

2010

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

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

WENDY HARRIS,

Plaintiff/Respondent,

v.

SHOPKO STORES, INC.,

Defendant/Petitioner.

Case no. 20110945-SC

Ct. App. Case no. 20100106-CA

Dist. Ct. Case no. 070101906

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

TABLE OF CONTENTS

Table of Authorities.....	iii
Issues and Standards of Review	1
Statement of the Facts	2
I. BACKGROUND OF THE LITIGATION.....	2
Wendy Harris's Accident at ShopKo	2
Medical Care.....	3
Wendy's Quality of Life after the Accident	4
Recent and Future Treatment	6
II. PROCEDURAL HISTORY.....	7
Apportionment Jury Instruction.....	7
Testimony as to Economic Damages.....	7
Present Value Jury Instruction.....	8
Verdict	8
Summary of Argument.....	8
Argument.....	9
I. THE COURT OF APPEALS CORRECTLY STATED UTAH LAW IN HOLDING THAT A DEFENDANT PROXIMATELY CAUSES ALL DAMAGES THAT RESULT FROM AGGRAVATION OF PREEXISTING CONDITIONS THAT ARE DORMANT AT THE TIME OF THE ACCIDENT	9
A. It is well-settled law that a defendant is liable for the full amount of damages that result from aggravation of preexisting conditions that are dormant at the time of the accident	10
B. The Court of Appeals correctly held that, for a jury to reduce damages based on preexisting injuries, Utah law requires evidence that would allow a reasonable juror to conclude that the preexisting condition was symptomatic at the time of the injury	13
II. THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS PREJUDICIAL ERROR FOR THE DISTRICT COURT TO INSTRUCT THE JURY TO APPORTION DAMAGES BETWEEN THE INJURIES CAUSED BY THE ACCIDENT AND PREEXISTING CONDITIONS	16
A. There was no evidence presented at trial that Wendy's preexisting conditions were symptomatic at the time of the accident.....	16
B. There is no evidence that Wendy's injuries or pain arose independently of the accident at ShopKo.....	22

C. There was no evidence presented at trial that would have provided the jury with a reasonable basis for apportioning Wendy's injuries between the accident and preexisting conditions	24
D. The Court of Appeals correctly concluded that the error was harmful	25
III. THE COURT OF APPEALS' DECISION SHOULD BE AFFIRMED, AS THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY TO REDUCE FUTURE DAMAGES TO PRESENT VALUE, AS DEFENDANT OFFERED NO EVIDENCE TO PROVIDE A BASIS FOR THE JURY TO REASONABLY CALCULATE THE PRESENT VALUE OF FUTURE MEDICAL EXPENSES	33
Conclusion.....	39
Certificate of Compliance	40
Proof of Service.....	41

TABLE OF AUTHORITIES

CASES

<i>Aldridge v. Baltimore and Ohio R. Co.</i> , 789 F.2d 1061 (4th Cir. 1986)	35, 37
<i>Alma v. Manufacturers Hanover Trust</i> , 684 F.2d 622 (9th Cir.1982)	37
<i>Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.</i> , 709 P.2d 330 (Utah 1985).....	28, 37
<i>Ault v. Dubois</i> , 739 P.2d 1117 (Utah App. 1987)	28, 37
<i>Bennett v. Denver & Rio Grande W. R.R. Co.</i> , 213 P.2d 325 (Utah 1950).....	34
<i>Bennett v. Messick</i> , 457 P.2d 609 (Wash. 1969)	11
<i>Biswell v. Duncan</i> , 742 P.2d 80 (Utah App. 1987)	10, 11, 12
<i>Brodie v. Philadelphia Transp. Co.</i> , 203 A.2d 657 (Pa. 1964)	34
<i>Buchalski v. United Marine Corp.</i> , 393 F. Supp. 246 (W.D. Wash. 1975).....	11
<i>Dafler v. Raymark Industries</i> , 611 A.2d 136 (N.J. Super. 1992)	25
<i>Freyermuth v. Lutfy</i> , 382 N.E.2d 1059 (Mass. 1978).....	11
<i>Gallegos v. Dick Simon Trucking</i> , 2004 UT App 322, 110 P.3d 710	34
<i>Garcia v. Wal-Mart Stores</i> , 209 F.3d 1170 (10th Cir. 2000)	25
<i>Gill v. Timm</i> , 720 P.2d 1352 (Utah 1986)	38
<i>Hansen v. Mountain Fuel Supply Co.</i> , 858 P.2d 970 (Utah 1993).....	28
<i>Jensen v. Eakins</i> , 575 P.2d 179 (Utah 1978).....	26
<i>John Call Engineering Corp. v. Manti City Corp.</i> , 795 P.2d 678 (Utah App. 1990).....	37
<i>Judd v. Rowley's Cherry Hill Orchards, Inc.</i> , 611 P.2d 1216 (Utah 1980)	33
<i>Kirkpatrick v. Wiley Rein & Fielding</i> , 2001 UT 107, 37 P.3d 1130	2
<i>Lewin Realty III, Inc. v. Brooks</i> , 771 A.2d 446 (Md. App. 2001).....	36, 37, 38
<i>Martin v. Owens-Corning Fiberglass Corp.</i> , 528 A.2d 947 (Pa. 1987).....	25
<i>Maurer v. United States</i> , 668 F.2d 98 (2d Cir. 1981).....	11, 13
<i>Miller v. Union P.R. Co.</i> , 900 F.2d 223, (10th Cir. 1990).....	36, 37
<i>Myer v. H.H. Bartholomew</i> , 690 P.2d 558 (Utah 1984)	26
<i>Robinson v. All-Star Delivery, Inc.</i> , 1999 UT 109, 992 P.2d 969	13, 24, 26, 27
<i>Ryan v. Gold Cross Svc., Inc.</i> , 903 P.2d 423 (Utah 1995)	11, 23
<i>Sprunt v. Denver & Rio Grande Western R.R.</i> , 340 P.2d 85 (Utah 1959)	26
<i>State v. Findlayson</i> , 2000 UT 10, 994 P.2d 1243.....	2

<i>State v. Hamilton</i> , 827 P.2d 232 (Utah 1992)	26
<i>State v. Krukowski</i> , 2004 UT 94, 100 P.3d 1222.....	1
<i>Steppi v. Stromwasser</i> , 297 A.2d 26 (Del. 1972)	35
<i>Tingey v. Chrstensen</i> , 1999 UT 68, 987 P.2d 588.....	11, 15
<i>TruGreen Companies, L.L.C. v. Mower Brothers, Inc.</i> , 2008 UT 81, 199 P.3d 929.....	34

RULES

Utah R. App. P. 49	1
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OTHER AUTHORITIES

American Jurisprudence, 2d (2012)	11
Guido Calabresi, <i>Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.</i> , 43 U. Chi. L. Rev. 69 (1975)	12
Model Utah Jury Instructions, 2d (Utah State Bar 2012), <i>available at</i> http://www.utcourts.gov/resources/muji	35
Restatement (Second) of Torts (1965)	11, 24, 28, 32
Restatement (Third) of Torts: Physical & Emotional Harm (2010).....	11, 13, 22
Thomas R. Lee, <i>Pleading and Proof: The Economics of Legal Burdens</i> , 1997 B.Y.U. L. Rev. 1.....	36, 38
W. Page Keeton et al., <i>Prosser and Keeton on The Law of Torts</i> (5th ed. 1984).....	11
Webster's New Collegiate Dictionary (1980 ed.)	13
William M. Landes & Richard A. Posner, <i>The Economic Structure of Tort Law</i> (1987)	12

ISSUES AND STANDARDS OF REVIEW

In reviewing the decision of the Utah Court of Appeals, the Court should consider the following three issues. Issues One and Two are fairly included in the questions presented for review in the petition for certiorari:¹

Issue One. Whether the Court of Appeals correctly stated Utah law when it held that a defendant is liable for the full amount of damages that result from aggravation of preexisting conditions that are dormant at the time of the accident, and that to determine whether a jury can be instructed on apportionment, the “crucial question” is whether those preexisting conditions were dormant on the date of the accident. (Pet. Cert. 5, 14-16; Order Grant’g Cert. ¶ 4.)

This Court reviews the legal conclusions of the court of appeals for correctness. *See State v. Krukowski*, 2004 UT 94, ¶ 10, 100 P.3d 1222.

Issue Two. Whether the Court of Appeals correctly held that it was prejudicial error for the district court to instruct the jury to apportion damages between the injuries caused by the accident and preexisting conditions where there was (a) no evidence that Wendy’s preexisting conditions were symptomatic at the time of the accident, (b) no evidence that Wendy’s injuries were activated independently of the accident at ShopKo, (c) no evidence that would have provided the jury with a reasonable basis for apportioning Wendy’s injuries between the accident and preexisting conditions, and (d)

1. *See* Utah R. App. P. 49(a)(4). Respondent has rephrased the issues from the original questions presented for review to make the scope and of the issues clearer and more comprehensive. The citation showing the portions of the petition and order granting certiorari where these issues were included is located in parentheses after each issue.

there was insufficient evidence to justify the jury's award on of one-third of the requested past and future medical expenses on grounds that the expenses were not reasonable and necessary. (Pet. Cert. 5, 12-14, 16-18.)

