

2010

Wendy Harris v. Shopko Stores, Inc : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WENDY HARRIS,

Plaintiff/Appellant,

vs.

SHOPKO STORES, INC.,

Defendant/Appellee.

Case No. 20100106 - CA

Dist. Ct. Case No. 070101906

BRIEF OF APPELLEE

Appeal from Final Judgment of the
Fourth Judicial District Court, Utah County
The Honorable Christine Johnson Presiding

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LIST OF PARTIES TO THE PROCEEDINGS

All interested parties are identified in the caption on appeal.

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW

Issue No. 1: Denial of motion for new trial or additur, insufficient evidence.

The Court of Appeals should uphold the trial court's decision to deny Harris's motion for a new trial or additur. Appellant (Harris) argued insufficient evidence, as illustrated by her perceived inadequacy of the jury's award of \$15,000 in current economic damages and \$10,000 in future economic damages. The trial court found that there was significant evidence to support the jury's verdict. (*Addendum of Appellant* at A-22 – A24).

Standard of Review: The Court of Appeals will uphold a trial court's decision to deny a new trial if there is reasonable basis to support that decision, *Crookston v. Fire Insurance Exchange*, 817 P. 2d 789, 805 (Utah 1991); and will only reverse if it finds clear abuse of discretion. *Markham v. Bradley*, 2007 UT App. 379, ¶ 14; 173 P. 3d 865.

Issue No. 2: Denial of motion for new trial or additur, passion or prejudice.

The Court of Appeals should uphold the trial court's decision to deny Harris's motion for a new trial or additur. Harris argued the jury acted under the influence of passion or prejudice, as illustrated by her perceived inadequacy of the jury's award of \$1,000 in non-economic damages. The trial court found that there was significant evidence to support the jury's verdict. (*Addendum of Appellant* at A24).

Standard of Review: The Court of Appeals will uphold a trial court's decision to deny a new trial if there is a reasonable basis to support that decision, *Crookston v. Fire*

Insurance Exchange, 817 P. 2d 789, 805 (Utah 1991); and will only reverse if it finds clear abuse of discretion. *Smith v. Fairfax Realty*, 2003 UT 41, ¶ 25; 82 P. 3d 1064.

Issue No. 3: Use of Harris’ deposition by Harris’ counsel. The Court of Appeals should find that the trial court did not abuse its discretion when it directed Harris’ counsel to ask Harris a question before resorting to use of Harris’s deposition during redirect, after ShopKo’s counsel had used Harris’ deposition to impeach Harris during cross-examination.

Standard of Review: The Court of Appeals will uphold a trial court’s decision to admit or exclude evidence and will only reverse upon a finding of clear abuse of discretion.

Jensen v. Intermountain Power, 1999 UT 10, ¶ 12; 977 P. 2d 474; *Ford v. American Express Financial Advisors*, 2004 UT 70, ¶ 33 FN 5; 98 P. 3d 15. A party who voluntarily abandons a line of questioning waives any assignment of error for that tactical decision. *Chournos v. D’agnillo*, 642 P. 2d 710, 713 (Utah 1982).

Issue No. 4: Exclusion of chair specifications drawing as exhibit. The Court of Appeals should find that the trial court did not abuse its discretion when it excluded a technical drawing of a chair for lack of foundation, when Harris did not include the drawing in its request for stipulation and sought to introduce it through a witness with no knowledge of the drawing.

Standard of Review: The Court of Appeals will uphold a trial court’s decision to admit or exclude evidence for lack of foundation and will only reverse upon a finding of clear abuse of discretion. *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 6; 214 P. 3d 865.

Issue No. 5: Jury instruction on present cash value. The Court of Appeals should find that the trial court properly instructed the jury on present cash value using the Model Jury Instructions after Harris presented evidence of future medical costs.

Standard of Review: The Court of Appeals reviews jury instructions for correctness and will uphold the instructions “when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.” *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 8; 214 P. 3d 865.

Issue No. 6: Jury instruction on apportionment of damages to pre-existing conditions. The Court of Appeals should find that the trial court properly instructed the jury on apportionment to pre-existing conditions using the Model Jury Instructions when the evidence was in conflict as to the cause of damages.

Standard of Review: The Court of Appeals reviews jury instructions for correctness and will uphold the instructions “when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.” *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 8; 214 P. 3d 865.

Issue No. 7: Testimony on delayed recovery syndrome. The Court of Appeals should find that the trial court did not abuse its discretion when it admitted testimony relevant to whether Harris’ medical care was necessary and reasonable.

Standard of Review: The Court of Appeals will uphold a trial court’s decision to admit or exclude evidence on relevance grounds and will only reverse upon a finding of clear abuse of discretion. *Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 17; 979 P. 2d 317.

Issue No. 8: Testimony on Harris’ counsel drafting expert report. The Court of Appeals should find that the trial court did not abuse its discretion when it admitted testimony that Harris’ expert witness report was drafted by counsel, given that the expert admitted signing the report before reviewing all the medical evidence.

Standard of Review: The Court of Appeals will uphold a trial court’s decision to admit or exclude evidence on overly prejudicial grounds and will only reverse upon a finding of clear abuse of discretion. *Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 17; 979 P. 2d 317.

Issue No. 9: Testimony by Harris’ husband on intimate (conjugal) relationship. The Court of Appeals should find that the trial court did not abuse its discretion when it excluded testimony from Harris’ husband as to the couple’s intimate relationship, when no claim was made for loss of consortium, Harris testified at length on loss of quality of life issues and Harris’ husband was allowed to bolster her testimony with the exception of the intimate relationship.

Standard of Review: The Court of Appeals will uphold a trial court’s decision to admit or exclude evidence on relevance grounds and will only reverse upon a finding of clear abuse of discretion. *Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 17; 979 P. 2d 317.

Issue No. 10: Admission of Doctor’s College’s written Curriculum Vitae (CV) in evidence. The Court of Appeals should find that the admission of a doctor’s CV, although hearsay, was harmless error when the doctor testified verbally to the jury about his qualifications.

Standard of Review: The Court of Appeals will not reverse a judgment merely because there may have been error, unless the appellate court's confidence in the verdict reached is undermined. *Kilpatrick v. Wiley, Rein & Fielding*, 2001 UT 107, ¶ 50; 37 P. 3d 1130.

Issue No. 11: Cumulative weight of error doctrine. The Court of Appeals should find that any error claimed were no error or were so minor as to result in no harm.

Standard of Review: The Court of Appeals will not apply the cumulative error doctrine unless the cumulative effect of several errors undermines the Court's confidence that a fair trial was had. *Radman v. Flanders' Corp.*, 2007 UT App. 351, ¶ 20; 172 P. 3d 668.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

There are constitutional or statutory provisions determinative of the issues.

STATEMENT OF THE CASE

ShopKo Stores, Inc. (ShopKo) agrees only with the Statement of the Case introduction describing the nature of the case, the course of proceedings and the decision below submitted by Harris at *Appellant's Brief* p. 5-6. ShopKo asserts that Harris' Statement of the Facts including the Background of the Litigation at *Appellant's Brief* p. 6 – 11 and Procedural History at *Appellant's Brief* p. 11 – 16 contains irrelevant matters but fails to set forth facts relevant to the issues presented and omits the evidence available to the jury supportive of the verdict.

The Accident: ShopKo generally agrees with the depiction of the accident submitted by Harris in *Appellant's Brief* at p. 6-7.

