2016

Kachina Choate, Plaintiff-Appellant vs. Ars-Fresno LLC, a California Limited Liability Company, Defendant-Appellee.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

KACHINA CHOATE, Plaintiff-Appellant vs. ARS-FRESNO LLC, a California limited liability company, Defendant-Appellee.	PUBLIC Case No. 20151054

Brief of Appellant

Appeal From the Third District Court, Salt Lake County, from an Order Denying Plaintiff-Appellant's Motion for New Trial before the Honorable Judge Paige Peterson

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I. STATEMENT OF JURSIDICTION

This Court has jurisdiction to decide this appeal under Utah Code Ann. § 78A-3-102(3)(j).

II. ISSUE PRESENTED FOR REVIEW

Did the required six jurors have sufficient evidence to find Kachina more than 49% at fault for the accident that injured her, where she was using a pedestrian walkway on ARS's property as a walking path and slipped on a patch of invisible black ice which was known to be a recurring safety issue affecting the pedestrian walkway by ARS, the causes of which ARS had not adequately repaired despite their knowledge?

This issue is preserved on appeal as it was raised by Plaintiff-Appellant's Motion for New Trial filed in the District Court on July 15th, 2015.

APPLICABLE STANDARD OF APPELLATE REVIEW

"A trial court has discretion in determining whether to grant or deny a motion for a new trial, and [appellate courts] will not reverse a trial court's decision absent clear abuse of that discretion." State v. Harmon, 956 P.2d 262, 266 (Utah 1998) (citing State v. Wetzel, 868 P.2d 64, 70 (Utah 1993).

III. RULES WHOSE INTERPRETATION IS DETERMINATIVE OF OR OF CENTRAL IMPORTANCE TO THIS APPEAL

Rule 59 of the Utah Rules of Civil Procedure provides , in pertinent part:

> (a) Grounds. Except as limited by Rule 61, a new trial may be granted to any party on any issue for any of the following reasons:
>
> ...
>
> (a)(6) insufficiency of the evidence to justify the verdict or other decision...

Utah Code Ann. § 78B-5-818 provides, in pertinent part:

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78B-5-819(2).

IV. STATEMENT OF THE CASE

A. NATURE OF PROCEEDING

This personal injury case arose from a slip-and-fall accident that occurred at about 4:47 PM on Friday December 28, 2012, on the icy northwest store walkway of Defendant-Appellee ARS's property located at 680 East 400 South in Salt Lake City.

This case was tried before the Honorable Judge Paige Peterson on June 16-19, 2015. The jury unanimously determined that both Ms. Choate and ARS Fresno had causal fault; but the required number of six jurors determined that Ms. Choate had more harm-causing fault than ARS did; and so the jury never determined the amount of Ms. Choate's damages sustained as a result of the subject incident. The Court entered Judgment in favor of ARS on July 2, 2015. Ms. Choate moved for a new trial under URCP 59(a) on July 15, 2015.

As a result of the incident, Ms. Choate sustained significant and lasting, inoperable, left foot and ankle injuries and bilateral plantar fasciitis that causes pain and renders her less mobile. The trial Court should have granted a new trial on Plaintiff's motion for the same, and she now appeals that decision.

B. FACTUAL BACKGROUND AND BRIEF HISTORY OF PROCEEDINGS

Plaintiff-Appellant Kachina Choate was injured on December 28th, 2012 at 4:47 PM. (R. III.108). It was the first day since Christmas that it had not snowed in Salt Lake City, and temperatures had been freezing or near it at the airport since the holiday (R. III.72-75). Kachina was walking with her mother, Bernadine Choate around the vicinity of the Shell convenience store owned by Defendant-Appellee ARS Fresno LLC.

Kachina and Bernadine were in the area that day to do some grocery shopping. There was a break in the weather after three days with snow, Bernadine called it "warmer than it had been," although the two were still dressed warmly (R. I. 9). Both Bernadine and Kachina were wearing tennis shoes (R.I.10, III.96). Kachina was carrying a grocery bag or possibly two from their stop at Whole Foods in addition to her purse (R. III. 98).

Kachina and her mother walked along the public sidewalk, navigating some clearly visible accumulated ice and snow without incident (R. I. 11). Kachina testified that she'd never had issues navigating winter conditions in the shoes she was wearing prior to the accident (R. III. 154). Kachina's shoes were admitted into evidence and are in good repair.

The Choate's continued along the sidewalk on 700 East until they got to the corner of ARS's property, the Shell gas station, and then decided to take a shortcut through the property (R. I. 12). The two had taken this route before; the pair would make a few stops at local grocery stores, parking at Smith's, heading to Whole Foods and then visiting Trader Joe's before returning home (R.I.6). They had taken the shortcut through ARS's parking lot before on their way from Whole Foods to Trader Joe's (R.I.12). Normally Kachina and Bernadine would walk through the parking lot or gas pump area in front of the Shell station (R.I.13).

On December 28th, 2012, Kachina and Bernadine took a different route through ARS's property (R. I.13). There were several cars parked at the pumps and the two walked between the pumps and the front of the store itself to avoid them (R. III.101). While walking on the asphalt in front of the store, Kachina observed a car pulling into the property towards them

and stepped up onto the concrete walkway at the front of the store to avoid it (R. III.102).

Kachina observed that the walkway appeared wet, but did not see any accumulated ice (R. III. 103). She walked across the sidewalk in a normal fashion, and after 3 steps without incident, she slipped on a patch of black ice and fell suddenly to the concrete sidewalk, landing with her left leg bent (R. III. 106). Bernadine, who was walking behind her, observed that she had fallen suddenly and landed awkwardly (R. I. 36).

Kachina had slipped on black ice which had accumulated on ARS's pedestrian walkway (variously referred to in testimony as the sidewalk, walkway and "catwalk" (R. II.111)). Kachina was unable to see the ice before falling, but once on the ground, she saw and felt it. (R.III.107, III. 124). Bernadine approached to find that Kachina had been injured in the fall. (R. I.17). Bernadine then entered the store to fill out an accident report while Kachina remained seated on the ground in front of the store for three to five minutes (R. III. 149). Kachina was able to regain her feet and hobble into the store where she maintained her feet by leaning against the counter while talking with Stefan Jennings, the clerk on duty (R. I. 50-51).

