

1994

Khai Chanhmany v. Joyce A. Preston, Brian D. Bone : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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BRIEF

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DOCKET NO.

IN THE UTAH COURT OF APPEALS

KHAI CHANHMANY,

Plaintiff/Appellant,

vs.

JOYCE A. PRESTON and BRIAN D.
BONE,

Defendants/Appellees.

Case No. 940036 CA

Priority No. 15

BRIEF OF THE APPELLANT

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

MAY 16 1994

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Plaintiff/Appellant,)	
)	
vs.)	
)	Case No. 940036 CA
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IV.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to decide this appeal under Utah Code Ann. § 78-2a-2(k). The judgment was entered on July 29, 1993. Chanhmany's motion for a new trial was filed on July 30, 1993 and denied on November 1, 1993. She filed her Notice of Appeal on November 26, 1993. On January 24, 1994, the Utah Supreme Court transferred this appeal to the Utah Court of Appeals.

V.

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW
AND STANDARD OF REVIEW**

1. Should this Court uphold a jury award of special damages in an amount for less than that established by the uncontroverted evidence?

2. Did the lower court err in denying Chanhmany a new trial or additur when the jury awarded less than the amount established by uncontradicted evidence for necessary medical expenses?

3. Is Chanhmany entitled to a general damage award if there is uncontested evidence to support a special damage award exceeding \$3,000 in medical expenses, but the jury chooses to award a lesser amount?

4. Was the jury influenced by passion or prejudice?

5. Can a trial court strike a general damages award if there is uncontradicted evidence of permanent disability and impairment, and the Court does not present the issue to the jury?

6. Did the lower court deny Chanhmany her right to a jury trial when it concluded Chanhmany was permanently disabled so it did not present the issue to the jury, but subsequently struck the general damages award which requires a conclusion that Chanhmany was not permanently disabled?

STANDARD OF REVIEW

The Standard of Review for a decision denying a motion for a new trial based on Utah Rules of Civil Procedure 59(a)(5) and/or (6) was articulated in Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991). It is the responsibility of the trial court to review the amount of the award to insure the jury has acted within its proper bounds. If the trial court can reasonably conclude that there was insufficient evidence to justify the verdict or that the verdict is against the manifest weight of the evidence, or that the jury acted with passion or prejudice, it may grant the motion and order a new trial. Crookston, supra at 804. In reviewing the judge's ultimate decision denying a new trial, the appellate court reverses if there is no reasonable basis for the lower court's decision. Crookston, supra at 805.

Issues (3) and (5) require an interpretation of Utah Code Ann. § 31A-22-309. Thereafter they are questions of law and reviewed with no deference to the legal conclusions of the trial court. See e.g., Matter of Estate of Anderson, 821 P.2d 1169, 1171 (Utah 1991); Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990);

Hatton-Ward v. Salt Lake City Corp, 828 P.2d 1071, 1072 (Utah App. 1992).

The issue of whether an appellant has been denied the right to a jury trial guaranteed by Utah Const. art. I, § 10 is also a question of law. See, International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418 (Utah 1981).

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The determinative constitutional provisions, statutes and ordinances are:

Utah Const. art. I, § 10;

Utah Code Ann. § 31A-22-307;

Utah Code Ann. § 31-22-309;

H.B. 15 (passed 2/4/94);

Utah Rules of Civil Procedure, Rule 59(a)(5) and (6).

Copies are set forth in the addendum to this brief.

VII.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final judgment entered on a jury verdict in the Third Judicial District Court and a subsequent order denying Chanhmany's Motion for an Additur and/or a New Trial.

B. Course of Proceedings.

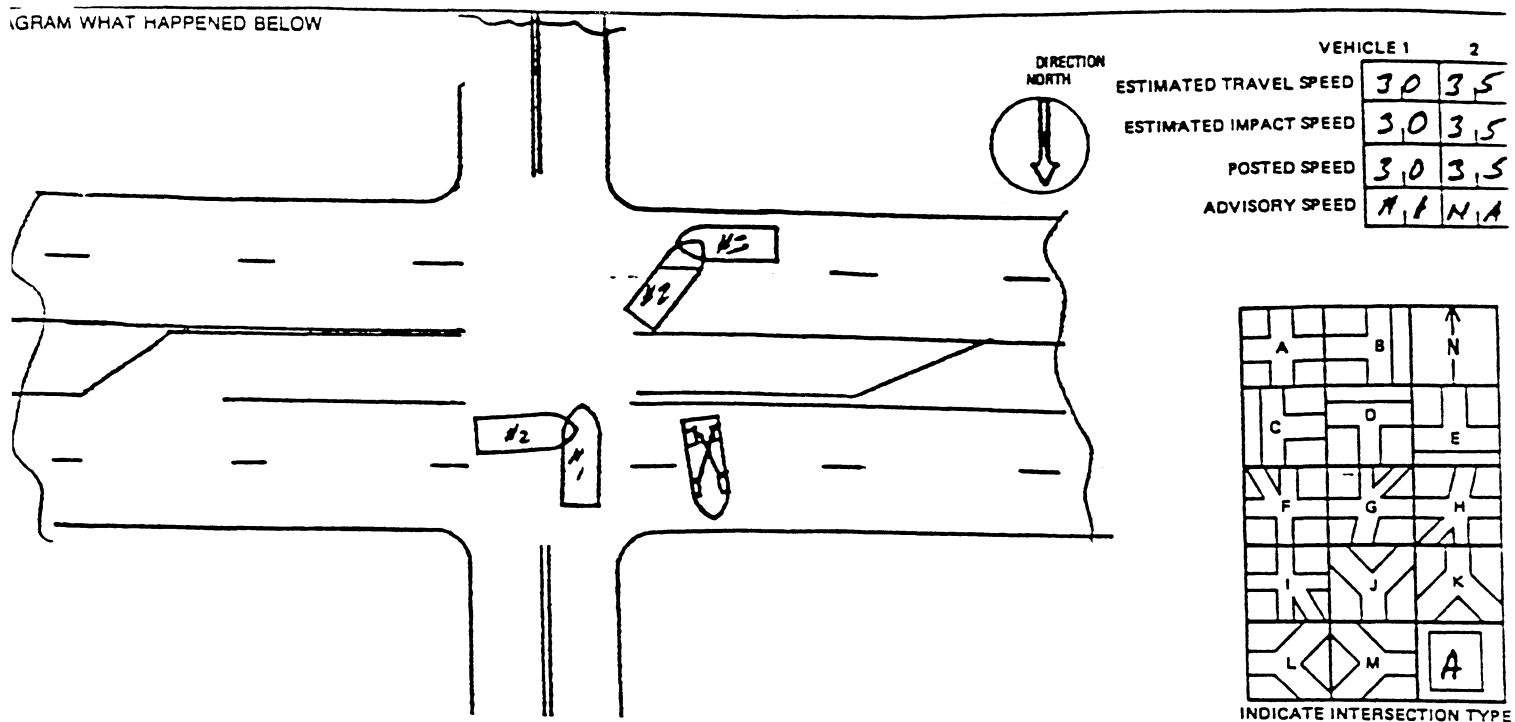
This is an automobile accident case. The jury awarded \$3,000 in general damages. The jury also awarded \$2,100 in special damages as compensation for medical expenses even though the uncontradicted evidence established medical expenses of at least \$3,299.09. Although the Court asked the jury to award damages to Chanhmany for her medical expenses, it did not ask the jury to determine whether Chanhmany met the threshold requirements of Utah Code Ann. § 31A-22-309(1)(e). Moreover, the Court did not ask the jury to decide whether Chanhmany was permanently disabled. Subsequently, the lower court denied Chanhmany's Motion for an Additur or Alternatively a New Trial. The Court also struck the jury's \$3,000 general damage award. Chanhmany timely appealed the judgment and subsequent Order of the lower court.