Medical Care: Regarding past medical care:

Dr. Rosenthal, Harris' expert, testified that Harris had overused dilaudid pain pills (Tr. 253:15-22); that Harris had developed a tolerance to the pain pills (Tr. 253:25-254:10); that the care received by Harris during the 35 months between the incident and his diagnosis was not adequate, that if his diagnosis had been made right after the accident, the care she received would have been different, and that past treatment would not have been necessary if she had been properly diagnosed (Tr. 311:18-312:21, 314:11-22, 334:3-335:6).

Dr. College, Harris' former treating physician (Tr. 550:23-25), testified that Harris' treatment with chiropractor and massage therapy is not the kind of treatment which is going to give her the relief she is looking for and that medical scientific evidence shows no support for massage therapy and chiropractic care (Tr. 593:25-594:19); that the nerve burning treatment may provide 50% relief in 50% of the patients, but because that treatment does not address the underlying tissue injury, it is short term relief (Tr. 621:15-622:3); that reasonable treatment looks for functional status improving patient working (Tr. 587:8-13), and that Workman's Compensation does not pay for nerve burning treatment because it does not treat the injury (Tr. 622:18-24).

Dr. Rodney Scuderi, Harris' treating chiropractor admitted that the treatment he provided is soft tissue manipulation akin to massage (Tr. 368:10-14); that his treatment would help Harris feel well briefly but could not fix anything and was never able to relieve the problem (Tr. 378:7-379:2); that he provided Harris 51 treatment sessions

between April 2006 and March 2008 and charged Harris \$6,200 while providing no lasting cure (Tr. 383:6-20).

Dr. Thomas Cole Snyder, Harris' massage therapist and doctor of chiropractic (Tr. 394:4-5), admitted that he treated Harris 27 times from September 2007 to August 2008 (Tr. 405:20-21, 406:1-8), and that Harris and her husband received a couple's massage on 1 August 2008 (Tr. 407:22-408:4).

Kay Whitaker, Harris' brother and treating nurse practitioner (Tr. 510:7-20, 511:19-22, 512:19-23), testified that neither the dilaudid nor the chiropractic care were helping Harris (Tr. 543:10, 544:10).

Tom Harris, Appellant's husband, testified that doctor appointments were not helping her get any better; that the massage therapy and chiropractic care would provide temporary relief for only a day or two and have to be repeated (Tr. 675:15-25).

Regarding future medical care:

Dr. Rosenthal testified that he had no way to tell what will happen and that he was being asked to look into a crystal ball (Tr. 250:20-22); that he had developed a "worst case scenario" to anticipate the future treatment (Tr. 324:16-25, 325:12-14); that he could not testify to a reasonable degree of medical certainty that Harris would need dilaudid in the future (Tr. 250:9-21, 325:5-11); that \$3,600 for dilaudid in future medical care would treat the symptom but not the cause (Tr. 323:22-324:3); and that the treatment he had anticipated may be more or "it may be less" (Tr. 255:22-256:7, 326:5-8).

Dr. College, in addition to challenging the necessary and reasonable nature of the nerve burning treatment, chiropractic and massage therapy, testified that future use of

pain pills (dilaudid) should be curtailed, that the more you take the more you need (Tr. 585:15-586:9).

Other causes of Harris' pain and injuries:

Dr. Rosenthal testified that Harris had been in three prior auto accidents for which she received treatment, including for neck pain and possibly lower back (Tr. 241:2-12); that his first diagnosis after the ShopKo incident was facet joint syndrome (Tr. 219:15-20, 297:14-24, 298:1-5); a condition which can be caused by degeneration due to aging and is not trauma related (Tr. 298:16-21).

Dr. Eric Hogenson, Harris' treating family doctor testified that Harris suffered from fibromyalgia; that the onset of the fibromyalgia was years ago, going back to May 1997 in the clinic records; and that fibromyalgia is indicated by chronic pains in the muscles, causes fatigue, sleep problems, painful and tender points at certain parts of the body, all symptoms of which Harris is currently complaining (Tr. 359:25-360:14, 361:1-362:10). He also testified that Harris had previously indicated in a medical history that she suffered from arthritis (Tr. 353:13-20).

Kay Whitaker testified that Harris suffered from degenerative arthritis and that she suffered from chronic pain, or at least that he reported that in his clinic records for insurance purposes (Tr. 535:8-9, 535:23-536:12, 536:19-538:22).

Dr. Rodney Scuderi testified that the pre-existing conditions evidenced in the medical records could be the source of Harris's pain (Tr. 387:1-24); the medical records he was asked to consider included Alta View Hospital records 1998 indicating cervical strain and discussing disk herniation; Alta View Hospital records May 2001 following

vehicle accident showing diffused neck pain; and Alta View Hospital records July 2002 indicating lumbar area pain (Tr. 385:21-386:16).

Dr. College testified that he suspected that Plaintiff had an annular tear (Tr. 576:23-577:5, 584:23-25), which is generally caused by age degeneration of the disks (Tr. 577:16-578:10); that he could not testify with any degree of medical probability that the suspected tear was caused by the ShopKo incident (Tr. 578:11-15); that Harris suffered low back pain consistent with degenerative disease with radiating leg pain (Tr. 580:19-581:13, 581:14-25); that Harris suffers from desiccation of the bones (Tr. 589:22-590:12) and facet disease which is the wear of the joints in the spine, and manifests itself as back pain (Tr. 582:3-583:6); that Plaintiff's complaints are the result of all three: the degenerative disk disease, facet disease, and an aggravation of her pre-existing conditions (Tr. 583:14-21); that the sciatica, documented in 2002 Alta View Hospital records, would play a role in her complaints at this time (Tr. 587:20-588:14); and that it is probable that the degenerative disk disease is the cause of Plaintiff's current complaints (Tr. 591:1-4). He could not testify to a reasonable degree of medical probability that Harris' complaint were related to the ShopKo incident (Tr. 585:8-13).

Other reasons for the jury to reduce Harris' damages:

Dr. College testified that Harris had gained weight which negatively impacted her ability to overcome her conditions (Tr. 592:14-19, 593:7-10).

Harris herself admitted that she had only attended 4 physical therapy sessions and stopped because she thought she knew what to do without having to visit the clinic (Tr. 724:14-23). She also testified that she suffered no back pain right after the ShopKo

incident (Tr. 722:5-12); and there was evidence that after the ShopKo incident she continued to perform her normal activities, and that her condition became worse over time (Tr. 728:20-729:10, 729:18-730:5).

Mr. Harris testified that right after the incident she continued to work and to perform normal activities, but that Harris' condition declined over time (Tr. 673:23-675:3, 681:9-682:3, 683:8-16).

Harris' use of her deposition transcript. After ShopKo used a portion of Harris' deposition to impeach Harris during cross-examination (Tr. 728:20-729:10, 729:18-730:5), Harris' counsel sought to introduce into evidence the remainder of that portion of the deposition. ShopKo objected to the improper use of the deposition, pointing out that no question had been asked of the witness. The Court did not rule that Harris' deposition transcript was excluded. The Court ruled that counsel should ask a question of Harris. Counsel began asking a question, withdrew it and closed his re-direct without eliciting the information from his client (Tr. 732:24-734:3). *Addendum of Appellant* at A-6.

Chair Specification Drawing. Although ShopKo had admitted in response to discovery that certain documents relating to the chair were accurate, the specification drawing for the chair were not included among the documents stipulated by the parties to be admissible (Tr.439:22-25). When Harris attempted to introduce the specification drawing through a witness who had no knowledge of the drawing (Tr.429:16-18), ShopKo objected and the trial court sustained the objection (Tr. 436:2-8). *Addendum of Appellant* at A-7 ¶¶ 15, 17. An exemplar chair was used as a demonstrative exhibit throughout the trial. Harris sought to use the drawing to show the chair could be adjusted

to a height of 21.5 inches although there is no evidence showing the height of the chair when it gave way under Harris. *Addendum of Appellant* at A-8 ¶¶ 19-20.

