No. 20220815-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

JENAFER BIRT MEEKS, individually and on behalf of
the heirs and estate of LILLIAN BIRT, deceased,
Appellee,
v.
WEI PENG, M.D., PhD; and CHRISTINA G. RICHARDS, M.D., F.A.C.S.,
Appellants.

PRINCIPAL BRIEF OF APPELLANTS

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Matthew Bates, District Court No. 180902456

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Current and Former Parties

Appellants

- Defendant Wei Peng, M.D., PhD
  Represented by Troy L. Booher, Caroline A. Olsen, and Taylor P. Webb of Zimmerman Booher; and Michael J. Miller, Kathleen J. Abke, and Savanna Jones of Strong & Hanni

- Defendant Christina G. Richards, M.D., F.A.C.S.

  Represented by Troy L. Booher, Caroline A. Olsen, and Taylor P. Webb of Zimmerman Booher; and Kurt M. Frankenburg and Greg Soderberg of Litchfield Cavo LLP

Appellee

- Plaintiff Jenafer Birt Meeks, individually and on behalf of the heirs and estate of Lillian Birt, deceased

  Represented by Karra J. Porter of Christensen & Jensen, P.C.; and Ashton J. Hyde, John M. Macfarlane, P. McKay Corbett, and Andres F. Morelli of Younker Hyde Macfarlane, PLLC

Parties below not parties to the appeal

- David Klein M.D.
- Heart and Lung Institute of Utah
- Daniel Cottom LLC, Daniel R. Cottom MD PC, and Daniel R. Cottom MD
- Bariatric Medicine Institute
- Alexander Del Castillo MD
- Salt Lake Regional Medical Center

Table of Contents

Addenda

A Memorandum Decision and Order, August 17, 2022 [R. 7110–18]

B Memorandum Decision and Order, August 17, 2022 [R. 7105–09]

C Trial Ruling on Jury Instructions, September 24, 2021 [R.2941–43]

D Trial Ruling on Defendants' Motion for Judgment as a Matter of Law, September 20, 2021 [R.4910–11]

E Determinative Provisions:

Utah Code § 78B-3-107

Utah Code § 78B-3-410

F Mem. in Supp. of Cooper Tire's Mot. in Limine to Exclude Evidence or References to Pre-Death Pain and Suffering, *Peterson v. DaimlerChrysler Corp.*, No. 06-cv-00108-TC (Mar. 4, 2011), ECF No. 529

G Jury Instruction 23 [R.1949,3162]

H Relevant Transcript Excerpts [R.3587–88; 3630; 3644–45]

Table of Authorities

Federal Cases

State Cases

Statutes

Rules

Other

Introduction

This appeal arises from a medical malpractice case concerning the decision to withdraw life-sustaining treatment from Lillian Birt, a sixty-seven-year-old patient suffering from severe septic shock and respiratory failure, among other things. Ms. Birt died from sepsis on April 25, 2016, approximately eight hours after the family decided to withdraw treatment.

Ms. Birt's daughter—Ms. Jenafer Birt Meeks—brought an action on behalf of herself and Ms. Birt's estate, alleging that Ms. Birt's treating physicians—Dr. Wei Peng and Dr. Christina Richards—negligently communicated with Ms. Birt's family in connection with the family's decision to withdraw treatment. After a ten-day trial, a jury found defendants liable, and Ms. Meeks was ultimately awarded $4,478,805.14, including $450,000 in noneconomic damages to Ms. Birt's estate for her pain and suffering after the withdrawal of treatment.

Although the errors at trial were pervasive, two errors require a new trial.

First, the jury was incorrectly instructed on the applicable law. This Court's case law establishes that a medical negligence claim has four elements, and that it is plaintiff's burden to prove each element, including the standard of care. Nonetheless, over defendants' repeated objections at trial, the district court informed the jury that Ms. Meeks had to prove only two elements to establish liability—breach and causation—and failed to inform the jury that Ms. Meeks also was required to prove the standard of care.

The error misstated the law and likely deprived defendants of a fair trial. The erroneous instruction effectively lowered Ms. Meeks's burden at trial with respect to a highly contested issue, and it potentially misled the jury to conclude that it was defendants' burden to establish the standard of care. Contrary to the district court's conclusion below, none of the other jury instructions cured the defect, because none of those instructions made clear that it was Ms. Meeks's burden to prove the standard of care.

Second, Ms. Meeks failed to offer legally sufficient proof of pain and suffering damages for the survival claim brought on behalf of Ms. Birt's estate. With respect to those damages, the estate could recover only for the eight-hour window between the withdrawal of treatment and Ms. Birt's death. During that period, Ms. Birt was given medication to prevent her from experiencing pain, and she was either unconscious or semiconscious. Ms. Meeks offered no evidence, expert or otherwise, that Ms. Birt could experience pain during that period, much less that she did so. Nonetheless, the jury awarded the estate approximately $1 million—an award that was subsequently reduced to $450,000 based on the Medical Malpractice Act's statutory cap on noneconomic damages.

In denying defendants' repeated motions for judgment as a matter of law to reduce that award to zero, the district court committed several legal errors. It incorrectly rejected defendants' argument that the evidence was legally insufficient because Ms. Meeks failed to introduce evidence that Ms. Birt could

experience or otherwise appreciate pain or suffering after treatment was withdrawn. The district court based its conclusion on the fact that the relevant Utah statutes do not expressly limit compensation to *conscious* pain and suffering. But such a limitation follows directly from this Court's case law, which interprets those statutes and makes clear that pain and suffering in the medical malpractice context concern a person's diminished capacity for the enjoyment of life. To award damages for pain and suffering, then, requires that the patient be capable of experiencing or appreciating a diminished capacity. The district court's contrary conclusion is premised on an assumption—unsupported by any evidence—that a patient can unconsciously appreciate their diminished capacity.

Separately, the district court erred in concluding that Ms. Meeks's evidence of pain and suffering was legally sufficient. Ms. Meeks introduced almost no evidence about what happened after the withdrawal of treatment and none establishing that Ms. Birt was, in fact, in pain or otherwise suffering.

Given these prejudicial errors, this Court should reverse the decision below and order a new trial.

Statement of the Issues

Issue 1: Whether the defendants are entitled to a new trial after the district court erroneously instructed the jury that the plaintiff had the burden of proving only two elements of a malpractice claim—i.e., breach and causation—and refused to instruct the jury that the plaintiff had the burden of proving the standard of care.

Standard of Review: This Court reviews a trial court's ruling concerning a jury instruction for correctness. *Arnold v. Grigsby*, 2018 UT 14, ¶ 11, 417 P.3d 606.

Preservation: This issue was preserved before, during, and after trial. [R.1246,2187–88,2941–43,4637–39,5766–78,5795–96.]

Issue 2: Whether defendants are entitled to judgment as a matter of law with respect to plaintiff's survival claim, where plaintiff failed to prove that the decedent experienced—or was capable of experiencing—pain or suffering after defendants' purported negligence.

Standard of Review: This Court "review[s] a denial of motion for judgment as a matter of law for correctness." *UMIA Ins., Inc. v. Saltz*, 2022 UT 21, ¶ 26, 515 P.3d 406 (internal quotation marks and citation omitted). On appeal, the movant must "demonstrate that there was no basis in the evidence, including reasonable inferences which could be drawn therefrom, to support the jury's verdict." *Id.* (quotation marks and citation omitted).

Preservation: This issue was preserved during and after trial. [R.4898–99,4905–06,5531–59.]

Statement of the Case

1. Legal Background

1.1 The requirement that jury instructions accurately and clearly state the law

"[J]ury instructions are intended to inform jurors of the applicable law." *State v. Lambdin*, 2017 UT 46, ¶ 19, 424 P.3d 117. Thus, jury instructions must "concisely and accurately state the issues and the law applicable thereto so that the jury will understand its duties." *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 274–75 (Utah 1992) (quotation marks and citation omitted).

As this Court has emphasized, clear instructions relating to the elements of a claim are particularly important. "The general rule for jury instructions is that an accurate instruction upon the basic elements of an offense is essential." *State v. Bird*, 2015 UT 7, ¶ 14, 345 P.3d 1141 (quotation marks and citation omitted). "[T]he court may not instruct the jury that they should, or may, render a verdict for one of the parties without considering and finding all of the elements that are necessary to support a verdict both in law and in fact in favor of that party." *Morgan v. Child, Cole & Co.*, 155 P. 451, 455 (Utah 1916).

An erroneous jury instruction constitutes "reversible error" when it "[1] tends to mislead the jury to the prejudice of the complaining party, or [2] insufficiently or erroneously advises the jury on the law." *In re Estate of Kesler*, 702 P.2d 86, 96–97 (Utah 1985).

1.2 The availability of noneconomic damages in survival actions

Under Utah law, a decedent's estate may bring a "survival action" to "recover for the interest of the decedent in the security of his or her person and property." *Camp v. Office of Recovery Servs. of Utah Dep't of Social Servs.*, 779 P.2d 242, 247 (Utah 1989). The damages available in such an action are distinct from those awarded in a wrongful death action, which can be brought by the decedent's heirs to recover "their own interest, which may include pecuniary losses and the loss of society, love, companionship, protection, and affection." *Id.*

With respect to survival actions, the "injured individual, or the personal representatives or heirs of the individual who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages," subject to limitations not relevant here. Utah Code § 78B-3-107(1)(a).

Utah's Health Care Malpractice Act limits the noneconomic damages available for survival actions arising from medical malpractice. *Smith v. United States*, 2015 UT 68, ¶¶ 20, 28, 356 P.3d 1249. As relevant here, the Act provides that, "[i]n a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience." Utah Code § 78B-3-410(1). The "amount of damages awarded for noneconomic loss may not exceed . . . $450,000." *Id.* § 78B-3-410(1)(d).

This Court has clarified that the "damages that the statute limits are commonly referred to by various names, but amount to the same measure: pain

and suffering, noneconomic loss, or general damages." *Judd v. Drezga*, 2004 UT 91, ¶ 4, 103 P.3d 135; *see also Pinney v. Carrera*, 2020 UT 43, ¶ 36, 469 P.3d 970 (noting that the term "general damages" is used interchangeably with "pain and suffering" damages). "The terms 'noneconomic loss' and 'general damages' merely euphemize what the damages truly represent—diminished capacity for the enjoyment of life." *Judd*, 2004 UT 91, ¶ 4. "The measure is actually the difference between what life would have been like without the harm done by the medical professional, and what it is like with that additional burden." *Id.*

2. Factual Background

In the 1990s, Ms. Birt underwent gastric bypass surgery. [NPR.14–18.[1]] In 2014, she began experiencing intermittent abdominal pain and gastrointestinal issues. [NPR.14–15.] In 2016, when she was about sixty-seven years old, she saw Dr. Christina G. Richards for abdominal pain and difficulty swallowing. [NPR.18.] After a diagnostic review, Dr. Richards scheduled Ms. Birt for an exploratory laparoscopy and hiatal hernia repair on April 11, 2016. [R.4,2041; NPR.18–24.]

On the morning of April 11, Dr. Richards was unable to perform the surgery because her husband had a medical emergency. [R.4963.] With Ms. Birt's consent, Dr. Richards's colleague, Dr. Daniel Cottam, performed the surgery in

[1] Citations to the "NPR." refer to portions of the record filed as nonpublic/private pursuant to rule 4-202.02 of the Utah Rules of Judicial Administration. Citations to "R." are to public portions of the record.

her stead. [R.4963–64.] Following the surgery, Ms. Birt was discharged from the hospital. [NPR.21–24; R.4,62.]

The day after the surgery, Dr. Richards saw Ms. Birt in her office, where Ms. Birt was prescribed additional pain medication. [R.5598–99.]

On April 14, Ms. Birt went to the emergency room at Salt Lake Regional Medical Center (SLRMC) complaining of abdominal pain. [NPR.25–26.] She was initially seen by Dr. Alexander Del Castillo, who diagnosed Ms. Birt with a variety of conditions, including pneumonia and sepsis. [NPR.28–29.] Ms. Birt was placed on broad-spectrum antibiotics and vasopressors to sustain her blood pressure. [NPR.27–28,35,41.] She also was placed on a mechanical ventilator to help her breathe, and doctors performed a procedure to drain fluid from her lungs. [NPR.32–33,39–40; R.3297.] Overnight, her condition deteriorated, and Dr. Richards's notes indicate that Ms. Birt was at a very high risk of death because she was experiencing multisystem organ failure. [NPR.41.]

On April 15, Drs. Cottam and Richards performed exploratory surgery to look for leaks in Ms. Birt's abdomen—a possible cause of her condition. [NPR.42.] The doctors oversewed the area where Dr. Cottam had previously repaired Ms. Birt's bowel and washed out her abdomen. [NPR.42–45,47.] Because the abdomen was swollen, it was left partially open to drain fluid. [NPR.42,45.] Ms. Birt was then transferred to SLRMC's intensive care unit (ICU). [NPR.42,45.]

From April 15 through April 19, Ms. Birt was treated by ICU physician Dr. David Klein. [R.3282–83.] When Dr. Klein took over Ms. Birt's care, her condition had worsened from when she was admitted. [R.3287.] She was suffering from, among other things, severe septic shock and acute respiratory failure, and her heart and liver functions were declining. [R.3287–3302; NPR.50–53.] As Dr. Klein put it, Ms. Birt was "seriously critically ill" and "her life was in the balance." [R.3302.]

Over the next few days, some of Ms. Birt's biochemical indicators improved somewhat, but she remained critically ill. [R.3314–16.] As of April 19, Dr. Klein believed that Ms. Birt had made some "slight improvements," but she remained "critically ill and at high risk of death." [R.3341,3469.] Among other things, she was still in multi-system organ failure, and she remained in septic shock and respiratory failure. [R.3469–70; NPR.54–55.]

On April 20, Dr. Peng took over for Dr. Klein as the ICU treating physician. [R.3326; NPR.57–58.] Dr. Peng is a board certified pulmonary critical care physician at SLRMC. [R.4758.] At the time he assumed care, Ms. Birt remained in septic shock and respiratory failure. [NPR.57.] Notwithstanding her condition, Dr. Peng's contemporaneous treatment notes indicate that he intended to continue her treatment course, including continuing antibiotics and attempts to wean her from the ventilator. [NPR.57–58.] On April 20, Dr. Richards closed Ms. Birt's abdomen, finding no signs of infection. [NPR.59–60; R.4979.]

