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Wendy Harris v. Shopko Stores, Inc : Amicus Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

WENDY HARRIS,

Plaintiff/Respondent,

v.

SHOPKO STORES, INC.,

Defendant/Petitioner.

Case no. 20110945-SC

Ct. App. Case no. 20100106-CA

Dist. Ct. Case no. 070101905

**BRIEF OF AMICUS CURIAE
UTAH ASSOCIATION FOR JUSTICE**

ON WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS

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UTAH APPELLATE COURTS

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STATEMENT OF INTEREST

The Utah Association for Justice (“UAJ”) is a statewide organization comprised of attorneys committed to protecting the rights of persons who have been injured in their person or property, and who turn to the courts for judicial redress. In promoting these interests, UAJ seeks to preserve a fair, prompt, open and efficient administration of justice.

UAJ members represent injured people in the vast majority of personal injury tort actions in this state. The Court’s decision on what jury instructions are appropriate based on evidence of a tort victim having a preexisting condition that is symptomatic compared to a preexisting condition that is asymptomatic will impact virtually every one of those actions, as well as future personal injury litigation. Thus, the resolution of this case significantly impacts not only the parties to this action, but also thousands of tort victims throughout the state of Utah.

STANDARD OF REVIEW AND STATEMENT OF THE CASE

As amicus curiae, the Utah Association for Justice refers to the Standard of Review and Statement of the Case as set forth by Plaintiff/Respondent, and incorporates them as if set forth fully herein.

ISSUES PRESENTED

This Court granted certiorari on the following issues:

1. Whether the court of appeals erred in holding there was insufficient evidence to support an apportionment-to-preexisting -conditions jury instruction.

2. Whether the court of appeals erred in holding the apportionment instruction required evidence of a symptomatic preexisting condition on the “date of the accident.”
3. Whether the court of appeals erred in holding the apportionment instruction affected the outcome of the trial.
4. Whether *Biswell v. Duncan*, 743 P. 2d 80 (Utah App. 1987) states the correct legal standard.

SUMMARY OF ARGUMENT

UAJ’s brief will not address the case-specific questions (one and three) but will only address the issues that have broader application (two and four). *Biswell v. Duncan*, 743 P.2d 80 (Utah App. 1987) states the correct legal standard as applied to asymptomatic plaintiffs.¹ A defendant is liable for the entire harm caused to a plaintiff with an asymptomatic condition because, “but for” the tortfeasor’s negligence, the plaintiff would not have had any pain or treatment due to the condition whatsoever.

The Court of Appeals, in determining that Plaintiff Harris was not symptomatic on the “date of the accident” and therefore a jury instruction instructing the jury on symptomatic preexisting conditions was inappropriate, indicated that Harris’ preexisting complaints were taken care of “by the time of the accident.” The question of how long a plaintiff must be free from symptoms in order to declare a preexisting condition resolved or “taken care of” was not directly before the Court of Appeals in this case, as the uncontested evidence shows that Harris was asymptomatic for several years prior to the accident at issue.

1. For purposes of this brief, the UAJ will refer to plaintiffs with latent, dormant or asymptomatic preexisting conditions (as opposed to preexisting injuries that caused pain or disability) at the time of the accident as “asymptomatic plaintiffs.”

Whether a plaintiff has a preexisting condition that was asymptomatic versus symptomatic at the time of the injury-causing event should be determined in two stages. First, the trial court should make a pretrial determination of whether the defendant can present sufficient evidence that the plaintiff was symptomatic within a sufficiently close period of time prior to the injury-causing event. If the defendant does not have sufficient evidence to present that the plaintiff was symptomatic within a sufficiently close period of time prior to the injury-causing event, then introducing evidence of any prior accidents or preexisting conditions would be irrelevant and unduly prejudicial. If the trial court believes that the defendant has sufficient evidence that the plaintiff was symptomatic within a sufficiently close period of time prior to the injury-causing event, then the matter should go to the jury to decide whether the plaintiff was symptomatic prior to the accident. *See Ortiz v. Geneva Rock Prods.*, 939 P.2d 1213, 1220 n.5 (Utah App. 1997) (noting that both instructions for a symptomatic condition and an asymptomatic condition were given when the evidence was disputed as to whether plaintiff's condition was asymptomatic).

