

2002

# Lori Haase v. Ashley Valley Medical Center and Columbia Ashley Valley Medical Center, and John Doe Defendants 1 Through 10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LORI HAASE,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

**BRIEF OF APPELLANT  
LORI HAASE**

Case No. 2:0020524-CA

Appeal from Amended Judgment on Verdict entered by the Eighth Judicial District Court, per the Honorable Douglas L. Cornaby, Senior Judge, on June 24, 2002.

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NOV 21 2002

Paulette Stagg  
Clerk of the Court

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Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1206 (Utah 1983) (quoting Jean F. Rydstrom, Annotation, Construction of Rule 60(a) of Federal Rules of Civil Procedure Authorizing Correction of Clerical Mistakes in Judgements, Orders, or other Parts of Record, and Errors Therein, 13 A.L.R. Fed. 794 (1972))

State v. Lovegren, 798 P.2d 767, 771 (Utah App. 1990)

State v. Moore, 802 P.2d 732, 739 (Utah App. 1990).

State in Interest of JRT v. Timperly, 750 P.2d 1234, 1236 (Utah App., 1988)

Suniland Corp. v. Radcliffe, 576 P.2d 847 (Utah 1978)

Umphrey v. Sprinkel, 682 P.2d 1247, 1255 (Idaho 1983)

Young v. Young, 979 P.2d 338, 342 (Utah 1999); Rule 52(a), URCP

## OTHER AUTHORITIES

Competency of Juror's Statement or Affidavit to Show That Verdict in Civil Case Was Not Correctly Recorded, 18 ALR 3d 1133;

Propriety of Reassembling Jury to Amend, Correct, Clarify or Otherwise Change a Verdict After Discharge or Separation at Conclusion of Civil Case, 19 ALR 5<sup>th</sup> 622.

## **STATEMENT OF JURISDICTION**

UCA § 78-2a-3(2)(j) confers jurisdiction on this Court to decide this appeal.

## **ISSUES PRESENTED FOR REVIEW**

**1. Did the district court err in *apparently* finding that the jury intended to award Mrs. Haase only 30% of its \$820,000 damage award for the hospital's negligence?**

This is a question of fact to be reviewed under a "clearly erroneous" standard. Young v. Young, 979 P.2d 338, 342 (Utah 1999); Rule 52(a), URCP. Under this standard, the appellant must prove the district court's apparent finding is "against the clear weight of the evidence". State in Interest of JRT v. Timperly, 750 P.2d 1234, 1236 (Utah App., 1988).

**2. Did the district court fail to follow Utah law in refusing to effectuate the jury's true intent to award Mrs. Haase \$820,000 for the hospital's negligence?**

This is a question of law, reviewable for "correctness." This Court need give no deference to the district court's ruling. Bishop v. GenTec, 48 P.3d 281 (Utah 2002); Moulton v. Staats, 27 P.2d 455, 459 (Utah 1933).

## ISSUES SOUGHT TO BE PRESERVED

The hospital has filed a cross appeal seeking a new trial due to what it contends were errors in evidentiary rulings by the trial court. **Mrs. Haase opposes remand for retrial.** (See Arguments VI and VII, *infra* at pp. 31-35). However, in the event this Court is inclined to order a new trial, she wishes to preserve her right to appellate review of several evidentiary rulings which were unfavorable to her. Issues raised by those unfavorable rulings include these:

1. Did the trial court abuse its discretion in refusing to allow the jury to consider authenticated medical records of the surgeon's treatment in a Dayspring Drug Addiction Treatment Program when those records were offered to rebut the hospital's claim it did not know the surgeon had a substance abuse problem and neither requested nor required him to submit to substance abuse treatment?<sup>1</sup>
2. Did the trial court abuse its discretion in refusing to permit the brief factual testimony of Dr. Raymond Middleton to be presented to the jury either via live telephonic examination or by the reading of his deposition transcript when, at the time of trial, Dr. Middleton was retired, living in St. George, and unable without hardship to appear personally at trial in Vernal?
3. Did the trial court abuse its discretion in refusing to permit two Salt Lake physicians who had treated the surgeon for drug and/or

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<sup>1</sup> At least 5 separate entries in this chart indicate the surgeon had been sent for treatment there by the hospital. The surgeon's treatment occurred just 6 months before he operated on Mrs. Haase. Witnesses who were not allowed to testify at trial (Drs. Collins and Burgoyne) would have testified the surgeon failed to submit to the recommended out-patient treatment following his discharge.

emotional problems prior to his surgery on Mrs. Haase (Drs. Collins and Burgoyne) to testify at trial via telephone?

4. Did the trial court abuse its discretion in refusing to permit the brief testimony of fact witness Bryan Gibby to be presented to the jury via live telephonic examination when, at the time of trial, Mr. Gibby (a physical therapist who had worked with the surgeon in Vernal) was living in Illinois and could not appear personally at trial in Vernal without great hardship on himself and his family?
5. Did the trial court abuse its discretion in precluding the introduction of evidence that the hospital was owned by Columbia/HCA and precluding any reference to the hospital at trial by its true name, Columbia/HCA Ashley Valley Medical Center?
6. Did the trial court abuse its discretion in refusing to allow the jury to consider any portion of the videotaped deposition testimony of Dr. Robert Dunn, an orthopedic surgery expert from New Jersey?
7. Did the trial court abuse its discretion in refusing to allow the jury to be informed that, at the hospital's request, the surgeon had submitted to several drug screen tests near the time of his surgery on Mrs. Haase and that the hospital was unable and/or unwilling to produce the results of those tests?
8. Did the trial court err as a matter of law in concluding that a statutory peer review privilege precluded Mrs. Haase's introduction of substantial evidence and testimony against the hospital, even though the individual who was the subject of the alleged peer review was, at the time of trial, deceased?
9. Did the trial court err in refusing to allow the jury to consider an assessment of punitive damages against the hospital when the hospital's own expert testified that permitting an uncredentialed surgeon to operate on patients would constitute reckless conduct?

Mrs. Haase defers her briefing of these issues to the submission she will file in response to the hospital's cross-appeal.

## STATEMENT OF THE CASE<sup>2</sup>

This is an appeal from the trial court's refusal to enter judgment in the amount of \$820,000, as supported by the jury's post-verdict affidavits and in-court declarations.

Mrs. Haase sued the hospital for negligently credentialing and retaining a dangerously impaired orthopedic surgeon who caused her serious permanent injury by severing her patellar tendon during a questionable surgery to repair a minimally displaced tibial plateau fracture. ( R. 3-10). The surgical error and injury occurred six years before Mrs. Haase's case against the hospital came to trial. ( R. 3-10). Mrs. Haase's claim against the surgeon was settled three years earlier. ( R. 895-899). That settlement occurred some fifteen months after the surgeon had died. Terms of the settlement were confidential but included express provision that Mrs. Haase would be free to pursue her claim against the hospital. ( R. 895-899, 1170-1173).

Prior to trial, Mrs. Haase's counsel filed a formal motion in limine seeking clarification as to how the trial court intended to handle the matter of Mrs. Haase's prior settlement with the surgeon's estate. Counsel also included the matter in a

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<sup>2</sup> All references to the district court record shall be cited as "R. \_\_\_\_\_" Plaintiff Lori Haase shall be referred to as "Mrs. Haase." Defendant Ashley Valley Medical Center shall be referred to as "the hospital."

proposed agendum of legal issues he hoped would be addressed before trial.<sup>3</sup> ( R. 934-940).

Despite counsel's effort, the issue was not resolved prior to trial. However, the court did instruct the jury that the surgeon's negligence "is not at issue in this trial. This trial is about what happened before the surgery." ( R. 982; R. 1358 at p.4). A few weeks before trial, the hospital decided not to contest the surgeon's negligence and asked the court to declare the surgeon's negligence to be an established fact. The court honored that request. ( R. 796-810; 1162).

After both sides had rested, the court reviewed proposed jury instructions with counsel in chambers. During this session, which was not "on the record," counsel debated one another's proposed jury instructions, with the court selecting those instructions it felt were appropriate. The form of the special verdict was also discussed. The special verdict form submitted on behalf of Mrs. Haase did not ask the jury to apportion fault between the hospital and the surgeon. ( R. 857-859; Exhibit 3, attached). Significantly, neither did the one submitted on

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<sup>3</sup> That proposed agendum was delivered to the court and the hospital's counsel two days before trial. Of the 17 issues it asked to be considered, only one is entirely capitalized: The one dealing with whether the fault of the surgeon should be apportioned with that of the hospital. ( R. 936).



behalf of the hospital. (See Exhibit 2, attached)<sup>4</sup>. The parties' disagreement over the special verdict had nothing to do with apportionment of fault. Rather, it concerned the hospital's contention that in order to find for Mrs. Haase, the jury should have to find specifically that the surgeon was "physically impaired at the time he operated on Lori Haase". The court brought the debate to an end without indicating which of the parties' proposed special verdict forms it would employ. It dismissed counsel for a brief lunch break with the indication that the reading of jury instructions would occur immediately after the lunch break, followed by closing arguments.

Following the lunch break, the court read its jury instructions to the jury and for the first time revealed to counsel the special verdict form it intended to use, which it apparently had created on its own during the lunch break. That form contained a blank for the surgeon's percent of negligence. 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.

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<sup>4</sup> The Eighth District Court Clerk has no record of a special verdict form having been filed by the hospital. However, plaintiff's counsel received a proposed special verdict form from the hospital's counsel shortly before trial along with the hospital's proposed 27 jury instructions. It is appended hereto as Exhibit 2.

The jury received no instruction concerning comparative negligence or apportionment of fault. ( R. 1006-1053). The jury also received no instruction explaining the impact of apportionment of fault decisions on the actual amount of the damage award Mrs. Haase would receive. ( R. 1006-1053). Neither party had requested any such instructions prior to trial. Mrs. Haase had not requested any because she had consistently contended, for a variety of reasons, that the jury should not be asked to apportion fault between the surgeon and the hospital. ( R. 943-959). Again, neither counsel knew that the court had decided to ask the jury to apportion fault between the hospital and the surgeon until the court presented its own special verdict form to the jury shortly before closing arguments were delivered.

The 48 instructions given by the court contain no guidance or standards as to how the surgeon's negligence should be "deliberated". They do not even discuss or mention the surgeon's negligence. The only reference to physician negligence appears in Instruction No. 24 which merely states:

A physician's negligence does not raise a presumption that the hospital was negligent in granting the physician privileges.

( R. 1030). Again, the court instructed the jury at the beginning of the trial that the surgeon's negligence was not at issue. ( R. 982, 1358 at p. 4).

During its deliberations, the jury sent out a note to the court requesting clarification of its task in assessing damages. ( R. 1005). Although this was an occasion for the court to allow counsel to help dispel any misunderstanding the jury may have had due to an absence of apportionment instructions, the court did not contact counsel. Rather, it returned a terse note to the jury undertaking to answer its question. ( R. 1005; Exhibit 6, attached). It is apparent that the seven-word response did not satisfactorily clarify the matter for the jury. In the end, the jurors were left to their own assumptions based on what they understood. (R.1058-59 ; Exhibit 8, attached, at pp. 1-2).

The jury foreman signed the special verdict form. It contains an award of \$820,000 in damages<sup>5</sup>. It also lists fault at 30% for the hospital and 70% for the surgeon. ( R. 1054-1055).

The verdict was returned at approximately 11:00 p.m. The court invited the jurors to go home and suggested that if counsel wanted to ask them questions, they could do so the next day. ( R. 1357 at p. 8; Exhibit 6, attached). The next

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<sup>5</sup> During the trial, four witnesses testified concerning Mrs. Haase's general damages: Mrs. Haase's mother and two daughters and Mrs. Haase herself. Two expert witnesses testified as to special damages: Rehabilitation Specialist/Life Care Planner Helen Woodard and Economist Patricia Pacey, Ph.D. Dr. Pacey testified that based on Ms. Woodard's finding and her own calculations, Mrs. Haase's special damages were at least \$1,241,900 (Trial Transcript Vol. IV, 618-652). The hospital offered no rebuttal evidence or witnesses on damages.

morning, Mrs. Haase's counsel discovered from his juror interviews that the special verdict form as interpreted by the court did not reflect the jury's true intent. Seven of the eight jurors indicated without equivocation that they intended to award Mrs. Haase the full \$820,000 for the hospital's negligence. ( R. 1058-1067 and 1108-1109; Exhibit 6, attached). The eighth juror indicated she had agreed during deliberations to go along with the others but she declined to sign an affidavit reflecting her intentions or understanding. Affidavits were prepared, signed and filed with the court. ( R. 1056 - 1081 and 1108 -1109; See Exhibit "6", attached).

After considering the affidavits, the trial court ordered that the jury be reconvened six weeks after the trial. ( R. 1138-1139). At that time, the jurors were asked to respond to questions. One of the questions put to the jurors was this:

***"Was it your intent to award Mrs. Haase the total sum of \$820,000 for injuries sustained by her as a result of the hospital's negligence"?***

( R. 1358 at p. 17; See Exhibit "5", attached at p. 17). **Six of the seven jurors**

**present** <sup>6</sup> **responded in the affirmative.** ( R. 1358 at pp. 17-19; See Exhibit "5", attached at pp. 17-19; See and hear also actual videotape of hearing for proof as to the number of affirmative responses, including Mr. Labrum's).

Another question posed to the jurors was:

***"Was it your intent to award Mrs. Haase only \$246,000 for the damages she sustained as a result of the hospital's negligence?"***

( R. 1358; Exhibit 5, attached, P.19, lines 1-18). The same six jurors again responded "no" (*Id.* at lines 22-25).

Finally, the six jurors who had responded with clarity to that question were posed this question:

Hearing what you have heard now from the Court about the \$246,00 judgment, ***did you inaccurately record on the special verdict form your actual intent?***

( R. 1358; Exhibit 5, attached at p. 24, lines 5-7) (Emphasis added). The record clearly reflects six individual affirmative responses to this question. ( R. 1358 at pp. 24-25; Exhibit 5, attached at pp. 24-25; Also, see and hear actual videotape of proceeding).

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<sup>6</sup> One of the jurors (Becky Solomon) was absent when the jury was re-convened and the eighth juror was not asked the question, having declined earlier to sign an affidavit but having indicated her agreement to "go along with the others". (See paragraph 4 of Affidavit of Frank J. Falk, 8<sup>th</sup> affidavit included in Exhibit "8", Exhibit "5", attached at pp. 17-19; see also Exhibit "9", attached).

## **SUMMARY OF ARGUMENT**

The jury intended to award Mrs. Haase \$820,000 for the hospital's negligence. Jurors made that intent clear in the affidavits they signed on the day following trial and in their declarations in open court when they were re-impaneled some six weeks later. Under Utah law, the jury's intent is to be carried into effect.

If the trial court genuinely believed the jury did not intend to award Mrs. Haase the full \$820,000 for the hospital's negligence, its belief was clearly erroneous and against the clear weight of evidence. If the trial court did not so believe, it erred as a matter of law in substituting its own judgment for the jury's.

## **ARGUMENT**

### **I**

#### **UNDER CONTROLLING UTAH CASE LAW, THE JURY'S TRUE INTENT GOVERNS AS TO THE DAMAGES MRS. HAASE IS TO RECEIVE FOR THE HOSPITAL'S NEGLIGENCE.**

It is well-established law that a court should enter judgment based on the actual intent of a jury in rendering its verdict. See 75B Am.Jur.2d, Trial §1789. If the verdict form completed by the jury does not accurately "reflect the jury's intent, the trial court may amend or modify the verdict to conform to the jury's intent and enter

judgment accordingly". Moulton v. Staats, 27 P.2d 455, 459 (Utah 1933). See also, e.g., Eastridge Development Co. v. Halpert Associates, 853 F.2d 722, 783 (10<sup>th</sup> Cir. 1988); Fried v. McGrath, 135 F.2d 833, 834 (D.C. Cir. 1943); Newport Fisherman's Supply Co., Inc. v. Derecktor, 569 A.2d 1051, 1053 (R.I. 1990); Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 496 A.2d 339, 346 (N.H. 1985); Umphrey v. Sprinkel, 682 P.2d 1247, 1255 (Idaho 1983). Entry of a judgment based on a verdict which does not accurately reflect the jury's intent undermines the public's confidence in the judicial system and frustrates the interests of justice.

The affidavits seven of the eight jurors signed on the day following the announcement of their verdict clarifies the verdict and explains the jurors' true intent. That the affidavits should be considered and declared dispositive is strongly suggested in our Supreme Court's recent decision in Bishop v. GenTec:

We disagree with the trial judge's characterization of the substance of the motion and conclude. ..that the affidavits were admissible, and that the jury verdict should be amended to reflect the true intent of the jury.

\* \* \* \*

"[I]n this broad approach to correctibility under Rule 60(a), it matters little whether an error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having judgment, order, or other part of the record reflect what was done or intended." Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d

1201, 1206 (Utah 1983) (quoting Jean F. Rydstrom, Annotation, Construction of Rule 60(a) of Federal Rules of Civil Procedure Authorizing Correction of Clerical Mistakes in Judgements, Orders, or other Parts of Record, and Errors Therein, 13 A.L.R. Fed. 794 (1972)).

Prior to the adoption of the Utah Rules of Civil Procedure, we addressed the issue of whether a trial court could correct a jury verdict to reflect the true intent of the jury. In Moulton v. Staats, 27 P.2d 455 (Utah 1933), we allowed the trial court to correct a jury verdict to reflect the true intent of the jury. In Suniland Corp. v. Radcliffe, 576 P.2d 847 (Utah 1978), Justice Maughan argued that juror affidavits were admissible "to demonstrate what verdict was actually agreed upon." Id. at 850 (Maughan, J., dissenting) at 946 n.1. More recently, the Tenth Circuit Court of Appeals has also determined that, under the Federal Rules of Civil Procedure, a jury verdict may be corrected to reflect the true intent of the jury. See Eastridge Dev. Co. v. Halpert Assocs., Inc., 853 F.2d 772, 783 (10th Cir. 1998).

Bishop is not arguing in this case that the mistake was a judicial error made in rendering the judgment, but rather that the error was clerical and was made by the jury in "recording the judgment as rendered." We agree that accurately recording the intent of the jury in its calculation of the damage award constitutes correction of a clerical error, not a judicial error. "The distinction between judicial error and clerical error. . .depends on whether it was made in rendering the judgment or in recording the judgment as rendered." Richards v. Siddoway, 471 P.2d 143, 145 (Utah 1970) (quoting 46 Am.Jur. 2d Judgments § 202).

Accordingly, the juror affidavits should have been admitted. On remand the jury verdict should be corrected to reflect the true intent of the jury by increasing the general and special damages to \$1,000,000 and



\$1,067,000 respectively, and then deducting Bishop's percentage of fault as required by the LRA.

Bishop v. GenTec Inc., 48 P.3d 218, (UT 2002).

A trial court may and should consider evidence which clarifies the jury's true intent. Moulton, 27 P.2d at 459. See also, Eastridge Development Co., 853 F.2d at 783. As succinctly noted by our Supreme Court in Moulton:

The general rule, that statements of jurors will not be received to establish their own misconduct, or to impeach their verdict agreed on, does not prevent the reception of their evidence as to what really was the verdict agreed on, in order to prove that, through mistake or otherwise, it has not been correctly expressed, as the agreement reached by the jury, and not the written paper filed, is the verdict; and a showing that the writing is incorrect is not an impeachment of the verdict itself. Affidavits of jurors are admissible to show that the verdict, as received and entered of record, by reason of a mistake, does not embody the true finding of the jury.

27 P.2d at 459 (citations omitted).

Utah law on clarification of jury verdicts is consistent with the law of many other jurisdictions. That law is organized and summarized in two relevant ALR articles: Competency of Juror's Statement or Affidavit to Show That Verdict in Civil Case Was Not Correctly Recorded, 18 ALR 3d 1133; Propriety of Reassembling Jury to Amend, Correct, Clarify or Otherwise Change a Verdict After Discharge or Separation at Conclusion of Civil Case, 19 ALR 5<sup>th</sup> 622. These two articles

(comprising 199 pages of reported cases and analysis) provide support for several basic principles recognized by Utah's Supreme Court, including these:

- 1) A verdict is what the jury intended;
- 2) If a verdict does not express the jury's true intent, clarification or correction is appropriate;
- 3) Juror affidavits which explain the intended verdict are admissible to clarify the verdict; and
- 4) Once a jury has been discharged or separated, the jury may be reconvened for the limited purpose of explaining or clarifying its decision but not to re-deliberate, reconsider the facts, or alter its original intent.

## II.

### **THE MARSHALED EVIDENCE IN SUPPORT OF THE TRIAL COURT'S *APPARENT* FINDING THAT THE JURY'S INTENT WAS TO AWARD MRS. HAASE ONLY \$246,000 FOR THE HOSPITAL'S NEGLIGENCE.**

#### **INTRODUCTORY STATEMENT**

The trial court made no express findings and gave no explanation as to why it decided to enter judgment in the amount of \$246,000 rather than \$820,000. Its only statement on the record is brief and opaque:

I recognize there's some confusion in the jury instructions.  
And that responsibility, of course, falls on me. . . . but, I'm

going to just order the judgment for the \$246,000, which is the 30% and which probably means you'll want to appeal it. And I just have to let it go.<sup>7</sup>

( R. 1357 at p. 9 and R. 1358 at p. 27).

It is apparent, but only apparent, that the trial court found the jurors' true intent was to award Mrs. Haase \$246,000 for the hospital's negligence.<sup>8</sup> (See R. 1357 at p. 9 and R. 2358 at pp. 27-28). An appellant generally is required to marshal evidence supporting the finding of fact in dispute. This requirement "serves the important function of reminding litigants and the appellate courts of the broad deference owed to the fact finder at trial." State v. Moore, 802 P.2d 732, 739 (Utah App. 1990). This Court, however, grants deference only when the disputed finding is sufficiently detailed to disclose the evidentiary basis for the court's decision. A trial court's decision is afforded no deference when its findings are inadequate. State v. Lovegren, 7988 P.2d 767, 771 (Utah App. 1990). This Court has declared:

There is . . . no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot be meaningful challenged as factual determinations.

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<sup>7</sup> The court went on to speculate on the possibility of a reviewing court ordering a new trial and stated its "hope" that a new trial not be ordered, "from the point of view its very, very expensive. And I would hate to see the parties go through it again". ( R. 1358 at p. 28; Exhibit "5", p. 28).

<sup>8</sup> It is possible, however, the district court simply decided to substitute its own judgment for the jury's. See Argument VI, *infra*, at pp. 31-34.

Rather, appellant can simply argue the legal insufficiency of the court's findings as framed.

Woodward v. Fazzio, 823 P.2d 474, 477-478 (Utah App. 1991).

Mrs. Haase, therefore, appears to have the option of marshaling evidence supporting the district court's assumed finding or challenging the legal sufficiency of the ruling as made. Mrs. Haase seeks to avoid further delay and sees no point in having the case remanded for an explanation of why the trial court entered judgment in the smaller amount. She contends the decision was wrong, whatever its basis, and prefers to attack that decision on the record as it exists. She asks this Court to determine that the decision was clearly erroneous, an abuse of discretion and incorrect as a matter of law, or reversible by whichever standard this Court deems applicable. (See Arguments III, VI, *infra*).

### **The Marshaled Evidence**

#### **A. The Percentage and Damage Figures Entered on the Special Verdict Form Itself.**

A finding that the jury intended Mrs. Haase to receive only 30% of its \$820,000 damage award may be inferable from the special verdict itself. (R. 1055). While it is not clear the jury understood why it was being asked to assign a percentage to the surgeon's negligence or the effect of its doing so, it *is* clear the jury foreman entered 70% beside the surgeon's name and 30% beside the hospital's name. It

is also clear the jury assessed damages at \$820,000 - \$600,000 in special damages and \$220,000 in general damages.

**B. The Court's Response to the Jury's Mid-Deliberation Question.**

The court may well have based its decision to enter judgment on only 30% of the jury's \$820,000 damage award on what it perceived to be the clarity of its response to the note the jury sent out during its deliberations. The note reads:

Your Honor,

In figuring damages, do we figure the percentage of total damages, or the whole damage & the court figures the percentage that we decide.

( R. 1005; Exhibit 6, attached).

The court returned to the jury a seven word response:

Figure the total value of all damages.<sup>9</sup>

( R. 1005; Exhibit 6, attached).

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<sup>9</sup> However, what may have seemed perfectly clear to the trial court may not have been clear to the jurors. Neither the question nor the answer referred to the surgeon or his negligence or to damages which might be considered attributable to the surgeon's negligence.

**C. Juror Responses to Individual Polling Immediately Following the Reading of the Verdict.**

After completing its deliberations, the jury was brought back into the courtroom. The court and counsel were present. At that time, the court asked the jury foreman to hand the verdict to the bailiff who then delivered it to the court. The court then read the verdict aloud. After doing so, the court asked if either counsel wanted the court to poll the jurors. Mrs. Haase's counsel responded in the affirmative. The court then asked each individual juror if each response to each of the questions on the special verdict form reflected his or her verdict. Each responded in the affirmative. ( R. 1357 at pp.4-7). Arguably, this could be construed as reflecting an intent consistent with the court's intent to enter judgment in the amount of 30% of the \$820,000 damage award.<sup>10</sup>

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<sup>10</sup> It is significant, however, that the jury had left the courtroom before the trial court directed counsel to prepare judgment for 30% of the \$820,000 award. (R.1357 at pp. 8-9 ). Having been absent when that direction was given, the jurors had no opportunity to object or express surprise at the trial court's misunderstanding of their intent.

**D. Isolated Excerpts of Juror Responses to Questions the Court Posed to Them When They Were Re-impaneled Six Weeks after the Trial.**

When the court re-impaneled the jury on May 2, 2002, it told the jurors:

We brought you back to determine what you intended when you signed your verdict. . . . We are not going to ask you to reconsider your verdict. We are not going to ask you to deliberate any more. We are only going to inquire into what you intended on the night you signed that verdict.

( R. 1358; Transcript of May 2, 2002 proceedings at 2-3; See Exhibit 5, attached).

The first question the court posed was: “Did your verdict of \$820,000 include all of the plaintiff’s injuries, those caused by Dr. Hawkes as well as those caused by Ashley Valley Medical Center?”. ( R. 1358 at p.5; see Exhibit 5, attached, p.5). The court started with the jury foreman, who responded:

My answer, I believe we were trying to clear up a question that we had when we were coming to that judgment on that. I don’t recall the exact way it was stated to you on the (inaudible).

*Id.* The court then reviewed with the jurors what had occurred on the night they were deliberating as to the note they sent out and the response the court sent back. After reviewing those matters, the court returned to the question and this further response was given by juror Chat Watt:

My intention, when I went through it, it was my impression that we were going for the whole, the totality for the

plaintiff in this case. And the amount that we were coming up with was the totality. . . .

The Court: Okay. . . . 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.

*Id.* at 7. Although other jurors responded inconsistently with this response and Mr. Watt himself later stated an intent and understanding completely contrary to the conclusion the court drew from the foregoing response, the district court may have inferred from this response that the entire jury intended to award Mrs. Haase only \$246,000 for the hospital's negligence.

On pages 10 and 11 of the May 2 transcript, juror Ardith Atwood<sup>11</sup>, identified only as "unidentified woman juror", expressed to the court her understanding of what she thought the damage award meant. Although her statements are somewhat opaque and indicate she believed it would be up to the judge to decide whether Mrs. Haase would receive \$820,000 or \$246,000 from the hospital, they may support a

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<sup>11</sup> Ms. Atwood was the one juror who declined to sign a post-trial affidavit, with the simple indication that she had agreed "to go along with the others" on the matter of damages. ( R. 1068-70; See Exhibit 8, attached).



conclusion that she believed part of the \$820,000 damage award represented what Mrs. Haase had already received in settlement from the surgeon.<sup>12</sup>

On page 12 of the transcript, the court asked the jurors whether the thought ever occurred to them “that the damages to be one hundred percent would have to be over two million?”. The court apparently intended by this question to mean that in order for Mrs. Haase to receive \$820,000 for the hospital’s negligence they would have to have found a total damage award of over two million dollars. Juror Fagnan and the “unidentified woman juror” (Ardith Atwood) responded in the negative.<sup>13</sup>

Mrs. Haase’s counsel has scrutinized the record for other evidence supporting a finding that the jurors intended Mrs. Haase to receive only \$246,000 for the hospital’s negligence and has found none.

