2016

Kachina Choate, Plaintiff/ Appellant, v. Ars-Fresno, LLC, a California Company, Defendant/ Appellee.

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KACHINA CHOATE, Plaintiff/Appellant, v. ARS-FRESNO, LLC, a California company, Defendant/Appellee.	Appellate Case 20151054-CA District Court Case 130907594

BRIEF OF APPELLEE ARS-FRESNO, LLC

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE PAIGE PETERSON

Levi H. Cazier
Beehive Law
P.O. Box 84118
Salt Lake City, Utah 84118
Telephone: (801) 856-1773
Attorneys for Plaintiff/Appellant

J. Angus Edwards (USB #4563)
JONES WALDO HOLBROOK & McDONOUGH PC
Attorneys for ARS-FRESNO, LLC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Attorneys for Defendant /Appellee

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KACHINA CHOATE, Plaintiff/Appellant, v. ARS-FRESNO, LLC, a California company, Defendant/Appellee.	Appellate Case 20151054-CA District Court Case 130907594

BRIEF OF APPELLEE ARS-FRESNO, LLC

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE PAIGE PETERSON

Levi H. Cazier
Beehive Law
P.O. Box 84118
Salt Lake City, Utah 84118
Telephone: (801) 856-1773
Attorneys for Plaintiff/Appellant

J. Angus Edwards (USB #4563)
JONES WALDO HOLBROOK & McDONOUGH PC
Attorneys for ARS-FRESNO, LLC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Attorneys for Defendant /Appellee

LIST OF PARTIES

The parties to this appeal are:

Plaintiff/Appellant Kachina Choate ("K. Choate").

Defendant/Appellee ARS-Fresno, LLC ("ARS-Fresno").

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court pursuant to § 78A-4-103, Utah Code Ann.

STATEMENT OF ISSUES

Issue No. 1: ARS Fresno's liability defenses were that sufficient ice melt was present on the walkway in front of ARS-Fresno's store prior to K. Choate's slip-and-fall accident in below-freezing temperatures on December 28, 2012 (the "Accident"), that the roof did not leak, and that water dripped off the roof only in above-freezing conditions. K. Choate and her mother disagreed that sufficient ice melt was on the walkway at the time of the Accident and her expert claimed there was a roof leak that did not depend on temperatures. Thus, as the trial court ruled in denying K. Choate's motion for new trial, an issue decided by the jury was the comparative credibility of the parties and their experts.

Standard of Review: A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. *Bonnivier v. Valley Asphalt, Inc.*, 2000 UT App 117 (citing *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355). Under the abuse of discretion standard, the verdict should be reversed "only if the evidence to support the verdict was completely lacking or was so slight and

unconvincing as to make the verdict plainly unreasonable and unjust." *Sharp v. Williams,* 915 P.2d 495, 497-499 (Utah 1996) (citations omitted).

Preservation: This issue was preserved in K. Choate's Motion for New Trial filed on July 15, 2015.

Issue No 2: ARS-Fresno's causation defense was that K. Choate should have been more careful walking in winter weather conditions at the time of the Accident. Six of the eight jurors decided that K. Choate was 60% comparatively at fault. Thus, the primary causation issue decided by the jury was that K. Choate should have been more careful.

Standard of Review: To challenge a jury verdict, K. Choate "must carry the heavy burden of establishing that the evidence so clearly preponderates in [her] favor ... that reasonable people would not differ on concluding that [ARS-Fresno] was negligent." *Avalos v. TL Custom, LLC*, 2014 UT App 156, ¶ 29, 330 P.3d 727 (citation and internal quotation marks omitted and alterations added). "[S]o long as some evidence and reasonable inferences support the jury's findings, we will not disturb them." *Id.* (citations and internal quotation marks omitted).

Preservation: This issue was preserved in K. Choate's Motion for New Trial.

Issue No. 3: The jury verdict finding that K. Choate was 60% comparatively negligent was overwhelmingly supported by the evidence. The evidence supporting the verdict included trial testimony by ARS-Fresno employees present before, and shortly after, the Accident and also by K. Choate's and Bernadine Choate's ("B. Choate") testimony.

Standard of Review: To review a jury's verdict places a difficult burden on the challenging party. *Selvage v. J.J. Johnson Assocs.*, 910 P.2d 1252, 1257 (Utah Ct. App. 1996). The appellant must show that the verdict is against the clear weight of the evidence by marshalling all of the evidence supporting the verdict and demonstrating that when viewed in a light most favorable to the verdict there is insufficient evidence to support it. *Id.* "Furthermore, all reasonable inferences are drawn in favor of the verdict, and if the evidence supports the verdict, we will affirm." *Id.* (citation omitted).

