Agenda
Advisory Committee on
Model Civil Jury Instructions

September 9, 2013
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
CV2018 and 2019, in view of Harris v. Shopko	Tab 2	Gary Johnson and Peter Summerill
CV324 Use of alternative treatment methods.	Tab 3	Ryan Springer
Insurance Litigation Continued from June 10, 2013	Tab 4	Rich Humpherys
New Insurance Litigation Instructions	Tab 5	Rich Humpherys and Gary Johnson

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

October 15, 2013 (Tuesday)
November 12, 2013 (Tuesday)
December 9, 2013

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 10, 2013
4:00 p.m.

Present: Dianne Abegglen, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

Excused: John L. Young (chair), Juli Blanch, John R. Lund, Peter W. Summerill, David E. West

Mr. Shea conducted the meeting in Mr. Young's absence. The committee continued its review of the Insurance Litigation instructions:

1. *CV2406, Exclusion from coverage.* The instruction was previously approved. Mr. Johnson added a committee note. Mr. Humpherys questioned whether citations to cases from other jurisdictions should be included. The committee decided that they were not necessary and deleted them. The comment was approved as modified.

Mr. Springer joined the meeting.

2. *CV2407, Proof of loss.* Messrs. Shea and Simmons questioned the necessity of the third paragraph. Messers. Humpherys, Ferguson, and Johnson explained why the second and third paragraphs were both necessary: an inadequate or untimely proof of loss can give rise to two defenses: (1) that the plaintiff breached the contract, meaning that there is no coverage, or (2) that the defendant did not breach the contract because the plaintiff failed to comply with a condition precedent, meaning that the defendant was excused from timely performing its obligations.

Dr. Di Paolo joined the meeting.

Mr. Simmons proposed adding to the end of the second paragraph the phrase "and that its further performance was therefore excused." Dr. Di Paulo thought the phrase "performance was excused" would be unclear to a lay juror. Mr. Shea suggested "it did not have to pay for the loss." Dr. Di Paolo suggested "it was not required to pay for the loss sooner." The committee revised the second and third paragraphs to read:

> [[Name of defendant] claims that [name of plaintiff] is not covered because [name of plaintiff] breached the terms of the insurance contract by not giving [adequate/timely] proof of loss.]

> [[Name of defendant] claims that it was not required to pay for the loss sooner because [name of plaintiff] did not submit [adequate/timely] proof of loss.]

Mr. Shea questioned whether paragraph 4 was necessary. Mr. Humpherys thought it was because attorneys may want to quote the policy language on proof of loss, but the policy requirements may be unenforceable under Utah's proof-of-loss statute and the cases construing it. At Mr. Shea's suggestion the first two sentences of subparagraph (1) were moved to the end of the first paragraph.

Mr. Ferguson questioned the use of "preclude" in subparagraph (2), and Mr. Shea thought that "the claim" was ambiguous, since it could refer to a claim for coverage or one of the claims in the case. Mr. Shea suggested revising subparagraph (2) to read: "If it was not reasonably possible to give proof of loss within the time required by the policy, there is still coverage for the claim unless [name of defendant] can prove that it was prejudiced by [name of plaintiff]'s failure to give proof of loss." Mr. Humpherys explained that prejudice is not an issue if it was not reasonably possible to give proof of loss in the time required by the policy. The committee decided to break subparagraph (2) into two parts:

> (2) If it was not reasonably possible to give the proof within the time required by the policy, the failure to give proof of loss within the required time is not a valid reason to deny the claim.
>
> (3) The failure to give [adequate/timely] proof of loss is not a valid reason to deny the claim unless [name of defendant] proves that it was prejudiced by [name of plaintiff]'s failure to give timely proof of loss.

Dr. Di Paolo suggested using "harmed" for "prejudiced," but Mr. Johnson explained that "prejudiced" was a term of art that would be explained in another instruction.

At Mr. Humpherys's suggestion, subparagraphs (2), (3), (4), and (5) were bracketed, since all may not apply in a given case.

Judge Stone joined the meeting.

Some committee members questioned whether the last paragraph was necessary. Mr. Simmons pointed out that it explains who has the burden of proof. At Mr. Ferguson's suggestion, the paragraph was revised to read:

> You must decide whether the proof of loss was [adequate/timely]. [Name of defendant] has the burden to prove that the proof of loss was not [adequate/timely].

At Mr. Simmons's suggestion, the paragraph was moved to the fourth paragraph of the instruction.

Dr. Di Paolo suggested breaking up the instruction into two instructions. Mr. Humpherys said his preference was to leave them as one because they would need to be given together.

Judge Stone suggested making the paragraph about the policy having to conform to Utah law a separate instruction. Mr. Humpherys thought that was a good idea, since the concept arises in other contexts as well. He, Mr. Johnson, and Mr. Ferguson will draft a proposed instruction that says that the terms of an insurance policy must conform to Utah law.

The committee broke CV2407 into two instructions–the first defining proof of loss and stating the parties' claims, and the second setting out the specific law that applies to proofs of loss. Mr. Shea asked where the committee note and references should go–with the first instruction or the second. Mr. Humpherys noted that the committee note needs to be revised. The only reference the first instruction needs is to *Zions First National Bank v. National American Title Insurance Co.*, 749 P.2d 651, 655-56 (Utah 1988). All three references should be included with the second instruction. The instruction was approved as modified.

3. *CV2410. Notice of loss.* Because the notice-of-loss instruction tracked the proof-of-loss instruction, the committee agreed to defer discussion of CV2410 until Mr. Shea has had an opportunity to revise CV2410 to conform with the revisions to CV2407. Dr. Di Paolo asked what the difference between a proof of loss and a notice of loss is. Mr. Humpherys explained that the notice of loss is notice to the insurer of the fact of a loss, and proof of loss is evidence of the amount claimed. Dr. Di Paolo suggested explaining the difference in the instructions and putting the two instructions next to each other. Mr. Shea noted that the organization of the instructions needs to be revised but can wait until a subset of the insurance instructions is complete.

4. *CV2408 [now renumbered 2409]. Unspecified time of performance.* The instruction was previously approved. The committee agreed to delete the links to the commercial contract instructions and approved the committee note to read, "This instruction applies only if the policy or the law does not provide when the performance at issue must be done." The committee approved the note as modified.

5. *CV2409 [now renumbered 2410]. Recovery of damages.* The instruction was previously approved. The committee added a citation to *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985), and changed "statute" to "law" in the committee note and approved the instruction as revised.

6. *CV2411. "Prejudice" defined.* Mr. Shea presented a new instruction he had recently received from Mr. Johnson defining "prejudice." Mr. Humpherys thought that the instruction needed more work and suggested deferring discussion of it until the next meeting. He noted that the definition of "prejudice" may depend on the context and the facts of the case, such as whether the policy is a liability policy or a life insurance policy, if the issue is lack of notice or failure to obtain approval to settle, etc. The committee also deferred discussion of the remaining instructions (CV2411, Coverage by estoppel, and CV2412, Insurable interest) until the next meeting.

7. *Next meeting:* The next meeting will be September 9, 2013, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:45 p.m.

Tab 2

Aggravation of symptomatic and dormant pre-existing conditions

(1) 2018. ~~Aggravation of symptomatic p~~Pre-existing conditions.

A person who has a [physical, emotional, or mental] condition before the time of [describe event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that was caused by [name of defendant]'s fault, even if the person's pre-existing condition made [him] more vulnerable to physical [or emotional] harm than the average person. This is true even if another person may not have suffered any harm from the event at all.

~~When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty to try to determine~~[Name of defendant] has the burden to prove what portion of the [specific harm] to [name of plaintiff] was caused by the pre-existing condition. ~~and what portion was caused by the [describe event].~~

If you are not able to make such an apportionment, then you must conclude that the entire [specific harm] to [name of plaintiff] was caused by [name of defendant]'s fault.

References

Robinson v. All-Star Delivery, 992 P.2d 969, 972 (Utah 1999).

Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 (Utah 1999).

Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966).

Harris v. ShopKo Stores, Inc., 2011 UT App 329.

Florez v. Schindler Elevator, 2010 UT App 254 (Absence of life expectancy evidence does not preclude award of future medical costs as damages.)

MUJI 1st Instruction

27.6.

Committee Notes

This instruction should only be used when the court determines that the defendant has made a showing that there is a nonarbitrary evidentiary basis for the jury to apportion damages.

This instruction is not intended to suggest that the verdict form include a line-item allocation of what part of the harm can be apportioned to the pre-existing condition, and what part to the defendant's fault. That question is answered by the jury's award of damages and should not be confused with allocation of comparative fault.

~~**(2) 2019. Aggravation of dormant pre-existing condition.**~~

~~If a pre-existing condition does not cause pain, but that condition plus the injury brings on pain by aggravating the preexisting condition, then it is the injury, not the pre-existing condition, that is a cause of the pain.~~

~~**References**~~

~~Harris v. ShopKo Stores, Inc., 2011 UT App 329.~~

~~Ortiz v. Geneva Rock Products, Inc., 939 P.2d 1213, (Utah App. 1997).~~

~~Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, (Utah App. 1992).~~

~~Biswell v. Duncan, 742 P.2d 80 (Utah App. 1987).~~

~~**MUJI 1st Instruction**~~

~~27.7.~~

~~**Committee Notes**~~

~~Unlike Instruction CV2018, Aggravation of symptomatic pre-existing conditions, this instruction is designed for asymptomatic conditions that are aggravated by an injury.~~

~~**Amended Dates:**~~

~~Amended January 10, 2012~~

This opinion is subject to revision before final publication in the Pacific Reporter

2013 UT 34

IN THE

SUPREME COURT OF THE STATE OF UTAH

WENDY HARRIS,
Respondent,

v.

SHOPKO STORES, INC.,
Petitioner.

No. 20110945
Filed June 14, 2013

On Certiorari from the Utah Court of Appeals

Fourth District, American Fork Dep't
The Honorable Christine Johnson
No. 070101906

Attorneys:

Michael E. Day, Nathan Whittaker, Murray, for respondent

Alain C. Balmanno, Ruth A. Shapiro, Salt Lake City, for petitioner

Brent Gordon, Idaho Falls, John P. Lowrance, South Jordan, amicus curiae

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CHIEF JUSTICE DURRANT, authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 Wendy Harris was injured when she sat on a display office chair at ShopKo Stores, Inc. (ShopKo), and the chair collapsed. She sued ShopKo for negligence. At the trial, evidence was introduced that she suffered from preexisting conditions that may have contributed to her injury. The trial court instructed the jury that, if it could, it should apportion damages between those attributable to ShopKo's negligence and those attributable to her preexisting conditions. The jury found ShopKo negligent but

awarded Ms. Harris substantially less than she requested in damages. She appealed.

