

2010

Wendy Harris v. Shopko Stores, Inc : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WENDY HARRIS,

Plaintiff/Appellant,

v.

SHOPKO STORES, INC.,

Defendant/Appellee.

Case no. 20100106-CA

Dist. Ct. Case no. 070101906

APPELLANT'S REPLY BRIEF

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

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ORAL ARGUMENT REQUESTED

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ARGUMENT

The fundamental questions before this Court are whether the jury's award was justified by the evidence and whether Plaintiff had a fair trial. As Plaintiff has shown in the arguments of her opening brief, the answer to both of those questions is no. This Court should reverse the trial court's decision and remand for a new trial. Because space is limited, this brief will address only those arguments in Defendant's response that were not already addressed in the opening brief.

I. THE JURY'S AWARD WAS NOT JUSTIFIED BY THE EVIDENCE.

In its brief, Defendant speaks of the "great deal of evidence supporting the verdict," all the while ignoring the relevant legal standards and Plaintiff's arguments showing that the evidence does not justify the verdict. Defendant's interpretation of a "reasonably necessary" medical expense would not allow for any treatment that reduces pain, and would require that both Wendy and her doctors be omniscient as to what treatment would work. This is not the definition of "reasonably necessary" in Utah law, which allows a party to recoup expenses for treatments that appear likely, based on the information available to the party at the time, to mitigate the pain and suffering and reduce the injury of the patient. Defendant also ignores the rule that to apportion injury to a pre-existing condition, it has to be symptomatic at the time of the accident and that there must be evidence that would allow the jury to make a reasonable apportionment. Rather than addressing that standard, Defendant gives a laundry list of Wendy's *asymptomatic* conditions and ignores that there was no evidence of apportioning the causes of Wendy's pain. Defendant has also misstated the record in several places

throughout its brief.¹ There was no evidentiary basis for discounting Plaintiff's past and future medical expenses, and *Robinson v. All-Star Delivery*, 992 P.2d 969 (Utah 1999),² and common sense show conclusively that \$1,000.00 is an unconscionably low amount of damages for Plaintiff's injuries.

The remainder of Defendant's argument regarding the issues of the economic and non-economic damages awards go to the interpretation of two Utah court cases, which Plaintiff will now address. In *Biswell v. Duncan*, this Court stated that pre-existing conditions must be symptomatic in order to reduce a party's recovery. 742 P.2d 80, 88. Defendant attempts to deal with *Biswell*, but in so doing, misstates the facts of the case and the law. First, Defendant attempts to distinguish *Biswell* by saying that in that case, "there was no evidence opposing plaintiff's assertion that all her pain was the result of the accident." This is not true. The opinion states:

Although Biswell suffered from degenerative changes in her spine prior to the accident, at trial she claimed that her prior conditions and ailments had been resolved and that she suffered no symptoms before the accident.

1. In its brief, Defendant made many statements that were unsupported by the record, such as "Dr. Rosenthal testified . . . that he could not testify to a reasonable degree of medical certainty that Harris would need dilaudid in the future," and "Dr. Colledge testified that Plaintiff's pain . . . was not caused by the Shopko incident." For reasons of space, Plaintiff will not go through a point-by point rebuttal, but urges the Court to verify the following citations and compare the record to the representations located on the following pages of Defendant's brief: at 6 (Tr. 593:25-594:19); at 7 (Tr. 543:10-544:10), (Tr. 324:16-25, 325: 12-14), (Tr. 250: 9-21, 325:5-11); at 8 (Tr. 298:16-21), (Tr. 535:8-9, 535:23-536:12); at 9 (Tr. 589:22-590:12), (Tr. 587:20-588:14), (Tr. 590:13-591:4); at 12 (Tr. 585:8-13), (Tr.586:10-19); at 31 (Tr. at 586:10-19; 584:12-20; 594:10-19).

2. *Robinson* was cited for the fact that the Plaintiff in that case was awarded \$1,000.00 while the evidence of his injuries was orders of magnitude lower than Plaintiff's injuries. Notwithstanding the limited injuries, the court still found that there was a good possibility that the plaintiff would recover more upon remand.

Biswell alleged that it was only after the accident that she experienced the pain she currently endures in her lower back.

Id.; see also Brief of Appellant, *Biswell v. Duncan* (No. 860124-CA) at 3 (explaining that Biswell’s experts “assigned a 3 to 5 percent rating to the pre-existing condition.”).³

Unlike in this case, where there was no evidence that Wendy’s conditions were symptomatic, there was conflicting evidence in *Biswell* as to whether the Plaintiff was symptomatic.

Defendant also states that “Harris was simply unable to clearly establish that her pain derived from and was caused solely by the ShopKo incident.” However, this is not Plaintiff’s burden—if there is no reasonable basis for determining the contribution of each cause, then a jury must conclude that the entire harm was caused by the tortfeasor. See MUJI 2d CV2018. Defendant did not provide any evidence that Wendy was suffering from symptomatic pre-existing conditions, and did not provide the jury with a reasonable basis for apportionment of the damages.

