

2002

# Lori Haase v. Ashley Valley Medical Center and Columbia Ashley Valley medical Center and John Doe Defendants 1 through 10: Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LORI HAASE, an individual,

Plaintiff/Appellant and  
Cross Appellee,

vs.

Case No. 20020524-CA

ASHLEY VALLEY MEDICAL  
CENTER and COLUMBIA ASHLEY  
VALLEY MEDICAL CENTER and  
JOHN DOE DEFENDANTS 1  
THROUGH 10,

Eighth Judicial District Court  
No. 98-0800377

Defendants/Appellees and  
Cross Appellant.

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BRIEF OF APPELLEE/CROSS APPELLANT

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APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT  
UINTAH COUNTY, STATE OF UTAH  
THE HONORABLE DOUGLAS L. CORNABY

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## **JURISDICTION**

This Court has jurisdiction over this appeal pursuant to UCA § 78-2a-3(2).

## **STATEMENT OF THE ISSUES**

**Issue:** Did the Court commit error in allowing the introduction of the personal medical records of Thomas Hawkes, where there was no foundation establishing that the Hospital had or should have had knowledge of the content of the records and had no opportunity to review the records or depose the physician who created them?

**Preserved:** Transcript at p. 543, lines 5-12.

**Standard of Review:** When a trial court is required to balance factors to determine the admissibility of evidence, the appropriate standard of review is abuse of discretion or reasonability. Mule-Hide Prods. Co. v. White, 40 P.3d 1155 (Utah App. 2002) (citations omitted).

**Issue:** Did the Court commit error, as a matter of law, in allowing the introduction of prior testimony from a deposition taken in another case in 1997, a case in which the Hospital was not a party and had no opportunity to cross-examine or develop the testimony?

**Preserved:** Transcript at p. 39, lines 2-5.

**Standard of Review:** Conclusions of law are reviewed for correctness with no deference to the trial court. Dalley v. Utah Valley Reg. Med. Ctr., 791 P.2d 193,195 (Utah 1990).

**Issue:** Did the Court commit error in allowing the introduction of the results of dexterity tests conducted more than fifteen months after the surgery on the plaintiff, absent any foundation establishing a connection between those results and the condition of Dr. Hawkes fifteen months earlier?

**Preserved:** Transcript at p. 961, lines 15-16.

**Standard of Review:** When a trial court is required to balance factors to determine the admissibility of evidence, the appropriate standard of review is abuse of discretion or reasonability. Mule-Hide Prods. Co. v. White, 40 P.3d 1155 (Utah App. 2002) (citations omitted).

**Issue:** Did the Court commit error in allowing the introduction of unedited videotape testimony of a fact witness, Dr. Lonnie Paulos, whose testimony was offered for the purpose of telling the jury what he would have told the Hospital had he been asked?

**Preserved:** Transcript at p. 152, p. 409, line 25, p. 410, line 1.

**Standard of Review:** When a trial court is required to balance factors to determine the admissibility of evidence, the appropriate standard of review is abuse of discretion or reasonability. Mule-Hide Prods. Co. v. White, 40 P.3d 1155 (Utah App. 2002) (citations omitted).

**Issue:** Did the Court commit error in allowing Dr. Margaret Ensign, a radiologist with no training or experience in impairment, and who relied solely on reading one postoperative note written by Dr. Hawkes, to testify as an expert that Dr. Hawkes was impaired?

**Preserved:** Transcript at p. 1247, line 23.

**Standard of Review:** When a trial court is required to balance factors to determine the admissibility of evidence, the appropriate standard of review is abuse of discretion or reasonability. Mule-Hide Prods. Co. v. White, 40 P.3d 1155 (Utah App. 2002) (citations omitted).

**Issue:** Did the Court commit error in allowing repeated references to records of evaluation at the Dayspring program, where there was no foundation for the admissibility of the records and they were excluded?

**Preserved:** Transcript at p. 111, lines 22-25.

**Standard of Review:** When a trial court is required to balance factors to determine the admissibility of evidence, the appropriate standard of review is abuse of discretion or reasonability. Mule-Hide Prods. Co. v. White, 40 P.3d 1155 (Utah App. 2002) (citations omitted).

### **STATEMENT OF THE CASE**

This is an action claiming negligence in the credentialing and retention of Dr. Thomas Hawkes, a surgeon at Ashley Valley Medical Center (“the Hospital”). The matter was tried to a jury and a verdict, now disputed, was rendered in which the plaintiff was awarded \$820,000 with an apportionment of 30% of fault to the Hospital. Jury Verdict Form, (Exhibit 1, Haase Addendum).

Hospital objections to a number of attempts by Haase to introduce testimony which the defense felt was either more prejudicial than probative, or without adequate foundation,

were overruled by the Court. This cross-appeal follows the plaintiff's appeal of the failure of the Court to revise the jury verdict in her favor, but addresses evidentiary rulings at trial rather than the verdict.

The Hospital submits that there was prejudicial error in six rulings of the Court which, given the cumulative weight of the evidence and testimony at issue, are so significant that the outcome of the trial would likely have been different.

First, the Court committed error in allowing the introduction into evidence of the personal medical records of Thomas Hawkes maintained by his private physician, Dr. Ace Madsen. The Court, having ruled in an unrelated case that the records be produced, made them available to Haase as well and required Dr. Madsen to testify about them. Transcript at p. 543, lines 5-12. The Hospital objected to the admission of the records, asserting that there was no foundation that Dr. Madsen shared with or had any obligation to share the records, or his impressions of his patient, with the Hospital. Transcript at p. 973, lines 2-8. In addition to the untimely decision to admit the records, the result of which was that the Hospital had no opportunity to depose Dr. Madsen or obtain expert testimony, the records were relied upon by Haase's expert, Dr. Pasternak, as the foundation for testimony that Dr. Hawkes was impaired. Transcript, at p. 862, lines 1-5.

Second, the Court committed error in allowing the introduction of the transcript of the deposition of Dr. Hawkes taken in another case to which the Hospital was not a party. The Hospital objected to the admission of the deposition testimony because it was not a party, was not present for the deposition, and had no opportunity to develop the testimony.

Transcript at p. 39, lines 2-5. The Hospital and Dr. Hawkes have distinct legal interests and the Hospital had no opportunity to raise objections unique to its interests.

Third, the Court committed error in allowing the introduction of the results of a manual dexterity test administered to Dr. Hawkes during the deposition. Transcript at p. 962, lines 3-5. As the Hospital was not a party, it had no opportunity to raise objections unique to its interests. Moreover, there was no expert testimony which established that the results of this 1997 test had any validity with respect to Dr. Hawkes' condition fifteen months earlier when the surgery on Haase was performed.

Fourth, the Court committed error in allowing the unedited videotape deposition of Dr. Lonnie Paulos. Transcript at pp. 409, line 25, p. 410, lines 1-8. The Hospital also objected as to foundation, as Dr. Paulos testified that was not certain that he shared any opinions with the Hospital, and affirmatively testified that he did not share the most critical of his opinions with the Hospital. Transcript at p. 151, lines 13-25, p. 152, lines 1-4.

Fifth, the Court committed error in allowing a radiologist with no special training or experience in the evaluation of drug impairment to offer an expert opinion that Dr. Hawkes was impaired. Transcript at p. 1247, line 23. The Hospital also objected to the foundation for her opinion, a single post-operative note written by Dr. Hawkes. Transcript at p. 1251, lines 22-25, p.1252, lines 1-3.

Sixth, the Court committed error in delaying a ruling on the Hospital's objection to the admission or use of records of Dr. Hawkes' evaluation at Dayspring, a mental health

and substance abuse program in Salt Lake City. The Hospital consistently objected to references to the records absent adequate foundation. Transcript at p. 111, lines 22-25. The Hospital also objected on the grounds of relevance, asserting that as there was no testimony that the Hospital ever saw the records, or had knowledge of their content, references to the records in front of the jury were more prejudicial than probative. Transcript at p. 1192, lines 24-25.

### **SUMMARY OF CROSS-APPELLANT'S ARGUMENT**

The Hospital argues that the Court committed reversible error in (1) admitting the medical records of Dr. Hawkes; (2) admitting the transcript of Dr. Hawkes' deposition in another case prior to his death in 1997; (3) admitting the results of manual dexterity tests administered at that deposition in 1997; (4) admitting the unedited videotape of Dr. Lonnie Paulos and allowing all of the tape to be shown, including opinions which Dr. Paulos testified he never shared with the Hospital; (5) allowing a radiologist with inadequate qualifications to testify as an expert on impairment, and to do so on an inadequate foundation; and (6) allowing the introduction of references to and information from the records of Dr. Hawkes' evaluation at the Dayspring program after objection from the Hospital but before making a ruling on the objection.

## ARGUMENT

### **I.**

**THE COURT COMMITTED ERROR IN ALLOWING THE INTRODUCTION OF THE PERSONAL MEDICAL RECORDS OF THOMAS HAWKES AS THERE WAS NO FOUNDATION ESTABLISHING THAT THE HOSPITAL HAD KNOWLEDGE OF THE CONTENT OF THE RECORDS AND WHERE THE DEFENSE HAD NO OPPORTUNITY TO REVIEW THE RECORDS OR DEPOSE THE PHYSICIAN WHO CREATED THEM.**

The Hospital objected to the admission or use of the personal medical records for Dr. Hawkes maintained by Ace Madsen, M.D., his personal physician. In addition to the unfair prejudice of the untimely release of the records, the Hospital objected on the grounds that Dr. Madsen never disclosed the records to the Hospital nor had any duty to do so. The circumstances under which these records came into the possession of Haase are unusual and are relevant to the Hospital's claim of error.

Dr. Madsen's records were subpoenaed by attorneys for an unrelated plaintiff in another case pending before the same Court, and counsel for Dr. Hawkes filed a motion to quash the subpoena. Prior to the Haase trial, the Court heard oral arguments on release of the documents in the unrelated case, but did not immediately issue a ruling. The Court's ruling on the production of Dr. Madsen's records in that unrelated case was addressed at the Haase trial, but the Court made no record of why the documents were being released to counsel for Haase as well as to counsel in the other case. Transcript at p. 543, lines 5-12.