C. Statement of the Facts.

Chanhmany is a young Laotian woman injured in an automobile accident on July 22, 1989. (R. 2-8). She had no prior history of neck, shoulder or back pain. (Transcript of Proceedings, April 27-29, 1993, pp. 72, 76, 135 [hereinafter "Tr. p. ____"]). She was lawfully stopped at a red light near the intersection of 3300 South and 300 East when struck by a car driven by Brian Bone. (Tr. pp. 65-67). Bone was involved in an immediate prior collision with a car driven by Joyce Preston. (R. 2-8; Tr.

pp. 66, 67, 309-311, 314; Tr. Exs. P-10, P-11). A diagram illustrating the accident is set forth below:

GRAM WHAT HAPPENED BELOW



Vehicle #1 - Joyce Preston
 Vehicle #2 - Brian Bone
 Vehicle #3 - Khai Chanhmany

Immediately after the accident, she was transported by ambulance to Holy Cross Hospital for treatment. At the hospital, Chanhmany complained of neck pain. (Tr. p. 154; Tr. Ex. D-15). The hospital x-rayed her back, neck and shoulder. (Tr. p. 70; Tr. Ex. D-15). The hospital also gave her a neck brace. (Tr. p. 70).

For two to four days, her neck, shoulder and back hurt. (Tr. p. 71). Her "foster mother" took her to see Dr. Gary Whitley, a chiropractor. (Tr. p. 71). She complained of pain in her neck, shoulder and lower back. (Tr. p. 72). Whitley treated her from July 26, 1989 to February of 1991. Chanhmany ceased treatment because she could not compensate Whitley. (Tr. p. 355). Dr. Whitley treated Chanhmany's injuries with heat, soft tissue massage, spinal manipulations, ultrasound, electrical stimulation, a neck brace and back brace. (Tr. pp. 71, 129, 130). Chanhmany testified that the treatments were helpful. (Tr. p. 72). Chanhmany was also examined by an orthopedic specialist at FHP, and on his recommendation received physical therapy at FHP. (Tr. pp. 74, 75, 99-100; Trial Ex. P-3).

As a result of the accident, Chanhmany's truck was heavily damaged. She received \$1,680 for repairs. (Tr. p. 69). In addition, she missed five (5) days of vacation and at least two (2) days of work. (Tr. pp. 80, 81, 242-243, 259; Trial Ex. P-22).

Chanhmany's neck pain ended after treatment. However, she still experiences sharp back pain 3-4 times a week, numbness in

her shoulder, and she occasionally wears the back brace. (Tr. pp. 74, 75, 78).

Chanhmany has trouble lifting things at work. Her co-workers must help her lift 50 lb. boxes. (Tr. pp. 76, 77, 260). She also has difficulty lifting laundry and groceries. (Tr. pp. 73, 77). She can no longer participate in sports. (Tr. p. 79). Exercises are difficult; she cannot do sit ups. (Tr. p. 78). Her neck, shoulder and back range of motions are restricted. (Tr. pp. 148, 149).

Chanhmany sued both Bone and Preston. (R. 2-8). She claimed that one or both of them was 100 percent at fault for the collision since Chanhmany's car was struck while lawfully stopped for the light. (Id.) At trial two of the jurors expressed a bias against chiropractors.

THE COURT: Do any of you oppose going to a chiropractor for treatment, have any strong feelings about going to --. We have two. We have the medical student, Mr. Staheli.

MR. STAHELI: I think they have their place and it depends on what the problem is.

THE COURT: Mr. Staheli, would the fact that you're a medical student, could you sit here and be fair and impartial and listen to the evidence and make your decision accordingly?

MR. STAHELI: I think so.

THE COURT: You have to answer yes or no.

MR. STAHELI: I will be fair and impartial here.

* * *

MR. NORTSTROM: In answer to your question, would I go to a chiropractor, no, I wouldn't, but that wouldn't affect me.

(Tr. pp. 41, lns. 24-25; 42, lns. 1-3, 16-23; 43, lns. 23-25).

At the trial, there was no dispute over whether Chanhmany was negligent. The Court entered a directed verdict that she was not negligent and so instructed the jury. (Tr. p. 331, Jury Instruction 22, R. 293-338).

In addition, although there was a dispute over whether Chanhmany should be compensated for every cent of her medical expenses (Tr. pp. 382, 383), there was no dispute that Chanhmany sustained more than \$3,000 in medical expenses. The defendants stipulated to the admission of Trial Exhibit P.-3, Chanhmany's medical bills. (Tr. pp. 278, 279). The exhibit shows that Chanhmany sustained the following medical expenses:

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

No witness testified that the expenses were unnecessary or did not meet the study authorized by Utah Code Ann. § 31A-22-307(2). Similarly, no party disputed the medical expenses by

requesting a medical panel as set forth in Utah Code Ann. § 31A-22-307(2)(e).

Because the parties did not dispute that Chanhmany sustained more than \$3,000 in medical expenses, the jury was not asked to find whether Chanhmany met the threshold requirements of Utah Code Ann. § 31A-22-309(1)(e). Nor were they instructed that Chanhmany could not maintain a cause of action unless she sustained more than \$3,000 in medical expenses. The jury was asked only to determine how much Chanhmany should receive for her medical expenses and general damages as reasonable compensation. (R. 293-338, Instruction Nos. 21, 29; Special Verdict R. 342-343).

There also was no dispute that Chanhmany was permanently disabled -- only how much. Chanhmany's treating chiropractor, Gary Whitley, gave her a "whole person" impairment rating of twelve (12%) percent. (Tr. pp. 147-150). The defendant's medical expert, Dr. Gerald R. Morress gave her a rating of 6.8% (Tr. p. 220, 229, 230). A permanent impairment means that the accident victim is disabled. Dr. Whitley explained:

Impairment is a physical loss of function....

* * *

A disability is a rating that they're given according to whether they can continue functioning in their normal environment, their job, their home, their regular activities....

* * *

You need to have an impairment in order to determine what a disability might be.

* * *

That means [Chanhmany's] 12% impaired for the whole function of the whole body for that particular injury a permanent kind of impairment.

(Tr. pp. 111, lns. 12, 15-20, 23-24, 150, lns. 7-9).

Based on the unanimous medical opinions, received by the Court, the trial judge concluded that Chanhmany was disabled and entitled to some compensation:

THE COURT: It has been established by both doctors that there's an injury, and what more do you have to tell that jury if she sustained an injury that may be compensable? They both assigned a rate of disability. One is 5 percent and the other is 12 percent. That jury is going to make its determination between five percent and twelve percent, how much should she receive.

(Tr. p. 269, lns. 2-10).

* * *

Either they believe Dr. Whitley that she has a 12 percent or they believe Dr. Morress that she has 5 percent.

(Tr. p. 270, lns. 16-19).

Because the trial judge concluded that Chanhmany was not permanently disabled, the jury was not asked to find whether Chanhmany was permanently disabled and was not instructed that Chanhmany could not maintain a cause of action if she was not permanently disabled. (R. 293-338, Jury Instructions). Disability simply was not an issue.

The jury attributed 100 percent of the accident fault to Bone, but only awarded Chanhmany \$2,100 in special damages as compensation for her medical expenses and \$3,000 in general damages. (R. 342-343). Chanhmany objected to the proposed verdict on the grounds that Chanhmany was permanently disabled so she met the statutory threshold requirements. (R. 371-72; 375-78).

Chanhmany also moved for a new trial or in the alternative, for an additur on the grounds that the jury disregarded the uncontroverted evidence and the verdict resulted from passion or prejudice. (R. 396-405).

The lower court denied Chanhmany's motions and granted Bone's motion to strike the general damage award. (R. 426-427). Chanhmany timely appealed. (R. 428-429).

VIII.

SUMMARY OF ARGUMENTS

POINT I

CHANHMAN Y IS ENTITLED TO A NEW TRIAL BECAUSE THE INADEQUATE AWARD FOR MEDICAL EXPENSES IS MORE THAN AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. IT IS AGAINST ALL OF THE UNCONTROVERTED TRIAL EVIDENCE. THEREFORE, THE TRIAL COURT'S DECISION DENYING THE MOTION FOR A NEW TRIAL WAS UNREASONABLE

Utah Code Ann. § 31A-22-309(1)(e) provides that an injured auto accident victim may maintain a cause of action if the person sustained more than \$3,000 in medical expenses. The parties stipulated to the admission of Exhibit P-3, Chanhmany's medical

expenses. No witness challenged the expenses or the medical treatment provided to Chanhmany. No disciplined review of the evidence justifies an award of less than \$3,999. Thus, a new trial should be ordered or an additur imposed. John Call Engineering, Inc. v. Manti City, 795 P.2d 678 (Utah App. 1990).

