

1994

Marvin A. Dalton, Jr. v. Brian G. Herold : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark Dalton Dunn; Kevin D. Swenson; Dunn & Dunn; Attorney for Appellant.

George T. Waddoups; Robert J. Debry & Associates; Attorney for Appellee.

Mark Dalton Dunn 4 562 Kevin D. Swensen 5803 DUNN & DUNN 230 South 500 East , #460 Salt Lake City , UT 84102 Telephone : (801) 521-6666 Attorneys for Appellant

George T. Waddoups 3965 ROBERT J . DeBRY & ASSOCIATES 4252 South 700 East Salt Lake City , UT 84107 Telephone : (801) 262-8915 Attorney for Appellee

Recommended Citation

Legal Brief, *Dalton v. Herold*, No. 940170 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5865

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MARVIN A. DALTON, JR.,

Appellee,

vs.

BRIAN G. HEROLD,

Appellant.

)
)
)
)
)
)
)
)
)
)

PETITION FOR REHEARING

Case No. 941070CA

APPELLEE'S PETITION FOR REHEARING

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE LESLIE A. LEWIS PRESIDING

George T. Waddoups 3965
ROBERT J. DeBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915
Attorney for Appellee

Mark Dalton Dunn 4562
Kevin D. Swensen 5803
DUNN & DUNN
230 South 500 East, #460
Salt Lake City, UT 84102
Telephone: (801) 521-6666
Attorneys for Appellant

I.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
POINT I - <u>THE COURT APPLIED THE WRONG STANDARD</u> <u>OF APPELLATE REVIEW. ON AN APPEAL OF</u> <u>AN ADDITUR, THE APPELLATE COURT DOES</u> <u>NOT "VIEW THE EVIDENCE AND ALL REASONABLE</u> <u>INFERENCES DRAWN THEREFROM IN THE LIGHT</u> <u>MOST FAVORABLE TO THE JURY'S VERDICT."</u> <u>A REVIEWING COURT ONLY REVERSES THE LOWER</u> <u>COURT'S ADDITUR DECISION IF THERE IS NO</u> <u>REASONABLE BASIS FOR THE DECISION.</u>	1
POINT II - THE LOWER COURT CORRECTLY FOUND THAT THE DAMAGES WERE "SO INADEQUATE AS TO INDICATE A DISREGARD OF THE EVIDENCE BY THE JURY."	3
A. <u>Introduction</u>	3
B. <u>District Judge Lewis correctly found</u> <u>that the damages awarded were "so</u> <u>inadequate as to indicate a disregard</u> <u>of the evidence by the jury."</u>	3
C. <u>The record support.</u>	4
POINT III - DALTON'S MOTION FOR SUMMARY DISPOSITION IS NOT MERITLESS. THE JUDGMENT AND MEMORANDUM DECISION AWARDED A NEW TRIAL UNLESS THE APPELLANT CONSENTED TO THE ADDITUR, WAS NOT AND IS NOT A FINAL APPEALABLE JUDGMENT.	7
POINT IV - THIS COURT ERRED IN NOT GRANTING ORAL ARGUMENT ON THIS APPEAL.	8
CONCLUSION 	9
CERTIFICATION	9

II.

