



Court of Appeals of Oregon.
Leonard O. KOBERSTEIN, Appellant,
v.
SIERRA GLASS CO., an Oregon corporation and
Chris A. Burkhardt, Respondents.
No. 40-537; CA A22340.

Argued and Submitted Sept. 27, 1982.
Decided Nov. 9, 1983.

Plaintiff driver brought action to recover for injuries sustained in three-car collision. The Circuit Court, Washington County, Gregory E. Milnes, J., on special verdict that plaintiff was 45 percent negligent, second driver 55 percent negligent, and third driver not negligent, awarded plaintiff judgment in amount of \$1,375, and he appealed. The Court of Appeals, Warren, J., held that: (1) trial court's overruling of general, unspecified objection would not be overturned on appeal; (2) doctor was qualified to testify as expert as to dynamics of and possible injuries from rear-end collision; (3) trial court properly instructed jury on presumption of nonnegligence, but should not have added instruction specifically noting presumption of defendant's nonnegligence; and (4) trial court erred in reducing amount of special damages alleged in complaint by amount of personal injury protection benefits which plaintiff received from his insurer and in excluding evidence of special damages compensated by such benefits.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 **231(3)**

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings

Thereon

30k231 Necessity of Specific Objection

30k231(3) k. Objections to Evidence in General. **Most Cited Cases**

Where plaintiff did not apprise trial court of grounds for his objection to defendant's questioning of police officer, trial court's overruling of general objection would not be overturned on appeal.

[2] Evidence 157 **545**

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k545 k. Preliminary Evidence as to Competency. **Most Cited Cases**

Party offering expert's testimony must show that expert is qualified to give opinion on particular matter at hand.

[3] Evidence 157 **543.5**

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k543.5 k. Damages. **Most Cited Cases**

(Formerly 157k5431/2)

Doctor who testified that he had been practicing medicine for 33 years, that he specialized in diagnostic and internal medicine, and that, while serving as member of medical advisory committee to National Traffic Safety Council, he had reviewed many automobile accident cases and had assisted in special study of rear-end accidents was sufficiently qualified to give expert testimony as to dynamics of and possible injuries from rear-end collision.

[4] Automobiles 48A **242(1)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak242 Presumptions and Burden of Proof

[48Ak242\(1\)](#) k. In General. [Most Cited](#)

[Cases](#)

In action arising from automobile accident, there is presumption of defendant's nonnegligence, and such presumption has value of evidence.

[\[5\] Automobiles 48A !\[\]\(ae7c1f8b6bba2d14eb5ab74ad75e9714_img.jpg\)246\(60\)](#)

[48A](#) Automobiles

[48AV](#) Injuries from Operation, or Use of Highway

[48AV\(B\)](#) Actions

[48Ak246](#) Instructions

[48Ak246\(60\)](#) k. Presumptions and Burden of Proof. [Most Cited Cases](#)

In action arising from automobile accident, trial court should have given only instruction that all parties were presumed to have obeyed law and to have been free from negligence, and should not have added instruction specifically focusing in on presumption of defendant's nonnegligence.

[\[6\] Automobiles 48A !\[\]\(db2e8a085c1cd7c8aa935c4abda15cf6_img.jpg\)251.18](#)

[48A](#) Automobiles

[48AV](#) Injuries from Operation, or Use of Highway

[48AV\(D\)](#) Effect of No Fault Statutes

[48Ak251.18](#) k. Procedure Peculiar to No Fault Cases; Jurisdiction. [Most Cited Cases](#)

Nothing in personal injury protection statutes prohibited plaintiff from pleading and proving all of his special damages in civil action arising from automobile accident, even though he had received personal injury protection benefits from his insurer, and thus, trial court erred in reducing amount of special damages in complaint by amount of benefits received and in excluding evidence of special damages compensated by such benefits. [ORS 18.510\(2\), \(3\)\(b\), 743.800-743.835, 743.825.](#)

*410 **1191 Michael J. Morris, Portland, argued the cause for appellant. With him on the briefs was Grebe, Gross, Jensen & Peek, P.C., Portland.

Carrell F. Bradley, Hillsboro, argued the cause for respondent Sierra Glass Co. On the brief was Larry A. Brisbee, Hillsboro.

Ralph C. Barker, Portland, argued the cause for

respondent Chris A. Burkhardt. On the brief were Bradley J. Lenhart and Charles D. Harms, Portland.

Before BUTTLER, P.J., and WARREN and ROSSMAN, JJ.

*411 WARREN, Judge.

Plaintiff appeals from a judgment awarding him damages for injuries he received in a collision involving three cars driven by plaintiff, defendant Burkhardt and an employe of defendant Sierra Glass Co. Judgment for plaintiff in the amount of \$1,375 **1192 was entered after the jury returned a special verdict finding that Sierra Glass was 55 percent negligent, that plaintiff was 45 percent negligent, that Burkhardt was not negligent and that plaintiff had suffered \$2,500 in damages. We reverse and remand.

