# Agenda
## Advisory Committee on
## Model Civil Jury Instructions

October 27, 2008
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

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| Approval of minutes | Tab 1 | John Young |
| Motor Vehicle Instructions<br>615. Right-of-way. Flashing red light.<br>616. Right-of-way. Flashing yellow light.<br>626. Comply with all duties. (deleted)<br>630. Negligent entrustment.<br>635. Seatbelt usage. | <br><br><br><br><br>Tab 2 | <br><br><br><br>Rich Humpherys<br>Lynn Davies |
| Introduction to MUJI 2d and Medical Malpractice Instructions | Tab 3 | Frank Carney |
| CV1052. Learned intermediary | Tab 4 | Frank Carney |
| CV1057. Safety risks. | Tab 5 | John Young |

**Committee Web Page:** http://www.utcourts.gov/committees/muji/

**Published Instructions:** http://www.utcourts.gov/resources/muji/

**Meeting Schedule:** Matheson Courthouse, 4:00 to 6:00 p.m.

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|---|---|
| November 10, 2008 | Intentional Torts / Fraud and Deceit |
| December 8, 2008 | Eminent Domain |
| January 12, 2009 | Premises Liability |
| February 9, 2009 | Insurance Obligations |
| March 9, 2009 | Probate |
| April 13, 2009 | Professional Liability |
| May 11, 2009 | Employment |
| June 8, 2009 | |

# Tab 1

***MINUTES***
Advisory Committee on Model Civil Jury Instructions
October 14, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill.

1. *Contract Instructions*. The committee continued its review of the motor vehicle instructions.

a. *CV6##. "Right of way" defined*. The committee revised the instruction to read:

> A [vehicle/pedestrian] has the right of way when [he] has the right to proceed in a lawful manner in preference to an approaching [vehicle/pedestrian].

**The committee approved the instruction as revised.**

b. *CV616. Emergency vehicles*. Mr. Ferguson thought the instruction did not clearly tell the jury what it was supposed to decide. At Mr. Ferguson's suggestion, the following changes were made: The following sentence was added to the beginning of the instruction: "You must decide whether [name of driver of an emergency vehicle] acted reasonably." The third paragraph was revised to read, "The law allows the driver of an emergency vehicle to disregard certain duties if each of the following is true:" And "but only" was deleted from the phrase starting "[drive through a stop signal . . .". **The committee approved the instruction as revised.**

c. *CV617. Pedestrians*. The committee deleted the phrase "at all times" and **approved the instruction as modified.**

Mr. Humpherys joined the meeting.

d. *CV618. Pedestrian crossing a roadway*. At Mr. Ferguson's suggestion, the committee replaced the first sentence of the instruction with the following: "You must decide whether [name of pedestrian] acted reasonably. You shall consider the following:"

Mr. Summerill joined the meeting.

Mr. Shea questioned whether the reference to unmarked crosswalks was necessary, since it appeared that all pedestrians must yield the right-of-way unless they are in a marked crosswalk. Mr. Carney looked up the statute, which gives the right-of-way to pedestrians in either a marked crosswalk or an

unmarked crosswalk at an intersection. The committee thought the definition of "unmarked crosswalk" was too cumbersome to include in the instruction and left it to the court and parties to craft an instruction defining "unmarked crosswalk" if that is an issue in the particular case. At the suggestion of Mr. Shea, subparagraph (1) was broken into two subparagraphs: one (subparagraph (1)) covering marked crosswalks, and the other (new subparagraph (2)) covering unmarked crosswalks, and the parenthetical referring to the statutory definition of unmarked crosswalks was placed at the end of new subparagraph (2). The phrase "shall yield" was replaced with "must yield," and the phrase "reasonably careful person in the position of a pedestrian" was replaced with "reasonable pedestrian."

Dr. Di Paolo joined the meeting.

Dr. Di Paolo suggested that the first sentence read: "To decide whether [name of pedestrian] acted reasonably, you must consider the following:" **The committee approved the instruction as modified.**

e. *CV619. Drivers toward pedestrians.* The committee revised the instruction to read:

> If traffic signals are [not in place/not in operation] a driver shall yield the right-of-way to a pedestrian:
>
> (1) if [he] is within a crosswalk on the half of the road where the driver is traveling, or
>
> (2) if [he] is approaching so closely from the opposite half of the road as to be in danger.
>
> Both a driver and a pedestrian have a continuing duty to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other.

Dr. Di Paolo asked whether subparagraphs (1) and (2) should be bracketed. Mr. Humpherys thought not, since the jury may have to decide whether the pedestrian fits within subparagraph (1) or (2), or both may apply in a given case. **The committee approved the instruction as revised.**

f. *CV620. Pedestrian signals.* Mr. Ferguson thought the instruction did not explain what the jury was supposed to do. He suggested starting the instruction with "You must decide whether [name of pedestrian] acted

