Agenda
Advisory Committee on
Model Civil Jury Instructions

November 10, 2008
4:00 to 6:00 p.m.

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

Approval of minutes	Tab 1	John Young
Fraud and Deceit	Tab 2	Gary Johnson George Haley
CV1057. Safety risks.	Tab 3	John Young
CV1052. Learned intermediary	Tab 4	Frank Carney
Introduction to MUJI 2d and Medical Malpractice Instructions	Tab 5	Frank Carney

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

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

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

December 8, 2008	Construction Contracts
January 12, 2009	Eminent Domain
February 9, 2009	Premises Liability
March 9, 2009	Insurance Obligations
April 13, 2009	Probate
May 11, 2009	Professional Liability
June 8, 2009	Employment

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 11, 2008

4:00 – 6:00 p.m.

Present: Judge William Barrett, Juli Blanch, Tracy Fowler, Gary Johnson, Stephen Nebeker, Timothy Shea, David West, John Young

Excused: Frank Carney, Professor Marianna Di Paolo, Phillip Ferguson, Rich Humpherys, Colin King, Paul Simmons, Peter Summerill

Guests: Lynn Davies

Mr. Young called the meeting to order.

Mr. Young reported that the construction contract instructions had been delayed. He asked Mr. Johnson to be ready to present the intentional tort instructions at the November meeting.

Mr. Young reported that due to the absence of several key people, the discussion of Instruction 1057, Safety risks, would be postponed to November.

Mr. Young reported that Frank Carney had proposed editing the Introduction and the committee note preceding the medical malpractice instructions because of reports that some lawyers are arguing to use the original MUJI rather than MUJI 2nd. Because Mr. Carney was unable to attend, these items will be postponed to November.

Mr. Young reported that Mr. Carney had also suggested amending Instruction 1052, Learned intermediary, because of the Supreme Court decision in *Downing v. Hyland Pharmacy*. This also was postponed to November, and Mr. Young suggested a separate instruction for pharmacists.

Mr. Johnson reported that he must resign from the committee. Mr. Young said that he has talked with John Lund about being a member, and Mr. Lund is willing. Mr. Young asked the committee to consider other possible replacements, and the committee will decide in November.

Instruction 615, Right of way. Flashing red light. Mr. Davies recommended adding a sentence in brackets "[The driver must yield the right-of-way to a pedestrian in a crosswalk.]" because the driver's duty at a flashing red light is the same as at a stop sign. Mr. Davies also recommended adding a citation to Utah Code Section 41-6a-902. The committee agreed.

Instruction 616, Right-of-way. Flashing yellow light. Because there are so many different circumstances, Mr. Young suggested adding "The driver must yield the right-of-way to [insert factual dispute]." The committee agreed.

Instruction 630, Owner who allows minor to drive. Mr. Davies recommended adding to the end of the instruction the sentence: "If you find that the driver is at fault, any judgment will be applied fully against both the driver and the vehicle owner." Mr. West asked whether a verdict form would be adequate to cover this point. Mr. Young thought

that the addition would confuse the jury. Mr. Davies argued that the jury should be told why the owner is in the case, and what will be the effect of the jury's verdict, citing *Dixon v. Stewart*. Mr. Young thought the new sentence restated the sentence before it.

Mr. Young suggested adding a new first paragraph that set up the opposing claims and what had to be decided.

After discussion, the committee approved the sentence recommended by Mr. Davies and added a new first paragraph:

> [[Name of plaintiff] claims that [name of owner] gave [name of driver] permission to drive the vehicle. [Name of owner] denies giving permission. You must decide whether [name of owner] gave [name of driver] permission to drive.]

The paragraph should be bracketed because permission might not be disputed.

Instruction 631, Negligent entrustment. After discussion, the committee agreed to replace the current committee note with a note suggested by Mr. Davies: "Liability for negligent entrustment is not imputed liability; rather, it is independent negligence for the act of entrustment. Therefore, the jury should apportion fault to the negligent entrustment tortfeasor pursuant to UCA 78B-5-818, -819 and -820."

Instruction 632, Threshold. Mr. Davies said that the subcommittee had recommended including "reasonable and necessary" to describe the necessary minimum medical expenses. He said that the subcommittee had discussed the point extensively. He argued that although Section 31A-22-309(1)(a) does not use the phrase, Section 31A-22-307 which describes the minimum personal injury protection coverage for reasonable and necessary medical expenses, establishes the formula for both -307 and -309. Mr. Young noted that Mr. Humphreys also had argued in favor of including "reasonable and necessary" at the previous meeting. After discussion, the committee decided to insert "reasonable and necessary" before "medical expenses in excess of $3,000" and delete the committee note.