¶2 The court of appeals reversed the jury's award and remanded for a new trial. It did so on the ground that the trial court had erred in giving the apportionment jury instruction. The court of appeals held that, because Ms. Harris's preexisting conditions were asymptomatic on the date of the accident, ShopKo was not entitled to a jury instruction permitting the jury to allocate some portion of the damages to Ms. Harris's preexisting conditions. We conclude that this approach is inconsistent with a core principle of tort law: defendants are liable only for those injuries proximately caused by their negligence. Under the court of appeals' approach, where a plaintiff is experiencing no symptoms on the date of an accident, a defendant is liable for the full extent of the plaintiff's injury, even though some portion of that injury may, in fact, have been caused by a preexisting condition. While we conclude the court of appeals erred in this regard, however, we nevertheless affirm that court's grant of a new trial. We do so because at trial ShopKo did not present evidence sufficient for the jury to apportion damages on a nonarbitrary basis.

BACKGROUND

¶3 On March 29, 2006, Ms. Harris went to ShopKo to buy an office chair. When she sat in one of the display chairs, the chair fell apart. Ms. Harris fell to the floor, landing on her wrist and tailbone. The next day, she went to the hospital after feeling "deep abdominal pain." She worried that "something had come loose" from a previous surgery. The pain in Ms. Harris's wrist eventually went away, but the abdominal pain intensified in her lower back and tailbone.

¶4 In the days after the ShopKo accident, Ms. Harris visited her brother, Kay Whittaker, who is a family nurse-practitioner. She later saw several doctors and therapists. These physicians observed that she suffered severe pain in her lower back and tailbone, which radiated down the back of her leg to her knee. Ms. Harris underwent a variety of treatments, including pain medication, physical therapy, massage therapy, and chiropractic care.

¶5 Despite the treatment she received, Ms. Harris continued to experience pain three years after the ShopKo accident. In 2009, she visited Dr. Richard Rosenthal, a pain-management specialist. Dr. Rosenthal diagnosed her with facet joint syndrome

(inflammation of one of the spinal joints) and coccydinia (inflammation of the tailbone). Dr. Rosenthal treated Ms. Harris's facet joint syndrome through radio frequency lesioning—a treatment that stops pain by severing the nerve to the facet joint. To treat the coccydinia, Ms. Harris had to sit on a donut cushion and receive occasional injections of steroids and anesthetics to reduce inflammation.

¶6 In 2007, Ms. Harris sued ShopKo for negligence. The case went to a jury trial in 2009. At trial, Dr. Rosenthal testified as an expert in interventional pain medicine. He stated that facet joint syndrome is not always trauma related and can be caused by degenerative disc disorder due to aging. He testified that it is more likely than not that the ShopKo accident caused Ms. Harris's pain and injury. He also testified that Ms. Harris received a single treatment for possible back pain in 2002, although her chief complaint at the time was leg pain.

¶7 Dr. Rosenthal further testified that Ms. Harris had been in three automobile accidents prior to the ShopKo accident. As a result, she had received treatment for neck and back pain, although "there was no subsequent treatment for back pain in any of those accidents." Dr. Rosenthal mentioned that he saw two references to fibromyalgia, which he described as a "chronic condition," in Ms. Harris's records from 2001 but did not believe fibromyalgia caused her pain after the ShopKo accident. He stated that he believed Ms. Harris's pain would eventually go away but that she may face permanent complications from her injuries. Finally, he testified that Ms. Harris's medical treatment was reasonable.

¶8 Following Dr. Rosenthal's testimony, Ms. Harris called, among others, Dr. Eric Hogenson, Mr. Kay Whittaker, and Dr Rodney Scuderi to testify. Each witness testified that he treated Ms. Harris after the ShopKo accident. First, Dr. Hogenson, Ms. Harris's family-practice physician, testified that he treated Ms. Harris for back pain. He testified that her back pain began after the ShopKo incident. He also testified that Ms. Harris's records indicate that he treated her for fibromyalgia and depression in 1997. Second, Mr. Whittaker, a family nurse-practitioner, also treated Ms. Harris for back pain shortly after the ShopKo incident. He testified that he ordered x-rays and that the x-rays did not show any fractures. Finally, Dr. Scuderi, Ms. Harris's chiropractor, testified that he treated Ms. Harris shortly after the ShopKo incident. He testified that, in his opinion, her fall at ShopKo caused her lower-back injury. He also testified

that his treatment of her was reasonable, although it did not provide lasting relief.

¶9 On cross-examination, ShopKo presented Dr. Scuderi with records of Ms. Harris's past medical treatment. These records included a 1998 hospital visit for "cervical strain and to rule out a disc herniation"; a 2001 hospital visit following a car accident for "diffuse neck pain"; and a 2002 hospital visit for "excruciating discomfort in the lumbar area," which led to a diagnosis of "left leg pain and questionable sciatica." Dr. Scuderi then explained that Ms. Harris's symptoms after the ShopKo incident were not consistent with a chronic condition. He noted that "[i]t's not unusual for a patient of Ms. Harris's age to have some neck and back pain." On redirect, Dr. Scuderi testified that nothing in Ms. Harris's past medical records indicated that she had a chronic lower-back condition prior to visiting him.

¶10 Dr. Alan Colledge testified for ShopKo. He practices family medicine and treated Ms. Harris a total of five times after the ShopKo accident. He testified that he could not conclude that the ShopKo incident was the cause of Ms. Harris's pain, stating that he "just report[s] the news" and "do[esn't] know where [the pain] comes from." He testified that the results of Ms. Harris's MRI and x-rays were "normal" and that her sacroiliac joint looked "fairly normal." He then testified that a sign of degenerative disc disease is an annular tear. Dr. Colledge believed that Ms. Harris had "an annular tear or . . . traumatized the disc complex" in her back and that "she had some trauma." He also testified that Ms. Harris's questionable sciatica in 2002 could potentially play a role in her current pain. Ms. Harris's counsel pointed out on cross-examination that the radiologists disagreed as to whether Ms. Harris had an annular tear.

¶11 Dr. Colledge further testified that Ms. Harris had back pain consistent with degenerative disc disease. He acknowledged that facet disease can be caused by a single incident of trauma and that it can also be "brought to light" by trauma. But he believed that Ms. Harris "probably ha[d] a component of" both degenerative disc disease and facet disease or an aggravation of both. Moreover, Dr. Colledge testified that degenerative disc disease can be asymptomatic and that a traumatic incident can cause it "to go from more of an asymptomatic to symptomatic state." Finally, he testified that Ms. Harris's pain is still "extraordinary" and "more than what [he] would usually see" for an annular tear or facet disease after nine months. He thought

Ms. Harris's use of narcotics and her involvement in the present lawsuit could be delaying her recovery.

¶12 At the close of trial, the district court instructed the jury concerning "[a]ggravation of symptomatic preexisting conditions" (Apportionment Instruction). The Apportionment Instruction read as follows:

> If Plaintiff had a physical, emotional, or mental condition before the time of the March 29, 2006 incident, she is not entitled to recover damages for that condition or disability. However, Plaintiff is entitled to recover damages for any aggravation of the pre-existing condition that was caused by Defendant's fault, even if Plaintiff's pre-existing condition made her more vulnerable to physical or emotional harm than the average person. This is true even if another person may not have suffered any harm from the event at all.
>
> When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty to try to determine what portion of the physical, emotional or mental harm to Plaintiff was caused by the pre-existing condition and what portion was caused by the March 29, 2006 fall.
>
> If you are not able to make such an apportionment, then you must conclude that the entire physical, emotional and mental harm to Plaintiff was caused by Defendant's fault.

¶13 Ms. Harris objected to the Apportionment Instruction because it "talks about an aggravation of symptomatic preexisting conditions, and . . . the evidence in this case does not support that finding." Ms. Harris also objected that there was no expert testimony to guide the jury on how to apportion damages. The court overruled her objections because "Dr. Colledge testified that [the ShopKo accident] may have aggravated a degenerative disc disorder[,] [s]o there is evidence of a preexisting condition."

¶14 Ms. Harris requested $72,777.34 for past and future medical expenses.[1] Although the jury found ShopKo negligent, it awarded her only $25,000 for those expenses, plus $1,000 in noneconomic damages.[2] Ms. Harris filed a motion for a new trial, or, in the alternative, additur of damages. The trial court denied her motion. Ms. Harris appealed.

¶15 The court of appeals reversed and remanded for a new trial. Relying on *Biswell v. Duncan*,[3] it held that the trial court erred in giving the Apportionment Instruction because there was no evidence that Ms. Harris's preexisting conditions were symptomatic at the time she fell at ShopKo.[4] The court also found that the Apportionment Instruction prejudiced Ms. Harris because "had the [improper] instruction [not] been given, the jury might have awarded more damages."[5] We granted ShopKo's petition for certiorari and have jurisdiction pursuant to section 78A-3-102(3)(a) of the Utah Code.

STANDARD OF REVIEW

¶16 "On certiorari we review the decision of the court of appeals, not the decision of the trial court. In doing so, we review for correctness, giving the court of appeals' conclusions of law no deference."[6]

ANALYSIS

¶17 The court of appeals reversed the jury's award and remanded for a new trial on the ground that the trial court erred in giving the Apportionment Instruction. On certiorari, ShopKo argues that the court of appeals applied the wrong legal standard when it concluded that preexisting conditions must be symptomatic on the day of the accident in order to justify

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[1] *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, ¶ 11, 263 P.3d 1184.

[2] *Id.*

[3] 742 P.2d 80 (Utah Ct. App. 1987).

[4] *Harris*, 2011 UT App 329, ¶¶ 14, 24.

[5] *Id.* ¶ 25 (alterations in original) (internal quotation marks omitted).

[6] *Grand Cnty. v. Rogers*, 2002 UT 25, ¶ 6, 44 P.3d 734 (internal quotation marks omitted).

apportioning damages. ShopKo also argues that the court of appeals erred in holding that there was insufficient evidence to support giving the Apportionment Instruction.

¶18 We decline to adopt the legal standard applied by the court of appeals because it requires a bright-line approach that is inconsistent with the principle of proximate cause, which should be the overarching and guiding principle in the analysis. But we nevertheless agree that the Apportionment Instruction was improper because the evidence at trial failed to provide a nonarbitrary basis for the jury to apportion damages. We therefore affirm the court of appeals' decision to order a new trial in this case.

I. WE DECLINE TO ADOPT THE COURT OF APPEALS' APPROACH OF REQUIRING PREEXISTING CONDITIONS TO BE SYMPTOMATIC ON THE DAY OF THE ACCIDENT IN ORDER FOR AN APPORTIONMENT INSTRUCTION TO BE PROPER

¶19 In deciding whether the Apportionment Instruction was properly given, the court of appeals determined that the "crucial question" in the analysis is whether the preexisting condition was symptomatic on the date of the injury.[7] Under the court's approach, a preexisting condition provides a basis for apportionment if, but only if, it is symptomatic on the date of the tortious conduct.[8] Thus, in the eyes of the court, "a victim with latent, dormant, or otherwise asymptomatic pre-existing conditions stands on equal footing with a victim with no pre-existing conditions."[9] In other words, under the court's analysis, a preexisting condition that is asymptomatic on the date of the accident cannot justify any reduction in damages.

