Agenda
Advisory Committee on
Model Civil Jury Instructions

February 10, 2014
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
CV 324. Alternative treatment methods.	Tab 2	Plaintiffs' Counsel and Defendants' Counsel
Insurance litigation instructions (from CV 2412).	Tab 3	Rich Humpherys

Committee Web Page

Published Instructions

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

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
January 13, 2014
4:00 p.m.

Present: John L. Young (chair), Alison A. Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Paul M. Simmons, Peter W. Summerill

Absent: Honorable Ryan M. Harris, Gary L. Johnson, John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone, David E. West

1. *Instructions for Cases Involving Pro-se Litigants.* The committee approved the committee note to CV099 that Ms. Adams-Perlac drafted.

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

a. *CV2415. Compliance with Utah law.* Mr. Humpherys noted that this instruction relates more to bad-faith claims than to breach-of-contract claims. The committee agreed, noting that the issue would not go to the jury in a breach-of-contract case, since the court would construe the contract as a matter of law. Mr. Humpherys thought an instruction might be needed to keep the jury from construing the policy anyway, since the policy is typically admitted into evidence. Mr. Young and Ms. Blanch thought that the problem could be handled by redacting any policy provision that the court has held is contrary to Utah law.

Dr. Di Paolo joined the meeting.

Ms. Blanch thought that a single stock instruction would not be able to cover all the different circumstances and noted that the court and the parties will need to decide the best way to keep the jury from considering policy language it should not consider based on the circumstances of the particular case. Mr. Young asked if there needed to be a committee note addressing the problem. Mr. Humpherys thought it was already covered in CV2403. The committee decided to omit CV2415 from the breach-of-contract instructions and reconsider it as part of the bad-faith instructions.

b. *CV2416. Recovery of consequential damages.* Mr. Humpherys noted that consequential damages can include damages for emotional distress if emotional distress was reasonably foreseeable from a breach of the contract and not excluded by the contract. The Utah Supreme Court rejected the argument that consequential damages are only available for bad faith in *Machan v. UNUM Life Insurance Company*, 2005 UT 37, 116 P.3d 342. Mr. Ferguson noted that consequential damages in a breach-of-contract case do not include attorney's fees. He asked whether CV2416 tracked the instruction on consequential

damages in commercial contract cases. The committee compared the two instructions (CV2416 and CV2136) and concluded they were substantially the same. Mr. Young noted, however, that CV2136 referred to "the parties' contemplation," whereas CV2416 referred to the defendant's contemplation. Mr. Simmons noted that the result would probably be the same, since the plaintiff will always claim that he contemplated the damages he is seeking, but the committee revised CV2416 to refer to the "parties" rather than the "defendant." Mr. Ferguson asked what "generally foreseen" meant. Mr. Humpherys checked the case law and changed "generally" to "reasonably." At Mr. Young's suggestion, the phrase "at the time the policy was issued" was moved to the end of the second paragraph, and the last phrase in that paragraph was deleted. At Mr. Fowler's suggestion, "follows" was changed to "naturally flows." So the second and third paragraphs now read:

> Consequential damages are those damages caused by [name of defendant]'s breach that the parties could have reasonably foreseen at the time the policy was issued.
>
> A loss is foreseeable if it naturally flows 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 the parties knew of or had reason to know of.

The parenthetical quotations from *Black v. Allstate Ins. Co.* in the References section were deleted. The committee approved the instruction as modified.

c. *CV2417. Claim regarding insurable interest.* The committee thought that most questions of insurable interest would be decided by the court as a matter of law. But the statute does not cover every situation, and the statutory language at times makes the question a fact question, e.g., Utah Code Ann. § 31A-21-104(1)(c) (defining insurable interest in property or liability to require a "*substantial* economic interest" in the nonoccurrence of an event) (emphasis added). Mr. Summerill asked who had the burden of proving that the plaintiff did or did not have an insurable interest. Mr. Humpherys thought it was an affirmative defense and that the insurer would have the burden. Mr. Young noted that generally the party making a claim or raising a defense has the burden of proving his claim or defense. Mr. Summerill suggested adding a sentence at the end of the instruction: "To prevail on this claim, [name of defendant] must prove that [name of claimant] did not have an insurable interest at the time of the loss." Mr. Carney, however, found some authority for the proposition that the plaintiff has the burden of proving an insurable interest in at least some cases. The committee decided not to address the burden of proof in the instruction

absent a clear expression of Utah law on the issue but to note the question in a committee note. Ms. Adams-Perlac volunteered to research the issue.

Ms. Blanch was excused.

Dr. Di Paolo raised the question of when the insurable interest must exist–at the time the policy is taken out or at the time a claim is made. From the statutory language ("An insurer may not knowingly provide insurance to a person who does not have or expect to have an insurable interest in the subject of the insurance," Utah Code Ann. § 31A-21-104(2)(a)), Mr. Humpherys thought it was when the policy was bought. Mr. Carney found an article in the *Utah Bar Journal* (Mark W. Dykes, *Parduhn Me: The Utah Supreme Court and the Insurable Interest Requirement*, 19 UTAH B. J. 38 (July/Aug. 2006)) supporting this position in the context of a life insurance policy. Mr. Ferguson asked what happens if the plaintiff has no insurable interest at the time of the loss. Mr. Young suggested adding a committee note that would refer attorneys to the statute for determining when an insurable interest must exist. Ms. Adams-Perlac added a note to that effect. The committee revised the last paragraph of the instruction to read:

> [Name of insurance company] claims that [name of claimant] did not have an insurable interest in [describe–item of property/person's life/liability for an event, etc.]. Unless [name of claimant] had an insurable interest, the insurance is not valid, and [name of insurance company] is not required to pay benefits.

The committee approved the instruction as modified, subject to Ms. Adams-Perlac's research on the burden of proof.

d. *CV2418. Insurable interest in property or liability*. Mr. Humpherys noted that the instruction followed the statutory language, but the statutory language was not easily understandable to lay people. At the suggestion of Mr. Young and Dr. Di Paolo, the phrase "nonoccurrence of the" was deleted. Mr. Young suggested saying that an insurable interest means an interest "in the insurance policy for the purpose of insuring against the occurrence of an event." Dr. Di Paolo and Mr. Humpherys thought the interest wasn't in the policy but in the property or event insured against. Mr. Young suggested adding an introductory section saying that insurance is bought to insure against the occurrence of an event. The committee thought that an introduction was not necessary, that other instructions adequately covered the concept and that jurors would understand the purpose of insurance at least by the time this instruction is given. The instruction was revised to read:

> An insurable interest means any lawful and substantial economic interest in the [property/event] that is insured.

The committee approved the instruction as modified.

e. *CV2419. Life insurance–insurable interest.* Some of the committee questioned whether "love and affection" was always required in the case of a close family relative. Mr. Simmons suggested moving the phrase "if it is a person closely related by blood or by law" to the end of the first paragraph, since, as the instruction is written, it applies to both subsections (1) and (2). Dr. Di Paolo suggested starting the instruction, "For [name of plaintiff] to have an insurable interest in [name of person] . . ." Mr. Humpherys noted, however, that it is not simply a matter of listing the elements of an insurable interest. He explained that the list in CV2419 and the statute it is based on (Utah Code Ann. § 31A-21-104(3)) is not exhaustive but only covers the most common situations that might present a jury question. Mr. Humpherys thought that subsection (2) was a general statement of the law (i.e., that the person making the claim for insurance benefits must have "a lawful and substantial interest in having the life, health, or bodily safety of the person insured continue"). If the people are closely related, the substantial interest may be that engendered by love and affection rather than an economic interest (as in the case of business partners or an ex-spouse). The committee thought the phrase "engendered by love and affection" was not sufficiently plain English and suggested alternatives ("comes from," "is rooted in," "generated by"). The committee revised the instruction to read:

> For [name of plaintiff] to have an insurable interest in the [life/health/safety] of [name of person], [he/she] must have a lawful and substantial interest in the continued [life/health/bodily safety] of [name of person]. If [name of person] is closely related by blood or law to [name of plaintiff], then the substantial interest may be that generated by love and affection.

