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Powers v. Temple,
S.C. 1967.

Supreme Court of South Carolina.
Sallie Turner POWERS, Appellant,

v.

Harry R. TEMPLE, Respondent.
No. 18690.

Aug. 9, 1967.

Action brought by passenger who sought to recover damages for personal injuries sustained while she was riding as a guest in an automobile which collided with the rear end of another vehicle. The Common Pleas Court, Richland County, C. Bruce Littlejohn, J., entered judgment for the driver and the passenger appealed. The Supreme Court, Bussey, J., held that fact that passenger had received payment from another tortfeasor for passenger's covenant not to sue should have been excluded from consideration of the jury unless there were fact questions concerning covenant for determination of the jury and credit for amount received should have been given by the court. The Court also held that the driver should not have been allowed to inject workmen's compensation and salary from the passenger's employer into the case for the sole purpose of attempting to reduce the amount of any recovery.

Judgment reversed and remanded.

Moss, C.J., dissented.

West Headnotes

[1] Damages 115 **63**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k63 k. Reparation by Wrongdoer.
Most Cited Cases

One tortfeasor is entitled to credit for amount paid by another tortfeasor for covenant not to sue.

[2] Damages 115 **208(7)**

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(7) k. Aggravation, Mitigation, and Reduction of Loss. **Most Cited Cases**

Fact that automobile passenger suing host driver had received payment from another tortfeasor for passenger's covenant not to sue should have been excluded from consideration of jury unless there were fact questions concerning covenant for determination of jury, and credit for amount received from the other tortfeasor should have been given by court.

[3] Pleading 302 **280**

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k273 Supplemental Pleading

302k280 k. Supplemental Answer. **Most Cited Cases**

Where injured passenger sought to avoid giving credit for amount paid by other tortfeasor and did not concede at trial that driver was entitled to credit for amount paid by the other for covenant not to sue, it was not improper to allow driver to amend answer setting up covenant not to sue as amended answer was actually supplemental pleading. Code 1962, § 10-610.

[4] Damages 115 **208(7)**

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(7) k. Aggravation, Mitigation, and Reduction of Loss. **Most Cited Cases**

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If passenger, injured when automobile in which she was riding collided with rear of another automobile, wanted matter of whether driver was entitled to credit for amount paid by driver of preceding automobile for passenger's covenant not to sue handled by court, rather than jury, she should have offered to so stipulate and disclosed to court all circumstances appertaining thereto.

[5] Workers' Compensation 413  **2221**

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)5 Actions and Proceedings

413k2218 Parties

413k2221 k. Action in Name of Employee, Dependents, or Personal Representative. **Most Cited Cases**

Primary purpose of statute authorizing workmen's compensation insurer to bring third party action in name of employee was to prevent third party from injecting workmen's compensation into action against third party, and amount of compensation involved for sole purpose of attempting to reduce amount of any recovery. Code 1962, §§ 72-124, 72-127.

[6] Workers' Compensation 413  **2237**

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)5 Actions and Proceedings

413k2236 Trial

413k2237 k. In General. **Most Cited Cases**

Workers' Compensation 413  **2242**

413 Workers' Compensation

413XX Effect of Act on Other Statutory or

Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)5 Actions and Proceedings

413k2242 k. Appeal and Error. **Most Cited Cases**

Where driver of automobile being sued for passenger's injuries brought matter of workmen's compensation to attention of jury, in fairness and to avoid prejudice to passenger, passenger should have been allowed to show that compensation carrier, rather than passenger, received proceeds of covenant not to sue from third party, however, such failure standing alone did not constitute reversible error. Code 1962, §§ 72-124, 72-127.

[7] Appeal and Error 30  **1048(6)**

30 Appeal and Error


30XVI Review

30XVI(J) Harmless Error

30XVI(J)9 Witnesses

30k1048 Rulings on Questions to Witnesses

30k1048(6) k. Cross-Examination and Re-Examination. **Most Cited Cases**

Witnesses 410  **275(6)**

410 Witnesses

410III Examination


410III(B) Cross-Examination

410k275 Cross-Examination of Party in General

410k275(2) Particular Subjects of Inquiry

410k275(6) k. Irrelevant, Collateral, or Immaterial Matters. **Most Cited Cases**

It was improper to allow driver of automobile to bring out on cross-examination that passenger's salary had been paid to her by her employer during her period of disability, and it could not be said with any reasonable certainty that erroneous admission of that evidence did not prejudice passenger's case, since jury found for driver on issue of liability.

