

2010

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

Utah Court of Appeals

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Alain C. Balmanno; Ruth A. Shapiro; Christensen & Jensen; Attorneys for Appellee.

Michael E. Day; Nathan Wittaker; Day Shell & Liljenquist; Attorneys for Appellant.

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IN THE UTAH SUPREME COURT

WENDY HARRIS,

Plaintiff/Appellee

vs.

SHOPKO STORES, INC.,

Defendant/Appellant

20110945-SC

Case No. 20100106 - CA

Dist. Ct. Case No. 070101906

HONORABLE CHRISTINE JOHNSON
FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY

BRIEF OF APPELLANT ON *CERTIORARI*

Ruth A. Shapiro, (9356)
Alain C. Balmanno (3985)
CHRISTENSEN & JENSEN, P.C.
Attorneys for ShopKo Stores, Inc.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101

Michael E. Day (7843)
Nathan Whittaker (11978)
DAY SHELL & LIJENQUIST
Attorneys for Wendy Harris
45 East Vine Street
Murray, UT 84107

**FILED
UTAH APPELLATE COURTS**

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Salt Lake City, Utah 84101

Michael E. Day (7843)
Nathan Whittaker (11978)
DAY SHELL & LIJENQUIST
Attorneys for Wendy Harris
45 East Vine Street
Murray, UT 84107

LIST OF PARTIES TO THE PROCEEDINGS

All interested parties are identified in the caption on appeal.

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated 78A-3-102 (3).

ISSUES PRESENTED FOR REVIEW

The Court granted certiorari on the following issues:

Issue No. 1: Whether the Court of Appeals erred in holding there was insufficient evidence to support an apportionment-to-pre-existing-conditions jury instruction.

Preservation: This issue was presented in the petition for certiorari at 5 and 12-14, and in the brief in opposition to the petition at 7-8.

Standard of Review: On a writ of certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Peterson v. Kennard*, 2008 UT 90, ¶ 8, 201 P.3d 956. A trial court's jury instructions are reviewed for correctness and will be upheld "when the instructions taken as a whole fairly instruct the jury on the law applicable to the case." *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶8; 214 P. 3d 865.

Issue No. 2: Whether the court of appeals erred in holding the apportionment instruction required evidence of a symptomatic pre-existing condition on the "date of the accident."

Preservation: This issue was presented in the petition for certiorari at 5 and 14-16.

Standard of Review: On a writ of certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Peterson v. Kennard*, 2008 UT 90, ¶ 8, 201 P.3d 956.

Issue No. 3: Whether the court of appeals erred in holding the apportionment instruction affected the outcome of the trial.

Preservation: This issue was presented in the petition for certiorari at 5 and 16-18, and in the brief in opposition to the petition at 13-15.

Standard of Review: On a writ of certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Peterson v. Kennard*, 2008 UT 90, ¶ 8; 201 P.3d 956. A trial court's judgment will be upheld unless "there is a reasonable likelihood that absent the error, there would have been a result more favorable to the complaining party." *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, ¶16; 992 P. 2d 969.

Issue No. 4. In addition to the three granted issues, the Court requested the parties to address the question of whether *Biswell v. Duncan*, 743 P. 2d 80 (UT App. 1987) states the correct legal standard.

OPINION BELOW

The Court of Appeals decision below is *Wendy Harris v. ShopKo Stores, Inc.*, 2011 UT App 329; WL4485973. A copy is appended in the addendum.

CONTROLLING CONSTITUTION, STATUTE, OR REGULATION

There is no controlling constitutional provision, statute or regulation.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition below

Plaintiff Wendy Harris sued Defendant ShopKo Stores for personal injury sustained when she sat on a sample office chair which fell apart, causing her to fall to the floor. Plaintiff sued alleging negligence, and seeking past medical expenses of \$33,203.34, future medical expenses of \$39,574, and noneconomic damages (Opinion below, ¶¶1, 11).

The case was tried to a jury in the Fourth District before the Honorable Christine S. Johnson. At the conclusion of the trial, the jury awarded \$15,000 in past medical expenses, \$10,000 in future medical expenses, and \$1,000 in noneconomic damages (Opinion below, ¶11). Plaintiff moved for a new trial or additur of \$130,000 and the trial court denied the motion (Opinion below, ¶12; R. 922, 1139).

During the trial, Plaintiff objected to the trial court giving a jury instruction on apportionment to pre-existing-conditions based on CV2018. The form of the instruction was not at issue, but Plaintiff objected that no trial evidence supported a finding she was suffering from any pre-existing condition at the time of the accident. The trial court denied the objection, finding “ShopKo presented

substantial evidence that Harris' injuries could be attributed to alternative sources (other than the ShopKo incident), both through cross examination of (Harris's) witnesses, and through affirmative testimony from its own witnesses. Harris had a history of neck and back pain, her medical records included references to fibromyalgia, and testimony also included the opinion that her current condition was not trauma related, but caused by degenerative disk disease. In short, testimony was conflicted with regard to the cause of Harris's condition" (Opinion below, ¶19 citing the trial court's Memorandum Decision). A copy of the trial court's Memorandum Decision is appended in the addendum.

Plaintiff raised eleven issues on appeal. The court of appeals reversed and remanded for a new trial after addressing only one issue, the apportionment-to-pre-existing-conditions jury instruction. The court of appeals found that giving that instruction was reversible error, concluding the jury might have awarded more damages if the instruction had not been given (Opinion below, ¶13, 25).

FACTS

The trial record contains evidence and testimony indicating that Ms. Harris suffered from pre-existing lower back problems which elicit the same types of pain and symptoms Ms. Harris is claiming as part of her damages, pre-existing back problems which continue to worsen over time. Dr. Colledge testified that it was "probable that the disc degeneration [he] observed with Ms. Harris is a cause of her

present complaints” (Tr. 641:17-20); that an MRI taken a year after the accident showed degenerative changes (Tr. 612: 13-15); the minor disc bulge is “part of the degenerative cascade or disease” (Tr. 608: 20-22); Ms. Harris’ complaint of low back pain was a component of degenerative disc disease; facet disease; and an aggravation of those (Tr. 583: 14-21). Kay Whittaker referred Ms. Harris to a neurologist in 2006, who noted that she had “some early degenerative changes consistent with her age” (Tr. 545:1-4, 14-16).

Dr. Colledge testified that Ms. Harris’ history of possible sciatica in 2002 (Tr. Tr. 386:11-15) could “play a role in some of the lower back issues she was having and complaining of at the time” (Tr. 588: 10-14). In 2002, Dr. Scuderi testified that he treated Ms. Harris for sciatica (TR: 392:9-12), including radiating left leg pain; Dr. Scuderi treated her for the same symptoms after the ShopKo accident (TR 392:25-393:1); Dr. Scuderi admitted that “it would appear” that Ms. Harris had a pre-existing history of neck and back pain, according to the medical records presented at trial (Tr. 387:1:5), including a July 2002, visit to Alta View Hospital for “excruciating discomfort in the lumbar area and a diagnosis of left leg pain and questionable sciatica” (Tr. 386:11-15).

Dr. Rosenthal testified that the pain from Ms. Harris’ facet syndrome had resolved, but she is still suffering from coccydynia (Tr. 231:20-24), which is a separate pain generator; coccydynia is caused by overuse (Tr. 231:25-232:6).

Harris also has a preexisting history of fibromyalgia (Tr. 572:15-19, 531:17-24), which can manifest itself in the form of lower back pain (Tr. 573:9-14).

Dr. Rosenthal, Harris' expert, testified that Harris had overused dilaudid pain pills (Tr. 253:15-22 - used prescription faster than she should have "on a regular basis"); that the care received by Harris during the 35 months between the incident and his diagnosis was not adequate (Tr. 312:5-8 - "was not a good thing"), that if his diagnosis had been made right after the accident, the care she received "would have been different" (Tr. 314:14-22), and that past treatment would not have been necessary if she had been properly diagnosed (Tr. 314:11-13 - "treatment would have been discontinued," Tr. 334:3-335:6 - "probable" intervening care would not have been necessary). Dr. Rosenthal testified that his first diagnosis after the ShopKo incident was facet joint syndrome (Tr. 219:15-20, 297:14-298:5), a condition which can be caused by degeneration due to aging and is not always trauma related (Tr. 298:16-21).

Dr. Rosenthal also testified that he had no way to tell what will happen in the future, that he was "being asked to look into a crystal ball" (Tr. 250:20-22); that he had developed a "worst case scenario" to anticipate the need for dilaudid (Tr. 324:21-25, 325:12-14); that he could not testify with certainty that Harris would need dilaudid in the future (Tr. 250:9-21 - "honestly there's no way to tell for certain," 325:5-14 - "I don't know that she won't, but I don't know that she

will”); and that the treatment he had anticipated may be more or “it may be less” (Tr. 255:22-256:7, 326:5-8).

Dr. Colledge, Harris’ former treating physician (Tr. 550:23-25), testified that Plaintiff’s pain was chronic (Tr. 584:9-11), and that he could not testify that Harris’ pain was related to the ShopKo incident (Tr. 585:8-13). Although he agreed that the ShopKo incident may have caused soft tissue damage, he went on to testify that the pain associated with the soft tissue injury could be expected to heal after three to six weeks (Tr. 584: 9-12, 586:10-23 – concerned that she still needed dilaudid); that Harris’ treatment with chiropractor and massage therapy is not the kind of treatment which is going to “give her the kind of relief she’s looking for” (Tr. 593:25-3), and that medical scientific evidence shows no support for massage therapy and chiropractic care (Tr. 594:10-19); that the nerve burning treatment does not treat the injury and provides only “short-term relief in about half of the patients” (Tr. 621:19-622:3); and that reasonable treatment looks for “improvement in function, activities, work hours” (Tr. 587:8-13). Dr. Colledge, in addition to challenging the necessary and reasonable nature of the nerve burning treatment, chiropractic and massage therapy, testified that Harris should “hold off” on her future use of pain pills (dilaudid) (Tr. 585:15-586:9 - treatment is to taper off of the narcotics).