The committee approved the instruction as modified.

f. *CV2420. Representation, warranty and estoppel.* In answer to a question from Mr. Ferguson, Mr. Humpherys noted that *Youngblood v. Auto-Owners Insurance Company,* 2007 UT 28, also applied to representations, warranties, and estoppel. Mr. Humpherys noted a caveat–the representation must not be one as to a future occurrence. The committee questioned whether certain terms in the instruction would be clear to lay jurors, viz., "warranty," "representation," "negotiation of an insurance policy." Mr. Young suggested revising the instruction to read:

> A statement made by any person representing [name of insurer] in buying an insurance policy that affects the insurance company's obligations under the policy is unenforceable unless it is stated in the policy or in a written application signed by the applicant.

Dr. Di Paolo suggested using "explanation" for "statement." Mr. Humpherys suggested adding a committee note referring the reader to the instructions on agency if there is any question about the agent's authority. Mr. Humpherys thought that the instruction needed more work and suggested that it be put over to the next meeting.

3. *Next meeting.* The next meeting will be on Monday, February 10, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

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:

Matthew H. Raty, Sandy, for petitioner

David G. Williams and Bradley R. Blackham, Salt Lake City,
for respondent University of Utah Hospitals & Clinics

David G. Williams, Rodney R. Parker and Bradley R. Blackham,
Salt Lake City, for respondent University of Utah

David G. Williams, Terrence L. Rooney, and Bradley R. Blackham,
Salt Lake City, for respondent State of Utah

Ryan M. Springer and Michael D. Karras, Holladay,
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.

ALTERNATIVE METHODS OF TREATMENT

No Utah precedent exists which expressly adopts or affirmatively endorses the 'Alternative Methods of Treatment' instruction. This committee is not tasked with creating law and, on many occasions, has refused to provide a jury instruction when no precedent exists. See, for example, the Committee Note to CV309 which refused to adopt a "loss of chance" causation instruction. "The committee considered a 'loss of chance' instruction, but decided that Utah law is unclear on whether such instructions are appropriate." An instruction on alternative methods is even less clear than the law regarding loss of chance and the Committee would be exceeding its authority by adopting and endorsing an alternative methods instruction in the absence of explicit precedent.

I. BACKGROUND

In *Turner v. University of Utah Hosps. & Clinics*,[1] the trial court allowed the following "alternative treatment method" (also referred to herein as the "alternative method" instruction) instruction 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.[2]

In reversing, the Utah Supreme Court stated that it was "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.'"[3]

The instruction at issue was essentially the same as Model Utah Jury Instruction 2d CV324.[4] As included in the model instructions, as well as was given to the jury in *Turner*, it is legally unsustainable. In particular, the phrase "even if it later turns out to be a wrong selection, or one not favored by some other providers" is contrary to Utah negligence law.

MUJI 2d CV324 was formerly MUJI 1st 6.29.[5] MUJI 1st 6.29 was drawn from language found in *Walkenhorst v. Kesler*.[6] In *Walkenhorst*, the plaintiff filed a medical malpractice action

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[1] 2013 UT 52, 310 P.3d 1212.

[2] *Id*. at ¶ 11.

[3] *Id*. at ¶ 16.

[4] *See* MUJI 2d CV324 (Utah State Bar 2011), available at http:// www. utcourts. gov/ resources/ muji.

[5] *See* Model Utah Jury Instructions Civil, MUJI 6.29 (1993); MUJI Correlation Table available at www.utcourts.gov/committees/muji/Correlation%20Table.docx.

against a chiropractor and supported his claims with the testimony of medical doctors.[7] After a jury verdict in favor of the plaintiff, the defendant appealed, claiming that it was inappropriate for medical doctors, who admitted that they had almost no familiarity with the standards of chiropractors, to testify against him.[8] At the time, the state did not license chiropractors separately but did license physicians under five categories. Most physicians were apparently licensed under the general category that allowed them "to practice medicine and surgery in all branches thereof."[9]

Much of the opinion was focused on the issue of when, if at all, an expert from one school of medical training can testify regarding the standard of care of another. Because the chiropractor may have stepped beyond the bounds of chiropractic medicine, he fell into the general category of Utah's statutes at the time and therefore any similarly licensed physician could testify against him. The court acknowledged that most jurisdictions would not allow an expert from one specialty to testify against another but deferred to Utah's statutory construction in how it categorized medical practitioners.[10] In the context of the issue of a physician expert witness testifying against a chiropractor, the court stated:

> Because one does not diagnose or treat a patient in the same way as another or use the other's methods, will not constitute malpractice, if the treatment employed has the approval of at least a respectable portion of the profession or is in accord with the standards of those recognized in the community to treat such ailments, and reasonable skill, learning, and diligence are manifest.[11]

The above language regarding one not treating or diagnosing a patient the same way as another refers to general physicians testifying as to the standard of care for chiropractors. Thus, the court apparently sought to prevent a physician from one school of medicine from criticizing the entire field of another school simply because chiropractors treat ailments in a different way. Given that many if not most doctors at the time fell under the same general license category, the language appears to be the court's attempt to soften the impact of its holding by permitting testimony that care can comply with the conduct from a "respectable portion" (presumably, what we might consider specialties today) of the general medical community, as long as "reasonable skill, learning, and diligence are manifest.[12]

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[6] 92 Utah 312, 67 P.2d 654 (1937); *see also* Model Utah Jury Instructions Civil, MUJI 6.29 (1993).

[7] *Id*. at 656-57.

[8] *Id*. at 657.

[9] *Id*. at 659.

[10] *Id*. at 663-4

[11] *Id*. at 668

[12] *Id*.

This instruction is derived from the issue of one medical specialty testifying against another. If anything, the language of *Walkenhorst* stands for the proposition that a medical expert may not create a standard of care whereby another medical specialty is called into question. The instruction is an outgrowth of a far different era when medical specialties were not clearly defined and when one medical specialty, chiropractic, had not even been recognized by statute.

In *Butler v. Naylor*, the only other Utah case to discuss the instruction in any way, the appellant challenged the instruction solely on the basis that the defendant had not shown the existence of alternate treatment methods. The validity of the instruction itself was not challenged.[13] In sum, no Utah case has expressly adopted the "alternative theories" instruction. The instruction is not based on Utah law, and it should not be given.

Both the original and current "alternative methods" instructions relate to a case concerning a physician's ability to testify outside of his or her specialty and which reflected antiquated practices of medicine that bear no relationship to modern medicine.

Worse, the current instruction essentially says "Maybe there are two ways of doing things: a right way and a wrong way. Even if the doctor chooses the wrong way, it is not negligent." That of course is not the law, and the phrase was found troubling to the Utah Supreme Court. Moreover, if the instruction is followed, it would make it so that no plaintiff could ever win since it exculpates a doctor's selection of the wrong method of treatment by defining it as "not negligent."