This Court reviews a decision of the Court of Appeals for correctness, adopting the same standard of review of the trial court's decision used by the Court of Appeals. *State v. Findlayson*, 2000 UT 10, ¶ 6, 994 P.2d 1243. Whether a jury instruction is properly given is a question of law, reviewed for correctness. *See Kirkpatrick v. Wiley Rein & Fielding*, 2001 UT 107, ¶ 64, 37 P.3d 1130.

Additionally, Respondent submits that the Court of Appeals' decision can be affirmed on the alternative ground presented in Issue Three:²

Issue Three. Whether the trial court erred in instructing the jury on reducing future damages to present value where ShopKo had produced no evidence that would give the jury a basis to calculate the reduction of future damages to present value.

Whether a jury instruction is properly given is a question of law, reviewed for correctness. *See Kirkpatrick*, 2001 UT 107 at ¶ 64.

STATEMENT OF THE FACTS

I. BACKGROUND OF THE LITIGATION

Wendy Harris's Accident at ShopKo. On March 29, 2006, Appellant Wendy Harris went into ShopKo's Provo store to buy an office chair. (Tr. 692:6-11.)³ There were

2. The Court may affirm a judgment of a lower court if it is sustainable on any legal ground or theory apparent on the record. *Findlayson*, 2000 UT 10 at ¶ 31.

various chairs on display at the store in an area where customers could test the chairs, and where the floor was hard and flat. (Tr. 427:8-16; 451:23-25.) Wendy sat in some of the chairs to try them out. (Tr. 692:13-16.) As she sat in one of the chairs, the chair suddenly split apart; the seat of the chair went flying in one direction and the wheels and base went flying in the opposite direction. (Tr. 692:17-693:2.) Wendy fell straight down and landed on her wrist and the left side of her tailbone. (Tr. 693:11-25.)

She started to get up on her own, and was helped by a ShopKo employee. (Tr. 694:19-23.) She tried to fill out ShopKo's accident report, but she could not do it. In Wendy's own words, "I was shaking. I mean, really shaking. And a young girl behind the counter actually filled it out for me." (Tr. 695:7-13.) While she was able to leave the store on her own, she was still shaking and she felt "a ringing sensation" in her whole body. (Tr. 695:15-23.)

Medical Care. The next day, Wendy started to feel deep abdominal pain that she described as similar to the pain she had after she underwent a hysterectomy. She was worried that "something had come loose" from that surgery, and so she went to the hospital. (Tr. 696:13-697:8.)

Over the next few days, Wendy's wrist pain resolved, but the pain localized into her lower back and tailbone area. (Tr. 697:15-23.) She went to see her brother, Kay Whittaker, a family nurse practitioner, and ultimately saw several other doctors and therapists. (698:3-699:19.) The physicians treating her observed that she was suffering

3. To simplify the record citations and make the brief easier to read, references to the trial transcript (R. at 1200-1203) will be abbreviated as Tr., followed by the relevant page and line of the transcript.

from severe and intense pain in her lower back and tailbone. (Tr. 217:2-8; 344:6-10; 371:13-373:6; 397:25-398:11; 519:15-520:1; 522:6-15; 573:23-574:17.) The pain radiated down the back of her leg to her knee. (Tr. 217:2-8; 397:25-398:11; 540:11-541:11.) Even after almost three years, the pain did not resolve. (Tr. 217:19-21.) Despite incurring over \$25,000.00 in medical expenses as of the end of 2008, her treating physicians and therapists could not offer her more than temporary relief through pain medicine, massage therapy and chiropractic care. (Tr. 378:7-16; 383:10-20; 400:2-8; 543:3-544:15; 590:13-20; 624:9-20; 675:4-14; 699:2-19; 722:16-723:15; R. at 1197, 229-237.)

Wendy's Quality of Life after the Accident. Wendy's pain began to significantly interfere with her daily life. Before the accident, Wendy was active and energetic, very outgoing and socially involved. (Tr. 647:13-24; 648:13-22; 650:15-20; 667:15-21.) She was not suffering from any chronic low-back pain before the accident. (Tr. 240:23-241:1; 515:17-516:2; 572:7-14; 650:21-24; 670:17-671:5.) She would play tennis with her husband and participate in other activities with her family. (Tr. 708:3-709:3.) She would often get together with her friends to go shopping and to watch movies together. (Tr. 648:14-22.) She enjoyed being involved in the PTA, the school activities of her five children, and other community projects. (Tr. 648:2-649:10; 669:11-22; 702:21-703:7.) She helped her husband with the paperwork for his business. (Tr. 666:12-23.) She also felt a deep satisfaction from taking care of her family, and had a vigorous everyday schedule of cooking and cleaning her house. (Tr. 670:4-15; 699:20-700:7.)

After the accident, she attempted to continue with her schedule as normal. In her words, "I just thought it was just like anything else; I just had to kind of get through it.

And I just knew it would go away. It would go away. I just kept telling myself, 'Tomorrow it will be fine.' You just push yourself and your kids. There's so much to do." (Tr. 699:20-700:7.) However, the pain did not go away, and she had to stop doing the things she enjoyed doing. (Tr. 683:5-16; 700:8-23.) The pain affected her sleep. (Tr. 217:22-24.) Her intimate relationship with her husband suffered. (Tr. 709:4-10; 712:19-21.) She could not sit for long periods of time. (Tr. 651:19-652:11; 725:14-17.) If she forced herself to sit, it would aggravate her pain for the next few days. (Tr. 685:13-22.) Most days, she was unable to perform everyday tasks like cooking for her family and cleaning her house. (Tr. 674:2-675:3.) Her husband devoted less time to work so that he could help with the household and help care for her and drive her to doctor's appointments. (Tr. 674:13-675:14; 700:13-23.) Their adult daughter moved back into the house to help care for Wendy's youngest son, Bridger. (Tr. 708:17-709:3.) Her family's activities became limited based on how she could function. (Tr. 677:22-678:4.) She could no longer do the things with friends that she once did. (Tr. 654:2-13.) She withdrew from her previous active place in the community. (Tr. 656:13-657:1.)

Wendy's pain and resulting loss of function affected her emotionally. She was frustrated and angry that she could not function normally and that she could not get the help she needed to ease her pain. (Tr. 676:8-677:8; 700:25-701:19.) The pain began to consume her and her family's daily life. (Tr. 677:22-679:8.)

Of the things she could no longer do, the thing that was hardest on Wendy was that she was limited in caring for Bridger. Bridger was three years old at the time of the accident. (Tr. 701:20-23.) After the accident, she could no longer pick him up and hold him, and could not run and play with him like she used to. (Tr. 701:24-702:16.) She has

not been involved with his schooling and activities to the degree that she was with her older children. (Tr. 702:21-703:7.) In her testimony, Wendy described a day when she had to walk Bridger to preschool because there was no car in which to take him:

[B]y the time I had gotten—it was about three blocks, long blocks, and then you enter this pathway that’s really long and it opens up to the back field of the school, and you’ve got a ways to go to get to the school. And by the time I got into that gateway area, . . . if you walk, it starts—your back starts having spasms all the way up, just severe spasms, and the quicker you go, the worse they become . . . I said, “Bridger, you know, Mommy can’t go all that way.” He knew it. He goes, “Okay. Mommy, that’s okay. I can do it.” . . . I remember just being sick watching him. And I thought—I just felt like I was a bad mom . . . I cried all the way home, and I remember keeping my head down. I was scared a neighbor would see me or someone would stop to give me a ride. I just thought, “I just need to get home. No one needs to see me,” and I just got home and I didn’t go upstairs. I laid down on the living room floor, and I just realized I’m never going to be enough for him unless this goes away.

(Tr. 703:8-705:10.)

Recent and Future Treatment. Despite her depression, Wendy kept stretching and exercising so that she could improve her function and did her best to take care of her family. (Tr. 698:16-699:19; 705:15-707:8.) In 2009, a little less than three years after the accident, Wendy was referred to Dr. Rosenthal, a board-certified pain management specialist. (Tr. 217:13-21.) He diagnosed her with facet joint syndrome, an inflammation of one of the spinal joints, (Tr. 224:5-225:25) and coccydinia, inflammation of the tailbone. (Tr. 231:20-232:3.) He treated her facet joint syndrome with a radio frequency lesioning treatment, which severs the nerve to the facet joint and stops the pain. (Tr. 229:3-25; 231:7-17.) Wendy testified that the treatment decreased her pain and increased her function and quality of life. (Tr. 709:16-710:16.) Because the nerve will eventually repair itself, this process will need to be repeated every 9-14 months for about seven years until the nerve stops growing back. (Tr. 249:1-16.)