There was a discussion between the Choates and Mr. Jennings at the counter which involved discussions of calling an ambulance for Kachina (R. III. 114). Kachina declined to incur the expense of an ambulance at that time as she was unable to pay for it (R. III. 115). [1]

The black ice had formed due to a persistent dripping of water through the seams in the roof that occurred due to a structural defect in the building (R. II. 159-61). The building's overhang, which covered the sidewalk, was leaking water through the soffit from an uncertain cause. (R. II. 159). It was observed by multiple employees of ARS, including both Stefan Jennings and David Edward Marshall (R.II.22, II.159). The issue was a long-standing one that was discussed among ARS employees (R.II. 165-66). Stefan Jennings observed the leak through the roof soffit, with water coming down steadily at the rate of 7-8 drips per minute (R. II.53). The dripping water would cause a buildup of ice when the temperature was cold enough (R.II.53). When incompletely attended to by the employees of ARS, the area could get very slick (R. II.54), because of a tendency for the

[1] There was testimony at trial that during the conversation there was a request by one or both of the Choates for $50 in compensation for the accident or to go to the doctor (R. II. 129). Ms Choate testified that she never asked Mr. Jennings for $50 (R. III. 115). But Ms. Choate did testify that during discussions about the ambulance she recalls asking Mr. Jennings something similar to "who's going to pay for [the ambulance]? you?" (R. III. 115).

water coming down to freeze in the area of the accident and cause a potentially hazardous situation (R. II. 22).

The ice that formed on the walkway was not only slippery but nearly invisible "black ice" (R. II.55). It was a concern that Jennings noticed, and also had been brought to his attention by customers of the store who had encountered it and reported the slippery hazard (R.II.57). The spot was a repeated concern for ARS's employees, not just because of the ice, but also because of the sloping of the adjacent walking paths and curbing (R. II.59). It was the practice of employees at the Shell station to put out ice melt on the trouble spot, early if possible to curtail the ice forming (R. II. 167).

Jennings had familiarity with the hazard, and testified that there was no reason Kachina would have been able to determine the spot was icy as opposed to just wet like the other areas of the walkway by just looking at it (R. II.66). Other testimony confirmed the pattern of black ice forming that was very difficult or nearly impossible to see (R. II. 171). Employees of ARS did not bring the issue to their boss's attention, testifying that they were never told to do so (R. II. 161). Tonya Howard, a district manager for 12 of ARS's stores was made aware of the problem with water leaking through the soffit in several of ARS's stores which were similarly

constructed (R. III. 11-13). Tonya Howard also testified that employees should have been trained on the policy and use of a "communications journal" to appropriately escalate maintenance issues like the leaking roof to management, but were not appropriately instructed (R. III. 14-15). So despite the fact that Jennings heard from regular customers to the store that it was a trouble spot, saw water coming down, and knew it posed a danger to pedestrians on the walkway, he didn't report it to his superiors (R. II.138).

There was various testimony regarding the cause and experts gave their opinions to the jury. Plaintiff's expert, Timothy Wyatt, visited the store on August 19th, and was able to observe the property during a rainstorm (R. III. 36). Mr. Wyatt observed that the top of the parapet wall around the building's roof was improperly sloped, which would allow water to flow toward the front of the store, possibly causing the dripping (R. III. 77). Mr. Wyatt was also able to directly observe water coming through the soffit in the overhang during the rainstorm (R. III. 38-39). There was some discussion that the lights in the overhang or the heat from the building may have contributed to the melting of snow that had settled on the building (R. III. 43).

At the trial, Mr. Jennings testified he was 90% sure he had placed ice melt on the pedestrian walkway between the start of his shift on December 28th and the incident (R. II. 44-45). Mr. Jennings testified that ARS employees were instructed to put down ice melt every hour (R. II. 44). Jennings also testified that there was some difficulty in addressing both the safety of the premises and dealing with customers due to ARS's practice of utilizing 'single coverage,' leaving only one employee at the store at a time (R. II. 47). Mr. Jennings clocked in at 2:53 PM, and Ms. Choate was injured at 4:47 PM (R. II. 73).

Both Kachina and Bernadine testified that while speaking with Mr. Jennings after the accident he mentioned that he forgot, or may have forgotten, or didn't have time to place ice melt (R.I.21, III. 113). Robert Ray Duncan, a manager with ARS who arrived on the scene after the Choate's were already on their way to the hospital claimed to have observed ice melt on the walkway as well as taking a number of photographs (R. II. 107-108). The photographs were not in existence at the time of the trial. Mr. Jennings testified that he did not place ice melt between the time of the accident and the time that Mr. Duncan arrived, meaning the ice melt Mr. Duncan observed would have to have been placed before the accident. Both

Kachina and Bernadine testified that they did not see, or did not recall seeing ice melt on the walkway prior to the accident (R.I.38, R.III. 125, 127).

The Trial Court, in its Order denying Ms. Choate's motion for a new trial addresses the relevant evidence presented regarding the fault of the parties (Addendum 1).

> 1. [S]RS's employee, Stefan Jennings ("Jennings"), knew that, at times, the northeast corner of the sidewalk in front of ARS's store would become slippery with "black ice" when water leaking from the roof would freeze; that knowledge is imputed to ARS; and ARS did not inspect the roof or fix the roof leak;
> 2. ARS should have kept a communications journal pertaining to safety issues, and there was no evidence that Jennings was trained to pass on information in the communications journal;
> 3. There was no warning provided by ARS to pedestrians on its store sidewalk concerning the slippery conditions on the walk, including warning cones;
> 4. Plaintiff and her mother, Bernadine Choate, offered disputed evidence that there was no ice melt placed on the sidewalk at the time of the Accident;
> 5. ARS had single coverage at the time of the Accident, but there was overlapping coverage by Jennings and another employee David Marshall in the hours prior to the Accident;
> 6. The northeast corner of the sidewalk was known to be slippery at times, but was not barricaded off to prevent pedestrians from using it;
> 7. Plaintiff slipped and fell on "black ice" in the area of the northeast corner of the sidewalk where Mr. Jennings had seen it."