The instruction in its current form discards any showing of reasonableness, which is the foundation of negligence law. Under Utah law, a health care provider has a duty to exercise the reasonable degree of skill, care and knowledge that would be exercised by a reasonably prudent care provider under similar circumstances.[14] There is no requirement of reasonable or prudent behavior in the instruction. To the extent that the instruction has any merit, it should include the requirement that the selection of treatment method be reasonable under the circumstances.

Given the treatment the instruction received from the Utah Supreme Court, it appears that, if the instruction is at all tenable, it derives from Utah's informed consent jurisprudence. Accordingly, if a court is considering giving that instruction, it needs to be understood in the context of the principles from which it derives.

MUJI 2d CV304, 310, 311, and 312 pertain to a health care provider's duty to disclose material information/informed consent. The idea is that a physician has to disclose risks—as well as alternative methods of treatment—to the patient. If the patient or physician elect one method of treatment over another, it is not negligent, as long as they are 1) both acceptable methods of treatment, and 2) it is one of the alternative methods disclosed to the patient in the context of obtaining informed consent.

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[13] 1999 UT 85, ¶¶ 19-20, 987 P.2d 41.

[14] *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 79 P.3d 922, 933 (Utah 2003).

If the defendant cannot show that the method of treatment employed was specifically disclosed to the patient in the context of obtaining informed consent, then there is insufficient evidence to justify inclusion of the instruction

II. APPLICABLE LAW

Under Utah law:

> [T]he relationship between a doctor and a patient creates a duty on the part of the physician to disclose to the patient any material information important to choosing a course of treatment . . . . [E]ncompassed in the duty to inform a patient of all material information, substantial and significant risks is the duty to inform not only of risks that might occur from the particular treatment in question, but also, any alternative treatments and the risk of no treatment at all.[15]

MUJI 2d CV310 states:

> A physician has a duty to obtain the patient's informed consent to proposed care. Consent is informed if the patient gives consent after the physician outlines the substantial and significant risks of serious harm from the care and the *reasonable alternatives* to the care.

As the Committee Note indicates, "[i]nformed consent is an agreement by the patient to a procedure after having been made aware of the substantial and significant risks of serious harm from the care, and the alternatives to it. One may *actually* consent to a procedure and yet not have given an *informed* consent."[16]

> As a basic principle underlying this discussion, it may be safely stated that, as part of the physician's duty to obtain a patient's informed consent to any medical procedure employed by the physician in dealing with the patient, there is a duty imposed on the physician to disclose to the patient the existence of any methods of diagnosis or treatment that would serve as feasible alternatives to the method initially selected by the physician to diagnose or treat the patient's illness or injury. The failure of a physician to disclose feasible alternatives has been held to permit a finding that the physician thereby failed to obtain the patient's informed consent to the method employed by the physician to diagnose or treat the patient's illness or injury, and that the physician was thereby liable for malpractice. In addition, it has been held that the duty to inform the patient of alternative methods of diagnosis is not limited to disclosure of less hazardous procedures than that contemplated by the doctor but includes the disclosure of feasible alternatives that

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[15] *Unthank v. U.S.*, 732 F.2d 1517, 1521 (10th Cir. 1984) (citing *Nixdorf v. Hicken*, 612 P.2d 248, 354 (Utah 1980)).

[16] MUJI 2d CV310, committee note (emphases in original) (citing *Lounsbury v. Capel*, 836 P.2d 188 (Utah App. 1992)).

> are more complicated or even more dangerous. The duty to disclose alternatives has been limited to the physician who is to perform the procedure, thus relieving from this duty the doctor who gives the patient a general description of the diagnostic procedure without mentioning feasible alternatives but who at the same time refers the patient to the physician who will actually perform the procedure. Physicians have been relieved of the duty to disclose alternative modes of diagnosis or treatment where an emergency situation exists that requires immediate attention to the patient's illness or injury. Failure to inform a patient of alternative methods of treatment does not result in liability for medical malpractice where the existing alternatives would not be appropriate for treating the patient's complaint or where the patient does not establish that the alternative method of treatment would have been chosen over that method actually used if disclosure had been made by the doctor.[17]

III. PROPOSED INSTRUCTION AND COMMITTEE NOTE.

> Where there is more than one medically accepted method of treatment that would be reasonable under the circumstances, and [defendant] has specifically informed [plaintiff] of the alternative methods and their risks, [defendant] must demonstrate they used reasonable care in the selection of the method of treatment, after securing the informed consent of [plaintiff].

If a defendant wishes to include an "alternative methods of treatment" instruction, then the defendant must show evidence not only of the existence of alternative methods, but that the alternative method was reasonable under the circumstances and disclosed in the informed consent discussion.

IV. OTHER JURISDICTIONS

a. Nebraska

> *Watson* [*v. McNamara*[18]]involved a medical malpractice action in which the plaintiff claimed that the defendant negligently failed to determine the plaintiff's fetal age, resulting in the plaintiff's premature birth. At issue was a jury instruction similar to the one at issue in this case. The plaintiff's main contention in that case was that the defendant breached the applicable standard of care by failing to ***552** use various methods available to him for determining fetal age. This court stated that a physician is not negligent for simply choosing one recognized method of diagnosis over another, as long as the method chosen conformed with the standard of care. In *Watson,* the issue was whether the

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[17] Medical Malpractice: Liaiblity for Failure of Physician to Inform Patient of Alternative Modes of Diagnosis or Treatment, 38 A.L.R. 4th 900 § 2.

[18] 424 N.W.2d 611 (1988).

method chosen by the defendant from alternative methods available conformed with the standard of care.[19]

b. Ohio

Although the Ohio Supreme Court did not completely abandon the different-methods-of-treatment instruction, it clearly held that its applicability is limited to a particular subset of medical malpractice cases.

> This instruction informs the jury that alternative methods can be used and that the selection of one method over the other is not in and of itself negligence. The instruction is grounded "on the principle that juries, with their limited medical knowledge, should not be forced to decide which of two acceptable treatments should have been performed by a defendant physician."
>
> This type of jury instruction, however, is not appropriate in all medical malpractice cases. It is well established that the trial court may not instruct the jury if there is no evidence to support an issue. By its very terms, in medical malpractice cases, **the "different methods" charge to the jury is appropriate only if there is evidence that more than one method of diagnosis or treatment is acceptable for a particular medical condition**.[20] (emphasis added)

c. Oklahoma

> The third error enumerated by the trial court as grounds for granting widow's motion for a new trial was the court's decision to include Jury Instruction Number 15 . . . which provides:
>
> > Alternative Methods of Diagnosis of Treatment
> >
> > Where there is more than one medically accepted method of diagnosis, a physician has the right to use his best judgment in the selection of the diagnosis, after securing the informed consent of the patient, even though another medically accepted method of diagnosis might have been more effective. OUJI 14.3
> >
> > Instructions are explanations of the law of a case enabling a jury to better understand its duty and to arrive at a correct conclusion . . . . In giving instructions, the trial court is not required to frame the issues, but it must state the law correctly . . . .

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[19] *Long v. Hacker*, 520 N.W.2d 195 (Neb. 1994).

[20] *Peffer v. Cleveland Clinic Found.*, 894 N.E.2d 1273, 1280 (Ohio App. 8 Dist. 2008) (quoting *Pesek v. Univ. Neurologists Assoc., Inc.*, 721 N.E.2d 1011, 1014 (Ohio 2000)).