[\[1\]](#) Plaintiff raises essentially four assignments of error.

He first contends that the trial court erred in overruling his objection to the following testimony given on cross-examination by the police officer who investigated the collision:

“Q [DEFENDANT'S ATTORNEY]: In your discussions with Mr. Koberstein there at the scene of the accident, did he ever tell you that his car had become airborne and traveled some 75 feet through the air after it had been hit?

“A [POLICE OFFICER]: No, he did not.

“Q: That would have been a pretty remarkable thing to hear would it not?

“[PLAINTIFF'S ATTORNEY]: Objection.

“THE COURT: Overrule the objection.

“A: It would be.”

Plaintiff, in his deposition, had testified that, as a result of the impact, his car had been propelled through the air for a distance of 75 feet. Subsequent questions to the officer demonstrate that the purpose of the question was to show that, had such a statement been made, the officer would have noted that fact in his report.

Plaintiff's objection did not apprise the court of the grounds for the objection. “The prevailing rule is that an objection, general in terms, if overruled, cannot avail the objector on appeal.” [Smith v. Oregon Agricultural Truck, 272 Or. 156, 159-60, 535 P.2d 1371 \(1975\).](#)

Although there are exceptions to this rule, none applies

here. McCormick, Evidence 115-16, § 52 (2d ed 1972).

Plaintiff asserts that the trial court erred in allowing a medical doctor to testify about the dynamics of a rear-end *412 collision and whether it could have caused an injury to plaintiff's abdomen. At trial, plaintiff objected on the ground that the doctor was not competent to testify to those matters.

[2][3] The party offering an expert's testimony must show that he is qualified to give an opinion on the particular matter at hand.

“Whether an expert witness has been shown to be adequately qualified to express an opinion on a particular subject is ordinarily a matter lying within the discretion of the trial court, and, on appeal, his decision will be reversed only for an abuse of that discretion. * * *” [Myers v. Cessna Aircraft, 275 Or. 501, 519, 553 P.2d 355 \(1976\)](#).

We conclude that the trial court did not abuse its discretion. The doctor testified that he had been practicing medicine for 33 years and that he specializes in diagnosis and internal medicine. Further, while serving as a member of the medical advisory committee to the National Traffic Safety Council, he had reviewed many automobile accident cases and had assisted in a special study of rear-end accidents. There is substantial evidence that the doctor was sufficiently qualified to testify as to the dynamics of and possible injuries from a rear-end collision.

[4] Plaintiff contends that the trial court erred in an instruction to the jury. The court gave the following instruction:

“* * * You should understand that the Defendants are presumed to obey the law and exercise reasonable care in the operation of their vehicles and were not negligent. “The presumption is evidence in favor of the Defendants. Unless Plaintiff overcomes this presumption by a preponderance of the evidence, your verdict should be returned in favor of the Defendants and against the Plaintiffs [sic].”

Plaintiff argues that the instruction was an inaccurate statement of the law, because there is no such

presumption and, if there were, it should not be considered as evidence. Plaintiff is in error. There is a presumption of non-negligence, [McVay v. Byars, 171 Or. 449, 453, 138 P.2d 210 \(1943\)](#), **1193 [overruled on other grounds Cook v. Michael, 214 Or. 513, 330 P.2d 1026 \(1958\)](#), and it has the value of evidence. See [Wright v. SAIF, 289 Or. 323, 331, 613 P.2d 755 \(1980\)](#).^{FN1}

^{FN1} We express no opinion on whether OEC, which was not in effect at the time of trial, has an effect on this presumption.

*413 [5] Plaintiff also argues that the instruction was one-sided and prejudicial, because the trial court should have instructed the jury that plaintiff is also presumed to have obeyed the law. The instruction in the form given focused on defendant. To that extent, it was “one-sided.” On retrial, the court should give *only* the instruction, which the court also gave here, that all parties are presumed to obey the law and have been free from negligence.

[6] Lastly, plaintiff asserts that the trial court erred in granting defendants' motion *in limine* to reduce the amount of special damages alleged in the complaint by the amount of the personal injury protection (PIP) benefits that plaintiff received from his insurer and to exclude evidence of the special damages compensated by PIP benefits. At trial, it was undisputed that plaintiff had incurred approximately \$11,000 in medical expenses, that his insurer paid him \$5,000 in PIP benefits, that his insurer had made a demand for reimbursement for that payment from Sierra Glass' insurer under [ORS 743.825](#) and that Sierra Glass' insurer had not made a reimbursement payment at the time of trial. As a result of the trial court's ruling on the motion *in limine*, plaintiff had to plead and testify at trial that his medical expenses amounted only to approximately \$6,000.