reasonably." Mr. Young noted that the instruction should only be given if CV6## is given first. Mr. Young questioned whether the last paragraph was necessary. It was revised to read, "But both a driver and a pedestrian have a continuing duty to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other." The paragraph was moved to the end of CV6##. Mr. Ferguson asked what a pedestrian's duty is if the signal counts down to zero. At what point must the pedestrian not try to cross the street? Mr. Carney noted that there may be municipal traffic codes that address the issue. He looked up Salt Lake City's, which appears to let a pedestrian start crossing an intersection during the countdown. At Mr. Young's suggestion, a committee note was added that says, "The judge should adjust this instruction if the pedestrian signal uses a different technology or the case is controlled by a local ordinance." The committee discussed which modal to use ("may" or "shall"). Dr. Di Paolo noted that "shall" is not commonly used and not readily understood by lay people. Mr. Summerill thought that, if a statute defines the standard of care (that is, if it is being used to define negligence), the instruction should say a violation "is evidence" of negligence, but he noted that the committee has not followed that convention with other instructions, such as CV607, which says that driving over the speed limit "may be evidence of fault." He thought the committee should be consistent. Messrs. Young and Ferguson, however, thought that the speed limit law was different, that more flexibility was built into it; that is, the speed limit is just prima facie evidence of a reasonable speed. The last clause of subparagraph (2) was revised to read, "but a pedestrian who has started crossing keeps the right-of-way while continuing to a [sidewalk/safety island]." **The committee approved the instruction as revised. The question at the end of the instruction was deleted.**

g. *CV621. Driving near children.* At Dr. Di Paolo's suggestion, "around" was changed to "near." Mr. Humpherys suggested deleting "than a mature person" because he thought it was ambiguous and imprecise, but others thought it was necessary to answer the implicit question, More carefully than what? Messrs. Humpherys and Shea suggested changing the instruction to track CV204 and to include a cross-reference to CV204, so that the instruction would read: "A driver must anticipate the ordinary behavior of children and must be more careful when children are present than when only adults are present." **The committee approved the instruction as revised.**

h. *CV622. Bicyclist.* The committee revised the instruction to read:

> A bicyclist must use reasonable care to operate [his] bicycle safely under the circumstances, both for [his] own safety and for the safety of others.

> However, a driver should be more cautious when [he] knows or should know a bicyclist is riding in the vicinity.

**The committee approved the instruction as revised.**

i. *CV623. Bicycles. Three-foot rule.* The committee revised the instruction to read:

> A driver may not drive within three feet of a moving bicycle, unless it is necessary to drive closer and it can be done safely.

**The committee approved the instruction as revised.**

j. *CV624. Real property owner to remove obstruction impairing view.* Mr. Humpherys suggested "landowner" for "owner of real property," but Dr. Di Paolo thought most jurors would interpret "landowner" as someone owning a large estate or undeveloped property, such as a rancher. The introductory phrase, "The owner of real property," was changed to "A property owner." Mr. Ferguson asked whether the duty also applied to tenants and whether it extended to pedestrians. The committee note was deleted, and a citation to *Jones v. Bountiful City Corp.,* 834 P.2d 556 (Utah Ct. App. 1992),was added to the references. **The committee approved the instruction as revised.**

k. *CV625. Violation of statute, ordinance or safety law.* The committee noted that CV625 is substantially similar to CV212. Mr. Humpherys questioned whether a violation of a statute is or should be excused if the violator "was incapable of obeying the law" or "incapable of understanding what the law required." Mr. Ferguson asked what these phrases meant. Mr. Johnson offered an example--a 14-year-old driving a car. Mr. Summerill thought that a child engaged in an adult activity was held to the same standard of care as an adult. Mr. Johnson did not think that was necessarily the case. Messrs. Carney and Young thought that the committee did not have to resolve these issues, that they were legal questions for the court to decide. Mr. Humpherys asked why the jury should be instructed on them at all, then, if they were legal issues. Mr. Young noted that the legal question, which the committee cannot resolve, is whether inability to understand or obey the law is a legal justification or excuse for violating the law; Utah appellate decisions seem to say that it is. If someone disagrees, they will have to take the matter up with the Utah Supreme Court. What the jury must decide is the factual question of whether a person was unable to understand or obey the law in a particular case. Messrs. Young and Summerill thought that the instruction should be approved if it is consistent with CV212.

Mr. Johnson thought that the instruction should be moved up to precede the instructions on specific statutory duties. **The committee approved the instruction. Mr. Young asked committee members to give Mr. Shea their suggestions on where the instruction should be moved to.**

l. *CV626. Comply with all duties.* Mr. Ferguson thought that CV626 was redundant, given CV625. Mr. Carney thought the instruction lacked authority and was more argument than a proper jury instruction. Mr. Fowler wanted to know if the motor vehicle subcommittee thought the instruction was necessary and why. **The committee struck the instruction, subject to some justification by the subcommittee for including it.**

m. *CV627. Assuming obedience to law.* The committee revised the first part to read, "A driver has a right to assume that others will obey the law." Mr. Ferguson questioned whether the phrase "a good reason to believe otherwise" was sufficiently specific. Others did not have a problem with it. Mr. Shea thought the instruction fit better in the negligence instructions. **The committee approved the instruction.**

n. *CV628. Increased duty.* **The committee deleted the instruction** because it was not specific to motor vehicle accidents and was already included in the general negligence instructions.

o. *CV629. Owner who allows minor to drive.* Mr. Young thought the last sentence was unnecessary. Mr. Johnson thought it may be necessary under *Dixon v. Stewart.* Mr. Simmons noted that the law was an exception to the Liability Reform Act's abolition of joint and several liability, which the jury will be instructed on in other instructions, and that, if both the owner and the driver are listed separately on the special verdict form, the jury should probably be instructed as stated in the last sentence. Mr. Young called for a vote on whether the last sentence should be struck. **The committee voted to strike the last sentence,** with Messrs. Carney, Ferguson, Fowler, Humpherys, and Summerill voting in the affirmative.