Instruction 635, Seatbelt usage. The committee reviewed and approved the committee note proposed by Mr. Fowler.

The meeting was adjourned.

Tab 2

Fraud Instructions

Table of Contents

(1) CV1701. Elements of fraud.

[Name of plaintiff] claims that [name of defendant] defrauded him by making a false [oral / written], statement about a fact that harmed [name of plaintiff]. To establish this claim, [name of plaintiff] must prove each of the following factors by clear and convincing evidence:

(1) [name of defendant] made a false statement concerning an important fact; and

(2) [name of defendant] either knew the statement was false, or that [he] made the statement recklessly and without regard for its truth; and

(3) [name of defendant] intended that [name of plaintiff] would rely on the statement; and

(4) [name of defendant]'s statement was reasonably relied on by [name of plaintiff]; and

(5) [name of plaintiff] suffered damages as a result of relying on the statement.

I will provide you with more information about each of these factors in the following instructions.

References

Yazd v. Woodside Homes Corp., 143 P.3d 283 (Utah 2006)

Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35 (Utah 2003)

Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060 (Utah 1996)

Taylor v. Gasor, Inc., 607 P.2d 293 (Utah 1990)

Dilworth v. Lauritzen, 18 Utah 2d 386, 424 P.2d 136 (1967)

Child v. Hayward, 16 Utah 2d 351, 400 P.2d 758 (1965)

MUJI 1st Instruction

17.1; 17.9

Committee Notes

This instruction and the instructions which follow use the term "important" rather than "material." The Committee made this change because jurors are more likely to understand the former term, and because Utah case law defines materiality in terms of importance. See, e.g., Yazd v. Woodside Homes Corp., 143 P.3d 283 ¶ 34 (Utah 2006) ("To be material, the information must be 'important.'").

Although some of the instructions in this section may be useful in negligent misrepresentation cases, they do not purport to comprise a complete set of instructions for such cases.

(2) CV1702. Intentional or reckless false statement.

A false statement is intentional if [name of defendant] made the statement knowing that it was false.

A false statement is reckless if [name of defendant] knew that [he] did not have sufficient knowledge to make the statement.

References:

Kuhre v. Goodfellow, 2003 UT APP 1, 69 P.3d 286

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, 56 P.3d 524

Rawson v. Conover, 2001 UT 24, 30 P.3d 876 ("To have made a false representation recklessly, defendants would have to know that they had insufficient knowledge upon which to base the representation made.")

MUJI 1st Instruction

(3) CV1703. Opinion as statements of fact.

You must decide if [name of defendant] made a false statement about a fact. Ordinarily, an opinion is not necessarily a statement about a fact, but is a person's belief about a fact. However, [name of defendant]'s statement is not an opinion, but a statement about a fact, if [name of plaintiff] proves all of the following

[Name of defendant] claimed to have special knowledge about the subject matter that [name of plaintiff] did not have.

[Name of defendant] made a representation in a way that implied the matter to be true, rather than just as an expression of [his] belief.

[Name of defendant] had a relationship of trust and confidence with [name of plaintiff].

[Name of defendant] has some other special reason to expect that [name of plaintiff] would rely on [name of defendant]'s opinion.

References

MUJI 1st Instruction

17.3; 17.4

Committee Notes

Instruct only on the listed elements for which there is evidence.

The Committee deleted MUJI 17.4 "puffing" and "sales talk" instruction. It was the Committee's view that Instruction 17.4 fits within the definitions of a CV 1703 opinion as a statement of fact and no specific instruction was necessary. Some of the exceptions to the general statement that opinions are not actionable do not appear in Utah State cases. They do appear in the Restatement and are recognized in other jurisdictions as exceptions to the general rule, and were accepted by the Committee as general statement of the common law. See Section 538A and 539 of the Second Restatement of Torts.

REVIEW SUBSTANCE W/ GEORGE HALEY.

(4) CV1704. Promises and statements of future performance.

A promise about an act in the future is a false statement about a fact if [name of plain tiff] proves that [name of defendant]:

(1) never intended to keep the promise; and

(2) made the promise for the purpose of deceiving [name of plaintiff].

References:

Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982)

Hull v. Flanders, 83 Utah 158, 27 P.2d 56 (1933)

MUJI 1st Instruction

(5) CV1705. Important statement of fact or promise.

A statement about a fact is important if knowing that it is false would influence a reasonable person's judgment, or his or her decision to act or not to act.

