

1994

Marvin A. Dalton, Jr. v. Brian G. Herold : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARVIN A. DALTON, JR., Plaintiff/Appellee, vs. BRIAN G. HEROLD, Defendant/Appellant.	Case No. 94 1070-CA Priority No. (15)
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BRIEF OF APPELLANT

**APPEAL FROM MEMORANDUM DECISION AND JUDGMENT OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY, JUDGE LESLIE A. LEWIS**

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MARVIN A. DALTON, JR.,

Plaintiff/Appellee,

vs.

BRIAN G. HEROLD,

Defendant/Appellant.

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PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the lower court are set forth in the caption of the case on appeal.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered by Judge Leslie A. Lewis in the Third Judicial District Court in and for Salt Lake County, State of Utah on January 24, 1994. That judgment incorporated the court's memorandum decision entered September 22, 1993, which granted the appellee's (hereinafter referred to as "Dalton") request for additur. That judgment also sets forth the court's ruling regarding an award of costs to Dalton. The court's judgment is appealed as of right pursuant to Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue: Did the lower court err in granting Dalton's motion for additur on the grounds that the jury made findings clearly against the evidence and the verdict was outside the limits of any reasonable appraisal of damages as shown by the evidence?

Standard: The court is "obliged to survey the evidence" and all reasonable inferences drawn therefrom in the light most favorable to the jury's finding. *Bodon v. Suhrmann*, 327 P.2d 826, 829 (Utah 1958); *Pratt v. Prodata, Inc.*, 246 Utah Adv. Rep. 3 (Utah 1994); *State v. Dunn*, 850 P.2d 1201, 1205-06 (Utah 1993); *State v. Hamilton*, 827 P.2d 232, 233-34 (Utah 1992).

A reviewing court will defer to a jury's damage award unless the award indicated that the jury disregarded competent evidence, or that the award is so excessive or inadequate beyond rational justification as to indicate the effect of improper factors in the determination, or that it clearly appears that

the award was rendered under a misunderstanding. *Bennion v. LeGrand Johnson Construction Company*, 701 P.2d 1078, 1084 (Utah 1985).

Issue: Did the lower court appropriately award Dalton costs in light of the appellant's (hereinafter referred to as "Herold") offer of judgment and the appropriate statutes and case law on the issue of taxable costs?

Standard: The trial court's award of costs is reviewed under an abuse of discretion standard. *Frampton v. Wilson*, 605 P.2d 771, 773-774 (Utah 1980); *Lloyd's Unlimited v. Nature's Way Marketing, Ltd.*, 753 P.2d 507, 512 (Utah Ct. App. 1988); *Morgan v. Morgan*, 795 P.2d 684 (Utah Ct. App. 1990).

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEDURES AND DISPOSITION IN THE COURT BELOW

On June 11, 1992, Dalton filed a complaint against Herold, asserting that on "October 15, 1990, [Dalton] was riding his motorcycle northbound on 900 West in Salt Lake City, Utah. [Herold] carelessly and recklessly made a left-hand turn in front of [Dalton] from the southbound traffic lane causing a collision." (R. 2-5) Dalton claimed that he suffered certain personal injuries with associated past and future medical expenses. On May 5, 1993, and pursuant to Rule 68(b) of the Utah Rules of Civil Procedure, Herold filed an offer of judgment in the amount of \$15,000. (R. 62-64) That offer was rejected by Dalton and this matter was tried to a jury on May 17 through 19, 1993.

Shortly after the automobile/motorcycle accident in question, Dalton was incarcerated. Later, Dalton entered a plea of guilty to the third degree felony of burglary. Prior to trial, the parties agreed that Dalton would not

make any claims for lost wages or any reference to how his physical limitations relate to employment in exchange for Herold not attempting to introduce evidence regarding Dalton's incarceration or criminal record. (R.373) Accordingly, the jury did not address any issues of whether Dalton could afford to obtain proper medical care or, in fact, receive free medical care while in jail.

After the conclusion of the evidence at trial, the court directed the jury to find that Herold was negligent. The remaining issues were submitted to the jury on a special verdict form to answer special interrogatories. The jury found Dalton to have been negligent and both parties' negligence to be a proximate cause of Dalton's injuries. The jury concluded that Dalton was 20% at fault and that Herold was 80% at fault. Finally, the jury awarded special damages in the amount of \$3,000 and general damages in the amount of \$5,000. (R. 292)

On May 27, 1993, Dalton filed his verified memorandum of costs and disbursements and a motion for additur and/or new trial with a supporting memorandum. (R. 358, 377) Dalton's memorandum and motion were opposed by Herold. (R. 387, 394) On August 10, 1993, the court heard argument regarding those issues. On September 27, 1993, the court issued a memorandum decision, a copy of which is attached hereto as Exhibit "A". (R. 433) On January 24, 1994, the court entered its final judgment and order regarding plaintiff's post-trial motion for verified costs and expenses, copies of which are attached hereto as Exhibits "B" and "C". (R. 452, 455)

The trial court found the amount of the jury's verdict to be "clearly inadequate in light of the evidence presented at the trial" and "not consistent with any actual special damages." Dalton's motion for additur was granted and the court increased the award of special damages from the jury's verdict of \$3,000.00 to a total of \$22,910.24. The court did not alter the jury's verdict which found Dalton 20% at fault for his own injuries or the award of \$5,000.00 in general damages.

The trial court awarded Dalton \$3,124.40 in costs, expenses and interest. Herold contended that because of the plaintiff's rejection of the offer of judgment no award of costs should be granted to Dalton or, in the alternative, that such an award should not include travel expenses incurred for the taking of the depositions of Dalton and Herold of \$573.00, the court reporter fee for the deposition of Newell Knight of \$188.90 (Knight was not called as a witness at trial), or the witness fees paid to Knight and Dr. Stadler of \$525.00. It was further contested that the service fees were inflated.

STATEMENT OF FACTS

1. On October 15, 1990, immediately prior to the accident, Herold was the second car stopped at a red light at the intersection of 900 West and North Temple in Salt Lake City, Utah. (R. 611)

2. Herold was facing south and intending to make a left-hand turn. (R. 612)

3. At the time of the accident, the traffic signals at the intersection in question did not provide a left-hand turn arrow.