Judd v. Rowley’s Cherry Hill Orchards, Inc. holds that an award for economic damages must be based on the evidence of damages that was presented to the jury. See 611 P.2d, 1216, 1221 (Utah 1980). From this we can infer that an award that bears no relationship to the amounts given to the jury as the reasonable amount of medical expenses, then it is likely that the award was not based on that evidence. Defendant offers a Florida case that talks about compromise verdicts, but there has been no claim of a compromise verdict in this case. Rather, Plaintiff’s claim is that to calculate economic damages, the jury would take the total amount of the figures and deduct the expenses that

3. The full brief can be found in Volume 16 of the Utah Court of Appeals Briefs in the State Law Library of the Matheson Courthouse.

they did not believe were reasonably necessary. There is no combination of figures submitted to the jury that would reach \$15,000.00 in past medical expenses, and so the Court can infer that the jury did not go through this process.

II. THE TRIAL COURT'S ERRONEOUS RULINGS PREVENTED PLAINTIFF FROM HAVING A FAIR TRIAL AND WARRANT REVERSAL.

The next issue the Court must decide is whether the trial court's errors, viewed cumulatively, prevented Plaintiff from having a fair trial. Plaintiff argued in the opening brief that the trial court's decision to limit motions in limine created a climate where errors abound, since even though the party submitting the motion in limine would be familiar with the relevant case law on a particular issue, the other party and the trial court would not be so fortunate. The trial court's unfamiliarity with the applicable law was a decisive factor in many of the errors that Plaintiff was prejudiced by. The trial court committed error by (a) disallowing use of Plaintiff's deposition transcript, (b) excluding the specification sheet for the chair that factored in to Wendy's accident, (c) charging the jury as to present value and (d) symptomatic pre-existing conditions without any evidence to support the charge, (e) admitting testimony as to "Delayed Recovery Syndrome" and (f) the authorship of Dr. Rosenthal's expert report, (g) excluding Mr. Harris's testimony as to Wendy's intimate relationship with her husband, and (h) improperly admitting a hearsay document. Because of the number and magnitude of these errors there is little doubt that Plaintiff was denied a fair trial.⁴

4. Because Defendant has not raised any substantial issue that was not adequately addressed in the opening brief on the "Delayed Recovery Syndrome" and cumulative error points, Plaintiff will not address those issues in this brief.

Prejudicial error. Defendant argues on nearly every issue that any error was harmless, citing alternate reasons why the jury may have found the way it did. While the substance of this claim is dealt with *supra* in Point I, it is worth noting that Defendant fails to analyze harmful error within the proper framework. “For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.” *State v. Hamilton*, 827 P.2d 832, 840 (Utah 1992). As Plaintiff stated in her opening brief, the lower the award is within the zone of reasonableness, the more likely that any error would have adversely affected the award. Also, as Plaintiff showed by comparing this case to *Robinson v. All Star Delivery*, the award of \$1,000.00 in non-economic damages is extraordinarily low for the injuries that Wendy suffered. The threshold for any piece of evidence to undermine confidence in the verdict in this case is therefore fairly low.

A. The trial court erred in excluding portions of Plaintiff’s deposition transcript from evidence.

One of the fundamental rules of our judicial system is that the appellate court does not give a party a second bite at the apple. The parties are supposed to offer all of their evidence, make all of their objections, and raise all of their legal theories so that the trial court has an opportunity to press or pass upon the issue. But what happens when the trial court makes an ambiguous⁵ ruling, such that one of the parties believes that the issue was

5. It is important to make the distinction between a ruling that is vague (the meaning is not clear in context) and one that is ambiguous (susceptible to two or more reasonable but conflicting interpretations). While a ruling that is vague may oblige a party to request clarification, an ambiguous ruling may seem to be perfectly clear to a reasonable person, who, given the extemporaneous nature of court proceedings, has no time to ponder alternate interpretations of the ruling. The question is whether it was reasonable under the circumstances to not seek further clarification.

raised and decided upon when the Court intended to decide a different issue? An ambiguous ruling has consequences. The question before this Court is whether the consequences of that ambiguity should be borne solely by the party who relied on a mistaken belief or by the trial court and both parties equally. The principles of equity allow for rescission of a contract on grounds of mistake of fact.⁶ It stands to reason that those same principles would allow for a new trial under similar circumstances.

In its brief, Defendant has conceded Plaintiff's interpretive rule that an appellate court should interpret a ruling in the same way that the appealing party did, so long as that interpretation is reasonable. Also, Defendant does not challenge that Plaintiff actually believed that the trial court had ruled that Plaintiff could not use the deposition transcript to clarify the portions of the transcript introduced by Defendant, that Plaintiff relied upon her interpretation of the court's ruling to her detriment, or that such a ruling would be in error. Defendant only advances three arguments in its brief: first, that the assertion that the ruling was ambiguous was not raised below; second, that Plaintiff's interpretation of the trial court's ruling was not reasonable; and third, that any error was harmless. Plaintiff will deal with these in order.