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<sup>12</sup> If that was her view, it was a one-juror minority view. See R. 1056-67; 1108-09; R. 1358 and Exhibit 9, attached).

<sup>13</sup> Juror Fagnan went on to explain that she and her fellow jurors understood the focus of the case was on the damages resulting from the hospital’s negligence. She stated:

**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 caused by the doctor. . . . - because **we were focusing on the hospital**. ( R. 1358 at pp. 9-10; see Exhibit 5, attached).

III.

**THE INTENT OF THE JURY TO AWARD MRS.  
HAASE \$820,000 FOR THE HOSPITAL'S  
NEGLIGENCE IS OVERWHELMINGLY CLEAR FROM  
THE JURORS' MARCH 21 AFFIDAVITS AND MAY 2  
DECLARATIONS IN OPEN COURT.**

On the day following announcement of its verdict, seven of the eight jurors signed affidavits. One of the affidavits is written entirely by hand. In it, juror Toni Fagnan avers:

During our deliberations, my fellow jurors and I had a question about our award of damages and how our "number" would be effected by our apportionment of fault between Dr. Hawkes and the hospital.  
***Specifically, we didn't know and wanted to know whether Lori Haase would get the whole sum we arrived at or only a percentage of it.*** 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. . . .

***I believed and intended that Lori Haase would get the total amount of the number we finally awarded - \$820,000 and I believe my fellow jurors believed and intended the same.***

( R. 1058-59; Exhibit 8, attached) (Emphasis added). The other six affidavits are identical in form and state:

Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and

special damages - \$820,000 would go to the plaintiff, not 30% of that sum.

One of the affiants, Chad Watt, deleted the phrase “not 30% of that sum”. However, his deletion did not alter his clearly stated intent that Mrs. Haase would receive the full \$820,000 awarded, for the hospital’s negligence. ( R. 1358; Exhibit 9, pp. 5-6, attached; See also Exhibits 5 and 8).

Finding the jurors’ post-verdict affidavits insufficiently dispositive, the trial court ordered the jury re-impaneled for a special hearing on May 2, 2002. At the beginning of that hearing, the trial court acknowledged it had instructed the jury before the trial started that the negligence of Dr. Hawkes “is not at issue in this trial. This trial is about what happened before the surgery”. ( R. 1358; Exhibit 5, attached, p.4 at lines 9-11). After undertaking to ask its own questions of the jurors, the court allowed counsel to question the jurors.

Attached to this brief as **Exhibit “9”** is an **Analysis of Juror Intent** based on the entire May 2 proceeding and the affidavits which seven of the jurors had signed on the day following trial. The eight jurors who decided the case were **Becky Solomon, Ray Labrum, Roberta Welch, Carrie Murray, Tonie Fagnan, Chad Watt, Tracy Cook and Ardith Atwood**. Exhibit “9” sets forth a juror-by-juror analysis based on all the available evidence.

During questioning by Mrs. Haase's counsel, one of the jurors, Ray Labrum, walked into the courtroom, having arrived at the hearing late. When Mr. Labrum entered the courtroom, the court interrupted counsel's questioning of individual jurors and immediately directed two questions of its own to Mr. Labrum. Without any possibility of being influenced or confused by any questions or answers which had preceded his entry into the courtroom, Mr. Labrum responded to the court's questions as follows:

The Court: . . . 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. Labrum: **No.**

The Court: Second question. Was it your intent to award the plaintiff \$820,000 from Ashley Valley Medical Center for injuries sustained by her as a result of the hospital's negligence?

Mr. Labrum: **Yes.**

( R. 1358; Exhibit 5, page 18, lines 2-11) (Emphasis added).

Before Mr. Labrum had entered the courtroom, Mr. Mortensen had posed this question to the jurors individually: "Was it your intent to award Mrs. Haase the total sum of \$820,000 for injuries sustained by her as a result of the *hospital's negligence*?" ( R. 1358; Exhibit 5, p. 17, lines 21-23). (Emphasis added). The record shows that at least four of the jurors had individually responded in the

affirmative when the questioning was interrupted by the court's acknowledgment of Mr. Labrum's late arrival and interruption of the proceeding by its above-quoted interrogation of Mr. Labrum. Mr. Mortensen was then allowed to continue. He posed this question to the jurors: **"Was it your intent to award Mrs. Haase only \$246,000 for the damages she sustained as a result of the hospital's negligence?"** ( R. 1358; Exhibit 5 attached, p.19, lines 1-18). As the court then acknowledged, **six of the seven jurors present responded "No"**. (Id. at lines 22-25).

Finally, Mrs. Haase's counsel was allowed to ask this question of the six jurors who had responded with clarity to his prior question:

Hearing what you have heard now from the court about the \$246,000 dollar judgment, ***did you inaccurately record on the Special verdict form your actual intent?***

(Id. p.24, lines 5-7) (Emphasis added). The record clearly reflects six individual affirmative responses to this question. ( R. 1358 at pp. 24-25).

The clear weight of the evidence supports but one conclusion: The jurors intended to award Mrs. Haase \$820,000 *for the hospital's negligence*.

#### **IV.**

#### **THE JURY BASED ITS AWARD ON WHAT IT THOUGHT THE HOSPITAL OWED, NOT ON PRINCIPLES OF APPORTIONMENT OF FAULT, ABOUT WHICH IT HAD RECEIVED NO INSTRUCTIONS.**

There is no evidence the jury was confused or indecisive about its core determinations. Clearly, it concluded from the evidence it heard that the hospital was negligent and that its negligence proximately caused significant injury to Mrs. Haase. At least seven of the jurors clearly desired and intended that Mrs. Haase receive the full \$820,000 it awarded, for the hospital's negligence.

The jury was forced to make its assessment of comparative fault in a virtual vacuum. It is strongly apparent the jury considered its apportionment assessment essentially irrelevant to its other determinations, including its damage award.

Two weeks before trial the hospital filed a motion in limine seeking to preclude the admission at trial of any evidence of the surgeon's breach of the standard of care applicable to him. ( R. 796-8). On page 3 of its supporting memorandum, the hospital declared:

Defendant submits herewith its stipulation that Thomas Hawkes, M.D., violated the standards of care for orthopedic surgeons in the performance of this operation on the plaintiff.

( R. 808). The hospital even submitted a formal “Stipulation as to Breach of the Standard of Care by Thomas Hawkes, M.D.”. ( R. 798-9). Its clear purpose in doing so was to preclude the jury from considering the particulars of the surgeon’s negligence. Though the stipulation was unilateral, the trial court accepted and honored it. At the hospital’s request, the surgeon’s negligence was declared to be an established fact. Because of this, no evidence was presented to the jury of the surgeon’s actual negligence. The jury, therefore, had no direct evidence on which to compare the surgeon’s fault with the hospital’s fault.

The jurors received no clue why they were asked to apportion fault between the hospital and the surgeon nor what the impact of that apportionment would be. *They were told repeatedly that they were to concern themselves only with the hospital’s negligence and liability.* They listened to a case which from beginning to end was about what the hospital did and they decided the case against the hospital and against no one else.

The hospital submitted 27 proposed jury instruction, none of which dealt with apportionment of fault, comparative negligence, contributory negligence or concurrent causation. (Exhibit 12, attached). Mrs. Haase’s proposed instructions also did not cover such matters. (Exhibit 13, attached). Her contention from the beginning was that the jury should not be asked to compare fault or apportion damages between the hospital and the surgeon.

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. It had no idea that the court intended to enter judgment for only 30% its \$820,000 damage award.

As soon as the jury learned (upon being re-impaneled six weeks after the trial) that the court intended to enter judgment against the hospital in the amount of only \$246,000, six of them unequivocally and unreservedly declared that their actual intent had been inaccurately recorded on the special verdict form. (R. 1358 at pp. 24-25; Exhibit 5, attached).



**V.**

**THE ERROR MRS. HAASE SEEKS TO  
CORRECT WAS A “CLERICAL,”  
NOT A “JUDICIAL,” ERROR.**

Our Supreme Court could not have been clearer when it stated in the penultimate paragraph of its recent GenTec decision:

We agree that accurately recording the intent of the jury in its calculations of the damage award constitutes correction of a clerical error, not a judicial error.

Bishop v. GenTec Inc., 48 P.3d 218; 2002 UT 36, at paragraph 32 (Utah 2002).

Here, six individual jurors have clearly and unequivocally averred after learning of the court’s intent to award judgment against the hospital for only \$246,000 that they had inaccurately recorded on the special verdict form their actual intent.

(See May 2, 2002 transcript, p. 24, lines 5-7; R. 1358).

## VI.

**THOUGH 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, THAT DISPARITY OF UNDERSTANDING PROVIDES NO BASIS FOR RETRIAL.**

Two questions may arise in the minds of this reviewing Court:

1. Why did the trial court and the jury not share the same understanding of the jury's damage award? and
2. When the jury's actual intent became known, why did the trial court not follow it?

These questions will be considered in reverse order.

The trial court may well have declined to enter judgment on the full amount of the jury's damage award based on its own belief that the jury's award was too high. However, no motion for Remittitur was filed, briefed or argued and the court made no effort to consider Remittitur *sua sponte*. The trial court never expressed a view that the jury's award was excessive, nor did the hospital ever contend such. The record is devoid of any contention that Mrs. Haase does not deserve to receive \$820,000 for the hospital's negligence.

The difference between the jury's and the court's understanding of the jury's damage award probably arises from the fact that the jury was given no

instructions on comparative negligence or apportionment of fault. The jury was repeatedly told and understood that Dr. Hawkes was not on trial and his negligence was not at issue. (R. 982; 1358 at p. 4; See also Exhibit 5, p. 4). Moreover, the hospital had actually conceded the surgeon's negligence prior to trial, wanting to preclude the introduction at trial of direct evidence of the egregiousness of the surgeon's errors. Since the surgeon's negligence was not at issue during the trial, the jury was without substantive basis to compare the surgeon's negligence with the hospital's.

The trial court fashioned its own special verdict form at the conclusion of trial after rejecting the special verdict forms proposed by counsel for both sides. Counsel had no input into the creation of the special verdict form the court chose to employ, was not invited to comment on it and was given no opportunity to submit additional instructions to explain the apportionment issues which the court's special verdict form necessarily created.

The special verdict form adopted by the court appears to have been taken from one of the MUJI comparative fault special verdict forms. Unfortunately, none of those forms was designed for a case in which fault is being apportioned between a named defendant and a non party. Confusion might have been avoided or lessened by adding a clarifying phrase to Question No. 4 on the

special verdict form. For example, Question No. 4 may have avoided misunderstanding if it had stated:

State the amount of special and general damages sustained by the plaintiff as a proximate result of both the hospital's and Dr. Hawkes' negligence, combined.

MUJI's proposed comparative negligence instruction for multiple defendant cases may well have provided the clarity jurors sought. It may have been helpful for the jurors to have been told something like this:

The total special and general damages sustained by the plaintiff may have been the proximate result of the negligence of Ashley Valley Medical Center or the negligence of Dr. Thomas Hawkes or the negligence of both of them, combined. Your task is to compute the total damages sustained by Mrs. Haase which were proximately caused by the negligence of either or both of the parties named in Question No. 3, above. The result will be that the Court will then award as damages to Mrs. Haase in this case the percentage of that total damage figure which is attributable to the hospital's percentage of negligence. For example, if you find the hospital's negligence to be 30%, then the plaintiff's recovery will be reduced by 70%. In other words, the plaintiff will receive only 30% of the total damage figure you list in response to Question No. 4 on the Special verdict form.

That the jury was not adequately instructed on matters of comparative negligence and apportionment of fault may be regrettable. However, that provides inadequate basis for ordering a new trial. Having been told the surgeon's negligence was not at issue, having been given no clear basis for

apportioning negligence between the surgeon and the hospital, and having been given no clue as to how, if at all, its comparison of fault percentages would impact Mrs. Haase's actual recovery from the hospital, the jury made its decision based on the evidence before it, and what it understood its duty to be. At this point, its intent and desire for Mrs. Haase to receive \$820,000 for the hospital's negligence is clear and should be carried into effect.

## **VII.**

### **REMANDING FOR A NEW TRIAL WOULD PENALIZE A NON-ERRING PREVAILING PARTY AND WASTE COURT AND LITIGANT RESOURCES.**

Mrs. Haase's case against the hospital did not go to trial until six years after she was injured by the surgeon from whom the hospital failed to protect her. The trial lasted nine days. After both sitting Eighth District Court judges recused themselves, a senior judge from Davis County was brought in to preside over the case. The attorneys for both sides were from Salt Lake. They and the judge spent the two weeks the trial lasted living out of Vernal area motels. So too did Mrs. Haase and her family, who had moved to Bakersfield, California, several years earlier. Their return to Vernal for trial caused them considerable inconvenience and expense, which they could ill afford. Expert witnesses

traveled to Vernal from Washington, Wisconsin and Colorado, at considerable expense to the parties. Other expert and fact witnesses testified by videotape, which itself involved unusual expense. Two witnesses testified by telephone, one of whom was a veteran, 86 year-old surgeon from Southern California who would have had difficulty physically coping with the significant elevation in altitude, had he been required to appear in person.

Mrs. Haase's out-of-pocket expenses incident to the trial exceeded \$35,000. If the case were remanded for a new trial, those expenses would have to be duplicated, as would the expenses incurred by the hospital and Utah's court system. Justice would be ill-served by the duplication of such expense. Remanding the case for a new trial would have the effect of significantly punishing the innocent prevailing party. Mrs. Haase committed no errors warranting a new trial. She cannot be faulted for the court's failure to give the jury adequate instructions and information concerning apportionment of fault, nor can she be faulted for the jury's not sharing the court's intent and understanding of the impact of the apportionment figures on the damage award.

Likewise, the jury did nothing wrong. It had ample evidence on which to determine the hospital's negligence and to determine the damages flowing from such negligence. It did so. It is clear the jury intended to award Mrs. Haase

\$820,000 for the hospital's negligence. Its intent should be carried into effect without further delay.

To rule otherwise would be to punish Mrs. Haase for misunderstandings she did not create and which, by the clear weight of evidence, the jurors' post-trial declarations resolve.

### **CONCLUSION AND REQUEST FOR RELIEF**

As a matter of law and sound policy, the jury's intent should be carried into effect. In this case, the jury's true intent was to award Ms. Haase \$820,000 for the hospital's negligence. The jury was not informed why it was being asked to compare the surgeon's negligence with the hospital's nor how Mrs. Haase would be impacted by the fault percentages they entered on the verdict form. The jurors cannot be faulted for not sharing the court's understanding of their intent. Regardless of the reasons for the misunderstanding, the juror's actual intent as revealed in their post-trial declarations should govern.

Mrs. Haase requests this Court to reverse the trial court's decision to enter judgment on only 30% of the jury's \$820,000 damage award and to instruct the trial court to enter judgment in favor of Mrs. Haase against the hospital in the amount of

\$820,000, plus taxable costs of \$4,570.19. Mrs. Haase also requests interest on the award at the prejudgment legal rate of 10% per annum.

Respectfully submitted this 21<sup>st</sup> day of November, 2002.

  
\_\_\_\_\_  
Douglas G. Mortensen  
**Matheson, Mortensen, Olsen & Jeppson, P.C.**  
Attorneys for Plaintiff/Appellant



## **ADDENDUM EXHIBITS**

1. June 24, 2002 Amended Judgment on Verdict.
2. The Hospital's Proposed Special Verdict Form.
3. Mrs. Haase's Proposed Special Verdict Form.
4. Jury Instructions given to jury at conclusion of trial.
5. Transcript of May 2, 2002 hearing upon re-impaneling of jury.
6. 3-20-02 note from Jury to Judge, with Judge's one sentence response.
7. Special Verdict Form completed by jury following deliberations.
8. Post-trial Affidavits submitted in support of entry of \$820,000 judgment against Ashley Valley Medical Center.
9. Analysis of Juror Intent.
10. District Court's April 2, 2002 "Preliminary Jury Verdict Ruling".
11. Utah Supreme Court's March 29, 2002 Opinion in Bishop v. GenTec, Inc., 48 P.3d 218 (UT 2002).
12. The Hospital's Proposed Jury Instructions.
13. Mrs. Haase's Proposed Jury Instructions.

# CERTIFICATE OF SERVICE

On the 27<sup>th</sup> day of November, 2002, I caused to be delivered via the following method two copies of the foregoing to the following:

Robert R. Harrison  
Snow, Christensen & Martineau  
10 Exchange Place, 11<sup>th</sup> Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

☐ U.S. Mail  
☐ Facsimile -363-0400  
☒ Hand-Delivered  
☐ Federal Express

Q. - 2

## **ADDENDUM EXHIBITS**

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13. Mrs. Haase's Proposed Jury Instructions.

Tab 1

# **EXHIBIT 1**

JUDICIAL COURT  
UINTAH COUNTY, UTAH  
JUN 24 2002  
JOANNE MCKEE, CLERK  
BY img DEPUTY

Douglas G. Mortensen, USB #2329  
**MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone (801) 363-2244

Attorneys for Plaintiff

---

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF 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.

**AMENDED  
JUDGMENT ON VERDICT**

Civil No. 98-0800377

Judge Douglas L. Cornaby

---

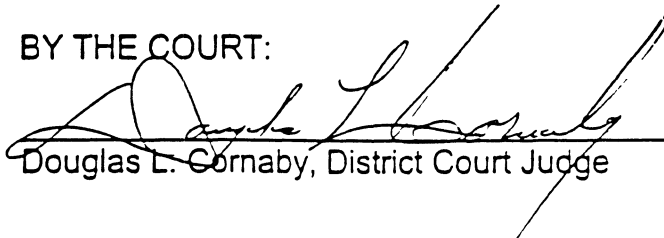
Based upon the answers provided in the jury's special verdict form and on this  
Court's Ruling on Motion to Accept Costs and Disbursements:

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that plaintiff Lori  
Haase be and the same is hereby granted judgment against Ashley Valley Medical  
Center in the amount of Two Hundred Forty Six Thousand Dollars (\$246,000.00), plus  
plaintiff's taxable costs incurred herein in the amount of Four Thousand Five Hundred  
Seventy Dollars Nineteen Cents (\$4,570.19) for a total judgment of Two Hundred Fifty

Thousand Five Hundred Seventy Dollars Nineteen Cents (\$250,570.19) which judgment shall bear interest at the judgment rate of 4.28% per annum from May 7, 2002, the date of this Court's original Judgment on Verdict herein.

DATED this 17 day of June, 2002.

BY THE COURT:

  
Douglas L. Cornaby, District Court Judge

APPROVED AS TO FORM:

  
Robert R. Harrison

#### CERTIFICATE OF SERVICE


I certify that on the 17 day of June, 2002 I caused to be served via the method indicated a copy of the foregoing to the following:

Robert R. Harrison  
Snow, Christensen & Martineau  
10 Exchange Place, 11<sup>th</sup> Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

- ☐ U.S. Mail
- ☐ Facsimile - 363-0400
- ☒ Hand-Delivered
- ☐ Federal Express

Honorable Douglas L. Cornaby  
Eighth District Court Judge  
3612 North 2900 East  
Layton, UT 84040

- ☒ U.S. Mail
- ☐ Facsimile
- ☐ Hand-Delivered
- ☐ Federal Express

  
\_\_\_\_\_

Tab 2



# **EXHIBIT 2**

# EIGHTH JUDICIAL DISTRICT COURTS

## From the Desk of:

Michelle Thomas  
Deputy Court Clerk  
920 East Hwy. 40  
Vernal, UT 84078  
(435) 781-9307 Phone  
(435) 789-0564 Fax

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## Facsimile Transmittal Sheet

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Date: July 23, 2002

Total Number of Pages (Including Cover Sheet): 4

To: Frank Faulk

Company: Matheson, Mortensen, Olsen & Jeppson,  
P.C.

Phone:

Fax: 801-363-2261

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Comments: Following is the Plaintiff's "Special Verdict Form" you requested. It was only "Received" into the file. It was received on March 4, 2002. It does not have a "FILED" date on it because this type of document is not "FILED" until signed. There is no record of a "Special Verdict Form" filed by the Defendant.

There is no record in the file that the Plaintiff's or Defendant's "Proposed Jury Instructions" were ever filed.

! Please feel free to call me at the number listed above if you need further information.

Please remit \$3.00 for the cost of the fax. Thank you.

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

---

LORI HAASE,

Plaintiff,

vs.

ASHLEY VALLEY MEDICAL CENTER,

Defendant.

**SPECIAL VERDICT**

No. 98-0800377

Judge Douglas L. Cornaby

---

We, the jurors empaneled in the above-entitled case, answer the questions put to us as follows:

1. Do you find from a preponderance of the evidence that Dr. Thomas Hawkes was physically impaired at the time he operated on Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If you answered question number 1 “no” then do not answer the following questions. Have your foreperson sign the verdict and return to the courtroom.**

2. Do you find from a preponderance of the evidence that Dr. Thomas Hawkes’ physical impairment was a proximate cause of injury to Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If you answered question number 2 “no” then do not answer the remaining questions. Have your foreperson sign the verdict and return to the courtroom.**

3. Do you find from a preponderance of the evidence that Ashley Valley Medical Center, through its administrators, knew or should have known that Dr. Thomas Hawkes was physically impaired at the time he operated on Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If you answered question number 3 “no” then do not answer the remaining questions. Have your foreperson sign the verdict and return to the courtroom.**

4. Do you find from a preponderance of the evidence that Ashley Valley Medical Center, acting through its administrators, was negligent in not restricting Dr. Hawkes’ operating privileges at the time he operated on Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If, and only if, you answered questions numbered 1 through 4 “yes,” then answer the following question.**

5. What sum of money do you find from a preponderance of the evidence will fairly and adequately compensate Lori Haase for her injuries:

Special damages \$ \_\_\_\_\_

General damages \$ \_\_\_\_\_

TOTAL \$ \_\_\_\_\_

DATED this \_\_\_\_\_ day of February, 2002.

\_\_\_\_\_  
Jury Foreperson

NA10749\151\MN\SPEC\VERD.DWS

ROBERT R. HARRISON (A7878)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant Ashley Valley Medical Center  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

---

IN THE EIGHTH JUDICIAL DISTRICT COURT OF 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.

CERTIFICATE OF SERVICE

No. 98-0800377

Judge Boyd Bunnell

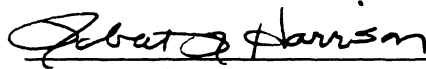
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Pursuant to Rule 4-502, Code of Judicial Administration, Robert R. Harrison of Snow, Christensen & Martineau, attorneys for Defendant Ashley Valley Medical Center, hereby certifies that he served upon all counsel of record the following

**DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT and SPECIAL VERDICT.**

DATED this 1 day of March, 2002.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in cursive script, appearing to read "Robert R. Harrison", is written over a horizontal line.

Robert R. Harrison  
Attorneys for Defendants

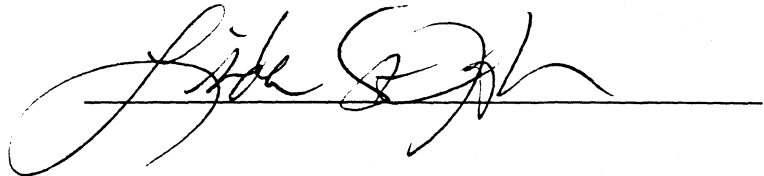
CERTIFICATE OF SERVICE

I state that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached CERTIFICATE OF SERVICE (Case Number 98-0800377, Eighth Judicial District Court in and for Uintah County) 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  
648 East 100 South  
Salt Lake City, Utah 84102

Honorable Douglas L. Cornaby (Original and one copy)  
3612 North 2900 East  
Layton, Utah 84040

and causing the same to be hand delivered on the 1<sup>st</sup> day of March, 2002.

A handwritten signature in black ink, appearing to read "Bridget", is written over a horizontal line.

N:\10749\151\CERTSERV.WPD



Tab 3

# **EXHIBIT 3**

# EIGHTH JUDICIAL DISTRICT COURTS

## From the Desk of:

Michelle Thomas  
Deputy Court Clerk  
920 East Hwy. 40  
Vernal, UT 84078  
(435) 781-9307 Phone  
(435) 789-0564 Fax

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## Facsimile Transmittal Sheet

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Date: July 23, 2002

Total Number of Pages (Including Cover Sheet): 4

To: Frank Faulk

Company: Matheson, Mortensen, Olsen & Jeppson,  
P.C.

Phone:

Fax: 801-363-2261

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Comments: Following is the Plaintiff's "Special Verdict Form" you requested. It was only "Received" into the file. It was received on March 4, 2002. It does not have a "FILED" date on it because this type of document is not "FILED" until signed. There is no record of a "Special Verdict Form" filed by the Defendant.

There is no record in the file that the Plaintiff's or Defendant's "Proposed Jury Instructions" were ever filed.

Please feel free to call me at the number listed above if you need further information.

Please remit \$3.00 for the cost of the fax. Thank you.

Douglas G. Mortensen, USB #2329  
**MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone (801) 363-2244

Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UINTAH COUNTY, STATE OF UTAH

LORI HAASE,	:	<b>SPECIAL VERDICT FORM</b>
Plaintiff,	:	
vs.	:	
COLUMBIA ASHLEY VALLEY	:	Civil No. 98-0800377
MEDICAL CENTER,	:	Judge Douglas L. Cornaby
Defendant.	:	

MEMBERS OF THE JURY:

Please answer the following questions, in the order presented, based on the jury instructions and the evidence presented in this case. If you find the evidence preponderates in favor of the issue presented answer "yes". If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "no".

**QUESTION NO. 1:** Was the defendant Columbia Ashley Valley Medical Center negligent in any respect as alleged by the plaintiff?

**ANSWER:**        ☐ Yes        ☐ No

**QUESTION NO. 2:** Was Columbia Ashley Valley Medical Center's negligence a proximate cause of injury sustained by the plaintiff?

**ANSWER:**        ☐ Yes        ☐ No

**QUESTION NO. 3:** State the amount of special and general damages sustained by the plaintiff as a proximate result of the injuries complained of.

**Special Damages (both past and future):**        \$ \_\_\_\_\_

**General Damages (both past and future):**        \$ \_\_\_\_\_

**QUESTION NO. 4:** Do you find this an appropriate case for the assessment of punitive or exemplary damages against Columbia Ashley Valley Medical Center?

**ANSWER:**        ☐ Yes        ☐ No

**QUESTION NO. 5:** If you have answered Question No. 4 "yes", what do you find to be an appropriate sum of punitive or exemplary damages against Columbia Ashley Valley Medical Center?

**\$** \_\_\_\_\_

DATED this \_\_\_\_\_ day of March, 2002.

\_\_\_\_\_  
Foreperson

### CERTIFICATE OF SERVICE

I certify that on the 1 day of March, 2002 I caused to be served via the method indicated a copy of the foregoing to the following:

Robert R. Harrison  
Snow, Christensen & Martineau  
10 Exchange Place, 11<sup>th</sup> Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

☒ U.S. Mail  
☒ Facsimile - 363-0400  
☐ Hand-Delivered  
☐ Federal Express

Honorable Douglas L. Cornaby  
Eighth District Court Judge  
3612 North 2900 East  
Layton, UT 84040

☒ U.S. Mail  
☐ Facsimile  
☐ Hand-Delivered  
☐ Federal Express



Tab 4

# **EXHIBIT 4**



INSTRUCTION NO.   1  

It is my duty to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. Even if you do not like the laws that must be applied, you must use them. On the other hand, it is your exclusive duty to determine the facts in this case, and to consider and weigh the evidence for that purpose. Your responsibility must be exercised with sincere judgment, sound discretion and honest deliberation.

