

2010

# John A. Lyon v. Dr. Donald W. Bryan, M.D., : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Lyon v. Bryan*, No. 20100006 (Utah Court of Appeals, 2010).  
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**IN THE UTAH COURT OF APPEALS**

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JOHN A. LYON,	)	
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Plaintiff and Appellant,	)	
	)	Appellate Case No. 20100006-CA
vs.	)	
	)	
DR. DONALD W. BRYAN, M.D.,	)	
	)	
Defendant and Appellee.	)	
	)	
	)	

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**REPLY BRIEF OF APPELLANT**

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**APPEAL FROM JURY VERDICT AND DENIAL OF MOTION  
FOR NEW TRIAL FROM THE SECOND DISTRICT COURT,  
WEBER COUNTY, THE HONORABLE MICHAEL D. LYON PRESIDING**

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FILED  
UTAH APPELLATE COURTS  
MAR 10 2011

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## ARGUMENT

### I. The Denial of Mr. Lyon's Motion for New Trial Should Be Reversed

A trial court has no discretion to uphold a jury verdict that is unsupported by the evidence presented at trial. See Brown v. Johnson, 472 P.2d 942, 944 (Utah 1970). Further, a trial court evaluating whether a verdict is supported by the evidence has no discretion to weigh the credibility of a witness absent record evidence that the witness's credibility actually was called into question at trial. See Chatelain v. Thackeray, 100 P.2d 191, 198 (Utah 1940). Moreover, a key aspect of determining whether a verdict is supported by evidence is the assumption that the jury followed the jury instructions in arriving at its verdict. See, e.g., Kirchgestner v. Denver & R.G.W.R. Co., 233 P.2d 699, 700 (Utah 1951); Williams v. Ogden Union Ry. & Depot Co., 230 P.2d 315, 322 (Utah 1951). A jury's disregard of either the evidence or the instructions, or both, is grounds for a new trial. Chatelain, 100 P.2d at 198.

The trial court abused its discretion in denying plaintiff-appellant Mr. Lyon's motion for new trial by ignoring the clear and uncontroverted evidence presented in Mr. Lyon's favor on the question of causation and instead engaging in speculation concerning how the jury reached its verdict. Additionally, the trial court repeatedly improperly assumed, or at least made conclusions that logically required the assumption, that the jury had ignored the jury instructions in reaching its verdict. Nearly all of defendant-appellee Dr. Bryan's<sup>1</sup> arguments in support of the denial of the motion for new trial similarly ask

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<sup>1</sup>Before going farther, Mr. Lyon's counsel must note that it has come to their attention that Dr. Bryan was referred to as "Dr. Lyon" on portions of pages 3 and 4 of the



this Court to uphold the verdict based on improper assumptions that the jury ignored the jury instructions.

**A. Dr. Bryan’s Suggestion that a Plaintiff Cannot Prevail on an Appeal of a Trial Court Denial of a Motion for New Trial Due to Insufficiency of the Evidence Has No Basis in Utah Law**

Dr. Bryan cites Missouri case law for the proposition that a trial court’s denial of a motion for new trial based on the insufficiency of the evidence to support the jury verdict should never be overturned on appeal if the motion was brought by the party bearing the burden of proof. Dr. Bryan admits that Missouri law has no application here but argues that “that it is important to acknowledge that given the proof burden, the verdict in this case is properly understood as a finding of ‘not proven’ . . . . It did not matter whether appellee Dr. Bryan introduced any evidence [on the element of causation], because he had no obligation to do so.” (Brief of Appellee at p. 20.) This argument fails because it ignores that the proper test in Utah for determining whether a new trial should be granted is an evaluation of the evidence regardless of which party brings the motion. In this case, the evidence clearly preponderated in favor of Mr. Lyon, and the verdict could only be justified by speculating as to why the jury may have ignored that clear and uncontroverted evidence.

**B. Dr. Bryan Does Not Point to Any Evidence Supporting the Jury Verdict; His Argument Is Limited to a Defense of the Trial Court’s Improper Speculation**

Dr. Bryan concedes that the trial court engaged in speculation in denying Mr.

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Brief of Appellant. Mr. Lyon’s counsel apologize for this error and for any confusion or inconvenience it caused this Court or Dr. Bryan’s counsel.