Addressing evidence showing Ms. Choate's comparative negligence, the lower court furthered ordered:

> 1. There were three days of snow and below freezing temperatures before the Accident, the Accident happened at dusk or sunset, and this evidence should have alerted plaintiff to be more careful and for Jennings to provide a warning to pedestrians;
> 2. Jennings provided disputed testimony that he was 90 percent sure that he had placed ice melt prior to the Accident, and when another employee, Ray Duncan, came to the store to assist in finding an accident report, Mr. Duncan saw and photographed ice melt, Jennings did not place any ice melt after the Accident was reported to him and before Mr. Duncan arrived, and the placement of ice melt should have made the walkway less slippery and alerted plaintiff to the possibility of danger;
> 3. Plaintiff was wearing tennis shoes and knew she would be walking a number of blocks prior to the Accident, the shoes she was wearing were shown to the jury and were entered into evidence, and the jury must have factored in the type of shoes plaintiff was wearing and given it the weight it deserved;
> 4. Plaintiff was carrying a purse and grocery bags from items purchased at Whole Foods, and it could have affected her balance and it could have been considered by the jury in whether she was able to catch herself at the time she fell;
> 5. Plaintiff admitted that the sidewalk looked wet before she stepped onto it (at a place south of where Jennings had observed the "black ice" condition) and, though she walked several steps before she encountered the icy area, the presence of below-freezing temperatures should have alerted plaintiff of the potential for slippery conditions; and,
> 6. Plaintiff and Bernadine Choate took a shortcut through the store's property and, because the jury is presumed to have found that the plaintiff was not a trespasser, the path chosen by plaintiff to walk through the store property could have caused

the jury to conclude that there was some danger in choosing this path"

[...]Testimony by a number of witnesses at trial was that the sidewalk was not consistently dangerous, but depended on weather conditions[...]"

[...]The jury considered disputed issues at trial, including whether ice melt was placed on the sidewalk before the Accident and where the Accident took place in comparison to the roof leak, the evidence was sufficient for the jury to have decided in favor of either party."

(Addendum 1 Order Denying Plaintiff's Motion for New Trial and Granting, In Part, and Denying, In Part, Defendant's Verified Memorandum of Costs)

The Jury found that ARS was at fault, that ARS's fault was a cause of Kachina's harm, that Kachina was at fault, and that Kachina's fault was a cause of her harm (Addendum 2 Verdict). The required six jurors found that Kachina was 60% at fault and the jury did not reach the issue of damages (Addendum 2).

V. SUMMARY OF ARGUMENT

Kachina Choate was acting as a reasonably careful and unlucky pedestrian taking a shortcut. She was injured on a pedestrian walkway which periodically developed a serious safety hazard for pedestrians due to an unaddressed structural defect which was known to ARS. A jury

lacked sufficient evidence to determine that Choate was 60% at fault where ARS knew of the defect and failed to make it's premises safe.

The path Kachina chose through ARS's property was irrelevant to the allocation of fault, as she'd already stepped onto a pedestrian walkway and gotten safely underway when she hit the hazard which caused her injury.

The allocation of liability should be made on the basis of the relative culpability of both parties and under a duration analysis or multiplicity of acts analysis, the finding that ARS was anything less than 51% at fault is manifestly against the weight of the evidence. Pedestrians in and around shops are not acting unreasonable in carrying shopping bags or wearing tennis shoes, and to the extent Kachina should have noticed ice melt on ARS's walkway and acted with increased caution in traversing the area, the hidden and insidious nature of the hazard presented by recurrently forming black ice meant that ARS was still more at fault for the accident which injured Ms. Choate where ARS's actions in addressing the hazard were manifestly and evidently insufficient to make their premises safe.

VI. ARGUMENT

The Jury's Verdict That ARS Was Causally At Fault Was Appropriate.

"The owner of a business is not a guarantor that his business invitees will not slip and fall ... [h]e is charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons."Jex v. JRA, Inc., 2008 UT 67, ¶ 25, 196 P.3d 576, 582 (quoting Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996)) (internal quotation marks omitted)

Owners of presmises are liable where there exists "some unsafe condition of a permanent nature, such as: in the structure of the building, [...] which was created or chosen by the defendant (or his agents), or for which he is responsible. Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975).

"[I]n cases where temporary unsafe conditions are created by owners, the notice requirement also does not apply. We emphasize, however, that "negligence will not be presumed" in either permanent or temporary unsafe condition cases. [...I]n temporary unsafe condition cases, a plaintiff also must prove that the owner acted negligently either in creating or failing to remedy the temporary unsafe condition. Jex v. JRA, Inc., 2008 UT 67, ¶ 26, 196 P.3d 576, 582 (Internal citations omitted).

The evidence at trial demonstrated that ARS knew of both a structural defect in the roof of their building, as well as the recurrent development of dangerous black ice on a pedestrian walkway beneath that roof as a result of the structural defect. The expert testimony provided at trial, both by Plaintiff and Defendant's experts, suggested that the defect and resulting dangerous condition on the walkway should have been repaired upon discovery of the same.

Further evidence, including the testimony of Tonya Howard, showed systemic failures on the part of ARS to address the hazard on their walkway, including the lack of a communications journal for Stefan Jennings to escalate to his superiors the complaints of customers who had witnessed the slippery condition on the walkway and reported to him. The systemic failures in this case were even more egregious, as Ms. Howard testified that there were leaks and structural issues with a number of ARS's stores of similar construction to the store where Kachina Choate was injured.

ARS failed in its duty to make it's premises safe. The jury's finding that they were at fault for Kachina's injury in slipping on the pedestrian

walkway in front of the store confirms that there was a danger which had been inadequately addressed.

The Jury's Verdict That Kachina was More At Fault Than ARS Was Against The Manifest Weight of the Evidence.

In determining the relative fault of the parties, "the kind of comparison of fault that a jury ought to make[in] allocate[ing] liability should be made on the basis of the relative culpability of both parties. Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983).

In Sharp v. Williams, 915 P.2d 495; 497-99 (Utah 1996), a "dog-confrontation" case, the Supreme Court reversed (915 P.2d 495, 497-99) the trial court's denial of the plaintiff's Rule 59(a)(6)-based motion for a new trial in a situation where the jury had determined that the plaintiff's injuries were 50% attributable to her own negligence. The court there held (id. at 499), citing Nelson, 657 P.2d 730, 732 (Utah 1982), that "the evidence in support of the jury's finding of fifty percent contributory negligence is so slight and unconvincing as to make the verdict plainly unreasonable and unjust." (Emphasis added).

In *Sharp*, a mail carrier encountered a dog while taking a shortcut across the defendant's lawn, the Utah Supreme Court gave, 915 P.2d at 497-

99, short shrift to the defense contention that taking a shortcut was evidence of negligence. Just as the *Sharp* court concluded, id. at 498-99, that the plaintiff letter carrier could not be considered negligent for cutting across the defendant's lawn because he could reasonably assume that the dog was inside the house as he always had been on prior deliveries, Ms. Choate should not be considered negligent for cutting across the ARS property. For she had no reason to think there would be any danger lurking on the northeast corner of a pedestrian walkway in front of the store, an area that other people frequently walked in and one of whose recurrent hazardous condition she, unlike ARS, had no prior knowledge.