TABLE OF AUTHORITIES

<u>Case:</u>	<u>Page</u>
<u>Andreason v. Aetna Casualty Co.</u> , 848 P.2d 171, 174 (Utah App. 1993)	2
<u>Bodon v. Suhrmdan</u> , 8 U.2d 42, 47, 372 P.2d 826 (1958)	6
<u>Carlson v. BMW Industries, Inc.</u> , 744 P.2d 1383, 1390 (Wyo. 1987)	6
<u>Creamer v. Troiano</u> , 494 P.2d 738, 740 (Ariz. App. 1972)	6
<u>Crookston v. Fire Insurance Exchange</u> , 817 P.2d 789, 802, 805 (Utah 1991)	2
<u>Haslam v. Paulsen</u> , 15 U.2d 185, 186 (Utah 1964)	7
<u>Howell v. Marmpegaso Compania Naviera S.A.</u> , 566 F.2d 992, 993 (5th Cir. 1978)	8
<u>Jacobson v. Manfredi</u> , 679 P.2d 251, 255 (Nev. 1984)	6
<u>King v. Union Pac. R. Co.</u> , 212 P.2d 692, 695 (Utah 1949)	6
<u>Mauriello v. University of Medicine & Dentistry</u> , 781 F.2d 46, 49 (3d. Cir. 1986)	8
<u>Pratt v. Products, Inc.</u> , 885 P.2d 786, 787 (Utah 1994)	1
 <u>Statutes and Rules:</u>	
Rule 35 of <u>Utah Rules of Appellate Procedure</u>	1
Rule 29 of <u>Utah Rules of Appellate Procedure</u>	8, 9

Mark A. Dalton, the Appellee, pursuant to Rule 35 of Utah Rules of Appellate Procedure, respectfully submits this Petition for Rehearing to the Utah Court of Appeals. The four points of law or fact which the Court overlooked or misapplied follow:

POINT I

THE COURT APPLIED THE WRONG STANDARD OF APPELLATE REVIEW. ON AN APPEAL OF AN ADDITUR, THE APPELLATE COURT DOES NOT "VIEW THE EVIDENCE AND ALL REASONABLE INFERENCES DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO THE JURY'S VERDICT." A REVIEWING COURT ONLY REVERSES THE LOWER COURT'S ADDITUR DECISION IF THERE IS NO REASONABLE BASIS FOR THE DECISION.

The first paragraph of the Utah Court of Appeals' Memorandum Decision¹ begins:

We note at the offset that a court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the jury's verdict. Pratt v. Products, Inc., 885 P.2d 786, 787 (Utah 1994).

Pratt was a garden variety appeal of a jury verdict and sets forth the correct standard of review for an appeal of a jury verdict. "On appeal from a jury's verdict, the court views the evidence and all reasonable inferences drawn therefrom in the light most favorable to a jury's verdict." Pratt, supra at 787. However, this case is not an appeal of a jury verdict. It is an appeal of

¹A copy of the Memorandum Decision is attached as Exhibit A.

District Judge Lewis's decision to award an additur. The standard for reviewing Judge Lewis's ultimate decision is set forth in Crookston v. Fire Insurance Exchange, 817 P.2d 789, 805 (Utah 1991):

In reviewing the judge's ultimate decision . . . we will reverse only if there is no reasonable basis for the decision.

A threshold purpose of the Crookston decision, was to clear up the confusion about the standard of review applied by trial courts on motions challenging a jury's verdict and the different standard of review applied by appellate courts of the lower court's ultimate decision. Crookston at 802. This Court incorrectly applied the standard of review which a lower court applies to the initial motion challenging the verdict. In short, this Court mistakenly reviewed the verdict directly without considering the intermediate action [additur decision] by the trial court. See Andreason v. Aetna Casualty Co., 848 P.2d 171, 174 (Utah App. 1993). Had the court applied the correct standard of view, it would have reached a different conclusion. As set forth in Point II of this Petition, there is plenty of reasonable basis for the additur decision².

²The factual support for Judge Lewis's additur decision is also summarized in pp. 16-19 of Dalton's Brief of Appellee.

POINT II

THE LOWER COURT CORRECTLY FOUND THAT THE DAMAGES WERE "SO INADEQUATE AS TO INDICATE A DISREGARD OF THE EVIDENCE BY THE JURY."

A. Introduction.

After misstating the standard of view, the Court of Appeals subsequently implied that the lower court "did not find that the damages were so inadequate as to indicate a disregard of the evidence by the jury." However, the lower court did find that damages were so inadequate as to indicate a disregard of the evidence by the jury and there is considerable record support for the District Court's decision.

B. District Judge Lewis correctly found that the damages awarded were "so inadequate as to indicate a disregard of the evidence by the jury."

