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

May 9, 2011
4:00 to 6:00 p.m.

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

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| Welcome and approval of minutes | Tab 1 | John Young |
| Instructions on ski resort injuries. | | David Cutt |
| General Instructions | Tab 2 | Phil Ferguson<br>Peter Summerill |
| CV2012 Noneconomic damages. Loss of consortium. | Tab 3 | Frank Carney |
| Verdict form | Tab 4 | Peter Summerill |

**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.

June 13, 2011
September 12, 2011
October 11, 2011 (Tuesday)
November 14, 2011
December 12, 2011

# Tab 1

***MINUTES***
Advisory Committee on Model Civil Jury Instructions
April 11, 2011
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, David E. West, Dianne Abegglen, and David A. Cutt

Excused: Juli Blanch, Tracy H. Fowler, Honorable Deno Himonas, L. Rich Humpherys, Honorable Kate A. Toomey

1. *CV1109. Recovery for injury to ski resort patrons.* David A. Cutt joined the meeting to discuss CV1109. Mr. Cutt thought that the instruction was inadequate. He noted that the case law construing the Inherent Risks of Skiing Act recognizes two categories of risks: those skiers expect to encounter, such as steep slopes and weather conditions, and those they would not want or expect to encounter, such as man-made structures on a ski run. The former are inherent risks of skiing for which a ski resort owner or operator cannot be liable, whereas an owner or operator can be liable for the latter if the risk could have been made safer through the exercise of reasonable care. Mr. Cutt noted that the instruction uses the term "risks of skiing," rather than the statutory term "inherent risks of skiing." Mr. Young explained that the committee was trying to simplify instructions by replacing terms of art with terms jurors would understand. Mr. Cutt, who represents injured skiers, said that he had discussed the instructions with Kevin Simon, who represents ski resorts, and the two agreed that more instructions were needed. He offered to work with Mr. Simon to come up with an agreed set of jury instructions. The two have a case going to trial beginning June 6, 2011, so they will need to prepare a set by then in any event. The committee accepted Mr. Cutt's offer and agreed to withdraw CV1109 in the meantime. Mr. Cutt was then excused. Messrs. Ferguson, Shea, and Summerill agreed to serve as the "Gang of Three" to review the proposed instructions that Messrs. Cutt and Simon submit for readability.

2. *"Jury Service in Utah."* Mr. Shea played for the committee the new video "Jury Service in Utah," which is being distributed to courts this week. Mr. Ferguson thought it made some of the general jury instructions superfluous, but Dr. Di Paolo thought that it was helpful to repeat the material in the general jury instructions.

Ms. Abegglen was excused.

3. *CV101, General admonitions.* Mr. Shea presented a new CV101, which he based on the American College of Trial Lawyers' jury instruction that Mr. Carney had circulated following the last meeting. Mr. Shea's proposal would replace both CV101A, "General admonitions," and CV101B, "Further admonition about electronic devices." The committee deleted "or your jury service" from the fourth paragraph, telling the jury that they must not communicate with anyone about the case. The committee also added "about this case" to the next paragraph, following the phrase "must not talk with your

fellow jurors." The committee also replaced the phrase "until I give you the case for deliberation" with "until I send you out to deliberate." Similarly, at Mr. Summerill's suggestion, the last line of the instruction was changed from "until all the evidence is in" to "until I send you to deliberate." Mr. Carney asked whether jurors should be required to sign an affirmation such as the one the ACTL proposed. Mr. Shea thought that if such a change were to occur, it should go through the administrative process. He suggested that, alternatively, a reminder could be posted in the jury room, or the jurors' oath could be modified to accomplish the same result. A number of committee members thought that asking jurors to sign an affirmation was inappropriate and implied that the court and the litigants did not trust them. Judge Berrett noted that, in his experience, jurors as a whole are conscientious and try very hard to do what they are supposed to do. The committee questioned whether it was necessary to say anything about sequestering juries. Some thought it was necessary because jurors will have heard of the practice or seen it on television. The committee changed that part of the instruction to say, "sequester, or isolate, . . . ." The committee approved the instruction as modified. The instruction will replace CV101A and 101B. Mr. Carney suggested sending the approved instruction to the committee preparing the model criminal instructions for its consideration.

Mr. Springer was excused.

4. *CV111. Definition of "person," and CV107, All persons are equal before the law.* Dr. Di Paolo suggested combining CV111 and CV107. Mr. Shea noted that CV111 applies to other sets of instructions, not just the general or preliminary instructions. Mr. Johnson thought that including both paragraphs of CV107 in the same instruction may suggest to the jury that it should be prejudiced against a corporation. Mr. Young noted that the instruction was meant to minimize that concern and not isolate corporations for special treatment. Mr. Ferguson asked whether taking the second paragraph out of CV107 would cause more problems. Mr. Johnson suggested combining the second paragraph of CV107 with CV111. The committee decided to keep CV111 a separate instruction and to divide CV107 into two instructions. The first paragraph will be its own instruction, titled "Jurors may not decide based on sympathy, passion and prejudice." The second paragraph will be a separate instruction titled "All persons equal before the law." The committee approved the instructions as so modified.

5. *CV112. Multiple parties.* Dr. Di Paolo said that she would leave the instruction as it was, that it did not need to be shortened. At Mr. Carney's suggestion, the committee left "each plaintiff and each defendant" in the second sentence but replaced it with "all parties" in the third sentence. The committee approved the instruction as modified.

6. *CV113, Multiple plaintiffs, and CV114, Multiple defendants.* The committee approved CV113 and CV114 as modified (to delete the phrase "in this action" from each).

7. *CV115. Settling parties.* Dr. Di Paolo suggested revising the instruction to make it clear that parties may settle only part of their dispute. At Mr. Summerill's suggestion, "parties" was replaced with "persons" throughout, since a person may settle before he or she is ever brought into the lawsuit as a party. Mr. Young noted that, by referring to persons who were "at fault," the instruction applies to tort cases but may not apply to commercial, non-tort cases as written. Mr. Simmons questioned whether the jury would have to decide any issues relating to nonparties in a non-tort case. Mr. Ferguson suggested having separate instructions for tort and non-tort cases. Mr. Summerill suggested dealing with the problem in a committee note saying that the instruction may need to be adapted for non-tort cases. Mr. Summerill also suggested leaving the specifics of fault allocation to the jury instruction dealing with allocation of fault. Mr. Ferguson questioned whether the term "settlement agreement" should be included in the instruction, since the agreement itself is rarely if ever given to the jury. The committee revised the second paragraph of the instruction to read:

> There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling party], were at fault.
>
> You must not consider the settlement as a reflection of the strengths or weaknesses of any party's positions.

The title of the instruction was changed to "Effect of settlement." The committee approved the instruction as modified.