> Although the law was stated correctly in Jury Instruction Number 15, this instruction was inapplicable to the facts in this cause and it misled the jury. . . .
>
> The instruction of alternative diagnosis should only be given when the evidence allows the jury to find that more than one method of diagnosis is recognized by the average practitioner. To justify this type of instruction, the defendant must show that the method of diagnosis has substantial support within the medical community. In order to make this showing, the doctor's expert must testify that the challenged method of diagnosis has substantial support and is generally recognized within the medical community.
>
> The question in the usual failure to diagnose case is whether the doctor was negligent in failing to recognize the significance of the symptom or symptoms. The alleged negligence lies in failing to do something, not in negligently choosing between two or more courses of action. Doing something and doing nothing do not add up to two methods of diagnosing a disease. In this case, the doctor's experts gave opinions as to whether the doctor breached the standard of care. However, none of these witnesses testified that there were alternative methods of diagnosis employed by the doctor. Because alternative methods of diagnosis were not employed, the instruction should not have been given. The trial court erred when it allowed this instruction to be read to the jury.[21]

d. Wisconsin

> If you find from the evidence that more than one method of treatment of [plaintiff] was recognized as reasonable given the medical knowledge at that time, then [defendant] was at liberty to select any recognized methods.
>
> [Defendant] was not negligent because he chose to use one of those recognized treatment methods rather than another recognized method if he used reasonable care, skill and judgment in administering this method[.][22]

A party seeking to include the alternative methods of treatment must show that 1) there are reasonable, alternative methods of treatment, and that 2) the alternatives were presented to the patient in the context of obtaining informed consent for treatment.

CONCLUSION

If an "alternative methods of treatment" instruction is going to be included in the model instructions, the example provided should be used, and the Committee Note should direct that its use is only proper where 1) the evidence shows that a patient was presented with alternative methods for treatment when informed consent was obtained; 2) the physician selected one from among the treatment methods that were reasonable under the circumstances.

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[21] *Taliaferro v. Shahsavari*, 154 P.3d 1240, 1247-49 (Okla. 2006) (footnotes and citations omitted).

[22] *Olson v. Physicians ins. Co. of Wisconsin, Inc*., 803 N.W.2d 868, ¶ 7 (Wis. App. 2011).

POSITION STATEMENT REGARDING CV 324

I. THE SURPEME COURT'S HOLDING IN *TURNER* DOES NOT WARRANT ABANDONING CV 324

At issue is whether CV 324 should continue to be included in the Utah Model Jury Instructions. This question has arisen because of the Utah Supreme Court's holding in *Turner v. University of Utah Hospitals & Clinics*, 310 P.3d 1212 (Utah 2013). This brief paper will discuss the *Turner* holding and the applicability and use of the instruction in general.

As an initial matter, CV 324 reads as follows:

> 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.

Committee notes to this instruction give clear guidance regarding when this instruction should be utilized. In pertinent part, the committee notes instruct as follows:

> 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).

As explained herein, the problem in *Turner* was not the instruction itself, but the misapplication of the instruction. Significantly, the Supreme Court did not hold that the instruction should not be used; it merely held that the instruction was misapplied in that particular case.

In *Turner*, the plaintiff, Ms. Turner, presented to the defendant hospital with a spinal injury after a significant car accident. The plaintiff argued that upon admission, her spine was still in "relatively normal" alignment. The plaintiff, however, alleged that 10 days after admission, her spine's alignment had changed dramatically causing irreversible paraplegia. At trial, the plaintiff presented evidence that the staff had been negligent in the manner that the staff had moved her. Plaintiff argued that the hospital should have posted a sign at the head of her bed instructing all care providers to follow spinal precaution guidelines. In contrast, the hospital argued that it did not improperly move or roll the plaintiff and that Ms. Turner was already injured at the time that she arrived at the hospital. Among several other arguments, the hospital presented evidence that posting a sign was not uniform practice at hospitals.

The hospital prevailed at trial and the plaintiff appealed to the court of appeals and ultimately the Utah Supreme Court. The Utah Supreme Court ultimately determined that the instruction was given in error. The Court, however, did not hold, or even suggest, that the instruction in general was incorrect or should be abandoned. The Court held that "issuing jury instruction No. 30 was error because it was unsupported by the evidence . . . ." *Id.* at 1216. In pertinent part, the Court reasoned as follows:

> 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."
> 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 are 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.

Id. at 1217. In other words, the instruction was given in error because whether to post a sign or not is not a method of treatment. As such, the instruction simply did not apply.

Critics of the instruction will likely point out that the Court noted that "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.'" *Id.* at 1217. When read in isolation, it appears that this sentence is a criticism of the instruction generally. In fact, it is not. When read in context, this statement is an evaluation of the Court of Appeals holding that giving the instruction was harmless error because the jury could have relied on an "alternative theory." (Such a rationale was applied in *Butler v. Naylor*, 987 P.2d 41 (Utah 1999.)) The Court statement merely addressed the fact that the jury was unlikely to have relied on an alternative theory in returning its verdict. In pertinent part, the Court reasoned as follows:

> *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, as the court of appeals assumed. And because Ms. Turner advanced only *one* theory for recovery, namely medical malpractice, our confidence 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.

Id. at 1217.

The Court never stated or suggested that the instruction should be abandoned. Instead, the Court held that it was simply inappropriate in that case. As this committee is aware, had the Court believed the instruction was improper in every context and should be abandoned, it certainly could have directed that CV 324 no longer be given. The Court has so directed in the past. It would simply be an overreaction to abandon a long-established jury instruction merely because it was inapplicable in a single case.

II. CV 324 IS AN ACCURATE EXPLANATION OF THE LAW

The instruction should remain as is currently written because it is an accurate explanation of the law. CV 324 merely instructs the jury that there may be more than one method of treatment accepted by the medical community (within the standard of care) for a particular condition. The mere fact that a physician chooses one approved method over another is not malpractice.[1] This has been the long standing law in Utah, indeed around the country, for decades. For example, as early as 1937, the Utah Supreme Court explained this exact same premise. In *Walkenhorst v. Kesler*, the Court stated as follows:

> That the treatment did not effect a cure is not a cause of action. Because one does not diagnose or treat a patient in the same way as another or use the other's methods, will not constitute malpractice, if the treatment employed has the

[1] The instruction even makes clear that the physician bears the burden of establishing any alternative treatment methods.

> approval of at least a respectable portion of the profession or is in accord with the standards of those recognized in the community to treat such ailments, and reasonable skill, learning, and diligence are manifest. Physicians or others authorized or licensed to treat human ailments are not insurers of a cure.

67 P.2d 654, 668 (Utah 1937). *See also Jones v. Childester*, 610 A.2d 964, 969 (Pa. 1992) ("Where competent medical authority is divided, a physician will not be held responsible if in the exercise of his judgment he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise.")(citing *Jones v. Childester*).

Even the Plaintiff's bar must agree that in many medical situations there is more than one accepted method of treatment which falls within the standard of care. The most important question in determining whether any jury instruction is appropriate is whether the instruction accurately instructs the jury on the law. CV 324 accurately instructs the jury on the law.

III. MANY OTHER JURISDICTIONS HAVE ADOPTED SIMILAR INSTRUCTIONS

While there is no specific Utah case law addressing the propriety of the instruction in general, it is worth noting that CV 324 is similar to instruction used in other courts around the country. For example, California civil instruction 506 is very similar to CV 324. That rule reads as follows:

> [A/An] [insert type of medical practitioner] is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.

Another example comes from Ohio:

> DIFFERENT METHODS. Although some other (physician) (surgeon) (in the specialty) might have used a method of (diagnosis) (treatment) (procedure) different from that used by defendant, this circumstance will not by itself, without more, prove that defendant was negligent. The mere fact that the defendant used

> an alternative method of (diagnosis) (treatment) (procedure) is not by itself, without more, proof of his negligence. You are to decide whether the (diagnosis) (treatment) (procedure) used by defendant was reasonably (careful) (cautious) (prudent) and in accordance with the standard of care required of a (physician) (surgeon) (specialist) in his field of practice.

