Agenda
Advisory Committee on
Model Civil Jury Instructions

November 12, 2013
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
CV2231 Damages for contractor's defective work.	Tab 2	John Young
Pro Se Litigant Instructions.	Tab 3	Gary Johnson John Young Judge Ryan Harris
CV324 Use of alternative treatment methods.	Tab 4	Ryan Springer
Insurance Litigation Instructions	Tab 5	Rich Humpherys

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

December 9, 2013
January 13, 2014
February 10, 2014
March 10, 2014
April 14, 2014
May 12, 2014
June 9, 2014
September 8, 2014
October 14, 2014 (Tuesday)
November 10, 2014
December 8, 2014

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
October 15, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill, David E. West, Craig R. Mariger (chair of the Professional Liability: Design Professionals subcommittee)

Excused: Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson

1. *Pro Se Litigants.* Mr. Young noted that Judge Toomey had asked the committee, on behalf of the Board of District Court Judges, to consider drafting a model jury instruction concerning pro se litigants (that they have the right to represent themselves, that they are equal in the eyes of the law to those parties represented by counsel, and that the court neither favors nor disfavors them). Mr. Young organized a subcommittee to draft such an instruction. The subcommittee is Mr. Young, Judge Harris, and Mr. Johnson.

2. *Design Professional Instructions.* The committee continued its review of the Design Professional Instructions. Mr. Mariger distributed a red-lined copy of the revised instructions and explained the changes.

a. *CV501. Standard of care for design professionals.* The first paragraph was revised to make it consistent with the other instructions, listing the different types of design professionals in brackets. "[A]nd the amount of the harm" was added to the last paragraph. At Mr. Humpherys's suggestion, it was revised to read, "and, if so, the amount of the harm." Several committee members questioned the bracketed paragraph on changes in the standard of care. Mr. West, for example, thought the court should just instruct on the standard of care. Mr. Mariger said that the standard of care is generally a question of fact for the jury to decide based on expert testimony. At Mr. Simmons's suggestion, the committee deleted the first two lines of the second paragraph so that it now reads:

> The "applicable standard of care" is the standard of care existing at the time of [name of defendant]'s services and in the same or similar locality as where [name of defendant]'s services were performed.

The committee approved the instruction as revised.

Mr. Springer joined the meeting.

b. *CV502. Standard of care of a specialist.* Mr. Mariger explained that he was asked to find a case to support CV502. He could not find a Utah case specific to design professionals. The closest he could find was *Steiner Corp. v. Johnson & Higgins,* a federal district court case involving an actuary. The cases hold that the act of holding oneself out to the public as a specialist is what triggers the higher standard of care. The design professional is not liable simply because he or she does not possess the skill and knowledge of a specialist but is only liable if he or she does not adhere to the standard of care of a specialist. The committee approved the instruction as revised.

c. *CV503. Evidence of standard of care where expert is required.* Mr. Shea had proposed a committee note saying to give instruction CV129 on lay opinion testimony if no expert is required. Mr. Mariger explained that, if the court determines that the applicable standard of care is within the knowledge of lay persons, the jury can generally decide the question itself, without either expert or lay opinion testimony. So the reference to CV129 was deleted. The committee approved the instruction as modified.

d. *CV504. Damages.* Mr. Mariger noted that most of the cases involving design professionals are contract cases, involving contract damages, because the economic loss rule bars tort damages unless there is a personal injury involved or damage to other property. The committee and Mr. Mariger questioned whether there should be an instruction number (CV504) for what is just a committee note. At Mr. Mariger's suggestion, CV504 was deleted, and the committee note was added to CV505. The rest of the instructions will be renumbered accordingly.

e. *CV505. Measure of damages. Defective improvements.* Mr. Mariger was asked to compare CV505 with CV2232 (avoiding unreasonable economic waste in commercial contracts). CV2232 is a modification of the rule stated in the Restatement (Second) of Contracts, which has not been adopted in Utah. It does not accurately state the law. Mr. Mariger traced the development of the law on this issue. Originally, the law was that the measure of damages was expectation damages, i.e., the cost to repair the property to its prior condition. This is the position taken in the Restatement (First) of Contracts and followed by the Utah Supreme Court in three cases–*Rex T. Fuhriman, Inc. v. Jarrell,* 445 P.2d 136 (Utah 1968); *Stangl v. Todd,* 554 P.2d 1316 (Utah 1976); and *Winsness v. M.J. Conoco Distributors,* 593 P.2d 1303 (Utah 1979). Judge Cardozo held in a 1921 New York case that a repair that cost more than the corresponding increase in market value could be considered economic waste. So some courts got away from the first Restatement rule and awarded either the repair cost or the loss of market value, whichever was lower. Some awarded the repair cost unless the repair required a substantial alteration of the structure. In the second

Restatement, the drafters returned to the principle that the plaintiff is entitled to the benefit of his or her bargain, so the presumptive measure of damages was the loss in the value of the property *to the plaintiff* as a result of the defective construction. It is only if the plaintiff cannot prove the loss in the value of the property to the plaintiff with sufficient certainty that the plaintiff recovers the diminution in the market value of the property or the reasonable costs of repair "if the costs are not clearly disproportionate to the probable loss in value to him." The second Restatement rule has not been followed by many courts, including Utah's. Economic waste is assumed if it would require a "substantial modification" to put the property back in its former state.

Mr. Mariger stated that CV2232 does not accurately state Utah law. CV505 has been brought into line with Utah law as stated in the *Winsness* line of cases. The committee thought CV505 was cumbersome and redundant. Mr. Humpherys suggested deleting "to be constructed" in the second line. Mr. West suggested deleting "receipt of" in the fourth line. Mr. Humpherys asked whether "unreasonably wasteful" is a fact question or a legal question. Mr. Mariger thought it was factual but noted that the *Fuhriman* case reviewed the issue de novo. Mr. Young asked whether it is waste if the cost of repair exceeds the increase in market value by $1. Mr. Mariger said that the standard is "unreasonably wasteful," so $1 is probably not enough; it must be significant. Mr. Humpherys questioned what "sufficiently larger" meant. Mr. Johnson noted that it is a two-step process: first, the jury calculates the difference between the cost of repair and the increase in fair market value; second, the jury must make a value judgment as to whether the repair would be "unreasonably wasteful." Mr. Mariger noted that the concept is whether a reasonable person would make the repair. Mr. Young asked whether "fair market value" needs to be defined. The committee noted that it is defined in CV2010 and CV2605. The committee revised the instruction to read:

> If [name of defendant]'s breach of the standard of care has caused a defective improvement, the amount of money that will reasonably compensate [name of plaintiff] for the injury resulting from the defective improvements will be either (1) a "repair" measure of damages or (2) a "loss in market value" measure of damages.
>
> "Repair" Measure of Damages: If repairing the improvements is possible and would not be unreasonably wasteful, you must award [name of plaintiff] the reasonable cost to repair the improvements to the condition they would have been in if [name of defendant] had not breached the standard of care. This is called the "repair" measure of damages.

> "Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful, then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had if [name of defendant] had not breached the standard of care and the fair market value of the improvements received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in market value" measure of damages.
>
> The repair is unreasonably wasteful if the cost of repair is sufficiently more than the loss in fair market value of the improvements caused by the breach of the standard of care, so that a reasonable person would not make the repair under the circumstances. If you find that a repair is unreasonably wasteful, then you should award to [name of plaintiff] the "loss in market value" measure of damages.

The committee approved the instruction as revised.

Mr. Summerill was excused.

f. *CV506. Betterment or value added.* The committee corrected a typographical error on line 2 and approved the instruction.

g. *CV507. Creation of a warranty.* Mr. Mariger noted that he had added references. The committee approved the instruction.

h. *CV508. Breach of warranty essential elements.* and *CV509. Implied warranties. Accuracy and fitness for purpose.* Mr. Mariger noted that he added to the committee notes to CV508 and CV509 a definition of an "*SME*-type warranty." The committee approved the instruction.

The committee thanked Mr. Mariger for all his and his subcommittee's good work on the design professional instructions. Mr. Mariger was then excused.

