

1994

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

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

MARVIN A. DALTON, JR.,
Plaintiff/Appellee,

v.

BRIAN G. HEROLD,
Defendant/Appellant.

)
) **BRIEF OF APPELLEE**
)
)
)

) Appeal No. 941070CA
)
)

) Priority No. 15
)
)

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

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO.

941070

FILED
Utah Court of Appeals

DEC 27 1994

Marilyn M. Branch
Clerk of the Court

There are no determinative constitutional provisions
in this brief.

MARVIN A. DALTON, JR.,)	BRIEF OF APPELLEE
)	
Plaintiff/Appellee,)	
)	
v.)	Appeal No. 941070CA
)	
BRIAN G. HEROLD,)	
)	
Defendant/Appellant.)	Priority No. 15
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III.

STATEMENT OF JURISDICTION

The appellant's Statement of Jurisdiction referring to Rule 3 of the Utah Rules of Appellate Procedure is inadequate. The appellate rules have no effect on jurisdiction. U.R.A.P. 1(d); c.f., Gregory v. Fourthwest Investment, Ltd., 735 P.2d 33 (Utah 1987) (referring to §78-2-2 without citing the subdivision is inappropriate). The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2(a)-3(k).

IV.

ISSUE PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

The issues presented for review are (1) whether the trial court exceeded its broad discretion when it granted an additur of special damages based on uncontested evidence of future medical expenses; and (2) whether the costs awarded were appropriate.

The standard of review set forth in appellant's Brief on the first issue is incorrect. The standard of review is abuse of discretion. In reviewing the Judge's ultimate decision granting an additur, **the** reviewing court will reverse only if there is no reasonable basis for the decision. Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991). See Andreason v. Aetna Casualty & Surety Co., 848 P.2d 171, 174 (Utah App. 1993) (remittitur). Similarly, the lower court's cost award (issue (2))

is also reviewed under an abuse of discretion standard (Appellant's brief p. 2).

V.

STATEMENT OF THE CASE

The statement of the case set forth in appellant's Brief is also inadequate because it fails to set forth the facts relevant to the issues presented for review. Herold's statement also sets forth numerous factors that are not relevant to the issues presented for review. For example:

Paragraphs 3, 4, 6, 8, 9, 10 are irrelevant. At trial, the lower court found that Herold made an improper left turn and directed a verdict on the issue of negligence.

The Court: It is my position that there is no question about the defendant's negligence

* * *

. . . I will take the special verdict form now, and place an X on 1 in the box where it says "Yes" and I will instruct the jury that . . . [T]he first question has been answered for them, and that is at the time and place of the incident in question, and under the circumstances, as shown by the evidence, the defendant Brian Herold was negligent.

(R. 925, lns. 16-17; 926, lns. 4-11).

The verdict was marked and the jury was so instructed that Herold was negligent. Moreover, Herold did not object to the directed verdict below and did not appeal the finding of negligence, only the lower court's additur.

Mr. Dunn: . . . We don't deny that there is negligence on Brian's part.

The Court: You don't deny there is negligence?

Mr. Dunn: We do not.

(R. 902, lns. 13-17).

The jury also found that Dalton was 20% negligent (R. 293) and neither party appealed the finding. In summary, the issues of negligence and comparative negligence in this case are not issues on appeal. Thus, paragraphs 3, 4, 6, 8, 9, and 10 of Herold's statement of the case are irrelevant.

Similarly, paragraphs 25, 26, 27, 28, 29, and 30 of Herold's statement of the case are largely irrelevant because the testimony of the expert witnesses was that proper oral hygiene had no effect on the need for surgery to correct Dalton's TMJ problem. (R. 837 - 839). When questioned by Herold's counsel, the oral surgeon testified:

Mr. Dunn: Q: If someone has poor dental hygiene or hygiene with their mouth, does that have any bearing on aggravating or making TMJ worse?

Dr. ~~Wicksell~~ A: The poor dental hygiene itself, I don't think would affect that.

(R. 839, lns. 20-24).

The appellant's brief also fails to set forth the facts in the light required on appeal. On appeal, the facts and

inferences therefrom are reviewed in the light most favorable to the lower court's ultimate decision. Crookston, supra. Viewed in that light, the facts relevant to the issue presented for review are as follows.

On October 15, 1990, Dalton was riding his motorcycle northbound on 900 West near the North Temple intersection. Herold was facing southbound attempting to turn left to go eastbound. Herold turned left in front of Dalton's motorcycle and caused a collision. (R. 611-621). At trial, Herold conceded that he was negligent and the court directed a verdict on the issue of Herold's negligence. (R. 902, 925-926).

As a result of the collision, Dalton sustained numerous fractures to his face¹. Bones near his right eye were broken. His cheek bones were also broken. There was a bone chip in his sinus.

