

2010

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

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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

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**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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## **JURISDICTION OF THE APPELLATE COURT**

Appellant John A. Lyon, plaintiff below, appeals the jury's verdict that the negligence of his doctor, appellee Donald Bryan, M.D., defendant below, in failing to diagnose a blood clot or clots during a postoperative examination was not the proximate cause of Mr. Lyon's injuries from a pulmonary embolism resulting from the clot or clots. Based upon the jury's verdict of no cause for lack of proximate causation, the trial court entered a judgment in favor of Dr. Bryan on August 31, 2009. On September 2, 2009, Mr. Lyon filed a motion for new trial based on the utter lack of evidence to support the jury's verdict. The trial court entered a ruling denying Mr. Lyon's motion for a new trial on November 30, 2009. Mr. Lyon filed a notice of appeal on December 28, 2009. The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated §§ 78A-3-102(3)(j), (4), and 78A-4-103(2)(j), Utah Rules of Appellate Procedure 3, 4 and 42(a), and a January 17, 2010 order of the Utah Supreme Court expressly transferring this matter to the Court of Appeals.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Was the evidence insufficient to support the jury's verdict that Dr. Bryan's negligence in failing to diagnose a blood clot or clots during a postoperative examination was not the proximate cause of Mr. Lyon's injuries from a pulmonary embolism resulting from the blood clot or clots, when the only evidence presented at trial regarding causation, which was not contradicted or controverted, was that Dr. Bryan's failure to diagnose the blood clot proximately caused Mr. Lyon's pulmonary embolism?

The standard of review for challenges to a jury verdict is whether, “taking the evidence in the light most favorable to the prevailing party, the appellant demonstrates that the findings lack substantial evidentiary support.” Water & Energy Systems Tech., Inc. v. Keil, 2002 UT 32, ¶ 15, 48 P.3d 888 (citing In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); Scudder v. Kennecott Copper Corp., 886 P.2d 48, 52 (Utah 1994); Heslop v. Bank of Utah, 839 P.2d 828, 839 (Utah 1992); Gustaveson v. Gregg, 655 P.2d 693, 695 (Utah 1982)). This issue was preserved in the trial court via trial of the issues in question and via Mr. Lyon’s Rule 59 Motion for New Trial.

2. Did the trial court err where, despite the court’s express finding that the sole and uncontroverted evidence offered at trial on the issue of causation was offered in support of Mr. Lyon, the court denied Mr. Lyon’s motion for a new trial after engaging in speculation as to possible reasons for the jury’s finding that Dr. Bryan’s negligence did not proximately cause injury to Mr. Lyon?

The standard of review for challenges to the denial of a motion for a new trial is abuse of discretion. King v. Fereday, 739 P.2d 618, 621 (Utah 1987) (citing Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 841 (Utah 1984); Pollesche v. Transamerican Ins. Co., 497 P.2d 236, 238 (Utah 1972)). This issue was preserved in the trial court via Mr. Lyon’s Rule 59 Motion for New Trial.

## STATEMENT OF THE CASE

### **I. Nature of the Case**

This is a medical malpractice action brought by Mr. Lyon against Dr. Bryan, an orthopedic surgeon, for injuries from a pulmonary embolism sustained as a result of Dr. Bryan's failure to diagnose Mr. Lyon with a blood clot or clots during a postoperative examination on November 28, 2005.

### **II. Course of the Proceedings and Disposition of the Matter Below**

The case was tried to a jury on August 3-5 and 7, 2009. (R. 000623-000626.) The jury returned its verdict on August 7, 2009. (R. 000334-000335) (the jury verdict is attached hereto at **Addendum Tab A**.) In that verdict, the jury determined that Dr. Bryan had been negligent in his treatment of Mr. Lyon but that Dr. Bryan's negligence was not the proximate cause of Mr. Lyon's injuries from a pulmonary embolism Mr. Lyon undisputedly suffered on December 1, 2005. (*See id.*) Based upon that verdict, the trial court entered a final judgment in favor of Dr. Bryan on August 31, 2009. (R. 000407-000408.)

Mr. Lyon filed a Rule 59 Motion for New Trial on September 2, 2009. (R. 000383-000406.) The motion challenged the jury verdict on the grounds that there was insufficient evidence to support the verdict of no proximate causation. (*See id.*) Specifically, the only evidence presented on the issue of proximate cause at trial was the testimony of plaintiff's medical expert, Anthony Serfustini, M.D. Dr. Serfustini testified that the pulmonary embolism suffered by Mr. Lyon was more likely than not the result of Dr. Lyon's failure to

diagnose and treat Mr. Lyon for a blood clot or clots during a postoperative examination on November 28, 2005. (*See id.*; R. 000625 at pp. 38-39, 60-61, 89) (the relevant excerpts of Dr. Serfustini's testimony are attached hereto at **Addendum Tab B**.) Dr. Lyon did not even attempt to controvert that evidence and failed to present evidence of any other possible cause of the pulmonary embolism.

Dr. Lyon filed a memorandum in opposition to the motion for new trial on or about September 11, 2009. (R. 000414-000479.) The memorandum set forth four separate arguments: (1) the jury was not required to believe Dr. Serfustini; (2) the basis for the finding of negligence was unclear; (3) causation had not been proven; and (4) defendant was barred from bringing a motion for new trial because no motion for directed verdict had been made at the close of evidence. (*See id.*)

The trial court heard Mr. Lyon's motion for new trial on November 12, 2009 and, on November 30, 2009, issued its Ruling Denying Plaintiff's Motion for New Trial. (R. 000627; R. 000537-000542.) The ruling found that Dr. Serfustini had provided uncontroverted testimony on the issue of causation, but nevertheless denied the motion on five grounds: (1) the evidence presented on causation "was very brief;" (2) "the evidence on causation was not presented in an emphatic, or even a very clear, manner;" (3) the jury was not bound by the testimony of Dr. Serfustini; and (4) there was a "plausible" possibility that the jury had determined Dr. Lyon had been negligent in some respect other than the failure to diagnose and treat the blood clot or clots. The trial court tacitly rejected Dr.

Bryan's assertion of a procedural bar to a new trial. (R. 000537-000542) (the trial court's ruling is attached hereto at **Addendum Tab C.**)

## **STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED**

### **I. The Underlying Facts of the Case**

On November 15, 2005, Dr. Bryan performed rotator cuff surgery on Mr. Lyon's left shoulder. (R. 000624 at pp. 115-16.) On about November 24th or 25th, Mr. Lyon began experiencing swelling and pain in his left arm. (*Id.* at pp. 119, 204, 210.)

On November 28, 2005, Mr. Lyon made a postoperative visit to Dr. Bryan. (R. 000624 at p. 120.) Mr. Lyon testified that by that date, the swelling was severe and two "very distinctive lumps, very large" had manifested in the crease of his left elbow. (*Id.* at 120, 122-23, 187, 199.) Mr. Lyon testified that he complained to Dr. Bryan of the swelling, the lumps and the pain in his arm during the postoperative, and that he told Dr. Bryan he felt as if his arm was going to explode. (*Id.* at 120-23, 184, 187-88, 190, 211-12.) Dr. Bryan disputed Mr. Lyon's testimony that he presented with those symptoms and made those complaints during the postoperative visit. (R. 000625 at pp. 157-58.) It was undisputed, however, Dr. Bryan did not investigate the complaints Mr. Lyon testified he made during that visit. (*See* R. 000624 at 121, 123, 130, 191, 212, 220.)

On the evening of December 1, 2005, Mr. Lyon began coughing up blood and experiencing excruciating pain in his back, as well as shortness of breath. (R. 000624 at pp. 125, 202, 213.) Mr. Lyon described the pain as being the worst he had suffered in his entire

life. (*Id.* at p. 125.) The pain lasted throughout the night. (*Id.* at p. 126-27.) Despite his high pain tolerance and aversion to taking pain pills, Mr. Lyon took one around 9:00 p.m. and found himself repeatedly checking the clock throughout the night in hopes that enough time had passed that he could take another one. (*Id.* at pp. 126, 129, 135.)

The following morning, Mr. Lyon, still in pain, called Dr. Bryan's office to report the pain and set up a time to see the doctor. Dr. Bryan referred Mr. Lyon to Dr. J. David Schmitz, Mr. Lyon's family doctor. (R. 000624 at p. 127, 213-14.)