3. *CV324. Use of alternative treatment methods.* Mr. Springer noted that the Utah Supreme Court's opinion in *Turner v. University of Utah Hospitals & Clinics,* 2013 UT 52, calls into question the continued use of CV324. The court in *Turner* did not expressly disapprove of the instruction, nor did it give any guidance as to what a proper instruction should say. The holding in *Turner* was that it was error to give the

instruction because the case did not involve "alternative treatment methods." But there is no Utah case law to support the instruction. Mr. Springer reviewed the apparent genesis of the instruction. The MUJI 1st instruction was based on instructions from Georgia and Wisconsin, but added the provision that "it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection." This provision is inconsistent with Utah tort law. The Georgia and Wisconsin instructions were in the context of informed consent. The Utah informed consent statute does not talk about alternative methods of treatment. Mr. Simmons asked why it is not sufficient to simply instruct on what the standard of care is, and not on what medical malpractice is not. Mr. Humpherys thought the instruction would only apply where the plaintiff was claiming that the defendant chose the wrong method. Messrs. West and Johnson thought that the court in *Turner* acknowledged the principle contained in the instruction and merely found that there was no evidence to support giving the instruction in that case. Judge Harris noted that the instruction would only apply if one expert was saying that there were equally viable alternative treatment methods and another expert disagreed. Judge Harris thought that, if there is a disagreement among the experts as to what the standard of care required, the choice of the standard of care should be left to the jury. The instruction short-circuits the jury's analysis by in effect telling the jury that it is not medical malpractice to select one method over another, even if a reasonable provider would not have chosen that method under the circumstances. Mr. Springer proposed deleting the instruction. Mr. Young thought that the committee should hear from the medical malpractice subcommittee on the issue before making a final decision. Mr. Springer agreed to get the subcommittee's input for the next meeting. In the meantime, Messrs. Young and Humpherys suggested saying on the MUJI 2d website that the instruction is "under review."

4. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions.

a. *CV2407. Notice of loss.* Mr. Humpherys noted that a notice of loss and proof of loss are not the same thing. Adequacy is more of an issue with proof of loss than it is with notice of loss. The committee bracketed the first three paragraphs. Judge Stone noted that the statute (Utah Code Ann. § 31A-21-312) only requires that the notice give "particulars sufficient to identify the policy." Some committee members thought the notice should also identify the nature of the loss or indicate that the claimant is making a claim under the policy. Mr. Humpherys noted that sometimes the claimant is not the insured and may not be able to correctly identify the policy, such as where a pedestrian is making a claim for personal injury protection (PIP) coverage under an auto policy, or where a permissive user was operating a covered auto. Mr. West asked whether the insurer must show prejudice if it was reasonably possible for the claimant to give notice within the required time and simply failed to do so, for no good reason. The fourth paragraph suggests not. Judge Stone suggested that the insurer must

show that it was prejudiced by the lack of notice or untimely notice in every case, citing § 31A-21-312(2). Mr. Humpherys thought that there might be an administrative rule that addressed the issue. The committee suggested dropping the introductory clause of the fourth paragraph ("If it was not reasonably possible to give the notice of loss within the required time"). Mr. Humpherys offered to research the issue further.

5. *Next meeting.* The next meeting will be on Tuesday, November 12, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

CV 505.Measure of Damages. Defective Improvements. Approved.

If [[name of defendant]'s breach of the standard of care has caused a defective improvement, the amount of money that will reasonably compensate [name of plaintiff] for the injury resulting from the defective improvements will be either (1) a "repair" measure of damages or (2) a "loss in market value" measure of damages.

"Repair" Measure of Damages: If repairing the improvements is possible and would not be unreasonably wasteful, you must award [name of plaintiff] the reasonable cost to repair the improvements to the condition they would have been in if [name of defendant] had not breached the standard of care. This is called the "repair" measure of damages.

"Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had if [name of defendant] had not breached the standard of care and the fair market value of the improvements received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in market value" measure of damages.

The repair is unreasonably wasteful if the cost of repair is sufficiently more than the loss in fair market value of the improvements caused by the breach of the standard of care, so that a reasonable person would not make the repair under the circumstances. If you find, that a repair is unreasonably wasteful, then you should award to [name of plaintiff] the "loss in the market value" measure of damages.

References

Winsness v. M. J. Conoco Distributors, Inc., 593 P.2d 1303, 1307 (Utah 1979)

F.C. Stangl, III v. Todd, 554 P.2d 1316, 1320 (Utah 1976).

Rex T. Fuhrman, Inc. v. Jarrell, 21 Utah 2d 298, 302-03, 445 P.2d 136, 139 (Utah 1968).

Restatement (First) of Contracts § 346(1) (1932).

See, Western Land Equities, Inc. v. City of Logan, 617 P. 2d 388, 395 [Economic waste results from expenditures of construction costs without benefit to public or private property owners].

MUJI 1st

7.40.

Committee Notes

It is appropriate to give in connection with Instruction CV 505, Instruction CV 2010, "Fair market value" defined.

Due to Utah's economic loss rule, claims for recovery of solely economic losses (the damages claimed do not seek recovery for personal injuries or damage to property separate from the property that is the subject of the design professional's services contract) against design professionals are normally submitted to the jury on breach of contract causes of action. In those cases, in addition to Instructions CV 505 and 506 as applicable and appropriate, the court should use the damages instructions (CV 2135, CV 2136, CV 2137, CV 2138, CV 2140 and CV 2141) in Commercial Contracts, CV 2101, *et. seq*., to the extent applicable and appropriately modified as circumstances in the case require.

With respect to claims against design professionals submitted to the jury in tort, including claims for personal injuries and claims for damages to property separate from the property that is the subject of the design professional's services contract, in addition to Instructions CV 505 and 506 as applicable and appropriate, the court should use the instructions in Tort Damages, CV 2001, *et. seq*., to the extent applicable and appropriately modified as circumstances in the case require. <

Comment [CRM10]: This is a correct statement of Utah law as announced to date by the Utah Supreme Court. It is the damages rule announced in Winsness, F. C. Stangl and Rex T. Fuhrman. It is the damages rule set forth in the Restatement (First) of Contracts, Section 346. It is a different standard than is set forth in Restatement (Second) of Contracts, Section 348.

The following is a summary of the development of the law on this point. Initially, the Plaintiff could recover whatever it cost to make the improvement designed or constructed with a defect to meet the specifications or other contract requirements. It was said that to give the Plaintiff the benefit of the Plaintiff's bargain, the Plaintiff must receive what the Plaintiff contracted to receive. Then Judge Cardozo wrote the majority opinion in Jacobs & Young v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921) deciding that if a contractor installed an unspecified brand of pipe of equal quality and value into a structure, the Plaintiff could not recover as damages for the breach of contract the costs to replace the unspecified pipe with the specified pipe because it would result in unreasonable economic waste. The unreasonable economic waste was the expenditure of costs of repair which did not increase the market value of the property. This became the Restatement (First) rule.

Over time, state courts made their own modifications to the Restatement (First) rule. Some awarded the lower of the repair measure of damages and the loss of market value measure of damages. Some, awarded the repair measure unless the repair required a substantial alteration of the structure (reasoning that only in such cases would the repair costs be disproportionate to the loss in market value. Some courts compared the costs to repair with the costs to construct the overall improvements to determine if economic waste was present. For a discussion of the various rules in the multiple jurisdictions, see 41 A.L.R. 4th 131. Utah has three cases annotated in the A.L.R. annotation, each following the unreasonable economic waste rule of the Restatement (First)

In the Restatement (Second) the drafters returned to the principle that the Plaintiff is entitled to the benefit of the Plaintiff's bargain, so the Plaintiff must receive the loss in value of the property to the Plaintiff as a result of the defective construction, which may be greater or less than the loss in the market value of the property. It is only if the Plaintiff cannot prove the loss in the value of the property to the Plaintiff with sufficient certainty, that the Plaintiff then recovers the diminution in the market value of the property or the reasonable costs of repair "if the costs are not clearly disproportionate to the probable loss in value to him". Under the Restatement (Second), the Plaintiff can choose between the loss in market value measure or the repair measure if the Plaintiff cannot prove the loss in value to the Plaintiff itself, unless the repair measure is clearly disproportionate ... [1]

CV2231 Damages for contractor's defective work.
If you find that [name of owner] was damaged by [name of contractor]'s [defective/incomplete] work, [name of owner] is entitled to recover as damages the amount of money that will reasonably~~e~~ compensate [name of owner] for the harm resulting from the defective improvements. The measure of damages will be either (1) the cost of ~~to [~~repair~~,/complete]~~ or (2) a loss of market value measure of damages. ~~the construction according to the [contract requirements] [plans and specifications] [requirements of the building code] [industry standards].~~

"Repair" Measure of Damages: If repairing the improvements is possible and would not be unreasonably wasteful, you must award [name of plaintiff] the reasonable cost to repair the improvements to the condition they would have been in if [name of defendant] had not breached the standard of care. This is called the "repair" measure of damages.

"Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had if [name of defendant] had not breached the standard of care and the fair market value of the improvements received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in market value" measure of damages.

The repair is unreasonably wasteful if the cost of repair is sufficiently more than the loss in fair market value of the improvements caused by [name of contractor]'s [defective/incomplete] work, so that a reasonable person would not make the repair under the circumstances. If you find, that a repair is unreasonably wasteful, then you should award to [name of plaintiff] the "loss in the market value" measure of damages.

References
Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 395 (Utah 1980) (holding that economic waste results from expenditures of construction costs without benefit to public or private property owners).
Winsness v. M.J. Conoco Distributors, Inc., 593 P.2d 1303 (Utah 1979).
F.C. Stangl, III v. Todd, 554 P.2d 1316 (Utah 1976).
Rex T. Fuhriman, Inc. v. Jarrell, 445 P.2d 136 (Utah 1968).
Restatement, (Second) of Contracts, Section 348(2)(b).

Committee Notes
It is appropriate to give instruction CV 2010, "Fair market value" defined, with this instruction.

~~Instruction CV2230 describes the elements of the claim for defective or incomplete work. Instruction CV2231 describes the usual measure of damages. Instruction~~

CV2232 describes the alternative measure of damages, if contractor proves that the usual measure of damages would result in unreasonable economic waste.

CV2232 Avoiding unreasonable economic waste.

[Name of contractor] claims that it would be unreasonably wasteful to [repair/complete] the construction according to the [contract requirements] [plans and specifications] [requirements of the building code] [industry standards]. To succeed on this claim, [name of contractor] must prove that the cost to [repair/complete] the construction:

(1) is clearly out of proportion to the value of the finished project; or

(2) would require the destruction or substantial reconstruction of useable property.

If you find that [name of contractor] has proved this claim, then you must award as damages to [name of owner] the difference between the market price that the property would have had without the defects and the market price of the property with the defects.

References

F.C. Stangl, III v. Todd, 554 P.2d 1316,1320, citing 5 Corbin on Contracts, §1089 (Utah 1976).
Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298 445 P.2d 136 (Utah 1968)
Restatement (Second) of Contracts, §348, comment (c).
Ludington, John P., Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract. 41 A.L.R.4th 131, ¶(2)(f).

Committee Notes

Instruction CV2230 describes the elements of the claim for defective or incomplete work. Instruction CV2231 describes the usual measure of damages. Instruction CV2232 describes the alternative measure of damages, if contractor proves that the usual measure of damages would result in unreasonable economic waste.
Comment (c) of the Restatement indicates that diminution in price is the correct measure of damages if the "the injured party does not prove the actual loss in value...." But in Stangl, the Supreme Court puts the burden of showing economic waste on the breaching party: "The contract breaker should pay the cost of construction and completion in accordance with his contract, unless he proves, affirmatively and convincingly, such construction and completion would involve unreasonable economic waste." F.C. Stangl, III v. Todd, 554 P.2d 1316,1320, citing 5 Corbin on Contracts, §1089 (Utah 1976). Jurisdictions differ on who has the burden of proof. See Ludington, 41 A.L.R.4th 131, ¶(9).

Although the Stangl case uses the phrase "proves, affirmatively and convincingly," requiring clear and convincing evidence of unreasonable economic waste seems not to be supported by the Restatement, but the court may need to decide the matter.

~~What is the standard for determining unreasonable economic waste and how unreasonable the economic waste has to be before diminution in price becomes the correct measure of damages is not revealed in Stangl or the Restatement. The two alternatives suggested in this instruction are summaries of the analysis in Ludington, 41 A.L.R.4th 131, ¶(2)(f). The ALR article suggests that unreasonableness may depend on the circumstances of the case, such as: whether the repairs can be made without seriously disturbing the structure; whether the correction is of a structural defect rather than an esthetic defect; whether the structure is safe and useable even with the defects.~~

~~**Amended Dates:**~~
~~December 10, 2012.~~

Tab 3

CV 099 Introducing pro se litigant to the jury.

The fact that one party is represented by counsel and another party is not should not play any part in your deliberations. Parties have a right to represent themselves, and the trier of fact must apply the law without regard to the litigant's status as a self-represented party. You should neither favor nor penalize a litigant because that litigant is self-represented.

References:

Stock Instruction, Hon. Kate Toomey, Third District Court

CV101A General admonitions. (pro se version).

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device.

You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

[Plaintiff] [Defendant] is proceeding “pro se,” which means he/she is representing him/herself.

[Defendant] [Plaintiff] is represented by _____.

[Plaintiff/Defendant], attorneys for the [plaintiff][defense] and witnesses are not allowed to speak with you during the case. When you see [plaintiff’s] [defendant’s] attorneys at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly – they are simply following the law.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn’t know about it. That’s why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References:

MUJI CV 101

Preliminary Jury Instructions for use with pro se litigants, U.S. District Court, Eastern District of California

Committee Notes:

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

CV102A Role of the judge, jury, parties and lawyers (pro se version).

You and I and [defendant] [plaintiff] and the lawyers play important but different roles in the trial.

I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.

You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.

The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.

It is the pro se [plaintiff][defendant] and [plaintiff][defense] counsel's duty to object when the other side offers testimony or other evidence that the pro se [plaintiff][defendant] or [plaintiff][defense] counsel believes is not admissible. You should not be unfair or prejudicial against the pro se [plaintiff][defendant], [plaintiff][defense] counsel, or [plaintiff][defendant] because the pro se [plaintiff][defendant] or [plaintiff][defense] counsel has made objections.

Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.

References

MUJI CV 102

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California

CV119A Evidence (pro se version).

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

> (1) Arguments and statements by pro se [plaintiff][defendant] and [plaintiff][defense] counsel are not evidence. Pro se [plaintiff][defendant] when acting as counsel and [plaintiff][defense] counsel are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way they have stated them, your memory of them controls. However, pro se [plaintiff's][defendant's] statements as a witness are evidence.
>
> (2) Questions and objections by pro se [plaintiff][defendant] and [plaintiff][defense] counsel are not evidence.

The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually are not evidence.

You are to consider only the evidence in the case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

References:

MUJI CV 119

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Tab 4

Use of alternative treatment methods

(1) 324. Use of alternative treatment methods.

When there is more than one method of [diagnosis/treatment] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

References

Cf. Butler v. Naylor, 1999 UT 85, 987 P.2d 41 (even if the evidence did not support giving this instruction, it was harmless error to do so, because the jury could have found for the defendant on other grounds).

Turner v. University of Utah Hospitals and Clinics, 2011 UT App 431, rev'd 2013 UT 52.

MUJI 1st Instruction

6.29

Committee Notes

This instruction is currently under further review in light of Turner v. University of Utah Hospitals and Clinics, 2013 UT 52.

This instruction is slightly modified from MUJI 1st 6.29. The committee agreed on deleting the "best judgment" language from the instruction, as that inappropriately suggested a subjective standard of care might be followed; that is, what defendant "thinks best," whether it is within the standard of care or not.

This instruction should only be used when a proper foundation is laid for it, namely, that the "alternative method" is shown by defendant to be used by something more than a small minority of doctors, but not necessarily the majority. In other words, the defendant must show that the challenged treatment enjoys such substantial support within the medical community that it truly is "generally" recognized. See Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993); Bickham v. Grant, 861 So.2d 299 (Miss. 2003); Velazquez v. Portadin, 751 A.2d 102 (N.J. 2000); Yates v. University of W. Va. Bd. of Trustees, 549 S.E.2d 681(W. Va. 2001); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 3-38, cmt. 3 (LexisNexis, 6th ed. 2007).

The drafting subcommittee was not unanimous in its approval of this instruction, so counsel and the trial court should review it with caution. Some thought that it is inappropriate to instruct a jury that a doctor is "not negligent" if he uses an approved

method, but that this is simply one factor to consider in determining whether the provider met the standard of care.

Some members of the committee expressed concerns regarding this instruction, and these concerns are summarized as:

First, no Utah authority recognizes the appropriateness of this instruction, and Butler v. Naylor did not question the propriety of giving the "alternative methods" instruction. Rather, appellant only challenged the instruction on the basis that the “evidence failed to establish that the surgical procedure used [was] recognized by a respectable portion of the medical community.” Butler v. Naylor, 1999 UT 85 at & 19, 987 P.2d 41. Butler avoided any detailed examination of the instruction “because [the instruction] presents only one of several theories upon which the jury could have relied in finding for [Defendant].” Id. at & 20. Accordingly, the court offered no direct endorsement or rejection of the instruction as an accurate statement of the law. At best, Butler is ambiguous about whether the instruction reflects the state of the law in Utah.