Preservation: This issue was preserved in K. Choate's Motion for New Trial.

DETERMINATIVE PROVISIONS OF LAW

Section 78B-5-818(2), Utah Code Ann., provides as follows:

> 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).

Utah R. Civ. P. 59(a) provides, in pertinent part, as follows:

> 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....

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition in the lower court.

K. Choate filed her negligence action against ARS-Fresno for injuries allegedly sustained in the Accident at a store owned and operated ARS-Fresno in Salt Lake City, Utah (the "Store"). The Accident happened on a walkway directly in front of the Store that runs along its entire east side (the "Walkway").

On the afternoon of the Accident, K. Choate and B. Choate parked at the Smith's grocery store and walked on public sidewalks to shop at several stores before entering the Store premises. Prior to the Accident, there had been three-days of snow, with continuous below-freezing temperatures, and there had not been any periods of sunny weather.

K. Choate and B. Choate saw the winter weather conditions before the Accident, since the roads were wet, snow was piled on the sides of the roads, and walking near the Store they encountered a public sidewalk with a pile of

snow on the ground that was frozen. Indeed, before the Accident, K. Choate and B. Choate saw that the entire Walkway was wet. However, despite knowledge that it may be below freezing and that the sidewalks, Walkway, and roads were all wet, K. Choate was not wearing winter shoes. In fact, B. Choate admitted that, before the Accident, she did not remember them being extremely careful in the way they walked.

At the time of the Accident, the ARS-Fresno employee working in the Store was Stefan Jennings ("Jennings"). Jennings was 90% sure that he applied ice melt on the Walkway before the Accident. After the Accident was reported, Jennings called the manager of another ARS-Fresno store, Ray Duncan ("Duncan"), to ask for assistance with the Accident. Duncan arrived a short time after the Accident, but after K. Choate and B. Choate had already left the Store. When Duncan arrived, there was adequate ice melt on the Walkway. Jennings was busy with customers and did not have time to apply ice melt between the time the Accident was reported and when Duncan arrived. By contrast, K. Choate and B. Choate testified that there was no ice melt on the Walkway.

The jury trial was on June 16, 17, 18, and 19, 2015. (R. 625-626 and 650-657). The jury answered Question Nos. 1 to 4 in the Special Verdict that ARS-Fresno and K. Choate were both at fault and their fault had caused harm.

(R. 660-661). In Question No. 5 of the Special Verdict, the jury found, assuming that all of the fault which caused harm to K. Choate was 100%, that ARS-Fresno's fault was 40% and K. Choate's was 60%. (R. 662). On November 4, 2015, the trial court denied K. Choate's motion for new trial. (R. 789-806; Addendum).

STATEMENT OF FACTS

1. ARS-Fresno owned and operated the Store at 680 East 400 South, Salt Lake City, Utah. (R. 1007).

2. Brian Blank ("Blank") was the manager of the Store from July 2011 to February 2013. (R. 1005 and 1008).

3. At the time of the Accident, Blank was the supervisor of the Store's Lead Cashier, Jennings, and other Cashiers employed at the Store, including David Marshall and Emily Larsen. (R. 1005, 1010 and 1013).

4. In 1982, Duncan started at ARS-Fresno's predecessor, Rainbow, and his employment at ARS-Fresno started when it purchased stores in December 2008. (R. 965). Duncan trained Blank when Blank was hired by ARS-Fresno. (R. 970).

5. At the time of the Accident, Duncan was the manager of an ARS-Fresno store at 2280 South Highland Drive, Salt Lake City, Utah. (R. 966-967).

6. Blank was on vacation on the day of the Accident. (R. 994-995 and 1020-1021). Blank's immediate supervisor was Tonya Howard, a District Manager. (R. 1009).

7. Ms. Howard was on vacation on the day of the Accident. (R. 977 and 994-995). While Ms. Howard was on vacation during December 2012 she assigned Duncan to cover for her. (R. 995).

8. Jennings learned of the Accident when a lady told him that another lady had slipped and fallen. (R. 914 and 916).

9. When Jennings could not contact Blank by phone, he called Duncan, because Jennings did not know how to handle the Accident. (R. 918 and 920).

10. Jennings called Duncan at his store on Highland Drive and told him that a lady had fallen on the corner and, in response, Duncan went to the Store. (R. 968 and 981). When Duncan arrived at the Store, K. Choate and B. Choate were no longer at the Store. (R. 920).