Mr. Lyon was examined by Dr. Schmitz later that morning. (R. 000624 at pp. 6-12; 127, 203.) Mr. Lyon testified that on the morning he presented to Dr. Schmitz his arm and the lumps in it were in a condition similar to that in which they were presented to Dr. Bryan on November 28. (*Id.* at pp. 124, 130, 195, 200.) Upon examining Mr. Lyon and learning that he had recently undergone surgery on his arm, Dr. Schmitz was concerned that he may have suffered a deep vein thrombosis ("DVT"), *i.e.*, a blood clot or clots, and a resultant pulmonary embolism. (*Id.* at pp. 6-11.) When asked at trial about the basis for his concern, Dr. Schmitz testified, "[A]nytime you have a thrombosis in an extremity, whether it's the arm or the leg, you're at risk for developing something call[ed] a pulmonary embolism which is when a part of the . . . clot breaks off and flows up into the lung and excludes a part of the pulmonary circulation in the lung. This can, pulmonary embolism causes over 150,000 deaths a year in the United States. So it's a very common complication of deep vein thrombosis." (*Id.*; *see also id.* at p. 17.)

Dr. Schmitz immediately sent Mr. Lyon for a sonogram to confirm the presence of DVT and pulmonary embolism. (R. 000624 at pp. 13, 128.) The sonogram revealed that Mr. Lyon indeed had suffered a pulmonary embolism. (*Id.* at p. 13, 14.) Dr. Bryan did not dispute that Mr. Lyon had suffered a pulmonary embolism.

Dr. Schmitz testified at length concerning DVTs, how DVTs can cause pulmonary emboli, how DVTs can result from surgery on the extremities, including the upper extremities, and the dangers of pulmonary emboli, which include possible death. (R. 000624 at pp. 12, 16, 18, 20-21.) There was no dispute regarding the seriousness of a pulmonary embolism.

Mr. Lyon was hospitalized for three days and endured several months of pain as a result of pulmonary embolism. (R. 000624 at p. 131, 133, 135-36, 207.) He expressed that during his ordeal he thought he was going to die and that he believes he would have died had he not consulted with Dr. Schmitz on December 2, 2005. (*Id.* at p. 142, 147-48, 186, 194.)

## **II. The Relevant Evidence Presented and Jury Instructions Given at Trial**

On June 21, 2007, Mr. Lyon brought his complaint in this matter. In it, he alleged medical malpractice against Dr. Bryan for failing to diagnose a blood clot or clots in his arm during the postoperative visit of November 28, 2005. (R. 000001-000008.)

Mr. Lyon's case was tried to a jury on August 3-5 and 7, 2009. The jury was instructed at the outset of the trial regarding the nature of the negligence at issue. The Introductory Jury Instruction stated, in relevant part:

The Plaintiff claims that on November 15, 2005, Dr. Bryan performed surgery on his left shoulder (rotator cuff) at the 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. 000184.)

Evidence was presented at trial regarding Dr. Bryan's negligence in failing to diagnose Mr. Lyon with and treat him for DVT on November 28, 2005. Evidence also was presented that one of the DVTs, or a portion thereof, was "thrown" and traveled through Mr. Lyon's veins to and through his heart, where it was pumped into the pulmonary artery and from there traveled into his lungs, resulting in the pulmonary embolism. (R. 000625 at p. 40-41.)

Mr. Lyon's medical expert, Dr. Serfustini, testified that, in his opinion, Dr. Bryan breached the medical standard of care by failing to take action to determine the cause of the swelling in Mr. Lyon's left arm during the November 28, 2005 postoperative visit. (R. 000625 at pp. 15-16, 23-28, 34, 37, 41-42.) Dr. Serfustini reiterated this opinion under cross-examination by Dr. Bryan's counsel. (*Id.* at p. 55.) The trial court recognized that Dr. Serfustini clearly expressed this opinion. (*Id.* at p. 79-80.)

Dr. Serfustini also was asked whether he had an opinion as to whether or not the pulmonary embolism suffered by Mr. Lyon was more likely than not caused by Dr. Bryan's failure to diagnose Mr. Lyon with and treat him for blood clots in his left arm on November 28, 2005. **In response, Dr. Serfustini testified that, in his opinion, it was more likely**

**than not that the pulmonary embolism had resulted from that failure.** (R. 000625 at pp. 38-39.)

Specifically, Dr. Serfustini testified, “Counsel, that’s really, not only is that the answer is a medical one, the answer is a common sense one. If you define the problem that is a blood clot, you take timely action then you stand an excellent chance of preventing this blood clot from breaking loose and going to the lungs.” Mr. Lyon’s counsel then asked Dr. Serustini, “. . . would you, taking into account all your years of experience and training. think that Mr. Lyon’s lung, blood clot to his lungs, pulmonary embolism, was more likely than not a result of him not being treated on November 28?” Dr. Serfustini answered, “Correct.” (R. 000625 at pp. 38-39) (attached hereto at **Addendum Tab B.**) Dr. Serfustini reiterated this opinion during cross-examination by Dr. Bryan’s counsel. (*Id.* at p. 60-61) (attached at **Addendum Tab B.**) Indeed, Dr. Bryan’s counsel asked whether that was the particular causation aspect on which Dr. Serfustini was concentrating in this case. Dr. Serfustini answered, “Yes.” (*Id.*) Dr. Serfustini again repeated his opinion during re-direct examination. (*Id.* at p. 89) (attached at **Addendum Tab B.**)

Dr. Bryan did not present any evidence contradicting, rebutting or offering any alternative to Dr. Serfustini’s opinion as to the cause of the pulmonary embolism. (*See* R. 000623-000626.) Dr. Bryan contested whether he had been negligent, but did not contest that a failure to diagnose blood clots would be the proximate cause of a resulting pulmonary embolism.

At the close of evidence, the jury was instructed as follows regarding the evidence on which it was to base its verdict:

[t]his case must be decided only upon the evidence which you have heard from the witnesses, and have seen in the form of documents, photographs or other tangible things admitted into evidence.

Anything you may have seen or heard from any other source may not be considered by you in arriving at your verdict.

You should not consider as evidence any statement of the lawyers made at trial.

(R. 000350.)

The trial court instructed the jury regarding expert opinions as follows:

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 such 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 should 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.)

The trial court instructed the jury regarding proximate causation as follows: “[a] proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.” (R. 000365.)

### **III. The Verdict**

The trial court sent the jury out to deliberate on August 7, 2009. The jury returned its verdict later that day. (*See* R. 000334-000335.)

The jury answered “YES” to the question “Considering all the evidence in this case, was the Defendant, Donald Bryan, M.D., negligent?” (R. 000334.) The jury answered “NO” to the question “If your answer to Question 1 is ‘yes,’ was such negligence the proximate cause of any injury or damages to Plaintiff?” (R. 000335) (the verdict is attached hereto at **Addendum Tab A.**)

### **IV. Mr. Lyon’s Rule 59 Motion for New Trial**

On September 2, 2009, Mr. Lyon filed his Rule 59 Motion for New Trial. The grounds for the motion were that, given Dr. Serfustini’s testimony on the issue of the proximate causation of the pulmonary embolism undisputedly suffered by Mr. Lyon on December 1, 2005 and the lack of any evidence controverting, rebutting or providing any alternative to that opinion, the jury’s verdict was unsupported by the evidence. (R. 000383-000406.)

Dr. Bryan opposed the motion for new trial in a memorandum filed with the trial court on or about September 11, 2009. Dr. Bryan made four separate arguments in that memorandum:

- a. the jury was not required to believe Dr. Serfustini;
- b. the basis for the jury’s finding of negligence against Dr. Bryan was unclear;

c. Mr. Lyon had failed to prove causation;

d. Mr. Lyon was barred from seeking a new trial because he did not move for directed verdict at the close of evidence.

(R. 000414-000479.)

Mr. Lyon filed a reply memorandum in support of his motion for a new trial on September 24, 2009, in which he rebutted each of the arguments advanced by Dr. Bryan's opposition memorandum. (R. 000516-000529.)

After hearing the motion for a new trial on November 12, 2009 (R. 000627), the trial court entered its Ruling Denying Plaintiff's Motion for a New Trial on November 30, 2009. In that Ruling, the trial court admitted that "[Mr. Lyon] makes a strong and persuasive argument" and expressly conceded that Dr. Serfustini had offered uncontroverted testimony regarding causation in favor of Mr. Lyon, but ultimately denied the motion for the following four reasons:

a. "... the evidence Plaintiff presented on causation was very brief" and "[c]onsidering the minimal evidence presented on causation, the jury may have concluded that Plaintiff had failed to carry his burden of proof on this point."

b. "... the evidence on causation was not presented in an emphatic, or even a very clear, manner" and "[i]t is entirely possible, and reasonable, that the jury may have simply found Dr. Serfustini's testimony on causation not credible or at least unpersuasive."

c. "... the jury was not bound by Dr. Serfustini's testimony, and it would not

have been unreasonable for the jury to disregard Dr. Serfustini's opinion as to causation."

d. It was "plausible" "that, as a result of the emphasis placed on Defendant's inaccurate notes, the jury may have found Defendant negligent in his note-taking, and not for his failure to diagnose the blood clots in Plaintiff's arm."

