

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

January 12, 2026

4:00 to 6:00 p.m.

Via Webex

Welcome and Approval of November Minutes	Tab 1	Alyson McAllister
Review Public Comments to CV331 and CV1740 series (none)		Alyson McAllister
CV2119 Implied Covenant of Good Faith and Fair Dealing	Tab 2	Alyson McAllister
CV2005 after <i>Gardner v Norman</i> , 2025 UT 47	Tab 3	Ben Lusty and Kara North
Progress on Instruction Topics	Tab 4	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: Feb. 9, 2026

TAB 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
November 10, 2025
4:00-6:00 p.m.

Present: Alyson McAllister, Stewart Harman, Michael Lichfield, Judge Brian D. Bolinder, Bill Eggington, Ben Lusty, Kara North, Aaron Pacini, John Macfarlane, Jace Willard (staff), Clancey Henderson (staff)

Excused: Ricky Shelton

Guests: None

1. Welcome and Approval of Minutes

Stewart Harman welcomed the Committee. The Minutes from the September meeting were approved.

2. Membership Update

Stewart Harman welcomed Aaron Pacini as a new member of the Committee.

3. CV331 (Past Medical Expenses)

The instruction was published for public comment in September 2025. The Committee received two comments on the Instruction. The Committee discussed whether any member had any additional experience with a trial involving this instruction during the intervening time. The Committee discussed the comments to the Instruction and considered the appropriateness of including a note with the Instruction based on the ruling by Judge Bates in *Osborne v Cottam*, Case No. 200906275, Third District Court, State of Utah, in the Order Denying Motion to Preclude Evidence of Economic Damages, entered on September 24, 2025. That order found the statute underlying the Instruction was, in part, unconstitutional. Judge Bolinder observed the procedural posture of the case—a verdict for the defendant—made it unlikely the case would be appealed or that the appellate court would have opportunity to address the ruling. Against that background, the Committee deliberated with regard to including a comment about the underlying statute’s constitutionality. After discussion, the Committee determined to include a comment that at least one district court concluded that there was a constitutional infirmity. The Committee determined not to include a specific case citation in the note to avoid suggestion that undue weight should be given to a single district court judge’s ruling. The Committee decided to re-publish the Instruction, with the new note, for public comment.

Mr. MacFarlane moved to approve the Instruction. Ms. North seconded the motion. Upon a vote, the Instruction was unanimously approved by the Committee for publication and public comment.

4. CV1740 Series Draft Instructions (abuse of process)

The Committee continued its discussion on the series of instructions addressing abuse of process. Mr. Lichfield directed the committee to his primary concern of making the Instruction understandable to a jury, especially with regard to “Court Process.” Mr. Lichfield explained the caselaw typically used the term “Legal Process,” and the distinctions that could be drawn between “Court Process” and “Legal Process.” He emphasized that potential application of abuse of process claims to administrative actions remains an open question under the law in Utah. Mr. Eggington suggested changing the proposed language from “Court Process” to “Legal Process,” as a phrase that better describes the designed purpose of the Instruction. The series of instructions and the Comment to the Instruction were changed to conform with the Committee’s decision to use “Legal Process.”

The Committee discussed the propriety of retaining in the Instruction an example of an abuse of legal process claim to help communicate the concept to a jury. While this has been done in at least one other instruction, it is rare. The committee determined the inclusion of an example is not needed in this series of instructions and would likely not be of value to the jury.

The Committee revised proposed Instruction CV1742 to address ambiguity in the phrasing regarding knowledge imputed to a company, and to simplify the Instruction’s language.

The Committee then moved and voted on the series of proposed instructions, as follows:

CV 1740 – Mr. Lichfield moved to approve Instruction CV1740. Mr. Harman seconded the motion. Upon a vote, the Instruction was unanimously approved by the Committee for publication and public comment.

CV 1741 - Mr. Lusty moved to approve Instruction CV1741. Mr. Harman seconded the motion. Upon a vote, the Instruction was unanimously approved by the Committee for publication and public comment.

CV 1742 - Mr. Lichfield moved to approve Instruction CV1742. Ms. North seconded the motion. Upon a vote, the Instruction was unanimously approved by the Committee for publication and public comment.

5. Progress on Instruction Topics

Ms. McAllister inquired if there had been any feedback from the subcommittee designated to consider product liability instructions. There had been no response to the most recent inquiry. It was determined that Mr. Willard and Ms. McAllister would attempt to contact them again.

Ms. McAllister inquired if there was an appellate decision yet regarding matters before the insurance subcommittee. Mr. Harman indicated they were still waiting for a decision.

Ms. McAllister inquired regarding the subcommittee considering director and officer liability, and whether Mr. Adam Buck needed assistance. Mr. Harman reported that he had reached out roughly three weeks ago and had not heard back. Mr. Harman will reach out again.

Ms. McAllister discussed the subcommittee considering wills/probate and indicated it should be given more direction.

Ms. McAllister asked about the subcommittee considering sales contracts. Mr. Willard had written to them. Ms. Adelaide Maudsley had indicated she was no longer involved. Mr. Willard, Ms. McAllister, and Mr. Harman are to meet and discuss other potential members for this and other stalled subcommittees.

Mr. Eggington reported there was a Corpus Linguistics presentation at BYU in October. Mr. Eggington will work with the linguistics and law subcommittee and Mr. Willard to have linguists report back to the Committee in February 2026.

Mr. Eggington also reported on his work toward defining “reasonableness.” He will visit with a former graduate student working on this project to find out the status and report back to the committee.

Ms. McAllister asked the committee members whether they were aware of any new statutes or caselaw that could catalyze changes to MUJI. The Committee discussed *Gardner v Norman*, 2025 UT 47, and the potential effect on consideration of medical bills and the collateral sources rule. Mr. Lusty and Ms. North will undertake a review of the current MUJI and make a recommendation to the Committee next month about whether we need a new instruction, a revision of existing instructions, or some combination of the two.

6. Scheduling and adjournment

The next meeting will be held on December 8, 2025, at 4:00 p.m.

The meeting adjourned.

TAB 2

CV2119 Implied covenant of good faith and fair dealing.

All contracts contain an unwritten or implied promise that the parties will deal with each other fairly and in good faith. This means that [name of plaintiff] and [name of defendant] have promised not to intentionally do anything to injure each other's right to receive the benefits of the contract. To decide if [name of defendant] violated this unwritten promise, you should consider whether [his] actions were consistent with the agreed common purpose and justified expectations of [name of plaintiff] in light of the contract language and the dealings between and conduct of the parties.

There are some limits to this unwritten promise that you need to keep in mind.

First, this unwritten promise between the parties to deal fairly with each other and in good faith does not establish new, independent rights or duties that [name of plaintiff] and [name of defendant] did not agree to.

Second, this unwritten promise does not create rights and duties that are inconsistent with the actual terms of the contract.

Third, this unwritten promise does not require either party to use a contract right in a way that will be harmful to themselves simply to benefit the other party.

Finally, you cannot use this unwritten promise to achieve an outcome that you believe is fair but is inconsistent with the actual terms of the contract.

If you find that [name of defendant] violated this unwritten promise to deal fairly and in good faith, then [name of defendant] breached the contract.

References

Young Living Essential Oils, LC, v. Marin, 2011 UT 64

Mark Technologies Corp. v. Utah Resources International, Inc., 2006 UT App 418, para. 7, 147 P.3d 509, 512.

St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).

Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, para. 45, 104 P.3d 1226, 1240.

MUJI 1st Instruction

26.30

Committee Notes

The duty of good faith and fair dealing as it applies to insurance contracts is addressed in MUJI 2d, 2400 series.

The committee notes that there has been no judicial definition of "justified expectations."



KeyCite Yellow Flag

Distinguished by [Kinzel v. Bank of America](#), N.D. Ohio, January 30, 2014

266 P.3d 814
Supreme Court of Utah.

YOUNG LIVING ESSENTIAL OILS, LC, Plaintiff and Respondent,

v.

Carlos MARIN, Defendant and Petitioner.

No. 20090875

|

Oct. 21, 2011.

Synopsis

Background: Supplier brought suit against distributor for breach of contract, and distributor claimed that breach was excused by supplier's breach of covenant of good faith and fair dealing. The Fourth District Court, Provo Department, [Samuel D. McVey, J.](#), granted summary judgment to supplier. Distributor appealed. The Court of Appeals, [2009 WL 3042385](#), affirmed. Certiorari was granted.

[Holding:] The Supreme Court, [Lee, J.](#), held that supplier's alleged failure to abide by promises to provide marketing materials to distributor by a certain date was not breach of covenant of good faith and fair dealing.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (5)

[1] **Certiorari** 🔑 Scope and Extent in General

73 Certiorari

73II Proceedings and Determination

73k63 Review

73k64 Scope and Extent in General

73k64(1) In general

On certiorari, Supreme Court reviews the decision of the court of appeals for correctness, giving no deference to its conclusions of law.

[2] **Contracts** 🔑 Terms implied as part of contract

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k168 Terms implied as part of contract

Court may recognize a covenant of good faith and fair dealing where it is clear from the parties' course of dealings or a settled custom or usage of trade that the parties undoubtedly would have agreed to the covenant if they had considered and addressed it; no such covenant may be invoked, however, if it would create obligations inconsistent with express contractual terms.

[59 Cases that cite this headnote](#)

[3] Contracts 🔑 Trade and Business

Customs and Usages 🔑 Reference to or incorporation of custom in making contract

95 Contracts

95II Construction and Operation

95II(C) Subject-Matter

95k202 Trade and Business

95k202(1) In general

113 Customs and Usages

113k9 Application and Operation

113k13 Reference to or incorporation of custom in making contract

Supplier's alleged failure to abide by promises to provide marketing materials to distributor by a certain date was not breach of covenant of good faith and fair dealing, where supplier did not have universally accepted duty to provide marketing materials evidenced by industry custom or course of dealing sufficient to incorporate covenant to provide such materials into contract.

[47 Cases that cite this headnote](#)

[4] Evidence 🔑 Particular contracts and agreements in general

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(C) Particular Writings, Parol or Extrinsic Evidence Concerning

157k1912 Particular contracts and agreements in general

(Formerly 157k397(3))

Distributor's allegations that supplier promised to provide distributor with marketing materials as inducement to enter distributorship agreement and that those materials would be necessary to meet distributor's performance guarantees under agreement were barred by parol evidence rule, where distributorship agreement was expressly integrated and said nothing about marketing materials as an inducement to contract or as precondition to meeting performance guarantees.

[1 Case that cites this headnote](#)

[5] Appeal and Error 🔑 Costs and fees

30 Appeal and Error

30XVIII Determination and Disposition of Cause

30XVIII(F) Directing New Trial or Other Further Proceedings in Lower Court; Remand

30k4749 Directing Further Proceedings Below on Certain Issues Only; Limited or Partial Remand

30k4751 Particular Issues

30k4751(3) Costs and fees

(Formerly 30k1178(6))

Supreme Court would remand to allow district court to make appropriate corrections to attorney fee award in supplier's breach of contract action against distributor, where award included fees for non-contract claims and supplier conceded that it was not entitled to recover fees related to those claims.

Attorneys and Law Firms

*815 [Barnard N. Madsen](#), [Scott D. Preston](#), [Joseph M. Hepworth](#), Provo, for plaintiff.

[Scott B. Mitchell](#), Salt Lake City, for defendant.

On Certiorari to the Utah Court of Appeals

Justice [LEE](#), opinion of the Court:

¶ 1 This is a breach of contract suit in which defendant Carlos Marin seeks to define the contracting parties' rights under an integrated distributorship agreement through the implied covenant of good faith and fair dealing. The district court granted summary judgment against Marin and in favor of plaintiff Young Living Essential Oils, holding that Young Living's alleged duty to provide marketing materials to Marin could not be inferred through the covenant of good faith and fair dealing. The court of appeals affirmed, and so do we. We clarify below the proper scope of this covenant and hold that it has no application in circumstances like those presented here.

I

¶ 2 In January 2005, Young Living entered into an agreement with Carlos Marin under which Marin would act as a distributor of Young Living's products. Marin represented that he had significant experience as a distributor in performing the duties outlined in the contract. He also agreed to meet certain cumulative “performance guarantees” (measured by dollar value of sales) by the 15th of each month from February through July 2005.

¶ 3 Young Living, for its part, agreed to pay Marin monthly minimum “advance payments,” offset by any commission payments due under a “standard commission payout plan.” The advances were to help Marin devote his energies to his duties under the contract and to entice him to quickly develop a marketing base for Young Living's products. An integration clause in the agreement provided that no other representations or understandings would be valid under the contract. There was no reference in the contract to any marketing materials to be used in distributing the product.

¶ 4 Young Living made its first advance payment to Marin on January 15, 2005, and its second on February 15, 2005, after Marin met his first performance guarantee on that date. Although Marin failed to meet his next performance guarantee on March 15, Young Living advanced him \$15,000 with the understanding that Marin would meet that quota by the next month. By April 15, however, Marin had failed to meet both his March and April performance guarantees.