11. Duncan estimated that 10-15 minutes elapsed between getting the call from Jennings at his store and arriving at the Store. (R. 971).

12. Jennings testified that in the time after he started his shift at the Store at 2:53 p.m., he was 90% sure that he applied ice melt before the Accident. (R. 900, 932 and 935). When Duncan arrived, on his way into the

Store, he saw adequate ice melt on the Walkway. (R. 985-987, 996 and 998). Duncan did not see any ice on the Walkway. (R. 997-998). After entering the Store, Duncan went back out to the Walkway and took photographs that would show the ice melt on the day of the Accident, if they could have been located. (R. 997).

13. B. Choate testified that there was no ice melt on the Walkway when K. Choate fell. (R. 876). When B. Choate walked back into the store to prepare a second accident report, she was sure there was no ice melt on the Walkway. (R. 864-865).

14. Jennings was cross-examined at trial concerning customers telling him that the walkway had a slippery spot as follows:

> Q. Okay. And so you – and you kind of – you went to look at it and I suppose, because you didn't want to fall, you were pretty tentative and kind of reached, you know, sort of feeling it and looking at it at the same time?
>
> A. Right. Well, but I had walked over that spot all the time.
>
> Q. But – but you never, to your knowledge, you never walked across it when it was a black ice situation, had you? I mean, you didn't do that intentionally, did you?
>
> A. What -- what do you mean?
>
> Q. When -- when it was frozen over, like walking at a normal pace, when you know there was going to be black ice there, you –

> A. Yeah. Like I said, I've never – I never slipped or anything like that and I walk over that spot more than anybody.

(R. 945).

15. Jennings had been told by regular customers about a slippery condition at the northeast corner of the sidewalk, but it did not happen often and no one ever fell, except K. Choate. (R. 909-910). Water would come off the roof somewhere below the corner and freeze at night, but Jennings could not remember the approximate area on the Walkway. (R. 910). Water would drip off the roof every eight seconds only in the daytime. (R. 941). The water freezing on the Walkway was never a big enough issue for Jennings to be mention it to management. (R. 913).

16. David Marshall ("Marshall") was employed by ARS-Fresno from the time it purchased the stores in 2008. (R. 1041).

17. Marshall was aware that, on days with melting and thawing, water would drip through the seams in the metal awning and on cold days could form ice to the north and south of the Store's door. (R. 1047 and 1049). Marshall testified that the florescent lighting in the metal awning did not have enough heat to cause snow to melt. (R. 1065).

18. At the time of trial, Jennings was employed by a grocery store, but between the termination of his employment at ARS-Fresno in September 2013

and the trial, Jennings had filed and resolved a wage dispute with the Utah Labor Commission against ARS-Fresno. (R. 894 and 896).

19. Jennings testified that K. Choate and B. Choate came into the Store and asked him what he was going to do about the Accident and who was going to pay for it, as if he owned the Store. (R. 921 and 924).

20. Jennings thought it was "weird" or "strange" that K. Choate and B. Choate were not customers and he had never seen anyone walk across the gas station at an angle and get up on the Walkway at the front of the Store, when there was a perfectly good sidewalk in the same direction they were going. (R. 922-923).

21. Jennings asked K. Choate and B. Choate if they wanted an ambulance and "[t]hey said no." (R. 925-926).

22. Jennings thought it was "odd" that, after K. Choate and B. Choate had reported the Accident to him, they walked in the same direction where K. Choate had fallen (R. 930).

23. B. Choate testified that Jennings said he had "been really busy and so didn't know if the person that had just left the shift had salted or not, he hadn't had time – I believe that he said he hadn't had time to check it." (R. 847).

24. B. Choate recalled that Jennings talked on the phone, because he did not know where the accident reports were or what he should do, and she remembered hearing Jennings say that he did not know whether there was ice melt out on the Walkway or not, because he had not been at work very long and did not have time to check it. (R. 848-849 and 867-868).

25. K. Choate was under the impression from her discussion with Jennings that he had just come on shift, was really busy with customers and had not had time to take care ice melt on the Walkway. (R. 1245).

26. On the day of the Accident, Jennings worked at the Store from 2:53 p.m. until 10:58 p.m. (R. 900, 961, and 1042-1043). On the day of the Accident, Marshall worked at the Store from 11:11 a.m. until 3:44 p.m. (R. 901, 961, and 1042-1043). Jennings and Marshall worked together 51 minutes. (R. 900-901 and 960-962).

27. K. Choate testified that the Accident happened at 4:47 p.m. (R. 1203).

28. K. Choate was not wearing boots she owned, because they not have any grip in snow and were slick. K. Choate did not have any winter boots with treads for walking in snow. (R. 1190-1191 and 1249).