Coccydinia is difficult to treat, since putting any pressure on the tailbone prevents healing. (Tr. 232:4-12.) However, sitting on a donut cushion, along with occasional injection of steroids and anesthetics to reduce the inflammation of the ligaments of the tailbone, will likely eventually allow the tailbone to heal. (Tr. 233:6-19.) In the meantime, Dr. Rosenthal recommended continuing pain medicine to manage any remaining pain. (Tr. 250:7-251:2.)

While Dr. Rosenthal believes that Wendy's pain will ultimately resolve, (Tr. 256:13-25) he noted that she will have permanent loss of mobility in her lower spine, (Tr. 257:8-258:1) and that it is possible that she will develop sciatica from her injuries related to the accident at ShopKo. (Tr. 258:2-17.) Despite that, the reduction in pain has allowed Wendy to do more of the things that she did before the accident. (Tr. 657:2-658:2; 680:14-23; 709:16-710:16.)

II. PROCEDURAL HISTORY

Apportionment Jury Instruction. During the jury instruction conference of July 16, 2009, Plaintiff objected to instructing the jury regarding apportionment of prior injuries, based on the fact that Defendant had not introduced evidence that any of Plaintiff's injuries to her lower back were caused by a prior condition, and that Defendant had not introduced any evidence that would provide any basis for apportionment. (Tr. 845:11-848:25; 885:7-887:8.) Notwithstanding Plaintiff's objection, the trial court instructed the jury on apportionment of damages for prior conditions. (Tr. 945:7-946:4.)

Testimony as to Economic Damages. Dr. Rosenthal appeared as an expert witness at the trial. He testified to a reasonable degree of medical certainty that it was more likely than not that Wendy's pain and injuries were caused by the accident at ShopKo, (Tr.

235:25-236:23; 244:24-245:9) that the \$33,203.34 in medical expenses she had incurred since the accident were medically necessary, (Tr. 245:18-246:14) and that she had sustained permanent injuries that would require future medical care in the amount of \$39,574.00. (Tr. 246:17-247:3.) The parties had earlier stipulated that the amounts of the prior treatments were reasonable, (R. at 863; 865-64) and Dr. Rosenthal testified that the amounts of the future treatments were reasonable. (Tr. 247:6-9.)

Present Value Jury Instruction. On January 21, 2009, the trial court issued a minute entry placing the burden on Defendant to prove the reduction of future damages to present value. (R. at 381-380.) Defendant offered no proof and presented no evidence at trial that would provide the jury with a basis for calculating the present value of future damages. (Tr. 851:7-16.) Plaintiff objected to instructing the jury about the issue during the jury instruction conference of July 16, 2009, as Defendant had not met its court-ordered burden of proof on the issue. (Tr. 851:1-852:2.) Nevertheless, the trial court instructed the jury to reduce future economic damages to present value. (Tr. 947:2-16.)

Verdict. At the conclusion of the trial, the jury found Defendant 100% at fault for Plaintiff's injuries. (Tr. 1016:13-1017:1.) The jury awarded Plaintiff economic damages in the amount of \$25,000.00, comprising past medical expenses of \$15,000.00 and future medical expenses of \$10,000.00, and non-economic damages in the amount of \$1,000.00. (Tr. 1017:1-4.)

SUMMARY OF ARGUMENT

In order to prevail on this appeal, ShopKo must convince this Court that (1)(a) The Court of Appeals misstated or misapplied the law, and ShopKo would prevail if the law

were stated or applied correctly; (b) The Court of Appeals ignored evidence that would have justified the district court's giving the jury instruction in question; or (c) The Court of Appeals erred in conducting its harmful error analysis; and (2) that there are there are no alternate grounds for affirming the Court of Appeals' decision. As explained below, the Court of Appeals correctly stated and applied Utah law in determining that a defendant is liable for the full amount of damages that result from aggravation of preexisting conditions that are dormant at the time of the accident, and so the crucial question in determining whether a jury can reduce damages based on preexisting conditions is whether those preexisting conditions were dormant on the date of the accident. The Court of Appeals also correctly determined that the evidence cited by ShopKo in its brief did not justify instructing the jury to reduce damages based on symptomatic preexisting conditions, and that the error was harmful. Finally, the Court of Appeals' decision can be affirmed on the ground that the district court improperly instructed the jury to reduce Wendy's future damages award to present value even though there was no evidence that would have enabled the jury to make such a calculation. This Court should therefore affirm the Court of Appeals' decision.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY STATED UTAH LAW IN HOLDING THAT A DEFENDANT PROXIMATELY CAUSES ALL DAMAGES THAT RESULT FROM AGGRAVATION OF PREEXISTING CONDITIONS THAT ARE DORMANT AT THE TIME OF THE ACCIDENT .

In concluding that the district court improperly instructed the jury regarding apportioning damages between those caused by the ShopKo incident and those caused by

preexisting conditions, the Court of Appeals relied on *Biswell v. Duncan*, 742 P.2d 80 (Utah App. 1987) for the proposition that “a victim with latent, dormant, or otherwise asymptomatic preexisting conditions stands on equal footing with a victim with no preexisting conditions; the tortfeasor is liable for the full amount of resulting damages when its conduct aggravates or ‘lights up’ an asymptomatic preexisting condition.” (Op. ¶ 17.) The Court of Appeals reasoned, based on that proposition, that “the crucial question [in determining whether the jury could reduce damages based on preexisting injuries] is whether Harris’s preexisting conditions were, on the date of the accident, latent, dormant or asymptomatic.” (Op. ¶ 23.) In its order granting certiorari review (see ¶¶ 4 and 2, respectively), this Court asks the parties to brief the question of whether the portions of the opinion quoted above constitute correct statements of Utah Law. Harris contends that they are.

A. It is well-settled law that a defendant is liable for the full amount of damages that result from aggravation of preexisting conditions that are dormant at the time of the accident .

In support of its holding that a defendant is liable for the full amount of damages that result from aggravation of preexisting conditions that are dormant at the time of the accident, the Court of Appeals cited the following language in *Biswell v. Duncan*:

The rule is well settled that when a defendant’s negligence aggravates or lights up a latent, dormant, or asymptomatic condition, or one to which the injured person is predisposed, the defendant is liable to the injured person for the full amount of damages which ensue, notwithstanding such diseased or weakened condition. In other words, when a latent condition itself does not cause pain, but that condition plus an injury brings on pain by aggravating the preexisting condition, then the injury, not the dormant condition, is the proximate cause of the pain and disability.

Biswell, 742 P.2d at 88. The foregoing statement is a correct extrapolation of the eggshell-skull plaintiff rule, the scope of which is succinctly and comprehensively laid out in the Second Circuit's opinion in *Maurer v. United States*:

It is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim. The defendant takes the plaintiff as he finds him. A plaintiff's recovery for damages caused by a defendant's wrongful act may not be proportionately reduced because of a preexisting weakness or susceptibility to injury . . . or a weakness caused by a previous injury.

Maurer v. United States, 668 F.2d 98, 99-100, (2d Cir. 1981) (citations omitted); see *Tingey v. Chrstensen*, 1999 UT 68, ¶ 14, 987 P.2d 588; *Ryan v. Gold Cross Svc., Inc.*, 903 P.2d 423, 428 (Utah 1995).⁴ As suggested by the phrase "a weakness caused by a previous injury," an injury that was previously symptomatic but has resolved is a latent condition under this rule. See, e.g., *Maurer*, 668 F.2d at 100; *Buchalski v. United Marine Corp.*, 393 F. Supp. 246, 248 (W.D. Wash. 1975); *Freyermuth v. Lutfy*, 382 N.E.2d 1059, 1064 & n.5 (Mass. 1978); *Bennett v. Messick*, 457 P.2d 609, 612 (Wash. 1969). The eggshell-skull plaintiff rule is followed by every jurisdiction in the United States, see Restatement (Third) of Torts: Phys. & Emot. Harm § 31, Reporters' Note, cmt. b (2010) (citing cases), and is advocated by commentators as promoting a proper allocation of resources to safety and care. See William M. Landes & Richard A. Posner, *The Economic*

4. For further explanation of the eggshell-skull plaintiff rule, see Restatement (Third), *supra*, § 31; Restatement (Second) of Torts § 461 (1965); 22 Am. Jur. 2d *Damages* § 239 (2012); W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 43 (5th ed. 1984)

Structure of Tort Law 249-50 (1987); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 92, 95-98 (1975).

ShopKo does not offer any authority from Utah or any other jurisdiction that would cast doubt on the correctness of the rule stated in *Biswell* that a defendant is liable for the full amount of damages that result from aggravation of preexisting conditions that are dormant at the time of the accident. Rather, ShopKo's point of disagreement with *Biswell* seems based on its erroneous perception that *Biswell* forecloses the possibility of an asymptomatic condition becoming symptomatic independently of the accident at issue. ShopKo argues that the Court of Appeals' statement in *Biswell* that a plaintiff "is entitled to recover all damages which actually and necessarily follow the injury," ignores the question of causation, noting that "it is not axiomatic that all damages which follow an injury will be the result of an the accident." (Br. Pet'r 20.)⁵ It is true that a plaintiff must show causation-in-fact, and *Biswell* does not ignore this, as shown by the sentence immediately before the sentence ShopKo chose to quote: "when a latent condition itself does not cause pain, but that *condition plus an injury brings on pain by aggravating the preexisting condition*, then the injury, not the dormant condition, is the proximate cause of the pain and disability." *Biswell*, 742 P.2d at 88 (emphasis added). Thus the word "follow" in the portion of *Biswell* ShopKo references does not mean "to come or take place after in time, sequence, or order," but rather "to come into existence or take place

5. See also Br. Pet'r 21-22 ("A preexisting condition may begin to be painful after an accident because of its own advancing condition, independent of the accident The fact that a preexisting condition is not painful 'on the date of the accident' and the plaintiff feels pain after the accident does not establish causation.").

as a result or consequence of.” *See* Webster’s New Collegiate Dictionary 442 (1980 ed.) (defining “follow”).