4. Dalton was northbound on his motorcycle on 900 West. (R. 640)
5. Dalton was not wearing a protective helmet. (Dalton has never worn a helmet while riding his motorcycle.) (R. 684)
6. As soon as the light turned green, Herold followed the vehicle in front of him in making a left-hand turn. (R. 680)
7. While approaching the intersection, Dalton had actually seen the green light for approximately four to six seconds before he passed the beginning of the left-hand turn lane for northbound traffic. (R. 677-678)
8. Dalton had a clear view of Herold and the car ahead of Herold. (R. 680)
9. In attempting to stop, Dalton claimed to have locked up his brakes, yet no skid marks were left by his motorcycle. (R. 680-681)
10. Dalton hit the very end of the Herold vehicle on its right rear quarter panel. (R. 685)
11. At the scene of the accident, Dalton refused medical aid. (R. 685-686)
12. Later on the day of the accident, Dalton was treated at the emergency room of Holy Cross Hospital and released on the same day. (October 15, 1990).
13. While at the emergency room, Dalton did not wish to have a plastic surgeon consulted. (R. 240, p. 2 of Holy Cross emergency department report)

14. Dalton was next examined by Dr. James Morgan, an orthopedic surgeon, almost two months later on December 6, 1990. (R. 748-749)

15. Dr. Morgan saw Dalton only one other time on January 24, 1991; by that time Dalton's knee injury had returned to about pre-injury level, although he continued to have numbness of his face, right arm and hand. (R. 756)

16. Dalton saw Dr. Richard Hodnett, a plastic surgeon, on only one occasion on December 17, 1990, no treatment was rendered. (R. 766)

17. Dr. Hodnett asked Dalton to return; Dalton did not return. (R.784)

18. It is the policy of Dr. Hodnett's office to "call and ask the patient to come in for a repeat exam." (R. 785)

19. In December of 1990, Dr. Hodnett "thought that, at that late of date, [Dalton] may need more extensive treatment than he would have needed if [Dr. Hodnett had] seen him within the first couple weeks of when [the accident] happened." (R. 769)

20. When asked at trial whether Dalton needed surgery approximately two and one-half years after Dr. Hodnett last saw Dalton and had x-rays taken, Dr. Hodnett stated: "It's difficult, since I haven't been able to examine Mr. Dalton". (R. 781)

21. Dalton received no treatment from any of the physicians who examined him (Dr. Morgan, Dr. Hodnett, Dr. Cosby, Dr. Mikesell, and Dr. Stadler) for his alleged injuries related to the accident in question. (R. 696)

22. Dalton did not follow his doctors' recommendations which would have mitigated his damages. (R. 702)

23. When Dalton saw Dr. Michael P. Cosby on December 16, 1991 for his temporal mandibular joint concerns, Dalton had one tooth actually rotted down to the roots. (R. 827-28)

24. When Dalton saw Dr. L. Vaun Mikesell, his second expert in the area of oral and maxillofacial surgery, shortly before trial on February 23, 1993, Dalton had eight teeth that had severe cavities and may need to be extracted. (R. 858)

25. In a letter to Dalton's attorney dated December 26, 1991, Dr. Cosby recommended that Dalton have his teeth cleaned. (R. 849)

26. Dalton did not follow the recommendation to have his teeth cleaned. (R. 702)

27. Dr. Cosby recommended that Dalton exercise appropriate dental hygiene. (R. 849)

28. Dalton "just turned lazy" and did not exercise appropriate dental hygiene. (R. 702)

29. Dr. Cosby recommended the removal of non-restored teeth and the restoration of restorable teeth. (R. 849)

30. Dalton did not obtain appropriate dental care. (R. 702)

31. Dr. Cosby recommended that Dalton be evaluated for splint therapy. (R. 849)

32. Dalton did not follow through in being evaluated for splint therapy. (R. 702)

33. It was Dr. Cosby's "feeling conservative treatment would be all that would be needed. Most likely, splint therapy would alleviate most of the myalgia and symptoms of TMJ dysfunction which [Dalton] is experiencing." (A copy of Dr. Cosby's letter is attached as Exhibit "D".)

34. Dr. Mikesell testified that splint therapy would cost "around \$300 to \$400." (R. 834)

35. Dalton did not obtain splint therapy when recommended by Dr. Cosby and his TMJ condition became worse. (R. 838)

36. When Dalton was examined by Dr. Cosby, Dalton's mouth opening was in the range of normal. (R. 845)

37. When Dalton was examined by Dr. Cosby, there was no clicking or popping of the jaw to palpation. (R. 846)

38. It did not appear from Dr. Mikesell's examination that Dalton followed any of the recommendations set forth by Dr. Cosby. (R. 850)

39. Even at the time of trial, Dr. Mikesell would begin treatment conservatively and only if the patient does not respond would surgery be considered. (R. 850)

40. Dr. Cosby's bill to Dalton's attorney was \$65.00 for the examination and \$200 for the report sent to Dalton's attorney; the report is an expense of litigation, not a medical bill. (R. 240, Dr. Cosby's itemization of charges and payments.)

41. Dalton's past medical expenses equal \$2,703.24, which represents the \$2,903.24 figure presented by Dalton at trial, less \$200 for Dr. Cosby's report to Dalton's attorney.

42. If one were to add \$300.00 for conservative splint therapy treatment for future special damages to the past medical special damages, the total special damage figure would be within \$3.24 of the jury's special damage award of \$3,000.00.

43. The plaintiff was examined by Dr. E. Warren Stadler, an expert in the area of physical rehabilitation, on February 22, 1993. (R. 864)

44. At the time of Dr. Stadler's examination, Dalton had a full range of motion of the cervical spine without weakness in the upper extremity or the neck area. (R. 869)

45. Dr. Stadler's examination found decreased sensation in Dalton's right index finger and on the right facial area around the right eye. (R. 869, 872)

46. Dalton's loss of sensation is caused by a nerve problem. (R. 873)

47. Dr. Stadler's examination found Dalton's facial fractures to be well healed. (R. 872)

48. Dr. Stadler did not place any limitation on Dalton's activities of daily living. (R. 873)

49. Dr. Stadler did not feel that surgical intervention on Dalton would be helpful with regard to his knee, his neck, his shoulder, his arm or with regard to his facial injuries. (R. 872-872)

50. Surgery would not be helpful in reestablishing the sensory patterns for nerve problems experienced by Dalton. (R. 873)

SUMMARY OF THE ARGUMENT

The jury's award of damages was consistent with the testimony of the witnesses at trial. The medical expenses established were \$2,703.24, plus the cost of conservative treatment which was estimated at \$300.00. The jury awarded a total of \$3,000.00. There was a reasonable basis for this award.

Sufficient evidence was produced that the jury could correctly decide that Dalton had failed to mitigate his damages. He had not received any medical treatment and had not followed through with any of his doctors' recommendations.

The jury was presented with credible evidence at trial rebutting Dalton's allegations that future surgeries would be required. The jury had sufficient evidence to decide that future surgeries would not be required. The court finding that \$20,007.00 for future medical expenses had been undisputed was in error.

Dalton was extended a reasonable offer of judgment prior to trial. The jury's award was less than that offer. Accordingly, Dalton should not be awarded costs. In the alternative, the cost award should be modified in accordance with statute.

ARGUMENT

I

BECAUSE THE DAMAGES AWARDED DALTON BY THE JURY WERE NOT SO INADEQUATE AS TO INDICATE A DISREGARD OF THE EVIDENCE BY THE JURY, THE TRIAL COURT WAS NOT EMPOWERED TO GRANT A MOTION FOR ADDITUR.

After the jury awarded Dalton \$3,000 for special damages and \$5,000 for general damages as a result of the automobile/motorcycle accident in question, Dalton moved the court for additur or new trial pursuant to Rule 59(a)(5), (6) and (7). Dalton maintains that the damages were inadequate and appeared to have been given under the influence of passion or prejudice, that the evidence was insufficient to justify the verdict, and that the verdict was against the law or an error in the law. The trial court was persuaded that the jury verdict was "inconsistent with the evidence adduced at trial" and granted "the motion for additur in the amount of \$19,910.24 as to special damages." (Memorandum Decision dated September 22, 1993, P. 1.) The trial court further stated:

The award for special damages must bear a reasonable relationship to the evidence. This court finds that the award of \$3,000 does not bear this reasonable relationship to the evidence adduced at trial. The plaintiff presented evidence that his past medical bills were \$2,903.24 (See Exhibit "3"); and an award of \$3,000, while close to this amount, it is greater than the actual past medical expenses, and not consistent with any actual special damages. An additur is therefore granted.