¶ 5 In July 2005, Young Living filed suit against Marin, asserting that Marin was in breach of contract for failing to meet the performance guarantees set forth in the distributorship agreement and claiming damages measured by the difference between the advance payments to Marin (\$65,000) and the commissions actually earned (\$3,637.57). Marin answered, claiming that his lack of performance was excused by Young Living's *816 failure to provide him with marketing materials to assist him in meeting his performance guarantees. In support of this defense, Marin submitted an affidavit alleging that Young Living had induced him to enter into the agreement by promising to provide by February 1, 2005, a “mainstream marketing website, recruiting DVD, audio CD, and other marketing materials.” Moreover, in the following months as Marin had trouble meeting his performance guarantees, Marin alleged that he had had various conversations with Young Living representatives in which

they acknowledged that they had failed to provide the agreed-upon marketing materials and indicated an understanding that those materials were essential for Marin to fulfill his duties under the contract.

¶ 6 The district court granted Young Living's motion for summary judgment, holding that the parol-evidence rule barred extrinsic evidence of a condition not set forth in the parties' integrated contract and that such a condition could not be inferred through the covenant of good faith and fair dealing. Young Living subsequently submitted a proposed final judgment (including an award of attorney fees), which was entered by the district court despite Marin's objection that a portion of the fees awarded were incurred in connection with tort claims on which Young Living had not prevailed. On appeal, the court of appeals affirmed the summary judgment for Young Living and also upheld the fee award on the ground that Marin had failed to preserve his challenge to Young Living's proposed final judgment because his objection was untimely.

[1] ¶ 7 We granted certiorari to review the court of appeals' treatment of the covenant of good faith and fair dealing in its affirmance of Young Living's summary judgment and also to consider its affirmance of the district court's attorney fee award. “On certiorari, we review the decision of the court of appeals for correctness, giving no deference to its conclusions of law.”

State v. White, 2011 UT 21, ¶ 14, 251 P.3d 820.


II

¶ 8 The implied covenant of good faith and fair dealing performs a significant but perilous role in the law of contracts. Its significance lies in its function of inferring as a term of every contract a duty to perform in the good faith manner that the parties surely would have agreed to if they had foreseen and addressed the circumstance giving rise to their dispute.¹ This function is important, in that the parties to a contract cannot feasibly anticipate all possible contingencies nor reasonably resolve how they would address them in writing. Yet the judicial inference of contract terms is also fraught with peril, as its misuse threatens “commercial certainty and breed[s] costly litigation.”²



¹ See St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991) (noting the covenant is informed by “the agreed common purpose and the justified expectations of the other party”); Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445, 450 (Utah Ct.App.1994) (noting that “contracting parties, hard as they may try, cannot reduce every understanding to a stated term,” and that “[t]he law of good faith and fair dealing, though inexact, attempts a remedy for [the] abuse” of the parties' “expected benefit of [the] bargain” (footnote omitted)); Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588 (7th Cir.1991) (explaining the function of the covenant as “giv[ing] the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero”).


² Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir.1990); see also Sw. Sav. & Loan Ass'n v. SunAmp Sys., Inc., 172 Ariz. 553, 838 P.2d 1314, 1319 (Ariz.Ct.App.1992) (“If contracting parties cannot profitably use their contractual powers without fear that a jury will second-guess them under a vague standard of good faith, the law will impair the predictability that an orderly commerce requires.”)

¶ 9 Our cases have balanced these concerns by charting a limited role for the covenant of good faith and fair dealing. First, we have recognized an implied duty that contracting parties “refrain from actions that will intentionally ‘destroy or injure the other party's right to receive the fruits of the contract.’” Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶ 43, 104 P.3d 1226, 1239 (quoting *817 St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199–200 (Utah 1991)).³ Such a duty advances the core function of the covenant, as no one would reasonably accede to a contract that left him vulnerable to another's opportunistic interference with the contract's fulfillment. And that same fact protects commercial reliance interests,

since a term that all reasonable parties would agree to is not likely to be imposed on the mere basis of a judge's subjective “sense of justice.”  *Oakwood Vill.*, 2004 UT 101, ¶ 45, 104 P.3d 1226.

3 See [RESTATEMENT \(SECOND\) OF CONTRACTS § 205 \(1981\)](#) (noting that the covenant encompasses a duty of “honesty in fact” to refrain from interfering with other's ability to perform contractual duties); [RESTATEMENT OF CONTRACTS § 295 \(1932\)](#) (precluding “prevent[ion] or hind [rance]” of the satisfaction of a condition to performance); see also *Carns v. Bassick*, 187 A.D. 280, 175 N.Y.S. 670, 673 (1919) (“To hold that one may employ another ... to do a specific thing, and yet may with impunity deliberately prevent the other from doing that thing, is ... plainly violative of good faith....”).

[2] ¶ 10 With these concerns in mind, we have set a high bar for the invocation of a new covenant. Under our cases, the court may recognize a covenant of good faith and fair dealing where it is clear from the parties' “course of dealings” or a settled custom or usage of trade that the parties undoubtedly would have agreed to the covenant if they had considered and addressed it.  *Id.* ¶ 43. No such covenant may be invoked, however, if it would create obligations “inconsistent with express contractual terms.”  *Id.* ¶ 45.⁴ These limitations likewise protect the reliance interests of the parties to a contract and foreclose the imposition of a code of commercial morality rooted merely in judicial sensibilities. Where the court adopts a covenant enshrined in a settled custom or usage of trade, it is simply endorsing a universal standard that the parties would doubtless have adopted if they had thought to address it by contract. Where the parties themselves have agreed to terms that address the circumstance that gave rise to their dispute, by contrast, the court has no business injecting its own sense of what amounts to “fair dealing.” By enforcing these standards and limitations, our cases preserve the core role of the covenant of good faith while controlling against its misuse to the detriment of commercial security and reliance.

4 As the court of appeals noted, we have also sometimes asserted that the covenant “cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante.” *Young Living Essential Oils, LC v. Marin*, 2009 UT App272U, para. 8, 2009 WL 3042385 (quoting  *Oakwood Vill.*, 2004 UT 101, ¶ 45, 104 P.3d 1226). Properly conceived, however, that proviso merely restates the proscription against using the covenant to establish new rights or duties that are “inconsistent with express contractual terms,” as the covenant would be completely negated if it could never establish any independent rights not expressly agreed to by contract. To the extent our cases suggest otherwise—indicating a broad proscription against *ever* using the covenant to establish duties not expressly agreed to by the parties—we disavow those suggestions here.



[3] ¶ 11 Marin falls far short in his attempt to invoke the covenant of good faith and fair dealing under these standards. The covenant that Marin has claimed is not rooted in an attempt to require Young Living to “refrain from actions that will intentionally destroy or injure the other party's right to receive the fruits of the contract.” *Id.* ¶ 42 (internal quotations marks omitted). Instead, he seeks to impose on Young Living an affirmative duty to provide a particular set of marketing materials by a certain date. That duty, moreover, is not even allegedly based in a universally accepted obligation established through industry custom or the parties' course of dealing. Marin does not allege, for example, that anyone negotiating a distributorship contract like this one would inevitably have understood and agreed to a condition that required the provision of the marketing materials that Marin expected by the date that he has identified.

¶ 12 Marin asserts, rather, that in various conversations Young Living's representatives acknowledged a responsibility to provide certain “marketing tools” and also suggested that Marin's “inability to satisfy the performance guarantees” spelled out in the contract “would not affect [his] receipt of” certain advance payments. None of these conversations come close to establishing a basis for a judicially imposed covenant of good faith; concluding that the provision of the anticipated marketing materials by the prescribed *818 date was a duty that the parties to a distributorship agreement would certainly have agreed to if they had thought to address it. Instead of pointing to some universal industry custom or standard to that effect, Marin simply cites the oral representations of the other party to the contract. He does so, moreover, in open contravention of the integrated terms of the written distributorship contract, which condition Marin's eligibility for advances and commissions on his fulfillment of

the performance standards that he now claims Young Living waived. We cannot endorse the covenant that Marin seeks without treading down a path we have repeatedly foreclosed-of imposing our own sense of commercial morality at the expense of the express terms of the parties' contract. This we refuse to do, and Marin's claim fails on that basis.⁵

⁵ There is no reason to think that the parties to a distribution agreement would necessarily allocate to the *supplier* the duty to produce any marketing materials deemed useful to the distributor. Without some basis in the parties' agreement, settled course of dealing, or custom or trade usage, it seems equally as likely that the parties would deem that responsibility to fall on the distributor. That could arguably have been Young Living's understanding here, given that Marin represented himself to Young Living as one with "significant experience as a Distributor/Leader and ... in being part of quality motivational and training materials," and that Marin attests that he himself "wrote more than 20 marketing and training scripts for video and web based content" for Young Living's products and "traveled to St. Augustine, Florida to work with Rainmaker Consulting shooting marketing videos."

Marin obviously contends that the duty is Young Living's, but his basis for doing so would take us well past the confines of the covenant of good faith and into the realm of the parol-evidence rule. If we were to impose a duty on Young Living to provide marketing materials, it would be on the basis of its alleged oral agreement to do so, not on a universally accepted duty evidenced by industry custom or course of dealing. And accepting that premise would only require us to head further down the path of parol evidence, which we would need to next consult to determine the precise nature of the materials Young Living covenanted to provide and the date it was to provide them. All of this confirms that this case is governed by the parol-evidence rule and is not the proper subject of the covenant of good faith and fair dealing.

[4] ¶ 13 Marin attempts to shoehorn his claim into the standards in our cases by asserting that his affidavit is not directed at parol evidence of a side agreement regarding marketing materials, but instead establishes the parties' "course of dealing." We find his characterization of the affidavit incomplete, however, and ultimately deem it to fall short of establishing the sort of "course of dealing" that is relevant to the covenant of good faith and fair dealing. Contrary to Marin's characterization, his affidavit does attempt in part to present parol evidence of a side agreement that is inadmissible as extrinsic evidence under the parties' integrated contract. See  *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326 ("[I]f a contract is integrated, parol evidence is ... not admissible to vary or contradict the clear and unambiguous terms of the contract." (internal quotation marks omitted)). Specifically, Marin alleges that he was "induce[d] to enter into the agreement by a representation that Young Living was nearing completion of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials." He also alleges an understanding by the parties "that these marketing tools would be absolutely necessary in order ... to be able to meet [the] performance guarantees under the Agreement" and that "it was represented [to him] that they would be available for [his] use by February 1, 2005." These allegations, however, are clearly barred by the parol-evidence rule.  *Tangren Family Trust*, 2008 UT 20, ¶ 11, 182 P.3d 326. The distributorship agreement is expressly integrated, and it says nothing about marketing materials as an inducement to the contract or as a precondition to the requirement of Marin meeting the performance guarantees. To the extent the Marin affidavit aims to substitute the terms of a side deal for the text of the contract, his argument clearly fails on parol-evidence grounds and cannot possibly be resuscitated by his invocation of the covenant of good faith and fair dealing.

¶ 14 Much of the rest of the Marin affidavit falters on similar grounds. Marin insists that some of the representations he claims to have been made by Young Living were *after* *819 the execution of the contract, and thus escape operation of the parol-evidence rule on the ground that it applies only to *prior* or *contemporaneous* conversations, representations, or statements. See *id.* In context, however, the representations that Marin alleges can only be understood to refer back to the prior representations that he claims to have induced him to enter into the contract in the first place. Such representations refer vaguely to an alleged acknowledgement by Young Living of "promised marketing tools." Marin never comes close to asserting that Young Living agreed to new terms that superseded the provisions of the written distributorship agreement. His allegations accordingly are the domain of the parol evidence rule and are not proper fodder for the covenant of good faith and fair dealing.

¶ 15 Marin misperceives the kind of “course of dealing” evidence that is relevant to establishing a covenant of good faith and fair dealing. The covenant is not a license for the judiciary to codify standards of altruism that a party may have held itself to in the course of its contract performance. Young Living may have expressed a willingness to provide marketing materials to Marin, but that does not itself establish a binding legal covenant to do so. To sustain a new covenant, evidence of “course of dealing” would have to conform to the core terms of the legal doctrine, by demonstrating a settled, longstanding pattern of dealing that the parties unquestionably would have relied on (but failed to memorialize) in entering into their contract. If Young Living for years provided new product to its distributors on the first of every month, for example, but suddenly withheld such product until the 20th of the month despite the existence of a monthly sales quota, it might make sense to deem Young Living to have breached a covenant informed by the parties' longstanding course of dealing. That is not at all what is presented by Marin here, however, and his claim fails despite his invocation of the “course of dealing” terminology.

III

¶ 16 The covenant of good faith inheres in every contract, but the scope and content of the covenant are limited. Marin's claim against Young Living hinges on a covenant that would take us well beyond the bounds established in our cases, and we accordingly affirm the court of appeals' decision upholding summary judgment in Young Living's favor.

[5] ¶ 17 Our affirmance of summary judgment still leaves unresolved an additional matter raised on appeal, which is Marin's challenge to the attorney fees awarded to Young Living in the district court. Although Young Living contends that Marin failed to preserve this matter for appeal, it also concedes that it was not entitled to recover fees related to non-contract claims and has agreed to submit a revised fee affidavit on remand to the district court. In light of that concession, we need not reach Marin's arguments that the trial court's error on this issue was “plain” or that we should reach the merits of this issue on the basis of “exceptional circumstances.” Instead, we simply accept Young Living's concession and remand to allow the district court to make any appropriate corrections to the fee award based on a revised fee affidavit filed by Young Living.

¶ 18 Chief Justice [DURHAM](#), Associate Chief Justice [DURRANT](#), Justice [PARRISH](#), and Justice [NEHRING](#) concur in Justice [LEE'S](#) opinion.