The question of the proper interpretation of the trial court's ruling is properly before this Court. While Defendant correctly states the general rule that a party who "fails to bring an issue before the trial court is generally barred from raising it on the first time on appeal," *State v. Irwin*, 924 P.2d 5, 7 (Utah App. 1996), it simply concludes that the rule applies in this case without any further analysis. However, Defendant focuses on

6. See *John Call Engineering v. Manti City Corp.*, 743 P.2d 1205, 1209-10 (Utah 1987) (setting forth the test for rescission on unilateral mistake of fact).

a subsidiary argument, rather than the issue—whether the trial court’s ruling was in error. Defendant also ignores the extraordinary circumstances exception.

The distinction between a new issue on appeal on one hand and additional authority and analysis on the other is a murky one; there is “no bright-line rule to determine whether an issue has been properly raised in the trial court.” *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1172 (10th Cir. 2006). The question of whether to address any issue on appeal is left to the discretion of the appellate court to apply the “rules of fundamental justice.” *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); see *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 n.1 (Utah 1996); *Irwin*, 924 P.2d at 8. Whether a particular issue or argument has been properly raised below depends on (1) whether the question is a separate issue or a subsidiary legal argument to a properly raised issue,⁷ and (2) whether, given the circumstances, the trial court had an adequate opportunity to address the issue below.⁸ Whether the Court should apply the exceptional circumstances doctrine should turn on (1) whether there was an opportunity to address

7. See *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008) (holding that “subsidiary questions” that must be addressed to answer the larger issues before the court are properly before the Court); *Gill v. INS*, 420 F.3d 82, 86-87 (2d Cir. 2005) (subsidiary legal arguments are properly considered by an appellate court, even if not made below); *State v. Markwardt*, 742 N.W.2d 546, 555-56 (Wis. App. 2007) (citation to additional authority and legal analysis on appeal does not constitute “new argument” or advancement of a new theory on appeal.).

8. See *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) (setting forth specific factors for determining whether a trial court had an opportunity to address the issue below.).

the issue below,⁹ and (2) whether the issue is a pure issue of law that can be decided on the existing record.¹⁰

First, the ambiguity of the trial court's ruling is a subsidiary argument to the main issue: whether the trial court's ruling regarding the deposition was in error. To decide whether the lower court's ruling was in error, this Court must interpret the ruling, including deciding the question of how to construe any ambiguities. The rule that ambiguous rulings should be decided consistently with the appellant's reasonable interpretation is a legal argument that would assist the Court in interpreting the ruling, not a separate issue that would have required preservation.

Second, under the circumstances, the question of the proper interpretation of the court's ruling was adequately raised. Before the trial court's memorandum decision, Plaintiff believed that the ruling prevented her from using the deposition transcript to clarify other portions of the deposition read into evidence. Plaintiff's motion for a new trial made her understanding clear. (R. at 1013.) At that point, the trial court was on notice that the issue of the proper interpretation of the ruling was at issue, and explicitly rejected Plaintiff's interpretation. (R. at 1135.) Given that Plaintiff did not know that the trial court intended its ruling to apply solely to form until after trial court stated so in its

9. See *Irwin*, 924 P.2d at 10-11 (exceptional circumstances exist where otherwise "there would have been no ready opportunity for appellate review."); *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003) ("We conclude that when the district court explicitly resolves an issue of law on the merits, the appellant may challenge that ruling on appeal even if he failed to raise the issue in district court.").

10. See, e.g., *Vintero Corp. v. Corporacion Venezolana De Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("Arguments made on appeal need not be identical to those made below, however, if the elements of the claim were set forth and additional findings of fact are not required. Therefore when a party raises new contentions that involve only questions of law, an appellate court may consider the new issues.").

memorandum decision, there could be no reasonable expectation that she was to provide legal authority to support her interpretation. Plaintiff raised the issue as adequately as could be expected under the circumstances, and this Court should hold that the issue of the proper interpretation of the trial court's ruling was adequately preserved.

However, even if the issue were not properly preserved, exceptional circumstances apply that would make it manifestly unjust to decline to address the proper interpretation of the trial court's ruling, as there was no opportunity to address the question before appeal. Plaintiff was not made aware that the trial court intended its ruling to apply solely to form until after trial court stated so in its memorandum decision. There was no way that Plaintiff could have raised an issue that it was not aware of. Because filing a second motion for a new trial would have been improper, *see Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Utah App. 1989), this is the first opportunity that Plaintiff has had to explicitly address the issue.¹¹

Application of the exceptional circumstances doctrine would be appropriate here because the proper interpretation of a court's ruling presents a pure question of law. *See Stevensen v. Goodson*, 924 P.2d 339 (Utah 1996). The record is adequate to rule on the question, and so the prudential considerations behind the practice of denying review to

11. It appears that the cases outlining the rule interpreting ambiguous rulings have done so without specific preservation of the question of whether the ruling was ambiguous. In *State v. Dunn*, the court looked at ambiguity based on Defendant's assertion of what the ruling meant. *See* 850 P.2d 1201, 1220 (Utah 1993). In *Williams v. Barber*, the appellant misinterpreted an ambiguous ruling on the burden of proof, and did not discover his error until after the trial court had entered its final judgment. *See* 765 P.2d 887, 890 (Utah 1988). It is unlikely that the appellant raised the issue before the trial court.

issues not raised below do not apply in this case. The Court should therefore review the proper interpretation of the Court's ruling on the deposition transcript.