POINT II

THE JURY'S INADEQUATE DAMAGE AWARD AS COMPENSATION FOR MEDICAL EXPENSES DOES NOT WARRANT THE STRIKING OF THE GENERAL DAMAGES AWARD

Utah Code Ann. § 31A-22-309(e) does not explicitly require a jury to award reasonable compensation in excess of \$3,000 for medical expenses. It only requires the car accident victim sustain more than \$3,000 in medical expenses. Thus, the jury was not asked to rule whether Chanhmany met the statutory threshold. There was no need to because there was no dispute. The parties did not avail themselves of the procedures provided in Utah Code Ann. § 31A-22-307. In summary, while people may differ as to how much Chanhmany should be compensated for medical expenses, there is no dispute that Chanhmany received the medical treatment and incurred the expenses. Thus, the lower court erred in striking the general damages' award.

POINT III

CHANHMAN Y IS ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO FACTUAL DISPUTE THAT CHANHMAN Y WAS PERMANENTLY DISABLED

All the medical testimony showed that Chanhmany has been permanently impaired 6.8 percent to 12 percent. If a person is

permanently impaired, he or she is permanently disabled. (Tr. p. 111); see H.B. 15 (passed 2/4/94). The lower court judge concluded that

Chanhmany was disabled. (Tr. p. 269, lns. 2-10). Since there is no dispute that Chanhmany is disabled, the general damage award should not have been stricken.

POINT IV

THE JURY'S INADEQUATE AWARD FOR MEDICAL EXPENSES RESULTS FROM PREJUDICE

The in court remarks of two jurors and the inadequate compensatory award for Chanhmany's medical expenses show that the jury's verdict is a product of prejudice. Thus, the lower court's denial of Chanhmany's motion for a new trial was without a reasonable basis. This Court should remand the case for a new trial.

POINT V

THE LOWER COURT'S CONCLUSION THAT CHANHMAN WAS DISABLED COUPLED WITH THE FAILURE TO SUBMIT THE DISABILITY ISSUE TO THE JURY AND SUBSEQUENT DENIAL OF CHANHMAN'S MOTION FOR A NEW TRIAL EFFECTIVELY DENIED CHANHMAN HER RIGHT TO A JURY TRIAL ON THIS IMPORTANT FACTUAL ISSUE

In this case, all of the medical testimony shows that there was not a dispute over whether Chanhmany was permanently disabled. Rather, there was only a dispute as to the extent of the permanent disability. Thus, the lower court concluded that Chanhmany was permanently disabled and entitled to compensation.

(Tr. p. 269, lns. 2-10). However, when the jury awarded less than \$3,000 for compensation for medical expenses, the Court struck the general damages award. To do that, it had to conclude that Chanhmany was not permanently disabled. However, whether Chanhmany was permanently disabled, was a question of fact. Chanhmany's right to a jury trial on this important issue was denied.

IX.

ARGUMENT

POINT I

CHANHMANY IS ENTITLED TO A NEW TRIAL BECAUSE THE INADEQUATE AWARD FOR MEDICAL EXPENSES IS MORE THAN AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. IT IS AGAINST ALL OF THE UNCONTROVERTED TRIAL EVIDENCE. THEREFORE, THE TRIAL COURT'S DECISION DENYING THE MOTION FOR A NEW TRIAL WAS UNREASONABLE

A. Factual Background -- Marshalling of the Evidence.

All the uncontroverted trial evidence established that Chanhmany incurred more than \$3,000 in medical expenses as a result of the accident. At trial, the parties stipulated to admission of Exhibit P-3. (Tr. pp. 277, 289). The exhibit is a copy of the medical bills. They show that Chanhmany incurred the following medical expenses:

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

There are not any contrary exhibits. Moreover, not one witness testified that the foregoing expenses were not medical expenses or said that the expenses were not incurred as a result of the accident.

At the trial, only three witnesses testified on the subject of medical expenses: Chanhmany, Dr. Gary Whitley, and Dr. Gerald R. Morress. A summary of each witnesses testimony follows:

CHANHMANY: Chanhmany, the accident victim, testified that an ambulance took her to Holy Cross Hospital. At the hospital Chanhmany received medical treatment including x-rays and a neck collar. She also received treatment from Dr. Whitley. The treatment consisted of soft tissue massage, spinal adjustments, and ultrasound treatments. In addition, she wore a neck brace and back brace provided by Dr. Whitley. She testified that Dr. Whitley's treatment helped. (Tr. pp. 69-70, 71-72). In addition, she testified that she received treatment by Dr. Penny at FHP, and obtained physical therapy. (Tr. pp. 74, 75, 99, 100).

DR. WHITLEY: Whitley testified that Chanhmany received the normal treatment for accident injury victims. (Tr. p. 131, lns. 16-25; 132, lns. 1-21).

DR. MORRESS: Dr. Morress, a neurologist retained by the defendant, did not criticize the medical expenses or the

medical treatment provided by Chanhmany's health care providers. His testimony was limited to describing the treatment provided by Dr. Penny and a comment that Dr. Whitley treated Chanhmany for the period indicated in her medical records for what Whitley, felt was the appropriate treatment. (Tr. pp. 199-200; 202, lns. 3-11).

B. Legal Analysis.

Utah Code Ann. § 31A-22-309(1) provides that an injured car accident victim may maintain a cause of action if "the person has sustained . . . (e) medical expenses to a person in excess of \$3,000.00." In this case, the medical expenses totalled \$3,299.00.

As shown in part "A" above, reasonable minds can only come to one conclusion, Chanhmany sustained more than \$3,000 in medical expenses. There is no dispute that as a result of the accident, Chanhmany received medical treatment and incurred the medical expenses.

When a jury, as in this case, fails to take into account, proven facts and awards inadequate damages, the remedies are to either award a new trial or grant an additur. As explained in Paul v. Kirkendall, 1 Utah 2d 1, 3, 261 P.2d 670 (1953):

If inadequacy . . . of the verdict presents a situation that such inadequacy . . . shows a disregard by the jury of the evidence . . . then the court may . . . grant a new trial.

See also Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1969). Or the court may grant an additur to the verdict. See Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826, 828 (1958).

Similarly on appeal, the lower court's failure to grant a new trial or an additur is remedied by either ordering a new trial or by remanding with instructions to enter a judgment in the amount justified by the evidence. In John Call Engineering, Inc. v. Manti City, 795 P.2d 678 (Utah App. 1990), an engineering firm appealed a \$13,440 jury verdict and claimed that the verdict was too low. As in this case, the plaintiff moved for a new trial and/or requested additional damages both of which were rejected. The Court of Appeals examined the evidence of damages and concluded:

While plausible views of the evidence might have led to fixing a damage award at certain other levels within this broad range, no evidence of record, nor any disciplined view of the evidence of record would support an award outside this range. . . . On appeal, although it [Call] would settle for a new trial, Call principally argues the court erred, given the lack of any contrary evidence in not directing a verdict or judgment in this minimal amount and that we should remand with instructions to do so.

* * *

In this case, while reasonable minds could differ on whether Call was entitled to more, the evidence established it was clearly entitled to judgment in at least the amount of \$56,377.60. . . . Accordingly, we reverse the judgment which was entered on the jury's verdict and remand with instructions to enter

judgment in the principal amount of
\$56,377.60.

John Call Engineering, Inc. v. Manti City, 795 P.2d 678, 683 (Utah App. 1990).

As in Call, there is no record evidence showing that Chanhmany's medical expenses were less than \$3,299. Moreover, any disciplined view of the evidence supports an award of medical expenses for \$3,299. Thus, this Court should either grant Chanhmany a new trial or remand with instructions to enter a judgment in the amount of \$3,299 for medical expenses, and to reinstate the general damage award.

POINT II

THE JURY'S INADEQUATE DAMAGE AWARD AS COMPENSATION FOR MEDICAL EXPENSES DOES NOT WARRANT THE STRIKING OF THE GENERAL DAMAGES AWARD

Utah Code Ann. § 31A-22-309(1)(e) only requires that a car accident victim sustain medical damages in excess of \$3,000 in order to maintain a cause of action. It does not require a jury to award compensatory damages for medical expenses in excess of \$3,000. Nor does it explicitly state how to resolve disputes over whether a victim has sustained more than \$3,000 in medical expenses. However, section 307 has some suggestions. This section of the Utah no-fault law, is designed so that the statute will apply with an even-handed manner. See R. E. Keaton, Compensatory Systems and Utah's No-Fault Statute, 1973 Utah L.Rev. 383, 391.