Second, the instruction is inconsistent with Utah law defining medical malpractice and standard of care. We tell jurors that a health care provider is required to use the same degree of learning, care, and skill ordinarily used by other qualified providers in good standing practicing in the same. This instruction, however, then tells the jurors that “it is not negligence” if more than one method exists, effectively eliminating any requirement that a physician exercise that degree of learning, care and skill ordinarily used

The bare existence of more than one method automatically excuses the physician because “it is not medical malpractice” to choose one method over another, thereby alleviating the physician of their duty to exercise any degree of learning, care or skill ordinarily used in the field. Under this instruction, the physician becomes “not negligent” simply by the existence of alternative methods without needing to exercise any judgment or care whatsoever in choosing the method.

This ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, it simply says that if there is more than one method and the method is “accepted by a respectable portion of medical community,” it is not malpractice to choose one over the other. Clearly, this cannot be the law of medical negligence where every practitioner must exercise their skill, learning and professional care in treating patients.

This opinion is subject to revision before final publication in the Pacific Reporter

2013 UT 52

IN THE

SUPREME COURT OF THE STATE OF UTAH

ELLA TURNER,
Petitioner,

v.

UNIVERSITY OF UTAH HOSPITALS & CLINICS,
UNIVERSITY OF UTAH, and STATE OF UTAH,
Respondents.

No. 20120120
Filed August 16, 2013

Third District, Salt Lake Dep't
The Honorable Tyrone E. Medley
No. 20091073

On Certiorari to the Utah Court of Appeals

Attorneys:

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for amicus curiae Utah Association for Justice

CHIEF JUSTICE DURRANT, authored the opinion of the Court,
in which ASSOCIATE CHIEF JUSTICE NEHRING,
JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 In 2002, Ella Turner was severely injured in an automobile accident. She received treatment for her injuries at the University Hospital (Hospital), where she claims she was rendered a paraplegic due to the Hospital's negligence. At trial, the jury found unanimously that the Hospital was not negligent. Ms. Turner appealed to the court of appeals, which upheld the jury's verdict. Ms. Turner then petitioned for certiorari, which we granted.

¶2 On certiorari, Ms. Turner argues that she is entitled to a new trial for two reasons. First, she argues that the court of appeals' application of the "cure-or-waive rule," which requires litigants to use their peremptory challenges on jurors who were unsuccessfully challenged for cause in order to preserve the issue of jury bias for appeal, yielded an unfair result in this case. Specifically, she argues that despite her efforts to remove potentially biased jurors by challenging them for cause and then by exhausting all of her peremptory challenges, the jury remained biased, and that the court of appeals' application of the cure-or-waive rule resulted in the affirmance of a biased jury's verdict. Accordingly, she asks us to "modify or clarify" the cure-or-waive rule and grant her a new trial. Ms. Turner's second argument is that the court of appeals incorrectly determined that it was harmless error for the district court to include one of the jury instructions.

¶3 We agree with Ms. Turner on both counts. The cure-or-waive rule did yield an unfair result in this case, and the inclusion of the jury instruction was error. Accordingly, we grant Ms. Turner's request for a new trial due to the erroneous jury instruction and, even though we need not reach the issue of jury bias, we nevertheless take this opportunity to guide the litigants and the district court with respect to the question of how to properly preserve that issue for appeal. In so doing, we reject the cure-or-waive rule entirely and adopt the standard set forth below in its stead.

BACKGROUND

¶4 On August 11, 2002, Ms. Turner was admitted to the Hospital after suffering a single-car rollover accident. Upon her arrival, doctors diagnosed her with multiple injuries, including a closed head injury accompanied by significant brain swelling, fractured vertebrae in all three parts of her spine, multiple rib fractures, lung contusions, a liver laceration, and extensive scalp laceration. But despite these injuries, doctors noted that Ms. Turner's legs and arms were still fully functional. Doctors also performed a CT scan of Ms.

Turner's spine, which showed that her spine was in a "relatively normal" alignment.

¶5 Due to the severity of her injuries, Ms. Turner's doctors determined that neither a back brace nor surgery could be used to treat Ms. Turner's fractured spine. Instead, they transferred her to the Neuro Critical Care Unit (NCC) with instructions that she remain there on bed rest under spinal precautions until she was healthy enough for a brace or surgery. The parties do not dispute the standard of care for a patient on spinal precautions. While spinal precautions are in place, the patient can be moved only by using a "log rolling" technique, which requires a minimum of three people so that each part of the patient's body can be rolled in unison, thereby maintaining proper alignment of the patient's spine.

¶6 Ten days later, on August 21, 2002, Ms. Turner received an MRI scan that showed dramatic changes in the alignment of her thoracic spine. Her attending orthopedic physician discussed the differences between the MRI and the August 11th CT scan with Ms. Turner's mother and sister a day later and stated, "I don't know how or when this was done, but it was done here at the hospital." As a result of the spinal injury revealed by the MRI, Ms. Turner was subsequently diagnosed with irreversible paraplegia.

¶7 Ms. Turner sued the Hospital for negligence. During jury selection, she challenged a number of jurors for cause, the majority of which the district court granted. Four of these challenges were denied, however. Ms. Turner also suspected that a fifth juror had concealed his true feelings during voir dire and, in her view, posed the greatest threat to a fair trial. Ms. Turner therefore had three peremptory challenges to deal with five potentially biased jurors. She decided to spend two of them on jurors who had been challenged for cause previously, but then she used her final challenge on the juror whom she suspected of harboring hidden biases. The other two jurors ended up serving on the jury.

¶8 At trial, Ms. Turner presented evidence showing that the Hospital had failed to post a sign at the head of her bed that would notify all care providers to follow spinal precaution guidelines. She also introduced eyewitness testimony that, prior to August 22, 2002, her attending nurses had failed to observe the spinal precautions and that they had instead moved her, sometimes "aggressively," without utilizing the required log rolling procedure. Ms. Turner argued that her injuries were caused by the nurses' failure to follow the spinal precautions and that this failure was in part due to the Hospital's failure to post the sign at the head of her bed.

¶9 The Hospital countered Ms. Turner's arguments by presenting evidence that the practice of posting a sign for spinal precautions at the head of the patient's bed was not uniform, but varied depending on the admitting nurse. The Hospital also presented evidence that the nurses caring for Ms. Turner were aware of the spinal precautions, and that they did not move her without utilizing the log rolling technique. In fact, the Hospital's nursing expert testified that spinal precautions are "always communicated during nurse-to-nurse shift reports" and that the Hospital's records reflected that the nurses were making these communications in their shift reports.

¶10 The Hospital also presented evidence about the differences between a CT scan and an MRI, arguing that soft tissues, including the spinal cord, are not effectively imaged by CT scanning technology. Thus, the Hospital argued that Ms. Turner could not rely on the CT scan to eliminate the possibility that her spinal cord had already been injured at the time of her arrival at the Hospital. Additionally, the Hospital argued that even if an MRI had been performed as soon as Ms. Turner was admitted, it would not have changed the doctors' decision to treat Ms. Turner with bed rest under spinal precautions.

¶11 Prior to the jury's deliberations, the trial judge issued the following jury instruction, Instruction No. 30, over Ms. Turner's objection:

> When there is more than one method of treatment that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

The jury returned a verdict of no negligence, and Ms. Turner appealed.

¶12 At the court of appeals Ms. Turner argued, among other things, that the district court erred by giving the jury instruction and that the jury was biased.[1] The court of appeals, relying on our deci-

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[1] *Turner v. Univ. of Utah Hosps.*, 2011 UT App 431, ¶¶ 8–13, 40, 271 P.3d 156.

sion in *Butler v. Naylor*,[2] determined that even if the district court erred in giving the jury instruction, "the error would be harmless as the jury could have reached the no-cause verdict on [an] alternative theor[y]," such as the theory that "the NCC nurses always log rolled Turner."[3] And with respect to the biased jury question, the court of appeals applied the cure-or-waive rule, "which means that in order to raise the issue of juror bias on appeal, the appealing party must [have] exercise[d] a peremptory challenge, if one is available, against the juror unsuccessfully challenged for cause, and the challenged juror must have actually served on the jury."[4] Because Ms. Turner failed to comply with this rule, the court of appeals reasoned that

> if we determine that one of the four jurors she challenged for cause was not biased, her argument is not preserved. This is so because if one of the four jurors was not biased, Turner would have had enough peremptory challenges to dismiss the remaining three prospective jurors and the trial court's error, if any, in not removing those jurors for cause would be harmless.[5]

The court of appeals then determined that one of the jurors was not biased and that therefore Ms. Turner's argument for juror bias was not preserved.[6] Ms. Turner petitioned this court for certiorari, which we granted. We have jurisdiction over this matter pursuant to section 78A-3-102(3)(a) of the Utah Code.

