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UTAH COURT OF APPEALS
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IN THE SUPREME COURT

OF THE STATE OF UTAH

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DaNIECE MIKKELSEN, Plaintiff-Appellant,	:	Case No. 860629
v.	:	
MARLAN J. HASLAM, M.D., Defendant-Respondent.	:	Category No. 14(b)

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BRIEF OF RESPONDENT MARLAN J. HASLAM, M.D.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH, HONORABLE RONALD O. HYDE, JUDGE, PRESIDING

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FILED
JUL 3 0 1987
Clerk, Supreme Court, Utah

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DaNIECE MIKKELSEN, Plaintiff and Appellant, v. MARLAN J. HASLAM, M.D., Defendant and Respondent,	:	Case No. 860629 Category No. 14(b)

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BRIEF OF RESPONDENT MARLAN J. HASLAM

STATEMENT OF ISSUES

1. Is the jury's finding of negligence a finding that Defendant told Plaintiff she could safely ski?

2. Were the defenses of contributory negligence and assumption of risk properly presented to the jury?

3. Did the trial court abuse its discretion in refusing to grant Plaintiff's motion for a new trial?

STATEMENT OF THE CASE

This is a medical malpractice action tried to a jury in the District Court of Weber County, wherein Plaintiff-Appellant DaNiece Mikkelsen sought damages for injuries sustained from a skiing accident following a total hip replacement. Plaintiff alleged that Defendant-Respondent Marlan J. Haslam, M.D. had been negligent in his post-operative treatment of her hip arthroplasty, claiming negligence in the following particulars:

1. In failing to properly advise her in the limitations that should be placed on her physical activity in light of the nature of the prosthetic device and its fit in her leg and hip area.

2. In advising her in the spring of 1979 that she could go skiing, when Dr. Haslam knew or in the exercise of reasonable care should have known that such activity could not be safely undertaken by a woman whose hip was in the condition that Dr. Haslam knew or should have known it to be in at the time of the advice.

3. In improperly advising her that she could go skiing without appropriate follow-up examinations sufficient to apprise himself of the condition that developed as a natural result of the surgery that was performed by Dr. Haslam

4. In failing to perform physical and x-ray examinations on a regular basis of the hip and leg area where the total hip replacement procedure was performed in the months and years following such procedure.

Plaintiff appeals from a judgment based on a jury verdict dated December 11, 1986, which found Plaintiff and Defendant equally negligent and from an order denying Plaintiff's motion for a new trial and/or motion for entry of judgment in her favor on the issue of liability dated November 7, 1986.

STATEMENT OF THE FACTS

Dr. Marlan J. Haslam is a 55-year-old board certified orthopedic surgeon, practicing in Ogden, Utah (R. 764). In 1972 he performed the first total hip arthroplasty in northern Utah (R. 771).

The total hip replacement was originated by Dr. John Charnley, an English surgeon who began using prosthetic joint implants in 1959 (Deposition of Dr. Harold K. Dunn, taken 8-16-84, page 24, R. 769). The procedure involves replacing the femoral head with a stainless steel prosthesis which is secured in the upper femur with methyl methacralate cement. A polyethelene plastic cup is then glued in the acetabular area following reaming of the bone to obtain an accurate fit (R. 773).

Defendant studied congenital hip dislocations and hip arthritis extensively from 1961-1964 (R. 769). He graduated from the University of Utah Medical School in 1957 and,

following an internship in Seattle and a two year term in the Air Force, spent three years training in orthopedic surgery at the Orthopedic Hospital in Los Angeles (R. 764). He was trained by Dr. J. Vernon Luck, a nationally prominent hip surgeon who was in close contact with Dr. John Charnley and his progress with artificial hips (R. 768).

The Federal Drug Administration prohibited physicians from using the methyl methacralate cement in this country for almost ten years after its initial use in Europe (R. 769). In 1970 the University of Utah was issued permission to begin performing the total hip operation (R. 769). Defendant joined in arthroplasties performed by Drs. Sherman Coleman and Harold Dunn at that facility and returned to Orthopedic Hospital in 1970 to be trained in the procedure by Dr. Luck (R. 770).