(R. 000537-000542) (the ruling is attached hereto at **Addendum Tab C.**)

### **SUMMARY OF ARGUMENTS**

The judgment in favor of Dr. Bryan should be reversed and the case remanded for a new trial for two separate reasons. First, the jury's determination that Dr. Bryan's negligence did not proximately cause injury to Mr. Lyon is not supported by any record evidence. The only evidence regarding causation was Dr. Serfustini's testimony that it was more likely than not Dr. Bryan's negligence in failing to examine, diagnose or treat Mr. Lyon for DVT on November 28, 2005 caused Mr. Lyon to experience a painful and life threatening pulmonary embolism on December 1, 2005. Dr. Bryan did not controvert this evidence nor did he present any alternative theory as to the causation of the pulmonary embolism. Dr. Bryan's entire defense at trial turned on his purported **lack of negligence**; he did not contend that his alleged negligence, if proven, did not result in the embolism. That defense failed. The jury found Dr. Bryan negligent. In light of that finding, which is not challenged by either party, and given that the only evidence on the issue of causation was Dr. Serfustini's uncontroverted testimony, the jury verdict is not only unsupported by the evidence but is contrary to it, and cannot stand.

Second, the trial court abused its discretion by denying Mr. Lyon's motion for a new trial and upholding the verdict. The trial court denied the motion for a new trial based upon a series of hypothetical justifications for the jury's verdict of no proximate cause, rather than a review of the evidence. Such a review shows, by the admission of the trial court, that the only evidence on the issue of causation was the uncontroverted testimony of Dr. Serfustini. Therefore, it is clear that the evidence was insufficient to support the jury's verdict of no proximate causation and that a new trial should have been granted.

Notwithstanding the plain lack of support for the jury's finding, however, the trial court improperly engaged in speculation regarding the weight assigned to evidence by the jury and the jury's view of Dr. Serfustini's credibility. The trial court improperly upheld the verdict based solely on that speculation. Additionally, the trial court failed to consider that some of its stated justifications for the relevant jury determination required that it be assumed the jury had disregarded certain jury instructions in reaching the determination. Any failure by the jury to follow the jury instructions provides additional grounds for **overturning** its verdict rather than grounds for upholding it.

## **ARGUMENT**

### **I. The Jury's Verdict Lacked Sufficient Evidentiary Support**

#### **A. The Standard of Review**

The standard of review on a challenge to a jury verdict is whether, taking the evidence in the light most favorable to the appellee, the appellant can demonstrate the jury's findings

lack substantial evidentiary support. Water & Energy Systems, 2002 UT 32 at ¶ 15. The verdict will be reversed where it is not supported by substantial evidence or where it is based on insufficient evidence. Ortiz v. Geneva Rock Prods., Inc., 939 P.2d 1213, 1216 (Utah Ct. App. 1997); see also Crookston v. Fire Ins. Exchange, 817 P.2d 789, 799 (Utah 1991). Evidence is insufficient to support a jury verdict where it “so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.” Ortiz, 939 P.2d at 1216 (quoting Billings v. Union Bankers Ins. Co., 918 P.2d 461, 467 (Utah 1996)) (reversing a jury’s finding of no negligence on the part of the defendant where the testimony of all of the witnesses relied upon by the appellants and the appellees evidenced at least some negligence by defendant).

**B. There Was Insufficient Evidence for the Jury’s Verdict that Dr. Bryan’s Negligence in Failing to Diagnose Blood Clots Was Not the Proximate Cause of Mr. Lyon’s Pulmonary Embolism, which Undisputedly Resulted from the Blood Clots**

This Court’s decision in *Ortiz* teaches that a jury’s finding that one of the elements of a claim of negligence does not exist (negligence in the case of *Ortiz*) is not supported by sufficient evidence where the only evidence presented on the issue supports a finding that the element in fact does exist and that evidence is uncontradicted and uncontroverted. See Ortiz, 939 P.2d at 1216-18. As shown by *Ortiz*, this analysis follows from two factors.

It follows first from the applicable standard of review, which requires an appellate court to simply determine what evidence was presented and prevents the court from engaging in speculation as to how the jury made its determination. Ortiz, 939 P.2d at 1216.

Specifically, in reviewing a jury verdict, an appellate court may not “reweigh the evidence or investigate witness credibility.” *Id.* (quoting *Butterfield v. Cook*, 817 P.2d 333, 337 (Utah Ct. App. 1991)). Rather, the court should “view the evidence in the light most supportive of the verdict, and assume that the jury believed those aspects of the evidence which **sustain** its findings and judgment.” *Id.* (quoting *Billings*, 918 P.2d at 467) (emphasis added). The court should not speculate as to how or why the jury found as it did, but confine its inquiry to the evidence actually presented at trial. *See id.* at 1218, n.4 (noting it was possible but refusing to speculate that the jury had concluded that the plaintiff’s comparative negligence was greater than the defendant’s in determining that the defendant was not at all negligent where the evidence clearly demonstrated the defendant was negligent to some degree).

Second, the *Ortiz* analysis follows from the required assumption that the jury was conscientious in its duty and followed the instructions of the trial court. *Ortiz*, 939 P.2d at 1216. Thus, it must be assumed that the jury made its determination based upon the evidence that was presented. As such, if the only evidence presented establishes the existence of the element under the trial court’s instructions, and there was no contrary or controverting evidence, then it must be concluded that there was no substantial competent evidence upon which a “reasonable, fair jury” could determine the element does not exist such that the jury’s verdict as to the non-existence of the element is not supported by the evidence. *Id.* at 1218.

Application of the *Ortiz* analysis in the present case demonstrates the judgment in favor of Dr. Bryan must be reversed because there was insufficient evidence for the jury’s

verdict that Dr. Bryan's negligence in failing to diagnose blood clot or clots on November 28, 2005 was not the proximate cause of Mr. Lyon's injuries from the pulmonary embolism , which resulted from that blood clot or clots.

There was no dispute that Mr. Lyon suffered a pulmonary embolism on the evening of December 1, 2005. There also was no dispute that a blood clot or clots, DVT, caused the pulmonary embolism. The only causation issue was whether Dr. Bryan's failure to diagnose DVT during Mr. Lyon's postoperative examination on November 28, 2005 was the proximate cause of Mr. Lyon's pulmonary embolism.

On this issue, Dr. Serfustini's testified that, in his expert opinion, Dr. Bryan's negligence in failing to further examine and treat Mr. Lyon for DVT in his left arm during the November 28, 2005 visit more likely than not resulted in Mr. Lyon suffering the pulmonary embolism. (R. 00625 at pp. 38-39, 60-61) (*see Addendum Tab B.*) This evidence was not controverted by Dr. Bryan. Nor did Dr. Bryan propose any alternative causation for the pulmonary embolism. Indeed, Dr. Bryan admitted that if Mr. Lyon had a DVT in his arm on November 28, 2005, the proper course of action would have been to start him on treatment with anticoagulation drugs to prevent pulmonary embolism. (R. 000625 at pp. 190-91.) Dr. Bryan's medical expert, Dr. Vanderhooft, agreed with that assessment. (R. 000626 at pp. 71, 76.) Dr. Bryan also admitted that, in retrospect, it was more likely than not that Mr. Lyon had a DVT in his left arm when he presented to Dr. Bryan during the November 28 visit. (R. 000625 at p. 146.) It was undisputed, however, that Dr. Bryan had

not placed Mr. Lyon on such a course of treatment. Dr. Bryan simply raised no defense to the causation of the pulmonary embolism. As such, there was no substantial competent evidence at trial which a reasonable, fair jury could enter a finding of no proximate cause.

A similar situation was presented in *Ortiz*. In *Ortiz*, this Court upheld a challenge to a jury verdict of no negligence where three witnesses for the plaintiff Ortiz provided testimony regarding facts that established defendant's negligence, and the defendant did not present a single witness whose testimony supported the jury's verdict. *See* 939 P.2d at 1217-18. Ortiz had been injured when a concrete truck driver and a mechanic were trying to repair, on site and from the truck cab, the back chute of the truck, which caused the chute to swing and strike Ortiz. One witness testified as to the lack of any warnings, the second testified that the repair attempt was not common practice, that there were safer alternatives and that the method employed left the driver and the mechanic unable to give any warnings, and the third testified that he would have never attempted the repair on site. This evidence was uncontroverted and uncontradicted. It was supported by the mechanic's testimony on behalf of the defendant. In short, there was only evidence of negligence, and no evidence that the defendant was not negligent. The court concluded that "[a]fter examining this testimony, we conclude that no 'substantial competent evidence' . . . was presented at trial upon which a reasonable, fair jury could enter a finding of absolutely no negligence on [defendant's] part. Therefore, we reverse and remand for a new trial." *Id.* at 1218.