The jury could reasonably have found some negligence on the part of Kachina Choate (if, for example, the jury determined that Mr. Jennings had applied some icemelt, it might have reasonably determined that there were icemelt remnants that Ms. Choate should have noticed and that she should therefore have proceeded more slowly, or that she should have walked around the area.) The other points of the trial court's ruling regarding evidence of negligence are slight and unconvincing and do not adequately account for the culpability analysis suggested by *Harris* 671 P.2d 217.

Kachina was wearing shoes when she slipped (trial Ex. 13). They were tennis shoes; but they have good tread and are fit for wintertime use; and she'd slipped on no surface during her pedestrian shopping loop, even while navigating visible ice and snow buildup that was slippery, until she hit the hazardous and invisible black ice at the scene of the tort.

It was not unreasonable for Ms. Choate to make use of a pedestrian walkway that culminated in the hazardous spot, rather than following the more diagonal route that she normally followed through the parking lot. As she explained, she took the path she took so she and her mother, witness Bernadine Choate, could avoid the cars that were on the property; and she had no reason to think there was anything dangerous in the route she took. It is certainly not unreasonable for a pedestrian to be on a pedestrian walkway when the alternative is a parking lot where she would be walking in the path of oncoming automobiles.

It was not unreasonable for Ms. Choate to walk at the normal walking pace which she was walking when she encountered the black ice. Ms. Choate took several steps before encountering the hidden danger, and it was reasonable for her to expect that ARS would maintain its walkway in a safe manner throughout, she certainly could not have reasonably been

expected to anticipate the black ice that formed as a result of an unaddressed structural defect. Kachina and her mother both testified that the walkway just looked "wet," and that it didn't feel slippery as they walked along.

There was no evidence of any use of drugs or alcohol, or of horseplay, misconduct, or inattention on the part of Ms. Chaote, and all this should further minimize the overall amount of fault Ms. Chaote should reasonably have been assigned even if the jury accepted Mr. Duncan's testimony that icemelt was present when he got there and Mr. Jenning's testimony that he didn't apply any ice melt after the incident had occurred.

Ms. Choate was carrying shopping bags in front of a retail establishment and using a pedestrian walkway as a walkway. There was nothing unreasonable about her conduct, she was simply the unlucky pedestrian who brought attention to the hazard on ARS's property by her injury, as opposed to the lucky pedestrians who had encountered the hazard previously without falling and had brought it to ARS's attention by reporting it to Mr. Jennings.

The Trial Court Erred in Not Granting Ms. Choate's Motion For A New Trial

In personal injury negligence actions, Utah law provides relief for a party on motion to be granted a new trial on the basis of insufficiency of the evidence. E.G. King v. Union Pac. R. Co., 212 P.2d 692, 694-97 (Utah 1949); Stack v. Kearnes, 221 P.2d 594, 596-97 (Utah 1950); Marshall v. Ogend U.R. & D. Co., 221 P.2d 868, 869-70 (Utah 1950); Holmes v. Nelson, 326 P.2d 722 (Utah 1958)(see especially the elucidating concurring opinion of Justice Crockett, id. at 725-26); Wellman v. Noble, 366 P.2d 730, 731-33 (Utah 1982); Sharp v. Williams, 915 P.2d 495; 497-99 (Utah 1996); and Ortiz v. Geneva Rock Prods., 939 P.2d 1213, 1216-18 (Utah App. 1997).

Sharp and Ortiz reversed trial court results and ordered new trials. The other cases affirmed trial judges' determinations that Rule 59(a)(6)-based new trials should be granted in the aftermath of defense verdicts.

In Nelson v. Trujillo, the Utah Supreme Court explained that "[t]he trial judge has broad latitude in granting or denying a motion for a new trial, and will not be overturned on appeal absent an abuse of discretion." (657 P.2d at 731) and (Id. at 732).

[w]here the trial court has [ruled on] the motion for a new trial, its decision will be sustained on appeal if the record contains 'substantial competent evidence which would support a verdict for the [moving party]'

(quoting from King. V. Union Pac. R. Co., cited above; emphasis supplied by the court).

Instructive Case Law from Other Jurisdictions.

Case law from several other states is also instructive. In weilheim v. Great Falls, 685 P.2d 350, 351 (Mont. 1984), the court upheld the trial court's granting of a new trial in a situation where the first jury had fixed the plaintiff's comparative fault at 90% and the defendant's at 10%.

In Lehmkuhl v. Bolland, 757 P.2d 1222, 1224-26 (Ida. App. 1988), the court reversed the trial court's failure to grant the plaintiff's motion for new trial in a case in which the first jury found that the plaintiff was 50% at fault, on the basis that "the jury's assessment of negligence equally between [the plaintiff and the defendant motor vehicle driver] was against the great weight of the evidence." Id. at 1226

Examining the comparative fault of the parties in this case makes it clear that the evidence of contributory negligence here is slight and unconvincing and the verdict itself is plainly unreasonable and unjust and certainly against the great weight of the evidence.

There was an abundance of trial evidence of ARS's failure to exercise reasonable care. The following are some examples. Stefan Jennings (the

ARS employee who had been informed of customers' reports of the slick condition and who knew of the hazardous condition of the black ice that there formed and of its insidious, nearly invisible nature; "you wouldn't think it was a dangerous spot. It doesn't look like it at all" was part of his deposition testimony that came into evidence) received essentially no training on safety issues, including on what to do once he discovered a dangerous condition. There was no "communication journal" in the store, of the kind witness Tonya Howard, the former ARS district manager, said was supposed to be at the store so employees could report – for effective company response – dangerous conditions.

There had been, according to Ms. Howard, incidents of water leaking through the soffit of other ARS buildings of similar construction. The roof was known to the company, through the knowledge of witness Dave Marshall, to be leaking in other places not far from the northeast corner where Mr. Jennings had noticed the problem and where the incident occurred. The roof was never even inspected. And it was not repaired.

Mr. Jennings was on an island at the time of Ms. Choate's injury due to ARS's policy of 'single coverage' where only one clerk was in charge of the entire premises at a time. Given that it was suggested Mr. Jennings

should have been applying ice melt every hour, and certainly more as needed given the persistent dangerous condition, his responsibilities to help customers [in the store] first, as he testified, reduced his ability to adequately address the known hazardous condition.