Other examples could be given, but suffice it to say that CV 324 is not an anomaly. It is an accurate expression of the law and numerous jurisdictions throughout the country have adopted similar instructions. The instruction should not be abandoned. Rather, as in the case of many jury instructions, trial courts must simply exercise care regarding when the instruction should be applied. The *Turner* holding and the existing committee notes should provide the court with adequate guidance.

Tab 3

C

Supreme Court of Utah.
LaVar C. FOX, Plaintiff and Respondent,
v.
ALLSTATE INSURANCE COMPANY, Defendant and Appellant.

No. 11336.
April 15, 1969.

Action against insurer to recover for loss of insured boat. The Third District Court, Salt Lake County, Stewart M. Hanson, J., rendered summary judgment for plaintiff, and defendant appealed. The Supreme Court, Ellett, J., held that insured's affidavit did not sufficiently show insured's ownership and loss to warrant summary judgment.

Reversed and remanded.

Callister and Tuckett, JJ., dissented.

West Headnotes

[1] Witnesses 410 ⚿37(1)

410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k37 Knowledge or Means of Knowledge of Facts
410k37(1) k. In General. Most Cited Cases

Party testifying must have opportunity to know that about which he testifies.

[2] Judgment 228 ⚿185.3(12)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(12) k. Insurance. Most Cited Cases

Affidavit by defendant insurer's claims supervisor, filed in opposition to motion for summary judgment, was not present at all times mentioned in affidavit, nor was affidavit objectionable for lack of supervisor's opportunity to know whereof he spoke. Rules of Civil Procedure, rule 56(e).

[3] Judgment 228 ⚿186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases

Movant, by failing to move to strike opponent's affidavit, filed in opposition to motion for summary judgment, waived right to show whether affiant knew firsthand that about which he deposed. Rules of Civil Procedure, rule 56(e).

[4] Judgment 228 ⚿185.3(12)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(12) k. Insurance. Most Cited Cases

Paragraph of claims supervisor's affidavit, filed in opposition to insured's motion for summary judgment, stating that insured's father had advised affiant that he knew nothing about insured property, whereupon insured destroyed statement that father was about to sign, was not objectionable as hearsay since it appeared that insured had been present at time of father's statement and affidavit would be admissible as showing insured's reaction.

[5] Judgment 228 ⚿185.3(12)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(12) k. Insurance. Most Cited Cases

Insured's affidavit in support of motion for summary judgment in action against insurer to recover for loss of insured boat did not sufficiently show insured's ownership and loss to warrant summary judgment.

****701 *384** Wendell E. Bennett, of Strong & Hanni, Salt Lake City, for appellant.

Mark A. Madsen, of Hansen, Madsen, Freebairn & Goodwill, Salt Lake City, for respondent.

ELLETT, Justice:

The defendant appeals from a summary judgment in favor of plaintiff. The complaint alleges that on a about April 30, 1965, the defendant issued a binder to the plaintiff on a boat owner's policy of insurance and thereafter issued said policy to plaintiff, and that on or about May 2, 1965, the insured boat struck a submerged object in Utah Lake and sank. It further alleged that the defendant was duly notified of the loss but refuses to pay according to the terms of the policy of insurance.

The defendant's answer is a general denial. In answer to requests for admissions the defendant admitted the execution of the binder and the delivery of the policy. The plaintiff's deposition was taken by the defendant.

The plaintiff filed a motion for summary judgment for the relief demanded in his complaint and attached to the motion an affidavit wherein he stated under oath substantially the same things which he had alleged in his complaint.

****702** The defendant filed an opposing affidavit as follows:

***385** Keith Lambourne being first duly sworn upon oath deposes and says:

1. That he is a Property Claims Supervisor for the Allstate Insurance Company, the defendant named in the above entitled action.

2. That the defendant was not notified by the plaintiff of his claimed loss which allegedly occurred on May 2, 1965 until May 17, 1965 at which time the said LaVar C. Fox filed a written report of the alleged loss with the defendant, Allstate Insurance Company.

3. After the report of the alleged loss was furnished to the defendant by the plaintiff, representatives of the defendant went to the site on Utah Lake where plaintiff claimed his boat had sunk and in the presence and with the assistance of the plaintiff conducted a methodical search of the entire area where the boat had allegedly sunk, but no signs of the sunken craft were ever found, and no indications were found that there was a sunken craft in the area where the plaintiff indicated to the defendant his craft had sunk.

4. That on numerous occasions since the alleged loss of the plaintiff's boat, representatives of the defendants have made repeated requests for the plaintiff to produce proof of ownership of the boat that was allegedly sunk but the plaintiff has failed and refused to produce proof of said ownership.

5. On several occasions the plaintiff has refused to furnish information to the defendant regarding the facts of the accident, and on June 25, 1965 the plaintiff physically interfered with the defendant's investigation of the loss when the defendant was attempting to talk with the plaintiff's father, who's (sic) residence the plaintiff claimed he had stored his boat prior to its being sunk, and after the plaintiff's father had advised your affiant that he knew nothing about the existence of such a boat of his son's ownership of same, and was about to sign a statement to that effect the plaintiff physically

took the paper from his father, tore it up, and refused to give it to your affiant.

6. Defendant has refused to make payment for the loss of said boat due to the fact that the plaintiff has failed to meet the conditions of the policy he claims to have with the defendant, has failed to **prove** that he had an **insurable interest** in the boat which was allegedly lost.

7. Due to the plaintiff's failure and refusal to cooperate and to present proof of ownership and proof of loss, the defendant has refused, and still refuses to make any payment of any kind on the grounds and for the reason that the plaintiff has failed and refused to show that he had an insurable interest, and that he suffered any ***386** loss in the event he had an insurable interest.

The plaintiff claims that the affidavit filed by defendant shows on its face that it is incompetent because it 'is based on hearsay,' and thus under Rule 56(c), U.R.C.P., it does not meet the positive allegations of plaintiff's affidavit.

[1][2] In the first place, the plaintiff is in error in claiming that the statements in the affidavit are based on hearsay information. He confuses the hearsay rule with another rule of evidence which is to the effect that a party testifying must have an opportunity to know that about which he testifies. On voir dire examination it might be made to appear that the affiant was one of the representatives of the defendant and that he was present at all times mentioned in his affidavit. Even if it was made to appear that he was not present, the objection would not be one based on hearsay but rather on a lack of opportunity to know whereof he spoke. See McCormick on Evidence, s 226 at page 461.

[3] By failing to move to strike the affidavit of Lambourne, the plaintiff ****703** waived the right to show whether the affiant knew first handed that about which he deposed.

In discussing this problem, Professor Moore states the following:

An affidavit that does not measure up to the standards of 56(e) is subject to a motion to strike; and formal defects are waived in the absence of such a motion or other objection.[FN1]

FN1. 6 Moore Fed.Pr. at page 2817.

[4] In regard to the statements in the paragraph numbered 5 of Lambourne's affidavit, if the son was present and heard his father state that he (the father) knew nothing about a boat being stored at his place, then there would be an exception to the hearsay rule, since such a statement would be made under circumstances which would naturally call for some response from the plaintiff. It seems rather obvious that the plaintiff did hear and understand what was being said, and the statement in paragraph 5 of the affidavit is admissible as showing what the reaction of the plaintiff was in trying to prevent the defendant from ascertaining the truth of the matter.