¹ The medical terms for Dalton's injuries follow. Dalton sustained: multiple fractures involving the right maxillary antral area; blowout fracture involving the floor of the right orbit; tripod fracture; nasal fracture; tooth fracture; displaced/dislocated meniscus, temporomandibular joint dysfunction on the right side of the jaw (TMJ); nerve damage with facial numbness, eye numbness and lip numbness; and forehead lacerations. He also sustained the following damages to his arm, shoulder, hands and knee: brachial plexus stretch injury with abnormal EMG; hypersensitivity of the dorsal cutaneous branch of the right ulnar nerve; distal and proximal sensory loss in the radial arm; decreased inward rotation of the right shoulder; headaches, neck pain, shoulder pain, arm pain, jaw pain, and popping and grinding; diplopia-blurry vision when laying on the right side; depressed or flattened right maxilla; left knee contusions and abrasions and aggravation of prior knee injury; moderate to severe pain in the physical areas of the anatomy injured; and permanent impairment, nerve damage, and sensory loss.

His upper jaw fractured which caused the area between his "arch. . . and teeth. . ." to be "literally free floating" (R. 652-657, 750-755, 768-782, 832-836). Dalton also sustained cuts and bruises, facial nerve damage, nerve damage to his hand and knee damage. He also experienced double vision (R. 653-658, 661-662, 750 -757, 764-765, 874-875, 881, 886). His knee is still loose (R. 692) and he cannot participate in sports (R. 663). Even Herold's medical expert assigned Dalton a 4% impairment rating (R. 897, Tr. ex. 10).

Four doctors testified at the trial. Dr. James Morgan was an orthopedic surgeon who examined Dalton a month and a half after the accident (R. 749-750). He diagnosed Dalton's facial fractures (R. 753-759). However, since his specialty was orthopedic surgery, he did not treat facial and jaw fractures and was not in the position to determine whether future surgeries were required.

Mr. Waddoups: Q: Since you don't treat TMJ, it wouldn't be your position or opinion to determine whether somebody needs surgery on the jaw; is that correct?

A: Correct.

Q: And since you don't treat the area of what area that had the blow out fractures, you wouldn't be the doctor to recommend whether the person has surgery or not, would you?

A: No, I would not.

Q: And again, you're an orthopedic doctor?

A: Correct.

(R. 762, lns. 24-25; 763, lns. 1-7).

Dr. Richard Hodnett, a plastic surgeon specializing in facial reconstructive surgery, examined Dalton twice; once two months after the accident and again before trial (R. 765, 767). He testified that Dalton will require two surgeries. One surgery, is needed to remove a bone chip near a nerve that controls sensation in the lip. Hodnett estimated the cost for this surgery to be \$2,500 - \$3,500 for the physician and \$5,000 - \$8,000 for the hospital (R. 771-772). He also testified that Dalton will require surgery on his upper jaw. He estimated this cost at \$15,000 (R. 783-784). Hodnett did not examine Dalton's neck, shoulder and knees and did not express an opinion as to what should be done for those injuries (R. 785).

Dr. Leo Vaughn Mikesell also examined Dalton. Mikesell specializes in oral and maxillofacial surgery. He treats TMJ patients (R. 824). He testified that Dalton will require surgery (an arthroplasty) and that the surgery will cost \$2,500 - \$3,500 for the physician and \$5,000 - \$8,000 for the hospital (R. 836-837, 840-841). He also testified that Dalton will require a bridge with an incurred cost of approximately \$1,200 - \$1,300.

Herold's medical expert was Dr. E. Warren Stadler, Jr., a specialist in physical rehabilitation (R. 864). On the basis of feeling Dalton's face with his hands, he testified that Dalton

would not require further surgery (R. 573, lns. 6-10). The rationale for his decision was that Dalton suffered facial nerve damages that would not be corrected by surgery (R. 874-876). Stadler admitted that he does not treat tripod or blow out facial fractures and he does not do surgery (R. 882, lns. 6-17). He treats patients, after the fractures have been repaired. He does not repair the fractures (R. 897).

Dalton's past medical expenses were established by Trial Exhibit 3. Herold stipulated to the admission of the exhibit (R. 366, 402, 805, 806). These past medical expenses were not paid by Dalton because he could not afford to pay them and Herold's insurance company did not advance the costs for the medical care. For the same reason, Dalton did not obtain the medical care recommended by his physicians (R. 795-797).

Despite Dalton's numerous fractures and need for further medical care, the jury only awarded him \$3,000 for special damages and \$5,000 for general damages. The judgment was discounted by 20% because the jury also found Dalton 20% at fault (R. 292-293).