**Mr. Shea will draft a committee note for the instruction.**

Mr. West was excused.

8. *CV117. Preponderance of the evidence.* Mr. Johnson suggested leaving in the phrase "I must emphasize to you that" in the second paragraph. He thought the instructions could not emphasis enough the differences between civil cases and criminal cases and noted a recent jury trial in which the jurors were overheard to frame the issue as whether the defendant was "guilty of products liability." The rest of the committee was okay with deleting the quoted language as proposed, but, at Dr. Di Paolo's suggestion, the second paragraph was made the first paragraph of the instruction. The committee approved the instruction as modified.

9. *CV118. Clear and convincing evidence.* The committee approved this instruction as modified.

10. *CV119. Evidence.* Mr. Shea noted that the deletions to CV119 were made because the matters are now covered in new CV101. Dr. Di Paolo thought the term "stipulate" would not be clear to the average juror. Mr. Carney suggested doing away with the term altogether, but Dr. Di Paolo thought it was helpful to include it because the jury will hear the attorneys referring to stipulations. The committee took "stipulations" out of the first paragraph and revised the penultimate paragraph to read, "The lawyers might agree, or stipulate, to a fact . . . ." The committee approved the instruction as modified.

11. *CV120. Direct and circumstantial evidence.* The committee approved the instruction as modified.

12. *CV126. Depositions.* Mr. Summerill questioned whether the phrase "may be received in evidence" is clear to a lay person. The committee thought that it might lead jurors to think that they can take the deposition transcripts with them into the jury room. At Mr. Ferguson's suggestion, the first sentence was deleted from the instruction. The committee approved the instruction as modified.

13. *CV127. Limited purpose evidence.* The committee approved the instruction as modified.

14. *CV131. Spoliation.* Mr. Johnson said that he would like to review *Hills v. UPS,* 2010 UT 39, before considering CV131, so the committee deferred discussion of the instruction until the next meeting.

15. *Approval dates.* Mr. Summerill asked whether the dates on which an instruction was approved and revised could be included in the on-line database. Mr. Shea thought that they could be but said that we could not track all of the changes to an instruction on-line, as some publishers do with statutory revisions. For changes to instructions and the reasons for the changes, one would have to review the committee minutes, but including the date the instruction was approved or revised would make searching the minutes easier.

16. *Special verdicts.* Mr. Summerill circulated before the meeting, by e-mail, drafts of proposed special verdict forms. He noted that the special verdict forms currently included in MUJI 2d do not cover multiple parties and non-parties who may have fault apportioned to them. Mr. Carney noted that they also do not make it clear

that the jury must award general damages if it finds liability in a tort case. The committee deferred further discussion of the special verdict forms until a later meeting.

17. *Next Meeting*. The next meeting will be Monday, May 9, 2011, at 4:00 p.m., in the Education Room.

The meeting concluded at 6:00 p.m.

# Tab 2

## General Instructions

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**(1) CV101 General admonitions.**

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

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

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

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

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

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

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

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

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

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

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

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

**References**

CACI 100

**MUJI 1st Instruction**

1.1; 2.4.

**Committee Notes**

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times

(3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Approved

**(2) CV101B Further admonition about electronic devices. (Delete)**

Approved

**(3) CV102 Role of the judge, jury and lawyers.**

You and I and the lawyers play important but different roles in the trial.

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

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

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

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

**MUJI 1st Instruction**

1.5; 2.2; 2.5; 2.6.

Approved

**(4) CV103 Nature of the case.**

In this case [Name of plaintiff] seeks [describe claim].

[Name of defendant] [denies liability, etc.].

[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.,] seeking [describe claim].

**MUJI 1st Instruction**

1.1.

Approved

**(5) CV104 Order of trial.**

The trial proceeds as follows:

(1) The lawyers will make opening statements, outlining what the case is about and what they think the evidence will show.

(2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may allow the parties to later offer more evidence.

(3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law. You must follow the law as I explain it to you, even if you do not agree with it.

(4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.

(5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

**MUJI 1st Instruction**

1.2.

Approved

**(6) CV105 Sequence of instructions not significant.**

The order in which I give the instructions has no significance. You must consider the instructions in their entirety, giving them all equal weight. I do not intend to emphasize any particular instruction, and neither should you.

**MUJI 1st Instruction**

2.1.

Approved

**(7) CV106 Jurors must follow the instructions. (Delete)**

Approved

**(8) Definition of "person."**

"Person" means an individual, corporation, organization, or other legal entity.

Approved

**(9) CV###. All persons equal before the law.**

The fact that one party is a natural person and another party is a [corporation/partnership/other legal entity] should not play any part in your deliberations. You must decide this case as if it were between individuals.

Approved

**(10) CV107 Jurors may not decide based on sympathy, passion and prejudice.**

You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.

Approved

**MUJI 1st Instruction**

2.3.

**(11) CV108 Note-taking.**

You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]

**References**

URCP 47(n).

**MUJI 1st Instruction**

1.6.

**Committee Notes**

Approved

**(12) CV110 Rules applicable to recesses. (Delete)**

Approved

**(13) CV111 All parties equal before the law. (Delete)**

Approved

**(14) CV112 Multiple parties.**

There are multiple parties in this case, and each party is entitled to have its claims or defenses considered on their own merits. You must evaluate the evidence fairly and separately as to each plaintiff and each defendant. Unless otherwise instructed, all instructions apply to all parties.

Approved

**(15) CV113 Multiple plaintiffs.**

Although there are _____ plaintiffs, that does not mean that they are equally entitled to recover or that any of them is entitled to recover. [Name of defendant] is entitled to a fair consideration of [his] defense against each plaintiff, just as each plaintiff is entitled to a fair consideration of [his] claim against [name of defendant].

**MUJI 1st Instruction**

2.21.

Approved

**(16) CV114 Multiple defendants.**

Although there are _____ defendants, that does not mean that they are equally liable or that any of them is liable. Each defendant is entitled to a fair consideration of

[his] defense against each of [name of plaintiff]'s claims. If you conclude that one defendant is liable, that does not necessarily mean that one or more of the other defendants are liable.

**MUJI 1st Instruction**

2.22.

Approved

**(17) CV115 Settlement agreement.**

[Name of persons] have reached a settlement agreement.

There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling person], were at fault.

You must not consider the settlement as a reflection of the strengths or weaknesses of any person's position. You may consider the settlement in deciding how believable a witness is.

**References**

Slusher v. Ospital, 777 P.2d 437 (Utah 1989).

Paulos v. Covenant Transp., Inc., 2004 UT App 35 (Utah App. 2004).

Child v. Gonda, 972 P.2d 425 (Utah App. 1998).

URE 408.

**MUJI 1st Instruction**

2.24.