Defendant was Chief of Surgery at McKay-Dee Hospital in Ogden when its new facility was constructed. He designed an operating room in the new building to be used for total hip surgeries (R. 770). He cultured the air in various locations within the room and installed ventilation controls to rotate the air 13 to 20 times each hour as a precaution against infection (R. 771). After determining that there was good control of the air and bacteria, Defendant performed the hospital's first total hip surgery in 1972 (R. 771).

Plaintiff first contacted Defendant about a total hip replacement on January 22, 1973 (R. 777). Plaintiff had been born with a congenitally dislocated right hip in 1934 (R. 509-511). She had been limited in her sports activity, but could ride a bicycle and attend dances. She walked with a limp (R. 510). She had been treated non-surgically through her youth. At approximately age fourteen she underwent surgery by Dr. Louis Peery, who placed a metal plate and screws in her upper femur to prevent progressive dislocation and to stabilize the bone (R. 512).

Plaintiff dropped out of school in the eleventh grade to avoid the pain associated with climbing the school's stairs (R. 513). She married shortly thereafter and had one child, Kathy Meeker (R. 514). She later divorced and married Gary Mikkelsen in 1955 (R. 514).

When Plaintiff contacted Defendant about a total hip arthroplasty in 1973, he recommended that she not undergo the procedure at that time (R. 518). He suggested that she wait to see what was going to take place with the hip procedures recently completed because there was a concern that the components would wear out (R. 778). Later observations indicated that the two components did not deteriorate after being placed in the body (R. 779).

Anticipating that Plaintiff might want a total hip replacement in the future, Defendant recommended that she have the metal removed from her femur to prepare the site for surgery. He removed the metal on February 20, 1973 (R. 779).

Plaintiff next approached Defendant about a total hip replacement on February 4, 1974, stating that the pain in her hip was increasing (R. 782). Following x-rays and an examination, they discussed the total hip replacement and decided on surgery (R. 783).

Since 1972, Defendant has instructed his total hip patients that the artificial hip is fine for walking; it is a man-made device and will wear out; it can break out, it can loosen, and it can be a source of infection because it can be a repository for germs. He is sure that he talked with Plaintiff about these factors at the time of her decision (R. 783). Defendant also informed Plaintiff that her femur was an unusual size and he would have to order a specially made component (R. 783).

Plaintiff's total hip arthroplasty was performed on March 13, 1974 at McKay-Dee Hospital (R. 784). Plaintiff had small bones (R. 840) so a femoral component with a smaller stem was used (Plaintiff's Exhibit #8, page 9). The procedure was successful (R. 785). At trial, Plaintiff made

no claim that the operation had been improperly performed (R. 919).

Following Plaintiff's discharge, Defendant recommended that she undergo an osteotomy of her right tibia to correct an angle that would prevent her from placing full weight on the hip. Defendant performed that operation on May 8, 1974 (R. 785).

Defendant examined Plaintiff on May 21, 1974; June 3, 1974; June 14, 1974; June 24, 1974; July 16, 1974; and September 17, 1974 (R. 787-788). His office notes state that during the September exam Plaintiff had no complaints and walked with a barely perceptible limp. Plaintiff was ordered to return PRN, meaning if she had any problems (R. 788).

Defendant testified that in 1974 his follow-up program was to take total hip patients through their education and crutch walking until they could walk well, teach them what type of chairs to avoid, and tell them to be careful of other activities like twisting, jumping and running. He told them to come back if they had problems (R. 789).

The trial testimony was conflicting concerning Defendant's instructions for post operative activities. Defendant testified that he is sure that he talked with Plaintiff prior to her surgery, about the limitations to be

used with the total hip (R. 819). He further testified that postoperatively you have to tell patients "not only the bad things, but you have to give them good encouragement. She had a good hip. I said, go and enjoy a good hip. You're now pretty much back to normal. Normal means she was pretty much like she was. But she was told don't run, don't twist, and don't lift, and then if you have trouble, contact me." (R. 855).

Plaintiff testified that prior to surgery she had no conversation with Defendant regarding the purpose of the total hip and the activities she could be expected to do or not do after the operation (R. 521). She testified that she expressed no interest and made no inquiry at that time as to what limitations she might have (R. 568). Plaintiff maintains that upon her release Defendant told her she had no limitations and that she could ski, play tennis and do whatever she wanted (R. 525).