29. B. Choate testified that at the time of the Accident she and K. Choate were "bundled up" and "it was so cold," but "there was a break in the

weather" and she did not remember it snowing while she and K. Choate were walking, after parking at Smith's. (R. 835).

30. B. Choate recalled that driving to Smith's the roads were wet and there was snow on the sides of the road. (R. 836).

31. In front of one of the stores while walking to the Store, B. Choate encountered difficulty, near the Modern Display store, because the sidewalk was not shoveled and a pile of snow on the ground was frozen. (R. 836-837, 1194 and 1243).

32. B. Choate was walking northbound on the Walkway behind K. Choate and saw K. Choate step up on the Store walkway to avoid a car and very shortly afterwards K. Choate fell. (R. 839-840 and 1197).

33. B. Choate testified that while she was walking behind K. Choate on the walkway it looked wet. (R. 840). K. Choate testified that the Walkway looked wet while she was walking on it, but she did not know whether the temperature was below 32 degrees and it did not occur to her that the wet Walkway may be icy. (R. 1198 and 1243). When B. Choate went up really close to K. Choate she could see that the Walkway was icy. (R. 842). K. Choate testified that she only saw the ice on the Walkway after she fell. (R. 1202).

34. B. Choate recalled that K. Choate was carrying grocery bags and a purse. (R. 843, 873 and 1192-1193).

35. B. Choate was walking normally and she did not remember that she and K. Choate were "being extremely careful." (R. 873).

36. B. Choate recalled that sometime after she entered the Store, K. Choate "somehow managed to get up and hobble into the store." (R. 847). B. Choate did not notice K. Choate come into the store so she did not know whether Jennings noticed K. Choate come in. (R. 874). K. Choate testified that if Jennings saw her come into the Store he would have seen her hobbling or limping. (R. 1248). K. Choate emphasized to Jennings that she was in real pain. (R. 1249).

37. Jennings though it was "weird" or "odd" that K. Choate did not seem to be injured. (R. 928).

38. Tim Wyatt ("Wyatt"), an owner of an architectural-design firm, testified that he had obtained weather records from the Salt Lake City Airport (the "Records") which showed that there was 2.50 inches of snow on December 26, 2012; 2.80 inches on December 27; and .90 inches on December 28. (R. 1155 and 1168-1169).

39. The Records reported that on December 26 the minimum temperature was 22 degrees and the maximum was 32 degrees. (R. 1167 and 1176).

40. The Records stated that on December 27 the minimum temperature was 25 degrees and the maximum was 29 degrees. (R. 1168).

41. The Records showed that on December 28 the minimum temperature was 17 degrees and the maximum was 33 degrees. (R. 1168-1169).

42. The Records showed that the hourly temperatures on the afternoon of December 28 were as follows: 12:53 32 p.m. degrees, 1:53 p.m. 32 degrees, 3:53 p.m. 26 degrees. (R. 1155-1156).

43. The Records for December 28, 2012, stated that sunset was at 5:08 p.m. and twilight was at 5:39 p.m., which meant that the Accident happened at dusk or sunset. (R. 1169).

44. The Records reported that there were no sunny or clear days between December 26 and 28, 2012. (R. 1169-1170).

45. Wyatt testified that the eight to ten-inch surface of the top of the parapet wall on the roof at the front of the Store was one percent of the total surface of the roof. (R. 1172-1173). Thus, water dripping off the parapet cap of the roof would be less than one percent of the snow or rain falling on the roof. (R. 1173).

46. Merlin Taylor ("Taylor"), a construction contractor that has built or remodeled over a thousand projects since 1980, was hired by ARS Fresno to inspect the Store's roof on November 14, 2014. (R. 1265 and 1267).

47. The top, outer edge of the front of the Store's roof was a parapet wall and the top of the wall had a metal cap. (R. 1274-1275).

48. The parapet cap should have a three to five percent grade back toward the inside of the roof to drain the water into the interior portion of the roof. (R. 1275).

49. The designed drainage path would be to send water that landed on top of the parapet cap to the interior roof drain. (R. 1279).

50. In Taylor's inspection, the parapet cap revealed it was flat or tipping forward and as part of maintenance the cap should be re-installed. (R. 1275 and 1281).

51. The relaxed parapet cap allowed water to accumulate away from the designed drainage path. (R. 1279). Water or snow on the parapet cap would stay on top if the temperature was below 32 degrees. (R. 1282).