ARGUMENT

I. *BISWELL* IS A CORRECT STATEMENT OF THE LAW AS APPLIED TO ASYMPTOMATIC PLAINTIFFS.

This Court should clarify that while a jury must try to apportion an aggravation of a preexisting symptomatic condition, a tortfeasor is fully liable for all of the damages caused by an injury to a plaintiff with a preexisting asymptomatic condition. The asymptomatic/symptomatic distinction is found in *Tingey v. Christensen*, 1999 UT 68,

¶ 15, 987 P.2d 588 and *Biswell v. Duncan*, 742 P.2d 80, 88 (Utah Ct. App. 1987). In *Tingey*, this Court held that “if the jury can find a reasonable basis for apportioning damages between a preexisting condition and a subsequent tort, it should do so; however, if the jury finds it impossible to apportion damages, it should find that the tortfeasor is liable for the entire amount of damages.” *Tingey*, 1999 UT 68 at ¶ 15. While this Court did not expressly make a symptomatic/asymptomatic distinction in *Tingey*, the Court noted that the plaintiff was symptomatic at the time of the accident and was receiving ongoing pain management treatment for numerous injuries, including a visit less than a month before the crash to a pain clinic during which she complained of severe pain. In *Biswell*, the Court of Appeals addressed injuries to a plaintiff with a preexisting asymptomatic condition and held that when the tortfeasor’s negligence causes an injury to a person with a preexisting 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*, 742 P.2d at 88.

The difference in the rules set forth in *Tingey* and *Biswell* is that *Tingey* applies to an aggravation of a symptomatic condition, while *Biswell* applies to a preexisting asymptomatic condition that is activated by the accident.² Courts and commentators have

2. It appears that ShopKo contends that *Biswell* is not a correct statement of the law because it removed “the aggravation element.” (See Br. Pet’r 21-22.) *Biswell* is clear that liability is found only “when a defendant’s negligence *aggravates* or *lights up* a latent, dormant, or asymptomatic condition.” *Biswell*, 742 P.2d at 88 (emphasis added). This statement of the law is substantively identical to the rule in *Brunson v. Strong*, 412 P.2d 451, 453 (Utah 1966) (holding plaintiff is entitled to recover damages “including any

noted the distinction between the application of the “eggshell plaintiff rule” to plaintiffs with a symptomatic preexisting condition and those with a dormant or latent condition. “[C]ourts note a distinction between an asymptomatic or latent condition—for which the defendant is entirely liable—and a preexisting symptomatic condition which requires apportionment, if possible.” Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 Cardozo L. Rev. 749, 761 (2010); *see also* 2 Jacob A Stein, *Stein on Personal Injury Damages* § 11:1 (3d ed. 1997) (noting the difference between the application of the eggshell plaintiff rule to plaintiffs with asymptomatic preexisting conditions and plaintiffs with preexisting conditions being actively treated at the time of the accident); Rachel V. Rose, et al., *Another Crack in the Thin Skull Plaintiff Rule*, 10 Tex. J. Women & L. 165, 182 (2011) (noting that the distinction between symptomatic and asymptomatic preexisting conditions is important because defendant is liable for all harm to a latent condition but only for the aggravation if the condition was symptomatic); Candice E. Renka, *The Presumed Eggshell Plaintiff Rule: Determining Liability When Mental Harm Accompanies Physical Injury*, 29 T. Jefferson L. Rev. 289, 298 (2007) (noting that defendant is liable for any resulting harm if he activates a latent condition but only liable for the aggravation if the condition is symptomatic at the time of the accident).