p. *CV630. Negligent entrustment.* The committee asked what the authority for the instruction was. Mr. Summerill noted the following Utah cases on negligent entrustment: *Lane v. Messer,* 731 P.2d 488 (Utah 1986); *Wilcox v. Wunderlich,* 73 Utah 1, 272 P. 207 (1928); and *Utah Farm Bureau v. Johnson,* 738 P.2d 652 (Utah Ct. App. 1987). The committee revised the first paragraph to read:

> The owner of a motor vehicle who allows another person to [use/drive] [his] vehicle may be responsible under certain circumstances for the harm caused by the [user/driver] if the owner knew or a reasonable person should have known that it was unsafe to allow the driver to [use/drive] the vehicle.

Mr. Young questioned the need for the last paragraph. Mr. Humpherys suggested deleting the "such as" clause. Mr. Shea suggested changing "exercised reasonable care" to "is responsible." Mr. Young suggested, "may be responsible" or "may be at fault." Mr. Humpherys thought the last paragraph implied vicarious liability on the part of the negligent entrustor. At Mr. Young's suggestion, **the last paragraph was struck, and the instruction was sent back to the motor vehicle subcommittee to rewrite it in terms of fault.**

q. *CV631. Threshold.* Mr. Humpherys suggested adding "reasonable and necessary" before "medical expenses" in subparagraph (3). Mr. Summerill disagreed, noting that the phrase "reasonable and necessary" was not in the statute. Mr. Johnson thought that there is an unpublished Utah Court of Appeals decision (*Vaughn v. Anderson,* 2005 UT App 423) that says whether the expenses were reasonable and necessary is a question for the jury. Mr. Summerill thought there were cases that said that one can infer that medical expenses are reasonable and necessary if insurance has paid for them. At Mr. Summerill's and Mr. Young's suggestion, a committee note was added saying that whether the medical expenses must be "reasonable and necessary" is an open issue under Utah law. Dr. Di Paolo thought the second sentence should be stated in the positive. The second sentence was revised to read: "For a person to recover non-economic damages resulting from an automobile accident [he] must meet one or more of the following threshold injury requirements." **The committee approved the instruction as modified.**

r. *CV632. Police officer testimony.* Dr. Di Paolo questioned the need for the first three paragraphs. Mr. Johnson noted that the subcommittee agreed that there is a problem in how juries view police officers' testimony and that an instruction on the subject is needed. Dr. Di Paolo thought that the instruction nevertheless did not have to explain the difference between a fact witness and an expert witness, unless the jury had to decide whether the officer was testifying as a fact witness or an expert. And if that is what the jury must decide, the instruction does not tell the jury how to make that decision. Mr. Ferguson thought that the instruction left it to the jury to decide how an officer is testifying. Dr. Di Paolo suggested adding a sentence before the last paragraph that says, "[Name of officer] testified in this case as a [fact/expert] witness." Dr. Di Paolo said she did not have a problem with the instruction if it is clear to the jury that a

given officer testified as a fact witness or as an expert (or both). Other committee members thought it would be clear during the course of the trial. **The committee approved the instruction without changes.**

s. *CV633. Insurance.* Mr. Young asked whether the instruction was already covered by CV2024, on collateral source payments. Mr. Humpherys thought it was important to include the instruction in the motor vehicle instructions because all owners and operators of motor vehicles are required to have insurance, so jurors will be more likely to consider insurance in motor vehicle cases. **The committee decided to leave the instruction in and approved it as written.**

t. *CV634. Motorcycle helmet usage.* Mr. Ferguson asked whether the same rules apply to bicyclists. The answer was no. Mr. Humpherys said the problem with the instruction was that it did not tell the jury what to do with the information. Is the failure to wear a helmet when required by law a matter of strict liability or comparative fault, or does it go to damages? Mr. Johnson thought it went to damages, under the doctrine of avoidable consequences. Mr. Summerill noted that it can also go to the issue of causation. Mr. Humpherys asked whether a violation of the statute is subject to justification or excuse under CV625. Mr. Young thought that the instruction should not be included unless there is some Utah appellate decision saying what the jury is supposed to do with the information.

u. *CV635. Seatbelt usage.* Mr. Fowler thought that the instruction should have a committee note saying that it may not apply in crashworthiness cases. **Mr. Fowler will propose such a note.** Mr. Johnson thought that the seatbelt usage statute was unconstitutional, as a legislative encroachment on the judiciary's power to adopt rules of evidence. The committee rewrote the instruction to read:

> You must decide this case without regard to whether you believe that a [seatbelt/child restraint device] was either used or not used by any party in this case. If you have heard evidence or if you believe that any party in this case used or did not use seatbelts or child restraint devices, you should not consider such information in reaching a verdict.

**The committee approved the instruction as revised.**

2. *Next Meeting*. The next meeting will be Monday, October 27, 2008, to discuss the construction contract instructions.

The meeting concluded at 6:30 p.m.

# Tab 2

**(1) CV615. Right-of-way. Flashing red light.**

A driver who approaches an intersection with a flashing red light must stop. After stopping, the driver must yield the right-of-way to any vehicle in the intersection or approaching so closely as to constitute an immediate hazard.