The evidence here as to proximate causation was equally one-sided as establishing

proximate causation as was the evidence in *Ortiz* that established negligence. Mr. Lyon presented evidence that Dr. Bryan's failure to diagnose the DVT on November 28, 2005 was the proximate cause of Mr. Lyon's pulmonary embolism, and Dr. Bryan did not present any evidence establishing that his failure to diagnose the DVT was not the proximate cause of Mr. Lyon's pulmonary embolism. Thus, it must be concluded under the *Ortiz* analysis that no "substantial competent evidence" was presented at the trial here upon which a reasonable, fair jury could enter a finding of no proximate causation, requiring a reversal and remand for a new trial.

Trial by jury is one of the most important and defining aspects of our legal system. As a result, jury verdicts should not be overturned lightly. As a matter of law, however, "it must be realized that even a jury is not so sacrosanct as to be beyond the possibility of error." *Hyland v. St. Mark's Hosp.*, 427 P.2d 736, 738 (Utah 1967). "The primary purpose of the trial of a case is to render justice between the litigants." *Chatelain v. Thackeray*, 100 P.2d 191, 198 (Utah 1940). Where a trial fails to do so, the courts have power to overturn the verdict and order a new trial. See *id.* Indeed, in a case where the jury verdict is not supported by sufficient evidence, and especially where it is not supported by **any** evidence, reversal of the verdict is mandatory. See *Ortiz*, 939 P.2d at 1216. For the reasons discussed above, this is such a case.

### **C. Marshaling of Record Evidence**

Mr. Lyon has the burden of marshaling all record evidence that supports the jury's

finding that Dr. Bryan's negligence did not proximately cause any injury or damage to him. Utah R. App. P. 24(a)(9); Crookston, 817 P.2d at 799. However, even assuming Dr. Bryan's position as to possible relevant evidence on the issue of causation, there simply was no evidence that supported the jury's verdict that Dr. Bryant's negligence, found by the jury, was not the proximate cause of Mr. Lyon's injuries from his pulmonary embolism resulting from a blood clot or clots. No evidence suggested a different cause for the pulmonary embolism. No evidence contradicted Dr. Sefustini's testimony regarding the causal link between the negligence and the pulmonary embolism. No evidence controverted Dr. Sefustini's testimony or credentials. This is demonstrated by a review of all possibly relevant evidence (taking Dr. Bryan's position as to possible relevance):

1. Dr. Schmitz testified that the surgery likely caused the DVT in Mr. Lyon's arm (R. 000624 at p. 22), and, during cross-examination by Dr. Bryan's counsel, Dr. Serfustini testified that the DVT experienced by Mr. Lyon did not result from Dr. Bryan's negligence (R. 00625 at p. 57, 60). However, the issue is the proximate cause of Mr. Lyon's pulmonary embolism, not the cause of the blood clots that necessarily caused the pulmonary embolism. Evidence regarding the cause of the DVT, the blood clot or clots, does not establish one way or the other whether Dr. Bryan's failure to diagnose the DVT was the proximate cause of Mr. Lyon's pulmonary embolism. (See R. 000520 at p. 5) (pointing out that Dr. Bryan's argument regarding the sufficiency of proof as to pain in Mr. Lyon's arm was a red herring.)

2. During cross-examination by Dr. Bryan's counsel, Dr. Serfustini agreed that,

hypothetically, it can be difficult to “head off” a pulmonary embolism and there can be difficulties posed by the presentation of a patient. (R. 000625 at p. 58.) This testimony went to the issue of negligence, not the issue of causation. Furthermore, Dr. Serfustini also testified that in **this particular case** “[i]t’s highly unlikely that [Mr. Lyon’s pulmonary embolism] from any other place than the symptomatic arm that had the proven clot by ultrasound and veinography.” (*Id.*) Dr. Serfustini also expressly opined that Dr. Bryan violated the medical standard of care by failing to investigate Mr. Lyon’s complaint during the November 28, 2005 postoperative visit **and that this particular failure more likely than not caused Mr. Lyon to experience a pulmonary embolism.** (*Id.* at pp. 38-39.)

3. During cross-examination by Dr. Bryan’s counsel, Dr. Schmitz agreed that Mr. Lyon “presented with a rather complex picture with regard to multiple potential causes of pain in the arm and hands and elbow[.]” (R. 000624 at p. 47.) Again, this evidence is irrelevant to whether Dr. Bryan’s failure to diagnose the DVT was the proximate cause of the pulmonary embolism. This evidence only went to whether Dr. Bryan was negligent in failing to diagnose DVT, which is an issue the jury found against Dr. Bryan.

4. During cross-examination by Dr. Bryan’s counsel, Dr. Schmitz agreed that in other cases he had seen pulmonary emboli that were diagnosable in the lung but it could not be determined from whence the emboli came. (R. 000624 at p. 66.) This testimony is irrelevant because, in the case of Mr. Lyon, the source of his pulmonary embolism was determinable and determined, specifically, the DVT that Dr. Bryan failed to diagnose on

November 28, 2005. (*See id.* at p. 69) (Dr. Schmitz testifying that it was his opinion there was nothing wrong with the surgery; he was concerned about Dr. Bryan's failure to recognize a clot in his patient.)

5. During cross-examination by Dr. Bryan's counsel, Dr. Schmitz testified that it was medically unlikely that, given the amount of time that had passed since the occurrence of the pulmonary embolism, Mr. Lyon would experience another embolism from any blood clot in his arm that had resulted from his 2005 surgery. (*See* R. 000624 at p. 73.) This, of course, has nothing to do with whether Mr. Lyon experienced the initial pulmonary embolism as a result of the negligence of Dr. Bryan.

6. During cross-examination by Dr. Bryan's counsel, Dr. Schmitz testified that by April 9, 2009, *i.e.*, within about three and a half years of the occurrence of the pulmonary embolism, Mr. Lyon's lung function was essentially normal and that Mr. Lyon was not experiencing any pain in the pleura, the sac surrounding his lungs (R. 000624 at pp. 78, 80). Mr. Lyon, however, did not claim at trial that the pulmonary embolism resulted in any chronic damage to his lung function. This was made clear to the jury by Mr. Lyon's counsel during his redirect examination of Dr. Schmitz. (*See id.* at p. 91.) In any event, this evidence was irrelevant to whether the pulmonary embolism itself occurred as a result of Dr. Bryan's negligence.

7. Dr. Serfustini testified that he had a low opinion of Dr. Bryan's notes. (R. 000625 at pp. 78-79.) In an attempt to square the jury's determination of negligence with its

determination of lack of causation, Dr. Bryan argued below that the jury might have concluded that his poor note-taking constituted negligence. (*See* R. 000421-000423.) Dr. Bryan's argument is baseless. No evidence was offered that the poor note-taking **violated the medical standard of care**, which would be prerequisite to a finding of negligence in this case. (*See* R. 000212, 000213.) The jury was expressly instructed that the negligence at issue in this case was Dr. Bryan's failure to diagnose the DVTs experienced by Mr. Lyon during the November 28, 2005 postoperative visit. (*See* R. 000184.) As to the suggestion that emphasis on the condition of Dr. Bryan's notes during closing argument might have persuaded the jury that Dr. Bryan was negligent in this regard, the jury was expressly instructed that argument of counsel was not evidence. (R. 000199.) Indeed, counsel for Mr. Lyon reminded the jury that his statements were not evidence during his own closing argument. (R. 000626 at p. 89.) Finally, the emphasis on Dr. Bryan's notes during closing argument was on their lack of credibility as evidence, not as an independent basis for assigning liability. (*Id.* at pp. 94-95, 104-05.)

8. Dr. Serfustini admitted that pulmonary emboli resulting from DVTs originating in the arms following rotator cuff surgery are relatively rare. (R. 000625 at pp. 94-95.) However, Mr. Lyon's DVT undisputably was such an occurrence. The relative rarity of the occurrence did not detract from Dr. Serfustini's opinions that Dr. Bryan had breached the medical standard of care and that the breach more likely than not caused Mr. Lyon to suffer a pulmonary embolism. (*Id.*) Additionally, the rarity of the condition went to the issue of

Dr. Bryan's negligence in failing to examine, diagnose and treat Mr. Lyon, not the causation of the pulmonary embolism he experienced.