Lyon's motion for new trial. Rather than attempt to point to any evidence that supports the jury verdict, Dr. Bryan devotes essentially his entire argument to attempting to justify the trial court's improper speculation. He argues that the speculation "honored" the presumption of the verdict's validity and that a trial court has little option but to engage in such speculation in order to honor that presumption. The case of Ortiz v. Geneva Rock Prods., Inc., 939 P.2d 1213 (Utah Ct. App. 1997), illustrates the fallacy of his argument.

Dr. Bryan likely will complain about reliance on *Ortiz* in this context because *Ortiz* was a direct appellate review of a jury verdict rather than a review of a trial court's denial of a motion for new trial. That distinction, however, is a hollow one for present purposes. *Ortiz* contains guidance on at least three points that should be considered regardless of which of the two contexts is before this Court.

First, *Ortiz* makes clear that, while entitled to great respect, jury verdicts are not sacrosanct and must be overturned if unsupported by the evidence. 939 P.2d at 1216; *see also Hyland v. St. Mark's Hosp.*, 427 P.2d 736, 738 (Utah 1967). Second, *Ortiz* sets forth the standard for determining when a jury verdict is not supported by the evidence. *See 939 P.2d at 1216*. This standard is essentially that applied in reviews of motions for new trial. *Cf. Brown*, 472 P.2d at 944. Third, *Ortiz* makes clear that a court should not speculate as to how a verdict may have been reached but rather must confine itself to evaluating the evidence actually presented and whether that evidence supported the verdict. *See Ortiz*, 939 P.2d at 1218, n.4. In light of what *Ortiz* taught on this third point, the trial court in the present case undeniably engaged in improper speculation.

In *Ortiz*, this Court was faced with an appeal from a jury verdict that clearly was based on insufficient evidence, and reversed that verdict as a result. *Ortiz*, like the present case, was a negligence action, but differed in that comparative negligence was tried. 939 P.2d at 1216-18. The jury had returned a verdict of no cause of action, *i.e.*, that the defendant was not guilty of any negligence whatsoever. *Id.* at 1216. Three witnesses had provided testimony that the defendant had been negligent to a degree, which did not support the verdict. *Id.* at 1217. The *Ortiz* defendant could point to only one witness who it claimed had provided testimony that supported the verdict. This Court concluded that witness's testimony did not, in fact, provide support for the finding of no negligence. *Id.* In short, the uncontroverted evidence presented to the *Ortiz* jury did not support the jury's verdict.

The *Ortiz* defendant also argued that the verdict should stand because of evidence that the plaintiff had been negligent, although the jury had not reached the question regarding comparative negligence on the verdict form. *Id.* at 1218, n.3. This Court admitted that it appeared “**possible** the jury actually may have found [the plaintiff] was more negligent than [the defendant], but marked no negligence on the special verdict form.” *Id.* at n.4 (emphasis added). This Court, however, refused to rely on this possibility to uphold the verdict. *Id.* at 1216, 1218. Instead, this Court focused exclusively on whether evidence actually presented at trial supported the verdict actually rendered. *Id.* at 1218. The lesson is clear - the **evidence** is the key to determining whether a verdict is based on **sufficient evidence**. The temptation to reason backward

and find a possible justification for a verdict that clearly is unsupported by the evidence must be avoided.

Dr. Bryan attempts to justify the trial court's speculation in the present case by arguing that the trial court was in a position of special advantage in that it actually observed the testimony and evidence presented at trial. This argument might have some teeth in a case where a new trial was sought from a verdict based on conflicting evidence. But that is not the case here. Here, the trial court acknowledged that clear, uncontroverted evidence was presented in support of Mr. Lyon on the issue of causation. (R. 000539, attached as **Addendum Tab C** to the Brief of Appellant.) Instead of granting a new trial, however, the court upheld the verdict on the basis that there were various "possibilities" as to how the jury had come to ignore that evidence and come to a contrary determination. (R. 000537-541, attached at **Addendum Tab C** to the Brief of Appellant.) This is precisely the type of backwards justification rejected by *Ortiz*.