STANDARD OF REVIEW

¶13 "On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court."[7]

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[2] 1999 UT 85, 987 P.2d 41.

[3] *Turner*, 2011 UT App 431, ¶ 40 (second alteration in original) (internal quotation marks omitted).

[4] *Id.* ¶ 8 (alterations in original) (internal quotation marks omitted).

[5] *Id.* ¶ 9.

[6] *Id.* ¶ 13.

[7] *Wasatch Cnty. v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768 (internal quotation marks omitted).

ANALYSIS

¶14 We first address Ms. Turner's argument that she is entitled to a new trial because the district court erroneously issued Instruction No. 30. Specifically, Ms. Turner argues that this instruction was unwarranted and prejudicial because there was no evidence presented at trial of an "alternative treatment method." She also argues that the court of appeals misapplied our decision in *Butler v. Naylor*[8] to the facts of this case. For the reasons stated below, we agree and remand this case to the district court for a new trial.

¶15 Because Ms. Turner is entitled to a new trial due to the prejudicial jury instruction, we take this opportunity to provide guidance to both the litigants and the district court with respect to the proper method of preserving the issue of jury bias for appeal.[9] As the court of appeals noted, we appear to have adopted the cure-or-waive rule in the case of *State v. Baker*.[10] We are, however, dissatisfied with the result yielded by this rule in the present case and are skeptical about its prospective usefulness. Accordingly, we overrule *Baker* and adopt a new standard for determining whether the issue of jury bias is preserved for appeal.

I. ISSUING JURY INSTRUCTION NO. 30 WAS ERROR BECAUSE IT WAS UNSUPPORTED BY THE EVIDENCE AND UNDERMINES OUR CONFIDENCE IN THE VERDICT

¶16 Ms. Turner argues that her case was prejudiced by the district court's inclusion of Instruction No. 30 because "there was no evidence of any approved, alternate treatment method in the case." Ms. Turner does not dispute the fact that there was conflicting evidence about whether the standard of care included posting a sign on her bed, but argues that this evidence "could not create an alterna-

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[8] 1999 UT 85, 987 P.2d 41.

[9] *See, e.g.*, *State v. White*, 2011 UT 21, ¶ 34, 251 P.3d 820 (addressing an issue "outside the scope of the narrow certiorari question presented . . . in order to provide guidance to the trial court on remand"); *State v. Jeffs*, 2010 UT 49, ¶ 39, 243 P.3d 250 (examining a nondispositive claim "in order to guide the trial court on remand"); *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2003 UT 5, ¶ 10, 73 P.3d 320 (addressing a nondispositive issue because "it may again arise on remand").

[10] 935 P.2d 503 (Utah 1997).

tive treatment method to defeat [Ms. Turner's] liability claim . . . that [the Hospital] improperly moved and injured [Ms. Turner]." Instead, Ms. Turner argues that the evidence regarding the absence of the sign was offered "only [as an] explanation for the improper movement, not proof that would allow [Ms. Turner] a recovery." Consequently, Ms. Turner argues that the court of appeals misapplied our decision in *Butler v. Naylor*[11] when it disposed of this claim and asks us to reverse and grant a new trial. Because we conclude that the issuance of Instruction No. 30 was both erroneous and prejudicial, we reverse and grant a new trial.

¶17 "Claims of erroneous jury instructions present questions of law that we review for correctness. We therefore review the instructions given to the jury without deference to the trial court" or, in this case, the court of appeals.[12] Additionally, "[e]rrors with regard to jury instructions require reversal only if confidence in the jury's verdict is undermined."[13]

¶18 In its decision, the court of appeals relied on the following language from *Butler*:

> When a civil case is submitted to a jury on several alternative theories and the jury does not identify which theory or theories it relied on in reaching its verdict, we may affirm the verdict if the jury could have properly found for the prevailing party on any one of the theories presented.[14]

¶19 The court of appeals noted that the jury did not explain the grounds for its finding of no negligence. The court then interpreted *Butler*'s use of the term "theory" quite broadly, determining that "the jury could have based the no-cause verdict upon a finding that the NCC nurses always log rolled Turner . . . regardless of whether they were supposed to post a sign."[15] In other words, the court of appeals determined that the verdict of no negligence could be attributed to

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[11] 1999 UT 85, 987 P.2d 41.

[12] *State v. Jeffs*, 2010 UT 49, ¶ 16, 243 P.3d 1250 (citation omitted).

[13] *Hess v. Canberra Dev. Co.*, 2011 UT 22, ¶ 38, 254 P.3d 161 (internal quotation marks omitted).

[14] *Turner v. Univ. of Utah Hosps.*, 2011 UT App 431, ¶ 40, 271 P.3d 156 (quoting *Butler*, 1999 UT 85, ¶ 21).

[15] *Id.*

the "theory" that the NCC nurses always log rolled Ms. Turner, as opposed to the "theory" that they were not required to post a sign.

¶20 Ms. Turner argues that this is a misapplication of *Butler*. Specifically, she notes that the language relied upon by the court of appeals flows from a line of cases beginning with *Leigh Furniture & Carpet Co. v. Isom*[16] and that, in each of these cases, the plaintiffs had advanced several different *causes of action* as grounds for recovery. For instance, in *Leigh*, we affirmed a jury's verdict for a counter-claimant based on the viability of his claim for interference with prospective economic relations.[17] This counter-claimant, however, had also advanced a claim for interference with contract, but failed to prove that cause of action.[18] In affirming the verdict, we observed that

> where more than one cause of action has been submitted to a jury and where one of those causes of action was error-free, supported by substantial evidence, and an appropriate basis for the general verdict, the judgment on that verdict will be affirmed, even though the evidence was insufficient to sustain the verdict on one of the other causes of action submitted.[19]

Ms. Turner then demonstrates that in subsequent cases where we applied this standard, we changed the language from "causes of action"[20] to "alternative grounds"[21] and then, finally, to "alternative theories."[22]

¶21 But in this case, Ms. Turner argues, there was only one "cause of action," "ground," or "theory" advanced for recovery: neg-

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[16] 657 P.2d 293 (Utah 1982). The other cases in this line are *Barson ex rel. Barson v. E.R. Squibb & Sons, Inc.*, 682 P.2d 832 (Utah 1984); *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239 (Utah 1987); and *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996).

[17] 657 P.2d at 313.

[18] *Id.* at 301.

[19] *Id.* at 301–02.

[20] *Barson*, 682 P.2d at 835.

[21] *Campbelt*, 745 P.2d at 1241–42.

[22] *Billings*, 918 P.2d at 467.

ligence. Thus, she asserts that "there was no error-free alternative for the jury to choose and upon which the court of appeals could disregard the prejudicial jury instruction." Hence, she concludes, *Butler* is inapplicable here, and the court of appeals erred by relying upon it. We agree.

¶22 *Butler* is distinguishable from the facts of this case because, unlike *Butler* and the subsequent cases applying it, here there was only one claim asserted, a claim for medical malpractice, and Instruction No. 30 expressly stated that "it is *not* medical malpractice for a provider to select one of the approved methods . . . [w]hen there is more than one method of treatment." (Emphasis added.) Because we believe that jurors take jury instructions seriously, we are troubled by the fact that this Instruction explicitly directs the jury to return a "no negligence" verdict if it finds that there was "more than one method of treatment." Given the way this Instruction is worded, therefore, it is reasonable to assume that the jury would have addressed the issue of alternative treatment plans first, rather than going straight to the issue articulated by Instruction No. 27,[23] as the court of appeals assumed.[24] And because Ms. Turner advanced only *one* theory for recovery, namely medical malpractice, our confidence

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[23] Instruction No. 27 stated:

> A nurse is required to use the same degree of learning, care, and skill ordinarily used by other qualified nurses in good standing providing similar care. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as "nursing negligence." In order to establish nursing negligence, plaintiff has the burden of proving three things: (1) what the standard of care is; (2) that the nurse failed to follow this standard of care; and, (3) that this failure to follow the standard was a cause of plaintiff's harm.
>
> In this action, plaintiff alleges that nurses employed by defendants failed to follow the standard of care by improperly moving plaintiff while she was a patient at University Hospital in August 2002.
>
> If you find that defendants' nurses breached the standard of care in any of these respects, then you must determine whether that failure was a cause of plaintiff's harm.