The law in *Biswell* is consistent with the well-accepted law in Utah and all other jurisdictions and states the correct standard for determining whether a defendant may reduce damages for a preexisting condition. Therefore, the Court of Appeals was correct in relying on *Biswell* and applying its principles to this case.

B. The Court of Appeals correctly held that, for a jury to reduce damages based on preexisting injuries, Utah law requires evidence that would allow a reasonable juror to conclude that the preexisting condition was symptomatic at the time of the injury.

While the eggshell-skull plaintiff rule prevents a defendant from using the foreseeability doctrine to limit the scope of its liability, the rule still requires that the plaintiff show that the defendant’s negligence was the cause-in-fact of plaintiff’s injuries. This causation requirement gives rise to the widely recognized limitation on the eggshell-skull plaintiff rule that “when a plaintiff is incapacitated or disabled prior to an accident, the defendant is liable only for the additional harm or aggravation that he caused.” *Maurer*, 668 F.2d at 100; *see Robinson v. All Star Delivery, Inc.*, 1999 UT 109, ¶¶ 10-15, 992 P.2d 969; Restatement (Third), *supra*, § 31, cmt. c. Therefore, once a plaintiff has presented sufficient evidence to establish a causal link between the injury and the “lighting up” of an asymptomatic preexisting condition, it falls on the defendant to present evidence of one or more of the above limitations in order to allow the jury to apportion damages. Because Harris presented sufficient evidence to establish the causal link between the injury and the “lighting up” of asymptomatic preexisting conditions (Tr. 235:25-236:23; 244:24-245:9), the Court of Appeals correctly held that “the crucial

question” in determining whether the district court erred in instructing the jury to reduce damages based on preexisting injuries is whether there is sufficient evidence to allow a reasonable juror to conclude that the plaintiff’s preexisting condition was symptomatic at the time of the injury at issue.

ShopKo argues that the Court of Appeals unduly limited a defendant’s ability to put on evidence that a plaintiff’s preexisting conditions were symptomatic by limiting the relevant time frame “to a single day, the day of the accident.” (Br. Pet. 18-19.) ShopKo misinterprets the Court of Appeals’ opinion. While the Court of Appeals correctly identified that the relevant question was “whether Harris’s preexisting conditions were, on the date of the accident, latent, dormant or asymptomatic,” the opinion does not state that only evidence from the date of the injury is relevant to determine whether an accident victim’s preexisting conditions were symptomatic on the date of the injury. A great deal of evidence would be relevant to the question of whether an accident victim’s preexisting conditions were symptomatic at the time of the accident: evidence of treatment for a condition near the time of the accident, evidence of a chronic condition that had not resolved, or that one would not expect to resolve, prior to the accident, evidence of taking prescription pain medicine, testimony of acquaintances that the victim had complained about her condition, and so on. None of this evidence would be barred from consideration by the Court of Appeals’ opinion.

It appears that the root of ShopKo’s confusion regarding the Court of Appeals’ opinion is the meaning of the term “asymptomatic,” as the term could be used both to describe a temporary cessation of symptoms and a permanent resolution of symptoms. The Court of Appeals makes it clear that it is referring to the latter meaning when it

concludes that it saw “no evidence capable of supporting a jury finding that Harris’s preexisting complains . . . were anything but—to borrow *Biswell*’s phrase—‘taken care of’ by the time of the accident.” (Op. ¶ 24.)⁶ As explained by the Utah Association for Justice, if a trial court determines there is sufficient evidence to raise a dispute of fact about whether a previously symptomatic preexisting condition had permanently resolved before the accident, then the question should be for the jury to decide, and both apportionment and eggshell-skull plaintiff instructions should be given. (Amicus Br. UAJ 10-13.)

However, in this case there was not sufficient evidence to give that question to the jury. As explained in Point II.A, *infra*, The uncontested evidence was that at the time of the accident, all of Wendy’s preexisting conditions had either not yet surfaced or had long since resolved. Therefore, the question of what evidence is sufficient to let the jury decide the question of whether a plaintiff is symptomatic or asymptomatic at the time of the injury was not before the Court of Appeals and need not be decided by this Court. This Court should affirm the decision of the Court of Appeals.

6. To answer ShopKo’s parenthetical question (Br. Pet. 18), “taken care of” in this context does indeed mean that previously symptomatic conditions have stabilized and resolved to the point that they will not cause the accident victim pain on their own. This understanding of the phrase “taken care of” also resolves any apparent tension between the Court of Appeals’ opinion and this Court’s conclusion in *Tingey* that evidence of pain from preexisting conditions 25 days before the accident was sufficient to allow the jury to find that the plaintiff was symptomatic at the time of the injury. *Tingey*, 1999 UT 68, ¶¶ 3, 7-9.

II. THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS PREJUDICIAL ERROR FOR THE DISTRICT COURT TO INSTRUCT THE JURY TO APPORTION DAMAGES BETWEEN THE INJURIES CAUSED BY THE ACCIDENT AND PREEXISTING CONDITIONS.

ShopKo also argues in its brief that the Court of Appeals erred both in determining that instructing the jury as to apportionment was error, and in determining that this error was harmful. While ShopKo lists a barrage of evidence in support of its goal,⁷ it does not attempt to analyze the import of the evidence and tell this Court why the Court of Appeals was wrong in ignoring or discounting this evidence. In fact, the Court of Appeals was right in determining that there was no evidence that supported instructing the jury as to apportionment, and the low amount of economic and non-economic damages, as well as the prejudicial and confusing nature of the evidence of asymptomatic conditions strongly supports the conclusion that the error was prejudicial.

A. *There was no evidence presented at trial that Wendy's preexisting conditions were symptomatic at the time of the accident.*

In its brief, ShopKo points to several preexisting conditions that it contends that Wendy had before the accident. As the Court of Appeals noted, “[t]hese statements, though accurate as far as they go, do not respond to Harris’s central point” (Op. ¶ 22), which is that “while the evidence of Harris’s preexisting conditions was substantial, none of it is capable of supporting a jury finding that those conditions were symptomatic on the date of the accident.” (Op. ¶ 21.) The evidence referred to in ShopKo’s brief does not

7. ShopKo is so zealous in this task that it repeats itself over and over, citing to the same testimony multiple times, (3, 34 and 35; 5 and 36; 7 and 42; 8 and 43; 23 and 39;) citing testimony as it was given on direct and repeated later by the same witness, (1 and 37; 23, 31 and 39;) and citing to multiple doctors reading the same record (5,6,8, and 36; 11 and 46).

present anything that has not already been thoroughly refuted in the briefs filed with the Court of Appeals. While Harris has previously marshaled all evidence that could be construed in favor of the trial court's decision before the Court of Appeals (Op. ¶ 21), she will only respond to the evidence that ShopKo contends is relevant in its brief. For the most part, Harris has used ShopKo's words to address the evidence except where that phrasing substantially misrepresents the record evidence.⁸

- Dr. Colledge testified that Wendy had a suspect annular tear and disc bulge, which is generally caused by degeneration of the disks due to aging. He observed desiccation of Wendy's spinal disks, which can be "the result of just the natural aging process" and is not "typically the result of a single incident of trauma." He testified that Ms. Harris suffered low back pain consistent with degenerative disease, and that degenerative disk disease, along with facet disease, could be the cause of Plaintiff's current complaints. Dr. Rosenthal testified that his first diagnosis after the ShopKo incident was facet joint syndrome, a condition that can be caused by degeneration due to aging and is not always trauma related. Dr. Colledge testified that Harris suffered from facet disease, which is the wear of the joints in the spine, and manifests itself as back pain. (See Pet. Br. 8:19-9:7; 10:11-14; 12:1-3, 5-12, 14-15.)

There was no evidence that Wendy had symptomatic degenerative disc disease immediately prior to the accident. Dr. Rosenthal stated that her 2009 MRI had no evidence of degenerative disc disease. (Tr. 308:19-309:1.) The report from Dr. Gardner in 2006 was that he did not see annular tear or degenerative collapse, but "some early degenerative changes consistent with her age." (Tr. 545:7-16.) Three different radiologists looked at her reports and did not note degenerative disc disease, even though that is something that radiologists routinely report. (Tr. 605:9-610:1.)⁹ The diagnosis of annular tear was never confirmed. (Tr. 593:11-24; 611:22-612:3.) In cross-examination, it

8. See *infra* notes 10-12, 15-18.

9. To be fair, the lack of degenerative disc disease on the radiology reports does not mean that it was not present on the MRI films. (Tr. 640:25-641:6.)

became clear that Dr. Colledge did not know whether it was the L4-L5 disc or the L5-S1 disc that was degenerating. (Tr. 612:4-617:11.)