The Hospital objected at that time to the admission of Dr. Hawkes' records. Transcript at 543, lines 16-17.

The release of the records was so untimely as to create unfair prejudice. It allowed the Hospital no opportunity to depose Dr. Madsen regarding his records or even to discuss the records with him informally prior to his testimony. The defense had no opportunity to call experts to support Dr. Madsen's contention that Dr. Hawkes was not a danger to patients, or to explain that reasonable physicians in Dr. Madsen's circumstances would have managed his patient in a similar way and reached similar conclusions. The inability to provide this testimony, which flowed directly from the Court's decision to order the records produced to Haase because it had decided to order them produced to a plaintiff in another case, substantially prejudiced the ability of the Hospital to respond.

In addition to objecting to the release, the Hospital objected on the grounds of foundation:

Mr. Harrison:        Your Honor, just reiterate our standing objection as to foundation. There has been no foundation that Dr. Madsen shared with or had any obligation to share with the hospital his impressions of his private patient or these records.

The Court:            I will withhold a ruling until such time as it is established.

Transcript at p. 973, lines 2-8.

The core of the prejudicial error emerges here. If the records had disclosed that Dr. Madsen felt that Dr. Hawkes was a danger to patients under his care and that he shared

that concern with the Hospital, the records would be useful to the trier of fact in determining what the Hospital knew prior to the surgery on Haase. Without that foundation, however, the records add nothing to the question of what the Hospital knew and are more prejudicial than probative. The Court should have required Haase to establish foundation before allowing any other inquiry into those records to proceed, and the failure to do is reversible error.

Notwithstanding the lack of foundation, the Court nevertheless allowed the jury to hear literally hours of testimony about the records maintained by Dr. Madsen. To allow the jury to hear extensive recitations from medical records without any foundation that the Hospital had or should have had any knowledge of the content of those records was highly prejudicial and the objection to discussion or admission of the records should have been sustained absent the necessary preliminary foundation.

The Court acknowledged that the Hospital cannot be charged with failure to act upon information or opinions it did not have: “They can’t have the knowledge to prevent him from operating unless they know the information. So if they don’t know the information . . . then it’s nothing that can be held against him (sic).” Transcript at p. 541, lines 4-9. Dr. Madsen did not share his records with the Hospital prior to the surgery on Haase nor indeed at any time prior to the death of Dr. Hawkes in 1997. Dr. Madsen testified that no one from the Hospital saw the medical records in question until June 15, 1999. Transcript at p. 981, lines 4-7.

There is no testimony establishing that the Hospital had a duty to obtain the records, or to second-guess in any way Dr. Madsen's professional judgment that Thomas Hawkes was not a danger to patients. As it is clearly established that the Hospital did not see nor have any duty to see Dr. Madsen's records, those records should not have been admitted.

The core of the prejudicial error is in allowing the records to be used for any purpose. However, an even greater prejudice here is that the plaintiff's expert, Dr. Pasternak, based his opinion that Dr. Hawkes was impaired on his review of Dr. Madsen's records. As an initial matter in attempting to qualify the witness, counsel for Haase asked Dr. Pasternak if he read the medical treatment records of Dr. Ace Madsen. Transcript at p. 71, lines 22-23. The Hospital objected on the basis of foundation, specifically that there had not been established "foundation that the hospital ever saw Dr. Ace Madsen's treatment records." Transcript at p. 781, lines 24-25 and p. 782, line 1.

The Court's ruling illustrates the manner in which prejudicial material was admitted without adequate foundation, despite recognition by the Court that discussing the material would create a problem if the foundation were never established:

The Court: I am going to overrule the objection and let him answer. It does create a problem if you don't get the information later, but we'll worry about that later. The objection is overruled. You may answer.

Transcript at p. 782, lines 5 through 8.

The Hospital reiterated its objection to Dr. Pasternak as an expert on physician impairment. Transcript at p. 858, lines 2-3. The Hospital also reiterated that the

information upon which Dr. Pasternak was relying was information not known to the Hospital. Transcript at p. 858, lines 4-19. On cross examination, in challenging Dr. Pasternak as an expert, the Hospital elicited that Dr. Pasternak is not a specialist in impairment, and that none of his medical practice as a physician is devoted to the evaluation or treatment of impaired physicians. Transcript at p. 861, lines 3-8. Dr. Pasternak further conceded that he had undertaken no evaluation of Dr. Hawkes, and that his opinions were based entirely on his review of medical records. Transcript at p. 862, lines 1-5.

Had this witness not been given these records, the Hospital could have challenged the foundation for his opinion that Dr. Hawkes was probably impaired. Accordingly, the likelihood that the jury would have reached a different conclusion but for this error is substantial.

## **II.**

### **THE COURT COMMITTED ERROR IN ALLOWING THE INTRODUCTION OF PRIOR TESTIMONY FROM A DEPOSITION TAKEN IN ANOTHER CASE IN WHICH THE HOSPITAL WAS NOT A PARTY AND HAD NO OPPORTUNITY TO DEVELOP THE TESTIMONY.**

Any testimony given at proceedings to which the Hospital was not a party should have been excluded as inadmissible hearsay. Absent some statutorily-provided exception, hearsay is not admissible. Utah R.Evid. 802. Hearsay is defined as “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to

prove the truth of the matter asserted.” Utah R.Evid. 801. Testimony from depositions taken in an action to which the Hospital was a not a party is hearsay, but as Dr. Hawkes was deceased at the time of trial, the only possible exception to the hearsay exclusion would be the provision for former testimony of an unavailable declarant.

The Utah Rules of Evidence allow, in a civil case, an exception to the hearsay exclusion for deposition testimony from another proceeding if “. . . a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.” White Pine Ranches v. Osguthorpe, 731 P.2d 1076, 1078 (Utah 1986) (citing Utah R. Evid. 804(b)(1)). Under this exception, in addition to establishing the unavailability of the witness, plaintiffs must demonstrate either that (a) the defendant was a party to the prior action, or (b) that a “predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Id.

There is no dispute as to the unavailability of Dr. Hawkes, or that the Hospital was not a party to the action in which Dr. Hawkes was deposed. Thus, the only basis for admissibility is to show that (a) Dr. Hawkes was a predecessor in interest of the Hospital, and (b) had a similar motive to develop the testimony.

Prior to opening statements, the Court addressed with counsel the issue of the deposition of Thomas Hawkes. The following exchange sets forth the Court’s position.

The Court:                This is one of the most hotly contested parts, and I – you know, I recognize the difficulty that defense counsel has, because he was not the counsel that was there cross examining, but I assume there was

somebody there cross examining. I'm assured there was somebody there cross examining. Was it Mr. Rencher's office?

Mr. Mortensen: Yes, it was David Epperson, the senior partner in his office.

The Court: Okay. So I'm going to rule that that's admissible. I don't think its as clear-cut an issue as I would like it to be.

Transcript at p. 38, lines 16-25.

The Hospital objected at that time. Transcript at p. 39, lines 2-5.

On the third day of trial, Haase proposed to read into the record the transcript of the deposition. As the Court had reserved its ruling on the pre-trial motion in limine filed by the Hospital, and announced its intention at trial to admit the deposition of Dr. Hawkes into the record, counsel objected again to the testimony. Transcript at p. 423, lines 2-10.

There is no case law or authority supporting the conclusion that, in litigation pursued by plaintiffs in stages, a physician is a predecessor in interest to a hospital at which he is alleged to have injured a patient. The Hospital and the physician have separate and distinct legal interests, and indeed Haase brought separate and distinct legal claims against the Hospital and the physician. The claim against Dr. Hawkes was for negligence in the performance of medical care, the claim against the Hospital is for negligence in its administrative functions prior to the provision of that medical care.

Even if the Hospital and Dr. Hawkes were deemed to have an identity of interest adequate to make him a predecessor in interest for purposes of the hearsay exception, he did not have a similar motive to develop testimony that would be relevant to the claim

against the Hospital. The Hospital had no opportunity to raise objections unique to its interests.

Accordingly, as Dr. Hawkes was not a predecessor in interest to the Hospital and did not have an adequately similar motive to develop testimony, his deposition transcript and the associated manual dexterity examination should be excluded as inadmissible hearsay.

### **III.**

#### **THE COURT COMMITTED ERROR IN ALLOWING THE INTRODUCTION OF THE RESULTS OF DEXTERITY TESTS CONDUCTED MORE THAN FIFTEEN MONTHS AFTER THE SURGERY ON THE PLAINTIFF.**

Any testimony given at proceedings to which the Hospital was not a party should be excluded as inadmissible hearsay. Absent some statutorily-provided exception, hearsay is not admissible. Utah R.Evid. 802. Hearsay is defined as “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” Utah R.Evid. 801. Testimony from depositions taken in an action to which the Hospital was a not a party are hearsay, but as Dr. Hawkes was deceased, the only possible exception to the hearsay exclusion would be the provision for former testimony of an unavailable declarant.

The Utah Rules of Evidence allow, in a civil case, an exception to the hearsay exclusion for deposition testimony from another proceeding if “. . . a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross or

redirect examination.” White Pine Ranches v. Osguthorpe, 731 P.2d 1076, 1078 (Utah 1986)(citing Utah R. Evid. 804(b)(1)). Under this exception, in addition to establishing the unavailability of the witness, plaintiffs must demonstrate either that (a) the defendant was a party to the prior action, or (b) that a “predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Id.

As argued above, the Hospital submits that Dr. Hawkes was not a predecessor in interest to the Hospital. Therefore, the entire deposition, including the manual dexterity test administered as part of the deposition, should be excluded.

