1986

James Lee Sanders v. Kristin S. Ahlstrom : Petition for Rehearing

Utah Court of Appeals

Robert H. Burton; Strong & Hanni; attorney for respondent.
Samuel King; attorney for appellant.

DOCKET NO. 860088-CA ~~IN THE~~ UTAH COURT OF APPEALS

JAMES LEE SANDERS, EUGENE P. SANDERS, ELISE SANDERS and JAMES P. and ELISE SANDERS as guardians ad litem for EUGENE P. SANDERS, JR., CHELISE SANDERS and JERRY HERMANSON, minors,	)	Case No. 860088-CA
Plaintiffs and Appellant,	)	
vs.	)	
KRISTIN S. AHLSTROM,	)	
Defendant and Respondent.	)	

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE PARTIES

Appellant and respondent are the only parties. Previously, appellant's adult son, the son's wife, and their three children had been plaintiff, but their cases had been settled and disposed of prior to trial and the jury herein was advised only of appellant and respondent as parties.

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ISSUES

The case presents a single issue. Is the jury verdict supported by the evidence? If not, it should be reversed.

BASIS FOR MOTION

This Petition for Rehearing is filed within 14 days of the date of decision of the Court of Appeals and is presented in good faith and not for delay, pursuant to Rule 35, Court of Appeals.

This Petition is based on appellant's belief that the Court of Appeals has overlooked the factual point of the appeal.

CITATIONS

For ease of reference, where possible, citations in this Petition are to the Briefs on appeal and this court's opinion. The parties are referred to as at the trial, and this court's opinion, as plaintiff and defendant.

STATEMENT OF POINT

The Court's Opinion deals primarily with whether plaintiff, Lee Sander's condition of fibrositis was caused by his collision with respondent.

The smaller issue is lost in the larger.

Plaintiff's cervical strain caused real but transient damage. This was overshadowed by the resulting Fibrositis which caused permanent disability and major damages.

It is regretted defendant chose to call two doctors, Drs. Barbuto and Spencer, who were not conversant with fibrositis (Opinion, page 3, paragraph 3; page 4, paragraph 1; App. Brief, pp. 14-23, 29, 33-34), missed its diagnosis and so, not finding a physical reason for plaintiff's disability, ascribed his complaints to "psychogenic pain," "stress physiology" and a desire for "secondary gain" at defendant's expense (Opinion page

3, footnotes), i.e., a malingerer trying to turn a minor accident into a huge windfall.

The reason defendant chose not to examine plaintiff by doctors who were competent concerning fibrositis was undoubtedly that they would concur with Dr. Goka, who specializes in that field (App. Brief, p. 9) that from an original cervical strain evolved as a sequelae the condition of fibrositis that was disabling due to intense pain (App. Brief, pp. 8,9). Such testimony confirmed would have led to an appropriate award.

The court's opinion on facts deals almost entirely with the heated trial debate as to fibrositis while paying scant attention to the original strain. The jury undoubtedly did the same.

If the jury had awarded the plaintiff $10,000, the verdict would not be appealable. It would then have compensated him for the strain, but not for the fibrositis. Within the framework of this case that would have been within its province.

Fortunately, because the jury awarded no damages at all, finding defendant caused plaintiff no injury at all, the door is open for this court to correct a disturbing trial result. It is disturbing because it leaves a working man, disabled by defendant's fault, with no remedy, based on testimony which the court's opinion indicates is not pleasing but is technically adequate to support the juries verdict.

Plaintiff was concerned that this court might focus on fibrositis because he believed that was what the jury had done. His concern was increased when defendant filed her Brief which

very effectively changed the focus of the appeal from the basic fact of plaintiff's original injury, the strain, to the matter of its extent, the fibrositis.

It is perfectly proper tactics for a party to make his argument on his strongest point. However, as that was a point different from the point of plaintiff's appeal, plaintiff filed a Reply Brief specifically setting forth that the issue was the original injury, not its extent and detailing the pertinent facts with reference to how defendant's brief conceded them. Appellant's Reply Brief is annexed for ease of reference, as Annex A.

Let us leave the fibrositis aside and look solely at the cervical strain as an injury caused by defendant. If we do so, we find no conflict in the evidence.