Dalton timely filed a motion for an additur or in the alternative a new trial. The trial judge concluded that "the jury's award, was clearly inadequate in light of the evidence presented at trial" and "outside the limits of any reasonable appraisal of damages as shown by the evidence" and granted an additur to \$19,902.24 (R. 433-439). At the conclusion of the

memorandum decision, the trial court judge notified Herold that he could accept the ruling or request a new trial. Herold did neither². Thereafter, the court entered a judgment. The judgment reduced the special damage award by 20% because the jury found Dalton 20% at fault (R. 456). Herold appealed the additur.

VI.

SUMMARY OF ARGUMENT

POINT I

THE STANDARD OF REVIEW OF AN ORDER GRANTING ADDITUR IS ABUSE OF DISCRETION.

On appeal of an additur, the reviewing court does not, as urged by Herold, directly view the verdict and ignore the intermediate action of a trial court. Instead, the reviewing court focuses on the ultimate decision of a trial court and reverses only if the lower court abuses its discretion. That is, it reverses only if there is no reasonable basis for the decision. E.g. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 799 (Utah 1991).

² Having appealed the judgment granted and additur, Herold cannot chose a new trial on the issue of damages if he loses his appeal on the additur issue. Jacobsen v. Manfredi, 679 P.2d 251, 255 n.4 (Nev. 1984).

POINT II

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING AN ADDITUR.

The lower court decision to grant a modest additur was well within the discretion granted a trial court. As set forth in Point II in the argument section of this brief, the decision has a reasonable basis. Both the evidence of special damages and the serious injuries incurred by Dalton justify the award. Moreover, in granting the additur, the lower court applied correct standard to reach its decision.

POINT III

THE COSTS AWARDED WERE AUTHORIZED AND APPROPRIATE.

Because Herold's offer of judgment is less favorable than the judgment obtained by Dalton, lower court "a matter of course" correctly awarded Dalton his costs pursuant to Rule 54(d) of the Utah Rules of Civil Procedure. The lower court's cost decision is viewed ~~under~~ an abuse of discretion. Herold has totally failed to show any ~~abuse~~ of discretion by the trial court.

VII.

ARGUMENT

POINT I

THE STANDARD OF REVIEW OF AN ORDER
GRANTING ADDITUR IS ABUSE OF DISCRETION.
THE STANDARD IS NOT WHETHER THE JURY'S
INITIAL VERDICT WAS BEYOND RATIONAL
JUSTIFICATION OR A PRODUCT OF
PASSION OR PREJUDICE.

A. The Appellant's Brief.

Relying principally on Bennion v. LeGrand Johnson Construction Co.,³; Bundy v. Century Equipment Co.,⁴; and Batty v. Mitchell,⁵, three cases that have nothing to do with reviewing a trial court's order granting an additur, Herold repeatedly misstates and/or urges this Court to apply an incorrect standard of review to the district court's Order granting a modest additur. For example, on pages 2 and 3 of his Brief, Herold says:

A reviewing court will defer to the jury's damage award unless the award indicates 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 the award was reached under a misunderstanding. Bennion v. LeGrand Johnson Construction Co.

(Appellant's Brief, pp. 1-2.)

³ 701 P.2d 1078, 1084 (Utah 1985)

⁴ 692 P.2d 754 (Utah 1981)

⁵ 575 P.2d 1040 (Utah 1971)

Similarly, Herold subsequently argues that the lower court was not "empowered to entertain a motion for an additur" because the courts:

. . . 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 Bundy v. Century Equipment Co.

(Appellant's Brief, p. 13.)

On page 34 of his Brief, Herold concludes that the additur must be reversed because:

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

However, on appeal of an additur, the reviewing court does not, as urged by Herold, directly review the verdict and ignore the intermediate action by the trial court. See Andreason v. Aetna Casualty Co., 848 P.2d 171, 174 (Utah App. 1993). Instead, the reviewing court focuses on the ultimate decision of the trial court and determines whether the lower court abused its discretion. Id.

The Court of Appeals in Andreason relied on the seminal case of Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991). In Crookston, the Utah Supreme Court acknowledged the confusion on the standard of review to be applied to motions

challenging the amount of a jury verdict and vowed to clear the confusion up:

First, we will address the standard for review to be applied by a trial court considering a motion that attacks the amount of a jury's damage award. Second, we will discuss the standard of review to be followed by an appellate court reviewing the trial court's decision on a challenge to a jury's damage award. (Emphasis added.)

Crookston, supra at 802.

After acknowledging that any determination of whether the jury exceeded its proper bounds is best made in the first instance by the trial court, the Crookston court announced the following standard of review:

In reviewing the Judge's ultimate decision . . . we will reverse only if there is no reasonable basis for the decision. Id. at 809.

The Court went on to explain that the standards of review cited in Bennion, Bundy and Batty, the cases relied upon by Herold, are misleading.