¶20 In assigning determinative effect to whether a preexisting condition is symptomatic or asymptomatic on the injury date, the court of appeals relied on its decision in *Biswell v. Duncan*.[10] *Biswell* involved a plaintiff who had a preexisting condition that

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[7] *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, ¶ 23, 263 P.3d 1184.

[8] *Id.* ¶¶ 23, 27.

[9] *Id.* ¶ 17.

[10] *Id.* ¶¶ 17, 22–24.

she claimed had been "resolved" and therefore did not cause pain prior to the accident.[11] The court stated that "when a defendant's negligence aggravates . . . a latent, dormant, or asymptomatic condition, . . . the defendant is liable . . . for the full amount of damages which ensue."[12] The court elaborated:

> [W]hen a latent condition itself does not cause pain, but that condition plus an injury brings on pain by aggravating the pre-existing condition, then the injury, not the dormant condition, is the proximate cause of the pain and disability. A plaintiff, therefore, is entitled to recover all damages which actually and necessarily follow the injury.[13]

¶21 The court of appeals quoted this language from *Biswell* in the instant case to support its conclusion that when a condition is asymptomatic on the date of the accident, the negligence will be deemed the proximate cause of the entire injury, and the preexisting condition will be disregarded.[14] Thus, by determining that Ms. Harris's conditions were asymptomatic on the date of the accident and that the Apportionment Instruction was improper, the court assumed that Ms. Harris's preexisting conditions could not have caused any portion of her pain and injury.

¶22 That the court of appeals would adopt this approach is certainly understandable given that other jurisdictions have followed a similar approach,[15] but we decline to adopt it. We conclude that our case law—which recognizes the central role proximate cause must play in tort law—is inconsistent with such a narrow, bright-line approach.

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[11] 742 P.2d 80, 88 (Utah Ct. App. 1987).

[12] *Id.*

[13] *Id.*

[14] *Harris*, 2011 UT App 329, ¶ 23.

[15] *See, e.g.*, *Sleeth v. Louvar*, 659 N.W.2d 210, 213–16 (Iowa 2003) (finding error in instructing the jury on aggravation where there was no evidence that plaintiff's preexisting arthritis was symptomatic prior to the accident at issue). *But see id.* at 217 (Carter, J., dissenting) (arguing that, given the evidence in the case, the jury should have been able to decide whether some or all of plaintiff's pain would have occurred even absent the accident).

¶23 In *Brunson v. Strong*, we recognized that "one who injures another takes him as he is."[16] Thus, a plaintiff is entitled to recover for all harm that is proximately caused by the defendant's negligence, "even if a given plaintiff is more vulnerable to injury than others."[17] But this principle, commonly known as the eggshell plaintiff doctrine, in no way bars consideration of other relevant potential sources of a plaintiff's pain in determining the extent of damage proximately caused by the defendant.

¶24 Indeed, we further recognized in *Brunson* that although an injured party is taken "as he is, nevertheless the plaintiff may not recover damages for any pre-existing condition or disability she may have had *which did not result from any fault of the defendant*."[18] And while "she is entitled to recover damages for any injury she suffered, including any aggravation . . . of such a pre-existing condition," she may only do so to the extent that the aggravation "*was proximately caused by the defendant's negligence*."[19] Moreover, in *Tingey v. Christensen*, we stated that "if the jury can find a reasonable basis for apportioning damages between a preexisting condition and a subsequent tort, it should do so."[20]

¶25 These cases highlight the fundamental aim in deciding damages: "to restore the injured party to the position he would have been in had it not been for the wrong of the other party."[21] Proximate cause plays a central role in determining the precise extent of the defendant's liability and, in turn, what the plaintiff's position would have been absent the defendant's negligence.[22]

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[16] *Brunson v. Strong*, 412 P.2d 451, 453 (Utah 1966).

[17] *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 428 (Utah 1995).

[18] *Brunson*, 412 P.2d at 453 (emphasis added) (footnote omitted).

[19] *Id.* (emphasis added).

[20] 1999 UT 68, ¶ 15, 987 P.2d 588.

[21] *Park v. Moorman Mfg. Co.*, 241 P.2d 914, 920 (Utah 1952).

[22] *See Raab v. Utah Ry. Co.*, 2009 UT 61, ¶ 22, 221 P.3d 219 ("[T]he 'legal cause' inquiry focuses on the question of whether liability should attach to a particular cause in fact."); *id.* ¶ 35 ("[A]ssessment of legal responsibility for a cause in fact of an injury is the *raison d'etre* of the proximate cause requirement."); *Williams v. Barber*, 765 P.2d 887, 889 (Utah 1988) ("With respect to

(Continued)

¶26 The eggshell plaintiff doctrine does not alter this aim. It has never required tortfeasors to compensate plaintiffs for damages that the tortfeasors' negligence did not proximately cause.[23] In our view, however, the court of appeals' narrow, bright-line approach to the eggshell plaintiff doctrine is inconsistent with this aim of awarding damages. An asymptomatic preexisting condition may well be an independent contributor to a plaintiff's pain and injury, which was also proximately caused to some degree by a tortfeasor's negligence.[24] But the court of appeals' approach would prevent the jury from apportioning damages between the preexisting condition and the negligence simply because the preexisting condition was not symptomatic on the date of the accident. In our view, this result is potentially arbitrary and risks holding defendants liable for more than they proximately caused in damages. We accordingly conclude that whether a preexisting condition is symptomatic or asymptomatic on the date of the accident is not the determinative factor in granting an apportionment instruction.[25]

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tort liability generally, a finding of proximate cause must be made by the trier of fact before an award for damages is granted.").

[23] *See, e.g.*, *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1192–93 (9th Cir. 2002) (discussing the eggshell plaintiff doctrine and recognizing that "[t]he defendant of course is liable only for the extent to which the defendant's conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was" (internal quotation marks omitted)).

[24] *See, e.g.*, *Maurer v. United States*, 668 F.2d 98, 100 (2d Cir. 1981) (per curiam) (stating that "when a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury"); *see also Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1495 (10th Cir. 1996) (citing cases that recognize this proposition).

[25] We also note that, to the extent that the court of appeals' approach requires evidence of symptoms on the precise date of the injury, it is inconsistent with our decision in *Tingey*, where we held that evidence of pain from a preexisting condition twenty-five days before an accident was sufficient to justify a jury's

(Continued)

¶27 While we reaffirm the jury's duty to apportion damages if the evidence supports doing so, we recognize that it is rarely easy to determine the causal contribution of a preexisting condition to a plaintiff's pain and injury. The "[o]bjective symptoms and the physical basis of . . . ailment[s] are often difficult to discover, analyze and demonstrate to others."[26] If the preexisting condition is asymptomatic at the time of the tortious conduct, the analysis will be even more difficult. But the "evaluation and the conclusion to be drawn [from the evidence] is peculiarly within the province of the jury."[27] Indeed, proximate cause—although often a thorny issue—is generally a question of fact for the jury to decide.[28]

¶28 We are also confident that our case law already provides sufficient protection for eggshell-type plaintiffs even without the court of appeals' bright-line approach. In *Tingey*, we recognized that "a tortfeasor should bear the burden of uncertainty in the amount of a tort victim's damages."[29] We accordingly held that while a jury should apportion if it can, "it should find that the tortfeasor is liable for the entire amount of damages" if it "finds it impossible to apportion."[30] Thus, the burden is on the defendant to demonstrate that apportionment is possible where there is any uncertainty.[31]

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conclusion that the preexisting condition was the cause of harm suffered after the accident. 1999 UT 68, ¶ 18.

[26] *Brunson*, 412 P.2d at 453.

[27] *Id.*

[28] *Crestwood Cove Apartments Bus. Trust v. Turner*, 2007 UT 48, ¶ 31, 164 P.3d 1247; *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996). The two circumstances in which proximate cause may be decided as a matter of law are "(i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts, and (ii) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law." *Crestwood Cove*, 2007 UT 48, ¶ 32 (internal quotation marks omitted).

[29] 1999 UT 68, ¶ 14.

[30] *Id.* ¶ 15.

[31] *See Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, ¶ 13 n.3, 992 P.2d 969 (discussing a tortfeasor's liability when the evidence at trial is uncertain as to apportionability of damages).

¶29 Finally, we emphasize that our decision today is not an invitation for tortfeasors to dredge up every physical injury or defect a victim has ever had in an attempt to reduce liability. Evidence of preexisting conditions must be relevant to the pain or injury at issue and must also overcome other pertinent evidentiary hurdles in order to be admissible.[32] If there is no evidence that a particular preexisting condition is relevant to the plaintiff's pain or injury, evidence of that condition should not be admitted.

¶30 Because a jury should apportion damages if the evidence indicates that the defendant's conduct was not the sole proximate cause of the plaintiff's injury, we decline to adopt the court of appeals' bright-line approach of focusing on whether the condition was asymptomatic or symptomatic on the date of the accident. We next consider whether there was sufficient evidence to support giving the Apportionment Instruction in this case.

II. THE APPORTIONMENT INSTRUCTION WAS ERRONEOUS BECAUSE THE EVIDENCE AT TRIAL DID NOT PROVIDE THE JURY WITH A NONARBITRARY BASIS FOR APPORTIONING DAMAGES

¶31 The court of appeals concluded that there was insufficient evidence to support the Apportionment Instruction.[33] As discussed above, this conclusion was a product of the court's bright-line approach to symptomatic and asymptomatic preexisting conditions, which we have declined to adopt. We must now consider whether the evidence at trial supported the Apportionment Instruction. While we recognize that there was, as the trial court found, expert testimony that Ms. Harris had a preexisting condition, we conclude that this testimony alone was insufficient to support the Apportionment Instruction because it did not address the extent to which Ms. Harris's condition may have contributed to her injury and pain.[34]

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[32] *See, e.g.*, UTAH R. EVID. 401, 402, 403.

[33] *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, ¶ 24, 263 P.3d 1184.

[34] Ms. Harris also argues that we can affirm the court of appeals' decision on the alternative ground that the trial court improperly instructed the jury to reduce future damages to present value. We decline to reach this issue given our conclusion

(Continued)

¶32 "The jury is entrusted to resolve all relevant questions of fact presented to the court," including "apportionment."[35] Nevertheless, the jury must have a reasonable basis for apportioning damages,[36] and apportionment may not be based on "pure speculation."[37] A jury instruction on apportionment, therefore, requires that there be some nonarbitrary evidentiary basis for the jury to apportion damages.[38]

¶33 In other contexts, we have declined to require expert testimony on apportionment. In fact, we have held that such expert testimony should be precluded in certain circumstances. For example, in *Steffensen v. Smith's Management Corp.*, a comparative negligence case, we held that the trial court did not abuse its discretion by excluding expert testimony on apportioning fault because the testimony would not have been "helpful to the fact finder" and "the apportionment of

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that there was insufficient evidence to support the Apportionment Instruction.

[35] *Little Am. Ref. Co. v. Leyba*, 641 P.2d 112, 114 (Utah 1982); *see also Anderson v. Bradley*, 590 P.2d 339, 342 (Utah 1979) ("[I]t is the jury's prerogative to decide questions of [comparative] negligence.").