All Citations

266 P.3d 814, 693 Utah Adv. Rep. 4, 2011 UT 64

Off the Shelf, Off the Mark – What to Do When MUJI Gets It Wrong

by Carolyn LeDuc

Litigation often turns on robust legal research. *Does the statute apply? Is the case on point? Procedural posture? Dicta? Distinguishable?* We attorneys work through endless strings of near-misses, hoping to land the one code section or case that proves unimpeachable. In the absence of that, we'll cobble together the authorities most likely to hold sway. Motion practice puts our work to judicial scrutiny – and sometimes vigorous battle. But after motion practice, our piles of careful research – now highlighted, dog-eared, bejeweled in post-its – must be reduced to a single set of concise jury instructions. Short, declarative sentences. Subject-verb-object. Active voice, preferably. For each issue, one clean statement of the law. The Model Utah Jury Instructions, colloquially called “MUJI,” purport to help that process along.

On the eve of trial, as we dicker with opposing counsel over proposed instructions, it always happens: one side pitches a model instruction with modifications; while the other side, self-righteously smug, pitches the MUJI version *verbatim*. This unsullied instruction, it is postured with a raised brow and a look down the nose, is the *holier* form.

The implied message is that an attorney with the truest intent to honor the law will simply pull up the MUJI website, make a fast grab for the most pertinent lines, and simply run with them. You may not know this (we learned it in the course of preparing this article), but the MUJI website actually facilitates this grab-and-go approach. You can scroll through the list of model instructions, check a box for each item you find relevant, click the tab that says “Generate Document,” and *voilà!* The website spits out a custom-fit set of instructions, each item click-and-draggable within the generated document, for ease of re-ordering. This tidy package in hand, you may feel well-armed for your holy war.

The trouble is, you're not. As the Utah appellate courts have repeatedly warned, the model instructions have been known to “get it wrong.”

Our firm learned this lesson a few years ago, in the course of work on a complex commercial dispute. A key issue in the case was the covenant of good faith and fair dealing. The MUJI instruction, boasting all the right *bona fides*, declared that the covenant of good faith “does not establish new, independent rights or duties that [the parties] did not agree to.” MUJI 2d CV 2119. The instruction, though familiar in its verbiage, seemed directly at odds with the very essence of the covenant of good faith. By its nature, the “unwritten” covenant had to establish rights and duties not spelled out in the parties' agreement, lest it be useless. At best, the model instruction was confusing. At worst, it was self-contradictory and misleading. With the covenant of good faith being the most critical issue in the nine-figure case we were about to try, this instruction could make the difference between an all-important win and an existential loss for our client.

In briefing on summary judgment, we'd been pleased to discover on-point authority from the Utah Supreme Court. In a footnote in *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 10 n.4, 266 P.3d 814, Justice Lee, writing for a unanimous court, pointed out that “the covenant [of good faith] would be completely negated if it could never establish any independent rights not expressly agreed to by contract.” He went on, “To the extent our cases suggest otherwise – indicating a broad proscription against ever using the covenant to establish duties not expressly agreed to by the parties – we disavow those suggestions here.” *Id.* The implied covenant, Justice Lee clarified, *could* supplement the terms of the contract, so long as it did not create rights or duties *inconsistent with* the contract language. *Id.*

CAROLYN LEDUC is a partner with the civil litigation firm of Burbidge | Mitchell in Salt Lake City.



Our case was going to trial in the fall of 2022. Even still, the MUJI addressing the implied covenant retained the confusing language that Justice Lee, on behalf of the entire Utah Supreme Court, had disavowed in 2011. When it came time to swap proposed jury instructions with opposing counsel, we pitched an instruction based on the model, but modified to reflect Justice Lee’s footnote. Opposing counsel, predictably, pushed for the MUJI version unmodified.

For the war over words that ensued, we went in armed with a few decisions from Utah appellate courts that called out potential problems with MUJI. In *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 359 (Utah 1997), for example, the district court had used a certain jury instruction “because it was taken directly from the Model Utah Jury Instructions (MUJI).” The Utah Supreme Court cautioned, “While we affirm this ruling, we explicitly distinguish Utah law from the MUJI. That is, the MUJI are merely advisory and do not necessarily represent correct statements of Utah law.” *Id.* In 2009, the court of appeals echoed these comments, again observing that MUJI instructions “are merely advisory.” *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 31, 214 P.3d 865.

As it turned out, our 2022 case settled on the eve of trial, and we never got to see how the judge would have ruled on the parties’

competing instructions. But we vowed that when consulting MUJI from that time forward, we would be more vigilant.

Just within the past couple of years, the Utah Supreme Court has been called upon twice to comment on whether a model instruction was sufficient. While the instructions at issue in both cases turned out to be acceptable, the court took the opportunity (twice!) to remind the Bar not to confuse MUJI with the law. “It is incumbent on the litigants and the trial court, in each case, to make sure that the instructions accurately convey the law, regardless of whether they come from MUJI,” the court warned. *State v. Wall*, 2025 UT App 30, ¶ 53, 566 P.3d 833; *see also Meeks v. Peng*, 2024 UT 5, ¶ 36, 545 P.3d 226 (“Although the Model Utah Jury Instructions (MUJI) provide guidance to attorneys and district courts about how to instruct a jury, those instructions are merely advisory and do not necessarily represent correct statements of Utah law.”) (citation modified).

To be clear, we mean no disrespect to those who drafted the model instructions; no doubt the models sprang from the best of intentions. Starting in 1957, members of the Utah Bar looked to the Jury Instruction Forms for Utah (JIFU) – a model set of instructions that, for a few decades, appears to have served its

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purpose well. Over time, however, the JIFU became stale. In the early '90s, the Board of District Court Judges for the State of Utah commissioned a set of new and improved model instructions. A Bar committee, chaired by John L. Young, gave “thousands of lawyer-hours” to the project, with the ambition to create instructions “that may be relied upon with some assurance as to accuracy.” *See* Resolution, Board of District Court Judges for the State of Utah, Apr. 16, 1993, at 1. Following exhaustive review by the bench and Bar, the first iteration of the Model Utah Jury Instructions took effect October 1, 1993. *See id.* at 2. The Bar released an updated set of instructions, known by the moniker MUJI 2d, in 2011. *See generally* Model Utah Jury Instructions, Second Edition, <https://legacy.utcourts.gov/muji/?cat=3>. The Utah Code of Judicial Administration captures the Bar’s noble objective: “[t]o develop jury instructions that are an accurate statement of Utah law using simple structure and, where possible, words of ordinary meaning.” Utah R. Jud. Admin Rule 3-418.

Even still, MUJI 2d purports to be a “work in progress.” *See* MUJI 2d Introduction. It’s been fifteen years since the latest major rework. The Bar has established standing committees to review and revise the model instructions on an ongoing basis. But these committee members are volunteers, presumably with regular

day jobs, and the law is constantly changing. Despite their best efforts (for which we sincerely thank them), members of these committees cannot be expected to catch everything. Unavoidably, the circumstances in which MUJI 2d may be insufficient are many.

The most glaring issue is, as reflected in our 2022 case involving the covenant of good faith, when the MUJI version is outdated and therefore inconsistent with Utah law.

But the problems may be more subtle. You may find, for example, that the MUJI covers the common law, when your case is controlled instead by the Utah Code. The code, of course, controls.

The model instruction may be incomplete – as was the case in *Peterson v. Hyundai Motor Co.*, 2021 UT App 128, ¶ 54, 502 P.3d 320, where the Utah Court of Appeals remanded a matter for a new trial, because the model instructions used in that case had not explained who bore the burden of proof on negligence and strict liability.

Depending on the complexity of the case, there may be issues of law that MUJI 2d just doesn’t address. In our 2022 case alone, there were dozens of instructions that had to be tailor-made for

NATHAN EVERSHED
CRIMINAL DEFENSE ATTORNEY
EXPERIENCED · TRUSTED · KNOWN

Former Prosecutor

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the parties' multi-faceted dispute. *What was the significance of the contract's integration clause? Did the law require an act that would be useless or futile? Did the covenant of good faith require a party to modify a contract if asked to do so? What qualified as a force majeure?* Without clean and accurate guidance on each of these issues, the jury's deliberations could have easily gone haywire.

Humbly, the introduction to MUJI 2d acknowledges its limitations: "These instructions are a summary statement of Utah law," the drafters observe, "but they are not the final expression of the law. Thus, in any case before them, a judge may review a model instruction for legal sufficiency."

To underscore the point: the model instructions are not gospel; the drafters do not purport to be omniscient.

When crafting proposed jury instructions, there may be no easy formula. However, we'll note that the Utah courts and the Judicial Council have endorsed the following pointers:

First, check MUJI. Is there an instruction on point? If so, check again to see how MUJI holds up to the law. Does the model instruction comport with the latest authorities? Just as importantly, is the instruction clear and concise? If not, consider revisions, perhaps looking to the model as a "useful starting point." See *State v. Eyre*, 2019 UT App 162, ¶ 17 n.4, 452 P.3d 1197. Keep in mind that "[j]ury instructions require no particular form so long as they accurately convey the law." *State v. Johnson*, 2016 UT App 223, ¶ 28, 387 P.3d 1048 (citation modified). Note that even if the MUJI gets the law right and is clear and concise, you should edit freely to clean up incidental problems like misfit pronouns, and for the insertion of party names instead of "plaintiff" and "defendant" – both edits specifically encouraged by the MUJI drafters. See MUJI 2d Introduction.

Second, if there is no on-point MUJI, does any state or federal statute control? Any agency regulation? If so, look to the operative language, but resist the temptation to copy the language *verbatim*, particularly if the controlling code is dense with legalese or multi-tiered subsections likely to confuse or mislead. Importantly, Utah courts "have never required jury instructions to mirror the exact language on which they are based." *Meeks*, 2024 UT 5, ¶ 35. What's more, "the rewording of a statute as a jury instruction is not error as long as it does not change the essential meaning of the statute." See *Gorostieta v. Parkinsin*, 2000 UT 99, ¶ 46, 17 P.3d 1110.

Third, if there is no MUJI on point, and no relevant statute or administrative code, craft an instruction from the common law.

In general, the shorter the better. And keep the language plain – target a sixth-grade audience. As the introduction to MUJI 2d explains, "accuracy is meaningless if the statement is not understood, or is misunderstood, by jurors." See MUJI 2d Introduction.

Fourth, in the course of debate with the court or with opposing counsel, if you find some proposed instruction objectionable, be sure to put your objection on the record, and be clear about the basis. See Utah R. Civ. P. 51(f); Utah R. Crim. P. 19(e). In both civil and criminal trials, objections to written instructions must be made before the instructions are given to the jury; for oral instructions, the objection must be made before the jury retires. *Id.* Absent a proper objection, the instruction will be reviewed only under the "manifest injustice" or "plain error" standard. *Id.*; see also *Kelly v. Timber Lakes Prop. Owners Assoc.*, 2022 UT App 23, ¶ 41, 507 P.3d 357. And if you go so far as to put your non-objection (assent) on the record, whether "by statement or act," waiver is inescapable; not even the "plain error" standard can help you. *State v. Chavez-Espinoza*, 2008 UT App 191, ¶¶ 12–13, 186 P.3d 1023, *cert. denied*, 199 P.3d 367; *Moore v. Smith*, 2007 UT App 101, ¶ 30, 158 P.3d 562.

Finally, know that the Bar's standing committees openly solicit your help. In the words of the MUJI 2d drafters, "The Judicial Council encourages lawyers and judges to share their experiences and suggestions with the standing committees. Judges and lawyers who draft a clearer instruction than is contained in these model instructions are also encouraged to share it with the appropriate committee." See MUJI 2d Introduction. If you like your own instruction better than the model, don't be shy about passing it along.

My colleagues and I are embarrassed to admit, we're now three years delinquent in advising the relevant committee of our concerns about the commercial contract "good faith" instruction. We've discovered, however, that the introduction page for MUJI 2d includes convenient links to information about current members of the drafting committees, other links for comments on instructions presently under review, and still more links to allow feedback and suggestions on any instructions of incidental concern. As of this writing, the link labeled "Contact the Committee" for civil instructions happens to be broken – a temporary glitch, no doubt. We'll be watching for the fix. But in the meantime, we'd love for this article to serve as our gentle nudge to the powers that be – please update Civil Instruction 2119, and let Justice Lee's clarifying footnote in *Young Living* serve as the basis to better instruct civil juries in the future.

TAB 3

2025 WL 3030153

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Utah.

Troy GARDNER, Appellee,

v.

Tyler NORMAN, Appellant.

No. 20240344

|

Heard April 9, 2025

|

Filed October 30, 2025

Synopsis

Background: Motorist filed suit against tortfeasor for injuries sustained in rear-end collision, seeking general damages for pain and suffering and special damages for past medical expenses. The Third District Court, Salt Lake County, [Keith A. Kelly, J.](#), excluded evidence of discounted, negotiated charges paid by motorist's health insurer for his medical care, and, following bench trial, awarded motorist special damages based on gross charges initially billed by health care provider. Tortfeasor appealed.

[Holding:] As matter of first impression, the Supreme Court, [Hagen, J.](#), held that negotiated charges between motorist's insurer and health care provider was proper measure of motorist's special damages for medical expenses, and thus, differential between gross costs and negotiated charges that motorist's insurer actually paid was not subject to collateral source rule.

Vacated; remanded for new trial.

Procedural Posture(s): On Appeal; Motion to Strike Testimony.