References

Utah Code Section 41-6a-307

**(2) CV616. Right-of-way. Flashing yellow light.**

A driver who approaches an intersection with a flashing yellow light may cautiously proceed through the intersection. The driver must yield the right-of-way to ?????????.

References

Utah Code Section 41-6a-307

~~**(3) CV626. Comply with all duties.**~~

~~The failure to comply with one or more of the duties or safety laws that I have just explained, unless that failure was excused, is evidence of fault.~~

~~The compliance with any duty does not justify the violation of another duty or safety law.~~

Delete, subject to subcommittee explaining what is intended and citation to law.

**(4) CV631. Negligent entrustment.**

[Name of plaintiff] claims that [name of owner] was negligent in allowing [name of driver] to drive the vehicle. [Name of owner] is responsible for the harm to [name of plaintiff] if all of the following are true:

(1) [Name of owner] owns the vehicle.

(2) [Name of owner] permitted [name of driver] to drive the vehicle.

(3) At the time [name of owner] gave permission to drive, [he] knew that [name of driver] was a [careless, reckless, incompetent, inexperienced, intoxicated] driver.

(4) [Name of driver] was negligent in driving the vehicle.

(5) [Name of driver]'s negligence caused the accident.

Reference

Wilcox v. Wunderlich, 73 Utah 1, 272 P 207 (1928).

Lane v. Messer, 731 P.2d 488 (Utah 1986).

Am Jur 2d Automobiles and Highway Traffic § 617

Committee Notes

The law is not clear to what extent the negligent entrustor is liable for the negligence of the driver.

**As proposed by the subcommittee:**

The owner of a motor vehicle who allows another person to [use/drive] [his] vehicle, may be responsible under certain circumstances for the harm caused by the [user/driver] if the owner knew or should have known that it was unsafe to allow the driver to [use/drive] the vehicle, and as a result, a reasonable person would realize that the driver may injure someone in the [name of plaintiff]'s position.

In deciding whether the owner exercised reasonable care in giving the vehicle to the [user/driver], you may consider what the owner knew or should have known, such as the [condition of the vehicle] [and the driver's or user's physical and mental condition, his experience, his abilities, his driving habits, etc.].

**(5) CV635. Seatbelt usage.**

You must decide this case without regard to whether you believe that a [seatbelt/child restraint device] was used or not used by any party in this case. If you have heard or if you believe that any party in this case used or did not use a [seatbelt/child restraint device], you should not consider such information in deciding a verdict.

References

Utah Code Section 41-6a-1806.

Committee Notes

From Tracy

# Tab 3

**Introduction to the Model Utah Jury Instructions, Second Edition.**

The Supreme Court has two advisory committees, one for civil instructions and one for criminal instructions, working to draft new and amended instructions to conform to Utah law. The Court will not promulgate the instructions in the same manner as it does the rules of procedure and evidence; rather the Court relies on its committees and their subcommittees, consisting of lawyers of varied interests and expertise, to subject the model instructions to a full and open critical appraisal.

The Utah Supreme Court approves this Second Edition of the Model Utah Jury Instructions (MUJI 2d) for use in jury trials. An accurate statement of the law is critical to instructing the jury, but accuracy is meaningless if the statement is not understood - or is misunderstood - by jurors. MUJI 2d is intended to be an accurate statement of the law using simple structure and, where possible, words of ordinary meaning. Using a model instruction, however, is not a guarantee of legal sufficiency. MUJI 2d is a summary statement of Utah law but is not the final expression of the law. In the context of any particular case, the Supreme Court or Court of Appeals may review a model instruction.

Sometimes the law itself is unclear. There might be no controlling statutes or cases. The statutes or cases might be incomplete, internally inconsistent, or inconsistent with each other. In such cases, an instruction might have two or more alternatives. The alternatives are different statements of the law based on differing authority. The order of the alternatives does not imply preference.

For civil instructions, MUJI 2d eventually will replace the original MUJI published by the Utah State Bar. MUJI 2d represents the first published compilation of criminal instructions in Utah. This will be a gradual process, but when a revised version appears in MUJI 2d, that is intended to replace the same instructions in MUJI 1st, and MUJI 1st should no longer be used.

MUJI 2d is a continual work in progress, with new and amended instructions being published periodically on the state court web site. Although there is no comment period for jury instructions as there is for rules, we encourage lawyers and judges to share their experience and suggestions with the advisory committees: experience with these model instructions and with instructions that are not yet included here. Judges and lawyers who draft a clearer instruction than is contained in these model instructions should share it with the appropriate committee.

If there is no Utah model instruction, the judge must nevertheless instruct the jury. The judge's task is to further the jurors' understanding of the law and their responsibility though accuracy, clarity and simplicity. To assist in this task, links on this page lead to principles for plain-language drafting and to the pattern instructions of some other jurisdictions.

Judges should instruct the jurors at times during the trial when the instruction will most help the jurors. Many instructions historically given at the end of the trial may be given at

the beginning or during the trial so that jurors know what to expect. The fact that an instruction is not organized here among the opening instructions does not mean that it cannot be given at the beginning of the trial. Instructions relevant to a particular part of the trial should be given just before that part. A judge might repeat an instruction during or at the end of the trial to help protect the integrity of the process or to help the jurors understand the case and their responsibilities.