In light of the foregoing, some statements about standards of review in prior cases can be read as misleading, though not actually incorrect. For example, in Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078 (Utah 1985), we stated that a "reviewing court will defer to a jury's damage award unless the award indicates that the jury disregarded competent evidence." Id. at 1084 (citations omitted); see also Batty v. Mitchell, 575 P.2d 1040, 1043 (Utah 1978). See generally, Bundy v. Century Equipment Co., 692 P.2d 754 (Utah 1984); First Security Bank of Utah v. J.B.J.

Feedyards, Inc., 653 P.2d 591 (Utah 1982). This statement of the standard, though perhaps not an inaccurate characterization of the test to be applied by a trial court faced with a new trial motion under rule 59, is inaccurate if it purports to state the standard of review by which an appellate court determines the propriety of a trial court's decision to grant or deny a new trial. The statement can be read to mean that this court reviews the jury's action directly, when in reality we review the trial court's action for an abuse of discretion. It is this type of loosely worded standard which has, over time, effectively confused the appellate court's proper role in assessing the merits of a rule 59 motion attacking a jury verdict with that of the trial judge. E.g., Bennion, 701 P.2d at 1083-84; Bundy, 692 P.2d at 758-59; First Security, 653 P.2d at 599; Batty, 575 P.2d at 1043.

In summary, whether the trial court's additur will be upheld or reversed does not depend upon whether the jury disregarded competent evidence or any other standard advocated in Herold's brief. Instead, the court's ultimate decision in granting or denying an additur will be reversed only if the lower court abused its discretion.⁶ Crookston at 709, 805; Andreason, supra at

⁶Other surrounding jurisdictions have also held that the standard of review of an order granting an additur is abuse of discretion. E.g., Bond v. Cartwright v. Little League, Inc., 536 P.2d 697, 704 (Ariz. 1975) (the question of an additur is left to the largest possible discretion of the trial court, and its decision will not be reversed on appeal, except in a clear case of abuse of discretion); Carlson v. BMW Industry Services, Inc., 744 P.2d 1383, 1390 (Wyo. 1987) (we will not set aside the granting of an additur unless an abuse of discretion is shown); Jacobsen v. Manfredi, 679 P.2d 251, 255 (Nev. 1984) (reviewing court defers to the trial court's point of view); Jehl v. Southern Pacific Co., 427 P.2d 968, 995 (Cal. 1967) (if trial court decides to order an

174. As hereinafter set forth in Point II, the lower court's Order granting a modest additur has a reasonable basis. Thus, the court acted well within the discretion granted to the trial court.

POINT II

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING AN ADDITUR.

A. The Trial Court Applied the Correct Standards in Granting The Modest Additur.

The first Utah case to consider the standards for granting an additur was Bodon v. Suhrmann, 8 Utah 2d 42, 372 P.2d 826 (Utah 1958). The Bodon Court explained that additurs have nothing to do with jury verdicts resulting from passion or prejudice.

We are not here concerned with any question as to whether the disparity in the verdict is so gross as to indicate that the whole verdict is so filled with passion and prejudice that it should be entirely set aside.⁷ Id. at 45.

Instead, the Court said that when a verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it

additur, it should exercise its complete and independent judgment).

⁷ The Bodon analysis has been accepted in neighboring jurisdictions. In Creamer v. Troiano, 494 P.2d 738, 739 (Ariz. App. 1972), the Court explained that the trial court must make two determinations when a jury's verdict is challenged. If the jury verdict is so inadequate as to be the result of passion or prejudice, the court must order a new trial. However, if the trial court's determination is that the award is merely insufficient, the court should award an additur.

is the "prerogative and duty of the trial court to order any necessary modification." Bodon, supra at 47.

Subsequently, in Dupuis v. Nielson, 624 P.2d 685, 686 (Utah 1988), the Utah Supreme Court reaffirmed that the trial court may grant an additur if the evidence compels "a finding that reasonable persons would reach a different measure of damages." In other words, if a disciplined review of the evidence shows that reasonable minds would not differ on a minimum amount of damages, and the jury verdict is less, then the trial court should correct the error. See John Call Engineering v. Manti City, 795 P.2d 678, 683 (Utah App. 1990).

In this case, the trial court surveyed the evidence "in the light most favorable to the jury's findings" (R. 433). It then applied the stance as enunciated in Bodon, supra and Dupuis, supra to correctly conclude, "the jury's award is clearly inadequate in light of the evidence presented at trial." Id. at 433-436. In summary, the lower court applied correct standards in granting the modest additur. Moreover, as set forth below, any disciplined review of the evidence shows that the jury verdict was clearly against the weight of the evidence and outside the limits of any reasonable appraisal of damages.

B. The Lower Court's Disciplined Review of the Evidence Shows That the Verdict Was Clearly Outside the Limits of Any Reasonable Appraisal of Damages.