**Committee Notes**

The judge and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in Slusher v. Ospital, 777 P.2d 437 (Utah 1989).

Substitute other legal concepts if "fault" is not relevant. For example, in commercial disputes.

Approved

**(18) CV116 Discontinuance as to some defendants.**

[Name of defendant] is no longer involved in this case because [explain reasons]. But you must still decide whether fault should be allocated to [name of defendant] as if [he] were still a party.

**MUJI 1st Instruction**

2.23.

**Committee Notes**

This instruction should be given at the time the party is dismissed. The court should explain the reasons why the defendants have been dismissed to the extent possible. If allocation of fault to the dismissed party is not appropriate under applicable law the final sentence should not be given.

No changes

**(19) CV117 Preponderance of the evidence.**

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence, that the fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

[Now] [At the close of the trial] I will instruct you in more detail about the specific elements that must be proved.

**References**

Johns v. Shulsen, 717 P.2d 1336 (Utah 1986).

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).

Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Hansen v. Hansen, 958 P.2d 931 (Utah App. 1998)

**MUJI 1st Instruction**

2.16; 2.18.

Approved

**(20) CV118 Clear and convincing evidence.**

Some facts in this case must be proved by a higher level of proof called “clear and convincing evidence.” When I tell you that a party must prove something by clear and

convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact.

Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

**References**

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).

Greener v. Greener, 212 P.2d 194 (Utah 1949).

See also, Kirchgestner v. Denver & R.G.W.R. Co., 233 P.2d 699 (Utah 1951).

**MUJI 1st Instruction**

2.19.

**Committee Notes**

In giving the instruction on clear and convincing evidence, the judge should specify which elements must be held to this higher standard. This might be done in an instruction and/or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case.

Approved

**(21) CV119 Evidence.**

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

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

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

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

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

**MUJI 1st Instruction**

1.3; 2.4.

**(22) CV120 Direct and circumstantial evidence.**

A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.

**MUJI 1st Instruction**

2.17.

Approved

**(23) CV121 Believability of witnesses.**

Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:

(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?

(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?

(3) Demeanor. Is there anything about the witness's appearance, conduct or actions that causes you to give more or less weight to the testimony?

(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?

(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?

(6) Memory. Does the witness's memory appear to be reliable?

(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?

These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.

**MUJI 1st Instruction**

2.9.

**(24) CV122 Inconsistent statements.**

You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.

**MUJI 1st Instruction**

2.10.

**(25) CV123 Effect of willfully false testimony.**

If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.

**References**

Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

**MUJI 1st Instruction**

2.11.

**(26) CV124 Stipulated facts.**

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

The parties have stipulated to the following facts:

[Here read stipulated facts.]

Since the parties have agreed on these facts, you must accept them as true for purposes of this case.

**MUJI 1st Instruction**

1.3; 1.4

**Committee Notes**

This instruction should be given at the time a stipulated fact is entered into the record.

**(27) CV125 Judicial notice.**

I have taken judicial notice of [state the fact] for purposes of this trial. This means that you must accept the fact as true.

**MUJI 1st Instruction**

1.3.

**Committee Notes**

This instruction should be given at the time the court takes judicial notice of a fact.

**(28) CV126 Depositions.**

A deposition is the sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party present and entitled to ask questions. Testimony provided in a deposition is evidence and may be read to you in court or may be seen on

a video monitor. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

**MUJI 1st Instruction**

2.12.

Approved

**(29) CV127 Limited purpose evidence.**

Some evidence is received for a limited purpose only. When I instruct you that an item of evidence has been received for a limited purpose, you must consider it only for that limited purpose.

**MUJI 1st Instruction**

1.3.

Approved

**(30) CV128 Objections and rulings on evidence and procedure.**

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers. Lawyers on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly.

**MUJI 1st Instruction**

2.5.

**(31) CV129 Statement of opinion.**

Under limited circumstances, I will allow a witness to express an opinion. ~~You do not have to believe an opinion, whether or not it comes from an expert witness.~~ Consider opinion testimony as you would any other evidence, and give it the weight you think it deserves.

**MUJI 1st Instruction**

2.13; 2.14.

**(32) CV130 Charts and summaries.**

Certain charts and summaries will be shown to you in order to help explain the evidence. However, the charts or summaries are not ~~in and of~~ themselves evidence. If the charts or summaries correctly reflect facts or figures shown by the evidence, you may consider them.

**MUJI 1st Instruction**

2.15.

**(33) CV131 Spoliation.**

You may consider whether [name of plaintiff] [name of defendant] intentionally concealed, destroyed, altered, or failed to preserve evidence. If so, you may assume that the evidence would have been unfavorable to ~~that party~~ [name of plaintiff] [name of defendant].

**References**

Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994).

URCP 37(g).

**(34) CV135 Out-of-state or out-of-town experts.**

You may not discount the opinions of [name of expert] merely because of where [he] lives or practices.

**References**

Swan v. Lamb, 584 P.2d 814, 819 (Utah 1978).

**MUJI 1st Instruction**

6.30

**Committee Notes**

The committee was not unanimous in its approval of this instruction. Use it with caution.

**(35) CV136 Conflicting testimony of experts.**

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

**MUJI 1st Instruction**

6.31

**(36) CV137 Selection of jury foreperson and deliberation.**

When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's

completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.

After you select the foreperson you must discuss with one another—~~or~~ that is deliberate—with a view to reaching an agreement. Your attitude and conduct during discussions are very important.

As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.

Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.

**(37) CV138 Do not speculate or resort to chance.**

When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.

If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.

**References**

Day v. Panos, 676 P.2d 403 (Utah 1984).

**(38) CV139 Agreement on special verdict.**

I am going to give you a form called the Special Verdict that contains several questions. You must answer the questions based upon the evidence you have seen and heard during this trial.

Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to ~~each~~ all question~~s~~, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

**(39) CV140 Discussing the case after the trial.**

Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you

have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.

You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.

If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.

Again, thank you for your service.

# Tab 3

This instruction has been removed, in light of Boyle v Christensen, 2011 UT 20, until the Committee can make appropriate changes.

**CV2012 Noneconomic damages. Loss of consortium.**

Noneconomic damages include loss of consortium. Loss of consortium is loss of the benefits that one spouse expects to receive from the other, such as companionship, cooperation, affection, aid and sexual relations.

To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered

(1) a significant permanent injury that substantially changes [his] lifestyle and

(2) one or more of the following:

(a) a partial or complete paralysis of one or more of the extremities;

(b) significant disfigurement; or

(c) incapability of performing the types of jobs [he] performed before the injury.

[You must decide whether [name of spouse] was [name of plaintiff]’s spouse at the time of [name of plaintiff]’s injury. "Spouse" means the legal relationship established between a man and a woman as recognized by the laws of Utah.]