Specifically, Utah Code Ann. § 31-22-307 provides that in a disputed case, the parties can refer to the study authorized by subsection (2). Or, the Court on its own motion, or on the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify before the Court. Utah Code Ann. § 31A-22-307(2)(d).

The fact that neither of the parties nor the Court used the study nor the panel shows that there was never a dispute that Chanhmany sustained more than \$3,000 in medical expenses. Moreover, even if there was a dispute, the jury was not asked to resolve it. It was not asked to determine whether Chanhmany met the threshold requirements of Section 309. All it was asked to do, was to determine reasonable compensatory damages for medical expenses (R. 342-343). As such, the award in and of itself, does not show that Chanhmany did not sustain more than \$3,000 in medical expenses. Thus, the Court's reliance on the special verdict, to find that Chanhmany did not meet the threshold requirements (R. 392-395) was misplaced.

POINT III

CHANHMANY IS ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO FACTUAL DISPUTE THAT CHANHMANY WAS PERMANENTLY DISABLED

A. Factual Background -- Marshalling of the Evidence.

Chanhmany is permanently disabled. She said so in her testimony. All the medical experts agreed that she was disabled and so did the trial judge.

Chanhmany testified that she still has sharp pains in her lower back and numbness in her shoulder. The pain and numbness are substantiated by her medical records. (Tr. pp. 73-74; Trial Ex. P-19, P-20). She cannot lift the 50 lb. boxes without help from her co-workers. (Tr. pp. 76, 77, 90-91, 260). She has trouble lifting the laundry or the groceries. (Tr. p. 77). She cannot do sit ups. (Tr. p. 78). She no longer participates in sports. (Tr. p. 79).

Dr. Gerald R. Morress, the defendant's medical expert, performed an Independent Medical Examination (IME). Based on his IME and Chanhmany's medical records, he gave Chanhmany a 6.8% whole person permanent impairment rating. He determined that Chanhmany's back pain and numbness in her shoulder equal a 6.8% permanent impairment rating under the guidelines promulgated by the American Medical Association (AMA). (Tr. p. 220, 230).

Dr. Whitley, the treating chiropractor, treated Chanhmany, and applied the same AMA guidelines to conclude that Chanhmany had a 12% permanent impairment rating or disability. (Tr.

pp. 147-150). He concluded that in addition to the lower back pain and numbness in her shoulder, Chanhmany's neck, shoulder and back range of motions were all impaired. (Tr. pp.149-150). If a person has a permanent impairment rating, he is by definition disabled. Dr. Whitley so testified:

Impairment is a physical loss of function....
A disability is rating that they're given
according to whether they continue functioning
in their normal environment, their job, their
home, their regular activities.

* * *

You need to have an impairment in order to
determine what a disability might be.

(Tr. p. 111, lns. 12-18, 23-24).

From the foregoing evidence and testimony, the trial court judge concluded that Chanhmany was permanently disabled and entitled to some compensation:

THE COURT: It has been established by both doctors that there is an injury and what more do you have to tell that jury if she sustained an injury that may be compensable? They both assigned a rate of disability. One is 5 percent and the other is 12 percent. That jury is going to make its determination between five percent and twelve percent. How much she should receive.

(Tr. p. 269, lns. 2-10).

Thus, the lower court did not instruct the jury on Section 31-22-309(1)(c). Nor did it submit the disability issue to the jury. There was no need. All the witnesses testified on the

subject agreed that she was disabled and the trial court judge concluded that she was disabled. . . until the jury returned an award of \$2,100 for medical expenses. The defendants moved to strike the general damages awarded. Chanhmany pointed out that the damage award should stand because there was no factual dispute that Chanhmany was permanently disabled and sustained more than \$3,000 in medical expenses. (R. 371-372, 375-378, 398-405). The trial court, however, struck the general damages award and by necessity concluded that contrary to all of the evidence marshalled above, Chanhmany was not permanently disabled.

B. Legal Analysis.

Utah's no-fault statute does not define the term disability. However, in Jones v. Transamerica Insurance Company, 592 P.2d 609, 611 (Utah 1979), the court defined disability as meaning the inability to work.¹ The evidence in this case clearly met the foregoing definition. Chanhmany testified that she could not lift the 50 lb. boxes without help by her co-workers. Her testimony was supported by her co-worker. (Tr. p. 260). Hence, her employee transferred her to packaging. (See Tr. pp. 90-91).²

¹Other state courts have concluded that injuries comparable to Chanhmany's can be a permanent disability. E.g. Elliott v. Simon, 385 A.2d 249 (N.J. 1978); see, Johnson v. Phillips, 345 So.2d 1116 (Fla. App. 1477) ("permanent injury").

²In other words, the employer made a reasonable accommodation consistent with the Americans With Disabilities Act. 42 U.S.C. 1211(9)(A) and (B).

If there ever was any doubt whether Chanhmany's injuries met the definition of disability, that doubt was removed when the legislature in the last session, amended Section 309 to read from "permanent disability" to "permanent disability or permanent impairment based upon objective findings". H.B. 15, (passed 2/4/94). The legislative definition of permanent disability is consistent with the testimony provided by Dr. Whitley. That is, a permanent impairment means that the individual has incurred a permanent disability.

In summary, no matter which definition of disability is used, all of the evidence on the issue shows that Chanhmany is disabled. She is disabled in the performance of her work, and she is disabled with permanent pain, numbness, and a restricted range of motion. For these reasons, the lower court's refusal to grant a new trial was without a reasonable basis.

POINT IV

THE JURY'S INADEQUATE AWARD FOR MEDICAL EXPENSES RESULTS FROM PREJUDICE

A. Factual Background -- Proceeding Before the Lower Court.

During voir dire, two jurors showed that they were prejudiced against chiropractors. They both raised their hands when the trial judge asked if any of the jurors opposed treatment by chiropractors. (Tr. pp. 41, lns. 24-25, 42, lns. 1-2). Juror Staheli, a medical student, said that while chiropractors have

their place, it depends on what the problem is. He also hesitated in answering whether he could base his decision on the evidence. (Tr. p. 42, lns. 16-23). Similarly, Juror Nortstrom said that he would not go to a chiropractor. (Tr. p. 43, lns. 23-24).

While both of them pledged that they would base their verdict on the evidence, an inadequate compensatory award for medical damages shows that they and the other jurors did not. Instead, as set forth in Point I, the jury disregarded the uncontested evidence that Chanhmany sustained \$3,299.09 and awarded her only \$2,001.00 in medical expenses.

B. Legal Analysis.

An inadequate verdict, may make it appear that the verdict was given under the influence of prejudice. See Meyer v. Bartholomew, 690 P.2d 558, 560 (Utah 1984). In addition, the failure to take into account proven facts is prejudice. See Wellman v. Noble, 12 Utah 2d 350, 353; 366 P.2d 701 (1969). Prejudice may also be shown when the jury disregards competent evidence. See Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078, 1084 (Utah 1985). Finally, juror prejudice may be shown by answering questions on voir dire. E.g. Jenkins v. Parrish, 627 P.2d 533 (Utah 1981)³

³In Jenkins, a statement by a prospective juror on voir dire that he would give more weight to the testimony of the witnesses' status as a doctor, established prejudice or bias and required a new trial.

In this case, prejudice is conclusively shown by all of the above. Two jurors expressed distrust of chiropractors and refused to award compensatory damages for all of the medical expenses Chanhmany incurred with Dr. Whitley. The jury's small compensatory award for medical expenses disregarded the medical bills presented to them. To find less than \$3,299.09 for medical expenses, the jury had to disregard the uncontested evidence. Thus, there is no reasonable basis for the trial court's refusal to grant a new trial. The decision should be reversed and the case remanded for trial.