Plaintiff testified that her recovery was "remarkable" (R. 520). The years from 1974 - 1980 were the best years of her life as far as her physicial condition was concerned (R. 580). She was totally free of pain (R. 524). She performed exercises to strengthen her leg (R. 523) and testified that in early February of 1979, she decided she would take up

skiing (R. 570). She testified that she called Defendant's office in the company of two co-workers from her place of employment and asked him if she could ski. She stated that Defendant said she could ski, that her left hip would probably break before her right, and to go and have a good time (R. 529).

Defendant testified that he never advised Plaintiff that her operated hip was stronger than her other hip or that she could go skiing (R. 763).

Defendant was invited to the wedding reception of Plaintiff's daughter in 1979. Plaintiff walked without a limp at that time and appeared to be in no pain (R. 844). Plaintiff introduced witnesses who testified that they discussed Plaintiff's skiing with Defendant at the reception (R. 533). Defendant does not recall any conversation dealing with Plaintiff's skiing (R. 812). Defendant's wife Patricia accompanied him to the event and testified that she recalls no discussion of skiing (R. 888).

Plaintiff skied 10-12 times in 1979 and another 10-12 times in 1980 (R. 531, 534). On Sunday, March 2, 1980, she was skiing with her daughter and son-in-law at Powder Mountain, near Ogden (R. 535). The skies were overcast.

Snow had fallen the night before and the runs were partially groomed (R. 611, 612). The light was not very good (R. 594) and the surface conditions were listed on the Ski Patrol Incident Form as heavy powder (Plaintiff's Exhibit 10, Appendix 1).

Plaintiff saw her friend Ken Herrick and asked him to ski with her and give her instruction (R. 536). Plaintiff and Mr. Herrick started down the Drifter run which has beginner, intermediate and expert terrain (R. 629).

Mr. Herrick could not recall whether he was skiing in front of Plaintiff or close to her (R. 613). She executed numerous turns (R. 614). They were skiing slowly because Plaintiff wanted him to give her pointers and he testified that "she was executing everything a little bit more pronounced than she normally was to get the effect of her ski" (R. 616).

Mr. Herrick testified "at one point, she started to fall, and I heard a definite pop and she went down" (R. 614). The Ski Patrol Incident Form lists the patient's description of the incident as follows: "Making a turn to the right, left ski edge caught, went straight downhill, resulting in doing the splits, falling to her knees with both skis extended" (Plaintiff's Exhibit 10; Appendix 1). Mr. Herrick

testified that Plaintiff's safety bindings did not release during the fall and that he did not run a check on the binding settings (R. 632).

Plaintiff requested that she be flown to St. Benedict's Hospital in Ogden because her daughter and son-in-law worked there (R. 541). She asked to be treated by Defendant (R. 542). A nurse contacted him at home regarding the accident (R. 812).

Defendant had relinquished his privileges at St. Benedict's Hospital in 1974 because nearly all of his work was being performed at McKay-Dee Hospital (R. 767). He told the nurse to tell Plaintiff that he did not have privileges at St. Benedict's, but would arrange for her to transfer by ambulance to McKay-Dee (R. 813). He was anxious and willing to help her (R. 814).

Plaintiff refused to be transferred (R. 573). She was disappointed that Defendant had not come to St. Benedict's and could not understand why he would not come to the hospital when it contained the facilities necessary to operate (R. 890).

Dr. Jack Crosland assumed Plaintiff's care. He strongly recommended that Plaintiff be treated by Defendant and contacted Defendant regarding her refusal to change

hospitals (Deposition of Dr. Jack Crosland taken 5-4-82). Dr. Haslam authorized Dr. Crosland's assumption of her care (Crosland deposition, page 12).

Dr. Crosland found Plaintiff's leg broken around the femoral component. The acetabular cup was not loose and remains intact (Crosland deposition, page 14). Dr. Crosland disconnected the joint and removed the femoral prosthesis, replacing it with a rod to stabilize the bone (Crosland deposition, page 17). The rod was removed 14 months later (Dunn deposition, page 9). Plaintiff's present physician, Dr. Harold Dunn, has recommended that a new femoral component not be inserted because the bone stock is poor (Dunn deposition, page 5). Plaintiff accordingly has no hip joint.