Tim Wyatt, Ms. Choate's liability expert, testified that it was unreasonable for ARS not to fix the problem when it had notice of it. Merlin Taylor, the ARS expert, also gave testimony helpful to Ms. Choate's case, including that it was likely a different problem with the building - the incorrectly sloped parapet wall in addition to or other than the leaking soffit observed by Mr. Wyatt, and one that would not be difficult or expensive to fix, that was the likely culprit. ARS, with the knowledge it had, did no roof inspection, did not fix the problem, did not cone off the hazardous area, did not place a warning sign, and did not make sure that enough icemelt, if any, was placed , in timely fashion, on the day of the incident.

The most, it seems, that the jury could reasonably have concluded, regarding the conduct of Ms. Choate, is that she had momentary inattention or misjudgment as she approached the to-her-unknown danger zone. And the evidence of Ms. Choate's true negligence was dwarfed by

that of ARS, when viewed from the perspective of how long each incidence of negligence lasted, as well as from a multiplicity-of-acts-of-negligence perspective.

VII. CONCLUSION

For the reasons argued above, Ms. Choate requests this Court reverse the Trial Court's ruling and grant her a new trial under Utah Rules of Civil Procedure 59(a)(6) as there was insufficient evidence to support the verdict that she was 60% at fault.

Respectfully submitted this 16th day of June, 2016

Levi H. Cazier
Attorney for Plaintiff-Appellant.

CERTIFICATE OF SERVICE

I certify that on June 16th, 2016, I caused to be served eight (8) copies of the foregoing on the Utah Court of Appeals by mailing the same, first class, to: **Utah Court of Appeals, PO Box 140230 Salt Lake City, UT 84114-0230**

I certify that on June 16th, 2016, I caused to be served two (2) copies of the foregoing by mailing the same, first class, to: **J. Angus Edwards, Attorney for Defendant-Appellant JONES WALDO HOLBROOK & McDONOUGH 170 South Main Street, Suite 1500 Salt Lake City, UT 84101**

Levi H. Cazier, Attorney for Plaintiff-Appellant

ADDENDUM

The Order of Court is stated below:
Dated: November 04, 2015 08:20:38 PM
/s/ PAIGE PETERSEN
District Court Judge

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KACHINA CHOATE,

Plaintiff,

vs.

ARS FRESNO LLC, a California limited liability company,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL and GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S VERIFIED MEMORANDUM OF COSTS

Civil Case No.130907594 PI

Judge Paige Petersen

This matter came before the Court and was heard on October 15, 2015, to consider plaintiff's Motion for New Trial (the "Motion") and defendant's Verified Memorandum of Costs and Disbursements (the "Verified Memorandum"). J. Angus Edwards of JONES WALDO HOLBROOK & McDONOUGH appearing on behalf of defendant ARS Fresno LLC ("ARS") and Peter C. Collins appearing on behalf of plaintiff Kachina Choate. The Court having reviewed the memoranda supporting and opposing the Motion and Verified Memorandum, having heard the arguments of counsel, having reconsidered the evidence offered at trial, and having observed that the jurors were attentive during trial, and being fully advised and good and sufficient cause appearing therefor, it is hereby

MOTION FOR NEW TRIAL

ORDERED that the primary issue in considering the Motion is whether the jury verdict finding plaintiff 60 percent negligent and ARS 40 percent negligent for a slip-and-fall accident at

4:47 p.m. on December 28, 2012 (the "Accident"), had sufficient evidence for the jury to reach its verdict, not whether this Court would have made the same findings, and it is hereby further

ORDERED that the jury made credibility findings in reaching its verdict that plaintiff was 60 percent negligent and ARS was 40 percent negligent, and this Court will defer to the jury's findings, and it is hereby further

ORDERED that plaintiff and ARS each offered relevant evidence concerning the negligence of ARS and the comparative negligence of plaintiff, including the following evidence showing ARS's negligence:

1. SRS's employee, Stefan Jennings ("Jennings"), knew that, at times, the northeast corner of the sidewalk in front of ARS's store would become slippery with "black ice" when water leaking from the roof would freeze; that knowledge is imputed to ARS; and ARS did not inspect the roof or fix the roof leak;
2. ARS should have kept a communications journal pertaining to safety issues, and there was no evidence that Jennings was trained to pass on information in the communications journal;
3. There was no warning provided by ARS to pedestrians on its store sidewalk concerning the slippery conditions on the walk, including warning cones;
4. Plaintiff and her mother, Bernadine Choate, offered disputed evidence that there was no ice melt placed on the sidewalk at the time of the Accident;

5. ARS had single coverage at the time of the Accident, but there was overlapping coverage by Jennings and another employee David Marshall in the hours prior to the Accident;
6. The northeast corner of the sidewalk was known to be slippery at times, but was not barricaded off to prevent pedestrians from using it;
7. Plaintiff slipped and fell on "black ice" in the area of the northeast corner of the sidewalk where Mr. Jennings had seen it; and it is hereby further

ORDERED that the evidence showing that plaintiff was comparatively negligent is as follows:

1. There were three days of snow and below freezing temperatures before the Accident, the Accident happened at dusk or sunset, and this evidence should have alerted plaintiff to be more careful and for Jennings to provide a warning to pedestrians;
2. Jennings provided disputed testimony that he was 90 percent sure that he had placed ice melt prior to the Accident, and when another employee, Ray Duncan, came to the store to assist in finding an accident report, Mr. Duncan saw and photographed ice melt, Jennings did not place any ice melt after the Accident was reported to him and before Mr. Duncan arrived, and the placement of ice melt should have made the walkway less slippery and alerted plaintiff to the possibility of danger;
3. Plaintiff was wearing tennis shoes and knew she would be walking a

number of blocks prior to the Accident, the shoes she was wearing were shown to the jury and were entered into evidence, and the jury must have factored in the type of shoes plaintiff was wearing and given it the weight it deserved;

4. Plaintiff was carrying a purse and grocery bags from items purchased at Whole Foods, and it could have affected her balance and it could have been considered by the jury in whether she was able to catch herself at the time she fell;
5. Plaintiff admitted that the sidewalk looked wet before she stepped onto it (at a place south of where Jennings had observed the "black-ice" condition) and, though she walked several steps before she encountered the icy area, the presence of below-freezing temperatures should have alerted plaintiff of the potential for slippery conditions; and,
6. Plaintiff and Bernadine Choate took a shortcut through the store's property and, because the jury is presumed to have found that the plaintiff was not a trespasser, the path chosen by plaintiff to walk through the store property could have caused the jury to conclude that there was some danger in choosing this path; and it is hereby further

ORDERED that the testimony by a number of witnesses at trial was that the sidewalk was not consistently dangerous, but depended on the weather conditions;

ORDERED that although ARS employees had overlapping shifts in the hours before the

Accident, but there was no testimony that employees took additional safety measures, and it is further

ORDERED that the jury considered disputed issues at trial, including whether ice melt was placed on the sidewalk before the Accident and where the Accident took place in comparison to the roof leak, the evidence was sufficient for the jury to have decided in favor of either party, and this Court cannot reverse a finding that plaintiff was 60 percent negligent and ARS was 40 percent negligent, because of the credibility judgments in weighing the conflicting evidence, and it is further

ORDERED that plaintiff's Motion for New Trial is denied.