When preparing written instructions, judges and lawyers should include the title of the instruction. This information helps jurors organize their deliberation and decision-making. Judges should provide a copy of the written instructions to each juror. This is permitted under the rules of procedure and is a sound practice because it allows each juror to follow the instructions as they are read and to refer to them during deliberations.

MUJI 2d is drafted without using gender-specific pronouns whenever reasonably possible. However, sometimes the simplest, most direct statement requires using pronouns. The criminal committee uses pronouns of both genders as its protocol. In the trial of criminal cases, often there will not be time to edit the instructions to fit the circumstances of a particular case, and the criminal instructions are drafted so that they might be read without further concern for pronoun gender. The civil committee uses masculine pronouns as its protocol. In the trial of civil cases there often is more time to edit the instructions. Further, in civil cases, the parties are not limited to individual males and females but include also government and business entities and multiple parties. Judges and lawyers should replace masculine with feminine or impersonal pronouns to fit the circumstances of the case at hand. Judges and lawyers also are encouraged in civil cases to use party names instead of "the plaintiff" or "the defendant." In these and other circumstances judges and lawyers should edit the instructions to fit the circumstances of the case.

**CV301A Committee Note on Medical Malpractice Instructions**

The Advisory Committee intentionally omitted several of the MUJI 1st medical malpractice instructions.

MUJI 1st 6.27 (Physician Not Guarantor of Results) was deleted in view of the decisions in Green v. Louder, 2001 UT 62, 29 P.3d 638 (trial courts directed not to instruct juries that the "mere fact" of an accident does not mean that anyone was negligent), and Randle v. Allen, 863 P.2d 1329 (trial courts directed not to instruct juries on "unavoidable accidents").

MUJI 1st 6.34 and 6.35 (causation instructions) have been replaced by a single instruction.

The Advisory Committee considered but did not include instructions on the role of custom in determining the standard of care, loss-of-chance causation, and apparent agency claims against hospitals. There is no clear appellate authority on whether those claims exist in this state.

As with all MUJI 2d instructions, these are intended to replace the earlier versions found in MUJI 1st and, thus, the medical malpractice instructions in MUJI 1st should no longer be used.

# Tab 4

CV1052. Learned intermediary.

Manufacturers of prescription drugs have a duty to warn only the physician prescribing the drug, not the patient, of the risks associated with the drug and the procedures for its use. If you find that the manufacturer gave appropriate warnings to the physician, you must find that the manufacturer fulfilled its duty to warn.

References

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922 (Utah 2003).

See also, Downing v Hyland Pharmacy, ____ P.3d _____, 2008 UT 65 (learned intermediary rule does not preclude a negligence claim against a pharmacist for dispensing drug that has been withdrawn from the market.)

IN THE SUPREME COURT OF THE STATE OF UTAH

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Steven Downing,
Plaintiff and Appellant,

v.

Hyland Pharmacy dba United Drug Hyland Pharmacy,
Defendant and Appellee.

No. 20060771

F I L E D

September 16, 2008

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Third District, Salt Lake
The Honorable Tyrone E. Medley
No. 040917216

Attorneys: D. David Lambert, Leslie W. Slaugh, Provo, for plaintiff
Jesse C. Trentadue, Kevin D. Swenson, Salt Lake City, for defendant

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DURHAM, Chief Justice:

**INTRODUCTION**

¶1 This appeal raises two related questions: (1) whether a pharmacy may be held liable in negligence for continuing to fill prescriptions for a drug that has been withdrawn from the market by the Food and Drug Administration (FDA) and/or the manufacturer; and (2) whether a pharmacy may be held liable in negligence for failing to warn the patient of the drug's status. The district court granted summary judgment to Hyland Pharmacy on both questions, concluding that this court's decision in Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 79 P.3d 922, precluded the plaintiff's claims. We reverse.

**BACKGROUND AND PROCEDURAL HISTORY**

¶2 In early 1996, Dr. Jerry Poulson began prescribing fen-phen,[1] an appetite suppressant medication, for Steven Downing.

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[1] According to the FDA,

> [f]en-phen refers to the . . . combination of

(continued...)

From February 1996 until September 2000, Hyland filled Downing's prescriptions for fen-phen.

¶3 On August 16, 2004, Downing brought negligence claims against Hyland for continuing to fill prescriptions for fenfluramine, brand name Pondimin, after it was withdrawn from the market by the FDA and the manufacturer, Wyeth-Ayerst Laboratories (Wyeth). Downing alleged that the pharmacy negligently filled his fen-phen prescriptions and failed to remove Pondimin from its shelves and inventory after the withdrawal. Hyland subsequently filed a summary judgment motion arguing that it was entitled to judgment as a matter of law because it acted as a reasonable prudent pharmacy in filling Downing's prescription and thus did not breach any duty owed to him. The trial court granted Hyland's summary judgment motion, holding that Schaerrer protects pharmacists from liability if they fill a prescription as directed by the manufacturer or physician. See Schaerrer, 2003 UT 43, ¶¶ 33, 35. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j) (Supp. 2008).