Over the following days, Ms. Birt remained on life support, and she remained in respiratory failure and septic shock. [NPR.61–66.] Despite repeated attempts, the weaning trials failed. [R.3824; NPR.61–66.] Ms. Meeks testified that she believed the weaning trials were very painful for her mother and that she observed Ms. Birt moan and groan through the trials. [R.3587–88.]

On April 23, Dr. Peng informed the family of his plans for Ms. Birt's continued care, including performing a tracheostomy. [R.3786–87.] A tracheostomy is a more comfortable alternative to a ventilator that involves placing a small tube in a patient's neck to help them breathe. [R.4475–76.] When Dr. Peng introduced the possibility of a tracheostomy, Ms. Meeks told Dr. Peng that she was not sure that her mother would want that procedure and broached the possibility of withdrawing treatment.[2] [R.3663,3786; NPR.66.] Dr. Peng suggested that Ms. Meeks discuss the possibility with her family. [R.3786–87; NPR.66.]

On April 24, Ms. Birt's hemoglobin levels fell, and Dr. Peng wanted to perform a blood transfusion. [R.5228–30; NPR.69–70.] The transfusion was not performed, however, because Ms. Meeks would not consent. [R.3882,5230; NPR.69.]

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[2] This brief uses the phrase "withdrawal of treatment" to refer to the termination of life-sustaining procedures, such as antibiotic treatment and ventilator support. As explained below (at 41–42), Ms. Birt continued to receive care in the form of pain and anti-anxiety medication until her death.

On the same day, Dr. Peng consulted with Dr. Elena James, a neurologist, who performed an electroencephalogram (EEG) on Ms. Birt to assess her brain activity. [R.5231; NPR.68-69.] Dr. Peng and Dr. James informed Ms. Meeks's husband, Alan Meeks, that the results of the EEG were positive and could support a positive prognosis. [R.5231; NPR.69.] At that time, Mr. Meeks informed Dr. Peng that the family had met the previous night to discuss Ms. Birt's care. [R.5231; NPR.70.] Although the family had not made a final decision, they were seriously considering withdrawing treatment from Ms. Birt. [R.5231; NPR.70.] They planned to meet at the hospital the following day to decide. [R.5231; NPR.70.]

As of 8:30 a.m. on the morning of April 25, Ms. Birt showed some signs of improvement but remained in septic shock and was still suffering from respiratory failure and decreased heart function. [R.5236; NPR.71–73.] Most concerning, her hemoglobin levels were still falling. [R.5236.] Nonetheless, as of that time, Dr. Peng's treatment plan included continuing attempts to wean Ms. Birt from the ventilator and other supportive medications while continuing antibiotics and performing the blood transfusion. [R.5237; NPR.73–74.]

Later that morning, the family met with Dr. Peng and a chaplain to discuss withdrawing treatment. [R.3828–29.] Among other things, Dr. Peng updated the family about Ms. Birt's condition and her prognosis. [NPR.75.] Although none of the family members later remembered the specifics of the meeting, Dr. Peng

testified that he informed the family that there was a chance Ms. Birt would survive—albeit with serious quality of life concerns—and that he had a plan for her continued treatment, including transfer to a long-term care facility. [R.3829,3920,3986,4832,4834-35.]

Ultimately, the family decided to withdraw treatment and to provide Ms. Birt comfort, or palliative, care. [NPR.75.] Ms. Birt was extubated and placed on comfort care. [NPR.78] She died that evening. [NPR.78.]

3. Procedural Background

Ms. Meeks filed a complaint on behalf of herself and Ms. Birt's estate asserting wrongful death and survival claims. [R.1–8.]

The district court conducted a ten-day jury trial on Ms. Birt's claims. [R.2220.] At trial, Ms. Meeks argued that Dr. Richards and Dr. Cottam were negligent in the planning and execution of Ms. Birt's surgery. [R.2225–26.] The jury found no liability on those grounds, and the appropriateness of the surgery is not at issue in this appeal. [R.2225–26.]

As relevant here, the primary issues at trial were whether the defendants breached the standard of care with respect to their communications with Ms. Meeks in the period leading up to the withdrawal of treatment from Ms. Birt. [R.2225–27.] Ms. Meeks's "theory of the case" was that she was "misinformed and misunderstood her mother's prognosis," in that Dr. Peng and Dr. Richards "had been sloppy in communicating with her and assessing her understanding

of her mother's condition." [R.7113.] As a result of those alleged communication failures, Ms. Meeks agreed to withdraw treatment, even though Ms. Birt's condition was not necessarily terminal. [R.7113.]

The jury returned a verdict in favor of Ms. Meeks. The jury awarded $1 million in noneconomic damages to Ms. Birt's estate for Ms. Birt's pain and suffering in the eight-hour window between when Ms. Birt was taken off the ventilator and her death. [R.2227.] That award was ultimately reduced to $450,000 based on the statutory cap on noneconomic damages for medical malpractice claims under section 78B-3-410(1)(d) of the Utah Code. [R.2227,2263.] In addition, the jury awarded general damages of $2 million each to Ms. Meeks and her brother, Torrey Birt. [R.2263.] The final award, including pre-judgment interest, totaled $4,478,805.14, with $1,343,641.54 against Dr. Richards, and $3,135,163.60 against Dr. Peng. [R.2227,2263–64.]

All the jurors did not agree. Eight jurors concluded that Dr. Peng breached the standard of care in connection with the withdrawal of treatment from Ms. Birt. [R.3080.] Seven jurors concluded that this purported breach caused Ms. Birt harm before her death, and only six jurors found that Dr. Peng's alleged negligence caused Ms. Birt's death. [R.3081.] Seven jurors concluded that Dr. Richards breached the standard of care in connection with the withdrawal of treatment from Ms. Birt. [R.3078.] Seven jurors concluded that Dr. Richards's purported breach caused Ms. Birt harm before her death, and only six jurors

concluded that Dr. Richards's alleged negligence caused Ms. Birt's death. [R.3078–79.]

3.1 The district court's trial rulings

At trial, the district court made several erroneous rulings.

3.1.1 The standard of care instruction

Prior to trial, both parties submitted proposed jury instructions. [R.1171–83,1243–48.] With respect to the elements of a medical negligence claim, Ms. Meeks proposed an instruction that omitted any reference to her burden to establish the standard of care:

> To establish that Defendants were at fault, Plaintiffs have the burden of proving two things: (1) a breach of the standard of care and (2) that the breach was a cause of Plaintiffs' injuries.

[R.1178.]

By contrast, defendants proposed an instruction making clear that Ms. Meeks bore the burden of proving "(1) the standard of care applicable to the Defendant; (2) a breach of the standard of care; and (3) that the breach was a cause of Plaintiff's harm." [R.1246.]

At trial, the district court accepted the plaintiff's proposed instruction, which omitted an express instruction that Ms. Meeks bore the burden of proving the standard of care. Thus, at trial, Instruction 23 informed the jury that "To establish that defendants were at fault, plaintiffs have the burden of proving two

things: One, a breach of the standard of care; and two, that the breach was the cause of the plaintiff's injuries." [R.3162,1949.]

At trial, the standard of care was sharply disputed, and the expert witnesses disagreed.

First, a dispute arose as to who was qualified to testify regarding the standard of care as to each defendant. Ms. Meeks put forward testimony from two physicians, Dr. Scott Manaker and Dr. Robert Mackersie, who purported to provide testimony as to the standard of care applicable to both defendants, even though they possessed distinct specialties. Dr. Manaker is a pulmonary and critical care physician, but—over defendants' objection—he testified as to the standard of care applicable to Dr. Richards, a bariatric surgeon. [R.4179,4243,4923,4926.] Likewise, Dr. Mackersie, who is a general and critical care surgeon, was permitted to testify as to the standard of care applicable to Dr. Peng, a pulmonary medicine and critical care physician who specializes in treating ICU patients—again over defendants' objection. [R.2675,2860,5212,2641–43.] As defendants argued at trial, allowing both physicians to testify as to both defendants was inconsistent with the rule that "[p]ractioners in one specialty are not ordinarily competent to testify as experts on the standard of care applicable in another specialty." *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993).

Second, the parties disputed what constituted the applicable standard of care governing communications regarding the withdrawal of treatment.

Dr. Manaker testified, for example, that physicians must try to dissuade a family from pursuing a decision that is contrary to the doctor's view of the patient's best interest and, if necessary, bring others into the decision-making process. [R.4272–73.] Dr. Charles Ivester, a nonparty expert, disagreed, testifying that elements of Dr. Manaker's proposed standard were "completely wrong," and that such dissuasion is not categorically appropriate, because, in some cases, the family's wishes should be respected. [R.4479–80.] More generally, Dr. Ivester testified that there were "real problems" with the highly "regimented" ten-step standard of care that Dr. Manaker put forward. [R.4479.]

Before jury deliberations, the judge denied a request by defendants' counsel to replace Instruction 23 with a revised instruction that made clear that it was plaintiff's burden to prove the standard of care. [R.2187–88,2941–43,4637–39.] Denying the request, the court recognized that the cases "very clearly and fairly consistently describe the elements of a medical negligence claim as a three-part test," including "show[ing] the standard of care." [R.2941–42.] Nonetheless, the court found that Instruction 23 was adequate, in part, because "by stating that the plaintiff has the burden of proving a breach of the standard of care, it's implicit that they must, in that, prove what the standard of care is." [R.2943.]

In addition, the court reasoned that "proving the standard of care . . . stands on slightly different footing than proving a breach or proving

causation." [R.2942.] And "in a case like this where the plaintiff has put on evidence of the standard of care and the defense has put on evidence of the standard of care, the jury is really not in the position anymore of deciding whether the plaintiff has proven the standard of care, but is simply deciding what the standard of care is." [R.2942.] The court then emphasized a "fear that if we put too much emphasi[s] on the plaintiff's burden to prove the standard of care, that the jury might get into a position where, if it's looking at the conflicting experts and it can't decide who it should follow or who it should believe, it could just then turn to that instruction and say, 'Well, it was the plaintiff's burden, and we can't decide who is right, so we're just going to find they didn't meet their burden and find no liability.'" [R.2942–43.] According to the court, that would "be the wrong answer in this case," so it denied defendants' request. [R.2943.]

3.1.2 The denial of defendants' motion for judgment as a matter of law on Ms. Birt's survival claim

At the close of the plaintiff's case-in-chief, defendants moved for judgment as a matter of law with respect to Ms. Birt's survival claim. As defendants argued, there was insufficient evidence to support an award of damages for Ms. Birt's pain and suffering during the eight-hour window between the withdrawal of treatment and death. [R.4898–99,4905–06.]

Defendants' argument was premised on the minimal testimony Ms. Meeks provided regarding events after the withdrawal of treatment. She explained that "we had decided to try to wean her from the vent, see if she could breathe on her

own. Hope and pray. Sorry, just hope." [R.3630.] She explained that "My family gathered after the meeting and signatures I signed. My aunt, my mom's sister, asked for a priest to be brought in to have her final rites given to her." [R.3644–45.] She continued: "They took the tube out of her mouth. She couldn't breathe on her own. My family stayed around, her sisters and my cousins. We played country music because she loved country music." [R.3645.]

She further testified: "At some point, everybody kind of needed a break from the day in the room, and so I stayed. And I held her hand and told her it was okay to go, that I would take care of everybody. And she went, just her and I." [R.3645.] After confirming the length of time that had passed between the withdrawal of treatment and Ms. Birt's death, Ms. Meeks's counsel asked if Ms. Birt tried to breathe on her own. [R.3645.] Ms. Meeks answered no. [R.3645.] She provided no other testimony regarding the time after the withdrawal of treatment.

Despite the paucity of evidence, the district court denied defendants' motion directed at the noneconomic damages. [R.4910–11.] The court opined that this was "one of those unique cases" where it was unnecessary to obtain medical testimony "as to the fact that the withdrawal of care caused the harm that she is alleged to have suffered." [R.4910–11.] According to the court, it was sufficient that there was medical testimony that the various medical interventions were

necessary for Ms. Birt's survival, and testimony that family members had observed Ms. Birt struggle to breathe during the weaning trials. [R.4911.]

3.2 The district court's posttrial rulings

Following the verdict, defendants filed a motion for new trial and a renewed motion for judgment as a matter of law. [R.5531–59,5766–97.] The district court denied both motions. [R.7105–17.]

3.2.1 The standard of care instruction

In their new trial motion, defendants reiterated that Instruction 23 misstated the law and that they were thereby prejudiced. [R.5766–78,5795–96.]

In the posttrial order, the district court appeared to acknowledge that Instruction 23 was "not as accurate as it could be." [R.7111.] Nonetheless, the court concluded that any inaccuracy in the instruction's statement of the law was cured when the jury instructions were viewed as a whole. [R.7111–12.]

In particular, the court concluded that Instruction 24 was curative because it "informed the jury that they had 'to decide, based on the evidence, what the standard of care is'" and resolve any disputes "if the experts disagreed." [R.7111.] The court likewise concluded that Instruction 9 was curative because it "defined the preponderance of the evidence standard." [R.7111.] Although neither of those instructions expressly stated that Ms. Meeks bore the burden of proof on any issue, the court concluded that "[r]ead together, Instructions 9, 23, and 24 accurately conveyed the law." [R.7111.] The court further concluded that

"any uncertainty in the instructions was harmless," because it did not believe that "Plaintiff's evidence of the standard of care was thin or lacking." [R.7112.]

3.2.1 The denial of defendants' renewed motion for judgment as a matter of law on Ms. Birt's survival claim

In their renewed motion for judgment as a matter of law, defendants again argued that Ms. Meeks provided legally insufficient evidence to support the award of damages for Ms. Birt's pain and suffering following the withdrawal of treatment. In particular, defendants argued that Ms. Meeks should have but failed to introduce evidence that Ms. Birt was capable of experiencing pain or suffering during the relevant eight-hour period. [R.5531–59.] Given the medication she was given to alleviate discomfort, and her unconscious or semiconscious state, it is unclear that she could experience pain or suffering or was otherwise aware of what was happening. Defendants further argued that, even in the absence of evidence establishing that Ms. Birt *could* experience pain and suffering, there also was no evidence that Ms. Birt, in fact, did suffer during the relevant period. [R.5531–59.]