The Opinion of the Court does state, at page 5, paragraph 3:

> "On the evidence presented, the jury could reasonably have found that plaintiff did not carry his burden of proof <u>as to either the original cervical sprain</u> or the allegedly resulting fibrositis." [Emphasis added. Opinion, page 5, paragraph 2]

It is respectfully submitted that this factual statement of this court on review relating to the basic injury, the cervical strain, is in error.

In regard to the Court's determination that plaintiff "did not carry his burden of proof as to either the original cervical strain ..." the court cites Dr. Barbuto (Opinion, page 3, paragraph 3), as saying that he found no sign of the original injury when he examined plaintiff, and the testimony of Dr.

Spencer, (Opinion, page 4, paragraph 2) that he also found no sign of original injury when he examined plaintiff. (App. Brief, page 15-17)

This is where this court's opinion errs on the facts as the inference is left unexamined in its opinion that such testimony indicates plaintiff didn't receive a cervical strain from defendant. (Please see discussion at pages 4-5 of the Reply Brief.)

The inference is unsupported because neither Dr. Barbuto nor Dr. Spencer was asked if defendant injured plaintiff. (App. Brief, page 15; Resp. Brief, pp. 4-5) That question could have been asked of them, but was not.

When a party has the opportunity to elicit evidence on a material point and chooses not to, the real inference is that that point is yielded. Cram v. Reynolds, 55 Utah 384, 186 P. 100; Morton v. Hood, 105 U 484, 143 P.2d 434.

The testimony of the three doctors who testified, Dr. Goka for plaintiff, (App. Brief, p. 7) and Drs. Spencer and Barbuto for defendant, all agreed that a cervical strain would heal within a three month period. (App. Brief, p. 15)

Dr. Barbuto examined plaintiff six months after the accident. Dr. Spencer examined plaintiff 18 months after the accident. (App. Brief, p. 15)

The testimony of Drs. Barbuto and Spencer was only that they found no evidence of an existing cervical strain when they examined plaintiff.

Their findings that plaintiff did not then exhibit signs of a cervical strain had nothing to do with whether he suffered the strain at time of the accident, as these same doctors both testified it would have healed before they saw him. (App. Brief, p. 15)

Thus, there is no medical testimony that plaintiff did not receive the original cervical strain.

In fact, the only evidence adduced by defendant on the point of plaintiff's original injury came in two forms, both favoring plaintiff.

First, defendant testified she left her car, went to plaintiff's car and asked him how he was doing, immediately after the accident occurred, and that plaintiff told her that he thought he had just received a whiplash. This was his immediate complaint of pain. (Opinion, page 1, paragraph 3)

The other evidence introduced by defendant was that of Mr. Checka, a rehabilitation specialist employed by defendant. Mr. Checka interviewed plaintiff, Dr. Goka, plaintiff's employer, and concluded that at that time, plaintiff was progressing to the point where he might soon begin to work a 20 hour week and in a few months, as he convalesced from the injury, return to full-time work. (Opinion, page 3, paragraph 1)

This evidence from Mr. Checka, by defendant concedes the fact of the injury as it deals with its fact and with plaintiff's convalescence from it.

As there is no medical evidence defendant did not injure

plaintiff, also there is no non-medical evidence of that, but to the contrary as shown above defendant's only evidence on point confirms the injury.

The troubling consideration in this court's affirming the jury's finding of no injury at all is that at trial defendant did not even contest that injury.

In defendant's entire Reply Brief, there is no statement of fact or quotation from the transcript at trial that plaintiff was not originally injured as he claimed. (Reply Brief, p. 4)

The closest defendant came was on appeal. In her Reply Brief she stated that the jury "might infer" from the testimony of Dr. Barbuto that plaintiff had not been injured at all. (Resp. Brief, p. 4)

If the fact of initial injury had been contested at trial, there would have been a direct question defendant put to the doctors. "Dr. Barbuto, based on your examination of plaintiff, do you have an opinion as to whether he was injured in the accident?"

Granted plaintiff had the duty to carry his own burden of evidence. Plaintiff had done so. If defendant then wanted to contest the fact, defendant's obligation was to produce rebuttal evidence. Defendant chose not to. This is argument, but the argument has weight.