The Hospital objected to the introduction of the records of this dexterity test. Transcript at p. 961, lines 15-16. The objection to lack of foundation was grounded in the impossibility that the Hospital could have known, prior to the surgery in March of 1996, what these tests showed in the summer of 1997. Transcript at p. 961, lines 18-24. Also completely absent was any foundation establishing that the test in 1997 was reliable as a reflection of Dr. Hawkes’ condition two to four years earlier, or indeed at any time in the past.

The absence of the Hospital as a party at the time of the test precluded the possibility that the Hospital could appeal the ruling which allowed a physical dexterity test to be performed without notice to Dr. Hawkes. The Hospital had no opportunity to raise objections unique to its interests.

Absent any expert testimony that connects the 1997 test result with some reliable determination of Dr. Hawkes’ manual dexterity on the day of the surgery on Haase in

1996, the results are more prejudicial than probative and leave the jury to speculate as to their significance. The Hospital submits that admission of the test results was prejudicial error.

#### IV.

**THE COURT COMMITTED ERROR IN ALLOWING  
THE INTRODUCTION OF UNEDITED VIDEOTAPE  
TESTIMONY OF A FACT WITNESS, DR. LONNIE  
PAULOS, WHOSE TESTIMONY WAS OFFERED FOR  
THE PURPOSE OF TELLING THE JURY WHAT HE  
WOULD HAVE TOLD THE HOSPITAL HAD HE BEEN  
ASKED.**

Haase was allowed to show an unedited videotape of a deposition of Lonnie Paulos, M.D., a fact witness, over the objection of the Hospital. The Hospital explicitly objected to showing an unedited videotape. Transcript at p. 409, line 25, p. 410, line 1.

There appear to be no Utah cases which explicitly address the issue of allowing unedited videotape depositions at trial in lieu of having the witness present. However, it is widely recognized that, where videotape testimony is allowed, the tape must first be edited to remove objectionable portions. See, e.g., In Re Stratosphere Corporation Securities Litigation, 182 F.R.D. 614, 617 (D. Nev.) The District of Nevada permits videotaped depositions at trial "unless it appears that . . . it may be difficult to edit objectionable portions of a video deposition for presentation at trial." Id.

Recent state court decisions recognize the need for editing videotapes before presentation to the jury. See, e.g., Hodge v. Lott, 553 S.E.2d 652, 653 (Georgia App. 2001) (deposition objections ruled on by the court as a pre-trial matter so that edited

deposition videotape could be presented to jury); March v. Associated Materials, Inc., 1999 W.L. 1037739 (Ohio App. 1999) (defendant's objections addressed prior to presentation to the jury and videotape edited accordingly); Sponenburgh v. County of Wayne, 308 N.W. 2d 589 (Mich. App. 1981) (videotaped deposition must be edited before presentation to the jury); Gage v. Morse, 933 S.W. 2d 410, 422 (Mo. Ap. 1996) (court viewed both edited and unedited videotaped depositions before deciding what the jury could see).

Indeed, the Court here recognized the inherent difficulty in allowing unedited videotape, explaining to the jury:

The Court: [There are some objections during the videotape] that would have been sustained and you would not have heard the testimony had I been there ruling and listening to it while that deposition was taking place. That's the problem with using this kind of a thing that isn't first censored, you see, for it, but he'd want you to know it from his point of view, because he can't very well go back and say, "Remember, and I object" you see.

Transcript at p. 515, lines 1-6.

As the Court recognized, it is impossible to look back at objections and conclude what the ruling would have been. However, as Dr. Paulos testified about criticisms of Dr. Hawkes he held in 1995 and 1996, criticisms he admits he never shared with anyone at the

Hospital, it is reasonable to assume that an objection as to foundation and relevance with respect to the majority of his testimony would have been sustained.<sup>1</sup>

The Hospital objected to having the jury hear testimony about what Dr. Paulos might have said to the Hospital over a period of years if he had been asked. Transcript at p. 152, lines 13-19. The Hospital was allowed to read into the record a segment of Dr. Paulos' deposition in which he conceded that he could not say to any degree of certainty that he ever said anything to the Hospital regarding Dr. Hawkes. Transcript at p. 151, lines 13-25, p. 152, lines 1-4. Dr. Paulos admits that if he had a conversation with the Hospital it would have been only in 1993, and not at any other time. Transcript at p. 152, lines 5-12. Most importantly, he cannot remember what, if anything, he said in 1993, testifying only "I think I didn't have very good things to say." Transcript at p. 151, lines 15-21.

As the transcript which Haase asked the Court to admit clearly established that Dr. Paulos was not sure he ever said anything to the Hospital, and that if he did say anything it would only have been in response to an initial inquiry in 1993, the Hospital's objection was that such testimony was inadequate to establish foundation for an entire line of questions asking Dr. Paulos what his opinions of Dr. Hawkes were in subsequent years

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<sup>1</sup> The Hospital's objections to foundation and relevance, at the time of the deposition, are found at page 16, lines 2-3, Deposition of Lonnie Paulos, an addendum hereto. The videotape shown at trial was inaudible to the court reporter and thus is not reproduced in the trial transcript. Transcript at p. 412.

and what he would have said to the Hospital had he been asked. Transcript at p. 152, lines 13-19.

At no point did Haase establish that the Hospital had any obligation to contact Dr. Paulos in subsequent years or that Dr. Paulos had any duty to inform the Hospital of his opinions. Absent that foundation testimony, the ruling which allowed the jury to listen to Dr. Paulos' criticisms of Dr. Hawkes was clearly more prejudicial than probative of what the Hospital knew and should not have been allowed.

The prejudicial result here is that had the Court ruled on objections to the testimony offered by Dr. Paulos, much of it would not have been heard by the jury. Transcript at p. 515, lines 1-2. It is reasonable to conclude that the Court would not have allowed testimony from Dr. Paulos given his testimony that his most negative opinions were never communicated to anyone at the Hospital.

Dr. Paulos was critical of the skills of Dr. Hawkes, and told the jury he had highly negative opinions in 1995 and 1996. Deposition of Lonnie Paulos at p. 16 (Exhibit 1, Addendum). These negative opinions added to the cumulative effect on the jury. Had Dr. Paulos' opinions not been communicated to the jury, they would not have heard that negative view of Dr. Hawkes, the cumulative effect would have been less, and the outcome may well have been different. Therefore, the Court's decision to allow the unedited videotape of Dr. Paulos' deposition was prejudicial error.

V.

**THE COURT COMMITTED ERROR IN ALLOWING A RADIOLOGIST WITH NO TRAINING OR EXPERIENCE IN IMPAIRMENT, AND WHO RELIED SOLELY ON READING ONE POSTOPERATIVE NOTE, TO TESTIFY AS AN EXPERT THAT DR. HAWKES WAS IMPAIRED.**

Despite her candid admission that she is a musculoskeletal radiologist with no special training or experience in evaluating physicians (or any other patient) with drug-related impairment, Dr. Margaret Ensign was allowed to offer an expert opinion that Thomas Hawkes was an impaired physician. Her sole basis for offering that opinion was her conclusion that the post-operative note written by Dr. Hawkes seemed confusing and inconsistent. Transcript at p. 1251, lines 23-25.

Trial courts have discretion to determine whether a particular witness offered as an expert is qualified to give an expert opinion on a matter. Dikeau v. Osborn, 881 P.2d 943, 947 (Utah App. 1984) (quoting Anton v. Thomas, 806 P.2d 744, 746 (Utah App. 1991)). The reasoning is instructive:

By definition, an expert is one who possesses a significant depth and breadth of knowledge on a given subject. To allow a doctor in one specialty, retained as an expert witness, to become an expert on the standard of care in a different medical specialty by merely reading and studying the documents in a given case invites confusion, error, and a trial fraught with unreliable testimony.

881 P.2d at 947.

Although these cases specifically addressed questions of the standard of care, they also make clear that the rule applies to proximate causation as well. Kent v. Pioneer

Valley Hospital, 930 P.2d 904, 906 (Utah App. 1997) (rejecting testimony from an expert who was not "competent to testify on . . . proximate causation."). See also: Chadwick v. Nielsen, 763 P.2d 817, 822 (Utah App. 1988) ("it is sound policy to limit expert testimony in medical malpractice cases to that which is within the doctor's specific field of practice.").

The rationale of these rulings is that the mere fact that a person is a physician does not give them expertise in all aspects of medicine. Beyond a medical degree, it is also required that one who offers testimony as an expert possess "significant depth and breadth of knowledge" on the subject of which testimony is offered. 930 P.2d at 906. Other courts have elaborated the scope of the trial court's discretion in qualifying expert witnesses, recognizing that merely being a physician is not an adequate basis for expert testimony on any medical question. Hardy v. Brantley, 417 So.2d 358 (Mississippi 1985) ("the trial judge should seek to assure that the proffered witness really is an expert in the area in which his opinion testimony is offered.").

The Hospital objected to having Dr. Ensign testify as an expert on impairment, and to do so by telephone. Transcript at p. 22, lines 6-14, p. 23, lines 7-18. The Court overruled the objections, despite its observation "seeing somebody do something or say something is very, very important, but in spite of that I am going to let her do by phone." Transcript at p. 25, lines 9-11.

Following these discussions on the first day of trial, upon the subsequent offer of Dr. Ensign's testimony, the Hospital again objected to allowing Dr. Ensign to offer

opinions on impairment. Transcript at p. 1247, line 23. The Court overruled the objection, but allowed voir dire. Dr. Ensign conceded that she is not a specialist on impairment and that her basis for concluding that Dr. Hawkes was an impaired physician was solely and exclusively the fact that she found his operative note confusing. Transcript at p. 1251, lines 23-25.

The Hospital objected to sole reliance upon an orthopedic surgeon's post-operative note as foundation for an expert opinion that the surgeon was impaired. Transcript at p. 1251, lines 22-25; p.1252, lines 1-3. The Court overruled the objection and Dr. Ensign was allowed to testify.