1. Proceedings in the Lower Court

The lower court, after a review of the evidence, concluded that the \$3,000.00 special damages verdict did not bear a reasonable relationship to the trial evidence. The Court noted that the parties stipulated to past medical bills of \$2,903.24. The Court then surveyed the expert medical testimony and correctly concluded that the amount of \$20,007.00 for future medical expenses was uncontroverted at trial (R. 436). As set forth below, the Court's disciplined review of the evidence was correct. In addition, although the Court did not base its additur on the serious injuries sustained by Dalton, the injuries also support the additur awarded by the Court.

2. The Special Damages Evidence, That Is, Evidence of Past and Future Medical Expenses, Was Uncontroverted.

The evidence establishing past medical expenses was Trial Exhibit 3. Herold did not object to its admission. Trial Exhibit 3 establishes past medical expenses of \$2,903.74.

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).

* * *

Q: (By Ms. Thomas) Approximately how much would that kind of surgery cost, physician fees and hospital fees?

A: 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 osteotomy⁸ and that the cost would be \$15,000 (R. 783-784).

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

Mr. Waddoups: Q: Dr. Mikesell, after examining Mr. Dalton and reviewing the medical records and the scans, the diagnostic tests, have you formed an opinion as to whether Mr. Dalton needs surgery to correct his TMJ?

* * *

The Witness: I have yes.

Q: What is your opinion?

A: I think that at some time, he will have to have surgery to correct that, yes.

(R. 840, lns. 7-10, 15-18).

⁸ An osteotomy is the rebreaking of the jaw bones and putting them in the proper place (R. 784, lns. 1-7).

The surgery recommended in Mikesell's treatment plan is 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. However, Stadler did not controvert the cost of the special damages. That issue was undisputed. Moreover, while it is true that Stadler opined that Dalton would not benefit from future surgery, the trial court properly discounted his opinion because (1) Stadler was not a surgeon, so his testimony warranted very little weight; and (2) his opinion was based only upon feeling Dalton's face with his hands⁹, again justifying very little weight; and crediting the testimony of the surgeons who were qualified on the subject of the need for surgery. In doing so, the trial court acted well within its discretion. As set forth in Point I of this Brief, 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, supra; C.f. King v. Union Pac. R. Co., 212 P.2d 692 (Utah 1949) (where there is a substantial conflict of evidence on a material issue,

⁹ Moreover, the only injury Stadler was concerned with was the facial nerve damages (R. 874, 876).

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 1380, 1338, 1340 (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); Jacobsen v. Manfredi, 679 P.2d 251 (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).

C. The Injuries Sustained By Dalton Also Justify the Additur.

As set forth in Point I, the trial court's decision to grant an additur will not be reversed unless there is no reasonable basis for that decision. The reasonable basis need not be the one used by the trial court. In this case, not only does the evidence of special damages justify the additur, so does the uncontested evidence of the injuries and general damages incurred by Dalton. To summarize, Dalton sustained numerous facial fractures, a damaged knee, and nerve damage to his face, shoulder, arm and hand. Yet, the jury only awarded \$5,000.00 for these damages. The injuries sustained by Dalton justify the lower court's additur. See Jacobsen, supra at 253.

D. The Doctrine of Unavoidable Consequences or Mitigation of Damages Did Not Justify Reversing the Additur.

The injured have a duty to reasonably mitigate damages. Thompson v. Jacobsen, 23 Utah 2d 359, 463 P.2d 801 (1970). The doctrine of mitigation of damages, also referred to as the doctrine of unavoidable consequences, generally operates to prevent one against whom a wrong has been committed from recovering any item of damage arising from the wrongful conduct which could have been avoided by reasonable means. Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 777 (Utah 1983).

Herold devotes eight pages of his Brief to the notion that the additur should be reversed because "the evidence supports the jury's finding that Dalton failed to mitigate his damages" (Appellant's Brief, p. 13). However, an examination of the record and the relevant legal principles show that Herold's argument lacks both factual and legal support. For example, the jury did not make any finding one way or the other that Dalton failed to mitigate his damages. The special verdict did not ask or allow them to make such a finding.

~~There~~ are three additional reasons why the Doctrine of Unavoidable Consequences cannot be used to reverse the additur. First, the injured is not required to incur a substantial expense to mitigate damages. The law only requires that the injured be willing to expend a trifling expense. 22 Am. Jur. 2d, Damages,

Section 501 at 585 (1988). C.f., Anesthesiologist Associates v. St. Benedict's Hospital, 852 P.2d 1030, 1040 (Utah 1993) (physician not required to establish a new practice to mitigate his damages). In this case, Dalton incurred \$2,903.00 in unpaid past medical expenses (R. 715, 716, 417, 418). There is nothing in the record showing that he could pay any medical expense. Before the doctrine of mitigation of damages may be applied, Herold is required to prove that Dalton had the ability to pay the expenses of mitigating the damages. Shellhammer v. Caruthers, 99 S.W.2d 1054 (Tex. Civ. App. (1936)).