Dr. Colledge also testified he suspected that Plaintiff had an annular tear (Opinion below ¶ 9; Tr. 576:23-577:5, 593:11-14), which is generally caused by degeneration of the disks due to aging (Tr. 577:16-578:10); that he could not testify with a “reasonable degree of medical probability that the suspected annular tear was a result of the incident at ShopKo” (Tr. 578:11-15); that Harris suffered low back pain consistent with degenerative disease with radiating leg pain (Tr. 580:19-581:25); that Harris suffers from desiccation of the disks which can be “the result of just the natural aging process” and is not “typically the result of a single incident of trauma” (Tr. 589:22-590:12) and facet disease (Tr. 583:16-17), which is the wear of the joints in the spine, and manifests itself as back pain (Tr. 582:3-583:6); that Plaintiff’s complaints may be the result of the degenerative disk disease and the facet disease (Tr. 583:14-21); that the sciatica, documented in 2002 (Tr. 587:23-25), could play a role in her complaints at this time (Tr. 588:10-14); and that the degenerative disk disease could be the cause of Plaintiff’s current complaints (Tr. 591:1-4). He testified that Harris had gained weight which negatively impacted her ability to overcome her conditions (Tr. 592:14-593:10). He could not testify to a reasonable degree of medical probability that Harris’ complaints were related to the ShopKo incident (Tr. 585:8-13).

Dr. Rodney Scuderi, Harris’ treating chiropractor admitted that the treatment he provided is “soft tissue manipulation . . . akin to massage” (Tr. 368:10-14); that

he provided Harris 51 treatment sessions between April 2006 and March 2008 and charged Harris \$6,200 while providing no lasting cure (Tr. 383:6-20).

Dr. Scuderi also testified that the pre-existing conditions evidenced in the medical records could be the source of Harris's pain (Tr. 387:1-24 "At least it had some element. It's not unusual for a patient of Mrs. Harris' age to have some neck and back pain."); that the medical records he was asked to consider indicated cervical strain, discussed disk herniation, showed Plaintiff suffered diffused neck pain following a vehicle accident, and indicated lumbar area pain from 2002 (Tr. 385:21-386:5).

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

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

previously indicated in a medical history that she suffered from arthritis (Tr. 353:13-20).

Kay Whitaker, Harris' brother and treating nurse practitioner (Tr. 510:7-20, 511:19-22, 512:19-23), testified that Harris suffered from "SI joint dysfunction," (Tr. 535:8-12) which can be caused by degenerative arthritis (Tr. 535:23-536:12) and diagnosed Ms. Harris as suffering from chronic pain (Tr. 535:8-9, 538:18-22).

Harris herself admitted that she suffered no back pain right after the ShopKo incident (Tr. 722:5-12); and there was evidence that after the ShopKo incident she continued to perform her normal activities, and that her condition became worse over time (Tr. 728:20--730:5).

Mr. Harris testified that right after the incident Plaintiff continued to work and to perform normal activities, but that her condition declined over time (Tr. 673:23-674:22, 681:9-682:3, 683:8-16).

SUMMARY OF ARGUMENT

The court of appeals erred in holding there was insufficient evidence to support giving the apportionment to pre-existing conditions jury instruction because there was a lot of evidence on which the jury could rely to conclude that Harris' pain was not the result of the ShopKo incident. In holding there was insufficient evidence, the court of appeals applied the wrong legal standard

(requiring a finding that the pre-existing conditions were symptomatic “on the day of the accident”) and substituted its judgment on the evidence for that of the jury.

The court of appeals erred in holding that the apportionment to pre-existing conditions requires evidence of symptoms “on the date of the accident” because such a bright line rule ignores the causation analysis. The jury instruction is not tied to existing pain at the time of the accident but to alleged aggravation of pre-existing conditions.

The *Biswell v. Duncan* decision fails to state the correct legal standard in that it goes further than the causal analysis required to establish liability. *Biswell* seems to say that any sequential relationship between pre-existing conditions, accident and pain results in liability. To the extent *Biswell* intended to set up such a *post hoc* analysis devoid of causation it should be overturned. The plaintiff is not entitled to recover for all pain and damages suffered after an accident, only those damages caused by the accident. With the presence of pre-existing conditions it is the aggravation factor which is key to the analysis.

The court of appeals erred in holding that the apportionment to pre-existing conditions jury instruction wrongly affected the outcome of the trial because giving the instruction was not error and because even if it was error, it was harmless error. A jury’s verdict is entitled to great deference and a jury is free to believe the evidence it chooses between conflicting evidence. The standard for overturning a

jury verdict requires a showing that the evidence compels a different result. In this case, there was abundant evidence to support the jury's award of less economic damages than sought by the plaintiff, and to support the jury's award of minimal noneconomic damages given the minimal nature of the ShopKo incident and the conflicting evidence of the cause of Harris' pain after the incident.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT AN APPORTIONMENT-TO-PRE-EXISTING-CONDITIONS JURY INSTRUCTIONS.

The Court of Appeals decided that there was insufficient evidence to give the apportionment-to-pre-existing-conditions jury instruction because it concluded that none of the evidence of pre-existing conditions "is capable of supporting a jury finding that those conditions were symptomatic on the date of the accident" (Opinion below, ¶21).

This conclusion was based on the wrong standard for analyzing pre-existing conditions: that the apportionment to pre-existing conditions defense can only apply if the pre-existing conditions are symptomatic "on the day of the accident." As a result, the court of appeal's conclusion overlooks the evidence that Plaintiff suffered from chronic pain before the accident (Tr.241:2-12; 359:25-360:14, 361:1-362:10; 387:1-24; 385:21-386:16; 587:23-588:14); the testimony of her former treating physician that the degenerative disk disease could be the cause of

Plaintiff's current complaints (Tr.591:1-4); the testimony that Plaintiff's complaints are the result of the degenerative disk disease and facet disease, and an aggravation of her pre-existing conditions (Tr.583:14-21); Plaintiff's expert's first diagnosis after the ShopKo incident of facet joint syndrome (Tr.219:15-20, 297:14-298:5), a condition caused by degeneration due to aging that is not always trauma related (Tr.298:16-21); testimony that Plaintiff's pain may not have been caused by the ShopKo incident (Tr.585:8-13); and the testimony that the ShopKo incident caused soft tissue damage, which could be expected to heal after three to six weeks (Tr.586:9-11).

Given the evidence adduced by ShopKo, the trial court was correct to give the instruction. There was evidence before the jury that Plaintiff's pain was the result of the natural progression of the pre-existing conditions and not the result of the ShopKo incident. The jury needed to be instructed on how to address this evidence. Parties have the right to have the jury instructed in their theory of the case so long as there is competent evidence to support those theories. *Black v. McKnight*, 562 P. 2d 621, 622 (Utah 1977); *Christiansen v. UTA*, 649 P. 2d 42, 46 (Utah 1982) ("The rule is that defendants, as well as plaintiffs, are entitled to instructions supporting their theory of the case").

Relying on *Biswell v. Duncan*, 742 P. 2d 80, 82 (Utah Ct. App. 1987), the court of appeals concluded that Plaintiff's pre-existing complaints were "taken care

of by the time of the accident” (Opinion below, ¶¶17, 24). That standard is not only vague (what does “taken care of” mean - does it mean those conditions will never on their own cause Harris pain?), but that conclusion also substituted the court of appeals’ judgment for that of the jury.

The evidence favorable to ShopKo before the jury included that Harris suffered from chronic pain; that her condition was not trauma related; that her complaints were the result of the aggravation of her pre-existing-conditions and the natural advancement of those conditions; and that Plaintiff’s pain was not caused by the ShopKo incident. There was also evidence that following the ShopKo incident, Harris did not suffer from back pain and continued with her normal activities, but that her general condition declined over time, thus distancing the ShopKo incident from her physical complaints at trial. There was sufficient evidence that the jury could conclude, contrary to Plaintiff’s assertion, that Mrs. Harris’ complaints were not all the result of the ShopKo incident.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE APPORTIONMENT INSTRUCTION REQUIRES EVIDENCE OF A SYMPTOMATIC PRE-EXISTING CONDITION ON THE “DATE OF THE ACCIDENT.”

The decision of the court of appeals establishes a bright-line test for when the apportionment to pre-existing-conditions jury instruction can be given and limits the application of the defense of apportionment for pre-existing-conditions

to a single day, the day of the accident. “ShopKo’s own briefing of this subject contains no record citations to evidence that Harris’s pre-existing conditions were symptomatic on the date of the accident” (Opinion below, ¶22 underline added). “Thus, the crucial question is whether Harris’s pre-existing conditions were on the date of the accident, latent, dormant, or asymptomatic” (Opinion below, ¶23 underline added).

This framing of the issue by the court of appeals was facially contrary to this Court’s decision in *Tingey v. Christensen*, in which this Court observed that evidence of pain from pre-existing conditions 25 days before the accident could justify a jury’s conclusion “that Tingey’s pain and suffering was entirely preexisting.” *Tingey v. Christensen*, 1999 UT 68, ¶18; 987 P. 2d 588. Thus the “day of the accident” standard is in error.

The court of appeals’ opinion below is based on its *Biswell v. Duncan* decision. *Biswell* dealt with a plaintiff who wanted a jury instruction that the defendant was liable for aggravating Biswell’s pre-existing back injury. The trial court had refused to give the instruction. The *Biswell* court held that the plaintiff was entitled to his theory of the case being submitted to the jury because there was evidence that the accident had aggravated his pre-existing back condition. *Biswell v. Duncan*, 742 P. 2d 80, 81, 88 (Utah Ct. App. 1987).

In *Biswell*, the court of appeals acknowledged that a plaintiff could recover for pain from a pre-existing condition made to be painful by the subsequent accident. “[W]hen a latent condition itself does not cause pain, but that condition plus an injury brings on pain by aggravating the pre-existing condition, then the injury, not the dormant condition, is the proximate cause of the pain and disability.” *Id.* at 88 (underline added). That statement of the law correctly recognizes the causation element required before a plaintiff can recover for pain from a pre-existing condition after an accident. The pain from that pre-existing condition must be shown to be caused by the subsequent injury.

Applying this statement of the law supports ShopKo’s position in this case that the jury instruction was properly given because there was evidence before the jury that the pain was not completely caused by Harris’ fall from the ShopKo chair. There was testimony that the pain was caused by the natural progression of Harris’ degenerative disk disease (Tr. 580:19-581:25).

The *Biswell* decision however, went further, concluding that “[a] plaintiff, therefore, is entitled to recover all damages which actually and necessarily follow the injury.” *Id.* That statement is far too broad to be a correct statement of the law because it sets up a sequential rule devoid of causal relationship. It is not axiomatic that all damages which follow an injury will be the result of the accident.

Biswell is wrong to the extent it ties the use of the apportionment to pre-existing conditions jury instruction to prior chronic pain.

That statement in *Biswell* ignores the core causal element established by this Court:

Our view of the basic issue here is that even though it is true that one who injures another takes him as he is, nevertheless, the plaintiff may not recover damages for any pre-existing condition or disability she may have had which did not result from any fault of the defendant, but that she is entitled to recover damages for any injury she suffered, including any aggravation or lighting up of such a pre-existing condition or disability, which was proximately caused by the defendant's negligence.