Dr. Ensign offered an opinion that Dr. Hawkes was had a medical condition of impairment, based solely upon a note he wrote about another patient. To allow this testimony is inconsistent with the requirement that a physician do more than "merely reading and studying the documents in a given case . . . ." 881 P.2d at 947. The Court did not comply with the requirement of Utah law to insure that Dr. Ensign has "significant depth and breadth of knowledge" on the subject of physician impairment. 930 P.2d at 906.

Dr. Ensign was not adequately qualified as an expert on impairment, and there was inadequate foundation for her testimony. For both of these reasons, her testimony should not have been admitted. As with all assertions of reversible error, there must be some indication that a different outcome might have resulted but for the ruling of the Court. Dr. Ensign did not testify as to some peripheral or secondary issue. A key issue in this case is whether Dr. Hawkes was impaired and she was allowed to offer an expert opinion to

that effect. Absent that testimony, the jury may well have been less likely to conclude that Dr. Hawkes was impaired.

## VI.

### **THE COURT COMMITTED ERROR IN ALLOWING REFERENCES TO DAYSPRING RECORDS REGARDING DR. HAWKES WHERE THERE WAS NO FOUNDATION FOR THE ADMISSIBILITY OF RECORDS OF THAT PROGRAM.**

In September of 1995, Dr. Hawkes was evaluated at the Dayspring program in Salt Lake City. There are no explanatory references in the trial record because the Court ultimately refused to allow the admission of the Dayspring<sup>2</sup> records. However, Haase repeatedly attempted to introduce the records indirectly, despite repeated objections from the Hospital. It was prejudicial error for the Court to allow continued references to, and characterizations of, the evaluation of Dr. Hawkes without first requiring adequate foundation for any reference to those records.

Testimony is admissible only if it is relevant. Utah R. Evid. 402. Relevant evidence is that having any tendency to make a fact of consequence more or less probable. Utah R. Evid. 401. However, testimony should be excluded where it is more prejudicial than probative. Utah R. Evid. 403. In this case, Haase never established that the records of Dr. Hawkes' evaluation at the Dayspring program were probative of what the Hospital knew,

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<sup>2</sup> "Dayspring" was a program of Intermountain Health Care offering evaluation and treatment for problems of mental illness and substance abuse. References to "Dayspring" are to that program.

and did not allow their admission. However, rather than require Haase to establish the requisite foundation at the time of the objection, the Court withheld a ruling until near the end of trial, allowing multiple references to Dayspring and the records.

The Hospital consistently objected to references to Dayspring absent proper foundation. Transcript at p. 111, lines 22-25. The Hospital also objected on the grounds of relevance, asserting that as there was no testimony or evidence that the Hospital ever saw the records, or had knowledge of their content, references to the content of the records in front of the jury were more prejudicial than probative. Transcript at p. 1192, lines 24-25. Indeed, the Court recognized that the records should not be admitted without proper foundation.

The Court:            Okay, let me answer you anyway. It does sound like part of this is DOPL, but Judge Bunnell looked at it. I don't know what he said, I don't what the discussions were, except the only thing I have seen is his order, and he ordered Dayspring to give you the records, and so you've got the records. . . .

Nevertheless, I think by giving you the records, the judge was saying they were usable if – and this was the 'if' that I had the other day when I talked to you about it, was that you show before we use them that somehow that information got back to the hospital.

That's the connecting link that concerned me the other day, and it is still the one that concerns me now. So I can't let you use it until you

make that jump. In other words, they have to know. It isn't enough for Dayspring to know. The hospital has to know that.

Transcript at p. 540, lines 7-25.

The Court:           **So if they don't know the information from Dayspring, then its nothing that can be held against him (sic).**

Transcript at p. 541, lines 7-9 (emphasis added).

Ultimately, the Hospital's objection was sustained.

The Court:           I'm going to sustain an objection to the use of the records at Dayspring. I just don't think the tie has been made – of course this is one of those early-on things that we discussed before the Court and I had concerns early on that I wanted the connection made first, and I don't believe the connection has been made to show that the information went back. Just to say that the hospital should have known and should have done something, I don't think is enough. So they are excluded.

Transcript at p. 1196, lines 6-14.

However, this was only after the jury had heard repeated references to Dayspring (from Haase) over a period of days, and it is illogical to suggest that the jury was not influenced. The Court should have required the necessary foundation before allowing repeated references to Dayspring, and the failure to so was prejudicial error.

Moreover, the ruling did not come until after Dr. Pasternak, plaintiff's expert, was allowed to testify based upon his review of the Dayspring records. Transcript at p.

843, lines 1-19. The Hospital objected to reference to the records:

Mr. Harrison: Your Honor, I have an objection to quoting from the Day Spring record. We haven't gotten around to bringing those records in yet.

The Court: Well, I'll withhold a ruling on that. I recognize that it lets it be heard, but - -

Transcript at p. 843, lines 4-8.

Had the Court made its ruling before Dr. Pasternak testified, the Hospital could have challenged that portion of the foundation for his opinion. The delay in that critical ruling deprived the Hospital of that challenge. Had a challenge to the foundation for Dr. Pasternak's opinion been sustained, it is likely that the jury would have reached a different conclusion. Allowing the jury to hear testimony from Dr. Pasternak and from Haase about these records before ruling on their admissibility was prejudicial error.

#### **SUMMARY OF APPELLEE'S ANSWER TO APPELLANT**

The Hospital argues that the Court was correct in refusing to accept juror affidavits as dispositive because the record clearly establishes that the jury was plagued by confusion and a lack of clarity, and therefore the error which led to the challenged verdict was judicial rather than clerical as defined by the cases of Utah and other states. Because the Court did not err in refusing to accept the juror affidavits, and because the affidavits do

not meet the tests for admissibility under Utah law, they cannot form the basis for an appeal and therefore the appeal should be denied.

The Hospital also argues that Haase cannot now criticize the jury instructions or the Special Verdict Form as her failure to raise the issue at trial precludes raising the issue now on appeal. However, the Haase brief does make a case for the existence of substantial juror confusion. The Utah Supreme Court and courts of other jurisdictions have held that the remedy for confusion and misunderstanding in reaching a jury verdict is a new trial, not revision of the verdict. Accordingly, if the Court of Appeals finds any error in the jury verdict, the appropriate remedy is a new trial.

## **ARGUMENT**

### **I.**

#### **THE COURT DID NOT COMMIT ERROR IN REFUSING TO ACCEPT JUROR AFFIDAVITS AS DISPOSITIVE.**

Haase argues that the holding of Bishop v. GenTec, Inc., 48 P.3d 218 (Utah 2002), strongly suggests that the juror affidavits are dispositive of this case. Appellant's Brief at 12. That argument is misplaced because the facts are inapposite.

Bishop does not allow the unrestricted admission of affidavits in Rule 60(a) motions, it allows affidavits only to correct clerical errors which do not reflect the intent of the parties and only "so long as it is clearly a formal error . . . ." Id. at 227 (quoting Stanger v. Sentinel Security Life Insurance Company, 669 P.2d 1201, 1206 (Utah 1983)). Nor does it hold that courts must revise or amend a jury verdict to conform to the jury's intent

in all situations, it holds only that affidavits may be received (in conjunction with Rule 60(a) motions) to establish that there was a clerical error in reporting the intent of the jurors. Id. Therefore, the fundamental question as to admissibility of juror affidavits is whether there was clerical error or judicial error.<sup>3</sup>

The authorities relied upon by the Utah Supreme Court in Bishop provide instructive evidence of the contours of this doctrine, supporting the proposition that where jurors were confused or misunderstood the law as to how to express their intent, the error is judicial and affidavits are not admissible. Of particular relevance is the Court's citation to Moisakis v. Allied Building Products Corporation, 697 NYS 2d 100, 105-06 (NY App. Div. 1999), a case holding that juror evidence may be used to correct clerical errors, "but **not to determine the extent of juror confusion regarding the verdict as rendered.**" Id. at n.5 (emphasis added).

Also instructive is Pache v. Boehm, 60 A.D.2d 867 (N.Y. App. 1978), another case from New York<sup>4</sup> involving confusion and misunderstanding in apportionment of fault. The Supreme Court, Appellate Division, held:

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<sup>3</sup> The distinction between clerical and judicial error is critical in Haase's argument because her persistent and consistent theme is that the jurors were confused, misunderstood, and needed more clarity. Those are the defining characteristics of judicial error rather than clerical error.

<sup>4</sup> The use of cases from New York may have greater persuasive authority than usual given the reliance upon New York case law by this Court in reaching its decision in Bishop v. GenTec, Inc.

Where errors are made in reporting a verdict, the Trial Judge may, in his sole discretion and upon the unanimous affidavits or statements of jurors, correct the judgement in accordance with actual verdicts. However, **this exception to the general rule prohibiting impeachment of jury verdicts was not intended to encompass jury error in reaching a proper verdict. Where the record demonstrates substantial confusion in reaching a verdict the court may only direct a new trial to prevent a miscarriage of justice to individual litigants.**

60 A.D.2d at 868 (citations omitted) (emphasis added).

A recent analysis from the Fifth Circuit provides additional perspective on the scope and availability of Rule 60(a): “It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a).” United States v. Kellogg, 12 F.3d 497, 505 (5<sup>th</sup> Cir. 1994).

All legal authorities identified, including those relied upon by Haase, are clear that where jurisdictions allow the consideration of juror affidavits, it is only for the purpose of correcting a clerical error. The phrase “clerical error,” if not a term of art, is at least well enough defined in Utah case law to permit judicial review.

The Utah Supreme Court defined clerical mistake as “. . . a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.” Stanger v. Sentinel Security Life Insurance Company, 669 P.2d 1201, 1206 (Utah 1983). In Stanger, the jury based its award to the plaintiff upon a mistaken calculation of an amount withheld from sales commissions. Id. The Court found that the error was simply the use of an incorrect figure and did not

involve any judgment by the jury as to the legal effect or proper calculation of apportioned damages. Id.