Second, Dalton is not required to take actions which Herold himself refused to take. In other words, Dalton could not be required to expend money on medical care -- money which he did not have -- if Herold, as in this case, could have accomplished the same result by paying Dalton's medical expenses. See also, Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982) (purchaser need not incur expense of paving the road since the vendor had the same opportunity to decrease the damages). In this case, Herold is well aware, as is his insurance company, that Dalton could not continue the medical care recommended by the physicians because he could not afford the medical care. Herold and his insurance company refused to advance monies necessary to cover any medical costs.

The final reason that mitigation of damages could not be used to reverse the additur is that the lower court considered the

issue below. Herold strongly urged the district court not to grant an additur because Herold said that Dalton did not mitigate his damages (R. 398-399). The court surveyed the evidence in the light most favorable to the verdict and granted the small additur. Once the court grants the additur, Herold must do more than show that there was some evidence that Dalton failed to mitigate all of his damages. Herold must show that the court's decision lacked a reasonable basis. This he failed to do. Moreover, even if Dalton had made no effort at rehabilitation after sustaining his severe injuries (and he did make an effort), that, in and of itself, does not demonstrate that the trial court erred in concluding that the verdict for Dalton was inadequate. Jehl v. Southern Pacific Co., 427 P.2d 988, 991 (Cal. 1967).

E. Conclusion

The lower court followed correct procedures and applied correct standards in awarding the additur. The decision was well within the court's discretion because the evidence of special damages and the severe injuries incurred by Dalton each justify the lower court's decision. The doctrine of mitigation of damages does not warrant or require a reversal of the lower court's decision. For these reasons, the decision of the lower court should be affirmed.

POINT III

THE COSTS AWARDED WERE
AUTHORIZED AND APPROPRIATE.

A. Factual and Procedural Background

Prior to trial, Herold made a Rule 68(b) offer of judgment in the amount of \$15,000.00 (R. 62-64). The offer was not accepted. Moreover, the final judgment obtained against Herold was more than one and a half times the offer of judgment. The final judgment totalled \$26,246.99. Because the judgment obtained by Dalton was more favorable than the Herold offer, the trial court, as a matter of course, awarded the following costs:

(1)	Filing fee	\$ 120.00
(2)	Travel expenses Re: depositions of Herold & Dalton	573.00
(3)	Court reporter fees (depo.)	
	Brian Herold	258.75
	Art Dalton	169.95
	Newell Knight	188.90
	Dr. Warren Stadler	194.15
	Dr. Vaughn 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
	Dr. Warren Stadler (depo.)	400.00
	Dr. Warren Stadler (service)	43.00
	Dr. Vaughn 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:		\$ 2,330.00

B. Legal Analysis

1. The Lower Court Correctly Awarded Dalton His Costs Because the Final Judgment was More Favorable Than the Offer of Judgment Submitted by Herold.

Rule 68(b) provides:

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

However, the \$26,000 plus final judgment awarded to Dalton was more favorable to Dalton than the \$15,000.00 offered by Herold. Thus, the offer is irrelevant to the issue of whether the lower court was correct when it awarded Dalton his costs. Since the final judgment was more favorable than Herold's offer, the lower court "as a matter of course" awarded costs to Dalton, the prevailing party pursuant to U.R.C.P. 54(d)(1). Rule 54(d) leaves the question of costs within the discretion of the trial court. Hull v. Goodman, 4 Utah 2d 163, 290 P.2d 245 (1955). Herold has not shown any abuse of discretion committed by the trial court. Thus, the cost award should not be modified.

2. The Lower Court Correctly Awarded Costs For Deposition Costs (Reporter's Fees and Witness Fees), Process Server Fees, and Travel Expenses.

Herold objects to the lower court awarding \$188.90 for court reporter's fees incurred in the taking of the deposition of Newell Knight. Newell Knight was the accident reconstruction expert retained by Herold. Deposition costs, including court

reporter's fees, are allowed as necessary and reasonable costs where the development of the case is of such a complex nature that discovery cannot be accompanied through less expensive discovery methods. Highland Construction Co. v. Union Pacific Railroad, 683 P.2d 1042, 1051 (Utah 1984). In this case, Herold has not shown that the lower court abused its discretion in awarding the reporter's costs in obtaining Knight's opinions, the basis for his opinions, and the expert's methodology¹⁰.