Brunson v. Strong, 412 P. 2d 451, 453 (Utah 1966). Thus a plaintiff is entitled to recover if her pre-existing conditions are aggravated by the accident, but is not entitled to recover for pain suffered from her pre-existing conditions if that pain is not caused by the subsequent accident. A pre-existing condition may begin to be painful after an accident because of its own advancing condition, independent of the accident. The key to the analysis is the aggravation element. To the extent *Biswell* establishes a sequential rule devoid of causation analysis it fails to state the correct legal standard.

The court of appeal's "date of the accident" focus in the decision below, like the broad concluding statement in *Biswell*, leaves out the causation element. The fact that a pre-existing condition is not painful "on

the date of the accident” and the plaintiff feels pain after the accident does not establish causation. Such a rationale suffers from the fallacy of *post hoc ergo propter hoc*. The plaintiff is not entitled to recover all damages which actually follow the accident, only those caused by the accident and any aggravation of the pre-existing conditions shown to arise from the accident. Whether a pre-existing condition was latent, dormant, or asymptomatic is only one of the factors to be analyzed. Therefore, whether the pre-existing condition is “taken care of” by the time of the accident (Opinion below, ¶24) is not conclusive to the issue.

In this case, as noted by the court of appeals, much testimony and many exhibits were devoted to Harris’ pre-existing conditions. (Opinion below, ¶27). There was evidence before the jury from which it could have concluded that, even if the pre-existing conditions were asymptomatic before the incident, they may have been the cause of Harris’ pain after the ShopKo incident. Some of the pre-existing conditions are degenerative in nature and are not caused by trauma. Harris’ current complaints at the time of trial did not start on the day of the accident. The evidence was that her complaints became worse over time. There was evidence that the pain from those pre-existing conditions was not caused by the minor fall from

the ShopKo chair, which would have created only soft tissue injury which healed after a short time.

Thus, the apportionment instruction was properly given, and the court of appeal's "date of the accident" bright line test is not the crucial question and is in error.

III. THE COURT OF APPEALS ERRED IN HOLDING THE APPORTIONMENT INSTRUCTION AFFECTED THE OUTCOME OF THE TRIAL.

As discussed above, giving the apportionment instruction was not error. However, even if it was error, it was harmless error and the jury verdict should not be overturned. "[T]o reverse a trial verdict, this court must find not a mere possibility, but a reasonable likelihood that the error affected the result." *Cheves v. Williams*, 1999 UT 86, ¶20; 993 P. 2d 191. Appellate courts will not reverse a jury verdict "where there is sufficient evidence in the record to support the jury's verdict on legally sound grounds." *Id*; *Green v. Louder*, 2001 UT 62, ¶14; 29 P. 3d 638.

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

The standard is not whether “the evidence introduced could have justified a larger verdict than granted.” *Meyer v. H.H. Bartholomew*, 690 P. 2d 558, 560 (Utah 1984), citing to *Sprunt v. Denver & Rio Grande Western Railroad*, 340 P. 2d 85, 87 (Utah 1959). In *Sprunt*, this Court observed that:

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

The Court went on in *Sprunt* to observe that “the jury was not bound to believe” the evidence presented by the Plaintiff. *Id.* Thus, courts “cannot substitute [their] judgment for that of the fact finder unless the evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion.” *Jensen v. Eakins*, 575 P. 2d at 180.

The court of appeals stated “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” (opinion below, ¶ 25). Nonetheless, the court of appeals concluded that “had the improper instruction not been given, the jury might have awarded more damages.” *Id.*

Not knowing why and how a jury arrived at its verdict however is not sufficient to conclude that the jury “might” have awarded more if an instruction had not been given. Nor is the mere possibility of a different outcome the correct standard. Reversing a jury award requires a reasonable likelihood that an error, if

there was error in this case, affected the result. *Cheves* at ¶20; *Steffensen v. Smith's Management Corp.*, 862 P. 2d 1342, 1347 (Utah 1993). “Errors require reversal only if confidence in the jury's verdict is undermined.” *Tingey v. Christensen*, ¶16. Such a conclusion needs to be based on the quality of the evidence presented to the jury and whether that evidence forms legally sound grounds for the verdict. *Green v. Louder*, at ¶14.

In this case, the jury had overwhelming evidence that the prior medical treatment claimed was neither wholly necessary nor reasonable: Plaintiff's own expert testified that she had overused pain pills (Tr.253:15-22 - used prescriptions faster than she should have “on a regular basis”), and that past treatment would not have been necessary if she had been properly diagnosed (Tr. 314:11-22 - treatment would have been discontinued, 334:3-335:6 - intervening treatment probably not necessary). Plaintiff's former treating physician challenged the necessity and reasonableness of the nerve burning treatment, chiropractic and massage therapy (Tr. 593:25-594:19, 621:19-622:3, 587:8-13).

The jury was presented evidence that Plaintiff sought and received 51 chiropractic sessions in two years which were soft tissue manipulation akin to massages (Tr. 368:10-14; 383:10-12) while also receiving 27 massages (including a couple's massage) in one year (Tr. 406:1-8, 407:22-408:4). The evidence also

showed that Plaintiff had gained weight which was affecting her prior conditions (Tr. 592:14-593:10).

This evidence of overlapping soft tissue massages/chiropractic treatments, overuse of pain pills, and the opinions of both Plaintiff's expert and her former treating physician as to the reasonableness and necessity of the past treatments support the jury reducing the claimed economic damages for past treatments.

Likewise, the hesitancy of Harris' own expert as to the necessity of claimed future medical treatments (Tr. 250:20-22, 255:22-256:7, 326:5-11, 325:5-14), and the Harris' former treating physician's challenge as to the necessity and reasonableness of the claimed future treatment plans (Tr. 593:25-594:19, 622:18-24, 587:8-13), both support the reduced amount of economic damages awarded by the jury for future treatments.

Finally, the \$1000 noneconomic damages awarded Harris shows that the jury recognized that the ShopKo accident had caused her some pain, while also reflecting the evidence that the fall from the sample office chair was minor, producing only soft tissue injuries (Tr. 585:1-7), and that Plaintiff's own weight gain had, in part, negatively impacted her ability to overcome her conditions (Tr. 592:14-593:10).

Granted that, in addition to the evidence supporting ShopKo, there was evidence adduced by Harris to support her claim that her pain was caused by the

ShopKo incident, the jury was free to believe some or all or none of the various conflicting evidence. *Sprunt v. Denver & Rio Grande Western Railroad*, 340 P. 2d 85, 87 (Utah 1959) (jury not bound to believe all the evidence presented by plaintiff); *Even Odds, Inc. v. Nielson*, 448 P.2d 709, 712 (1968) (jury “not bound to slavishly follow the evidence and the figures given by any particular witness”); *Arnold Mach. Co. v. Intrusion Prepakt, Inc.*, 357 P.2d 496, 497 (1960) (“the jury was not obliged to follow abjectly the plaintiff’s evidence, but had the right to place [its] evaluation upon ... the witnesses and the weight of the evidence”).

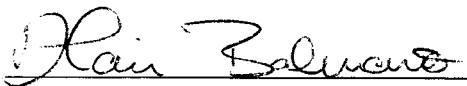
The evidence before the jury does not compel a conclusion that reasonable persons would reach a different decision than the jury, nor does the evidence undermine confidence in the jury’s verdict. To the contrary, the evidence available to the jury supports giving the jury its due deference in deciding damages.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeal’s holding and remand the case to the court of appeals for further proceeding.

DATED this 18th day of April, 2012.


CHRISTENSEN & JENSEN, P.C.

By: 
Ruth A. Shapiro
Alain C. Balmanno
Attorneys for ShopKo Stores, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2012, a true and correct copy of the foregoing was mailed, postage prepaid, to the following:

Michael E. Day
Nathan Whittaker
DAY SHELL & LIJENQUIST
Attorneys for Wendy Harris
45 East Vine Street
Murray, UT 84107

_____

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 5,285 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
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Ruth A. Shapiro

Alain C. Balmano

Attorneys for ShopKo Stores, Inc.

Dated this 18th day of April, 2012

ADDENDUM

263 P.3d 1184, 692 Utah Adv. Rep. 23, 2011 UT App 329
(Cite as: 263 P.3d 1184)

▷

Court of Appeals of Utah.
Wendy HARRIS, Plaintiff and Appellant,
v.
SHOPKO STORES, INC., Defendant and Appellee.

No. 20100106-CA.
Sept. 29, 2011.

Background: Customer filed negligence action against store for injuries sustained when sample office chair in which she was sitting fell apart and she fell to floor. The Fourth District Court, American Fork Department, Christine S. Johnson, J., entered judgment on jury awards to customer of \$25,000 in economic damages and \$1,000 in noneconomic damages. Customer appealed.

Holdings: The Court of Appeals, Voros, J., held that: (1) evidence did not support an instruction on apportionment of damages; and (2) improper instruction on apportionment of damages was prejudicial to customer.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ↪ 842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent. in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In general. Most Cited

Cases

A trial court's decision regarding jury instructions presents a question of law, which is reviewed for correctness.

[2] Damages 115 ↪ 216(1)

115 Damages

115X Proceedings for Assessment

115k209 Instructions

115k216 Measure of Damages for Injuries to the Person

115k216(1) k. In general. Most Cited

Cases

Evidence did not support an instruction on apportionment of damages, in negligence action against store by customer who fell to floor when sample office chair in which she was sitting fell apart, where customer's pre-existing conditions were asymptomatic at time of fall.

[3] Trial 388 ↪ 203(1)

388 Trial

388VII Instructions to Jury

388VII(B) Necessity and Subject-Matter

388k203 Issues and Theories of Case in General

388k203(1) k. In general. Most Cited

Cases

All parties are entitled to have their theories of the case submitted to the jury in the court's instructions, provided there is competent evidence to support them.

[4] Trial 388 ↪ 203(1)

388 Trial

388VII Instructions to Jury

388VII(B) Necessity and Subject-Matter

388k203 Issues and Theories of Case in General

388k203(1) k. In general. Most Cited

Cases

A trial court may not instruct the jury on a theory of the evidence unless a rational jury could find a factual basis in the evidence to support that theory.

[5] Damages 115 ↪ 221(7)

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115 Damages

115X Proceedings for Assessment

115k219 Verdict and Findings

115k221 Special Interrogatories and Findings by Jury

115k221(7) k. Sufficiency of verdict or findings. Most Cited Cases

If the jury can find a reasonable basis for apportioning damages between a pre-existing condition and a subsequent tort, it should do so, but, if the jury finds it impossible to apportion damages, it should find that the tortfeasor is liable for the entire amount of damages.