Dr. Bryan also argues that the speculation in which the trial court engaged is "inherent" to deciding a motion for new trial, and therefore "expected." He does not cite any authority for that proposition, nor does he point to any examples of trial courts engaging in this "inherent," "expected" speculation. He cannot do so. The cases are clear that the test for determining whether a new trial should be granted is whether the verdict is supported by the evidence. Where the verdict is not so supported, the verdict **must** be overturned. *Brown*, 472 P.2d at 944. The test is **not** whether some possibility might be construed to justify a verdict notwithstanding the evidence. The trial court's analysis

should have ended when it concluded that Mr. Lyon had presented uncontroverted evidence in support of his position and contrary to the jury's verdict. Instead, the trial court took it upon itself to take the inquiry in a new, and improper, direction by speculating how the jury had reached its verdict.

For example, the trial court reasoned that the “jury **may have concluded** that Plaintiff failed to carry his burden” in proving causation because the evidence presented on causation was “very brief.” (R. 000539) (emphasis added). That the trial court was concerned with what the jury “may have” thought, rather than what the evidence was, demonstrates that this was a speculative exercise rather than an objective review of the evidence.

The trial court went on to reason that “[i]t is entirely **possible**, and reasonable, that the jury may have simply found Dr. Serfustini's testimony not credible or at least unpersuasive” because he only answered the plaintiff's counsel's question regarding causation “**clearly**” when that question was rephrased. (R. 000539, attached as **Addendum Tab C** to Brief of Appellant.) (emphasis added). Again, this is nothing more than speculation regarding the jury's refusal to accept what the trial court acknowledges to have been clear and uncontroverted testimony. The court may as well have speculated that the jury simply might not have been listening when the causation evidence was presented, or might not have heard Dr. Serfustini, or might have suffered from collective amnesia. All such speculations are equally invalid. Uncontroverted evidence was presented in Mr. Lyon's favor on the issue of causation at trial, and therefore the jury's verdict of no

causation is unsupported by the evidence.

**C. Dr. Serfustini's Testimony Is Not the Sort of Uncontroverted Testimony that Simply Can Be Disbelieved**

Dr. Bryan also attempts to support the trial court's decision by pointing out that, in some circumstances, a finder of fact is free to disbelieve uncontroverted testimony. He fails, however, to point to any authority permitting a jury to simply disregard uncontroverted expert opinion. He also fails to explain how the jury could have both complied with the jury instructions and disregarded Dr. Serfustini's opinion regarding causation.

**1. The *Homer* and *Glauser* Cases Cited by Dr. Bryan Are Readily Distinguishable and Inapplicable**

Dr. Bryan points to two cases he claims support the position that the jury was free to simply disregard Dr. Serfustini's testimony, *Homer v. Smith*, 866 P.2d 622 (Utah Ct. App. 1993), and *Glauser Storage, L.L.C. v. Smedley*, 2001 UT App 141, 27 P.3d 565. Neither of those cases is applicable here.

*Homer* involved a dispute over use of a piece of land and whether that use entitled the plaintiff in that case to a prescriptive easement. 866 P.2d at 624-26. The trial judge in *Homer*, sitting at a **bench trial**, disregarded certain testimony of two **fact witnesses** who testified that the predecessors in interest to the plaintiff had permission to cross the land during their lifetimes. *Id.* at 627. "This testimony was uncontroverted because the [predecessors in interest] were no longer alive at the time of trial." *Id.* The trial court expressly stated in its **written findings of fact** that the "testimony concerning the

[predecessors in interest] was ‘self-serving and not believable in view of [the fact witnesses’] conduct, demeanor and substantive testimony during trial.’” *Id.* Furthermore, the testimony of the two fact witnesses in question “was contradictory and inconsistent” throughout the trial. *Id.* Like *Homer*, *Glauser* was tried to the bench rather than to a jury, and the trial court expressly set forth the reasons it found the subject fact witness’s testimony unpersuasive in written findings of fact. 2001 UT App at ¶¶ 11, 24-27.

The present case differs materially from both *Homer* and *Glauser*. First, unlike those cases, the present matter involves a jury trial. Therefore, in this case the trial judge was not the finder of fact. As a result, there are no written findings of fact. Second, unlike *Homer*, this case does not involve a situation where the relevant witness’s testimony was only uncontroverted because there was no living witness available to controvert it. The defendant had his own medical expert, Dr. Vanderhooft, who presumably would have controverted Dr. Serfustini’s testimony on causation had he been able. Third, both *Homer* and *Glauser* dealt with fact, rather than expert witnesses. As a matter of law and as the jury was instructed, uncontroverted expert testimony may only be wholly disregarded under certain circumstances, none of which were met in this case.