Plaintiff's understanding of the trial court's ruling was reasonable under the circumstances. Next, Defendant argues that Plaintiff's understanding of the ruling was not reasonable. Defendant does not address any of Plaintiff's arguments in support of this proposition—the fact that Defendant's objection had been to the “improper use of a deposition,” that the Court itself was in the better position to see Plaintiff's confusion and clarify its ruling, and that the method of introducing the deposition was correct as a matter of form. Defendant only argues that “given that this was the second time the issue had arisen,” Plaintiff's interpretation of the ruling as disallowing use of the deposition transcript was not reasonable.

The previous episode that Defendant refers to is as follows:

Q. [by Mr. Day] Just a few questions, Dr. Hogenson. I want to draw you back to page 14 of that deposition.

A. [Dr. Hogenson] Yes.

Q. That's the one you just read out of with Ms. Shapiro. I'd like you to follow along with me from—in fact, let's start with the question on line 12, and then you can answer the answer that comes after that on line 16. Okay?

MS. SHAPIRO: Your Honor, I don't believe this is a proper use of the deposition. *He hasn't given any inconsistent testimony in which to use the deposition.*

MR. DAY: *I'm simply trying to put into context the—*she read the part of the deposition that comes exactly after that.

THE COURT: *Why don't you ask the question first and allow him to respond.*

MR. DAY: Okay.

THE COURT: *If you need to refresh his recollection with that subsequently,* then certainly you're welcome to do that.

Q. This is the question and then let's wait for your response. “QUESTION”—and this would be a question Ms. Shapiro was asking at your deposition. “At this point she's a year and a half post-incident from Shopko. Is it your opinion that managing her pain through the pharmacy was the way to go?” And let me just—

instead of reading that in the deposition, was it your opinion that managing her pain through pharmaceutical or medication—was that the way to treat her?

A. Yes.

(Tr. 363:21-365:2 (emphasis added).) This exchange validates Plaintiff's understanding of the trial court's subsequent ruling. It is clear from the context here that the Court erroneously ruled that Plaintiff could not read in the deposition, just like the ruling complained of on appeal. Ms. Shapiro's objection was that a witness must make an inconsistent statement before the witness could refer to the deposition. Mr. Day responds that he has the right to put the statement into context, and the Court rules that he must ask a question first, and only use the deposition transcript if the witness needs to refresh his recollection. Plaintiff complies, and the witness does not read in or otherwise use the transcript. Given that the trial court ruled in this exchange that the deposition could not be read in, but only used to refresh recollection, it was reasonable for Mr. Day to assume that when Ms. Shapiro later objected that Mr. Day's use of the deposition was improper and the trial court told him to ask a question, that the court had made the same ruling.

While Mr. Day managed to elicit the relevant testimony with Dr. Hogenson without reading in the deposition transcript, that opportunity was not available in Wendy's case. Mr. Day had two objectives in reading in the deposition testimony: to rehabilitate Wendy's credibility and to show the jury that Ms. Shapiro was misrepresenting the contents of the deposition. Ms. Shapiro's selective use of the deposition gave the false impression that Wendy's testimony on the stand contradicted her deposition testimony, and that she had a much higher ability to perform the activities of daily living than was actually the case. Just asking Wendy what she remembered of her deposition testimony would not have cured the prejudicial effect that Plaintiff suffered by

not being allowed to show the jury exactly what words Ms. Shapiro left out of the transcript.¹²

Harmful Error. Because non-economic damages are incapable of exact determination, a major determinative factor in any award for non-economic damages is whether the jury trusts and empathizes with the plaintiff. Because evidence excluded by the trial court went to Wendy's credibility, it was very likely than any to have adversely affected the award of non-economic damages. The trial court acknowledged this in its decision. Because of the low threshold for a piece of evidence to affect the award and because of the central nature of the evidence to her credibility, this error is harmful.

B. The trial court erred in excluding the chair specification sheet from evidence.

When it was a party to the litigation, the manufacturer of the chair that figured in to Wendy's accident at Shopko produced a specification sheet giving the dimensions and specifications of the chair. Plaintiff sought to admit this specification sheet to establish the maximum height of the chair. The court's exclusion of this for lack of foundation was in error, since the foundation was admitted to under Rule 36 and any objection to its admission was waived under Rule 26(a)(4).

Rule 36 admissions. Defendant argues that facts admitted by a party pursuant to Utah R. Civ. P. 36 cannot be used to establish the authenticity of a document. This is incorrect. "Requests for admission may ask the party to whom the request is addressed to admit the genuineness of any described document." 7 *Moore's Federal Practice* §

12. This argument is not an admission that a party must exhaust all alternate means of introducing the evidence before Defendant's right to challenge the error on appeal, as explained *infra* in Part X.A.