[6] Damages 115 33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k31 Physical Suffering and Inconvenience

115k33 k. Aggravation of previous injury, disease, or disability. Most Cited Cases

The tortfeasor takes the victim as he finds her and bears the burden of any uncertainty in the amount of the victim's damages.

[7] Damages 115 33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k31 Physical Suffering and Inconvenience

115k33 k. Aggravation of previous injury, disease, or disability. Most Cited Cases

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.

[8] Workers' Compensation 413 552

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(A) Nature and Character of Physical Harm

413VIII(A)4 Aggravation of Previously Impaired Condition

413k552 k. In general. Most Cited Cases

Under workers' compensation analysis as to whether an injury arose out of and in the course of employment, it matters not at all, from the standpoint of legal causation, whether the preexisting condition was symptomatic or asymptomatic.

[9] Trial 388 228(1)

388 Trial

388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency

388k228 Form and Language

388k228(1) k. Form and arrangement. Most Cited Cases

As a general rule, the Model Utah Jury Instructions are merely advisory and do not necessarily represent correct statements of Utah law.

[10] Damages 115 33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k31 Physical Suffering and Inconvenience

115k33 k. Aggravation of previous injury, disease, or disability. Most Cited Cases

When a latent condition itself does not cause pain, but that condition plus an injury brings on pain by aggravating the pre-existing condition, then the injury, not the dormant condition, is the proximate cause of

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the pain and disability.

[11] Appeal and Error 30 1064.1(8)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

30k1064.1(2) Particular Cases

30k1064.1(8) k. Negligence

and torts in general. Most Cited Cases

Improper instruction on apportionment of damages was prejudicial to customer who brought negligence action against store in connection with her fall when sample office chair in which she was sitting fell apart, where jury awarded customer only one-third, i.e., \$25,000 of the economic damages she claimed and only \$1,000 in economic damages, much testimony and many exhibits were devoted to customer's pre-existing conditions, and there was no evidence that those conditions were symptomatic at time of incident at issue.

[12] Appeal and Error 30 1064.1(1)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

30k1064.1(1) k. In general. Most

Cited Cases

The failure to give a jury instruction to which a party is entitled, or the giving of an instruction to which a party was not entitled, may constitute reversible error only if it tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law.

***1185** Michael E. Day and Nathan Whittaker, Murray, for Appellant.

Ruth A. Shapiro and Alain C. Balmanno, Salt Lake City, for Appellee.

Before Judges DAVIS, VOROS, and CHRISTIANSEN.

***1186 OPINION**

VOROS, Judge:

¶ 1 Plaintiff Wendy Harris sued Defendant ShopKo Stores, Inc. for personal injuries sustained when she sat in a sample office chair that fell apart, causing her to fall to the floor. At the conclusion of trial, the jury awarded approximately one-third of her claimed economic damages and \$1,000 in noneconomic damages. Harris contends on appeal that the jury was erroneously instructed on the apportionment of damages between those attributable to the ShopKo incident and those attributable to her various pre-existing conditions. We agree and accordingly reverse and remand.

BACKGROUND

¶ 2 While shopping for an office chair in a ShopKo store, Harris sat in a display model. When she did, the chair split apart and the seat of the chair fell out from under her. She fell straight down and landed on her wrist and tailbone. Shortly after the accident, Harris went to the hospital because she felt "deep pelvic pain" and worried that "something had come loose"—possibly a complication from her previous surgery. The pain in her wrist resolved on its own after a few days, but the pain in her lower back and tailbone intensified over time.

¶ 3 Harris sought medical help from a family nurse practitioner, a physical therapist, a chiropractor, and various physicians. The physicians treating her observed that she was suffering from severe pain in her lower back and tailbone and that the pain radiated down the back of her leg to her knee. Even after three years, the pain did not resolve. To ease the pain, Harris tried medication, chiropractic treatment, physical therapy, and massage therapy. She was prescribed a variety of medications including a painkiller, which, according to Dr. Richard Rosenthal, a physician specializing in pain management, she sometimes took more of than the prescribed amount. She visited a physical therapist four times, went to fifty-one chiropractic sessions, and had twenty-seven massage treatments, including one couples massage with her husband.

¶ 4 Three years after the accident, Dr. Rosenthal diagnosed her with facet joint syndrome, an inflam-

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mation of one of the spinal joints, and coccydinia, inflammation of the tailbone. He treated her facet joint syndrome with a radio frequency lesioning treatment, which severs the nerve to the facet joint and stops the pain.

¶ 5 Harris sued ShopKo, alleging negligence. She also sued Office Star Products, the manufacturer of the chair, but Office Star was dismissed before trial. The case went to trial before a jury.

¶ 6 At trial, Dr. Rosenthal testified that it was more likely than not that Harris's pain and injuries were caused by the ShopKo accident. He testified that her medical expenses were reasonable and necessary. He also stated that he thought her pain would ultimately resolve but that she might have permanent loss of mobility in her spine and may develop sciatica or other complications from her injuries. He also testified that she had sustained permanent injuries that would require future medical care costing approximately \$39,574. Dr. Rosenthal also testified that Harris had been in three prior auto accidents and had received treatment for neck pain and possibly lower back pain. He also testified that facet joint syndrome can be caused by degeneration due to aging and is not trauma related.

¶ 7 Harris's family practitioner testified that Harris's low back pain started after the ShopKo incident. He also testified that records from his clinic indicated that Harris had complained of fibromyalgia and depression several years before the ShopKo incident. A nurse practitioner, who is also Harris's brother, testified that he treated her for low back pain following the accident. He also testified that her X-rays following the ShopKo incident showed no fractures.

¶ 8 Dr. Rodney Scuderi, Harris's chiropractor, also testified. He stated that he first treated her one week after the ShopKo incident. On that day, he explained, "She had trouble even walking. Even coming back to the [examination] room took a great amount of time. She couldn't sit. It was with great difficulty to even get her down on *1187 the table." Harris visited him fifty-one times over approximately two years, but Dr. Scuderi said that although he could sometimes provide relief, "it would never fix anything." On cross-examination, ShopKo's counsel presented Dr. Scuderi with a series of Harris's medical records from past incidents. The records showed a 1998 visit to Alta

View Hospital for cervical strain and possible disc herniation; a 2001 visit to Alta View Hospital for diffuse neck pain and neck strain following a car accident; a 2002 visit to Alta View Hospital for excruciating discomfort in the lumbar area resulting in a diagnosis of left leg pain and questionable sciatica. Dr. Scuderi indicated that while it appeared that Harris had previously experienced neck and back pain, such pain was not unusual for a person of her age. He also indicated that when he first saw her, her symptoms were more consistent with someone who had suffered a recent injury than someone with chronic back pain.

¶ 9 Dr. Allan Colledge, one of Harris's former treating physicians, testified for ShopKo. He had treated Harris five times since the ShopKo incident. He agreed that Harris was in "extraordinary" pain but testified that her MRI and X-rays were "normal" and her sacroiliac joint seemed "fairly normal." He thought she had an annular tear, but the radiologist did not. He indicated that a traumatic event, such as Harris's fall at ShopKo, can cause previously asymptomatic disc degeneration to flare up and cause pain.

¶ 10 Dr. Colledge also testified concerning "delayed recovery," a term used to describe nonphysical factors that can prolong recovery. He stated that Harris had some indicators for delayed recovery, including the length of time she was in pain, the use of narcotics, and the fact that she was involved in personal injury litigation. He did not, however, think she was malingering or suffering from hysteria or hypochondriasis.

¶ 11 Ultimately, Harris presented evidence that her past medical expenses were \$33,203.34. This included \$17,137.50 in doctor and hospital visits, \$7,539.84 in prescriptions, \$768 in physical therapy visits, \$1,579 in massage therapy visits, and \$6,179 in chiropractic visits. She presented evidence that her future medical expenses were estimated at \$39,574. This included visits at the pain clinic, nerve-burning procedures, annual check-ups, massage therapy, medication, and a coccyx seat support. The jury awarded \$25,000 in economic damages (\$15,000 in past medical expenses and \$10,000 in future medical expenses) and \$1,000 in noneconomic damages.

¶ 12 Harris moved for a new trial; the trial court denied the motion. Harris appeals, alleging various errors.

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ISSUE AND STANDARD OF REVIEW

[1] ¶ 13 Harris presents eleven issues on appeal. Among these is her contention that the trial court erred when it instructed the jury regarding apportioning damages between those caused by the ShopKo incident and those caused by pre-existing conditions. “A trial court’s decision regarding jury instructions presents a question of law, which is reviewed for correctness.” *Vitale v. Belmont Springs*, 916 P.2d 359, 361 (Utah Ct.App.1996). Because we determine that this claim of error requires reversal, we do not address the remaining issues.

ANALYSIS

[2] ¶ 14 Harris contends that the trial court erred in instructing the jury on apportioning damages between those caused by the accident and those caused by symptomatic pre-existing conditions. This was error, she contends, because no evidence of symptomatic pre-existing conditions was adduced at trial.

[3][4] ¶ 15 “A trial court’s ruling concerning a jury instruction is reviewed for correctness.” *Paulos v. Covenant Transp., Inc.*, 2004 UT App 35, ¶ 10, 86 P.3d 752 (citation and internal quotation marks omitted). “All parties are entitled to have their theories of the case submitted to the jury in the court’s instructions, provided there is competent evidence to support them.” *Id.* (citation and internal quotation marks omitted). A trial court may not instruct the jury on a theory of the evidence unless a rational jury could find a factual basis in the evidence to support *1188 that theory. See *State v. White*, 2011 UT 21, ¶ 22, 251 P.3d 820.

[5][6] ¶ 16 The parties do not dispute the rules governing pre-existing conditions in the negligence context. “[T]he plaintiff may not recover damages for any pre-existing condition or disability she may have had which did not result from any fault of the defendant, but ... she is entitled to recover damages for any injury she suffered, including any aggravation or lighting up of such a pre-existing condition or disability, which was proximately caused by the defendant’s negligence.” *Brunson v. Strong*, 17 Utah 2d 364, 412 P.2d 451, 453 (1966). Thus, “if the jury can find a reasonable basis for apportioning damages between a pre-existing condition and a subsequent tort, it should do so; however, if the jury finds it impossible to apportion damages, it should find that the tortfeasor is liable for the entire amount of damages.” *Tingey v.*

Christensen, 1999 UT 68, ¶ 15, 987 P.2d 588. These rules follow from several well-accepted principles, among them that the tortfeasor takes the victim as he finds her and that the tortfeasor bears the burden of any uncertainty in the amount of the victim’s damages. See *id.* ¶ 14.