**STANDARD OF REVIEW**

¶4 In reviewing a district court's grant of summary judgment, we afford no deference to the lower court's legal conclusions and review them for correctness. Schaerrer, 2003 UT

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[1] (...continued)

> fenfluramine and phentermine. Fenfluramine ("fen") and phentermine ("phen") are prescription medications . . . approved by the FDA for many years as appetite suppressants for the short-term (a few weeks) management of obesity. Phentermine was approved in 1959 and fenfluramine in 1973 . . . . [S]ome physicians . . . prescribed fenfluramine or dexfenfluramine in combination with phentermine, often for extended periods of time, for use in weight loss programs. Use of drugs in ways other than described in the FDA-approved label is called "off-label use." In the case of fen-phen . . . no studies were presented to the FDA to demonstrate either the effectiveness or safety of the drugs taken in combination.

Questions and Answers about Withdrawal of Fenfluramine (Pondimin) and Dexfenfluramine (Redux), http://www.fda.gov/cder/news/phen/fenphenqa2.htm (last visited August 26, 2008).

43, ¶ 14. The granting of summary judgment is appropriate only in the absence of any genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Thus, in reviewing a district court's grant of summary judgment, we review the facts and all reasonable inferences in the light most favorable to the nonmoving party. Surety Underwriters v. E & C Trucking, Inc., 2000 UT 71, ¶ 15, 10 P.3d 338.

¶5 The question of whether a pharmacist owes a legal duty in prescribing drugs that have been withdrawn from the market by the FDA and/or the manufacturer is a question of law, which we review for correctness, granting no deference to the trial court's conclusions. Palmer v. Oregon Short Line R. Co., 98 P. 689, 696 (Utah 1908); State v. Blake, 2002 UT 113, ¶ 6, 63 P.3d 56.

**ANALYSIS**

¶6 It appears from the record that the trial court assumed for purposes of its summary judgment ruling that the allegations in plaintiff's complaint regarding the withdrawal of the drug from the market by the manufacturer at the request of the FDA were true. Hyland nowhere in its argument or pleadings in the trial court or in this court specifically denied the accuracy of that assertion, although it did raise foundational objections to exhibits offered by plaintiff in connection with the summary judgment proceedings establishing that fact, and raised the possibility with the trial judge that Hyland had not in fact received notice of the withdrawal. In any event, as mentioned above, the trial judge apparently premised his holding on the legal conclusion that under no set of circumstances could Hyland be held liable for negligence in filling prescriptions issued by a physician under Schaerrer. We disagree.

¶7 Schaerrer involved a products liability claim based on a pharmacy's failure to warn of general side effects and/or dangerousness of an FDA-approved drug (fen-phen, prior to the time of its alleged removal from the market) prescribed by a licensed physician. 2003 UT 43, ¶ 20. We adopted the learned intermediary rule for purposes of exempting pharmacists from strict products liability, noting the classic concerns that the rule is intended to address. Id. ¶ 22. We also made it clear, however, that the rule made sense in the context of a highly regulated distribution system for prescription drugs:

> So long as a pharmacist's ability to distribute prescription drugs is limited by the highly restricted, FDA-regulated drug distribution system in this country, and a

> pharmacist cannot supply a patient with prescription drugs without an intervening physician's prescription, we will not impose a duty upon the pharmacist to warn of the risks associated with the use of prescription drugs.

Id. Many courts examining the learned intermediary rule have applied it to negligence as well as products liability claims. See, e.g., Koenig v. Purdue Pharma Co., 435 F. Supp. 2d 551, 554-55 (N.D. Tex. 2006) (applying the intermediary rule to strict products liability and negligence claims brought against pharmaceutical companies under a failure to warn theory); Krasnopolsky v. Warner-Lambert Co., 799 F. Supp. 1342, 1345 (E.D.N.Y. 1992) ("With regard to the liability of drug manufacturers, 'where the theory of liability is failure to warn, negligence and strict liability are equivalent.'" (quoting Fane v. Zimmer, Inc., 927 F.2d 124, 130 (2d Cir. 1991))); Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 396 (Ill. 1987) (finding that the protection afforded by the learned intermediary rule in strict products liability claims also extended to negligence claims for failure to warn); Elliott v. A.H. Robins Co. (In re New York County Diet Drug Litig.), 691 N.Y.S.2d 501, 502 (N.Y. App. Div. 1999) ("Since there is no allegation that the pharmacy defendants failed to fill the prescriptions precisely as they were directed by the manufacturers and physicians . . . there is no basis to hold the pharmacists liable under theories of negligence, breach of warranty or strict liability."). We agree with these courts that the rule makes sense in negligence as well as strict liability contexts.

¶8 The majority of recent decisions discussing the rule, however, have recognized limits or exceptions to its scope in the negligence context, concluding that its protections extend only to warnings about general side effects of the drugs in question, but not to specific problems known to the pharmacist such as prescriptions for excessively dangerous amounts of the drug or for drugs contraindicated by information about a patient. These holdings attempt to account for the nature of modern pharmacy practice and to apply traditional common law negligence rules to that practice.[2]

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[2] See, e.g., Fagan v. Amerisource Bergen Corp., 356 F. Supp. 2d 198, 212 (E.D.N.Y. 2004) ("New York courts have held that absent any allegation that a pharmacy failed to fill a prescription precisely as directed by the manufacturer and/or physician, or that the plaintiff had a condition of which the pharmacist was aware, rendering prescription of the drug at issue (continued...)