[36] *See Egbert v. Nissan Motor Co.*, 2010 UT 8, ¶ 37, 228 P.3d 737 ("[F]or a jury to apportion relative fault between two parties, the jury, of necessity, must have *sufficient evidence* of the culpability of each party to make that apportionment." (internal quotation marks omitted)); *see also Osuala v. Olsen*, 609 P.2d 1325, 1326 (Utah 1980) ("There is substantial, credible evidence here, together with reasonable inference to be drawn therefrom, by which the Court, as factfinder, could apportion the negligence between the parties as it did."); *Lamkin v. Lynch*, 600 P.2d 530, 531–32 (Utah 1979) (refusing to disturb an apportioned jury award because "the jury could reasonably conclude" from the evidence that the apportionment was appropriate); *Anderson*, 590 P.2d at 342 ("From the record it appears that the jury reasonably concluded that plaintiff and defendant were equally negligent, and it is the jury's prerogative to decide questions of driver's and pedestrian's negligence.").

[37] *Egbert*, 2010 UT 8, ¶ 37.

[38] *Tingey v. Christensen*, 1999 UT 68, ¶ 15, 987 P.2d 588.

negligence . . . was exclusively the jury's responsibility."[39] But finding fault is normally an exercise in common sense of which jurors and experts are equally capable.[40] Thus, the nonarbitrary basis for apportioning damages in cases like *Steffensen* can be found in the jury's common experience.

¶34 This is often not true when allocating causation between preexisting pathologies and a subsequent accident. Where apportionment depends on the competing causal influences of a defendant's negligence and a preexisting medical condition, as it does in this case, common experience is a poor substitute for expert guidance.[41] This is because the average lay juror is ill-equipped to sift through complicated medical evidence and come to a nonspeculative apportionment decision.[42] In cases like this, expert testimony may be the jury's only guide as to whether apportionment is proper and, if so, to what extent.

¶35 In the instant case, we conclude that expert testimony allocating causation between Ms. Harris's preexisting conditions and her fall at ShopKo was necessary in order for an

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[39] 862 P.2d 1342, 1347–48 (Utah 1993); *see also* UTAH R. EVID. 702(a) ("[A] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge *will help the trier of fact* to understand the evidence or to determine a fact in issue." (emphasis added)).

[40] *See Leyba*, 641 P.2d at 114 (stating that apportionment of fault is entrusted to juries).

[41] *See Martin v. Owens-Corning Fiberglas Corp.*, 528 A.2d 947, 950 (Pa. 1987) (plurality opinion) ("[C]ommon sense and common experience possessed by a jury do not serve as substitutes for expert guidance, and it follows that any apportionment by the jury in this case was a result of speculation and conjecture and hence, improper."); *Lee v. Pittsburgh Corning Corp.*, 616 A.2d 1045, 1048 (Pa. Super. Ct. 1992) (same).

[42] *Cf. Bowman v. Kalm*, 2008 UT 9, ¶ 7, 179 P.3d 754 (stating that the "general requirement in medical malpractice cases that the element of proximate cause be supported by expert testimony" is grounded in the idea that "the causal link between the negligence and the injury [is] usually not within the common knowledge of the lay juror").

apportionment instruction to be given. The evidence supports a reasonable inference that Ms. Harris had previously suffered injuries in car accidents and that she had a number of preexisting conditions at the time of her fall. For example, Dr. Colledge, who testified for ShopKo, stated that he believed Ms. Harris had an annular tear, which could be a sign of degenerative disc disease. He also testified that Ms. Harris's back pain was consistent with degenerative disc disease and suggested that her facet joint syndrome may have predated, and been aggravated by, her fall at ShopKo.

¶36 And there is also testimony indicating that these preexisting conditions contributed to Ms. Harris's pain and that they would have caused similar symptoms even in the absence of her fall at ShopKo. Dr. Rosenthal testified that the facet joint syndrome, which he had diagnosed Ms. Harris with after her fall, can be caused by degenerative disc disorder. Dr. Scuderi testified that it was "not unusual" for somebody of "Ms. Harris's age to have some neck and back pain." And Dr. Colledge testified that degenerative disc disease and Ms. Harris's prior "questionable sciatica" could have contributed to her symptoms.

¶37 But while this testimony suggests some connection between Ms. Harris's preexisting conditions and her current pain, there is no expert testimony in the record on the *extent* to which her conditions contributed to her pain, if at all. In fact, Dr. Colledge refused to offer such an opinion, stating that he "just report[s] the news" and "do[esn't] know where [the pain] comes from." He did testify that Ms. Harris "probably has a component of" both degenerative disc disease and facet disease or an aggravation of both. But this testimony does not provide a relative comparison between the proposed causes of Ms. Harris's pain. Without such testimony, the jury would have had to speculate as to any basis for apportioning damages, especially in light of Ms. Harris's expert testimony indicating that her fall at ShopKo caused her injury. We therefore conclude that there was insufficient evidence to support the Apportionment Instruction in this case. On remand, an apportionment instruction will be proper only if there is adequate expert testimony that Ms. Harris's preexisting back condition contributed to her injury and, if so, to what extent.

¶38 Although expert testimony allocating causation is necessary for an apportionment instruction on remand, the testimony need not opine on the exact percentage, if any, of the injury attributable to Ms. Harris's preexisting conditions.[43] In an ideal world, an expert would provide a precise estimation (e.g., "Fifty percent of the injury is attributable to the preexisting condition."). But we must account for the reality of medical uncertainty. An apportionment instruction will not be precluded if the testimony presents a reasonable range of percentages (e.g., "Forty to sixty percent of the injury is attributable to the preexisting condition.") or a useful nonnumeric description (e.g., "The vast majority of the injury is attributable to the preexisting condition.").[44] The determinative question is whether the expert testimony has supplied the jury with a nonarbitrary basis for apportioning damages.

¶39 Finally, ShopKo argues that even if the Apportionment Instruction was erroneous, it was harmless because the jury may have awarded Ms. Harris less than she requested on the ground that some of her medical care was not reasonably necessary. We disagree. An erroneous jury instruction is prejudicial if, taken "in context" with "the jury instructions as a whole,"[45] "it misadvised or misled the jury on the law."[46] The law on apportionment to

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[43] *See Egbert*, 2010 UT 8, ¶ 37 ("sufficient evidence is not pure speculation, but neither does it require . . . precise, specific evidence" (internal quotation marks omitted)); *see also Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1996) ("The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment.").

[44] *See Egbert*, 2010 UT 8, ¶ 38 ("This apportionment may of course . . . be a rough apportionment" (internal quotation marks omitted)).

[45] *Jensen v. Intermountain Power Agency*, 1999 UT 10, ¶ 16, 977 P.2d 474 (internal quotation marks omitted).

[46] *Butler v. Naylor*, 1999 UT 85, ¶ 10, 987 P.2d 41; *see also Jensen*, 1999 UT 10, ¶ 16 ("[I]f the jury instructions as a whole fairly instruct the jury on the *applicable law*, reversible error does not arise merely because one jury instruction, standing alone, is not as

(Continued)

preexisting conditions was inapplicable because, as we have explained, the evidence did not provide the jury a nonarbitrary basis to apportion damages. Nothing in the jury instructions as a whole cured the erroneous instruction. Indeed, the Apportionment Instruction went so far as to impart a "duty" for the jury to apportion damages in this case whereas we have concluded that there was nothing beyond a speculative basis for doing so.

¶40 We also note, as did the court of appeals,[47] that we are obviously unable to know the precise basis of the jury's award. Nevertheless, given the substantial testimony at trial concerning Ms. Harris's preexisting conditions, ShopKo's arguments at trial concerning apportionment,[48] and the Apportionment Instruction itself, we find it "reasonably likely" that the jury apportioned damages to Ms. Harris's preexisting conditions.[49] Therefore, our "confidence in the jury's verdict is undermined" and reversal is required.[50]

CONCLUSION

¶41 The court of appeals' bright-line approach to analyzing preexisting conditions, focusing exclusively on whether a condition was symptomatic or asymptomatic on the date of the accident, risks holding defendants liable for more damages than they proximately caused. We therefore decline to adopt it. We also conclude that the Apportionment Instruction was erroneous and prejudicial because (a) the evidence failed to supply the jury with a nonarbitrary basis for apportioning damages, and (b) there is a reasonable likelihood the jury apportioned damages. On the facts of Ms. Harris's case, an apportionment instruction requires expert testimony on the portion of the plaintiff's injury that is

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accurate as it might have been." (emphasis added) (internal quotation marks omitted)).

[47] *Harris*, 2011 UT App 329, ¶ 25.

[48] At closing argument, counsel for ShopKo argued that Ms. Harris was "asking to be compensated for conditions that existed before the accident, and under the law that's not proper."

[49] *See Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1378–79 (Utah 1995) ("An error is harmful if it is reasonably likely that the error affected the outcome of the proceedings.").

[50] *Tingey*, 1999 UT 68, ¶ 16.

attributable to her preexisting conditions. Accordingly, we affirm and remand to the court of appeals to order a new trial consistent with this opinion.

Tab 3

Use of alternative treatment methods

(1) 324. Use of alternative treatment methods.

When there is more than one method of [diagnosis/treatment] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

References

Cf. Butler v. Naylor, 1999 UT 85, 987 P.2d 41 (even if the evidence did not support giving this instruction, it was harmless error to do so, because the jury could have found for the defendant on other grounds).

Turner v. University of Utah Hospitals and Clinics, 2011 UT App 431, rev'd 2013 UT 52.

MUJI 1st Instruction

6.29

Committee Notes

This instruction is slightly modified from MUJI 1st 6.29. The committee agreed on deleting the "best judgment" language from the instruction, as that inappropriately suggested a subjective standard of care might be followed; that is, what defendant "thinks best," whether it is within the standard of care or not.

This instruction should only be used when a proper foundation is laid for it, namely, that the "alternative method" is shown by defendant to be used by something more than a small minority of doctors, but not necessarily the majority. In other words, the defendant must show that the challenged treatment enjoys such substantial support within the medical community that it truly is "generally" recognized. See Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993); Bickham v. Grant, 861 So.2d 299 (Miss. 2003); Velazquez v. Portadin, 751 A.2d 102 (N.J. 2000); Yates v. University of W. Va. Bd. of Trustees, 549 S.E.2d 681(W. Va. 2001); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 3-38, cmt. 3 (LexisNexis, 6th ed. 2007).

The drafting subcommittee was not unanimous in its approval of this instruction, so counsel and the trial court should review it with caution. Some thought that it is inappropriate to instruct a jury that a doctor is "not negligent" if he uses an approved method, but that this is simply one factor to consider in determining whether the provider met the standard of care.

Some members of the committee expressed concerns regarding this instruction, and these concerns are summarized as:

First, no Utah authority recognizes the appropriateness of this instruction, and Butler v. Naylor did not question the propriety of giving the "alternative methods" instruction. Rather, appellant only challenged the instruction on the basis that the “evidence failed to establish that the surgical procedure used [was] recognized by a respectable portion of the medical community.” Butler v. Naylor, 1999 UT 85 at & 19, 987 P.2d 41. Butler avoided any detailed examination of the instruction “because [the instruction] presents only one of several theories upon which the jury could have relied in finding for [Defendant].” Id. at & 20. Accordingly, the court offered no direct endorsement or rejection of the instruction as an accurate statement of the law. At best, Butler is ambiguous about whether the instruction reflects the state of the law in Utah.