West Headnotes (21)

[1] **Appeal and Error** Admission or exclusion of evidence in general

30 Appeal and Error

30XVI Review

30XVI(D) Scope and Extent of Review

30XVI(D)8 Evidence and Witnesses in General

30k3364 Reception of Evidence

30k3366 Admission or exclusion of evidence in general

While an appellate court reviews a district court's decision to admit evidence for abuse of discretion, it reviews for correctness the legal questions underlying the admissibility of evidence.

[2] **Damages** Nature and theory of compensation

115 Damages

115III Grounds and Subjects of Compensatory Damages
 115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
 115III(A)1 In General
 115k15 Nature and theory of compensation

When a plaintiff suffers harm from a defendant's tortious actions, "compensatory damages" seek to place the plaintiff in the same position the plaintiff would have occupied had the tort not been committed.

[3] Damages 🔑 **General and special damage**

115 Damages
 115I Nature and Grounds in General
 115k5 General and special damage

"Special damages," a form of compensatory damages also known as specific or economic damages, account for harm that is considered more finite and measureable; they are limited to "hard amounts" incurred by the plaintiff that are subject to careful calculation, such as the cost of medical and other necessary care.

[4] Damages 🔑 **Medical treatment and care of person injured**

115 Damages
 115III Grounds and Subjects of Compensatory Damages
 115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
 115III(A)1 In General
 115k41 Expenses
 115k43 Medical treatment and care of person injured

To recover compensation in the form of special damages for medical expenses in a tort action, a plaintiff must prove that the amount incurred was reasonable and necessary.

[5] Damages 🔑 **Medical treatment and care of person injured**

115 Damages
 115III Grounds and Subjects of Compensatory Damages
 115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
 115III(A)1 In General
 115k41 Expenses
 115k43 Medical treatment and care of person injured

When a tort plaintiff requests special damages in the form of medical expenses resulting from a tort, evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injury and that the charges are reasonable.

[6] Damages 🔑 **Matter of mitigation; collateral source rule in general**

115 Damages
 115III Grounds and Subjects of Compensatory Damages
 115III(B) Aggravation, Mitigation, and Reduction of Loss
 115k59 Matter of mitigation; collateral source rule in general

When a third party covers all or part of a plaintiff's medical expenses, the "collateral source rule" is implicated, for purposes of a calculating the plaintiff's damages award, in a tort action.

[7] Damages ➡ [Matter of mitigation; collateral source rule in general](#)**Damages** ➡ [Weight and Sufficiency](#)[115 Damages](#)[115III Grounds and Subjects of Compensatory Damages](#)[115III\(B\) Aggravation, Mitigation, and Reduction of Loss](#)[115k59 Matter of mitigation; collateral source rule in general](#)[115 Damages](#)[115IX Evidence](#)[115k183 Weight and Sufficiency](#)[115k184 In general](#)

Under the “collateral source rule,” which has both an evidentiary and a damages aspect in application, wrongdoers are not entitled to have damages, for which they are liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source.

[8] Damages ➡ [Aggravation, mitigation, and reduction of loss](#)[115 Damages](#)[115IX Evidence](#)[115k164 Admissibility](#)[115k182 Aggravation, mitigation, and reduction of loss](#)

In a tort case, the evidentiary aspect of the collateral source rule precludes both explicit reference and methodical allusion to collateral source benefits.

[9] Evidence ➡ [Torts and Personal Injuries in General](#)[157 Evidence](#)[157V Tendency to Mislead or Confuse; Prejudicial Effect](#)[157V\(B\) Particular Cases](#)[157k1071 Torts and Personal Injuries in General](#)[157k1072 In general](#)

In a tort action seeking damages for personal injuries, evidence of collateral source benefits involves a substantial likelihood of prejudicial impact which may occur in two ways: first, evidence of payment from a collateral source suggests that a plaintiff is already receiving any necessary care, which may lead the jury to believe that the outcome of the trial is immaterial to the party benefiting from the collateral source; and second, because many jurors do not understand the concept of subrogation rights, they will erroneously conclude that the plaintiff is seeking a windfall, which misunderstanding is highly prejudicial because the jury will believe that the plaintiff has already been fully compensated and is trying to obtain a double recovery, thereby tainting the jury's decision-making process.

[10] Damages ➡ [Matter of mitigation; collateral source rule in general](#)[115 Damages](#)[115III Grounds and Subjects of Compensatory Damages](#)[115III\(B\) Aggravation, Mitigation, and Reduction of Loss](#)[115k59 Matter of mitigation; collateral source rule in general](#)

The damages aspect of the collateral source rule prevents a tort plaintiff's recovery from being offset by any payments provided by an independent collateral source.

[11] Damages 🔑 [Reduction of loss by insurance](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k64 Reduction of loss by insurance

Under the damages aspect of the collateral source rule, the plaintiff in a tort action for personal injuries may recover damages for medical expenses already paid by the plaintiff's insurance even when it results in a windfall to the plaintiff based on the premise that the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall.

[1 Case that cites this headnote](#)

[12] Damages 🔑 [Reduction of loss by insurance](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k64 Reduction of loss by insurance

The collateral source rule is intended to encourage the maintenance of insurance by assuring that a plaintiff's payments for medical expenses from a collateral source will not be reduced in the calculation of damages by a subsequent judgment.

[13] Damages 🔑 [Medical treatment and care of person injured](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 Medical treatment and care of person injured

Special damages for medical expenses must reflect the actual loss resulting from the tortfeasor's conduct.

[14] Damages 🔑 [Aggravation, mitigation, and reduction of loss](#)

115 Damages

115IX Evidence

115k164 Admissibility

115k182 Aggravation, mitigation, and reduction of loss

Under the "collateral source rule," the fact that a third party bore the plaintiff's loss for medical expenses is inadmissible and cannot be used to reduce a plaintiff's recovery in a personal injury action.

[15] Damages 🔑 [Matter of mitigation; collateral source rule in general](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k59 Matter of mitigation; collateral source rule in general

The collateral source rule prevents a tortfeasor from obtaining a windfall where collateral source benefits have mitigated the plaintiff's out-of-pocket losses.

[16] Damages  [Reduction of loss by insurance](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k64 Reduction of loss by insurance

The difference between the gross charge for medical expenses and the negotiated charge is not a “benefit” under the collateral-source rule, because it is not a payment; only the amount a plaintiff’s health insurer actually pays to the health care provider is a benefit from a collateral source.

[17] Damages  [Aggravation, mitigation, and reduction of loss](#)

115 Damages

115IX Evidence

115k164 Admissibility

115k182 Aggravation, mitigation, and reduction of loss

When no one pays the difference between the gross charge for medical expenses and the negotiated charge between a plaintiff’s insurer and the plaintiff’s health care provider, admitting evidence of the predetermined reduction does not violate the purpose behind the collateral-source rule; the tortfeasor does not obtain a credit because of payments made by a third party on behalf of the plaintiff, which is what the collateral source rule prevents.

[1 Case that cites this headnote](#)

[18] Damages  [Reduction of loss by insurance](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k64 Reduction of loss by insurance

If special damages for a tort plaintiff’s medical expenses are based on the gross charges, rather than the discounted prices negotiated by the plaintiff’s insurer and the health care provider, for purposes of determining the amount of the plaintiff’s special damages, it would place the plaintiff in a better financial position than before the tort was committed, but in limited situations, for instance, if the collateral source lacked subrogation rights, such a windfall to the plaintiff is permitted by the collateral source rule, which contemplates that the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall; however, that does not allow the plaintiff to recover more than the actual loss caused by the tortfeasor’s conduct as special damages.

[19] Damages  [Aggravation of previous injury, disease, or disability](#)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k31 Physical Suffering and Inconvenience

115k33 Aggravation of previous injury, disease, or disability

One who injures another takes him as he is; this will often mean that the same tortious conduct might result in vastly different damage awards based on the identity and personal characteristics of the plaintiff.

[20] Damages  Expenses

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k101 Expenses

The negotiated charge between a tort plaintiff's insurer and the plaintiff's health care provider is the proper measure of plaintiff's special damages for past medical expenses.

[21] Damages  Aggravation, mitigation, and reduction of loss**Evidence**  Torts and Personal Injuries in General

115 Damages

115IX Evidence

115k164 Admissibility

115k182 Aggravation, mitigation, and reduction of loss

157 Evidence

157V Tendency to Mislead or Confuse; Prejudicial Effect

157V(B) Particular Cases

157k1071 Torts and Personal Injuries in General

157k1072 In general

Where the reasonableness of the negotiated charge for a tort plaintiff's medical expenses is in dispute, for instance, the gross charge for the medical expenses might be relevant to a fact at issue, in calculating the plaintiff's special damages, although the risk of prejudice might substantially outweigh the probative value of that evidence, especially if its admission risks violating the collateral source rule by revealing that the cost was covered, in whole or in part, by insurance. [Utah R. Evid. 401, 403](#).

1 Case that cites this headnote

Third District Court, Salt Lake County, The Honorable Keith A. Kelly, No. 220906066

Attorneys and Law Firms

Attorneys ^{*}:

[Karra J. Porter](#), Michael N. Driggs, Salt Lake City, for appellee

[Samantha J. Slark](#), Salt Lake City, for appellant

* Additional attorneys for *amici curiae*, in support of appellant: Freyja Johnson, Rachel Phillips Ainscough, Bountiful, for International Municipal Lawyers Association; Darcy M. Goddard, Salt Lake City, for Utah Counties Indemnity Pool; Troy L. Booher, Salt Lake City, for State Farm Mutual Automobile Insurance Company; S. Spencer Brown, Scarlet R. Smith, Salt Lake City, for Prime Insurance Company; Heidi G. Goebel, Salt Lake City, Cary Silverman, Mark A. Behrens, Wash., D.C., for National Federation of Independent Business Small Business Legal Center, Inc., National Association of Manufacturers, American Tort Reform Association, Coalition for Litigation Justice, Inc., American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, American Trucking Associations, Inc., and Utah Trucking Association; Nathanael J. Mitchell, Salt Lake City, for Utah Defense Lawyers

Association; Peggy E. Stone, Joshua D. Davidson, J. Clifford Petersen, Asst. Solics. Gen., Salt Lake City, for Utah Division of Risk Management.

Additional attorneys for *amicus curiae*, in support of appellee: Peter W. Summerill, South Jordan, for Utah Association for Justice.

Justice Hagen authored the opinion of the Court, in which Chief Justice Durrant, Associate Chief Justice Pearce, Justice Petersen, and Justice Pohlman joined.

Justice Hagen, opinion of the Court:

INTRODUCTION

*1 ¶1 This opinion resolves a recurring issue in personal injury cases in which a plaintiff seeks to recover past medical expenses. If the plaintiff carried health insurance, those medical expenses may have already been paid, at least in part, by the insurance company. But evidence that the expenses were covered by insurance is generally inadmissible because a defendant's liability for damages cannot be reduced based on compensation the plaintiff received from a third party. This is known as the collateral source rule.

¶2 The amount that must be paid to satisfy an insured patient's medical bill varies based on the contractual arrangement between the health insurance company and the healthcare provider. The amount that providers agree to accept as full payment for services rendered to insured patients is often significantly less than the gross charge. We are asked to decide whether the collateral source rule requires exclusion of that negotiated charge.

¶3 This case arises from an automobile collision between Troy Gardner and Tyler Norman. Gardner brought a negligence claim against Norman in which he sought special damages for his past medical expenses. Both parties filed motions in limine to determine the admissibility of the negotiated charge Gardner's insurance paid the hospital to satisfy his medical bills. The district court decided that, under the collateral source rule, the negotiated charge paid by Gardner's insurance must be excluded. The district court ultimately awarded Gardner special damages for his past medical care based on the hospital's gross charges. Norman appealed, and we elected to retain this case because it presents an issue of first impression before this court.

¶4 We hold that the collateral source rule does not require exclusion of the negotiated charges for Gardner's medical care. The gross charge does not reflect Gardner's past medical expenses because neither he nor his insurance were ever obligated to pay that amount. Because the difference between the gross charge and the negotiated charge was not a benefit to Gardner from a collateral source, the rule does not apply. Accordingly, we vacate the special damages award and remand for a new bench trial on that issue.

BACKGROUND

¶5 Norman was driving a marked Salt Lake City police vehicle when he rear-ended Gardner's car, which was stopped in traffic on a freeway off-ramp. As a result of the collision, Gardner went to the emergency room and saw an eye doctor. The hospital billed Gardner \$7,175.77 for the emergency room visit. But as required by an existing contract between Gardner's health insurance and the hospital, the amount his insurance paid to fully satisfy the bill was \$4,395.75—just under a forty percent reduction of the initial charge. For Gardner's eye exam, the amount billed by the hospital and paid by his insurance was \$92.

¶6 Gardner later brought a negligence claim against Norman, seeking special damages for his past medical expenses and general damages for pain and suffering.¹ Gardner sought \$7,267.77 in special damages, representing the gross charges listed on the initial bill he received from the hospital.

1 Gardner also named Norman's employer, Salt Lake City, as a defendant. Prior to trial, the court granted the City's motion for summary judgment. Because Norman was not acting within the scope of his employment, the court determined that the City could not be held liable for the accident. We therefore refer to Norman as the only defendant even though the City participated in the litigation prior to its dismissal.

Pretrial Rulings

*2 ¶7 Both parties filed motions in limine to determine what evidence the fact finder could consider in determining Gardner's medical expenses. In his motion, Norman moved to exclude all evidence of the gross charge, which he refers to as the “chargemaster rate.”