[2] (...continued)
contraindicated, there is no basis to hold the pharmacy liable under theories of negligence, breach of warranty, or strict liability."); Heredia v. Johnson, 827 F. Supp. 1522, 1525 (D. Nev. 1993) ("At a minimum, a pharmacist must be held to a duty to fill prescriptions as prescribed and properly label them (include the proper warnings) and be alert for plain error."); Walls v. Alpharma USPD, Inc., 887 So. 2d 881, 885 (Ala. 2004) (agreeing with the Washington Supreme Court's conclusion that a pharmacist "has a duty to accurately fill a prescription and to be alert for clear errors or mistakes in the prescription"); Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1133-34 (Ariz. Ct. App. 1994) (recognizing the possibility of liability by holding that the question of whether a pharmacist breached a standard of care by failing to warn a patient of the highly-addictive nature of a drug or of drug interactions was a question for the trier of fact); Deed v. Walgreen Co., No. CV03082365 15, 2004 Conn. Super. LEXIS 3412, at *15 (Nov. 15, 2004) (holding that a pharmacist has a duty to warn in circumstances where "(1) a pharmacy or pharmacist has specific knowledge of potential harm to specific persons in particular cases; or (2) the pharmacy or pharmacist makes a representation that they will engage in a process of evaluation of the possible effects caused by the administration of a drug or combination of drugs; or (3) there is something patently and unambiguously wrong with the prescription itself, e.g., it is or should be plain that the medication prescribed provides a fatal dose to the patient."); Dee v. Wal-Mart Stores, Inc., 878 So. 2d 426, 427 (Fla. Dist. Ct. App. 2004) ("A pharmacy must use due and proper care in filling a prescription. When a pharmacy fills a prescription which is unreasonable on its face, even though it is lawful as written, it may breach this duty of care." (citation omitted)); Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1129 (Ill. 2002) ("[A] narrow duty to warn exists where, as in the instant case, a pharmacy has patient-specific information about drug allergies, and knows that the drug being prescribed is contraindicated for the individual patient. In such instances, a pharmacy has a duty to warn either the prescribing physician or the patient of the potential danger."); Gassen v. E. Jefferson Gen. Hosp., 628 So. 2d 256, 259 (La. Ct. App. 5 Cir. 1993) ("[A] pharmacist has a limited duty to inquire or verify from the prescribing physician clear errors or mistakes in the prescription."); Cottam v. CVS Pharmacy, 764 N.E.2d 814, 823 (Mass. 2002) (finding that where a pharmacist has undertaken a duty, it was appropriate to impose upon the pharmacist "a duty commensurate with what it appeared to have undertaken"); Stebbins v. Concord Wrigley Drugs, Inc., 416 N.W.2d 381, 387-88 (Mich. Ct. App. 1987) ("[A] pharmacist has no
(continued...)

¶9 We observed in Schaerrer that pharmacists have a "generally recognized duty to possess and exercise the reasonable degree of skill, care, and knowledge that would be exercised by a reasonably prudent pharmacist in the same situation," 2003 UT 43, ¶ 35 (internal quotation marks and citation omitted), but we were not required in that case to address the interface between that standard and the learned intermediary rule. We do not address

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[2] (...continued)
duty to warn the patient of possible side effects of a prescribed medication where the prescription is proper on its face . . . ."); Horner v. Spalitto, 1 S.W.3d 519, 523-24 (Mo. Ct. App. 1999) (finding that although the physician is in the best position to determine what drug to prescribe to the patient, the pharmacist's duties should not be defined as merely that of an order filler. Thus holding that pharmacists are in the best position to alert the prescribing physician where a prescription is outside a normal range or where there are any "contraindications relating to other prescriptions the customer may be taking as identified by the pharmacy records, and to verify that the physician intended such a dose for a particular patient"); Hand v. Krakowski, 453 N.Y.S.2d 121, 122-23 (N.Y. App. Div. 1982) (recognizing a possibility of a duty on a pharmacy to warn an alcoholic patient because it knew or should have known that the drug prescribed to the alcoholic patient was contraindicated for individuals who were alcoholics); Ferguson v. Williams, 374 S.E.2d 438, 440 (N.C. Ct. App. 1988) ("While a pharmacist has no duty to advise absent knowledge of the circumstances . . . once a pharmacist is alerted to the specific facts and he or she undertakes to advise a customer, the pharmacist then has the duty to advise correctly."); Riff v. Morgan Pharmacy, 508 A.2d 1247, 1253 (Pa. Super. Ct. 1986) (allowing expert testimony that the failure of the pharmacy to notify the prescribing physician of obvious inadequacies on the face of the prescription was negligent); Pittman v. Upjohn Co., 890 S.W.2d 425, 434 (Tenn. 1994) (holding that a pharmacist may have a duty to warn where he knew that the physician failed to relay to the patient certain warnings the manufacturer required be given to the patient); Morgan v. Wal-Mart Stores, Inc., 30 S.W.3d 455, 466-67 (Tex. App. 2000) (holding that although pharmacists have no general duty to warn, pharmacists may be held liable for negligently filling a prescription and neglecting information on the face of the prescription where a reasonably prudent pharmacist would have acted); McKee v. Am. Home Prods. Corp., 782 P.2d 1045, 1052-55 (Wash. 1989) (holding that a pharmacist has a duty "to be alert for clear errors or mistakes in the prescription," such as where a prescription contains obvious lethal dosages, inadequate instructions, known contraindications, or incompatible prescriptions).

that interface here, except to note that our application of the rule in Schaerrer does not mean that we will not limit its application to negligence claims when the facts and public policy require such limitation.