[7][8] ¶ 17 Furthermore, and most relevant here, a victim with latent, dormant, or otherwise asymptomatic pre-existing conditions stands on equal footing with a victim with no pre-existing conditions; the tortfeasor is liable for the full amount of resulting damages when its conduct aggravates or “lights up” an asymptomatic pre-existing condition:

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 pre-existing condition, then the injury, not the dormant condition, is the proximate cause of the pain and disability. A plaintiff, therefore, is entitled to recover all damages which actually and necessarily follow the injury.

Biswell v. Duncan, 742 P.2d 80, 88 (Utah Ct.App.1987). The facts in *Biswell v. Duncan*, 742 P.2d 80 (Utah Ct.App.1987), parallel those at bar. Biswell was injured in a traffic accident. See *id.* at 81. Before the accident, she suffered from degenerative changes in her spine and upper back. See *id.* at 82. However, she testified that her condition had been “taken care of” and that at the time of the accident she was symptom-free. See *id.* at 82. On these facts, we held that she was entitled to a jury instruction “which clearly expresses the concept that if [the defendant’s] negligence aggravated or lit up Biswell’s dormant asymptomatic condition, then Biswell is entitled to recover all the damages which follow.” *Id.* at 89 (emphasis omitted); see also *Ortiz v. Geneva Rock Prods., Inc.*, 939 P.2d 1213, 1219 (Utah Ct.App.1997) (rejecting plaintiff’s claim that evidence of his pre-existing conditions was irrelevant, on the ground that medical testimony called into question plaintiff’s claim that those pre-existing conditions were latent).^{EN1}

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FN1. A different rule applies in worker's compensation cases where the legal question is whether an injury arose out of or in the course of employment. "When analyzing whether an injury arose out of and in the course of employment, it matters not at all, from the standpoint of legal causation, whether the preexisting condition was symptomatic or asymptomatic." Acosta v. Labor Comm'n, 2002 UT App 67, ¶ 27, 44 P.3d 819.

¶ 18 In keeping with the foregoing principles of law, the Model Utah Jury Instructions (MUJI) offer two different jury instructions for use in cases involving pre-existing conditions. Instruction CV2018 is designed for cases involving "[a]ggravation of symptomatic pre-existing conditions." See MUJI 2d CV2018 (Utah State Bar 2011), available at <http://www.utcourts.gov/resources/muji>. It explains that the jury should, if it can, apportion damages between those resulting from the pre-existing condition and those resulting from the accident, and that if it cannot, it should treat all damages as caused by the accident. See *id.* CV2019 is designed to be used in cases involving aggravation of "dormant pre-existing conditions." See *id.* *1189 CV2019. It instructs the jury that all damages caused by the accident are recoverable. See *id.*

[9] ¶ 19 Here, the trial court gave a jury instruction based on CV2019. ^{FN2} However, over Harris's objection, it also gave a jury instruction based on CV2018. That instruction stated that "[i]f Plaintiff had a physical, emotional, or mental condition before the time of the March 29, 2006 incident, she is not entitled to recover damages for that condition or disability," but that the jury should, if it is able, apportion damages between those attributable to Harris's pre-existing condition and those attributable to the ShopKo fall. ^{FN3} The form of the instruction is not at issue. ^{FN4} Harris objected to this instruction on the ground that no trial evidence supported a finding that she was suffering from any pain at the time of the accident. The trial court denied the objection on the basis that evidence of pre-existing conditions had been presented:

FN2. Instruction No. 24 read as follows:

A person who has a physical, emotional or

mental condition before the time of the March 29, 2006 incident is not entitled to recover damages for that pre-existing condition or disability.

However, if a person has a pre-existing condition that does not cause pain or disability, but the March 29, 2006 incident causes the person to suffer physical, emotional or mental suffering, Wendy Harris may recover all damages caused by the event.

Although modeled on MUJI CV2019, this instruction is not a model of clarity. For example, it never clearly states the governing rule 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." Biswell v. Duncan, 742 P.2d 80, 88 (Utah Ct.App.1987). A clearer instruction was given in Ortiz v. Geneva Rock Products, Inc., 939 P.2d 1213 (Utah Ct.App.1997):

A person who has a latent, dormant or asymptomatic condition, or a condition to which the person is predisposed, may recover the full amount of damages that proximately result from injuries that aggravate the condition. In other words, when a latent condition does not cause pain, but that condition plus the injury brings on pain by aggravating the preexisting, dormant or asymptomatic condition, then it is the injury, not the dormant or asymptomatic condition, that is the proximate cause of pain and disability.

Id. at 1219 n. 5.

FN3. Instruction No. 23 read as follows:

If Plaintiff had a physical, emotional, or mental condition before the time of the March 29, 2006 incident, she is not entitled to recover damages for that condition or

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disability. However, Plaintiff is entitled to recover damages for any aggravation of the pre-existing condition that was caused by Defendant's fault, even if Plaintiff's pre-existing condition made her more vulnerable to physical or emotional harm than the average person. This is true even if another person may not have suffered any harm from the event at all.

When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty to try to determine what portion of the physical, emotional or mental harm to Plaintiff was caused by the pre-existing condition and what portion was caused by the March 29, 2006 fall.

If you are not able to make such an apportionment, then you must conclude that the entire physical, emotional and mental harm to Plaintiff was caused by Defendant's fault.

FN4. The wording of the instruction was taken directly from Model Utah Jury Instruction CV2018, *see* MUJI CV2018. As a general rule, the Model Utah Jury Instructions are “merely advisory and do not necessarily represent correct statements of Utah law.” *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 359 (Utah 1997). This particular rule, however, is an amended form of a jury instruction that was previously sanctioned as a correct statement of Utah law. *See Tingey v. Christensen*, 1999 UT 68, ¶¶ 12, 15, 987 P.2d 588. Neither party contends that the instruction given was not an accurate statement of Utah law.

Shopko presented substantial evidence that Harris's injuries could be attributed to alternative sources [other than the Shopko incident], both through cross examination of [Harris's] witnesses, and through affirmative testimony from its own witnesses. Harris had a history of neck and back pain, her medical records included references to *fibromyalgia*, and testimony also included the opinion that her current condition was not trauma-related, but caused by degenerative disk disease. In short, testimony was

conflicted with regard to the cause of Harris's condition.

¶ 20 Harris renews her attack on appeal. She argues that ShopKo “presented no evidence that would provide a reasonable basis for determining the portion of damages attributable for each injury, and there was no *1190 evidence of *symptomatic* pre-existing conditions.” **FN5** ShopKo does not dispute the law upon which Harris relies, but maintains that “there was testimony from Harris's own doctors that the pre-existing conditions could be the source of her pain.”

FN5. Harris also frames her claim as an attack on the trial court's refusal to order a new trial based on the ground that the evidence was insufficient to support the jury's damage award.

¶ 21 In support of her challenge, Harris painstakingly marshals the evidence that, in her words, “could be construed in favor of the trial court's decision.” Her effort consumes six pages of her brief containing over seventy citations to the record on appeal. She catalogs her prior episodes of low back pain; her three prior auto accidents and resulting neck and spine pain; her possible *fibromyalgia*; Dr. Colledge's testimony that she suffered from a suspect annular tear and disc bulge, dessication of her spinal discs, age-related *degenerative disc disease*, and possible *facet joint syndrome*; her prior diagnosis of sciatica and subsequent diagnosis of *arthritis*; and a variety of other less relevant medical conditions. **FN6** “After constructing this magnificent array of supporting evidence,” Harris proceeds to “ferret out a fatal flaw in the evidence.” *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991). She shows that, while the evidence of Harris's pre-existing conditions was substantial, none of it is capable of supporting a jury finding that those conditions were symptomatic on the date of the accident.

FN6. We thus do not agree with ShopKo that Harris “lightly glossed over” her marshaling burden.

¶ 22 This conclusion is tacitly confirmed by ShopKo's brief. Although ShopKo chides Harris for the “fragment[s] of evidence Harris deigns to men-

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tion,” ShopKo’s own briefing of this subject contains no record citations to evidence that Harris’s pre-existing conditions were symptomatic on the date of the accident. Rather, it summarizes in a single sentence the evidence of her pre-existing conditions, stating that several health professionals testified that these pre-existing conditions “could be the cause of Harris’s current complaints.” From this ShopKo concludes that, in contrast to *Biswell*, “there was testimony from Harris’s own doctors that the pre-existing conditions could be the source of her pain.” These statements, though accurate as far as they go, do not respond to Harris’s central point.

[10] ¶ 23 As stated above, “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.” *Biswell v. Duncan*, 742 P.2d 80, 88 (Utah Ct.App.1987). “In other words, when a latent condition itself does not cause pain, but that condition plus an injury brings on pain by aggravating the pre-existing condition, then the injury, not the dormant condition, is the proximate cause of the pain and disability.” *Id.* Thus, the crucial question is whether Harris’s pre-existing conditions were, on the date of the accident, “latent, dormant, or asymptomatic,” see *id.* Harris adamantly contends that they were. ShopKo makes no attempt to refute her contention.

¶ 24 Based on Harris’s marshaling of the evidence, ShopKo’s response, and our own careful examination of the record on appeal, we see no evidence capable of supporting a jury finding that Harris’s pre-existing complaints of head, neck, back, and shoulder pain were anything but—to borrow *Biswell*’s phrase—“taken care of” by the time of the accident. *Id.* at 82. We therefore agree with Harris that no evidence supported the jury instruction on apportionment of damages and, consequently, that giving the instruction was error.

[11][12] ¶ 25 However, “[w]e 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.” *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, ¶ 16, 992 P.2d 969 (citation and internal quotation marks omitted).

“The failure to give a jury instruction to which a party is entitled”—or in this case, giving an instruction to which a party was not entitled—“may constitute reversible*1191 error only if it tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law.” *Id.* As in *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, ¶ 18, 992 P.2d 969, “[i]t is impossible to analyze how the jury came to award \$1000 in general damages.” *Id.* ¶ 18. It is equally impossible to know why the jury reduced Harris’s claimed economic damages by two-thirds. However, given the nature and volume of the evidence concerning Harris’s pre-existing conditions, the lack of evidence indicating that those conditions were symptomatic at the time of the accident, and the level of the damage awards, we conclude that, had the jury not been erroneously permitted to reduce Harris’s damages due to asymptomatic pre-existing conditions, that is, “had the [improper] instruction [not] been given, the jury might have awarded more” damages. See *id.* ShopKo understandably does not argue otherwise.