The Court also correctly awarded \$525.00 as costs for the witness fees associated with the taking of the depositions of Knight and Stadler. Knight was Herold's accident reconstructionist. Stadler was Herold's medical expert. If Dalton had not paid the two witness fees, he could not have taken the deposition. That these fees are necessarily incurred deposition costs is established by U.R.C.P. 26(b)(4)(C), which required Dalton to pay Knight and Stadler a reasonable fee for their time. Hence, the witness fees paid to Stadler and Herold come under the same analysis as set forth in Highland, supra.

¹⁰ Herold is in no position to argue that the deposition was unnecessary. Herold never disclosed what Mr. Knight's testimony would be. Nor did he disclose that Knight did not have an opinion and could not render one. Herold knew this information prior to the taking of Knight's deposition. The added costs could have been avoided had Herold informed Dalton that Knight lacked an opinion and would not be testifying.

The lower court also allowed some minimal service fees incurred in subpoenaing Dr. Stadler, Dr. Mikesell, Dr. Hodnett, Officer Mike Roberts, and all who testified at the trial. Awarded fees were for Dr. Stadler (\$43.00), Dr. Mikesell (\$37.00), Dr. Hodnett (\$45.00), Dr. Morgan (\$35.00), and Roberts (\$30.00). Utah Code Ann. §21-2-4(1) and (4) provide for a service fee of \$6.00 plus \$1.00 per mile going from the courthouse. To challenge the award, Herold must show that the statutory rates were exceeded. However, Herold has pointed to nothing in the record which shows that the process service fees were incorrectly calculated. In short, he has failed to show that the lower court abused its discretion in awarding these small fees.

Finally, the Court awarded the trial expenses of Dalton's counsel to depose Herold in Oregon (\$317.00) and Dalton in Colorado (\$256.00). Ordinarily, counsel's travel expenses are not taxed as costs. However, the lower court awarded these travel costs because Herold's counsel would not agree to a reasonable discovery plan wherein the parties would make their clients available for depositions in Utah. Simply put, Herold chose to run up the costs (R. 405-408). Had Dalton moved for the imposition of a discovery plan pursuant to F.R.C.P. 26, and Herold refused to cooperate in the plan, the Court could have imposed reasonable expenses under Rule 37(e). However, there is no reason analytically why Herold should be treated differently just because the Court had not

ordered a discovery plan. Rule 37(e) sanctions are imposed to assure that the parties reasonably cooperate in discovery. In this case, a reasonable discovery plan was proposed by Dalton and rejected by Herold. On that basis, the Court correctly exercised its discretion to award the travel expenses.

VIII.

CONCLUSION

The standard of review of an additur is abuse of discretion. The lower court did not abuse its discretion because the lower court followed correct procedures and applied correct standards when it granted the small additur. The lower court's decision does not lack a reasonable basis. Both the evidence of special damages and Dalton's severe injuries justify the lower court's additur. The costs awarded by the lower court are authorized and appropriate. For each of these reasons, the Judgment of the lower court should be affirmed.

Respectfully submitted this 27th day of December, 1994.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant

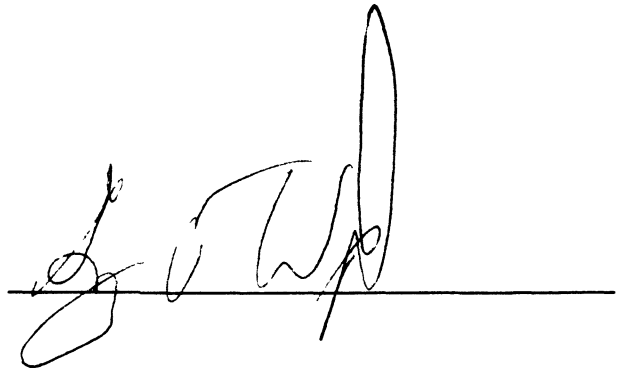


GEORGE T. WADDOUPS

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** (**Dalton v. Herold**) were mailed, postage prepaid, this ____ day of December, 1994 to the following:

Mark Dalton Dunn
Kevin D. Swenson
DUNN & DUNN
230 South 500 East, #460
Salt Lake City, Utah 84102
Attorneys for Appellee

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

ADDENDUM

1. Special Verdict.
2. Memorandum Decision
3. Judgment
4. Trial Exhibit 3, page 5 - Medical Bills and Medical Summary of
Marvin Dalton

Tab 1

MAY 13 1993

SALT LAKE COUNTY
By [Signature] Deputy Clerk

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

MARVIN A. DALTON, JR.,
Plaintiff,
vs.

BRIAN G. HEROLD,
Defendant.

)
) SPECIAL VERDICT
)
)
)

) Civil No. 920903329PI
)
)

) Judge Leslie A. Lewis
)
)

We, the jury in the above-entitled action, answer the questions submitted to us as follows:

1. At the time and place of the incident in question and under the circumstances as shown by the evidence, was the defendant, Brian Herold negligent?