(*Id.* at p.3.)

Dalton's exhibit summarizing his medical bills indicated: \$1,232.77 for examination, x-rays, CT scans and stitches at Holy Cross Hospital on the day

of the accident, October 15, 1990; \$328.47 for x-rays and CT scans by Valley Radiologists also on the day of the accident, October 15, 1990; (Over one-half of the plaintiff's actual past special damages were incurred on the day of the accident. \$1,561.24/\$2,703.24.); \$115.00 for extended consultation, examination and x-rays by Dr. Richard Hodnett on December 5, 1990; \$192.00 for consultation and examination by Dr. William Bentley on May 16, 1991; \$540.00 for EMG study by Dr. Karl Gross on May 20, 1991; \$95.00 for consultation, examination and x-rays by Dr. Marc Schwartz on June 25, 1991; \$265.00 for TMJ consultation and report by Dr. Michael Cosby on December 16, 1991; and \$135.00 for TMJ exam and x-ray by Dr. L. Vaun Mikesell on February 23, 1993. (R. 240, medical bills and treatment summary for Dalton.)

It was pointed out to the jury that Dr. Cosby's bill dated May 12, 1993 for services performed on December 16, 1991, was for a TMJ consultation fee of \$65.00 and a narrative report or Dr. Cosby's letter to Dalton's attorney of \$200.00. (R. 1001). The letter to Dalton's attorney is a cost of litigation and should be subtracted from the plaintiff's total medical expenses of \$2,903.24, leaving the actual total of the plaintiff's past special damages at \$2,703.24.

This court must "view the evidence and all reasonable inferences drawn therefrom in the light most favorable to [the jury's] verdict." *Pratt v. Prodata, Inc.*, 246 Utah Adv. Rep. 3 (Utah 1994). There is no question that Dalton failed to follow through with his treating physicians. In fact, from the time of the accident to the time of trial, Dalton received no actual treatment from any medical provider. In that light, a jury could have reasonably inferred from Dr.

Stadler's testimony that Dalton would not have benefited at the time of trial from any surgical intervention with regard to Dalton's knee, neck, shoulder, arm and face. The jury could have also reasonably inferred from Dr. Crosby's letter of December 26, 1991, to Dalton's attorney that splint therapy and "conservative treatment would be all that would be needed to resolve Dalton's TMJ symptoms." Conservative treatment, on the low end, would cost Dalton \$300.

"When the damages are not so inadequate as to indicate a disregard of the evidence by the jury, a court is not **empowered** to entertain a motion for an additur." *Dupuis v. Nielson*, 624 P.2d 685, 686 (Utah 1981). (Emphasis added.) In the recent case of *Pratt v. Prodata, Inc.*, 246 Utah Adv. Rep. 3, 4 (Utah 1994), the Supreme Court of Utah stated:

We dispose of defendants' sufficiency-of-the-evidence claims by adhering to a well-established principle of appellate review: This court will upset a jury verdict 'only upon a showing that the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.' [*EA. Strout W. Realty Agency, Inc. v. W.C. Foy & Sons, Inc.*, 665 P.2d 1320l, 1322 (Utah 1983); accord *Bundy v. Century Equip. Co.*, 692 P.2d 754, 758 (Utah 1984).] 'The burden on an appellant to establish that the evidence does not support the jury's verdict and the factual findings implicit in that verdict ... is quite heavy.' [*Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987).] 'To successfully attack the verdict, an appellant must marshal all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is not sufficient to support it.' [*Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985) (citing *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985)).]

There is no question that "the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict" support a finding of past special damages in the amount of \$2,703.24, and future special damages in the amount of \$300.00. Clearly, the jury's award of \$3,000 for special damages bears "a reasonable relationship to the evidence."

The damages awarded by the jury to Dalton are not so inadequate "as to be shocking to one's conscience and to clearly indicate passion, prejudice or corruption on the part of the jury." *McAfee v. Ogden Union Ry. & Depot Co.*, 62 Utah 115, 129, 218 P.98, 104 (1923); *Cruz v. Montoya*, 660 P.2d 723 (Utah 1983). Accordingly, the jury's verdict, not the trial court's additur, should stand.

II

THE JURY CORRECTLY RECOGNIZED THAT DALTON FAILED TO MITIGATE HIS DAMAGES

The basis of the court's order that \$19,910.24 should be added to the jury's award of \$3,000 in special damages was that such an amount in medical care "more probably than not will be required and given in the future." (Jury Instruction No. 44. R. 343.) The court found the amount of \$20,007 for future medical expenses to have been undisputed and uncontroverted at trial. (R. 435) Apparently, the court was also convinced that the care would be "given in the future." That medical expense figure represented the cost of two future surgeries. One of the surgeries was testified to by Dr. Hodnett and would be performed in an effort "to release either scar tissue or bony fragments from the nerve to attempt to recover some of the sensation" lost in Dalton's face. (R.

782) The second surgery was testified to by Dr. Mikesell and would be intended to assist Dalton with his TMJ symptoms.

At the close of the evidence, the jury was instructed regarding special damages. Jury Instruction No. 44 states:

You may award special damages, if proven, for the reasonable value of medical care, services and supplies reasonably required and actually given in treatment of the plaintiff and the reasonable value of similar items that more probably than not will be required and given in the future.

(R. 343) That instruction clearly directs the jury to award special damages for future medical treatment only if they are persuaded that Dalton will require and **be given** the treatment. Accordingly, Dalton's "track record" of ignoring his physicians' recommendations and failing to receive treatment is insightful, if not, critical.

The law also requires a plaintiff to mitigate his damages. The jury was directed in Jury Instruction No. 36 as follows:

It is the duty of a person who has been injured to use reasonable diligence in caring for the injuries and reasonable means to prevent their aggravation and to accomplish healing.

When an injured person does not use reasonable diligence to care for the injuries, and they are aggravated as a result of such failure, the liability, if any, of another whose act or omission was a proximate cause of the original injury, must be limited to the amount of damage that would have been suffered if the injured person had exercised the required diligence.