**INSTRUCTION NO. 2**

This case must not be decided for or against anyone because you feel sorry for anyone or angry at anyone. It is your sworn duty to decide this case based on the facts and the law, without regard to sympathy, passion or prejudice.

INSTRUCTION NO. 3

This case must be decided only upon the evidence which you have heard from the witnesses, and have seen in the form of documents, photographs or other tangible things admitted into evidence.

Anything you may have seen or heard from any other source may not be considered by you in arriving at your verdict.

You should not consider as evidence any statement of the lawyers made during trial.

INSTRUCTION NO. 4

**CIRCUMSTANTIAL EVIDENCE**

A fact may be proved by circumstantial evidence. Circumstantial evidence consists of facts or circumstances that give rise to a reasonable inference of the truth of the facts sought to be proved.

INSTRUCTION NO. 5

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. The lawyers are here to represent the best interests of their clients. It is the duty of the lawyer on each side of a case to object when the other side offers evidence which the lawyer believes is not admissible. You should not speculate as to the reasons for the objections, nor should you allow yourself to become angry at a party because a party's lawyer has made objections.

INSTRUCTION NO. 5

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. The lawyers are here to represent the best interests of their clients. It is the duty of the lawyer on each side of a case to object when the other side offers evidence which the lawyer believes is not admissible. You should not speculate as to the reasons for the objections, nor should you allow yourself to become angry at a party because a party's lawyer has made objections.

INSTRUCTION NO. 6

It has never been my intention to give any hint that you should return one verdict or another in this case. Please understand that I do not wish in any way to influence your verdict. It would be improper for me to do so. Deciding a proper verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything that I may have said or done if it made you think that I preferred one verdict over another, that I believed one witness over another, or that I considered any piece of evidence more important than another.

You are the exclusive judges of the facts and the evidence. It is your duty to render a just verdict based upon the facts and the evidence.

INSTRUCTION NO. 7

Your attitude and conduct at the outset of your deliberations is very important. It will not be productive for any of you, upon entering the jury room, to make an emphatic expression of your opinion on the case, or to announce a determination to stand for a certain verdict. When that happens, your sense of pride may be aroused and you may hesitate to recede from an announced position, even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges. Your deliberations in the jury room are for the ascertainment and declaration of the truth and the administration of justice.



INSTRUCTION NO. 8

Your verdict must be based solely and exclusively upon the evidence in this case and upon the instructions outlining the law as given to you by the Court. You should not be influenced by preconceived opinions or prejudices or by sympathy or any other motive except to do justice between the parties to this case. You should not allow any sympathy which you may have for the Plaintiff to influence you in any degree whatsoever in arriving at your verdict. This does not mean that you may not sympathize with the Plaintiff, because it is only natural and human to sympathize with persons who have sustained misfortune, but you are instructed that you must not permit your feelings of sympathy to influence a fair and impartial consideration of the evidence.

Further, you are not permitted to base your verdict on speculation, guesswork or conjecture, nor upon what you think ought to be the law or the facts in this case.

INSTRUCTION NO. 9

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

INSTRUCTION NO. 16

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness, except as that witness may have been corroborated by other credible evidence.

INSTRUCTION NO.      //

**INCONSISTENT STATEMENTS**

You may believe that a witness, on some former occasion, made statements inconsistent with that witness' testimony given here in this case.

That does not necessarily mean that you are required to entirely disregard the present testimony. The effect of such evidence upon the credibility of the witness is for you to determine.

INSTRUCTION NO. 2

**DEPOSITION TESTIMONY**

In the present action, certain testimony has been read to you by way of deposition. You are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration as if the witness had personally appeared.

INSTRUCTION NO. 13


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

**INSTRUCTION NO. 11**

An opinion is the expression of a conclusion or judgment which does not purport to be based on actual knowledge. In determining whether a particular statement was a statement of fact or merely an expression of opinion, you may consider the surrounding circumstances under which it was made, the manner in which the statement was made and the ordinary effect of the words used. You may also consider the relationship of the parties and the subject matter with which the statement was concerned.

INSTRUCTION NO. 15

**OUT OF STATE/TOWN EXPERTS**

The fact that an expert witness resides or pursues his or her profession in another state or community should not effect the weight you give that witnesses' testimony. A party may rely upon qualified experts from other states  in presenting evidence to the jury.



**INSTRUCTION NO. 6**

**CONFLICT BETWEEN MEDICAL EXPERTS**

In resolving any conflict that may exist in the testimony of medical experts, you may compare and weigh the opinion of one expert against that of another. In doing this, you may consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters on which opinions are based.

INSTRUCTION NO. 17

Whenever in these instructions it is stated that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you shall find that the same is not true. If the evidence is evenly balanced, as to its convincing force on any allegation, you must find that such allegation has not been proved.

INSTRUCTION NO. 18

The term "preponderance of the evidence" means that evidence which, in your minds, seems to be of the greater weight; the most convincing and satisfactory. The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony, weighed impartially, fairly and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

INSTRUCTION NO. 19

**PROXIMATE CAUSE**

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

To find "proximate cause," you must first find a cause and effect relationship between the negligence and plaintiff's injury. But cause and effect alone is not enough. For injuries to be proximately caused by negligence, two other factors must be present:

1. The negligence must have played a substantial role in causing the injuries; and
2. A reasonable person could foresee that injury could result from the negligent behavior.

INSTRUCTION NO. 20

**CONCURRENT PROXIMATE CAUSES**

There may be more than one proximate cause of the same injury. If the negligence of a person and a corporation combines to produce an injury, and the negligence of each of them is a proximate cause of the injury, then the person and the corporation must share liability for the resulting injury, in proportion to their individual negligence.

INSTRUCTION NO. 2

A person has a duty to use reasonable care to avoid injuring other people or property.

"Negligence" simply means the failure to use reasonable care. Reasonable care does not require extraordinary caution or exceptional skill. Reasonable care is what an ordinary, prudent person uses in similar situations.

The amount of care that is considered "reasonable" depends on the situation. You must decide what a prudent person with similar knowledge would do in a similar situation.

Negligence may arise in acting or in failing to act.

A party whose injuries or damages are caused by another party's negligent conduct may recover compensation from the negligent party for those injuries or damages.

**INSTRUCTION NO. 22**

**NEGLIGENCE OF COMMISSION VERSUS OMISSION**

Negligence is of two kinds. The first kind is the doing of something that an ordinarily careful and prudent person or, in this case, hospital, would not have done under the same or similar circumstances; the second kind is the omission to do something than an ordinarily careful and prudent person, or, in this case, hospital, would have done in the same situation.

INSTRUCTION NO. 23

**NON NEGLIGENCE OF PLAINTIFF**

You are instructed as a matter of law that the plaintiff, Lori Haase, was not negligent.



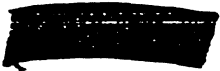

**INSTRUCTION NO. 24**

A physician's negligence does not raise a presumption that the hospital was negligent in granting the physician privileges.

INSTRUCTION NO. 25

**DUTY OF HOSPITAL TOWARD PATIENT**

It is the duty of a hospital toward a person received as a patient to use reasonable care in the selection of both its employees and its staff physicians and surgeons and in otherwise providing for the needs of the patient.



INSTRUCTION NO. 26

You must determine whether Defendant complied with the standards of care applicable to it based upon the information available to it prior to the Plaintiff's surgery, rather than on the basis of facts which are revealed by later developments.

INSTRUCTION NO. 27

**DUTY OF HOSPITAL TO COMPLY WITH STANDARD OF CARE**

A hospital is required to exercise the same degree of care ordinarily possessed and used by other hospitals in good standing. The law requires a hospital to exercise the degree of care that other qualified hospitals would ordinarily exercise under the same circumstances.



**INSTRUCTION NO. 28**

You are instructed that the hospital has a governing body that is legally responsible for the conduct of the hospital as an institution; the governing body of the hospital must ensure that the medical staff is accountable to it for the quality of medical care provided to patients. The hospital, through its governing body and medical staff, is under a duty to exercise reasonable care in granting physicians the privilege to admit and treat patients in the hospital based upon the practitioner's competence, training, character, experience and judgment; the medical staff has a duty to examine the credentials of candidates for medical staff appointment and to make recommendations to the governing body on the appointment of candidates; privileges may not be granted solely on a practitioner's certification, fellowship or membership in a specialty body or society.

Negligent credentialing on the part of the hospital is the failure of the hospital, through its governing body and medical staff, to use reasonable care in granting a surgeon the privilege to admit and perform surgery on patients in the hospital; "reasonable care" does not require extraordinary caution or exceptional skill. Negligence may arise in acting or in failing to act.

A party whose injuries or damages are caused by another party's negligent conduct may recover compensation from the negligent party for those injuries or damages.

**INSTRUCTION NO. 20**

**VIOLATION OF INDUSTRY STANDARD**

A violation of an industry standard intended to protect patients from harm is evidence of negligence if it is shown that:

1. The person injured belongs to a class of people the standard intended to protect; and
2. The standard intended to protect against the type of harm which in fact occurred as a result of the violation.

**INSTRUCTION NO. 34**

Hospitals are prevented, by Utah law, from disclosing the contents or substance of meetings or documents which are part of the peer review and quality improvement process. You must not conclude that the inability to discuss those processes is evidence of improper behavior on the part of the hospital.

INSTRUCTION NO. 31

The only way you may properly learn the applicable standard of care is through evidence presented during this trial by individuals testifying as expert witnesses and through other evidence admitted for the purpose of defining the standard of care.

In deciding whether a hospital properly fulfilled its duties, you are not permitted to use a standard derived from your own experience with physicians, hospitals or any other standard of your own.



INSTRUCTION NO. 32

**CORPORATION ACTS THROUGH ITS AGENTS**

Ashley Valley Medical Center is a corporation and, as such, can act only through its officers and employees, and others designated by it as its agents.

Any act or omission of an officer, employee or agent of a corporation, in the performance of the duties or within the scope of the authority of the officer, employee or agent, is the act or omission of the corporation.

**INSTRUCTION NO. 53**

**SCOPE OF AGENT'S AUTHORITY DEFINED**

In order for Ashley Valley Medical Center to be held responsible for the act or acts of one or more of its employees, the act or acts must be within the scope of the agent's employment authority either expressed or implied. However, it is not necessary that the specific act, or failure to act, be expressly authorized by the employer to bring it within the scope of the agent's employment. An act is within the scope of an agent's authority if it is done while the agent is doing anything which his or her contract of employment expressly or impliedly authorizes him or her to do or which would be reasonably incidental to his or her employment.

INSTRUCTION NO. 34

Each licenced hospital in the State of Utah shall have a governing body called the board. The board is legally responsible for the conduct of the hospital. The board is also responsible for the appointment of the medical staff.

[REDACTED]

INSTRUCTION NO. ٤٥

The administrator shall function as liaison between the board, the medical staff, the nursing staff and departments of the hospital.

[REDACTED]

**INSTRUCTION NO. 31**

**LIABILITY FOR PHYSICIAN PREDICATED ON NEGLIGENCE  
IN EXTENDING AND/OR CONTINUING STAFF PRIVILEGES**

The law requires a hospital to screen its medical staff to ensure that only competent physicians are permitted to treat its patients. If, therefore, you find from the evidence that Ashley Valley Medical Center knew or ought to have known that Dr. Hawkes' condition or propensities made him a danger to patients and that but for Ashley Valley's failure to remove him, failure to adequately monitor and supervise him or failure to cease extending him privileges to operate in the hospital Mrs. Haase's injury would have not occurred, you must find for the plaintiff against the hospital.

**INSTRUCTION NO. 37**

**ROLE OF CUSTOM IN JUDGING BEHAVIOR**

When deciding whether a corporation is negligent, you may consider customs of behavior, such as business customs or industry customs. However, following a custom does not necessarily mean a corporation exercised ordinary care. It is merely a factor you may consider. A custom or standard may be negligent in and of itself.

**INSTRUCTION NO. 38**

**CHARTS AND SUMMARIES**

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

INSTRUCTION NO. 39

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if your individual judgment allows such agreement. You each must decide the case for yourself, but only after consideration of the case with your fellow jurors. You should not hesitate to change an opinion when convinced that it is wrong. However, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.



INSTRUCTION NO. 40

It is your duty to make findings of fact as to the questions I will submit to you. In making your findings of fact, you should bear in mind that the burden of proving any disputed fact rests upon the party claiming the fact to be true, and that fact must be proved by a preponderance of the evidence.

This is a civil action and six members of the jury may find and return a verdict. At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question, have the verdict signed and dated by your foreperson and then return it to this room.

**INSTRUCTION NO. 47**

**INTRODUCTORY INSTRUCTION ON DAMAGES**

If you find the issues in favor of Lori Haase and against Ashley Valley Medical Center, then it is your duty to award Lori Haase such damages that you find from a preponderance of the evidence will fairly and adequately compensate her for the injury and damage sustained.

**INSTRUCTION NO. 72**

**GENERAL DAMAGES**

In awarding such damages, you may consider any pain, discomfort, and suffering, both mental and physical, its probable duration and severity, and the extent to which the plaintiff has been prevented from pursuing the ordinary affairs of life as previously enjoyed. You may also consider whether any of the above will, with reasonable certainty, continue in the future. If so, you may award such damages as will fairly and justly compensate the plaintiff for them.

No definite standard or method of calculation is prescribed by law to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

**INSTRUCTION NO. 15**

**SPECIAL DAMAGES**

The law also allows you to award special damages. Special damages are those that are alleged to have been sustained in reference to the special circumstances of the plaintiff. They include the reasonable value of medical and nursing care, both medical and non-medical services and supplies and tools reasonably required and actually given in the treatment and/or care of the plaintiff and the reasonable value of such items that more probably than not will be required and given in the future.

Special damages also include lost earnings and loss of future earning capacity or loss of earning power.

In awarding such damages, you may consider the reasonable value of working time lost to date. In determining this amount, you should consider (1) evidence of the plaintiff's earning capacity; (2) earnings; (3) how the plaintiff ordinarily was occupied; and (4) what the plaintiff was reasonably likely to have earned in the time lost if the plaintiff had not been injured.

If you find the plaintiff has suffered a loss of earning capacity, you should award the present cash value of earning capacity reasonably likely to be lost in the future as a result of the injury in question.

Special damages also include the reasonable value of the loss of employee-related benefits, such as loss of or reduction in retirement benefits, health benefits, paid vacation, employee stock options and savings benefits and the like.

**INSTRUCTION NO. 76**

**AMOUNT OF DAMAGE NEED NOT BE PROVED WITH PRECISION**

Although an award of damages may not be based only on speculation, some degree of uncertainty in the evidence of damages will not relieve a defendant from recompensing a wronged plaintiff. As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of some uncertainty. Where there is evidence of the fact of damage, a defendant may not escape liability because the amount of damage cannot be proved with precision. The amount of damages may be based on approximations if the fact of damage is established and approximations are based on reasonable assumptions or projections.

INSTRUCTION NO. 5

The amount of damages for any loss to be suffered in the future would not be the present payment of the total of such damages, but must be discounted to the present cash value of such future benefit. Therefore, in determining the present value of any future benefit lost to the Plaintiff as a result of the injury, you should calculate the same on the basis that any sum you might award will be invested with reasonable wisdom and frugality, and that all of it, except the amount currently needed to compensate for the loss sustained, will be kept so invested as to yield a rate of return consistent with reasonable security.

**INSTRUCTION NO. 12**

The law forbids you to decide any issue in this case by resorting to chance. If you decide that a party is entitled to recover, you may then determine the amount of damages to be awarded. It would be unlawful for you to agree in advance to take the independent estimate of each juror, then total the estimates, draw an average from the total, and to make the average the amount of your award. Each of you may express your own independent judgment as to what the amount should be. It is your duty to thoughtfully consider the amounts suggested, test them in the light of the law and the evidence and, after due consideration, determine which, if any, of such individual estimates is proper.

**INSTRUCTION NO. 47**

**COLLATERAL SOURCE**

Any fact or inference in the evidence that any portion of the damages may have been paid by some entity other than the defendant is not to be considered by you to diminish any of the damages, if any, to be awarded.

In awarding such damages, you may consider the reasonable value of medical hospital and nursing care, services and supplies reasonably required and actually given in the treatment of the plaintiff and the reasonable value of similar items that more probably than not will be required and given in the future.

It is the court's duty following the trial to see that what other damages are awarded are allocated or distributed to the party who, by law, is entitled to receive them. You are instructed not to concern yourself with such matters. They will be handled by the court in due course following trial. This instruction applies with respect to past, present and future damages.



INSTRUCTION NO. 11

Upon retiring to the jury room you will select one of you to act as foreperson, who will preside over your deliberations and sign the verdict to which you agree. The foreperson should not dominate the jury, but the foreperson's opinion should be given the same weight as the opinions of the other members of the jury.

*Dated March 20, 2002*

*Sept. J. Kennedy*  
*Judge*

Tab 5

# **EXHIBIT 5**

)  
 LORI HAASE, )  
 )  
 Plaintiff, )  
 )  
 VS. ) CASE NO. 980800377  
 )  
 CENTER COLUMBIA ASHLEY VALLEY )  
 MEDICAL CENTER, ET AL. )  
 )  
 Defendants )  
 )

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APPEARANCES

FOR THE PLAINTIFF:

DOUGLAS G. MORTENSEN  
648 EAST 100 SOUTH  
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1 May 2, 2002. Vernal, Utah.

2 PROCEEDINGS

3 THE COURT: You can be seated. Record can show that  
4 counsel and the plaintiff and some of the jurors are present.  
5 Appreciate your being here.

6 Let me just check to see those not here. There are  
7 six jurors out of the eight that are present. We have no idea  
8 why the other two are not. One would be. Let's see -- you are  
9 Carie Murray. And so Becky Sullivan is absent. And you are  
10 Chad Watts. And Ardith Atwood. And Roberta Welch. Tracy  
11 Cook, Toni Fagnan. And Ray Labrum is not here.

12 Appreciate your being here.

13 When we left, we didn't anticipate we were going to  
14 see you again as jurors. But we appreciate you being here. We  
15 brought you back to determine what you intended when you signed  
16 your verdict. You, I think most of you, if not all of you,  
17 have signed an affidavit. Is there anybody here that didn't  
18 sign those affidavits? You did not. Okay. Now, let's see,  
19 just so I get it right, that would be Ardith Atwood. You did  
20 not sign an affidavit. And the other five of you here did sign  
21 the affidavits. Okay. Was there any, counsel, that didn't  
22 sign the affidavits besides Mrs. Atwood?

23 MR. MORTENSEN: No.

24 THE COURT: Okay. We are not going to ask you to  
25 reconsider your verdict. We are not going to ask you to

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20 not sign an affidavit. And the other five of you here did sign  
21 the affidavits. Okay. Was there any, counsel, that didn't  
22 sign the affidavits besides Mrs. Atwood?

23 MR. MORTENSEN: No.

24 THE COURT: Okay. We are not going to ask you to  
25 reconsider your verdict. We are not going to ask you to

1 deliberate any more. We are only going to inquire into what  
2 you intended on the night you signed that verdict. I'm going  
3 to refer to some things that I have here, however. As we began  
4 the case, I gave you -- first instruction I gave you, there was  
5 some preliminary jury instructions before the trial started.  
6 I'm going to quote from a part of that first one. "In this  
7 case, the plaintiff alleges she was injured by a surgeon during  
8 an operation he performed in 1996. Her claim against the  
9 surgeon, Dr. Thomas Hawkes, has been settled. And his  
10 negligence is not at issue in this trial. This trial is about  
11 what happened before the surgery."

12           There was an instruction more before that, there was  
13 more after that. And I am repeating again today, that the  
14 plaintiff has settled her claim with Dr. Hawkes. And so,  
15 nothing more is going to be received by the plaintiff from Dr.  
16 Hawkes. The amount of that settlement was never made public  
17 and probably never will be made public. When you returned your  
18 verdict, after we determined that was in fact your verdict, do  
19 you remember I asked you each individual questions about it.  
20 And then we excused you. And then I told counsel based on the  
21 verdict that you had told the total negligence between Ashley  
22 Valley Medical Center and Dr. Hawkes at 100 percent, ask you to  
23 make the determination of how much or what percentage of each  
24 of them the negligence was caused by. And your answer was  
25 70 percent by Dr. Hawkes and 30 percent by Ashley Valley



1 Medical Center. Based on that then, I directed counsel that a  
2 verdict of 30 percent of the injury should be attributed to the  
3 hospital, or \$246,000, gave them a judgment for that amount.

4 When you signed the affidavits, it brought the  
5 question back up to the court. And rather than just rely upon  
6 those affidavits, the court directed you to come back in today.

7 First question for you, did your verdict of \$820,000  
8 include all of the plaintiff's injuries, those caused by Dr.  
9 Hawkes as well as those caused by Ashley Valley Medical Center?  
10 Let me ask first -- as I recall, Mr. Watts, you were the  
11 foreman. Let me just start with you and ask what your answer  
12 to that is.

13 MR. WATTS: My answer, I believe we were trying to  
14 clear up a question that we had when we were coming to that  
15 judgment on that. I don't recall the exact way it was stated  
16 to you on the (inaudible).

17 THE COURT: Let me refer to something, if I can.

18 MR. WATTS: Okay.

19 THE COURT: I have, and, counsel, I think has been  
20 given a copy of this, haven't you?

21 <sup>MORTIMER</sup>  
MR. HARRISON: Yes, sir.

22 THE COURT: About 10 o'clock it was getting late. And  
23 the court was trying to decide whether we would put it off  
24 until the next day to finish the deliberations or finish. And  
25 the jurors chose to finish. But they sent out this question

1       dated March 20th, 2002. "Your Honor, in figuring damages, do  
2       we figure the percentage of the total damages or the whole  
3       damages and the court figures the percentage that we decide?

4               I added just a simple little thing there. Counsel was  
5       not present. Counsel was each in their motel waiting for a  
6       call from the clerk to reassemble. I just added at the bottom,  
7       "Figure the total value of all damages."

8               And now, I'm sure you didn't know what the results of  
9       that was going to be. I referred you with that to another  
10      instruction. And I'll read that instruction. I understand in  
11      the replies that were given that it was not helpful to you.  
12      But I'm going to read it to you anyway.

13              "Any fact or inference in the evidence that of portion  
14      of Mrs. Haase's damages have been paid by some person or entity  
15      other than Mrs. Haase is not to be considered by you or used to  
16      diminish the damage award you make, if any. The fact, if it be  
17      a fact that any one of the plaintiff's claim that any of the  
18      plaintiff's claimed expenses or damages were or may be paid by  
19      some source other than the plaintiff's own funds does not  
20      affect the plaintiff's right to recover for such expenses or  
21      damages. It is the court's duty following trial to see what  
22      other damages are awarded. What other damages awarded or  
23      allocated or distributed to the party who by law is entitled to  
24      receive them, you are instructed not to concern yourself with  
25      such matters. They will be handled by the court in due course

1 following trial. This instruction applies with respect to  
2 past, present and future damages."

3 That was the instruction that the court referred you  
4 to. It was the only one that the court could see would be of  
5 any help to you to answer that question. Now, I come back to  
6 the question that I ask you of what you intended.

7 MR. WATTS: My intention, when I went through it, it  
8 was my impression that we were going for the whole, the  
9 totality for the plaintiff in this case. And the amount that  
10 we were coming up with was that totality. For (inaudible).

11 THE COURT: Okay. You can stay seated as you answer  
12 these questions. It will probably be easier for you. Let me  
13 ask you the question again, because it's very carefully worded.  
14 Did your 820,000 verdict include all of the plaintiff's  
15 injuries, those caused by Dr. Hawkes as well as those caused by  
16 Ashley Valley Medical Center? It's not the only question we  
17 may ask you, but that's the first question.

18 MR. WATTS: It was mine.

19 THE COURT: It was the total 820,000, was her total  
20 damages?

21 MR. WATTS: It is what I thought was the total damage.

22 THE COURT: Okay. Now, of the other five jurors  
23 sitting there, do any of you -- did any of you have a different  
24 understanding?

25 MS. MURRAY: Judge --

1 THE COURT: State your name, if you would.

2 MS. MURRAY: Carie Murray. I intended her to get that  
3 much money.

4 THE COURT: Now, I'm -- let me --

5 MS. MURRAY: Okay.

6 THE COURT: Let me ask another little question. I'm  
7 sure that all of you intended she would receive all 820,000.  
8 That your affidavits' clear on that. That's not quite this  
9 question though. And there were some things that you didn't  
10 know that we couldn't tell you. The amount of the settlement  
11 for Dr. Hawkes we couldn't tell you that. The legal effect was  
12 that, whatever that sum was, that took care of his 70 percent  
13 of damages because that was negotiated. So it brings me back  
14 to the question. Now, go ahead. Finish the explanation that  
15 you are making.

16 MS. MURRAY: Apparently, we should have awarded her  
17 over \$2 million for her to get \$820,000.

18 THE COURT: That's correct. Where did you get the two  
19 million figure? That's right. But where did you get it from?  
20 Did you talk about it that night?

21 MS. MURRAY: No.

22 THE COURT: All right. Where did you get the figure  
23 from?

24 MS. MURRAY: Well, I figured it out later.

25 THE COURT: All right.

1 MS. MURRAY: But I -- I -- when we finished at night,  
2 I thought she was going to receive 820,000. So that would be  
3 the 30 percent of the 2 million, is what I thought.

4 THE COURT: Okay.

5 MR. WATTS: When we --

6 THE COURT: I'm going to have to have you speak your  
7 name each time.

8 MR. WATTS: When we brought the question to your  
9 attention, I believe we were trying to come to that, whether we  
10 needed to not necessarily do the math and try to say that this  
11 is what the total is, this is what she gets out of it, the  
12 plaintiff in this case gets out of it. We were trying to  
13 figure out if what we were given would be the amount which  
14 would be concerned is that 30 percent without doing the math or  
15 anything like that. I think that was the intention of the  
16 question when it was written, as we were discussing it as it  
17 was being written.

18 THE COURT: Anybody else on that answering on that?  
19 I'm going back to the original question now. Did the 800 --  
20 did your 820,000-dollar verdict include all of the plaintiff's  
21 injuries, those caused by Dr. Hawkes as well as those caused by  
22 Ashley Valley Medical Center?

23 MS. FAGNAN: Toni Fagnan. When we were deliberating,  
24 I don't remember us talking about like breaking down this is  
25 the harm that was caused by the hospital, this is the harm that

1 was caused by the doctor. We were just trying -- because we  
2 were focusing on the hospital. And so I don't remember us  
3 talking about saying okay, the doctor did "X" amount of dollars  
4 of damage here and the hospital did this. I mean, I think  
5 that's the question. We weren't talking about the doctor and  
6 the hospital between ourselves. And I'm still very confused.  
7 But I -- it was a confusing thing. We really struggled with  
8 it. So it was still just unknown what the damages -- what we  
9 were figuring.

10 *Arzith F. Wood*  
UNIDENTIFIED WOMAN JUROR: I think I felt like we were  
11 trying to decide what it would, dollar-wise, would cost for her  
12 to be adequately taken care of the rest of her life, in  
13 essence. We figured that we thought she should be able to work  
14 part-time. We didn't think she was totally disabled. We  
15 thought that it would cost "X" amount of dollars for help for  
16 her in the house and things we have talked about in her  
17 testimony. And that's the way we came up with the 820,000.  
18 But I felt like that she had received part of that through the  
19 other settlement. I knew that she had had another settlement.  
20 But I think we were thinking that's what would take care of  
21 her. And so it wasn't a total thing that we thought -- we  
22 thought she had already received part of it through a  
23 settlement.

24 THE COURT: Okay. The only other question I have on  
25 it, was the \$820,000 intended to be solely from Ashley Valley

1 Medical Center for the injuries she suffered by the hospital's  
2 negligence?

3 *Arbith Atwood*  
UNIDENTIFIED WOMAN JUROR: Say that again, please.

