGHT TO APPEAL A VERDICT RESULTING FROM PREJUDICE

In her opening brief, Chanhmany argued that she was entitled to a new trial because the verdict results from prejudice. Chanhmany supported her argument by citing the low verdict, the jury's disregard of competent evidence, and answers of two jurors in voir dire. In response, Bone effectively says that since

Chanhmany did not challenge either of the two jurors, but instead passed the jury for cause, Chanhmany waived her right to appeal.

However, Chanhmany's appeal is not based on the composition of the jury. She does not say that a juror challenged for cause was allowed to sit. She did not say that a Court required her to exercise a preemptory challenge to exclude a juror that should have been excluded for cause. If she had, then Bone would be correct in asserting that Chanhmany waived her right to challenge the composition of the jury.

However, Chanhmany has not challenged the composition of the jury, she's challenging its verdict. A small damage award can and will be set aside if the jury's verdict results from passion or prejudice. U.R.C.P. 59(a)(5). Evidence of prejudice includes a low verdict, the jury's disregard of competent uncontested evidence, and answers to questions on voir dire. With regard to the latter, Chanhmany is not arguing on the basis of a juror's answer that the juror should have been excluded. What she does submit is that the answer disclosing some bias, which, when coupled with the low verdict and the disregard of competent evidence demonstrates that the verdict is the product of prejudice. Because the damages award is the product of prejudice, Chanhmany is entitled to have the verdict set aside and to be awarded a new trial.

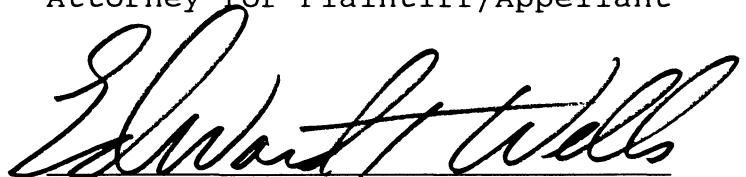
VII.

CONCLUSION

Chanhmany does not have the burden of pleading and proving threshold damages or threshold disability. Bone does. However, regardless of who has the burden of proof, the marshalled evidence shows that Chanhmany sustained more than \$3,000 in medical expenses and she is permanently disabled. Moreover, by failing to submit an instruction on threshold issues, Bone waived the affirmative defense offered by the threshold statute. Hence, threshold damages was not an issue nor was threshold disability. In addition, Chanhmany did not waive her right appeal the verdict on the basis of prejudice. She also did not waive her right to a jury trial on all factual issues. For each of these reasons, Chanhmany should be awarded a new trial.

DATED this 18<sup>th</sup> day of July, 1994.

ROBERT J. DEBRY & ASSOCIATES  
Attorney for Plaintiff/Appellant

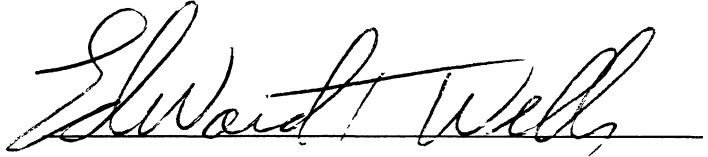
  
EDWARD T. WELLS



**CERTIFICATE OF MAILING**

I hereby certify that on the 18<sup>th</sup> day of July, 1994, two true and correct copies of the foregoing **REPLY BRIEF OF THE APPELLANT** (Chanhmany vs. Preston and Bone) were mailed postage prepaid to the following:

Terry M. Plant  
HANSON, EPPERSON & SMITH  
4 Triad Center, Suite 500  
P. O. Box 2970  
Salt Lake City, UT 84110-2970

A handwritten signature in cursive script, reading "Edward T. Wells", written over a horizontal line.

4148-062/vah

**APPENDIX**

1. Page 1 of Exhibit 3.
2. Jury Instructions 28 - 29.

# **APPENDIX**

## **EXHIBIT 1**

## **MEDICAL BILLS SUMMARY**

**KHAI CHANHMANY**

GOLD CROSS AMBULANCE	\$ 158.09
HOLY CROSS HOSPITAL	256.00
FHP	469.00
DR. GARY WHITLEY	<u>2,416.00</u>
TOTAL	<u><u>\$3,299.09</u></u>

# **APPENDIX**

## **EXHIBIT 2**

INSTRUCTION NO. 28

If you find the issues in favor of the plaintiff and against the defendant, it will be your duty to award the plaintiff such damages, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate him for any injury and damage he has sustained as a proximate result of the defendant's negligence complained of by him.

In awarding such damages, you may consider the nature and extent of the injuries sustained by him; the degree and character of his physical suffering; its probable duration and severity, and the extent to which he has been prevented from pursuing the ordinary affairs of life as theretofore enjoyed by him; and any disability or loss of earning capacity resulting from such injury.

You may consider whether any of the above will, by a preponderance of the evidence, continue in the future, and if you so find, award such damages as will fairly and justly compensate the plaintiff therefor.

INSTRUCTION NO. 29

You may award such special damages as you find from a preponderance of the evidence the plaintiff is entitled for:

Reasonable and necessary expenses for doctors, x-rays, and other medical services actually incurred by plaintiff.