[8] Evidence 157  **5(2)**


157 Evidence

157I Judicial Notice

157k5 Matters of Common Knowledge in General

157k5(2) k. Particular Facts. **Most Cited Cases**

It is matter of common knowledge that in closely contested cases, verdict of jury is not infrequently result of compromise of varying viewpoints.

[9] Witnesses 410  **394**

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k394 k. Rebuttal of Evidence of Inconsistent Statements. **Most Cited Cases**

Where passenger was cross-examined on written statement which she admittedly signed for driver's insurance adjuster, and cross-examination clearly tended to convey to jury impression that such statement was contradictory of testimony which passenger was then giving, passenger should have been allowed to prove full circumstances surrounding taking of statement, including identity of taker and his connection with case.

[10] Appeal and Error 30  **970(2)**


30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility of Evidence in General. **Most Cited Cases**

Evidence 157  **118**

157 Evidence

157IV Admissibility in General

157IV(B) Res Gestae; Excited Utterances

157k118 k. Nature of Doctrine in General; Determination of Question of Admissibility. **Most Cited Cases**

(Formerly 157k18)

Whether or not statements are admissible as part of res gestae is matter largely left to discretion of trial judge, and unless that discretion has been abused, or it is shown that he is clearly in error, his ruling will not be disturbed on appeal.

[11] Evidence 157  **118**


157 Evidence

157IV Admissibility in General

157IV(B) Res Gestae; Excited Utterances

157k118 k. Nature of Doctrine in General; Determination of Question of Admissibility. **Most Cited Cases**

Admission as part of res gestae of testimony of witness as to statements made to him by unidentified party some minutes after accident occurred was not abuse of discretion of trial judge.

[12] Automobiles 48A  **246(11)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak246 Instructions

48Ak246(2) Care Required and Negligence

48Ak246(11) k. Vehicles Following, Overtaking, or Passing. **Most Cited Cases**

Where automobile in which passenger was riding collided with the rear of preceding automobile and passenger sued host driver for damages, it was not improper for trial judge to charge jury as to any law applicable to or governing conduct of preceding driver.

[13] Automobiles 48A  **172(7)**

48A Automobiles


48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability

48Ak172 Following, Overtaking, and Passing

[48Ak172\(7\)](#) k. Care Required of Following Vehicle. [Most Cited Cases](#)

In absence of anything which would reasonably put driver of automobile on notice to contrary, driver was entitled to presume that any vehicles ahead of him would be operated in compliance with law and while that presumption did not relieve driver from duty to exercise due care, in determining whether he did exercise such care, his conduct had to be judged in light of such presumption.


[14] Trial 388  **261**

388 Trial

[388VII](#) Instructions to Jury

[388VII\(E\)](#) Requests or Prayers

[388k261](#) k. Erroneous Requests. [Most Cited Cases](#)

Trial 388  **279**

388 Trial

[388VII](#) Instructions to Jury

[388VII\(F\)](#) Objections and Exceptions

[388k276](#) Sufficiency and Scope of Objections or Exceptions to Instructions Given

[388k279](#) k. Statement of Grounds of Objection. [Most Cited Cases](#)

Charge which was incomplete statement of legal proposition should not have been given in such incomplete form, although it was not objected to on that ground.

[15] Automobiles 48A  **246(58)**

48A Automobiles

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

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


[48Ak246](#) Instructions

[48Ak246\(39\)](#) Applicability to Pleadings and Evidence

[48Ak246\(58\)](#) k. Contributory and Comparative Negligence; Apportionment. [Most Cited Cases](#)

Where record did not give rise to reasonable infer-

ence of recklessness or willfulness on part of passenger, driver was not entitled to charge on contributory recklessness.

[16] Automobiles 48A  **245(24)**

48A Automobiles

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

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

[48Ak245](#) Questions for Jury

[48Ak245\(2\)](#) Care Required and Negligence

[48Ak245\(24\)](#) k. Operator Injuring Occupant. [Most Cited Cases](#)

Where there is any evidence introduced touching or supporting allegations as to host driver's failure to keep proper lookout or have proper control, in cases controlled by guest statute, it is ordinarily question for jury whether such conduct constitutes reckless disregard of rights of passenger. Supreme Court Rules, rule 4, § 8.