VERIFIED MEMORANDUM OF COSTS AND DISBURSEMENTS

ORDERED ARS was the prevailing party within the meaning of Utah R. Civ. P. 54(d), and it is further hereby

ORDERED ARS shall recover its Answer and Jury Demand fee of $250, the charge for service of the Stefan Jennings trial subpoena of $18.50, and seven $5.00 charges for Green Filing pleadings or discovery responses, for a total of $303.50, and it is hereby further

ORDERED that all charges for deposition transcripts or copies of depositions sought by ARS in its Verified Memorandum, and all charges for copies of trial exhibits, which total $1,682.16, shall be denied, and it is hereby further

ORDERED that this Court has discretion to award costs to the prevailing party, unless it otherwise directs and this Court exercises its discretion to otherwise direct that the charges for depositions and copies of trial exhibits, although very desirable for ARS to prepare for trial, were

not essential, and the preparation for trial and presentation of its defense at trial could have been accomplished by less expensive written discovery, and it is hereby further

ORDERED that the Verified Memorandum is granted, in part, awarding $303.50 in costs and denied, in part, for $1,683.16 in costs.

SO ORDERED AND ENTERED BY THE COURT
(The Signature of the Court will Appear at the Top of the First Page)

APPROVED AS TO FORM:

PETER C. COLLINS LLC

By: /s/ *Peter C. Collins* (signed w/permission)

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

KACHINA CHOATE, Plaintiff, vs. ARS - FRESNO LLC, a California limited liability company, Defendant.	VERDICT Case No. 130907594PI Judge Paige Petersen (Tier 2)

MEMBERS OF THE JURY:

Please answer the following questions, *in the order presented*, and based on the Jury Instructions and the evidence presented in this case. If you find the greater weight of the evidence is in favor of the issue presented, answer "Yes." If you find the evidence is equally balanced or that the greater weight of evidence is against the issue, answer "No." Also, any damages assessed must be proven by the greater weight of the evidence.

(At least six jurors must agree on the answer to each question, but they need not be the same six on each question. When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson shall sign and date the form and advise the bailiff that you have reached a verdict.)

QUESTION 1: Was ARS – Fresno at fault?

ANSWER: Yes ✓ No _____

If you answer "Yes," answer Question 2. If you answer "No," stop here and have your foreperson sign this Verdict.

QUESTION 2: Was ARS – Fresno's fault a cause of any harm to Kachina Choate?

ANSWER: Yes ✓ No _____

If you answer "Yes," answer Question 3. If you answer "No," stop here and have your foreperson date and sign this Verdict.

QUESTION 3: Was Kachina Choate also at fault?

ANSWER: Yes √ No. _____

If you answer "Yes," answer Question 4. If you answer "No," skip to Question 6.

QUESTION 4: Was Kachina Choate's fault also a cause of her harm?

ANSWER: Yes √ No. _____

If you answer "Yes," answer Question 5. If you answer "No," skip to Question 6.

QUESTION 5: Assuming all the fault that caused harm to Ms. Choate totals 100%, what percentage is attributable to:

A.	Defendant ARS – Fresno LLC:	40 %
B.	Plaintiff Kachina Choate:	60 %
	TOTAL:	100%

Stop here if plaintiff Kachina Choate's fault is 50% or more; do not answer Question 6.

NOTE: Do **not** deduct from the following amount the percentage of fault, if any, that you have assessed to Ms. Choate. The judge will make any necessary deductions later.

QUESTION 6: What amount, if any, would fairly compensate plaintiff Kachina Choate for her damages?

$_____

DATED this 19 day of June, 2015.

Chris Waters
FOREPERSON

PRELIMINARY JURY INSTRUCTION NO. 1

Members of the jury, we are about to begin the trial of this case. You have heard some details about this case during the process of jury selection. Before the trial begins, however, there are certain instructions you should have to better understand what will be presented to you and how you should conduct yourself during the trial.

The party who brings a lawsuit is called the plaintiff. In this case the plaintiff is Kachina Choate. The party against whom a suit is brought is called the defendant. In this case the defendant is ARS – Fresno LLC.

By your verdict, you will decide disputed issues of fact. I will decide all questions of law that arise during the trial. Before you retire to deliberate at the close of the case, I will instruct you on the law that you must follow and apply in deciding your verdict.

Because you will be called upon to decide the facts of this case, you should give careful attention to the testimony and other evidence presented for your consideration, bearing in mind that I will instruct you at the end of the trial concerning the manner in which you should determine the credibility or "believability" of each witness and the weight to be given the testimony. During the trial, however, you should keep an open mind and should not form or express

any opinion about the case one way or the other until you have heard all of the testimony and evidence, the closing arguments of the lawyers, and my instructions to you on the law.

While the trial is in progress, you must not discuss the case in any manner among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence.

From time to time during the trial, I may be called upon to make rulings of law on objections or motions made by the lawyers. It is the duty of the lawyer on each side of a case to object when the other side offers testimony or other evidence that the lawyer believes is not properly admissible. You should not be angry at a lawyer or the client because the lawyer has made objections. You should not infer or conclude from any ruling or other comment I may make that I have any opinion on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not draw any inference or conclusion from the question itself.

During the trial it may be necessary for me to confer with the lawyers out of your hearing with regard to questions of law or procedure that may require consideration by me. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but

you should remember the importance of the matter you are here to determine, and should be patient even though the case may seem to go slowly.

MUJI 1.1 (mod.)

PRELIMINARY JURY INSTRUCTION NO. 2

The case will proceed in the following order:

1. The plaintiff's lawyer may make an opening statement outlining the case. The defendant's lawyer may also make an opening statement outlining the case immediately after the plaintiff's lawyer's statement, or may defer making an opening statement until the conclusion of the plaintiff's case. Neither side is required to make an opening statement. What is said in the opening statement is not evidence, but is simply designed to provide you with an introduction to the evidence the party making the statement intends to produce.