Present Cash Value. The trial court gave the jury an instruction on reducing future economic losses to present cash value taken from the Model Jury Instructions over the objection of Harris. The trial court determined that there was sufficient evidence before the jury regarding future economic losses to warrant giving the jury the instruction. *Addendum of Appellant* at A-9 to A-10.

Apportionment Jury Instruction. The trial court gave the jury instructions on apportionment taken entirely from the Model Jury Instructions (Civil 2018 and 2019) over the objection of Harris (Tr. 945:7-946:15). The instructions advised the jury that it is their duty to apportion damages between those caused by ShopKo and those which pre-existed the accident and that if they were unable to do so, they must assign the entire cause of harm to ShopKo. The trial court determined that ShopKo had presented substantial evidence that Harris' injuries could be attributed to sources other than the incident. The trial court concluded that it would have been reversible error to not give the instructions. *Addendum of Appellant* at A-11 to A-13.

Dr. College's Delayed Recovery Syndrome Testimony. Dr. College was called because he is Harris' former treating physician. He was not called as an expert witness. (Tr.551:1-3, 568:11-569:6). He testified at the end of his direct testimony that delayed recovery syndrome helps explain why some of Harris' treatments, past and future, were neither reasonable nor necessary; the consequence of the delayed recovery syndrome is that people pursue marginal treatments (Tr. 637:3-638:2). Dr. College testified that

Plaintiff's pain was chronic (Tr. 584:9-11), and not caused by the ShopKo incident (Tr. 585:8-13). Although he agreed that the ShopKo incident caused soft tissue damage, he went on to testify that the pain associated with the soft tissue injury could be expected to heal after two to three weeks (Tr. 586:10-19). He testified that after three to eight weeks the pain is chronic, establishes new circuitry, and serves no useful purpose (Tr. 584:10-13). He opined that hurt does not mean harm in this case (Tr. 583:22-584:13), and to treat chronic pain like acute pain limits quality of life and is debilitating to the patients (Tr. 584:17-20). *Addendum of Appellant* at A-14 to A-15 ¶¶ 37, 39.

To protect Harris' rights that a tortfeasor takes the plaintiff as he finds her, the trial court instructed the jury that "a person who may be more susceptible to injury than someone else is still entitled to recover the full amount of damages that were caused by the Defendant's fault. In other words, the amount of damages should not be reduced merely because Plaintiff may be more susceptible to injury than someone else."

Addendum of Appellant at A-15 to A-16 ¶ 42.

Dr. Rosenthal's Expert Report. During the cross-examination of Dr. Rosenthal, ShopKo referred to Dr. Rosenthal's report as "attorney drafted." Immediately prior to the cross-examination the trial court gave the jury an instruction that procedural rules allow an expert report to be prepared by the expert or the party (Tr. 288:20-289:5). The trial court determined that the authorship of the report was relevant because although the report asserted that it was based on the review of Harris' medical records (Tr. 316:2-23), Dr. Rosenthal admitted that he signed the report before reviewing several of Harris' medical records (Tr. 318:7-321:3). The trial court determined that the authorship of the

expert report went to credibility and the weight of its conclusions. *Addendum of Appellant* at A-18 to A-20 ¶¶ 54, 56 – 58.

Testimony of Tom Harris. ShopKo generally agrees with the depiction of the exchange regarding Mr. Harris’ attempted testimony as to the couple’s intimate relations with the exception that Mr. Harris testified before Harris during the trial (Tr. 665: Mr. Harris’ testimony starts, 691: Harris’ testimony starts). The trial court concluded that Ms. Harris had the opportunity to testify freely regarding her non-economic damages but that Mr. Harris’ loss of consortium testimony was not relevant to the Plaintiff’s claim. *Addendum of Appellant* at A-20 to A21.

Dr. College’s CV. ShopKo generally agrees with the depiction of the exchange regarding the admission of Dr. College’s CV.

SUMMARY OF ARGUMENT

Harris has failed to marshal the evidence supporting the jury’s verdict so the Court of Appeals should affirm the trial court’s denial of Harris’ motion for a new trial or additur. Moreover, the trial court’s decision to deny Harris’ motion for a new trial deserves to be upheld because there is significant evidence to support the jury’s awards, both as to economic and non-economic damages, and the trial court’s decision rests on reasonable bases. A jury’s verdict is entitled to the greatest deference.

The trial court did not commit error and did not abuse its discretion when it advised Harris’ counsel to ask his client a question before using Harris’ deposition on redirect. Counsel could have properly used his client’s deposition but abandoned the attempt, and in so doing waived any assignment of error. Nor did the trial court commit

error or abuse its discretion in excluding the chair specifications drawing which had not been stipulated as an exhibit and which Harris sought to introduce through a witness who had no knowledge of the exhibit. Any possible error in excluding the specification drawing was at most de minimus because there was an actual chair in evidence and there was no evidence concerning the height of the chair at the time of the accident.

The trial court correctly instructed the jury on present cash value and on apportionment of damages to pre-existing conditions because the evidence supported the need for those instructions, the instructions were correct and taken directly from the Model Jury Instructions. The instructions fairly instructed the jury on the applicable law.

The trial court did not err nor abuse its discretion in its evidentiary rulings. Dr. College's testimony on delayed recovery syndrome was relevant to the issue of whether Harris' treatments were necessary and reasonable. Dr. College's testimony was not unfairly prejudicial, and the trial court protected Harris by properly instructing the jury that a tortfeasor takes his victim as it finds her. Allowing ShopKo to refer to Dr. Rosenthal's report as "attorney drafted" was proper because Dr. Rosenthal admitted signing the report before reviewing the medical records which supposedly formed the basis for the report, an issue which went to the credibility and weight the jury should give to Dr. Rosenthal and his report. The court likewise did not err when it excluded Mr. Harris' testimony as to the couple's intimate relationship because there was no loss of consortium claim and because Harris herself was free to testify to her loss of consortium and loss of quality of life.

The admission of Dr. College's CV, although not benefiting from an exception to the hearsay rule, was nevertheless not reversible error. Dr. College testified fully to his qualifications, and the admission of the CV did not affect the substantial rights of the Plaintiff. Confidence in the jury's verdict is not undermined by the introduction of the CV into evidence.

The cumulative weight of error doctrine is not applicable. Harris received a fair trial and the jury's verdict should stand no matter her displeasure at the results.

ARGUMENT

1. Appellant has failed to properly marshal the evidence.

"A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." *Utah R. App. P. 24(a)(9)*.

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence.

West Valley City v. Majestic Inv. Co., 818 P. 2d 1311, 1315 (UT App 1991). *See also* *Balderas v. Starks*, 2006 UT App. 218 ¶21; 138 P. 3d 75.

Harris has lightly glossed over this heavy burden, not even conceding that there is any evidence supporting the jury's decision, choosing instead to refer to record evidence "that could be construed in favor of the jury's decision." *Appellant's Brief at 19, 25*. For every fragment of evidence Harris deigns to mention, she argues it is "irrelevant" or opposed by other evidence, or rendered immaterial by some legal theory she argues

overcomes the evidence. In so doing, Harris ignores her great obligation to present the evidence in a light most favorable to the trial court's decision and to the verdict, "and not attempt to construe the evidence in a light favorable to [her] case." *Chen v. Stewart*, 2004 UT 82, ¶ 78; 100 P. 3d 1177; *Tingey v. Christensen*, 1999 UT 68 ¶7; 987 P. 2d 588.