4 THE COURT: Was it your intent to award the plaintiff  
5 820,000 from Ashley Valley Medical Center for injuries  
6 sustained by her as a result of the hospital's negligence?  
7 Now, this question overlaps what you have just been asked. And  
8 you have all been answering the same question. But you just  
9 got through answering, Mrs. Atwood, that question. I think she  
10 said, you intended it to come from two sources. Is that right?  
11 One settled --

12 MS. ATWOOD: She ~~had already received one part.~~ *had received part of*

13 THE COURT: Yes. Anybody else want to comment on it.

14 UNIDENTIFIED WOMAN JUROR: That was not my intention.  
15 My intention was for her to get the \$820,000.

16 THE COURT: Now, I just have two of you. The other  
17 four of you want to answer on that?

18 UNIDENTIFIED WOMAN JUROR: That was my intent.

19 THE COURT: Okay. You are --

20 *Toni Fagnan*  
UNIDENTIFIED WOMAN JUROR: That's what I thought would  
21 happen.

22 THE COURT: -- Toni Fagnan.

23 MS. FAGNAN: Toni Fagnan.

24 THE COURT: You expected 820,000 was going to come  
25 from the hospital?

1 MS. FAGNAN: That's what I hoped. I hoped because  
2 there was a question of the percentage. In making that  
3 verdict, I still didn't know if she would get the 820 or if  
4 that percentage would come down. So I hoped that she would get  
5 the whole amount. But I didn't know that she would. That was  
6 my thinking.

7 THE COURT: Did the thought ever occur to you that the  
8 damages to be 100 percent would have to be over 2 million?

9 MS. FAGNAN: For?

10 THE COURT: For the hospital to pay that amount.

11 MS. FAGNAN: Pardon me?

12 THE COURT: For the hospital to pay 820,000.

13 MS. FAGNAN: No, that didn't.

14 THE COURT: Did that ever occur to anybody?

15 UNIDENTIFIED WOMAN JUROR: Not until later.

16 MS. FAGNAN: No. For me, it was hard to try to think  
17 in that many zeroes, if you want to know the truth.

18 THE COURT: I don't deal in that many zeros either.

19 MS. FAGNAN: Very intimidating thing.

20 THE COURT: Now, that's all the questions the court  
21 intends to ask. Now --

22 MR. MORTENSEN: Yes, I would ask, first of all, I have  
23 some questions that each of them be asked to answer those two  
24 questions. I think just before Miss Fagnan spoke, we didn't  
25 get the name on the record of the juror seated in the corner



1 who said it was her intent to award \$820,000 to this woman for  
2 the hospital.

3 THE COURT: Tracy Cook, is that who you are talking?

4 MR. ~~HARRISON~~<sup>Mortensen</sup>: No. I am talking to Tracy Cook.

5 MS. COOK: No, I agreed with Carie. That was my  
6 intent. It was for her to get 820,000 from the hospital. I  
7 didn't realize that she would only get 30 percent of that.

8 MR. MORTENSEN: Right. And I saw, when you were  
9 asking the second question, I saw an affirmative head nod from  
10 the juror who hasn't yet spoken --

11 THE COURT: Mrs. Welch.

12 MR. MORTENSEN: -- Mrs. Welch, that the \$820,000 was  
13 intended to be solely from Ashley Valley for the hospital's  
14 negligence. That's what I understood.

15 MS. WELCH: Yes.

16 MR. MORTENSEN: That would be your answer to that  
17 question?

18 MS. WELCH: Yes.

19 MR. MORTENSEN: Okay. And I believe from the  
20 supplemental answer that Mr. Watts gave, that that  
21 substantially modifies his first response. The way I  
22 understood, <sup>what</sup>~~the way~~ he said after the more complete explanation  
23 was given, that the \$820,000, in his mind, was going to be  
24 construed as the 30 percent of the total damage. I thought  
25 that's what his answer was the second time he was allowed to

1 speak.

2 THE COURT: I don't think that we ought to be  
3 asking -- I don't think that, at this point, you know, it's  
4 different. I don't want you to phrase so that he answers, has  
5 to answer to your positive statement. I just -- if he wants to  
6 add it differently or state what your intent was, you can go  
7 ahead and do it, Mr. Watts.

8 MR. WATTS: You know, with the other jurors, I never  
9 went through and figured it would be a 30/70 split. To tell  
10 you the truth, not having experience in civil, I have  
11 experience in criminal, but I didn't really understand what the  
12 70/30 was all about; mostly other than probably trying to -- I  
13 don't know really what it was about. Because of the fact that  
14 there was already a settlement reached with Dr. Hawkes that,  
15 you know, we were -- we were made known there was some kind of  
16 a settlement, and we had to keep that out of our decision. I  
17 think, you know, at the time of the trial, at least for me, it  
18 seemed like the Dr. Hawkes, you know, obviously, the person who  
19 was an actor in this was not on trial. It was Ashley Valley.  
20 So my attention was towards Ashley Valley and not towards Dr.  
21 Hawkes.

22 THE COURT: Okay. By the answers of the jurors, the  
23 court thinks it's bound to direct the judgment as I did before  
24 for 246,000 or 30 percent. Now, with that having been said,  
25 counsel, you can ask any questions you want.

1 MR. MORTENSEN: Thank you. I would like to ask each  
2 of them to respond separately. And I'll start with Miss Welch  
3 on this end. Did either Mr. Mortensen or Mr. Faulk apply any  
4 pressure on you to sign the affidavit you signed?

5 MS. WELCH: No.

6 MR. MORTENSEN: Mrs. Atwood? Well, you didn't sign  
7 one.

8 MS. ATWOOD: I didn't sign one.

9 MR. MORTENSEN: I'll come back on that. Mr. Watts?  
10 No?

11 MR. WATTS: No.

12 MR. MORTENSEN: Miss Cook?

13 MS. COOK: No.

14 MR. MORTENSEN: May the record show that all of the  
15 witnesses who are here who signed affidavits indicated that  
16 neither Mr. Mortensen or Mr. Faulk applied any pressure on them  
17 to sign ~~afterwards~~ <sup>their Affidavits</sup>?

18 THE COURT: The record can show that.

19 MR. MORTENSEN: Now, starting at the other end. Did  
20 you sign your affidavit voluntarily and willingly?

21 UNIDENTIFIED WOMAN JUROR: Yes.

22 UNIDENTIFIED WOMAN JUROR: Yes.

23 UNIDENTIFIED MAN JUROR: I did.

24 UNIDENTIFIED WOMAN JUROR: Yes.

25 MR. MORTENSEN: May the record show that the five

*affidavit*

1 jurors who signed afterwards have all responded in the  
2 affirmative?

3 THE COURT: It can show that.

4 MR. MORTENSEN: Was your desire in signing the  
5 affidavit to clarify your intent as to the awarding of damages  
6 to Mrs. Haase?

7 UNIDENTIFIED WOMAN JUROR: Yes.

8 MR. WATTS: Yes.

9 UNIDENTIFIED WOMAN JUROR: Yes.

10 *Male then Female (Boys saying 20) 5*  
MR. MORTENSEN: May the record show that all signing  
11 jurors have indicated in the affirmative?

12 THE COURT: Yes.

13 MR. MORTENSEN: Has anyone applied any pressure on you  
14 in any way concerning your verdict against the hospital or your  
15 affidavits?

16 UNIDENTIFIED WOMAN JUROR: No.

17 *There may be a voice here but you can't prove it.*  
UNIDENTIFIED WOMAN JUROR: No.

18 MR. WATTS: No.

19 UNIDENTIFIED WOMAN JUROR: No.

20 MR. MORTENSEN: Mrs. Atwood, did you agree to go along  
21 with other jurors on the matter of damages?

22 MS. ATWOOD: Yes. In our deliberation, I still  
23 thought that the court would determine whether it was 30 or 70.  
24 But I thought -- I felt that 820,000 was a good amount. And I  
25 thought that the court would take into consideration what she

1 had received before. That we didn't know that. But the court  
2 knew that. And so they would make the judgment whether 820,000  
3 was hospital or had she already received enough so that that  
4 was part of that 30 percent was there.

5 MR. MORTENSEN: But was it your understanding it went  
6 the other way you had agreed to go along as well?

7 MS. ATWOOD: Oh, not necessarily. I would have to  
8 rethink that.

9 THE COURT: I think that it's not proper to ask her to  
10 rethink anything.

11 MR. MORTENSEN: I'm not asking her to.

12 THE COURT: The only thing I'm going to permit him to  
13 ask questions is what you intended that night, not what you  
14 thought about since. Not what you did. You could rethink it  
15 and go back to the jury room knowing we would change some  
16 instructions knowing what we know, you see. So you had better  
17 understand what you were asked to do. If -- but we are not  
18 doing that.

19 MR. MORTENSEN: Okay. I would like to ask each juror  
20 to answer this same question. I guess we could go in the same  
21 order. Was it your intent to award Mrs. Haase the total sum of  
22 \$820,000 for injuries sustained by her as a result of the  
23 hospital's negligence?

24 UNIDENTIFIED WOMAN JUROR: Yes.

25 UNIDENTIFIED WOMAN JUROR: Yes.

1 MR. WATTS: Yes.

2 UNIDENTIFIED WOMAN JUROR: Yes.

3 *Woman Voice saying "Yes"*  
MR. MORTENSEN: Okay. Was it your understanding at  
4 the time that you --

5 THE COURT: Just a minute. Come on in. Go ahead,  
6 counsel. But we won't have him answer any questions at this  
7 point. I may ask him in a minute. But let me do it. Let me  
8 ask two questions first without going to the detail. Let's  
9 see, you are Mr. Labrum, right?

10 MR. LABRUM: Yes.

11 THE COURT: Appreciate your being here.

12 MR. LABRUM: I'm sorry I was late. I thought it was  
13 tomorrow.

14 THE COURT: We have asked each of the other jurors  
15 several questions about what they intended the night that the  
16 verdict was rendered, not what you have thought about since,  
17 not what you would do if you were going back in the jury room  
18 now, but what you intended the night that you signed your  
19 verdict. First question, did your 820,000-dollar verdict  
20 include all of the plaintiff's injuries, those caused by Dr.  
21 Hawkes as well as those caused by Ashley Valley Medical Center?

22 MR. LABRUM: What did I think at the time? I took it  
23 that I understood it to say that she was to get 600,000 to take  
24 care of her for the rest of her life. And the 220,000 was for  
25 pain and suffering.

1 THE COURT: Okay. Let me go back and ask the question  
2 again, because that isn't what I asked you. Did your  
3 820,000-dollar verdict include all of the plaintiff's injuries,  
4 those caused by Dr. Hawkes as well as those caused by Ashley  
5 Valley Medical Center?

6 MR. LABRUM: No.

7 THE COURT: Second question. Was it your intent to  
8 award the plaintiff 820,000 from Ashley Valley Medical Center  
9 for injuries sustained by her as a result of the hospital's  
10 negligence?

11 MR. LABRUM: Yes.

12 THE COURT: Okay. Go ahead with your question.

13 MR. MORTENSEN: Was it your understanding, at the time  
14 you agreed to the damage figures set forth on the special  
15 verdict form, that Mrs. Haase would be awarded only 30 percent  
16 of the sum of those damages? Otherwise stated, was it your  
17 intent to award Mrs. Haase only \$246,000 for the damages she  
18 sustained as a result of the hospital's negligence?

19 UNIDENTIFIED WOMAN JUROR: No.

20 UNIDENTIFIED WOMAN JUROR: No.

21 *another woman (No) she sounded like Toni Faghan the*  
22 *then Mr Watts.*  
23 MR. WATTS: No.

24 MR. MORTENSEN: May the record show that six -- let's  
25 see. All of the jurors except Mrs. Atwood have responded  
negatively to the two questions I just posed.

THE COURT: Yes. Record can show that.

1                   MR. MORTENSEN: Thank you.

2                   THE COURT: Thank you. Any questions you want to ask  
3 them, counsel?

4                   MR. HARRISON: I would like to ask each of you -- and  
5 I realize some of you have spoken to this already -- but I need  
6 to do this for the record. Did you at any point during your  
7 deliberations have any confusion or uncertainty as to the legal  
8 effect of apportionment of fault or any other aspect of your  
9 deliberations in reaching a verdict?

10                  MR. WATTS: (Inaudible.)

11                  UNIDENTIFIED WOMAN JUROR: Is that the answer?

12                  MR. HARRISON: Were you confused? Did you feel that  
13 you didn't adequately understand apportionment of fault? I  
14 believe one person said something about didn't really  
15 understand the 70/30 business. Maybe that's putting it a  
16 little bit -- I'm asking you if in reaching the verdict that  
17 you rendered you had on this issue or other issues some  
18 confusion or lack of understanding or uncertainty about the  
19 effect legally of what you were doing?

20                  MR. MORTENSEN: I just want the question, I ask that  
21 it be clarified. Not during the deliberation, but the end of  
22 the deliberation were they confused. Is that the question or  
23 any -- I want to make sure we are not talking about --

24                  THE COURT: After -- when the verdict was rendered --  
25 you are not asking what occurred during the deliberations. We



1 have to be speaking of what occurred at the time -- at the time  
2 the verdict was signed and came back into court.

3 MR. HARRISON: Were you unsure --I'm on delicate  
4 grounds. I want to make sure the jury understands what I am  
5 asking, but I don't want to be prompting.

6 THE COURT: Re-ask if you want.

7 MR. HARRISON: Okay. I'm trying to ask for a response  
8 from each of you to the general issue that some of you have  
9 suggested this, is that you were not sure about how the  
10 allocation of fault, the apportionment of fault, the  
11 percentages, how that would affect your verdict. Does that  
12 help? Okay. All right.

13 MR. MORTENSEN: Your Honor, I'm going to have to  
14 object to that under rule 606 of the rules of evidence. I  
15 think the question asks them to pry into their deliberating  
16 process.

17 THE COURT: Well, if the question is asking about the  
18 deliberative process, of course, I'm going to sustain the  
19 objection. But I didn't understand it that way. I understood  
20 the question to be is, at the time you rendered the verdict,  
21 did you have any -- you use the words that you want to.

22 MR. HARRISON: Any lack of understanding, uncertainty.  
23 I don't want to put words in your mouth. That's the concept  
24 I'm going for.

25 UNIDENTIFIED WOMAN JUROR: Where do I start?

*Harrison*

1 MR. MORTENSEN: With anyone. Mrs. Atwood?

2 MS. ATWOOD: Yes. They were not clear to me.

3 UNIDENTIFIED WOMAN JUROR: I agree. I'm still not  
4 sure. You know, I'm confused over the 70/30.

5 MR. HARRISON: Okay. That's the answer -- that's the  
6 answer I wanted. Sir?

7 MR. WATTS: I believe after our question to the judge,  
8 (inaudible) deliberation, I think after the question to the  
9 judge to help us come up with or determine that total, I felt I  
10 was clear on my understanding.

11 UNIDENTIFIED WOMAN JUROR: I understood when we got  
12 finished that she would receive the 820,000 from the hospital.  
13 And the -- do you want me to tell the first clue I knew she  
14 wasn't? Do you want me to go into more?

15 MR. HARRISON: No.

16 THE COURT: No, not what you found out afterwards. I  
17 think your answer would be after.

18 UNIDENTIFIED WOMAN JUROR: All I knew is what I  
19 intended her to receive. I didn't know if we had to do math or  
20 not.

21 MR. HARRISON: Okay.

22 MR. LABRUM: I was confused on 70/30. I wasn't too  
23 sure of what she was going to get out of the 820. But I  
24 assumed she would get 820.

25 MR. HARRISON: And --

1 UNIDENTIFIED WOMAN JUROR: I wasn't real confused,  
2 because I kind of know what to do. It was just trying to help  
3 everybody trying to figure out what we needed to do if it was  
4 going to end up this way, I would have went with a higher  
5 amount if I knew what was going to happen.

6 MR. HARRISON: I would like to ask each of you if you  
7 have discussed your verdict or your deliberations with anyone  
8 other than Mr. Mortensen and his associates since the trial, of  
9 course.

10 UNIDENTIFIED WOMAN JUROR: Sure.

11 ~~MR. LABRUM:~~ *My wife.*  
MR. LABRUM: Yes. My wife.

12 MR. HARRISON: How about you?

13 UNIDENTIFIED WOMAN JUROR: Not really. Nobody.

14 MR. HARRISON: Okay. Your Honor, it is my  
15 understanding that two of the jurors indicated that they didn't  
16 really discuss how to allocate fault. I wonder if it's  
17 appropriate to ask all the jurors if they concur in what those  
18 two had said or if that's something to take up in another  
19 forum.

20 THE COURT: Well, I think we would be asking what the  
21 ~~directions were,~~ *deliberation*  
22 from that.

23 MR. HARRISON: Well, if that's the case, then I have  
24 no other questions. Thank you. Thank you all too.

25 MR. MORTENSEN: I have one further question for the

1 jurors --

2 THE COURT: Go ahead.

3 MR. MORTENSEN: -- to respond to this. The six jurors  
4 who responded to my last two questions, hearing what you have  
5 heard now from the court about the 246,000-dollar judgment, did  
6 you inaccurately record on the special verdict form your actual  
7 intent? Do you understand the question?

8 UNIDENTIFIED WOMAN JUROR: ~~Yes~~ Yes, I did.

9 UNIDENTIFIED WOMAN JUROR: I don't understand.

10 ~~MR. HARRISON~~ <sup>MORTENSEN</sup> MR. HARRISON: Well, there's an indication that the  
11 amount that will be awarded to Mrs. Haase, based on the way the  
12 verdict form was filled out and signed, will be \$246,000, not  
13 \$820,000. And my question is, did the special verdict form  
14 inaccurately record your intent?

15 UNIDENTIFIED WOMAN JUROR: Well, my intent was to get for her  
16 ~~to get \$20,000~~ <sup>\$246,000</sup> \$820,000.

17 MR. MORTENSEN: So your answer to that question is  
18 yes?

19 UNIDENTIFIED WOMAN JUROR: ~~Yes~~ Yes.

20 MR. MORTENSEN: Miss Fagnan?

21 MS. FAGNAN: ~~Yes~~ Yes.

22 MR. MORTENSEN: Mr. Watts?

23 MR. WATTS: Having had this hearing today, I think it  
24 explained it to me, ~~so yes~~ so yes..

25 MR. MORTENSEN: ~~Miss Welch~~ Miss Welch?

1 MS. WELCH: Yes. *This Sounded like Mr. Labrum*  
2 UNIDENTIFIED WOMAN JUROR: Yes.  
3 MR. MORTENSEN: Okay. Thank you.  
4 THE COURT: All right. Do we figure that to be fairly  
5 short? And we are going to excuse you now and express thanks  
6 for coming. You are free to leave.  
7 VOICE: (Inaudible.)  
8 THE COURT: Yes.  
9 (Whereupon, the following proceedings were held in  
10 open court outside the presence of the jury.)  
11 THE COURT: Record can show the jurors have all left  
12 the courtroom now. Does counsel want to do anything with the  
13 court?  
14 MR. MORTENSEN: Well, I would just like to state that  
15 I think the answers that we received from the late arriving  
16 juror and the answers that we received to the questions I posed  
17 to the jurors, I submit mandate an entry of judgment in the  
18 larger amounts. And they clearly stated what their intent was.  
19 And I think what the controlling precedent case law is, is that  
20 the intent of the jurors is to control and to be given, to be  
21 given effect. And I think they all very clearly said they  
22 never intended to award her for the hospital's negligence only  
23 246,000, but they did intend to *Award her* ~~order~~ from the hospital's  
24 negligence \$820,000. And I recognize that Ardith Atwood does  
25 not say that's the case. But it's the six out of eight. And

1 we had six. Clearly, six jurors who said that. I think their  
2 responses mandate that result. Thank you.

3 MR. HARRISON: Your Honor, I think what the response  
4 indicates is that there was substantial confusion among the  
5 jurors about what they were communicating. They have -- many  
6 of them said this morning they still don't understand the  
7 process. The continuing arguments of counsel in the briefs to  
8 the court are that the jury was confused, didn't understand,  
9 needed more clarity. The case law which counsel has offered to  
10 the court very clearly says without exception that that is the  
11 kind of error that is not susceptible to revision on the basis  
12 of <sup>juror</sup> affidavits. And that something other than a post-trial  
13 revision is an appropriate alternative for a plaintiff or for a  
14 party who feels that they have been disadvantaged. We disagree  
15 strongly that anything from this morning mandates anything  
16 other than the order which this court has indicated it will  
17 enter. Thank you.

18 MR. MORTENSEN: Just briefly, Your Honor. We got up  
19 at 3:30 in the morning -- after we got up 6 o'clock at night --  
20 after we got this last brief last night is when I opened my  
21 mail and looked through again, the distinction between clerical  
22 error and judicial error and looked at all the cases, and they  
23 are all clear that in this context what happened here was a  
24 clerical error, not a judicial error. Cases all say it doesn't  
25 matter who made the error. What matters is, was it an error in

1 the thinking deliberative process or an error in recording it.  
2 And the answers that they gave, especially to the last  
3 question, is they said what was written down on the special  
4 verdict form was an error by us. This was a clerical error.  
5 That's not what we intended. We intended the other thing. All  
6 of the cases that we looked at, and there are several, and they  
7 only end with the Gen Tech (phonetic) case. But the Gen Tech  
8 case, pardon the expression, but they talk about cases being on  
9 all fours. That one is on all fours. And I submit there isn't  
10 room for interpreting otherwise. Thank you.

11 THE COURT: Thank you. I recognize there's some  
12 confusion in the jury instructions. And that responsibility,  
13 of course, falls on me. It would have been a lot easier if  
14 counsel had done what the court asked them to do a month prior  
15 to trial with regard to submitting agreed upon jury  
16 instructions, and then a week before trial, and then the day of  
17 trial starting, and then when we met, of course, we spent, oh,  
18 several hours trying to work them out. And it was very  
19 difficult, because to me it seems like this is something  
20 counsel, having been through this so many times, should be able  
21 to agree on, knows but couldn't agree on -- couldn't agree on  
22 very many of them. But, I'm going to just order the judgment  
23 for the 246,000, which is the 30 percent and which probably  
24 means you'll want to appeal it. And I just have to let it go.  
25 And it will have to -- what happens will happen. I think there

that will get appealed

1 is enough problem it may be one <sup>↑</sup>of you to appeal or overrule --  
2 not overruled, sustain on appeal -- not sustain. Not saying  
3 the right word. That to order a new trial would not surprise  
4 me at all. I would hope not only from the point of view it's  
5 very, very expensive. And I would hate to see the parties go  
6 through it again. But you each have your own point of view and  
7 you have to go along with that. That's all. Thanks, counsel.

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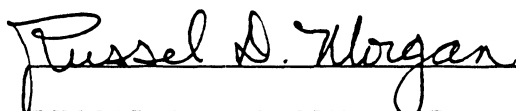
CERTIFICATE

STATE OF UTAH

COUNTY OF WASHINGTON

THIS IS TO CERTIFY THAT THE FOREGOING  
PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A  
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF  
UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

THAT THE PROCEEDINGS WERE TAKEN BY ME  
IN STENOGRAPHY FROM AN ELECTRONIC RECORDING, AND  
THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO  
TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION  
OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST  
OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES  
NUMBERED FROM 3 TO 28 INCLUSIVE.



RUSSEL D. MORGAN, CSR  
LICENSE #87-108442-7801

Tab 6

# **EXHIBIT 6**

3-20-02

Your Honor,

In figuring damages, do we figure the Percentage of total Damages. Or the whole Damages & the Court figures the percentage that we decide.

Figure the total value of all damages.

*[Signature]*

Tab 7

# EXHIBIT 7

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH

JUDICIAL DISTRICT COURT  
UINTAH COUNTY, UT

MAR 20 2002

JOANNE MCKEE, CLE  
BY rust D

LORI HAASE, Plaintiff.	SPECIAL VERDICT FORM
vs.	Case Number 980800377
ASHLEY VALLEY MEDICAL CENTER, Defendant	Judge Douglas L. Cornaby

MEMBERS OF THE JURY:

Please answer the following questions, in the order presented, based on the jury instructions and the evidence presented in this case. If you find the evidence preponderates in favor of the issue presented answer "yes". If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence. or if you find that the evidence preponderates against the issue presented, answer "no".

**QUESTION NO. 1** Was the defendant, Ashley Valley Medical Center, negligent?

ANSWER:   X   Yes        No

If you answered question number 1 "no" then do not answer the following questions.

Have your foreperson sign the verdict and return to the courtroom.

**QUESTION NO. 2** Was Ashley Valley Medical Center's negligence a proximate cause of injury sustained by the Plaintiff?

ANSWER:   X   Yes        No

If you answered question number 2 "no" then do not answer the remaining questions.

Have your foreperson sign the verdict and return to the courtroom.

**QUESTION NO. 3:** Assuming the combined negligence of Dr. Thomas Hawkes and Ashley Valley Medical Center to total 100 %, what percentage of that negligence is attributable to:

A. Dr. Thomas Hawkes                      70 %

B. Ashley Valley Medical Center        30 %

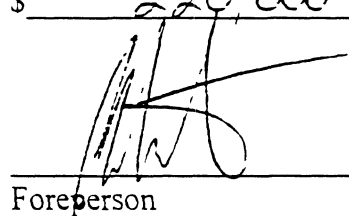
C. Total    100 %

**QUESTION NO. 4:** State the amount of special and general damages sustained by the Plaintiff as a proximate result of the injuries complained of.

Special Damages (both past and future):    \$ 600,000.00

General Damages (both past and future):    \$ 220,000.00

DATED this 20<sup>th</sup> day of March, 2002.

  
\_\_\_\_\_  
Foreperson



Tab 8

# **EXHIBIT 8**

MAR 21 2002

JOANNE MCKEE, CLERK

IN THE 8<sup>th</sup> JUDICIAL DISTRICT COURT

OF JUNTAH COUNTY, STATE OF UTAH

LORI HANSE

- ASHLEY VALLEY MEDICAL CENTER,  
et al.

Affidavit of Juror

Case No. 98-080037

(J. Cernady)

~~State of Utah~~  
County of Juntah } ss

1. I was a member of the jury in  
Hanse v Ashley Valley Medical Center. I have  
personal knowledge of the facts I state here.

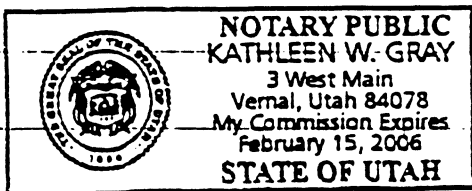
2. During our deliberations, my fellow  
jurors and I had a question about our award  
of damages and how our "number" would  
be affected by our apportionment of fault  
between Dr. Hawkes and the hospital. Specifically,  
we didn't know and wanted to know whether  
Lori Hanse would get the whole sum we  
arrived at or only a percentage of it.  
We sent a note out to the Judge asking  
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.

3 We continued to deliberate, forming our own assumptions on the matter. I believed and intended that ~~the~~ Lori Hease would get the total amount of the number we finally awarded — \$820,000.00 and I believe my fellow jurors believed and intended the same.

Dated this 21 day of March, 2002

Tanix Fagham  
Tanix Fagham

Subscribed and sworn to before me this  
21 day of March, 2002



Kathleen W. Gray

FILED  
DISTRICT COURT  
UINTAH COUNTY UTAH  
MAR 21 2002  
JOANNE MCKEE, CLERK  
BY \_\_\_\_\_ DEPUTY

Douglas G. Mortensen, USB # 2329  
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

Attorneys for Plaintiff

LORI HAASE,	:	JUROR'S AFFIDAVIT
	:	
Plaintiff,	:	
	:	
vs.	:	Civil No. 98-0800377
	:	
ASHLEY VALLEY MEDICAL CENTER AND	:	Judge Douglas L. Cornaby
COLUMBIA ASHLEY VALLEY MEDICAL	:	
CENTER AND JOHN DOE DEFENDANTS	:	
1 THROUGH 10	:	
	:	
Defendants.	:	

State of Utah }  
                  }ss.  
County of Uintah }

Tyler Lynn Cook being first duly sworn, deposes and says:

1. I was a member of the jury in this case. I have personal knowledge of the facts I

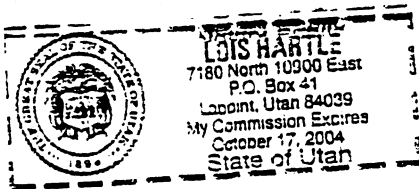
state here.

2. Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff, not 30% of that sum.

Dated this 21 day of March, 20002.

Tracy Lynn Cook  
Juror Tracy Lynn Cook

Subscribed and sworn to before me this 21 day of March, 2002.



Lois Hartle

Notary Public

FILED  
DISTRICT COURT  
JINTAH COUNTY, UTAH  
MAR 21 2002  
JOANNE MOORE, CLERK  
BY                      DEPUTY

Douglas G. Mortensen, USB # 2329  
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

Attorneys for Plaintiff

LORI HAASE,	:	JUROR'S AFFIDAVIT
	:	
Plaintiff,	:	
	:	
vs.	:	Civil No. 98-0800377
	:	
ASHLEY VALLEY MEDICAL CENTER AND	:	Judge Douglas L. Cornaby
COLUMBIA ASHLEY VALLEY MEDICAL	:	
CENTER AND JOHN DOE DEFENDANTS	:	
1 THROUGH 10,	:	
	:	
Defendants.	:	

State of Utah        }  
                              }ss.  
County of Uintah    }

Ray Edgar Labrum being first duly sworn, deposes and says:

1. I was a member of the jury in this case. I have personal knowledge of the facts I

state here.

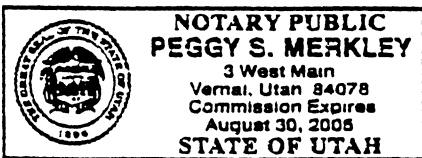
2. Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff. not 30% of that sum.

Dated this 21<sup>st</sup> day of March, 2002.

Ray Edgar Labrum

Juror

Subscribed and sworn to before me this 21<sup>st</sup> day of March, 2002.



Peggy S. Merkley

Notary Public



MAR 21 2002

JOANNE MCKEE, CLERK  
BY                      DEPUTY

Douglas G. Mortensen, USB # 2329  
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

Attorney for Plaintiff

LORI HAASE.

Plaintiff.

vs.

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

Defendants.

JUROR'S AFFIDAVIT

Civil No 98-0800377

Judge Douglas L. Cornaby

State of Utah        }  
                              } ss.  
County of Uintah    }

Carle Murray. being first duly sworn, deposes and says:

1. I was a member of the jury in this case. I have personal knowledge of the facts I

state here.

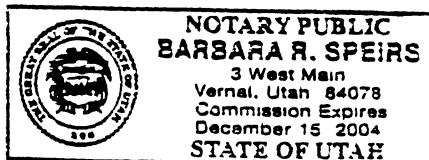
2. Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff, not 30% of that sum.

Dated this 21<sup>st</sup> day of March. ~~2000~~ 2002

Carrie Murray

Juror

Subscribed and sworn to before me this 21<sup>st</sup> day of March. 2002.



Barbara R. Speirs

Notary Public

MAR 21 2002

JOANNE WICKEE, CLERK  
BY                      DEPUTY

Douglas G. Mortensen, USB # 2329  
MATHESON, MORTENSEN OLSEN & JEPPSON, P.C.  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

Attorneys for Plaintiff

LORI HAASE,	:	JUROR AFFIDAVIT
	:	
Plaintiff,	:	
	:	
vs.	:	Civil No. 98-0800377
	:	
ASHLEY VALLEY MEDICAL CENTER AND	:	Judge Douglas L. Cornaby
COLUMBIA ASHLEY VALLEY MEDICAL	:	
CENTER AND JOHN DOE DEFENDANTS	:	
1 THROUGH 10,	:	
	:	
Defendants.	:	

State of Utah        }  
                              }ss.  
County of Uintah    }


Becky Solomon being first duly sworn, deposes and says:

1       I was a member of the jury in this case. I have personal knowledge of the facts I

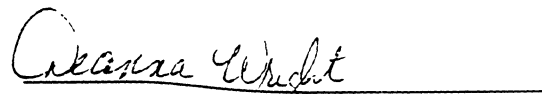
state here.

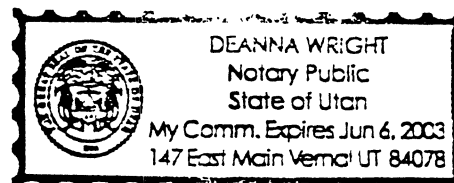
2. Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff, not 30% of that sum.

Dated this 21 day of March, 20002.

  
Juror Becky Solomon

Subscribed and sworn to before me this 21 day of March, 2002.

  
Notary Public Deanna Wright



MAR 21 2002

JOANNE MCKEE, CLERK  
BY                      DEPUTY

Douglas G. Mortensen, USB # 2329  
**MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

Attorney for Plaintiff

LORI HAASE.	:	JUROR'S AFFIDAVIT
	:	
Plaintiff.	:	
	:	
vs.	:	Civil No. 98-0800377
	:	
ASHLEY VALLEY MEDICAL CENTER AND	:	Judge Douglas L. Cornaby
COLUMBIA ASHLEY VALLEY MEDICAL	:	
CENTER AND JOHN DOE DEFENDANTS	:	
1 THROUGH 10.	:	
	:	
Defendants.	:	

State of Utah	}
	}ss
County of Uintah	}

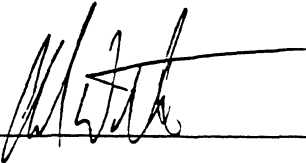
Shad I Watt . being first duly sworn, deposes and says:

1. I was a member of the jury in this case. I have personal knowledge of the facts I

state here.

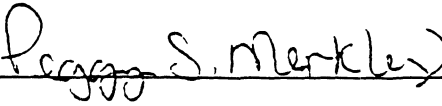
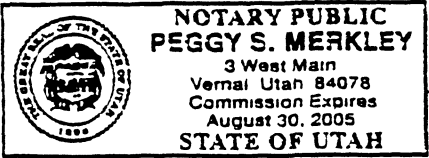
2. Based on my understanding of the information and instructions given to us. it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff, ~~not 30% of that sum.~~ <sup>full</sup>

Dated this 21 day of March, 2002.



Juror

Subscribed and sworn to before me this 21<sup>st</sup> day of March, 2002.



Notary Public

Douglas G. Mortensen, USB # 2329  
**MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

Attorneys for Plaintiff

ORI HAASE,	:	JUROR'S AFFIDAVIT
	:	
Plaintiff.	:	
	:	
vs.	:	Civil No. 98-0800377
	:	
ASHLEY VALLEY MEDICAL CENTER AND	:	Judge Douglas L. Cornaby
COLUMBIA ASHLEY VALLEY MEDICAL	:	
CENTER AND JOHN DOE DEFENDANTS	:	
THROUGH 10,	:	
	:	
Defendants.	:	

State of Utah        }  
                              }ss.  
County of Uintah    }

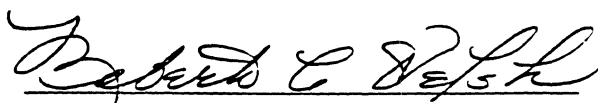
Robert C. Welsh. being first duly sworn. deposes and says:

1. I was a member of the jury in this case. I have personal knowledge of the facts I


state here.

2. Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff, not 30% of that sum.

Dated this 21 day of March, 2002.

  
\_\_\_\_\_  
Juror Roberta C. Welsh

~~Subscribed and sworn to before me this \_\_\_\_\_ day of March, 2002.~~

  
\_\_\_\_\_  
~~Notary Public~~ WITNESSED by FRANK J. Fall



FILED  
DISTRICT COURT  
UINTAH COUNTY, UTAH  
MAR 21 2007  
JOANNE WICKEE, CLERK  
BY \_\_\_\_\_ DEPUTY

Douglas G. Mortensen. USB # 2329  
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.  
648 East 100 South  
Salt Lake City. Utah 84102  
Telephone: (801) 363-2244

Attorneys for Plaintiff

LORI HAASE.	:	AFFIDAVIT OF FRANK J.
	:	FALK
Plaintiff,	:	
	:	
vs.	:	Civil No. 98-0800377
	:	
ASHLEY VALLEY MEDICAL CENTER AND	:	Judge Douglas L. Cornaby
COLUMBIA ASHLEY VALLEY MEDICAL	:	
CENTER AND JOHN DOE DEFENDANTS	:	
1 THROUGH 10,	:	
	:	
Defendants.	:	

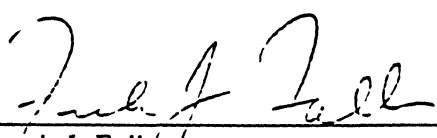
State of Utah        }  
                          }ss.  
County of Uintah    }

Frank J. Falk. being first duly sworn. deposes and says:

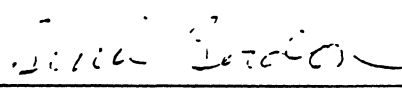
- 1. I am an attorney licensed to practice in this state.
- 2. I have personal knowledge of the matters stated herein.

3. On the morning following the jury's verdict in this case (which was announced at 11 p.m.), I participated in "exit" interviews with jurors, which we customarily conduct in an effort to find out how we might improve our presentation, what the jurors found persuasive and what they found unpersuasive. During the course of an early interview with a juror, I learned that that juror intended Lori Haase to receive the full amount of the total damage figure listed on the Special Verdict Form and thought that she would. I thereafter learned the same thing from exit interviews with other jurors. I also learned that the jurors were uncertain on the relation between their apportionment of fault and their award of damages and sent a note to the judge seeking clarification. The note they received back did not answer their question to their complete satisfaction so they made certain assumptions based on what they understood and completed the Special Verdict Form. All of the jurors with whom I spoke told me voluntarily and without any prodding that they intended that the plaintiff receive the damage award they gave and that they had already made the discounts they felt were appropriate.
4. Late this afternoon after receiving affidavits from several jurors, I accompanied plaintiff's chief counsel in this case to the home of the sister of juror Ardith Atwood, where Mrs. Atwood was working. Mrs Atwood spoke with us briefly. Although she declined to sign an affidavit, she did tell us that she agreed to "go along with the others" on the matter of damages. When asked if she personally intended for the plaintiff to receive 30% of the \$820,000 total damage figure, Mrs Atwood replied that she preferred not to answer that question.

Dated this 31 day of March, 2002.

  
\_\_\_\_\_  
Frank J. Falk  
Attorney for Plaintiff

Subscribed and sworn to before me, a Clerk of the Court, this 31<sup>st</sup> day of March, 2002.

  
\_\_\_\_\_  
Name: \_\_\_\_\_  
Clerk of the Court  
Eighth Judicial District Court

Douglas G. Mortensen, USB #2329  
**MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone (801) 363-2244

Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UINTAH COUNTY, STATE OF UTAH

LORI HAASE,	:	
	:	
Plaintiff,	:	<b>AFFIDAVIT OF</b>
	:	<b>DOUGLAS G. MORTENSEN</b>
vs.	:	
	:	Civil No. 98-0800377
ASHLEY VALLEY MEDICAL CENTER	:	
AND COLUMBIA ASHLEY VALLEY	:	Judge Douglas L. Cornaby
MEDICAL CENTER, AND JOHN DOE	:	
DEFENDANTS 1 THROUGH 10	:	
	:	
Defendants.	:	

STATE OF UTAH )  
: ss  
COUNTY OF SALT LAKE )

- Douglas G. Mortensen, being first duly sworn deposes and says:
1. I am counsel for the plaintiff in this action and have personal knowledge of the facts stated in this affidavit.
  2. Following the announcement of the jury’s decision in this case at approximately 11:00 p.m., on March 20, it was apparent that the jurors were not

interested in staying later to discuss their decision with counsel or others. I therefore decided to wait until the following morning to conduct our customary "exit interviews".

3. On the morning following trial, Frank Falk and I began telephoning members of the jury in an attempt to find out their impressions of various aspects of the evidence presented to them. We prepared a common list of several questions relevant to the case. Those questions included: How did you arrive at special damages of \$600,000?; How did you arrive at general damages of \$220,000?; Why did it take 7 hours to reach your verdict?; What was your assessment of the experts who testified at trial?; What was your assessment of the fact witnesses?; What was the most persuasive evidence you considered?; What was the least persuasive evidence?; Were you bothered by having to hear testimony by videotape, telephone or by the reading of deposition transcript?; How did you apportion fault?

4. We learned that the jurors carefully and painstakingly reviewed all of the evidence which had been presented at trial, with each juror in turn discussing his or her own notes on all of the evidence presented at trial. We learned that after reviewing all of the evidence, the jurors voted by secret, written ballot on issues of the hospital's liability. We learned that the jurors did in fact unanimously agree that the hospital was negligent and that its negligence proximately caused injury to Lori Haase. We learned that the jury then spent the bulk of its deliberation time considering damages. We were told that the jurors found expert economist Patricia Pacey very credible and informative.


no one told us that he or she thought Dr. Pacey's figures were "way off" in any respect. We learned that they were uncertain on the matter of apportionment of fault and how apportionment affected the award of damages. We learned that the jurors sent a note to the judge seeking clarification. Several jurors told us that the note they received back from the judge did not make the matter clearer to them. Some said they thought that the judge's response had referred them to a jury instruction but that when they read the jury instruction, it didn't answer their question. It was clear from our interviews with the jurors that whatever their note to the judge said and whatever the judge's note back to them replied, what they were really trying to determine was how to express their intent as the net dollar sum they wanted the plaintiff to receive from their finding of the hospital's negligence. It became abundantly clear that the jurors' intent was that Lori Pacey would receive the net figure of \$820,000. Each juror who signed an affidavit independently and without reference to any other juror indicated an intent to award Mrs. Pacey \$820,000 for the hospital's negligence. It was clear that they had already, through their own calculations and deliberations, "backed out" or apportioned off the damages attributable to Dr. Hawkes' negligence.

5. No pressure of any kind was applied to any of the jurors in connection with the signing of the affidavits. When one juror told us that she knew what she had said was true but that she wasn't sure she wanted to sign an affidavit, she was encouraged simply to think about it on her own and if she decided she wanted to sign

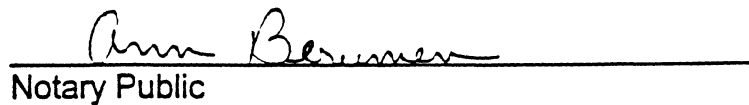
an affidavit, she could call us back. This discussion took place on a cell phone while Mr. Falk and I were driving to a bank where another juror had agreed to meet us to have his signature notarized. Several minutes later, we received a phone call on Frank Falk's cell phone from the juror who had been invited to think about the matter. This juror voluntarily called us back and expressed a desire to sign an affidavit so that there could be no doubt as to her and her fellow jurors' true intent. We then arranged to meet that juror at a place where that juror's signature could be notarized. When the 8<sup>th</sup> juror stated a disinclination to sign any sort of affidavit, we immediately thanked her for her time, apologized for inconveniencing her with our visit and departed. We made no attempt of any kind to persuade her to sign an affidavit against her wish.

6. One juror signed an affidavit late in the day at a place of considerable distance from the nearest notary. She volunteered a willingness to take a blank form of the affidavit to a notary the next day, sign it in front of the notary and personally file it with the court. Again, no pressure of any kind was applied to any juror to sign an affidavit.

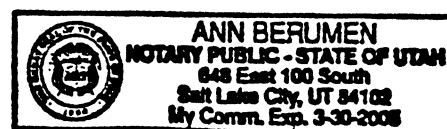
DATED this 22 day of March, 2002.

  
Douglas G. Mortensen

SUBSCRIBED AND SWORN TO BEFORE ME this 22 day of March, 2002.

  
Notary Public

Pldg Affidavit Douglas G.Mortensen.0322



Tab 9



# **EXHIBIT 9**

## ANALYSIS OF JUROR INTENT

The intentions and understandings of the individual jurors deserve scrutiny. The eight jurors who decided the case were **Becky Solomon, Ray Labrum, Roberta Welsh, Carrie Murray, Tonie Fagnan, Chad Watt, Tracy Cook, and Ardith Atwood.**

All of the eight jurors except Ardith Atwood signed post-verdict affidavits. Six of the seven affidavits were identical in form and state:

“Based on my understanding of the information and instructions given to us, it was my intention and belief that the full amount of the sum awarded in general and special damages - \$820,000.00 would go to the plaintiff, not 30% of that sum”.

Chad Watt deleted the phrase “not 30% of that sum”. However, his deletion did not change his clearly stated intent that Mrs. Haase would receive the full \$820,000 awarded. (See analysis of Chad Watt intent, pp. 5-6, *infra*).

**Becky Solomon** did not appear at the May 2, 2002 hearing. The only thing known about her intention is reflected in her March 21 affidavit. Her intention and belief was that the full amount of the sum awarded - \$820,000 - would go to the plaintiff, not 30% of that sum.

**Ray Labrum** signed an affidavit identical to Becky Solomon’s. His statements at the May 2 hearing were totally consistent with his affidavit and entirely clear and unequivocal. He arrived at the hearing late. When he entered the courtroom, the court interrupted Mr. Mortensen’s questioning of individual jurors and immediately directed its own questions to Mr. Labrum. Without any possibility of being influenced or confused by any questioning which had preceded his entry into the courtroom, Mr. Labrum responded to the court’s questions as follows:

The Court: . . . 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. Labrum: **No.**

The Court: Second question. Was it your intent to award the plaintiff \$820,000 from Ashley Valley Medical Center for injuries sustained by her as a result of the hospital's negligence?

Mr. Labrum: **Yes.**

(May 2, 2002 hearing, page 18, lines 2-11) (Emphasis added). Mr. Labrum's intent is therefore beyond dispute.

**Roberta Welsh** signed a post-verdict affidavit unequivocally stating her intention and belief that the full amount of the sum awarded would go to Mrs. Haase, not 30% of that sum. Her statements during the May 2 hearing were as unequivocal as Mr. Labrum's. On page 11 of the May 2 transcript, the court asked jurors whether it was their intent "to award the plaintiff \$820,000 from Ashley Valley Medical Center for injuries sustained by her as a result of the hospital's negligence." On that page, three unidentified women jurors individually responded that their intent was for Mrs. Haase to get the \$820,000. Ms. Welsh was likely one of those three unidentified women jurors. On page 13 of the transcript, Mr. Mortensen specifically asked Mrs. Welsh virtually the same question and she responded unequivocally that the \$820,000 was intended by her to be solely from Ashley Valley for the hospital's negligence. ( May 2 transcript, page 13 lines 12-18).

When the hospital's counsel, Mr. Harrison, began querying the jurors about the extent of their confusion, Ms. Welsh (identified by the court reporter only as

“unidentified woman juror”), responded:

I wasn't real confused, because I kind of know what to do. It was just trying to help everybody trying to figure out what we needed to do. If it was going to end up this way, I would have went with a higher amount if I knew what was going to happen.

(See May 2, 2002 hearing transcript, page 23 lines 1-5).

Thereafter, Mr. Mortensen asked the jurors whether, having heard what they had heard from the court about entering judgment for only \$246,000, they had inaccurately recorded on the Special Verdict Form their actual intent. The six jurors to whom that question was directed all responded in the affirmative. (May 2 transcript, pages 24-25). Ms. Welsh was one of those jurors.

**Carrie Murray** signed an affidavit identical to the affidavit signed by five of her fellow jurors. It was her intention and belief that the full amount of the \$820,000 sum would go to the plaintiff, not 30% of that sum. During the May 2 hearing, Ms. Murray was the second juror to address the court. She stated unequivocally: “I intended her to get that much money [the total \$820,000]”. (May 2 hearing transcript, p. 8). She admitted she only later realized that in order for Mrs. Haase to receive the full \$820,000 sum, the jury should have put a figure on the special verdict form of over two million dollars. That this realization came to her only later is not dispositive, however, because she unequivocally volunteered to the court:

But I - I - when we finished that night, I thought she was going to receive \$820,000. So that would be the 30% of the two million, is what I thought.

(May 2 transcript, p. 8-9). Ms. Murray is, according to counsel's clear recollection, the “unidentified woman juror” who responded on page 22 of the May 2 transcript:

"I understood that when we got finished that she would receive the \$820,000 from the hospital".

She clearly was one of the jurors who responded in the affirmative to Mr. Mortensen's closing question as to whether the special verdict form, in light of the court's intention to enter judgment against the hospital in the amount of only \$246,000, inaccurately recorded the jury's actual intent. (See page 24-25 of May 2 transcript).

**Tonie Fagnan** signed a handwritten affidavit slightly different and somewhat longer than the others. It includes this statement:

. . . My fellow jurors and I had a question about our award of damages and how our "number" would be effected by our apportionment of fault between Dr. Hawkes and the hospital. Specifically, we didn't know and wanted to know whether Lori Haase would get the whole sum we arrived at or only a percentage of it. 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.

We continued to deliberate, forming our own assumptions on the matter. I believed and intended that Lori Haase would get the total amount of the number we finally awarded - \$820,000.00 and I believe my fellow jurors believed and intended the same.

(See Tonie Fagnan's March 21, 2002 affidavit herein).

During the May 2 hearing, Ms. Fagnan told the court that she "hoped" Mrs. Haase would receive the full \$820,000. She admitted the thought had never occurred to her that, in the court's words, "the damages to be 100% would have to be over two million". That is understandable, however, because she like the other jurors understood that the focus of the case was on the damages resulting from the hospital's negligence.

Ms. 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 caused by the doctor. . . . - ***because we were focusing on the hospital.*** (May 2 transcript, pp. 9-10).

The court had repeatedly told the jury that the case was not about Dr. Hawkes' negligence. The jurors apparently assumed from such indication that they were charged with responsibility for assessing the damages resulting from the hospital's negligence only. Ms. Fagnan was among the six jurors responding affirmatively to the final question: "Hearing what you have heard now from the court about the \$246,000 judgment, did you inaccurately record on the Special Verdict Form your actual intent?"

**Chad Watt** also signed an affidavit indicating his belief and intent that Mrs. Haase would receive the full \$820,000 awarded by the jury. His answers to the court's initial questions during the May 2 hearing reflect confusion over precisely what the court was asking. That Mr. Watt misunderstood the court's initial questions is apparent from his later explanation to the court:

***" It seemed to me like the Dr. Hawkes . . . was not on trial. It was Ashley Valley. So my intention was toward Ashley Valley and not towards Dr. Hawkes."*** (Emphasis added) (May 2, transcript, p. 14, lines 18-21).

Mr. Watt expressly responded in the affirmative to Mr. Mortensen's question: "Was it your intent to award Mrs. Haase the total sum of \$820,000 for injuries sustained by her as a result of the hospital's negligence". (May 2 transcript, p. 17, line 21 - p. 18, line 1). Later, Mr. Watt indicated unequivocally that it was not his intent to award Mrs. Haase only \$246,000 for the damages she sustained as a result of the hospital's negligence. (May 2 hearing transcript, p. 18, lines 16-21).

Finally, Mr. Watt agreed that having heard what he had heard during the May 2

hearing about the Court's intent concerning a \$246,000 judgment, he did inaccurately record his actual intent on the Special Verdict Form . (May 2 hearing transcript, p. 24).

**Tracy Cook** signed an affidavit identical in form to the affidavits of jurors Solomon, Labrum, Welsh and Murray. She stated clearly and unequivocally at the May 2 hearing that her intent was to award Mrs. Haase \$820,000 damages sustained by her as a result of the hospital's negligence. (May 2 hearing transcript, pp. 11, 13 (lines 5-7), 15 (line 12), 17, 18, 24, 25). Ms. Cook's intent was stated perhaps most clearly on page 13:

Ms. Cook: No, I agreed with Carie. That was **my intent**.  
It **was for her to get \$820,000 from the**  
**hospital**. I didn't realize that she would only  
get 30 percent of that. (Emphasis added).

**Ardith Atwood**, the eighth juror, declined to sign an affidavit. Her statements at the May 2 hearing are terse and opaque. Since Utah law requires the agreement of only 6 of 8 jurors on any issue, her view on the damage award may be "thrown out" as a one-person minority view. However, it is noteworthy that not even she understood or intended that Mrs. Haase would receive only \$246,000 for the hospital's negligence. She claims to have believed it was up to the judge to decide whether Mrs. Haase would get \$820,000 or \$246,000 from the hospital. (May 2 transcript, p. 16, line 22 - p. 17, line 4).

Tab 10



# **EXHIBIT 10**

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH

---

LORI HAASE,

Plaintiff,

PRELIMINARY JURY VERDICT RULING

vs.

ASHLEY VALLEY MEDICAL  
CENTER,

Civil No. 98-0800377

Judge Douglas L Cornaby

Defendant.

---

The jury rendered a verdict in this case on March 22, 2002. The following day the Plaintiff contacted each juror and most of them signed an affidavit stating they intended the Plaintiff to receive the entire \$820,000. The Plaintiff then submitted a verdict to the Court different from the one directed by the Court along with a memorandum supporting her position. The Defendant has responded with a memorandum in opposition. The Plaintiff then submitted a reply brief together with a copy of what she claims is dispositive authority, to-wit, *Patty Bishop, et al. v. Gen Tec Inc., et al.*, 2002 UT 36 (filed by the Supreme Court of Utah on March 29, 2002). Finally, the Plaintiff submitted a notice to submit for decision.

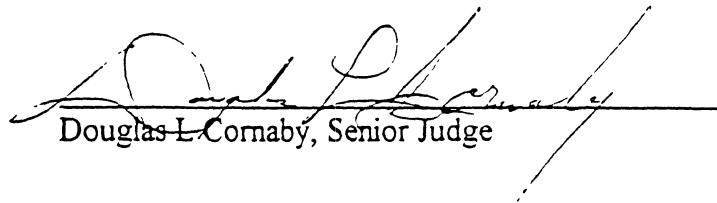
This matter is not ready for a decision.

The Court is hereby ordering the jury to be reconvened at the Court's Building in Vernal on Thursday, May 2, 2002, at 11 a.m. to determine, if, in fact, there was a clerical error. Counsel are invited to be present, personally or by associate counsel. The Court will make the

presentation. Counsel are also invited to submit to the Court prior to that time specific questions they want the Court to ask the jurors. The Court expects this hearing to be limited in both time and content. At this point in time, however, the Court does not know how it can avoid informing the jury of the amount the Plaintiff has already received from the Estate of Dr. Hawkes.

The parties and their counsel are ordered not to have contact with any juror from this time forward and until the hearing is ended.

Dated this 2nd day of April, 2002.



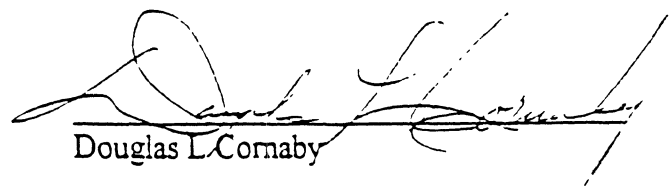
Douglas L. Cornaby, Senior Judge

Certificate of Service

I certify that on the 2nd day of April, 2002, I caused to be served via U.S. mail a copy of the foregoing to the following:

Douglas G. Mortensen  
Matheson, Mortensen, Olsen & Jeppson, P.C.  
648 East 100 South  
Salt Lake City, Utah 84102

Robert R. Harrison  
Snow, Christensen & Martineau  
10 Exchange Place, 11th Floor  
P. O. Box 45000  
Salt Lake City, Utah 84145



Douglas L. Cornaby

Tab 11

# **EXHIBIT 11**

2002 UT 36

**Patty BISHOP, individually and as personal representative of the Estate of Douglas J Bishop, deceased, Bart J Bishop, Douglas Wade Bishop, Bradley David Bishop, and Joshua Lee Bishop**  
**Plaintiffs and Appellants**

v

**GENTEC INC, a Kentucky corporation, and John Does I—V, Defendants Third-Party Plaintiff, Appellee, and Cross-Appellant**

v

**Valley Asphalt, Inc, a Utah corporation, Third-Party Defendant and Appellant**

**Nos. 20000467 20000492**

Supreme Court of Utah

March 29 2002

Rehearing Denied June 12 2002

Personal representative of estate of deceased worker brought wrongful death action against asphalt silo manufacturer. Manufacturer filed third party complaint against employer seeking indemnification. The trial court granted summary judgment for manufacturer on indemnification claim. After jury trial the Fourth District Court Utah County Ray Harding Jr apportioned judgment. Employer and personal representative appealed. Manufacturer cross appealed. The Supreme Court Durham J held that (1) Liability Reform Act impliedly preempted common law doctrine of respondeat superior (2) Act did not create unconstitutional classification and (3) manufacturer was not entitled to indemnification.