You must allocate fault as I have instructed you in Instruction 211 including [name of spouse] in your allocation. If you decide that the [combined] fault of [name of plaintiff]’s and [name of spouse]'s is 50% or greater, [name of spouse] will recover nothing for loss of consortium. If you decide that [name of plaintiff] has no claim against [name of defendant], then [name of spouse] also has no claim. As with other damages, do not reduce the award by [name of plaintiff]'s and [name of spouse]’s percentage of fault. I will make that calculation later.

Committee Note

Often there is no dispute about whether the plaintiff’s spouse is the spouse at the time of the injury. If there is, the jury should be instructed on this issue as well.

Utah Code Section 30-2-11 is ambiguous about whether the fault of the spouses is combined or separate for the purpose of calculating loss of consortium damages: that is, whether the jury should consider the fault of the non-injured spouse alone when calculating loss of consortium damages or whether the fault of the injured spouse also reduces the loss of consortium damages.

References

Utah Code Section 30-2-11.

Black's Law Dictionary, 8th Edition.

Utah Code
Title 30 Husband and Wife
Chapter 2 Property Rights
**Section 11** Action for consortium due to personal injury.

**30-2-11. Action for consortium due to personal injury.**

(1) For purposes of this section:

(a) "injury" or "injured" means a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:

(i) a partial or complete paralysis of one or more of the extremities;

(ii) significant disfigurement; or

(iii) incapability of the person of performing the types of jobs the person performed before the injury; and

(b) "spouse" means the legal relationship:

(i) established between a man and a woman as recognized by the laws of this state; and

(ii) existing at the time of the person's injury.

(2) The spouse of a person injured by a third party on or after May 4, 1997, may maintain an action against the third party to recover for loss of consortium.

(3) A claim for loss of consortium begins on the date of injury to the spouse. The statute of limitations applicable to the injured person shall also apply to the spouse's claim of loss of consortium.

(4) A claim for the spouse's loss of consortium shall be:

(a) made at the time the claim of the injured person is made and joinder of actions shall be compulsory; and

(b) subject to the same defenses, limitations, immunities, and provisions applicable to the claims of the injured person.

(5) The spouse's action for loss of consortium:

(a) shall be derivative from the cause of action existing in behalf of the injured person; and

(b) may not exist in cases where the injured person would not have a cause of action.

(6) Fault of the spouse of the injured person, as well as fault of the injured person, shall be compared with the fault of all other parties, pursuant to Sections **78B-5-817** through **78B-5-823**, for purposes of reducing or barring any recovery by the spouse for loss of consortium.

(7) Damages awarded for loss of consortium, when combined with any award to the injured person for general damages, may not exceed any applicable statutory limit on noneconomic damages, including Section **78B-3-410**.

(8) Damages awarded for loss of consortium which a governmental entity is required to pay, when combined with any award to the injured person which a governmental entity is required to pay, may not exceed the liability limit for one person in any one occurrence under Title 63G, Chapter 7, Governmental Immunity Act of Utah.

Amended by Chapter 3, 2008 General Session
Amended by Chapter 382, 2008 General Session
Download Code Section Zipped WordPerfect 30_02_001100.ZIP 3,264 Bytes

« Previous Section (30-2-10) Next Section (30-3-1) »

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

**2011 UT 20**

IN THE

# SUPREME COURT OF THE STATE OF UTAH

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JOHN BOYLE & NORRINE BOYLE
*Plaintiffs and Appellants,*

v.

KERRY CHRISTENSEN,
*Defendant and Appellee.*

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No. 20090822
Filed April 15, 2011

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On Certiorari to the Utah Court of Appeals

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Third District, Salt Lake
The Honorable Tyrone E. Medley
No. 050912506

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Attorneys:
Roger P. Christensen, Karra J. Porter, Scot A. Boyd,
Salt Lake City, for plaintiffs

Kristin A. VanOrman, Jeremy G. Knight, Pamela E. Beatse,
Salt Lake City, for defendant

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CHIEF JUSTICE DURHAM, opinion of the Court:

## INTRODUCTION

¶1 Mr. Boyle was hit by a truck and injured while walking in a crosswalk. Mr. Christensen, the driver, admitted liability, but the

case went to trial on damages. Not satisfied with the jury award, Mr. Boyle appealed, and the court of appeals affirmed the district court decision in all respects. Mr. Boyle sought certiorari review regarding three issues. He argues that (1) the district court provided inadequate voir dire questioning, (2) opposing counsel's improper reference to the "McDonald's coffee case"[1] in closing argument warrants reversal, and (3) Mrs. Boyle's related loss of consortium claim was improperly dismissed. We hold that the court of appeals was correct in deciding that Mr. Boyle did not properly preserve the voir dire issue for appeal, because he neither objected to the district court's voir dire questions nor asked for additional questions when he could have done so. However, the court of appeals incorrectly affirmed on the other two issues. We conclude that the reference to the McDonald's coffee case was irrelevant and improper. We reverse and remand for a new trial because, under the circumstances, the reference had a reasonable likelihood of influencing the jury verdict to Mr. Boyle's detriment. We also find that the dismissal of Mrs. Boyle's loss of consortium claim was improper, because there were disputed issues of fact (or at least disputed reasonable inferences therefrom) as to whether there was a qualifying injury as defined by statute.

## BACKGROUND

¶2 Appellants Mr. and Mrs. Boyle are husband and wife. Mr. Boyle was hit by a truck while walking in a crosswalk in a grocery store parking lot. Mr. Boyle sustained injuries that led to back surgery. For months he could not work and therefore lost his job. He now suffers from chronic pain that has multiple consequences, including an inability to sleep through the night, sleep in a bed, drive for extended periods, work an eight-hour day, or perform certain work-related tasks such as lifting two buckets of golf balls at once. He is now working for a new company in the same general industry he worked for before and for the golf shop where he worked before the injury, but with modified income potential and

[1] The case referenced here is a New Mexico lawsuit, *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994), which is referred to as the "McDonald's coffee case" throughout this opinion.

reduced abilities (mentally because of the lack of sleep and constant pain, and physically because he is unable to lift buckets of golf balls, drive for extended periods, or work a full eight-hour shift). He was once a professional golfer, and the back injury has also affected his golf game.

¶3 Mr. Boyle brought a negligence action against Mr. Christensen, who admitted liability. The case went to trial on the question of appropriate damages. Before trial, Mrs. Boyle also brought a claim for loss of consortium, which the district court dismissed. The grounds for dismissal were that Mrs. Boyle could not show that Mr. Boyle had suffered a qualifying injury under Utah Code section 30-2-11(1).