9. Dr. Bryan's medical expert, Dr. Vanderhooft, testified regarding the relatively rarity of DVTs originating in the upper extremities. (R. 000626 at pp. 17-22, 61-62.) Dr. Vanderhooft also testified generally that the standard of care was met by Dr. Bryan. (*Id.* at pp. 31-34.) Dr. Vanderhooft admitted, however, that if presented with a patient complaining of the symptoms Mr. Lyon testified he complained of to Dr. Bryan, he would examine that patient further despite the rarity of DVTs in the upper extremity. (*Id.* at pp. 66-67.) Dr. Vanderhooft agreed with Dr. Serfustini that, while a given condition may be rare, if the condition happens to a particular patient the occurrence of the condition in that case is 100 percent. (*Id.* at p. 68.) Dr. Vanderhooft also testified that Dr. Schmitz "did the right thing" by examining Mr. Lyon and sending him to radiography on December 2 given that Mr. Lyon presented with significant, "brawny" swelling. (*Id.* at pp. 70-71, 75.) He agreed with Dr. Schmitz that this was the correct course of action regardless of the presence or absence of pulmonary symptoms. (*Id.* at p. 76.) Further, and most importantly, Dr. Vanderhooft testified that if Mr. Lyon presented to Dr. Bryan with similar swelling on November 28, Dr. Bryan should have similarly examined him and sent him to radiology. (*See id.* at p. 71.) Finally, all of this evidence was concerned with the issue of negligence, not causation.

10. Dr. Bryan testified, "I don't know 100 percent, a 100 percent that I'd have got an ultrasound on the 28th it would have shown the clot." (R. 000625 at p. 146; *see also id.*

at p. 165.) Dr. Bryan admitted, however, that the clot was more likely than not present at the time of the postoperative visit on November 28, 2005. (*Id.* at p. 146.) He also admitted that if Mr. Lyon had been given an ultrasound on November 28 and been found to have had a DVT in his arm, the correct course of treatment would have been to place him on anticoagulants to prevent the occurrence of a pulmonary embolism. (*Id.* at pp. 190-91.) This testimony supports Dr. Serfustini's testimony that the failure to appropriately treat Mr. Lyon on November 28 more likely than not caused his condition to progress to pulmonary embolism.

11. Dr. Bryan testified that he believed his relevant conduct on November 28, 2005 was within the standard of care. (R. 000625 at p. 147.) Whether his conduct met the standard of care, however, went to the issue of his negligence, not the issue of causation.

12. Dr. Bryan testified that he believed the only reason Dr. Schmitz sent Mr. Lyon for an ultrasound was because Mr. Lyon already had experienced a pulmonary embolism and was experiencing chest pain by the time he saw Dr. Schmitz. (R. 000625 at pp. 145, 168, 175.) Diagnosis and treatment of the DVT went to the issue of negligence, not causation. Furthermore, this self-serving, baseless statement about what Dr. Schmitz did and why he did it was directly contrary to Dr. Schmitz's own testimony, and this was pointed out to the jury. (R. 000624 at 12; R. 000625 at pp. 168, 170-72.) It was also contrary to the testimony of Dr. Bryan's own medical expert, Dr. Vanderhooft. (R. 000626 at pp. 66-67.) .

## **II. The Trial Court Abused Its Discretion in Denying Mr. Lyon's Motion for a New Trial**

### **A. The Standard of Review**

Where a motion for new trial is based on insufficient evidence to support the verdict, and the motion is denied by the trial court, an appellate court “will reverse the denial only if ‘the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.’” *King*, 739 P.2d at 621 (quoting *McCloud v. Baum*, 569 P.2d 1125, 1127 (Utah 1977)). In the present case, there was no evidence to support the jury’s determination that Dr. Bryan’s negligence did not proximately cause harm to Mr. Lyon. The evidence was precisely the contrary. Further, the trial court’s stated reasons for denying Mr. Lyon’s motion for new trial demonstrate that the court abused its discretion by speculating as to the possible reasons the verdict came out as it did rather than simply reviewing the evidence.

### **B The Trial Court Expressly Determined that Mr. Lyon Had Presented Evidence on the Issue of Causation, and that Dr. Bryan Had Not Done So**

When considering whether or not to grant a motion for new trial where it is contended that the evidence presented at trial was insufficient to support the jury’s verdict, the primary obligation of the trial court is to review and weigh the evidence to determine whether the verdict was indeed supported. “[S]ince it is the personal duty of the trial judge to weigh and to consider the evidence and to reach a just conclusion thereon, if he be satisfied that the verdict or decision in question is not in fact **supported by the evidence, or that it is**

**contrary to the weight of the evidence, he is not only authorized, but it is his bounden duty to grant the motion for new trial.”** Brown v. Johnson, 472 P.2d 942, 944 (Utah 1970) (citation omitted) (emphasis added).

In denying Mr. Lyon’s motion for new trial, the trial court expressly found that Dr. Serfustini “was the **only** witness at trial to testify as to causation.” (R. 000538.) The trial court went on to characterize Dr. Serfustini’s causation testimony, appropriately, as “uncontroverted.” (R. 000539.) It was therefore clear the jury’s determination that Dr. Bryan’s negligence was not a proximate cause of the harm or injury to Mr. Lyon was unsupported by the evidence and contrary to the weight of the evidence. The trial court erred in denying Mr. Lyon’s motion for a new trial in light of those findings.

**C. Each of the Trial Court’s Stated Reasons for Denying the Motion for New Trial Fails**

Instead of simply reviewing and weighing the evidence that was presented, the trial court incorrectly engaged in a backwards justification of the jury verdict, attempting to reconcile the verdict by speculating as to what the jury might have thought of Dr. Serfustini and the evidence presented. This was error, as discussed above. Moreover, each of the justifications for the verdict set forth by the trial court fails. The trial court stated four grounds for denial of Mr. Lyon’s motion for new trial, namely:

a. “. . . the evidence Plaintiff presented on causation was very brief” and “[c]onsidering the minimal evidence presented on causation, the jury may have concluded that Plaintiff had failed to carry his burden of proof on this point.”

b. “... the evidence on causation was not presented in an emphatic, or even a very clear, manner” and “[i]t is entirely possible, and reasonable, that the jury may have simply found Dr. Serfustini’s testimony on causation not credible or at least unpersuasive.”

c. “. . . the jury was not bound by Dr. Serfustini’s testimony, and it would not have been unreasonable for the jury to disregard Dr. Serfustini’s opinion as to causation.”

d. It was “plausible” “that, as a result of the emphasis placed on Defendant’s inaccurate notes, the jury may have found Defendant negligent in his note-taking, and not for his failure to diagnose the blood clots in Plaintiff’s arm.”

(R. 000537-000542) (*see Addendum Tab C.*)

None of these reasons stand up in light of the evidence actually presented at trial and the instructions given the jury.

**1. The Jury Could Not Have Merely Concluded Mr. Lyon Failed to Carry His Burden of Proof on the Basis Determined by the Trial Court**

Contrary to the trial court’s determination, the jury cannot have properly concluded that the brevity of Dr. Serfustini’s testimony regarding causation prevented Mr. Lyon from prevailing on that issue. Such a conclusion would have required the jury to ignore the instructions provided to it by the trial court. When reviewing a jury verdict, it generally should be assumed that the jury followed the trial court’s instructions in evaluating the evidence and applying the law. *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); *Ortiz*, 939 P.2d at 1216. When it is apparent that the jury disregarded the evidence or the instructions, however, and by doing so arrived at a verdict that is against the clear weight of the evidence, it is the duty of the trial court to set aside the verdict. *Chatelain*, 100 P.2d at 198.

In considering Mr. Lyon's motion for a new trial, the trial court correctly recognized that Dr. Serfustini had delivered an expert opinion on causation, and that Dr. Serfustini was the only witness to testify on that issue. (R. 000563.) The trial court characterized the evidence on the issue of causation, however, as "minimal," and noted that the evidence took approximately only one minute of the four day trial to present. (R. 000564.) The trial court concluded that the brevity of the evidence on causation may have impacted the jury. (R. 000564.) This justification for the verdict ignored that, in order for the jury to have dismissed Dr. Serfustini's testimony merely for its brevity, the jury would have had to improperly ignore the jury instructions.

The jury was instructed that Mr. Lyon had the burden of demonstrating by the preponderance of the evidence that Dr. Bryan had been negligent and that his negligence proximately caused injury to Mr. Lyon. (R. 000360.) The jury was instructed as follows regarding the meaning of "preponderance of the evidence:"

The term "preponderance of the evidence" means that evidence which, in your minds, seems to be the greater weight, the most convincing and satisfactory.  
**The preponderance of the evidence is not determined by the number of**

**witnesses, nor the amount of testimony**, but by the convincing character<sup>1</sup> of the testimony, weighed impartially, fairly, and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

(R. 000358) (emphasis added.) When this instruction, which was stipulated to by the parties and delivered by the trial court, is considered it is clear that, contrary to the first finding of the trial court, the jury cannot properly have simply concluded that Dr. Serfustini's uncontroverted testimony regarding causation was insufficient because of its brevity. If the jury did so, then it improperly ignored the instruction on determining the preponderance of the evidence, and Mr. Lyon would be entitled to a new trial on that basis.