Judge Lewis in her Memorandum Decision said:

[I]f 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.

* * *

In such instances, the remedy is to order a modification of the verdict to bring it within the evidence.

* * *

The Court finds the amount of \$20,007.00 for future medical expenses to have been undisputed and uncontroverted at trial.

* * *

This Court finds that the award of \$3,000.00 does not bear [a] reasonable relationship to the evidence adduced at trial An additur is therefore granted. (Memorandum Decision, pp. 2-3.) A copy of the Memorandum is attached as Exhibit B.

The foregoing shows that Judge Lewis, contrary to the opinion of this Court, did find that the damages were so inadequate as to evidence a disregard of the evidence by the jury.

C. The record support.

Only three witnesses, other than Dalton, testified on the subject of Dalton's future medical expenses. Dr. Richard Hodnett, a plastic surgeon, testified:

His [Dalton's] CT scan showed that there was a chip of bone from the bottom of the eye socket down the . . . sinus. And if he had the numbness when I saw him, and looking at the CT scan, . . . he may still have need of what is called plate and screw fixation, or another open procedure to possibly remove a bone chip from around his nerve which was the nerve that controls the sensation to his lip.

(R. 770, lns, 24-25; 771, lns. 1-8).

* * *

The doctor's fees would probably be in the range of \$2,500 - \$3,500 . . . and . . . probably in the range of \$5,000 - \$8,000 in hospital fees, I would assume.

(R. 771, lns. 23-25; 772, lns. 1, 7, 9-10).

Dr. Hodnett also testified that Dalton would require an osteotomy³ and that the cost would be \$15,000 (R. 783-784).

Dr. Leo Vaughn Mikesell, a specialist in maxillofacial surgery, also testified:

I think that at some time, he [Dalton]
will have to have surgery

(R. 840, lns. 17-18).

The surgery recommended by Mikesell was an arthroplasty. Mikesell estimated the cost at \$2,500 - \$3,000 and \$8,000 for the hospital fees (R. 836-837). He also testified that Dalton needs a bridge that could cost somewhere between \$1,200 - \$1,300 (R. 859, 860, ln. 3).

Herold called Dr. Stadler, a specialist in physical rehabilitation, as a witness. He is not a surgeon. Further, Stadler did not controvert the cost of the future surgery. That issue was undisputed. While it is true that Stadler opined that Dalton would not benefit from future surgery, the only injury Stadler was concerned with was facial nerve damage (R. 874, 876). He did not address the injuries testified to by Hodnett and Mikesell. Hence, he did not directly contradict Dalton's need for surgery, nor its cost. Further, (1) Stadler was not a surgeon, so his testimony warranted very little weight; and (2) his opinion was

³An osteotomy is the rebreaking of the jaw bones and putting them in the proper place (R. 784, lns. 1-7).

based only upon feeling Dalton's face with his hands. Therefore, the trial court properly discounted Stadler's opinion and believed the testimony of the surgeons who were qualified on the subjects of the need and cost for future surgery. In doing so, the trial court acted well within its discretion. The trial court, in granting an additur, does not determine whether there is any evidence at all supporting the verdict but whether the verdict is within or outside the limits of a reasonable appraisal of damages. Bodon v. Suhrmdan, 8 U.2d 42, 47, 372 P.2d 826 (1958); c.f. King v. Union Pac. R. Co., 212 P.2d 692, 695 (Utah 1949) (where there is a substantial conflict of evidence on a material issue, the Supreme Court will defer to the discretion exercised by the trial court in granting a new trial); see Carlson v. BMW Industries, Inc., 744 P.2d 1383, 1390 (Wyo. 1987) (the trial court's grant or denial of an additur will not be set aside on appeal, unless the court acted arbitrarily or capriciously); Creamer v. Troiano, 494 P.2d 738, 740 (Ariz. App. 1972) (we do not believe that here, where there is a conflict in the evidence as to damages, that the trial court should be reversed when it determines that the additur was required); Jacobson v. Manfredi, 679 P.2d 251, 255 (Nev. 1984) (reviewing Court must accord deference to the point of view of the trial judge, since he had the opportunity to weigh the evidence and the credibility of the witnesses).