POINT V

**THE LOWER COURT'S CONCLUSION THAT CHANHMAN WAS
DISABLED COUPLED WITH THE FAILURE TO SUBMIT THE
DISABILITY ISSUE TO THE JURY AND SUBSEQUENT DENIAL
OF CHANHMAN'S MOTION FOR A NEW TRIAL EFFECTIVELY
DENIED CHANHMAN HER RIGHT TO A JURY TRIAL ON
THIS IMPORTANT FACTUAL ISSUE**

Utah's Const. art. I, § 10 guarantees the right to a jury trial in civil cases. International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418 (Utah 1981). This right, is an important right, "a fundamental part of our judicial system." Id at 420. The right to a trial by jury extends to all the facts and may not be infringed by the judge. State v. Estrada, 119 Utah 339, 227 P.2d 247 (1951). Article I section 10 and Rule 38 provide a litigant the right to have any factual issue tried by a jury, upon a proper demand. Holland v. Wilson, 8 Utah 2d 11, 327 P.2d 250 (1958).

In this case, Chanhmany demanded a jury trial. (R. 2-8). The issue of whether an individual is permanently disabled is a factual issue. Elliott, supra; see Johnson, supra; Lynch v. Adirondack Transport Lines Inc., 564 N.Y.S.2d 826 (1991); Petrone v. Thornton, 561 N.Y.S.2d 49 (1990). However, because there was no dispute that Chanhmany was disabled, see Point III above, the trial judge concluded that Chanhmany was disabled and the issue was not presented to the jury. Only, after the jury awarded less than \$3,000 as compensation for medical expenses, the lower court struck the general damages award. To strike the general damages award, the Court had to change its mind and conclude that Chanhmany was not permanently disabled. The trouble with all of that is, that Chanhmany had a constitutional right to have a this factual issue determined by a jury. The remedy for the Court's failure to do so, is to grant a new trial. Holland v. Wilson, supra.

X.

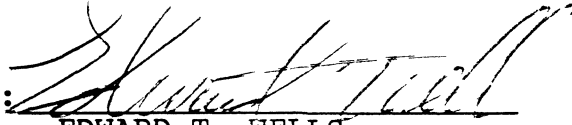
CONCLUSION

The lower court's decision denying Chanhmany a new trial lacks a reasonable basis. There is no dispute. She is permanently disabled. There is no dispute she sustained more than \$3,000 in medical expenses. Two jurors expressed prejudice. In addition, at the very least, Chanhmany was deprived of her constitutional right to a jury trial on the disability issue. For each of these

reasons, the Order and Judgment of the lower court should be reversed and the case remanded for a new trial.

DATED this 16th day of May 1994.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

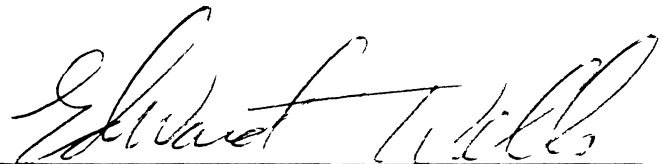
By: 
EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** (Chinnany, et al. West n. et al) were mailed, postage prepaid this 16th day of May, 1994 to the following.

Wendell F. Bennett
448 East 400 South, #304
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ADDENDUM

1. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES
2. ORDER DENYING PLAINTIFF'S MOTION FOR ADDITUR OR IN THE ALTERNATIVE FOR A NEW TRIAL
3. JUDGMENT ON SPECIAL VERDICT
4. OBJECTIONS TO DEFENDANT JOYCE PRESTON'S JUDGMENT ON SPECIAL VERDICT

ADDENDUM 1

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

History: Const. 1896.

Cross-References. — Civil actions, right to jury trial in, U.R.C.P., Rules 38, 39.

31A-22-307. Personal injury protection coverages and benefits.

(1) Personal injury protection coverages and benefits include:

(a) the reasonable value of all expenses for necessary medical, surgical, X-ray, dental, rehabilitation, including prosthetic devices, ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person;

(b) (i) the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss, except that this benefit need not be paid for the first three days of disability, unless the disability continues for longer than two consecutive weeks after the date of injury; and

(ii) a special damage allowance not exceeding \$20 per day for a maximum of 365 days, for services actually rendered or expenses reasonably incurred for services that, but for the injury, the injured person would have performed for his household, except that this benefit need not be paid for the first three days after the date of injury unless the person's inability to perform these services continues for more than two consecutive weeks;

(c) funeral, burial, or cremation benefits not to exceed a total of \$1,500 per person; and

(d) compensation on account of death of a person, payable to his heirs, in the total of \$3,000.

(2) (a) To determine the reasonable value of the medical expenses provided for in Subsection (1) and under Subsection 31A-22-309(1)(e), the commissioner shall conduct a relative value study of services and accommodations for the diagnosis, care, recovery, or rehabilitation of an injured person in the most populous county in the state to assign a unit value and determine the 75th percentile charge for each type of service and accommodation. The study shall be updated every other year. In conducting the study, the department may consult or contract with appropriate public and private medical and health agencies or other technical experts. The costs and expenses in-

curring in conducting, maintaining, and administering the relative value study shall be funded by the tax created under Section 59-9-105. Upon completion of the study, the department shall prepare and publish a relative value study which sets forth the unit value and the 75th percentile charge assigned to each type of service and accommodation.

(b) The reasonable value of any service or accommodation is determined by applying the unit value and the 75th percentile charge assigned to the service or accommodation under the relative value study. If a service or accommodation is not assigned a unit value or the 75th percentile charge under the relative value study, the value of the service or accommodation shall equal the reasonable cost of the same or similar service or accommodation in the most populous county of this state.

(c) This subsection does not preclude the department from adopting a schedule already established or a schedule prepared by persons outside the department, if it meets the requirements of this subsection.

(d) Every insurer shall report to the Commissioner of Insurance any patterns of overcharging, excessive treatment, or other improper actions by a health provider within 30 days after such insurer has knowledge of such pattern.

(e) In disputed cases, a court on its own motion or on the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify on the issue of the reasonable value of the claimant's medical services or expenses.

(3) Medical expenses as provided for in Subsection (1)(a) and in Subsection 31A-22-309(1)(e) include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

(4) This section does not prohibit the issuance of policies of insurance providing coverages greater than the minimum coverage required under this chapter nor does it require the segregation of those minimum coverages from other coverages in the same policy.

(5) Deductibles are not permitted with respect to the insurance coverages required under this section.

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following

- (a) death,
- (b) dismemberment,
- (c) permanent disability,
- (d) permanent disfigurement, or
- (e) medical expenses to a person in excess of \$3,000

(2) (a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy,

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle,

(iii) to any injured person, if the person's conduct contributed to his injury

(A) by intentionally causing injury to himself, or

(B) while committing a felony,

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing, or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan, and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because he is on active duty in the military service

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident

(5) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as ex-

penses are incurred. Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer. If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1 1/2% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(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

regarding a victim's response to patterns of domestic abuse or violence be considered by the trier of fact in determining imminence or reasonableness in accordance with that section, and that the evidence be considered when useful in understanding the perceptions or conduct of a witness.

H. B. No. 15

Passed 2/4/94, Approved 2/16/94

Effective 5/2/94

Laws of Utah 1994, Chapter 4

Motor Vehicle Insurance - Personal Injury Protection

By John L. Valentine, Kelly C. Atkinson, Steve
Barth, J. Brent Haymond, Russell A. Cannon,
Frank R. Pignanelli, J. Reese Hunter, Met
Johnson

**An Act relating to the insurance code;
permitting a cause of action for general
damages from personal injuries caused by
an automobile accident in cases of
permanent impairment; and making
technical corrections.**

THIS ACT AFFECTS SECTIONS OF UTAH
CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

31A-22-309, as last amended by Chapter 230,
Laws of Utah 1992

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Amended.

Section 31A-22-309, Utah Code Annotated
1953, as last amended by Chapter 230, Laws of
Utah 1992, is amended to read:

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) A person who has or is required to have direct
benefit coverage under a policy which includes
personal injury protection may not maintain a cause
of action for general damages arising out of
personal injuries alleged to have been caused by an
automobile accident, except where the person has
sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability or permanent impairment
based upon objective findings;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of
\$3,000.

(2)(a) Any insurer issuing personal injury
protection coverage under this part may only
exclude from this coverage benefits:

(i) for any injury sustained by the insured while
occupying another motor vehicle owned by or
furnished for the regular use of the insured or a
resident family member of the insured and not
insured under the policy;

(ii) for any injury sustained by any person while
operating the insured motor vehicle without the

express or implied consent of the insured or while
not in lawful possession of the insured motor
vehicle;

(iii) to any injured person, if the person's conduct
contributed to his injury:

(A) by intentionally causing injury to himself; or

(B) while committing a felony;

(iv) for any injury sustained by any person arising
out of the use of any motor vehicle while located
for use as a residence or premises;

(v) for any injury due to war, whether or not
declared, civil war, insurrection, rebellion or
revolution, or to any act or condition incident to
any of the foregoing; or

(vi) for any injury resulting from the radioactive,
toxic, explosive, or other hazardous properties of
nuclear materials.