**2. There Was No Basis For Finding Dr. Serfustini's Testimony to Lack Credibility or Be Unpersuasive**

The trial court suggested that Dr. Serfustini's testimony on the causation issue may have seemed equivocal to the jury. This finding ignores the proper standard for determining whether a new trial should be granted. The trial court should not step into the jury's shoes and attempt to reweigh the evidence. Nor should the trial court speculate as to the weight assigned by the jury to any evidence. Rather, the trial court should consider only whether the evidence presented supported the relevant jury finding and determine whether the jury properly performed its duty in accordance with the instructions of the court. *Chatelain*, 100 P.2d at 199.

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<sup>1</sup>The jury instruction in question contains a handwritten notation indicating the Court may have used the word "quality" instead of "character." (R. 000358.)

The trial court clearly found that Dr. Serfustini testified it was his opinion Dr. Bryan's negligence had more likely than not caused harm to Mr. Lyon in the form of a pulmonary embolism. (R. 000563.) The trial court also clearly found that this testimony was not challenged or disputed. (R. 000563.) Therefore, evidence was provided in support of a positive finding of causation, and no evidence was provided in support of the contrary determination by the jury. A trial court cannot properly reason backward from such a contrary determination and assume that the jury reached that determination because it was unpersuaded by uncontroverted evidence. Nor can a trial court engage in weighing the evidence and speculate that the jury may have felt a witness equivocated. Were a trial court permitted to do these things, its discretion in upholding jury verdicts would be absolute. This is not the case. A trial court has no discretion to uphold a jury verdict that is unsupported by the evidence actually presented at trial. See Brown, 472 P.2d at 944 (stating the rule that a trial court is bound to overturn an unsupported jury verdict).

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 credibility of the witness actually was called into question at trial. See Chatelain, 100 P.2d at 198. In the present case, nothing in the trial court's denial of Mr. Lyon's motion for new trial points to any evidence at trial attacking Dr. Serfustini's credibility on the causation issue or any other issue.

Indeed, the trial court's unsupported conclusion that the jury simply found that Dr.

Serfustini lacked credibility ignores another key aspect of the jury's verdict - the jury must have found Dr. Serfustini credible on at least the issue of negligence, otherwise it could not have assigned negligence to Dr. Bryan as a matter of law. Dr. Serfustini testified as Mr. Lyon's medical expert. As such, he opined as to the appropriate medical standard of care and that Dr. Bryan had not met that standard. This being a medical malpractice case, the jury could not have determined Dr. Bryan's duties and the breach thereof without that testimony. It is noteworthy that, unlike his testimony on causation, Dr. Serfustini's testimony regarding negligence was challenged by his fellow medical expert, Dr. Vanderhooft. Therefore, the jury must not only have found Dr. Serfustini credible, but apparently found him more credible than Dr. Vanderhooft, at least on the issue of negligence. Nothing in the record, and nothing noted by the trial court, demonstrates why the jury would have been inclined to find Dr. Serfustini credible on one crucial element of this case and not another.

**3. The Jury Was Not Free to Entirely Disregard Dr. Serfustini's Opinion Where No Contrary Opinion Was Offered**

The trial court interpreted the jury instruction regarding the jury's consideration of expert opinion testimony to provide the jury with unbridled freedom to arbitrarily disregard any expert opinion. That is an incorrect reading of the jury instruction, and one that is contrary to the law.

The relevant jury instruction 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 should 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.)

Although the jury was instructed that it was not bound by any given opinion, it also was instructed that it was not free to entirely disregard an opinion unless one of three conditions was met: (1) lack of sufficient education and experience; (2) unsound reasoning by the expert; or (3) the outweighing of the opinion by other evidence. None of the three conditions for disregarding the opinion in question was met. Dr. Serfustini's experience and education, which were similar to that of Dr. Bryan, were unchallenged. The trial court itself found there was no evidence that outweighed the opinion. (R. 000563.) And the reasons given for the opinion were not only unchallenged, but their soundness was corroborated by the testimony of Dr. Bryan, who admitted that, had Mr. Lyon been found to have a DVT in his arm on November 28, the appropriate course of action would have been to begin treatment with anticoagulents as a prophylactic measure against pulmonary embolism. (R. 000625 at pp. 190-91.)

The trial court characterized these conditions as a "non-exclusive list of examples of instances in which an expert's opinion may be disregarded." (R. 000540.) There is no

support for that proposition anywhere in the jury instruction. Furthermore, it must be remembered that the trial court's charge in determining whether a new trial should be granted is not to decide what the jury might have thought of the evidence, but whether the jury's ultimate findings actually **are supported by substantial evidence**. Findings of fact that are directly contrary to uncontroverted expert opinion and unsupported by any other evidence are, by definition, not supported by substantial evidence. See Berven v. Gardner, 414 F.2d 857, 861 (8th Cir. 1969) (stating that it is ““recognized that a finding contrary to uncontroverted expert opinion should be set aside as being conjectural and not supported by substantial evidence and speculative”” (citation omitted)).

**4. The Jury Cannot Properly Have Assigned Negligence to Dr. Bryan on the Basis of Dr. Bryan's Note-taking**

The trial court's determination that the jury may have settled on Dr. Bryan's questionable notes as an “alternative” basis for assigning him negligence in this case is based on pure speculation rather than evidence, ignores the jury instructions and mischaracterizes the closing argument of counsel for Mr. Lyon.

The jury was expressly instructed that the alleged negligence in this case was Dr. Bryan's failure “to diagnose and treat blood clots in [Mr. Lyon's] arm, causing injury and damages.” (R. 000336.) There was no suggestion in the jury instructions that an assignment of negligence for any other conduct would be proper. Again, it cannot be assumed that the jury simply disobeyed or ignored this instruction. It must be assumed they followed it and determined Dr. Bryan's negligence on the correct basis. See, e.g., Kirchgestner, 233 P.2d

at 700; *Williams*, 230 P.2d at 322; *Ortiz*, 939 P.2d at 1216. Moreover, and more importantly, the trial court was not free to justify the jury verdict based on a speculation that the jury may have disregarded the introductory jury instruction. If the jury did disregard the instruction and base its determination of negligence on some inappropriate alternative basis, that alone would justify the grant of a new trial.

The jury was further instructed that it was to make its determinations based on the evidence, and that statements of the lawyers were not evidence. It is true that, as noted by the trial court, Dr. Serfustini critiqued the quality of Dr. Bryan's notes. (R. 000625 at pp. 78-79.) The clear thrust of the testimony of Dr. Serfustini, however, as well as that of Dr. Schmitz and the Lyons, was that Dr. Bryan was negligent in his failure to examine, treat and diagnose Mr. Lyon for DVT on November 28, 2005. (*See, e.g.*, R. 000624 at pp. 69, 120-23, 130-36, 142, 147-48, 184, 186-88, 190, 194, 207, 211-12, 220; R. 000625 at pp. 15-16, 23-28, 34, 37, 41-42, 55, 79-80.) Additionally, contrary to the trial court's determination, counsel for Mr. Lyon did not argue during closing argument that Dr. Bryan's note-taking was negligent. Rather, counsel argued that Dr. Bryan's notes demonstrated the doctor's lack of credibility. (R. 000626 at pp. 94-95, 104-05.) This was an argument directed at the quality of Dr. Bryan's evidence, not the basis for assignment of liability. The clear thrust of counsel's closing argument concerned the particular negligence of Dr. Bryan in regards to his conduct during Mr. Lyon's November 28, 2005 postoperative visit. Indeed, the trial court conceded that the trial evidence and closing arguments were such that the jury must have

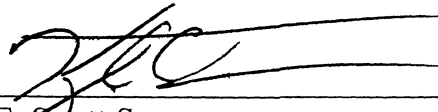
considered Dr. Bryan's failure to diagnose blood clots in Mr. Lyon's arm. (R. 000541.)

### CONCLUSION

Based upon the foregoing, the judgment in favor of Dr. Bryan should be reversed and the case remanded for a new trial.

DATED this 10th day of December, 2010.

SAVAGE. YEATES & WALDRON, P.C.



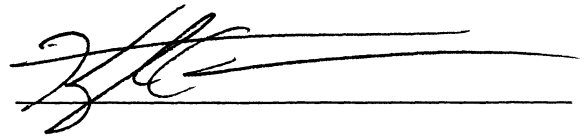
---

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 December, 2010, I caused two true and correct copies of the within and foregoing BRIEF OF APPELLANT to be mailed, postage prepaid, to the following:

David H. Epperson  
David C. Epperson  
EPPERSON & OWENS  
10 West 100 South, Suite 500  
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read 'D. H. Epperson', is written over two horizontal lines.