¶8 Federal law requires hospitals to publish “a list of the hospital's standard charges for items and services provided by the hospital.” 45 C.F.R. § 180.10. “Standard charge means the regular rate established by the hospital for an item or service provided to a specific group of paying patients,” including (1) the “[g]ross charge,” (2) the “[d]iscounted cash price” for individuals who self-pay, (3) the “[p]ayer-specific negotiated charge,” which is the amount a hospital has negotiated with a third party, and (4) the “[d]e-identified maximum” and “[d]e-identified minimum” representing the highest and lowest charge a hospital has negotiated with all third-party payers. *Id.* §§ 180.20, 180.50(b). The gross charge “means the charge for an individual item or service that is reflected on a hospital's chargemaster, absent any discounts.” *Id.* § 180.20. “Payer-specific negotiated charge[s]” include those that insurance companies have negotiated to pay. *Id.* § 180.50(b). Insurance companies regularly contract with healthcare providers in advance to set the negotiated charge for all available services. See [Tschaggeny v. Milbank Ins.](#), 2007 UT 37, ¶ 10, 163 P.3d 615 (explaining that it is “typical in the industry,” as part of an existing contractual arrangement, for a “health insurer [to have] negotiated a lower rate for health care services for its policy holders”).

¶9 Norman argued in his motion that the district court should exclude evidence of the gross charge for Gardner's medical care or, in the alternative, allow evidence of both the gross charge and the negotiated charge Gardner's insurance actually paid to satisfy the bill. In response, Gardner argued that exclusion of the gross charge listed on his initial bill “based on indemnification from [his] private health insurance” would “directly violate[] Utah's adoption of the collateral source rule.” He contended that limiting his ability to present “evidence of the amount charged” as a direct result of the car crash would hinder his ability “to show that the value of medical services received was reasonable and necessary.”

¶10 The district court denied Norman's motion, ruling that “the insurance company payment and discount that were received as a benefit to the plaintiff fit under the collateral source doctrine.” The court reasoned that alleged tortfeasors are not entitled to the benefit of discounts negotiated by a plaintiff's insurance because a tortfeasor who denies liability (1) “has not accepted responsibility for payment,” (2) “has not negotiated for discounts,” (3) “has not voluntarily accepted payment responsibility at the time of the service,” and (4) “delays payment until after a lawsuit is filed.” Such tortfeasors, the court continued, “should not be entitled to the same discounts available to patients or their insurers who voluntarily agree to pay at the time medical services are rendered.”

¶11 Following the court's ruling, the parties proceeded with disclosure of trial exhibits. Upon receipt of the exhibits, Gardner moved to exclude any evidence or mention of the negotiated charges he or his insurance actually paid for medical services as opposed to the gross charges originally billed. Gardner argued that the negotiated charges were inadmissible under the collateral source rule. Norman countered that evidence of the negotiated amount “doesn't violate the collateral source rule because it's not seeking to reduce [damages] by the fact the third party had paid [them], just trying to introduce [the negotiated rate] as relevant evidence of the amount that is reasonable for the services.” The district court granted Gardner's motion ruling that evidence of “insurance discounts” would be excluded from the trial.

Bench Trial

*3 ¶12 During a bench trial, Norman's counsel attempted to question Gardner about the billing for his emergency room visit. The evidence showed that the hospital billed Gardner's emergency room visit at two different levels of service—level four and level five. The evidence also showed that Gardner's insurance denied coverage of the level five bill for \$1,208—an amount included in the total \$7,267.77 Gardner sought.²

² Norman contends that this denial included a comment: “[M]edical records do not support level 5. Please re-bill.” The record citation Norman provides for this comment only shows a denial with no comment. But Gardner has not disputed the factual accuracy of Norman's representation.

¶13 Norman's counsel asked Gardner on cross-examination if he ever questioned the hospital about why it billed the emergency room visit at two different levels. Gardner said he did not. Norman's counsel then asked whether the hospital ever withdrew the bill. Gardner's counsel objected that the question called for speculation, which the district court overruled. Gardner responded that he knew “they made adjustments later.” Norman's counsel asked whether Gardner knew what those adjustments were. Gardner's counsel moved to strike, citing the collateral source rule. The court sustained the objection.

¶14 At the conclusion of the bench trial, the court determined that Norman breached his duty of care and proximately caused Gardner's injuries. In addition to general damages, the court awarded Gardner special damages for past medical expenses in the amount of \$7,267.77—the gross charge initially billed by the hospital. Because Norman had already reimbursed Gardner's personal injury protection car insurance for \$3,000, the court deducted that amount from the special damages award, bringing the total to \$4,267.77.

¶15 Norman appealed.

ISSUE AND STANDARD OF REVIEW

[1] ¶16 Norman argues that the district court erred when it relied on the collateral source rule to allow Gardner to introduce the gross charge for his medical care, to prevent Norman from introducing the negotiated charge, and to prevent Norman from questioning Gardner about whether a bill was withdrawn or reduced due to a billing error. While we review a district court's decision to admit evidence for abuse of discretion, we review for correctness the “legal questions underlying the admissibility of evidence”—in this case the applicability of the collateral source rule. [State v. Griffin](#), 2016 UT 33, ¶ 14, 384 P.3d 186 (cleaned up); see also [Mahana v. Onyx Acceptance Corp.](#), 2004 UT 59, ¶ 35, 96 P.3d 893 (“Whether the district court was correct in its application of the collateral source rule is a question of law that we review for correctness, without deference to the district court's conclusions.”).

ANALYSIS

¶17 The question presented is whether the collateral source rule requires courts to exclude evidence of the negotiated charge for an insured plaintiff's past medical care. This is a matter of first impression in Utah. See [Tschaggeny v. Milbank Ins.](#), 2007 UT 37, ¶ 24, 163 P.3d 615 (noting “that the application of the collateral source rule to medical bill write-offs is a matter of first impression in Utah” but declining to reach the unpreserved issue). To answer this question, we begin with basic principles governing special damages as well as an overview of the collateral source rule. We next examine how other courts have analyzed

the collateral source rule in this context. We then conclude that the collateral source rule does not operate to exclude evidence of the negotiated rates paid for an insured plaintiff's medical care.

1. Special Damages

*4 [2] [3] ¶18 When a plaintiff suffers harm from a defendant's tortious actions, “compensatory damages seek to place the plaintiff in the same position [the plaintiff] would have occupied had the tort not been committed.” *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 37 n.10, 289 P.3d 369 (cleaned up). Special damages, a form of compensatory damages also known as specific or economic damages, account for “harm that is considered more finite” and “measureable.” *Sheppard v. Geneva Rock*, 2021 UT 31, ¶ 17 n.5, 493 P.3d 632 (cleaned up). Such damages are limited to “hard amounts” incurred by the plaintiff “that are subject to careful calculation such as the cost of medical and other necessary care.” *Id.* (cleaned up); see also *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993) (explaining that plaintiffs may recover medical expenses “incur[red] as a result of a demonstrated injury” (cleaned up)).

[4] [5] ¶19 To recover “compensation for medical expenses in a tort action,” a plaintiff must prove that the amount incurred was “reasonable and necessary.” *Hansen*, 858 P.2d at 981; see also *Wilson*, 2012 UT 43, ¶ 37, 289 P.3d 369 (“Upon proof of liability, a plaintiff may recover medical expenses that are reasonable and necessary.”); *Simmons v. Wilkin*, 80 Utah 362, 15 P.2d 321, 323 (1932) (explaining that special damages must “be reasonable and necessary as a result of the accident”). Specifically, “evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injur[y] and that the charges are reasonable.” *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 35, 17 P.3d 1110. The reasonableness requirement means that, even if the treatment was necessary, recovery is limited to “the reasonable value of the services rather than the amount paid or charged.” RESTATEMENT (SECOND) OF TORTS § 911 cmt. h (A.L.I. 1979).

¶20 But if “the injured person paid *less* than the exchange rate, he can recover no more than the amount paid.” *Id.* (emphasis added). Because special damages compensate the plaintiff for the concrete economic harm suffered as a result of the tortfeasor's actions, *Sheppard*, 2021 UT 31, ¶ 17 n.5, 493 P.3d 632, it is not enough to prove that certain expenses *would have been* reasonable had they been incurred. In other words, only “reasonable and necessary expenses for medical care and other related expenses incurred” are compensable as special damages. Cf. MODEL UTAH JURY INSTRUCTIONS 2d CV2003 & CV2005, <https://legacy.utcourts.gov/muji/?cat=1&subcat=20> (last visited Oct. 24, 2025) (defining economic damages).

2. The Collateral Source Rule

[6] [7] ¶21 When a third party covers all or part of a plaintiff's medical expenses, the collateral source rule is implicated.³ Under this rule, wrongdoers are “not entitled to have damages, for which [they are] liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source.” *Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co.*, 949 P.2d 337, 345 (Utah 1997) (cleaned up). In its application, the collateral source rule has both an evidentiary and a damages aspect.

³ The collateral source rule is a common law concept that can be altered by statute. In some states, the legislature has modified or abolished the collateral source rule. See, e.g., *Gulfstream Park Racing Ass'n v. Volin*, 326 So. 3d 1124, 1126 (Fla. Dist. Ct. App. 2021) (Florida statute “requires a court to setoff certain payments from collateral sources in personal injury cases”); *Swanson v. Brewster*, 784 N.W.2d 264, 269 (Minn. 2010) (Minnesota “statute changed the rule on collateral sources and damage awards, essentially providing that a plaintiff cannot recover money damages from

the defendant if the plaintiff has already received compensation from certain third parties or entities”); [Furlong v. Merriman](#), No. HHBCV044000416S, 2006 WL 1461112, at *7 (Conn. Super. Ct. May 4, 2006) (Connecticut statute requires the court to “reduce the amount of an economic damages award by an amount equal to the total” paid by a collateral source (cleaned up)).

The Utah Legislature has altered this common law rule only for medical malpractice claims. *See generally* [UTAH CODE § 78B-3-405](#). When a plaintiff receives damages in a malpractice action, “the court shall reduce the amount of the award by the total of all amounts paid to the plaintiff from all collateral sources.” [Id.](#) § 78B-3-405(1). But where a collateral source has a subrogation right or the collateral payment was not included in the damages award, the court does not reduce the damages. *Id.*

*5 [8] [9] ¶22 The evidentiary aspect “precludes both explicit reference and methodical allusion to collateral source benefits.” [Wilson](#), 2012 UT 43, ¶ 2, 289 P.3d 369. “It has long been recognized that evidence of collateral source benefits involves a substantial likelihood of prejudicial impact.” [Id.](#) ¶ 47 (cleaned up). That prejudice may occur in two ways. First, evidence of payment from a collateral source suggests that a plaintiff is already receiving any necessary care, which may lead the jury to “believe[] that the outcome of the trial is immaterial to the party benefitting from the collateral source.” [Id.](#) (cleaned up). Second, because many jurors “do not understand the concept of subrogation rights, they will erroneously conclude that the plaintiff is seeking a windfall.” [Id.](#) This misunderstanding is “highly prejudicial because the jury will believe that the plaintiff has already been fully compensated and is trying to obtain a double recovery,” thereby tainting the jury’s decision-making process. [Id.](#) (cleaned up).

[10] [11] [12] ¶23 The damages aspect prevents a plaintiff’s recovery from being offset by any payments provided by an independent collateral source. *See* [Gibbs M. Smith, Inc.](#), 949 P.2d at 345; [Mahana v. Onyx Acceptance Corp.](#), 2004 UT 59, ¶ 37, 96 P.3d 893. Put simply, “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.” [RESTATEMENT \(SECOND\) OF TORTS § 920A\(2\) \(A.L.I. 1979\)](#). This means that the plaintiff may recover medical expenses already paid by the plaintiff’s insurance even when “it results in a windfall to the plaintiff based on the premise that the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall.” [Mahana](#), 2004 UT 59, ¶ 37, 96 P.3d 893. The rule is also intended to “encourage[] the maintenance of insurance by assuring that a plaintiff’s payments from a collateral source will not be reduced by a subsequent judgment.” [Wilson](#), 2012 UT 43, ¶ 31, 289 P.3d 369 (cleaned up).

3. Application to the Negotiated Charges Context

¶24 In this appeal, Norman argues that the collateral source rule “does not apply to preclude evidence of the amount” of the negotiated charge “or to entitle a plaintiff to recover more than the damage actually caused by the defendant.” He contends that the collateral source rule instead is “limited to preventing evidence of the source of the payment, *not the amount paid*.” In Norman’s view, “admitting evidence of rates not charged to or paid by [a plaintiff] or his insurer and excluding the amounts actually charged and paid is contrary to bedrock principles of compensatory damages and tort recovery, which aim to compensate only for the harm caused.”

¶25 In contrast, Gardner argues that “[c]onsistent with the collateral source rule,” only the gross charge initially billed to a plaintiff is “admissible to prove the reasonable and necessary amount of medical expenses.” He contends that this is consistent with the purpose of the collateral source rule: “to prevent a windfall to the tortfeasor, ensuring that the plaintiff—not the wrongdoer—benefits from” a plaintiff’s “efforts to secure discounted medical bills while avoiding full responsibility for payment of the claim.” Gardner asserts that “evidence of the amount paid or accepted by insurance” is evidence of a benefit from a

collateral source and “does not reflect the true costs and efforts associated with obtaining and maintaining coverage, including paying premiums and dealing with coverage disputes.”