(b) The provisions of this subsection do not limit
the exclusions which may be contained in other
types of coverage.

(3) The benefits payable to any injured person
under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is
entitled to receive as a result of an accident covered
in this code under any workers' compensation or
similar statutory plan; and

(b) any amounts which that person receives or is
entitled to receive from the United States or any of
its agencies because [he] that person is on active
duty in the military service.

(4) When a person injured is also an insured party
under any other policy, including those policies
complying with this part, primary coverage is given
by the policy insuring the motor vehicle in use
during the accident.

(5) (a) Payment of the benefits provided for in
Section 31A-22-307 shall be made on a monthly
basis as expenses are incurred.

(b) Benefits for any period are overdue if they are
not paid within 30 days after the insurer receives
reasonable proof of the fact and amount of
expenses incurred during the period. If reasonable
proof is not supplied as to the entire claim, the
amount supported by reasonable proof is overdue if
not paid within 30 days after that proof is received
by the insurer. Any part or all of the remainder of
the claim that is later supported by reasonable proof
is also overdue if not paid within 30 days after the
proof is received by the insurer.

(c) If the insurer fails to pay the expenses when
due, these expenses shall bear interest at the rate of
1-1/2% per month after the due date.

(d) The person entitled to the benefits may bring
an action in contract to recover the expenses plus
the applicable interest. If the insurer is required by
the action to pay any overdue benefits and interest,
the insurer is also required to pay a reasonable
attorney's fee to the claimant.

(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

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Fee for filing motion for new trial, § 21-2-2.

Harmless error not ground for new trial. Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

ADDENDUM 2

THIRD JUDICIAL DISTRICT COURT
Third Judicial District

NOV 01 1993

TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant Bone
4 Triad Center, Suite 500 (84180)
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

By [Signature]
Deputy Clerk

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

RANDY CHANHMAN, a minor, by and)	
through his natural mother and)	
guardian, KHAI CHANHMAN, and)	
KHAI CHANHMAN, individually,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
JOYCE A. PRESTON and BRIAN D.)	
BONE,)	
)	
Defendants.)	

ORDER DENYING PLAINTIFFS'
MOTION FOR ADDITUR
OR IN THE ALTERNATIVE
FOR A NEW TRIAL

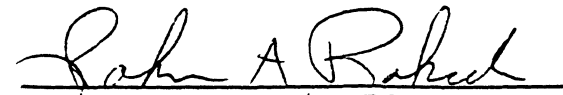
Civil No. 910907726PI
Judge John A. Rokich

The motion of the plaintiffs for additur or in the alternative for a new trial having come before this Court on October 4, 1993, Edward T. Wells appearing for the plaintiffs and Wendell E. Bennett and Terry M. Plant appearing for defendants Preston and Bone, respectively, the Court having considered the memorandum of the plaintiff and defendant Bone and being otherwise fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion of the plaintiffs for additur or in the alternative for a new trial is hereby denied, and the Judgment on Special Verdict entered by this Court on July 29, 1993 will stand.

DATED this 1st day of November, 1993.

BY THE COURT:

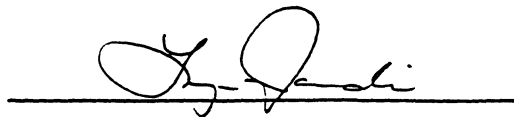

HONORABLE JOHN ~~MA~~ ROKICH
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER DENYING PLAINTIFFS' MOTION FOR ADDITUR OR IN THE ALTERNATIVE FOR A NEW TRIAL, postage prepaid, this 8th day of October, 1993, to the following:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107

Wendell E. Bennett
Attorney for Defendant Preston
448 East 400 South, Suite 304
Salt Lake City, UT 84111



ADDENDUM 3

JUDGMENT

FILED DISTRICT COURT
Third Judicial District

TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant Bone
4 Triad Center, Suite 500 (84180)
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

JUL 29 1993

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

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

RANDY CHANHMAN, a minor, by and
through his natural mother and
guardian, KHAI CHANHMAN, and
KHAI CHANHMAN, individually,

Plaintiffs,

vs.

JOYCE A. PRESTON and BRIAN D.
BONE,

Defendants.

**JUDGMENT ON SPECIAL
VERDICT**

2185031
8-4-93-802 am

Civil No. 910907726PI
Judge John A. Rokich

The above-entitled case was tried before a jury commencing April 27, 1993 and continuing through April 29, 1993 on the complaint of the plaintiff, Khai Chanhmany, versus both Joyce A. Preston and Brian D. Bone. The claim of plaintiff Randy Chanhmany was bifurcated from the case of Khai Chanhmany just prior to the commencement of trial. The jury, having heard evidence produced by the plaintiff Khai Chanhmany, the Court having received the Special Verdict on the jury and also having considered the issue as to whether or not Plaintiff had met the threshold requirements of Utah Code Annotated § 31A-22-309(1) and having made

its Minute Entry on July 1, 1993, based upon the Special Verdict of the jury and the Minute Entry of the Court,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff Khai Chanhmany was not negligent.
2. The defendant Joyce A. Preston was not negligent.
3. The defendant Brian D. Bone was negligent, and his negligence was the sole proximate cause of the damages claimed by the plaintiff Khai Chanhmany.

4. The total damages which have been incurred by Khai Chanhmany as a direct consequence of the negligence of Brian D. Bone are as follows:

a. Past medical expenses	\$2,100.00
b. Past wage loss	<u>101.00</u>
TOTAL	\$2,201.00

5. Even though the jury in its Special Verdict found general damages in favor of the plaintiff Khai Chanhmany in the sum of \$3,000.00, in accordance with the Minute Entry of the Court dated July 1, 1993, the Court specifically finds that she is not entitled to general damages in this matter because she failed to meet the threshold requirements of § 31A-22-309(1) Utah Code Annotated (1953, as amended). Due to the fact that Plaintiff failed to prove that she had met the \$3,000.00 threshold for medical expenses as required by Utah Code Annotated § 31A-22-309(1)(e) (1953, as amended) and further that Plaintiff failed to prove that she had suffered a permanent disability in accordance

with Utah Code Annotated § 31A-22-309(1)(3). The Court further finds that the award made by the jury for general damages was indicative that the jurors did not find Plaintiff suffering from any permanent disability. Further, the Court specifically finds that the plaintiff failed to comply with any of the other potential "threshold" criteria set forth in Utah Code Annotated § 31A-22-309 (1953, as amended).


6. Plaintiff Khai Chanhmany is, therefore, entitled to a judgment against the defendant Brian Bone only in the sum of \$2,201.00 plus interest in an amount of \$402.30 and costs in the amount of \$219.00, for a total judgment of \$2,822.30.

7. Defendant Joyce A. Preston is entitled to judgment against the plaintiff Khai Chanhmany on the plaintiff's complaint of no cause of action and is entitled to her taxable court costs from the plaintiff Khai Chanhmany.

8. It was determined that all judgment entered herein will draw interest following the entry of judgment in accordance with Utah statute, Utah Code Annotated § 15-1-4 (1953, as amended).

DATED this 29 day of July, 1993.

BY THE COURT:

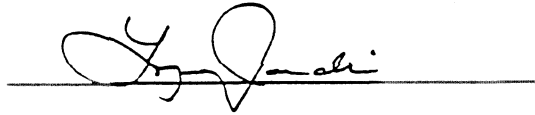

HONORABLE JOHN A. ROKICH
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT ON SPECIAL VERDICT, postage prepaid, this 15th day of July, 1993, to the following:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107

Wendell E. Bennett
Attorney for Defendant Preston
448 East 400 South, Suite 304
Salt Lake City, UT 84111



ADDENDUM 4

TO: DIRECTOR
BY: _____

EDWARD T. WELLS

CERTIFICATE OF MAILING

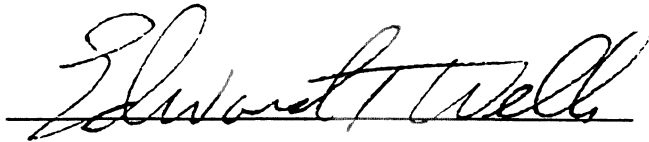
I hereby certify that true and correct copies of the foregoing **MOTION FOR ADDITUR OR IN THE ALTERNATIVE FOR A NEW TRIAL**

(Chanhmany v. Preston) were mailed, postage prepaid, this 30

day of JULY, 1993 to the following:

Wendell E. Bennett
448 East 400 South, #304
Salt Lake City, UT 84111

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, appearing to read "Wendell E. Bennett", written over a horizontal line.