36.10[9] (3d ed. 1997).¹³ In fact, the origin of Rule 36 was Equity Rule 58, which provided for the “admission of the execution and genuineness of documents.” *Momand v. Paramount Pictures Distributing Co.*, 36 F. Supp. 568, 572 (D. Mass. 1941). The continuing relevance of the rule’s original purpose is found in both the federal and Utah version of Rule 37, which calls for sanctions “if a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions *thereafter proves the genuineness of the document* or the truth of the matter” *See also Johnson Int’l Co. v. Jackson Nat’l Life Ins. Co.*, 812 F. Supp. 966 (D. Neb. 1993) (sanctioning a party for refusing to admit the authenticity of medical and prescription records).

Defendant’s argument that Utah R. Evid. 901 does not allow for authentication by admission is also incorrect. While Rule 901 provides several methods by which authentication can be accomplished, the rule expressly states that those methods are listed “[b]y way of illustration only, and not by way of limitation” Also, subsection (b)(10) of that rule allows for authentication by means of “[a]ny method of authentication or identification provided by court rule or statute of this state.” This would presumably include an admission, since a fact admitted to under Rule 36 is “conclusively established . . . for the purpose of the pending action.” Utah R. Civ. P. 36(b).

Finally, Defendant’s invokes Utah R. Civ. P. 26(b)(1) to argue that “admission of a fact in discovery does not waive any objection to admissibility, nor does it waive any

13. *See also Van Wagenen v. Consolidated Rail Corp.*, 170 F.R.D. 86, 87 (N.D.N.Y. 1997); *Berry v. Federated Mutual Ins. Co.*, 110 F.R.D. 441, 443 (N.D. Ind. 1986); *Gonzales v. Boas*, 874 A.2d 491, 500 (Md. App. 2005); *Guest v. Allstate Ins. Co.*, 205 P.3d 844, 860 (N.M. App. 2009).

objection to foundation.” However, *Moore’s Federal Practice* explains that because admissions are not designed to discover facts, Rule 26 does not apply:

Request for admission do not serve the same purpose as other discovery because requests for admission are not designed to elicit or discover facts but rather to eliminate issues not really in dispute between parties. By contrast, for example, interrogatories are designed to elicit relevant information that may or may not be admissible, but that may appear reasonably calculated to lead to discovery of admissible evidence.

7 *Moore’s Federal Practice* § 36.02[2]; see also *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1061 (Utah 1998) (“The policy behind rule 36 is to facilitate and expedite the discovery process by allowing parties to obtain admissions as to certain undisputed matters and thus avoid the effort and expense of having to conduct discovery as to those matters.”); 7 *Moore’s Federal Practice* § 36.02[1] (requests for admission are not discovery). It is clear beyond doubt that Rule 36 admissions can be used to lay a foundation for the introduction of documents, and so the trial court’s ruling was in error.

Waiver under Rule 26(a)(4). While the admission conclusively established the foundation, there is yet another reason that the trial court should have overruled any objection to foundation: Defendant waived the objection by failing to make the objection in writing within two weeks of Plaintiff’s pre-trial disclosures. While Defendant argues that the trial court found good cause to excuse the waiver, it does not answer the fact that the ruling was an abuse of discretion, as there was no good-faith dispute over the authenticity of the document, and Plaintiff actually relied upon Defendant’s waiver in not getting a foundational witness. Defendant’s argument about why the court found good cause is also unsupported by the record. While Defendant states that Plaintiff did not ask Defendant to stipulate to the document, there is no support in the record for that

proposition,¹⁴ and Plaintiff submits that such an assertion is patently false.¹⁵ Regardless, Defendant has never raised any grounds to dispute the authenticity of the document. Refusal to admit or to stipulate to the authenticity of the document without a reasonable belief that the document is not genuine is cause for sanction under Rule 37 and a violation of the Standards of Professionalism and Civility, *see* UJCA 14-301(10). Based on this, it is clear that a desire to “put a party to its proof” on this issue does not constitute good cause to excuse a party’s failure to object to the foundation of a document.

Harmful Error. Exclusion of the specification sheet was prejudicial, as Plaintiff should have been allowed to provide evidence that the chair extended to a height of 21.25 inches. Defendant argues that since there was no evidence as to the height of the chair at the time of Wendy’s accident, this evidence would have been irrelevant. However, the actual chair was in ShopKo’s possession, and they either lost or destroyed it. (Tr. 452:9-20; 462:5-15.) Because the jury could draw an adverse inference from ShopKo’s failure to produce the chair, it was proper for the jury to consider the maximum height of the chair. *See Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah App. 1994). Second, Defendant argues that because there was an exemplar chair provided by Defendant, there was no prejudice. However, taking a chair that may or may not have been put together the same way as the chair at issue and using a measuring tape to

14. The portions of Appellant’s brief and the record that Defendant cites only indicate that the parties did not stipulate, not that no stipulation was requested.