Russon A C J concurred in result.

**1 Appeal and Error**  $\S$ 842(1)

The application of Liability Reform Act (LRA) in apportioning fault is a legal question of statutory construction which the Supreme Court reviews for correctness. U.C.A. 1953 78-27-37 to 78-27-43.

**2 Appeal and Error**  $\S$ 842(1)

A district court's disposition of a summary judgment motion is a question of law that the Supreme Court reviews for correctness.

**3 Appeal and Error**  $\S$ 863

The Supreme Court accords a trial court's interpretation of a contract no deference and reviews it for correctness.

**4 Appeal and Error**  $\S$ 842(9)

Mixed questions of law and fact are reviewed for abuse of discretion in applying the law to the facts.

**5 Negligence**  $\S$ 549(8) (10)

**Products Liability**  $\S$ 28 42

Liability Reform Act impliedly preempted common law doctrine of respondeat superior and therefore liability of immune employer and employee should not have been combined in determining fault allocation in wrongful death action against manufacturer by estate of worker killed while repairing asphalt silo where Act and common law were in conflict. Compliance with both was impossible and application of respondeat superior would nullify effects of section of Act permitting recovery for injured plaintiffs from any defendant whose fault combined with fault of persons immune from suit exceeded fault of plaintiffs. U.C.A. 1953 78-27-37 to 78-27-43.

**6 Constitutional Law**  $\S$ 243 1

**Negligence**  $\S$ 203

**Statutes**  $\S$ 74(1)

Provision of Liability Reform Act that allowed recovery for injured plaintiffs from any defendant whose fault combined with fault of persons immune from suit exceeded fault of plaintiffs did not create unconstitutional classification and thus Act did not violate equal protection or Uniform Operation of Laws provision of state constitution where Act served legitimate purpose of balancing economic burdens between injured employee and defendant where immune employer was also at fault. U.S.C.A. Const. Amend. 14 Const. Art. 1 § 24 U.C.A. 1953 78-27-37 to 78-27-43.

**7 Statutes**  $\S$ 71

In scrutinizing a legislative measure under Uniform Operation of Laws provision of state constitution the court must determine whether the classification is reasonable whether the objectives of the legislative action are legitimate and whether there is a reasonable relationship between the classification and the legislative purposes. Const. Art. 1 § 24.

**8 Indemnity**  $\S$ 29

Manufacturer of asphalt silo was not entitled to indemnification in wrongful death action by employer of worker killed while performing repair work on silo where language in indemnification clause limited employer's indemnification to situations where employer itself was negligent. There was no reference in indemnification clause to products liability and language disclaiming liability for any injury arising out of installation did not apply to condition of product when sold.

**9 Indemnity**  $\S$ 30(1)

The common law generally disfavors agreements that indemnify parties against their own negligence because one might be careless of another's life and limb if there is no penalty for carelessness.

**10 Contracts**  $\S$ 114

Parties seeking to exempt themselves from tort liability must clearly and unequivocally express an intent to limit tort liability within the contract without such an expression of intent the presumption is against any such intention and it is not achieved by inference or implication from general language.

**11 Indemnity**  $\S$ 30(1)

The Supreme Court will not infer an intention to indemnify against other kinds of liability including strict liability where such intention is not clearly expressed.

**12 Indemnity**  $\S$ 28

Allegations of negligence contained in claim for products liability did not transform claim into one for ordinary negligence and thus claim was not covered by indemnification language in product invoice.

**13 Products Liability**  $\S$ 8, 11, 14

Products liability always requires proof of a defective product which can include manufacturing flaws design defects and inadequate warnings regarding use.

**14 Trial**  $\S$ 344

Jury's error in recording judgment as rendered constituted clerical error not judicial error and thus affidavits of jurors were admissible to show jurors' actual intent and that jury made mistake in calculating damage award by subtracting plaintiffs' proportion of fault. Rules Civ. Proc. Rules 59 60.

**15 Motions**  $\S$ 15

It is the substance not the labeling of a motion that is dispositive in determining the character of the motion.

Allen K. Young, Springville, for plaintiffs.  
Paul M. Belnap, Andrew D. Wright, Darren K. Nelson, Salt Lake City, for GenTec.

Robert G. Gilchrist, Mark L. McCarty, Brandon B. Hobbs, Lynn S. Davies, Salt Lake City, for Valley Asphalt.

DURHAM Justice

**INTRODUCTION**

¶ 1 This appeal and cross appeal challenge the judgment entered in a wrongful death action brought by Patty Bishop individually and as the executor of the decedent Douglas Bishop's estate and Bishop's children Bishop, an employee of Valley Asphalt, Inc. died as a result of personal injuries sustained while performing repair work on asphalt silo components manufactured by GenTec, Inc. and installed and maintained by Valley Asphalt. Bishop sued GenTec for products liability and GenTec filed a third party complaint against Valley Asphalt seeking indemnification for GenTec's negligence, strict liability and products liability based on the language in an invoice signed by Valley Asphalt. With respect to the indemnification, the court granted GenTec's motion for summary judgment. The jury allocated fault to both GenTec and Valley Asphalt. Judgment was then apportioned

pursuant to Utah's Liability Reform Act. Bishop moved to amend the jury verdict based on clerical error, but the trial court denied the motion. Valley Asphalt and Bishop appealed, and GenTec filed a cross-appeal.

## BACKGROUND

¶2 In late 1994 or early 1995, Valley Asphalt, planning to expand its asphalt storage capacity, contacted GenTec, a manufacturer and assembler of hot asphalt silos and silo components, to purchase hot asphalt silo components. Valley Asphalt purchased components for an asphalt silo from GenTec on August 7, 1995, and signed GenTec's standard invoice entitled "Equipment Sales Order and Security Agreement." On the reverse side of the pre-printed invoice were two sections entitled "INDEMNIFICATION" and "INSTALLATION," which purported to place limitations on GenTec's liability. Soon after completion of the purchase, Valley Asphalt received the silo components and constructed the system pursuant to the specifications provided by GenTec.

¶3 On July 12, 1997, while inspecting and attempting to repair one of Valley Asphalt's asphalt silos, Bishop was caught between the doors of the silo when they suddenly closed and was crushed. He died later that day as a result of his injuries. The components that crushed Bishop were those purchased under the August 7, 1995 invoice. Subsequently, Bishop's executor filed this wrongful death action against GenTec.

¶4 GenTec filed a third-party complaint against Valley Asphalt, seeking apportionment of fault and indemnification under the pre-printed terms on the reverse side of the August 7, 1995 invoice. After review of GenTec's and Valley Asphalt's cross-motions for summary judgment on the indemnification question, the trial court found that the two entities were sophisticated business entities, that they negotiated the terms of the invoice at arm's length, and that the language in the invoice evidenced the intent of the parties to reallocate all liability to Valley Asphalt, including claims against GenTec for negligence, strict liability, and products liability.

¶5 The jury apportioned fault according to a special verdict form, allocating 25 percent of the fault to Bishop, 45 percent to GenTec, and 30 percent to Valley Asphalt. In addition to apportioning fault, the jury determined the amount of general damages to be \$750,000 and special damages to be \$800,000. Because Valley Asphalt was a party immune from suit pursuant to Utah Code Ann. § 78-27-37(3)(a) (Supp.2001), the trial judge reapportioned Valley Asphalt's 30 percent fault according to Utah's Liability Reform Act ("LRA"), Utah Code Ann. §§ 78-27-37 to -43 (1999), which resulted in allocating 64.29 percent of the total fault to GenTec and 35.71 percent to Bishop. The trial court then reduced the jury's damages award by the 35.71 percentage of fault allocated to Bishop. Both GenTec and Valley Asphalt objected to the reapportionment. They claimed that either Valley Asphalt's liability should be combined with Bishop's liability under the common law doctrine of respondeat superior or, if respondeat superior did not apply, that the reapportionment part of the LRA, section 78-27-39(2)(a), is unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Uniform Operation of Laws Clause of the Utah Constitution, art. I, section 24. The trial court overruled GenTec's and Valley Asphalt's constitutional objections. With respect to the respondeat superior argument, the trial court found that the LRA superceded the common law and that "the statute clearly and unambiguously requires that [the] Court must consider the fault of Mr. Bishop and Valley [Asphalt] separately."

¶6 After the trial ended and the jury was excused, Bishop's counsel talked to at least three of the jurors, including the jury foreman, all of whom subsequently signed affidavits indicating they had made a mistake in their calculation of the jury award. In their affidavits, the jurors testified that they had mistakenly subtracted 25 percent (Bishop's proportion of fault as determined by the jury) from the general and special damages, not realizing that the subtraction for Bishop's fault was the duty of the trial court, not the jury. Relying on these affidavits, Bishop moved to amend the jury verdict pursuant to

Utah R. Civ. P. 59, or 60(a) or 60(b); later, however, in a hearing on the matter, Bishop modified his motion from a request for impeachment or amendment of the verdict under rule 59 or rule 60 to one solely for a correction of clerical error under rule 60. Bishop conceded that the juror affidavits would not support a rule 59 motion to impeach the jury verdict.

¶7 Bishop argued, with the support of the juror affidavits, that the jury's allocation error reduced the final general and special damages award announced in the jury verdict to a sum that was 25 percent lower than the amount the jury intended to award. Bishop maintained that the jury's intent was further evidenced by the fact that its special damages award was almost exactly 75 percent of the \$1,067,000 special damages amount presented by Bishop's expert witness to the jury at trial. The trial court concluded that Bishop's motion to amend the jury verdict was in reality a motion to impeach the verdict and ruled that the affidavits were not admissible pursuant to Utah R. Civ. P. 59(a)(2). In its order, however, the trial court did not specifically address Bishop's rule 60 motion to amend.

## STANDARD OF REVIEW

[1-4] ¶8 The application of the LRA in apportioning fault is a legal question of statutory construction, which we review for correctness. *Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1079 (Utah 1998). A district court's disposition of a summary judgment motion is a question of law that we review for correctness. *Schwartz v. BMW of North America, Inc.*, 814 P.2d 1108, 1111-12 (Utah 1991). "We accord a trial court's interpretation of a contract no deference and review it for correctness." *Aquagen Int'l, Inc., v. Calrac Trust*, 972 P.2d 411, 413 (Utah 1998). Mixed questions of law and fact are reviewed for abuse of discretion in applying the law to the facts. *Woodhaven Apartments v. Washing-*

*ton*, 942 P.2d 918, 920 (Utah 1997) (citing *State v. Pena*, 869 P.2d 932 (Utah 1994)).

## ANALYSIS

### I. LIABILITY REFORM ACT

[5] ¶9 GenTec and Valley Asphalt argue that the trial court should have combined Bishop's negligence with that of his employer, Valley Asphalt, under the doctrine of respondeat superior. Alternatively, GenTec and Valley Asphalt also argue that if the doctrine of respondeat superior does not apply, the reapportionment provision of the LRA, section 78-27-39(2)(a), is unconstitutional under the Uniform Operation of Laws clause of the Utah Constitution, Utah Const. art. I section 24, and the Equal Protection Clause of the federal constitution, U.S. Const. amend. XIV, section 1. The first question before us therefore concerns the interaction between the LRA and the common law doctrine of respondeat superior.<sup>1</sup> Utah has adopted the common law, except for instances where the common law is contrary to or conflicts with the United States Constitution, the Utah Constitution, a statute, or Utah public policy. *See* Utah Code Ann. § 68-3-1 (2001). In determining whether a state statute pre-empts the common law, we have used the federal model for determining whether federal law pre-empts state law. *See Gilger v. Hernandez*, 2000 UT 23, ¶11, 997 P.2d 305. The United States Supreme Court has stated,

[i] Sometimes courts, when facing the pre-emption question, find language in the . . . statute that reveals an explicit [legislative] intent to pre-empt [common] law. [ii] More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the . . . statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent.

ing injury, and, thus, use of respondeat superior under such circumstances would be problematic in any event. In this case, however, we need not address this problem because we conclude that the doctrine has been pre-empted, as discussed hereafter.

1. We note that the general application of respondeat superior requires an employer to be responsible for the actions of an employee where the employee, acting within the scope of her employment, injures a third party. In this case the employee is the injured party, not the party caus-

[a] A . . . statute, for example, may create a scheme of [statutory] regulation "so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it."

[b] Alternatively, [statutory] law may be in "irreconcilable conflict" with [the common] law. Compliance with both . . . , for example, may be a "physical impossibility," or,

[c] the [common] law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of [the legislature]."

*Id.* (citing *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996) (citations omitted)).

¶ 10 The Utah Legislature did not explicitly pre-empt the common law doctrine of respondeat superior when it passed the LRA. Therefore, we look to the statute's structure and purpose to determine whether it reflects an implied legislative intent to do so. We conclude that the state statute and the common law principle are in conflict, and that the common law must necessarily give way to the statute. Compliance with both is impossible. Additionally, the "[common] law . . . 'stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the legislature].'" *Id.*

¶ 11 Application of the common law doctrine of respondeat superior to determine fault allocation in this case would undermine the legislature's objectives in enacting the LRA. Under the plain language of the statute, the only time the principle of respondeat superior could theoretically apply is in the initial apportionment of fault under section 78-27-39(1), in cases where the person seeking recovery is not an employee. As reallocation under the statute occurs only when the plaintiff is an employee of an immune employer, the principle of respondeat superior cannot operate to combine the employee's and the employer's fault in the initial allocation pursuant to section 78-27-39(1), or in the reallocation under section 78-27-39(2)(a). If it did, the effects of section 78-27-38(2), permitting recovery for an injured plaintiff from any defendant "whose fault, combined with the fault of persons immune from suit,

exceeds the fault of the [plaintiff]," Utah Code Ann. § 78-27-38(2)(2001), would be completely nullified. The combined fault of a defendant and an immune employer would *always* be greater than that of the plaintiff/employee if the plaintiff/employee's fault were to be attributed to the employer; the combined fault would, by definition, be 100 percent. The LRA must pre-empt the common law; otherwise sections 78-27-38(2) and 78-27-39(2)(a) would be without meaning or function.

¶ 12 More explicitly, we believe that the history of the allocation and reallocation provisions of the LRA reveals a legislative intent to override the operation of respondeat superior in this situation. Recent amendments to the LRA were undertaken by the legislature in specific response to *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877 (Utah 1993). One of the issues addressed in *Sullivan* was whether a jury could apportion fault to an injured employee's employer where the employer was a party immune from suit. Upon a plain reading of the statute and a review of the legislative history, we determined that the LRA required apportionment both to immune parties and to defendants in order to prevent a "defendant [from being] held liable for damages in excess of its proportion of fault" in violation of the statutory language. *Id.* at 879. The dissent in *Sullivan* pointed out that the result would seriously curtail employee recovery, *id.* at 886 (Stewart, J., dissenting), but the majority felt obliged to follow the statutory language. *Id.* at 881. The legislature took notice of the case, and, in 1994 after vigorous debate, amended the LRA to provide for reallocation of fault in cases where the fault of all parties immune from suit is less than 40 percent. Section 78-27-38 was amended by adding the language "under Section 78-27-39" to read, "No defendant is liable to any person seeking recovery for an amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39." Utah Code Ann. § 78-27-38(3) (2001). The legislature thus balanced the factors for and against reallocation of fault and found that reallocation between the plaintiff and the defendant was a better policy than forcing the plaintiff

to bear the full burden of the immune party's fault. "Thus, in some instances the [revised] statutory scheme itself holds defendants liable for some percentage of fault initially attributable to a person immune from suit." *Fried v. Boyer Co., L.C.*, 952 P.2d 1078, 1081-82 (Utah 1998).

¶ 13 Valley Asphalt's and GenTec's reliance on respondeat superior is in effect a challenge to the operation of the reapportionment provisions of the LRA, section 78-27-39(2)(a). Their position, if accepted, would recreate the *Sullivan* dilemma. Through the doctrine of respondeat superior, Valley Asphalt and GenTec seek to reject the legislature's explicit resolution of that dilemma. GenTec's and Valley Asphalt's contention that fault should not be reallocated to a defendant in excess of the liability originally attributed to that defendant is therefore unavailing in light of the legislature's 1994 amendment to the LRA.<sup>2</sup> The trial court correctly determined that the LRA pre-empted the common law.

[6, 7] ¶ 14 GenTec and Valley Asphalt also argue that the reallocation provision of the LRA should be declared unconstitutional under the Uniform Operation of Laws provision of the Utah Constitution, art. I, section 24, and federal equal protection jurisprudence. Article I, section 24 of the Utah Constitution provides that "[a]ll laws of a general nature shall have uniform operation." "In scrutinizing a legislative measure under article I, § 24, we must determine whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purposes." *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989).

2. We note that another historic common law doctrine abandoned by the LRA, that of joint and several liability, would have made GenTec liable for the entire amount of the damages. GenTec would presumably agree that the result compelled by the LRA is better than the result under this common law principle. The legislature's decision to implement the LRA was premised on fairness. See *Floor Debate*, Utah Senate, 46th Leg 1986, General Sess., Senate Day 31, Records No. 63 (Feb 12, 1986). Fairness includes not only fairness to the defendant, but also fairness

¶ 15 GenTec and Valley Asphalt argue that the failure to include an injured employee's fault with that of his or her employer under the common law doctrine of respondeat superior creates an unconstitutional classification. They assert that this classification unduly burdens non-immune defendants because they may become liable for fault in excess of the fault initially attributed to them, at least where the immune party's fault is less than 40 percent.

¶ 16 As explained above, the legislature never intended the fault initially attributed to the injured employee to be combined, pursuant to respondeat superior, with the fault of the employer in the reallocation. The legislature recognized the injustice of a specific classification where an injured employee or a partially at-fault defendant third party would have to bear or share the burden of an immune employer's fault. The classification they settled on responds in a rational way to the conflict between protection of the interests of plaintiff-employees and of defendants. The amended statute strives to balance and protect the interests of both. Where the immune employer's fault is greater than 40 percent, the injured plaintiff-employee bears the burden of the employer's fault, but where the employer's fault is less than 40 percent, the injured plaintiff-employee proportionately shares the burden of the employer's fault with non-immune defendants. The 40 percent fault threshold is a reasonable cut-off point; the statutory scheme legitimately strives to balance and protect both defendants and injured employees. The classification therefore serves a legitimate legislative purpose: to balance economic burdens between an injured employee and a defendant where an immune employer is also at fault.

to the plaintiff. The legislature made a policy judgment after *Sullivan* that illustrated the dilemma created by the original statute and determined that the best policy was to share the burden of an immune party's liability in certain cases between the plaintiff and the defendants instead of making the plaintiff bear the full burden. We cannot see how spreading this burden proportionally between parties is unconstitutional. Certainly, the result that GenTec and Valley Asphalt advocate would not be fairer



¶17 Likewise, we conclude that the economic classification undertaken by the legislature here easily meets the “rational basis” standard required by the Equal Protection Clause of the federal constitution; the legislature’s classification, as discussed above, was entirely reasonable and legitimate. Therefore, neither the Uniform Operation of Laws provision nor the Equal Protection Clause requires us to invalidate the LRA with respect to reallocation; the legislature’s policy choice to reallocate the burden of an immune party’s fault proportionally in some circumstances between defendants and plaintiffs is constitutional.

## II. CONTRACT PROVISIONS

[8] ¶18 Valley Asphalt argues that the trial court improperly granted summary judgment with respect to certain indemnification provisions found on the reverse side of the GenTec invoice for the equipment involved in Bishop’s accident. We have previously stated that “[on] grounds of public policy, parties to a contract may not generally exempt a seller of a product from strict tort liability for physical harm to a user or consumer unless the exemption term ‘is fairly bargained for and is consistent with the policy underlying that [strict tort] liability.’” *Interwest Constr. v. Palmer*, 923 P.2d 1350, 1356 (Utah 1996) (quoting Restatement (Second) of Contracts § 195(3) (1981)). Comment (c) to the Restatement (Second) of Contracts, section 195, indicates that agreements exempting a seller from strict products liability are unenforceable.<sup>3</sup>

[9–11] ¶19 In the context of negligence, we have consistently held that an “indemnity agreement which purports to make a party respond for the negligence of another should be strictly construed.” *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 370 (1990). In construing such agreements, we have looked at the “objectives of the parties and the surrounding facts and circumstances” in interpreting the contractual language. *Id.* “In

3. In accord with the Restatement, the Utah Legislature promulgated section 78–15–7 on March 15, 2000, which voids any agreement to exempt a seller of a product from strict products liability on grounds of public policy. Section 78–15–7 is

general, the common law disfavors agreements that indemnify parties against their own negligence because ‘one might be careless of another’s life and limb, if there is no penalty for carelessness.’” *Hawkins v. Peart*, 2001 UT 94, ¶14, 37 P.3d 1062 (citing *Hyde v. Chevron U.S.A.*, 697 F.2d 614, 632 (5th Cir.1983)). Parties seeking to exempt themselves from tort liability must “‘clearly and unequivocally’ express an intent to limit tort liability” within the contract. *See Interwest*, 923 P.2d at 1356 (quoting *DCR, Inc. v. Peak Alarm Co.*, 663 P.2d 433, 438 (Utah 1983)). “Without such an expression of intent, ‘the presumption is against any such intention, and it is not achieved by inference or implication from general language.’” *Id.* (citation omitted). Furthermore, we will not infer an intention to indemnify against other kinds of liability, including strict liability, where such intention is not clearly expressed.

¶20 The two pertinent paragraphs found on the reverse side of the GenTec invoice read as follows:

### INDEMNIFICATION

Customer shall indemnify and hold GenTec harmless from all expenses (including attorney’s fees), claims, demands, suits, judgments, actions, costs, and liabilities (including without limitation those alleging GenTec’s own negligence) which arise from, relate to or are connected with the Customer’s negligent possession, use, operation or resale of the equipment and other goods described herein or any manuals, instructions, drawings or specifications related thereto.

(Emphasis added.)

### INSTALLATION

Customer shall be solely responsible at its cost for the installation and erection of the equipment and other goods purchased. Although GenTec may in some cases provide a serviceman, data, manuals, instructions, drawings or specifications to aid Customer with installation or start-up.[sic] GenTec

is inapplicable to the current case because the accident here occurred before the new section was adopted. The statute nonetheless reflects the legislature’s view of public policy on this question.

assumes no responsibility for proper installation or support of the equipment or other goods when erected and disclaims any express or implied warranties with respect to such installation or support. Whether or not data manuals, instructions, drawings or specifications are provided or a serviceman aids in the installation, *Customer shall indemnify and hold GenTec harmless from all expenses (including attorney’s fees), claims, demands, suits, judgments, actions, costs, and liabilities (including without limitation those alleging GenTec’s own negligence) which may arise from, relate to, or be connected with damage or personal injury arising out of the installation, erection, start-up, or use of the equipment and other goods purchased* (including any manuals, instructions, or drawings related thereto).

(Emphasis added.)

¶21 The plain reading of the paragraph entitled “INDEMNIFICATION” restricts Valley Asphalt’s agreement to indemnify to those situations where Valley Asphalt itself is negligent. Thus, where Valley Asphalt is not negligent, Valley Asphalt has no duty to indemnify GenTec at all. Furthermore, there is no reference in the indemnification language to products liability. GenTec included a parenthetical clause to indicate that “liabilities” specifically included GenTec’s own negligence, but we will not read that reference to include products liability, in view of the principles of strict construction to which we adhere in this area.

¶22 Analysis of the paragraph entitled “INSTALLATION” results in a similar conclusion. In the relevant portion of the “INSTALLATION” paragraph, GenTec purports to disclaim any liability for damage or personal injury “arising out of the installation, erection, start-up, or use of the equipment.” That language must be read in accordance with the paragraph as a whole, which notes that Valley Asphalt is solely responsible for installation. Thus, whereas the INDEMNIFICATION paragraph purports to protect GenTec generally from any liability for negligence when injuries “arise from [Valley Asphalt’s] negligent possession, use, operation or resale” of equipment, the INSTALLA-

TION paragraph specifically protects GenTec for injuries arising out of “the installation, erection, start-up, or use” thereof. By definition, injuries arising from Valley Asphalt’s installation could not be attributed to the condition of the product when sold (products liability), and therefore the INSTALLATION paragraph cannot be read to provide indemnification for products liability. Thus, GenTec is not entitled to indemnification for Bishop’s products liability claim.

[12] ¶23 GenTec has also argued on appeal that the plaintiffs’ cause of action against it was tried to the jury as both a products liability claim and a negligence claim, and that it is therefore entitled to the protections in the INDEMNIFICATION paragraph for negligence. We disagree. Bishop’s complaint against GenTec contains only one cause of action, for “Products Liability (Strict Liability in Tort).” The complaint alleges a defective and dangerous product, and asserts that the product was defectively designed and manufactured. It also alleges, as part of the defective design theory, that GenTec “so negligently, carelessly and recklessly designed, manufactured, . . . sold, . . . serviced and failed to warn relative to said silo system . . . so as to directly and legally cause the accident, injuries and damages to plaintiff as described herein, . . . as a result of the unreasonably dangerous defects in the silo system design, the plaintiffs’ husband and father, Douglas J. Bishop, was fatally injured.”

¶24 In several memoranda to the trial court, and now on appeal, GenTec cites the foregoing language as evidencing a theory of recovery for ordinary negligence, which it argues should bring Bishop’s claim within the negligence language of the INDEMNIFICATION & INSTALLMENT provisions of the contract. GenTec has misapprehended the applicable principles of products liability law.

[13] ¶25 Products liability always requires proof of a defective product, which can include “manufacturing flaws, design defects, and inadequate warnings regarding use.” *Grundberg v. Upjohn Co.*, 813 P.2d 89, 92 (Utah 1991). Alternative theories are available to prove different categories of defective

product, including negligence, strict liability, or implied warranty of merchantability. See, e.g., Restatement (Third) of Torts: Product Liability § 2 cmt. n (1997). Alternative theories entail different evidentiary burdens. For example, proof of a defect under a negligent manufacture theory will necessitate proof that the defective condition of the product was the result of negligence in the manufacturing process, or proof that the manufacturer knew or should have known of the defective condition, whereas these elements are unnecessary under strict liability or breach of warranty theories. Whatever the theory, however, the defendant's liability is for the defective product, and not merely for any underlying negligence. See generally, 63 Am.Jur.2d Products Liability § 8 (1996) ("In a products liability action, a defect in a product may consist of a mistake in manufacturing, improper design, or the inadequacy or absence of warnings regarding the use of the product.")