Six orthopedic surgeons testified at trial. The following brief excerpts from trial testimony are relevant to the issues raised:

Respondent Marlan J. Haslam. Defendant testified as to his qualifications, training, experience, and board certification. He has stayed current on developments in the area of total hip replacements by attending yearly continuing education meetings on the subject (R. 766). He represents the state of Utah on the board of counselors for the American Academy of Orthopedic Surgeons (R. 766). He is also a

clinical instructor of orthopedics at the University of Utah Medical School (R. 766). He has performed over 300 hip replacements (R. 834). Defendant's competency was never challenged.

Defendant testified that there was a hint of possible component loosening in total hips in 1974, but that it was not being widely published at that time. He stayed abreast of the ongoing information as well as he could (R. 832). By the late 70's, loosening was a factor that could be expected down the line after an operation (R. 833). He has revised 20 of his approximately 300 total hip cases due to loosening (R. 834) and had performed three fracture revisions by 1981 (R. 849). He testified that from all of the evidence, Plaintiff did not have a loose femoral component in 1979 (R. 849). She probably had no loosening prior to her accident (R. 849). There was nothing wrong with the hip components themselves following her accident (R. 794).

Methyl methacralate cement contains barium which allows the cement to be visible on x-ray. The term "lucency" refers to a black area on the film which can indicate looseness of the components or cement (R. 790, 791). Looseness is always accompanied by pain (R. 835). A patient can have lucency on film without any looseness of components (R. 791).

Accordingly, revisions of the operation are not undertaken without patient symptoms (R. 791). Revisions are much more difficult than the original operation (R. 791). A physician cannot do preventive surgery, but must operate to correct symptoms (R. 791). Defendant asked his patients to contact him if they had pain, rather than at regular intervals (R. 835).

Defendant testified that he has had two patients who skied prior to their total hip surgery. They were both told they could not ski if he did their surgery (R. 824). If Plaintiff had been involved in sports before her surgery, he would have talked with her about sports (R. 827). He did not recall getting a telephone call from Plaintiff regarding skiing. If he had, his response would have been "no." (R. 809).

Dr. Sherman Coleman. Dr. Coleman is an orthopedic surgeon, practicing primarily at the University of Utah Medical Center where he also teaches orthopedic surgery on a weekly basis (Deposition of Dr. Sherman Coleman, taken 6-12-86, page 7). He has been president of the American Orthopedic Association and has been the Chief of Staff at Shriner's Hospital in Salt Lake City for 29 years (Coleman deposition, page 5). Dr. Coleman was called as an expert witness by defendant and testified through video deposition.

Dr. Coleman testified that from his review of the records, x-rays and statements, Defendant's behavior was within the standard of care (Coleman deposition, page 16). To advise a patient that it is safe to go skiing would be a departure from the standard of care (Coleman deposition, page 55). Dr. Coleman knows of total hip recipients who do ski and play tennis (Coleman deposition, page 17). He allows his patients to play doubles and has patients who have become national tennis champions (Coleman deposition, page 34).

Dr. Wallace Hess. Dr. Hess is an orthopedic surgeon practicing in Salt Lake City who was called as an expert witness by Defendant. Dr. Hess has done research in Europe on total hip replacements with Dr. John Charnley and has specialized in total joint surgery since 1970 (R. 863). He has performed 1650 total hip replacements (R. 875). After reviewing the case, Dr. Hess testified that Defendant's care of Plaintiff was very good (R. 866).

Dr. Harold Dunn. Dr. Dunn was Plaintiff's treating physician at the time of trial. He was called as Plaintiff's witness and his testimony was presented by deposition. Dr. Dunn practices at the University of Utah where he has been chairman of the Division of Orthopedic Surgery since 1981. Upon Plaintiff's request, he assumed her care on April 24, 1981 (Dunn deposition, page 3).