The district court disagreed, concluding that there was sufficient evidence to support the damages award. In support, the court did not rely on testimony about events on the day care was withdrawn. Instead, it pointed to testimony about Ms. Birt's condition "a few days before," when "the hospital staff conducted 'weaning trials' to attempt to get Ms. Birt off a ventilator." [R.7107.] As the district court observed, there was testimony from weaning trials on

previous days that Ms. Birt was "'in a lot of pain, moaning and groaning.'" [R.7107.] The court also noted that Ms. Meeks testified that, during the weaning trials, "'it just seemed excruciating to—what was happening to her.'" [R.7017.]

The court acknowledged the paucity of testimony regarding Ms. Birt's condition during the eight-hour window from the withdrawal of treatment to her death. The court noted that, with respect to that window, Ms. Meeks testified simply and without elaboration that the "hospital staff removed the ventilator and that her mother 'couldn't breathe on her own.'" [R.7107.] Nonetheless, from this testimony, the district court concluded that "a reasonable jury could infer from her earlier testimony about the weaning trials that withdrawing treatment caused Ms. Birt to suffer and experience discomfort." [R.7107.]

The court also acknowledged the absence of evidence that Ms. Birt was capable of experiencing pain during the relevant window, given her unconscious state and the fact that she was on palliative care, which is designed to alleviate discomfort. [R.7107.] Nonetheless, the court held that "Utah has never adopted a rule that injured parties must consciously experience harm to recover general damages." [R.7107.] Instead, the court adopted an expansive view of general damages, including "all damages other than those awarded for economic losses." [R.7107.] The court ultimately concluded that Utah's law on "general damages includes more than just conscious pain and suffering." [R.7108.]

Summary of the Argument

The district court committed at least two errors warranting a new trial.

First, the district court misstated the law when it instructed the jury that Ms. Meeks had to prove only two elements of a medical malpractice claim. The error not only lessened the plaintiff's burden at trial, but it also effectively shifted to defendants the burden of proof on the standard of care. The experts disagreed as to the applicable standard of care, yet the instruction allowed the jury to find defendants liable without the plaintiff carrying her burden. And contrary to the district court's conclusion, no other instructions were curative, because none made clear that plaintiff had the burden to prove the standard of care.

Second, the court erred when it denied defendants' motion for judgment as a matter of law as to the noneconomic damages on Ms. Birt's survival claim. Utah law makes clear that noneconomic damages in the medical malpractice context are limited to pain, suffering, and inconvenience. A prerequisite to incurring such damages is the capacity for pain, suffering, and inconvenience. But here, there was no evidence that Ms. Birt had that capacity during the relevant window for which damages were awarded—i.e., the eight-hour window between the withdrawal of treatment and her death. And even if evidence of that capacity was not required, there was insufficient evidence, as a matter of law, of *any* pain, suffering, or inconvenience for Ms. Birt during the eight-hour period.

This Court should order a new trial or remit the noneconomic damages.

Argument

1. The District Court Committed Reversible Error When It Incorrectly Instructed the Jury on the Elements of a Medical Negligence Claim

Under Utah law, Ms. Meeks bore the burden of proving all elements of her medical malpractice claims, including the standard of care. But the jury instructions not only failed to inform the jury that Ms. Meeks had the burden of establishing the standard of care, they implied by omission that Ms. Meeks had no such burden. The instructions violate Utah law, which requires that jury instructions "clearly, concisely and accurately state the issues and the law applicable thereto so that the jury will understand its duties." *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 274–75 (Utah 1992).

As demonstrated below, the standard of care was a hotly contested issue at trial, and therefore, the failure to instruct the jury that Ms. Meeks had the burden of establishing the standard of care requires a new trial.

1.1 The elements instruction misstated the law

In Utah, a "claim for medical malpractice requires a plaintiff to prove four elements: '(1) the standard of care by which the [medical professional's] conduct is to be measured, (2) breach of that standard by the [medical professional], (3) injury that was proximately caused by the [medical professional]'s negligence, and (4) damages.'" *Ruiz v. Killebrew*, 2020 UT 6, ¶ 9, 459 P.3d 1005 (alterations in original) (quoting *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 96, 82 P.3d 1076).

Here, Jury Instruction 23 did not accurately instruct the jury that Ms. Meeks was required to prove the standard of care. Utah law is clear that "at trial, the plaintiff has the burden of demonstrating the appropriate standard of care." *Milne v. USA Cycling Inc.*, 575 F.3d 1120, 1128 (10th Cir. 2009) (applying Utah law). Indeed, in response to defendants' objections, the district court acknowledged that Utah law "very clearly and fairly consistently describe[s] the elements of a medical negligence claim" as requiring the plaintiff to "show the standard of care." [R.2941–42.] Nonetheless, Instruction 23 informed the jury that, "To establish that Defendants were at fault, Plaintiffs have the burden of proving two things: (1) a breach of the standard of care and (2) that the breach was a cause of Plaintiffs' injuries." [R.5836,3162.]

That instruction misstated the law because, among other things, it did not state that Ms. Meeks had the burden of proving the standard of care, only that she had to prove a breach and causation.

At trial, the district court concluded that Instruction 23 was adequate because it implied that Ms. Meeks had to prove the standard of care. [R.2942.] But that ruling is irreconcilable with this Court's precedents requiring jury instructions to clearly state the law. *E.g.*, *Nielsen*, 830 P.2d at 274–75.

Relying on implicit instructions is insufficient given lay jurors' unfamiliarity with issues relating to burdens of proof and standards of care. As this Court has explained in a related context, while "lawyers and judges with a

background in negligence law may" be able to draw appropriate inferences, it is not clear a lay jury "could do so." *Id.* at 274.

The district court's reliance on inference was particularly problematic in this case, given the complex medical questions at issue. This was not a standard case where it would have been relatively easy for the jurors to define what constituted the standard of care necessary to prevent a slip and fall. In this case, the relevant question was the standard of care governing the communications of physicians in two separate specialties concerning the withdrawal of treatment from a patient with an uncertain prognosis. It was therefore Ms. Meeks's burden to put forward expert testimony sufficient to persuade the jury as to the appropriate standard of care. As this Court has emphasized, "[u]nless the propriety of the treatment received is within the common knowledge and experience of the layman, the plaintiff is required to prove the standard of care through an expert witness who is qualified to testify about the standard." *Jensen*, 2003 UT 51, ¶ 96 (quotation marks and citation omitted).

The district court ruled that its incomplete instruction nonetheless was adequate because Ms. Meeks had put forward expert evidence attempting to establish the relevant standard of care. [R.2942.] But that reasoning does not establish that the instruction was correct; at most it suggests that any omission was not prejudicial. And as explained below, that conclusion also was erroneous. (See *infra* at 30–36.)

Regardless, the fact that Ms. Meeks introduced expert testimony purporting to establish the standard of care does not negate the need for a complete instruction in this case, because there was a meaningful dispute as to whether Ms. Meeks's experts accurately described the standard of care. As explained above (at 15), there was a real dispute as to whether both of Ms. Meeks's experts were competent to provide standard-of-care testimony as to both defendants given their disparate specialties. The jury may have doubted the plaintiff's experts' authority to speak to the standard of care applicable to both defendants. Nonetheless, Instruction 23 allowed the jury to find defendants liable, even if they viewed defendants' experts as more credible on the question of the appropriate standard of care.

In addition, the experts—qualified or not—sharply disputed the standard of care governing defendants' communications about the withdrawal of treatment. For example, one defense expert, Dr. Ivester, testified that there were "real problems" with the standard of care proposed by Ms. Meeks's expert because it was unrealistic and "too regimented." [R.4479.] Testifying as an expert, Dr. Peng pointed out that Dr. Manaker's proposed standard of care was incomplete because it did not take account of quality-of-life issues, which might be relevant to discussions about withdrawing treatment. [R.4781.] Dr. Peng likewise testified that there are circumstances where it is appropriate to defer to a family's wishes, even if the doctor would continue treatment. [R.4783.] As the

district court acknowledged, there was a "sharp dispute over the standard of care" in this case. [R.7116.]

Notwithstanding the dispute regarding the standard of care, the jury could have found defendants liable without understanding that it was Ms. Meeks's burden to prove the governing standard. Indeed, it is possible that the jury was persuaded by defendants' experts as to what constituted the standard of care, but nonetheless ruled for Ms. Meeks because they did not understand that they could not find defendants liable without concluding that Ms. Meeks's proffered standard of care was the correct one. It also is possible that the jury did not understand that they did not have to accept Ms. Meeks's proffered standard.

The court's error in refusing to give a clear elements instruction was compounded by its reason for that refusal. The court feared that "if we put too much emphasi[s] on the plaintiff's burden to prove the standard of care, that the jury might get into a position where, if it's looking at the conflicting experts and it can't decide who it should follow or who it should believe, it could just then turn to that instruction and say, 'Well, it was the plaintiff's burden, and we can't decide who is right, so we're just going to find they didn't meet their burden and find no liability.'" [R.2942–43.] Of course, that is the very purpose of placing the burden of proof on one party. "Where the evidence on an issue of fact is evenly balanced between the parties, or where there is any doubt or perplexity as to the side on which the evidence preponderates, the party having the burden of proof

fails on that issue." 32A C.J.S. Evidence § 1556 (Mar. 2023). To the extent Ms. Meeks's experts failed to persuade the jury that the "greater weight of the evidence" supported their favored standard of care, her claims should have failed as matter of law. *Wightman v. Mountain Fuel Supply Co.*, 302 P.2d 471, 473 n.5 (Utah 1956).

1.2 The other jury instructions did not cure the error

When evaluating whether a new trial is warranted for an erroneous jury instruction, courts may generally "look at the jury instructions in their entirety." *Jensen v. IHC Health Servs., Inc.*, 2020 UT 57, ¶ 27, 472 P.3d 935 (quotation marks and citation omitted).

Relying on this rule in its posttrial order, the district court concluded that two other jury instructions cured any defect in Instruction 23. [R.7111–12.] That conclusion also was wrong. Although jury instructions should be considered wholistically, "one correct instruction does not necessarily correct another erroneous instruction." *State v. Bonds*, 2023 UT 1, ¶ 41, --- P.3d ---. And here, none of the other instructions on which the district court relied cured the defect in Instruction 23, because none made clear that Ms. Meeks bore the burden of proving the standard of care.

Instruction 24 was not curative. In relevant part, that instruction informed the jury that the "standard of care is established through expert witnesses and other evidence," and that it is the jury's "duty to decide, based on the evidence,

what the standard of care is." [R.5837.] It further instructed that, if the experts disagreed as to the applicable standard of care, it was the jury's "responsibility to determine the credibility of the experts and to resolve the dispute." [R.5837.] According to the district court, Instruction 24 was curative because it "informed the jury that they had 'to decide, based on the evidence, what the standard of care is'" and resolve any disputes "if the experts disagreed." [R.7111.]

Instruction 24 did not cure the error in Instruction 23, because, like Instruction 23, it "did not specify which party bore the burden of proof." *Peterson v. Hyundai Motor Co.*, 2021 UT App 128, ¶ 54, 502 P.3d 320. Instructing the jury that they must decide a question on which the experts disagree does not tell them how to do so if they find the experts equally credible. Indeed, Instruction 24's use of the passive voice sidestepped the issue of burden of proof by stating that the standard of care "*is established*" through evidence, not that the plaintiff bears the burden of establishing that standard. Instruction 24 was thus equally consistent with an inference that it was *defendants'* burden to establish the standard of care. And it also failed to make clear that, if the jury was unpersuaded by Ms. Meeks's expert evidence on the standard of care, then Ms. Meeks had failed in her burden, and the jury should find no liability.

Jury Instruction 9 also was not curative. According to the district court, it was curative because it "defined the preponderance of the evidence standard." [R.7111.] But that instruction also failed to inform the jury that plaintiff carried

the burden on any element of her claim, whether the standard of care or otherwise. The instruction informed the jury that when "a party must prove something by a 'preponderance of the evidence,'" the court "mean[t] that the party must persuade you, by the evidence, that a fact is more likely to be true than not true." [R.5822.] The instruction spoke generically of a "*party*" and did not assign the burden of proof to Ms. Meeks for any part of her claim. Such a generic instruction cannot cure the defect in Instruction 23.

A recent Court of Appeals case is illustrative. In *Peterson*, the trial court "had given a general instruction regarding the 'preponderance of the evidence' burden of proof that applied in civil cases." 2021 UT App 128, ¶ 20. That instruction—like Instruction 9 (and 24) did "not mention which party bears the burden." *Id.* Accordingly, the Court of Appeals concluded that the instruction did not cure the failure of an elements instruction to inform the jury that the plaintiffs bore the burden of proof on particular issues. *Id.* ¶ 56. As the court emphasized, such instructions are deficient because they do not "inform the jury which party bears the burden on which claims and defenses." *Id.*

1.3 The erroneous instruction prejudiced defendants

The trial court's erroneous instruction was prejudicial because it misstated the law. The instruction did not accurately inform the jury of the law it was required to apply when resolving Ms. Meeks's claim. *Butler v. Naylor*, 1999 UT 85,

¶ 10, 987 P.2d 41 (recognizing that an instruction can be "prejudicial" where it "misadvised or misled the jury on the law").

Because the error pertained to an elements instruction, it was especially problematic. "The general rule for jury instructions is that an accurate instruction upon the basic elements of an offense is essential." *Bird*, 2015 UT 7, ¶ 14 (quotation marks and citation omitted). "[T]he court may not instruct the jury that they should, or may, render a verdict for one of the parties without considering and finding all of the elements that are necessary to support a verdict both in law and in fact in favor of that party." *Morgan*, 155 P. at 455. That is because "[t]he correctness and comprehensibility of an 'elements' instruction" is "particularly vital to a jury's ability to understand and apply the law to the facts in each particular case." *LaPorte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 524 (Ind. 2012).

It is especially critical that the court properly instruct the jury regarding the standard of care because that standard is at the center of most medical malpractice actions—just as it was here. As other state courts have recognized, the "most critical element of most medical malpractice claims based on negligence . . . is the standard of care owed by the doctor to his or her patient." *Watson v. Hockett*, 727 P.2d 669, 672 (Wash. 1986) (en banc); *Curi v. Murphy*, 852 N.E.2d 401, 410 (Ill. Ct. App. 2006). Among other things, a proper standard of

care instruction helps the jury differentiate between non-negligent bad outcomes and negligent medical conduct. *Watson*, 727 P.2d at 672.[3]

Instruction 23 not only misstated the law, there also is a reasonable likelihood that it confused the jury. *Nielsen*, 830 P.2d at 274–75.