As noted by the Utah Court of Appeals, the distinction is found in the two different model jury instructions addressing preexisting conditions: (1) “aggravation of

aggravation or lighting up of such a preexisting condition”), which ShopKo notes is the correct rule of law and contains “the core causal element.” (*See* Br. Pet’r 21.)

symptomatic preexisting conditions” and (2) “dormant preexisting conditions.” See *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, ¶ 18, 263 P.3d 1184 (referencing MUJI 2d CV2018 and CV2019). Other jurisdictions follow a similar approach when distinguishing between symptomatic and asymptomatic preexisting conditions.

The Washington Supreme Court noted the symptomatic/asymptomatic distinction in *Harris v. Drake*, 99 P.3d 872 (Wash. 2004). With facts similar to this case, the court upheld a trial court’s directed verdict for the plaintiff on causation when the defense failed to show that a preexisting condition was symptomatic “prior to the accident.” *Id.* at 878. The court explained that “when an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, *the preexisting condition is not a proximate cause of the resulting damages.*” *Id.* (emphasis added) (citing *Bennett v. Messick*, 457 P.2d 609, 612 (1969)).³

The Iowa Supreme Court has also noted that the tortfeasor is liable for the full injury when the injury is superimposed upon an asymptomatic condition. In *Sleeth v. Louvar*, 659 N.W.2d 210 (Iowa 2003), the court noted the conflict presented by the rule applicable to an aggravation of a symptomatic injury (as in *Tingey*) and the rule applicable to an injury involving an asymptomatic condition (as in *Biswell*). *Id.* at 211-12. The court characterized the two rules as (1) the aggravation rule and (2) the eggshell plaintiff rule. *Id.* The aggravation rule, it explained, applies when a preexisting condition

3. The Utah Court of Appeals relied upon *Bennett v. Messick* in its opinion in *Biswell*. See *Biswell*, 742 P.2d at 88.

was symptomatic and caused some sort of disability prior to the accident, and the eggshell plaintiff rule applied when the condition was asymptomatic. *Id.*

In *Sleeth*, the plaintiff had asymptomatic arthritis in her knee when she was in a car crash and injured her knee. *Id.* at 211. Her friends, coworkers, and family testified that she had never complained of pain in her knee prior to the accident and that she was very active. *Id.* at 214-15. Over the plaintiff's objections, the trial court gave both the aggravation rule and the eggshell plaintiff rule to the jury. *Id.* at 212. As there "was no substantial evidence of preexisting disability" to the plaintiff at the time of the injury-causing event, the court held that it was error to give the aggravation (*Tingey*) jury instruction and that the trial court should have only given the eggshell (*Biswell*) instruction. *Id.* at 216; see also *Becker v. D&E Distributing Co.*, 247 N.W.2d 727 (Iowa 1976) (holding that because a plaintiff's prior foot condition was "not disabling in any way" before the accident caused by the defendant, the defendant was liable for the full extent of those injuries).

Several other jurisdictions have made similar conclusions. The Hawaii Supreme Court held that there should be no apportionment of damages if a person was fully recovered from a preexisting injury or condition at the time of an accident. "In such circumstances, [the tortfeasor] should be liable for the entire damages." *Bachran v. Morishige*, 469 P.2d 808, 811 (Hawaii 1970). The court distinguished the fully recovered plaintiff from one who was still experiencing pain or who was disabled from a prior injury at the time of an accident. If the plaintiff was still experiencing pain at the time of the accident, "then damages should be apportioned." *Id.* at 812. The Texas Supreme

Court held that an aggravation instruction (*Tingey*) should only be given if the plaintiff had a symptomatic preexisting condition before the crash and similar pain after the crash due to the injury, creating an intermingling of pain. *See Dallas Ry. & Terminal Co. v. Orr*, 215 S.W.2d 862, 864 (Tex. 1948). The Arizona Supreme Court also held that it was not proper to give an aggravation instruction (*Tingey*) when the plaintiff had a dormant condition involving “an anatomically different spine than that of a ‘normal’ person.” *Scottsdale v. Kokaska*, 495 P.2d 1327, 1335 (Ariz. 1972). Thus, courts of various jurisdictions have upheld the rationale supporting the sound ruling issued in *Biswell*.