## **2. The Jury Could Not Have Disregarded Dr. Serfustini’s Testimony and Obeyed the Jury Instructions**

As a matter of law, it should be assumed that the jury followed the trial court’s instructions in evaluating the evidence and applying the law. *Kirchgestner*, 223 P.2d at 700; *Williams*, 230 P.2d at 322. If it appears the jury did not follow the jury instructions, however, and as a result reached a verdict that was contrary to the evidence, then that

verdict must be set aside. Chatelain, 100 P.2d at 198. Therefore, Dr. Bryan has little choice but to argue that the jury followed the instructions, and does so. The difficulty Dr. Bryan faces in making that argument is **that the reasoning of the trial court in upholding the verdict tacitly requires an assumption that the jury did not follow the instructions.**

The trial court reasoned that the jury “may have” simply disregarded Dr. Serfustini’s uncontroverted opinion regarding causation on the grounds that the opinion was brief and that Mr. Lyon’s counsel asked a follow-up question to clarify that opinion. Neither of those reasons, however, would have provided the jury with grounds to entirely disregard Dr. Serfustini’s opinion and find that the Dr. Bryan’s negligence did not cause injury to Mr. Lyon.

Jury Instruction No. 15 stated:

The rules of evidence ordinarily do not permit the opinions of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. Witnesses who, by education, study and experience, have become expert in some art, science, profession or calling, may state opinions as to any such matter in which that witness is qualified as an expert, so long as it is material and relevant to the case. You should consider expert opinion and the reasons, if any, given for it. You are not bound by such an opinion. Give it the **weight** you think it deserves. **If you decide that the opinions of an expert witness are not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinions are not sound, or that such opinions are outweighed by other evidence, you may disregard the opinion entirely.**

(R.000355, attached at **Addendum Tab 3** to the Brief of Appellee.) (emphasis added.)

This instruction plainly limited the jury’s discretion to entirely disregard an expert witness’s opinion to one of three circumstances: (1) lack of sufficient education and



experience; (2) unsound reasoning by the expert; or (3) other evidence outweighing the opinion.

Dr. Bryan argues, as he must, that the jury was not so limited. First, he argues that “[n]either precedent nor logic supports such restriction in expert opinion instruction.” (Brief of Appellee at p. 21.) Second, he argues that Mr. Lyon’s position improperly elevates the jury instruction concerning consideration of expert opinion above the other jury instructions. Third, he argues that the trial court correctly construed that jury instruction as setting forth a “non-exhaustive list” of circumstances where it would be appropriate for the jury to entirely disregard expert opinion. Each of those arguments fails for the reasons below.

Dr. Bryan’s first argument, his appeal to precedent and logic, is noteworthy because he neither supplies any precedent nor explains his “logic.” He cannot. There is no precedent in support of his position; the rule is to the contrary. Further, the reasoning of courts that have applied the rule illustrate the logic in limiting the discretion of a fact finder to simply disregard expert opinion.

In the case of *Berven v. Gardner*, 414 F.2d 857 (8th Cir. 1969), the 8th Circuit recognized that “a finding contrary to uncontroverted expert opinion should be set aside as being conjectural and not supported by substantial evidence and speculative.” 414 F.2d at 861. Dr. Bryan attempts to distinguish *Berven* on the grounds that it was a summary judgment case decided without a jury. The reasoning of *Berven* and the cases cited by it,<sup>2</sup>

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<sup>2</sup>See *Nelms v. Gardner*, 386 F.2d 971 (6th Cir. 1967); *Combs v. Gardner*, 382 F.2d 949 (6th Cir. 1967); *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Celebrezze v.*

however, applies equally in a jury proceeding. Those courts' reasoning boils down to this: a finder of fact, be it a judge or a jury, is in no position to place itself in the position of an expert such as a doctor and determine that an uncontroverted opinion of another expert based on education and experience is wrong absent some direct evidential attack on the expert's credentials or the opinion itself. The logic behind this reasoning is simple: allowing fact finders to simply ignore uncontroverted learned opinions in medicine, engineering and similar fields in which the fact finder has no expertise would lead to absurd results based on the fact finder's uneducated conjecture and speculation. A litigant who submits his or her case to a jury certainly turns the determination of the facts of the case over to that jury, but doing so does not provide the jury the power to ignore or rewrite medical science or the laws of physics. Therefore, juries are instructed that they may only entirely ignore such opinions under certain circumstances. Neither the trial court nor Dr. Bryan points out where any of those circumstances were met in this case.