¶ 26 “Our decision to reverse and remand for retrial renders the remaining issues on appeal moot.” *State v. Sellers*, 2011 UT App 38, ¶ 23, 248 P.3d 70. We recognize that if an appellate court grants a new trial, it “may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.” *Utah R.App. P. 30(a)*; see also *Bair v. Axiom Design LLC*, 2001 UT 20, ¶ 20, 20 P.3d 388 (“[W]here an appellate court finds that it is necessary to remand a case for further proceedings, it has the duty of pass[ing] on matters which may then become material” (second alteration in original) (citation and internal quotation marks omitted)). Here, however, even if the case is retried, the remaining issues thoroughly briefed on appeal are either unlikely to recur on retrial or unlikely to recur in a factual context sufficiently similar to the instant one as to make addressing them now, on balance, “helpful to the parties and the court as the case proceeds.” See *Sellers*, 2011 UT App 38, ¶ 23, 248 P.3d 70.

CONCLUSION

¶ 27 At trial, much testimony and many exhibits were devoted to Harris’s pre-existing conditions. However, no witness testified, and no exhibit indicated, that those conditions were symptomatic on the date of the ShopKo incident. ShopKo identifies no

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such evidence, and our own examination of the record has disclosed none. We therefore conclude that under controlling law the evidence offered no basis to instruct the jury on apportioning Harris's damages between those attributable to the accident and those attributable to pre-existing conditions. The trial court's instruction on this point was, consequently, erroneous. We further conclude that the error was prejudicial. We therefore reverse the ruling of the trial court and remand for further proceedings consistent with this decision.

¶ 28 WE CONCUR: JAMES Z. DAVIS, Presiding Judge and MICHELE M. CHRISTIANSEN, Judge.

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**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

WENDY HARRIS,

Plaintiff,

vs.

SHOPKO STORES, INC.,

Defendant.

MEMORANDUM DECISION

Civil No. 070101906

Date: December 23, 2009

JUDGE CHRISTINE S. JOHNSON

This matter came before the Court on Plaintiff's Motion for a New Trial, or in the Alternative, Additur, received by this Court together with a Memorandum in Support on August 31, 2009. Shopko filed its Opposition to Plaintiff's Motion on September 15, 2009. Harris filed her Reply Memorandum on October 12, 2009. The court heard oral arguments on the pending motion on November 16, 2009. Plaintiff was present with counsel, Mr. Nathan Whitaker and Mr. Michael Day. Shopko was present through counsel Alain Balmanno. Having considered arguments presented, having reviewed the file and pleadings submitted by counsel, and having reviewed the applicable law, the Court now makes the following findings and conclusions:

BACKGROUND

1. It is not necessary to provide here a lengthy recitation of the facts, as they are fully preserved in the record. The following are summarized facts pertinent to the motion before the court, granting the jury deference in its role as the fact-finder, and recognizing that for the purposes of a motion for a new trial, the court should view the evidence in the light most favorable to the verdict. *Tingey v. Christensen*, 987 P.2d 425, at ¶7 (Utah 1999).
2. This action centers around an incident which occurred at Defendant Shopko's retail establishment located in Orem, Utah. The incident occurred on March 29, 2006, when Harris was shopping for an office chair. Harris attempted to sit down in a model chair, which was held out as an example of chairs which were offered for purchase. In the process of sitting on the chair, the seat pad detached from the base and Harris fell to the floor. Harris experienced immediate physical pain from her fall and sought medical treatment for her injuries after returning home. She later filed this action, attributing negligence to Shopko for their failure to properly assemble the chair and requesting economic damages for both her existing and future medical expenses, as well as non-economic damages.
3. Trial was conducted from July 13-16, 2009. At the trial, Harris brought forward the testimony of various medical providers to describe her physical injuries from the Shopko incident and the treatment she has received. The primary injury was described as continuing pain in her lower back and coccyx. Harris's treatments since the accident

have included massage therapy, chiropractic adjustments, pain medications, and ultimately a spinal nerve-burning procedure. Future similar procedures are anticipated. Harris presented testimony that her injury was caused by the Shopko incident, and that these procedures have been both reasonable and necessary.

4. Testimony elicited by Shopko countered that Harris suffered from pre-existing conditions, including fibromyalgia and other various complaints of back and neck pain over a period of years. Harris's chiropractor conceded that Harris's pre-existing conditions could be a source of her pain. Testimony further described that Harris's current complaints could be age-related and attributable to the unrelated condition of degenerative disc disorder. Neither party attempted to provide a specific estimate with regard to how much of Harris's pain was attributable to the incident at Shopko, and how much was attributable to these other conditions.
5. Additionally, trial testimony included medical evidence critical of the treatment Harris had received. A former treating physician of Harris, Dr. College, elaborated that much of the treatment sought by Harris was not useful. Specifically, massage therapy and chiropractic care were not helpful in treating her condition and, based on medical evidence, they had not helped improve Harris's functioning. One invoice for message therapy indicated that Harris had received a couple's massage, which was clearly not therapeutic in nature. Dr. College also expressed skepticism in the nerve-burning procedure, as it did nothing to address the underlying tissue injury. He further testified that Harris abused the painkillers prescribed to her, and that this abuse actually tends to

intensify pain for chronic pain sufferers like Harris. Harris's current physician, Dr.

Rosenthal, also confirmed that Harris had been abusing her narcotic medication.

6. With regard to future medical expenses sought by Harris, medical testimony was less than clear about what would be required. Dr. Rosenthal testified that knowing Harris's future needs was akin to looking into a crystal ball, and that he could not testify with a reasonable degree of medical certainty that Harris would need the future pain medication which was requested as part of the award for future damages.
7. The jury found Shopko negligent but awarded a lesser amount of damages than Harris requested. Harris followed by filing the present motion, requesting a new trial, or alternatively an additur, due to multiple argued errors at trial.

CONCLUSIONS OF LAW

8. Harris makes her motion pursuant to Rule 59(a) of the Utah Rules of Civil Procedure, which states in relevant part that a new trial or additur of damages may be granted when, inter alia, there is "irregularity in the proceedings of the court" or there are "excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice," or there is an "insufficiency of the evidence to justify the verdict or other decision." Utah R. Civ. P. 59(a)(1), (5)-(6).
9. The jury is entitled to a large degree of deference in its role in making a damage award. A motion for a new trial should be granted "only where it is obvious that the jury lacked a reasonable basis for its decision, acted with prejudice or passion, or disregarded

competent evidence.” *Andreason v. Aetna Casualty & Surety Co.*, 848 P.2d 171, 174 (UT App 1993).

Plaintiff's Deposition Transcript

10. Harris first asserts that the Court erroneously excluded portions of her transcript, preventing her from clarifying other portions which had been introduced by Shopko on cross-examination. This error, Harris claims, was prejudicial as it prevented her from rehabilitating her credibility.
11. Shopko responds that Defense counsel did not object to Plaintiff's use of the deposition transcript itself. Rather, Defense counsel merely objected that Plaintiff's counsel had not asked the witness a question regarding the transcript.
12. Indeed, the Court did not rule at trial that Harris's deposition transcript was excluded. This Court's ruling was limited merely to directing Plaintiff's counsel to elicit the proposed testimony regarding the deposition in the form of a question. Counsel then initiated a question, but then withdrew it and closed his re-direct of his witness.
13. The Court agrees that it was likely prejudicial to Ms. Harris that she was not able to further explain her deposition testimony. However, any prejudice from this is not attributable to the Court. The Court directed Plaintiff's counsel that he could ask Ms. Harris a question about the transcript. Counsel failed to do so.

Specifications of the Chair

14. Harris claims that a new trial or additur is warranted based upon the court's ruling at trial excluding the specifications of the suspect chair from evidence.

15. Through Plaintiff's Requests for Admission no. 6, served on Defendant on April 6, 2009, Shopko had admitted that Office Star Model #2993 was the type of chair at issue in the case, and that the photographs and instructions attached were accurate. In preparation for trial, counsel on both sides stipulated to the admission of numerous documents; however, the specifications for the chair were not included among those stipulated documents. At trial, Harris showed the specifications of the chair to an entry-level employee of Shopko, Sean Briggs, in what appeared to be an attempt to lay foundation for the document. Shopko objected to the foundation under Rule 901 and the court sustained the objection.
16. URE 901 describes what is required for foundation of documentary evidence as follows:
- "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule elaborates that foundation may be provided by "[t]estimony of witness with knowledge." Utah R. Evid. 901(b)(1).
17. Sean Briggs appeared to have no knowledge of the document being shown to him, and was not a witness with knowledge under Rule 901.
18. Harris asserts that Shopko had waived its foundational objection to the document by not objecting to it within 14 days pursuant to Rule 26. However, Rule 26 allows the court to excuse any waiver "for good cause shown." Utah R. Civ. Pro. 26(a)(4)(d). The court found good cause, as the witness on the stand did not appear to have any knowledge surrounding the document, and because the court deemed that the document, if it had

been admitted to through discovery, ought to have been included with the other stipulated documents which were already before the court.

19. In any case, even should the exclusion of this document be deemed error, there is no support for the position that Plaintiff was prejudiced by it. An exemplar chair was used as a demonstrative exhibit throughout the trial to show the jury the type of chair that was at issue in the incident. Plaintiff's primary argument in support of possible prejudice is that the written specifications described that the chair's maximum height was 21.5 inches, while counsel for Shopko represented that its maximum height was 19 inches.
20. This Court is not persuaded that this distinction is significant. In the first place, there was no indication that the chair was in fact extended to its maximum height at the time of the incident. Therefore, the idea that the jury automatically concluded that Ms. Harris fell from a 19 inch position is without merit. We simply do not know the height of the chair at the time of her fall. Furthermore, Ms. Harris herself testified that the seat pad detached from the chair immediately, and did little, if anything, to break her fall. Accordingly, whether the chair was adjusted to 19 inches, 21.5 inches, or something else, has little significance.
21. Finally, Harris asserts that counsel for Shopko offered improper testimony by representing to the jury that the maximum height of the chair was 19 inches, and that the specifications for the chair should have been allowed to impeach counsel's improper testimony. This argument was not made at trial, thus this Court was not able to consider allowing the specifications to come in for impeachment purposes. In asserting this point

now Harris concedes that Plaintiff's counsel refrained from objecting to the improper testimony by counsel during trial "as part of a litigation strategy." *Plaintiff's*

Memorandum at 21. Where Plaintiff's counsel exercised professional discretion in not making an objection at trial, this Court will not now consider that as reversible error.