***151 **760** James W. Alford, Whaley & McCutchen, Fulmer, Barnes, Berry & Austin, Columbia, for appellant.

***152** Turner, Padgett, Graham & Laney, Columbia, for respondent.

****761 *153** BUSSEY, Justice.

In this action plaintiff-appellant seeks to recover damages for serious personal injuries sustained by her on November***154** 29, 1961, while she was riding as a guest in an automobile owned and operated by the defendant, which collided with the rear end of a vehicle being driven by Mrs. Mazzie Nichols on U.S. 76 some twenty miles east of the City of Columbia. The appeal is from an order of the trial judge denying a motion for a new trial, following a verdict for the defendant.

The answer of the defendant pled a general denial, sole negligence and willfulness on the part of Mrs. Nichols, and contributory negligence and willfulness on the part of the plaintiff. Subsequent to the defendant's answer, plaintiff, in consideration of the

payment of \$6,500, executed a covenant not to sue in favor of Mrs. Nichols, and the defendant moved to amend his answer by alleging, inter alia, the execution of the aforesaid covenant, which motion was granted over the opposition of the plaintiff. In the course of the trial evidence was adduced as to the execution of the covenant and the amount thereof. The jury was instructed that in the event it found for the plaintiff, it should find the total amount of damages to which she was entitled and then deduct therefrom the amount of the covenant.

The exceptions of the appellant are fourteen in number, raising the issues asserted as grounds for a new trial. We shall first deal with those exceptions which impute error in connection with the aforesaid covenant. Plaintiff contends that the court should not have allowed the defendant to amend his answer and set up the covenant as a defense. Additionally, she contends that the covenant was a matter for the court alone and that such should not have been submitted to the jury. Plaintiff concedes that the defendant was entitled to have the proceeds of the covenant credited on any judgment against him, and the entire argument concerns the manner in which the court should have gone about according such credit to the defendant.

[1][2] While this question has not yet received the attention of this court, there is a rather complete annotation in 94 A.L.R.2d, commencing at page 348, *155 dealing with the subject. A review of this annotation and authorities therein cited shows that the rule is almost universally followed that one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue. There is considerable conflict, however, as to the proper manner of allowing such credit, that is, whether the credit should be allowed by the jury in assessing the injured party's damages, or by the court. We are convinced from a study of these authorities that the sounder and preferable method, at least where there are no fact questions concerning the covenant for the determination of the jury, is for evidence thereabout to be excluded from the consideration of the

jury, and for credit to be given by the court.

[3][4] It does not follow, however, that there was error on the part of the trial judge in the instant case. While plaintiff now concedes that the defendant was entitled to credit for the amount paid for the covenant, the record does not disclose that she did so concede on the trial or at the time that defendant sought to amend his answer. If plaintiff wanted the matter handled by the court, rather than the jury, she should have offered to so stipulate and disclosed to the court all circumstances appertaining thereto. Instead, plaintiff sought to avoid the credit being given. Under the circumstances, there was no error on the part of the trial judge in allowing the amendment and submitting the issue to the jury. As pointed out by the trial judge, although styled an amended answer, the portion thereof setting up the covenant not to sue was actually a supplemental pleading and its allowance was governed by Sec. 10-610 of the Code which provides,

****762** 'The plaintiff and defendant, respectively, may be allowed on motion to make a supplemental complaint, answer or reply alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made * * *.'

Plaintiff, as an employee of the American Red Cross, was entitled to Workmen's Compensation benefits. The order of *156 the trial judge reflects that on the back of the original complaint there appeared a statement, 'that the action was brought by and with the consent of The Travelers Insurance Company to the extent of its interest as the Workmen's Compensation insurer of the plaintiff's employer pursuant to Code Sec. 72-124.' The complete trial record is not before us, but apparently Workmen's Compensation was first brought to the attention of the jury when counsel for the defendant unsuccessfully sought to elicit evidence as to the amount of benefits drawn by the plaintiff. Thereafter, plaintiff sought to show that the proceeds of the covenant not to sue, in the amount of \$6,500, were paid to the carrier and that plaintiff, of course,

received no part thereof. This evidence was excluded on the basis of Code Sec. 72-127, which is applicable to a third party action such as this. Said section is as follows:

‘The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.’