15. Plaintiff notes that the portion of the audio recording discussing the stipulation is inaudible, and therefore, the record is incomplete. (Tr. 439:14-441:21.) While the issue is not important enough to justify supplementing the record pursuant to Utah R. App. P. 11(f), in the interest of accuracy, Plaintiff states that the document was submitted to Defendant’s counsel, Ms. Shapiro, for stipulation, and she refused to do so.

calculate its height is not nearly as reliable or convincing evidence as the manufacturer's specifications of the height of the chair. *Cf. Gordon v. United States*, 344 U.S. 414, 420-21 (1953).

The second reason that the exclusion of the specification sheet was harmful was that it deprived Plaintiff of her opportunity to impeach the improper testimony of Ms. Shapiro.¹⁶ As explained in Plaintiff's opening brief, Ms. Shapiro improperly testified in her opening statement that the maximum height of the chair was 19 inches. Any person who gives evidence at a trial puts their credibility at issue and is subject to impeachment. *See Utah R. Evid.* 607. This is true for attorneys, as well. *See State v. Leonard*, 707 P.2d 650, 653 (Utah 1985) ("Once counsel becomes a witness his personal credibility is placed at issue before the jury and this may lessen his effectiveness as an advocate."). When Ms. Shapiro improperly testified, she put her credibility at issue. It is not unlikely that the jury, seeing that Ms. Shapiro's testimony was inaccurate, would discount her credibility on other statements and arguments, leading to a higher award of damages.

C. The trial court improperly instructed the jury to reduce future damages to present value.

The trial court erred by charging the jury to reduce the award of future damages to present value where no evidence was presented to allow them to make such a determination. Consider the following: you will have expenses of \$39,574 over the next five years. Some expenses will accrue monthly, some quarterly, some semi-annually.

16. Defendant's brief misstates the prejudice involved—Plaintiff's interest was not in excluding Ms. Shapiro's testimony, rather it was in impeaching her credibility. Therefore, the error did not result from Plaintiff's failure to object, but rather from the exclusion of the evidence that Plaintiff planned to use to impeach Ms. Shapiro.

How much money would you need today, so that if it were prudently invested, would cover all \$39,574.00 in expenses? By the way, this is a closed-book exam—consulting bond rates, savings rates, annuity tables and the like are not allowed.

This was the question posed to the jury in this case, and the difficulty of deriving an answer from one's common sense and everyday experience underscores this Court's statement in *Gallegos v. Dick Simon Trucking* that present value calculations are "almost impossible for a jury without assistance." 2004 UT App. 322, ¶ 11, 110 P.3d 710.

Defendant's position on this issue assumes that lay jurors are familiar enough with compound interest, interest rates and methods of investing that they can make a reasoned decision on present value. That is not a reasonable assumption. It is more likely that the jury, being told that they had to reduce the damages to present value, arbitrarily reduced the award, which constitutes harmful error.

In its brief, Defendant does not argue that the trial court was wrong in assigning it the burden of proof on the issue of present value. Rather, it argues that the trial court's order did not obligate them to actually give evidence.¹⁷ However, there is no other way to read the court's ruling—if a party has the burden of proof on an issue, then it follows that the party would have to submit evidence to prove it. Also, Defendant's reliance on the court's statement that "expert testimony . . . is not required to present the issue to the jury" is misplaced, as an annuity table, statement of bond yields, or other such evidence

17. The irony of Defendant's changed position on this issue cannot be overstated. Defendant originally contended that Plaintiff had the burden of proof to provide evidence to calculate present value, and argued that since she did not produce such evidence in discovery, that was grounds to exclude any evidence of future damages. (R. at 235.) Now that it is clear that the burden is on Defendant, it argues that no one should have that burden.

would not be expert testimony. Finally, Defendant attempts to distinguish *Gallegos* by saying that it involved a more complex investment scheme. However, the relevant question is whether the present value calculation in this case is sufficiently complex to be outside of the common sense of the jury. There is no question that it is. Defendant effectively argues that no one has the burden to produce proof on this issue, which is inconsistent with the trial court's order, and totally unworkable, as it puts an impossible burden on the jury.

D. The trial court improperly instructed the jury regarding apportionment of damages between the injuries caused by Defendant and symptomatic pre-existing conditions.

Because there was no evidence of symptomatic pre-existing conditions and no competent evidence by which the jury could apportion injuries, the trial court's instruction on apportionment was in error. *See Mikkelsen v. Haslam*, 764 P.2d 1384, 1387 (Utah App. 1988) (submitting an issue to the jury for which there is no evidence is reversible error). As pointed out earlier in the brief, Defendant ignores the distinction between symptomatic and asymptomatic pre-existing conditions, and there was no evidence that Wendy was symptomatic prior to the accident. Additionally, Defendant ignores the fact that there was no expert testimony as to apportionment. Without such testimony, there is no reasonable basis for apportionment, and the court improperly submitted the instruction to the jury for consideration. As this Court stated previously:

Where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury.