[24] *Turner*, 2011 UT App 431, ¶ 40.

in the jury's verdict is undermined because Instruction No. 30 expressly forecloses the avenue of recovery set forth in Instruction No. 27 if the jury found that there were alternative, approved methods of treatment. Thus, we agree with Ms. Turner that the court of appeals' reliance on *Butler* in this case is misplaced.

¶23 We also note that even if the court of appeals was correct in assuming that the jury could have relied on the theory presented in Instruction No. 27 to support its verdict, Instruction No. 30 was still erroneous because there was no evidence supporting the existence of an alternative, approved treatment method. The Hospital argues that the evidence regarding the placing of a sign was sufficient to support this instruction, asserting that "the trial testimony established two potential treatment methods. The first method is to post a sign . . . [while] [t]he second method is not to post a sign and rely on shift reports and the patient's medical records to pass information regarding spine precautions."

¶24 We are not persuaded by this argument. While it is true that the evidence regarding the procedure of posting a sign on the patient's bed was conflicting, in our view this is not sufficient to support the conclusion that posting a sign is a "method of treatment." As the Hospital admits, when Ms. Turner was admitted her doctors had to choose between three "treatment options": surgery, a back brace, or bed rest under spinal precautions. These sorts of options are what is contemplated by the term "method of treatment," as would the procedures involved for a patient under spinal precautions (e.g., the log rolling procedure). Signs and shift reports, however, are not "methods of treatment," but means of carrying out the method selected by the doctor, which, in this case, was bed rest under spinal precautions. We conclude that the decision of whether or not to post a sign does not qualify as a "method of treatment" and that, therefore, there was no evidence that supported the inclusion of Instruction No. 30. The potential confusion created by this mislabeling is significant in that this instruction could have led the jury to erroneously conclude that if it was acceptable to either post or not post a sign, they should find no medical negligence. Accordingly, we hold that the district court erred in giving Instruction No. 30 and that Ms. Turner is entitled to a new trial due to its prejudicial nature.

II. BECAUSE OF ITS TENUOUS FOUNDATION AND LIMITED UTILITY, WE ABANDON THE CURE-OR-WAIVE RULE AND ADOPT A NEW STANDARD FOR PRESERVING THE ISSUE OF JURY BIAS

¶25 Because Ms. Turner is entitled to a new trial due to the erroneous inclusion of Instruction No. 30, we take this opportunity to clarify for the litigants and the district court the applicable standard for preserving an argument based on jury bias for appeal. In this case, the court of appeals applied the cure-or-waive rule and concluded that Ms. Turner had failed to preserve the issue of jury bias for appeal.[25] Ms. Turner argues that the application of the cure-or-waive rule to the facts of this case yielded an unfair result. We agree. Accordingly, we abandon the cure-or-waive rule in favor of the standard articulated below and remand this case to the district court for further proceedings consistent with this opinion.

¶26 As the court of appeals noted, we adopted the cure-or-waive rule in *State v. Baker*.[26] That case's adoption of this rule, however, was far from straightforward. First, *Baker* was a criminal case, and there was no discussion about the rule's applicability within a civil context. In fact, the rule was not applied in a civil context until the court of appeals did so in 2007.[27] Second, the rule itself only garnered a plurality of votes: Justices Howe and Russon voted to adopt the rule, but Associate Chief Justice Stewart authored a separate concurrence, wherein he expressed doubts about the rule's effectiveness in assuring fair trials but nevertheless expressed satisfaction "that the cure-or-waive rule is properly applied *in this case*."[28] Justice Zimmerman dissented, and Justice Durham concurred with his dissent. Thus, the rule itself was supported by just two justices, while a third arguably voted to adopt it only for that particular case. Finally, the rule has not been widely applied in Utah cases.[29]

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[25] *Turner v. Univ. of Utah Hosps.*, 2011 UT App 431, ¶¶ 8–13, 271 P.3d 156.

[26] 935 P.2d 503, 510 (Utah 1997).

[27] *See Clatterbuck v. Call*, 2007 UT App 76U, 2007 WL 701039.

[28] *Baker*, 935 P.2d at 510 (emphasis added).

[29] By our count, the rule has been applied in just a handful of cases, and discussed in only a few others. *See Baker*, 935 P.2d at 510 (adopting the cure-or-waive rule); *Turner*, 2011 UT App 431, ¶¶ 8–13 (applying the cure-or-waive rule in a civil context); *Clatterbuck*, 2007 (continued)

¶27 In addition to the shaky foundations of this rule, we are also concerned about the results its application yielded in this case. While we agree with the observation made in *Baker* that the right to peremptory challenges is not constitutional,[30] we disagree with the reasoning in *Baker* that places the burden on the defendant to utilize these challenges in order to correct what could be perceived as judicial error.[31] While it is true that "[b]oth parties and the court share a duty to help ensure a fair trial—a trial in which a jury impartially weighs the evidence,"[32] it is nevertheless a reality that both parties view their peremptory challenges as a tactical tool and desire to use them accordingly. This reality is illustrated clearly in this case, where Ms. Turner had to determine whether to expend her peremptory challenges on jurors whom she had already challenged for cause, or on a juror whom she suspected of harboring hidden biases. She chose the latter option, and consequently the previously challenged jurors were seated on the jury. Thus, under the cure-or-waive rule, Ms. Turner was prevented from raising the issue of jury bias on appeal because the rule required her to expend that final peremptory challenge on one of the other two jurors who had been challenged for cause.

¶28 This result strikes us as unduly harsh to the appellant. Furthermore, it seems to us that, in the end, this issue boils down to a pure policy determination. On the one hand, there is the constitutional right to a fair trial, while on the other is the fact that peremptory challenges are merely a means to ensure that end. The question, therefore, is whether attorneys should be allowed to use peremptory challenges on jurors whom they would otherwise be unable to challenge for cause *without* thereby losing the ability to raise the issue of jury bias on appeal. In *Baker*, we expressed the concern that "if a defendant needs to show only that he used all of his peremptories and

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UT App 76U (same); *see also State v. Wach*, 2001 UT 35, ¶ 36 n.3, 24 P.3d 948 (discussing the cure-or-waive rule, but not applying it); *State v. Robertson*, 2005 UT App 419, ¶ 7 n.1, 122 P.3d 895 (same).

[30] *Baker*, 935 P.2d at 506 (observing that "the peremptory is not constitutionally guaranteed").

[31] *Id.* at 507 ("To preserve the issue on appeal, a defendant whose for-cause challenge has been denied must exercise a peremptory challenge, if one is available, to achieve a legally impartial jury.").

[32] *Id.* (emphasis omitted).

that a biased juror sat . . . there is a great temptation to sow error."[33] That is, "[a] defendant whose for-cause challenge is erroneously denied by the trial court could always generate reversible error merely by expending all of his peremptories on other jurors, adverse or not."[34]

¶29 We find this reasoning unpersuasive and insufficient to justify continued adherence to the cure-or-waive rule for several reasons. First, it is simply not the case under the rule articulated below that a party could "create reversible error" merely by expending all of their peremptory challenges on jurors other than those who were previously challenged for cause. Under the rule we adopt today, such a course of action would merely preserve the issue of jury bias for appeal. It would not automatically create reversible error, however, since the party would still have to demonstrate that (a) a juror who was previously challenged for cause sat on the jury, and (b) that juror was, in fact, biased.[35] Only then would an appellate court be justified in reversing based on jury bias.

¶30 Second, the concerns expressed in *Baker* ignore the fact that there are cases where attorneys have good reason to suspect bias, but lack sufficient grounds to challenge those jurors for cause. In such a situation, the attorney should be allowed to use a peremptory challenge on that juror without losing the ability to raise the issue of jury bias on appeal. And this case is a perfect illustration of such a situation. Here, Ms. Turner had three peremptory challenges at her disposal, but suspected that five jurors were biased against her. Four of these jurors had previously been challenged for cause, but she suspected that the fifth posed the greatest threat to a verdict in her favor. Thus, in this situation, Ms. Turner should have been allowed to use one of her peremptory challenges on the juror whom she suspected of bias (but lacked grounds to challenge for cause) without thereby losing the ability to raise the issue of jury bias on appeal.

¶31 Accordingly, we reject the cure-or-waive rule and adopt the rule stated in *People v. Hopt*[36] in its stead. In that case, a defendant had peremptory challenges available but failed to use them to dismiss a previously challenged juror. When the defendant then at-

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[33] *Id.* at 507.