The judge reasoned that to allow the excluded evidence would have shown that at least \$6,500 in compensation benefits was paid and, accordingly, such would have been in violation of the aforesaid section. While the language of the Code section is perfectly plain, this court has had no prior occasion to consider the intent and purpose thereof. The section, however, has been considered by the Fourth Circuit Court of Appeals, in the case of [Blue Ridge Rural Electric Cooperative v. Byrd](#), 264 F.2d 689 (1959). In that case it was held that in a third party action the district judge correctly withheld from the jury the fact that the plaintiff had received any benefits under the Workmen's Compensation Law of South Carolina. We quote the following pertinent language from the opinion,

‘We, too, think the record ought to show Bouligny to be a use-plaintiff, but we still think this interest is not now relevant to the jury issue. Therefore, the evidence should be *157 admitted before the trial judge only, without disclosure to the jury, unless controverted or unless some other basis for its admission develops in the trial, such as its pertinency to credibility of witnesses, or otherwise, as in [Sprinkle v. Davis](#), 4 Cir., 111 F.2d 925, 931, 128 A.L.R. 1101. In the last event, the amount of the compensation must be kept from the jury, irrelevance or limited relevance of the compensation award to a present recovery should be explained to them, and the purpose of the evidence strictly confined in argument as well as sharply circumscribed in the charge. Cf. 1952 Code, s 72-127.’

The Supreme Court of North Carolina has on more

than one occasion had opportunity to consider the purpose and intent of the section of its Workmen's Compensation Law which is quite similar to our Code Section 72-127. In [Lovette v. Floyd](#), 236 N.C. 663, 73 S.E.2d 886, it was held that the statute clearly contemplated that an action against a third party must be tried on its merits as an action in tort, and that any verdict of the jury adverse to the third party was to declare the full amount of damages suffered by the employee on account of his injury, notwithstanding any award or payment of compensation to him under the provision of the Workmen's Compensation Act. See also [Spivey v. Babcock & Wilcox Company](#), 264 N.C. 387, 141 S.E.2d 808.

****763** [5]Section 72-124 authorizes the carrier to bring a third party action in the name of the employee, and we think that the primary purpose and intent of Sec. 72-127 was to prevent a third party, such as the defendant here, from injecting Workmen's Compensation into a case, and the amount of compensation involved, for the sole purpose of attempting to reduce the amount of any recovery.

[6] We are in accord with the principles enunciated in the above quotation from the opinion in the Blue Ridge case. In apparent compliance with such, the statement relative to the compensation carrier was inserted on the back of the complaint for the purpose of showing to *158 the court that plaintiff was a use-plaintiff. Such fact could have well been made a matter of record otherwise, but had the defendant not injected the issue of Workmen's Compensation into the case, the trial judge could and should have deleted such statement before handing the complaint to the jury. The defendant, however, having brought the matter of Workmen's Compensation to the attention of the jury, we think that in fairness and to avoid any prejudice to the plaintiff, the trial judge should have allowed plaintiff to show that the compensation carrier, rather than plaintiff, received the proceeds of the covenant no to sue. We do not hold, however, that such failure on his part, standing alone, constituted reversible error.

[7] The defendant was allowed, over objection by the plaintiff, to bring out from her on cross-examination, that her salary in the amount of \$400 per month had been paid to her by her employer for a period of eleven months during her period of disability. Such, we think, was clearly error on the part of the trial judge. While admittedly there is some authority for this ruling of the trial judge, the great weight of authority is to the contrary. There is a comprehensive annotation of the subject in [7 A.L.R.3d 518](#), and we quote from Sec. 1(a) thereof as follows,

‘As a general rule, total or partial compensation for an injury which the injured party receives from a collateral source wholly independent of the wrongdoer does not operate to lessen the damages recoverable from the wrongdoer.’

The rationale of the majority view, usually referred to as the ‘collateral source rule’ is set forth in [22 Am.Jur.2d 286](#), Damages, Section 206, and also in [7 A.L.R.3d 522](#), Section 3(b), wherein it is explained that,

‘The reason generally advanced in support of the general rule is that the wrongdoer can have no concern with the transaction between the employer and employee and there is no equitable ground to grant the tortfeasor a ‘windfall’*[159](#) by allowing him a credit for payments made by the employer.’

While we apparently have had no prior occasion to consider or apply the collateral source rule with respect to wages or salary, we have, in effect, applied it in other situations. [Jeffords v. Florence County](#), [165 S.C. 15](#), [162 S.E. 574](#), [575](#), [81 A.L.R. 313](#); [Joiner v. Fort](#), [226 S.C. 249](#), [84 S.E.2d 719](#). In the fairly recent case of [Scott v. Southern Ry. Co.](#), [231 S.C. 28](#), [97 S.E.2d 73](#), this court held,

‘* * * there is no merit in the contention that the rental value of the car used was not a proper element of damages ages because it was furnished gratis by a party other than appellants.’