(R. 335)

FACIAL INJURIES

Dalton was not wearing a helmet at the time his motorcycle collided with the rear-end of Herold's car. (R. 684) Dalton suffered facial injuries as a result of that accident. Immediately after the accident, Dalton refused medical aid. (R. 685) The police took Dalton to his home and later some friends took Dalton to Holy Cross Hospital. (R. 687) Dalton was at Holy Cross Hospital, on the day of the accident, for approximately two and one-half to three hours. (R. 688) Much of the time at the hospital was spent lying on a cot without being examined. (R. 689) At that time, Dalton "did not wish to have a plastic surgeon consulted." (R. 240; Holy Cross Emergency Room record dated 10/15/90)

Dalton was also examined by CT scans and x-rays at the hospital. Nothing other than diagnostic testing was performed. No treatment was received by Dalton. (R. 689)

Dalton was next examined by Dr. Hodnett on December 17, 1990, over two months after the accident. (R. 766) The failure to receive care within the first couple of weeks of the accident may have caused Dalton's condition to worsen and may have lead to Dalton needing "more extensive treatment". (R. 769) Dalton was only seen and diagnosed by Dr. Hodnett on that one occasion and no treatment was performed. After his only visit, Dalton was told by Dr. Hodnett to return. Dalton failed to do so. (R. 784) Dalton never saw Dr. Hodnett again. The jury was clearly instructed that if Dalton failed

to care for his injuries, Herold could not be liable for the fact that the injuries had worsened.

When Dalton was examined shortly before trial on February 22, 1993, Dalton's facial fractures were well-healed. (R. 841, 872) The **only** deficit in the face was that "his sensation was decreased around the right facial area around the right eye when compared to the left." (R. 872) That problem was diagnosed by the only doctor, Dr. Stadler, to have examined Dalton's facial injuries in 26 months.

Apparently, the jury did not award future damages for Dalton's facial injuries. In viewing the evidence most favorable to the jury's verdict, the evidence clearly supports a finding that Dalton's fractures were well-healed at the time of trial and that his only deficit as a result of those fractures was a very minor one. In fact, Dr. Stadler testified that Dalton would experience no day-to-day limitation as a result of the decreased sensation around his right eye.

To successfully attack the verdict, [the party attacking the verdict] must marshal all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it.

Von Hake v. Thomas at 769. It is impossible for Dalton to meet his burden as set forth above for the simple fact that the evidence in this case strongly supports the jury's verdict.

TMJ SYMPTOMS

When Dalton was examined in the emergency department at Holy Cross Hospital on the day of the accident on October 15, 1990, he denied "any neck

pain, or any other pain, except that he scraped his left knee which is significant for reconstructive surgery (although it does not feel painful at this time.)" (R. 240, Holy Cross Emergency Room record dated 10/15/90) On examination of his facial injuries at the emergency room, there was no palpable bony fracture, although he was very tender over the zygomatic arch, and there was some soft tissue swelling and tenderness over the maxilla on the right side. His oral cavity was unremarkable.

Dalton had a tender "TMJ" when examined by Dr. Hodnett on December 17, 1990. Dalton was first seen, however, by an oral and maxillofacial surgeon, Dr. Michael P. Cosby, in Denver, Colorado one year later on December 16, 1991. When Dalton saw Dr. Cosby, he "presented with a chief complaint of pain with chewing and popping of the jaws." His pain, which was experienced on a daily basis lasting 30 to 60 seconds, was on the right side only. In a letter to Dalton's attorney, Dr. Cosby diagnosed Dalton as having "internal derangement of the TMJ on the right," and recommended conservative splint therapy treatment. It was Dr. Cosby's "feeling conservative treatment would be all that would be needed" regarding Dalton's TMJ dysfunction.

In anticipation of trial, Dalton's attorney arranged to have Dalton examined by another oral and maxillofacial surgeon, Dr. Vaun Mikesell, on February 22, 1993. A comparison of Dr. Cosby's and Dr. Mikesell's examinations shows Dalton's unwillingness to care for his own health and his continued failure to follow-through with his doctors' recommendations. It

was clear to the jury that Herold should not be liable for Dalton allowing his injuries to go unattended.

At the time of Dr. Cosby's examination, Dalton had an inner-incisal opening within the range of normal of 44 millimeters. That opening was reduced to 32 millimeters with a strain and 25 millimeters without straining when he was seen by Dr. Mikesell. (R. 838, 845) Dr. Cosby found Dalton to have a normal occlusion on the right and an abnormal occlusion on the left. Dr. Mikesell found an abnormal occlusion on both sides and Dalton indicated to Dr. Mikesell that Dalton had had a recent change in his bite. (R. 832) Dr. Cosby noted a negative finding for clicking, popping or crepitus. A positive finding was made by Dr. Mikesell. (R. 837)

Dalton's personal dental hygiene was lacking to say the least. For example, in December of 1991, Dalton had only one tooth that was decayed down to the root such that it should be extracted. In February of 1993, Dalton had at least six teeth in such a condition. Dalton simply did not care about his own personal needs or following his doctors' orders. At trial on May 17, 1993, Dalton testified in response to questioning by counsel for Herold, in part, as follows:

Q: I see. When you were brought over [to Utah from Colorado] at my expense to see Dr. Stadler, did you not also take advantage of that time and see Dr. Mikesell for the first and only time?

A: Yes, sir.

Q: Only time you ever saw Dr. Mikesell?

A: That was the first time.

Q: Did Dr. Mikesell treat you in any regard?

A: No. He did a thorough exam.

Q: So again, you had more diagnostic examination without treatment?

A: Yes.

Q: Have you received any of the treatment that Dr. Mikesell recommended on February 23, 1993?

A: No, I haven't.

Q: At that time, Dr. Mikesell recommended that you have all six or seven of these rotten teeth extracted. Have you had that done?

A: No, I haven't.

Q: Have you had a teeth cleaning?

A: No, I haven't.

Q: Have you been instructed on proper oral hygiene?

A: Yes, I have.

Q: Who instructed you?

A: That would be back in Colorado with a Dr. Cosby.

Q: So Dr. Cosby did, in fact, do the instructions?

A: Yes, originally.

Q: But you didn't follow those instructions, did you?

A: For a while, sir.

Q: How long?

A: I would say about nine months.

Q: And then you went back to patterns of not brushing your teeth?

A: Yes. Well, not the flossing part, and the heavy part, I quit doing that. I still brush my teeth.

Q: All right. So if Dr. Mikesell were to testify that it didn't appear from his examination that you followed with any good oral hygiene, would that surprise you?

A: No, it wouldn't.

Q: So you would agree that you did not change and have good oral hygiene after your meeting with Dr. Cosby?

A: It started looking better, and then I just turned lazy on it.

Q: Okay. So you didn't have the teeth extracted, didn't have a teeth cleaning. Did you have conservative treatment for the TMJ problem, the splint therapy?

A: No, I didn't.

Q: I'm just checking what else he recommended. Did you have any of your teeth fixed, those in addition to the ones that had rotted down to the root, did you have fillings or anything placed in those?

A: No, sir.

(R. 700-702)

There is no doubt that the evidence supports the jury's finding that Dalton failed to mitigate his damages with respect to his TMJ symptoms. In fact, Dr. Mikesell directly testified on that point in examination at trial by Dalton's attorney.

Q: Now, if somebody has a damage to their TMJ joint, say on October 15th of 1990, if that is not treated, either by splint therapy or surgery, can the condition become worse?

A: Yes.

Q: Do you think that happened in this case?

A: I believe it did, yes.

(R. 838)

The failure to obtain appropriate treatment and the subsequent worsening of conditions falls squarely on the shoulders of Dalton. In December of 1991, an oral and maxillofacial surgeon, Dr. Cosby, opined that Dalton only needed conservative splint therapy treatment for the TMJ injuries

allegedly resulting from the accident in question. The cost of that treatment is between \$300 and \$400. (R. 834) Any future complications would have been avoided had Dalton simply followed through with the recommendations of his physician.