52. Taylor's opinion was that the lighting system would not produce enough heat to reach the top of the parapet cap. (R. 1281).

53. Taylor's opinion was that the relaxed parapet cap was not a breach of the duty of reasonable care, because it was not serious and it was a maintenance issue. (R. 1283).

54. Taylor's opinion was that there was not a leak in the roof. (R. 1285-1286).

55. Taylor disagreed with Wyatt's opinion that there was a roof leak. (R. 1286-1287).

56. In Instruction No. 8, the trial court instructed the jury as follows: "You are the excusive 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 the right to take into consideration any biases, any interest in the result, and any motive to testify fairly." (R. 568).

57. On November 4, 2015, the trial court entered its Order Denying Plaintiff's Motion for New trial and Granting, in Part, and Denying, in Part, Defendant's Verified Memorandum of Costs (the "New Trial Order"). (R. 796-801; Appellant's Addendum).

58. In the New Trial Order, the trial court denied K. Choate's motion for a new trial, because the jury verdict finding K. Choate 60% negligent was supported by sufficient evidence, the trial court deferred to the jury's credibility findings in reaching its verdict that K. Choate was 60% negligent, and the trial

court provided a detailed description of the conflicting evidence concerning the parties' comparative negligence. (R. 796-801; Appellant's Addendum).

SUMMMARY OF ARGUMENTS

Although the evidence offered at trial by K. Choate and ARS-Fresno conflicted on important issues, it does not entitle K. Choate to overturn the verdict, since only some evidence and reasonable inferences were required to support the verdict. Indeed, determining the credibility of witnesses is the prime function of the jury. The verdict finding K. Choate 60% at fault for the Accident means that the jury found her evidence less credible than ARS-Fresno's evidence and this Court should refrain from disturbing the verdict.

The verdict finding K. Choate 20% more at fault than ARS-Fresno was supported by evidence and reasonable inferences showing that K. Choate should have been more careful after three days of snow, below-freezing temperatures, and no sunshine. K. Choate failed to dispute the evidence concerning additional precautions she should have, or could have, taken when she saw that the Walkway was wet in below-freezing temperatures.

This Court should assume that the jury believed those aspects of the facts and reasonable inferences which supported the verdict and, if it does, the verdict was not against the clear weight of the evidence. In fact, the verdict was overwhelmingly supported by the evidence that K. Choate was significantly

more at fault for the Accident than ARS-Fresno, especially testimony by Duncan, Jennings, Marshall, and Taylor that adequate ice melt was on the Walkway before the Accident and water only dripped from the roof in melting or thawing conditions.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL, BECAUSE THE JURY FOUND THAT ARS-FRESNO'S TESTIMONY WAS MORE CREDIBLE THAN K. CHOATE'S TESTIMONY

There were numerous, material conflicts in the testimony offered by K. Choate's witnesses compared to ARS-Fresno's witnesses. "[T]he existence of conflicting evidence, alone, does not justify overturning a verdict for insufficient evidence." *Avalos v. TL Custom, LLC*, 2014 UT App 150, ¶ 29 (citation and internal quotation marks omitted). Indeed, this Court should not disturb the verdict as long as "some evidence and reasonable inferences" support it. *Id.* In receiving Instruction No. 8, the jurors were properly instructed by the trial court that they were "the excusive judges of the credibility of the witnesses and the weight of the evidence." Neither party objected to Instruction No. 8. Moreover, Instruction No. 8 accurately states the applicable standard under Utah law for denying motions for new trial where jury verdicts depend on determinations of the credibility of witnesses. *Id.* (it is

the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses).

In *Bridzette Lane v. D. C.*, 104 F. Supp. 3d 7 (D.D.C. 2015), after a wrongful death verdict was entered in favor of the defendants, the court denied the plaintiff's motion for new trial. The court noted that, unlike the narrow review by an appellate court of the denial of a motion for new trial, "[i]n granting a motion for new trial on the grounds that the verdict was against the weight of the evidence, the trial judge risks usurping the prime function of the jury – to weigh the evidence and determine the credibility of the witnesses." *Id.* at 9 (citation omitted); *see also Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992) (where the resolution of the issues depends on an assessment of the credibility of witnesses it is proper for the court to refrain from granting a new trial).

At trial, critical testimony by K. Choate and B. Choate concerning the cause of the Accident conflicted with the testimony of multiple other witnesses. The jurors could not have found K. Choate 60% at fault if they believed her testimony, as corroborated by B. Choate, in the many instances it contradicted the testimony of other witnesses.