Second, the instruction is inconsistent with Utah law defining medical malpractice and standard of care. We tell jurors that a health care provider is required to use the same degree of learning, care, and skill ordinarily used by other qualified providers in good standing practicing in the same. This instruction, however, then tells the jurors that “it is not negligence” if more than one method exists, effectively eliminating any requirement that a physician exercise that degree of learning, care and skill ordinarily used

The bare existence of more than one method automatically excuses the physician because “it is not medical malpractice” to choose one method over another, thereby alleviating the physician of their duty to exercise any degree of learning, care or skill ordinarily used in the field. Under this instruction, the physician becomes “not negligent” simply by the existence of alternative methods without needing to exercise any judgment or care whatsoever in choosing the method.

This ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, it simply says that if there is more than one method and the method is “accepted by a respectable portion of medical community,” it is not malpractice to choose one over the other. Clearly, this cannot be the law of medical negligence where every practitioner must exercise their skill, learning and professional care in treating patients.

This opinion is subject to revision before final publication in the Pacific Reporter

2013 UT 52

IN THE

SUPREME COURT OF THE STATE OF UTAH

ELLA TURNER,
Petitioner,

v.

UNIVERSITY OF UTAH HOSPITALS & CLINICS,
UNIVERSITY OF UTAH, and STATE OF UTAH,
Respondents.

No. 20120120
Filed August 16, 2013

Third District, Salt Lake Dep't
The Honorable Tyrone E. Medley
No. 20091073

On Certiorari to the Utah Court of Appeals

Attorneys:

Matthew H. Raty, Sandy, for petitioner

David G. Williams and Bradley R. Blackham, Salt Lake City,
for respondent University of Utah Hospitals & Clinics

David G. Williams, Rodney R. Parker and Bradley R. Blackham,
Salt Lake City, for respondent University of Utah

David G. Williams, Terrence L. Rooney, and Bradley R. Blackham,
Salt Lake City, for respondent State of Utah

Ryan M. Springer and Michael D. Karras, Holladay,
for amicus curiae Utah Association for Justice

CHIEF JUSTICE DURRANT, authored the opinion of the Court,
in which ASSOCIATE CHIEF JUSTICE NEHRING,
JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 In 2002, Ella Turner was severely injured in an automobile accident. She received treatment for her injuries at the University Hospital (Hospital), where she claims she was rendered a paraplegic due to the Hospital's negligence. At trial, the jury found unanimously that the Hospital was not negligent. Ms. Turner appealed to the court of appeals, which upheld the jury's verdict. Ms. Turner then petitioned for certiorari, which we granted.

¶2 On certiorari, Ms. Turner argues that she is entitled to a new trial for two reasons. First, she argues that the court of appeals' application of the "cure-or-waive rule," which requires litigants to use their peremptory challenges on jurors who were unsuccessfully challenged for cause in order to preserve the issue of jury bias for appeal, yielded an unfair result in this case. Specifically, she argues that despite her efforts to remove potentially biased jurors by challenging them for cause and then by exhausting all of her peremptory challenges, the jury remained biased, and that the court of appeals' application of the cure-or-waive rule resulted in the affirmance of a biased jury's verdict. Accordingly, she asks us to "modify or clarify" the cure-or-waive rule and grant her a new trial. Ms. Turner's second argument is that the court of appeals incorrectly determined that it was harmless error for the district court to include one of the jury instructions.

¶3 We agree with Ms. Turner on both counts. The cure-or-waive rule did yield an unfair result in this case, and the inclusion of the jury instruction was error. Accordingly, we grant Ms. Turner's request for a new trial due to the erroneous jury instruction and, even though we need not reach the issue of jury bias, we nevertheless take this opportunity to guide the litigants and the district court with respect to the question of how to properly preserve that issue for appeal. In so doing, we reject the cure-or-waive rule entirely and adopt the standard set forth below in its stead.

BACKGROUND

¶4 On August 11, 2002, Ms. Turner was admitted to the Hospital after suffering a single-car rollover accident. Upon her arrival, doctors diagnosed her with multiple injuries, including a closed head injury accompanied by significant brain swelling, fractured vertebrae in all three parts of her spine, multiple rib fractures, lung contusions, a liver laceration, and extensive scalp laceration. But despite these injuries, doctors noted that Ms. Turner's legs and arms were still fully functional. Doctors also performed a CT scan of Ms.

Turner's spine, which showed that her spine was in a "relatively normal" alignment.

¶5 Due to the severity of her injuries, Ms. Turner's doctors determined that neither a back brace nor surgery could be used to treat Ms. Turner's fractured spine. Instead, they transferred her to the Neuro Critical Care Unit (NCC) with instructions that she remain there on bed rest under spinal precautions until she was healthy enough for a brace or surgery. The parties do not dispute the standard of care for a patient on spinal precautions. While spinal precautions are in place, the patient can be moved only by using a "log rolling" technique, which requires a minimum of three people so that each part of the patient's body can be rolled in unison, thereby maintaining proper alignment of the patient's spine.

¶6 Ten days later, on August 21, 2002, Ms. Turner received an MRI scan that showed dramatic changes in the alignment of her thoracic spine. Her attending orthopedic physician discussed the differences between the MRI and the August 11th CT scan with Ms. Turner's mother and sister a day later and stated, "I don't know how or when this was done, but it was done here at the hospital." As a result of the spinal injury revealed by the MRI, Ms. Turner was subsequently diagnosed with irreversible paraplegia.

¶7 Ms. Turner sued the Hospital for negligence. During jury selection, she challenged a number of jurors for cause, the majority of which the district court granted. Four of these challenges were denied, however. Ms. Turner also suspected that a fifth juror had concealed his true feelings during voir dire and, in her view, posed the greatest threat to a fair trial. Ms. Turner therefore had three peremptory challenges to deal with five potentially biased jurors. She decided to spend two of them on jurors who had been challenged for cause previously, but then she used her final challenge on the juror whom she suspected of harboring hidden biases. The other two jurors ended up serving on the jury.

¶8 At trial, Ms. Turner presented evidence showing that the Hospital had failed to post a sign at the head of her bed that would notify all care providers to follow spinal precaution guidelines. She also introduced eyewitness testimony that, prior to August 22, 2002, her attending nurses had failed to observe the spinal precautions and that they had instead moved her, sometimes "aggressively," without utilizing the required log rolling procedure. Ms. Turner argued that her injuries were caused by the nurses' failure to follow the spinal precautions and that this failure was in part due to the Hospital's failure to post the sign at the head of her bed.

¶9 The Hospital countered Ms. Turner's arguments by presenting evidence that the practice of posting a sign for spinal precautions at the head of the patient's bed was not uniform, but varied depending on the admitting nurse. The Hospital also presented evidence that the nurses caring for Ms. Turner were aware of the spinal precautions, and that they did not move her without utilizing the log rolling technique. In fact, the Hospital's nursing expert testified that spinal precautions are "always communicated during nurse-to-nurse shift reports" and that the Hospital's records reflected that the nurses were making these communications in their shift reports.

¶10 The Hospital also presented evidence about the differences between a CT scan and an MRI, arguing that soft tissues, including the spinal cord, are not effectively imaged by CT scanning technology. Thus, the Hospital argued that Ms. Turner could not rely on the CT scan to eliminate the possibility that her spinal cord had already been injured at the time of her arrival at the Hospital. Additionally, the Hospital argued that even if an MRI had been performed as soon as Ms. Turner was admitted, it would not have changed the doctors' decision to treat Ms. Turner with bed rest under spinal precautions.

¶11 Prior to the jury's deliberations, the trial judge issued the following jury instruction, Instruction No. 30, over Ms. Turner's objection:

> When there is more than one method of treatment that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

The jury returned a verdict of no negligence, and Ms. Turner appealed.

¶12 At the court of appeals Ms. Turner argued, among other things, that the district court erred by giving the jury instruction and that the jury was biased.[1] The court of appeals, relying on our deci-

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[1] *Turner v. Univ. of Utah Hosps.*, 2011 UT App 431, ¶¶ 8–13, 40, 271 P.3d 156.

sion in *Butler v. Naylor*,[2] determined that even if the district court erred in giving the jury instruction, "the error would be harmless as the jury could have reached the no-cause verdict on [an] alternative theor[y]," such as the theory that "the NCC nurses always log rolled Turner."[3] And with respect to the biased jury question, the court of appeals applied the cure-or-waive rule, "which means that in order to raise the issue of juror bias on appeal, the appealing party must [have] exercise[d] a peremptory challenge, if one is available, against the juror unsuccessfully challenged for cause, and the challenged juror must have actually served on the jury."[4] Because Ms. Turner failed to comply with this rule, the court of appeals reasoned that

> if we determine that one of the four jurors she challenged for cause was not biased, her argument is not preserved. This is so because if one of the four jurors was not biased, Turner would have had enough peremptory challenges to dismiss the remaining three prospective jurors and the trial court's error, if any, in not removing those jurors for cause would be harmless.[5]

The court of appeals then determined that one of the jurors was not biased and that therefore Ms. Turner's argument for juror bias was not preserved.[6] Ms. Turner petitioned this court for certiorari, which we granted. We have jurisdiction over this matter pursuant to section 78A-3-102(3)(a) of the Utah Code.

STANDARD OF REVIEW

¶13 "On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court."[7]

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[2] 1999 UT 85, 987 P.2d 41.

[3] *Turner*, 2011 UT App 431, ¶ 40 (second alteration in original) (internal quotation marks omitted).

[4] *Id.* ¶ 8 (alterations in original) (internal quotation marks omitted).

[5] *Id.* ¶ 9.

[6] *Id.* ¶ 13.

[7] *Wasatch Cnty. v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768 (internal quotation marks omitted).

ANALYSIS

¶14 We first address Ms. Turner's argument that she is entitled to a new trial because the district court erroneously issued Instruction No. 30. Specifically, Ms. Turner argues that this instruction was unwarranted and prejudicial because there was no evidence presented at trial of an "alternative treatment method." She also argues that the court of appeals misapplied our decision in *Butler v. Naylor*[8] to the facts of this case. For the reasons stated below, we agree and remand this case to the district court for a new trial.

¶15 Because Ms. Turner is entitled to a new trial due to the prejudicial jury instruction, we take this opportunity to provide guidance to both the litigants and the district court with respect to the proper method of preserving the issue of jury bias for appeal.[9] As the court of appeals noted, we appear to have adopted the cure-or-waive rule in the case of *State v. Baker*.[10] We are, however, dissatisfied with the result yielded by this rule in the present case and are skeptical about its prospective usefulness. Accordingly, we overrule *Baker* and adopt a new standard for determining whether the issue of jury bias is preserved for appeal.