2. The plaintiff will introduce evidence through testimony of witnesses and exhibits. At the conclusion of the plaintiff's case, the defendant may introduce evidence. The defendant, however, is not obligated to introduce any evidence or to call any witnesses. If the defendant introduces evidence, the plaintiff may then introduce rebuttal evidence.

3. I will instruct you on the law which you are to apply in reaching your verdict.

4. The parties may present closing arguments to you as to what they believe the evidence has shown and the inferences which they contend you should draw from the evidence. What is said in a closing argument, just as what is said in

an opening statement, is not evidence. The arguments are designed to present to you the contentions of the parties based on the evidence introduced. The plaintiff has the right to open and to close the argument.

MUJI 1.2

PRELIMINARY JURY INSTRUCTION NO. 3

The evidence in the case will consist of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have introduced them.

Statements and arguments of lawyers are not evidence in the case, unless made as an admission or stipulation of fact. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

I may take judicial notice of certain facts. If I declare that I will take judicial notice of some fact, you must accept that fact as true.

Any evidence as to which I sustain an objection, and any evidence I order to be stricken, must be entirely disregarded.

Some evidence is admitted for a limited purpose only. If I instruct you that an item of evidence has been admitted for a limited purpose only, you must consider it only for that limited purpose and for no other.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been

proved, such reasonable inferences as you feel are justified in light of your experience.

MUJI 1.3 (mod.)

PRELIMINARY JURY INSTRUCTION NO. 4

A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts or circumstances that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.

MUJI 2d CV120
MUJI 2.7

PRELIMINARY JURY INSTRUCTION NO. 5

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence presented in court, that the fact is more likely to be true than not true.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but I must emphasize to you that this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must

find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

Johns v. Shulsen, 717 P.2d 1336 (Utah 1986)
Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972)
Alvarado v. Tucker, 268 P.2d 986 (Utah 1954)
Hansen v. Hansen, 958 P.2d 931 (Utah App. 1998)

MUJI 2d CV117 (submitted by ARS; last sentence deleted)

PRELIMINARY JURY INSTRUCTION NO. 6

After the evidence has been heard and arguments and instructions are concluded, you may retire to consider the evidence and arrive at your verdict. You will determine the facts from all the testimony you hear and the other evidence that is received. You are the sole judges of the facts. Neither I nor anyone else may invade your responsibility to act as judges of the facts.

On the other hand, and with equal emphasis, I instruct you that you are bound to accept the rules of law that I give you whether you agree with them or not.

MUJI 1.5

PRELIMINARY JURY INSTRUCTION NO. 7

During this trial I will permit you to take notes. Many courts do not permit note-taking by jurors, and a word of caution is in order. There is always a tendency to attach undue importance to matters which one has written down. Some testimony that is considered unimportant at the time presented, and thus not written down, takes on greater importance later in the trial in light of all the evidence presented. Therefore, your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes time to deliberate and render a decision in this case.

MUJI 1.6

PRELIMINARY JURY INSTRUCTION NO. 8

Since this case involves an incident that occurred at a particular location, you may be tempted to visit the scene yourself. Please do not do so. In view of the time that elapses before a case comes to trial, substantial changes may have occurred at the location after the event that gives rise to this lawsuit. Also, in making an unguided visit without the benefit of explanation, you might get erroneous impressions. Therefore, please avoid going to it or near it, if you can, until the case is over.

MUJI 1.7 (mod.)

PRELIMINARY JURY INSTRUCTION NO. 9

At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witnesses' testimony. I urge you to pay close attention to the testimony as it is given.

MUJI 2d
CV141

PRELIMINARY JURY INSTRUCTION NO. 10

You will not be required to remain together while we are in recess. It is important that you obey the following instructions with reference to the recesses of the court:

1. Do not discuss the case either among yourselves or with anyone else during the trial. In fairness to the parties to this lawsuit, you should keep an open mind throughout the trial, reaching your conclusion only during the final deliberations. Only after all the evidence is in and you have heard the lawyers' summations and my instructions to you on the law, and only after an interchange of views with each other may you reach your conclusions.

2. Do not permit any person to discuss the case in your presence. If anyone does so, despite your telling them not to, report that fact to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact, or any other fact that you feel necessary to bring to my attention.

3. Though it is normal human tendency to converse with other people, please do not converse with any of the parties or their lawyers or any witnesses. By this, I mean not only do not converse about the case, but do not converse at all, even to pass the time of day. In no other way can all the parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

4. There is unlikely to be any media coverage of this trial, but just in case: Do not read about the case in the newspapers, or listen to radio or television broadcasts about the trial. If a newspaper headline catches your eye, do not examine the article further. Media accounts may be inaccurate and may contain certain matters which are not proper evidence for your consideration. You must base your verdict solely on what you see and hear in this courtroom.

5. Do not do any research or make any investigation about the case on your own.

6. Finally, I instruct you again – do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Now, we will begin by giving the lawyers for each side an opportunity to make their opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show. These statements are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for purposes of opening statements.

MUJI 1.8 (mod.)

JURY INSTRUCTION NO. _____

It is my duty to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose.

The authority thus vested in you is not arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

JURY INSTRUCTION NO. _____

If in these instructions any rule, direction or idea is stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the other, but are to consider all the instructions as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

JURY INSTRUCTION NO. _____

You must not decide for or against anyone because you feel sorry for or angry at anyone. You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice.

JURY INSTRUCTION NO. _____

In this case the plaintiff is an individual and the defendant is a company. This should make no difference to you. You must decide this case as if it were between individuals.

JURY INSTRUCTION NO. _____

Both parties to this case are entitled to equal justice under the law, and you have no right in arriving at your verdict to consider any matters except the evidence submitted to you in open court, and inferences that may reasonably be drawn therefrom, viewed in the light of and under the law as given you in these instructions.

JURY INSTRUCTION NO. _____

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that I have ruled should be stricken; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as herein stated.

JURY INSTRUCTION NO. _____

At times throughout the trial I have been called upon to determine whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, I do not determine what weight should be given such evidence; nor do I pass on the credibility of the witness. You are not to consider evidence offered but not admitted, nor any evidence that I've stricken out; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

JURY INSTRUCTION NO. _____

You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses, you have a right to take into consideration any biases, any interest in the result, and any motive or lack of motive to testify fairly. You may consider the witnesses' conduct while testifying before you, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider these matters you believe have a bearing on the truthfulness or accuracy of the witnesses' statements.

JURY INSTRUCTION NO. _____

You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.

JURY INSTRUCTION NO. _____

If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.