¶26 Thus, allegations of negligence contained in a claim for products liability do not transform the claim into one for ordinary negligence. GenTec has overlooked this principle in construing the import of the Special Verdict Form returned by the jury in this case. The Verdict Form asked: "1. When the product, the silo, left the defendant GenTec, was it in a defective condition, making the product unreasonably dangerous to the decedent?" and "3. Was the manufacturer, GenTec, negligent?" Both questions were answered in the affirmative by the jury, and GenTec now argues that the answer to question three demonstrates that this case was "submitted to the jury on negligence theories." We conclude, however, that the reference to negligence in question three could only have been connected to the plaintiff's theory of a product defect based on negligence, as an alternative to its theory of a product defect based on strict liability, which was addressed by question one. At least one state has expressly held that the adoption of strict liability doctrine does not abolish the theory of "product liability negligence" as proof of a product defect, *Big Rivers Elec. Corp. v. General Elec. Co.*, 820 F.Supp. 1123, 1127 (S.D.Ind.1992), and no argument has been made in this case that the theories are

mutually exclusive or inconsistent. See also *Monsanto Co. v. Reed*, 950 S.W.2d 811, 814 (Ky.1997). Therefore, we reject GenTec's argument that this claim sounded in negligence and was covered by the invoice's indemnification language.

### III. JURY VERDICT

[14] ¶27 Bishop appeals the trial court's denial of his motion to amend the jury verdict pursuant to Utah R. Civ. P. 60. Bishop also appeals the trial court's decision to strike the juror affidavits. GenTec properly argues that we should review a trial court's determination under Utah R. Civ. P. 59 and 60(b) pursuant to an abuse of discretion standard. We do not address rule 59, however, as rule 59 was not argued by Bishop to the trial court.

[15] ¶28 As noted above, Bishop originally filed a motion with the trial court pursuant to Utah R. Civ. P. 60(a) or (b) to amend the jury verdict to correct a clerical error; alternatively, the motion asked the court to amend the jury verdict pursuant to Utah R. Civ. P. 59. In spite of the caption of the motion referring to the alternative theory, Bishop actually argued at the hearing on the motion only for a correction of the jury verdict under rule 60. Further, Bishop's counsel orally conceded at the hearing that no tenable basis for relief existed under rule 59. "[I]t is the substance, not the labeling, of a motion that is dispositive in determining the character of the motion." *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶9, 20 P.3d 388. Thus, even though the motion was captioned as either a rule 60 or a rule 59 motion, we conclude that its substance requires us to treat it as a rule 60 motion to correct a clerical error.

¶29 Basing its ruling on *Rosenlof v. Sullivan*, 676 P.2d 372 (Utah 1983), which dealt with a rule 59 motion for a new trial, the trial court denied Bishop's motion and struck the juror affidavits pursuant to rule 59. The trial court did not state its grounds for denying Bishop's motion under rule 60, other than explaining that it believed Bishop's motion was substantively a motion to impeach the jury verdict pursuant to rule 59. We dis-

agree with the trial judge's characterization of the substance of the motion and conclude that Utah R. Civ. P. 60 is determinative, that the affidavits were admissible, and that the jury verdict should be amended to reflect the true intent of the jury.

¶30 "The correction contemplated by rule 60(a) must be undertaken for the purpose of reflecting the actual intention of . . . the parties." *Lindsay v. Atkin*, 680 P.2d 401, 402 (Utah 1984). "[I]n this broad approach to correctability under Rule 60(a), it matters little whether an error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having judgment, order, or other part of the record reflect what was done or intended." *Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983) (quoting Jean F. Rydstrom, Annotation, *Construction of Rule 60(a) of Federal Rules of Civil Procedure Authorizing Correction of Clerical Mistakes in Judgments, Orders, or other Parts of Record, and Errors Therein*, 13 A.L.R. Fed. 794 (1972)).

¶31 Prior to the adoption of the Utah Rules of Civil Procedure, we addressed the issue of whether a trial court could correct a jury verdict to reflect the true intent of the jury. In *Moulton v. Staats*, 83 Utah 197, 27 P.2d 455 (1933), we allowed the trial court to

correct a jury verdict to reflect the true intent of the jury. In *Suniland Corp. v. Radcliffe*, 576 P.2d 847 (Utah 1978), Justice Maughan argued that juror affidavits were admissible "to demonstrate what verdict was actually agreed upon." *Id.* at 850 (Maughan, J., dissenting).<sup>1</sup> Similarly we noted in *Brown v. Johnson*, 24 Utah 2d 388, 472 P.2d 942 (1970), that "[w]hile jurors may not by affidavit or otherwise impeach their verdict, they may give proof to explain it." *Id.* at 946 n. 1 More recently, the Tenth Circuit Court of Appeals has also determined that, under the Federal Rules of Civil Procedure, a jury verdict may be corrected to reflect the true intent of the jury. See *Eastridge Dev. Co. v. Halpert Assocs., Inc.*, 853 F.2d 772, 783 (10th Cir.1988).<sup>5</sup>

¶32 Bishop is not arguing in this case that the mistake was a judicial error made in rendering the judgment, but rather that the error was clerical and was made by the jury in "recording the judgment as rendered." We agree that accurately recording the intent of the jury in its calculation of the damage award constitutes correction of a clerical error, not a judicial error. "The distinction between judicial error and clerical error . . . depends on whether it was made in rendering the judgment or in recording the judgment as rendered." *Richards v. Siddo-*

sion regarding the verdict as rendered); *Newport Fisherman's Supply Co. v. Derektor*, 569 A.2d 1051, 1052-53 (R.I.1990); *State v. Williquette*, 190 Wis.2d 677, 526 N.W.2d 144, 151 (1995) (criminal case, but extended by the Wisconsin Supreme Court to both civil and criminal cases); see also 8 Wigmore, Evidence § 2355 (Chadbourn rev.1978) (discussing the admissibility of evidence to correct a jury verdict); J.F. Ghent, Annotation, *Competency of Juror's Statement or Affidavit to Show That Verdict in Civil Case Was Not Correctly Recorded*, 18 A.L.R.3d 1132 § 3 (1968) (discussing cases that allow clerical error exception).

Jurisdictions not admitting evidence to correct a jury verdict include: *Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir.1993); *Cyr v. Michaud*, 454 A.2d 1376, 1383-84 (Me.1983); *McKinney v. Smith*, 63 N.M. 477, 322 P.2d 110, 111 (1958); see also J.F. Ghent, Annotation, *Competency of Juror's Statement or Affidavit to Show That Verdict in Civil Case Was Not Correctly Recorded*, 18 A.L.R.3d 1132, §§ 6-7 (1968) (discussing cases that do not allow clerical error exception).

4. The court did not decide this issue as it was not properly before the court on appeal.

5. A split of authority currently exists over whether a court can admit evidence, including juror affidavits and testimony, to determine whether the jury verdict reflects the true intent of the jury and to correct the jury verdict. Jurisdictions admitting evidence to correct a jury verdict include: *United States v. Stauffer*, 922 F.2d 508, 513 (9th Cir.1990) (criminal case); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 73 (8th Cir. 1989) (narrowly interpreting the clerical error exception to apply to an error in transmission of the jury verdict); *Eastridge Dev. Co. v. Halpert Assoc., Inc.*, 853 F.2d 772, 783 (10th Cir.1988); *Attridge v. Concorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir.1987); *Umphrey v. Spunkel*, 106 Idaho 700, 682 P.2d 1247, 1254-55 (1983); *Latino v. Crane Rental Co.*, 417 Mass. 426, 630 N.E.2d 591, 593 (1994); *Moisakis v. Allied Bldg. Prods. Corp.*, 265 A.D.2d 457, 697 N.Y.S.2d 100, 105-06 (1999) (noting that juror evidence can be used to, correct clerical errors, but not to determine the extent of juror confu-

*way*, 24 Utah 2d 314, 471 P.2d 143, 145 (1970) (quoting 46 Am.Jur.2d *Judgments* § 202). Accordingly, the juror affidavits should have been admitted. On remand the jury verdict should be corrected to reflect the true intent of the jury by increasing the general and special damages to \$1,000,000 and \$1,067,000 respectively, and then deducting Bishop's percentage of fault as required by the LRA.

### CONCLUSION

¶ 33 We affirm the trial court's holding that the LRA precludes the application of the common law doctrine of respondeat superior; the legislature has pre-empted the common law. We reverse the trial court's determination on summary judgment that Valley Asphalt must indemnify GenTec for all liability. Finally, we reverse the trial court's decision to strike the juror affidavits and instruct the court below to increase the general and special damages award to \$1,000,000 and \$1,067,000 respectively, before deducting Bishop's percentage of fault.

¶ 34 Justice DURRANT, Justice WILKINS, and Judge BENCH concur in Justice DURHAM's opinion.

¶ 35 Associate Chief Justice RUSSON concurs in the result.

¶ 36 Having disqualified himself, Chief Justice HOWE did not participate herein; Court of Appeals Judge RUSSELL W. BENCH sat.



2002 UT 51

STATE of Utah, Plaintiff and Appellee,

v.

Travis E. TELFORD, Defendant  
and Appellant.

No. 20000654.

Supreme Court of Utah.

May 17, 2002.

Movant sought to correct murder sentence of five years to life imprisonment. The

First District Court, Brigham City, Ben H. Hadfield, J., denied motion. Movant appealed. The Supreme Court held that: (1) indeterminate sentencing scheme did not violate the separation of powers clause; (2) accomplice liability was not a per se violation of the Eighth Amendment; and (3) movant could not use motion as a vehicle to attack underlying conviction.

Affirmed.

### 1. Constitutional Law ⇨80(2)

#### Sentencing and Punishment ⇨1005

Indeterminate sentencing scheme was valid as against claim that it violated the separation of powers clause because it forced the sentencing judge to pass on his ultimate core judicial function of sentencing to the Board of Pardons and Parole. Const. Art. 5, § 1; U.C.A.1953, 77-18-4.

### 2. Sentencing and Punishment ⇨1452

Accomplice liability is not a per se violation of the Eighth Amendment, as the accomplice liability statute requires accomplices to have a comparable degree of culpability as the principal in order to be convicted of the same level of offense. U.S.C.A. Const. Amend. 8; Const. Art. 1, § 9; U.C.A.1953, 76-2-202.

### 3. Sentencing and Punishment ⇨2280

Claims under rule governing motion to correct illegal sentence are not restricted by time limits for bringing notice of appeal. Rules Crim.Proc., Rule 22(e).

### 4. Sentencing and Punishment ⇨2279

Claims under rule governing motion to correct illegal sentence are not waived by failure to raise them at the first opportunity before the District Court. Rules Crim.Proc., Rule 22(e).

### 5. Sentencing and Punishment ⇨2279

An illegal sentence is void and, like issues of jurisdiction, may be raised at any time. Rules Crim.Proc., Rule 22(e).

### 6. Sentencing and Punishment ⇨2254

Claims under rule governing motion to correct illegal sentence must be narrowly circumscribed to prevent abuse. Rules Crim.Proc., Rule 22(e).

### 7. Sentencing and Punishment ⇨2250

Motion to correct sentence was not proper vehicle for movant to raise claim that indeterminate sentencing scheme violated Sixth Amendment, which only pertained to rights of accused persons prior to conviction and did not create any distinct rights related to sentencing. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 12; U.C.A.1953, 77-18-4; Rules Crim.Proc., Rule 22(e).

### 8. Sentencing and Punishment ⇨2250

Movant could not use motion to correct sentence as a means to attack underlying murder conviction, which he attempted to do by raising constitutional challenges to accomplice liability statute. U.C.A.1953, 76-2-202; Rules Crim.Proc., Rule 22(e).

Mark L. Shurtleff, Att'y Gen., Jeffrey T. Colemere, Asst. Att'y Gen., Salt Lake City, for plaintiff.

Travis E. Telford, pro se.

### PER CURIAM.

¶ 1 Defendant Travis E. Telford was convicted of murder and received a sentence of five years to life. The Board of Pardons and Parole set his parole date in 2018. Telford petitioned for extraordinary relief. The district court denied the petition, the court of appeals affirmed, and this court declined to review the court of appeals' decision on certiorari. See *Telford v. Bd. of Pardons*, 29 P.3d 1 (Utah 2001).

¶ 2 Telford then moved for correction of his sentence under rule 22(e) of the Utah Rules of Criminal Procedure. The district court denied Telford's motion, and this appeal followed. Telford attacks the constitutionality of Utah's indeterminate sentencing scheme, section 77-18-4 of the Utah Code.

1. For instance, rule 22(e) may be employed to correct a sentence under circumstances where the sentencing court had no jurisdiction, or to

He claims indeterminate sentencing "forces the sentencing judge . . . to pass on his ultimate core judicial function of sentencing to the Utah State Board of Pardons and Parole," in violation of article V, section 1 of the Utah Constitution, the separation of powers clause. Telford also maintains indeterminate sentencing contravenes the Sixth and Eighth Amendments to the United States Constitution, and article I, sections 9 and 12 of the Utah Constitution. In particular, he maintains that because he was merely an accomplice to the murder, the State may not impose the same punishment on him as on his co-perpetrator or, for that matter, any other person who commits a crime classified as a first degree felony. Although his brief is not entirely clear on this issue, Telford appears to attack indeterminate sentencing on both per se and as applied grounds. We address his arguments as follows.

[1] ¶ 3 This court has already addressed and rejected the contention that Utah's indeterminate sentencing scheme violates the separation of powers clause. See *Padilla v. Bd. of Pardons*, 947 P.2d 664, 668-69 (Utah 1997). Telford has provided no basis for us to depart from our established precedent. We therefore reject his separation of powers argument.

[2] ¶ 4 To the extent Telford argues accomplice liability under section 76-2-202 of the Utah Code is a per se violation of the Eighth Amendment and article I, section 9 of the Utah Constitution, his contentions likewise fail. The accomplice liability provision requires the fact finder to determine that the accomplice had the same mental state as the person who directly committed the crime. See Utah Code Ann. § 76-2-202. Because the statute requires that accomplices bear a comparable degree of culpability to be convicted of the same level of offense, Telford's argument is meritless.

[3-6] ¶ 5 The balance of Telford's arguments are not properly raised under rule 22(e). The purpose of rule 22(e) is to allow correction of manifestly illegal sentences.<sup>1</sup>

correct a sentence beyond the authorized statutory range. See *State v. Babbel*, 813 P.2d 86, 87 (Utah 1991).

Tab 12

# **EXHIBIT 12**

DAVID SLAGLE (A2975)  
ROBERT R. HARRISON (A7878)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant Ashley Valley Medical Center  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

---

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

---

LORI HAASE,

Plaintiff,

vs.

ASHLEY VALLEY MEDICAL  
CENTER,

Defendant.

**DEFENDANT'S PROPOSED JURY  
INSTRUCTIONS AND SPECIAL  
VERDICT**

No. 98-0800377

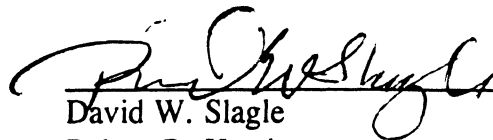
Judge Douglas L. Cornaby

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Defendant, Ashley Valley Medical Center, hereby requests that the Court instruct the jury in accordance with proposed instructions numbered 1 through 27, inclusive. Defendant further requests that the Court submit the case to the jury on special verdict in accordance with the form submitted herewith.

DATED this 28 day of February, 2002.

SNOW, CHRISTENSEN & MARTINEAU



David W. Slagle  
Robert R. Harrison  
Attorneys for Defendant

**INSTRUCTION NO. 1**

It is my duty to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. Even if you do not like the laws that must be applied, you must use them. On the other hand, it is your exclusive duty to determine the facts in this case, and to consider and weigh the evidence for that purpose. Your responsibility must be exercised with sincere judgment, sound discretion and honest deliberation.

**INSTRUCTION NO. 2**

In this case, the plaintiff alleges she was injured by a surgeon during an operation he performed in 1996. Her claim against the surgeon, Dr. Thomas Hawkes, has been settled and his negligence is not at issue in this trial. This trial is about what happened before her surgery.

The plaintiff claims that Ashley Valley Medical Center is responsible for her injury because it allowed Dr. Hawkes to use its operating room facilities. Specifically, she claims Dr. Hawkes made mistakes during the surgery; that the mistakes were made because he was impaired; that the hospital administrators knew or should have known about his alleged impairment; and that the hospital administrators were negligent in not taking away his privilege to use the operating room.

The plaintiff must prove, by a preponderance of the evidence, that Dr. Hawkes was impaired when he performed her surgery; that he would not have caused her injury but for his impairment; that the hospital failed to meet the standard for evaluating Dr. Hawkes; and that if the standard were met, it would have chosen to take away his privileges. You will be required to answer questions on the Verdict Form as to each of these issues. If you find that plaintiff has not met her burden on each issue, by a preponderance of the evidence, you will answer each such question “no.”



**INSTRUCTION NO. 3**

Whenever in these instructions it is stated that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you shall find that the same is not true. If the evidence is evenly balanced, as to its convincing force on any allegation, you must find that such allegation has not been proved.

**INSTRUCTION NO. 4**

The party upon whom the burden of proof rests must sustain it by a preponderance of the evidence. You should not base your verdict on speculation or conjecture as to negligence upon the part of either party or as to the cause of the injury or as to damage claimed.

If the evidence does not preponderate in favor of the party making the claim of negligence, proximate cause or damage, then that party has failed to fulfill his burden of proof and your finding must be against that party on that issue.

**INSTRUCTION NO. 5**

The term “preponderance of the evidence” means that evidence which, in your minds, seems to be of the greater weight; the most convincing and satisfactory. The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony, weighed impartially, fairly and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

**INSTRUCTION NO. 6**

This case must not be decided for or against anyone because you feel sorry for anyone or angry at anyone. It is your sworn duty to decide this case based on the facts and the law, without regard to sympathy, passion or prejudice.

**INSTRUCTION NO. 7**

This case must be decided only upon the evidence which you have heard from the witnesses, and have seen in the form of documents, photographs or other tangible things admitted into evidence.

Anything you may have seen or heard from any other source may not be considered by you in arriving at your verdict.

You should not consider as evidence any statement of the lawyers made during trial.

**INSTRUCTION NO. 8**

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. The lawyers are here to represent the best interests of their clients. It is the duty of the lawyer on each side of a case to object when the other side offers evidence which the lawyer believes is not admissible. You should not speculate as to the reasons for the objections, nor should you allow yourself to become angry at a party because a party's lawyer has made objections.

**INSTRUCTION NO. 9**

Your verdict must be based solely and exclusively upon the evidence in this case and upon the instructions outlining the law as given to you by the Court. You should not be influenced by preconceived opinions or prejudices or by sympathy or any other motive except to do justice between the parties to this case. You should not allow any sympathy which you may have for the Plaintiff to influence you in any degree whatsoever in arriving at your verdict. This does not mean that you may not sympathize with the Plaintiff, because it is only natural and human to sympathize with persons who have sustained misfortune, but you are instructed that you must not permit your feelings of sympathy to influence a fair and impartial consideration of the evidence.

Further, you are not permitted to base your verdict on speculation, guesswork or conjecture, nor upon what you think ought to be the law or the facts in this case.

**INSTRUCTION NO. 10**

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



**INSTRUCTION NO. 11**

In resolving any conflict that may exist in the testimony of medical experts, you may compare and weigh the opinion of one expert against that of another. In doing this, you may consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters on which such opinions are based.

**INSTRUCTION NO. 12**

An opinion is the expression of a conclusion or judgment which does not purport to be based on actual knowledge. In determining whether a particular statement was a statement of fact or merely an expression of opinion, you may consider the surrounding circumstances under which it was made, the manner in which the statement was made and the ordinary effect of the words used. You may also consider the relationship of the parties and the subject matter with which the statement was concerned.

**INSTRUCTION NO. 13**

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

**INSTRUCTION NO. 14**

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury. Expert testimony is required to show proximate cause in a claim of negligent credentialing.

**INSTRUCTION NO. 15**

On the Special Verdict, which requires you to answer specific questions, you will see that question number four asks you to find from a preponderance of the evidence, whether the hospital, through its administrators, was negligent in not restricting Dr. Thomas Hawkes' operating room privileges. In order to answer this question, if it becomes necessary to do so, you will have to decide whether the hospital acted below the appropriate standard of care. To do so would be negligence.

The only way you may properly learn the applicable standard of care is through evidence presented during this trial by individuals testifying as expert witnesses and through other evidence admitted for the purpose of defining the standard of care.

In deciding whether a hospital properly fulfilled its duties, you are not permitted to use a standard derived from your own experience with physicians, hospitals or any other standard of your own.

**INSTRUCTION NO. 16**

The fact that, for purposes of this suit, the hospital has stipulated that Dr. Thomas Hawkes was negligent during the operation that he performed on Lori Haase, should not be taken by you as any proof or indication that the hospital was negligent. As you have been told elsewhere in these instructions, the claims against the hospital are separate and distinct from the issues concerning whether Dr. Hawkes was or was not negligent.

**INSTRUCTION NO. 17**

You must determine whether Defendant complied with the standards of care applicable to it based upon the information available to it prior to the Plaintiff's surgery, rather than on the basis of facts which are revealed by later developments.

**INSTRUCTION NO. 18**

The Plaintiff bears the burden of proving, by a preponderance of the evidence, which evidence must include expert testimony, that the hospital's negligence, if any, more likely than not caused the injury or loss of which the Plaintiff complains.



**INSTRUCTION NO. 19**

Plaintiff is not entitled to your verdict merely by showing, by a preponderance of the evidence, that a defendant failed to conform to the standard of care elsewhere defined in these Instructions. Plaintiff must also prove, by a preponderance of expert medical testimony, that the injury or loss of which he complains would not have occurred if Ashley Valley Medical Center had conformed to the standard of care. In this connection, it is not enough for Plaintiff to have shown that the result might have been different, or that there is a possibility that the result would have been different, had a defendant conformed to the standard of care. In other words, unless Plaintiff has proved, by a preponderance of the expert medical testimony, that the result probably would have been different if the Hospital had conformed to the standard of care as defined in these Instructions, then Plaintiff has not proved that any injury or loss sustained by her was proximately caused by the conduct of the Defendant.

INSTRUCTION NO. 20

On the Special Verdict which will be submitted to you, you will find that question number five deals with the issue of damages. The following instruction is given to you to help answer that question, if it becomes necessary for you to do so.

A party who is injured as a proximate cause of negligence of another party is entitled to a monetary award which will fairly and adequately compensate the injured party for the injury and damage sustained. The plaintiff in this case has the burden of proving her damage by a preponderance of the evidence. You are not permitted to award damages for detriment which, although possible, are remote or based on conjecture or speculation.

Further, the fact that I have instructed you on the issue of damages is not to be taken as an indication that I either believe or do not believe that the Plaintiff is entitled to damages.

With that in mind, there are two kinds of damage:

**Special Damage:**

Special damages are those that are alleged to have been sustained in reference to the special circumstances of the plaintiff. They include the reasonable value of medical and nursing care, both medical and non-medical services and supplies and tools reasonably required and actually given in the treatment and/or care of the plaintiff and the reasonable value of such items that more probably than not will be required and given in the future.

Special damages also include lost earnings and loss of future earning capacity or loss of earning power.

In awarding special damages, you may consider the reasonable value of working time lost to date. In determining this amount, you should consider (1) evidence of the plaintiff's earning

capacity; (2) earnings; (3) how the plaintiff ordinarily was occupied; and (4) what the plaintiff was reasonably likely to have earned in the time lost if the plaintiff has not been injured.

If you find the plaintiff has suffered a loss of earning capacity, you should award the present case value of earning capacity reasonably likely to be lost in the future as a result of the injury in question.

Special damages also include the reasonable value of the loss of employee-related benefits, such as loss of or reduction in retirement benefits, health benefits, paid vacation, employee stock options and savings benefits and the like.

**General Damages:**

In awarding damages, you may consider any pain, discomfort, and suffering, both mental and physical, its probable duration and severity, and the extent to which the plaintiff has been prevented from pursuing the ordinary affairs of life as previously enjoyed. You may also consider whether any of the above will, more likely than not, continue in the future. If so, you may award such damages as will fairly and justly compensate the plaintiff for them.

No definite standard or method of calculation is prescribed by law to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment, and the damages you fix shall be just and reasonable in light of the evidence.

**INSTRUCTION NO. 21**

The law forbids you to decide any issue in this case by resorting to chance. If you decide that a party is entitled to recover, you may then determine the amount of damages to be awarded. It would be unlawful for you to agree in advance to take the independent estimate of each juror, then total the estimates, draw an average from the total, and to make the average the amount of your award. Each of you may express your own independent judgment as to what the amount should be. It is your duty to thoughtfully consider the amounts suggested, test them in the light of the law and the evidence and, after due consideration, determine which, if any, of such individual estimates is proper.

**INSTRUCTION NO. 22**

In this case you may not include in any award to Plaintiff any sum for the purpose of punishing the Defendant, or to make an example of it for the public good or to prevent other injuries. Such damages would be punitive rather than compensatory, and the law does not authorize punitive damages in this action.

**INSTRUCTION NO. 23**

The amount of damages for any loss to be suffered in the future would not be the present payment of the total of such damages, but must be discounted to the present cash value of such future benefit. Therefore, in determining the present value of any future benefit lost to the Plaintiff as a result of the injury, you should calculate the same on the basis that any sum you might award will be invested with reasonable wisdom and frugality, and that all of it, except the amount currently needed to compensate for the loss sustained, will be kept so invested as to yield a rate of return consistent with reasonable security.

INSTRUCTION NO. 24

It has never been my intention to give any hint that you should return one verdict or another in this case. Please understand that I do not wish in any way to influence your verdict. It would be improper for me to do so. Deciding a proper verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything that I may have said or done if it made you think that I preferred one side over another, that I believed one witness over another, or that I considered any piece of evidence more important than another.

You are the exclusive judges of the facts and the evidence. It is your duty to render a just verdict based upon the facts and the evidence.

**INSTRUCTION NO. 25**

Your attitude and conduct at the outset of your deliberations is very important. It will not be productive for any of you, upon entering the jury room, to make an emphatic expression of your opinion on the case, or to announce a determination to stand for a certain verdict. When that happens, your sense of pride may be aroused and you may hesitate to recede from an announced position, even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges. Your deliberations in the jury room are for the ascertainment and declaration of the truth and the administration of justice.



**INSTRUCTION NO. 26**

It is your duty to make findings of fact as to the questions I will submit to you. In making your findings of fact, you should bear in mind that the burden of proving any disputed fact rests upon the party claiming the fact to be true, and that fact must be proved by a preponderance of the evidence.

This is a civil action and six members of the jury may find and return a verdict. At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question, have the verdict signed and dated by your foreperson and then return it to this room.

**INSTRUCTION NO. 27**

Upon retiring to the jury room you will select one of you to act as foreperson, who will preside over your deliberations and sign the verdict to which you agree. The foreperson should not dominate the jury, but the foreperson's opinion should be given the same weight as the opinions of the other members of the jury.

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

---

LORI HAASE,

Plaintiff,

vs.

ASHLEY VALLEY MEDICAL CENTER,

Defendant.

**SPECIAL VERDICT**

No. 98-0800377

Judge Douglas L. Cornaby

---

We, the jurors empaneled in the above-entitled case, answer the questions put to us as follows:

1. Do you find from a preponderance of the evidence that Dr Thomas Hawkes was physically impaired at the time he operated on Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If you answered question number 1 “no” then do not answer the following questions. Have your foreperson sign the verdict and return to the courtroom.**

2. Do you find from a preponderance of the evidence that Dr. Thomas Hawkes’ physical impairment was a proximate cause of injury to Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If you answered question number 2 “no” then do not answer the remaining questions. Have your foreperson sign the verdict and return to the courtroom.**

3. Do you find from a preponderance of the evidence that Ashley Valley Medical Center, through its administrators, knew or should have known that Dr. Thomas Hawkes was physically impaired at the time he operated on Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If you answered question number 3 “no” then do not answer the remaining questions. Have your foreperson sign the verdict and return to the courtroom.**

4. Do you find from a preponderance of the evidence that Ashley Valley Medical Center, acting through its administrators, was negligent in not restricting Dr. Hawkes’ operating privileges at the time he operated on Lori Haase?

Yes \_\_\_\_\_

No \_\_\_\_\_

**If, and only if, you answered questions numbered 1 through 4 “yes,” then answer the following question.**

5. What sum of money do you find from a preponderance of the evidence will fairly and adequately compensate Lori Haase for her injuries:

Special damages	\$ _____
General damages	\$ _____
TOTAL	\$ _____

DATED this \_\_\_\_\_ day of February, 2002.