I. ISSUING JURY INSTRUCTION NO. 30 WAS ERROR BECAUSE IT WAS UNSUPPORTED BY THE EVIDENCE AND UNDERMINES OUR CONFIDENCE IN THE VERDICT

¶16 Ms. Turner argues that her case was prejudiced by the district court's inclusion of Instruction No. 30 because "there was no evidence of any approved, alternate treatment method in the case." Ms. Turner does not dispute the fact that there was conflicting evidence about whether the standard of care included posting a sign on her bed, but argues that this evidence "could not create an alterna-

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[8] 1999 UT 85, 987 P.2d 41.

[9] *See, e.g.*, *State v. White*, 2011 UT 21, ¶ 34, 251 P.3d 820 (addressing an issue "outside the scope of the narrow certiorari question presented . . . in order to provide guidance to the trial court on remand"); *State v. Jeffs*, 2010 UT 49, ¶ 39, 243 P.3d 250 (examining a nondispositive claim "in order to guide the trial court on remand"); *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2003 UT 5, ¶ 10, 73 P.3d 320 (addressing a nondispositive issue because "it may again arise on remand").

[10] 935 P.2d 503 (Utah 1997).

tive treatment method to defeat [Ms. Turner's] liability claim . . . that [the Hospital] improperly moved and injured [Ms. Turner]." Instead, Ms. Turner argues that the evidence regarding the absence of the sign was offered "only [as an] explanation for the improper movement, not proof that would allow [Ms. Turner] a recovery." Consequently, Ms. Turner argues that the court of appeals misapplied our decision in *Butler v. Naylor*[11] when it disposed of this claim and asks us to reverse and grant a new trial. Because we conclude that the issuance of Instruction No. 30 was both erroneous and prejudicial, we reverse and grant a new trial.

¶17 "Claims of erroneous jury instructions present questions of law that we review for correctness. We therefore review the instructions given to the jury without deference to the trial court" or, in this case, the court of appeals.[12] Additionally, "[e]rrors with regard to jury instructions require reversal only if confidence in the jury's verdict is undermined."[13]

¶18 In its decision, the court of appeals relied on the following language from *Butler*:

> When a civil case is submitted to a jury on several alternative theories and the jury does not identify which theory or theories it relied on in reaching its verdict, we may affirm the verdict if the jury could have properly found for the prevailing party on any one of the theories presented.[14]

¶19 The court of appeals noted that the jury did not explain the grounds for its finding of no negligence. The court then interpreted *Butler*'s use of the term "theory" quite broadly, determining that "the jury could have based the no-cause verdict upon a finding that the NCC nurses always log rolled Turner . . . regardless of whether they were supposed to post a sign."[15] In other words, the court of appeals determined that the verdict of no negligence could be attributed to

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[11] 1999 UT 85, 987 P.2d 41.

[12] *State v. Jeffs*, 2010 UT 49, ¶ 16, 243 P.3d 1250 (citation omitted).

[13] *Hess v. Canberra Dev. Co.*, 2011 UT 22, ¶ 38, 254 P.3d 161 (internal quotation marks omitted).

[14] *Turner v. Univ. of Utah Hosps.*, 2011 UT App 431, ¶ 40, 271 P.3d 156 (quoting *Butler*, 1999 UT 85, ¶ 21).

[15] *Id.*

the "theory" that the NCC nurses always log rolled Ms. Turner, as opposed to the "theory" that they were not required to post a sign.

¶20 Ms. Turner argues that this is a misapplication of *Butler*. Specifically, she notes that the language relied upon by the court of appeals flows from a line of cases beginning with *Leigh Furniture & Carpet Co. v. Isom*[16] and that, in each of these cases, the plaintiffs had advanced several different *causes of action* as grounds for recovery. For instance, in *Leigh*, we affirmed a jury's verdict for a counter-claimant based on the viability of his claim for interference with prospective economic relations.[17] This counter-claimant, however, had also advanced a claim for interference with contract, but failed to prove that cause of action.[18] In affirming the verdict, we observed that

> where more than one cause of action has been submitted to a jury and where one of those causes of action was error-free, supported by substantial evidence, and an appropriate basis for the general verdict, the judgment on that verdict will be affirmed, even though the evidence was insufficient to sustain the verdict on one of the other causes of action submitted.[19]

Ms. Turner then demonstrates that in subsequent cases where we applied this standard, we changed the language from "causes of action"[20] to "alternative grounds"[21] and then, finally, to "alternative theories."[22]

¶21 But in this case, Ms. Turner argues, there was only one "cause of action," "ground," or "theory" advanced for recovery: neg-

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[16] 657 P.2d 293 (Utah 1982). The other cases in this line are *Barson ex rel. Barson v. E.R. Squibb & Sons, Inc.*, 682 P.2d 832 (Utah 1984); *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239 (Utah 1987); and *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996).

[17] 657 P.2d at 313.

[18] *Id.* at 301.

[19] *Id.* at 301–02.

[20] *Barson*, 682 P.2d at 835.

[21] *Campbelt*, 745 P.2d at 1241–42.

[22] *Billings*, 918 P.2d at 467.

ligence. Thus, she asserts that "there was no error-free alternative for the jury to choose and upon which the court of appeals could disregard the prejudicial jury instruction." Hence, she concludes, *Butler* is inapplicable here, and the court of appeals erred by relying upon it. We agree.

¶22 *Butler* is distinguishable from the facts of this case because, unlike *Butler* and the subsequent cases applying it, here there was only one claim asserted, a claim for medical malpractice, and Instruction No. 30 expressly stated that "it is *not* medical malpractice for a provider to select one of the approved methods . . . [w]hen there is more than one method of treatment." (Emphasis added.) Because we believe that jurors take jury instructions seriously, we are troubled by the fact that this Instruction explicitly directs the jury to return a "no negligence" verdict if it finds that there was "more than one method of treatment." Given the way this Instruction is worded, therefore, it is reasonable to assume that the jury would have addressed the issue of alternative treatment plans first, rather than going straight to the issue articulated by Instruction No. 27,[23] as the court of appeals assumed.[24] And because Ms. Turner advanced only *one* theory for recovery, namely medical malpractice, our confidence

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[23] Instruction No. 27 stated:

> A nurse is required to use the same degree of learning, care, and skill ordinarily used by other qualified nurses in good standing providing similar care. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as "nursing negligence." In order to establish nursing negligence, plaintiff has the burden of proving three things: (1) what the standard of care is; (2) that the nurse failed to follow this standard of care; and, (3) that this failure to follow the standard was a cause of plaintiff's harm.
>
> In this action, plaintiff alleges that nurses employed by defendants failed to follow the standard of care by improperly moving plaintiff while she was a patient at University Hospital in August 2002.
>
> If you find that defendants' nurses breached the standard of care in any of these respects, then you must determine whether that failure was a cause of plaintiff's harm.

[24] *Turner*, 2011 UT App 431, ¶ 40.

in the jury's verdict is undermined because Instruction No. 30 expressly forecloses the avenue of recovery set forth in Instruction No. 27 if the jury found that there were alternative, approved methods of treatment. Thus, we agree with Ms. Turner that the court of appeals' reliance on *Butler* in this case is misplaced.

¶23 We also note that even if the court of appeals was correct in assuming that the jury could have relied on the theory presented in Instruction No. 27 to support its verdict, Instruction No. 30 was still erroneous because there was no evidence supporting the existence of an alternative, approved treatment method. The Hospital argues that the evidence regarding the placing of a sign was sufficient to support this instruction, asserting that "the trial testimony established two potential treatment methods. The first method is to post a sign . . . [while] [t]he second method is not to post a sign and rely on shift reports and the patient's medical records to pass information regarding spine precautions."

¶24 We are not persuaded by this argument. While it is true that the evidence regarding the procedure of posting a sign on the patient's bed was conflicting, in our view this is not sufficient to support the conclusion that posting a sign is a "method of treatment." As the Hospital admits, when Ms. Turner was admitted her doctors had to choose between three "treatment options": surgery, a back brace, or bed rest under spinal precautions. These sorts of options are what is contemplated by the term "method of treatment," as would the procedures involved for a patient under spinal precautions (e.g., the log rolling procedure). Signs and shift reports, however, are not "methods of treatment," but means of carrying out the method selected by the doctor, which, in this case, was bed rest under spinal precautions. We conclude that the decision of whether or not to post a sign does not qualify as a "method of treatment" and that, therefore, there was no evidence that supported the inclusion of Instruction No. 30. The potential confusion created by this mislabeling is significant in that this instruction could have led the jury to erroneously conclude that if it was acceptable to either post or not post a sign, they should find no medical negligence. Accordingly, we hold that the district court erred in giving Instruction No. 30 and that Ms. Turner is entitled to a new trial due to its prejudicial nature.

II. BECAUSE OF ITS TENUOUS FOUNDATION AND LIMITED UTILITY, WE ABANDON THE CURE-OR-WAIVE RULE AND ADOPT A NEW STANDARD FOR PRESERVING THE ISSUE OF JURY BIAS

¶25 Because Ms. Turner is entitled to a new trial due to the erroneous inclusion of Instruction No. 30, we take this opportunity to clarify for the litigants and the district court the applicable standard for preserving an argument based on jury bias for appeal. In this case, the court of appeals applied the cure-or-waive rule and concluded that Ms. Turner had failed to preserve the issue of jury bias for appeal.[25] Ms. Turner argues that the application of the cure-or-waive rule to the facts of this case yielded an unfair result. We agree. Accordingly, we abandon the cure-or-waive rule in favor of the standard articulated below and remand this case to the district court for further proceedings consistent with this opinion.

¶26 As the court of appeals noted, we adopted the cure-or-waive rule in *State v. Baker*.[26] That case's adoption of this rule, however, was far from straightforward. First, *Baker* was a criminal case, and there was no discussion about the rule's applicability within a civil context. In fact, the rule was not applied in a civil context until the court of appeals did so in 2007.[27] Second, the rule itself only garnered a plurality of votes: Justices Howe and Russon voted to adopt the rule, but Associate Chief Justice Stewart authored a separate concurrence, wherein he expressed doubts about the rule's effectiveness in assuring fair trials but nevertheless expressed satisfaction "that the cure-or-waive rule is properly applied *in this case*."[28] Justice Zimmerman dissented, and Justice Durham concurred with his dissent. Thus, the rule itself was supported by just two justices, while a third arguably voted to adopt it only for that particular case. Finally, the rule has not been widely applied in Utah cases.[29]

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[25] *Turner v. Univ. of Utah Hosps.*, 2011 UT App 431, ¶¶ 8–13, 271 P.3d 156.

[26] 935 P.2d 503, 510 (Utah 1997).

[27] *See Clatterbuck v. Call*, 2007 UT App 76U, 2007 WL 701039.

[28] *Baker*, 935 P.2d at 510 (emphasis added).