Dr. Dunn testified that he permits his patients to do cross country skiing, but no waterskiing or snow skiing. He has many patients who ski, but it is not with his blessing (Dunn deposition, page 17). He tells patients the device is a walking hip only, and does not make a list of activities to avoid because the list can never be complete enough to address each new activity that people may think of (Dunn deposition, page 26).

Dr. Dunn has his patients return for a one year checkup and every five years thereafter to assist him in compiling data for his research. His follow-up routine is definitely not the standard of the community (Dunn deposition, page 23).

<u>Dr. John P. Cranston</u>. Dr. Cranston testified as Plaintiff's expert witness at trial. Dr. Cranston is a 52-year-old California physician, who has performed 20-30 total hip operations (R. 658, 663). Since 1981, his practice has been largely limited to examination of patients for permanent disability evaluations and testifying in medical malpractice and personal injury actions (R. 670-672). He occasionally sees former patients, but is not a doctor that people go to for medical problems (R. 731).

Dr. Cranston testified that the standard of care requires a doctor to tell his total hip patients specific activities they cannot engage in, including collision sports, mountain climbing, skiing, playing tennis with any degree of vigor and heavy loading or twisting. The standard required

that these specific limitations be told to the patient several times, before and after surgery (R. 681). Defendant's care was substandard because "the specific do's and don'ts down through a long list, for a complicated hip case, were not detailed to this woman" (R. 683). It was not in compliance with the standard of care if Defendant waited for Plaintiff to ask specific questions before giving her advice (R. 683).

Dr. Cranston testified that if Defendant did tell Plaintiff that she could ski in either 1974 or 1979, such advice was below the standard of care (R. 685, 686). It was below the standard of care if Defendant told Plaintiff that her right hip was as good as her left (R. 686). Defendant's failure to schedule follow-up appointments or x-ray examinations and his advice to come back as needed were substandard. He should have examined her every three to six months for the first year, and at six month intervals for the second (R. 688). Dr. Cranston had his patients come in annually thereafter for as long as necessary (R. 749). He testified that the wedding reception and alleged telephone conversation both represented additional opportunities for Defendant to ask Plaintiff to come in for a checkup (R. 691). Defendant's failure to examine her following the alleged telephone contact was substandard conduct (R. 689).

Dr. Cranston testified that multiple factors made Plaintiff a textbook complicated case as far as management follow-up was concerned (R. 689). X-rays taken over time would probably have shown a deterioration of her hip (R. 693). Procedures to minimize damage if deterioration is present include advising the patient to slow down on activities and use crutches. If further deterioration occurs and symptoms are present, replacement of the components may be required (R. 694).

Dr. Jack Crosland. Dr. Crosland was Plaintiff's treating physician following her accident. Plaintiff read his deposition to the jury. During surgery he found the bone along the medial cortex of the femur to be paper thin (Crosland deposition, page 16). He cannot say whether x-rays taken the day before would have shown the bone to be paper thin (Crosland deposition, page 56). If the projection was just right, you could probably tell it was thin cortical bone (Crosland deposition, page 56). He has performed 25 or 30 total hip procedures (Crosland deposition, page 30). He testified that Defendant's surgery was performed well (Crosland deposition, page 53).

X-rays following the accident showed lucency between the cement and the cortex. In this instance, the lucency was a result of the fracture (Crosland deposition, page 35). The

cement had not decomposed (Crosland deposition, page 36). Dr. Crosland tells his total hip patients they are going to have to live a sedentary lifestyle and does not recommend jogging, running, or active athletics (Crosland deposition, page 38). He does not recommend that his patients ski (Crosland deposition, page 51). Dr. Crosland stated that in 1974, doctors probably overestimated the functional life of total hips. They were placed in younger and younger people then, with the expectation that they would last for long periods. Since then, they have found they are not holding up as they had hoped and expected they would (Crosland deposition, page 37).

SUMMARY OF THE ARGUMENT

This case is a very unusual medical malpractice action with an ongoing history of many years. It centers on Dr. Haslam's treatment of Mrs. Mikkelsen's total hip replacement in 1973 and 1974. Also at issue is an alleged telephone call placed five years later in 1979. The issues were resolved in a five day jury trial. Plaintiff makes no claim that she was unable to admit all of her evidence or that she was restricted in arguing any of her claims fully to the jury.