Whether or not the affidavit of Lambourne is defective is not a serious matter in this case for the reason that the plaintiff in his deposition testified to many of the same things which are in the affidavit.

A synopsis of his testimony in his deposition is as follows:

1. He bought a 17-foot inboard-outboard Glasspar boat from a total stranger.

***387** 2. He does not know where the boat was last registered.

3. He paid $2200 cash to the stranger but got no bill of sale.

4. His wife did not know about his buying the boat.

5. He had secreted the cash at home in a tin box for nearly a year, the amount of cash being unknown to his wife.

6. He and the stranger transferred the boat in a parking lot of a shopping center from one trailer to another by themselves and without any help.

7. On April 30, 1965, he had the boat insured for $2,000.

8. Two days later, on May 2, 1965, he took the boat to Utah Lake, where he launched it by himself with no one being present to witness the act.

9. He drove the boat a few miles out to Bird Island, where he felt it strike an object, although no water came into the boat until later during a windstorm.

10. Almost immediately after striking the object with his boat, he noticed that the wind had increased greatly, and waves three or four feet high were beating against his boat.

11. The boat dropped front first into the trough between two waves and disappeared.

12. Although a 17-foot boat could not remain afloat, the plaintiff was able to swim safely to shore, a distance of from one half to one mile.

13. The plaintiff made no report of the loss of his boat until three or four days later, when he contacted a representative from the Utah Park Commission.

14. The plaintiff and representatives from the defendant's office searched the lake where the boat went down and covered the whole area of the lake in an efficient manner but found no boat.

15. At all times after he bought the boat and until he took it to the lake he stored it at his father's place.

The testimony of the plaintiff given in the deposition does not overcome the issue of whether he owned the boat which he insured with the defendant or whether he lost a boat at all. Had the parties rested with no evidence other than the deposition ****704** being before the court, we do not think a motion for a directed verdict could properly by granted. The issues would be for the jury's determination, and the fact that the defendant was not able to produce negative evidence would not entitle the plaintiff to win as a matter of law.

[5] If the law were otherwise, anyone could allege that he ate a mouse which was in a can of pork and beans, and while he might or might not be able to recover on the trial of the action against the canner and distributor of the food, he could win on a ***388** motion for summary judgment simply because there could not be a counter affidavit filed saying that there was no mouse in the can. All that a defendant could do in a situation such as is supposed above or in this case would be to rely on circumstantial evidence and the wisdom and honesty and good judgment of the jury to arrive at a correct verdict.

We do not think the plaintiff has sustained the burden of showing that there is no issue of fact to be tried by a jury, and we, therefore, reverse the ruling of the district court and remand the case for a trial upon the merits. Costs are to abide the final outcome of this matter.

CROCKETT, C.J., and HENRIOD, J., concur.

CALLISTER, Justice (dissenting):

I dissent.

Plaintiff, on the basis of his pleadings, deposition, and certain admissions on file, together with his affidavit, moved for summary judgment, which the trial court granted. Defendant Insurance Company, which had filed an opposing affidavit, appeals on the ground that there was a genuine issue as to material facts and, therefore, the trial court erred in granting plaintiff's motion.

In his complaint, plaintiff alleged that on or about April 30, 1965, he was issued a binder on a boatowners policy of insurance and thereafter the policy itself for which he paid a premium[FN1] and

that on or about May 2, 1965, while on Utah Lake, his insured boat struck a submerged object, sank and was lost.

> FN1. Photostatic copies of the binder and the front page of the policy were attached to plaintiff's Request for Admissions.

Defendant answered the complaint with a general denial. Subsequently, the defendant, in answer to plaintiff's Request for Admission, admitted the execution of the binder and delivery of the policy. thereafter, it took plaintiff's deposition and had an opportunity to examine him in detail as to the existence of the boat and the circumstances surrounding its loss.

Attached to plaintiff's motion for summary judgment was his affidavit in which he attested to the fact that he was alone in his boat and that it struck a submerged object and sank and that the boat, motor, and all personal property aboard were lost. He also attested to the fact that the defendant had refused to make any payment in accordnance with the insurance policy although, at one time, it indicated that it would.

Defendant filed an opposing affidavit of Keith Lambourne, its property claims supervisor. The problem arises as to whether this affidavit complies with ***389**Rule 56(e), U.R.C.P.,[FN2] thus raising genuine issues of ****705** material facts which would preclude summary judgment.

> FN2. 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to matters stated therein. Sworn or certified copies of all papers of parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supported or opposed by depositions, answers to interrogatiories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidacvit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' (Emphasis added.)

Lambourne's affidavit fails to meet the requirements of Rule 56(e). In it, he states that the defendant Company was not nofified of the claimed loss on May 2, 1965, until May 17, 1965, when plaintiff filed a written report. However, if this statement amounts to a valid defense, which we doubt, it is to be noted that neither a copy of the report nor of the insurance policy was attached to the affidavit and is not in evidence.

If sworn or certified copies of all papers referred to in an affidavit are not attached as Rule 56(e) requires, they cannot be relied upon to raise a genuine issue of fact.[FN3]

> FN3. Washington Post Co. v. Keogh, 125 U.S.

> FN3. Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 20 A.L.R.3d Practice, s 56.11(3), p. 2170.

The foregoing principle is equally applicable to affiant's statement that plaintiff has failed to meet the conditions of the policy in that he has not proved that he had an insurable interest in the boat which was allegedly lost.

Lambourne further attests that after the report of the alleged loss, representatives of defendant went to the site on Utah Lake where plaintiff claimed his boat had sunk and, with the assistance of plaintiff, conducted a methodical search of the entire area, and no indications were found that there

was a sunken craft in the area where plaintiff indicated his boat had sunk.

The foregoing is hearsay and, as such, would not be admissible at trial. [FN4] An affidavit under Rule 56(e) 'must be made on the personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein.'[FN5]

FN4. 6 Moore's Federal Practice s 56.22(1), pp. 2806-2809.

FN5. Id., p. 2803.

The affidavit of Lambourne continues with a statement that on numerous occastions representatives of defendant have requested that plaintiff produce proof of ***390** ownership, which plaintiff has refused and failed to do. This statement is subject to the same infirmities previously mentioned. In addition, the facts appear to be more in the nature of a summary than the type of evidentiary facts required under Rule 56(e). [FN6]

FN6. 3 Barron and Holtzoff, Federal Practice and Procedure, s 1237, p. 165.

Lambourne's affidavit states that plaintiff refused to furnish information regarding the facts of the accident and that on June 25, 1965, plaintiff physically interfered with defendant's investigation of the loss while affiant was atempting to talk with plaintiff's father, at whose residence plaintiff had claimed that he had stored the boat. Affiant states that the father had advised him that he knew nothing of the existence of the boat or of the son's ownership and was about to sign a statement to that effect when plaintiff physically took the paper from his father and tore it up.

The father's alleged statement to affiant is hearsay and does not qualify under Rule 56(e). [FN7] It is further of significance that plaintiff in his deposition testified that his father was now dead and defendant, although it had knowledge of plaintiff's alleged interference with its investigation, elected not to pursue the matter in its deposition of the plaintiff.

FN7. Footnote 4, supra.

Lambourne's affidavit concluded:

Due to plaintiff's failure and refusal to cooperate and to present proof of ownership and proof of loss, the defendant has refused, and still refuses to make any payment of any kind on the grounds and for the reason that the plaintiff has failed and refused to show that he had an insurable interest, and that he suffered any loss in the event he had an insurable interest.