Dr. Rosenthal testified to a reasonable degree of medical certainty that it was more likely than not that Wendy's pain and injuries, including facet joint syndrome, were caused by the accident at ShopKo. (Tr. 235:25- 236:23; 244:24-245:9) Dr. Colledge testified that facet disease can be brought about by a single incident of trauma, (Tr. 583:7-13) and that he believed that her injuries were at least partly due to trauma. (584:23-25.) He testified that it was possible that degenerative disc disease was not a cause of her injuries. (Tr. 618:7-12.) Most importantly, Dr. Colledge testified that it is not uncommon for degenerative disc disease to be asymptomatic, then flare up after a traumatic event. (Tr. 641:25-643:7.)

- Dr. Rosenthal testified that the pain from Ms. Harris facet syndrome had resolved, but she is still suffering from coccydynia, which is a separate pain generator. Coccydynia is caused by overuse. (Pet. Br. 12:18-20.)

Contrary to ShopKo's assertion, Dr. Rosenthal did not testify that Wendy's coccydynia was caused by overuse; rather, he said that coccydynia is difficult to treat, as sitting down keeps the tailbone inflamed and prevents it from healing. (Tr. 232:4-13.) Dr. Rosenthal testified to a reasonable degree of medical certainty that it was more likely than not that Wendy's pain and injuries were caused by the accident at ShopKo. (Tr. 235:25- 236:23; 244:24-245:9.)

- In July of 2002, Wendy visited Alta View Hospital and was diagnosed with "left leg pain and questionable sciatica." Dr. Scuderi testified that radiating pain is a symptom of sciatica, and that Wendy had radiating leg pain after the ShopKo accident. Dr. Colledge testified that Ms. Harris suffered radiating leg pain, and that

her history of possible sciatica could “play a role in some of the lower back issues she was having and complaining of at the time.” (Pet. Br. 9:8-17; 12:5-8,12-13.)¹⁰

There was no evidence that Wendy had symptomatic sciatica immediately prior to her accident at ShopKo. The only report of “questionable sciatica” was in 2002, almost four years before the accident. (Tr. 588:10-14.) There was no expert opinion as to what extent any preexisting sciatica contributed to her injury, or for that matter, that it contributed at all to her injuries. Dr. Colledge testified that Wendy might not have had sciatica at all before the accident. (Tr. 632:25-633:9.)

- Dr. Rodney Scuderi was asked to consider past medical records, including a 1998 record indicating cervical strain and discussing disk herniation, a 2001 record showing diffused neck pain following a vehicle accident, and a 2002 record indicating “excruciating discomfort in the lumbar area.” After reviewing those records Dr. Scuderi admitted that “it would appear” that Ms. Harris had a preexisting history of neck and back pain (Pet. Br. 9:13-17; 13:3-9.)¹¹

There was no evidence that Wendy had symptomatic neck pain immediately prior to the ShopKo accident. (Tr. 410:20-411:2.) Wendy never received any treatment for back pain from the motor vehicle accident. (Tr. 241:9-12.) She has never complained of or was treated for neck pain as part of the ShopKo accident. (Tr. 377:14-17; 410:20-411:2.) Also, there was no opinion testimony that her prior neck injuries were a cause of her pain. (Tr. 393:2-5.)

10. Contrary to ShopKo’s assertion (Pet. Br. 9:10-11), Dr. Scuderi did not testify that he treated Wendy for sciatica in 2002 or that he ever diagnosed her with sciatica before the accident.

11. Contrary to ShopKo’s assertion (Pet. Br. 13:3-6), Dr. Scuderi actually testified that his examination of Wendy indicated that her pain was **not** consistent with chronic preexisting pain. (Tr. 387:14-18.) He also testified that there was nothing in the medical records that would indicate chronic preexisting back pain. (Tr. 388:21-392:1.)

The uncontested evidence was that the prior episode of lower back pain resolved on its own about four years before the accident at ShopKo. (Tr. 239:2-17; 629:9-17.) Wendy received no therapy for this incident and no MRI was done. (Tr. 239:2-240:22.) There was no opinion testimony that this incident was related to her injuries. In fact, Defendant's witness, Dr. Colledge, testified that an injury from four years before would not have anything to do with her present back pain. (Tr. 631:24-632:18.)

- There is evidence in Wendy's medical records that she had fibromyalgia sometime prior to the accident. Fibromyalgia can manifest itself in muscle aches and lower back pain. Dr. Hogenson testified 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. (Pet. Br. 10:1-2; 13:14-19.)¹²

There was no evidence that Wendy had symptomatic fibromyalgia immediately prior to the accident. The records that had "fibromyalgia" written on them include a self-assessment of "achy" and did not indicate that there was a physical examination to confirm the diagnosis. (Tr. 241:19-242:5.) It is not uncommon for doctors to mistakenly use the word fibromyalgia when they just mean muscle aches. (Tr. 241:22-242:3.) Dr. Colledge also testified that fibromyalgia is not well understood and is often misdiagnosed. (Tr. 634:8-17.) The latest record of fibromyalgia is over three years before the accident at ShopKo. (Tr. 242:4-17.) Dr. Rosenthal stated that he did not believe that her injuries were due to fibromyalgia. (Tr. 242:18-21.) Dr. Hogenson did not testify that he believes Wendy had fibromyalgia or that it was a cause in any of her injuries. He was not aware of any pain medication or other treatment that she was taking for fibromyalgia

12. Contrary to ShopKo's assertion (Pet. Br. 13:14-16), Dr. Hogenson did not testify that Wendy "suffered from fibromyalgia."

prior to the accident. (Tr. 365:5-8.) There was no opinion testimony that fibromyalgia was a cause of her injuries.

- Wendy indicated that she had arthritis on a 2007 MRI report. Kay Whittaker testified that Harris suffered from “SI Joint dysfunction,” which can be caused by degenerative arthritis. (Pet. Br. 13:19-14:5.)

There is no indication from the single record that Wendy was ever independently diagnosed with arthritis, or where the supposed arthritis was located. There was never any evidence put on to show that she was ever diagnosed with degenerative arthritis. There was no evidence that she was ever treated or took any medicine for arthritis before the accident at ShopKo. There was no evidence that her arthritis had any connection with her injuries. There was no expert opinion as to what extent any preexisting arthritis contributed to her injury, if at all.

- Dr. Colledge testified that Plaintiff’s pain was chronic. Kay Whittaker diagnosed Ms. Harris as suffering from chronic pain. (Pet. Br. 11:3-4; 14:6.)

Both of these diagnoses were after the ShopKo accident. Dr. Colledge testified that “chronic pain” is pain that persists more than eight weeks after the injury. (Tr. 584:9-11.) The uncontested evidence was that Wendy was not suffering from lower-back problems immediately prior to the accident, (Tr. 240:23-241:1; 389:10-392:4; 572:7-14; 650:21-24; 670:17-671:5) and that she had never been treated for chronic back problems or chronic pain at any time. (Tr. 349:20-350:1; 365:5-8; 515:17-516:2; 670:17- 671:5.)

In short, while there was evidence that Wendy suffered from preexisting conditions, there was no evidence that any of those were symptomatic at the time of the injury, and the uncontested evidence is that those preexisting conditions had been “lit up” by the accident at ShopKo. Therefore, the Court of Appeals was correct in concluding

that the jury should not have been instructed to apportion damages between the injury and preexisting conditions.

B. There is no evidence that Wendy's injuries or pain arose independently of the accident at ShopKo.

For the first time on this appeal, ShopKo contends that there is evidence that Wendy's pain and injuries arose independently of the accident caused by ShopKo's negligence.¹³ There is no expert testimony that would support that conclusion. Moreover, this theory would not be consistent with the jury verdict—as the jury awarded future damages for treating Wendy's back and tailbone problems, they must have believed that these injuries were caused by the accident. If the jury had believed that the accident had only caused temporary pain and Wendy's facet joint syndrome and coccydinia were not activated by the accident, they would not have awarded future damages for treating these injuries. ShopKo can only come up with three bits of evidence that it says would support this conclusion. As the following paragraphs make clear, none of these pieces of evidence are adequate for a jury to conclude that Wendy's injuries arose independently from the accident.

- Dr. Colledge could not testify to a reasonable degree of medical probability that Harris' injuries were related to the ShopKo incident. (Pet. Br. 11:4-5; 12:3-5, 17-18.)

13. It is unclear whether ShopKo's argument is that the accident at ShopKo played no part in activating Wendy's injuries or that the injuries, while activated by the accident, deteriorated further as time went on. For purposes of this brief, Harris will assume that ShopKo is arguing the former, as the latter argument would not exclude it from liability under the eggshell-skull plaintiff rule. *See* Restatement (Third), *supra*, § 31, cmt. b, illus. 1.