POINT III

DALTON'S MOTION FOR SUMMARY DISPOSITION IS NOT MERITLESS. THE JUDGMENT AND MEMORANDUM DECISION AWARDING A NEW TRIAL UNLESS THE APPELLANT CONSENTED TO THE ADDITUR, WAS NOT AND IS NOT A FINAL APPEALABLE JUDGMENT.

Dalton, in his Motion for Summary Disposition, said that the court's decision to award a new trial if the appellant declined to accept the additur, is not a final appealable order. A portion of the Memorandum Decision and subsequent judgment follow:

The defendant may accept this ruling or request a new trial. (Memorandum Decision, p. 6.)

* * *

The court having inquired of the jury as to its verdict directs that judgment be entered in accordance with . . . its Memorandum Decision entered September 22, 1993 and incorporated herein by reference (Judgment, p. 2. A copy of the Judgment is attached as Exhibit C).

In Haslam v. Paulsen, 15 U.2d 185, 186 (Utah 1964), the Utah Supreme Court explained that an order comparable to the one at issue is not a final appealable order:

The right of appeal is from a final judgment. Utah Const. Art. VIII, Sec. 9, . . . [Rule 4 U.R.A.P.]. The order granting a new trial is not a final judgment . . . the proper redress is either a petition for an interlocutory appeal which may be granted in a proper case; or the claimed error can be preserved and reviewed if necessary upon the final outcome of the case

C.f. Howell v. Marmpegaso Compania Naviera S.A., 566 F.2d 992, 993 (5th Cir. 1978); Mauriello v. University of Medicine & Dentistry, 781 F.2d 46, 49 (3d. Cir. 1986). (When the district court issues a remitter order declaring a new trial unless the plaintiff concurs to a lesser recovery, the order is not final or appealable until the plaintiff accepts the remitter.)

POINT IV

**THIS COURT ERRED IN NOT GRANTING ORAL
ARGUMENT ON THIS APPEAL.**

Rule 29 of the Utah Rules of Appellate Procedure provides that oral argument is required unless the appellate court appropriately concludes that:

(1) The appeal is frivolous; or (2) the disputed issue or set of issues, has been recently authoritatively decided; or (3) . . . the decisional process would not be significantly aided by oral argument.

In this case, the appeal is not frivolous. This Court mistakenly awarded the relief sought on appeal. The dispositive issues, of what standard of review is applied to the ultimate decision granting an additur, has not been authoritatively decided. Neither has the issue of whether an order granting a new trial unless an additur is accepted, is a final appealable judgment.

Oral argument was and still is crucial for an appropriate review and consideration of the issues presented in this case. An oral presentation explaining the correct standard of review and showing that the lower court's order was not a final

appealable judgment, would have prevented this Court from picking the wrong standard of review and reviewing an order that is not final or appealable. In short, deciding this case, without oral argument was plainly and simply contrary to Rule 29. The remedy is to grant a rehearing and oral argument.

CONCLUSION

This Court, applied the wrong standard of review to the lower court's additur decision. Moreover, the Court mistakenly overlooked the fact that the lower court's judgment was not final. In addition, this Court failed to comply with Rule 29 of the Utah Rules of Appellate Procedure. Each of the foregoing demands a rehearing on the issues raised in this Petition.

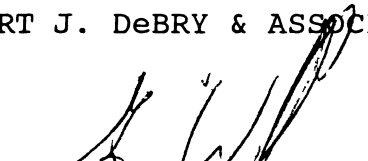
CERTIFICATION

As counsel for plaintiff/appellee, the undersigned certifies that this Petition is filed in good faith and not for delay.

RESPECTFULLY SUBMITTED this 16 day of August,
1995.