In 1984, one year after the Stanger decision, the Utah Supreme Court again considered the nature of clerical error: “Rule 60(a) is not intended to correct errors of a substantial nature, particularly where the claim of error is unilateral. The fact that an intention was subsequently found to be mistaken would not cause the mistake to be “clerical.” Lindsay v. Atkin, 680 P.2d 401, 402 (Utah 1984).

At issue in Lindsay was a determination of the trial court that a defendant should be granted dismissal with prejudice, a dismissal which was subsequently challenged in an action for indemnification by another defendant. Id. The Court indicated that if the dismissal was an error, it was judicial rather than clerical because it was a mistake in rendering the judgment, not in recording it. Id. The Court noted: “Rule 60(a) is not intended to correct errors of a substantial nature, particularly where the claim of error is unilateral.” Id.

Other jurisdictions have been equally clear that juror confusion or misunderstanding regarding the judge’s instruction is not clerical error and is not susceptible to revision on the basis of juror affidavits. See, e.g., Kitt v. Yakima County, 596 P.2d 314, 317 (Wash. App. 1979). In Kitt, The Washington Court of Appeals found that juror affidavits are not competent to revise a verdict where a misunderstanding of instructions was inherent in the verdict. Id. Jury misunderstanding of trial court instructions in comparative negligence cases is grounds for a new trial, not for revision of the verdict. Id.

It is the general rule that where the jury had a clear intent at the time of their deliberations, but made a mistake in recording that intent, the verdict should reflect their true intent. Moulton v. Staats, 27 P.2d 455, 459 (Utah 1933). However, no case supports revision of a verdict where there is substantial evidence that the jury did not fully understand what it was doing. The rule allows correction of clerical errors in recording a clearly understood verdict, it does not provide a post-trial forum for the jury to listen to counsel<sup>5</sup> and reconsider issues about which there was confusion or misunderstanding.

The United States Supreme Court articulated this very point, recognizing the danger that if “verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication . . . all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.” McDonald v. Pless, 238 U.S. 264, 267 (1915).

In this case, the juror statements indicate that the jury was confused about the verdict it should render. The Haase brief is replete with references to, and in some cases explanations of, the various ways in which the Court contributed to the confusion and misunderstanding of the jurors, and Haase concedes that judicial error was a factor, yet she asks this Court to ignore all of that and conclude that this was a simple clerical error.

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<sup>5</sup> After the trial, the jurors had unrestricted conversations with counsel for Haase, but before the Hospital’s counsel could meet with them to discuss the affidavits prepared by Haase, the Court entered an order prohibiting any further contact between counsel and the jury.

For example, Haase argues that the Court contributed to the jury's misunderstanding in its response to a mid-deliberation question from the jury regarding calculation of damages and apportionment of fault, asserting "although there was an occasion for the Court to allow counsel to help dispel any misunderstanding the jury may have had due to the absence of apportionment instructions, the Court did not contact counsel. Rather, it returned a terse note to the jury undertaking to answer its question." Appellant's Brief at p. 8.

Haase also complains that the Court, rather than adopting or modifying a Special Verdict Form submitted by counsel, revealed during its reading of instructions to the jury that it intended to use a form created (by the Court) during the noon break. Appellant's Brief at p. 6. Haase asserts "counsel were neither asked nor permitted to comment on the Court's Special Verdict Form prior to its being presented to the jury. They had no opportunity even to see it until shortly before it was read to the jury." Appellant's Brief at p. 6. She complains that, "despite counsel's effort," the Court did not resolve prior to trial the question of how her settlement with Dr. Hawkes would be handled with respect to the jury. Appellant's Brief at pp. 4, 5.

Although the impermissibility of waiting until appeal to complain of the Special Verdict Form is addressed below, the key point is that Haase asserts that the Court committed an error which added to confusion and uncertainty in the jury deliberations.

Haase notes that, in response to a question from the jury regarding the apportionment and calculation of damages, the jury was instructed by the Court to calculate

"the total value of all damages." Appellant's Brief at p. 18. The footnote offered here is yet another illustration of Haase's recognition that the jurors were not clear on what they were doing. Haase suggests that the Court assumed the jury would understand its instruction, but asserts "what may have seemed perfectly clear to the trial court may not have been clear to the jurors." Appellant's Brief at p. 18. However, Haase discusses an exchange between the Court and Juror Chad Watt (foreperson of the jury) at the beginning of the hearing, and in this exchange there is no lack of clarity in the Court's question or Mr. Watts' answer:

The Court: Okay. Let me ask you the question again, because its very carefully worded. Did your \$820,000 verdict include all of the plaintiff's injuries, those caused by Dr. Hawkes as well as those caused by Ashley Valley Medical Center?

Mr. Watt: It was mine.

The Court: It was the total \$820,000, was her total damages?

Mr. Watt: It is what I thought was the total damage.

Hearing Transcript at p. 7 (Exhibit 5, Haase Addendum).

Elsewhere in her brief, Haase complains again of the extent to which the Court created confusion and misunderstanding:

The trial court determined on its own to give the jury a Special Verdict Form asking it to compare fault. However, the Court did not give the jury any instructions on comparative negligence or apportionment of fault and did not tell the jury what it intended to do with the fault apportionment figures it was being asked to enter on its verdict form. The jury, therefore, was in the

dark as to whether or how its comparative fault figures would impact Mrs. Haase.

Appellant's Brief at p. 29.

The passage from Juror Toni Fagnan relied upon by Haase illustrates the confusion and lack of understanding among the jurors. Fagnan states, in part, "we sent a note out to the judge seeking an answer. He wrote back suggesting we refer to a particular jury instruction. Neither the judge's note nor the jury instruction answered our question." Appellant's Brief at p. 23. Elsewhere Haase asserts again that the Court created confusion with the Special Verdict Form it used, Appellant's Brief at p. 32, concedes that the jurors were seeking (and therefore lacked) clarity, Appellant's Brief at p. 33, and asserts "the jury was not adequately instructed on matters of comparative negligence and apportionment of fault . . . ." Appellant's Brief at p. 33. If the Court erred or created confusion in instructing the jury that Dr. Hawkes was negligent and that some percentage of fault could be apportioned to him, it was judicial error rather than clerical error.

It is instructive to contrast these facts with the facts in the Eastridge case cited by Haase. Appellant's Brief at p. 12. In Eastridge, the jury mistakenly deducted 20% from its verdict of \$260,000, having apportioned 80% of the fault to the defendant, and wrote \$208,000 on the special verdict form. Eastridge Development Co. v. Halpert Associates, 853 F.2d 772, 783 (10th Cir. 1988). The Eastridge court noted the mathematical symmetry, specifically that \$208,000 is 80% of the plaintiff's claimed damages of \$260,000. Id. The jury claim that they made a mistaken calculation in deducting 20%

from their true verdict was consistent with and supported by calculations which could easily be made from the face of the verdict form. This is an example of the kind of formal clerical error correctable on the basis of affidavits. This is factually very different from the case now before this Court. Here, neither the theories advanced by Haase nor the juror responses on May 2, 2002 explain how the jury arrived at the verdict it entered on the Special Verdict Form.

Unlike the facts in Eastridge, the argument made by Haase makes no sense mathematically. If the jury based its special damages award on the testimony of the plaintiff's damages experts, without any reduction, 30% of that amount would be \$372,570, not \$600,000 [ $1,241,900 \times .30 = 372,570$ ]. In the alternative, if the jury intended to award \$600,000 thinking that was 30% of the plaintiff's special damages, the jury would have to have assumed special damages to be \$2,000,000 [ $2,000,000 \times .30 = 600,000$ ], an amount almost twice that argued by the plaintiff's expert.

Neither of these scenarios makes any sense as a mere mistaken calculation, and as evidenced by the comments of juror Fagnan, the jury did not make any calculation that would result in a 30% award equaling \$820,000.

The Court: Did the thought ever occur to you that the damages to be 100 percent would have to be over two million?

Ms. Fagnan: For?

The Court: For the hospital to pay that amount.

Ms. Fagnan: Pardon me?

The Court: For the hospital to pay 820,000.

Ms. Fagnan: No, that didn't.

The Court: Did that ever occur to anybody?

Unidentified Woman Juror: Not until later.

Ms. Fagnan: No. For me, it was hard to try to think in that many zeroes, if you want to know the truth.

Transcript of Jury Hearing at p. 12 (Exhibit 5, Haase Addendum).

Haase concedes that "judicial or attorney error may have caused or contributed to the disparity between the Court's and the jury's understanding of the jury's damage award." Appellant's Brief at p. 31. She then argues that judicial error does not provide a basis for retrial. Id. The Hospital addresses below the legal question of a new trial as the proper remedy for judicial error; the relevant point here is that the fact that Haase concedes that there was judicial error, misunderstanding, and a lack of clarity in the jury deliberations.

Another important consideration is the appearance of the record. Utah law is clear that a clerical error must be "apparent on the record." 669 P.2d at 1206. This is a well-established rule of law. Indeed, one appellate court held that where a trial court finds it necessary to hear proof to determine whether an alleged mistake was clerical, that is itself a sufficient demonstration that the error is not apparent on the face of the record and therefore cannot be clerical. Tillman v. Tillman, 172 F.2d 270, 274 (D.C. Cir. 1948), *cert. den.*, 336 U.S. 954 (1948).

The record here reflects a jury verdict form which does not have blank spaces or obvious inadvertencies such as the misplacing of commas or decimal points. There is no mechanical or clerical error apparent on the Special Verdict Form or in the record. Therefore, consistent with the law of Utah and other jurisdictions, the error cannot be characterized as clerical and is not susceptible to modification based upon juror affidavits.

## II.

### **FAILURE TO OBJECT TO THE SPECIAL VERDICT FORM OR THE SUFFICIENCY OF THE VERDICT AT TRIAL IS A WAIVER OF THE RIGHT TO RAISE THE ISSUE ON APPEAL.**

Appellant's objections to the format of the Special Verdict Form are precluded by her failure to raise these issues at trial. It is well established in Utah that the failure to raise objections to the form of a Special Verdict or the sufficiency of a verdict so recorded, before the jury is dismissed, constitutes a waiver of the right to raise those issues on appeal. Ute-Cal Land Dev. Corp. v. Sather, 605 P.2d 1240, 1247-1248 (Utah 1980).