It is urged, however, that the foregoing error was not prejudicial since the jury found for the defendant on the issue of liability. No case in point from this jurisdiction is cited in support of such contention. In [5A C.J.S. Appeal and Error s 1736](#), p. 1046, the general rule is stated as follows,

‘Error in the admission of evidence as to the measure of damages is also harmless where the jury render a verdict or finding against plaintiff and for defendant**[764](#) on the main issue, unless such evidence prejudices the jury on such issue;’

Under this rule, the question becomes whether the evidence, erroneously admitted, prejudiced the jury on the issue of liability. At the time the evidence was admitted both the covenant not to sue and the existence of Workmen's Compensation had been brought to the attention of the jury. Thus, when the evidence was admitted, the jury knew that plaintiff was protected by Workmen's Compensation benefits and that, in addition, she had received \$6,500 for the covenant not to sue and wages from her employer in the amount of \$4,400, making a total of \$10,900 which plaintiff had received in addition to Workmen's Compensation*[160](#) benefits. As above mentioned, plaintiff was not allowed to show that the proceeds of the covenant went to the compensation carrier.

[8] While the entire record is not before us, it appears that the issue of liability was a closely contested one. It is a matter of common knowledge that in closely contested cases, the verdict of the jury is not infrequently the result of a compromise of varying viewpoints. Under the circumstances of this case, it is not at all unlikely that some, if not all, of the jurors agreed to the verdict for the defendant upon reached the conclusion that plaintiff had already been substantially compensated for her injuries. We cannot say with any reasonable certainty that the erroneous admission of this evidence did not, in fact, prejudice plaintiff's case. See: [Dillard v. Samuels](#), [25 S.C. 318](#). As was held in [Entzminger v. Seigler](#), [186 S.C. 194](#), [195 S.E. 244](#),

'In our opinion there is a reasonable probability that the jury was influenced by such extraneous matter to the prejudice of the plaintiff. Verdicts so gained should not be allowed to stand. The only remedy is a reversal of the judgment so that a fair trial can be had.'

Since a new trial must be had, we deal with the remaining exceptions only to the extent necessary. The plaintiff was cross-examined upon a written statement which she admittedly signed for a Mr. Moody, who was defendant's insurance adjuster, and the cross-examination clearly tended to convey to the jury the impression that such statement was contradictory of the testimony which she was then giving. On redirect examination, plaintiff sought to show Mr. Moody's connection with the case and the detailed circumstances surrounding the taking of the statement, including the fact that Mr. Moody was defendant's insurance adjuster. The plaintiff was allowed to show only that Mr. Moody was not representing her interests. Whether the statement, in fact, contained anything contradictory of plaintiff's testimony does not clearly appear, said statement not being in the record. It was offered by the defendant who contended *161 that it was definitely contradictory. Plaintiff objected to its admission, in the absence of being allowed to prove the identity of Mr. Moody, which objection was sustained.

Plaintiff concedes that evidence as to liability insurance is ordinarily not admissible, but urges that she should have been allowed to show what Mr. Moody's interest in the case was, and to offer any evidence of bias or prejudice on his part against her or in favor of the defendant. Reliance is had on an annotation in 4 A.L.R.2d 761, et seq., wherein it is said, at page 775, Sec. 5,

'Notwithstanding the general rule * * * the suggestion of the possession of insurance will not be avoided at the cost of suppressing evidence material to the establishment of a cause of action and the liability of a defendant sued for damages, or to show the bias or prejudice of a witness.' And, at page 782, Sec. 9,

'As a general rule, where a previously written statement is produced in court and used for the purpose of impeaching plaintiff or one of his witnesses, it is **765 proper for plaintiff's counsel to show that the person procuring such statement was a representative of defendant's insurance company.'

The reason for the foregoing general rule is stated in *Smith v. Pacific Truck Express*, 164 Or. 318, 100 P.2d 474, 479, as follows,

'* * * (the statement taker), though he may never appear in the court room, is nevertheless, in a sense, vouching for the accuracy and authenticity of the document. He is, as it were, a mute witness, and the jury have the right to be informed of his interest in the case when weighing the testimony of the witness who attacks his handiwork.'

[9] The rationale of this rule appeals to us, but we are not unmindful that its universal application might give rise to abuse. It should certainly never be applied, we think, except under circumstances, where the reason for the rule exists, warranting its application. The instant case, we think, warranted its application. The jury *162 was clearly given the impression that the statement substantially contradicted plaintiff's testimony on material points. We think that His Honor should have allowed plaintiff to prove the full circumstances surrounding the taking of the statement, including the identity of the taker and his connection with the case. Being allowed to show only that the taker was not acting in the interest of the plaintiff did not fully inform the jury of the adversary interest of defendant's mute witness, Mr. Moody.