¶4 In the jury selection process, both parties submitted voir dire questions. The judge combined and revised the questions, omitting some of Mr. Boyle's questions that addressed jurors' views on tort reform issues. It is unclear from the record (and disputed in the briefs before this court) whether the district court provided copies of its own voir dire questions to the parties before it began questioning the potential jurors. During the jury selection process, Mr. Boyle's counsel neither objected to the omission of any questions nor asked for additional questions, even when given the opportunity to do so. Mr. Boyle does not dispute that no such attempt was made either before the jury or in the judge's chambers.

¶5 During closing argument, Mr. Christensen's counsel referred for the first time in trial to the McDonald's coffee case. Mr. Christensen's counsel incorrectly represented that both the McDonald's coffee case and the case at hand involved an effort at a per diem analysis in determining damages. Mr. Boyle's counsel immediately objected that the case was not in evidence and was prejudicial; his objection was noted but overruled. In the limited time allowed for Mr. Boyle's response, his counsel tried to mitigate the impact of this statement by explaining that the judge in the McDonald's case reduced the ultimate verdict. Mr. Boyle's counsel did not explain how the facts of the case had been misrepresented.

¶6 The jury verdict was for a total of $62,500. The jury awarded $29,700 for past economic damages, $5,000 for future

economic damages, and $27,800 for noneconomic (or pain and suffering) damages. Mr. Boyle had asked for $56,934 in past economic damages, $31,790 in future economic damages, and $370,000 for pain and suffering— a total of $458,724.

¶7 Mr. and Mrs. Boyle appealed, and the court of appeals affirmed. *Boyle v. Christensen*, 2009 UT App 241, 219 P.3d 58. The Boyles then petitioned this court for certiorari review. We have jurisdiction under Utah Code section 78A-3-102(3)(a) (Supp. 2010).

## STANDARD OF REVIEW

¶8 "On certiorari, we review the court of appeals' decision for correctness." *Magana v. Dave Roth Constr.*, 2009 UT 45, ¶ 19, 215 P.3d 143.

¶9 The court of appeals outlined the proper standards of review for each issue in this case. For challenges to the trial court's management of jury voir dire, an abuse of discretion standard was appropriate, but "alleged deficiencies in voir dire must [have been] brought to the district court's attention in order to be preserved for appeal." *Boyle v. Christensen*, 2009 UT App 241, ¶ 7, 219 P.3d 58. Challenges regarding "'whether remarks made during closing argument improperly influenced the verdict'" also an abuse of discretion standard. *Id.* ¶ 8 (quoting *Green v. Louder*, 2001 UT 62, ¶ 35, 29 P.3d 638). Finally, "a trial court's ruling on a motion to dismiss [is reviewed] for correctness, according no deference to the trial court." *Id.* ¶ 9 (internal quotation marks omitted); *J.S. v. P.K. (In re Adoption of I.K.)*, 2009 UT 70, ¶ 7, 220 P.3d 464.

## ANALYSIS

¶10 First, Mr. Boyle claims that the court of appeals erred in holding he did not preserve the jury voir dire issue for appeal. Furthermore, he argues that the district court abused its discretion in eliminating his proposed tort reform questions. We need not reach the latter point because we affirm the court of appeals on the former. Second, Mr. Boyle argues that the reference to the McDonald's coffee case in closing argument was improper and warranted reversal. We agree that, under the circumstances in this

case, the improper reference had a reasonable probability of affecting the outcome to Mr. Boyle's detriment, thus requiring a new trial. Third, Mrs. Boyle argues that her loss of consortium claim was improperly dismissed. Because there were issues of fact (or at least issues of the reasonable inferences properly to be drawn therefrom) as to whether Mr. Boyle had suffered a qualifying injury, we agree that Mrs. Boyle's claim was erroneously dismissed.

## I. MR. BOYLE FAILED TO PRESERVE THE VOIR DIRE ISSUE FOR APPEAL

¶11 The court of appeals correctly concluded that Mr. Boyle failed to preserve for appeal the claim that voir dire questioning was inadequate. The claim was not preserved because Mr. Boyle's counsel never objected that the district court's questions insufficiently addressed tort reform, nor did he seek additional questioning during the voir dire process before affirmatively approving the jury selected. In approving the composition of the jury, he was implicitly approving the process by which the jury had been selected. We have stated that

> [i]f a party is dissatisfied with the thoroughness of voir dire . . . that party may . . . propose additional questions, or ask the court for further questioning. But where a party affirmatively expresses to the trial court his assent to the composition of the jury, that party cannot challenge the composition of the jury on appeal.

*State v. Lee*, 2006 UT 5, ¶ 18, 128 P.3d 1179 (citation omitted). Using the same logic, Mr. Boyle cannot approve the composition of the jury and later challenge the process used to select it unless he has registered a relevant objection.

¶12 In spite of this rule, Mr. Boyle argues that (1) the tort reform questions that he submitted to the judge before voir dire should be sufficient alone to preserve the issue on appeal, and (2) there was no opportunity to object or request additional questions during voir dire. We disagree.

¶13 In arguing that his submitted tort reform questions

should be sufficient to preserve the appeal, Mr. Boyle relies on Utah Rule of Civil Procedure 46:

> Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Relying on this rule, Mr. Boyle claims he was not required to object to the district court's voir dire questions because they constituted a "ruling or order," and Mr. Boyle had already submitted differently formulated questions before the district court decided on its own list.

¶14 The problem with this reasoning is that the district court's list of voir dire questions did not constitute a "ruling or order" as those terms are used in rule 46. Voir dire questions cannot be fully defined until after the voir dire process is completed. Until that point, the district court may agree to additional or revised questioning. Here, the district court accepted questions from both parties, and then constructed its own questions in an effort to accommodate both sides. The district court's new questions presented a new issue to the parties: did the revised questions sufficiently address both parties' concerns and legal entitlements? If Mr. Boyle believed the tort reform issues had been inadequately addressed in the district court's new questions, he had an obligation to notify the district court so it could examine the issue. As we have stated:

> In order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be

> afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority. Issues that are not raised at trial are usually deemed waived.

*438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (alterations in original) (citations omitted) (internal quotation marks omitted); *see also* UTAH R. APP. P. 24(a)(5)(A) (requiring an appellant's brief to contain a "citation to the record showing that the issue was preserved in the trial court"). Where parties fail to object to inadequate questioning in voir dire, the district court cannot be expected to second-guess that silence. It is not unreasonable to require attorneys to voice concerns they have regarding voir dire questions at the time of voir dire so that the district court can immediately address the issues, rather than allow them to remain silent and appeal later. This approach conserves judicial resources and promotes speedy justice for all concerned.[2]

¶15 Mr. Boyle claims that even were he required to make some objection, he was given no reasonable opportunity to do so. After reviewing the transcript of the jury selection in this case, we disagree. We find there were multiple opportunities for an objection or request for additional questioning. If Mr. Boyle had an advance copy of the district court's revised questions (a fact disputed by the parties and unclear from the record), he could have voiced his concern when the district court judge asked both parties whether they were ready to proceed. However, even if he did not receive the questions in advance, he heard the questions posed to each juror. When asked whether he had challenges for cause, Mr.