ROBERT J. DeBRY & ASSOCIATES

BY:

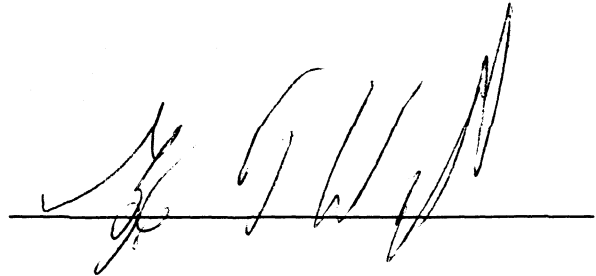


GEORGE T. WADDOUPS
Attorney for
Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of August,
1995, I caused two true and correct copies of the foregoing
PETITION FOR REHEARING to be mailed, postage prepaid thereon,
addressed to the following:

Mark Dalton Dunn 4562
Kevin D. Swensen 5803
DUNN & DUNN
230 South 500 East, #460
Salt Lake City, UT 84102

A handwritten signature in black ink, appearing to read "Mark Dalton Dunn", is written over a horizontal line.

Dale\Dalton.PFR

Exhibit A

FILED

JUL 27 1995

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Marvin A. Dalton, Jr.,)	MEMORANDUM DECISION
)	(Not for Publication)
Plaintiff and Appellee,)	
)	
v.)	Case No. 940170-CA
)	
Brian G. Herold,)	
)	
Defendant and Appellant.)	F I L E D
		(July 27, 1995)

Third District, Salt Lake County
The Honorable Leslie A. Lewis

Attorneys: Mark Dalton Dunn and Kevin D. Swenson, Salt Lake
City, for Appellant
George T. Waddoups, Salt Lake City, for Appellee

Before Judges Davis, Garff¹, and Wilkins.

GARFF, Judge:

We note at the outset that a 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., 885 P.2d 786, 787 (Utah 1994).

Herold argues that the trial court erred in granting the motion for additur. We agree.

Before a trial court can entertain a motion for additur, the court must find that the damages awarded were "so inadequate as to indicate a disregard of the evidence by the jury." Dupuis v. Nielson, 624 P.2d 685, 686 (Utah 1981). Only if the trial court so finds can it then consider the motion to determine if "the influence of passion or prejudice resulted in inadequate damages." Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 529 (Utah App. 1990).

1. Senior Judge Regnal W. Garff, acting pursuant to appointment under Utah Code Judicial Administration R3-108(4).

In this case, the trial court gave the jury Instruction Number 44 which states:

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


(Emphasis added).

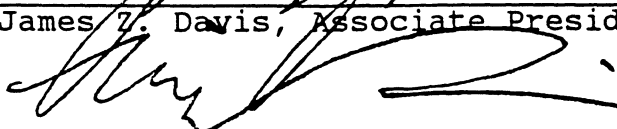
Our review of the record reveals conflicting medical evidence on the necessity of future medical care for Dalton's injuries, and "the evidence does not compel a finding that reasonable persons would have reached a different measure of damages." Dupuis, 624 P.2d at 686. The jury, following instruction number 44, could reasonably have believed that it was "more probable than not" that Dalton would not require and be "given [medical care] in the future." Based on the forgoing, the trial court should never have considered the motion for additur since the record does not show that the jury disregarded the evidence. We therefore reverse the trial court's additur and reinstate the original jury award of special damages in the amount of \$3,000.00.

Because we have reversed the trial court's additur, the amount of the final judgment falls below Herold's \$15,000.00 offer of settlement. Therefore, we also reverse the trial court's award of costs to Dalton.²


Reginal W. Garff, Judge

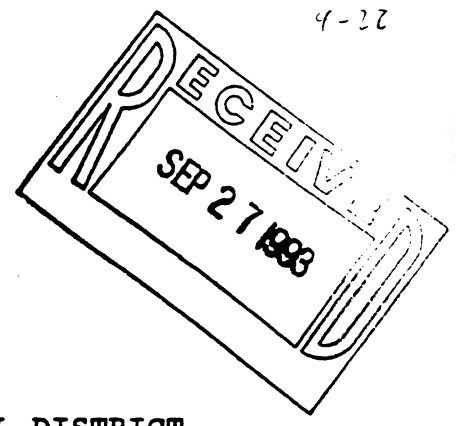
WE CONCUR:


James Z. Davis, Associate Presiding Judge


Michael J. Wilkins, Judge

2. We find the points raised in Dalton's motion for summary disposition to be meritless and therefore do not address them. See State v. Carter, 776 P.2d 886, 888-89 (Utah 1989).