An inference does not stand as a basis for a jury verdict when there is substantial direct testimony to the contrary on the point. Nelson v. Trijillo, Utah, 657 P.2d 730. (Resp. Brief, p.4)

What was plaintiff's positive evidence? It included the following:

1. The collision was sufficiently severe to bend the frame of plaintiff's car into its rear tires so that it could not be driven but had to be towed from the accident scene. (App. Brief, p. 5)

2. The case title and file show the five other occupants of plaintiff's car, his son Eugene, Eugene's wife Elise, and their three little children were all injured by the collision. They were less injured and all settled before trial, so that James Lee Sanders was the only plaintiff at trial. (App. Brief, p. 1) When five younger people, with bodies that are supposed to be more flexible, are hurt by the collision, it is probable that the father-grandfather would be hurt too.

3. Plaintiff complained of pain immediately to defendant. (App. Brief, p. 13)

4. Plaintiff had had two previous rear-end collisions. He volunteered these in opening statement and in his direct testimony. (App. Brief, p. 12)

Both of those were liability cases on the part of the other driver and, by coincidence, all three, the first two and defendant's accidents were covered by the same insurer. (Reply Brief, p. 2) In both of the first two accidents, plaintiff submitted a claim for and received payment of damage to his vehicle. In neither did he submit a claim for personal injury or medical treatment. (App. Brief, p. 12) The first accident

occurred in 1981, over a year before the subject accident (not 1982 as indicated in the Court's Opinion, page 1, paragraph 3. App. Brief, p. 12). The second accident occurred a few weeks before the collision with defendant, but was minor. Plaintiff complained of a stiff neck for a few days but it passed, and he received no medical attention. This accident caused him no time loss. (App. Brief, p. 12)

5. At the time the accident occurred, plaintiff was not under medical treatment. (App. Brief, p. 13)

6. Immediately after the accident, plaintiff sought medical treatment for his cervical strain. (App. Brief, pp. 6-7)

7. At the time of the accident, plaintiff was working full time. After the accident, plaintiff never returned to work fulltime. He was disabled by the time of trial. (App. Brief, pp. 6-7)

8. The accident occurred on a Saturday. On the following Monday, plaintiff saw a chiropractor, Dr. Kidman. Dr. Kidman in two weeks (App. Brief, p. 6) referred plaintiff to an internist, Dr. Gordon Evans, who found defendant had caused plaintiff a "whip lash," a cervical strain (App. Brief, p. 11). Dr. Evans referred plaintiff on to a neurologist, Dr. Rich, who confirmed the cervical strain and its cause by defendant (App. Brief, p. 11). As plaintiff continued to have trouble after the whiplash should have healed, seven months after the accident Dr. Evans referred plaintiff to Dr. Goka (App. Brief, p. 7), an M.D. who specializes in rehabilitation, that specialty including diagnosis

and treatment of fibrositis. Thereafter, and at trial, Dr. Goka was plaintiff's attending physician. Dr. Goka reconfirmed the cervical strain as caused by defendant. (App. Brief, pp. 7, 11)

None of this medical evidence as to plaintiff sustaining a cervical strain caused by defendant was rebutted.

Plaintiff's wife testified in detail, as did plaintiff, of his prior good health, the instant pain caused him by the collision, that while he attempted to stay with the family outing he went to bed in the afternoon, spent most of Sunday inactive, and saw the chiropractor the first thing Monday. (App. Brief, p. 4) His ability to work was impaired from the start. He had a period of improvement when the strain was healing and the fibrositis just beginning, and then his descent into disability as the fibrositis progressed (App. Brief, pp. 6-10). While plaintiff was impeached on many points--his income, his taxes, etc.--there was no impeachment on the above sequence of events from the accident onward. Had there been, such would have been in defendant's brief on appeal.

ARGUMENT

In its review of the sufficiency of plaintiff's evidence, the Court of Appeals makes note of the fact that plaintiff called only Dr. Goka as his medical witness and not Dr. Kidman, Dr. Evans, nor Dr. Rich. However, without objection Dr. Goka read into the record the findings of Dr. Evans and Dr. Rich that plaintiff suffered a cervical strain caused by defendant. (App. Brief, p. 11) This was evidence of their findings, not just

Dr. Goka's.

At a trial involving medical issues, if each preceding doctor, laboratory technician, nurse, and other expert was called, trials would be unreasonably long and expensive. The most logical, and customary, doctor to call is the then attending physician as he is best qualified to testify in necessary detail as to present condition and prognosis. He bases the patient's history on the reports of the doctors who preceded him. On appeal, it is late for defendant to now say the prior doctors should have been called.