K. Choate and B. Choate claimed that the Accident happened, because there was no ice melt on the Walkway where she walked or where she fell. By

contrast, Jennings testified that he was 90% sure that he applied ice melt before the Accident and Duncan testified that there was ice melt on the Walkway, which he photographed, when he arrived after the Accident. Jennings testified that he was busy with customers in the Store and did not apply ice melt between the time the Accident was reported to him and when Duncan arrived 10-15 minutes later.

K. Choate and B. Choate testified that Jennings stated that he had just started working at the time of the Accident and had not had time to apply ice melt to the Walkway before the Accident. However, the time records admitted into evidence and the testimony of multiple witnesses were undisputed that Jennings had been working for 1 hour and 54 minutes before the Accident. In addition, the suggestion that Jennings did not have time to apply ice melt before the Accident, because he was too busy with customers working "single coverage," was contradicted by the time records and testimony proving that he worked "double coverage" with Marshall for 51 minutes before the Accident.

In Instruction No. 8 the jury was instructed that, in judging the weight and credibility of the witnesses, the jury had the right to take into consideration the witnesses' biases and interest in the result. In weighing the contradictory testimony of K. Choate and Jennings, the jury may have believed that K. Choate had a bias and interest in obtaining a favorable verdict, which Jennings

did not have. Specifically, when Jennings testified, not only was he no longer employed by ARS-Fresno, after his employment terminated he demonstrated his bias against ARS-Fresno by filing a wage claim at the Utah Labor Commission. Similarly, as a former employee, Jennings had no interest in the result, since his trial testimony would not affect his continued employment.

K. Choate and B. Choate testified that K. Choate hobbled or limped in and out of the Store and her injuries should have been obvious to Jennings. In contrast, Jennings testified that K. Choate did not appear injured and when she left he saw her walk toward the area where the Accident happened. When asked by Jennings, K. Choate declined an ambulance, but she asked him whether he was going to pay her for the Accident as though he was the owner of ARS-Fresno.

Finally, K. Choate contended that there was a roof leak which caused water to drip every 8 seconds on the Walkway in the area where the Accident happened and that, even if the temperature was below freezing, heat produced by lighting could have caused water to drip on the Walkway. However, Jennings and Marshall testified that water dripped off the roof only when melting and thawing occurred. Marshall testified that lighting did not produce enough heat to melt snow on the roof. ARS-Fresno's expert contractor, Taylor, testified that there was not a roof leak and that lighting did not cause an increase

in temperatures on the roof. Taylor explained that the parapet cap was relaxed which meant that, in above-freezing conditions, water could drip off the front edge of the parapet roof. The Records showed that it was dusk or sunset at the time of the Accident and it was below-freezing. The Records further demonstrated that there was no sunshine and it was not above freezing for three days before the Accident. Thus, K. Choate did not prove that, in the conditions which existed for before the Accident, water dripped off the roof down to the Walkway.

The contradictory trial testimony presented by K. Choate's witnesses, compared to ARS-Fresno's witnesses, covered the issues that were essential for the jury to decide the parties' comparative fault. The jury could not have found K. Choate 60% negligent without finding that ARS-Fresno's witnesses were more credible than her witnesses. *See Proctor v. Costco Wholesale Corp.*, 2013 UT App 226, ¶ 24, 311 P.3d 564 (in reviewing a jury verdict the appellate court views the evidence in the light most supportive of the verdict and assumes the jury believed those aspects of the evidence which sustain it).

K. Choate does not have the comprehensive and persuasive kind of evidence sufficient to meet her heavy burden to overturn the trial court's ruling denying her motion for new trial. The verdict should not be reversed unless "the evidence to support the verdict was completely lacking or was so slight and

unconvincing as to make the verdict plainly unreasonable and unjust." *Sharp v. Williams,* 915 P.2d at 497.

The evidence that K. Choate was more at fault than ARS-Fresno for the Accident was not completely lacking, slight, or unconvincing. Specifically, there was extensive and corroborated testimony by Duncan, Jennings, Marshall, and Taylor, to show that ice melt was on the Walkway and that, because of the three days of freezing conditions before the Accident, there was not a roof leak and water did not drip down to the Walkway. This Court should refrain from disturbing the verdict, since ARS-Fresno admitted some evidence and reasonable inferences to support the verdict.

Therefore, the verdict finding K. Choate 60% at fault was not plainly unreasonable and unjust.