Dr. Bryan's second argument fails because Mr. Lyon's position clearly does not "elevate" Instruction No. 15 above the other instructions. Rather, Mr. Lyon's position puts Instruction No. 15 on equal footing with the other instructions. It should be noted that Instruction No. 15 is the only instruction that deals directly and exclusively with expert opinion testimony. Dr. Bryan would have this Court ignore Instruction No. 15 and its plain language.

Dr. Bryan's third argument fails because the proper grounds for entirely

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Warren, 339 F.2d 833 (10th Cir. 1964); Pollard v. Gardner, 267 F. Supp. 890 (W.D.Mo. 1967).

disregarding expert testimony provided by Instruction No. 15 **are exclusive**, as evidenced by the plain language of the instruction. There is no language in the body of the instruction that even suggests otherwise - no “such as”, no “including,” no “for example.” The instruction lists only three grounds. Dr. Bryan points to no authority that supports the trial court’s characterization that the grounds listed by instruction are “non-exclusive.” Nor does he can offer any explanation as to how the jury could read the grounds as non-exclusive in light of the plain language of the instruction.

Additionally, the trial court’s determination that the jury “may have” found Dr. Serfustini to be unpersuasive ignores an important reality of this case. The jury must have found Dr. Serfustini credible and persuasive on the hotly contested issue of **negligence** in order to find in the plaintiff’s favor on that issue. Dr. Serfustini was the only witness who testified that Dr. Bryan’s failure to treat and diagnose Mr. Lyon was a violation of the medical standard of care. Even were it proper to make assumptions regarding the jury’s evaluation of the evidence, and it is not, it makes no sense to assume that the jury simply concluded that Mr. Lyon’s medical expert lacked credibility or was unpersuasive on an uncontroverted point where it is clear the jury accepted that same expert’s testimony on a furiously contested point.

**D. The Trial Court’s Denial of the Motion for New Trial Should Not Be Upheld on the Theory that the Jury Based Its Verdict of Negligence on Some Speculative “Alternative Basis”**

Dr. Bryan’s argument that the jury may have found him to have been negligent on the basis of his note-keeping, rather than on the basis of his failure to diagnose and treat Mr. Lyon’s blood clots, should be rejected for at least two reasons. First, concluding that

the jury determined that Dr. Bryan was negligent on any other basis than his failure to diagnose and treat Mr. Lyon requires assuming that the jury ignored the jury instructions. If the jury did ignore the jury instructions, then a new trial should be granted on that basis. Second, the record does not support this “theory.”

**1. If the Jury Found Dr. Bryan Negligent on Some Basis Other than His Failure to Diagnose and Treat Mr. Lyon, then It Ignored the Jury Instructions**

Again, as a matter of law, it should be assumed that the jury understood and complied with the jury instructions in reaching its verdict. Kirchgestner, 233 P.2d at 700; Williams, 230 P.2d at 322. Here, the jury instructions expressly informed the jury:

[t]he Plaintiff claims that on November 15, 2005, Dr. Bryan performed surgery on Mr. Lyon’s left shoulder (rotator cuff) at McKay-Dee Hospital and that on November 28, 2005, Dr. Bryan **negligently failed to diagnose and treat blood clots in his arm**, causing injury and damage. The Defendant Dr. Bryan has denied that he was negligent in the medical care rendered to Mr. Lyon and that his care was the cause of his alleged injury and damage.

(R. 000336, attached at **Addendum Tab 3** to the Brief of Appellee.) (emphasis added.)

Dr. Bryan acknowledges that this instruction was given, but protests that it only was given once, prior to the presentation of evidence. That argument fails because upholding the denial of the motion for new trial on based on **that very argument** would also require an assumption that the jury ignored the jury instructions.