There was no indication whether he could not testify to this because the evidence was not there, or if it was because he had not done sufficient examination of the causal data. His testimony seems to indicate the latter. Dr. Colledge was asked twice about causation. The first time he said, “No. We just report the news. We don’t make it. We don’t know where it comes from.” (Tr. 575:5-6.) The second time he said, “I can’t. Just, again, identify that the pathology exists. Causation is why you’re here.” (Tr. 585:13-14.) Given that he stated that her injuries were at least partly due to trauma, (Tr. 584:23-25) his failure to testify as to causation cannot be treated as affirmative evidence that the jury could consider alongside Dr. Rosenthal’s testimony as to causation. Finally, even if Dr. Colledge’s testimony were an affirmative statement, it would justify a no-cause verdict for failure to prove causation, not a reduction in award. It therefore cannot be used to justify the verdict.

- While Dr. Colledge agreed that the ShopKo incident caused soft tissue damage, he testified that the pain associated with the soft tissue injury could be expected to heal after three to six weeks. (Pet. Br. 11:5-8.)

This is false—Dr. Colledge actually testified that the tissue healing has taken place within that amount of time, but said nothing about the pain. (Tr. 586:10-19.) Moreover, the expected time for healing is irrelevant, as the uncontradicted evidence was that Wendy’s pain was real. (Tr. 601:6-602:13.) A tortfeasor takes its victim as it finds her, and cannot seek to reduce damages by offering testimony that the victim was unusually fragile. *See Ryan*, 903 P.2d at 428.

- Harris herself admitted that she suffered no back pain right after the ShopKo incident, and there was evidence that after the ShopKo incident she continued to perform her normal activities and that her condition became worse over time. Mr. Harris testified that right after the incident Wendy continued to work and to

perform normal activities, but that her condition declined over time. (Pet. Br. 14:7-14.)

The uncontested evidence was that pain from a “sudden jarring type of injury” often starts as general body aches, then after a period of time begins to localize. (Tr. 244:9-23; 379:18-21.) This is consistent with Wendy’s experience—her pain localized a few days after the accident. (Tr. 695:15-23, 696:13-697:8, 697:15-23.) The uncontradicted testimony was that, although Wendy was in pain, she tried for a time to keep her normal schedule, but reached the end of her endurance and had to give up. (Tr. 683:5-16; 699:25-701:19.)

C. There was no evidence presented at trial that would have provided the jury with a reasonable basis for apportioning Wendy’s injuries between the accident and preexisting conditions.

Furthermore, the Court of Appeals’ conclusion that giving CV2018 was in error could also be sustained because there was no expert testimony that would have allowed the jury to reasonably apportion damages between the injury and symptomatic preexisting conditions. For a defendant to reduce damages based on a symptomatic preexisting condition, it must show “a reasonable basis for determining the contribution of each cause to a single harm.” *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109 at ¶ 12. It is the trial court’s responsibility to determine whether there has been sufficient evidence presented for the jury to apportion between harms. *See* Restatement (Second), *supra*, § 434. If the defendant has not presented sufficient evidence to provide a reasonable basis for apportionment, “the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.” *Robinson*, 1999 UT 109 at ¶ 12.

While the apportionment does not need to be exact, a reasonable basis for apportionment requires more than just the common-experience of lay persons; there must be some evidence upon which the jury can rely in determining a percentage for apportionment. *See Martin v. Owens-Corning Fiberglass Corp.*, 528 A.2d 947, 950-51 (Pa. 1987) (“[T]he jury cannot be expected to draw conclusions which medical experts, relying on the same evidence, could not draw . . . any apportionment by the jury in this case was a result of speculation and conjecture.”). A reasonable basis for apportionment can be provided by expert medical testimony, as well as epidemiological data. *See Dafler v. Raymark Industries*, 611 A.2d 136, 146 (N.J. Super. 1992) (holding that evidence that exposure to asbestos increases the risk of lung cancer in the general population five-fold, and smoking increases the risk ten-fold, was sufficient to permit apportionment). However, evidence that a preexisting condition was likely a contributing factor to a plaintiff’s injury, *see Garcia v. Wal-Mart Stores*, 209 F.3d 1170, 1175 (10th Cir. 2000), and evidence that a plaintiff’s injury was expected to heal within six months, *see id.*, is not sufficient evidence to provide a basis for apportioning damages.

In this case, there was no expert testimony or epidemiological data comparing Wendy’s injuries and preexisting conditions. There was no comparison data, as Wendy was in no pain before the accident. There was therefore no evidence that would have supported reducing apportioning damages, and so the Court of Appeals was correct in holding that giving CV2018 was improper.

D. The Court of Appeals correctly concluded that the error was harmful.

In undertaking their harmful error analysis, the Court of Appeals correctly noted that “we may reverse a trial court judgment only if there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party.”¹⁴ (Op. ¶ 25.) The Court of Appeals properly analyzed how the error was significant to the case as a whole, *see State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992), and determined that the error was harmful based on “the nature and volume of the evidence concerning Harris’s preexisting conditions, the lack of evidence indicating that those conditions were symptomatic at the time of the accident, and the level of the damage awards.” (Op. ¶ 25.)

This was both proper procedure and substantively correct. As a general principle, the lower the award is, the more likely that additional favorable evidence or instructions would translate into a higher award for damages, and thus, it is more likely that any given

14. In its brief, ShopKo misstates the standard for determining harmful error, confusing it with the standard for determining sufficiency of damages under Utah R. Civ. P. 59(a)(5)-(a)(6). (Br. Pet’r 24.) *See Myer v. H.H. Bartholomew*, 690 P.2d 558, 560 (Utah 1984); *Sprunt v. Denver & Rio Grande Western R.R.*, 340 P.2d 85, 87 (Utah 1959); *Jensen v. Eakins*, 575 P.2d 179, 180 (Utah 1978) (all discussing sufficiency of the amount of damages).

ShopKo also criticizes the Court of Appeals for stating that “it is impossible to analyze how the jury came to award \$1000 in general damages. It is equally impossible to know why the jury reduced Harris’ claimed economic damages by two-thirds” and that “had the improper instruction not been given, the jury might have awarded more damages.” (Br. Pet’r 24, quoting Op. ¶ 25.) The language that ShopKo finds objectionable is quoted verbatim from this Court’s opinion in *Robinson v. All Star Delivery Inc.*, 1999 UT 109 at ¶ 18. Moreover, the Court of Appeals quotation of this Court’s language does not indicate that the Court of Appeals applied the wrong standard in determining harmful error, especially since it had quoted the correct standard earlier in its that same paragraph. (*See* Op. ¶ 25 (“However, ‘we may reverse a trial court judgment only if there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party.’”).)

error would be harmful. In this case, the damages awards of one-third of requested medical expenses and \$1,000 in noneconomic damages were very low, and given the great amount of focus placed on preexisting conditions at trial, there was ample reason to believe that the verdict would have been different absent the trial court's error.

As a comparison, consider this Court's decision in *Robinson v. All-Star Delivery, Inc.* As in this matter, the plaintiff in *Robinson* was awarded \$1,000.00 in general damages. *See* 1999 UT 109 at ¶ 8. However, the similarities end there. In *Robinson*, the plaintiff only suffered \$3,800.00 in economic damages. *See id.* at ¶ 4. The plaintiff testified that while he felt pain in his neck, back and leg after the accident, the neck pain resolved after a two weeks, and the leg pain resolved one year later, after he underwent a surgery that was recommended before the accident giving rise to the suit. *See id.* at ¶ 7. He further testified that while his back pain still existed three years later, the pain had not caused him to miss work, did not interfere with most major life activities, and did not warrant the expense of epidural injections that would have been 70-80% successful in reducing his back pain. *See id.* The plaintiff stopped seeing his doctor one month after the accident, and stopped going to physical therapy three months after the accident. *See id.* The plaintiff's doctor rated the severity of his back sprain as one out of four, one being the most mild. *See id.* ¶ 5.

Notwithstanding the paucity of the evidence of pain and suffering, this Court stated that because there was conflicting evidence as to whether the damage caused by preexisting injuries was apportionable, there was a reasonable likelihood that if the jury did not believe that they were required to apportion damages to a preexisting injury, they may have awarded more in general damages. *See id.* ¶ 18. Given the much higher level of

both medical expenses and evidence of pain and suffering in this case, the decision in *Robinson* justifies (and perhaps even compels) a finding of harmful error in this case.