¶26 The debate between these two parties is one that has played out in other cases across the country with states reaching various conclusions. Among the states that have allowed consideration of the negotiated charge, several approaches have emerged. For a number of states, the outcome has been dictated by state statutes modifying the collateral source rule.⁴ Other states allow the admission of both the gross rate and the negotiated rate as evidence of the reasonable value of medical care.⁵ Yet a third approach precludes recovery based on the gross charge by either excluding evidence of the gross charge or reducing the damages award post-verdict.⁶

⁴ See, e.g., [Weston v. AKHappytime, LLC](#), 445 P.3d 1015, 1019 (Alaska 2019); [Meek v. Mont. Eighth Jud. Dist. Ct.](#), 379 Mont. 150, 349 P.3d 493, 496 (2015); [Haygood v. De Escabedo](#), 356 S.W.3d 390, 395–99 (Tex. 2011); [Swanson](#), 784 N.W.2d at 269–70, 282; [Deck v. Teasley](#), 322 S.W.3d 536, 538–42 (Mo. 2010) (en banc); [Crocker v. Grammer](#), 87 So. 3d 1190, 1193 (Ala. Civ. App. 2011); [Furlong](#), 2006 WL 1461112, at *7–8, *11.

⁵ See, e.g., [Martinez v. Milburn Enters., Inc.](#), 290 Kan. 572, 233 P.3d 205, 222–23 (2010); [Law v. Griffith](#), 457 Mass. 349, 930 N.E.2d 126, 135–36 (2010); [Stanley v. Walker](#), 906 N.E.2d 852, 858 (Ind. 2009); [Robinson v. Bates](#), 112 Ohio St.3d 17, 857 N.E.2d 1195, 1200–01 (2006); [Barday v. Donnelly](#), No. CV-04-508, 2006 WL 381876, at *2–3 (Me. Super. Ct. Jan. 27, 2006).

⁶ See, e.g., [Weston](#), 445 P.3d at 1019; [Haygood](#), 356 S.W.3d at 395–99; [Howell v. Hamilton Meats & Provisions, Inc.](#), 52 Cal.4th 541, 129 Cal.Rptr.3d 325, 257 P.3d 1130, 1139–40 (2011); [Swanson](#), 784 N.W.2d at 269–70, 282; [Sliker v. Nat'l Feeding Sys., Inc.](#), No. 282 CD 2010, 2015 WL 13779690, at *8 (Pa. Ct. Com. Pl. Oct. 19, 2015); [Furlong](#), 2006 WL 1461112, at *7–8, *11; [Wildner v. Wendorff](#), No. 05-1998, 2006 WL 2265453, at *4 (Iowa Ct. App. Aug. 9, 2006).

*6 ¶27 The third approach is best exemplified by [Howell v. Hamilton Meats & Provisions, Inc.](#), 52 Cal.4th 541, 129 Cal.Rptr.3d 325, 257 P.3d 1130 (2011). In that case, the California Supreme Court considered “whether restricting recovery to amounts actually paid by a plaintiff or on his or her behalf contravenes the collateral source rule.” [Id.](#), 129 Cal.Rptr.3d 325, 257 P.3d at 1137. As in our case, the defendant moved “to exclude evidence of medical bills that neither [the] plaintiff nor her health insurer ... had paid.” [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1137. The defendant asserted that the record showed that “significant amounts” of the plaintiff’s past medical bills “had been adjusted downward before payment pursuant to [prior] agreements between” the healthcare providers and her insurance. [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1133–34.

¶28 The court held “that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less.” [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1137. The court explained that “[t]o be recoverable, a medical expense must be both incurred *and* reasonable.” [Id.](#) In the court’s view, the burden to prove that the plaintiff’s special damages reflect the “reasonable value” of the services incurred limits “recovery to reasonable expenditures” but does “not expand [] recovery beyond the plaintiff’s actual loss or liability.” [Id.](#) In other words, the reasonable value of medical care in this context “is a term of limitation, not of aggrandizement.” [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1136 (cleaned up).

¶29 Turning to the case before it, the court concluded that the “plaintiff did not incur liability for her providers’ full bills, because at the time the charges were incurred the providers had already agreed on a different price schedule for” patients covered by the plaintiff’s insurance. [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1143. And because the plaintiff “never incurred the full bill,” the court went on, the plaintiff “could not recover [that amount] in damages for economic loss,” making the collateral source rule “inapplicable.” [Id.](#)

¶30 The court clarified that the rule still “applie[d] with full force” to prevent the deduction of payment made by an independent source “from the *damages which the plaintiff would otherwise collect from the tortfeasor.*” [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1143–44 (cleaned up). But “the negotiated rate differential [was] not a collateral payment or benefit subject to the collateral source rule.” [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1144. “Certainly, the collateral source rule should not extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay.” [Id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1143 (cleaned up).

[13] [14] ¶31 We find the reasoning of the California Supreme Court persuasive. Special damages must reflect the actual loss resulting from the tortfeasor’s conduct. Under the collateral source rule, the fact that a third party bore that loss is inadmissible and cannot be used to reduce a plaintiff’s recovery. But that rule does not alter the fundamental principle that special damages are limited to the actual loss resulting from the injury.

¶32 Here, Gardner never incurred the gross charges listed on the initial hospital bill. Before he was injured, Gardner’s insurance had entered into a contract with the hospital that set out the authorized amounts that could be charged to insured patients. Because the contracted prices were in place when Gardner sought treatment, his “prospective liability” was limited to those authorized amounts. See [id.](#) 129 Cal.Rptr.3d 325, 257 P.3d at 1139. As a result, Gardner “cannot meaningfully be said” to have ever “incurred the full charges.” [Id.](#) Even if the gross charges reflect a reasonable cost of necessary treatment resulting from the injury, they do not represent the cost of the medical services that Gardner received, which was limited to the preexisting negotiated charges.

*7 ¶33 Gardner argues that such a determination violates the public policy underlying the collateral source rule by awarding a windfall to tortfeasors. See [Wilson](#), 2012 UT 43, ¶ 31, 289 P.3d 369 (“[P]ublic policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source.” (cleaned up)). Norman, on the other hand, argues that to rule otherwise violates “the fundamental tort law purpose of placing” plaintiffs in the same position they would have occupied but for the tort. See [Mahana](#), 2004 UT 59, ¶ 26, 96 P.3d 893 (“To the extent possible, the fundamental purpose of compensatory damages is to place the plaintiff in the same position he would have occupied had the tort not been committed.”). We agree with Norman.

[15] [16] ¶34 Limiting an insured plaintiff’s recovery to the negotiated charge does not create a windfall for tortfeasors. The collateral source rule prevents a plaintiff’s recovery from being “reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source.” [Gibbs M. Smith, Inc.](#), 949 P.2d at 345 (cleaned up). It prevents a tortfeasor from obtaining a windfall where collateral source benefits have mitigated the plaintiff’s out-of-pocket losses. See generally [Wilson](#), 2012 UT 43, 289 P.3d 369. But the difference between the gross charge and the negotiated charge is “not a ‘benefit’ under the collateral-source rule because it is not a payment.” [Robinson v. Bates](#), 112 Ohio St.3d 17, 857 N.E.2d 1195, 1200–01 (2006). Only “the amount a plaintiff’s health insurer actually pays to the health care provider is a benefit from a collateral source.” [Martinez v. Milburn Enters., Inc.](#), 290 Kan. 572, 233 P.3d 205, 213 (2010).

[17] ¶35 Given that no one pays the difference between the gross charge and the negotiated charge, admitting evidence of the predetermined reduction “does not violate the purpose behind the collateral-source rule.” [Robinson, 857 N.E.2d at 1200](#). The tortfeasor does “not obtain a credit because of payments made by a third party on behalf of the plaintiff,” which is what the collateral source rule prevents. [Id.](#) The tortfeasor still faces the burden of paying for the economic loss proximately caused by the tortfeasor's negligence. But the difference between the gross charge and the negotiated charge results from the preexisting contractual arrangement between the insurer and the healthcare provider. It is not a loss caused by the tortfeasor's conduct.

[18] ¶36 If special damages were based on the gross charge, it would place the plaintiff “in a better financial position than before the tort was committed.” [Howell, 129 Cal.Rptr.3d 325, 257 P.3d at 1136](#). In limited situations, such a windfall to the plaintiff is permitted by the collateral source rule. If the collateral source lacked subrogation rights, for instance, the rule contemplates that “the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall.” [Mahana, 2004 UT 59, ¶ 37, 96 P.3d 893](#). But that does not allow the plaintiff to recover more than the actual loss caused by the tortfeasor's conduct as special damages.

[19] ¶37 Gardner also argues that it would be unfair to allow a tortfeasor to benefit from the plaintiff's efforts to maintain health insurance when the tortfeasor's liability to an otherwise identical plaintiff might have been greater based merely on insurance status. We recognize that medical billing “depends, to a significant extent, on the identity of the payer.” [Howell, 129 Cal.Rptr.3d 325, 257 P.3d at 1142](#). But “one who injures another takes him as he is.” [Harris v. ShopKo Stores, Inc., 2013 UT 34, ¶ 23, 308 P.3d 449](#) (cleaned up). This will often mean that the same tortious conduct might result in vastly different damage awards based on the identity and personal characteristics of the plaintiff. It is simply the luck of the draw that a defendant who injured an insured plaintiff might be required to pay a lower damages award for past medical expenses because of the preexisting contract between the plaintiff's insurer and the medical providers.⁷

⁷ We also recognize that the disparity between an insured and uninsured plaintiff may not be as great as Gardner suggests. As with insured individuals, predetermined discounted rates exist for those who are uninsured. By way of example, the hospital where Gardner received care has posted rates showing that an uninsured individual receiving the same treatment as Gardner would receive about a twenty-five percent discount. *See Price Transparency, INTERMOUNTAIN HEALTH, <https://intermountainhealthcare.org/locations/intermountain-medical-center/about/price-transparency>* (last visited Oct. 24, 2025). The adjusted charge for an uninsured patient would be greater than the negotiated charge Gardner incurred, but in both cases, the gross charge would not reflect the medical expenses they each incurred, regardless of their insurance status.

*8 [20] ¶38 In holding that the negotiated charge for past medical expenses is the proper measure of special damages, we emphasize that our holding does not modify the collateral source rule. Under that rule, evidence that an insurer paid any portion of the medical costs a plaintiff incurred is inadmissible. *See* [Wilson, 2012 UT 43, ¶ 2, 289 P.3d 369](#). Similarly, a plaintiff's recovery cannot be reduced by the amounts paid or reimbursed through health insurance, except in medical malpractice cases as provided by statute. *See supra* ¶ 21 n.3. To borrow the California Supreme Court's language in [Howell](#), “we merely conclude [that] the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule.” [129 Cal.Rptr.3d 325, 257 P.3d at 1145](#). Both the evidentiary and damages aspects of the collateral source rule remain in full effect, except where abrogated by statute. But that rule does not allow a plaintiff to recover more than the amount actually incurred for past medical treatment.

[21] ¶39 Although special damages must be based on the costs the plaintiff actually incurred, we do not go so far as to hold that evidence of gross charges is never admissible. Where the reasonableness of the negotiated charge is in dispute, for instance, the gross charge might be relevant to a fact at issue, *see* [UTAH R. EVID. 401](#), although the risk of prejudice might substantially

outweigh the probative value of that evidence, *id.* R. 403, especially if its admission risks violating the collateral source rule by revealing that the cost was covered, in whole or in part, by insurance. And we express no opinion on the “relevance or admissibility” of this evidence “on other issues, such as noneconomic damages or future medical expenses.” [Howell, 129 Cal.Rptr.3d 325, 257 P.3d at 1146](#).

¶40 Here, the district court excluded evidence of the negotiated charge and used the gross charges to calculate the special damages award, based on its understanding that the collateral source rule required that result. But while the collateral source rule prohibits evidence that Gardner's medical costs were paid by his insurance, it does not allow Gardner to recover special damages for costs he has not and never will incur. We therefore vacate the district court's award of special damages and remand for a new trial on that issue.

CONCLUSION

¶41 Under the collateral source rule, the fact that the negotiated charge was paid by a third party is inadmissible and cannot reduce the plaintiff's recovery. But the amount of the negotiated charge reflects the actual loss incurred, which is the measure of special damages. Because the court based the special damages award on the gross charges for which neither Gardner nor his insurance were responsible, we vacate the award and remand.

All Citations

--- P.3d ----, 2025 WL 3030153, 2025 UT 47

Restat 2d of Torts, § 911

Restatement of the Law, Torts 2d - Official Text > Division 13- Remedies >
Chapter 47- Damages > Topic 1- General Statements

§ 911 Value

(1) As used in this Chapter, value means exchange value or the value to the owner if this is greater than the exchange value.

(2) The exchange value of property or services is the amount of money for which the subject matter could be exchanged or procured if there is a market continually resorted to by traders, or if no market exists, the amount that could be obtained in the usual course of finding a purchaser or hirer of similar property or services. The rental value of property is the exchange value of the use of the property.