Accordingly, Rule 703, Utah Rules of Evidence, adopts verbatim the Federal Rule to allow an expert to base his testimony on the opinions of others. In his testimony, Dr. Goka read from the medical records of Dr. Evans and Dr. Rich, that plaintiff had a cervical strain caused by defendant. There was no objection to this procedure by defendant.

Utah cases approve this procedure including Schurtleff v. Jay Tuft & Company, (1980) 622 P.2d 1168, State v. Clayton, (1982) 646 P.2d 723, Barson v. Squibb & Sons, Inc., (1984) 682 P.2d 832. See State v. Wade, 251 SE 2d 407 (NC), as specifically allowing a medical doctor to base his testimony not only on his own findings, but on statements given him by the patient and findings of other, prior, doctors.

Rule 703 provides:

> "BASES OF OPINION, TESTIMONY BY EXPERTS: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to

> him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, facts or data need not be admissible in evidence."

Similarly, had there been such rebuttal, plaintiff could have called the other plaintiffs in the case and Dr. Evans and Dr. Rich.

The question is whether plaintiff's evidence on the cervical strain is adequate to justify reversal of the jury's finding that defendant did not injure plaintiff.

To tie this Petition back to plaintiff's brief on appeal, plaintiff restates his argument there at page 24:

> "1. A verdict must be supported by evidence that is (a) substantial and (b) competent. Christensen v. Shear, Utah Supreme Court, No. 19679; filed 8-10-84; Watters v. Querry, Utah, 626 P.2d 455 (1981); E. A. Strout Western Realty Agency, Inc. v. W. C. Foy & Sons, Inc., Utah, 665 P.2d 1320 (1983)."
>
> "2. If it seems clear the jury has misunderstood or misapplied the evidence, its verdict should be set aside. Holmes v. Nelson, 7 Utah 2d 435, 326 P.2d 722 (1958) (concurring opinion)."
>
> "3. A verdict cannot be based on speculative evidence. Nelson v. Trujillo, Utah, 657 P.2d 730 (1982)."
>
> "Application of these three criteria to the evidence shows what caused the jury to go amiss."

Criteria 1 - Was plaintiff's evidence substantial and competent?

Each of the nine factors listed in the Statement of Facts herein meets both criteria. Cumulatively, and unrebutted, they are more than adequate.

This case is the reverse image of Christensen v. Shear,

supra. There, plaintiff concealed previous accidents causing major injuries. Here, defendant had full access to plaintiff's prior accidents (App. Brief, p. 13) and produced no evidence of medical expense or time loss. Only a sore neck for a few days.

Should plaintiff's neck have been rendered unusually susceptible to injury by the prior accidents is of no moment as a matter of law, because a party who aggravates a pre-existing condition is responsible for the aggravation, and as plaintiff had no time loss nor medical expense until defendant hit him, all of his special damages relate to that -- her hitting him. Biswell v. Duncan, 64 Utah A.W.Rep. 36, 40.

Criteria 2 - Did the jury misunderstand the evidence?

The purpose of plaintiff's going into detail in his original brief on the testimony about fibrositis (Brief pp. 7-11, 14-23, 26-38; Reply Brief, pp. 3-6) was to explain two factors adequate to cause the jury to misunderstand.

First, as this court may have been misled, the jury may have been by the phrasing of the questions put to Drs. Barbuto and Spencer that inferred plaintiff had no original injury, when on close reading they never so testified. (Brief, pp. 29-33; Reply Brief, p. 5)

Second, if the jury felt plaintiff was overreaching, it could have decided to punish him by awarding him nothing. (Brief, p. 33; Reply Brief, pp. 5-6)

As plaintiff stated in his brief at pages 33-34:

> "It was only on cross-examination that plaintiff found first as to Dr. Barbuto and then as to Dr. Spencer that

they weren't qualified to diagnose fibrositis. By then their testimony on secondary gain, compensated accident setting (R 671, L14-R 672, L10), and such, was in. The bell cannot be unrung once rung. Their testimony also was admissible having some probative value as to the degree of plaintiff's physical impairment. Evidence admissible as competent on one point, is not barred because not competent on another point. State v. Cooper, 114 U 531, 201 P2d 764. 29 AmJur Evidence, Sec. 262, page 310."