In supporting its argument that there was no harmful error, ShopKo argues that many of the treatments were not reasonable and necessary, and that testimony as to future damages was too speculative. Neither of these statements are consistent with Utah law. Utah law provides for the recovery of medical expenses if they were reasonably necessary. *See Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 981 (Utah 1993); Restatement (Second) of Torts § 924 (1979). Whether an expense is reasonably necessary is not determined retrospectively by whether the treatment was actually successful, but rather whether a reasonably prudent person in a similar situation would have undertaken a similar act. *See Restatement (Second), supra*, § 919 cmts. b & c. Further, the amount of future damages “may be based upon approximations, if . . . the approximations are based upon reasonable assumptions or projections.” *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985). Once Plaintiff has established an approximation of future damages, it is up to the Defendant to provide affirmative evidence that an alternate figure is more likely. *See Ault v. Dubois*, 739 P.2d 1117, 1120-21 (Utah App. 1987). As the following paragraphs show, the jury could not have reasonably found that Wendy’s past or future care was not reasonably necessary.

- Dr. Colledge challenged the necessary and reasonable nature of the nerve burning treatment, chiropractic and massage therapy, and testified that future use of pain pills should be curtailed. (Pet. Br. 11:15-19.)

Although Dr. Colledge was critical of these therapies, he never stated that any treatment was not reasonable and necessary in Wendy’s case. The opinion of both Dr. Colledge and Dr. Rosenthal was that if it increases function, treating pain using pain

medicine and other “passive treatments” is reasonable. (Tr. 340:2-341:3; 627:9-629:5.)

Also, Dr. Colledge never stated that Wendy’s use of pain medication was unreasonable—just that it should not be taken unless it improves function. (Tr. 586:24-587:13.) The uncontested evidence at trial was that the massage therapy, chiropractic and pain medicine increased Wendy’s function and quality of life. (Tr. 217:2-8; 219:12-14; 345:25- 346:9; 378:7-16; 400:2-8; 699:2-19.)

- Dr. Rosenthal testified that he was not positive as to Wendy’s future treatment—he referred to it as “looking into a crystal ball.” He further testified that his projection for future pain medication followed a “worst-case scenario,” and that Wendy’s future medical needs may be more or less than the treatment plan he outlined. (Pet. Br. 10:15-11:2.)¹⁵

This statement is irrelevant. As stated earlier, it is not Plaintiff’s burden to provide absolute certainty with respect to the amount of future damages. Dr. Rosenthal testified to a degree of medical certainty that it was more probable than not that her future medical needs were as he stated. (Tr. 246:17-247:3; 326:5-15.) Further, his comment about following a “worst-case scenario” was only in the context of her only getting partial pain relief, not the amount of medicine she would need. (Tr. 324:4-325:14.) He testified that she may need more pain medicine than his projections, but the scenario he presented to the jury was his “best assessment.” (Tr. 325:25-326:13.) As explained previously,

15. ShopKo’s assertion that Dr. Rosenthal “could not testify with certainty that Harris would need dilaudid in the future” (Pet. Br. 10:18-20) is false. ShopKo’s counsel asked Dr. Rosenthal this very question at trial, and he denied it. (Tr. 325:1-4.) Dr. Rosenthal stated that there was “no way to tell for certain” what dose Wendy needed, (Tr. 250:20-21) but it was his “medical opinion” that she would need dilaudid in the future, (Tr. 246:17-21) and he believed that assessment was true “to a reasonable degree of medical probability.” (Tr. 326-5-13.)

Defendant cannot refute this testimony without providing evidence that an alternative amount of damages is more likely.

- Dr. Rosenthal testified that if a diagnosis had been rendered earlier, Wendy's care "would have been different," and it was "probable" that the intervening care would not have been necessary. (Pet. Br. 10:5-11.)¹⁶
- Dr. Colledge testified that Wendy's treatment with chiropractic 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 that massage therapy and chiropractic care will not offer long-term relief. Wendy received 51 chiropractic treatment sessions and 27 massage therapy sessions, but did not receive any lasting relief from these treatments. (Pet. Br. 11:9-12; 12:19-13:2, 10-13.)¹⁷

These statements are irrelevant from a legal standpoint. As stated earlier, whether a medical treatment was reasonably necessary is not determined by looking at an ideal outcome, but rather what a reasonable person would do given the same information and circumstances. Dr. Rosenthal testified that sometimes low-back conditions resolve with chiropractic or physical therapy. (Tr. 331:2-25.) He further testified that, given the fact that the facet joint syndrome and coccydinia had not yet been discovered, he had no issues with the prior treatment and thought it was appropriate. (Tr. 311:1-7; 312:14-20; 331:19-25.) Wendy went to see a physician and followed his advice. She went to massage therapy based on a doctor's recommendation. (Tr. 345:3-11.) She took pain medicine based upon a prescription. (Tr. 520:9-12.) The massage therapy, chiropractic and pain

16. ShopKo's assertion that Dr. Rosenthal testified that Wendy's prior care was inadequate (Pet. Br. 10:5-7) is false. In the portion of the record ShopKo refers to, Dr. Rosenthal stated: "Other than the fact that she was never provided a diagnosis I believe that her care was appropriate in regards to being symptomatic care." (Tr. 312:17-21.)

17. ShopKo's assertion that Dr. Colledge testified that there is no scientific support for massage therapy and chiropractic care (Pet. Br. 11:11-12) is false. Dr. Colledge actually said that massage therapy and chiropractic would not cure Wendy's injuries, but would provide short-term relief. (Tr. 594:14-15.)

medicine increased her function and quality of life. (Tr. 217:2-8; 219:12-14; 345:25-346:9; 378:7-16; 400:2-8; 699:2-19.) The uncontested testimony was that if it increases function, treating pain using pain medicine and other “passive treatments” is reasonable. (Tr. 340:2-341:3; 587:8-13; 627:9-629:5.) Finally, there was no testimony that these expenses were not medically necessary.

- Dr. Colledge testified that radio frequency treatments do not treat the injury and provides only “short-term relief in about half the patients.” (Pet. Br. 11:12-14.)

This statement is contradicted by the great weight of the evidence, as Plaintiff testified that the treatment actually worked (Tr. 709:16-710:16), and Dr. Rosenthal testified that it was likely that after seven years, the nerve would stop growing. (Tr. 249:7-25.) Dr. Colledge did not address this evidence.

- Dr. Rosenthal testified that Wendy regularly finished her thirty-day prescription for dilaudid in less than thirty days. (Pet. Br. 10:3-5.)¹⁸
- Dr. Colledge testified that Harris should “hold off” on her future use of dilaudid. (Pet. Br. 11:15-19.)

These statements are also irrelevant, as the uncontradicted evidence was that her usage of dilaudid was reasonably necessary, (Tr. 245:18-246:14) and that any dependence that Wendy had on pain medicine was a result of her accident at ShopKo. (Tr. 254:23-255:14.) Dr. Colledge never stated that Wendy’s use of pain medication was unreasonable—just that it should not be taken unless it improves function. (Tr. 586:24-

18. ShopKo’s assertion that Dr. Rosenthal testified that Wendy had overused dilaudid (Pet. Br. 10:3-5) is misleading. Dr. Rosenthal did not state that Wendy had “overused” dilaudid. Dr. Rosenthal testified that Wendy regularly finished her thirty-day prescription for pain killers in less than thirty days, (Tr. 253:15-22) but he could not form an opinion as to whether Wendy was addicted to dilaudid, (Tr. 252:17-253:6) and did not testify that she abused dialudid or used it in an unsafe fashion.

587:13.) The uncontested evidence was that the pain medication improved Wendy's function (Tr. 345:25-346:9), which was Dr. Colledge's standard for a reasonable treatment. (Tr. 587:8-13.) Dr. Hogenson testified that Wendy was not addicted to pain medicine (Tr. 348:6-13), and there was no evidence that she was abusing or overusing the pain medicine. There was no evidence that Wendy was suffering from hyperalgesia—Dr. Colledge's statements were not based on an examination or anything other than speculation. Dr. Hogenson testified that Wendy's dose of pain medication stayed stable while he was treating her, (Tr. 347:16-348:5) leading one to believe that her tolerance had not increased to the point of hyperalgesia.

- One of Plaintiff's massage treatments was listed as a couples massage. (Pet. Br. 13:12-13.)

This statement is not supported by any evidence that Wendy's treatment that day was not medically necessary. Also, the record suggests that the massage for Mr. Harris was free, since the cost of the massage was \$39.00, the same as Wendy's previous treatments. (R. at 1197, 206 & 231 (Records of 8/1/2008).) Even if the jury determined that one-half of the cost was attributable to Mr. Harris, that conclusion would still only justify a deduction of \$19.50.

- Dr. Colledge testified that Wendy had gained weight, which negatively impacted her ability to overcome her conditions. (Pet. Br. 12:15-16).

There was no testimony as to how the extra weight affected Wendy's treatment or damages. The uncontradicted evidence was that she was maintaining a low-calorie diet and keeping as active as her condition would allow. (Tr. 592:3-9; 596:6-11; 706:8-707:8.) Wendy did not need to engage in unreasonable efforts in order to lose weight. *See* Restatement (Second), *supra*, § 919 cmt. b.