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[2] Mr. Boyle has argued that *Bee v. Anheuser-Busch, Inc.* supports his position because in that case the attorney did not place an objection on the record regarding the denial of his tort reform questions—the attorney merely objected to the judge in a sidebar. 2009 UT App 35, ¶ 4, 204 P.3d 204. This case is distinguishable in that Mr. Boyle's counsel gave no indication of his objection during voir dire. However, we also clarify that an objection must be made on the record to be preserved for appeal.

Boyle's counsel could have registered his concern. Indeed, when opposing counsel was asked whether she had additional challenges for cause, she said she wanted to further question one of the jurors and was allowed to do so. Even when Mr. Boyle's counsel was asked whether he had further questions of that same juror, he did not raise his concern. Furthermore, both counsel met with the district court judge in chambers during a recess as soon as the judge had finished his original questioning of the jurors and before asking the attorneys whether they had challenges for cause. Presumably, if Mr. Boyle's counsel had concerns about making legal arguments to the judge before the jury, he could have registered his concerns with the judge in this conference, and, if the judge were unrelenting, he could have placed his objection on the record upon return to the courtroom.[3]

¶16 Mr. Boyle has argued that if he did not preserve the voir dire issue for appeal, we should apply a plain error review. We will not do so because, "where the appellant affirmatively proclaims the acceptability of the jury in the trial court," the doctrine of invited error applies and denies appellate review. *Lee*, 2006 UT 5, ¶¶ 16–20; *see also State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (noting that parties invite error where they affirmatively represent to the court that they have no objection). When Mr. Boyle's counsel made no objections regarding inadequate questioning and then affirmatively passed the jury for cause[4] stating that he had no objection to

[3] Mr. Boyle argues that "by penalizing Mr. Boyle for passing the jury 'for cause,' the court of appeals is conflating the peremptory and for-cause phases of jury selection. . . . [T]ort reform questions are pertinent to the exercise of peremptory challenges." This argument misses the point. The problem is that Mr. Boyle never registered an objection at any point in the proceedings, even when he had reasonable opportunities to do so. If he had wanted to preserve the issue for appeal, he should not have approved the jury without registering an objection at some point during the jury selection process.

[4] When Mr. Boyle's counsel was asked if he passed the jury for cause, he stated, "Yes, to the extent we've questioned the jurors." This does not qualify as registering an objection where counsel never attempted to ask for additional questions after being presented with

discharging the remaining panel members, this qualified as an affirmative representation that there were no objections based on inadequate questioning in voir dire. Because any error by the district court regarding inadequate questioning was therefore invited error, we refrain from a plain error analysis and affirm the court of appeals on this issue.

## II. DEFENDANT'S COUNSEL'S ALLUSION TO THE MCDONALD'S COFFEE CASE DURING CLOSING ARGUMENT WAS IMPROPER AND WARRANTS REVERSAL

¶17 Mr. Boyle has argued that opposing counsel's reference to the McDonald's coffee case during closing arguments was improper and warrants reversal. Where counsel makes improper remarks during closing arguments, we will reverse only if "absent the improper argument, there was a reasonable likelihood of an outcome more favorable to the" complaining party. *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989). Granting a new trial is an extreme remedy that we do not provide lightly, but, for the reasons described below, we agree with Mr. Boyle that the reference here was both improper and reasonably likely to prejudice the jury, thus warranting reversal.

### *A. The Reference to the McDonald's Coffee Case Was Improper*

¶18 We grant both sides "considerable latitude in their closing arguments. . . . to fully discuss from their perspective the evidence and all inferences and deductions it supports." *Id*. However, that "latitude does not extend to counsel calling the jury's attention to material that the jury would not be justified in considering in its verdict." *State v. Alonzo*, 973 P.2d 975, 981 (Utah 1998). For example, comments meant to inflame passion or prejudice in the jury would be improper because they divert the jury from its duty to base its verdict on the evidence presented. *See, e.g.*, *State v. Alonzo*, 932 P.2d 606, 615 (Utah Ct. App. 1997) (explaining that the trial court may have properly limited counsel's reference to the Rodney King incident if it "were an attempt to inflame the jury or suggest that

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or hearing the district court's revised questions.

because the Rodney King officers were found guilty, the officers in this case were also guilty of using excessive force"), *aff'd*, 973 P.2d 975.

¶19 Here, during closing argument, Mr. Christensen's counsel referred to Mr. Boyle's requested pain and suffering damages and said the following:

> Ladies and gentlemen, they want a lot of money for this. A lot of money. What's been written on the board is called a per diem analysis. . . . How many days has it been since the accident? How many days for the rest of his life. And how much per day is that worth? That's what's been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee.

Mr. Boyle's counsel immediately objected that the reference to this case was "prejudicial and . . . not in evidence." His objection was noted but overruled.

¶20 Before we analyze this statement, it may be useful to explain the cultural context of the McDonald's coffee case, more formally known as *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*[5] Few cases have ever achieved as much notoriety among the general public of this country as the McDonald's coffee case, fueled by its wide-ranging and repeated publicity in national and local news media. It has been mocked in extremely popular entertainment television, including *The Tonight Show*, *The Late Show*, and *Seinfeld*. It has been debated on talk shows, parodied in television commercials, mentioned in congressional debates, and is firmly lodged in the public consciousness. Mark B. Greenlee, *Kramer v. Java World: Images, Issues and Idols in the Debate over Tort Reform*, 26 CAP. U. L. REV. 701, 702–03 (1997). "What made the headlines and what is most commonly recalled by the general populace about the . . . case is the size of the verdict and the source of the injury—$2.9 million for spilled coffee." *Id.* at 718. In U.S. popular culture, the case has come to symbolize greedy plaintiffs and lawyers who file frivolous lawsuits and win hugely excessive sums in a broken legal

[5] *See supra* note 1.

system. *See, e.g.*, Peter G. Angelos, Commentary, *1996 Spring Commencement Speech*, 27 U. BALT. L.F. 19, 21 (1996); Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 115 (2001).