"Accordingly, the jurors heard the doctors testify that plaintiff was not hurt, (R 763, L6-10), that the only doctor he needed was a psychiatrist, (R 765, L2-R 766, L2), and that he was probably motivated by an urge for secondary gain, (R 676, L22-R 688, L19), before they ever heard the cross-examination showing that the doctors lacked foundation."

"The cross-examination may well have come too late. Many of us hear enough on a point to make up our minds and then we go to sleep, or our minds otherwise close. Republicans accuse democrats of this and vice versa."

Criteria 3 - A jury's verdict cannot be based on speculative evidence.

On the facts submitted, isn't it fair to say that plaintiff's evidence was real enough? It was defendant's evidence--if plaintiff did not show the strain six and eighteen months later, maybe he did not have it--that was speculative.

SUMMARY

Plaintiff prays this case be remanded for new trial on the issue of damages and that he recover his costs.

Respectfully submitted,

Samuel King

SAMUEL KING
Attorney for Appellant

NOTICE OF MAILING

I certify that I mailed 4 copies of the foregoing to Robert H. Burton, Attorney for Defendant/Respondent, 6th Floor Boston Bldg., Salt Lake City, UT 84111, U. S. mail, postage prepaid, February 19, 1988.

Samuel King

SAMUEL KING

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES LEE SANDERS, Plaintiff and Appellant,	)	
vs.	)	Civil No. 20375
KRISTIN A. AHLSTROM, Defendant and Respondent.	)	

APPELLANT'S REPLY BRIEF

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ARGUMENT

This Reply Brief is filed because Respondent's Brief on Appeal is a powerful and compelling document. Its arguments were presented to the jury and could well have led to the jury's finding that Appellant, plaintiff, Mr. Sanders, suffered no injury at all at the hands of respondent. The problem is that these arguments could well, as appellant insists, have misled the jury.

This appeal is on a single point -- the jury erred when it said respondent did not injure appellant.

Appellant's point is that respondent's arguments go only to the amount of damages, not to their basic existence.

As stated in Appellant's Brief, the evidence was uncontradicted that appellant had been receiving no medical attention for injuries, and lost no time from work before respondent struck his car. This is not rebutted in Respondent's Brief to any degree.

Appellant's evidence was similarly uncontradicted that immediately on the happening of that accident, he suffered pain, and on the Monday following the accident (which occurred on a Saturday), started an uninterrupted course of medical treatment to deal with that injury. This also is not rebutted in Respondent's Brief.

Although respondent was fully advised as to the facts of the appellant's two prior accidents, not a word of testimony was ever introduced that appellant had in fact had any medical expense or time loss from those or any other prior injury or accident.

A piece of evidence of almost controlling weight is that the first two auto accidents plaintiff was involved in were clear liability cases -- plaintiff was rearended both times. In both he filed claim for, and received, payment for the damage to his car. In both he filed no claim for injury nor medical expense.

Plaintiff did not know defendant would be the third person to rearend him. He is an insurance agent. If either accident had caused him personal injury, he would have filed claim for personal damages as well as property damages.

This evidence was before the jury (R 433, L9-14; 434, L15-R436, L3). It was competant evidence that plaintiff received no injury of substance from either prior accident. There was no rebuttal.

These are the key points on the basic issue -- did respondent injure appellant? That is, plaintiff is injured, yet there is no evidence of any prior injury causing work loss or medical expense.

The fact that appellant was injured by respondent was verified by the testimony of Dr. Goka who incorporated into his testimony the medical records of Dr. Evans and Dr. Rich, who saw appellant promptly after his accident. Respondent argues this evidence is insufficient, but no objection was made by respondent at trial to this form of using one doctor to cover the findings of several. It happens frequently in cases such as this, where complications following an injury require referral to a specialist who then becomes the attending physician, and who then becomes the live medical witness used in court, as here Dr. Evans referred appellant first to Dr. Rich, and then to Dr. Goka who testified.

Whether appellant did or did not have fibrositis caused by the accident is not an issue on original injury. It is an issue on aggravation, the amount of damages only. The initial injury respondent caused appellant was described by appellant's doctors as a moderately severe cervical strain. (R.526, L. 22-R.527, L.14; R.582, L.9-R.583, L.3) This is not by itself a permanently disabling condition. The problem is, according to appellant's experts, not only Dr. Goka but also the prestigious St. Luke's Hospital in Phoenix, Arizona, fibrositis can, and in appellant's case did, arise from a cervical strain. (R.525, L.18-R. 526, L.21; R.547, L.21-R.548, L.12)

Plaintiff's original injury by defendant as diagnosed by Drs. Evans, Rich and Goka was never directly impeached. Defendant did not present any records or doctors showing any error in their original diagnosis, or medical treatment relating to other injuries. No such evidence existed as plaintiff had no other injury causing medical expense or work loss.but only a temporarily sore neck about which ne did not see a doctor caused by the second rearender. (R. 434, L.15-R. 436, L.3).