Besides the lack of evidence that would support reducing the amounts of economic damages, the round amounts of the awards suggest that the jury did not decide which expenses were or were not compensable and add them together, but rather chose a number arbitrarily. A jury verdict that appears to have arbitrarily chosen an amount for an award of economic damages is based on insufficient evidence. *See Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216, 1221 (Utah 1980) (holding that the jury was in error for reducing Plaintiff's award for economic damages without an evidentiary basis). The jury was presented with the amount of \$33,203.34 in past medical expenses and \$39,574.00 in future medical expenses and was given an itemization of these sums. Because the parties stipulated to the reasonableness of the amounts, the jury did not have discretion to reject that stipulation and decide that other numbers were more reasonable—they could only accept or reject item by item. There is simply no combination of figures presented to the jury that could total \$15,000.00 in present damages or \$10,000.00 in future damages, and so the conclusion is inescapable that the jury just chose figures out of the air. The jury verdict is therefore not based on sufficient evidence and the Court of Appeals correctly reversed the trial court's decision.

III. THE COURT OF APPEALS' DECISION SHOULD BE AFFIRMED, AS THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY TO REDUCE FUTURE DAMAGES TO PRESENT VALUE, AS DEFENDANT OFFERED NO EVIDENCE TO PROVIDE A BASIS FOR THE JURY TO REASONABLY CALCULATE THE PRESENT VALUE OF FUTURE MEDICAL EXPENSES.

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 \$39,574.00 over the

next five years. Some expenses will accrue monthly, some quarterly, some semi-annually. 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 the Court of Appeals’ 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; *see also Brodie v. Philadelphia Transp. Co.*, 203 A.2d 657, 659-60 (Pa. 1964) (“Trial judges and lawyers freely admit that the application of the “present worth rule” is beyond the understanding and capabilities of most lay persons serving on juries The involved process of reducing future losses to their present worth has, undoubtedly, led to confusion and guesswork verdicts.”). While expert testimony is not necessary, competent evidence of present value, such as an annuity table or some similar actuarial table, must be introduced into evidence to assist the jury in making the calculation. *See Bennett v. Denver & Rio Grande W. R.R. Co.*, 213 P.2d 325, 328 (Utah 1950). Without some evidentiary basis to guide the jury, its reduction of damages would be completely arbitrary and invalid. *See TruGreen Companies, L.L.C. v. Mower Brothers, Inc.*, 2008 UT 81, ¶ 15, 199 P.3d 929. As stated by the Pennsylvania Supreme Court, “[T]he amount of future damages warranted by the evidence and the law in a given case is a mathematical fact. There is no logical reason why it should not be established by proof like other relevant facts.” *Brodie*, 203 A.2d at 660.

But what party should be required to produce this evidence? As stated by the Fourth Circuit Court of Appeals, the issue presented “is whether reduction to present value is an indispensable element of the plaintiff’s claim for future lost wages which he must always prove by specific evidence or whether, absent contest by the defendant, the plaintiff sufficiently proves his claim by evidence of the gross amount of those lost wages.” *Aldridge v. Baltimore and Ohio R. Co.*, 789 F.2d 1061, 1067 (4th Cir. 1986). As noted in the committee notes for the Model Utah Jury Instructions, there is no Utah case law on point, and other jurisdictions are split on the issue. Model Utah Jury Instructions 2d CV2021 (Utah State Bar 2012), *available at* <http://www.utcourts.gov/resources/muji>. However, the jurisdictions that have concluded that the burden of producing evidence of present value is on the Plaintiff invariably base their decisions on a conclusory statement that evidence of present value is a material element of a plaintiff’s claim for future damages. *See, e.g., Aldridge*, 789 F. 2d at 1068 (Boyle, Dist. J., dissenting) (“The present value of lost future earnings is not an affirmative defense but rather a material element of the plaintiff’s claim for that special damage.”); *Steppi v. Stromwasser*, 297 A.2d 26, 27 (Del. 1972) (“[The] burden is upon the plaintiff to prove the nature and extent of the loss caused by the defendant; that burden . . . is not satisfied by proof of the amount that she would have earned had she not been injured; that is not the true measure of her loss. Her proof is not complete without evidence of the present value of that loss.”). As one commentator noted, allocation of burdens of proof based on “essential elements” and “affirmative propositions” are “hollow, semantic debate[s]” that are “easily manipulated” by altering the syntax of the issues presented. Thomas R. Lee, *Pleading and Proof: The*

Economics of Legal Burdens, 1997 B.Y.U. L. Rev. 1. The Court should reject the semantic approach to allocating burdens of proof in favor of a methodology of burden allocation based on maximizing efficiency and minimizing social costs (“cost minimization methodology”). *See id.* at 11-28.

Cost minimization methodology posits that there are two types of costs associated with litigation: direct costs, which are the costs to the parties and to the courts or pursuing litigation; and error costs, which are the social costs associated with erroneous decisions by the court. *Id.* at 4-6. Under this methodology, burdens of proof and production of evidence are properly allocated when the frequency and magnitude of both types of costs are minimized. *Id.*¹⁹

Allocating the burden to produce evidence of present value to the defendant is consistent with minimizing social costs for several reasons. First, the cost of non-production is lower on the defendant than the plaintiff. If the defendant fails to meet its burden of producing the evidence, it has to pay the non-reduced value, *see Miller v. Union P.R. Co.*, 900 F.2d 223, 226 (10th Cir. 1990), while if the plaintiff failed to produce the evidence, it would have failed to produce sufficient evidence of the amount of its future damages and so would lose all of its future damages, *see Lewin Realty III, Inc. v. Brooks*, 771 A.2d 446, 476 (Md. App. 2001). In this scenario, a plaintiff will

19. While the cited article applies cost minimization methodology mostly to issues of liability, the principles apply equally as well to questions regarding the amount of damages.

almost always lose more than a defendant.²⁰ Second, while the direct cost of producing this evidence is theoretically equal for both parties,²¹ because the defendant benefits from the introduction of evidence of present value, it should bear the direct cost of producing it. *See Aldridge*, 789 F.2d at 1067 (“To the extent that the issue [of determining present value] in a given case necessarily becomes difficult, it seems fair to place the burden of procuring and presenting economic evidence on the litigant who would benefit from its acceptance by the factfinder.”); *Alma v. Manufacturers Hanover Trust*, 684 F.2d 622, 626 (9th Cir.1982) (holding on that basis that defendant should produce evidence of present value, while plaintiff should produce evidence of inflation); *Lewin*, 771 A.2d 473-74; *Miller*, 900 F.2d at 226; *see also John Call Engineering Corp. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah App. 1990) (“It is not a plaintiff’s burden to produce the evidence on which any reduction of damages is to be predicated.”); *Ault*, 739 P.2d at 1120-21 (allocating on defendant the burden to show that an alternate method of valuation would lead to reduced recovery). Finally, placing the burden of proof on the defendant is consistent with the policy preference in Utah law that once liability has been established, it is “the wrongdoer, rather than the injured party, who should bear the burden of some uncertainty in the amount of damages.” *Atkin Wright & Miles*, 709 P.2d at 336; *cf. Lee*,

20. Assuming a discount rate of 2% above the rate of inflation and equal yearly withdrawals, a defendant’s cost of nonproduction would only be lower if the plaintiff were awarded future damages 79 years or more into the future.

21. It is for this reason that producing evidence of present value can be distinguished from the requirement of producing evidence of both revenue and costs in determining lost profits—evidence of the costs of doing business is almost entirely within the possession of the plaintiff, making the direct cost of producing such evidence lower.

supra, at 20-27 (discussing minimization of costs based on a policy determination that some errors are more costly than others). Additionally, these grounds for allocating the burden to defendant have been endorsed as sound by several other jurisdictions, including all but one federal circuit. *See Lewin*, 771 A.2d 470-77 (citing and discussing cases). Therefore, the burden of production of reduction to present value is properly on the defendant.

In this case, there was absolutely no evidence of any kind that would have instructed the jury on how to make a present value calculation. Because the burden to produce that evidence was on the Defendant, its failure to present the evidence constitutes a waiver of the present value theory of reducing damages. *Cf. Gill v. Timm*, 720 P.2d 1352, 1354 (Utah 1986) (holding that a defendant's failure to present evidence of mitigation at trial waived the defense). Because the trial court instructed the jury on reducing future damages to present value when Defendant had waived the theory, the jury likely reduced the future damages when they should not have. Further, because the jury had absolutely no guidance about how to reduce future damages, there is a reasonable likelihood that they overestimated the amount of reduction, meaning that Plaintiff's award would have been higher. The reasonable likelihood of harm is supported by the disparity between the ample evidence of future economic damages presented at trial and the amount of future damages that the jury actually awarded. The trial court's error prejudiced Plaintiff, justifying a new trial.

CONCLUSION

For the foregoing reasons, Harris respectfully asks this Court to affirm the court of appeals' decision in this matter.

RESPECTFULLY SUBMITTED this 1st day of June, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that—

1. This brief was prepared using Microsoft Word and uses 13-point Times New Roman font.
2. According to Microsoft Word's word-count function, this brief contains 11,877 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service and addendum. This brief is therefore in compliance with the type-volume limitation of Utah R. App. P. 24(f)(1).

DATED this 1st day of June, 2012.

/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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DATED this 1st day of June, 2012.

/S/ Nathan Whittaker