The foregoing consists of factual conclusions and arguments. It does not come within the ambit of Rule 56(e), i.e., it does ****706** not 'set forth specific facts showing that there is a genuine issue for trial.'

Was the award of summary judgment to plaintiff 'appropriate'?

Plaintiff in his deposition described the manner in which he acquired the boat, i.e., he observed it on a parking lot and contacted the owner through the information displayed thereon. He paid $2,000 in cash to the former owner, who gave him a receipt that is in the possession of the defendant. Defendant's agent inspected the boat and copied the motor number therefrom. Plaintiff's mother is alive, and he stored the boat at her residence.

All of the foregoing facts contained in the deposition could have been met by defendant in opposing affidavits and created triable issues.

The uncontradited testimony from plaintiff's deposition establishes that he had an ***391** insurable interest.[FN8] 'The issuance of the policy and the payment of premiums establishes prima facie the liability of the insurer. * * *' Peterson v. Western Casualty and Surety Co., 19 Utah 2d 26, 29, 425

P.2d 769 (1967).

> FN8. See Sec. 33-19-4, U.C.A.1953; National Farmers Union Property and Casualty Co. v. Thompson, 4 Utah 2d 7, 12, 286 P.2d 249, 61 A.L.R.2d 635 (1955), wherein this court held that the insured has an insurable interest if he has a substantial economic interest, and the nature of his interest or the status of his title or possession is immaterial.

Does plaintiff's sworn version of the loss of the boat in both his deposition and affidavit entitle him to a summary judgment? Yes.

* * * If, however, the moving party presents evidence which would entitle him to a directed verdict if not controverted and the opposing party does not discredit it, the opposing party must at least specify some opposing evidence that he can present which will change the result. In other words, the opposing party must show a plausible ground for his claim or defense. Facts set out in the moving party's affidavit showing that he is entitled to judgment must be accepted as true when not met by counter-affidavits or testimony. The mere denial of the moving party's contentions, without showing any facts admissible in evidence, raises no issue of fact. The opposing party must show how he will support his contentions that issues of fact are present. But he need not submit all his evidence and it is sufficient if he shows that he has evidence of a substantial naure, as distinguished from legal conclusions, to dispute that of the moving party on material factual issues.

The rationale of these cases seems to be the moving party has the burden of showing that there is no genuine issue as to a material fact and that he is entitled to judgment as a matter of law, but that when he has made a prima facie showing to this effect the opposing party cannot defeat a motion for summary judgment and require a trial by a bare contention that an issue of fact exists. He must show that evidence is available which would justify a trial of the issue.[FN9]

> FN9. 3 Barron and Holtzoff, Federal Practice and Procedure, s 1235, pp. 146-149; also see Dupler v. Tates, 10 Utah 2d 251, 269-270, 351 P.2d 624 (1960), and James v. Honaker Drilling Inc., (C.A.10, 1958) 254 F.2d 702.

Finally, it is not correct that summary judgment must be denied where the case turns on facts peculiarly within the knowledge of the moving party. So long as the party opposing the motion has had full access to the facts-as normally he will through the discovery procedure-the motion shold be granted if he has ***392** failed to show any genuine issue as to a material fact. [FN10]

> FN10. 3 Barron and Holtzoff, Federal Practice and Procedure, s 1232.2, p. 114; also see Bolack v. Underwood, (C.A.10, 1965) 340 F.2d 816, 819.

In the instant action, defendant's basic assertion, although cast in several legal arguments, has been that plaintiff's claim is incredible, that in fact the boat never existed****707** and that it never sank. However, as with any other fact, it takes more than vehement denials to place credibility in issue. To avoid summary judgment the opposing party must disclose ‘specific facts'; this defendant has failed to do.

From the foregoing, it is evident that defendant's contention that the trial court erred in denying its motion to alter and amend the judgment is without merit.

In the majority's opinion's synopsis of plaintiff's deposition, there are certain omissions which are significant.

Although plaintiff could not recall the name of the town, he knew the boat was previously registered in California. These papers were on the boat and were lost when it sank. The plaintiff did

receive a receipt for the cash he paid from the vendor, which defendant has retained and significantly has refused to tender as evidence. His wife knew after the purchase that he had acquired the boat, although this matter is hearsay. His wife knew of the cash in the tin box but did not know the exact amount; this money was derived largely from the sale of a home they had previously owned. The plaintiff did not have a bank account but dealt strictly on a cash basis. The plaintiff did not immediately report the loss of the boat because he first made several attempts to locate it himself. Plaintiff's mother also lived at the father's residence and was still alive and available to testify about whether she observed the boat.

The mouse in the can situation cited by the majority is not analogous to the instant case. The insurance company could have indicated by affidavit of one of its agents that it was unable after a diligent search to locate the person whose name appeared on the receipt. Since defendant demanded the receipt shortly after the claimed loss thus indicating doubts as to the validity of plaintiff's claim, it could have procured affidavits from personnel who worked in the shopping center as to the issue of whether a boat had been displayed on the parking lot. The company could have interrogated plaintiff's mother as to her observations concerning the existence of the boat. Defendant could have presented the affidavit of its agent who plaintiff claimed inspected the boat and copied the motor number therefrom.

***393** Upon a review of the entire record the defendant has, in effect, asserted that plaintiff is attempting to commit fraud without defendant's compliance with Rule 9(b), U.R.C.P., that averments of fraud shall be stated with particularity. The majority opinion has adopted this theory by its reversal of the judgment of the trial court. The basic issues upon trial will be whether plaintiff has falsely represented his ownership and loss of a boat to his insurance carrier. '* * * fraud is a wrong of such nature that it must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo.'[FN11] Defendant has not only failed to allege fraud but also has not tendered any admissible evidence in support thereof.

FN11. Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 117-118, 405 P.2d 339, 341, 14 A.L.R.3d 1058 (1965).

This case constitutes a dangerous precedent, wherein an insurance company through insinuation and harassment can defeat at its election any claim for loss sustained by an insured. Furthermore, the majority opinion has nullified Rule 56(e) just as effectively as if it had been specifically repealed by this court from the Rules of Civil Procedure.

TUCKETT, J., concurs in the dissenting opinion of CALLISTER, J.

Utah 1969.
Fox v. Allstate Ins. Co.
22 Utah 2d 383, 453 P.2d 701

END OF DOCUMENT

Insurance Litigation

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. Approved.

[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. To whom notice must be given. Approved.

Notice of the loss [or claim] may be given to any authorized agent of [insurer]. This may be done directly by oral communication, delivery of written notice, or by first class mail ~~by depositing the notice in a first class postage prepaid envelope addressed~~ to [insurer].

References

Utah Code Section 31A-21-312 (1) (a) and (4).

Utah Admin. Code R. 590-190-7(2).

Committee Note

Notice of claim or loss may be given to "any appointed agent, authorized adjuster, or other authorized claim representative of an insurer." Utah Admin. Code R. 590-190-7(2).

CV 2409. 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 2409a. To Whom Proof of Loss Must Be Given. Approved.

Proof of loss may be given to any authorized agent of [insurer]. This may be done directly or by first class mail ~~by depositing a first class postage prepaid envelope addressed~~ to [insurer].

References

Utah Code Section 31A-21-312 (1) (a) and (4).

R. 590-190-3(10).

CV 2410. When Insurer claims prejudice (harm) from delay in notice or proof. Approved.

[Insurer] claims that [Insured]'s delay in providing [notice][proof] of [describe claim or loss] harmed the [Insurer] by obstructing [Insurer]'s ability to reasonably [investigate] [defend] [resolve] a claim.