In failing to properly marshal all the evidence supporting the jury's verdict and the trial court's decision to deny the motion for a new trial or additur, Harris has failed to point out a fatal flaw showing that the evidence supporting the verdict was insufficient.

2. The trial court's denial of the motion for new trial must be upheld.

a. A Jury's Verdict is Entitled to Great Deference.

Our legal system provides a "general deference towards the jury's role as fact-finder." *Water & Energy Systems Technology Inc., v. Keil* 2002 UT 32 ¶15; 48 P. 3d 888. "Because damage assessment is peculiarly a jury function, trial courts should exercise caution in setting aside a verdict." *Andreason v. Aetna Casualty & Surety Co.*, 848 P. 2d 171, 174 (UT App 1993); *Jensen v. Eakins*, 575 P. 2d 179,180 (Utah 1981) (it is "the prerogative of the jury to make the determination of damages"); *Bearden v. Wardley Corp.*, 2003 UT App, ¶ 13; 72 P. 3d 144 (the amount of the verdict is a matter exclusively for the jury).

The burden on an appellant to establish that the evidence does not support the jury's verdict is quite heavy. *Id.* When, as here, Plaintiff seeks to set aside the verdict, claiming inadequate damages, the Court is not empowered to entertain a motion for Additur "when the damages are not so inadequate as to indicate a disregard of the evidence." *Onyeabor v. Pro Roofing Inc.*, 787 P. 2d 525, 529-30 (UT App 1990).

The standard is not whether “the evidence introduced could have justified a larger verdict than granted.” *Meyer v. H.H. Bartholomew*, 690 P. 2d 558 (Utah 1984), citing to *Sprunt v. Denver & Rio Grande Western Railroad*, 340 P. 2d 85 (Utah 1959). In *Sprunt*, the Court observed that

the evidence of the actual damage suffered by appellant was not so certain that the amount granted is so inadequate as to make it appear that it was given under the influence of passion or prejudice or that in the interest of justice should be set aside. *Id* at 88.

In *Sprunt* the Court went on to observe that “the jury was not bound to believe” all the evidence presented by the Plaintiff. *Id*. Thus, Courts “cannot substitute [their] judgment for that of the fact finder unless the evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion.” *Jensen v. Eakins*, at 180.

b. The Evidence Supports the Jury’s Verdict.

Here, Harris wanted the trial court to ignore, and wants the Court of Appeals to ignore the evidence supporting the verdict. Specifically, there is a great deal of evidence to support the conclusion that much of Harris’ past treatment was not necessary or reasonable. Harris’ expert, Dr. Rosenthal, concluded that the past treatments would not have been necessary if she had been properly diagnosed. Harris sought reimbursement for 51 chiropractic sessions, 27 massage therapy sessions (including a couple’s massage), and physical therapy sessions, which were not helping her get better and provided only temporary relief. Dr. Scuderi agreed that the chiropractic treatments he provided Harris were akin to soft tissue massages. Dr. Rosenthal also found that Harris overused pain pills, and that the pain medication only served to treat the symptom and not the cause.

Dr. College, Plaintiff's former treating physician testified that much of the treatment Plaintiff pursued was marginal, lacked medical scientific support, was calculated to provide only short term relief, or was excessive.

Harris' evidence in support of planned future treatment was weak and lacked the indicia of necessity and reasonableness. Again, the evidence regarding future care supports the jury's verdict. Dr. Rosenthal, upon whom Harris relies to support her desired future treatment, testified that he could not be sure what treatment she would need, and that he could not testify to a reasonable degree of medical certainty that Harris would need dilaudid in the future. Dr. College testified that the future care contemplated, nerve burning treatment, chiropractic and massage therapy, is ineffective, does not improve function and has no lasting effect.

There is also abundant evidence supporting the jury's verdict based on the existence of pre-existing conditions which were responsible for some of Harris' pain and injury. There is ample evidence that Harris suffers from degenerative disk disease, including annular tear, bulging disk, facet joint syndrome, disk herniation, desiccation, and ligament hypertrophy. All of these symptoms and conditions are natural, associated with aging and not the result of a single incident of trauma. Dr. College testified that it is probable that the disk degenerative disease is the cause of Harris' current complaints. Dr. Scuderi concluded that pre-existing conditions could be the source of Harris' pain. Dr. Rosenthal testified that his first diagnosis for Harris' complaint was facet joint syndrome which can be caused by disk degeneration due to aging and is not caused by trauma.

In other words, there was abundant evidence for the jury to conclude that some of Harris' past treatments were not reasonable and necessary, that some of the future treatments were not reasonable and necessary, and that some of Harris' physical complaints were not the result of the ShopKo incident. The evidence that Harris' condition deteriorated over time also supports assigning the blame for her complaints in part to her advancing pre-existing conditions. Ultimately, there is no evidence that all of Harris' injuries were triggered by the ShopKo incident.

Harris cites to *Biswell v. Duncan* for the proposition that a dormant condition that is made painful by the defendant's action renders the defendant liable. *Biswell v. Duncan*, 742 P. 2d 80, 88 (Ut App. 1987). Although this is good law, and the trial court so instructed the jury, *Biswell* is not applicable to Harris' case. In *Biswell* there was no evidence opposing plaintiff's assertion that all her pain was the result of the accident. *Id.* Unlike in *Biswell*, in this case, there was testimony from Harris' own doctors that the pre-existing conditions could be the source of her pain. In this case, Harris was simply unable to clearly establish that her pain derived from and was caused solely by the ShopKo incident. She did not meet her burden of proof.

c. Round Numbers do not Signify an Arbitrary Decision by the Jury.

Harris argues, without any legal authority for support, that the round numbers of the awards suggest the jury acted arbitrarily. *Appellant's Brief* at 30. The fact that the jury preferred round figures however is not sufficient to invalidate a verdict. *See e.g. Pan Am. Bankshares Inc. v. Trask*, 278 So. 2d 313 (Fla. App 1973) (fact that jury verdict was in round figure insufficient to show that verdict was compromise verdict.). ShopKo has

found no Utah decision supporting Harris' speculation that round figures indicate arbitrariness. Rather, the issue is whether the jury's award, even expressed in round numbers, is supported by the evidence.

Harris points the Court of Appeals to the *Judd v. Rowley* case, in which the Supreme Court ordered the verdict increased from \$15,000 to \$15,761.48 because the jury had reduced the special damages without evidentiary support. *Judd v. Rowley*, 611 P. 2d 1216, 1221 (Utah 1980). However, the Court in *Judd* did not rule that the round number was evidence of an arbitrary decision, so Harris gets no support for her theory there. Unlike in *Judd*, the jury here had copious evidence to support reducing past and future medical costs for lack of necessity and reasonableness, because there is evidence that some of the future treatment is not attributable to the ShopKo incident, and because of Harris' own behavior, abusing pain pills, failing to control her weight, and not following through with physical therapy.

d. The Noneconomic Damages do not Evidence Passion or Prejudice.

Harris argues that the \$1,000 she was awarded in noneconomic damages is inadequate and evidences passion or prejudice. She relies on *Robinson v. All-Star Delivery*, 1999 UT 109; 992 P. 2d 969. However, *Robinson* does not support Harris' case. In *Robinson*, the issue was whether the trial court had erred in refusing to instruct the jury as requested by the plaintiff. The Supreme Court ruled that because the evidence as to apportionability was in conflict, "the trial court should have instructed the jury on what to do if it was unable to apportion damages in a reasonable manner." *Id* at ¶ 14. In this case, the trial court did instruct the jury that if they were not able to reasonably

apportion damages, they must conclude that the entire harm was caused by ShopKo (Tr. 945:7-946:4). *Addendum of Appellant* at A-12 ¶ 32.