¶10 We conclude that this is such a case. The facts alleged here state a cause of action for negligence as a matter of law. A pharmacist owes the consumer a duty of reasonable care with respect to the sale of drugs not authorized for sale by the FDA or the manufacturer. Our declaration that a duty exists does not, however, establish what the pharmacist's standard of care is; that is a factual matter that must be examined on remand. "[W]here the question is one simply of determining, under all the facts, whether a legal duty is created, the question is one of law," Palmer, 98 P. at 696, but "[o]rdinarily, whether a defendant has breached the required standard of care is a question of fact for the jury," Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982) (citation omitted).

¶11 This difference between duty--a question of law, and standard of care is treated in Prosser and Keeton:

> It is better to reserve "duty" for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same--to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty.

W. Page Keeton et al., Posser and Keeton on the Law of Torts § 53 (5th ed., Lawyer's ed. 1984).

¶12 The Arizona Court of Appeals examined this problem very effectively in Lasley v. Schrake's Country Club Pharmacy, Inc., pointing out that health care providers (including pharmacists) are "held to a higher standard of care than that of the ordinarily prudent person when the alleged negligence involves the defendant's area of expertise." 880 P.2d 1129, 1132 (Ariz. Ct. App. 1994) (citing Bell v. Maricopa Med. Ctr., 755 P.2d 1180, 1182 (Ariz. Ct. App. 1988)). Expert testimony and relevant

statutory and regulatory standards will be relevant to establishing what the standard of care is for a pharmacist filling prescriptions for a drug withdrawn from the market at the request of the FDA. It will be for the fact-finder to determine what the standard is and whether it was breached in this case.

**CONCLUSION**

¶13 We hold that the learned intermediary rule does not preclude as a matter of law a negligence claim against a pharmacist for dispensing a prescribed drug that has allegedly been withdrawn from the market, and that pharmacists under such circumstances owe their customers a duty of reasonable care. We thus reverse the summary judgment dismissing the plaintiff's claims and remand this case to the trial court for further proceedings. This will presumably include the development of the record on the question of withdrawal of the drug and the standard of care for a reasonable pharmacist under the circumstances.

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¶14 Associate Chief Justice Durrant, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

# Tab 5

**CV 1057. Safety risks.**

A [product] ~~is~~ may not be defective or unreasonably dangerous ~~merely because it presents some safety risks that cause it to be dangerous for its intended use, nor is it defective or unreasonably dangerous~~ merely because it could have been made safer or because a safer model of the [product] is available.

**References**

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10.

Fed. Jury Prac. and Instr., § 122.10 (5th Ed. 2000) (modified).

**MUJI 1st References**

**Committee Notes**

In Slisze v. Stanley-Bostitch, the Utah Supreme Court held that a product manufacturer does not have a duty to make a non-defective product safer or to warn a user that a safer alternative exists. 1999 UT 20, ¶¶ 9-15. Committee members who favored this instruction maintain that under Slisze, a plaintiff cannot establish that a product is defective or unreasonably dangerous merely by offering evidence that a safer alternative exists. A manufacturer is not an insurer of a product's safety, nor must a manufacturer provide only the very safest of products. See, e.g., Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). Under Utah law, a product may not be considered to have a defect or to be in a defective condition unless at the time it was sold there was a defect or defective condition in the product that made it unreasonably dangerous to the user or consumer. Utah Code Ann. § 78B-6-703(1). Committee members who favored this instruction thought that it makes clear that there is no duty for manufacturers to provide products that are perfectly safe, consistent with the holding in Slisze.

Other committee members, however, thought that this instruction is unnecessary and improper. They believe that jury instructions should state what the law is, not what the law is not. The plaintiff must prove that a product is defective and unreasonably dangerous. This instruction states that a product may not be defective or unreasonably dangerous just because it could have been made safer or because a safer model is available. On the other hand, a jury may find that a product that could have been made safer *is* defective or unreasonably dangerous. The test is not whether the product could have been made safer but whether it was dangerous to an extent beyond what would be contemplated by the ordinary and prudent consumer or user of the product in that community. *See* Utah Code Section 78B-6-702. The jury is already instructed on the proper test; "unreasonably dangerous" is defined in CV 1006. These committee members believe this instruction does not help the jury decide whether a product is defective or unreasonably dangerous, but is just argumentative. Moreover, they believe that *Slisze* was a negligence case. They believe that Slisze did not address when a product is not defective or unreasonably dangerous and therefore do not think that Slisze supports the instruction.

These committee members also thought that the instruction is similar to an instruction that the mere fact of an accident does not necessarily mean that anyone was negligent, which the Utah Supreme Court has held is improper. *See Green v. Louder,*

2001 UT 62, ¶¶ 15-18, 29 P.3d 638. As the court noted in *Green,* if there is no evidence from which a jury could conclude that an element of the plaintiff's claim has been met, the court should direct a verdict for the defendant. If there is such evidence, the jury should be allowed to decide the issue based on proper instructions on the elements of the claim and the burden of proof, not on negative instructions about what does not constitute an element of the claim.