II. THE JURY FOUND THAT K. CHOATE WAS 60% COMPARATIVELY AT FAULT, SINCE SHE SHOULD HAVE BEEN MORE CAREFUL IN WINTER WEATHER CONDITIONS

In the Special Verdict the jury answered Question No. 5 that K. Choate was the primary cause of the Accident. Indeed, the jury's verdict finding K. Choate 60% at fault meant the jury concluded that she was significantly more negligent than ARS-Fresno. *See Proctor v. Costco Wholesale Corp.*, 2013 UT App 226, ¶ 24 (in reviewing a jury verdict the appellate court views the

evidence in the light most supportive of the verdict). In other words, the jury did not find that the parties' comparative fault was a close call.

In her brief, K. Choate has cited several Utah decisions where the jury found that the opposing parties' were each 50% comparatively negligent. *See Sharp v. Williams*, 915 P.2d at 497-99; *Nelson v. Trujillo*, 657 P.2d 730 (Utah 1982). The verdict in this action was markedly different, because the jury found a 20% difference in the relative negligence of the parties. On the other hand, K. Choate has cited other Utah decisions where the jury found that the defendants were 0% negligent. *See Harris v. Utah Transit Auth.*, 671 P.2d 217 (Utah 1983); *Ortiz v. Geneva Rock Products, Inc.*, 939 P.2d 1213 (Utah Ct. App. 1997); *Holmes v. Nelson*, 326 P.2d 722 (Utah 1958). Again, the verdict in this action was vastly different, because the jury found that ARS-Fresno was 40% at fault.

The 20% difference in the parties' comparative negligence means that K. Choate has a two-step burden to reverse the jury's verdict under Section 78B-5-818. K. Choate would be barred from recovery of damages unless this Court holds that ARS-Fresno's fault was more than 50%. In other words, it is not enough to persuade this Court that the verdict finding K. Choate 60% at fault was erroneous, to recover damages K. Choate must prove that the jury's verdict was in error by more than 10 %. If this Court cannot conclude that the verdict

finding K. Choate 60% at fault was 10% too high, there would be no reason to reverse the trial court, since K. Choate's recovery would be the same.

Utah opinions where parties appealed wider differences in jury verdicts have more precedential value in considering this action. For example, in *Bonnivier v. Valley Asphalt*, 2000 UT App 117, the plaintiff appealed the trial court's denial of a motion for a new trial after the jury found that he was 90% at fault and defendant was 10% at fault for an auto-motorcycle accident. At trial several witnesses testified that they did not see plaintiff on his motorcycle at an intersection, because he was too close behind defendant's vehicle. Plaintiff testified that he was close to the vehicle, because it was driving at a slower rate of speed and he was preparing to pass it. The trial court's ruling was affirmed with minimal discussion, since this testimony was sufficient to support the verdict.

K. Choate relies on *Wilhelm v. City of Great Falls*, 685 P.2d 350 (Mont. 1984), a decision where the jury found the homeowners 90% comparatively negligent in their nuisance action for smoke, stench and litter from defendants' city dump. However, the Montana Supreme Court was reviewing the trial court's order granting a new trial. An appeal of a ruling granting a new trial is substantially different from the appeal of a denial of a new trial. In particular, a trial judge has maximum latitude in exercising discretion to grant a motion for

new trial, since the trial judge has heard and seen the evidence and is best suited to evaluate the claim that it was insufficient to justify the verdict. *Nelson v. Trujillo*, 657 P.2d at 731-32 (there is a different standard of appellate review of trial court decisions on motions for new trial, depending on whether the court denied or granted the motion). This may explain the reason that the Montana Supreme Court's only explanation for affirming the trial court's order was that there was insufficient evidence that the homeowners were 90% comparatively negligent for the nuisance merely by building their home near the city dump.

The evidence that K. Choate was 60% at fault for the Accident was not effectively disputed by K. Choate during trial. K. Choate did not dispute that the temperatures for three days before the Accident were below freezing and that there was no sunshine. K. Choate did not dispute that the afternoon of the Accident it was never above freezing and that it was dusk or sunset at the time of the Accident. K. Choate admitted that she knew she would be walking a number of blocks before the Accident. K. Choate testified that while driving and walking before the Accident she saw snow and ice on the roads and sidewalks and, while walking on the sidewalk near the Store, she saw a pile of snow frozen on the ground. Nevertheless, K. Choate conceded that she was not wearing winter shoes and she was carrying a purse and grocery bags. K. Choate, as corroborated by B. Choate, testified that she saw that the Walkway

was wet before the Accident, but B. Choate did not remember them being extremely careful in the way they walked.

Therefore, at trial K. Choate did not effectively dispute that her comparative negligence was equal to, or greater than, ARS-Fresno's negligence.