4148-040\vah

FILED
COURT

JUL 30 4 11 PM '93

CLERK
BY

EDWARD T. WELLS - A3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

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

RANDY CHANHMANY, et al.,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR ADDITUR OR IN
Plaintiff,	)	THE ALTERNATIVE FOR A
	)	NEW TRIAL
vs.)	
JOYCE A. PRESTON, et al.,	)	Civil No. 910907726PI
)	
Defendant.	)	Judge John A. Rokich
)	

Plaintiff submits the following Memorandum in support of her motion for an additur or in the alternative for a new trial on the issue of damages.

MATERIAL FACTS

At trial, the following facts were established by undisputed testimony:

1. Plaintiff was injured in an automobile accident on July 22, 1989, when a car driven by Brian Bone collided with her vehicle.
2. Dr. Gary Whitley testified as to treatment rendered for her injuries totalling \$3,299.09.

3. Dr. Whitley testified the treatment received by Khai Chanhmany was reasonable and necessary.

4. No witness testified to there being a smaller amount as the reasonable and necessary amount of treatment, and there was no testimony by any medical provider that any of the treatments received by plaintiff were unnecessary, or that any specific amount charged was not reasonable.

5. Exhibit 3 listed all medical bills, and it was admitted showing total bills to be \$3,299.09.

6. No evidence was received to contradict this amount or to show a lesser amount as reasonable and necessary or to dispute the reasonableness or necessity of any item shown therein.

7. Defendant's expert gave no testimony that any of plaintiff's billings were unreasonable or unnecessary.

ARGUMENT

POINT I

THE SPECIAL DAMAGE AWARD IS INSUFFICIENT UNDER THE EVIDENCE AND THIS COURT SHOULD GRANT AN APPROPRIATE ADDITUR OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES

Rule 59(a)(5) of the Utah Rules of Civil Procedure provides, in pertinent part, as follows:

(a) [A] new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes. . .

(5) Excessive or inadequate damages, appearing to have been

given under the influence or passion
or prejudice.

While granting a new trial is one remedy for inadequate damages, the Utah Supreme Court has held that implicit within the authority of the Court to grant a new trial is the power to grant an additur to the verdict. In Boden v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826, 828 (1958), the Court stated:

There is implicit within the authority of the court to grant a new trial on the statutory ground of "excessive or inadequate damages" the power to order a new trial conditionally; that is, to order that a new trial be granted unless the part adversely affected by the order agrees to a remittitur or an additur of the damages to an amount within proper limits as viewed by the court.

The Court explained that this process of modifying the verdict to bring it within the evidence is reserved for situations where the verdict is outside the limits of what appears justifiable under the evidence to such an extent that the verdict should not be permitted to stand. Id. at 829.

In Paul v. Kirkendall, 1 Utah 2d 1, 261 P.2d 670, 671 (1953), the Utah Supreme Court explained the standard in determining whether to grant an additur or new trial as follows:

If inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the Court as to the law applicable to the case as to satisfy the court that the verdict was rendered under such disregard or misappre-

hension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interest of justice and grant a new trial.

The Court further clarified this standard in Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (Utah) by stating that an additur or new trial is warranted where "it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence." Id. at 354.

The plaintiff acknowledges that it is generally the prerogative of the jury to make the determination of damages. Jensen v. Ekins, 575 P.2d 179 (Utah 1978). Where, however, the standards listed above have been satisfied, the trial court can and should step in and exercise its prerogative to bring the verdict within the limits of the evidence. Such is the case here.

This is not a case where the plaintiff is dissatisfied with the amount of a general verdict and requests an additur. This is a case where the jury rendered a special verdict. The damage award of that special verdict on the issue of special damages is inconsistent with the evidence on special damages which was before the jury, and upon which they must base their verdict.

The jury found that defendant Bone was negligent and that this negligence was a proximate cause of plaintiff's injuries. The

undisputed testimony was that the amount of reasonable and necessary medical care received by plaintiff was \$3,299.09.

In the case of John Call Engineering, Inc. v. Manti City Corporation, 795 P.2d 678, 683 (Utah App. 1990), the Utah Court of Appeals held that a jury award below the lowest figure for damages set forth in the evidence could not be allowed to stand and reversed the case and sent it back to the trial court with instructions to enter judgment for the lowest amount of damages established by testimony. In this case, that figure would be the \$3,299.09 for special damages.

When a verdict is supported by competent evidence, the court usually leaves it as it is. When, however, there is no evidence to support an award, the court may take action to conform the award to the evidence. See Weber Basin Water Conservancy District v. Skeen, 8 Utah 2d 79, 328 P.2d 730 (1958).

An additur is a proper method of treating a situation where inadequate damages are awarded. See Bodon v. Suhrmann, supra.

In the present case, the only evidence on the issue was that \$3,299.09 was the amount spent by plaintiff for medical expenses for treatment of injuries received in the accident. Dr. Whitley testified such amount was reasonable and necessary. No testimony was received to the contrary. Therefore, an additur to

bring the special damages to \$3,299.09 should be granted. In the alternative, a new trial should be granted on this issue because the jury did not follow the evidence and instructions of the Court. Instruction Number 29 instructed the jury to award special damages for "reasonable and necessary expenses for doctors, x-rays, and other medical services actually incurred by plaintiff."

\$3,299.09 was the amount of expense actually incurred by plaintiff and according to testimony of Dr. Whitley, such was reasonable and necessary. There was no contrary evidence.

Failure of the jury to follow the instructions of the court on the law is sufficient basis for granting a new trial. Efco Distributing, Inc. v. Perrin, 17 Utah 2d 375, 412 P.2d 615 (1966); Matter of Acquisition of Property by Eminent Domain, 236 Kan. 417, 690 P.2d 1375 (1984); Cole v. Gerhart, 5 Ariz. App. 24, 423 P.2d 100 (1967); Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978); Salvail v. Great Northern Ry Co., 473 P.2d 549 (Mont. 1970); Price v. Sinnot, 85 Nev. 600, 460 P.2d 837 (1969) affd. 90 Nev. 5, 517 P.2d 1006 (1974).

A new trial is also proper where there is insufficient evidence to support the jury verdict. Efco Distributing, Inc. v. Perrin, supra; Villegas v. Bryson, 16 Ariz. App. 456, 494 P.2d 61 (1972).

The whole purpose of a new trial is to correct errors made at the trial. In the present case, the jury made obvious errors in not following the court's instruction on damages and in failing to award special damages according to the undisputed evidence.

As the court observed in Efco Distributing, Inc. v. Perrin, supra:

If it clearly appears that there has been a miscarriage of justice because the jury has refused to accept credible, uncontradicted evidence where there is no rational basis for rejecting it, or it is plain to be seen that the jury has acted under a misconception of proven facts, or has misapplied or disregarded the law, or where it appears that the verdict was the result of passion or prejudice, it is both the prerogative and the duty of the court to set aside the verdict and grant a new trial.

In the present case, the findings of the jury do not follow the evidence. In the event the court does not grant the additur motion, a new trial should be granted on damages.

CONCLUSION

The jury's answers to the question on special damages is not justified under the evidence in the case and cannot be allowed to stand.

The evidence at trial argues for an additur to \$3,299.09 to comply with the evidence at trial on special damages; or in the alternative for a new trial on the damage issue.