22. Accordingly, the exclusion of the chair's specifications is not a basis for a new trial or additur.

Present Cash Value

23. Harris next objects to the instruction provided to the jury with regard to present cash value. The instruction, which was taken from the Model Jury Instructions, provided to the jury was as follows:

If you decide that Wendy Harris is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though Wendy Harris would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield. To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide Wendy Harris with the amount of money needed to compensate her for future economic losses, if any. In making your determination, you should consider the earnings from a reasonably safe investment.

24. Harris asserts that some manner of testimony was required for the jury to interpret how to calculate the damages into a present value. Harris cites as authority *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, *cert. denied* (Utah 2005). However the *Gallegos* decision does not stand for this proposition. *Gallegos* permits expert testimony on annuities in order to translate the present value of those future payments. However, as is observed by the Committee Notes, "Utah law is silent

on whether expert testimony, government tables, or other evidence is necessary before a jury is charged to calculate present cash value.” MUJI CV2021 Committee Notes.

25. Based on current law, no expert testimony or other supplementary evidence was required in this case for the jury to make the determination on present value. The plaintiff’s evidence with regard to future damages was not presented in the form of a future sum, such as an annuity, which needed to be translated into a present value. Rather, plaintiff presented the present cost of medical procedures which would be required in the future. It was fairly within the province of the jury to make a reasonable judgment about the present sum of money Ms. Harris would require for her future treatments.
26. Furthermore, the jury instruction given prevented confusion. Had no instruction been given, the jury would have been forced to guess at whether they were to award damages based on present value or on some unknown future figure. Instructing the jury with an accurate statement of the law provided them with the information they required to make a fair and reasonable award of damages.

Apportionment of Pre-Existing Injury

27. Harris asserts that the court erred in advising the jury on the issue of apportionment, and that this error warrants the granting of a new trial.
28. Shopko presented substantial evidence that Harris’s injuries could be attributed to alternative sources, both through cross examination of Plaintiff’s witnesses, and through affirmative testimony from its own witnesses. Harris had a history of neck and back pain, her medical records included references to fibromyalgia, and testimony also included the

opinion that her current condition was not trauma-related, but caused by degenerative disk disease. In short, testimony was conflicted with regard to the cause of Harris's condition.

29. The Utah Supreme Court considered the issue of apportionment in *Robinson v. All-Star Delivery*, 992 P.2d 969 (Utah 1999). In *Robinson*, the plaintiff sued the defendant after a motor vehicle collision where plaintiff alleged the he was physically injured. The defendant did not dispute his liability in causing the accident, but asserted that plaintiff's injuries were attributable to a previous motor vehicle accident. *Id.* At trial, the parties presented conflicting expert testimony as to whether the plaintiff's injuries arose from the previous accident, or the accident at issue. The plaintiff's doctor testified that the physical injuries were primarily the result of the accident defendant caused, while defendant's doctor "concluded that it was more likely than not that [the plaintiff's injuries] each stemmed from the [previous] accident. However, [he] acknowledged that the [later] accident could have caused a 'flare up' or 'some increase' in pain to Robinson's preexisting injuries." *Id.* at ¶6.
30. The trial court did not give plaintiff's proposed jury instruction on aggravation of preexisting injuries, and when the jury verdict returned for a lesser amount than was requested, the plaintiff appealed. The Utah Supreme Court found the trial court's decision to be reversible error, and the case was remanded for a new trial on damages. In so holding, the Court observed that "the evidence was in conflict as to the apportionability of the damages. [The plaintiff's doctor] testified that the [recent] accident

caused most of Robinson's damages. [The defendant's doctor] testified that the [earlier] accident caused Robinson's injuries. Thus, the trial court should have instructed the jury on what to do if it was unable to apportion damages in a reasonable manner." *Id.* at 14.

31. The facts of the present case are notably similar to those of *Robinson*. In both instances, the plaintiff's medical testimony indicated that the injuries were linked to the accident which initiated the lawsuit, while the defendant's medical testimony indicated that the injuries were largely attributable to other causes. In neither *Robinson* nor this case was there an attempt to offer testimony as to what specific percentage, if any, of the damages could be tied to the accident at issue.¹ Thus, the jury needed to be instructed about what to do if they could not apportion the damages in a reasonable manner.
32. The instructions given in the present case accomplished that purpose. Taken entirely from *Model Utah Jury Instruction*, Civil 2018 and 2019, the instructions advised jurors that it is their duty to try to apportion damages, and if they were not able to reasonably do so, then they must conclude that the entire harm was caused by Shopko. This is a correct statement of the law, and it provided the jury with the information they required in order to weigh the conflicting testimony presented with regard to Harris's medical injuries.

Whereas the *Robinson* court determined, under strikingly similar circumstances, that it

¹It does not appear that this type of specificity is required, as the Committee Note makes clear that the jury need not make this precise finding in its verdict. The Committee observes that "[t]his instruction is not intended to suggest that the verdict form include a line-item allocation of what part of the harm can be apportioned to the pre-existing condition, and what part to the defendant's fault. That question is answered by the jury's award of damages[.]" MUJI CV2018 Committee Notes.

was reversible error *not* to give the pre-existing condition instruction, this court cannot reasonably find that it was reversible error to give it.

Liability of a Business Owners Jury Instruction

33. Harris next contends that the Jury Instruction regarding the liability of business owners was error and should result in a new trial or additur. Harris does not assert that the instruction was an incorrect statement of the law; rather, she claims that the instruction was prejudicial and resulted in a lowered damage award. Shopko responds that this instruction was directed to address the jury's deliberations regarding liability, and whereas the jury found Shopko negligent, the instruction has no bearing on Harris's current complaint regarding the damage award.
34. Shopko is correct that the jury instruction at issue is unrelated to damages. It solely addressed the question of negligence, and when read in its entirety, described for the jury the distinction between a temporary condition, which would require notice to the business owner, and a permanent condition, which would not. Harris does not specifically articulate how this instruction was prejudicial to its damage award, but broadly claims that the instruction suggests "that there is a requirement for a plaintiff to prove beyond negligence." *Plaintiff's Memorandum* at p. 26.
35. This Court does not read any such requirement into this instruction. Whereas the jury found Shopko liable, this instruction has no relation to the damage award to which Harris now objects. Accordingly, it does not form a basis for a new trial or additur.

Dr. College's Delayed Recovery Syndrome Testimony

36. Plaintiff asserts that the Court erred when it allowed Dr. College to testify regarding “delayed recovery syndrome” as this testimony was not relevant, and it was more prejudicial than probative. Harris maintains that this testimony acted to lower her award of damages. Shopko responds that this testimony was relevant because it speaks to the issue of whether the treatment Harris sought was necessary or reasonable.
37. Dr. College offered his testimony regarding “delayed recovery syndrome” because it explained, in part, why he believed that the treatment she sought was not medically reasonable or necessary. Dr. College agreed that the Shopko incident had caused some soft tissue injury to the Plaintiff, but elaborated that this type of injury should be expected to heal after a matter of weeks, not years as was the case with Ms. Harris. In Ms. Harris’s case, her condition evolved into what Dr. College described as “chronic pain.” Dr. College explained that the remedies Harris had sought, such as chiropractic care, massage therapy, and surgery, were not reasonable or necessary for the treatment of her chronic pain. As stated by Dr. College: “after three to eight weeks the pain is chronic, establishes new circuitry, and serves no useful purpose. *Hurt does not mean harm in this case*, and to treat chronic pain like acute pain limits quality of life and is debilitating to the patients.” *Defendant’s Opposition*, at p. 32 (emphasis added).
38. URE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

39. Given this broad definition of relevancy, it is simply not tenable to suggest that Dr. College's testimony on this point was not relevant. Central to the issue of damages in this case was the question of whether Ms. Harris's treatment was reasonable and necessary. Dr. College, one of Harris's treating physicians, used his assessment that she suffered from delayed recovery syndrome to explain why he believed much of the treatment she sought was neither reasonable nor necessary. It was Dr. College's opinion that Ms. Harris's course of treatment was not necessary to treat the injury she sustained in the Shopko incident. This type of testimony is relevant under the rule.
40. Relevant evidence may be excluded if unduly prejudicial, as described in URE 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]"
41. Harris maintains that Dr. College's testimony is confusing and prejudicial. She asserts that a tortfeasor takes the plaintiff as he finds her. This includes any physical or mental weakness that would make the plaintiff more susceptible to injury, or cause the plaintiff to heal more slowly. Accordingly, if Harris does suffer from delayed recovery syndrome, she is still entitled to recover for her injuries.
42. However, the jury was instructed with regard to this principle. Jury Instruction No. 22 reads as follows: "A person who may be more susceptible to injury than someone else is still entitled to recover the full amount of damages that were caused by Defendant's fault."

In other words, the amount of damages should not be reduced merely because Plaintiff may be more susceptible to injury than someone else.”

43. Accordingly, the jury was aware that any reduction in damages could not be given merely because Ms. Harris was susceptible to greater injury, or to a prolonged recovery as a result of her delayed recovery syndrome.
44. In addition, much of Shopko’s case was prejudicial to Harris, and similarly much of Harris’s case was prejudicial to Shopko. Prejudice alone is not a sufficient basis to exclude relevant evidence. “[T]he critical question is whether certain testimony is so prejudicial that the jury will be unable to fairly weigh the evidence.” *State v. Downs*, 2008 UT App 247 ¶7; 190 P.3d 17.
45. This Court is not persuaded that Dr. College’s testimony regarding delayed recovery syndrome prevented the jury from fairly weighing all of the evidence presented. His testimony was one factor among many which the jury considered in arriving at the damage award in this case. Indeed, it is clear from the verdict that the jury did not adopt Dr. College’s pessimistic view of Harris’s treatment. Dr. College discounted the nerve-burning procedure Harris had received and testified that the future similar procedures she is seeking would not be helpful in treating her pain. Notwithstanding this, the jury awarded Harris \$10,000 in future damages, adopting, at least in part, her theory that future medical treatment was reasonable and necessary and rejecting Dr. College’s opinion that such a procedure was not reasonable in the treatment of her chronic pain.
46. Accordingly, Dr. College’s testimony does not provide a basis for new trial or an additur.

Dr. College's Curriculum Vitae

47. Plaintiff further objects to the admission of Dr. College's Curriculum Vitae as documentary evidence, asserting that it is hearsay.
48. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Unless an exception to this rule applies, hearsay is not admissible. *See* Utah R. Evid. 802. Harris asserts that receiving the CV was reversible error, as it allowed the jury to place undue emphasis on Dr. College's qualifications.
49. Shopko concedes that the CV was hearsay, but claims that it qualifies for an exception to exclusion pursuant to Rule 807. However, at a minimum, this rule requires that the adverse party receive notice "in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it." Utah R. Evid. 807. This notice was not given.
50. Accordingly, the CV does not meet the hearsay exception outlined in Rule 807. Notwithstanding, this court is persuaded that "if a witness testifies to the points on his CV, exclusion serves little purpose" *Defendant's Opposition* at p. 35. Indeed, at trial, Dr. College's qualifications were fully presented to the jury and it seems far-fetched to believe that seeing in print the same information that was presented verbally amounts to the reversible error Harris now claims.
51. The court must consider any motion for a new trial in light of the following:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court

inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Utah R. Civ. Pro. 61.