The trial court's ruling was error. Nothing in the PIP statutes, [ORS 743.800](#) to [743.835](#), prohibits a plaintiff from pleading and proving all of his special damages in a civil action, even though he has received PIP benefits from his insurer. On the contrary, the provisions of

[ORS 18.510](#) clearly contemplate that a plaintiff may plead and prove all of his special damages, even if he has received PIP benefits and his insurer has received reimbursement from the liability insurer under [ORS 743.825](#).

Under [ORS 743.825](#),^{FN2} an insurer who pays PIP benefits to its insured can recover reimbursement from the liability *414 insurer of the amount of the PIP benefits paid, reduced in proportion to the amount of the insured's negligence. The insurers either decide between themselves the percentage of the insured's negligence or the percentage is determined through arbitration. [ORS 743.825\(3\)](#). If an insured who has received PIP benefits brings an action and secures a judgment for which an insurer who made a reimbursement payment is liable, the provisions of [ORS 18.510](#) apply. Under [ORS 18.510\(2\) and \(3\)\(b\)](#),^{FN3} the **1194 amount of the insured's judgment can be reduced by the lesser of (1) the amount of the PIP payments, reduced by the percentage of the insured's negligence found at trial, or (2) the amount of the reimbursement payment.

[FN2. ORS 743.825](#) provides:

“(1) Every authorized motor vehicle liability insurer whose insured is or would be held legally liable for damages for injuries sustained in a motor vehicle accident by a person for whom personal injury protection benefits have been furnished by another such insurer, or for whom benefits have been furnished by an authorized health insurer, shall reimburse such other insurer for the benefits it has so furnished if it has requested such reimbursement, * * *.

“(2) In calculating such reimbursement, the amount of benefits so furnished shall be diminished in proportion to the amount of negligence attributable to the person for whom benefits have been so furnished, * * *.

“(3) Disputes between insurers as to such issues of liability and the amount of reimbursement required by this section shall be decided by arbitration.”

[FN3. ORS 18.510\(2\) and \(3\)\(b\)](#) provides:

“If judgment is entered against a party who is insured under a policy of liability insurance against such judgment and in favor of a party who has received benefits that have been the basis for a reimbursement payment by such insurer under [ORS 743.825](#), the amount of the judgment shall be reduced by reason of such benefits in the manner provided in subsection (3) of this section.

“* * *

“[(3)](b) The amount of any benefits referred to in subsection (2) of this section, diminished in proportion to the amount of negligence attributable to the party in favor of whom the judgment was entered and diminished to an amount no greater than the reimbursement payment made by the insurer under [ORS 743.825](#), may be submitted by the insurer which has made the reimbursement payment, in the manner provided in [ORCP 68 C.\(4\)](#) for the submission of disbursements.”

The purpose of the prepayment provisions of [ORS 18.510\(2\) and \(3\)\(b\)](#) is to shield a liability insurer from having to pay both the plaintiff and the plaintiff's insurer for the same medical expenses. If a plaintiff were precluded from pleading and proving as part of his special damages the medical expenses for which he had received PIP benefits, the liability insurer would never have to pay both the plaintiff and his insurer for those expenses, and [ORS 18.510\(2\) and \(3\)\(b\)](#) would be unnecessary. Further, if a plaintiff were not allowed to prove the full amount of his medical expenses, he would be unable to respond accurately if asked at trial the amount of *415 those expenses. Here, plaintiff testified that his medical expenses totaled approximately \$6,000, even though both parties agreed that they totaled nearly \$11,000.

To uphold the trial court's ruling precluding plaintiff from pleading and proving as part of his special damages his medical expenses for which he received PIP payments, we would have to hold that the legislature intended [ORS 18.510\(2\) and \(3\)\(b\)](#) to be mere surplusage and intended to prohibit plaintiff from giving accurate testimony and to deprive the jury of a

complete account of the facts. We cannot attribute such an intent to the legislature.

Defendants argue that, if the trial court's ruling was error, it was harmless. They contend that, even if plaintiff could have proven an additional \$5,000 in medical expenses and the jury had awarded an additional \$5,000 in damages, any resulting increase in the judgment would have been decreased by the same amount under [ORS 18.510](#). The contention is unsupported by the record. The provisions of [ORS 18.510](#) would have applied only if Sierra Glass' insurer had made a reimbursement payment to plaintiff's insurer. It is undisputed that no reimbursement had been paid before trial, and nothing in the record shows that it was ever paid. Therefore, plaintiff's potential increased judgment could not have been reduced under [ORS 18.510](#).^{FN4} The error might have resulted in a reduced judgment for plaintiff and was therefore prejudicial.

[FN4](#). We do not decide whether the error would be harmless if there had been a reimbursement.

Reversed and remanded.

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65 Or.App. 409, 671 P.2d 1190

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