In Respondent's Brief, respondent implicitly admits this.

At P. 36 of that brief, the brief states:

> "From Dr. Barbuto's testimony alone, the jury could reasonably infer Sanders was not injured in the accident of September 25, 1982." [Emphasis added.]

As stated under the Utah cases in Appellant's Brief, (pages 23-24, 27-29, 36-38), there has to be substantial evidence, rather than mere inference, to overcome solid substantial evidence on a point.

In fact, at trial, the reality of appellant's having been injured by respondent, so that the real issues were damages and liability, is evidenced by the form respondent's counsel used in examining his own doctors, Drs. Barbuto and Spencer. Neither Dr. Barbuto nor Dr. Spencer were ever asked by respondent's counsel if appellant had been injured by respondent at all. Rather, the questions put to them

ANNEX A

assumed the fact of the injury and asked about convalescence.

When Dr. Barbuto was asked about appellant's original injury, he was asked only if it had healed at the time Dr. Barbuto examined him.

> "Q. ... Did you form an opinion as to whether that had healed? (R. 672, L.15-15)

Similarly, when Dr. Spencer was asked about appellant's condition at the time when Dr. Spencer examined him, the form of the question was this:

> "Q. (By Mr. Burton) Now, assuming that Mr. Sanders felt the symptoms he described to you, do you have an opinion whether or not the accident was the cause of the symptoms?" (R.756, L.7-11)

This question did not ask whether respondent had injured plaintiff. It asked if the symptoms that appellant described to Dr. Spencer 18 months after the accident were caused by the accident.

Thus the lengthy and harmful testimony of Drs. Barbuto and Spencer didn't rebut at all plaintiff's medical proof of the original injury. They simply were never asked about that. The original injury was conceded by not being challenged. Their testimony went only to the persistence of the original injury as being motivated by plaintiff's desire for economic

gain. This was unfair, as neither doctor was capable of diagnosing fibrositis (See Appellant's Brief, pages 16-23, 29-36), which, if properly diagnosed, explained plaintiff's pain and disability on an objective medical basis (Appellant's Brief, pages 7-11, 25-26), not a "psychogenic" basis as Drs. Barbuto and Spencer called it.

Nevertheless, what the jury heard from them was that plaintiff was a malingerer. If believed, and it apparently was, this could lead the jury to award plaintiff no damages, thereby punishing him for overreaching.

An injured plaintiff is not a criminal. Appellant was in his 50s when the subject accident occurred and had, of course, 50 years history behind him -- he had prior health problems, his first wife had died leaving him to raise five children, he had had a short second marriage which ended in divorce, he was married a third time at the time of the accident, and his insurance agency wasn't setting course records. Any person could be impeached on all the precise details of exactly what's in a tax return, accountings, the date of a wife's layoff from a job, etc. Respondent did this with great skill.

CONCLUSION

Appellant requests his original brief be reread. While there are clearly many points of factual dispute between the parties at trial and now in their briefs on appeal, the record is uncontradicted that the only evidence

before the jury was that appellant was injured by defendant by hitting him hard enough to bend the frame of his car into the rear wheels making his car undriveable (Appellant's Brief, pages 5-6), that he was up to then working full-time, had immediate medical expense thereafter, and that he had no prior medical expense nor time loss for injury. Thus, it is clear that the jury confused the amount of damages, or the medical testimony denegrating his convalescence, with the fact of injury. Its verdict stating that respondent caused plaintiff no injury is wrong.

DATED June 18, 1985.

Respectfully submitted,

SAMUEL KING
Attorney for Appellant

NOTICE OF MAILING

I certify that I mailed 4 copies of the foregoing to Robert H. Burton, Attorney for Defendant/Respondent, 6th Floor Boston Building, Salt Lake City, UT 84111, U. S. Mail, postage prepaid, June 18, 1985.

ANNE &A