[10][11] One exception of appellant alleges error in the admission of testimony of one Douglas as to statements made to him by an unidentified party some minutes after the accident. This evidence was admitted because the trial judge concluded it was part of the *res gestae*. We will not discuss this evidence in detail. Whether or not statements are admissible as part of the *res gestae* is a matter largely left to the discretion of the trial judge, and unless

that discretion has been abused, or it is shown that he was clearly in error, his ruling will not be disturbed on appeal. See [Marks v. I. M. Pearlstine & Sons](#), 203 S.C. 318, 26 S.E.2d 835, and cases therein cited. While the issue is a close one, we are not prepared to hold, in the light of the present record, that there was any abuse of discretion on the part of the trial judge in this particular. Neither his ruling nor the decision of this court, however, shall be binding upon the judge who next tries the case. The admissibility or inadmissibility of the evidence will be addressed to his sound discretion, in the light of applicable principles of law and the circumstances developed by the evidence on that trial.

Plaintiff's remaining exceptions impute error as to the charge of the trial judge and his refusal of certain requests to charge on the part of plaintiff. We limit our discussion of these exceptions to the disposition of those questions which may prove helpful on a new trial. Our failure to discuss any particular question should not be construed as evincing approval or disapproval of any facet of the charge not mentioned or discussed.

163** [12][13] Plaintiff asserts there was prejudicial error in charging the jury as to the conduct of the other automobile operator, 'when the issue for the jury to determine was the recklessness of the defendant.' Plaintiff does not contend that there was any improper statement of the law by the trial judge, but that he simply should not have charged any law applicable to or governing the conduct of the operator of the automobile with which the defendant collided. There is no merit in this contention. The answer raised the defense of sole negligence and recklessness of another person, namely, Nichols. There was evidence of acts and omissions on the part of Nichols. Moreover, in the absence of anything which would reasonably put the defendant on notice to the contrary, he was entitled to presume that any vehicle ahead of him would be operated in compliance *766** with law. While this presumption, of course, did not relieve the defendant from the duty to exercise due care, it is well settled

in this state that in determining whether he did exercise such care, his conduct has to be judged in the light of such presumption.

[14] In connection with the last stated proposition of law we should point out that defendant's request to charge No. 5, which was charged by the trial judge, is an incomplete statement of that legal proposition. The charge, we think, should not have been given in such incomplete form, although it was not objected to on that ground by plaintiff.

[15] Since the case will have to be retried, we point out that there is, we think, other error in His Honor's charge not, strictly speaking, properly reserved for review here. A matter of importance, we think, is his charge on contributory recklessness. Defendant's answer pled contributory 'negligence and/or willfulness.' Simple contributory negligence in this case, on the part of plaintiff would not be a bar to recovery by plaintiff since the liability of the defendant, if any, is predicated on the existence of either recklessness or willfulness. Such of the record as is ***164** before us does not contain any evidence giving rise to a reasonable inference of recklessness or willfulness on the part of plaintiff, and unless there was other evidence reasonably giving rise to such inference, the defendant was not entitled to a charge on contributory recklessness. The record does not show, however, that plaintiff moved to strike such defense on the part of the defendant at the conclusion of the evidence, and, moreover, the plaintiff did not except to the main charge of the judge dealing with contributory negligence or recklessness. She did except, without assigning any reason or ground, to defendant's request to charge No. 3, dealing with the duty of due care on the part of the plaintiff, which request was charged, out of context, near the end of His Honor's charge. Assuming that there was evidence warranting a charge on contributory recklessness or willfulness, the vice in His Honor's charge was that it could well have led the jury to the conclusion that simple contributory negligence should bar a recovery by plaintiff.

Plaintiff alleges error in the refusal of His Honor to charge plaintiff's requests Nos. 11, 16 and 17. We need not now decide whether the principles set forth in these requests were covered in the general charge of the trial judge. Suffice it to say that on a retrial of the case at least the substance of these requests should be charged, unless already covered in the general charge of the judge, or, perchance, made inapplicable by evidence adduced on a new trial.