Rather, plaintiff's argument is that the trial court should have eliminated the defenses of assumption of the risk

and contributory negligence from the case. Plaintiff argues that the defenses were inapplicable because the jury conclusively found that Dr. Haslam had advised Mrs. Mikkelsen that she could safely ski.

Plaintiff's theory is without foundation. There is no specific jury finding to that effect. Nor can the jury's determination that Defendant was negligent be construed as a conclusion that he committed each act of negligence alleged by Plaintiff. Neither the jury instructions nor the special verdict form required Plaintiff to prove all of her claims before the jury could rule in her favor.

Plaintiff presented several allegations of negligence to the jury, thereby broadening the trial to encompass numerous medical and factual issues requiring the jury's deliberation. The claims were argued separately throughout trial. No special interrogatory on the issue of skiing advice was presented to the jury. The jury's finding of negligence could be based on any one of her claims. It cannot be concluded that the jury found that Defendant told Plaintiff that she could ski.

Defendant testified that he never advised Plaintiff that she could ski and that he had instructed her not to load or twist the artificial hip. Skiing is a dangerous activity and each participant assumes the risks inherent in the sport.

The facts surrounding Plaintiff's skiing accident presented sufficient evidence to support submission of assumption of risk and contributory negligence to the jury. These defenses are not barred by the physician-patient relationship that existed. The jury was correctly instructed as to the burden of proof on each issue and concluded that Plaintiff was negligent or assumed the risk of her injury by skiing. Plaintiff has failed to satisfy the requirements for reversal of a judgment on appeal and the verdict should stand.

The trial court acted properly in refusing to enter judgment in Plaintiff's favor on the issue of liability or grant her a new trial on the question of damages. This Court has stated that it will not reverse a trial court's denial of a motion for a new trial unless there is a manifest abuse of discretion in the ruling. No such abuse of discretion has been established here.

Moreover, this is not the type of case where a new trial could properly be granted on the issue of damages alone. Plaintiff is not asking that an error in an award of damages be corrected. Rather, Plaintiff is asking this Court to disregard the jury's ruling and strike their answers to questions 3, 4 and 6 of the special verdict form which state that Plaintiff contributed to her injury to such an extent as to bar her from recovery. The jury verdict is supported by

competent evidence in the record. To remove those questions from deliberation would deprive Defendant of the privilege of presenting his side of contested issues to a jury. If a new trial is granted, it should, in fairness, encompass all issues.

ARGUMENT

I.

THE JURY DID NOT MAKE A FINDING THAT DEFENDANT HAD ADVISED PLAINTIFF THAT SHE COULD SAFELY SKI.

A. The Trial Court's Instructions and Special Verdict Form Did Not Require the Plaintiff to Prove Each of Her Claims Before the Jury Could Find Defendant Negligent.

Plaintiff's brief is based on the premise that the jury found that defendant specifically told her that she could ski, and that the giving of such advice was a cause of her injuries. Plaintiff's argument is without foundation.

In Instruction No. 1, the trial court instructed the jury, in part, as follows:

> You are instructed that this is an action for medical malpractice filed by DaNiece Mikkelsen, the plaintiff, against Marlan J. Haslam, M.D.
>
> The plaintiff alleges in her Complaint that she had been a patient of the defendant, Marlan J. Haslam, M.D., for the period of time from January 1973, up to and including March 1980. During that period of time, the plaintiff alleges that the defendant was negligent and provided medical

services and advice that were below the standard of care for a doctor with the defendant's medical specialty as a board certified orthopedic surgeon.

More specifically, plaintiff alleges that the defendant was negligent in the following:

1) In failing to properly advise DaNiece Mikkelsen in the limitations that should be placed on her physical activity in light of the nature of the prosthetic device and its fit in her leg and hip area.

2) In advising DaNiece Mikkelsen in early 1979 that she could go skiing when Dr. Haslam knew or in the exercise of reasonable care should have known that such activity could not be safely undertaken by a woman whose hip was in the condition that Dr. Haslam knew or should have known it to be in at the time of the advice.