Exhibit B



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

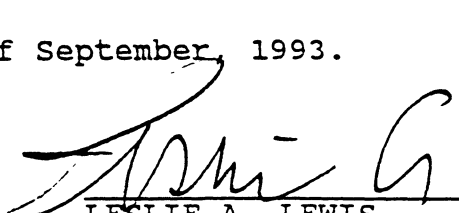
plaintiff did not actually suffer any general damages but did reasonably incur special damages for medical expenses or loss of wages. This is the case if the plaintiff's complaints are subjective and his credibility is questioned." Eisele v. Rood, 551 P.2d 441 (Or. 1976).

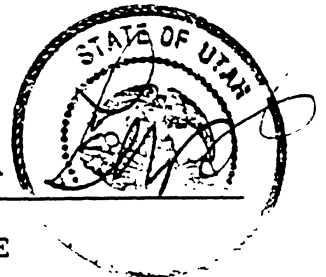
While this Court was not privy to the jury's deliberations or exact considerations in arriving at the general damage award, this Court can only conclude that the jury did not feel that the plaintiff's entitlement to general damages, i.e., his pain and suffering, warranted a large amount. This Court appreciates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

Earline Matheson

Exhibit C

FILED DISTRICT COURT
Third Judicial District
JUDGMENT JAN 24 1994

GEORGE T. WADDOUPS #3965
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

by E. M. M. M. M. M.
Deputy Clerk

Attorney for Plaintiff

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

MARVIN A. DALTON, JR.,)	JUDGMENT
Plaintiff,)	2189219
vs.)	1-26-94-809am
BRIAN G. HEROLD,)	Civil No. 920903329PI
Defendant.)	Judge Leslie A. Lewis

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:

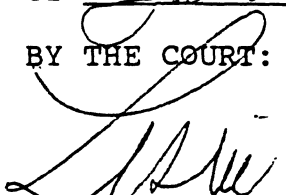
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be rendered in favor of the plaintiff and against the defendant, Brian Herold, as follows:

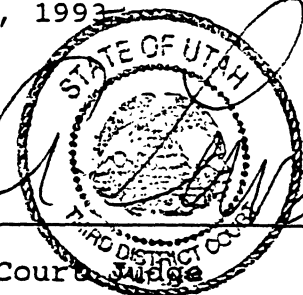
1. The plaintiff is awarded judgment against the defendant for special damages in the amount of \$18,328.19 ($\$3,000 + \$19,910.24 \times 80\%$).
2. The plaintiff is awarded judgment against the defendant for pre-judgment interest of past special damages in the amount of \$794.40 pursuant to Utah Code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

3. The plaintiff is awarded judgment against the defendant for general damages in the amount of \$4,000 (\$5,000 x 80%).
4. The plaintiff is awarded post-judgment interest against the defendant pursuant to Utah Code Ann. §15-1-4 consistent with the judgment accruing at the rate of 5.72% per annum.
5. The plaintiff is awarded his costs against the defendant in the amount of \$3,124.40.
6. The total judgment awarded is \$26,246.99 [\$18,328.19 (special damages) + \$794.40 (pre-judgment interest) + \$4,000.00 (general damages) + \$3,124.40 (costs and fees)].

DATED this 24th day of Jan, 1993⁴

BY THE COURT:


Leslie A. Lewis
Third District Court Judge



Approved as to form:

Mark D. Dunn

Attorney for Defendant