References:

Yazd v. Woodside Homes Corp., 2006 UT 47, 143 P.3d 283

Walter v. Stewart, 2003 Utah App. 86, 67 P.3d 1042

MUJI 1st Instruction

(6) CV1706. Intent to induce reliance.

You may find that [name of defendant] intended to make [name of plaintiff] rely on a false statement about a fact, even though [name of defendant] did not make the false statement of fact directly to [name of plaintiff]. [Name of defendant] intended [name of plaintiff] to rely on the false statement about a fact if

[[Name of defendant] made the statement to a group of people that included [name of plaintiff]].

[[Name of defendant] made the statement to another person, with the intent or the belief that it would be communicated to [name of plaintiff]].

References:

Ellis v. Hale, 373 P.2d 382 (1962)

MUJI 1st Instruction

(7) CV1707. Reasonable reliance.

You must decide whether [Name of plaintiff]'s reliance on the false statement was reasonable by taking into account all relevant circumstances, including [his] age, mental capacity, knowledge, experience, and [his] relationship to [name of defendant].

References

Mikkelson v. Quail Valley Realty, 641 P.2d 124 (Utah 1982)

Berkeley Bank for Coops. v. Meibos, 607 P.2d 1369 (Utah 1980)

MUJI 1st Instruction

17.8

(8) CV1708. Concealment or fraudulent non-disclosure.

I have determined that [name of plaintiff] was in a [type of relationship] that gave [name of defendant] a duty to disclose an important fact to [name of plaintiff]. What you must decide is if [name of defendant] failed to disclose an important fact. To establish that [name of defendant] failed to disclose an important fact, [name of plaintiff] must prove all of the following:

(1) that [name of defendant] knew an important fact and failed to disclose it to [name of plaintiff];

(2) that [name of plaintiff] did not know of the fact; and

(3) that [name of defendant]'s failure to disclose the important fact was a substantial factor in causing [name of plaintiff]'s damages.

References

Yazd v. Woodside, 143 P.3d 283 (Utah 2006)

Moore v. Smith, 158 P.3d 561 (Utah App. 2007)

MUJI 1st Instruction

17.10

THIS INSTRUCTION ASSUMES THAT THIS RELATIONSHIP IS ESTABLISHED AS A MATTER OF LAW. IF NOT, AN INSTRUCTION SHOULD ALSO BE GIVEN ABOUT HOW THE JURY SHOULD DECIDE THE RELATIONSHIP.

(9) CV1709. Compensatory damages.

If you decide that [name of defendant] defrauded [name of plaintiff], then you must also decide how much money is needed to fairly compensate [name of plaintiff] for any damages caused by the fraud.

[ALTERNATIVE A]

In deciding how much money [name of plaintiff] is entitled to as damages, you should determine the difference between the value of the property that [name of plaintiff] [bought /sold] and the value the same property would have had if [name of defendant]'s statements about it had been true.

[ALTERNATIVE B]

In deciding how much money [name of plaintiff] is entitled to as damages, you should determine the total amount [name of plaintiff] was damaged as a consequence of [his] reliance on [name of defendant]'s statements. There are three types of categories to consider:

(1) You may award damages for the amount [name of plaintiff] lost as a consequence of [name of defendant]'s fraud. You may also award damages for expenses [name of plaintiff] would not have incurred except for [name of defendant]'s fraud as long as you determine that they were a reasonably foreseeable consequence of [name of defendant]'s fraud, and that [name of defendant] has proven these damages with reasonable certainty. The following is a list of possible expenses:

(a) loss of good will,

(b) expenditures in mitigation of damages,

(c) lost earnings,

(d) prejudgment interest,

(e) loss of interest on loans required to finance the business,

(f) and other similar items,

(2) You may award damages for [name of plaintiff]'s "lost profits," that is to say, profits [name of plaintiff] would have made, except for [name of defendant]'s fraud. You may only award lost profits if

(a) you decide that they were a reasonably foreseeable consequence of [name of defendant]'s fraud, and

(b) that [name of defendant] has proven them with reasonable certainty.

(3) You may also award damages for the emotional distress caused by [name of defendant]'s false statement if the emotional distress was a reasonably foreseeable consequence of [name of defendant]'s fraud.

References

Alternative A

Dugan v. Jones, 615 P.2d 1239 (Utah 1980)

Lamb v. Bangart, 525 P.2d 602 (Utah 1974)

Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967)

Alternative B

Restatement (Second) of Torts, § 549

Campbell v. State Farm Mutual Automobile Ins. Co., 65 P.3d 1134 (2001)

Ong International (U.S.A.) Inc., v. 11th Avenue Corp., 850 P.2d 447 (1993)

Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991)

MUJI 1st Instruction

17.11

Committee Notes

This instruction expands MUJI 17.11 to address a broader range of fraud cases than in MUJI 17.11. Alternative A states the traditional measure of damages in fraud cases involving the purchase or sale of property, as recognized in Dugan v. Jones, 615 P.2d 1239 (Utah 1980) (real estate), Lamb v. Bangart, 525 P.2d 602 (Utah 1974) (livestock), Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967) (distributorship) and others.