III

CREDIBLE EVIDENCE WAS PRESENTED AT TRIAL REBUTTING DALTON'S ALLEGATIONS THAT FUTURE SURGERIES WILL BE REQUIRED

In justifying the need to award the plaintiff an additur, the court stated in its memorandum decision:

This court finds the amount of \$20,007.00 for future medical expenses to have been undisputed and uncontroverted at trial. During the trial, Dr. Richard Hodnett and Dr. Leo Vaun Mikesell, expert witnesses called by the plaintiff, testified that the amount of future medical expenses, if surgery occurred (and they both perceived surgery as necessary) would be, at least, \$20,007.00. Although the defendant called Dr. Warren Stadler as a witness, evidence of the cost of the plaintiff's special damages was not disputed.

(R. 435)

The trial court, however, in its review of the evidence apparently ignored the contrary credible evidence testified to by Dr. Stadler and documented by Dr. Cosby that future surgeries would not be necessary. Because there was evidence that the surgeries were not necessary, the cost of those surgeries need not be disputed.

FACIAL INJURIES

Dr. Hodnett's first and only examination of Dalton took place on December 17, 1990. The next physician to examine the plaintiff's facial injuries

was Dr. Stadler on February 22, 1993. Three months later at trial, Dr. Stadler testified regarding Dalton's facial injuries and the need for surgery regarding those injuries:

Q: Now, with regard to [Dalton's] facial injuries, what was your examination of the facial injuries?

A: It would have been palpation around the face, feeling of the face at the site of the injury.

Q: Now, with that, do you have an opinion as to how well-healed this individual was with regard to the fractures he experienced in his face?

A: Yes.

Q: And what was that opinion?

A: I feel that the fractures would be well-healed.

Q: Did you feel that there would be a need at the time for any type of surgical intervention with regard to the facial fractures?

A: No, I would not.

Q: Now, you did find -- please respond to whether you found any deficit in the face.

A: I'm going to look back at the clinical examination. I felt that his sensation was decreased around the right facial area around the right eye when compared to the left.

Q: How would that place a limitation on this individual, if at all, on day-to-day living?

A: On activities of daily living, I would not see any limitations.

Q: What would be the cause of the loss of sensation? Is it a nerve problem, or what would that be?

A: It would be a nerve problem.

Q: Would surgery assist in correcting the nerve problem?

Mr. Waddoups: Objection, foundation, your honor.

The court: Sustained.

Q: (By Mr. Dunn) Do you have an opinion as to whether surgery would assist in any regard, with regard to the nerve problem in the face?

Mr. Waddoups: Objection, foundation. We don't know if this person's qualified to do surgery.

The court: This question can be answered yes or no.

Q: (By Mr. Dunn) Do you have an opinion as to whether surgery would be helpful?

A: Surgery would not be helpful.

Mr. Waddoups: Objection, that was a yes or no question.

The court: Sustained. The answer will be stricken.

Q: (By Mr. Dunn) Just answer if you have an opinion as to whether it would be helpful or not.

A: Yes.

Q: Yes, you have an opinion. And what is that opinion based on? What background do you have to come to that opinion?

A: Well, my background is physical medicine and rehabilitation. It deals with people that have had nerve injury, both spinal cord, peripheral nerve injuries, meaning, by peripheral, I mean nerves that are outside of the spinal cord. That would be facial nerves, that would be nerves, sensory nerves that are in the upper or lower extremities, or in the face.

Q: So then I would like to ask that next question. Why, is it, then -- what is your opinion as to whether surgery would be helpful with regard to the nerve damage in the face?

Mr. Waddoups: Objection, your honor. We still don't have foundation as to his qualifications as a surgeon. I would like to voir dire the witness as to that.

The court: You may voir dire.

Mr. Waddoups: Dr. Stadler, are you a surgeon?

The witness: No, I am not a surgeon.

Mr. Waddoups: Do you perform surgery?

The witness: No, I do not perform surgery.

Mr. Waddoups: If surgery is indicated, you refer patients to a surgeon?

The witness: That is correct.

Mr. Waddoups: Your honor, I renew my objection.

The court: I believe it goes to the weight, versus the admissibility. The objection is overruled, you may answer the question if you remember it, if not, counsel will put it to you again.

Mr. Dunn: Thank you, your honor.

Q: (By Mr. Dunn) What is your opinion as to whether surgery would be necessary or helpful in regard to the nerve injury in the face?

A: My opinion is that surgery would not be helpful.

Q: And why is that?

A: Because there's been, number one, a length of time with regard to the injury, there are different types of nerve injuries, called a transection of the nerve, there would also be a crushing injury of the nerve. The length of time in this case, I do not feel that surgery would be helpful in reestablishing the sensory pattern on this gentleman's face.

Q: What does regeneration of a nerve mean?

A: Regeneration means the nerve grows back.

Q: Can a nerve, after this length of time, from an accident back in 1990 of October to the present time, could the nerve regenerate?

A: Medical probability at this time would speak against that.

(R. 872-876)

In *Jensen v. Eakins*, 575 P.2d 179, 180 (Utah 1978), the Utah Supreme Court stated:

The award of damages may be less than the plaintiff wished or even less than we would have found had we been the jury; but it is the prerogative of the jury to make the determination of damages and we cannot substitute our judgment for that of the fact finder unless the evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion.

The jury in this case was presented with evidence from a physician the court allowed to testify that Dalton's facial injuries would not benefit from surgical intervention. Accordingly, the courts should not substitute their judgment for that of the finder of fact and add to the special damages awarded by the jury. The evidence presented at trial does not support "a finding that reasonable men and women would, of necessity, come to a different conclusion."

TMJ SYMPTOMS

It is truly uncontroverted that Dalton's first oral and maxillofacial surgeon, Dr. Cosby, was of the opinion that Dalton's TMJ symptoms would be

corrected by conservative splint therapy. No one will ever know whether Dr. Cosby was correct because Dalton completely ignored Dr. Cosby's recommendations regarding his dental and TMJ care. Dr. Cosby's correspondence to Dalton's attorney, standing alone, directly rebuts Dalton's allegation that future surgery on his temporal mandibular joint will be required.

Dr. Cosby's opinion is bolstered yet further by Dr. Mikesell's own testimony when questioned at trial regarding his own treatment plan for Dalton:

Q: What was your treatment plan for Mr. Dalton?

A: I would have probably started him out on a soft diet, heat, massage, and probably some medications, and an occlusal splint to see if that would help relieve the joint symptoms.

(R. 833-834) ...

Q: Now, would you please tell the jury what recommendations Dr. Cosby gave the plaintiff in December of 1991?

A: He indicated that he should have his dentition, or his teeth restored to normal health, and that would involve a good cleaning, and instruction of oral hygiene, to remove non-restored teeth, and restoration of the restorable teeth. He also indicated he ought to have tomograms of the

TMJ's to asses for structural abnormalities, after which he should be evaluated for splint therapy. And he indicated at this point that conservative therapy would probably be all that was required.