The jury expressly was instructed in Instruction 7A that the order of the instructions and the number of instructions on any given topic had no significance:

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. The order in which the instructions are given has no significance as to their relative importance. If a direction or an

idea is stated more than once, or in varying ways, no emphasis is intended and none must be inferred by you.

(R. 000347, attached at **Addendum Tab 3** to the Brief of Appellee.) Dr. Bryan's implication that the jury may simply have forgotten the basis of negligence at issue because the instruction was given prior to the presentation of evidence is also belied by Instruction 7A, which stated, "You **will** take these instructions with you into the jury room for further reference." (*Id.*) (emphasis added.)

Dr. Bryan also argues that other, "non-specific" instructions concerning negligence were given that "invited" the jury to find negligence on some basis other than the one it was expressly instructed to consider. This is just another form of the same argument - Dr. Bryan cannot get around the fact that the instruction concerning the nature of the negligence at issue was given, that the jury was instructed to consider all of the instructions, and that the law requires the assumption that the jury understood and followed **all** of the instructions. As a matter of law, it must be assumed that the jury received and understood the instruction regarding the negligence at issue. Therefore, it must be assumed that the jury understood the basis for the claim of negligence it was called upon to decide.

Dr. Bryan's citation of *Schmidt v. Intermountain Health Care*, 635 P.2d 99 (Utah 1981), adds nothing to his argument. Nothing in *Schmidt* suggests that the jury in that case expressly was instructed as to the basis of the alleged negligence. See 635 P.2d at 99-102. Additionally, the lack of clarity regarding the basis of the finding of negligence in *Schmidt* was **not** the reason the *Schmidt* jury's verdict was upheld. The basis for that decision was

that “[t]here was clearly a conflict in the testimony” concerning the causation of the plaintiff’s injuries, and “[s]ince reasonable minds could have found as the jury did based on the evidence before it,” it could not be said that the trial court had abused its discretion in refusing to grant a new trial. *Id.* at 101. The *Schmidt* court’s mention of the lack of clarity as to the basis of negligence came in response to a separate contention by the plaintiff that any jury’s “finding of negligence with no finding of proximate cause” is unlawful and inconsistent as a matter of law. *See id.* In other words, the *Schmidt* plaintiff argued on appeal that **all** jury determinations that find a defendant negligent but that the negligence was not a proximate cause of injury **must be reversed as a matter of law**. No such contention is before this Court.

As discussed above and in the Brief of Appellant, Dr. Bryan’s arguments in support of the jury verdict, and especially in support of the notion that the jury arrived at a finding of negligence on some basis other than Dr. Bryan’s negligence in failing to diagnose and treat Mr. Lyon, require the assumption that the jury ignored or disobeyed the jury instructions. If Dr. Bryan’s arguments are accepted, then Mr. Lyon is entitled to a new trial as a matter of law. *See Chatelain*, 100 P.2d at 198.

**2. The Record Does Not Support Dr. Bryan’s Theory that the Finding of Negligence Was Based on Something Other than Dr. Bryan’s Failure to Diagnose and Treat Mr. Lyon**

Dr. Bryan’s theory, which was adopted by the trial court, is that the jury’s finding of negligence might have been based on argument concerning notes that counsel for Mr. Lyon characterized as “phony” to the jury during closing argument. This theory is unsupported by the record. Furthermore, upholding the verdict on this theory would, once

again, require this Court to assume that the jury ignored the trial court's instructions.

It goes almost without saying that closing argument is not evidence. Therefore, it would be inappropriate to uphold the jury verdict and the trial court's denial of new trial based merely on a closing argument. Furthermore, the jury was expressly instructed that closing argument is not evidence. (R. 000199.) Moreover, Mr. Lyon's counsel reminded the jury of this instruction during his argument. (R. 000626 at p. 89.)

Dr. Bryan concedes that, as a matter of law, argument is not evidence, but argues that the rule that argument is not evidence ignores the "reality" that juries are persuaded by closing arguments. This appeal to "reality" is an invitation to ignore the law by upholding the jury verdict on a basis that requires assuming the jury ignored the court's instructions.