III. THE JURY VERDICT FINDING THAT K. CHOATE WAS 60% NEGLIGENT AND ARS-FRESNO WAS 40% NEGLIGENT WAS OVERWHELMINGLY SUPPORTED BY THE EVIDENCE

ARS-Fresno's primary liability defenses were that there was sufficient ice melt on the Walkway and that K. Choate should have been more careful in walking in winter weather conditions. Whether there was adequate ice melt and how careful K. Choate should have been before the Accident are fact-intensive questions that were decided by the jury and should not be overturned by an appellate court.

To overturn a jury verdict "places a difficult burden on the challenging party." *Selvage v. J.J. Johnson & Assocs.*, 910 P.2d at 1257. To reverse a jury verdict the appellant must show that it is against the clear weight of the evidence by marshaling all of the evidence supporting the verdict and demonstrating that when viewed in a light most favorable to the verdict there is insufficient evidence to support it. *Selvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1257 (Utah Ct. App. 1996). This Court will "assume that the jury

believed those aspects of the evidence which sustain its findings and judgment." *Stevensen 3rd East, LC v. Watts,* 2009 UT App 137, ¶ 26, 210 P.3d 977 (citation and internal quotation marks omitted).

K. Choate attempted to meet her burden to marshal the evidence by reciting a list of facts. Most of these facts are arguments, or were used by K. Choate at trial to argue, that ARS-Fresno was negligent, but these arguments were rejected by the jury. More importantly, K. Choate failed to consider the numerous other facts and reasonable inferences that supported the verdict. If this Court assumes the jury believed the following additional facts and inferences supporting the verdict, the weight of the evidence was not clearly insufficient to support the jury's verdict:

> (1) Jennings was 90% sure that he had placed ice melt prior to the Accident and when Duncan came to the Store to assist Jennings, Duncan saw and photographed ice melt, Jennings did not place any ice melt after the Accident was reported to him and before Duncan arrived.
>
> (2) K. Choate and B. Choate observed that the Walkway looked wet before the Accident, but despite knowledge that it may be below freezing B. Choate did not remember them being extremely careful in the way they walked.
>
> (3) K. Choate and B. Choate took a shortcut through the Store property that Jennings testified was weird or strange, because he had never seen pedestrians that were not customers walk across the property at an angle to walk on the Walkway.
>
> (4) There were three days of snow and below freezing temperatures before the Accident, the Accident

happened at dusk or sunset, K. Choate saw snow and ice on roads and sidewalks before the Accident.

(5) K. Choate was not wearing winter shoes, but she knew she would be walking a number of blocks prior to the Accident.

(6) K. Choate was carrying a purse and grocery bags at the time of the Accident.

(7) The Walkway did not consistently have ice on it from water dripping from the roof, since it depended on the weather conditions.

(8) There was disputed evidence concerning where the Accident happened on the Walkway in comparison to where water had been reported to drip from the roof.

(9) K. Choate and B. Choate testified that Jennings said that he had just started working before the Accident and he did not have time to apply ice melt, but the evidence was undisputed that he had been working for 1 hour and 54 minutes before the Accident and Jennings and Marshall had worked together for 51 minutes before the Accident.

(10) Taylor's expert opinions were that the relaxed parapet cap was not a breach of the duty of reasonable care and that there was not a roof leak.

If this Court assumes that the jury believed those aspects of these additional facts and inferences which sustained its verdict, the verdict was not against the clear weight of the evidence. Indeed, the clear weight of the evidence was that K. Choate was 60% or more negligent.

CONCLUSION

For the reasons stated above, ARS-Fresno requests that the Court affirm the jury's verdict finding that K. Choate was 60% negligent.

DATED this 12th day of July, 2016.

JONES WALDO HOLBROOK & McDONOUGH

By _____
J. Angus Edwards
Attorneys for Appellee ARS-Fresno, LLC

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

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,642 words.

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Word 2007, Times New Roman style and 14 font size.

DATED this 12th day of July, 2016.

JONES WALDO HOLBROOK & McDONOUGH, PC

By _____
J. Angus Edwards
Attorneys for Appellee ARS-Fresno, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2016, I served via U.S. mail, postage fully prepaid, two true and correct print copies and one electronic copy on CD of the **BRIEF OF APPELLEE** on the following:

Levi H. Cazier
Beehive Law
P.O. Box 84118
Salt Lake City, Utah 84118
Telephone: (801) 856-1773

Counsel for Plaintiff/Appellant

JONES WALDO HOLBROOK & McDONOUGH, PC

By: _____
J. Angus Edwards
Attorneys for Defendant/Appellee