Q: Right. And that's in the second paragraph he said, 'It is my feeling that conservative treatment will be all that will be needed.' Is that correct?

A: That's what he indicated.

Q: And conservative treatment is similar to what your treatment plan was of soft diet, heat, and splint therapy?

A: Yes.

Q: And the splint therapy would cost between \$300 and \$400?

A: In my office.

Q: With regard to these recommendations, and when you examined the plaintiff, did he follow, from your examination, any of the recommendations set forth by Dr. Cosby?

A: It did not appear that he had.

Q: Now, with regard to surgery, he indicated that he, quote, may need surgery sometime in the future. Is that an accurate description of your testimony?

A: That is.

Q: And isn't it true that you would not cross the bridge of surgery, so to speak, until after you have had an opportunity to treat this individual conservatively for three or four months?

A: In my office we begin treatment conservatively, and if the patient does not respond, then we seek other methods of treatment, which would include surgery.

Q: Right. But you do the conservative treatment and hope the patient will respond?

A: Yes.

Q: And that will be enough, correct?

A: Yes, we hope so.

(R. 849-850)

Again, no one will know whether Dalton would have responded to conservative treatment performed by Dr. Mikesell and whether the "bridge of surgery" would ever have to be crossed because Dalton did not follow Dr. Mikesell's recommendations. The jury was correct in determining that credible evidence was presented at trial rebutting Dalton's assertions that future surgeries would be necessary.

IV.

**THE TRIAL COURT IMPROPERLY AWARDED COSTS IN
EXCESS OF THOSE ALLOWED BY STATUTE**

Pursuant to Rule 68(b) of the Utah Rules of Civil Procedure, Herold filed an offer of judgment in the amount of \$15,000. That offer was rejected by Dalton. Rule 68(b) states:

... If the judgment finally obtained by the offerree is not more favorable than the offer, the offerree must pay the costs incurred after the making of the offer. ...

The jury awarded an amount less than the offer of judgment filed by Herold. Herold did not seek the payment of any costs but contended that Dalton also should not be awarded costs.

Rule 68 is designed to encourage parties to make and accept reasonable settlement offers. It is obvious that the \$15,000 offered by Herold was reasonable in light of the jury's verdict. Plaintiffs such as Dalton should not be awarded costs when they refuse to accept reasonable settlement offers. In the case at hand, liability was primarily against Herold. In such cases, the plaintiff will undoubtedly be the "prevailing party" and could be awarded costs. Public policy would argue that a plaintiff that does not accept a reasonable offer of judgment should not be awarded costs. In this case, neither of the parties should be awarded costs.

Despite Herold's arguments, the trial court awarded Dalton \$2,330.00 in costs. In the alternative of awarding no costs to Dalton, the following costs should not be awarded Dalton, or modified, under any circumstance:

Travel expenses re: depositions of Herold and Dalton - \$ 573.00

Court reporter fee for Newell Knight's deposition -	\$ 188.90
Process server's fees, witness fees, and mileage -	
Newell Knight (depo)	\$ 125.00
Dr. Warren Stadler (depo)	\$ 400.00
Dr. Warren Stadler (service)	\$ 43.00
Dr. Vaun Mikesell (service)	\$ 37.00
Dr. James Morgan (service)	\$ 35.00
Dr. Richard Hodnett (service)	\$ 45.00
Officer Mike Roberts (service)	<u>\$ 30.00</u>
Total:	\$1,476.90

(R. 453)

The Utah Supreme Court stated in *Frampton v. Wilson*, 605 P.2d 771, 773 (Utah 1980): "Costs were not recoverable at common law; and are therefore generally allowable only in the amounts and in the manner provided by statute." Utah Code Annotated allows for a taxing of costs for serving a subpoena upon a witness. Section 21-2-4(1) and (4) of the Utah Code Annotated provides that the sheriff shall receive a fee of \$6.00 for serving a subpoena and \$1.00 for each mile necessarily traveled, in going only. Section 21-5-4 allows the payment of witnesses \$17.00 per day and "if traveling more than 50 miles, \$1.00 for each four miles in excess of 50 miles actually and necessarily traveled in going only."

Dalton was awarded as costs a minimum of \$30.00 for the service of a subpoena for a witness to appear at trial. As such, the individual would have

to reside 24 miles from the courthouse for that amount to be justified. In addition, Dalton was awarded costs for service of subpoenas on Dalton's own expert witnesses. Those costs should be modified.

Dalton was awarded \$525.00 as costs for the witness fees associated with the taking of Herold's expert's depositions, Newell Knight and Dr. Stadler. The statutes only allow the payment of \$17.00 as witness fees. Dalton's award of costs should be accordingly reduced. The remainder of the money paid by Dalton is an expense of litigation which is not properly taxable as costs. *Id.* at 774.

Finally, Dalton was awarded as costs the expense of traveling to Portland to take the deposition of Herold and to Denver to defend the deposition of Dalton. Such travel expenses are not recoverable as costs. The court abused its discretion when it awarded those costs.

CONCLUSION

Although not all the evidence was favorable to Herold, clearly sufficient competent evidence existed to enable the jury to arrive at its verdict for damages and accordingly the jury's verdict should stand. *Batty v. Mitchell*, 575 P.2d 1040, 1041 (Utah 1978). Based on the foregoing, Herold urges this court to overturn the trial court's award of additur and reinstate the jury's

award of damages as the final judgment in this case, without an award of costs to any party.

DATED this 27th day of October, 1994.

DUNN & DUNN

A handwritten signature in cursive script, appearing to read "Mark Dalton Dunn", written over a horizontal line.

MARK DALTON DUNN
KEVIN D. SWENSON
Attorneys for Defendant/Appellant

CERTIFICATE OF HAND-DELIVERY

I hereby certify that two true and correct copies of the foregoing Brief of Defendant/Appellant was hand-delivered this 22 day of October, 1994, to the following:

George T. Waddoups
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107

Attorney for Plaintiff

DUNN & DUNN

A handwritten signature in cursive script, appearing to read "Mark Dalton Dunn", written over a horizontal line.

MARK DALTON DUNN
KEVIN D. SWENSON

Exhibit A

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

MARVIN A. DALTON, JR.,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 920903329
vs.	:	
BRIAN G. HEROLD,	:	
Defendant.	:	

This matter comes before the Court pursuant to the Plaintiff's Motion for Additur or New Trial. A hearing was held in this Court on August 10, 1993, and argument was heard on the plaintiff's motion. The court denied the plaintiff's Motion for New Trial and took the Motion for Additur under advisement. The Court having now carefully reviewed the relevant law, the memoranda submitted by counsel, and having considered counsels' arguments, rules as stated herein. The Court finds that the amount of the jury's verdict is inconsistent with the evidence adduced at trial, and grants the Motion for Additur in the amount of \$19,910.24 as to special damages. The jury's award of \$5,000.00 for general damages is to remain at that amount.

The Court in assessing the verdict has considered the same in the light most favorable to the jury's findings. Assessment, under

this standard, leads the Court to conclude that the jury's award is clearly inadequate in light of the evidence presented at trial.