Given the instruction's wording, it is reasonably likely—and, indeed, probable—that the jury interpreted the instruction to mean that Ms. Meeks had to prove two—and only two—elements of medical negligence. Indeed, this Court has observed that when ordinary speakers interpret language, they assume that "the expression of one term should be interpreted as the exclusion of another." *McKitrick v. Gibson*, 2021 UT 48, ¶ 37, 496 P.3d 147 (internal quotation and alteration marks omitted) (citation omitted). For example, if a person says ,"I tried to get to work today," ordinary language speakers interpret that to mean the person did not make it to work today, even though people nearly always try to get to work when they succeed in doing so. Ordinary speakers communicate not only with what they say, but also with what they imply or do not say.

Here, by expressly stating that Ms. Meeks had the burden to prove only breach and causation, the clear implication is that she carried no other burden of proof. And by obviating the necessity of Ms. Meeks proving the standard of care,

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[3] *See also Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 714 (8th Cir. 2001) (party was prejudiced when the instructions "were at best ambiguous as to which party had the burden of proof and they did not explain adequately the proper standard of care on which to judge liability").

the instruction "effectively lowered" Ms. Meeks's "burden for proving" medical negligence. *See Lee v. Williams*, 2018 UT App 54, ¶ 43, 420 P.3d 88.

What's worse, some jurors may have interpreted the erroneous instruction to require *defendants* to prove the standard of care. The instruction suggested that it was plaintiff's burden to prove two—and only two elements—to establish a malpractice claim. The express statement was likely interpreted by the jury as meaning defendants carried all other burdens, including proving the standard of care. To lay jurors, the argument that the defendant doctors' actions did not fall below the standard of care might have felt like a defense that defendants had to prove, not an essential element of Ms. Meeks's affirmative case. And if the jury could not choose between the competing standards of care, the defendants should have prevailed, but would not have prevailed under these instructions.

Events at trial confirm the jury likely reached a verdict based on an erroneous understanding of the law, i.e., without requiring Ms. Meeks to prove the standard of care. During the trial, Ms. Meeks principally offered expert testimony regarding the standard of care applicable to the *communications* a physician should have with a patient's surrogate decisionmaker regarding the withdrawal of treatment. [R.4272–73.] Such evidence bore, at most, indirectly on the standard of care applicable to the *decision* about whether to withdraw treatment. Nonetheless, at closing, plaintiff's counsel suggested that the jury

could render a verdict against defendants solely because it was improper to withdraw treatment from Ms. Birt. [R.2999–3000.]

Likewise, based on single form, plaintiff's counsel attempted to argue that it was against hospital policy to withdraw treatment from a nonterminal patient, and that the jury could find defendants liable on that basis "alone." [R.2999.] But Ms. Meeks did not introduce any expert or other evidence as to what constituted hospital policy, or the relationship between hospital policy and medical negligence.

Any confusion was likely exacerbated at trial by plaintiff's counsel's closing statement that Ms. Meeks had the burden of proving only breach and causation. [R.2974–76.] It is entirely possible that at least some jurors accepted counsel's statement and resolved the case on that basis, not understanding the need to link the asserted wrongdoing to an established, expert-proven standard of care. In other words, the omission in the instructions—especially coupled with counsel's statements—made it probable that the jury would punish defendants for a bad outcome, regardless of whether that outcome was a result of conduct that fell below an expert-proven standard of care.

The confusion is manifest in the jury verdict. Eight and seven jurors, respectively, concluded that Dr. Peng and Dr. Richards were negligent, while only six jurors concluded that such negligence injured Ms. Birt. [R.2226–27,3078–81.] That disconnect indicates that the jury may have been confused about

Ms. Meeks's burden with respect to proving a breach of a particular standard of care, or whether they could find defendants liable for any conduct they deemed wrongful.

The district court was thus wrong to conclude that "any uncertainty in the instructions was harmless," because "Plaintiff's evidence of the standard of care was [not] thin or lacking." [R.7112.] The problem is not just the quantity of plaintiffs' evidence on the standard of care. The problem is that the instruction left the jury without guidance on how to resolve the issue if defendants' evidence was equally or more persuasive.

And in any event, although Ms. Meeks put on evidence regarding the standard of care for some of her asserted theories of negligence, she did not submit standard-of-care evidence supporting all her theories. Plaintiff's counsel nonetheless invited the jury to hold defendants liable based on negligence for which Ms. Meeks never attempted to establish a standard of care. Instruction 23 suggested she could prevail notwithstanding that failure.

Other courts have explained that the mere proffer of evidence is insufficient to cure the prejudice from an inaccurate instruction regarding the burden of proof. In *District of Columbia v. Mitchell*, for example, the D.C. Court of Appeals concluded that a new trial was appropriate where the district court erroneously instructed the jury on the elements of an ordinary negligence claim, even though the claim was actually a medical malpractice claim. 533 A.2d 629

(D.C. Ct. App. 1987). The appeals court concluded that the plaintiff satisfied the higher burdens of a medical malpractice case by putting forth expert testimony on the standard of care. *Id.* at 649. Nonetheless, the court concluded that it was improper for that claim to have gone to the jury because the instruction "did not recognize the need for an expert to establish the standard of care." *Id.* at 648. As a result, "the jury reached a verdict for [the plaintiff] on instructions that arguably made his case easier than it should have been for the jury to find in his favor." *Id.* at 649–50. A similar result was probable here.

In short, the "potential for confusion here" was "substantial." *Nielsen*, 830 P.2d at 275. Accordingly, the "error was prejudicial in that there is a reasonable likelihood that the jury's verdict may have been different absent the error." *Id.* A new trial is required.

2. The District Court Also Erred in Denying Defendants' Motion for Judgment as a Matter of Law on Ms. Birt's Survival Claim

Independent of the jury-instruction error, the district court also erred when it denied defendants' motion for judgment as a matter of law with respect to the jury's award of noneconomic damages for Ms. Birt's survival claim.

A trial court may grant a motion for judgment as a matter of law, notwithstanding the jury verdict, "when the court concludes that there is no competent evidence to support the verdict after examining the evidence and all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Collins v. Wilson*, 1999 UT 56, ¶ 14, 984 P.2d 960 (citation omitted). An

appellant challenging the sufficiency of the evidence on appeal must marshal the evidence in support of the challenged finding but need not present "every scrap of competent evidence in a comprehensive and fastidious order." *State v. Nielsen*, 2014 UT 10, ¶ 43, 326 P.3d 645 (quotation marks omitted). Instead, this Court focuses on "whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings and jury verdicts—and not on whether there is a technical deficiency in marshaling meriting a default." *Id.* ¶ 41.

Here, there was insufficient evidence to support the award of noneconomic damages for Ms. Birt's survival claim, even drawing all inferences in plaintiff's favor.

As the district court correctly recognized, the noneconomic damages for that claim are not intended to compensate Ms. Birt for any pain or suffering she may have experienced throughout her hospitalization. Rather, it was limited to damages incurred during the eight-hour period after the purported negligence, i.e., the time "between the withdrawal of care and her death." [R.7107.] For that period, the jury awarded $1 million. [R.2227.]

The district court also correctly reduced the award to $450,000, based on the statutory cap on noneconomic damages under Utah Code section 78B-3-410(1)(d).

Nonetheless, the district court erred when it declined to further reduce the award to zero. The court incorrectly excused Ms. Meeks from providing evidence

that Ms. Birt was capable of experiencing pain, suffering, or inconvenience, or relatedly, diminished pleasure or enjoyment of life. The district court also erred in ruling that there was legally sufficient evidence to support the jury's award of damages.

2.1 Ms. Meeks was required, but failed, to demonstrate that Ms. Birt was capable of experiencing pain and suffering

Under the Malpractice Act, a plaintiff "may recover noneconomic losses to compensate for pain, suffering, and inconvenience." Utah Code § 78B-3-410(1). This Court has made plain that the Act's authorization of noneconomic damages encompasses not only any pain and suffering the plaintiff endured, but also any inconvenience, meaning the loss of pleasure or "the enjoyment of life." *Judd*, 2004 UT 91, ¶ 4.

A prerequisite to an award of damages for a diminished capacity for life is the plaintiff's ability to appreciate their diminished capacity. In this case, that means Ms. Birt had to be capable of experiencing pain or suffering or otherwise capable of appreciating a loss of pleasure in life. As other courts have recognized, when an injured person's mental condition precludes them from appreciating the loss of enjoyment of life, money damages have "no meaning or utility to the injured person." *McDougald v. Garber*, 536 N.E.2d 372, 375 (N.Y. 1989) (quoting *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983)). Because pain and suffering damages are intended to be compensatory, it would be illogical to

award damages for a period in which a person was unconscious of their pain or suffering and otherwise unable to appreciate their diminished capacity.

The courts of many other states have held precisely that.[4] Indeed, the "vast majority of jurisdictions require pain and suffering to be consciously experienced." *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. Nev. 1991) (collecting cases). The consciousness requirement need not arise from express statutory text. Rather, it "comports with the ordinary meanings of the terms 'pain' and 'suffering,' which assume conscious awareness." *Id.*

Evaluating the availability of damages for a survival action under section 78B-3-107 of the Utah Code—the very statute at issue here—the U.S. District Court for the District of Utah also reached the same conclusion. *Petersen v. Daimler Chrysler Corp.*, No. 1:06-CV-00108-TC, 2011 WL 13076885 (D. Utah June 20, 2011). There, the defendant sought to exclude evidence of a decedent's

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[4] *E.g.*, *Haley v. Pan Am. World Airways, Inc.*, 746 F.2d 311, 316 (5th Cir. 1984) (collecting cases and observing that "[a] number of courts have disallowed recovery in similar situations for lack of evidence the decedent was aware of the danger or in fact suffered any pre-impact terror"); *Nichols v. Marshall*, 486 F.2d 791, 793 (10th Cir. 1973) ("It appears very clearly that pain and suffering are conscious experiences and do not exist in an unconscious state."); *Brown v. Clark Equip. Co.*, 618 P.2d 267, 272 (Haw. 1980) ("[R]ecovery for pain and suffering depend[s] on the existence of conscious pain and suffering."); *Leiker ex rel. Leiker v. Gafford*, 778 P.2d 823, 836 (Kan. 1989) ("Kansas generally follows the majority rule that damages are recoverable only for pain and suffering which is consciously experienced.") (collecting cases); *Samuel v. Baton Rouge Gen. Med. Ctr.*, 798 So. 2d 126, 129 (La. Ct. App. 2000) ("Where there is no indication that a decedent consciously suffered, an award for pre-death pain and suffering should be denied."); *McDougald*, 536 N.E.2d at 375 ("[C]ognitive awareness is a prerequisite to recovery for loss of enjoyment of life.").

pre-death pain and suffering from a car crash, because there was no evidence that the decedent had, in fact, experienced any pain.[5] Although the court did not categorically exclude such evidence before trial, it recognized that "the admissibility of such evidence depends on the foundation laid by Plaintiffs." *Id.* at *2. Accordingly, the court held that before "any damage expert may testify on" the issue of pre-death pain and suffering, the plaintiff was required to "make a foundational showing that the decedents knew of their imminent deaths or were conscious for a period of time" before death. *Id.*

Here, no evidence nor argument established that Ms. Birt was capable of appreciating pain or the loss of enjoyment of life during the relevant period.

There was no testimony that Ms. Birt was conscious, much less that she was alert during the relevant period. Moreover, during the relevant eight-hour window, Ms. Birt was on "comfort" or "palliative" care. [R.5741,5556.] She was given pain medication designed to minimize her discomfort, including Xanax. [R.5556-57.] And the dosage of her pain-control medication was increased when other treatments—like antibiotics and ventilator support—were withdrawn. [R.5557.] Given this, it was incumbent upon Ms. Meeks to present competent evidence that, notwithstanding Ms. Birt's condition, she was capable of

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[5] *See* Mem. in Supp. of Cooper Tire's Mot. in Limine to Exclude Evidence or References to Pre-Death Pain and Suffering, *Peterson v. DaimlerChrysler Corp.*, No. 06-cv-00108-TC (Mar. 4, 2011), ECF No. 529. (Attached as Addendum F.)

experiencing pain or otherwise aware of her diminished capacity, whether the diminished capacity involves suffering or diminished pleasure.

There was thus no basis for the jury to award damages to Ms. Birt's estate for her survival action.

The district court reached the opposite conclusion based on its view that there is a distinction between pain and suffering damages and general damages. [R.7107]. According to the district court, general damages encompass "all damages other than those awarded for economic loss," which "includes more than just conscious pain and suffering." [R.7107–08.] That conclusion lacks merit.

The distinction is at odds with this Court's case law. Whether a statute uses the term "general damages"—as Utah's survival statute does, *see* Utah Code § 78B-3-107—or "pain [and] suffering"—as used in the Malpractice Act, *see id.* § 78B-3-410—the damages are intended to compensate the plaintiff for the same thing: the plaintiff's "diminished capacity for the enjoyment of life," *Judd*, 2004 UT 91, ¶ 4. And a capacity to appreciate a loss of capacity is a prerequisite to such damages, however termed.

The district court's conclusion also is illogical. At bottom, it depends on the assumption that a person is entitled compensation for a diminished capacity that the individual could not consciously experience. Perhaps there is a rare case where a plaintiff could proffer expert testimony suggesting that an injured

person was capable of suffering pain or discomfort notwithstanding their unconscious or medicated state. But Ms. Meeks made no attempt here.

To be sure, "requiring some cognitive awareness as a prerequisite to recovery for loss of enjoyment of life will result in some cases in the paradoxical situation that the greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages." *McDougald*, 536 N.E.2d at 375 (quotation marks and citation omitted). "The force of this argument, however—the temptation to achieve a balance between injury and damages—has nothing to do with meaningful compensation for the victim." *Id.* "Instead, the temptation is rooted in a desire to punish the defendant in proportion to the harm inflicted." *Id.* Such a retributive sentiment "has no place in the law of civil damages, at least in the absence of culpability beyond mere negligence." *Id.*

2.2 In any event, no evidence established that Ms. Birt suffered, consciously or unconsciously

Even if Utah law permits a party to recover pain and damages without proving the decedent was aware of her pain, suffering, or diminished capacity, there still was insufficient evidence as a matter of law to support the jury's damage award.

Like the other elements of a medical negligence claim, damages must be proven by a preponderance of the evidence. *Jensen*, 2003 UT 51, ¶ 96. Defendants were entitled to judgment as a matter of law on Ms. Birt's survival action because

Ms. Meeks submitted no evidence of Ms. Birt's pain, suffering, or diminished capacity.