Additionally, there is nothing in the portions of the closing argument cited by Dr. Bryan that supports his theory. Evidence regarding Dr. Bryan's notes was presented to attack Dr. Bryan's credibility and the opinions of Dr. Vanderhooft, which were based on those notes. This was explained to the jury during the closing argument of Mr. Lyon's counsel. (R. 000626, at pp. 94-95, 104-05.) Dr. Bryan argues that the closing argument does not "clearly convey[] the idea that the inaccuracy of [his] 'informed consent' notes impeaches the credibility of his other clinical notes - or of his trial testimony.'" Even were this true, and an objective reading of those portions will reveal it is not, there is nothing in those portions of the closing argument that supports the notion that the jury somehow understood the closing argument of Mr. Lyon's counsel to convey that Dr. Bryan's note-taking or note-keeping was evidence of negligence. Acceptance of that theory requires pure speculation, which clearly is an improper basis for denial of a new trial.

## **II. This Court is Free to Independently Review the Jury's Verdict**

Dr. Bryan argues that, because Mr. Lyon filed a motion for new trial, this Court is precluded from conducting an independent review of the jury's verdict and is limited to merely reviewing the trial court's denial of the motion. Dr. Bryan does not provide a shred of authority for that proposition. This Court is free to conduct an independent review of the evidence and the jury verdict, and should grant a new trial based on that review for the reasons set forth in Section I of the Argument portion of the Brief of Appellant.

### **A. An Independent Review of the Verdict Would Not “Disrespect” the Trial Court**

Dr. Bryan does not point to a single case where an appellate court refused to review a jury verdict because the trial court had ruled on a motion for new trial. Rather, he claims that an independent review of the trial court's “conscientious effort . . . to carefully consider all of the evidence, as well as the parties' arguments, related to the new trial motion” would “disrespect” the trial court. Even were this true in some cases, it clearly is not true in this case.

A trial court faced with a motion for new trial based on the insufficiency of the evidence is charged with determining whether sufficient **evidence** supported the verdict. *See King v. Fereday*, 739 P.2d 618, 621 (Utah 1987). Here, the trial court reviewed the evidence and determined that the testimony regarding causation in this case was presented in favor of plaintiff and was uncontroverted (R. 000538, 000539, attached to the Brief of Appellant at **Addendum Tab C**.) Instead of confining its analysis to the review of the evidence of the evidence presented at trial, however, the trial court proceeded to engage in



rank speculation as to how the jury “may have” reached its verdict. The court settled on four avenues through which the jury “may have” reached the verdict, none of which were supported by the uncontroverted evidence, and at least three of which tacitly assumed that the jury had ignored jury instructions. (*See* Brief of Appellant at pp. 26-36.) The ruling is clearly an abuse of the trial court’s discretion and, therefore, not entitled to any deference. If this Court does consider itself to be limited to a review of the denial of the motion for new trial, the outcome of this appeal should be summary reversal of that decision for the reasons set forth above.

**B. There Is No Procedural Bar to an Independent Review of the Verdict**

Dr. Bryan argues that Mr. Lyon did not preserve direct review of the jury verdict because Mr. Lyon did not make a motion for directed verdict at trial and a post-trial motion for judgment notwithstanding the verdict. Amazingly, Dr. Bryan makes this argument even though he concedes that the plaintiff-appellant in the *Ortiz* case obtained the reversal of a jury verdict without filing either a motion for directed verdict or a motion for new trial. (*See* Brief of Appellee, at p. 35.)

Dr. Bryan does not point to any authority in support of his position; his argument merely notes similarities between the standard for grant of a motion for judgment notwithstanding the verdict and language used in the Brief of Appellant. A motion for judgment notwithstanding the verdict and a motion for new trial, however, clearly are not synonymous - they are separate motions authorized by separate rules that seek separate relief. *See* Utah Rs.Civ.P. 50, 59.

Dr. Bryan’s argument is further belied by cases such as *Nelson v. Trujillo*, 657 P.2d

730 (Utah 1982), because such cases make clear that motions for new trial based on insufficiency of the evidence can be brought and granted in circumstances where moving for directed verdict would be inappropriate. In *Nelson*, a motion for new trial based on the insufficiency of the evidence to justify the verdict was brought by the plaintiff, granted and affirmed even though there clearly was substantial evidence supporting the verdict. See 657 P.2d at 732. In such a case, it would be at best an empty formality, and possibly bad faith, for the plaintiff to bring a motion for directed verdict at trial.