¶21 Although the public view of the case is understandable when limited to a superficial view of its facts, a deeper look at the details and issues in the case may dramatically alter one's perspective. Among the many relevant facts generally missing from the public consciousness are the following:

> (1) The temperature of the spilled coffee was so hot—180 to 190 degrees—that within seconds it caused third-degree burns that extended through the skin to the fat, muscle or bone on Ms. Liebeck's thighs, buttocks and groin area. She was hospitalized for eight days, underwent skin grafts, was disabled for two years following the accident, and was permanently disfigured with scars on over 16 percent of her body. *See* Greenlee, *supra*, at 718–19; *see also* Angelos, *supra*, at 21; Brian Timothy Beasley, *North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?*, 74 N.C. L. REV. 2174, 2190 (1996).
>
> (2) The jury heard evidence that McDonald's had received approximately 700 other complaints about coffee-burn injuries in the previous decade (some of which were settled for a total outlay of over $500,000), but considered the number of injuries statistically insignificant and therefore did not lower the temperature of its coffee. *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 732 (1998); Greenlee, *supra*, at 719–22.
>
> (3) The jury awarded $2.7 million in punitive damages because it believed the extreme temperature of the coffee was unreasonably dangerous and that McDonald's had callously disregarded the danger even after hundreds of injuries. The $2.7 million figure

> was based on the approximate revenues from just two days of McDonald's coffee sales. Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J.L. & PUB. POL'Y 143, 146–47 (2003).

¶22 Given the uniquely iconic nature of this case, the passion it has produced in the media, and the general misunderstanding of the totality of its facts and reasoning among the public, we find it hard to imagine a scenario where it would be proper for a party's counsel to refer to it before a jury. Generally, as here, such a reference would seem to have the sole purpose of recalling the public outrage over isolated elements of the case—thus improperly appealing to a jury's passions. It is not the jury's job to make legal determinations, so no legal arguments from the case are relevant. The facts in the McDonald's coffee case were not in evidence before this jury and were also utterly irrelevant. Indeed, the one attempt counsel made to make her reference seem relevant was a misrepresentation because the high punitive damages award in the McDonald's coffee case had nothing to do with a per diem analysis. It is certainly unfair to require the other party to clarify all the misconceptions about this irrelevant case in the limited time allotted for closing argument. The great latitude provided in closing arguments regards reasonable inferences about evidence properly before the jury and does not extend to misrepresentations or efforts to appeal to a jury's passions. Thus the reference to the McDonald's coffee case in closing argument was improper.

### *B. Absent the Improper Reference to the McDonald's Coffee Case, There Was a Reasonable Likelihood of a More Favorable Outcome for Mr. Boyle*

¶23 It is a difficult task to rewind the clock and determine whether a jury verdict might have been different had some things not been said. But we are not required to make that determination in absolute terms. Instead, to determine whether reversal is warranted, the test is whether "absent the improper argument, there was a reasonable likelihood of an outcome more favorable to the" complaining party. *Dibello*, 780 P.2d at 1225. Given the latitude generally provided in closing argument, and the extreme nature of the remedy of granting a new trial, we will not reverse simply

because statements were improper. There must be a showing of a "reasonable likelihood" that there was actual prejudice in the outcome. We have defined the words "reasonable likelihood" as "'a probability sufficient to undermine confidence in the outcome.'" *State v. Knight*, 734 P.2d 913, 920 (Utah 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). It falls somewhere on a spectrum between absolute certainty of influence on the verdict and the mere possibility of such. *See Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 20, 228 P.3d 747.

¶24 Although the improper reference was likely made with the intent to influence the jury, whether it had a reasonable likelihood of actually doing so is the question at issue. Here, a number of factors convince us there was a reasonable likelihood of a better verdict for Mr. Boyle absent the improper reference to the McDonald's coffee case: (1) the iconic nature of the case that has aroused such public passion, as described earlier in this opinion; (2) the fact that the trial judge did not sustain the objection, thus allowing the jury to believe it was proper to consider the McDonald's coffee case when deciding the verdict; (3) the misrepresentation of the McDonald's coffee case as a per diem analysis that could have convinced the jury it was similar to the case at hand when it was not; and (4) the size of the pain and suffering damages awarded by the jury, which certainly could have been the product of entirely rejecting a per diem analysis in response to the McDonald's coffee case comparison.

¶25 We need not and do not decide whether any of these factors alone would have been enough to overturn the verdict. But each additional factor takes us further on the spectrum from mere possibility toward greater probability that the statement had some negative influence on the verdict for Mr. Boyle. Taken together, these factors are sufficient to convince us that there was at least a reasonable likelihood of a more favorable verdict for Mr. Boyle absent the improper reference. The erroneous reference "might be compared to a drop of ink placed in a vessel of milk. It cannot long be seen, but it surely remains there to pollute its contents." *Pearce v. Wistisen*, 701 P.2d 489, 494 (Utah 1985). The court of appeals thus should have found an abuse of discretion in allowing the McDonald's coffee case remarks. We therefore reverse the court of

appeals' decision on this point and remand the case to the district court for a new trial.

## III. IT WAS ERROR TO DISMISS MRS. BOYLE'S LOSS OF CONSORTIUM CLAIM

¶26 Mrs. Boyle argues that the district court erred when it dismissed her loss of consortium claim. The district court did so, and the court of appeals affirmed, based on an erroneous interpretation of the statute at issue.[6] The relevant statute states that "[t]he spouse of a person injured by a third party . . . may maintain an action against the third party to recover for loss of consortium." UTAH CODE ANN. § 30-2-11(2) (Supp. 2010).[7] The statute defines such injury as

> a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:
>
> (i) a partial or complete paralysis of one or more of the extremities;
>
> (ii) significant disfigurement; or
>
> (iii) incapability of the person of performing the types of jobs the person performed before the injury.

*Id.* § 30-2-11(1)(a).

¶27 When interpreting a statute, we look first to its plain language and "presume that the legislature used each word advisedly

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[6] The court of appeals actually "express[ed] no opinion on whether the parties are correct in their interpretation of section 30-2-11(1)(a)" but accepted the parties' erroneous interpretation for purposes of the opinion. *Boyle v. Christensen*, 2009 UT App 241, ¶ 21 n.3, 219 P.3d 58.

[7] Because there has been no substantive change that affects the issues in this case, we refer to the current version of the statute.

and read each term according to its ordinary and accepted meaning. . . . [I]f the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotation marks omitted). Here, the plain language defines an injury as "a significant permanent injury to a person that substantially changes that person's lifestyle." UTAH CODE ANN. § 30-2-11(1)(a). The parties interpreted the words "and includes" (which follow that definition) to introduce an exhaustive list of examples. This was incorrect. When "including" precedes a list, its common usage is to indicate a partial list. *See* BLACK'S LAW DICTIONARY 777–78 (8th ed. 2004). Had the legislature wished to limit the definition of injury to only the three listed scenarios, it could easily have stated "must include" rather than "includes." The structure of the statute also supports this interpretation because the examples are listed as a subset of the definition. If these were the only consortium claims to be honored, the overlying definition would be superfluous. Furthermore, the parties' definition would, for example, likely exclude a claim where impotence was at issue, thus providing no remedy for loss of sexual relations between spouses—one of the more common definitions of loss of consortium. *See id.* at 328. Had this been the legislature's intent, we believe it would have stated so clearly. Because the statute does not say "must include," we interpret the list of examples as just that—examples that satisfy the definition previously stated, but not an exclusive list. *See Mouty v. Sandy City Recorder*, 2005 UT 41, ¶ 39, 122 P.3d 521 ("The legislature's use of the word 'includes' indicates that the [subsequent] examples listed were not necessarily meant to be exhaustive.").