The cause of the jury only awarding Harris \$1,000 in noneconomic damages is that the evidence supports such an award. The evidence showed that the ShopKo incident would produce only soft tissue injury, and that the greater amount of pain and suffering was caused by the prior medical conditions, which even Harris' expert stated were not caused by the ShopKo trauma.

There was also evidence that after the ShopKo incident, Harris continued to maintain her previous activities for some time. Tom Harris testified that over time, Plaintiff "became less and less able to function at that level." Plaintiff testified that after the ShopKo incident, she continued to "vacuum, cleaning, take care of the home" and "run errands, go to appointments, physical therapy." This evidence is consistent with the conclusion that much of the suffering Harris feels come from her naturally advancing pre-existing conditions.

Finally, there is evidence that Plaintiff's pain and damages were, in part, caused by her own actions. The discharge summary from physical therapy dated 23 June 2006 listed "failure to attend sessions" as the cause of discharge. Plaintiff had only attended four sessions. Dr. College testified that Plaintiff's overuse of pain killers had likely intensified her pain level. Many of the doctors, including Dr. Rosenthal, Plaintiff's own expert, discussed Plaintiff's overuse of pain medication and the increased tolerance to the pain medication caused by excessive and frequent use (Tr. 251:12-252:2). He stated that increase tolerance leads to higher use and dependency (Tr. 253:23-254:10, 325:15-24).

In particular, Dr. College was critical of Plaintiff's expectations and handling of her chronic pain. He testified that quality of life is more influenced by what we do on our own, rather than what is done to us by others (Tr. 594:20-595:7). He particularly disapproved of the pain clinic mentality which promises to eradicate all pain from one's life, observing that there is certain value to becoming more resilient to the opposition that comes to us and we become stronger through it. (Tr. 628:9-12). He observed that Harris' weight had continued to rise during the period of time he treated her, and noted that this was important because the added weight increased her pain and lack of functionality (Tr. 592:14-593:10). He testified that it is important for people to be responsible for their own health, that treatment is what others do to us, but the most important is what we do ourselves (Tr. 593:3-5, 594:20-595:7).

Given all this evidence, it is not reasonable to assume that the jury acted with passion or prejudice. There is substantial evidence to conclude that the jury believed that ShopKo's liability for Plaintiff's noneconomic damages was limited. The evidence here does not compel a finding that reasonable men and women would, of necessity, come to a different conclusion. The standard is not whether the evidence introduced could have justified a larger verdict. Harris' evidence in this case was simply not so certain.

3. The Trial Court did not commit reversible error.

a. The Court did not Err in Ordering Harris' Counsel to Question Harris Before Using her Deposition in Re-direct.

Harris argues that not allowing the use of her deposition on redirect unfairly prejudiced her because it did not allow her to rehabilitate her credibility, it gave the jury

the impression she had not been limited in her activities after the ShopKo incident, and because testifying as to what she had meant in her deposition would result in the jury ‘very likely’ perceiving her to engage in Post-hoc justification. *Appellant’s Brief* at 36. None of these results, if they occurred, were caused by the trial court’s ruling.

Harris’s counsel abandoned the issue, failed to ask his client a question, and waived his opportunity to rehabilitate Harris. Counsel could have simply asked Harris if she recalled her deposition, if the partial statement used by ShopKo’s counsel was complete and what the rest of her deposition testimony had been. Had Harris’ memory failed, counsel could have sought to refresh her memory by asking a leading question or even showing Plaintiff her own deposition, and then asking another question. *See URE 612*. Harris’ counsel could have asked Harris to testify about her level of activities.

This was not the first time in this trial that Harris’ counsel had faced this issue of how to use a deposition to rehabilitate his witness. In Harris’ redirect testimony of Dr. Hogenson, the same issue arose. At that time, the trial court instructed counsel to ask a question first (Tr. 363:21-364:16).

In Utah, a party who abandons a line of questioning or fails to pursue her remedy during the trial waives the issue thereafter. *Chournos v. D’agnillo*, 642 P. 2d 710, 713 (Utah 1982). In *Chournos* the Supreme Court observed that “counsel had waived any objection” by announcing to the Court “that he had no further evidence to offer.” *Id.* In this case, Plaintiff’s counsel stated “I withdraw the question, nothing further” and ended his redirect examination (Tr. 734:2). As the Utah Supreme Court observed, post trial remedy is not “intended to give attorneys the option of waiting until after the case has

been decided adversely by the Court before they pursue deficiencies in their proof.” *Id.* See also *Walker v. Hansen*, 2003 UT App 237; 74 P. 3d 635 (¶18: Plaintiff waived objection to whether the Court would allow questioning of witness by not questioning that witness).

Harris asserts her counsel understood the trial court’s ruling to be an exclusion of the deposition and that it was an ambiguous ruling. *Appellant’s Brief* at 37-38. This issue was not raised below to the trial court, and should not now be raised for the first time on appeal. “In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51; 99 P.3d 801. Here the trial court never had the opportunity to evaluate whether the judge’s ruling was ambiguous because that issue was not raised in Harris’ Rule 59 motion for a new trial. “Issues that are not raised at trial are usually deemed waived.” *Id.* Moreover, given that this was the second time the issue had arisen, the Court of Appeals should not accept this claim of ambiguity.

Finally, even if the Court’s ruling was error, which it was not, URCP 61 provides that Courts may disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. *URCP 61*. Here, as in *Walker v. Hansen*, Plaintiff has not demonstrated that the Court’s ruling on the use of Plaintiff’s deposition has had any affect on her substantial rights or the outcome of the trial. *Walker v. Hansen* at ¶ 19 (“Nor is it clear from the record that the trial court improperly limited Walker’s examination of Dr. Sawchuck or whether Walker’s trial counsel elected not to call this witness”). As shown above, the reason for the low amount of damages awarded by the

jury is the lack of necessity and reasonableness for past and future medical treatments, the evidence of pre-existing conditions, and the lack of evidence that ShopKo is responsible for all of Harris' complaints.

b. The Court did not Err in Excluding the Chair Specification Sheet.

Harris argues that it was reversible error for the trial court to sustain an objection based on foundation and to exclude a chair specification drawing. She asserts that an admission made in answer to a request for admission during discovery admits to foundation. *Appellant's Brief* at 39. Admission of a fact in discovery however does not waive any objection to admissibility, nor does it waive any objection to foundation. URCP 26(b) makes clear that "it is not ground for objection (to discovery) that the information sought will be inadmissible at trial." The trial court noted that admission did not waive foundation at trial (Tr. 436:2-8).

Although URE 901 (b)(1) does provide for authentication through the testimony of a witness with knowledge, the Rule does not provide for authentication through discovery admission. Plaintiff sought to introduce the specification sheet through the testimony of ShopKo employee, Sean Briggs, who had no knowledge regarding the chair (Tr. 429:16-18). Sean Briggs had no basis to know anything about the document (Tr. 438:1-12). None of the other bases for foundation established in URE 901 (b) are present in this case. Therefore, the Court correctly sustained the foundation objection.