COMMENTS & ILLUSTRATIONS

Comment:

a. Specific rules on the measure of recovery when there has been a conversion or destruction of chattels or the destruction of title to land or other things, are stated in § 927. This Section defines value with particular reference to that Section but also with reference to value wherever the word is used in this Chapter.

b. *Market value.* If there is an established market, the value of property ordinarily is determined by the amount paid in actual transactions involving a similar subject matter if the transactions have occurred at or about the time fixed for determining value. If no transaction has taken place, the value is determined by the amounts that have been bid and asked for substantially identical things.

c. *Place of market.* If there is no market at the place where a chattel is destroyed or converted, the cost of transportation to or from the nearest market is added to or subtracted from the value in the market in order to measure the pecuniary loss suffered by the injured person. Thus, if the property was raised or manufactured elsewhere for sale at the market and it was destroyed at its place of origin, the cost of transportation to the market is deducted. If, however, the article had been transported from a distant market for the owner's own use or for sale at the place where it was taken or destroyed, the cost of transportation is added. Thus the damages for the destruction of a portion of the supplies of an exploring expedition would include an amount for transportation from the nearest market where the supplies were available.

If goods are converted when en route to a market for sale or use, damages are the value of the goods in the market. If they are converted by the carrier, the damages are the value of the goods at the place of market, less the freight if the freight has not been paid.

d. *Wholesale or retail value.* From the time when a chattel is manufactured to the time of its actual use, there may be many markets in which it is sold. Thus, different prices are paid by the wholesaler, the retail dealer and the consumer. Since the measure of recovery is determined by the harm done, the market that determines the measure of recovery by a person whose goods have been taken, destroyed or detained is that to which he would have to resort in order to replace the subject matter. Thus the consumer can recover the retail price; the retail dealer, the wholesale price. The manufacturer, who does not buy in a market, receives his selling price. Damages for the profits that the wholesale dealer or the retail dealer would normally anticipate from a sale are not ordinarily allowed. However, if the dealer has made a contract to sell certain goods that another has destroyed, taken or detained and he has been unable to obtain similar goods for delivery to the purchaser, he is entitled to recover damages for the loss of profits thus caused, if he can satisfy the requirement of certainty. (See § 912). Likewise, a consumer or user may recover for the harm done through the loss of use of the chattel until he can obtain a substitute; the dealer or manufacturer is entitled to damages for any harm done to his business through his inability to obtain substitutes and thus satisfy his customers. (See § 927).

§ 911, Value

e. Peculiar value to the owner. The phrase "value to the owner" denotes the existence of factors apart from those entering into exchange value that cause the article to be more desirable to the owner than to others.

Some things may have no exchange value but may be valuable to the owner; other things may have a comparatively small exchange value but have a special and greater value to the owner. The absence or inadequacy of the exchange value may result from the fact that others could not or would not use the thing for any purpose, or would employ it only in a less useful manner. Thus a personal record or manuscript, an artificial eye or a dog trained to obey only one master, will have substantially no value to others than the owner. The same is true of articles that give enjoyment to the user but have no substantial value to others, such as family portraits. Second-hand clothing and furniture have an exchange value, but frequently the value is far less than its use value to the owner. In these cases it would be unjust to limit the damages for destroying or harming the articles to the exchange value.

Real property may also have a value to the owner greater than its exchange value. Thus a particular location may be valuable to an occupant because of a business reason, as when he has built up good will in a particular neighborhood.

Even when the subject matter has its chief value in its value for use by the injured person, if the thing is replaceable, the damages for its loss are limited to replacement value, less an amount for depreciation. (See § 928). If the subject matter cannot be replaced, however, as in the case of a destroyed or lost family portrait, the owner will be compensated for its special value to him, as evidenced by the original cost, and the quality and condition at the time of the loss. Likewise an author who with great labor has compiled a manuscript, useful to him but with no exchange value, is entitled, in case of its destruction, to the value of the time spent in producing it or necessary to spend to reproduce it. In these cases, however, damages cannot be based on sentimental value. Compensatory damages are not given for emotional distress caused merely by the loss of the things, except that in unusual circumstances damages may be awarded for humiliation caused by deprivation, as when one is deprived of essential articles of clothing. If the article was wantonly destroyed, punitive damages can be awarded.

f. Exchange value when there is no market. In case of land for which there is no ready market, the exchange value of a tract can be proved by evidence of sales of other nearby tracts at or about the same time if substantially the same elements of value appear in the tracts. The opinion of a real estate expert, and indeed, any opinion as to exchange value, is an attempt to estimate the amount that would be given for the property by a person, if there were one, willing to buy the property for the lawful purpose to which it is most advantageously adapted, and willing to pay a price that, in view of its use, is a fair one. If the supply is limited at the time when the exchange value is to be determined, the fact of scarcity is considered, while on the other hand, the fact that there is other property, either of the same or of a different nature, that could be utilized, may be considered in reducing the price that otherwise might be paid. The exchange value of an old building is not determined solely by the original cost or the cost of replacement, with deductions for depreciation or obsolescence, although the cost may be a factor in determining its value. In addition, there can be considered rental value, the value of the materials, the character of neighborhood and all other matters that might be properly considered by a purchaser.

The same principle and similar rules apply to determine the value of chattels for which there is no ready market or as to which there have been no transactions of purchase or sale. In determining the value of corporate shares in these cases, the net worth of the corporation may be considered. In determining the value of a used or unique chattel that has no peculiar value to the owner, the opinion of experts, the cost of reproduction and similar matters are relevant.

g. Value of a chose in action. Prima facie the present worth of a chose in action calling for an unconditional payment of a sum of money is the amount of the obligation. If it is represented by a document regularly bought and sold in a market, the market value, if shown, whether greater or less than the face amount, will control. Similarly, if it has no market value, it may be shown to be worth more than its face amount, as in the case of a note by a solvent person with a high rate of interest, or it may be shown to be worth less than its face amount, as when the obligor is of doubtful solvency.

Ordinarily one permanently deprived of a negotiable instrument representing the debt of a third person is entitled to the exchange value of the instrument at the time of taking or to the amount shown to have been lost

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by its taking, whichever is greater, as when the maker was insolvent at the time of taking and becomes solvent before trial or vice versa.

If a document representing a chose in action is wrongfully appropriated, the owner can elect to recover the value of the chose in action or to regain possession of it, if this is possible, with damages for loss caused by the interference with his possession of the document. If a claim is based upon the negligent loss or destruction of the document, the owner can recover the value only when the amount represents the harm in fact caused to him. This may be only nominal, as when a share certificate has been destroyed for which a substitute can easily be obtained.

h. Value of services rendered. The measure of recovery of a person who sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages, is the reasonable exchange value of the services at the time and place. This may be distinct from and may be either greater or less than an amount that would be given for harm resulting from the loss of time by the injured person. (See § 924).

If the services are rendered in a business or profession in which there is a rate for them definitely established by custom, the customary rate controls. If there is no customary rate, evidence of what the claimant has received and what other persons receive for similar services, and other factors, including the reputation of the person giving the services, the skill with which the work is done and the difficulty and danger of the work, are taken into consideration.

When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him. A person can recover even for an exorbitant amount that he was reasonable in paying in order to avert further harm. (See § 919).

i. Value of a contract. The value of a contract is the present value of the net expectable profit to be derived from the contract, plus the value of partial performance already given by the claimant and not paid for. This profit is the difference between the amount that probably would be received under the contract and the amount that probably would be expended in performance, both reduced to present worth. In some contracts the contingencies on both sides are so uncertain that any fixed sum is a mere estimate based on guess. If so, the rule on certainty (see § 912) may prevent recovery of anything more than nominal damages; if, however, it is reasonably certain that some profit would have been received, the trier of fact is justified in awarding an amount that roughly corresponds to the smallest sum that probably would have been gained. In the case of an uncompleted contract, the plaintiff must show that probably he would have completed his part of it. In proceedings brought for interference with contracts, the solvency or insolvency of the other contracting party is relevant.

j. Value of money. The value of money is assumed to be constant in actions for money tortiously taken or destroyed and in actions to obtain the value of property or services at a particular time. In both cases the measure of recovery is unaffected by a subsequent increase or decrease in the purchasing power of money, that is, its value with reference to commodities. However, in actions for permanent harm to earning capacity in which the damages are based upon the probable loss of future income from services, facts as to the variations in the amount of money paid for services in the recent past are relevant. Likewise, in actions for physical harm, such as damage to property, the fact that the purchasing power of money has lessened or increased since the injury may be relevant.

Money as used herein means only domestic currency. Foreign money is a commodity and its value fluctuates in terms of domestic currency like the value of other commodities, so that the general rule for the value of a commodity applies in actions in which the value of foreign money is relevant. See § 927 for the time when value is determined in actions for the destruction or conversion of chattels.

k. Value with reference to time. As stated in § 927, a person deprived of property may have an election to determine the time at which the value is to be fixed; and this is important in cases in which its value has fluctuated, either because similar articles have fluctuated in value, or because the condition or known properties of the subject matter have changed. Thus when the defendant has converted the plaintiff's shares in a corporation, the plaintiff may be entitled to the value at a time subsequent to that at the time of conversion. Likewise, the value of the subject matter may be affected by external events, such as the likelihood at a

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particular time that a railroad will approach a particular piece of land, which may be either a depreciating or an appreciating factor. So a lottery ticket, if the tickets are legal, may vary in value from the current price of five dollars before the drawing to \$ 100,000 or nothing after the drawing. In the same way a growing crop may be worth \$ 1000 immediately preceding a period of drought and worth nothing immediately afterwards, or a tract of land thought to contain oil may lose its value when a dry well is bored. (See § 929, Comment a). In these cases the value of the subject matter, as the basis for recovery of damages, depends upon the time at which the plaintiff is entitled to fix the completion of the tort. It should be noted, however, that in accordance with the rule stated in § 927, in many of these cases the plaintiff is entitled to obtain, not merely the value of the subject matter at a particular time, but also any additional damages that may result from the defendant's act, including, in some cases, profits that would have been made from the sale or use of the property.

REPORTER'S NOTES

Comment b: Market value.

See *United States v. Hatahley*, 257 F.2d 920 (10th Cir.1958), cert. denied 358 U.S. 899, 79 S.Ct. 222, 3 L.Ed.2d 148 (1958); *Stoll v. Almon C. Judd Co.*, 106 Conn. 551, 138 A. 479 (1927); *Atlanta Commercial Builders, Inc. v. Polinsky*, 148 Ga.App. 181, 250 S.E.2d 781 (1978); *Higgins v. Belson*, 66 Idaho 736, 168 P.2d 813 (1946); *Everett v. Union Pac. R. Co.*, 59 Iowa 243, 13 N.W. 109 (1882); *McGilvra v. Minneapolis, St. P. & S.S.M. R. Co.*, 35 N.D. 275, 159 N.W. 854 (1916).

Comment c: Place of market.

On deducting the cost of transportation, see *Felder v. Reeth*, 34 F.2d 744 (9th Cir.1932); *Montgomery County Nat. Bank v. Wherry*, 102 Kan. 224, 169 P. 1146 (1918); *Rass v. Sharp*, 46 Mont. 474, 128 P. 594 (1912); *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154, 46 P. 52 (1896); *Graves v. Trevino*, 386 S.W.2d 831 (Tex.Civ.App.1965); *Nelson v. Eastern Ry. & Lbr. Co.*, 166 Wash. 363, 6 P.2d 1111 (1932).

On adding the cost of transportation, see *McGilvra v. Minneapolis, St. P. & S.S.M. R. Co.*, 35 N.D. 275, 159 N.W. 854 (1916); *Atchison, T. & S.F. R. Co. v. Nation & Slavens*, 92 S.W. 823 (Tex.Civ.App.1906); *Weber v. Wisconsin Power & Light Co.*, 215 Wis. 480, 255 N.W. 261 (1934).

Comment d: Wholesale or retail value.

See *Whaley v. Crutchfield*, 226 Ark. 921, 294 S.W.2d 775 (1956); *Hedderman v. Robert Hall, Inc.*, 145 Conn. 410, 144 A.2d 60 (1958); *Stoll v. Almon C. Judd Co.*, 106 Conn. 551, 138 A. 479 (1927); *International Harvester Co. v. Chicago, M. & St. P. R. Co.*, 186 Iowa 86, 172 N.W. 471 (1919); *Amstar Corp. v. M/V Alexandros T.*, 472 F.Supp. 1289 (D.Md.1979); *Dubiner's Bootery, Inc. v. General Outdoor Advertising Co.*, 10 A.D.2d 923, 200 N.Y.S.2d 757 (1960); *Needham Piano & Organ Co. v. Hollingsworth*, 91 Tex. 49, 40 S.W. 787 (1897); *Shield Co. v. Cartwright*, 172 S.W.2d 108 (Tex.Civ.App.1943), aff'd, 142 Tex. 324, 177 S.W.2d 954 (1944); *Missouri, K. & T. R. Co. v. Cadenhead*, 164 S.W. 395 (Tex.Civ.App.1914).

Comment e: Peculiar value to owner.