In Ute-Cal Land Dev. Corp., the plaintiff appealed the responses the jury gave to questions on the special verdict, and the defendant responded that the plaintiff "waived any objection to the jury's determination by not objecting to the answers when they were originally returned." Id. The Court's analysis reiterated the holding of an earlier case addressing the same question: "It is well established by numerous authorities that when a verdict is not in the proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed

to make any request that its informality or uncertainty be corrected.” Id. (quoting Cohn v. J.C. Penny, Inc., 537 P.2d 306, 311 (Utah 1975)).

The Court compared the facts to those of another case in which the failure to object to a jury verdict at the time it was announced precluded appeal, quoting its earlier analysis in that case:

If counsel be permitted to remain mute when a verdict is insufficient or informal, he gains an unfair strategic advantage and since there must be reasonable rules to control the termination of litigation if counsel has an opportunity to correct the error at the time of its occurrence and he fails to do so, any objection based thereupon is waived.

Id. (quoting Langton v. International Transport, Inc., 491 P.2d 1211, 1214 (Utah 1971)).

In this case, the plaintiff made no objection to the special verdict form, neither when read to the jury nor several hours later when returned by the jury. She made no objection to the sufficiency of the verdict. Under the rule of law in Utah, the failure to object to the form or the sufficiency of the verdict prior to discharge of the jury constitutes a waiver of the right to raise the issue on appeal.

### III.

#### **APPELLANT’S ARGUMENTS ABOUT THE INADEQUACY OF JURY INSTRUCTIONS ARE PRECLUDED BY HER FAILURE TO OBJECT AT TRIAL.**

Haase argues that the confusion of the jury was due to the lack of appropriate jury instructions on comparative negligence and apportionment of fault. Appellant’s Brief at 29, 30-31. She reiterates this assertion in several places, for example, “the jury was not

adequately instructed on matters of comparative negligence and apportionment of fault.”

Appellant’s Brief at 33.

The Utah Supreme Court dealt with precisely this issue in 1983 in a case in which the plaintiff failed to object or otherwise preserve any exceptions to the jury instructions as submitted. E.A. Strout Western Realty v. W.C. Foy & Sons, 665 P.2d 1320, 1322 (Utah 1983). The Court held: “A party may not assign as error the giving or the failure to give an instruction unless he objects thereto, and the objection must be sufficiently specific to give the trial court notice of the claimed error.” Id.

Haase did not object to the Court’s failure to give jury instructions on comparative negligence or apportionment of fault, and her failure to object at trial precludes raising the issue on appeal.

#### IV

#### THE EXTENT OF JUROR CONFUSION AND MISUNDERSTANDING IN THIS CASE STRONGLY SUPPORTS AN ORDER FOR A NEW TRIAL.

Haase argues that the confusion and misunderstanding of the jury in this case do not require a new trial. Appellant’s Brief at p. 29. More explicitly, she argues that the remedy for judicial error is not a new trial. Appellant’s Brief at p. 31. This argument is inconsistent with the law of Utah and of other jurisdictions.

A new trial is appropriate where the jury misapplied or misunderstood the law. Wellman v. Noble, 366 P.2d 701, 703 (Utah 1961), overruled on other grounds, Randle v. Allen, 862 P.2d 1329 (Utah 1993). See also, Kitt v. Yakima County, 596 P.2d 314, 317

(Wash. App. 1979) (jury misunderstanding of trial court instructions in comparative negligence cases is grounds for a new trial); Pache v. Boehm, 60 A.D. 2d 867 (N.Y. App. 1978) (“where the record demonstrates substantial confusion in reaching a verdict” a new trial is appropriate to prevent a miscarriage of justice); Reinhart v. Seaboard C. L. R. Co., 472 So. 511 (Fla. App. 1985) (where jury verdict suggests misunderstanding, case should be remanded for new trial).

A clear statement that the jury did not understand its role is provided by juror Tony Fagnan:

When we were deliberating, I don’t remember us talking about like breaking down this is the harm that was caused by the hospital, this is the harm that was caused by the doctor. We were just trying . . . because we were focusing on the hospital. And so I don’t remember us talking about saying okay, the doctor did X amount of dollars of damage here and the hospital did this. I mean I think that’s the question. We weren’t talking about the doctor and the hospital between ourselves. And I’m still very confused. But I -- it was a confusing thing. We really struggled with it. So it was still just unknown what the damages -- what we were figuring.

Transcript of Jury Hearing at pp. 9, 10 (Exhibit 5, Haase Addendum).

It is clear that this jury did not have an adequate understanding of the affect of apportionment of fault and its role in their verdict. No verdict may be considered just and fair to either party when the jurors concede that they did not understand what they were doing in reaching that verdict. It is for this reason that the courts of other states, including those relied upon by the Utah Supreme Court in its recent Bishop holding cited by Haase, have concluded that a new trial is the appropriate remedy for situations such as this.

There is an additional basis for concluding that a new trial is the appropriate remedy for issues appealed by Haase. A new trial may be granted where there is “irregularity in the proceeding of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.” Rule 59(a)(1), Utah R.Civ.P. The Hospital submits that the Court’s failure to comply with requirements of Rule 47(n) of the Utah Rules of Civil Procedure, in addition to the Court’s acknowledgment of possible error in communicating jury instructions, constitute irregularity in the proceedings sufficient to ground an order for a new trial.

The Court received a question in the evening while counsel were “in their motel rooms,” and acknowledges returning an answer without informing counsel of the question. Jury Hearing Transcript at p. 6 (Exhibit 5, Haase Addendum). The Utah Rules of Civil Procedure provide that a jury may ask for clarification of matters of law after beginning their deliberations. The Rules provide, in relevant part: “After the jury have retired for deliberation . . . if they desire to be informed on any point of law arising in the cause . . . the required information must be given in the presence of, or after notice to, the parties or counsel.” Rule 47(n), Utah R.Civ.P. The procedure outlined in the Rule is to be followed explicitly. Johnson v. Maynard, 342 P.2d 884, 887-888 (Utah 1959).

As in this case, the relevant question in Maynard was whether the case was submitted to the jury in such a manner as to allow “a proper deliberation of the issues.” Id. at 885. In Maynard, the judge was asked a question by the deliberating jury and answered the question without informing counsel. Id. at 877. Despite the trial judge’s action of immediately

informing counsel of what he had done, and making a record which afforded an opportunity for objection, the Supreme Court found failure to follow the explicit Rule 47 procedure to be reversible error, notwithstanding the motivations or intentions of the trial judge. Id. at 887, 888 (“Although there is no question that the judge acted with the best of intentions, such conduct is improper.”). If a trial court error cannot be saved where immediate remedial steps are taken by the trial court, it is certainly reversible error where no such steps are taken.

The Hospital submits that a jury request for clarification of the legal effect of apportionment of fault, the process for calculating damages, or the effect of the absence of a settled defendant from the trial, are questions of substantial significance which should have been addressed by the Court only after informing counsel of the jury request or, at minimum, making a record before discharge of the jury. Accordingly, an irregularity in the proceedings exists which constitutes an adequate and proper basis for a new trial pursuant to Rule 59(a)(1).

### **CONCLUSION**

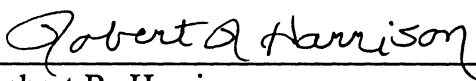
As Appellee, the Hospital submits that the record and the arguments of the Appellant make clear that the error in the verdict was judicial rather than clerical and is therefore not susceptible to revision by affidavits or through post-discharge inquiry by the Court. Rule 60(a) does not provide for the correction of judicial error. The remedy for judicial error is a new trial.

As Cross-Appellant, the Hospital submits that there were several errors committed by the Court in its rulings at trial, the cumulative effect of which was to impart to the jury

a bias which is substantial and without which the outcome of the trial would likely have been different. The substantial irregularity in the proceedings, and the resulting cumulative bias, can be remedied only by a new trial.

DATED this 23 day of December, 2002.

SNOW, CHRISTENSEN & MARTINEAU

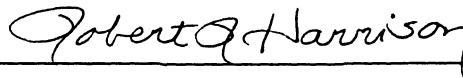
  
\_\_\_\_\_  
Robert R. Harrison  
David W. Slagle  
Attorneys for Appellee/Cross-Appellant

**CERTIFICATE OF SERVICE**

I state that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached **BRIEF OF APPELLEE/CROSS APPELLANT** (Case Number 20020524-SC, In the Utah Court of Appeals) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen  
Matheson, Mortensen, Olsen & Jeppson  
Attorneys for Plaintiff/Appellant  
648 East 100 South  
Salt Lake City, Utah 84102

and causing the same to be mailed, first class, postage prepaid, on the 23 day of December, 2002.

  
\_\_\_\_\_

N:\10749\151\appeal\Brief of Appellee wpd

## **ADDENDUM**

(The Addendum to Appellant's Brief is incorporated by reference herein.)

Tab 1

# COPY OF TRANSCRIPT

IN THE EIGHTH JUDICIAL DISTRICT COURT

UINTAH COUNTY, STATE OF UTAH

LORI HAASE,

Plaintiff,

vs.

ASHLEY VALLEY MEDICAL CENTER  
AND COLUMBIA ASHLEY VALLEY  
MEDICAL CENTER, AND JOHN DOE  
DEFENDANTS 1 THROUGH 10,

Defendants.

Deposition of:

LONNIE PAULOS, M.D.

Case No. 98-0800377

Judge Douglas Cornaby

March 4, 2001 - 11:30 a.m.