Harris admits she did not ask ShopKo to stipulate to the introduction of the drawing (Tr. 439:22-25). *Appellant's Brief* at 41. Therefore, Harris had no reason to anticipate that ShopKo would waive the foundation requirement. Harris argues however

that ShopKo should have objected to the pre-trial disclosures and that the trial court abused its discretion when it found good cause to excuse the lack of objection. Utah R. Civ. Pro. 26 allows the trial court to excuse any waiver for good cause. *URCP Rule 26(a)(4)(C)*. Here the trial court found good cause because Harris should have included the drawing sheet in the items to which the parties stipulated (Tr. 441:12-20, 442:4-5). *Addendum of Appellant* at A-7 to A-8 ¶18. Had Harris asked for the stipulation, she would have learned she needed to lay a foundation for the specification sheet, or she could have gained a stipulation as to foundation from ShopKo.

Harris claims the exclusion of the specification sheet was harmful error. But the trial court found that Harris suffered no harm from the exclusion because there was an exemplar chair which the witnesses, including Harris, used during their testimony and which the parties used during closing arguments. *Addendum of Appellant* at A-8 ¶19. Harris seeks to create reversible error because ShopKo's counsel mentioned the height of the chair during opening statement as being 19 inches, when the chair was possibly susceptible of being set to a height of 21.25 inches. *Appellant's Brief* at 42. There is however no evidence available regarding the height of the chair at the time Harris fell from the seat, so the jury would not have been helped by that information.

Moreover, Harris again seeks to assign reversible error for her counsel's tactical decision. Harris admits her counsel did not object to any statement made by ShopKo's counsel regarding the height of the chair, "as part of a litigation strategy." *Addendum of Appellant* at A-8 to A-9, ¶ 21. In *State v. Hall* the Court of Appeals declined to consider a defendant's plain-error arguments where "the alleged errors reasonably resulted from

defense counsel's conscious decision to refrain from objecting or if defense counsel led the trial court into error.” 946 P. 2d 712, 716 (UT App 1991). The Court in *Hall* also cited to *State v. Morgan*, 813 P.2d 1207, 1211 (Utah Ct.App.1991) where the Court refused to consider plain-error argument because “it was within counsel's professional discretion to not object to testimony that would aid [trial] strategy”.

c. The Trial Court did not Err in Instructing the Jury on Present Cash Value.

Relying on three inapposite cases, Harris argues that the trial court erred in instructing the jury on present cash value for future damages. *Appellant's Brief* at 43. Harris cites *John Call Engineering v. Manti City* for the proposition that “it is not a plaintiff's burden to produce the evidence on which any reduction of damages is to be predicated.” 795 P. 2d 678, 680 (Utah App. 1990). *Call Engineering* dealt with a claim for breach of contract and a defense that plaintiff had not mitigated its damages. The reduction of damages spoken of by the Court of Appeals in that case refers to mitigation of contract damages. No such claim is pending in this matter. Similarly, *Ault v. Dubois*, dealt with damage to real property. It is in that context that the Court of Appeals held “where damage to realty may be measured either by diminution in value or by the cost of restoration, and the plaintiff gives evidence only as to one, it is up to the defendant to show that the other measure of damages would be less.” 739 P. 2d 1117, 1120-21 (Utah App. 1987). This is not a case where damages can be measured by alternative theories. In this case, it is the Plaintiff's burden to prove the reasonableness and necessity of her past and future desired treatments, and of the cause of her complaints.

Harris argues that ShopKo should have introduced evidence regarding how the jury should reduce future damages before the trial court could properly instruct the jury on present cash value. *Appellant's Brief* at 43-44. Her argument rests on an inaccurate reading of the trial court's order addressing motions in limine and on cases involving the admissibility of annuity tables (*Gallegos v. Dick Simon Trucking*) and mortality tables (*Bennett v. Denver & Rio Grande Western R. Co.*). Neither support Harris' contentions.

In *Gallegos*, the Court of Appeals reversed the trial court's decision to exclude all evidence regarding annuities. *Gallegos v. Dick Simon Trucking*, 2004 UT App. 322, ¶10; 110 P. 3d 710. The *Gallegos* case involved complex issues of how to invest future damages of between \$14 millions and \$52 millions. *Id.*, ¶ 20. Given the complexity of investing such large sums, evidence regarding annuities was admissible. Similarly, in *Bennett v. Denver & Rio Grande Western R. Co.*, the Supreme Court ruled that a mortality table was properly admitted. 213 P. 2d 325, 328 (Utah 1950). Once again, the issue dealt with the admissibility of evidence to assist the jury in deciding complex issues dealing with life expectancy and large sums of damages. These situations are much different from the present case.

In this case, Harris sought future medical expenses of \$39,574. *Appellant's Brief* at 1. ShopKo challenged the future medical expenses on necessity and reasonableness, and did not challenge the costs of future medical treatment. The trial court determined that Harris' evidence regarding future damages was presented as the current costs of her desired future medical treatments. *Addendum of Appellant* at A-10, ¶ 25. Given the relatively minor amount involved, ShopKo had no need to introduce annuity information;

nor did the trial court order ShopKo to submit such information. In its pre-trial order, the trial court expressly ruled that “while expert testimony to reduce future damages to present value would no doubt be helpful, it is not required to present the issue to the jury.” (*R. at 380*).

As the Court of Appeals noted in *Gallegos*, “in Utah, a finder of fact must discount damages for future losses to the present cash value.” 2004 UT App. 322, ¶ 11. Since there was some evidence to support future damages, the trial court here properly instructed the jury, and no error can be assigned to the jury instruction.

When reviewing the jury instructions, the Court of Appeals will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.” *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 8; 214 P. 3d 865; *State v. Hobbs*, 2003 UT App. 27, ¶ 31; 64 P.3d 1218. In this case, the jury instructions as whole fairly instructed the jury on the applicable law.

d. The Trial Court did not Err in Instructing the Jury on Apportionment.

Harris argues that instructing the jury on apportionment was error because she does not believe that there was any evidence upon which the jury could rely to apportion injury to the pre-existing conditions. *Appellant’s Brief* at 45. Contrary to Harris’ claim, the trial court determined that the instruction was appropriate because “ShopKo presented substantial evidence that Harris’ injuries could be attributed to alternative sources.” *Addendum of Appellant* at A-10, ¶ 28. In fact, there is abundant evidence that pre-existing conditions were responsible for some of Harris’ pain and injury. There is ample evidence that Harris suffers from degenerative disk disease, including annular tear,

bulging disk, facet joint syndrome, disk herniation, desiccation, and ligament hypertrophy. All of these symptoms and conditions are natural, associated with aging and not the result of a single incident of trauma. Dr. College, Harris' former treating physician, testified that "it is probable that the disk degenerative disease is the cause of Plaintiff's current complaints." Dr. Scuderi, Harris' chiropractic physician, concluded that "pre-existing conditions could be the source of Plaintiff's pain." Dr. Rosenthal, Harris' expert and treating physician, testified that his first diagnosis for Plaintiff's complaint was facet joint syndrome which can be caused by disk degeneration due to aging and which is not trauma related.

The instruction given by the trial court protected Harris by advising jurors that if they were unable to reasonably apportion damages, they must conclude that the entire harm was caused by ShopKo (Tr. 945:7-946:15). *Addendum of Appellant* at A-10, ¶ 28. Again, the trial court properly instructed the jury, and no error can be assigned to the jury instruction. As the Utah Supreme Court has held, "if the jury can find a reasonable basis for apportioning damages between a preexisting condition and a subsequent tort, it should do so; however, if the jury finds it impossible to apportion damages, it should find that the tortfeasor is liable for the entire amount of damages." *Tingey v. Christensen*, 1999 UT 68, ¶ 15; 987 P. 2d. 588.

e. The Trial Court did not Abuse its Discretion by allowing Dr. College to Testify on Delayed Recovery Syndrome.