[34] *Id.*

[35] *See infra* ¶¶ 31–32.

[36] 9 P. 407, 408 (Utah Terr. 1886), *aff'd*, 120 U.S. 430 (1887).

tempted to argue jury bias on appeal, we held that "[u]ntil [the defendant] had exhausted his peremptory challenges, he could not complain" about possible jury bias.[37]

¶32 We conclude that this rule strikes the right balance between the competing interests mentioned above. On the one hand, it requires that the parties utilize all available peremptory challenges before the issue of jury bias can be raised on appeal, thereby encouraging them to use their challenges in order to achieve the goal of a fair trial. But as opposed to the cure-or-waive rule, it does not *require* the parties to use those challenges in a particular way, thus leaving the door open to their tactical use. That is, parties need not use all of their challenges on jurors who were previously challenged for cause in order to preserve the issue of jury bias for appeal. Rather, as long as (a) all of the party's peremptory challenges were used and (b) a juror who was previously challenged for cause ends up being seated on the jury, the issue of jury bias has been preserved, which is precisely what has occurred in this case. Ms. Turner used all of her peremptory challenges in the way that she thought afforded her the best chance at prevailing. But despite her efforts, jurors whom she thought should have been removed for cause ended up being seated on the jury, and hence she should be allowed to raise this issue of jury bias on appeal where, if she is successful in demonstrating that a challenged juror was biased, she would be entitled to a new trial.[38] We therefore expressly reject the cure-or-waive rule and in its stead adopt the rule articulated above as the proper standard for determining when the issue of jury bias has been properly preserved for appeal. We also overrule *Baker* to the extent that it is inconsistent with this opinion and remand this case to the district court for further proceedings consistent with this opinion.

CONCLUSION

¶33 The district court erred when it included Instruction No. 30 because no evidence was before the jury that supported that instruction. And because its presence undermines our confidence in the jury's verdict, we conclude that Ms. Turner is entitled to a new trial.

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[37] *Id.*

[38] Since we have already concluded that Ms. Turner is entitled to a new trial due to the erroneous jury instruction, we need not reach the issue of whether the previously challenged jurors in this case were, in fact, biased.

On remand, we instruct the litigants and the district court that the cure-or-waive rule is no longer the standard governing preservation of jury bias. Instead, appellate courts will apply the *Hopt* rule, as stated above, in order to determine whether the issue of jury bias has been adequately preserved.

Tab 5

31A-21-312. Notice and proof of loss.

(1) Every insurance policy shall provide that:

(a) when notice of loss is required separately from proof of loss, notice given by or on behalf of the insured to any authorized agent of the insurer within this state, with particulars sufficient to identify the policy, is notice to the insurer; and

(b) failure to give any notice or file any proof of loss required by the policy within the time specified in the policy does not invalidate a claim made by the insured, if the insured shows that it was not reasonably possible to give the notice or file the proof of loss within the prescribed time and that notice was given or proof of loss filed as soon as reasonably possible.

(2) Failure to give notice or file proof of loss as required by Subsection (1)(b) does not bar recovery under the policy if the insurer fails to show it was prejudiced by the failure. This subsection may not be construed to extend the statute of limitations applicable under Section **31A-21-313**.

(3) The insurer shall, on request, promptly furnish an insured any forms or instructions needed to make a proof of loss.

(4) As an alternative to giving notice directly under Subsection (1)(a), it is a sufficient service of notice or of proof of loss if a first class postage prepaid envelope addressed to the insurer and containing the proper notice or proof of loss is deposited in any United States post office within the time prescribed.

(5) The commissioner shall adopt rules dealing with notice of loss and proof of loss time limitations under insurance policies. Under Section **31A-21-202**, the commissioner's express approval shall be received before any contract clause requiring notice of loss or proof of loss in a manner inconsistent with the rule may be used in an insurance contract.

(6) The acknowledgment by the insurer of the receipt of notice, the furnishing of forms for filing proofs of loss, the acceptance of those proofs, or the investigation of any claim are not alone sufficient to waive any of the rights of the insurer in defense of any claim arising under the insurance policy.

Breach of contract. First party claim.

CV 2401. Insurance policy is a contract. Approved

An insurance policy is a contract between an insurance company and a policy holder, and therefore the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy obligates both [name of plaintiff] and [name of defendant] to comply with the terms of the policy.

References

MUJI 1

21.4

Committee Notes

See also the Commercial Contract instructions, CV 2101 et seq., which may have some application here, depending on the circumstances.

CV 2402. General description of claims and defenses. Approved

[Name of plaintiff] claims that [name of defendant] breached the insurance policy and claims to have been damaged by the breach as follows: [describe claimed losses].

[Name of defendant] claims that [describe defenses].

References

MUJI 1

Committee Notes

CV 2403. Breach of policy provision. Approved

[Name of plaintiff] claims that [name of defendant] breached the following provisions in the policy: [Quote applicable policy language.]

[When deciding this case, you must use the following definitions: Instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

References

MUJI 1

Committee Notes

The interpretation of the policy is the court's responsibility. If there are words and phrases in the policy which need special interpretation, the court will need to provide this to the jury. The jury would not interpret the provision, but only decide the contested facts that relate to the issue.

CV 2404. Elements of the claim. Approved

To succeed on this claim, [name of plaintiff] has the burden to prove [state the elements of the claim that are in dispute].

References

MUJI 1

Committee Notes

The existence of a contract between the insured and the insurer is rarely disputed, and rather than restate all of the elements necessary for a breach of contract claim — see CV 2102, Elements for breach of contract — the judge should focus the jury on those elements that are in dispute.

CV 2405. Value of loss. Approved

[Name of plaintiff] claims that [name of defendant] has not paid for [describe loss]. To succeed on this claim, [name of plaintiff] has the burden to prove the value of [his] loss.

References

MUJI 1

Committee Notes

CV 2406. Exclusion from coverage. Approved

[Name of defendant] claims that the policy excludes [name of plaintiff]'s claim from coverage. The exclusion reads:

[Quote the exclusion or limitation.]

[When deciding this case, you must use the following definitions: instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

To succeed on this claim, [name of defendant] has the burden to prove that the exclusion applies to [name of plaintiff]'s claim.

References

LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988).

MUJI 1

Committee Notes

See the committee note to CV 2403, Breach of policy provision.

It is the general rule in coverage litigation that the burden is on the insured to demonstrate that the loss (under either third-party or first-party coverage) is encompassed by the general coverage provisions of the insurance contract. See, e.g., Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F.Supp. 1278, 1295-96 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 1995) (insured bears the burden of proving that its claim comes within the broad meaning of occurrence, and thus comes within the coverage under an insurance policy).

In Young v. Fire Ins. Exchange, 2008 UT App 114, 182 P.3d 911, the Utah Court of Appeals concluded that in litigation arising out of a first party property claim based on a fire, the insured had the threshold burden to present evidence that the fire was the result of an accident. Id. at ¶ 28.

Once the insured meets its burden of establishing that the loss comes within the grant of coverage of the insurance contract, the burden then shifts to the insurer to show the application of an exclusion which would bar coverage. LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988); Metric Construction Co. v. St. Paul fire & Marine Ins. Co., 2005 WL 2100939 at *2 (D. Utah August 31, 2005); Young v. Fire Ins. Exchange, 2008 UT App 114, ¶ 28, 182 P.3d 911; Draughon v. CUNA Mutual Ins. Soc., 771 P.2d 1105, 1108 (Utah Ct. App. 1989).

Once the insurer meets its burden of showing the application of an exclusion, should that exclusion contain any exceptions, the burden is on the insured to show the application of an exception to an exclusion. Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F. Supp 1278, 1312 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 2005).

CV 2407. Notice of loss.

[Name of insurance company] claims that [name of policy holder] breached the terms of the insurance contract because [he/she/it] did not give [adequate/timely] notice of the loss.

[[Name of insurance company] claims that it did not breach the insurance policy because [name of policy holder] did not submit a[n] [adequate/timely] notice of loss.]

[The insurance company must be given an adequate notice of loss. A notice of loss is adequate if it provides sufficient facts to identify the loss and the insurance policy.]

[~~If it was not reasonably possible to give the notice of loss within the required time, t~~The failure to give the notice of loss within the time required by the policy is not a valid reason to deny the claim unless [name of defendant] can prove that it was prejudiced by the failure to give timely notice.]

You must decide whether the notice of loss was [adequate/timely]. [Insurance company] has the burden to prove that the notice of loss was not [adequate/timely]. If it was not timely, [Insurance company] has the burden to prove it was prejudiced before you may rule in [Insurance company]'s favor.