[29] By our count, the rule has been applied in just a handful of cases, and discussed in only a few others. *See Baker*, 935 P.2d at 510 (adopting the cure-or-waive rule); *Turner*, 2011 UT App 431, ¶¶ 8–13 (applying the cure-or-waive rule in a civil context); *Clatterbuck*, 2007 (continued)

¶27 In addition to the shaky foundations of this rule, we are also concerned about the results its application yielded in this case. While we agree with the observation made in *Baker* that the right to peremptory challenges is not constitutional,[30] we disagree with the reasoning in *Baker* that places the burden on the defendant to utilize these challenges in order to correct what could be perceived as judicial error.[31] While it is true that "[b]oth parties and the court share a duty to help ensure a fair trial—a trial in which a jury impartially weighs the evidence,"[32] it is nevertheless a reality that both parties view their peremptory challenges as a tactical tool and desire to use them accordingly. This reality is illustrated clearly in this case, where Ms. Turner had to determine whether to expend her peremptory challenges on jurors whom she had already challenged for cause, or on a juror whom she suspected of harboring hidden biases. She chose the latter option, and consequently the previously challenged jurors were seated on the jury. Thus, under the cure-or-waive rule, Ms. Turner was prevented from raising the issue of jury bias on appeal because the rule required her to expend that final peremptory challenge on one of the other two jurors who had been challenged for cause.

¶28 This result strikes us as unduly harsh to the appellant. Furthermore, it seems to us that, in the end, this issue boils down to a pure policy determination. On the one hand, there is the constitutional right to a fair trial, while on the other is the fact that peremptory challenges are merely a means to ensure that end. The question, therefore, is whether attorneys should be allowed to use peremptory challenges on jurors whom they would otherwise be unable to challenge for cause *without* thereby losing the ability to raise the issue of jury bias on appeal. In *Baker*, we expressed the concern that "if a defendant needs to show only that he used all of his peremptories and

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UT App 76U (same); *see also State v. Wach*, 2001 UT 35, ¶ 36 n.3, 24 P.3d 948 (discussing the cure-or-waive rule, but not applying it); *State v. Robertson*, 2005 UT App 419, ¶ 7 n.1, 122 P.3d 895 (same).

[30] *Baker*, 935 P.2d at 506 (observing that "the peremptory is not constitutionally guaranteed").

[31] *Id.* at 507 ("To preserve the issue on appeal, a defendant whose for-cause challenge has been denied must exercise a peremptory challenge, if one is available, to achieve a legally impartial jury.").

[32] *Id.* (emphasis omitted).

that a biased juror sat . . . there is a great temptation to sow error."[33] That is, "[a] defendant whose for-cause challenge is erroneously denied by the trial court could always generate reversible error merely by expending all of his peremptories on other jurors, adverse or not."[34]

¶29 We find this reasoning unpersuasive and insufficient to justify continued adherence to the cure-or-waive rule for several reasons. First, it is simply not the case under the rule articulated below that a party could "create reversible error" merely by expending all of their peremptory challenges on jurors other than those who were previously challenged for cause. Under the rule we adopt today, such a course of action would merely preserve the issue of jury bias for appeal. It would not automatically create reversible error, however, since the party would still have to demonstrate that (a) a juror who was previously challenged for cause sat on the jury, and (b) that juror was, in fact, biased.[35] Only then would an appellate court be justified in reversing based on jury bias.

¶30 Second, the concerns expressed in *Baker* ignore the fact that there are cases where attorneys have good reason to suspect bias, but lack sufficient grounds to challenge those jurors for cause. In such a situation, the attorney should be allowed to use a peremptory challenge on that juror without losing the ability to raise the issue of jury bias on appeal. And this case is a perfect illustration of such a situation. Here, Ms. Turner had three peremptory challenges at her disposal, but suspected that five jurors were biased against her. Four of these jurors had previously been challenged for cause, but she suspected that the fifth posed the greatest threat to a verdict in her favor. Thus, in this situation, Ms. Turner should have been allowed to use one of her peremptory challenges on the juror whom she suspected of bias (but lacked grounds to challenge for cause) without thereby losing the ability to raise the issue of jury bias on appeal.

¶31 Accordingly, we reject the cure-or-waive rule and adopt the rule stated in *People v. Hopt*[36] in its stead. In that case, a defendant had peremptory challenges available but failed to use them to dismiss a previously challenged juror. When the defendant then at-

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[33] *Id.* at 507.

[34] *Id.*

[35] *See infra* ¶¶ 31–32.

[36] 9 P. 407, 408 (Utah Terr. 1886), *aff'd*, 120 U.S. 430 (1887).

tempted to argue jury bias on appeal, we held that "[u]ntil [the defendant] had exhausted his peremptory challenges, he could not complain" about possible jury bias.[37]

¶32 We conclude that this rule strikes the right balance between the competing interests mentioned above. On the one hand, it requires that the parties utilize all available peremptory challenges before the issue of jury bias can be raised on appeal, thereby encouraging them to use their challenges in order to achieve the goal of a fair trial. But as opposed to the cure-or-waive rule, it does not *require* the parties to use those challenges in a particular way, thus leaving the door open to their tactical use. That is, parties need not use all of their challenges on jurors who were previously challenged for cause in order to preserve the issue of jury bias for appeal. Rather, as long as (a) all of the party's peremptory challenges were used and (b) a juror who was previously challenged for cause ends up being seated on the jury, the issue of jury bias has been preserved, which is precisely what has occurred in this case. Ms. Turner used all of her peremptory challenges in the way that she thought afforded her the best chance at prevailing. But despite her efforts, jurors whom she thought should have been removed for cause ended up being seated on the jury, and hence she should be allowed to raise this issue of jury bias on appeal where, if she is successful in demonstrating that a challenged juror was biased, she would be entitled to a new trial.[38] We therefore expressly reject the cure-or-waive rule and in its stead adopt the rule articulated above as the proper standard for determining when the issue of jury bias has been properly preserved for appeal. We also overrule *Baker* to the extent that it is inconsistent with this opinion and remand this case to the district court for further proceedings consistent with this opinion.

CONCLUSION

¶33 The district court erred when it included Instruction No. 30 because no evidence was before the jury that supported that instruction. And because its presence undermines our confidence in the jury's verdict, we conclude that Ms. Turner is entitled to a new trial.

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[37] *Id.*

[38] Since we have already concluded that Ms. Turner is entitled to a new trial due to the erroneous jury instruction, we need not reach the issue of whether the previously challenged jurors in this case were, in fact, biased.

On remand, we instruct the litigants and the district court that the cure-or-waive rule is no longer the standard governing preservation of jury bias. Instead, appellate courts will apply the *Hopt* rule, as stated above, in order to determine whether the issue of jury bias has been adequately preserved.

Tab 4

Insurance Litigation

Breach of contract. First party claim.

CV 2401. Insurance policy is a contract. Approved

An insurance policy is a contract between an insurance company and a policy holder, and therefore the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy obligates both [name of plaintiff] and [name of defendant] to comply with the terms of the policy.

References

MUJI 1

21.4

Committee Notes

See also the Commercial Contract instructions, CV 2101 et seq., which may have some application here, depending on the circumstances.

CV 2402. General description of claims and defenses. Approved

[Name of plaintiff] claims that [name of defendant] breached the insurance policy and claims to have been damaged by the breach as follows: [describe claimed losses].

[Name of defendant] claims that [describe defenses].

References

MUJI 1

Committee Notes

CV 2403. Breach of policy provision. Approved

[Name of plaintiff] claims that [name of defendant] breached the following provisions in the policy: [Quote applicable policy language.]

[When deciding this case, you must use the following definitions: Instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

References

MUJI 1

Committee Notes

The interpretation of the policy is the court's responsibility. If there are words and phrases in the policy which need special interpretation, the court will need to provide this to the jury. The jury would not interpret the provision, but only decide the contested facts that relate to the issue.

CV 2404. Elements of the claim. Approved

To succeed on this claim, [name of plaintiff] has the burden to prove [state the elements of the claim that are in dispute].

References

MUJI 1

Committee Notes

The existence of a contract between the insured and the insurer is rarely disputed, and rather than restate all of the elements necessary for a breach of contract claim — see CV 2102, Elements for breach of contract — the judge should focus the jury on those elements that are in dispute.

CV 2405. Value of loss. Approved

[Name of plaintiff] claims that [name of defendant] has not paid for [describe loss]. To succeed on this claim, [name of plaintiff] has the burden to prove the value of [his] loss.

References

MUJI 1

Committee Notes

CV 2406. Exclusion from coverage. Approved.

[Name of defendant] claims that the policy excludes [name of plaintiff]'s claim from coverage. The exclusion reads:

[Quote the exclusion or limitation.]

[When deciding this case, you must use the following definitions: instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

To succeed on this claim, [name of defendant] has the burden to prove that the exclusion applies to [name of plaintiff]'s claim.

References

LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988).

MUJI 1

Committee Notes

See the committee note to CV 2403, Breach of policy provision.

It is the general rule in coverage litigation that the burden is on the insured to demonstrate that the loss (under either third-party or first-party coverage) is encompassed by the general coverage provisions of the insurance contract. See, e.g., Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F.Supp. 1278, 1295-96 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 1995) (insured bears the burden of proving that its claim comes within the broad meaning of occurrence, and thus comes within the coverage under an insurance policy).

In Young v. Fire Ins. Exchange, 2008 UT App 114, 182 P.3d 911, the Utah Court of Appeals concluded that in litigation arising out of a first party property claim based on a fire, the insured had the threshold burden to present evidence that the fire was the result of an accident. Id. at ¶ 28.

Once the insured meets its burden of establishing that the loss comes within the grant of coverage of the insurance contract, the burden then shifts to the insurer to show the application of an exclusion which would bar coverage. LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988); Metric Construction Co. v. St. Paul fire & Marine Ins. Co., 2005 WL 2100939 at *2 (D. Utah August 31, 2005); Young v. Fire Ins. Exchange, 2008 UT App 114, ¶ 28, 182 P.3d 911; Draughon v. CUNA Mutual Ins. Soc., 771 P.2d 1105, 1108 (Utah Ct. App. 1989).

Once the insurer meets its burden of showing the application of an exclusion, should that exclusion contain any exceptions, the burden is on the insured to show the application of an exception to an exclusion. Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F. Supp 1278, 1312 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 2005).

CV 2407. Proof-of-loss.

The insurance policy required [name of plaintiff] to submit a proof-of-loss. A proof-of-loss is a summary of the facts and circumstances that gave rise to the covered loss. The purpose of the proof-of-loss is to give [name of defendant] an adequate opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.

[[Name of defendant] claims that [name of plaintiff] is not covered because [he] breached the terms of the insurance contract ~~because [he/she/it] did~~ by not give~~ing~~ [adequate, timely] proof of loss ~~as required by the terms of the policy~~.]

[[Name of defendant] claims that it ~~did not breach the insurance policy~~ was not required to pay for the loss sooner because [name of plaintiff] did not submit a [adequate, timely] proof of loss.]

You must decide whether the proof-of-loss was [adequate/timely]. [Name of defendant] has the burden to prove that the proof-of-loss was not [adequate/timely].

References

Zions First National Bank v. National American Title Ins. Co., 749 P.2d 651, 655 – 656 (Utah 1988).