The *Biswell* rule is not only rationale and equitable, but it is also supported by sound public policy. Holding tortfeasors liable for the full damages suffered by an asymptomatic plaintiff is logical because, but for the tortfeasor’s negligence, the asymptomatic plaintiff would not have had any pain and would not have been forced to seek medical treatment. In other words, in the absence of the tortfeasor’s negligence, an asymptomatic plaintiff would not have experienced pain and suffering or incurred medical expenses at all.⁴

Even though an asymptomatic plaintiff might have greater damages than a person without an asymptomatic preexisting condition, courts and commentators agree that the

4. The Delaware Supreme Court explained that, under tort law, if a plaintiff had a preexisting disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident. The accident need not be the sole cause or even the substantial cause of the injury. If the accident provides the “setting” or “trigger,” causation is satisfied for purposes of compensability. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1993).

tortfeasor should be liable for the full amount of the damages. The rule “accords with society’s general sense of justice that a tortfeasor should be liable irrespective of the unexpectedness of such harm.” Richard A. Epstein, *Cases and Materials on Torts* 524 (7th ed. 2000). Our civil system awards a plaintiff for his actual damages, not what a typical or average person would recover. For example, if a tortfeasor runs a red light and crashes into a person driving a \$250,000 luxury vehicle and totals it, the plaintiff recovers \$250,000, not the value of an average car. Or, if a tortfeasor runs a red light and crashes into a physician who makes \$250,000 per year and the crash disables him, the physician recovers the amount of income he lost even though the average person’s income is much less. *See Schafer v. Hoffman*, 831 P.2d 897, 902 n.9 (Colo. 1992) (explaining that the “shabby millionaire rule” is the application of the eggshell plaintiff doctrine to the extent of damages). The same rule applies with injury claims: if a tortfeasor runs a red light and crashes into a vehicle occupied by a healthy college football linebacker and his grandmother, the football player would recover no damages if he was not injured, while his grandmother would recover all of her damages, even if the average damages incurred by a person in a car crash would be more than the football player’s damages or less than his grandmother’s damages.

Allowing a jury to apportion damages based on a person’s asymptomatic condition will lead juries to award less to the elderly and those with active jobs and lifestyles because these categories of plaintiffs are more likely to have degenerative conditions, many of which are asymptomatic. For example, degenerative disc disease is a spinal condition caused by age and wear and tear that makes the discs between the vertebrae

more susceptible to injury. William C. Shiel, Jr., *Degenerative Disc Disease and Sciatica*, MedicineNet.com, http://medicinenet.com/degenerative_disc/article.htm (last visited May 29, 2012). It should not be surprising that older people have more fragile spines and many will have discs that have started to degenerate due to age. Similarly, nurses, farmers, mechanics, and construction workers will have spines and joints that have begun to degenerate due to wear and tear from active physical jobs. Finally, those who maintain an active lifestyle such as campers, hikers, bikers, fisherman, runners, etc. will likely have more wear and tear on their joints due to their active lifestyle. Thus, the dormant “condition” that would be apportioned, absent *Biswell*, is the plaintiff’s age, sex, occupation, or lifestyle. Apportioning damages in such a way would penalize people for simply growing old, choosing a certain job, or choosing an active lifestyle. The *Biswell* rule is not only the correct statement of the law, but also an equitable rule, as it holds the tortfeasor responsible for the damages that, but for his or her negligence, the plaintiff would not have suffered.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THERE WAS INSUFFICIENT EVIDENCE TO SUBMIT THE QUESTION OF WHETHER HARRIS WAS SUFFERING FROM A SYMPTOMATIC PREEXISTING CONDITION ON THE “DATE OF THE ACCIDENT” TO THE JURY.

The Court of Appeals’ decision indicated that a tortfeasor is liable for all damages caused to a plaintiff who has a dormant condition if the plaintiff’s condition was asymptomatic on the date of the accident. *See Harris*, 2011 UT App 329 at ¶ 22. After looking at the evidence marshaled by Harris and conducting its own review of the record, The Court of Appeals concluded that the uncontested evidence was that Harris’

preexisting complaints were taken care of “by the time of the accident” and so the trial court erred in submitting the issue of apportionment to the jury. *Id.* at ¶ 23. The Court of Appeals’ decision was correct on the merits and suggests the proper procedure for trial courts dealing with cases where the question of whether a plaintiff’s preexisting injuries are symptomatic is in dispute.