References

Utah Code Section 31A-21-312.

Committee Notes

This instruction applies if plaintiff is claiming damages arising from breach of the insurance contract or if the insurer is claiming there is no coverage due to the failure to timely file a proof of loss. It may not apply if the dispute is simply to determine the value of the covered loss.

It has not yet been decided whether this notice of loss instruction applies to claims made policies.

CV 2408. Proof-of-loss. Approved

[[Name of insurance company] claims that [name of policy holder] is not covered because it did not receive a[n] [adequate, timely] proof-of-loss.]

[[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate, timely] proof of loss.]

The insurance company must be given an adequate proof-of-loss. [[Name of insurance company] claims that [name of policy holder] is not covered because it did not receive a[n] [adequate, timely] proof-of-loss.]

[[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate, timely] proof of loss.]

A proof-of-loss is a summary of the facts and circumstances that gave rise to the covered loss. The law does not require strict compliance with policy provisions related to submission of the proof-of-loss, as long as the proof-of-loss is adequate. A proof-of-loss is adequate if it gives [[insurance company] a sufficient opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.

[If it was not reasonably possible to give the proof of loss within the required time, the failure to give proof of loss within the time required by the policy is not a valid reason to deny the claim.]

You must decide whether the proof-of-loss was [adequate/timely]. [Insurance company] has the burden to prove that the proof-of-loss was not [adequate/timely].

References

Zions First National Bank v. National American Title Ins. Co., 749 P.2d 651, 655 – 656 (Utah 1988).

MUJI 1

Committee Notes

CV 2409. When Insurer claims prejudice from delay in notice or proof.

[Insurer] claims that [Insured's] delay in providing [notice][proof] of [describe claim or loss] was so lengthy it caused actual prejudice to [Insurer's] ability to adequately and fully [investigate and defend the claim][investigate and settle the loss]. An insurer is prejudiced if it suffers a material change in its ability to investigate, or defend, or resolve a claim.

When you consider whether [Insurer] suffered actual prejudice, you should consider the evidence in light of the purposes of the notice requirements, namely to enable insurer to investigate and take the necessary steps to evaluate the [claim][loss] and protect its interests.

In determining if [Insurer] suffered actual prejudice, you should consider whether the late notice interfered with the [Insurer's] ability to adequately:

(1) Examine the scene of the accident;

(2) Properly interview witnesses;

(3) Review and assess damages claims, both at the outset and as new information came in during the investigation;

(4) [Direct and control the actual trial with attorneys of its choosing;]

(5) Determine the reasonable cost for resolving the claim; and/or

(6) Retain experts to help assess liability and damages.

The failure to give [adequate/timely] [notice of loss][proof-of-loss] is a valid reason to deny the claim if the [name of defendant] proves that it was prejudiced by [name of plaintiff]'s failure to give [adequate/timely] proof-of-loss.

References

Busch v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987).
State Farm Mut. Auto Ins. Co., 2003 UT 48, 89 P.3d 97.
F.D.I.C. v. Oldenburg, 34 F.3d 1529.

Utah Transit Authority v. Liberty Mut. Ins. Co., 2006 WL 2992715 (D. Utah Oct. 18 2006) (applying Utah law).
Utah Code Section 32A-21-312(2).

Committee Notes

The wording selected will depend on whether the claim at issue is a first-party claim or a third-party claim. If a prejudice instruction is needed in a case involving breach of the consent to settle in the context of underinsured or uninsured motorist coverage. *See* State Farm Mut. Ins. Co. v. Green*,* 2003 UT 48, ¶ 33, 89 P.3d 97 (setting forth the factors to be considered).

CV 2410. Unspecified time of performance. Approved

When the policy requires an act to be performed without specifying the date to perform the act, the act must be done by a reasonable time under the circumstances.

Because the policy does not require [name of defendant/name of plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.] by a particular date, you must decide, based on all of the circumstances, what was a reasonable time for [insurer/plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.].

References

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998).

Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

MUJI 1

Committee Notes

This instruction applies only if the policy or the law does not provide when the performance at issue must be done.

CV 2411. Recovery of damages. Approved.

If you find that [name of defendant] breached the provisions of the policy, [name of plaintiff] is entitled to the unpaid benefits under the policy and damages caused by [name of defendant]'s breach.

As appropriate, instruct the jury on expectation damages:

Instruction CV2135. Expectation damages - General.

And consequential damages:

Instruction CV2136. Consequential damages.

References

Machan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17, 116 P.3d 342, 346.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163, 1170.

Berube v. Fashion Centre, 771 P.2d 1033, 1050 (Utah 1989).

Gardiner v. York, 2006 UT App 496, ¶ 14, 153 P.3d 791, 795.

Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985).

Restatement (Second) of Contracts § 351 (1981).

MUJI 1

21.9

Committee Notes

The measure of damages for breach of an insurance contract is the same as for commercial contracts generally, unless changed by law.

CV 2412. Coverage by estoppel. Approved

[Name of plaintiff] claims that [Name of defendant]'s agent misrepresented the [scope of coverage/benefits] of [name of defendant]'s insurance policy. [Name of plaintiff] therefore claims that [he/she/it] is entitled to modify the insurance policy to conform to what was represented by [name of defendant]'s agent. To succeed, [name of plaintiff] must prove the following:

[Name of defendant]'s agent made an important misrepresentation to [name of plaintiff] regarding the [scope of coverage/ benefits/protection] provided by the insurance policy;

[Name of plaintiff] reasonably relied on [name of defendant]'s agent's misrepresentations, and

[Name of plaintiff] was harmed by [his/her/its] reliance.

References

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 25, 158 P.3d 1088.

Committee Notes

Estoppel is generally an equitable relief to be decided by the court. This instruction applies if the court has an advisory jury to decide the factual issues.

CV 2413. Insurable interest.

You will be asked to decide whether [name of plaintiff] has an insurable interest in [real or personal property].

Under the law, a person has an insurable interest in [real or personal property] whenever [he/she/it] would profit by or gain some advantage by its continued existence and suffers some loss or disadvantage by its destruction. Title or possession to the property, or having a lien on the property, is not the deciding fact. The interest may be legal, qualified, conditional, contingent, or merely a right to use the property, with or without the payment of rent.

References

Error v Western Home Ins. Co., 762 P.2d 1077, 1081-1082 (1988).

Hill v Safeco Ins. Co., 22 Utah 2d 96, 448 P.2d 915 (1969).

CV 2414. Compliance with Utah law.

When interpreting the insurance contract, [name of defendant] was required to do so consistent with Utah law, which I will now explain.

[(1) An insurance company is required to construe any ambiguous or uncertain language in the policy in favor of coverage as long as the uncertain language could be reasonably interpreted in favor of coverage. The court has ruled that:]

[(2) An insurance company cannot deny a claim based on a provision in the policy which is contrary or inconsistent with Utah law. Utah law provides:

If [name of defendant] did not comply with the above, you may consider this in deciding if [name of defendant] breached the insurance contract.]

References

Lieber v. ITT Hartford Insurance Center, 2000 UT 90, ¶ 14, 15 P.3d 1030 (“[T]o the extent that any provision in this policy is not in harmony with the statutory requirements as we have interpreted them today, we hold such provisions invalid ...”).

CV 2415. Recovery of consequential damages.

If you find that [name of defendant] breached the provisions of the policy, [name of plaintiff] is entitled to the unpaid benefits under the policy and any “consequential” damages caused by [name of defendant]’s breach.

Consequential damages are those damages caused by [name of defendant]'s breach which, at the time the policy was issued, [name of defendant] could have generally foreseen might occur if it breached the terms of the policy.

A loss is foreseeable if it follows from the breach in the ordinary course of events. A loss is also foreseeable if it is the result of special circumstances, beyond the ordinary course of events, that [name of defendant] knew of or had reason to know of.

In deciding whether the damage was foreseeable at the time the policy was issued, you may consider the nature and language of the policy and the reasonable expectations of the parties.

References

Mahan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17, 116 P.3d 342.
Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163. ("Limiting Black's recovery in this action to contractual damages does not leave him without a meaningful remedy for Allstate's breach. …We stated [in *Beck*] that '[d]amages recoverable for breach of contract include both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.' …We recognized that 'consequential damages for breach of contract may reach beyond the bare contract terms,' indicating that '[a]though the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.' Thus, while Black will be unable to recover punitive damages in this case, he may recover both general and consequential damages, which could conceivably exceed the amount of his policy limit.")