## **ADDENDUM**

Tab A

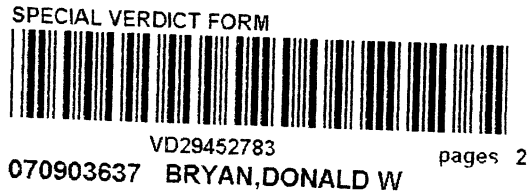


IN THE SECOND JUDICIAL DISTRICT **AUG 10 2009**  
IN AND FOR WEBER COUNTY, STATE OF UTAH,

---

JOHN A. LYON,	)	
	)	SPECIAL VERDICT FORM
Plaintiff,	)	
	)	
vs.	)	Case No. 070903637
	)	
DR. DONALD W. BRYAN, M.D.,	)	Judge Michael D. Lyon
	)	
Defendant.	)	

---



MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

1. Considering all the evidence in this case, was the Defendant, Donald Bryan, M.D., negligent?

ANSWER: Yes X No       

2. If your answer to Question 1 is "yes," was such negligence the proximate cause of

any injury or damages to the Plaintiff?

ANSWER: Yes \_\_\_\_\_ No X

NOTE: If you answered Question 1 and 2 "No," you need not go further in answering additional questions. Please sign the verdict form and notify the Court. If you have answered Question 1 and 2 "Yes," please proceed to the next question.

3. What amount of general damages will fairly compensate the plaintiff for his injuries?

GENERAL DAMAGES: \$ \_\_\_\_\_

DATED this 7 day of August, 2009.

  
FOREPERSON

Tab B

SECOND JUDICIAL DISTRICT COURT, OGDEN

WEBER COUNTY, STATE OF UTAH

---

JOHN A. LYON,

Plaintiff,

v

DONALD W. BRYAN,

Defendant.

: Case No. 070903637

:

: Appellate Case No. 20100006

:

: Volume III of IV

:

:

:

: With Keyword Index

---

JURY TRIAL AUGUST 3, 4, 5 & 7, 2009

BEFORE

JUDGE MICHAEL D. LYON

---

2010 SEP 20 P 3:41  
SECOND DISTRICT COURT

---

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way

Sandy, Utah 84092

801-523-1186

**ORIGINAL**

1     itself in the vein will get worse?

2           A     Yes.

3           Q     And have you read from the records, do you have an  
4     opinion as to whether or not Mr. Lyon with his blood clot in  
5     his arm later had a pulmonary thrombosis?

6           A     Yes, this is confirmed by the computerized scan,  
7     what they call the CT scan that was done in relationship to  
8     the positive ultrasound.

9           Q     Okay. Does it make any difference to you if on  
10    11/28 the patient presented with a sore, swollen upper  
11    extremity as opposed to a lower extremity?

12          A     I assume we're talking hypothetical now?

13          Q     Yeah.

14          A     Hypothetically no, the treatment is the same.

15          Q     And while the upper extremity clotting is more  
16    rare, that's still something you've got to look for.

17          A     Absolutely.

18          Q     And it's still potentially life threatening.

19          A     Correct.

20          Q     And it's going to get worse if it isn't immediately  
21    treated.

22          A     More likely than not.

23          Q     I'm sorry, what?

24          A     More likely than not.

25          Q     Do you have an opinion as to whether or not Mr.

1 Lyon's subsequent pulmonary embolism was more likely than not  
2 caused by the lack of him getting attention on November 28?

3 MR. EPPERSON: Objection, calls for speculation.

4 THE COURT: Overruled.

5 MR. SAVAGE: Thank you.

6 THE WITNESS: It's really, not only is the answer a  
7 medical one but the answer is a common sense one. If you  
8 define the problem, that is a blood clot, you take timely  
9 action, then you stand an excellent chance of preventing this  
10 blood clot from breaking loose and going to the lungs.

11 Q (BY MR. SAVAGE) Okay.

12 A So that's a medical and common sense answer.

13 Q Right. And just to make sure we're clear on this,  
14 so would you, taking in account all your years of experience  
15 and training think that Mr. Lyon's lung blood clot, blood  
16 clot to his lungs, pulmonary embolism, was more likely than  
17 not a result of not being treated on 11/28?

18 A Correct.

19 Q As far as you've seen from the records, did Dr.  
20 Schmitz do the right thing on December 12 - or December 2?

21 A Absolutely.

22 Q And is that what should have been on 11/28?

23 A Correct.

24 Q Do people die of post surgery blood clots in the  
25 arm if they move to the lung?

1           Q     Certainly. I'm just trying to say that since this  
2 is a complication not caused by Dr. Bryan's fault as you  
3 conceded, that the injury associated with that clot in the  
4 arm itself - now I'm going to separate out the lung next -  
5 but with regard to the arm itself and the clot that formed,  
6 you're not claiming that that is the fault of Dr. Bryan?

7           A     That's correct.

8           Q     And to the extent that Mr. Lyon has complaints  
9 about his arm from that initial clot in the arm, similarly  
10 that is not the fault of Dr. Bryan, would you agree?

11          A     Correct.

12          Q     Now with regard to the lung though, you've  
13 indicated that if this clot had been suspected and if an  
14 ultrasound had been ordered, that in probability it would  
15 have headed off the clot that ended up in the lung?

16          A     Correct.

17          Q     And is that essentially the basis of your damage  
18 testimony in this case?

19               MR. SAVAGE: Counsel, we haven't listed him as a  
20 damage witness and in your deposition we made it clear that  
21 we were not going to. You're opening that up -

22               MR. EPPERSON: Let me rephrase damage.

23          Q     (BY MR. EPPERSON) Is that the causation aspect  
24 that you are focusing on in this case?

25               I accept that, thank you.

1           A     Yes.

2           Q     This patient had an event on December the 1<sup>st</sup> and  
3 we had commented during the course of this trial about how he  
4 had received - well, the jury will remember - how he had  
5 instructions from the hospital to watch for certain things.  
6 One would be shortness of breathe, inability to breath and  
7 things of that nature. Is that the sort of thing that you  
8 would routinely instruct patients as they go home from your  
9 orthopedic surgeries to watch for?

10          A     I don't think that's specifically an instruction.  
11 That's inherently implied with any person that is walking and  
12 talking. If you have shortness of breath, they're going to  
13 call their doctor. If they have swelling at a post operative  
14 site, they're going to tell their doctor. It's just an  
15 inherent common sense thing.

16          Q     Kind of a no-brainer.

17          A     Thank you. That's what I was looking for.

18          Q     Thank you. And from your review of the records,  
19 did Mr. Lyon receive those no-brainer instructions?

20          A     Yes.

21          Q     Watch for swelling and if you can't breath, call or  
22 go to the emergency?

23          A     Counsel, I think that's just common sense. There's  
24 no reason being given instructions as to that.

25          Q     Nevertheless, this client did receive that written

1     there was not disclosure and informed consent, is that your  
2     understanding?

3             A     Yes.

4             Q     But the fact that you only to disclose to get  
5     consent, more common side - or sequella, that doesn't change  
6     the fact that you as a doctor have to be on the lookout for  
7     even rare occurrences.

8             A     That's part of your responsibility when you suggest  
9     surgery, yes.

10            Q     Counsel asked you - and we touched a little bit  
11    upon this same subject, counsel ask you whether or not a clot  
12    in the arm can occur even with proper surgery and you said  
13    yes. That's a complication of the surgery, correct?

14            A     Yes.

15            Q     In this case do you have an opinion - and I might  
16    have already asked this - to a degree of reasonable medical  
17    probability, that the clot that later went into Mr. Lyon's  
18    lung was a normal complication of surgery?

19            A     It was a complication of the clot.

20            Q     Right.

21            A     The clot was a complication of the surgery.

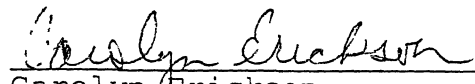
22            Q     To a reasonable degree of medical certainty, would  
23    it be more likely than not that Mr. Lyon would have not had  
24    the lung blood clot had he been properly treated on 11/28?

25            A     Correct.

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings were held before Judge Michael Lyon was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this September 17<sup>th</sup>, 2010 in Sandy, Utah.

  
Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber

Tab C

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

JOHN A. LYON,

Plaintiff,

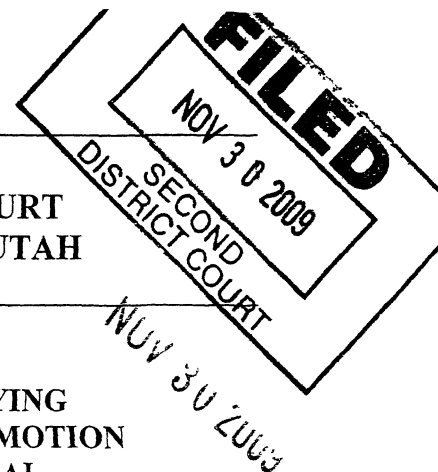
vs.

DONALD BRYAN, M.D.,

Defendant.