The failure to give [adequate/timely] [notice of loss][proof-of-loss] is a valid reason to deny the claim if [Insurer] proves that it was harmed because of [Insured]'s failure to give [adequate/timely] proof-of-loss.

You must determine whether the evidence shows [Insurer] was harmed due to [Insured]'s delay. ~~An insurer suffers detriment if it is unable to reasonably investigate, or defend, or resolve a claim because of an insured's delay in providing [notice][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).

Utah case law requires that an insurer show "actual prejudice", as opposed to theoretical prejudice, based on the insured's failure to provide adequate or timely proof-of-loss. *Id*. at ¶ 37. To make the concept easier for a jury to understand, the committee substituted the word "prejudice" with "harm."

CV 2411. 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 2412. Recovery of 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 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.

To recover consequential damages [plaintiff] must prove: a. [he][she] sustained damages caused by the breach; b. the amount of such damages with reasonably certainty; and c. that the damages were within the contemplation of the parties or were reasonably foreseeable by the parties at the time the policy was obtained.

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.

Castillo v. Atlanta Casualty Co., 939 P.2d 1204, 1209 (Utah App. 1997).

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 2413. 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 2414. ~~Must Have an I~~ Insurable interest required. Approved.

~~Under the law, a~~A person may not recover insurance benefits unless he has an insurable interest in the [~~i~~Insured]'s [describe the event, such as the life of an individual, the destruction of real or personal property, or other event or item]. You ~~will be asked to~~must decide whether [name of plaintiff] has ~~such~~ an insurable interest.

References

Utah Code Section 31A-21-104.

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

CV 2414a. ~~What is an~~ Insurable interest defined. Rich to draft.

CV 2415. 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 2416. Recovery of consequential 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 any "consequential" damages caused by [name of defendant]'s breach.

Consequential damages are those damages caused by [name of defendant]'s breach, which, the parties could have reasonably foreseen 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 naturally flows~~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]~~ the parties 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

Machan 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.")~~

CV 2417. Claim Regarding Insurable Interest. Approved.

[Name of claimant] is making a claim for benefits under an insurance policy issued by [name of insurance company].

[Name of insurance company] claims that [name of claimant] did not have an insurable interest in [describe - item of property, a person's life, liability for an event, etc.]. Unless [name of claimant] had an insurable interest, the insurance is not valid and [name of insurance company] is not required to pay benefits.

References
Utah Code § 31A-21-104(2)(a).
Parduhn v. Bennett, 2005 UT 22, 112 P.3d 495.
Parduhn v. Bennett, 2002 UT 93, 61 P.3d 982.

Committee Notes
Refer to Utah Code section 31A-21-104(2) to determine the time when the insurable interest must exist.

CV 2418. Insurable Interest in Property or Liability. Approved.

An insurable interest means any lawful and substantial economic interest in the [property or event] that is insured.

References
Utah Code § 31A-21-104(1)(c).

CV 2419. Life Insurance – Insurable Interest. Approved.

For [name of plaintiff] to have an insurable interest in the [life, health, safety] of [name of person], [he] [she] must have a lawful and substantial interest in the continued [life, health, or bodily safety] of [name of person].

If [name of person or decedent] is closely related by blood or by law to [name of plaintiff], then the substantial interest may be that which is generated by love and affection.

References
Utah Code § 31A-21-104(3).

Committee Notes
Utah Code section 31A-21-104(3) through (8) provides a non-exhaustive list of insurable interests which are expressly permitted under certain conditions, such as shareholders, members or partners having insurable interest in other shareholders, members or partners; a trust having insurable interests in beneficiaries; a corporation

having an insurable interest in officers and employees. These listed items are not intended to exclude other valid insurable interests. *Id*. at § 21-104(9).

CV 2420. Representation, Warranty and Estoppel.

A statement made by any person representing [name of insurer] in the purchase of an insurance policy that affects the insurance company's obligation under the policy is unenforceable unless it is stated in the policy or in a written application signed by the applicant. This general rule is subject to the following exception.

If the person representing [name of insurer] made a representation about a [provision] [absence of provision] contained in the policy, [name of insurer] is bound by the representation if the policy holder reasonably relied upon that representation to his or her detriment. This is true even if there is a provision in the insurance policy that the terms of the policy cannot be waived.

For this exception to apply, the statement by the agent must be:

a. clear;
b. important [material];
c. made to induce [name of plaintiff] to get the insurance;
d. the type that a reasonable person would rely on; and
e. the type that would lead [name of plaintiff] to feel as though he/she need not read the policy.

References

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

Hardy v. Prudential Insurance Co. of America, 763 P.2d 761, 768 (Utah 1988).

Committee Notes

If there is a question about whether the person representing the insurance company has legal authority, refer to Agency Instructions.

Regarding representations, the Utah Supreme Court has stated, "Moreover, we emphasize that the rule we have set forth is a narrow one and only applies in limited circumstances. The representations must be clear and material and must be made in an attempt to induce the potential insured to enter into the contract. The representations must lead the potential insured to feel as though he or she need not read the contract, and the representations must be of the type that a reasonable person would rely upon." *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 27, 158 P.3d 1088.

CV 2421. Estoppel – reasonable reliance.

When determining whether [name of plaintiff] reasonably relied on the agent's statement, you must consider whether a reasonable person in similar circumstances would have relied on what the agent said. To make this decision, you may consider the following:

a. Did [name of plaintiff] have easy access to the policy so he/she could read it?

b. Did [name of plaintiff] read the policy?

c. Was the applicable policy language clear?

d. Would a reasonably intelligent person have difficulty understanding the applicable language?

e. [Name of plaintiff] does not need to do independent research to find out if what the agent says is true unless [name of plaintiff] discovers something which would give him/her a reason to doubt what the agent was saying.

References

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 24-27, 158 P.3d 1088.

CV 2422. Intentional act exclusion.

This exclusion is only valid if [name of plaintiff] intended or expected the result that happened. In other words, the [plaintiff] may have intentionally or deliberately done what he did, but there is still coverage unless he/she intended the consequences of what happened.

You must decide whether the consequences of [name of plaintiff]'s conduct was intended or expected, or whether they were unintended and not anticipated by [name of plaintiff].

References

N.M. on behalf of Caleb v. Daniel E., 2008 UT 1, 175 P.3d 566.

Committee Notes

This instruction anticipates a special interrogatory to the jury and the court would enforce or not enforce the exclusion based on the jury's answer.

CV 2423. Insurer bound by licensed agent.

The law presumes that every insurance company is bound by any action of its appointed and licensed agent if the action is within the scope of the agency. This simply means that [defendant] is responsible for its agents unless the insurer proves otherwise.

References

Utah Code 31A-23a-405 (2).

"(2) There is a rebuttable presumption that every insurer is bound by any act of its appointed licensee performed in this state that is within the scope of the appointed licensee's actual (express or implied) or apparent authority, until the insurer has canceled the appointed licensee's appointment and has made reasonable efforts to recover from the appointed licensee its policy forms and other indicia of agency. Reasonable efforts include a formal demand in writing for return of the indicia, and notice to the commissioner if the appointed licensee does not promptly comply with the demand. This Subsection (2) neither waives any common law defense available to insurers, nor precludes the insured from seeking redress against the appointed licensee individually or jointly against the insurer and licensee."

Committee Note

The statute refers to express, implied and apparent authority when referring to the scope of the agency. See MUJI Instructions _____. This rebuttable presumption exists until the insurance company has canceled the appointment and has made reasonable efforts to recover from the agent its policy forms and other indicia of the insurance company's agency. See Utah Code section 31A-23a-405 for more information.