Alternative B is intended for cases where loss is suffered in reliance on a fraudulent misrepresentation, but there is not necessarily any purchase or sale between the plaintiff and defendant. This situation is presented in a variety of cases: e.g., where the plaintiff is fraudulently induced to extend money or credit, or where the plaintiff is fraudulently induced to purchase or use an article which is inappropriate for the intended use. See Restatement (Second) of Torts § 549, and comments thereto.

The second and third paragraphs of Alternative B deal specifically with lost profits and emotional distress damages in fraud cases, and may be applicable only in some cases.

Tab 3

CV 1057. Safety risks.

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

References

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

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

MUJI 1st References

Committee Notes

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

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

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

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

From: Gary L. Johnson [mailto:Gary-Johnson@rbmn.com]
Sent: Wednesday, October 22, 2008 9:36 AM
To: John Young
Cc: tfowler@swlaw.com; Juli Blanch
Subject: Instruction CV 1057

John:

This instruction has been the source of marked disagreement among Committee members. The present, revised version is watered down, but even this stirs opposition. The basis of the instruction (which I had no hand in drafting) is the Utah Supreme Court's reasoning in Slisze v. Stanley-Bostich, 979 P.2d 317 (Utah 1999). As you may remember, this case involves a construction worker who took a nail into the head. He was using a pneumatic nailer known as a "contact-trip" model (you just push the end down, and if your finger is on the trigger, a nail automatically fires). The industry also manufactures a "sequential-trip" model (you push the end of the nailer down and then you have to separately push the trigger after), which is admittedly a safer model.

Plaintiff was appealing the dismissal of his negligence claim brought under Utah's Product Liability Act (the court first decided that a party can bring a negligence action under then Section 78-15-6). On appeal, the Utah Supreme Court identified the plaintiff's arguments as follows:

(1) Slisze is essentially asserting that Stanley had a duty to stop marketing a product that is less safe than another, although not defective, or to actively warn and inform consumers that the product is less safe.

(2) Alternatively, Slisze wants this court to impose a duty on the manufacturer to inform consumers about the safer model. (979 P.2d at 320).

The Utah Supreme Court rejected both contentions and, as the proposed committee note to CV 1057 explains, held that a manufacturer does not have a duty to make a non-defective product safer or to warn a user that a safer alternative exists. The court specifically held that a "non-defective product may present some safety risks that cause it to be dangerous for its intended use, but not 'unreasonably dangerous' according to the statutory definition;…." Id.

Instruction CV 1057 (both in its original form and in the watered down version) sets forth the public policy of the State of Utah concerning the issue of whether admittedly dangerous products, that can be made safer, are automatically defective and unreasonably dangerous, and the answer is no. The instruction so states. Some members of the Committee do not like the fact that this is the law in Utah. I can appreciate the opposition, particularly after the Tenth Circuit's decision in Henrie v. Northrop Grumman Corp., 502 F.3d 1228 (10th Cir. 2007). There, the court (applying Utah law) affirmed Judge Cassell's summary judgment in favor of the defendant manufacturer of an apparatus used by plaintiff painter to support large aircraft parts for painting. Relying on Slisze as stating the law in Utah, the court found that while the apparatus may have been dangerous, it was not "unreasonably dangerous" according

to the Utah statutory definition and that the defendant was not required to make the apparatus safer.

Slisze is the law in Utah on this issue and has not been questioned, let alone overruled by any later cases. This instruction should be used.

Tab 4

CV1052. Learned intermediary.

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

References

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

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

IN THE SUPREME COURT OF THE STATE OF UTAH

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Steven Downing,
Plaintiff and Appellant,

v.

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

No. 20060771

F I L E D

September 16, 2008

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

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

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DURHAM, Chief Justice:

INTRODUCTION

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

BACKGROUND AND PROCEDURAL HISTORY

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

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[1] According to the FDA,

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

(continued...)

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

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

STANDARD OF REVIEW

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

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[1] (...continued)

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Tab 5

Introduction to the Model Utah Jury Instructions, Second Edition.

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

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

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

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

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

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

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

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

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

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

CV301A Committee Note on Medical Malpractice Instructions

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

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

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

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

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