Before submitting the issue of apportionment to the jury, an initial determination must be made regarding whether there is sufficient evidence that a plaintiff was symptomatic at the time of, or within a sufficiently close period of time prior to, the injury-causing event. In the present case, the Court of Appeals was easily able to make this determination as there was no evidence presented that Harris had suffered from symptoms or treated with a doctor for the days, weeks, months, if not years, prior to the accident. Thus, the Court of Appeals was not faced with the issue of determining whether a plaintiff’s condition was symptomatic on the day of the accident since Harris was asymptomatic for years prior to the accident. (*See* Respt’ Br. Opp. Cert. at 13 n.4.)

Further, the Utah Court of Appeals approvingly cited to *Ortiz v. Geneva Rock Prods.*, 939 P.2d 1213 (Utah App. 1997) and noted that *Ortiz* rejected plaintiff’s claim that evidence of his preexisting conditions was irrelevant because there was some evidence that the condition was not latent. In *Ortiz*, the Court of Appeals affirmed the trial court’s ruling admitting evidence of a preexisting condition because there was evidence presented by a doctor that the preexisting condition was not latent at the time of the crash. The court noted that both instructions for a symptomatic condition and an asymptomatic condition were given because there was conflicting evidence as to whether

plaintiff's condition was latent. *Ortiz*, 939 P.2d at 1220 n.5. The Court of Appeals' decision suggests that the jury should make the determination as to whether a condition was symptomatic or asymptomatic if there was some evidence that a condition was not latent during the time leading up to the accident.

This approach is consistent with the law in other jurisdictions. In reviewing case law and authority from other jurisdictions, it does not appear that a bright-line test has been established indicating how long a plaintiff must be asymptomatic before a jury cannot reasonably conclude that the condition was symptomatic. Rather, it appears that this issue must be looked at on a case-by-case basis. In *Hoskins v. Reich*, the Washington Court of Appeals looked at whether the evidence showed that the plaintiff was symptomatic "immediately" before an accident. *See Hoskins v. Reich*, 174 P.3d 1250 (Wash. App. 2008). The court held that the trial court erred in admitting evidence of pre-accident conditions when plaintiff was asymptomatic for the "weeks and months immediately before this accident." *Id.* at 568.

In approaching a case where there is a dispute as to the question of whether damages may be apportioned between the injuries caused by the tortfeasor and preexisting conditions, the trial court should exercise its gatekeeper function by determining whether evidence of preexisting conditions or a prior accident is relevant to a determination of whether the condition was symptomatic prior to the injury-causing event. If the evidence does not support a finding that a plaintiff was suffering from a symptomatic preexisting condition on the date of the accident, the trial court should exclude evidence of prior accidents (i.e. auto accidents, slip and falls, workers

compensation claims, etc.) and/or preexisting conditions as irrelevant and prejudicial because the evidence cannot support a finding that the condition was symptomatic. If a genuine dispute exists, then, like *Ortiz*, the jury can be given both the symptomatic and asymptomatic instructions.

CONCLUSION

For the foregoing reasons, UAJ respectfully requests that this Court recognize *Biswell* and *Tingey* both contain the correct legal standard.

RESPECTFULLY SUBMITTED this 1st day of June, 2012.

/S/ John P. Lowrance

John P. Lowrance

UTAH ASSOCIATION FOR JUSTICE

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that—

1. This brief was prepared using Microsoft Word and uses 13-point Times New Roman font.
2. According to Microsoft Word's word-count function, this brief contains 3,502 words, excluding the caption, table of contents, table of authorities, signature line, certificate of compliance, certificate of service and addendum. This brief is therefore in compliance with the type-volume limitation of Utah R. App. P. 24(f)(1).

DATED this 1st day of June, 2012.

/S/ John P. Lowrance

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