53. There is nothing presented by Harris to give rise to the conclusion that the jury's review of Dr. College's CV affected the substantial rights of the Plaintiff. Accordingly, it cannot be viewed as the basis for a new trial or additur.

Dr. Rosenthal's Report

54. Plaintiff next objects to the characterization at trial of her expert's report as "attorney drafted." At trial, Shopko cross-examined Dr. Rosenthal regarding the credibility of the conclusions contained in his written report. This cross-examination included an inquiry into the fact that Dr. Rosenthal's report was drafted by Plaintiff's counsel, and then signed by Dr. Rosenthal after his review. Plaintiff objected, asserting that these questions were irrelevant and prejudicial, and Plaintiff renews this argument here.
55. Procedural rules regarding expert reports permit the practice adopted by Plaintiff. Parties are required to disclose expert witnesses prior to trial, and this disclosure must "be accompanied by a written report prepared and signed by the witness *or party*." Utah R. Civ. P. 26(a)(3)(B)(emphasis added). Thus, Harris did nothing improper in proceeding in this fashion, and likely minimized some of the expenses of retaining an expert witness. Indeed, this cost-savings is contemplated by the rule.²

²The Advisory Committee reports that one consideration for this rule was "[b]oth plaintiffs' attorneys and defense attorneys reported on the high cost of reports by experts[.]" Utah R. Civ. P. 26, Advisory Committee's Note.

56. However, the issue of cost-savings aside, the simple fact remains that the practice of having someone other than the witness draft the report may, under certain facts, introduce a credibility issue. This was the case here. Dr. Rosenthal's report contained in it's opening statement the assertion that the report was "based upon the review of the Plaintiff's medical records." However, Dr. Rosenthal conceded that his record review was incomplete, and that he had not reviewed Alta View Hospital's records, Spanish Fork Clinic's records, South Towne Chiropractic records, Central Utah Clinic's records, Dr. College's records, Utah Neurological Clinic's records, Dr. Cardner's report, Intermountain Healthcare records, Massage Envy records, Dr. Jackson's records, South Valley Physical Therapy records, the August 2007 MRI, or the pre-Shopko incident records. What he had reviewed was a *summary* of these records, which had been prepared by Plaintiff's counsel.
57. In short, Dr. Rosenthal's written assertion that, in consideration of his conclusions, he had reviewed the Plaintiff's medical records was, at best, an overstatement, which seems attributable to the fact that he did not author the report that he signed. Inquiry into the credibility of Dr. Rosenthal's report, and its conclusions, is allowed, and under these facts was clearly appropriate.
58. Immediately prior to cross-examination on this issue, the court instructed the jury that "pursuant to Rule 26, a witness who is retained or specially employed to provide expert testimony in a case is required to submit a written report. That report may be prepared by either the witness who is testifying or a party." This supplementary instruction was taken

almost directly from the rule, and was intended to advise the jury that Harris had done nothing *improper* in allowing Dr. Rosenthal to sign a report prepared by counsel, and that no inference of impropriety should be given. Rather, any inquiry into the authorship of the report simply went to the weight of its conclusions. This is an issue which is clearly relevant for the jury to consider. Both parties at trial are entitled to fairness in the proceedings, and this includes the right of the Defendant to cross-examine an expert witness about the credibility of his conclusions.

59. Accordingly, the court rejects the argument that the reference to Dr. Rosenthal's report as being "attorney-drafted" was irrelevant or unduly prejudicial.

Plaintiff's Loss of Consortium

60. Harris's next claim of error is the exclusion of a portion of the testimony from Harris's husband, Tom Harris. At trial, Mr. Harris described for the jury the diminished quality of life Ms. Harris has experienced since the Shopko incident. Shopko objected at the point where Plaintiff's counsel inquired as to the couple's intimate relationship, based upon the fact that no loss of consortium claim had been made. The Court sustained Shopko's objection and excluded the testimony. Plaintiff now claims that non-economic damages were reduced as the jury was not permitted to hear this portion of Mr. Harris's testimony.
61. However, at trial Ms. Harris offered her own testimony regarding her lessened quality of life since the incident, and was permitted to describe for the jury at length what she believes she has suffered in terms of non-economic damages. Mr. Harris was permitted to bolster her testimony, with the exception of his account of their intimate relationship.

62. Plaintiff does not dispute that there was no loss of consortium claim made on the part of Mr. Harris, and that the testimony proffered by Mr. Harris was intended only “to support the credibility of Ms. Harris’s testimony[.]” *Plaintiff’s Memorandum* at 34.
63. Utah law provides that a spouse may maintain an action against a third party for loss of consortium, provided that such claim is made concurrently with the claim of the injured party. Utah Code Ann. §30-2-11(2)-(4). However, where this action included no complaint of loss of consortium, Mr. Harris’s testimony about his lack of intimacy with his wife was simply not relevant. Mr. Harris’s account of any lack of intimacy would have offered nothing to the jury’s consideration of how Ms. Harris had been damaged. Ms. Harris was free to detail for the jury the manner in which the quality of her life had been diminished since her injury, and this testimony certainly could have included a description of her loss of intimacy. Had Shopko attacked her credibility on this point, Mr. Harris’s testimony supporting her credibility would have been appropriate. However, Shopko maintains that it did not attack Ms. Harris’s credibility regarding any loss of intimacy, and Harris, in not contesting this point, appears to concede the same.
64. Accordingly, this Court is not persuaded that Mr. Harris’s proffered testimony about his intimate relationship with his wife was relevant. Exclusion of this testimony is not a basis for a new trial or additur.

Sufficiency of the Evidence

65. Harris next contends that a new trial or additur is warranted due to an insufficiency of the evidence, based upon the assertion that the damages awarded are inadequate given the evidence presented by the Plaintiff.
66. Harris contends in support of this argument is that the damage award was given in a round number, and this should compel a finding that the jury simply reached an arbitrary figure without attempting to determine whether the damages were reasonable or necessary. No authority, however, is offered for this position. This Court declines to simply make this assumption. It is the prerogative of the jury to make the determination of damages, and deference must accordingly be given to the jury's verdict. "We cannot substitute our judgment for that of the fact finder unless the evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion." *Onyeabor v. Pro Roofing*, 787 P.2d 525, 530 (Utah Ct. App. 1990).
67. The evidence presented at trial does not compel a different conclusion. Indeed, Harris's claim that the jury's damage award is not supported by the evidence ignores much of the testimony that was presented during this trial. While the Plaintiff did present significant evidence in its case that Ms. Harris was injured in the Shopko incident, and that she incurred necessary and reasonable medical expenses as a result, Shopko also presented a compelling case. Shopko's theory of the case was first, it was not negligent and did not cause Harris's injury, and second, if there was causation, that the medical expenses were unrelated to the Shopko incident, and they were not reasonable or necessary.

68. At the close of Harris's case-in-chief, both sides made a motion for a directed verdict. This Court denied both motions, noting that a reasonable jury could find for either the Plaintiff or the Defendant. The verdict of the jury fully supports the Court's ruling on that motion. The jury in this matter concluded that Shopko was negligent, and caused Ms. Harris's injury, thus rejecting Shopko's contention that it was not liable. However the jury also appears to have concluded that many of Shopko's arguments with regard to damages were well-taken.
69. There were multiple grounds for the jury to reduce the amount of damages from what was requested by Harris. The jury heard significant evidence of the following: (1) Harris had pre-existing injuries and health complaints which could account for many of her on-going physical complaints, including evidence that Harris currently suffered from degenerative disc disease which was unrelated to the Shopko incident, and that she had previously complained of back pain and possible fibromyalgia; (2) Harris had abused pain medication after the Shopko incident, taking beyond the amount her physicians prescribed as necessary, thereafter placing herself in a position where she was physically dependant upon the drugs as well as actually intensifying her pain level; (3) much of her past treatment was characterized as not being reasonable or necessary, as chiropractic sessions and message therapy did not serve to treat her underlying injury³; (4) the future treatment

³The jury likely found in particular Ms. Harris's "couple's massage" to be a particularly egregious mis-use of treatment. While there was only one example of a couple's massage, this certainly could have undercut Harris's credibility and made it appear that she was seeking treatment that was not truly related to the Shopko incident.

requested was similarly criticized as being marginal, unnecessary, and completely speculative.

70. In short, there was significant evidence to support the jury's conclusions that while Shopko was liable for Ms. Harris's fall, Shopko was not responsible for the amount of damages requested. While Harris may have a different opinion about the result, this is not a basis to set aside the damage award of the jury.
71. Absent some evidence compelling this Court to set aside the conclusions of the jury, this Court declines to grant a new trial or additur on Harris's claim of insufficient evidence.

Passion or Prejudice

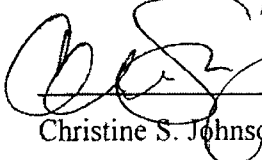
72. Plaintiff's final contention is that a new trial or additur is warranted as the jury's award appears to have been given under passion or prejudice. Rule 59 does permit a new trial or amendment to judgment for "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice." Utah R. Civ. Pro. 59(a)(5).
73. However, the Court of Appeals has previously determined that "[a] trial court *cannot* grant a new trial if there is sufficient evidence to support a verdict for either party and the judge merely disagrees with the judgment of the jury." *Neely v. Bennett*, 51 P.3d 724, 729 (UT App 2002) (emphasis in original).
74. As stated above, there is ample evidence to support the conclusions of the jury, and no evidence to suggest that the jury rendered its decision based upon passion or prejudice. Harris "simply failed to convince the jury of [her] entire case." *Onyeabor*, 787 P.2d at 530. This is not a basis for a new trial or additur.

ORDER

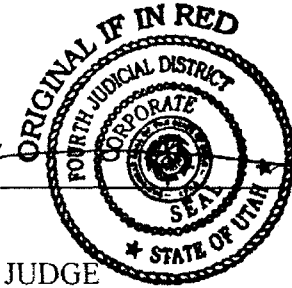
75. Based upon all the foregoing, Harris's Motion for a New Trial or Additur is DENIED.

DATED this 23 day of December, 2009.

BY THE COURT:


Christine S. Johnson

DISTRICT COURT JUDGE



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