Near the end of his direct testimony, Dr. College was asked about delayed recovery syndrome. The testimony was brief. He explained that the syndrome is relevant

when trying to determine best treatments for injuries because injured persons are known to take longer to recover. (Tr. at 597: 22-598:10). He explained that Harris showed signs of the syndrome and connected that to the nonessential nature of some of the treatment pursued by Harris, including the use of excess narcotics and marginal medical treatments, including massage therapy and chiropractic treatment which do not result in resolution of pain or injury. (Tr. at 599:17-23; 637:3-638:10; 638:18-640:12). Dr. College concluded that the issue has to do with the severity of the disability or incapacity subjectively reported by Harris. (Tr. at 640:4-9). Dr. College was critical of Dr. Rosenthal's approach. Dr. College testified that the ShopKo incident would have produced soft tissue injury which would have healed within a few weeks, and that any pain thereafter was chronic pain (not caused by trauma) and should be treated differently. (Tr. at 586:10-19; 584:12-20; 594:10-19). He was critical of marginal medical treatments which mask pain but do not treat cause (Tr. 592:24-593:3, 594:4-19, 621:16-622:3, 624:14-20, 637:4-14).

Harris mischaracterizes the testimony of Dr. College, referring to the syndrome as "a psychosomatic weakness" a label which Dr. College never used. Harris asserts that the testimony was not relevant, should have been excluded under URE 402, was overly prejudicial and should have been inadmissible under URE 403. *Appellant's Brief* at 45-47. Prior to Dr. College's testimony, however, Harris objected to the testimony arguing that Dr. College was not an expert, that the matter amounted to improper character evidence, and that it would be "more prejudicial than probative given his lack of expertise in the field." (Tr. at 560:1-14). Harris also objected on the ground that the syndrome is "a generalized idea" and that it would be improper to apply it to her. (Tr. at

562:23-563:2). The trial court ruled the testimony admissible, finding that Dr. College was qualified to testify on the subject, that as Harris' former treating physician he could testify with specificity about Harris, and that the testimony was relevant to the issue of damages. (Tr. 562:14-21; 563:19-564:2). The trial court's ruling is entitled to great discretions and will only be overturned upon a finding of clear abuse of discretion. *Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 17; 929 P. 2d 317.

URE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." URE 402 provides that "all relevant evidence is admissible... Evidence which is not relevant is not admissible." A trial court has broad discretion to determine whether proffered evidence is relevant under Rule 401. *State v. Hobbs*, 2003 UT App 27, ¶¶ 11, 26, 64 P.3d 1218 (quoting *State v. Kohl*, 2000 UT 35, ¶ 17, 999 P.2d 7). The evidence of the delayed recovery syndrome is relevant because it makes more probable that the treatments Harris sought were not reasonably necessary based on the ShopKo incident. Dr. College's entire testimony revolved around the fact that Harris was chasing the impossible, the complete resolution of all her ills, and that the ShopKo incident was simply the means and method for that resolution.

URE 403 provides in part that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." A trial court is granted broad discretion when weighing the probative value of evidence against the reasons for exclusion enumerated in

rule 403. *State v. Bluff*, 2002 UT 66, ¶ 56, 52 P.3d 1210 (a trial court's ruling under Rule 403 is reviewed for abuse of discretion); *State v. Pena*, 869 P.2d 932, 937-38 (Utah 1994) (noting that “a spectrum of discretion” exists and “toward the broad end of the spectrum is the decision to admit or exclude evidence under Utah Rule of Evidence 403”). A trial court is in the best position to make evidentiary rulings as they arise because it can evaluate the claims and the evidence already admitted or proffered. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 923 (Utah 1990) (noting the “trial court's advantageous position” in “reviewing questions of admissibility of evidence at trial”).

When deciding whether to apply Rule 403's exclusionary protection “the critical question is whether certain testimony is so prejudicial that the jury will be unable to fairly weigh the evidence.” *State v. Downs*, 2008 UT App 247 ¶ 7; 190 P. 3d 17. “Absent a *substantial, not potential or minor, prejudicial effect*, the evidence is admissible for the jury's consideration in reviewing all other facts.” *Id.* emphasis in original. As the Utah Supreme Court has observed “in a broad sense, almost all evidence is [prejudicial]. There is little reason to offer evidence if it does not cast doubt or prejudice on the opposing party's position.” *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109 ¶ 28; 992 P. 2d 969. Utah Courts should “have confidence in our juries to appropriately weigh evidence that may be adverse” to a party. *State v. Downs* ¶ 7. In this case, the delayed recovery syndrome was not overly or unfairly prejudicial to Plaintiff, because Dr. College was clear that Plaintiff's pain was real and that Harris was not a malingerer (Tr. 601:6-12, 602: 4-13). He also testified that disc degeneration which is painless can flair up with

trauma and agreed that the ShopKo caused trauma caused some of Harris' (Tr. 642:12-643:7).

College also testified that Harris caused a lot of her pain by overusing pain pills (Tr. 627:2-6), and explained why the treatments she sought, massage therapy, chiropractic therapy, and her overuse of pain medication were unnecessary and unreasonable. Dr. College's testimony on delayed recovery syndrome must be evaluated in the context of his entire testimony and not separated and distorted through an out-of-context analysis. *Utah State Road Commission v. Johnson*, 550 P. 2d 215, 221 (Utah 1976); *Child v. Gonda*, 972 P. 2d 425, 431 (Utah 1998) (appellate courts to evaluate testimony "in its context").

f. The Trial Court did not Err in Allowing ShopKo to Refer to Dr. Rosenthal's Report as "Attorney Drafted."

Harris asserts that the question of who drafted an expert's report is not relevant to the credibility of that expert witness. *Appellant's Brief* at 52. Although the Utah Rules of Civil Procedures allow the practice of parties drafting expert reports (*See URCP 26(a)(3)(B)*), that practice may raise credibility issues and may go to the weight that a jury might give to a report in certain circumstances. This is one of those instances.

Dr. Rosenthal admitted on cross-examination that he had not read all the medical evidence before signing the report, even though the report asserted otherwise. He testified that, although the report's first line stated it was "based upon the review of the Plaintiff's medical records" (Tr. 316:2-23), Dr Rosenthal had, in fact, not reviewed the Alta View Hospital's records, the Spanish Fork clinic records, the South Towne

Chiropractic records, nor the Central Utah Clinic's records, nor Dr. College's records, nor the Utah Neurological Clinic's records, nor Dr. Gardner's report, nor the Intermountain Healthcare and Eric Passage's records, not the Massage Envy records, nor Dr. Jackson's records, nor the South Valley Physical Therapy records, nor the MRI from August 2007, nor the pre-ShopKo incident records. In fact, Dr. Rosenthal admitted that, although the report claims he had reviewed the medical records, he had only reviewed a summary of those records prepared by Plaintiff's counsel, prior to signing the report (Tr. 318:7-319:3). Surely these facts go to the credibility of the witness and his report.

Moreover, although prejudicial, these facts, and ShopKo's counsel's commenting on the authorship of the report, are not "overly prejudicial" such as to require they be barred pursuant to URE 403. *See discussion on URE 403 above.* The trial court advised the jury at the start of Dr. Rosenthal's cross-examination that "pursuant to Rule 26, a witness who is retained or specially employed to provide expert testimony in a case is required to submit a written report. That report may be prepared by either the witness who is testifying or a party." Tr. 288:20-289:5.