Beard v. K-Mart Corp., 2000 UT App 285, ¶ 16, 12 P.3d 1015. This standard applies equally to a defendant seeking to apportion fault to a pre-existing injury. *See also Garcia v. Wal-Mart Stores*, 209 F.3d 1170, 1175 (10th Cir. 2000).

E. The trial court improperly allowed counsel for Defendant to elicit testimony that Dr. Rosenthal's expert report was drafted by Counsel for Plaintiff.

Because the issue of the authorship of Dr. Rosenthal's expert report was not relevant and highly prejudicial, the trial court erred in allowing Defendant to elicit that testimony. Defendant does not contest the proposition that because the rules were meant to encourage attorney drafting as a cost-saving measure, that allowing the opposing party to bring up the issue would normally be inappropriate. However, Defendant argues that because the report states that Dr. Rosenthal had reviewed the medical records at the time of signing the report, when in fact he had only reviewed a summary, that the authorship of the report is relevant. This does not follow. The authorship of the report, standing alone, does not bear on Dr. Rosenthal's credibility or the weight of his conclusions. It was also not a necessary foundation for asking whether the report accurately stated whether Dr. Rosenthal had reviewed the medical records by the date of the report. There was no necessity to elicit the authorship of the report in order to ask Dr. Rosenthal whether the report was accurate, and it was highly prejudicial, as a lay jury could easily conclude that attorney drafting was improper and that the attorney was putting words into the expert's mouth. Finally, for the reasons stated in Plaintiff's opening brief (and not addressed by Defendant), the trial court's jury instruction did not render the error harmless.

F. The trial court improperly excluded the testimony of Tom Harris relating to Wendy's intimate relationship with her husband.

One of the ways that a plaintiff in a personal injury action can show the extent of the change in her quality of life is by comparing her life before the injury to her life afterwards. Often, a plaintiff will testify to this herself, but it is also good to have a third party relate his or her observations to the jury. Plaintiff elicited this “before-and-after” testimony from third parties regarding other aspects of her life at the trial. Likewise, Mr. Harris was set to give the same kind of testimony about the change in Wendy’s intimate relationship with her husband after her injuries.

Defendant concedes that the substance of Mr. Harris’s proposed testimony was relevant by arguing that Wendy could have testified to the change in her intimate relationship with her husband herself.¹⁸ Defendant also does not contest that Wendy’s testimony was not adequate to cure the harm of excluding Mr. Harris’s testimony. Instead, Defendant rests its opposition on a novel theory for which it provides no support: since Wendy had the opportunity to testify about her intimate relationship, the exclusion of Mr. Harris’s testimony “should not be the basis for assessing error to the trial court.”¹⁹

18. Defendant echoes the trial court in saying that “Mr. Harris’ testimony about his lack of intimacy would have offered nothing to the jury’s consideration of how [Wendy] herself had been damaged.” However, this misunderstands the nature of the proposed testimony. Mr. Harris did not propose to testify about *his* lack of intimacy, but rather about the fact of the decrease in intimacy and his observations about how Wendy’s ability to enjoy physical intimacy had changed—which is indisputably relevant.

19. While Defendant phrased the argument in terms of a “tactical decision . . . to not have [Wendy] fully develop her . . . testimony,” this formulation improperly takes the focus off of the claim of error, namely the trial court’s exclusion of Mr. Harris’s testimony.

Normally, for a trial court's error to merit reversal by the appeals court, the error must be (1) properly be preserved and (2) prejudicial. Defendant's argument seeks to introduce a new requirement, heretofore unheard of in Utah law, that a party must also exhaust all alternate means of introducing the evidence before the party has right to challenge the error on appeal. Defendant provides no authority for this proposition and Plaintiff knows of no such requirement in Utah or any other jurisdiction. This is not surprising, since such a requirement would be totally unworkable. To determine whether a party had exhausted alternate means of introducing excluded evidence, an appellate court would have to base its conclusion on evidence that was (by definition) not in the record. Defendant's formulation also misunderstands the nature of a claim of error. A party does not challenge the right to admit evidence on appeal; rather, the party challenges a ruling of the Court. *See* Utah R. Evid. 103(a). While it may be prudent for a party to attempt to introduce evidence by alternate means to try to mitigate the effect of an erroneous ruling, such actions are not required to preserve an assignment of error or to show that an error was harmful.

Defendant's insistence that Wendy should have put on the evidence also ignores a practical truth about jury trials: the form of the evidence and the identity of the witness matter. One commentator has noted that appellate courts are reluctant to conclude that an error was harmless "where the record indicates that the excluded evidence would have been more persuasive than or would have lent needed corroboration to evidence already in the record." Robert W. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3. Vill. L. Rev. 48, 59 (1957).