A party bringing a survival action may not recover judgment absent "competent satisfactory evidence other than the testimony of the injured individual." Utah Code § 78B-3-107(2). Absent that evidence, the claim fails as a matter of law. *Veater v. Brooklane Apts., LLC*, No. 2:11-cv-487-PMW, 2014 WL 1350196, at *8–9 (D. Utah Mar. 31, 2014).

Damages "may not be determined by speculation or guesswork." *Diversified Striping Sys. Inc. v. Kraus*, 2022 UT App 91, ¶ 52, 516 P.3d 306 (quotation marks and citation omitted). So "when a plaintiff's injury 'involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony.'" *Kalashnikov v. Salt Lake City*, 2016 UT App 213, ¶ 5, 387 P.3d 534 (citation omitted); *Pinney v. Carrera*, 2019 UT App 12, ¶ 27, 438 P.3d 902 (same). The "evidentiary demands of inherently ambiguous" claims for general damages involving pain and suffering "nearly always require expert testimony from medical professionals." *Kawamoto v. Fratto*, 2000 UT 6, ¶ 25, 994 P.2d 187 (Russon, J., dissenting).

Here there was no such testimony. Of all the witnesses, only Ms. Meeks was asked about the period after treatment was withdrawn, and she provided minimal testimony. She explained that "we had decided to try to wean her from

the vent, see if she could breathe on her own. Hope and pray. Sorry, just hope." [R.3630.] She then testified that "My family gathered after the meeting and signatures I signed. My aunt, my mom's sister, asked for a priest to be brought in to have her final rites given to her." [R.3644–45.] She continued: "They took the tube out of her mouth. She couldn't breathe on her own. My family stayed around, her sisters and my cousins. We played country music because she loved country music." [R.3645.] She further testified: "At some point, everybody kind of needed a break from the day in the room, and so I stayed. And I held her hand and told her it was okay to go, that I would take care of everybody. And she went, just her and I." [R.3645.] After confirming the amount of time that had passed between the withdrawal of treatment and Ms. Birt's death, Ms. Meeks's counsel asked her if her mother tried to breathe on her own. [R.3645.] Ms. Meeks answered no. [R.3645.] She provided no other testimony regarding the period after the withdrawal of treatment.

The district court acknowledged the lack of evidence about Ms. Birt's condition after the withdrawal of treatment. [R.7107.] Nonetheless, it concluded that there was sufficient evidence based on Ms. Meeks's testimony about Ms. Birt's condition "a few days before," when "the hospital staff conducted 'weaning trials' to attempt to get Ms. Birt off a ventilator." [R.7107.] The district court noted that the plaintiff testified, with respect to those weaning trials, "that Ms. Birt struggled to breathe" and appeared to be in substantial pain. [R.7107.]

But testimony from the weaning trials cannot compensate for the absence of evidence regarding Ms. Birt's condition after care was withdrawn.

First, the court drew an unreasonable inference in Ms. Meeks's favor based on the weaning trials. To be sure, Ms. Meeks testified that it appeared that Ms. Birt was in pain days earlier. [R.3587–88.] But that testimony only heightens the contrast between the earlier period and the later one: Ms. Meeks provided no comparable testimony about the relevant eight-hour period. [R.3644–45.]

Second, no evidence, expert or otherwise, linked Ms. Birt's condition during the weaning trials and on the day treatment was withdrawn. It would be guesswork, at best, to assume Ms. Birt's condition on a different day under different circumstances was probative of her condition on the day treatment was withdrawn, especially given the administration of medications designed to prevent pain and anxiety. Such guesswork is inappropriate and insufficient under Utah law. *Diversified Striping*, 2022 UT App 91, ¶ 52.

If anything, Ms. Meeks's testimony confirms that a jury could not reasonably infer that Ms. Birt suffered during the relevant period. With respect to the weaning trials, Ms. Meeks confirmed that the doctors took Ms. Birt "off what was keeping her asleep or not in pain." [R.3587–88.] By contrast, it is undisputed that during the relevant eight-hour period, Ms. Birt was receiving palliative care, which included medication designed to prevent pain and eliminate any anxiety she might otherwise have felt. [R.5556-57.]

Third, even assuming the general relevance of evidence from the weaning trials, that evidence also was insufficient support an award of damages. Ms. Meeks testified that, during the weaning trials, she observed her mother moan and groan, and she assumed her mother was in excruciating pain. [R.3588.] But Ms. Meeks introduced no expert testimony discussing what pain, if any, Ms. Birt was capable of experiencing at that point. And as other courts have recognized, "[e]vidence as to body sounds, such as moaning, gurgling, and heavy breathing, is insufficient to show consciousness or suffering on the part of the victim." *Ory v. Libersky*, 389 A.2d 922, 929 (Md. Ct. Spec. App. 1978) (collecting cases).

Similarly, in *Pierre v. Lallie Kemp Charity Hospital*, the plaintiffs brought a survival action for the pain and suffering of their child, who died as a result of sepsis and aspiration pneumonia after vomiting during surgery. 515 So.2d 614, 616–17 (La. Ct. App. 1987). The plaintiffs asserted that "[i]t can be assumed that the child suffered greatly from the time of aspiration, throughout the transfer and up until his death." *Id.* at 619 (alteration in original). Rejecting that argument, the court noted that "[i]t is hornbook law that a plaintiff bears the burden of proving the facts which support a damage award by a preponderance of the evidence." *Id.* And "[p]roof of damages for the child's pain and suffering due to the aspiration of the vomitus cannot be assumed." *Id.* (emphasis omitted).

Likewise, here, it cannot be assumed that Ms. Birt experienced pain and suffering because she was taken off the ventilator. Ms. Birt's estate was required to prove with competent evidence that Ms. Birt actually experienced pain and suffering after the withdrawal of treatment, despite being heavily medicated to mediate any pain. [R.5556-57.] Ms. Meeks's testimony that her mother could not breathe is insufficient to establish that fact. Noneconomic damages thus should have been reduced to zero for the survival claim.

Claim for Attorney Fees

None.

Conclusion

For the reasons stated above, the Court should order a new trial. Alternatively, it should enter judgment for defendants on the survival claim.

DATED this 10th day of March, 2023.

ZIMMERMAN BOOHER

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Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 11,452 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the addendum requirements of Utah R. App. P. 24(a)(12).

3. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 10th day of March, 2023.

/s/ Caroline A. Olsen

Certificate of Service

This is to certify that on the 10th day of March, 2023, I caused the Principal Brief of Appellants to be served via email on:

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Addendum A

Memorandum Decision and Order, August 17, 2022 [R. 7110–18]

DISTRICT COURT OF THE STATE OF UTAH
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

JENAFER BIRT MEEKS, individually and on behalf of the heirs and estate of LILLIAN BIRT, Plaintiff, vs. DANIEL R. COTTAM, M.D., et al., Defendants	**MEMORANDUM DECISION and ORDER** Case Number 180902456 Judge Matthew Bates

MEMORANDUM DECISION

A ten-day jury trial was held in this matter after which the jury rendered a verdict for Jenafer Birt Meeks. It found Defendants Christina G Richards, MD, and Wei Peng, MD, at fault for Lillian Birt's death and awarded $5,000,000 in general damages. Defendants now move this Court for a new trial, asserting several prejudicial errors.[1] Briefing is complete, and the Court heard argument on June 17, 2022.

Rule 59, Utah Rules of Civil Procedure, allows the Court to grant a new trial for several enumerated reasons, including "irregularity in the proceedings of the court, jury or opposing party, or any order of the court, or abuse of discretion by which a party was prevented from having a fair trial." But the Court's discretion is circumscribed by Rule 61: "[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Instead, "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Utah R. Civ. P. 61. Thus, in the case of a claim of a legal misstep, it is not enough to show mere error. The moving party must show harmful error. In other words, "the moving party must demonstrate a legal error that justifies granting a new trial." *See, e.g., USA Power, LLC v. PacifiCorp*, 2016 UT 20. With this standard in mind, the Court denies the Motion for New Trial.

[1] The term "Defendants" in this decision refers only to Dr. Richards and Dr. Peng.

I. THE JURY INSTRUCTIONS CORRECTLY STATED THE LAW.

Defendants first claim that the Court failed to correctly instruct the jury on elements of medical negligence. Specifically, they assert that Instruction 23 did not adequately communicate that Plaintiff bore the burden to prove the standard of care. The Court disagrees.

"Jury instructions require no particular form so long as they accurately convey the law." *State v. Maama*, 2015 UT App 235, ¶29. "The fact that one instruction, considered alone, is not as accurate as it could have been does not constitute reversible error so long as the instructions as a whole fairly instruct the jury on the applicable law." *State v. Johnson*, 2016 UT App 223, ¶29. Instructions need not mirror statutory language or legal descriptions in court opinions. To the contrary, "[j]ury instructions require no particular form so long as they accurately convey the law." *Maama*, 2015 UT App 235 at ¶29. And the fact that one instruction, standing alone, is not as accurate as it could be does not amount to reversible error if the instructions as a whole adequately explained the law. *Id.*

Defendants assert that Instruction 23 did not accurately explain that Plaintiff bore the burden to prove the standard of care. Instruction 23 stated, "To establish that Defendants were at fault, Plaintiffs have the burden of proving two things: (1) a breach of the standard of care and (2) that the breach was a cause of Plaintiffs' injuries." Defendants claim that because "the standard of care" was not separated out as an independent element of a medical negligence claim, the jury may not have understood that Plaintiff bore the burden to prove the standard of care. But Instruction 23 was not the only instruction to discuss the standard of care.

Instruction 24 stated, in part,

> The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

Instruction 24 thus informed the jury that they had "to decide, based on the evidence, what the standard of care is." It also explained that if the experts disagreed, that it was their "responsibility to determine the credibility of the experts and to resolve the dispute." The jury was also aided by Instruction 9, which defined the preponderance of the evidence standard. That instruction directed the jury that a party with the burden of proof must "persuade you, by the evidence, that the fact is more likely to be true than not true."

Read together, Instructions 9, 23, and 24 accurately conveyed the law. They instructed the jury that Plaintiff had the burden to prove a breach of the standard of care. They further explained that the standard of care was a factual question that the jury would resolve by

hearing and evaluating the credibility of factual and expert testimony. Any reasonable jury reading those three instructions together would understand that Plaintiff's evidentiary burden included establishing the standard of care.

Defendants nevertheless complain that the instructions as a whole were not sufficient, because they did not "inform the jury that it should default to the defendants if Ms. Meeks's evidence did not sufficiently persuade them of the standard of care." But that is exactly what Instructions 9 and 24 did. They instructed the jury on the burden of proof and directed the jury to "determine the credibility of experts and to resolve the dispute."

Moreover, any uncertainty in the instructions was harmless. This is not a case where the Plaintiff's evidence of the standard of care was thin or lacking. Plaintiff presented abundant evidence of a clear standard of care from at least two experts. And at the end of trial, no reasonable jury could have been left questioning whether Plaintiff had established a standard of care. Rather, the question for the jury was which of two competing standards of care was more credible and persuasive.

II. THE CONSENT FORM WAS RELEVANT AND WAS NOT SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE.

Defendants next claim that the Court abused its discretion in not excluding page BIRT0301 of Exhibit 1, a form entitled CONSENT FOR WITHDRAWAL OF LIFE SUPPORT (hereafter, "the Form"). They assert the Form was irrelevant and substantially more prejudicial than probative. They also complain that the Court wrongly directed the jury to ignore a "hold harmless" provision on the form.

As a threshold matter, Defendants waived any objection to admitting the Form. The Form was part of a stipulated set of Exhibits that the Court received at the beginning of trial. It was shown to the jury and discussed at length during Plaintiff's case in chief. Defendant's did not object to the form until Plaintiff rested and they moved for a directed verdict. Given Defendants' stipulation to the admission of the form, any error is not just waived, it is invited.

The Form was also relevant. Evidence is relevant if it has any tendency to make a material fact more or less probable than it would be without the evidence. *See* Utah R. Evid. 401. The Form was drafted by the hospital and was a stock form with spaces to handwrite the patient's name. It stated the following,

> I certify that I am at least eighteen (18) years old and that I have discussed the medical condition and prognosis of Lillian Birt (Patient Name) with his/her treating and consulting physician(s). I understand that his/her medical condition is terminal and that to continue to provide life sustaining procedures

would only serve to unnaturally prolong the moment of death, and to unnaturally postpone or prolong the dying process.

I hereby give my consent to withdraw all life support procedures and measures from Lillian Birt (Patient Name) and agree to hold harmless the treating and consulting physicians and Salt Lake Regional Medical Center of Salt Lake City, Utah.

Underneath this language, the Form was signed by Plaintiff, both Defendants, and a witness.

The Form's relevance in this case cannot be understated. Both Plaintiff and Defendants were required to sign the Form before the hospital would withdraw care, but the Form blatantly misstated Ms. Birt's actual prognosis. Every physician to testify at trial admitted that Ms. Birt was likely to survive. Yet the Form stated that Ms. Birt's condition was terminal and that continuing "to provide life sustaining procedures would only serve to unnaturally prolong the moment of death, and to unnaturally postpone or prolong the dying process."

Under Plaintiff's theory of the case, the form corroborated Plaintiff's testimony that she was misinformed and misunderstood her mother's prognosis. At the time she signed it, the Form confirmed her understanding that her mother was terminal and that her decision to withdraw care was correct. At trial, the Form corroborated her claim that Defendants had been sloppy in communicating with her and assessing her understanding of her mother's condition. With the Form in evidence, the case was no longer Plaintiff's word against the Defendants' word. Rather, The Form was written evidence signed by the Defendants of their own negligence. Considering the record as a whole, the Form was perhaps the single most persuasive evidence of Defendants' breach of the standard of care.

In light of the strong probative value of the Form, Defendants' complaint that the form was substantially more prejudicial than probative is meritless. Most evidence presented by an opposing party is prejudicial. But Rule 403, Utah Rules of Evidence, only precludes evidence that is unfairly prejudicial. And here, there was nothing unfair about admitting a form Defendants signed that misstated their patient's prognosis.

Defendants also claim that the Court erred in instructing the jury to disregard the "hold harmless" language in the form. Mid-trial, the parties filed cross-motions for judgment as a matter of law on Defendants' affirmative defense of release. The Court granted Plaintiff's motion and denied Defendants' motion, ruling that the hold harmless clause was too vague and ambiguous to be enforceable and that it lacked adequate consideration. The Court stands by its ruling.