Location: Office of Lonnie Paulos, M.D.  
5848 S. Fashion Blvd  
Murray, UT 84107

Reporter: Lanette Shindurling, RPR, CRR  
Notary Public In and For the State of Utah

P R O C E E D I N G S

LONNIE E. PAULOS, M.D.,

called as a witness, for and on behalf of the Plaintiff,  
being first duly sworn, was examined and testified as  
follows:

EXAMINATION

BY MR. MORRISON:

Q. Would you state your name, please.

A. Lonnie Paulos.

Q. Are you a medical doctor?

A. I am an orthopedic surgeon in Salt Lake City.

Q. Have you been board certified for the last 22  
years?

A. I have.

Q. I have your 47-page CV that was handed to me  
before you got here and I'm sure that some of the jurors  
down in Vernal may never have heard of you. Just real  
quickly here, you've been practicing as an orthopedic  
surgeon in Salt Lake for the last how many years?

A. Approximately 19 years. Since 1983.

Q. And you've been board certified continuously  
since 1980?

A. I have.

Q. And your CV indicates that you've given  
something like several dozen -- well, more than that.

1 How many presentations have you given, do you recall?

2 A. Somewhere over 300.

3 Q. And you have written articles in peer review  
4 medical journals?

5 A. That's correct.

6 Q. Dozens of those?

7 A. That's correct.

8 Q. You've also taught instructional courses for  
9 other doctors on orthopedic surgery?

10 A. Yes.

11 Q. Extensively?

12 A. Yes.

13 Q. In January of this year, Dr. Paulos, did you  
14 receive a letter from me?

15 A. I did.

16 Q. Can you tell me whether what I'm showing you  
17 right now is a true and accurate copy of the letter that  
18 you received from me in late January of this year?

19 A. It is.

20 Q. I'm going to ask the court reporter to mark  
21 that as Exhibit A.

22 **(EXHIBIT-1 MARKED.)**

23 Q. (BY MR. MORTENSEN) I'm going to -- this  
24 letter that I sent to you on January 24th dispenses with  
25 the normal preliminaries and begins with a question to

1     you that's typed in bold face type; is that correct?

2             A.     That's correct.

3             Q.     I'm going to read that question to you.  "If  
4     the administrators or Medical Executive Committee of  
5     Ashley Valley Hospital had asked you in early 1993 or at  
6     any time thereafter whether Dr. Thomas Hawkes was a  
7     danger to patients by reason of being an impaired or  
8     compromised provider or due to poor judgment or  
9     inadequate skill, what would your truthful response have  
10    been?"  Did you read that first sentence of my letter to  
11    you?

12            A.     I did.

13            Q.     Did you respond to my letter in writing?

14            A.     I did.

15            Q.     Is what is going to be marked Exhibit 2 a true  
16    and accurate copy of your written response to that  
17    letter?

18            A.     It is.

19                    **(EXHIBIT-2 MARKED.)**

20            Q.     (BY MR. MORTENSEN)  Would you read that for  
21    me?

22            A.     "Dear Mr. Mortensen:  I have received your  
23    letter concerning Dr. Thomas Hawkes dated 1-24-02.  My  
24    response to the question that you posed is that patients  
25    would have been in danger.  I am available to discuss

1     this matter with you and to conduct a videotaped  
2     disposition -- deposition. You may contact my  
3     assistant, Jane Schilling," and so forth.

4             Q.     That's what you responded?

5             A.     That is.

6             Q.     Was it true when you said it?

7             A.     It is.

8             Q.     Is it true today?

9             A.     It is.

10            Q.     Okay. Dr. Paulos, could you tell us how a  
11     surgeon such as yourself obtains information about  
12     another surgeon's technical skill or judgment or  
13     abilities as a surgeon?

14            A.     Well, there are probably three or four  
15     different ways. One, the most direct way and probably  
16     the most accurate is to see patients in common that each  
17     have treated, either in second opinion or after a  
18     complication wherein you're asked to evaluate that  
19     patient and the care rendered by a physician prior to  
20     your evaluation.

21                    The second way would be discussions with other  
22     physicians who are on staff with physicians in question.  
23     Some of those could be a committee of credentialing type  
24     physicians or just orthopedic staff physicians.

25                    Third would be patients who seek counsel for

1 the family members and/or relatives, and a fourth way is  
2 peer professionals such as nurses, operating room  
3 technicians, administrative people.

4 Q. Okay. Thank you.

5 Do you have any recollection, Dr. Paulos, of  
6 having received a questionnaire about Dr. Hawkes from  
7 anyone at Ashley Valley Medical Center or Columbia  
8 Ashley Valley Hospital back in 1993?

9 A. No, I do not.

10 Q. Last November, I'm going to represent to you  
11 that in November the administrator of that hospital was  
12 deposed by me and he told me that he didn't have -- that  
13 he didn't make any contact with you and didn't know  
14 whether the hospital -- to his knowledge the hospital  
15 hadn't made any contact with you.

16 MR. HARRISON: Objection, misstates the  
17 deposition transcript significantly.

18 Q. (BY MR. MORTENSEN) Well, the transcript says  
19 whatever it says, but since that time --

20 MR. HARRISON: That's an important distinction  
21 and I reiterate the objection. You're posing a question  
22 based on your interpretation of what the transcript says  
23 and what the transcript says is different. So the  
24 doctor's answer is going to be based on something other  
25 than what the transcript says.

1           MR. MORTENSEN: Well, I haven't posed the  
2 question yet. Do you want to tell him how you read the  
3 transcript?

4           MR. HARRISON: You're asking the questions  
5 here.

6           Q. (BY MR. MORTENSEN) We've already established,  
7 Dr. Paulos, that you don't recall receiving a  
8 questionnaire from the hospital down in Vernal?

9           A. That's correct.

10          Q. Now, recently in the last week I have received  
11 a copy of a letter supposedly dated March 23, 1993 from  
12 a person named Deena Mansfield at Ashley Valley Medical  
13 Center on Ronald Perry letterhead. Would you look at  
14 that for a moment? And I'm going to ask the court  
15 reporter to mark this as Exhibit 3.

16                   **(EXHIBIT-3 MARKED.)**

17          THE WITNESS: (Witness reviewed document.)

18          Q. (BY MR. MORTENSEN) After you've read it let  
19 me know and I'll ask you a couple of questions.

20          A. I've read it, yes.

21          Q. Okay. Dr. Paulos, is it your policy to  
22 respond on a questionnaire about another surgeon if you  
23 are asked to do so?

24          A. Yes, I would have.

25          Q. Was that your custom and practice back in

1 1993?

2 A. Yes.

3 Q. Again, do you have any recollection of having  
4 received that letter?

5 A. I don't.

6 Q. Is there any reason that you would not have  
7 responded if you had received it?

8 A. No. I might have made a phone call, but I  
9 would have also followed that with a letter, official  
10 letter in that I know Ron Perry very well. And so I  
11 would think I would recall that because Ron and I are  
12 personal friends.

13 Q. How long have you known Ron Perry?

14 A. Since 19 -- I worked at the hospital, covered  
15 the Emergency Room and moonlighted there from 197 --  
16 let's see, 1975 through '79, I believe.

17 Q. . So you have known him for a long time?

18 A. Yes.

19 Q. Okay. So do you have any recollection of  
20 having received any phone call from anyone at Ashley  
21 Valley Medical Center in 1993?

22 A. I don't.

23 Q. In 1994?

24 A. I don't recall ever receiving a phone call.

25 Q. Any year?

1           A.   Any time.

2           Q.   All right.  Do you recall ever having talked  
3 with Ron Perry about Dr. Hawkes?

4           A.   I don't recall at this time, but I could have.  
5 I don't recall.

6           Q.   Now, I'm not going to try and misstate and I  
7 haven't so far tried to misstate Ron Perry's testimony,  
8 but I think he testified that during the recruiting  
9 process of Dr. Hawkes, Dr. Hawkes told him that he had  
10 had a falling out with his colleagues at Cottonwood  
11 Hospital, including you and Dr. Rosenberg, and he  
12 indicated to Dr. -- to Ron Perry that the reason for  
13 that falling out was of jealousies over his, Dr. Hawkes,  
14 having some preeminence in laser surgery.

15           MR. HARRISON:  Objection, misstates testimony.

16           Q.   (BY MR. MORTENSEN)  Okay.  Now --

17           MR. HARRISON:  Mr. Perry didn't say anything  
18 about jealousy.

19           Q.   (BY MR. MORTENSEN)  Well, did you have any --  
20 had there been a falling out between you and Dr. Hawkes?

21           A.   Not that I'm aware of.  Tom and I are very  
22 good friends.

23           Q.   Okay.  Do you recall ever having talked to  
24 Deena Mansfield, this person whose signature appears at  
25 the bottom of that May 23 -- or excuse me, March 23,

1 1993 letter?

2 A. I do not recall.

3 Q. Are you personally aware of Dr. Thomas Hawkes'  
4 return to Salt Lake City after his lengthy stint in the  
5 military?

6 A. I am.

7 Q. And are you aware that he started in Salt Lake  
8 City with the Salt Lake Clinic and doing surgeries at  
9 the LDS Hospital?

10 A. I am.

11 Q. What are you aware of concerning how long that  
12 lasted?

13 A. When Tom first came back, Tom and I are  
14 friends from college and we played on the football team  
15 together up at the University of Utah, he was a  
16 linebacker and I was his strong safety, and we became  
17 very good friends and I respected Tom very much. When  
18 he came back I was interested in perhaps him joining  
19 myself and Tom Rosenberg as a partner in our practice  
20 and we had preliminary discussions with Tom concerning  
21 that venture.

22 As it turned out, there was various hearsay  
23 and discussions amongst other staff and the nurses and  
24 the techs that Tom was less than proficient in the  
25 operating room, was perhaps not showing the greatest

1 judgment in some of his case selection. Tom Rosenberg  
2 brought that to my attention within a year of Tom  
3 Hawkes' arrival and was not interested in having Tom  
4 join us, Rosenberg wasn't interested in having Tom  
5 Hawkes join us.