JURY INSTRUCTION NO. _____

Depositions may be received in evidence. Depositions contain sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party being entitled to ask questions. Testimony provided in a deposition may be read to you in court. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

JURY INSTRUCTION NO. _____

A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts or circumstances that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.

JURY INSTRUCTION NO. _____

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence presented in court, that the fact is more likely to be true than not true.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but I must emphasize to you that this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

JURY INSTRUCTION NO. _____

The rules of evidence do not ordinarily permit the opinions of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A witness who, by education, study, or experience, has become expert in some art, science, profession, calling, or subject matter, may state opinions as to any such matter in which that witness is qualified as an expert, so long as it is material and relevant to the case. You should consider such expert opinion and the reasons, if any, given for it. You are not bound by such an opinion. Give it the weight, if any, you think it deserves. If you should decide that the opinions of an expert witness are not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinions are not sound, or that such opinions are outweighed by other evidence, you may disregard the opinion entirely.

JURY INSTRUCTION NO. _____

Your job as jurors is, among other things, to decide whether Kachina Choate was harmed and, if so, whether anyone is at fault for that harm. If you decide that both she and ARS – Fresno LLC were at fault, you must then allocate fault between them.

Fault means any wrongful act or failure to act that causes harm to the person seeking recovery. The wrongful act or failure to act alleged in this case is negligence.

Your answers to the questions on the verdict form will determine, among other things, whether anyone was at fault.

JURY INSTRUCTION NO. _____

Negligence means that a person did not use reasonable care. We all have a duty to use reasonable care to avoid injuring others. Reasonable care is simply what a reasonably careful person or company would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

JURY INSTRUCTION NO. _____

Ms. Choate has the burden of proving, by the greater weight of the evidence, that ARS – Fresno LLC was at fault and that that fault was a cause of her damages. Ms. Choate also has the burden of proving, by the greater weight of the evidence, the amounts of her damages.

JURY INSTRUCTION NO. _____

ARS – Fresno LLC has the burden of proving, by the greater weight of the evidence, that Ms. Choate was herself at fault and that her fault was a cause of her damages.

JURY INSTRUCTION NO. _____

I've instructed you that the concept of fault includes a wrongful act or failure to act that causes harm.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the company's or person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence;

and

(2) the company's or person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

JURY INSTRUCTION NO. _____

If you decide that both ARS – Fresno LLC and Kachina Choate had fault, you must decide the percentage of fault of each. This allocation of fault must be done on a percentage basis, and must total 100%.

Ms. Choate's total recovery, if any, will be reduced by the percentage of fault that you attribute to her. If you decide that Ms. Choate's fault is 50% or greater, she will recover nothing.

When you answer the questions on damages, do not reduce the award by Ms. Choate's percentage of fault, if any. I will make that calculation later.

JURY INSTRUCTION NO. _____

I will now instruct you about damages. My instructions are given as a guide for calculating what damages should be if you find that Kachina Choate is entitled to them. However, if you decide that she is not entitled to recover damages, then you must disregard these instructions.

If you decide that any ARS – Fresno LLC's fault caused Kachina Choate's harm, you must decide how much money will fairly and adequately compensate her for that harm. There are two kinds of damages: noneconomic and economic.

JURY INSTRUCTION NO. _____

To be entitled to damages, Kachina Choate must prove two points:

First, that damages occurred. There must be a reasonable probability, not just speculation, that Kachina Choate suffered damages from ARS – Fresno LLC's fault.

Second, the amount of damages. The level of evidence required to prove the amount of damages is not as high as what is required to prove the occurrence of damages. There must still be evidence, not just speculation, that gives a reasonable estimate of the amount of damages, but the law does not require a mathematical certainty.

In other words, if Kachina Choate has proved that she has been damaged and has established a reasonable estimate of those damages, ARS – Fresno LLC may not escape liability because of some uncertainty in the amount of damages.

JURY INSTRUCTION NO. _____

Noneconomic damages are the amount of money that will fairly and adequately compensate Ms. Choate for losses other than economic losses.

Noneconomic damages are not capable of being exactly measured; and, though the lawyers are free to make whatever suggestions they see fit, be sure to keep in mind that there is really no fixed rule, standard or formula for them. Noneconomic damages must be awarded even though they may be difficult to compute. It is your duty to make this determination with calm and reasonable judgment. The law does not require the testimony of any witness to establish the amount of noneconomic damages.

In awarding noneconomic damages, among the things that you may consider are:

(1) the nature and extent of injuries;

(2) the pain and suffering, both mental and physical;

(3) the extent to which Ms. Choate has been prevented from pursuing her ordinary affairs;

(4) the degree and character of any disfigurement;

(5) the extent to which Ms. Choate has been limited in the enjoyment of life; and

(6) whether the consequences of these injuries are likely to continue and, if so, for how long.

JURY INSTRUCTION NO. _____

It is the duty of a person who has been injured to use reasonable diligence in caring for the injuries and reasonable means to prevent their aggravation and to accomplish healing.

If an injured person does not use reasonable diligence to care for the injuries, and they are aggravated as a result of such failure, the liability, if any, of another whose act or omission was a cause of the original injury must be limited to the amount of damage that would have been suffered if the injured person had exercised the required diligence.

ARS – Fresno LLC has the burden of proof regarding his contention that Ms. Choate has failed reasonably to mitigate her damages.

JURY INSTRUCTION NO. _____

You shall award damages in an amount that fully compensates Ms. Choate. Do not speculate on or consider any other possible sources of benefit Ms. Choate may have received. After you have returned your verdict, I will make whatever adjustments may be necessary.

JURY INSTRUCTION NO. _____

According to mortality tables, a person of Ms. Choate's age and gender is expected to live approximately 39 more years. You may consider this fact in deciding the amount of future damages. A life expectancy is merely an estimate of the average remaining life of all persons in our country of a given age and gender, with average health and exposure to danger. Some people live longer and others die sooner. You may also consider all other evidence bearing on the expected life of Ms. Choate, including her occupation, health, habits, life style, and other activities.

JURY INSTRUCTION NO. _____

When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.

After you select the foreperson you must discuss with one another—that is, deliberate—with a view to reaching an agreement. Your attitude and conduct during discussions are very important.

As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.

Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.

JURY INSTRUCTION NO. _____

When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.

If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.

JURY INSTRUCTION NO. _____

I am going to give you a form called the Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.

Because this is not a criminal case, your Verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the Verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Verdict with you.

If you feel the need to communicate with me, you should do so through your foreperson.

Thank you for your service.

Dated this _____ day of June, 2015.

_____
PAIGE PETERSEN
Third District Judge