In Utah, a hold harmless contractual clause is enforceable if it is "clearly and unequivocally expressed." *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 905 (Utah App. 1995). To release a party from its own negligence, the contract need not explicitly use the word

negligence, but the intent must be clear and unequivocal from "the language and purpose of the entire agreement, together with the surrounding facts and circumstances." *Id.* (citing *Healey v. J.B. Sheet Metal, Inc.*, 892 P.2d 1047, 1049 (Utah App.1995)).

In the case, the hold harmless clause was anything but clear. It stated, in total, that Plaintiff agreed "to hold harmless the treating and consulting physicians and Salt Lake Regional Medical Center of Salt Lake City, Utah." First, it is unclear who is doing the releasing. Plaintiff signed the form as her mother's surrogate decision-maker. Was she releasing her own claims, her mother's claims, or both? And if she was releasing her mother's claims, it begs the question whether she even has the legal authority to do that? It is also unclear what she is releasing the hospital from. Does the release pertain only to intentional conduct or gross negligence? Or does it include ordinary negligence? And what is the scope of conduct released? Does the release go all the way back to include Dr. Cottam's diagnosis and surgery, the follow up care, and the treatment in the ICU? Or does it only release claims related to the withdrawal of care?

The Court struggles to think of. More bare bones, generic, ambiguous release. Given the numerous unanswered questions regarding the hold harmless clause in the Form, the Court can only rule that it is insufficiently clear to be enforceable.

Finally, Defendants argue that the Court's instruction to the jury that the hold harmless language was unenforceable was prejudicial because it "likely misled the jury into thinking that defendants did something improper simply by asking for a release."

Defendants waived any claim that the instruction was prejudicial when they assented to its content. After the Court ruled that the hold harmless clause was unenforceable, it stated that it was going to submit the Form to the jury without redacting the hold harmless clause. The Court explained that counsel for Dr. Cottam had asserted that the clause had some evidentiary value outside of the affirmative defense of release. The Court then indicated that it would give the jury an instruction explaining the Court's ruling and the proper evidentiary value of the hold harmless clause, and it asked Plaintiff to submit a proposed instruction. No party objected.

The next day, the parties presented competing instructions on the hold harmless clause. The Court set those aside in favor of an instruction that it drafted. That was Instruction 34, and it said,

> The Court has determined that, under Utah law and the facts of this case, the hold harmless provision is unenforceable. Accordingly, in rendering your verdict, you should not consider whether the plaintiffs agreed to release the defendants from liability. The Court has already determined that they did not. Rather, you should consider the defendants' liability only using the law as provided in the instructions from the Court.

> You may, however, consider the hold harmless clause for any other purpose, such as to evaluate the credibility of any witness or to determine the extent to which any witness actually relied on the statements in the consent to withdraw care form.

The Court provided a copy of its instruction to the parties before including it in the set of final instructions. Counsel for Defendants carefully reviewed the instruction and then said, "Okay. Yes, I'm fine with that."

Defendants' failure to object to the Court's decision to give the instruction or to object to the proposed instruction itself is a waiver of any claim that the instruction was inappropriate or prejudicial.

III. THE TESTIMONY OF DRS. MANAKER AND MACKERSIE WAS PROPERLY ADMITTED.

Defendants final set of claims is that the Court should not have allowed Drs. Manaker and Mackerise testify. Defendants assert that the scope of their testimony was not adequately disclosed, that they improperly testified outside of their area of expertise, and that their testimony was needlessly cumulative. The Court finds that the disclosures were sufficient, that the standard of care relating to withdrawal of care is the same across physician disciplines, and that the testimonies and opinions were not needlessly cumulative.

Defendants complain that Plaintiff never disclosed that Dr. Manaker would opine about a nine-step decision-making process for withdrawing care. While Plaintiff's did not articulate a rigid nine-step process in their disclosures or Dr. Manaker's deposition, the substance of the process he explained at trial was in his disclosure. On the last paragraph of page five of Plaintiff's expert disclosures, Plaintiffs states that Dr. Manaker will opine that (1) Dr. Peng did not fully or adequately explain Ms. Birt's prognosis to her family members; (2) Dr. Peng did not adequately consult with Ms. Birt's other healthcare providers; (3) Dr. Peng should have been advocating for Ms. Birt; and (4) withdrawing care should never have been an option Dr. Peng entertained. Dr. Manaker's nine-step decision-making process at trial was essentially the same opinions. He expanded some points into two steps. But his opinions at trial on the standard of care for withdrawing care did not deviate substantially from the opinions described in Plaintiff's disclosure.

Defendants next assert that Dr. Manaker never disclosed that he would opine that Dr. Richards breached the standard of care with respect to withdrawing care. Plaintiff's expert disclosure did not state that Dr. Manaker would opine about Dr. Richards' conduct. But Dr. Manaker told Defendants at his deposition that he would offer an opinion that Dr. Richards breached the standard of care by signing the Consent to Withdraw Care form without performing and independent assessment of Ms. Birt. At trial, however, Dr. Manaker went

beyond his deposition opinion and opined that Dr. Richards breached the standard of care by not following several other steps in the decision-making process he described.

The Court agrees that Dr. Manaker's opinion that Dr. Richards breached the standard of care in several respects went beyond the scope of his opinions in his depositions and should have been excluded. But while Defendants objected generally to Dr. Manaker's nine-step decision-making process, they never objected at trial to Dr. Manaker's specific opinions of Dr. Richards conduct. And they have not explained in their Motion for New Trial how those specific undisclosed opinions were harmful. The Court declines to order a new trial for an error that was never objected to and that does not appear to be harmful.

Defendants similarly argue that Plaintiff failed to disclose all of Dr. Makersie's opinions about Dr. Richards' breach of the standard of care. But they make no effort to articulate any harm from that non-disclosure. The Court thus also declines to order a new trial on that point.

Defendants complain that both Dr. Manaker and Dr. Mackersie were allowed to testify outside their speciality. Specifically, Dr. Manaker, an intensive care specialist, was allowed to opine about Dr. Richards, a surgeon. And Dr. Mackersie, a surgeon, was allowed to testify about Dr. Peng, an intensive care specialist.

In Utah, "a practitioner of one school of medicine is ordinarily not competent to testify as an expert in a malpractice action against a practitioner of another school due to the wide variation between schools in both precepts and practices." *Sprague v. Avalon Care Center*, 2019 UT App 107, ¶29. But this general rule does not apply when the standard of care in a practitioner's school of medicine is the same standard of care as an allegedly negligent doctor's specialty. *See De Adder v Intermountain Healthcare, Inc.*, 2013 UT App 173, ¶17. And that is the exact circumstance in this case.

Both Dr. Manaker and Dr. Mackersie testified that the standard of care that applies to the withdrawal of care is an ethical issue that applies the same to any specialty. Dr. Manaker specifically testified that he had vast experience working with other specialties in making end of care decisions and that the standard of care was always the same. He stated, "I can tell you those are basic skills of communication and understanding withdrawal of care and ethical issues with withdrawal of care . . . It really doesn't matter what your specialty is, it matters that you call yourself a physician." Dr. Manaker and Dr. Makersie were thus both qualified to opine about the standard of care relating to the withdrawal of care for any physician specialty.

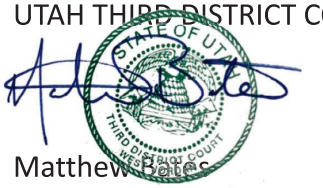
Lastly, Defendants argue that the testimonies of Drs. Manaker and Mackersie were needlessly cumulative. The Court disagrees. Given the sharp dispute over the standard of care and the mix of physician specialties involved in this case, it was entirely appropriate for Plaintiff to offer testimony from two experts about the standard of care, one from Dr. Richards specialty and one from Dr. Peng's specialty.

ORDER

Defendants' Motion for New Trial is hereby DENIED.

DATED this 17th day of August, 2022

UTAH THIRD DISTRICT COURT



Matthew Bates
Third District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180902456 by the method and on the date specified.

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08/18/2022 /s/ JULI PATURZO

Date: _____ _____

Signature

Addendum B

Memorandum Decision and Order, August 17, 2022 [R. 7105–09]

DISTRICT COURT OF THE STATE OF UTAH
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

JENAFER BIRT MEEKS, individually and on behalf of the heirs and estate of LILLIAN BIRT, Plaintiff, vs. DANIEL R. COTTAM, M.D., et al., Defendants	**MEMORANDUM DECISION and ORDER** Case Number 180902456 Judge Matthew Bates

MEMORANDUM DECISION

A ten-day jury trial was held in this matter after which the jury rendered a verdict for Jenafer Birt Meeks. It found Defendants Christina G Richards, MD, and Wei Peng, MD, at fault for Lillian Birt's death and awarded $5,000,000 in general damages. Those Defendants now move this Court for judgment as a matter of law, challenging the sufficiency of the evidence in several respects.[1] Briefing is complete, and the Court heard argument on June 17, 2022. The Court now issues this Memorandum Decision denying Defendants' Motion for Judgment as a Matter of Law.

A court may grant a motion for judgment as a matter of law only if it finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Utah R. Civ. P. 50(a)(1). Utah's appellate courts have declared that such a judgment is "only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented." *Mahmood v. Ross*, 1999 UT 104, ¶ 18, (cleaned up). The Court must view all the evidence and all reasonable inferences arising therefrom in a light most favorable to the non-moving party. *See Walker v. Parish Chemical Co.*, 914 P.2d 1157, 1159 (Utah App. 1996). "Because it is the exclusive function of the jury to weigh the evidence, a jury verdict should not be regarded lightly nor overturned without good and sufficient reason." *ACS Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2013 UT 24 ¶18 (cleaned up). "Accordingly, a district court may grant a JNOV motion only if there is no basis in the evidence, including reasonable inferences which could be drawn therefrom, to support the jury's determination." *Id.* (cleaned up).

I. THERE WAS AMPLE EVIDENCE THAT DRS. PENG AND RICHARDS BREACHED THE STANDARD OF CARE.

Defendants assert that Plaintiff failed to prove that they breached the standard of care in communicating Ms. Birt's condition. Specifically, they argue that witnesses for the Plaintiff generally testified to being unable to recall the details of conversations with the Defendants and

[1] The term "Defendants" in this decision refers only to Dr. Richards and Dr. Peng.

only testified that they could not remember either Defendant telling them that Ms. Birt would survive. But this argument misconstrues the standard of care proposed by Plaintiff.

Plaintiff's expert, Dr. Scott Manaker, testified that the applicable standard required Defendants to do more than simply inform Plaintiff of her mother's prognosis. Rather, Dr. Manaker testified that Defendants' obligations included informing Plaintiff that her mother was likely to survive, assessing her understanding of that prognosis, educating and correcting any misunderstandings that Plaintiff had, advocating for Ms. Birt and attempting to dissuade Plaintiff from withdrawing care, bringing in other physicians to assist in educating Plaintiff and advocating for Ms. Birt, and consulting with the hospital's ethics committee. Dr. Mananker ultimately testified that the standard of care in this case required Defendants to refuse to withdraw care and to seek judicial intervention to prevent Plaintiff from withdrawing care.

Defendants clearly did not follow this standard of care. While Plaintiff's witnesses struggled to remember the details of their conversations with Defendants, it was clear from both their testimony and Defendants own testimony that Defendants did almost none of the things required by Dr. Manaker's standard of care. Assuming the jury adopted Dr. Manaker's standard of care, which the Court must on a motion for judgment as a matter of law, there was ample evidence that Defendants breached the standard of care.

II. THERE WAS SUFFICIENT EVIDENCE THAT DRS. PENG AND RICHARDS BREACH OF THE STANDARD OF CARE CAUSED LILLIAN BIRT'S DEATH.

Defendants next claim that Plaintiff failed to establish that their negligence caused Ms. Birt's death. They assert that there was no competent evidence that the withdrawal of care caused her death as opposed to some other underlying health condition. The Court disagrees.

"There is a general requirement in medical malpractice cases that the element of proximate cause be supported by expert testimony." *Bowman v. Kalm*, 2008 UT 9 ¶7. "This requirement is grounded in the fact that most medical malpractice cases depend upon knowledge of the scientific effect of medicine." *Id.* (cleaned up). In this case, that means Plaintiff had to produce expert testimony that withdrawing care proximately caused Ms. Birt's death.

There was ample evidence that withdrawing care caused Ms. Birt's death. Every expert witness who testified agreed that Ms. Brit's condition was not terminal and that with continued care she was likely to make a full recovery. Even Defendants agreed that Ms. Birt would have survived. Dr. Peng testified that he told the family that "she was not terminal" and that he had a plan for her. And on cross examination he agreed that "Ms. Birt died because care was withdrawn." Dr. Richards also agreed that "before care was withdrawn on Lillian Birt that she was going to be in the hospital for another week or two" and that "she may need to go to rehab, but that she would go home."

Defendants nevertheless complain that recovery was not certain and point to testimony that Ms. Birt was septic, was fighting multiple infections, had trouble weaning from a ventilator, and still had a twenty percent chance of death. But weighing the competing evidence about Ms. Birt's prognosis is the exclusive province of the jury, not this Court. For purposes of a motion for judgment as a matter of law, there need only be some evidence that Ms. Birt was likely to

survive absent withdrawing care. That evidence came from multiple sources and provided a clear basis for the jury to find that Defendants' negligence caused Ms. Burt's death.

III. A REASONABLE JURY COULD FIND THAT LILLIAN BIRT EXPERIENCED PAIN, SUFFERING, OR INCONVENIENCE BETWEEN THE WITHDRAWAL OF CARE AND HER DEATH.

Lastly, Defendants assert that there was no evidence that Ms. Birt experienced any pain or suffering between the withdrawal of care and her death. Specifically, they argue that there was no evidence that Ms. Birt was conscious or aware of her condition and thus did not experience any pain or suffering. They also claim that she was receiving pain medication to minimize her discomfort and thus experienced no pain. But Defendants' argument improperly narrows the scope of general damages.

The jury awarded Plaintiff the statutory cap for Ms. Birt's survival claim. But because the jury found that Dr. Cottam was not negligent, the general damages for Ms. Birt's survival claim are limited to those damages caused by the negligence of Dr. Peng and Dr. Richards. Those doctors were found to be negligent only in allowing Plaintiff to withdraw care. Thus, Ms. Birt's survival claim is limited to general damages occurring between the withdrawal of care and her death.