\_\_\_\_\_  
Jury Foreperson

NA10749\151\MN\SPECVERD.DWS

ROBERT R. HARRISON (A7878)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant Ashley Valley Medical Center  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

---

IN THE EIGHTH JUDICIAL DISTRICT COURT OF 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.

CERTIFICATE OF SERVICE

No. 98-0800377

Judge Boyd Bunnell

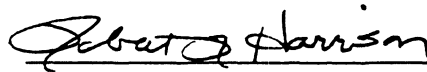
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Pursuant to Rule 4-502, Code of Judicial Administration, Robert R. Harrison of Snow,  
Christensen & Martineau, attorneys for Defendant Ashley Valley Medical Center, hereby certifies  
that he served upon all counsel of record the following:

**DEFENDANT’S PROPOSED JURY INSTRUCTIONS AND SPECIAL  
VERDICT and SPECIAL VERDICT.**

DATED this   1   day of March, 2002.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in cursive script, appearing to read "Robert R. Harrison", is written over a horizontal line.

Robert R. Harrison  
Attorneys for Defendants

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 CERTIFICATE OF SERVICE (Case Number 98-0800377, Eighth Judicial District Court in and for Uintah County) 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  
648 East 100 South  
Salt Lake City, Utah 84102

Honorable Douglas L. Cornaby (Original and one copy)  
3612 North 2900 East  
Layton, Utah 84040

and causing the same to be hand delivered on the 1<sup>st</sup> day of March, 2002.



N:\10749\151\CERTSERV.WPD



Tab 13

# EXHIBIT 13

Douglas G. Mortensen, USB #2329  
**MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
Telephone (801) 363-2244

Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF UINTAH COUNTY, STATE OF UTAH

LORI HAASE,	:	
	:	
Plaintiff,	:	<b>PLAINTIFF'S SUBMISSION</b>
	:	<b>OF PROPOSED JURY</b>
vs.	:	<b>INSTRUCTIONS</b>
	:	
ASHLEY VALLEY MEDICAL CENTER	:	
AND COLUMBIA ASHLEY VALLEY	:	Civil No. 98-0800377
MEDICAL CENTER, AND JOHN DOE	:	
DEFENDANTS 1 THROUGH 10	:	Judge Douglas L. Cornaby
	:	
Defendants.	:	

Plaintiff Lori Haase submits to the court the attached proposed jury instruction to be submitted to the jury. Plaintiff asks leave to reserve the right to submit additional instructions and/or withdraw instruction she has submitted based on the actual evidence presented at trial.

DATED this 7 day of February, 2002.



Douglas B. Mortensen  
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.  
Attorneys for Plaintiff

### CERTIFICATE OF SERVICE

I certify that on the \_\_\_\_ day of February, 2002 I caused to be served via the method indicated a copy of the foregoing to the following:

Robert R. Harrison  
Snow, Christensen & Martineau  
10 Exchange Place, 11<sup>th</sup> Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

- ☒ U.S. Mail
- ☐ Facsimile - 363-0400
- ☐ Hand-Delivered
- ☐ Federal Express

~~Jaryl L. Rencher  
Epperson & Rencher  
5<sup>th</sup> Floor Crandall Building  
10 West 100 South  
Salt Lake City, Utah 84111-1566~~

- ☒ U.S. Mail
- ☐ Facsimile - 983-9808
- ☐ Hand-Delivered
- ☐ Federal Express

Honorable Douglas L. Cornaby  
Eighth District Court Judge  
3612 North 2900 East  
Layton, UT 84040

- ☒ U.S. Mail
- ☐ Facsimile
- ☐ Hand-Delivered
- ☐ Federal Express

Lori Lima  
Assistant Attorney General  
160 East 300 South  
P.O. Box 140872  
Salt Lake City, UT 84114-0872

- ☒ U.S. Mail
- ☐ Facsimile
- ☐ Hand-Delivered
- ☐ Federal Express

*John B. ...*

---

Haase\AshleyValley.PldgJury instructions

INSTRUCTION NO. \_\_\_\_

**CREDIBILITY OF WITNESSES**

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

***References:***

MUJI 2.9

**INSTRUCTION NO. \_\_\_\_**

**INCONSISTENT STATEMENTS**

**You may believe that a witness, on some former occasion, made statements inconsistent with that witness' testimony given here in this case.**

**That does not necessarily mean that you are required to entirely disregard the present testimony. The effect of such evidence upon the credibility of the witness is for you to determine.**

***References:***

MUJI 2.10

INSTRUCTION NO. \_\_\_\_

**EFFECT OF WILLFULLY FALSE TESTIMONY**

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness, except as that witness may have been corroborated by other credible evidence.

*References:*

MUJI 2.11



INSTRUCTION NO. \_\_\_\_

**DEPOSITION TESTIMONY**

**In the present action, certain testimony has been read to you by way of deposition. You are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration as if the witness had personally appeared.**

***References:***

MUJI 2.12

**INSTRUCTION NO. \_\_\_\_\_**

**OUT OF STATE/TOWN EXPERTS**

The fact that an expert witness resides or pursues his or her profession in another state or community should not effect the weight you give that witnesses' testimony. A party may rely upon qualified experts from other states and countries in presenting evidence to the jury.

**INSTRUCTION NO. \_\_\_\_\_**

**CONFLICT BETWEEN MEDICAL EXPERTS**

In resolving any conflict that may exist in the testimony of medical experts, you may compare and weigh the opinion of one expert against that of another. In doing this, you may consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters on which opinions are based.

**INSTRUCTION NO. \_\_\_\_\_**

**INTRODUCTORY INSTRUCTION ON NEGLIGENCE**

In this case the plaintiff claims the defendant was negligent in failing to protect her from injury by Dr. Hawkes. In particular, the plaintiff claims that the defendant negligently extended hospital operating room privileges to Dr. Hawkes and/or failed to exercise reasonable care in seeing that patients treated by Dr. Hawkes at the hospital received appropriate care and treatment from a competent, non impaired surgeon. The plaintiff asserts that the defendant knew or should have known that at the time Dr. Hawkes performed surgery on her he was not in a fit condition to perform that surgery and that the injury inflicted during that surgery and the damages flowing therefrom would not have occurred but for the negligent, reckless or otherwise wrongful acts and omissions of Columbia Ashley Valley Medical Center in extending hospital operating room privileges to Dr. Hawkes and/or in otherwise failing to exercise reasonable care to see that patients treated by him received appropriate surgical care and treatment.

To return a verdict for the plaintiff, you must find by a preponderance of the evidence that:

1. The defendant was negligent in one or more of the particulars alleged by the plaintiff; and
2. The defendant's negligence was a proximate cause of the plaintiff's injuries.

If you find in favor of the plaintiff on those two questions, you must then decide the amount of the damages suffered by the plaintiff.

MUJI 3.1; See also JIFU 2.5 (1957)

**INSTRUCTION NO. \_\_\_\_\_**

**RIGHT TO RECOVER FOR NEGLIGENT CONDUCT**

A hospital has a duty to use reasonable care to protect patients being treated at the hospital from injury. "Negligence" simply means the failure to use reasonable care.

The amount of care that is considered "reasonable" depends on the situation. You must decide what a prudent hospital with similar knowledge and/or with access to information available here would do in a similar situation. Negligence may arise in acting or in failing to act.

A party whose injuries or damages are caused by another party's negligent conduct may recover compensation from the negligent party for those injuries or damages.

### **AMOUNT OF CARE REQUIRED VARIES WITH CONDITIONS**

The amount of care that is considered “reasonable” depends on the situation. Some situations require more caution because an institution of ordinary prudence would understand that more danger is involved. In other situations, less care is expected, such as when the risk of danger is low or when the situation happens so suddenly that a person of ordinary prudence would not appreciate the danger.

**INSTRUCTION NO. \_\_\_\_\_**

**AMOUNT OF CAUTION REQUIRED FOR DANGEROUS ACTIVITIES**

Because of the great danger involved in human surgery, those who are engaged in providing facilities for such surgery are held to a higher-than-ordinary standard of care and must exercise extra caution for the protection of patients undergoing surgery. The greater the danger, the greater the care that must be used.

**INSTRUCTION NO. \_\_\_\_\_**

**ROLE OF CUSTOM IN JUDGING BEHAVIOR**

When deciding whether a corporation is negligent, you may consider customs of behavior, such as business customs or industry customs, However, following a custom does not necessarily mean a corporation exercised ordinary care. It is merely a factor you may consider. A custom or standard may be negligent in and of itself.



**INSTRUCTION NO. \_\_\_\_\_**

**VIOLATION OF INDUSTRY STANDARD**

A violation of an industry standard intended to protect patients from harm is evidence of negligence if it is shown that:

1. The person injured belongs to a class of people the standard intended to protect; and
2. The standard intended to protect against the type of harm which in fact occurred as a result of the violation.

**INSTRUCTION NO. \_\_\_\_\_**

**NEGLIGENCE OF COMMISSION VERSUS OMISSION**

Negligence is of two kinds. The first kind is the doing of something that an ordinarily careful and prudent person or, in this case, hospital, would not have done under the same or similar circumstances; the second kind is the omission to do something than an ordinarily careful and prudent person or, in this case, hospital, would have done in the same situation.

**INSTRUCTION NO. \_\_\_\_\_**

**NON NEGLIGENCE OF PLAINTIFF**

You are instructed as a matter of law that the plaintiff, Lori Haase, was not negligent.

**INSTRUCTION NO. \_\_\_\_\_**

**DUTY OF HOSPITAL TO COMPLY WITH STANDARD OF CARE**

A hospital is required to exercise the same degree of care ordinarily possessed and used by other hospitals in good standing. The law requires a hospital to exercise the degree of care that other qualified hospitals would ordinarily exercise under the same circumstances.

**INSTRUCTION NO. \_\_\_\_\_**

**DUTY OF HOSPITAL TOWARD PATIENT**

It is the duty of a hospital toward a person received as a patient to use reasonable care in the selection of both its employees and its staff physicians and surgeons and in otherwise providing for the needs of the patient.

If the hospital undertakes, through the agency of any person in its employ, to provide to the patient the services of a surgeon, the hospital's duty is to perform such services in accordance with the standard of care required by law of such surgeon.

**INSTRUCTION NO. \_\_\_\_\_**

**CORPORATION'S LIABILITY FOR ITS EMPLOYEES'  
NEGLIGENCE AND BREACH OF DUTY OF CARE**

In this case, Columbia Ashley Valley Medical Center leased certain employees to Dr. Hawkes. While those employees were performing services for the benefit of Dr. Hawkes and his medical practice, they remained employees of Columbia Ashley Valley Medical Center. If you find that any such employee breached a duty to act in the best interests of patients of Columbia Ashley Valley Hospital, either by acting or failing to act, such breach of duty is imputed to the medical center itself. Columbia Ashley Valley Medical Center is liable for the acts and omissions of its employees under the Doctrine of Respondeat Superior, including the employees it leased to Dr. Hawkes.

**INSTRUCTION NO. \_\_\_\_\_**

**CORPORATION ACTS THROUGH ITS AGENTS**

Columbia Ashley Valley Medical Center is a corporation and, as such, can act only through its officers and employees, and others designated by it as its agents.

Any act or omission of an officer, employee or agent of a corporation, in the performance of the duties or within the scope of the authority of the officer, employee or agent, is the act or omission of the corporation.

**INSTRUCTION NO. \_\_\_\_\_**

**LIABILITY OF PRINCIPAL FOR ACTS OF AGENT**

The acts or omissions of an agent are, in contemplation of law, the acts and omissions of the agent's principal, so long as they are done within the scope of the agent's employment. If, therefore, an employee of Columbia Ashley Valley Medical Center was acting within the scope of his or her employment at the time the events in question occurred, then Columbia Ashley Valley Medical Center is responsible for such conduct.



**INSTRUCTION NO. \_\_\_\_\_**

**SCOPE OF AGENT'S AUTHORITY DEFINED**

In order for Columbia Ashley Valley Medical Center to be held responsible for the act or acts of one or more of its employees, the act or acts must be within the scope of the agent's employment authority either expressed or implied. However, it is not necessary that the specific act, or failure to act, be expressly authorized by the employer to bring it within the scope of the agent's employment. An act is within the scope of an agent's authority

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In order for Columbia Ashley Valley Medical Center to be held responsible for the act or acts of one or more of its employees, the act or acts must be within the scope of the agent's employment authority either expressed or implied. However, it is not necessary that the specific act, or failure to act, be expressly authorized by the employer to bring it within the scope of the agent's employment. An act is within the scope of an agent's authority if it is done while the agent is doing anything which his or her contract of employment expressly or impliedly authorizes him or her to do or which would be reasonably incidental to his or her employment.

**INSTRUCTION NO. \_\_\_\_\_**

**AGENCY ESTABLISHED**

It has been established that Ron Perry, Sherry Stettler and \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, were acting as agents for Columbia Ashley Valley Medical Center and within the scope of their employment at the time the events in question occurred. If you find, therefore, that any alleged act or omission of any of these persons occurred, such act or omission is attributable or chargeable to the employer, Columbia Ashley Valley Medical Center.

## SCOPE OF EMPLOYMENT

INSTRUCTION NO. \_\_\_\_

Scope of employment refers to those acts which are so closely connected with what the employee is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment. In general, the servant or employee's conduct is within the scope of <sup>his or</sup> her employment if it is of the kind of which <sup>he or</sup> she is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the employer.

### References:

*Burkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989);  
W. Keeton, Prosser & Keeton On The Law of Torts Section 70, at 502 (5th Edition 1984);  
Restatement (Second) of Agency Section 228

**INSTRUCTION NO. \_\_\_\_\_**

**SCOPE OF EMPLOYMENT**

An employer is liable for the act or omission of its employee when the employee is acting within the scope of the employee's employment authority at the time of the act or omission. An employee is acting within the scope of the employee's employment authority if each of the following is true:

1. The employee is engaged in conduct of the general kind the employee was employed to perform; in other words, the employee was engaged in carrying out the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor; and
2. The employee's conduct occurs within working hours, and within the normal work place; and
3. The employee's conduct was motivated, at least in part, by the purpose of serving the employer's interest.

If you find that, at the time of the act or omission in question, the employee deviated from the employer's express or implied orders or wishes or attended to business other than that of the employer, but was serving the employer's interests at the same time, the employee was acting in the scope or course of employment and the employer shall be held liable for the acts or omissions of the employee.

**INSTRUCTION NO. \_\_\_\_\_**

**LIABILITY FOR PHYSICIAN PREDICATED ON LACK OF SUPERVISION**

A hospital owes to its patients a duty, irrespective of whether the physician who treated the patient was its employee or agent or was an independent contractor, to review, monitor and supervise the care and treatment administered within its facility. If you find from the evidence that Columbia Ashley Valley Medical Center deviated from the standards of care required of it in the performance of this duty and that the injury to Mrs. Haase resulted from such breach of duty, you must find the hospital liable.

Kelley v. Wiggin, 724 SW2d 443 (Ark. 1987); Traxler v. Varady, 12 Cal App. 4<sup>th</sup> 1321, 16 Cal Rptr 2d 297 (1993); Camacho v. Mennonite Bd of Missions, 703 P2d 598 (Colo. 1985); Cronic v. Doud, 523 NE 2d 176 (Ill. 1988); Yaney v. McCray Mem. Hosp, 496 NE2d 135 (Ind. App. 1986); Sibley v. Board of Supervisors of Louisiana State Univ., 446 S2d 760 (LA. App. 1983); Oehler v. Humana, Inc., 775 P2d 1271 (Nev. 1989); Marek v. Professional Health Services, Inc., 432 Atl 2d 538 (NJ. Super. 1981); Schoening v. Grays Harbor Community Hosp., 698 P2d 593 (Wash. 1985).

**INSTRUCTION NO. \_\_\_\_\_**

**LIABILITY FOR PHYSICIAN PREDICATED ON NEGLIGENCE  
IN EXTENDING AND/OR CONTINUING STAFF PRIVILEGES**

The law requires a hospital to screen its medical staff to ensure that only competent physicians are permitted to treat its patients. If, therefore, you find from the evidence that Columbia Ashley Valley Medical Center knew or ought to have known that Dr. Hawkes' condition or propensities made him a danger to patients and that but for Ashley Valley's failure to remove him, failure to adequately monitor and supervise him or failure to cease extending him privileges to operate in the hospital Mrs. Haase's injury would have not occurred, you must find for the plaintiff against the hospital.

Townsend v. Kiracoff, 545 F. Supp. 465 (D. Colo. 1982); Focke v. U.S., 597 F. Supp. 1325 (D. Kan. 1982); Jackson v. Power, 743 P2d 1376 (Alaska 1987); Ziegler v. Superior Court of Pima County, 656 P2d 1251 (Ariz. 1982); Park North General Hospital v. Hickman, 705 SW2d 262 (Texas App. 1985); Alexander v. Gonser, 711 P2d 347 (Wash. 1985); Greenwood v. Wierdsma, 741 P2d 1079 (Wyo. 1987).

**INSTRUCTION NO. \_\_\_\_\_**

**LIABILITY FOR PHYSICIAN PREDICATED ON OSTENSIBLE AGENCY**

In this action there is evidence tending to show that Dr. Hawkes was not an employee of Columbia Ashley Valley Medical Center but was an independent contractor. Should you determine this to have been so, if you find from the evidence that the hospital held itself out to the public as an institution furnishing doctors, staff and facilities for the care of the public, and that Mrs. Haase undertook treatment by Dr. Hawkes by reason of reasonable reliance of such a holding out, your verdict on the question of liability for any resulting injury should be for the plaintiff against the hospital.

Jackson v. Power, 743 P2d 1376 (Alaska 1987); Gilbert v. Sycamore Mun. Hosp., 622 NE 2d 788 (Ill. 1993); Golden v. Kishwaukee Community Health Services Center, 645 NE2d 319 (Ill. App. 1994); Adamski v. Tacoma General Hospital, 579 P2d 970 (Wash. 1978); Pamperin v. Trinity Memorial Hospital, 423 NW2d 848 (Wisc. 1988).



## INTRODUCTORY INSTRUCTION ON PROXIMATE CAUSE

*In my introductory statement to you on the concept of negligence, you will recall that I informed you that in order for any party to prevail on a claim of negligence against another party, that party must prove that the other party's negligence was a proximate cause of the injury complained of. I will now explain to you the concept of proximate cause.*

A proximate cause of an injury is that cause which, in natural and continuance sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

### References:

MUJI 3.13 (1993) (*Modified by adding 1<sup>st</sup> paragraph to connect Causation to Negligence*)

Proximate Cause Established by Negligence

Which Increases Risk of Harm

Instruction No. \_\_\_\_

Proximate cause may be established by evidence that the negligence of a party was a substantial factor in bringing about the injury or in increasing the risk of harm to the plaintiff.

References:

George v. LDS Hospital, 797 P2d 1117 (Ut App 1990)

Restatement (Second) of Torts, Section 323

**INSTRUCTION NO. \_\_\_\_\_**

**CONCURRENT PROXIMATE CAUSES**

There may be more than one proximate cause of the same injury. If the negligence of a person and a corporation combines to produce an injury, and the negligence of each of them is a proximate cause of the injury, then the person and the corporation must share liability for the resulting injury, in proportion to their individual negligence.

**INSTRUCTION NO. \_\_\_\_\_**

**RES IPSA LOQUITUR**

You may draw an inference of negligence on the part of a physician or hospital if each of three elements is established by a preponderance of the evidence:

1. That the patient's injury was of a kind which, in the ordinary course of events, would not have happened had due care been observed; and
2. That the patient's actions were not responsible for the injury; and
3. That the cause of the injury was under the exclusive management or control of the physician or hospital.

If you find each of the foregoing elements by a preponderance of the evidence, then negligence on the part of the physician or hospital may be inferred and would be sufficient to support a finding of negligence. The defendant may introduce evidence to rebut the inference of negligence. It is your duty to resolve conflicts in the evidence.

**INSTRUCTION NO. \_\_\_\_\_**

**PROXIMATE CAUSE**

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

To find "proximate cause," you must first find a cause and effect relationship between the negligence and plaintiff's injury. But cause and effect alone is not enough. For injuries to be proximately caused by negligence, two other factors must be present:

1. The negligence must have played a substantial role in causing the injuries; and
2. A reasonable person could foresee that injury could result from the negligent behavior.

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**RES IPSA LOQUITUR**

You may draw an inference of negligence on the part of a physician or hospital if each of three elements is established by a preponderance of the evidence:

1. That the patient's injury was of a kind which, in the ordinary course of events, would not have happened had due care been observed; and
2. That the patient's actions were not responsible for the injury; and
3. That the cause of the injury was under the exclusive management or control of the physician or hospital.

If you find each of the foregoing elements by a preponderance of the evidence, then negligence on the part of the physician or hospital may be inferred and would be sufficient to support a finding of negligence. The defendant may introduce evidence to rebut the inference of negligence. It is your duty to resolve conflicts in the evidence.

**INSTRUCTION NO. \_\_\_\_\_**

**INTRODUCTORY INSTRUCTION ON DAMAGES**

If you find the issues in favor of Lori Haase and against Columbia Ashley Valley Medical Center, then it is your duty to award Lori Haase such damages that you find from a preponderance of the evidence will fairly and adequately compensate her for the injury and damage sustained.

## **GENERAL DAMAGES**

**INSTRUCTION NO. \_\_\_\_\_**

In awarding damages, you may consider any pain, discomfort, and suffering, both mental and physical, its probable duration and severity, and the extent to which the plaintiff has been prevented from pursuing the ordinary affairs of life as previously enjoyed. You may also consider whether any of the above will, more likely than not, continue in the future. If so, you may award such damages as will fairly and justly compensate the plaintiff for them. *Such damages are called general damages.*

No definite standard or method of calculation is prescribed by law to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment, and the damages you fix shall be just and reasonable in light of the evidence.

### *References:*

**MUJI 27.2 (1993) (*Modified*)**



## **SPECIAL DAMAGES**

### **INSTRUCTION NO. \_\_\_\_\_**

The law also allows you to award special damages. Special damages are those that are alleged to have been sustained in reference to the special circumstances of the plaintiff. They include the reasonable value of medical and nursing care, both medical and non-medical services and supplies and tools reasonably required and actually given in the treatment and/or care of the plaintiff and the reasonable value of such items that more probably than not will be required and given in the future.

Special damages also include lost <sup>earnings</sup>~~wages~~ and loss of future earning capacity or loss of earning power.

In awarding special damages, you may consider the reasonable value of working time lost to date. In determining this amount, you should consider (1) evidence of the plaintiff's earning capacity; (2) earnings; (3) how the plaintiff ordinarily was occupied; and (4) what the plaintiff was reasonably likely to have earned in the time lost if the plaintiff had not been injured.

If you find the plaintiff has suffered a loss of earning capacity, you should award the present cash value of earning capacity reasonably likely to be lost in the future as a result of the injury in question.

Special damages also include the reasonable value of the loss of employed-related benefits, such as loss of or reduction in retirement benefits, health benefits, paid vacation, employee stock options and savings benefits and the like.

*Reference:*

BLACK'S LAW DICTIONARY 353, 354 (5th ed. 1979)

BLACK'S LAW DICTIONARY 396 (7th ed. 1999)

MUJI 27.3 (1993)

MUJI 27.4 & 27.5 (1993) (modified)

**AMOUNT OF DAMAGE NEED NOT BE  
PROVED WITH PRECISION**

**INSTRUCTION NO. \_\_\_\_\_**

Although an award of damages may not be based only on speculation, some degree of uncertainty in the evidence of damages will not relieve a defendant from recompensing a wronged plaintiff. As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of some uncertainty. Where there is evidence of the fact of damage, a defendant may not escape liability because the amount of damage cannot be proved with precision. The amount of damages may be based on approximations if the fact of damage is established and the approximations are based on reasonable assumptions or projections.

*References:*

*Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985)  
*Bastian v. King*, 661 P.2d 953, 957 (Utah 1983)  
*Sampson v. Richins*, 770 P.2d 998, 1007 (Utah Ct. App. 1989)

**DAMAGE AWARD NOT TO BE DIMINISHED  
BY COLLATERAL SOURCE PAYMENTS, IF ANY.**

**INSTRUCTION NO. \_\_\_\_\_**

Any fact or inference in the evidence that any portion of Mrs. Haase damages may have been paid by some person or entity other than Mrs. Haase is not to be considered by you or used to diminish the damage award you make, if any. The fact, if it be a fact, that any of the plaintiff's claimed expenses or damages were or may be paid by some source other than the plaintiff's own funds does not effect the plaintiff's right to recover for such expenses or damages.

It is the court's duty following trial to see that what other damages are awarded are allocated or distributed to the party who, by law, is entitled to receive them. You are instructed not to concern yourself with such matters. They will be handled by the court in due course following trial. This instruction applies with respect to past, present and future damages.

**References:**

MUJI 14.16  
MUJI 27.3, comment to MUJI 27.3  
Utah Health Care Malpractice Act (UCA §78-14-1 et seq.)

**INSTRUCTION NO. \_\_\_\_\_**

**FAILURE TO PRODUCE EVIDENCE**

In this case you have heard mention of drug screen tests administered to Dr. Hawkes prior to his perform surgeries at the hospital. You have also heard mention of a report from a surgeon in Texas who operated on Dr. Hawkes' neck in the Spring of 1995. You have also heard mention of Dr. Hawkes having received treatment on more than one occasion in the emergency room of Columbia Ashley Valley Hospital. Finally, there is evidence that the surgery Dr. Hawkes performed on Mrs. Haases' knee was videotaped. Where evidence which would properly part of a case is within the control of the party in whose interests it naturally would be to produce it, and without satisfactory explanation the party fails to produce it, you may infer that the evidence would be unfavorable to that party if the party had produced it. In other words, the failure of Columbia Ashley Valley Medical Center to produce evidence on the matters in question or to provide a satisfactory explanation for its failure to do so permits you do believe that had the missing evidence been produced, it would have been unfavorable to the hospital.

Burns v. Cannondale Bicycle Company, 876 P2d 415 (Utah App. 1994); Nation-wide Check Corp. v. Forest Hills Distribs, Inc. 692 F2d 214, 217-18 (First Cir. 1982); National Association of Radiation Survivors v. Turnage, 115 F.R.D., 543, 557, 58 (N.D. Cal. 1987); Williams, et al. v. Washington Hospital Center, 601 A.2d 28, 31 (D.C. Col. 1991)

**EFFECT OF FAILURE TO PRODUCE  
AVAILABLE STRONGER EVIDENCE**

**INSTRUCTION NO. \_\_\_\_\_**

If you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you may view with distrust any weaker and less satisfactory evidence actually offered by him or her on that point, unless such failure is satisfactorily explained.

*References:*

JIFU 3.13; BOJI 30;  
*Cram v. Reynolds*, 55 Utah 384, 186 P. 100.

**WHEN UNFAVORABLE PRESUMPTION  
IS JUSTIFIED**

**INSTRUCTION NO. \_\_\_\_\_**

You are instructed that the highest proof of which any fact is susceptible is that which presents itself to the senses of the court or jury. Neglect, then, to produce such evidence by any party who has it in his power justifies an unfavorable presumption against that party and you are at liberty to draw an unfavorable inference against such party if you think it warranted under all the circumstances and believe such party has failed to produce any such evidence.

*References:*

*State v. Campbell*, 116 Utah 74, 208 P.2d 530 (Utah 1949)

**INSTRUCTION NO. \_\_\_\_\_**

**PUNITIVE DAMAGES**

Punitive damages may be awarded if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the responsible party are the result of willful and malicious intentional fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

You are instructed that under current Utah law in any judgment where punitive damages are awarded and paid, fifty percent of the amount of the punitive damages in excess of \$20,000 shall, after payment of attorneys' fees and costs, be remitted to the State Treasurer for deposit into the State's General Fund.

UCA §78-18-1 (1)(a) and (3) (1991).