YES X NO

2. Was such negligence a proximate cause of plaintiff's injury?

YES X NO

3. At the time and place of the incident in question and under the circumstances as shown by the evidence, was the plaintiff, Art Dalton, negligent?

YES X NO

4. Was such negligence a proximate cause of plaintiff's injury?

YES X NO

5. Considering all the negligence which caused the incident at 100%, which percentage of that negligence is attributable:

A. To defendant, Brian Herold: 80 %

B. To plaintiff, Art Dalton: 20 %

6. What sum would fairly compensate plaintiff for the damages, if any, which he sustained as a result of the incident?

(a) Special Damages \$ 3000⁰⁰

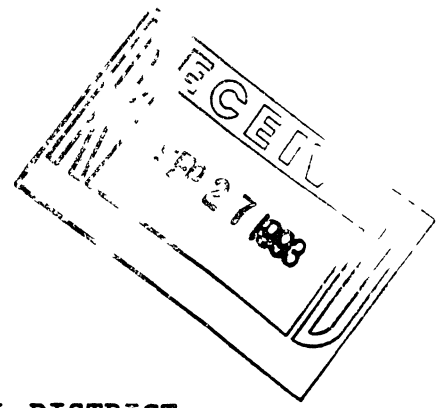
(b) General Damages \$ 5000⁰⁰

TOTAL \$ 8000⁰⁰

DATED and signed this 19 day of May, 1993 at Salt Lake City, Utah.

D. Scott Peterson
FOREPERSON

Tab 2



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

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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

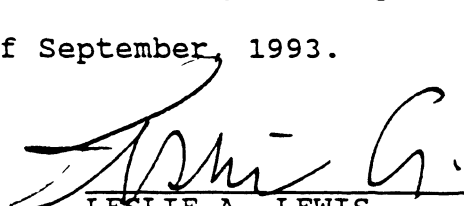
plaintiff did not actually suffer any general damages but did reasonably incur special damages for medical expenses or loss of wages. This is the case if the plaintiff's complaints are subjective and his credibility is questioned." Eisele v. Rood, 551 P.2d 441 (Or. 1976).

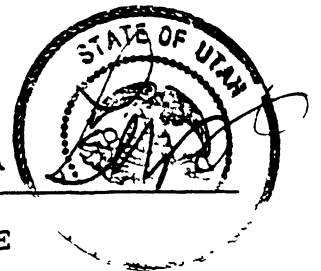
While this Court was not privy to the jury's deliberations or exact considerations in arriving at the general damage award, this Court can only conclude that the jury did not feel that the plaintiff's entitlement to general damages, i.e., his pain and suffering, warranted a large amount. This Court appreciates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

Tab 3

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. Matheson
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:

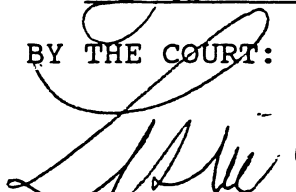
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be rendered in favor of the plaintiff and against the defendant, Brian Herold, as follows:

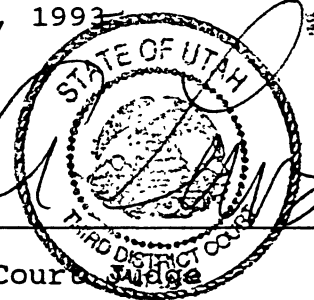
1. The plaintiff is awarded judgment against the defendant for special damages in the amount of \$18,328.19 ($\$3,000 + \$19,910.24 \times 80\%$).
2. The plaintiff is awarded judgment against the defendant for pre-judgment interest of past special damages in the amount of \$794.40 pursuant to Utah Code 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

Tab 4

**MEDICAL BILLS AND TREATMENT
SUMMARY FOR
MARVIN DALTON**

<u>PROVIDER</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>TOTAL</u>
HOLY CROSS HOSPITAL	10/15/90	Examination; x-rays; CT scans, stitches;	\$1,232.77
VALLEY RADIOLOGISTS	10/15/90	X-rays; CT scans	\$ 328.47
DR. RICHARD HODNETT	12/05/90	Extended consultation, examination & x-rays	\$ 115.00
DR. WILLIAM BENTLEY	05/16/91	Consultation and examination	\$ 192.00
DR. KARL GROSS	05/20/91	EMG study	\$ 540.00
DR. MARC SCHWARTZ	06/25/91	Consultation, examination and x-rays	\$ 95.00
DR. MICHAEL COSBY	05/12/93	TMJ consultation and report	\$ 265.00
DR. L. VAUN MIKESELL	02/23/93	TMJ exam and x-ray	\$ 135.00
		MEDICAL EXPENSES:	\$2,903.24