The law is clear that although a trial judge may assess the evidence differently than a jury, mere disagreement is not a sufficient reason to order a new trial or an additur. The power of a trial judge to order a new trial or grant an additur is reserved for those rare cases when a jury verdict is manifestly contrary to the weight of the evidence. Goddard v. Hickman, 685 P.2d 530 (Utah 1984), and Bodon v. Suhrmann, 327 P.2d 826 (Utah 1958). Bodon v. Suhrmann, makes it clear that if an award shows that the jury misapplied or failed to take into account proven facts, or misunderstood or disregarded the law, or made findings clearly against the evidence, and the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand. Although Bodon is a 1958 case, it remains the law in Utah. Bodon has been cited and reaffirmed in Dupuis v. Nielson, 624 P.2d 685 (Utah 1981), and in Meyer v. Bartholomew, 690 P.2d 558 (Utah 1984).

The Bodon case is important to review in relation to the instant case. In Bodon, the contention was that the verdict was outside the limits of what appeared justifiable under the evidence. The Court ruled, "In such instances the remedy is to order a

modification of the verdict to bring it within the evidence." Id at 828.

This Court finds the amount of \$20,007.00 for future medical expenses to have been undisputed and uncontroverted at trial. During the trial Dr. Richard Hodnett and Dr. Leo Vaughn Mikesell, expert witnesses called by the plaintiff, testified that the amount of future medical expenses, if surgery occurred (and they both perceived surgery as necessary), would be, at least, \$20,007.00. Although the defendant called Dr. Warren Stadler as a witness, evidence of the cost of the plaintiff's special damages was not disputed.

A finding of negligence was made and a review of the Special Verdict form establishes that the jury concluded that the plaintiff had been damaged. The award for special damages must bear a reasonable relationship to the evidence. This Court finds that the award of \$3,000.00 does not bear this reasonable relationship to the evidence adduced at trial. The plaintiff presented evidence that his past medical bills were \$2,903.24 (see Exhibit 3); and an award of \$3,000.00, while close to this amount, is greater than the actual past medical expenses, and not consistent with any actual special damages. An additur is therefore granted. The total special damages testified to were \$22,910.24. The jury's award of

\$3,000.00, is \$19,910.24 below this. Additur is therefore granted in the amount of \$19,910.24. This amount, when added to the special damage verdict of \$3,000.00, equals \$22,910.24, which is consistent with the testimony concerning specials.

The Court now turns its attention to the general damage award. It is well-settled that general damages must bear a reasonable relationship to special damages and to the evidence. General damages are designed to compensate an injured plaintiff for pain and suffering and for damages that the plaintiff has incurred over and above those quantifiable damages such as lost wages and medical expenses. McIntire v. Gray, 593 P.2d 1273 (Or. App. 1979). It is clear that special damages are more capable of definitive assessment than general damages. General damages are by their nature more subjective and difficult to pin down. This Court must view the general damage award in relation to the original special damage award and determine whether a reasonable relationship exists between the two. Where the original award for specials was \$3,000.00 and the general award was \$5,000.00; one cannot conclude that a reasonable relationship between the two does not exist. The question of whether the award bears a reasonable relationship to the evidence, must be assessed, with the case law in mind concerning general damages. Case law concerning general damages indicates that these awards are rarely susceptible of additur.

In Cruz v. Montoya, 660 P.2d 723 (Utah 1983), the Court ruled that juries are generally allowed wide discretion in the assessment of damages, and that where personal injuries involve a loss of employment, personal inconvenience, and pain and suffering, there is no set formula to compute the amount of general damages. Id. at 726. In the case of Sheraden v. Black, 752 P.2d 791, (N.M. App. 1988), the Court ruled that "there is no standard fixed by law for measuring the value of pain and suffering; rather the amount to be awarded is left to the fact finder's judgment." And, in another case, Cartwright v. Atlas Chemical Industries, Inc., 593 P.2d 104 (Okla. App. 1988) it was held that compensation for pain and suffering rests in the sound discretion of the jury, since there is no market where pain and suffering are bought and sold, nor any standard by which compensation can be definitely ascertained, or the amount actually suffered determined.

This analysis leads this Court to conclude that generals and specials are sufficiently distinct from each other that specials may be subject to additur without modification of generals. The two are not synonymous nor are they inseparable. To illustrate this concept, the Court notes that a jury is at liberty, in some circumstances, to award one without the other. "When the issue of general damages is contested, the jury may conclude that the

plaintiff did not actually suffer any general damages but did reasonably incur special damages for medical expenses or loss of wages. This is the case if the plaintiff's complaints are subjective and his credibility is questioned." Eisele v. Rood, 551 P.2d 441 (Or. 1976).

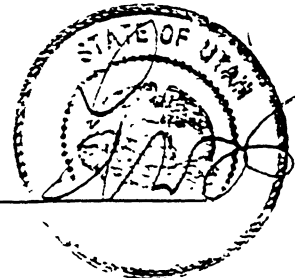
While this Court was not privy to the jury's deliberations or exact considerations in arriving at the general damage award, this Court can only conclude that the jury did not feel that the plaintiff's entitlement to general damages, i.e., his pain and suffering, warranted a large amount. This Court appreciates the province of the jury and will not substitute its judgment for that of the jury in arriving at a general damage award.

In making this ruling, this Court elects to exercise its supervisory power to ensure justice consistent with the jury's verdict.

The defendant may accept this ruling, or request a new trial.

Dated this 22nd day of September, 1993.


LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 22nd day of September, 1993:

George T. Waddoups
ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff
4252 South 700 East
Salt Lake City, Utah 84107

Mark Dalton Dunn
Kevin D. Swenson
DUNN & DUNN
Attorney for Defendant
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Eauline Matheson

Exhibit B

by E. M. H. Smith
Deputy Clerk

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

This matter was tried to the jury on May 17th, 18th, and 19th, 1993, the Honorable Leslie A. Lewis presiding. George T. Waddoups and Karen Thomas represented the plaintiff. Mark Dunn and Kevin Swenson represented the defendant.

The Court directed a verdict against the defendant and answered question one on the verdict form. The jury found that the defendant's negligence was a proximate cause of the plaintiff's injuries. The jury also found the plaintiff was negligent and the plaintiff's negligence was a proximate cause of the plaintiff's injuries. The jury answered question five by assessing 80% of the

negligence to the defendant Brian Herold and 20% of the negligence to the plaintiff, Art Dalton.

The jury awarded special damages in the amount of \$3,000. The jury also awarded general damages in the amount of \$5,000, for total damages in the amount of \$8,000. The verdict was appropriately dated and signed by the jury foreperson. The Court having inquired of the jury as to its verdict directs the judgment to be entered in accordance with the verdict and its Memorandum Decision entered September 22, 1993, and incorporated herein by reference, which grants plaintiff's additur in the additional amount for specials of \$19,910.24:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be rendered in favor of the plaintiff and against the defendant, Brian Herold, as follows:

1. The plaintiff is awarded judgment against the defendant for special damages in the amount of \$18,328.19 ($\$3,000 + \$19,910.24 \times 80\%$).
2. The plaintiff is awarded judgment against the defendant for pre-judgment interest of past special damages in the amount of \$794.40 pursuant to Utah Code Ann. §78-27-44. This sum represents interest at 10% per annum on \$2,400 from October 15, 1990 through September, 1993.