**RULING DENYING  
PLAINTIFF'S MOTION  
FOR NEW TRIAL**

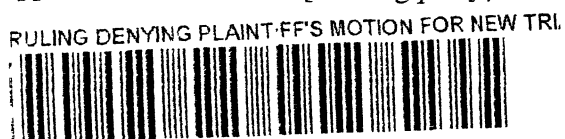
Case No. 070903637  
Judge Michael D. Lyon



This matter is before the Court on Plaintiff's motion for new trial. The Court heard oral arguments on November 12, 2009. The Court denies the motion.

This medical malpractice suit was tried before a jury on August 3, 4, 5, and 7, 2009. At trial, Plaintiff contended that Defendant negligently failed to diagnose Plaintiff with blood clots in his arm during a post-surgery examination on November 28, 2005. Plaintiff further maintained that Defendant's negligence in failing to diagnose and treat the clots caused Plaintiff to suffer a pulmonary embolism four days later. After deliberating for over four hours, the jury returned its verdict, finding by a 6-2 vote that Defendant was negligent, but unanimously determining that his negligence was not the cause of injury to Plaintiff. Plaintiff now brings this motion pursuant to rule 59(a)(6), arguing that the evidence does not support such a verdict.

Under rule 59, the Court "has broad latitude in granting or denying a motion for new trial." *Nelson v Trujillo*, 647 P.2d 730, 732 (Utah 1982). However, "the trial court cannot grant a new trial on the basis of insufficient evidence unless the record contains 'substantial competent evidence which would support a verdict for the [moving party].'"



*Id.* (quoting *King v. Union Pacific Railroad Co.*, 212 P.2d 692, 698 (Utah 1948)).

Further, “[t]he trial judge may grant a new trial only if the jury's verdict is so contrary to the manifest weight that the trial judge ‘cannot in good conscience permit it to stand.’”

*Goddard v. Hickman*, 685 P.2d 530, 532 (Utah 1984) (quoting *Holmes v. Nelson*, 326 P.2d 722, 726 (Utah 1958)). Accordingly, “the trial judge’s prerogative to grant a new trial on an evidentiary basis under rule 59(a)(6) should be exercised with forbearance.” *Nelson*, 647 P.2d at 732.

Central to Plaintiff’s motion is the testimony of Dr. Serfustini, who was the only witness at trial to testify as to causation. On direct examination, Plaintiff’s counsel and Dr. Serfustini had the following exchange:

**Plaintiff’s Counsel:** Do you have an opinion as to whether or not Mr. Lyon’s subsequent pulmonary embolism was more likely than not caused by the lack of him getting attention on November 28?

**Dr. Serfustini:** Counsel that’s really, not only is that the answer is a medical one, the answer is a common sense one. If you define the problem that is a blood clot you take timely action then you stand an excellent chance of preventing this blood clot from breaking loose and going to the lungs.

**Plaintiff’s Counsel:** Okay.

**Dr. Serfustini:** So that’s a medical and common sense answer.

**Plaintiff’s Counsel:** Alright and just to make sure we’re clear on this so would you take into account all your years of experience and training think that Mr. Lyon’s lung blood clot, blood clot to his lungs, pulmonary embolism, was more likely than not a result of him not being treated on 11/28?

**Dr. Serfustini:** Correct.

(Plaintiff’s Exhibit B to Memo in Support, p. 1). This exchange constitutes the entirety of testimony presented at trial regarding causation, except for Dr. Serfustini’s testimony

connected with defense counsel's inquiry on cross-examination about the possibility of a pulmonary embolism having been caused by a blood clot located in another part of Plaintiff's body. Plaintiff asserts that in light of the uncontroverted testimony of Dr. Serfustini regarding causation, and having already determined that Defendant was negligent, the jury's "no" answer as to causation is not supported by the evidence. Though Plaintiff makes a strong and persuasive argument, ultimately the Court disagrees.

While on first glance the jury's verdict may seem unusual, it is by no means unreasonable. Despite the burden of proof resting with Plaintiff, the evidence Plaintiff presented on causation was very brief. The entirety of the Plaintiff's evidence spanned approximately one minute of one witness's lengthy testimony as part of a four-day trial. Considering the minimal evidence presented on causation, the jury may have concluded that Plaintiff had failed to carry his burden of proof on this point.

Moreover, the evidence on causation was not presented in an emphatic, or even a very clear, manner. Dr. Serfustini, while agreeing that the failure to diagnose the blood clot led to the pulmonary embolism, gave his opinion in a way that could have been seen by jurors as equivocal. Instead of answering "yes" to Plaintiff's counsel's first question of whether he had an opinion and then answering directly, clearly, and unequivocally on the follow-up question, he does neither. Only when Plaintiff's counsel rephrased the question, "to make sure we're clear," does he really answer the question clearly. Dr. Serfustini's answers to Plaintiff's counsel's questions on the issue of causation leave much to be desired, especially for such a critical element of Plaintiff's case. It is entirely possible, and reasonable, that the jury may have simply found Dr. Serfustini's testimony on causation not credible or at least unpersuasive.

Additionally, the jury was not bound by Dr. Serfustini's testimony, and it would not have been unreasonable for the jury to disregard Dr. Serfustini's opinion as to causation. In fact, the Court's instructions to the jury permit it to do just that. For example, Instruction No. 3 states: "You are to determine what witnesses to believe and what parts of their testimony you believe." Further, Instruction No. 15 on expert opinions states: "You are not bound by such an opinion. Give it the weight you think it deserves." Instruction No. 15 goes on to provide the jury with a non-exclusive list of examples of instances in which an expert's opinion may be disregarded. Consequently, the jury was well within its bounds to disregard Dr. Serfustini's opinion, if it saw fit to do so.

The Court also feels compelled to address an alternate theory regarding the jury's verdict raised by Defendant in his memorandum in opposition regarding Defendant's clinical notes. The topic was a significant one at trial and at oral arguments on this motion. At trial, much was made of Defendant's clinical notes regarding informed consent, which Defendant admitted did not accurately reflect what was said in his visits with Plaintiff. Dr. Serfustini gave his opinion that Defendant's notes were inadequate, and stated that if Defendant were a resident-in-training, he would place Defendant "on probation." Plaintiff's counsel made Defendant's notes a point of emphasis in his closing argument, using poster-sized enlargements of Defendant's notes and calling them "phony."

Defendant argues that, as a result of the emphasis placed on Defendant's inaccurate notes, the jury may have found Defendant negligent in his note-taking, and not for his failure to diagnose the blood clots in Plaintiff's arm. The Court agrees. Such a

scenario would explain the jury's unanimous finding of no cause of action, given that Defendant's inaccurate note-taking may have been negligent, but could not have caused Plaintiff's pulmonary embolism.

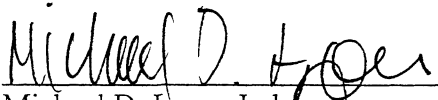
The Court finds this scenario plausible, notwithstanding the Court's preliminary instruction directing the scope of the jury's determination, particularly given the language of the verdict form. Question No. 1 merely asked the jury if Defendant was negligent, without specifying whether the jury's determination was limited to the failure to diagnose Plaintiff's blood clots. Given the emphasis Plaintiff's counsel placed on the issue of Defendant's notes, the jury may have felt a responsibility to consider whether Defendant was negligent in his note-taking, *in addition to his failure to diagnose*.

Nevertheless, even if the jury did consider Defendant's note-taking and found him negligent for such, there is nothing that suggests that the jury abandoned the principal issue of the case, namely, Defendant's failure to diagnose blood clots in Plaintiff's arm. The circumstances of the trial evidence and closing arguments suggest that the jury thoughtfully considered that issue, and may have additionally considered Plaintiff's note-taking.

While the Court cannot state with certainty what led the jury to answer "yes" as to negligence and "no" as to causation, the Court is satisfied that there are multiple reasonable ways in which the jury could have come to such a conclusion. Therefore, the Court finds that the jury's verdict is not "so contrary to the manifest weight" of the evidence, and the reasonable inferences therefrom, as to entitle Plaintiff to a new trial.

Accordingly, the Court denies Plaintiff's motion for new trial.

Dated this 30 day of November, 2009.

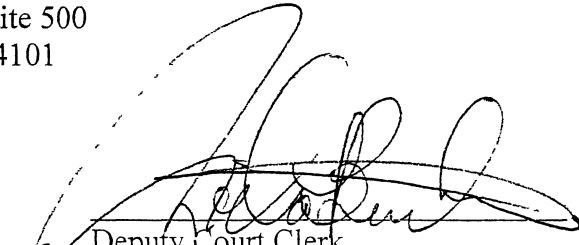
  
\_\_\_\_\_  
Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 30<sup>th</sup> day of November, 2009, I sent a true and correct copy of the foregoing ruling to Plaintiff and Defendant as follows:

E. Scott Savage  
Attorney for Plaintiff  
170 South Main Street, Suite 500  
Salt Lake City, Utah 84101

David H. Epperson  
Attorney for Defendant  
10 West 100 South, Suite 500  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
Deputy Court Clerk