Considering the record as a whole, there was some evidence of Ms. Birt's suffered general damages during that time to support the jury's damage award. Plaintiff testified that a few days before Ms. Birt passed that the hospital staff conducted "weaning trials" to attempt to get Ms. Birt off a ventilator. Those trials consisted of staff waking Ms. Birt up and removing her ventilator. Plaintiff then testified that Ms. Birt struggled to breathe. She stated, "She would try to breath. I don't know if you've ever seen someone try to breathe and they can't. They're writhing. I felt like she was in a lot of pain, moaning and groaning." Plaintiff also described her mother "[f]ighting for breath, moaning, not recognizing me. It seemed like she was in an extreme amount of pain. Like it seemed it -- it just seemed excruciating to -- what was happening to her." When Plaintiff described the withdrawal of care, she testified that hospital staff removed the ventilator and that her mother "couldn't breathe on her own." While Plaintiff did not elaborate, a reasonable jury could infer from her earlier testimony about the weaning trials that withdrawing care caused Ms. Birt to suffer and experience discomfort.

Defendants claim that evidence to support a general damages award is nevertheless lacking because there was no testimony that Ms. Birt was actually aware that she was suffering. But Utah law on general damages is not so narrow. Utah has never adopted a rule that injured parties must consciously experience harm to recover general damages. And the jury was not limited to assessing damages only for pain and suffering. Utah law defines general damages as "all damages other than those awarded for economic losses." *Bear River Mut. Ins. Co. v. Wall*, 937 P.2d 1282, 1285 n4 (Utah 1997). Thus, Instruction 41 directed the jury to consider a host of possible harm, including "(1) the nature and extent of injuries; (2) the pain and suffering, both mental and physical; (3) the extent to which Plaintiffs have been prevented from pursuing her ordinary affairs; . . . [and] (5) the extent to which Plaintiffs have been limited in the enjoyment of life. Removing Ms. Birt's ventilator, which every witness agreed that she needed to breathe and survive, is therefore sufficient for the jury to award general damages.

Defendants ask this Court to follow a few other jurisdictions and adopt the principle of "conscious pain and suffering" cited in section 221 of the second edition of American Jurisprudence. That section states, "Pain and suffering are not proper elements of damages where the decedent was unconscious from the time of the injury until death occurred, for the reason that there was no consciousness of any pain." 22 Am. Jur. 2d Damages § 221 (2022). States following section 221 allow general damages only for "conscious pain and suffering." *See Peretz v. Belnekar Licata*, No. A-4953-17T1, 2020 WL 2507642 *19 (N.J. App. Div. May 15, 2020); *Kevra v. Vladagin*, 96 A.D.3d 805, 806, 949 N.Y.S.2d 64 (N.Y. App. Div. 2012); *Cominsky v. Donovan*, 2004 PA Super 98 ¶11, 846 A.2d 1256, 1260. But, as explained, Utah has never adopted a "conscious pain and suffering" standard. To the contrary, its law on general damages includes more than just conscious pain and suffering. *See Pinney v. Carrera*, 2020 UT 43, ¶36 (explaining that noneconomic damages "measure the amount needed to compensate an individual for a diminished capacity for the enjoyment of life" or "the difference between what life would have been like without the harm done and what it is like as a result of the harm"). The Court therefore declines to adopt the reasoning of section 221.

ORDER

Defendants' Motion for Judgment as a Matter of Law is hereby DENIED.

DATED this 17th day of August, 2022

UTAH THIRD DISTRICT COURT

Matthew Bates
Third District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180902456 by the method and on the date specified.

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08/18/2022 /s/ JULI PATURZO

Date: _____ _____

Signature

Addendum C

Trial Ruling on Jury Instructions, September 24, 2021 [R.2941–43]

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

JENAFER MEEKS BIRT, individually and on behalf of the heirs and estate of LILLIAN BIRT, deceased, Plaintiff, vs. DANIEL R. COTTAM, M.D., et al, Defendants.	JURY TRIAL - DAY 10 Case No. 180902456 Judge James Gardner

September 24, 2021 * 8:35 a.m.

OFFICIAL TRANSCRIPT OF ELECTRONIC RECORDING

Reporter: Lindsay Payeur, RPR

Absolutely, this had to have been done. It would have breached the standard of care not for it to have done because of the patient's past bariatric surgeries.

So -- but there is nobody in this case who is saying, "Oh, these were both good ideas, and you could have done one or the other, and they both would have been fine. It would have been reasonable for a doctor to pick one or the other."

Because we've got conflicting experts who say that you can either do one or the other, but nobody is here saying that they are both viable alternatives, it's my opinion that that instruction is not appropriate in this case. We'd be incorrectly instructing the jury based on the evidence and the facts in this case that there are viable alternatives to the situation that Ms. Birt found herself in before that surgery.

As to the medical negligence elements instruction, I got the filings that both parties sent in last night. I reviewed the cases that were cited. Again, I think this is fact-dependent. The cases that were -- the cases, as I read them, very clearly and fairly consistently describe the elements of a medical negligence claim as a

three-part test. You've got to show the standard of care, you've got to prove a breach, and you've got to prove that it caused harm.

But proving the standard of care, in my view, stands on slightly different footing than proving a breach or proving causation. And in this particular case, I believe that the instructions, the way they have been written and the way they come out of MUJI, are appropriate. And here's why:

The plaintiff has the burden of proving the standard of care, but in a case like this where the plaintiff has put on evidence of the standard of care and the defense has put on evidence of the standard of care, the jury is really not in the position anymore of deciding whether the plaintiff has proven the standard of care, but is simply deciding what the standard of care is.

And I fear that if we put too much emphasize on the plaintiff's burden to prove the standard of care, that the jury might get into a position where, if it's looking at the conflicting experts and it can't decide who it should follow or who it should believe, it could just turn to that instruction and say, "Well, it was the plaintiff's burden, and we can't decide who is right, so we're

just going to find they didn't meet their burden and find no liability." And that would be the wrong answer in this case.

The cases are also clear that the jury -- and I think we have an instruction on this -- that where the jury is presented with conflicting experts, they need to decide who has properly described the standard of care.

I can envision cases where the plaintiff just completely fails or substantially fails to present evidence of a standard of care, and that instruction, it would be appropriate to separate it out, as they have done in the case law, and put a little more emphasize on the burden here. But I don't think that's necessary here.

Additionally, in the instruction as written, by stating that the plaintiff has the burden of proving a breach of the standard of care, it's implicit that they must, in that, prove what the standard of care is.

So I'm going to leave the medical negligence and the standard of care instructions as they are written. I'm not going to issue or give the alternate -- alternative treatments or alternative remedies instruction.

Addendum D

Trial Ruling on Defendants' Motion for Judgment as a Matter of Law, September 20, 2021 [R.4910–11]

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

JENAFER MEEKS BIRT, individually and on behalf of the heirs and estate of LILLIAN BIRT, deceased, Plaintiff, vs. DANIEL R. COTTAM, M.D., et al, Defendants.	JURY TRIAL - DAY 6 Case No. 180902456 Judge James Gardner

September 20, 2021 * 8:35 a.m.

OFFICIAL TRANSCRIPT OF ELECTRONIC RECORDING

Reporter: Lindsay Payeur, RPR

MR. MILLER: I did.
THE COURT: -- if you were going to -- I -- let me look.
MR. MILLER: I don't know if it's --
THE COURT: I saw something filed. I assumed it was the bench brief that Mr. Soderberg handed me. Hold on.
Oh, I see. There is a -- okay. Hold on.
MR. MILLER: And counsel will need a chance -- plaintiff's counsel will probably need a chance to look at that as well (inaudible).
THE COURT: Okay. I see.
So it's his motion for judgment as a matter of law and opposition to plaintiff's motion to strike affirmative defense. Okay.
MR. MILLER: That's right. Yes.
THE COURT: So that particular issue, I'm going to take under advisement. We'll save that for argument once I've had a chance to review the briefs and the other side has had a chance to review that, and we can set a time to talk about that. But for now, page 301 is just going to remain as it is.
Lastly, with respect to the survival claim, this does not -- this strikes me as one of those unique cases where I don't think we need

further medical testimony as to the fact that the withdrawal of care caused the harm that she is alleged to have suffered.

There was, in fact, harm that she suffered during the period between which care was withdrawn and she, in fact, passed. Again, there has been a lot of testimony from doctors that this -- these lifesaving efforts, such as the ventilator and other things, were required, that they needed to be there, that if they weren't there, that she would suffer harm and would pass. There has been some testimony from the family, as Mr. Hyde reiterated, that they were watching her struggling to breathe and that they saw her experiencing pain. And this is not one of those cases where it's -- it takes, I think, medical expertise for the jury to draw that connection between the two. And so I'm going to deny -- with that, I will deny Dr. Peng's motion for a directed verdict, except saving the issue as to the release and the effect of that until we have argument and decide that issue.

With respect to Dr. Cottam's motion for a directed verdict, the Court disagrees that Dr. Mackersie did not, cannot, or could not provide evidence of a breach of the standard of care simply

Addendum E

Determinative Provisions:
Utah Code § 78B-3-107
Utah Code § 78B-3-410

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 3. Actions and Venue
Part 1. Actions--Right to Sue and be Sued

U.C.A. 1953 § 78B-3-107
Formerly cited as UT ST § 78-11-12

§ 78B-3-107. Survival of action for injury or death to individual, upon death of wrongdoer or injured individual--Exception and restriction to out-of-pocket expenses

Effective: May 14, 2019
Currentness

(1)(a) A cause of action arising out of personal injury to an individual, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of the wrongdoer or the injured individual. The injured individual, or the personal representatives or heirs of the individual who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

(b) If, prior to judgment or settlement, the injured individual dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representatives or heirs of the individual have a cause of action against the wrongdoer or personal representatives of the wrongdoer for special and general damages which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured individual from the unrelated cause.

(c) If the death of the injured individual from an unrelated cause occurs more than six months after the incident giving rise to the claim for damages, the claim shall be limited to special damages unless, prior to the injured individual's death:

(i) written notice of intent to hold the wrongdoer responsible has been mailed to or served upon the wrongdoer or the wrongdoer's insurance carrier or the uninsured motorist carrier of the injured individual, and proof of mailing or service can be produced upon request; or

(ii) a claim for damages against the wrongdoer or against the uninsured motorist carrier of the injured individual is the subject of ongoing negotiations between the parties or persons representing the parties or their insurers.

(d) A subsequent claim against an underinsured motorist carrier for which the injured individual was a covered person is not subject to the notice requirement described in Subsection (1)(c).

(2) Under Subsection (1) neither the injured individual nor the personal representatives or heirs of the individual who dies may recover judgment except upon competent satisfactory evidence other than the testimony of the injured individual.

(3) This section may not be construed to be retroactive.

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Credits

Laws 2008, c. 3, § 683, eff. Feb. 7, 2008; Laws 2009, c. 293, § 1, eff. May 12, 2009; Laws 2014, c. 220, § 1, eff. May 13, 2014; Laws 2015, c. 382, § 1, eff. May 12, 2015; Laws 2019, c. 387, § 1, eff. May 14, 2019.

Notes of Decisions (48)

U.C.A. 1953 § 78B-3-107, UT ST § 78B-3-107

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

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West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 3. Actions and Venue
Part 4. Utah Health Care Malpractice Act (Refs & Annos)

U.C.A. 1953 § 78B-3-410
Formerly cited as UT ST § 78-14-7.1

§ 78B-3-410. Limitation of award of noneconomic damages in malpractice actions

Currentness

(1) In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. The amount of damages awarded for noneconomic loss may not exceed:

(a) for a cause of action arising before July 1, 2001, $250,000;

(b) for a cause of action arising on or after July 1, 2001 and before July 1, 2002, the limitation is adjusted for inflation to $400,000;

(c) for a cause of action arising on or after July 1, 2002, and before May 15, 2010 the $400,000 limitation described in Subsection (1)(b) shall be adjusted for inflation as provided in Subsection (2); and

(d) for a cause of action arising on or after May 15, 2010, $450,000.

(2)(a) Beginning July 1, 2002 and each July 1 thereafter until July 1, 2009, the limit for damages under Subsection (1)(c) shall be adjusted for inflation by the state treasurer.

(b) By July 15 of each year until July 1, 2009, the state treasurer shall:

(i) certify the inflation-adjusted limit calculated under this Subsection (2); and

(ii) inform the Administrative Office of the Courts of the certified limit.

(c) The amount resulting from Subsection (2)(a) shall:

(i) be rounded to the nearest $10,000; and

(ii) apply to a cause of action arising on or after the date the annual adjustment is made.

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(3) As used in this section, "inflation" means the seasonally adjusted consumer price index for all urban consumers as published by the Bureau of Labor Statistics of the United States Department of Labor.

(4) The limit under Subsection (1) does not apply to awards of punitive damages.

Credits

Laws 2008, c. 3, § 716, eff. Feb. 7, 2008; Laws 2010, c. 97, § 1, eff. May 11, 2010.

Notes of Decisions (9)

U.C.A. 1953 § 78B-3-410, UT ST § 78B-3-410

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

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Addendum F

Mem. in Supp. of Cooper Tire's Mot. in Limine to Exclude Evidence or References to Pre-Death Pain and Suffering, *Peterson v. DaimlerChrysler Corp.*, No. 06-cv-00108-TC (Mar. 4, 2011), ECF No. 529

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

ROBERT H. PETERSEN, *et al.*, Plaintiffs, vs. DAIMLERCHRYSLER CORPORATION, *et al.*, Defendants.	**MEMORANDUM IN SUPPORT OF COOPER TIRE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OR REFERENCES TO PRE-DEATH PAIN AND SUFFERING** Civil No. 1:06-CV-00108 TC Judge Tena Campbell Magistrate Judge Paul Warner

Defendant Cooper Tire & Rubber Company ("Cooper"), by and through undersigned counsel, hereby submits this memorandum of law in support of its Motion in Limine ("Motion") to Exclude Evidence or References to Pre-Death Pain and Suffering.

INTRODUCTION

Plaintiffs should be barred from arguing or adducing evidence to support claims of pre-death pain and suffering for those decedents who were unconscious. There is no evidence that the decedents experienced the kind of pre-death pain or suffering sufficient to support a cognizable claim under Utah's survival statute.