**C. *Ortiz* Is Directly on Point and Dispositive of this Appeal**

Dr. Bryan desperately seeks to have this Court distinguish the *Ortiz* case, 939 P.2d 1213, for a simple reason. *Ortiz* teaches that, where a plaintiff appeals a jury verdict and demonstrates that the verdict is not supported by uncontroverted evidence presented at trial, the verdict must be overturned and a new trial granted. There is no dispute that the uncontroverted evidence presented at trial in this matter on the issue of causation does not support the verdict of no causation. Under *Ortiz*, then, the jury verdict should be overturned and Mr. Lyon should be granted a new trial.

Dr. Bryan attacks Mr. Lyon's reliance on *Ortiz* on two grounds. First, he claims that *Ortiz* was procedurally distinguishable from the present matter because "there is no indication that the [*Ortiz*] trial court . . . was ever presented with a post-verdict motion for new trial; rather, judgment was entered on the verdict, and the appeal followed." Second, he argues that the present case differs substantively from *Ortiz* in that Mr. Lyon points only to the uncontroverted testimony of one witness in his favor, while the *Ortiz* plaintiff could point to three witnesses. Neither of those arguments presents any meaningful

distinction.

Dr. Bryan's procedural argument is perplexing in light of his argument that Mr. Lyon failed to preserve independent review of the jury verdict. As discussed above, Dr. Bryan admits that "[i]t . . . appears in *Ortiz* [that] . . . no directed verdict was sought by either party." That begs the question: if the *Ortiz* plaintiff neither moved for a new trial nor moved for a directed verdict, how did the *Ortiz* plaintiff preserve review of the jury verdict for appeal? Dr. Bryan alludes to two possibilities.

On the one hand, Dr. Bryan abandons his own argument that an independent review of a jury verdict requires the appellant to have made a motion for directed verdict at trial. Instead, he concedes that simply obtaining a jury verdict may be sufficient to preserve review of the verdict for appeal, which *Ortiz* implies. His attempt at drawing a distinction between the present case and *Ortiz* is an unsupported suggestion that a party who takes the additional step of making a motion for new trial is, for some unexplained reason, limited to only a review of the denial of that motion in the event it is denied.

On the other hand, Dr. Bryan suggests that the *Ortiz* defendant failed to raise procedural issues with the plaintiff's appeal, and that the outcome of the *Ortiz* appeal might have been different had such issues been raised. By his own admission, however, nothing in *Ortiz* suggests there were any procedural defects, much less how this Court would have ruled had any been raised. *Ortiz* clearly cannot be distinguished from the present case on the basis of imaginary procedural defects and rulings.

Dr. Bryan's argument that *Ortiz* differs substantively from the present case is correct in one respect. The *Ortiz* defendant could point to one witness who it could at least

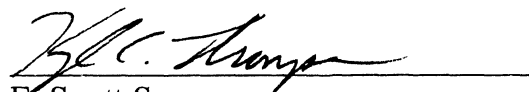
argue had presented evidence in support of the jury verdict. *See Ortiz*, 939 P.2d at 1217-18. Dr. Bryan has not, and cannot, point to any such witness. The uncontroverted evidence presented at trial clearly preponderates against the jury's verdict and against his position on appeal. Instead, throughout his argument, he repeatedly asks this Court to do what it would not in *Ortiz*: uphold a jury verdict on the basis of mere possibilities. *See id.* at 1218; n.4. Doing so in this case would be every bit as improper as it would have been in *Ortiz*. Therefore, the verdict must be overturned and a new trial granted.

### CONCLUSION

For the reasons set forth above and in the Brief of Appellant, the jury verdict should be set aside and a new trial granted.

DATED this 10th day of March, 2011.

SAVAGE, YEATES & WALDRON, P.C.

A handwritten signature in dark ink, appearing to read "E. Scott Savage", is written over a horizontal line.

E. Scott Savage


Kyle C. Thompson

*Attorneys for Appellant, John A. Lyon*

**CERTIFICATE OF SERVICE**

Pursuant to Utah Rule of Appellate Procedure 21, I hereby certify that on this 10th day of March, 2011, I caused two true and correct copies of the within and foregoing .REPLY BRIEF OF APPELLANT to be mailed, postage prepaid, to the following:

David H. Epperson  
David C. Epperson  
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