¶28 The parties argued at length over whether changes in Mr. Boyle's abilities post-accident could constitute "incapacity" to do the same "types of jobs" he could perform before the injury under the statute. *See* UTAH CODE ANN. § 30-2-11(1)(a)(iii). We do not need to reach this question,[8] because, as explained above, while

[8] We do note, however, that in interpreting this standard the district court and court of appeals were too narrow in their definitions of "incapacity" and "types of jobs." We agree with the analysis of *Spahr v. Ferber Resorts, LLC*, that "[r]ather than being

meeting this standard would be sufficient to constitute an injury, all that is required is that there was "a significant permanent injury to a person that substantially changes that person's lifestyle." In this case, opposing counsel conceded in a hearing before the district court that there were facts in dispute regarding whether there was such a significant injury to Mr. Boyle that it substantially changed his lifestyle.[9] That concession precluded dismissal. Both parties were mistaken that there also needed to be issues of fact about at least one of the three examples provided by the statute.

## CONCLUSION

¶29 We affirm the court of appeals' decision that Mr. Boyle failed to preserve for appeal the claim that voir dire questioning was inadequate. However, we conclude that the improper reference to the McDonald's coffee case in Mr. Christensen's closing argument had a reasonable likelihood of prejudicing the jury and producing a less favorable outcome for Mr. Boyle. We therefore reverse and remand for a new trial. On remand, Mrs. Boyle's claim for loss of consortium should be reinstated because there are issues of fact in dispute regarding whether there was an injury under the relevant consortium statute.

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literally and completely incapable of doing a job even in a most limited and extraordinary way, then, being unable to engage in an essential part of a job in a routine manner must suffice to make one incapable of performing that job under the statute." 686 F. Supp. 2d 1214, 1220 (D. Utah 2010). The fact that Mr. Boyle works in the same type of industry as before the injury would not necessarily mean he has the same type of job. Inability to work the same hours or perform some of the same tasks he could perform before may, in certain circumstances, constitute an injury under the statute. Where the facts regarding present and previous jobs are not disputed, there may still be reasonable inferences in dispute (derived from the undisputed facts) that must be left to the jury.

[9] Counsel for Mr. Christensen acknowledged that there must "be a significant permanent injury that substantially changed the plaintiff's life, Mr. Boyle's life. That I would [agree] is in dispute in this case so there are issues of fact on that. However, taking that aside, the other criteria that must be met . . . ."

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

# Tab 4

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| IN THE DISTRICT COURT IN AND FOR COUNTY,<br>CITY DEPARTMENT, STATE OF UTAH | |
|---|---|
| Plaintiff,<br><br>Plaintiffs,<br><br>vs.<br><br>Defendant,<br><br>Defendants. | SPECIAL VERDICT FORM<br><br>Civil No.<br><br><br>Judge |

Plaintiff submits the following as a special verdict form in this case.

MEMBERS OF THE JURY:

Please answer the following questions in the order they are presented. If you find that the issue has been proved by a preponderance of the evidence, answer "Yes." If you find that the evidence is equally balanced or that the greater weight of evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

| | | | |
|---|---|---|---|
| (1) Was either Defendant fault? (Check one.) | | | |

| | | | |
|---|---|---|---|
| | (a) Was Defendant A at fault? | ☐ Yes | ☐ No |
| | (b) Was Defendant B at fault? | ☐ Yes | ☐ No |
| | (If you answer "Yes," to either Defendant A or Defendant B, please answer Question 2. If you answer "No" to both questions stop here, sign the verdict form and advise the bailiff.) | | |
| (2) Did the Defendants' fault cause any harm to the Plaintiff[s]? (Check one.) | | | |
| | (a) Did Defendant A's fault cause any harm to the Plaintiff[s] [or their heirs]? | ☐ Yes | ☐ No |
| | (b) Did Defendant B's fault cause any harm to the Plaintiff[s] [or their heirs]? | ☐ Yes | ☐ No |
| | (If you answer "Yes" to either Defendant A or Defendant B, please answer Question 3. If you answer "No" to both questions stop here, sign the verdict form and advise the bailiff.) | | |
| (3) Was [Name of Third Party] at fault? (Check one.) | | ☐ Yes | ☐ No |
| | (If you answer "Yes," please answer Question 4. If you answer "No," please skip Question 4 and go on to Question 5.) | | |
| (4) Was [Name of Third Party]'s fault a cause of any harm to the Plaintiff [s] [or their heirs]? | | ☐ Yes | ☐ No |
| (5) Assuming all of the fault that caused the harm totals 100%, what percentage is attributable to: | | | |

| | | |
|---|---|---|
| | [Name of Defendant A] fault percentage: NOTE: If answer to either (1)(a) or (2)(a) is "No," then place a zero. | _____% |
| | [Name of Defendant B] fault percentage: NOTE: If answer to either (1)(b) or (2)(b) is "No," then place a zero. | _____% |
| | [Name of Third Party] fault percentage: NOTE: If answer to either (3) or (4) is "No," then place a zero. | _____% |
| | Total must equal 100% | 100% |
| (6) Please answer the following questions: | | |
| | (a) What amount fairly compensates [Plaintiff A] for the loss of affection, counsel and advice; the loss of care and solicitude for the welfare of the family; and loss of the comfort and companionship of [Decedent A]? | $_____ |
| | (b) What amount fairly compensates [Plaintiff B] for the loss of affection, counsel and advice; the loss of care and solicitude for the welfare of the family; and loss of the comfort and companionship of his [Decedent A]? | $_____ |
| | (c) What amount fairly compensates [Plaintiff A] for the loss of affection, counsel and advice; the loss of care and solicitude for the welfare of the family; and loss of the comfort and companionship of [Decedent B]? | $_____ |
| | (d) What amount fairly compensates [Plaintiff B] for the loss of affection, counsel and advice; the loss of care and solicitude for the welfare of the family; and loss of the comfort and companionship of [Decedent B]? | $_____ |
| | (e) What amount fairly compensates for the past medical and funeral expenses? | $_____ |

| | | |
|---|---|---|
| | Total damages: | $_____ |
| | (When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.) | |
| Date_____ | Jury Foreperson_____ | |