See *Rhoades, Inc. v. United Air Lines, Inc.*, 224 F.Supp. 341 (W.D.Pa.1963), aff'd, 340 F.2d 481 (3rd Cir.1965) (airboat); *Cecil v. Headley*, 237 Ark. 400, 373 S.W.2d 136 (1963) (household goods); *Holms v. Freeman*, 23 Conn.Supp. 504, 185 A.2d 88 (1962) (same); *Rafal v. Rafal*, 41 Del.Ch. 434, 198 A.2d 177 (1964) (same); *Southern Indiana Gas & Elec. Co. v. Indiana Ins. Co.*, Ind.App. , 383 N.E.2d 387 (1978) (wearing apparel); *Anchor Stove & Furn. Co. v. Blackwood*, 109 Ind.App. 357, 35 N.E.2d 117 (1941) (household goods); *Union Light, H. & P. Co. v. Heving*, 250 Ky. 223, 62 S.W.2d 789 (1932) (same); *Henderson v. Park Central Motors Services, Inc.*, 138 Misc. 183, 244 N.Y.S. 409 (1930) (automobile); *De Spirito v. Bristol County Water Co.*, 102 R.I. 50, 227 A.2d 782 (1967) (household goods); *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299 (Tex. 1963) (sentimental value); *Railway Express Agency v. Bennett*, 350 S.W.2d 214 (Tex.Civ.App.1961) (wearing apparel); *Jay Fikes & Assoc. v. Walton*, 578 S.W.2d 885 (Tex.Civ.App.1979); *Mieske v. Bartell Drug Co.*, 92 Wash.2d 40, 593 P.2d 1308 (1979) (home movies).

Comment f: No market.

See *United States v. 2,635.04 Acres of Land*, 336 F.2d 646 (6th Cir.1964); *Wade v. Rathbun*, 23 Cal.App.2d 758, 67 P.2d 765 (1937); *Wassenich v. City & County of Denver*, 67 Colo. 456, 186 P. 533 (1919); *State Highway Dept. v. Rutland*, 112 Ga.App. 792, 146 S.E.2d 544 (1965); *Forest Preserve Dist. v. Kean*, 298 Ill. 37, 131 N.E. 117 (1921); *Iowa Power & Light Co. v. Board of Water Works Trustees*, 281 N.W.2d 827 (Iowa 1979); *Commonwealth v. Begley*, 272 Ky. 289, 114 S.W.2d 127 (1938); *Coleman v. Louisville & N.R. Co.*, 190 Ky. 17,

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226 S.W. 360 (1920); *Zambarano v. Massachusetts Turnpike Authority*, 350 Mass. 485, 215 N.E.2d 652 (1966); *State v. Williams*, 357 S.W.2d 799 (Tex.Civ.App.1962). Cf. *Demeo v. Manville*, 68 Ill.App.3d 843, 25 Ill.Dec. 943, 386 N.E.2d 917 (1979) (dog).

Comment g: Chose in action.

See *First Nat. Bank v. Felker*, 185 F. 678 (C.C.Ark.1911); *Revert v. Hesse*, 184 Cal. 295, 193 P. 943 (1920); *Rogers v. Rogers*, 96 Colo. 473, 44 P.2d 909 (1935); *Hoyt v. Stuart*, 90 Conn. 41, 96 A. 166 (1915); *Citizens' Bank v. Shaw*, 132 Ga. 771, 65 S.E. 81 (1909); *Mutual Life Ins. Co. v. Allen*, 212 Ill. 134, 72 N.E. 200 (1904); *Jones v. Sears*, 258 Iowa 906, 140 N.W.2d 854 (1966); *Stebbins v. North Adams Trust Co.*, 243 Mass. 69, 136 N.E. 880 (1922); *Good Roads Mach. Co. v. Broadway Bank*, 267 S.W. 40 (Mo.App.1924); *Arnold v. Hamilton Inv. Co.*, 132 N.J.L. 10, 38 A.2d 118 (1944), *aff'd*, 132 N.J.L. 419, 40 A.2d 649 (1945).

Comment h: Services rendered.

See *Hanlon v. MacFadden Publications, Inc.*, 302 N.Y. 502, 99 N.E.2d 546 (1951); *Alder v. Crosier*, 50 Utah 437, 168 P. 83 (1917). Cf. *Demeo v. Manville*, 68 Ill.App.3d 843, 25 Ill.Dec. 443, 386 N.E.2d 917 (1979) (dog).

Comment i: Contract interests.

See *Elsbach v. Mulligan*, 58 Cal.App.2d 354, 136 P.2d 651 (1943); *Kerr v. Du Pree*, 35 Ga. App. 122, 132 S.E. 393 (1926); *Wade v. Culp*, 107 Ind.App. 503, 23 N.E.2d 615 (1939); *Vaught v. Pettyjohn & Co.*, 104 Kan. 174, 178 P. 623 (1919); *Watts Co. v. American Bond & Mortgage Co.*, 267 Mass. 541, 166 N.E. 713 (1929); *Lurie v. New Amsterdam Cas. Co.*, 270 N.Y. 379, 1 N.E.2d 472 (1935); *Anthony v. George T. Bye, Inc.*, 243 App.Div. 390, 277 N.Y.S. 222 (1935); *Lien v. Northwestern Eng. Co.*, 39 N.W.2d 483 (S.D.1949).

Comment j: Money.

On earning capacity, see *Ocilla & S. R. Co. v. McInvale*, 26 Ga. App. 106, 105 S.E. 451 (1920); *Canfield v. Chicago, R. I. & P. R. Co.*, 142 Iowa 658, 121 N.W. 186 (1909); *Cross v. Lee Lumber Co.*, 130 La. 66, 57 So. 631 (1912); *Jakubec v. Southern Bus Lines, Inc.*, 31 So.2d 282 (La.App.1947); *Bucktrot v. Partridge*, 130 Okl. 122, 265 P. 768 (1928); *Dallas Ry. & Term. Co. v. Guthrie*, 206 S.W.2d 638 (Tex.Civ.App.1947), *rev'd*, on other grounds, 146 Tex. 584, 210 S.W.2d 550 (1948); *Halloran v. New England Tel. & Tel. Co.*, 95 Vt. 273, 115 A. 143 (1921).

On physical harm, see *Cole Co. v. Hays*, 281 Ala. 118, 199 So.2d 659 (1967); *Squires v. City of Los Angeles*, 100 Cal.App.2d 708, 224 P.2d 744 (1950); *Smith v. Illinois Cent. R. Co.*, 343 Ill.App. 593, 99 N.E.2d 717 (1951); *Fetters v. City of Des Moines*, 260 Iowa 490, 149 N.W.2d 815 (1967); *Normand v. Thomas Theatre Corp.*, 349 Mich. 50, 84 N.W.2d 451 (1957); *Hart v. City of Butler*, 393 S.W.2d 568 (Mo. 1965); *Burr v. Kansas City Public Serv. Co.*, 365 Mo. 115, 276 S.W.2d 120 (1955); *Cermak v. Hertz Corp.*, 53 N.J.Super. 455, 147 A.2d 800 (1958), *aff'd*, 28 N.J. 568, 147 A.2d 795 (1959); *Cornett v. Hardy*, 241 S.W.2d 186 (Tex.Civ.App.1951).

See Leonard, *The Measurement of Damages: An Economist's View*, 31 Ohio St.L.J. 687 (1970).

Cross Reference

ALR Annotations:

Measure of damages for conversion of corporate stock or certificate. 31 A.L.R.3d 1286.

Damages for diminution of value of use of the property as recoverable for a permanent nuisance affecting real property. 10 A.L.R.2d 669.

Digest System Key Numbers:

C.J.S. Damages § 162; Trover and Conversion §§ 163, 166-168, 191-195, 198.

West's Key No. Digests, Damages 188(2); Trover and Conversion 44 et seq.

MUJI 2005 recommendations

Suggestions:

1. Update citations to CV 2005.
2. Consider expansion of CV 2005 in light of *Gardner v. Norman*.
 - a. Paragraphs 19 and 20 of the opinion provide expanded analysis and clarity on the substantive law of damages in Utah. These paragraphs clarify that:
 - i. The amount paid for medical care is the cap for this category of damages
 - ii. But this amount must still be reasonable
 - iii. A plaintiff must still prove that 1) the medical care received was necessary to treat injuries sustained because of the tort and 2) the costs of the care were reasonable
3. Consider separation of incurred and future costs. Should there be a separate instruction for incurred medical costs and a separate instruction for future costs?
4. Should there be a jury instruction regarding insurance? Specifically, should the jury be instructed that it is not to consider who or how charges are paid?

Current version of CV 2005

CV2005 Economic damages. Medical care and related expenses.

Economic damages include reasonable and necessary expenses for medical care and other related expenses incurred in the past and those that will probably be incurred in the future.

References

Wilson v. IHC, 2012 UT 43, n 11.

Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216 (Utah 1980).

MUJI 1st Instruction

27.3.

Note, at ¶20, the opinion specifically referenced CV 2005, seemingly favorably, but under a *Cf.*

¶19 “To recover compensation for medical expenses in a tort action a plaintiff must prove that the amount incurred was reasonable and necessary.” (citing *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993 (explaining that plaintiffs may recover medical expenses “incur[red] as a result of a demonstrated injury” (cleaned up)) (SCOUT’s description—bkl) and (citing *Wilson v. IHC Hosps., Inc.*,

2012 UT 43, ¶37 n.10 (“compensatory damages seek to place the plaintiff in the same position [the plaintiff] would have occupied had the tort not been committed.” (clean up) (SCOUT’S edit—bkl).

¶19 “Upon proof of liability, a plaintiff may recover medical expenses that are reasonable and necessary.” (quoting *Simmons v. Wilkin*, 80 Utah 362, 15 P.2d 321, 323 (Utah 1932) (explaining that special damages must “be reasonable and necessary as a result of the accident”) (SCOUT’S description—bkl).

¶19 “Specifically, evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injur[y] and that the charges are reasonable.” (quoting *Gorostieta v. Parkinson*, 2000 UT 99, ¶35. The reasonableness requirement means that, even if the treatment was necessary, recovery is limited to “the reasonable value of the services rather than the amount paid or charged.”

¶20 “if the injured person paid *less* than the exchange rate, he can recover no more than the amount paid.” (italics in original). Citing Restatement (Second) of Torts §911, cmt h.

Also

¶20 “it is not enough to prove that certain expenses *would have been* reasonable had they been incurred.”

Reference

Section 911 of Second Restatement of Torts

Value of Damages

Value means “exchange value or the value to the owner if this is greater than the exchange value.”

“The exchange value of property or services is the amount of money for which the subject matter could be exchanged or procedure if there is a market continually resorted to by traders, or if no market exists, the amount that could be obtained in the usual course of finding a purchaser or hirer of similar property or services. The rental value of property is the exchange value of the use of the property.”

Cmt. h.

h. Value of services rendered. The measure of recovery of a person who sues for the value of his services tortiously obtained by the defendant’s fraud or duress, or for the value of services rendered in an attempt to mitigate damages, is the reasonable exchange value of the services at the time and place. This may be distinct from and may be either greater or less than an amount that would be given for harm resulting from the loss of time by the injured person. (See § 924).

If the services are rendered in a business or profession in which there is a rate for them definitely established by custom, the customary rate controls. If there is no customary rate, evidence of what the claimant has received and what other persons receive for similar services, and other factors, including the reputation of the person giving the services, the skill with which the work is done and the difficulty and danger of the work, are taken into consideration.

When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. **If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him.** A person can recover even for an exorbitant amount that he was reasonable in paying in order to avert further harm. (See § 919).

TAB 4

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
331	Past and Future Medical Expenses	John Macfarlane	John presented his draft instruction August and Sept. 2025. Published for public comment Sept. New note published Nov.	Jan. 2026
1000	Products Liability	Tracy Fowler, Paul Simmons, Judge Todd Shaughnessy	Appeared on Agenda November 2021. Continuing to work and will report back.	2026
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Dan Bertch, Bruce Pritchett, Jake Hinkins	Appeared on Agenda March 2022. Feb. 2025 Stewart indicates the group is awaiting a decision on appeal.	
	Unjust Enrichment	Aaron Pacini	Aaron to research and draft these instructions.	2026
1700	Abuse of Process		David Reymann's prior draft instructions were considered in August 2025. Michael Lichfield presented draft revisions in Sept. and Nov. Published for public comment Nov.	Jan. 2026
2700	Directors and Officers Liability	Adam Buck	April 2025 - Stewart will contact	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals. Alyson, Stewart, and Jace to follow up on this one.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee. Alyson, Stewart, and Jace to follow up on this one.	
	Case law and Statutory Updates	TBD	Previous chairs or group leads may have feedback.	
	Linguistics and Law I - General	Bill Eggington, Judge Kelly, John Macfarlane, Michael Lichfield, Robert Cummings, Clark	Presented Feb. 2025. Have identified instructions potentially in need of plain-language adjustments; awaiting feedback on work; desire to work with MUJI (Crim) as well	Feb. 2026

		Cunningham, Jesse Egbert, Scott Jarvis		
	Linguistics and Law II - Reasonableness	Judge Bolinder, Bill Eggington, Ben Lusty	Bill presented Feb. 2025 on the changing meaning of reasonableness; this subcommittee would also like to work with MUJI (Crim)	Feb. 2026

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022, December 2022
135	Pretrial Delay	December 2022, February 2023
107A	Avoiding Bias	May 2023, February 2025
632, 632A- 632D	Minimum Injury Requirements Update and New	October 2023
132A	Remote Testimony	October 2023
2021	Present Cash Value Update	October 2023, Feb. 2025
900	Easements (prescriptive 920-925, easement by necessity 930-931, and easement by implication, 940-941)	February 2024, Feb. 2025
301B/301C	Elements of a Medical Negligence Claim; Standard of Care	December 2024
324	Use of Alternative Treatment Methods (removed with explanatory committee note)	December 2024
2015	Survival claim (amended committee note)	December 2024
1700	Assault/Battery/False Arrest/Malicious Prosecution	August 2025