Thus, it is reasonable to conclude that the jury understood that a party drafting a report is proper under the rules, while also concluding from Dr. Rosenthal's own testimony, that Dr. Rosenthal's opinion and report lacked credibility. The trial court determined that the authorship of the report went to credibility and to the weight of its conclusion. *Addendum of Appellant* at A-18 – A-20, ¶¶ 54, 56-58.

Harris concedes that she had the opportunity to address the implications raised by the authorship revelation in redirect, that Dr. Rosenthal testified that after he signed the

report he went back and reviewed all the medical records, and that he found nothing which would cause him to change his report. (Tr. at 332:24-333:20). Anticipating the attack on credibility by ShopKo, Harris had also sought out the same information during the direct examination of her expert. (Tr. 234:17-235:9). In conclusion, Harris has brought nothing to cause the Court of Appeals to conclude that the trial court abused its discretion on this issue.

g. The Trial Court did not Err when it excluded Mr. Harris' Testimony on Conjugal Relations.

Harris argues that the trial court committed error when it excluded Mr. Harris' testimony regarding lack of intimacy. Harris argues that Mr. Harris should have been allowed to testify on the lack of intimacy as evidence of Harris' noneconomic losses. *Appellant's Brief* at 56. But Harris admits that she had the opportunity of testifying on the subject of her intimate relations with her husband, and bemoans the fact that "the testimony was far too brief and general." *Id.* note 16. Surely the tactical decision, for whatever reason made, to not have Harris develop fully her loss of enjoyment of life during her testimony should not be the basis for assessing error to the trial court. Harris' argument on this issue is even more difficult to accept given that Mr. Harris testified before Harris. Thus, Harris, knowing that Mr. Harris had not testified as to the loss of intimacy in the marriage, had all the more reasons to address the issue with the jury.

Harris argues that not allowing Mr. Harris to testify as to the loss of conjugal relations accounts for the "incredibly low" general damages award. *Appellant's Brief* at 56. In advancing that argument, Harris ignores all the evidence before the jury which

supports the general damages award. Defendant did not attack Plaintiff's testimony regarding her loss of quality of life, only the cause of that loss of quality. The evidence, reviewed above, is that Plaintiff suffered from preexisting conditions, including degenerative disk disease and fibromyalgia, and that much of her loss of enjoyment was caused by those preexisting conditions and her by own actions.

The trial court found that Mr. Harris' testimony about his lack of intimacy would have offered nothing to the jury's consideration of how Harris herself had been damaged. In light of Harris own admission that she did not testify fully and expressly about that particular loss of enjoyment of life, the trial court was not wrong. It may well have been that Mr. Harris found the loss of conjugal relations more of a loss than Harris herself. Absent Harris' own testimony on this issue, the trial court was not wrong to exclude Mr. Harris' testimony on his own loss, since no loss of consortium claim was before the jury.

h. The Admission of Dr. College's CV was Harmless Error.

Harris assigns fault to the trial court for admitting Dr. College's CV. She relies on a criminal case dealing with pre and post motive to fabricate information, *State v. Bujan*, 2006 UT App. 322; 142 P. 3d 581 for the proposition that using hearsay to bolster the testimony of a witness is improper. *Appellant's Brief* at 57. However, unlike in *Bujan*, here there is very little likelihood that a different outcome would have resulted, and confidence in the verdict is not undermined.

Although a CV is technically hearsay, CVs are routinely admitted into evidence as a material aid to the trier of facts. Moreover, if a witness testifies to the points on his CV, exclusion serves little purpose. And, if an appeal becomes necessary, exclusion of the

CV deprives the appellate court of a convenient summary of those facts asserted to support the qualifications of the witness.

Harris asks the Court of Appeals to assign reversible error to the admission of the CV. But an error is considered harmless if it is sufficiently inconsequential that the Court of Appeals can conclude that “there is no reasonable likelihood that the error affected the outcome of the proceedings.” *Gallegos v. Dick Simon Trucking*, 2004 UT App. ¶ 19 (citations omitted). Reasonable likelihood means reasonable probability, or “probability sufficient to undermine confidence in the outcome.” *Id.* Given the evidence adduced from all the witnesses, including Harris’ own doctors and expert, there is substantial evidence to support the jury’s verdict, and it is not reasonable to infer that the jury would have awarded greater damages if Dr. College’s CV had not been admitted into evidence, especially since he had testified to all the points in his CV during his testimony (Tr. 567:15-568:3, 569:15 – 571:22. Dr. College’s testimony was important, effective, and assertive, unlike that of Dr. Rosenthal who sounded cautious, tentative and uncertain.

4. The cumulative weight of error doctrine does not apply.

Harris seeks to have the Court of Appeals throw out the jury verdict based upon the weight of her assignment of errors. She argues that the many claims of errors she has brought are sufficient to undermine the Court’s confidence that the trial was fair, and she wants the Court of Appeals to determine that she was denied the ability to fully and freely litigate her case. *Appellant’s Brief* at 58.

Although Harris has claimed many errors, the Court of Appeals should determine that the majority of the claims do not constitute error, and that any error is so minor as to

result in no harm. Harris asserts that she was also negatively impacted from the Court's decision to not allow written motions in limine after the deadline for filing such, although the trial court allowed Harris to bring all the verbal motions in limine she desired to present. Plaintiff asserts that "creating a situation that demanded split second judgments without the ability to read and consider the relevant authorities" created an "atmosphere in which errors abound." *Appellant's Brief* at 59. It is axiomatic however, that Harris, knowing she would make oral motions in limine, would have prepared prior to the opening of trial, and had an opportunity to review all relevant authorities. It is also axiomatic that motions in limine may be made in writing or orally to the Court.

Harris was allowed to fully present her case to the jury. She testified, was allowed to call all witnesses she wanted and needed, was allowed to call her expert, was allowed to cross-examine all of Defendant's witnesses, and was allowed to argue her case to the jury. Ultimately, she was denied only her husband's testimony regarding their intimate relations (though she could have testified to that herself and failed to do so), was denied the publication of a portion of her deposition (though, again, she could have testified directly about the subject matter in that portion of her deposition, but her counsel waived that opportunity), and was denied a particular specification sheet regarding the chair (although there was an actual chair present and in evidence before the jury).

The trial court allowed ShopKo to refer to Harris' expert report as "attorney drafted" because it went to the weight and credibility of Harris' expert, given the fact that the report as written, was in part misleading. That was not error, and Dr. Rosenthal was able to testify that after he read the materials upon which the report was based, he had no

objection or correction to make to the report. The trial court also allowed Dr. College's CV to be introduced in evidence, but that error was de minimus because Dr. College testified to all the points in his CV so the jury already knew his qualifications. Finally, the trial court allowed Dr. College to testify on delayed recovery syndrome, finding it relevant to the issue of necessity and reasonableness for the past and future treatment. Given the evidence adduced from Harris' own witnesses, Dr. College's testimony was relevant and not overly prejudicial. Finally, Harris complains about the instructions to the jury regarding present cash value and apportionment. Again, given the evidence submitted to the jury, the instructions were correct, and on the whole fairly instructed the jury on the law applicable to the case.

In order to apply the cumulative weight of error doctrine, the Court of Appeals must find that errors undermine the Court's confidence that a fair trial was had. The evidence here simply does not justify such a finding.

CONCLUSION

The Court of Appeals should affirm the results below and dismiss the appeal.

DATED this 23rd day of September, 2010.

CHRISTENSEN & JENSEN, P.C.

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CERTIFICATE OF SERVICE

On this the 24th day of September, 2010, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be mailed via First Class Mail, postage prepaid, to plaintiff's counsel of record to the following address:

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