Exhibit C

FILED JAN 24 1994
Third Judicial District

JAN 24 1994

GEORGE T. WADDOUPS #3965
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107
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by E. THOMAS JORD
SALT LAKE COUNTY
Deputy Clerk

Attorney for Plaintiff

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

MARVIN A. DALTON, JR.,)	ORDER REGARDING PLAINTIFF'S
)	POST-TRIAL MOTION FOR
Plaintiff,)	VERIFIED COSTS AND EXPENSES
)	
vs.)	
)	Civil No. 920903329PI
BRIAN G. HEROLD,)	
)	Judge Leslie A. Lewis
Defendant.)	

The plaintiff's motion for an award for costs and expenses incurred in the preparation for trial of the above-entitled matter came on for hearing on Tuesday, August 10, 1993 at 2:45 p.m., the Honorable Leslie A. Lewis presiding. The plaintiff was represented by George Waddoups. The defendant was represented by Mark Dunn.

The Court having reviewed the written memoranda submitted by the parties, the appropriate sections of the Utah Code cited in plaintiff's memoranda and defendant's memorandum, and the case law cited therein, and having listened to oral argument presented by counsel,

ORDERS, ADJUDGES AND DECREES that the following costs are awarded to plaintiff:

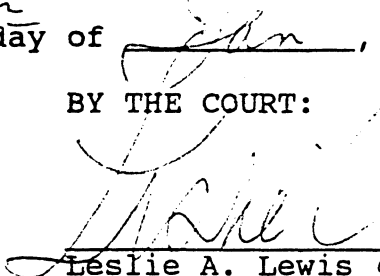
1.	Filing fee	\$ 120.00
2.	Travel expenses Re: depositions of Herold and Dalton	573.00 X
3.	Court reporter fees (depo.) Brian Herold	258.75
	Art Dalton	169.95
	Newell Knight	188.90 X
	Dr. Warren Stadler	194.15
	Dr. Vaun Mikesell	62.50
	Dr. James Morgan	34.50
	Dr. Richard Hodnett	13.25
4.	Process server's fees, witness fees, and mileage	
	Newell Knight (depo.)	125.00 X
	Dr. Warren Stadler (depo.)	400.00 X
	Dr. Warren Stadler (service)	43.00 X
	Dr. Vaun Mikesell (service)	37.00 X
	Dr. James Morgan (service)	35.00 X
	Dr. Richard Hodnett (service)	45.00 X
	Officer Mike Roberts (service)	<u>30.00 X</u>
	SUBTOTAL:	\$ 2,330.00
	PRE-JUDGMENT INTEREST ON SPECIAL DAMAGES (10% per annum on \$2,400 from 10/15/90 - 9/93):	\$ 794.40
	TOTAL COSTS, EXPENSES AND INTEREST:	\$ 3,124.40

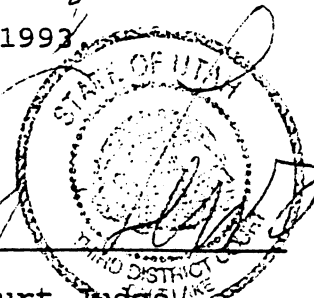
The Court denies plaintiff's motion in regard to the expenses and costs as to Ron Probert, an accident reconstructionist. However, the Court orders that Mr. Probert provide a detailed itemization of his fees, costs, and expenses incident to this litigation, and orders the defendant to pay for the fees, costs, and expenses incurred by Mr. Probert to testify at

the hearing which was held in-camera by this Court. The plaintiff is to bear the fees, costs, and expenses of Mr. Probert prior to Mr. Probert preparing and testifying in-camera before this Court on the issue of his expertise regarding helmets and motorcycles.

DATED this 24th day of Jan, 1993

BY THE COURT:


Leslie A. Lewis
Third District Court Judge



Approved as to form:

Mark D. Dunn

Attorney for Defendant

Exhibit D

SBY & JAMES, P.C.

Maxillofacial Surgery

HAEL P. COSBY, D.O.S., M.D.
DAL B. JAMES, D.D.S.

MAIN OFFICE—CHERRY CREEK
180 ADAMS STREET
SUITE 100
DENVER, COLORADO 80206
PHONE (303) 321-0333

DENVER TECH CENTER OFFICE
8200 EAST BELLEVIEW AVE.
SUITE 306
ENGLEWOOD, COLORADO 80111
PHONE (303) 779-8420

26 December 1991

George Waddoups, Esquire
4252 S. 700 East
Salt Lake City, UT 84107

Regarding: Marvin Dalton

Dear Mr. Waddoups:

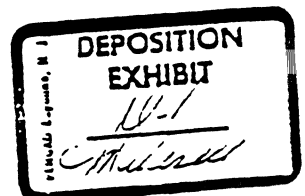
The above patient was seen by me for evaluation of TMJ-type symptoms on 12/16/91. He presented with a chief complaint of pain with chewing and popping of the jaws.

The history of his present illness, he relates being in a motorcycle accident on 10/16/90 at which time he sustained multiple facial injuries - primarily to the right side of his face. He relates having fractures (blow-out type). Since the accident, he relates his bite is off and has noticed popping of the right TMJ. He has been having headaches - primarily related to the left temple region but sometimes involving the right temporal. The pain related to his TMJ is primarily related to biting. Apparently, when chewing, he experiences pain in the pre-auricular area over the zygomatic arch and into the temple areas as well. The pain is on the right side only. Apparently, he experiences this type pain on a daily basis which lasts 30 to 60 seconds. He also relates noticing decreased opening of his mouth.

On physical examination, he has a maximum inner-incisal opening of 44 mm. with pain. The pain he experiences with maximum opening is to the right pre-auricular and right masseter regions. He has a Class I occlusion on the right and Class II on the left. To palpation, he is tender over the right TMJ and temporalis muscle. To palpation, there is no clicking or popping detected. There is no crepitus noted. Tooth #7 has been fractured, and it appears only the root is remaining. He has other carious teeth in his mouth - primarily the left mandibular molar which is decayed down to the roots. There is moderate periodontal disease with a fair amount of

π = mola

Exhibit # 17

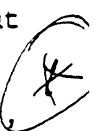


George Waddoups, Esquire
26 December 1991
Page II.

Re: Marvin Dalton


calculus around the anterior mandibular teeth. A tentative diagnosis would be myalgia related to the muscles of mastication. There is a working diagnosis of internal derangement of the TMJ on the right: moderate periodontal disease; dental decay and fracture of tooth #7.

Recommendation:

It is my recommendation the patient have his dentition restored to a more normal health. This would most likely involve good prophylaxis and instruction on oral hygiene; the removal of non-restored teeth and restoration of restorable teeth. After the occlusion is in a more functional state, the patient should have corrected tomograms of the TMJ's to assess any structural abnormalities, after which he should be evaluated for splint therapy. It is my feeling conservative treatment would be all that would be needed. Most likely, splint therapy would alleviate most of the myalgia and symptoms of TMJ dysfunction which he is experiencing. 

Hopefully, this will help in answering any questions you have regarding this patient's TMJ function.

Sincerely,


MICHAEL P. COSBY, D.D.S., M.D.

jul