G. The trial court improperly allowed Dr. Colledge's written Curriculum Vitae to be admitted as documentary evidence.

Defendant admits that the CV was improperly admitted, but asserts that its admission into evidence constituted harmless error. First, Defendant asserts without authority that the admission of CVs is a common practice. However, the prevalence of a practice is irrelevant to a harmful error analysis—the proper question is whether it is likely that a different result would have been reached had the CV not been offered into evidence. Defendant next attempts to argue that exclusion of the CV would have been meaningless, since Dr. Colledge testified to his credentials. However, this conveniently ignores the fact that Ms. Shapiro emphasized the importance of the CV in her closing, telling the jurors that they would have it to examine in the jury room. *See Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 395 (10th Cir. 1985) (emphasizing improperly admitted evidence in closing is a factor in determining whether error is prejudicial).

This is a textbook example of using improper hearsay evidence to bolster the credibility of a witness. While somewhat different in degree, this question is similar to the question in *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). In that case, the principal piece of evidence against a man accused of sexual abuse was the testimony of his daughter. *Id.* at 390. The prosecution called four expert witnesses that corroborated what she had said in interviews and basically testified that they found her allegations credible. *Id.* at 390-91. The Utah Supreme Court held that the experts' testimony was improper under Utah R. Evid. 608(a) and 702. *Id.* at 391-407. The court held that the admission of the testimony was harmful error because the case “hinged on a determination of

credibility,” and that “the daughter's version of the events was bolstered principally by the testimony of the four experts challenged here.” *Id.* at 407.

In this case, any medical testimony adverse to Plaintiff was offered by Dr. Colledge. The only basis that the jurors had in order to decide who to believe was the witnesses’ credibility as experts. It is certainly not unlikely that the jury, after being reminded that they had his qualifications on a document in the jury room, reviewed the document and gave more credibility to Dr. Colledge than it otherwise would have if they had relied upon their memories of his testimony.²⁰ In light of the low damages awards in this case, the possibility for any improper piece of evidence to affect the outcome is fairly high.

III. PLAINTIFF ADEQUATELY MARSHALED THE EVIDENCE IN HER OPENING BRIEF.

Finally, Defendant claims that Plaintiff did not adequately marshal the evidence. However, there is no substance to this argument. Defendant does not point to a single piece of evidence that Plaintiff did not identify and address in the argument section of her brief.²¹ Moreover, every piece of evidence that Defendant brings up in its brief was properly stated with a citation to the record and addressed in Plaintiff’s opening brief.²²

20. Defendant’s assertion that Dr. Colledge’s testimony “was important, effective and assertive” while Dr. Rosenthal’s was “cautious, tentative and uncertain” is an improper attempt to assert facts not in the record and should be stricken.

21. Utah R. App. P. 24(a)(9) requires that an appellant must “marshal all record evidence that supports the challenged finding” in the argument section of its opening brief. *See also Rukavina v. Triatlantic Adventures, Inc.*, 931 P.2d 122, 125 (Utah 1997). There is no requirement to marshal evidence in the Statement of Facts section. *See* Utah R. App. P. 24(a)(7).

22. *See* Br. Appellant 19-24, 25-30, 33-35, 41, 49-50, & 53.

Rather than a substantive argument, Defendant appears to have included this point in its brief in order to attempt to impugn Plaintiff's arguments without addressing them. Defendant refers to the evidence that Plaintiff marshals and addresses as "fragments" of evidence that Plaintiff "deigns to mention," (*see* Br. Appellee 15) without pointing out any piece of crucial evidence that Plaintiff fails to address. Defendant attempts to make an issue out of Plaintiff's choice to refer to the evidence she marshaled as "evidence that could be construed in favor of the jury's decision," (*see* Br. Appellee 15) without explaining what impact that word choice might have on the issues to be decided by the Court.²³ Defendant insinuates that Plaintiff somehow acted improperly when she argued that the marshaled evidence is "'irrelevant' or opposed by other evidence, or rendered immaterial by some legal theory she argues overcomes the evidence," (*see* Br. Appellee 15-16) notwithstanding the fact that Defendant itself pointed out one paragraph earlier that it was Plaintiff's burden to "ferret out a fatal flaw in the evidence." *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). The substance of that burden is "to correlate particular items of evidence with the challenged findings and convince [the appeals court] of the [lower] court's missteps in application of the evidence to its findings." *Id.*; *see also Child v. Gonda*, 972 P.2d 425, 434 (Utah 1998) (stating that the marshaling party must "state *fully and accurately* all of the evidence on an issue and

23. As an aside, Plaintiff submits that her word choices were not meant to imply that there was no adverse evidence, only that adverse record evidence would be included regardless of whether it was referenced later by the lower court or parties, such as the references to Wendy's pregnancy, depression and irritable bowel syndrome. (*See* Br. Appellant 29-30.)

then show, as a matter of law, that the evidence does not support the verdict.”). This is exactly what Plaintiff has done in her opening brief.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to reverse the trial court’s decision and remand for a new trial in this matter.

RESPECTFULLY SUBMITTED this 1st day of November, 2010.

/S/ Nathan Whittaker
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PROOF OF SERVICE

I hereby certify that I caused two copies of the foregoing brief to be placed in the United States Mail, first class, postage prepaid, to the following:

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