STATEMENT OF FACTS

1. Plaintiffs, as heirs and personal representatives of the estates of the decedents, seek damages for pre-death pain and suffering of the decedents. Complaint at ¶¶ 24, 25. They allege that

> 24. Decedent Jonathan Jorgensen survived for a period of time following the accident; was sufficiently conscious at the scene of the accident to suffer intense pain and terror; and was transported from the accident scene and subsequently life-flighted to the University of Utah Hospital where he died following the best medical efforts.
> 25. On information and belief, decedents Justin Clark Huggins, Bradley G. Wilcox, Curt A. Madsen, Justin W. Gunnell, Ryan Wayne McEntyre, Steven Delbert Bair and Dustin D. Fuhriman survived for a period of time following the accident, each experiencing conscious pain, suffering and terror, but thereafter died at the accident scene and/or while en route to the hospital.

Id.

2. Most of the decedents died due to head trauma and severing ("transection") or compaction of the brain stem. *See* Medical Examiner Reports (attached as Ex. "A").

3. Plaintiffs' biomechanical and kinematics expert Dr. Joseph Burton opined on the effects of the van roll on the decedents. *See* Report of Dr. Joseph Burton (attached as Ex. "B".

4. Dr. Burton speculated that van passengers experienced pain prior to death, based on the assumption that they were tumbling around in the van for some time prior to dying. *See*

Deposition of Dr. Joseph Burton at 115-117 (cited portions attached as Exhibit "C"). However, he admitted that he could not say who might have suffered or the degree of pain experienced.

> Q. And you're not able to say within a reasonable degree of probability that any one of the occupants in particular was conscious enough to have sustained any cognizable pain for any length of time given what we know about this accident, right, other than obviously Mr. Petersen or Mr. Nelson?
> A. That's true.

Id.

ARGUMENT

THE COURT SHOULD EXCLUDE EVIDENCE AND ARGUMENTS REGARDING PLAINTIFFS' SUPPOSED PRE-DEATH PAIN AND SUFFERING, BECAUSE THERE IS INSUFFIENT EVIDENCE OF SUCH PAIN AND SUFFERING FOR A CLAIM UNDER UTAH'S SURVIVAL STATUTE.

Plaintiffs are not entitled to seek damages for pre-death pain and suffering unless there is some evidence that a given decedent actually consciously experienced pain for an appreciable time. The evidence of post-accident/pre-death pain and suffering must be significant enough to be more than merely "contemporaneous" with or "incidental" to death. *Great N. Ry. Co. v. Capital Trust Co.*, 242 U.S. 144, 147 (1916). Where, as here, no such evidence exists, there is no valid basis for a pre-death pain and suffering claim.

Claims for post-accident pain and suffering must be proven with "competent satisfactory evidence." Utah Code Ann. § 78B-3-107(2). Plaintiffs bear the burden of proving the decedents actually experienced pain and suffering. *See Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2007 UT App 407, ¶ 58, 175 P.3d 572 (a plaintiff must prove their damages with reasonable certainty, although not with precision). While there is no clear Utah law holding that unconsciousness of the decedent precludes a claim of pre-death pain and suffering, it is clear that juries may not simply presume that a decedent experienced pain and suffering prior to death. This is only

logical: there must be some evidence to support such a claim. "It is well-established that 'pain and suffering substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages' for predeath pain and suffering." *Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1061 (9th Cir. 1997) (quoting *Great N. Ry. Co. v. Capital Trust Co.*, 242 U.S. 144, 147 (1916)); *see also English v. U.S.*, 204 F.2d 808, 810 (5th Cir. 1953) (applying Florida survival statute) ("Where, as here, the decedent met instant death at the time of the accident there can of course, be no recovery for his damages . . . ."); *Klawes v. Firestone Tire & Rubber Co.*, 572 F. Supp. 116, 120 (E.D. Wis. 1983) (applying Wisconsin law) ("Pain and suffering does not legally occur unless one is conscious. A victim who is rendered unconscious and never regains consciousness cannot be awarded damages for pain and suffering."); *Nye v. Com., Dept. of Transp.*, 480 A.2d 318, 321 (1984) (applying Pennsylvania law) ("where death is instantaneous the decedent experiences neither pain nor suffering. . . ."). Even momentary consciousness does not give rise to a claim for pre-death pain and suffering. *See Ghotra by* Ghotra, 113 F.3d at 1060 (requiring evidence that the decedent was conscious for "an appreciable length of time" prior to death).

Even the fact that a decedent might have been conscious for a short time prior to his death will not suffice to establish a claim for pre-death pain and suffering in this case. In *Ghotra*, the court held that ten seconds of "insensible" consciousness did not suffice to permit a claim for pre-death pain and suffering. *Ghotra*, 113 F.3d at 1061. Similarly in *Masters v. Courtesy Ford Co., Inc.*, a court found that no pain and suffering could be awarded to a decedent who died of carbon monoxide poisoning shortly after a single vehicle accident even though there

was evidence that he was conscious after the collision. 758 So.2d 171 (La. Ct. App. 1999). By comparison, the U.S. Supreme Court has held that where the decedent was conscious and "groaning every once in a while," "would raise his arm," and "try to pull himself," this did suffice—just barely—to establish that he consciously experienced pain and suffering. However, the court noted that that the case was "close to the border line." *St. Louis, I.M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 654-55 (1915). There is no evidence in this case that any of the decedents experienced pain and suffering other than that "substantially contemporaneous with death or mere incidents to it." Moreover, the jury may not presume that decedent suffered simply because death was not instantaneous. *See Prysock v. Manchester Tank and Equipment Co*., No. 95-2629 (E.D. La., July 23, 1996), 1996 WL 413638, *3 (unpublished) (applying Louisiana law) (stating, in the context of automobile accident death, "[a] damage award for the decedent's pain and suffering cannot be based merely on the fact that death was not instantaneous.") (attached as Ex. "D").

In this case there is no factual basis to support Plaintiffs' claims for pre-death pain and suffering. Plaintiffs' own expert Dr. Burton admitted he is "not able to say within a reasonable degree of probability that any one of the occupants in particular was conscious enough to have sustained any cognizable pain for any length of time given what we know about this accident." Dr. Joseph Burton Depo. at 116-17. Therefore Plaintiffs should be precluded from arguing such issues to the jury or eliciting speculative testimony about the pain they might have experienced if they were conscious and—in the U.S. Supreme Court's terminology—"sensible." Plaintiffs will no doubt rely on testimony from emergency responders that Mr. Jorgensen was alive for some period of time after the collision, but that evidence clearly does not meet the legal standard

necessary to establish a claim for pain and suffering separate and discrete from pain incidental to death. As such, Plaintiffs should be barred from introducing such evidence.

CONCLUSION

Evidence and arguments regarding allegations that the decedents experienced pre-death pain and suffering should be excluded, because there is insufficient evidence for such claims under Utah's survival statute.

DATED this 4th day of March, 2011.

THORNTON, DAVIS & FEIN, P.A.
Frederick J. Fein
Douglas E. Horelick

SNOW, CHRISTENSEN & MARTINEAU
John R. Lund
Julianne P. Blanch
David F. Mull

By: /s/ David F. Mull
Attorneys for Defendant Cooper Tire & Rubber Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of March, 2011, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF COOPER TIRE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OR REFERENCES TO PRE-DEATH PAIN AND SUFFERING** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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Addendum G

Jury Instruction 23 [R.1949,3162]

JURY INSTRUCTION NO. 23

Elements of a Medical Negligence Claim

To establish that Defendants were at fault, Plaintiffs have the burden of proving two things: (1) a breach of the standard of care and (2) that the breach was a cause of Plaintiffs' injuries.

MUJI 2d CV301B (Modified)

THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

-ooOoo-

JENAFER MEEKS BIRT, individually and on behalf of the heirs and estate of LILLIAN BIRT, deceased,

Plaintiff,

v.

DANIEL R. COTTAHM, M.D.; DANIEL COTTAHM, LLC; DANIEL R. COTTAHM, M.D., PC; BARIATRIC MEDICINE INSTITUTE; SURGICAL & MEDICAL WEIGHT LOSS SOLUTIONS, PLLC; WEI PENG, M.D., PH.D.; CHRISTINA G. RICHARDS, M.D.; FACS; SALT LAKE REGIONAL MEDICAL CENTER LP, dba SALT LAKE REGIONAL MEDICAL CENTER; ALEXANDER DEL CASTILLO, M.D.; DAVID KLEIN, M.D.; HEART AND LUNG INSTITUTE OF UTAH, INC; and DOES INDIVIDUALS 1-10; and ROE ENTITIES 1-10, inclusive,

Defendants.

CASE NO. 180902456

TRANSCRIPT OF JURY TRIAL
VOLUME I

SEPTEMBER 13, 2021

* ELECTRONICALLY RECORDED HEARING *

Reported by: Tamera L. Stephens, RPR, CSR, CRR

practices. Likewise, you may not discount the opinions of a witness merely because of how their testimony was delivered to the jury, be it in person or by video.

Number 21. In resolving any conflict that may exist in the testimony of the experts, you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

Number 22. At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witness's testimony. I urge you to pay close attention to the testimony as it is given.

Number 23. To establish that defendants were at fault, plaintiffs have the burden of proving two things: One, a breach of the standard of care; and, two, that the breach was the cause of the plaintiff's injuries.

Number 24. A doctor is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent doctors in good standing practicing in the same field. This is known as the standard of care. The failure to follow the standard of care is a form of fault known as either medical

Addendum H

Relevant Transcript Excerpts [R.3587–88; 3630; 3644–45]

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

-ooOoo-

JENAFER MEEKS BIRT, individually and on behalf of the heirs and estate of LILLIAN BIRT, deceased,

Plaintiff,

v.

DANIEL R. COTTAM, M.D.; DANIEL COTTAM, LLC; DANIEL R. COTTAM, M.D., PC; BARIATRIC MEDICINE INSTITUTE; SURGICAL & MEDICAL WEIGHT LOSS SOLUTIONS, PLLC; WEI PENG, M.D., PH.D.; CHRISTINA G. RICHARDS, M.D.; FACS; SALT LAKE REGIONAL MEDICAL CENTER LP, dba SALT LAKE REGIONAL MEDICAL CENTER; ALEXANDER DEL CASTILLO, M.D.; DAVID KLEIN, M.D.; HEART AND LUNG INSTITUTE OF UTAH, INC; and DOES INDIVIDUALS 1-10; and ROE ENTITIES 1-10, inclusive,

Defendants.

CASE NO. 180902456

JUDGE JAMES GARDNER

TRANSCRIPT OF JURY TRIAL
VOLUME II

SEPTEMBER 14, 2021

* ELECTRONICALLY RECORDED HEARING *

Reported by: Tamera L. Stephens, RPR, CSR, CRR

was -- she's improving. She was improving."

Did Dr. Peng convey that to you on the 20th?

A No.

Q Next, let's turn to page 34.

Question, line 17: "As of the 20th, had you formed any opinions as to the prognosis of Ms. Birt?"

"No. That's day one. Normally I don't tell anybody on my day because I need time for meeting the patient."

So, similar to him there, you actually agree, it sounds like, that -- was the prognosis discussed with you on the 20th?

A No.

Q Okay. Now moving to the 21st, so we're now on the second day here.

Question, line 8: "So we've now reviewed your note from the 21st. Overall, how would you characterize her condition on this day compared to the day prior?"

"So I think the patient had several issues. She failed the weaning trial that day before."

What do you remember about the weaning trial?

A I remember there were several weaning trials. Painful.

Q What happened? What did they look like?

A I -- they had to take her off of what was

keeping her asleep or not in pain, I guess. I don't know the right terminology.

She would try to breathe. I don't know if you've ever seen someone try to breathe and they can't. They're writhing. I felt like she was in a lot of pain, moaning and groaning.

Q And how did that inform your impression on how she was doing?

A Well, when someone can't breathe on their own, they're not doing well. They're not improving. I mean, that's the best way that I could --

Q He goes on to describe: "So I wanted to find out if anything was missed to affect patient not able to doing well for weaning. For example, I want to make sure there's nothing wrong with her head, like a stroke, so that's why I ordered a CT scan."

Do you remember a CT scan being ordered? Or a concern about a stroke?

A I remember the concern over a stroke.

Q And how did that influence your impression on how she was going?

A Great. This is another thing that's happening, another hit to her.

Q "Even she's come in not for stroke but if she had kind of mental status change, I want to make sure we

Q Let me point you to Dr. Richards's note, which we were just looking at. This is page 207. It's a fairly brief note.

This is the night where Dr. Peng came to her, said the family is withdrawing care. (Inaudible) and would like you to talk to the family.

Do you see anywhere in this note where she discussed the withdrawal of care with the family?

A No.

Q The following morning, April 25th, there was a more formal meeting. Well, tell me what happened on the morning of the 25th.

A So we had decided to try to wean her from the vent, see if she could breathe on her own. Hope and pray. Sorry, just hope.

Q And there was -- was there a meeting with a provider that morning?

A Dr. Peng.

Q Was anyone else present? A health care provider?

A Just Dr. Peng.

Q And what do you recall about that meeting?

A My family was there. Myself, my brother, my husband. My dad was there. My mom's sisters. We discussed withdrawing care.

to discuss withdrawal issues?

A No. He was not in the meeting.

Q Neurologist Dr. James, did you ever have any -- was Dr. James ever brought in to discuss the withdrawal issues?

A No.

Q "They understand the medical" -- "the patient's medical condition and prognosis."

What did you understand her medical condition and prognosis to be?

A She was already gone.

Q We saw the consent that you signed. Does that accurately reflect what you understood her medical condition and prognosis to be?

A Yes.

Q "I also discussed with Dr. Richards, who agreed with the family decision."

Did Dr. Richards ever try to dissuade you?

A No, she wasn't in the meeting.

Q "After the patient was put on comfort care, extubated around noon, the patient finally died around 19:04."

Tell us about that experience.

A Yeah. My family gathered after the meeting and signatures I signed. My aunt, my mom's sister, asked

for a priest to be brought in to have her final rites given to her.

They took the tube out of her mouth. She couldn't breathe on her own. My family stayed around, her sisters and my cousins. We played country music because she loved country music.

At some point everybody kind of needed a break from the day in the room, and so I stayed. And I held her hand and told her it was okay to go, that I would take care of everybody. And she went, just her and I.

Q According to that discharge summary, the tube was pulled around noon and she finally died around 1900 hours. That's about seven hours. Does that sound about right?

A Yes.

Q In those seven hours, did your mom try to breathe?

A No.

Q I want to talk about your loss. We're here to tell the jury about what is missing from your life. So why don't you (inaudible) and tell the jury how it's impacted you to lose your mother.

A I had a ten-month-old baby at home. I never needed my mom more than during that time.

My brother's children were old enough to