DATED this 30th day of JULY, 1993.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff

By: Edward T. Wells
EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR ADDITUR OR IN THE ALTERNATIVE FOR A NEW TRIAL (Chanhmany v. Preston) were mailed, postage prepaid, this 30th day of JULY, 1993 to the following:

Wendell E. Bennett
448 East 400 South, #304
Salt Lake City, UT 84111

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

Edward T. Wells

4148-039\vah

JUDGMENT

THIRD JUDICIAL DISTRICT COURT
Third Judicial District

TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant Bone
4 Triad Center, Suite 500 (84180)
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

JUL 29 1993

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

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

RANDY CHANHMAN, a minor, by and
through his natural mother and
guardian, KHAI CHANHMAN, and
KHAI CHANHMAN, individually,

Plaintiffs,

vs.

JOYCE A. PRESTON and BRIAN D.
BONE,

Defendants.

**JUDGMENT ON SPECIAL
VERDICT**

2185031
8-4-93-802 am

Civil No. 910907726PI
Judge John A. Rokich

The above-entitled case was tried before a jury commencing April 27, 1993 and continuing through April 29, 1993 on the complaint of the plaintiff, Khai Chanhmany, versus both Joyce A. Preston and Brian D. Bone. The claim of plaintiff Randy Chanhmany was bifurcated from the case of Khai Chanhmany just prior to the commencement of trial. The jury, having heard evidence produced by the plaintiff Khai Chanhmany, the Court having received the Special Verdict on the jury and also having considered the issue as to whether or not Plaintiff had met the threshold requirements of Utah Code Annotated § 31A-22-309(1) and having made

its Minute Entry on July 1, 1993, based upon the Special Verdict of the jury and the Minute Entry of the Court,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff Khai Chanhmany was not negligent.
2. The defendant Joyce A. Preston was not negligent.
3. The defendant Brian D. Bone was negligent, and his negligence was the sole proximate cause of the damages claimed by the plaintiff Khai Chanhmany.

4. The total damages which have been incurred by Khai Chanhmany as a direct consequence of the negligence of Brian D. Bone are as follows:

a. Past medical expenses	\$2,100.00
b. Past wage loss	<u>101.00</u>
TOTAL	\$2,201.00


5. Even though the jury in its Special Verdict found general damages in favor of the plaintiff Khai Chanhmany in the sum of \$3,000.00, in accordance with the Minute Entry of the Court dated July 1, 1993, the Court specifically finds that she is not entitled to general damages in this matter because she failed to meet the threshold requirements of § 31A-22-309(1) Utah Code Annotated (1953, as amended). Due to the fact that Plaintiff failed to prove that she had met the \$3,000.00 threshold for medical expenses as required by Utah Code Annotated § 31A-22-309(1)(e) (1953, as amended) and further that Plaintiff failed to prove that she had suffered a permanent disability in accordance

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT ON SPECIAL VERDICT, postage prepaid, this 15th day of July, 1993, to the following:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107

Wendell E. Bennett
Attorney for Defendant Preston
448 East 400 South, Suite 304
Salt Lake City, UT 84111

A handwritten signature, likely of Robert J. Debry, is written over a horizontal line. The signature is cursive and stylized.

ADDENDUM 4

EDWARD T. WELLS - A3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

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

RANDY CHANHMAN, et al.,)	
)	
Plaintiff,	)	OBJECTIONS TO DEFENDANT
	)	JOYCE PRESTON'S JUDGMENT ON
vs.	)	SPECIAL VERDICT
)	
JOYCE A. PRESTON, et al.,	)	Civil No. 910907726PI
)	
Defendant.	)	Judge John A. Rokich
)	

Plaintiff Khai Chanhmany, through counsel Edward T. Wells, hereby objects to Defendant Joyce Preston's Judgment on Special Verdict as follows:


Plaintiff objects to paragraph 5 on the grounds that plaintiff does meet the threshold requirements of Utah Code Ann. § 31A-22-309(1)(c) and (e). The undisputed trial testimony was that plaintiff has a permanent impairment of at least 6.8%.

Plaintiff incurred over \$3,000 in medical bills as well. The jury in its discretion did not award the full amount of the bills despite the undisputed testimony that the injuries she was being treated for were related to the accident from which this lawsuit arose.

Plaintiff also objects to paragraph 7 in that the jury in its discretion did not attribute any negligence on the part of Joyce Preston. Brian Bone was found 100% at fault. Therefore, all costs should be paid by Defendant Brian Bone.

DATED this 14 day of May, 1993.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff


By: 
EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the foregoing **OBJECTIONS TO DEFENDANT JOYCE PRESTON'S JUDGMENT ON SPECIAL VERDICT** (Chanhmany v. Preston) were mailed, postage prepaid, this 17 day of May, 1993 to the following:

Wendell E. Bennett
448 East 400 South, #304
Salt Lake City, UT 84111

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



4148-037\vah

TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant Bone
4 Triad Center, Suite 500 (84180)
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

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

RANDY CHANHMAN, a minor, by and)	
through his natural mother and	)	MEMORANDUM OF POINTS AND
guardian, KHAI CHANHMAN, and	)	AUTHORITIES IN SUPPORT
KHAI CHANHMAN, individually,	)	OF OBJECTION TO PLAINTIFF'S
	)	JUDGMENT ON THE VERDICT
Plaintiffs,)	
)	
vs.)	
)	
JOYCE A. PRESTON and BRIAN D.)	
BONE,	)	Civil No. 910907726PI
	)	Judge John A. Rokich
Defendants.)	

The defendant, Brian D. Bone, submits the following memorandum of points and authorities in support of his objection to Plaintiff's judgment on the verdict.

In her judgment on the verdict submitted to this defendant on May 12, 1993, a copy of which is attached hereto for the convenience of the Court, Plaintiff properly sets forth the answers to the special interrogatories answered by the jury. Special Interrogatory No. 6 contains the damages portion of the jury verdict. In awarding damages, the jury awarded past medical expense to the plaintiff in the amount of \$2,100.00. A general damage award was given for \$3,000.00.

Utah Code Annotated § 31A-22-309 sets forth as follows:

- (1) A person who has or is required to have direct benefit coverage under a policy which includes Personal Injury Protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an accident, except where the person has sustained one or more of the following:
 - (a) death;
 - (b) dismemberment;
 - (c) permanent disability;
 - (d) permanent disfigurement; or
 - (e) medical expenses to a person in excess of \$3,000.

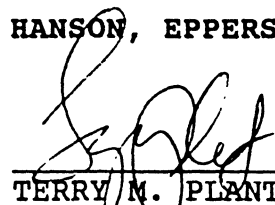
Due to the fact that the plaintiff has failed to meet any of the threshold requirements of Utah Code Annotated § 31A-22-309, in accordance with the language of that statute she is not entitled to any general damage award. There are a number of "thresholds" set forth under § 31A-22-309 which will allow a party to meet the requirements of the statute. Given the jury's verdict, she did not meet the medical expense threshold and there was no evidence presented to the jury regarding any of the remaining thresholds. The plaintiff obviously is not dead and has sustained no dismemberment or permanent disfigurement of any kind as a result of the accident. As to the permanent disability threshold, while there was evidence discussed at the trial concerning "impairment", there was no evidence whatsoever offered concerning disability and particularly no medical testimony or other appropriate testimony to establish that the plaintiff had sustained permanent disability. As the Court is aware, there is a distinct difference between

impairment and disability, and in order for the plaintiff to sustain her burden of meeting the threshold requirements, he must establish that she is not only impaired, but disabled in some way. There was virtually no evidence offered in this trial regarding disability. Further, given the low amount of general damages awarded, the Court can and should rule as a matter of law that the jury found no permanent injury of any kind. However, even if the Court does believe there may be an issue concerning a permanent impairment, since the plaintiff failed to put on any evidence of a "disability" and further given the amount of the jury verdict for general damages, the Court should rule as a matter of law that there was no permanent disability established and therefore should likewise rule that the plaintiff has failed to meet the threshold requirements of § 31A-22-309.

As a result of the foregoing, the defendant Brian Bone prays that the award of \$3,000.00 for general damages be stricken and that the plaintiff recover only her special damages, which would include past medical expense and past wage loss, but be given no award for general damages.

DATED this 14th day of May, 1993.

HANSON, EPPERSON & SMITH



TERRY M. PLANT
Attorney for Defendant Bone

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTION TO PLAINTIFF'S JUDGMENT ON THE VERDICT, postage prepaid, this 14th day of May, 1993, to the following:

Edward T. Wells
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107

Wendell E. Bennett
Attorney for Defendant Preston
448 East 400 South, Suite 304
Salt Lake City, UT 84111