[16] Finally, we point out that if the record before us clearly showed that plaintiff failed to prove a case of liability on the part of the defendant, we would be warranted in holding error on the part of the trial judge to be harmless and affirming the judgment, even though such issue was not raised as a sustaining ground or argued. Supreme Court Rule 4, Section 8. Such, however, is not the case. The complete trial transcript is not contained in the record, and properly so. The record before us contains evidence to the effect that the Nichols car, contrary to the *165 contention of the defendant, had lights on it at the time. We have repeatedly held, in cases controlled by the guest statute, that where there is any evidence introduced touching or supporting allegations as to defendant's failure to keep a proper lookout or have proper control, it is ordinarily a question for the jury whether such conduct constituted a reckless disregard of the rights of the passenger. *Shearer v. DeShon*, 240 S.C. 472, 126 S.E.2d 514; *Cummings v. Tweed*, 195 S.C. 173, 10 S.E.2d 322; *Spurlin v. Colprovia Products Co.*, 185 S.C. 449, 194 S.E. 332.

For the reasons hereinabove set forth, we conclude that there was error and a sufficient probability of prejudice to require**767 a new trial. Upon such new trial, both the matter of Workmen's Compensation and the covenant not to sue should be withheld from the jury in the absence of any factual issue arising thereabout for its determination.

Reversed and remanded.

LEWIS and BRAILSFORD, JJ., concur.

MOSS, C.J., dissents.

LITTLEJOHN, J., disqualified.

MOSS, Chief Justice (dissenting):

Finding myself not in accord with the opinion of Justice Bussey, I most respectfully dissent. In my view the appellant has failed to sustain her burden of showing that the errors complained of were prejudicial to her.

Sallie Turner Powers, the appellant herein, was a guest passenger in the automobile of Harry R. Temple, the respondent herein. The appellant instituted this action to recover damages for personal injuries alleged to have been proximately caused by the reckless, willful, wanton and grossly negligent acts of the respondent. The liability is governed by the guest statute, Section 46-801 of the Code. Under such statute a guest cannot recover against the owner and operator of an automobile for simple negligence but liability is restricted to those cases where the injury *166 has resulted from either intentional or reckless misconduct of the owner or operator of the motor vehicle. *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410.

It appears from the record that the appellant sustained personal injuries on November 29, 1961, while she was riding as a guest in an automobile owned and operated by the respondent which collided with the rear end of a vehicle being driven by Mrs. Mazzie Nichols on U.S. Highway No. 76, some twenty miles east of the City of Columbia. The answer of the respondent contained a general denial, sole negligence and willfulness on the part of Mrs. Nichols, and contributory willfulness on the part of the appellant.

This case came on for trial in the lower court before The Honorable C. Bruce Littlejohn, Presiding Judge, and a jury, and resulted in a verdict for the respondent. Thereafter, the appellant, on numerous grounds, made a motion for a new trial and from the order of the trial judge denying such motion, this appeal is prosecuted.

During the course of the trial testimony was admit-

ted showing that the appellant had entered into a covenant not to sue with Mrs. Mazzie Nichols and had received \$6,500.00 for the covenant. Testimony was allowed over the objection of the appellant that she had received her salary in the amount of \$400.00 per month from her employer for a period of eleven months, during her period of disability as a result of her injuries. The record also shows that the appellant was covered by workmen's compensation and it is inferable that she had received certain benefits under the act.

Justice Bussey has concluded that there was no error in allowing testimony as to the covenant not to sue and the amount received thereunder by the appellant. He also holds that the fact of workmen's compensation having been brought to the attention of the jury, that in fairness and to avoid any prejudice to the appellant, that the trial judge should have allowed the appellant to show that the compensation*167 carrier rather than the appellant received the proceeds of the covenant not to sue. He states, however, that such failure on the part of the trial judge, standing alone, did not constitute reversible error. He does hold that allowing the respondent, over the objection of the appellant, to show that her salary in the total amount of \$4,400.00 paid to her during her eleven months period of disability was clearly error on the part of the trial judge. He concludes that since the jury knew that the **768 appellant was protected by workmen's compensation benefits and in addition thereto she had received \$6,500.00 for the covenant not to sue and wages from her employer in the amount of \$4,400.00, making a total of \$10,900.00, received in addition to workmen's compensation benefits, there was a reasonable probability that the jury was influenced by such extraneous matter and agreed to a verdict for the respondent upon the ground that the appellant had already been substantially compensated for her injuries. He relies upon the authority of [Entzinger v. Seigler](#), 186 S.C. 194, 195 S.E. 244.