6 I was disappointed in that in that Tim and I  
7 were good friends, but I understood it and we agreed to  
8 just proceed to watch and see how he did before pursuing  
9 it any further. It became apparent that he probably was  
10 not the best orthopedic surgeon in the valley and  
11 probably one we wouldn't wanted to be associated with  
12 our practice and so we decided not to pursue it any  
13 further. I can't tell you that time frame at all, I  
14 just know that Tom Rosenberg and I talked about it on  
15 several occasions. Ultimately he left LDS Hospital and  
16 relocated out in Cottonwood Hospital.

17 Q. Do you know how long he had been at LDS  
18 Hospital?

19 A. I don't recall the detail, I don't.

20 Q. Was it a relatively short or long time?

21 A. It was a short time, I believe, but I can't  
22 tell you. I really would just be guessing. I lost  
23 track of Tom out at Cottonwood, really. I don't recall  
24 any specific cases that alarmed me when he was out here.  
25 I recall a story where he had operated on himself

1 filtering back up. We came out and built TOSH and  
2 occupied it in '91 and I assumed Tom was still here. We  
3 really didn't even have discussions, although in the  
4 back of my mind there was -- Tom may have approached us  
5 about doing work here at TOSH and I'm sure we would have  
6 denied him by that time because we were concerned --

7 THE COURT REPORTER: Could I stop you here?

8 (Off the record.)

9 Q. (BY MR. MORTENSEN) Can you pick that up mid  
10 sentence?

11 A. Yes. I don't know that Tom and I had any  
12 discussions out here, when we were out here and he was  
13 here at Cottonwood. Somewhere in the back of my memory  
14 he may have asked to do some cases here at TOSH and he  
15 didn't have privileges and couldn't do it. So when he  
16 left for Ashley Hospital it was without my knowledge or  
17 discussions with Tom and I wouldn't have known until  
18 later and notified when he was already there.

19 Q. Can you recall when you heard of this incident  
20 of his having attempted surgery on himself?

21 A. I can't.

22 Q. Now, while we were off the record  
23 accommodating the court reporter who ran out of  
24 batteries or something, you looked at this letter from  
25 Deena Mansfield and that touched something off in your

1 memory?

2 A. Well, I'm trying to remember. It just seems  
3 that I -- in this instance I would have called Ron. And  
4 I think I talked to him about Tom Hawkes and I think I  
5 didn't have very good things to say and I didn't want to  
6 put it in a letter form and I handled it with a phone  
7 call. And that's what I think I did, but I can't be  
8 sure of that. But this letter kind of sparked a memory  
9 in me for several reasons. One is I knew Ron very well  
10 and I knew Tom very well and I wanted Tom very badly to  
11 succeed, and it seems to me I had a conversation with  
12 Ron Perry.

13 Q. From what you've said, I'm taking that this  
14 conversation was such that you expressed some serious  
15 reservations about his ability to perform orthopedic  
16 surgeries?

17 A. I would have expressed that there were some  
18 issues in Salt Lake Valley, that he would have to, if he  
19 accepted him, be monitored very closely. And it seems  
20 like I had a conversation with someone about Tom Hawkes.

21 Q. By 1996, let's say March 12, 1996, which is  
22 the date my client was operated on by Dr. Hawkes, if you  
23 had been contacted, say, in early March of 1996 by  
24 anyone associated with the recredentialing of Dr.  
25 Hawkes, what kind of response would you have given by

1 then?

2 MR. HARRISON: Objection, foundation, form of  
3 the question, relevance.

4 Q. (BY MR. MORTENSEN) You may answer.

5 A. The response I would have given at that time  
6 would have been definitely negative.

7 Q. And why?

8 A. By then quite a few cases had emerged out of  
9 the Vernal area of basically what I thought was  
10 malpractice, certainly poor treatment, unethical  
11 billing, and I was very alarmed and concerned for  
12 patients' care. I had I believe by '95 collected,  
13 sometime in '95, three or four cases of my own that were  
14 workman's compensation related cases and I sent those to  
15 the Workman's Compensation Board for peer review. I  
16 actually --

17 Q. What was the problem in those cases?

18 A. In those cases they were inappropriate  
19 surgeries that were billed unethically, multiple charges  
20 for procedures that can't be performed with a laser.

21 Q. These were surgeries by Dr. Hawkes?

22 A. Yes.

23 Q. Were some of the surgeries that he had billed  
24 for surgeries that you found hadn't even taken place?

25 A. I don't know that it hadn't taken place.

1 Basically, if you say I repaired a meniscus, I welded a  
2 meniscus or a shoulder ligament with a laser and you  
3 charge for ligament stabilization or a meniscal repair,  
4 that's totally unethical because laser doesn't work that  
5 way. That isn't the way in which you repair an ACL or  
6 which you repair a meniscus or a shoulder ligament, and  
7 he was doing that repeatedly. So he was billing major  
8 charges for surgical procedures using a device that has  
9 simply not ever been found or taught or authorized to be  
10 used for those procedures.

11 Q. Let's go back to this laser issue. To your  
12 knowledge, was Dr. Hawkes a preeminent practitioner in  
13 the use of laser in surgeries as of 1993?

14 A. No.

15 Q. Do you know that to be -- do you know that  
16 from -- how do you know that?

17 A. Well, first of all, in the sports medicine and  
18 knee and shoulder surgery area, I consider myself to be  
19 perhaps one of the preeminent people in the  
20 intermountain area, which means that most courses that  
21 are related to the arthroscopic surgery and/or laser I  
22 would have been a participated in many times. I myself  
23 had given by that time some laser papers using laser  
24 energy for some procedures that we were investigating.  
25 We had a laser here at TOSH. I had been involved in

1 certifying physicians for laser use here at TOSH and Dr.  
2 Hawkes was not part of, nor to my knowledge, ever part  
3 of any of those courses nor certification processes.

4 Q. Do you recall having received any contact from  
5 anyone associated with Ashley Valley Hospital or Medical  
6 Center in 1995?

7 A. No. Unless the conversation in my head I'm  
8 remembering was in '95, not '93. But no, I don't recall  
9 it specifically.

10 Q. This conversation, your best recollection is  
11 that it would have occurred back in '93?

12 A. I think this letter would have prompted me to  
13 call Ron Perry. And somewhere along the line I think I  
14 talked to Ron about Tom Hawkes.

15 Q. And that contacting him, not in writing but  
16 otherwise, was to sort of tip him off that he may have  
17 some problems?

18 A. That's correct.

19 **(EXHIBIT-4 MARKED.)**

20 Q. (BY MR. MORTENSEN) Is Exhibit 4 a true and  
21 accurate copy of your current CV? It's 47 pages long.

22 A. I'm not sure it's been brought up-to-date. I  
23 think it's short by about six months.

24 Q. Would it be pretty accurate but for the last  
25 six months as well?

1           A.    Yes.

2           Q.    Dr. Paulos, I don't think I've asked  
3 specifically how you would have responded in 1995. I  
4 think my most recent question on that was how you would  
5 have responded in 1996. Would your response have been  
6 the same in 1995?

7           A.    I believe so.

8           Q.    It would have been highly negative?

9           A.    Highly negative.

10          Q.    When, if at all, did you ever become aware of  
11 Dr. Hawkes having any sort of problems with drug use?

12               MR. HARRISON: Objection, foundation.

13               MR. HALL: Join.

14               THE WITNESS: I was not aware of it until  
15 after his death.

16          Q.    (BY MR. MORTENSEN) So your reservations would  
17 not have been based on any sort of impairment related to  
18 drug use, but as to skill and judgment in performing  
19 surgeries; is that correct?

20          A.    That's right.

21          Q.    Were you ever jealous of Dr. Hawkes?

22          A.    I may have been during my college. He was a  
23 great football player.

24          Q.    I mean in professional as a doctor.

25          A.    No, absolutely not. I wanted Tom to succeed

1 in every way possible.

2 MR. MORTENSEN: Thank you. I don't think I  
3 have any more questions.

4 MR. HARRISON: I just want to make a couple of  
5 observations for the record. Number one, to formally  
6 assert a continuing objection to the use of videotaped  
7 trial depositions in this case and to continue to  
8 reserve the right, which the judge has allowed me, to  
9 ask him to order witnesses to appear at trial, if  
10 necessary. Number two, to object to a videotape made of  
11 this proceeding because it's made on a home camera  
12 without a certified videographer.

13 EXAMINATION

14 BY MR. HARRISON:

15 Q. Dr. Paulos, I just want to be sure that I  
16 understand what you've told me. I think I do, forgive  
17 me if I'm asking you to repeat yourself. You believe,  
18 but are not sure, that you had a conversation with Ron  
19 Perry upon receipt of the letter from the hospital?

20 A. That's correct.

21 Q. But you don't remember the content, you don't  
22 remember the substance of the conversation?

23 A. Not in specific.

24 Q. Okay. Do you recall ever having a  
25 conversation subsequent to that with Mr. Perry about Dr.

1 Hawkes?

2 A. No, I do not.

3 Q. Do you recall ever having a conversation with  
4 anyone else at Ashley Valley Medical Center about Dr.  
5 Hawkes?

6 A. I do not.

7 MR. HARRISON: That's all I have.

8 FURTHER EXAMINATION

9 BY MR. MORTENSEN:

10 Q. I've got a couple. First I want to spread on  
11 the record the fact that my normal videographer, Blaine  
12 Gale, spoke with me this morning about having to drive  
13 his mother to the funeral of the last relative on the  
14 Gale line and couldn't attend. The second thing I want  
15 to spread on the record is a series of real quick  
16 questions to you, Dr. Paulos, about your practice here  
17 right now in Salt Lake.

18 This trial is scheduled to begin in March, on  
19 March 11, which is a week from today. Do you have  
20 surgeries scheduled for next week, March 11 through the  
21 15th?

22 A. I believe I do, plus I'm also out of town.

23 Q. Where will you be?

24 A. Africa.

25 Q. Will you be in Africa the week following March