MUJI 1

Committee Notes

CV 2408. Insurance policy must conform to Utah law.

As it relates to a proof of loss, the law that applies is:

(1) ~~A proof-of-loss is a summary of the facts and circumstances that gave rise to the covered loss. The purpose of the proof-of-loss is to give [name of defendant] an adequate opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.~~ The law does not require that the proof-of-loss be notarized or that [name of plaintiff] strictly comply with the proof-of-loss provisions in the policy. Only substantial compliance — not strict compliance — is required.

[(2) If it was not reasonably possible to give the proof of loss within the required time, the failure to give proof of loss within the time required by the policy is not a valid reason to deny the claim .]

[(3) The failure to give [adequate/timely] proof-of-loss is not a valid reason to deny the claim unless the [name of defendant] proves that it was prejudiced by [name of plaintiff]'s failure to give [adequate/timely] proof of loss.]

[(4) On request, [name of defendant] must provide [name of plaintiff] any forms or instructions relating to the proof of loss.]

[(5) The proof of loss may be given directly to the insurer or sent by first class mail to the insurer.]

~~You must decide whether the proof-of-loss was [adequate, timely]. [Name of defendant] has the burden to prove that the proof-of-loss was not [adequate to allow it to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.] or [timely. If it was not timely, [name of defendant] has the burden to prove it was prejudiced before you may rule in [name of defendant]'s favor.~~

References

Utah Code Section 31A-21-312.

Zions First National Bank v. National American Title Ins. Co., 749 P.2d 651, 655 – 656 (Utah 1988).

Utah Administrative Code R590-190-3.

MUJI 1

Committee Notes

CV 2408. Unspecified time of performance. Approved

When the policy requires an act to be performed without specifying the date to perform the act, the act must be done by a reasonable date under the circumstances.

Because the policy does not require [name of defendant/name of plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.] by a particular date, you must decide, based on all of the circumstances, what was a reasonable date for [insurer/plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.].

References

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998).

Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

MUJI 1

Committee Notes

This instruction applies only if the policy or the law does not provide when the performance at issue must be done.

CV 2409. Recovery of damages. Approved.

If you find that [name of defendant] breached the provisions of the policy, [name of plaintiff] is entitled to the unpaid benefits under the policy and damages caused by [name of defendant]'s breach.

As appropriate, instruct the jury on expectation damages:

Instruction CV2135. Expectation damages - General.

And consequential damages:

Instruction CV2136. Consequential damages.

References

Machan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17, 116 P.3d 342, 346.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163, 1170.

Berube v. Fashion Centre, 771 P.2d 1033, 1050 (Utah 1989).

Gardiner v. York, 2006 UT App 496, ¶ 14, 153 P.3d 791, 795.

Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985).

Restatement (Second) of Contracts § 351 (1981).

MUJI 1

21.9

Committee Notes

The measure of damages for breach of an insurance contract is the same as for commercial contracts generally, unless changed by law.

CV 2410. Notice of loss. [same format as proof of loss]

[Name of defendant] claims that [name of plaintiff] breached the terms of the insurance contract because [he/she/it] did not give [adequate, timely, etc.] notice of the loss as required by the terms of the policy.

[[Name of defendant] claims that it did not breach the insurance policy because [name of plaintiff] did not submit a [adequate, timely] proof-of-loss.]

The language of an insurance policy must conform to Utah law. As it relates to a notice of loss, the law that applies is:

> (1) The notice of loss may be given to any authorized Utah agent of [Name of defendant] directly or by first class mail to the insurer.
>
> (2) The notice of loss should provide sufficient facts to identify the insurance policy.
>
> (3) The failure to give notice of loss within the time required by the policy does not preclude the claim [if it was not reasonably possible to give the notice within the required time] or [unless [Name of defendant] can prove that it was prejudiced by the failure to give timely notice].

You must decide whether the notice of loss was [adequate, timely]. [Name of defendant] has the burden to prove that the notice of loss was not [adequate to identify the policy.] or [timely. If it was not timely, [name of defendant] has the burden to prove it was prejudiced before you may rule in [name of defendant]'s favor.

References

Utah Code Section 31A-21-312.

Committee Notes

This instruction applies if plaintiff is claiming damages arising from breach of the insurance contract or if the insurer is claiming there is no coverage due to the failure to timely file a proof of loss. It may not apply if the dispute is simply to determine the value of the covered loss.

CV 2411. "Prejudice" defined.

"Prejudice" is the loss of a valuable right or benefit, and occurs when an insurer suffers a material change in its ability to investigate, or defend or resolve a claim. The issue of whether an insurer suffered prejudice should be considered in light of the purposes of the notice requirements, namely to enable the insurer to investigate and take the necessary steps to evaluate the loss and protect its interests.

In determining if [insurer] suffered prejudice, you should consider whether the late notice interfered with the [insurer's] ability to adequately:

(1) Examine the scene of the incident;

(2) Properly interview witnesses;

(3) [examine or assess damages to the _____];

(4) Determine the reasonable cost for resolution of the claim; and/or

(5) Retain forensic experts to assess liability and damages.

References

Busch v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987).

State Farm Mut. Auto. Ins. Co. v. Green, 2003 UT 48, 89 P.3d 97.

F.D.I.C. v. Oldenburg, 34 F.3d 1529.

Transwest Credit Union v. CUMIS Ins. Soc., Inc. 2013 WL 1830810 (D. Utah April 30, 2013).

Utah Transit Authority v. Liberty Mut. Ins. Co., 2006 WL 2992715 (D. Utah Oct. 18, 2006).

Committee Notes

Paragraph (3) should be used in a claim for first party property damage. If a prejudice instruction is needed in a case involving breach of the consent to settle in the context of underinsured or uninsured motorist coverage, see State Farm Mut. Ins. Co. v. Green, 2003 UT 48,¶ 33, 89 P.3d 97 (setting forth factors to be considered).

CV 2412. Coverage by estoppel.

[Name of plaintiff] claims that [Name of defendant]'s agent misrepresented the [scope of coverage/ benefits/protection] of [name of defendant]'s insurance policy. [Name of plaintiff] therefore claims that [he/she/it] is entitled to a modification of [name of

defendant]'s insurance policy to conform with the [scope of coverage/benefits/protection] represented by [name of defendant]'s agent. To succeed, [name of plaintiff] must prove the following:

[Name of defendant]'s agent made a material misrepresentation to [name of plaintiff] regarding the [scope of coverage/ benefits/protection] provided by the insurance policy;

[Name of plaintiff]reasonably relied on [name of defendant]'s agent's misrepresentations, and

[Name of plaintiff] was harmed by [his/her/its] reliance.

References

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 25, 158 P.3d 1088.

Committee Notes

Estoppel is generally an equitable relief to be decided by the court. This instruction applies if the court has an advisory jury to decide the factual issues.

CV 2413. Insurable interest.

You will be asked to decide whether [name of plaintiff] has an insurable interest in [real or personal property].

Under the law, a person has an insurable interest in [real or personal property] whenever [he/she/it] would profit by or gain some advantage by its continued existence and suffers some loss or disadvantage by its destruction. Title or possession to the property, or having a lien on the property, is not the deciding fact. The interest may be legal, qualified, conditional, contingent, or merely a right to use the property, with or without the payment of rent.

References

Error v Western Home Ins. Co., 762 P.2d 1077, 1081-1082 (1988).

Hill v Safeco Ins. Co., 22 Utah 2d 96, 448 P.2d 915 (1969).

Tab 5

CV 24__. Compliance with Utah law.

When interpreting the insurance contract, [name of defendant] was required to do so consistent with Utah law, which I will now explain.

[(1) An insurance company is required to construe any ambiguous or uncertain language in the policy in favor of coverage as long as the uncertain language could be reasonably interpreted in favor of coverage. The court has ruled that:]

[(2) An insurance company cannot deny a claim based on a provision in the policy which is contrary or inconsistent with Utah law. Utah law provides:

If [name of defendant] did not comply with the above, you may consider this in deciding if [name of defendant] breached the insurance contract.]

References

Lieber v. ITT Hartford Insurance Center, 2000 UT 90, ¶ 14, 15 P.3d 1030 ("[T]o the extent that any provision in this policy is not in harmony with the statutory requirements as we have interpreted them today, we hold such provisions invalid ...").

CV 24__. Recovery of consequential damages.

If you find that [name of defendant] breached the provisions of the policy, [name of plaintiff] is entitled to the unpaid benefits under the policy and any "consequential" damages caused by [name of defendant]'s breach.

Consequential damages are those damages caused by [name of defendant]'s breach which, at the time the policy was issued, [name of defendant] could have generally foreseen might occur if it breached the terms of the policy.

A loss is foreseeable if it follows from the breach in the ordinary course of events. A loss is also foreseeable if it is the result of special circumstances, beyond the ordinary course of events, that [name of defendant] knew of or had reason to know of.

In deciding whether the damage was foreseeable at the time the policy was issued, you may consider the nature and language of the policy and the reasonable expectations of the parties.

References

Mahan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17, 116 P.3d 342.
Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163. ("Limiting Black's recovery in this action to contractual damages does not leave him without a meaningful remedy for Allstate's breach. …We stated [in *Beck*] that '[d]amages recoverable for breach of contract include both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.' …We recognized that 'consequential damages for breach of contract may reach beyond the bare contract terms,' indicating that '[a]though the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.' Thus, while Black will be unable to recover punitive damages in this case, he may recover both general and consequential damages, which could conceivably exceed the amount of his policy limit.")

CV 24___. When Insurer claims prejudice from delay in notice.

[Insurer] claims that [Insured's] delay in providing notice of [describe claim or loss] was so lengthy it caused actual prejudice to [Insurer's] ability to adequately and fully [investigate and defend the claim][investigate and settle the loss]. When you consider whether [Insurer] suffered actual prejudice, you should consider the evidence in light of the purposes of the notice requirements, namely to enable insurer to investigate and take the necessary steps to evaluate the [claim][loss] and protect its interests.

In determining if [Insurer] suffered actual prejudice, you should consider whether the late notice interfered with the [Insurer's] ability to adequately:

(1) Examine the scene of the accident;

(2) Properly interview witnesses;

(3) Review and assess damages claims, both at the outset and as new information came in during the investigation;

(4) [Direct and control the actual trial with attorneys of its choosing;]

(5) Determine the reasonable cost for resolving the claim; and/or

(6) Retain experts to help assess liability and damages.

References

Busch v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987).
State Farm Mut. Auto Ins. Co., 2003 UT 48, 89 P.3d 97.

Utah Transit Authority v. Liberty Mut. Ins. Co., 2006 WL 2992715 (D. Utah Oct. 18 2006) (applying Utah law).
Utah Code Section 32A-21-312(2).

Committee Notes

The wording selected will depend on whether the claim at issue is a first-party claim or a third-party claim. If a prejudice instruction is needed in a case involving breach of the consent to settle in the context of underinsured or uninsured motorist coverage. *See* State Farm Mut. Ins. Co. v. Green, 2003 UT 48, ¶ 33, 89 P.3d 97 (setting forth the factors to be considered).