To justify a reversal because of improper admission

of evidence, the appellant must show not only error in the admission of such evidence but also that she was prejudiced or that the verdict of the jury was probably influenced thereby. [Gaskins v. Firemen's Ins. Co.](#), 206 S.C. 213, 33 S.E.2d 498. This Court should not order a new trial where, from an examination of the record, it has no doubt the verdict of any fair jury would have been the same, even if no error had been committed. In such a case the error should be regarded as harmless and not prejudicial. [Dennis v. Columbia Electric Street Railway](#), 93 S.C. 295, 76 S.E. 711. It is my opinion that the appellant could not have been prejudiced by the admission of the evidence heretofore referred to however erroneous it may have been. Considering the evidence in this case on the question of liability, the respondent was entitled to the direction of a verdict in his favor had proper and timely motion therefor been made.

The alleged error in the admission of testimony related solely to the measure or quantum of damages. It is my *168 opinion that the only logical conclusion from the evidence in the record is that the appellant has failed to show any legal liability on the part of the respondent to her and, hence, the question of damages becomes immaterial and the admission of any erroneous evidence thereabout could not affect this question.

I now refer to the testimony in the record which, in my opinion, fails to establish any reckless misconduct of the respondent in the operation of the motor vehicle in which the appellant was riding as a passenger. The record shows that at the place where the collision occurred the maximum speed limit was sixty miles per hour. There was no testimony that the respondent was exceeding this speed limit and the appellant admitted that he was driving in a normally safe manner and there was not a thing unusual about the way he was driving. As a matter of fact, the appellant testified that she and the respondent were on their way to Columbia for a meeting scheduled for 7:30 P.M. and it was approximately 6:30 P.M. when the collision occurred and

she said: 'We had plenty of time to get to Columbia cause there was a sign that said 22 miles to Columbia.' She further testified that she had not complained in any fashion about the way the respondent was driving. She admits that the lights were on the respondent's car at the time of the accident because it was dark, but whether such lights were on dim or bright she did not know. She further testified that she did not know whether the automobile with which the respondent collided had any lights on it or not, even though she saw it just before it was struck.

The highway patrolman, who investigated this collision, testified that at the scene of the accident he found the Chevrolet automobile driven by Mrs. Mazzie Nichols, and the Corvair automobile driven by the respondent, on the unpaved right shoulder of the road, both headed in the direction of Columbia and about 25 to 30 feet apart. This officer testified that he found skid marks leading up to the respondent's vehicle and estimated such to be about the length *169 of the Corvair automobile which he estimated to be 'maybe 14 feet'. This officer testified that Mrs. Nichols admitted to him that she was traveling at a speed of between 30 and 35 miles an hour. He testified that the minimum speed at the point was 40 miles an hour.

****769** The foregoing is all of the testimony in the record given in behalf of the appellant, bearing on the issue of the liability of the respondent. Such falls far short of showing any reckless misconduct on the part of the respondent.

The record shows that the collision with which we are concerned took place about one-fourth of a mile from the Coronet Motel. One Douglas, the manager of the motel, a witness for the respondent, testified that a man in a very excited state, who identified himself as a minister, came into his office and asked that an ambulance and the patrol be called. Douglas testified that this unidentified minister told him that he was coming towards Columbia and that he almost ran into the Nichols car, that he swerved and just missed it, and that he looked into his rear-

view mirror and saw the car that had been following him strike the car that he had almost hit himself. I am in agreement with Justice Bussey that the foregoing testimony was admissible as a part of the *Res gestae*.

The respondent testified that he and the appellant at the time of the collision were on their way to Columbia to attend a regional meeting of the Red Cross, and near the intersection of Highways 76 and 601, a distance of some 22 miles from Columbia, while he was traveling at a speed of less than 60 miles per hour, was in collision with the Nichols automobile. He testified that he did not see any lights on the Nichols car and that it just loomed up out of the darkness only a matter of feet in front of him. He said he had no warning of its presence. He immediately applied his brakes and swerved to miss the Nichols car but was unable to do so.

After reviewing all of the evidence in the record I conclude therefrom that the respondent was not guilty of *170 reckless misconduct in the operation of his automobile. Hence, there is no liability of the respondent to the appellant under the guest statute. Since I have concluded that there is no evidence of reckless misconduct on the part of the respondent, the appellant cannot recover in any event, and no other error is prejudicial.

I would affirm the order of the trial judge refusing a new trial in this case.

S.C. 1967.
Powers v. Temple
250 S.C. 149, 156 S.E.2d 759

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