3) In improperly advising Mrs. Mikkelsen that she could go skiing without appropriate follow-up examinations sufficient to apprise himself of the conditions that developed as a natural result of the surgery that was performed by Dr. Haslam.

4) In failing to perform physical and x-ray examinations on a regular basis of the hip and leg area where the total hip replacement procedure was performed in the months and years following said operation.

The plaintiff, DaNiece Mikkelsen, further alleges that these negligent acts either individually or jointly caused her injury, damage and loss . . . (emphasis added).

(R. 269, 270, Appendix 2).

This instruction was written by Plaintiff and was adopted by the court at her request.

Plaintiff requested an additional instruction stating that she need not prove each claim in her complaint for the jury to find Defendant negligent (R. 198). The instruction was rejected by the court. It was cumulative and unnecessary in light of the specific language of Instruction No. 1 that the alleged acts either individually or jointly caused Plaintiff's loss.

This Court has stated:

> When the error assigned is the giving or failure to give instructions, the real inquiry should be were the issues of fact necessary to be determined, and the principles of law applicable thereto, correctly presented to the jury in a clear and understandable manner? That is the purpose of instruction and if it is accomplished, the failure to give additional ones is not of controlling importance.

Wellman v. Noble, 12 Utah 2d 350, 352, 366 P.2d 701, 702 (1961).

Plaintiff extends her argument that the jury found in her favor on each issue by claiming that the trial court improperly used the term "the proximate cause" when defining the term in its Instruction No. 8 (Appendix 3). Plaintiff argues that the instruction implied that Plaintiff had the burden of proving each of her claims of negligence to arrive at the conclusion that Defendant's conduct was "the proximate cause" of her injuries.

The instructions read as a whole defeat this argument. Instruction No. 3 had originally stated that Plaintiff had the burden of proving both that Defendant was negligent and that his negligence was "the legal cause" of Plaintiff's injuries. Upon Plaintiff's request, the court changed the instruction to require Plaintiff to prove that Defendant's negligence was "a proximate cause" of her injuries (R. 90, Appendix 4). The special verdict form also asked the jury to determine whether the negligence of either party was "a cause" of her injuries.

The jury was correctly directed to read these instructions as one connected whole (Instruction No. 31, Appendix 5, R. 304). When so read, the instruction on proximate cause does not mandate as Plaintiff suggests.

At the conclusion of the jury instructions, the jurors were given a special verdict form, which asked "Was defendant negligent as alleged by plaintiff?" (Appendix 6). Plaintiff argues that this form, read in conjunction with her Instruction No. 1, required the jurors to conclude that Defendant had committed each of the four acts alleged before they could find him negligent. Plaintiff therefore concludes that their finding of negligence necessarily reflects a determination that Defendant told Plaintiff she could ski.

Plaintiff's theory forces a strained interpretation of the specific language used. No words to that effect are included in the instruction. Indeed, it is difficult to imagine that Plaintiff would have proposed the instruction if she felt it could reasonably be interpreted as such an "all or nothing" charge. All that can be discerned from the jury's verdict is that Plaintiff was successful in proving at least one of her claims by a preponderance of the evidence. Plaintiff's conclusion that the jury specifically found that Defendant advised Plaintiff that she could ski is simply without foundation.

B. Plaintiff's Claims of Negligence Were Treated as Separate Issues Throughout Trial.

Plaintiff's four claims of negligence were treated as separate issues at trial. Plaintiff's counsel argued the claims of negligence individually in his summation to the jury. He argued that Defendant had a duty to schedule Plaintiff for yearly x-ray examinations, adding:

> And if that be true, that duty was owed and that duty breached, and she was injured as a proximate result of the breach of that duty, she's entitled to a verdict at your hands in this case. It's just that simple. And that would be true whether that telephone conversation occurred or whether it didn't occur. What difference does it make, if she wasn't taken care of, if she wasn't sufficiently instructed and advised by this physician and surgeon. (Emphasis added).

(R. 917).

Plaintiff's counsel also argued:

> The first and foremost duty that he owed under the law and facts of this case, was to make a complete and full disclosure to the patient of the do's and don'ts, of the risks involved in this operation. If he fell short of that duty, then he breached that duty, and that, in the eyes of the law, is negligence.

(R. 906, 907).

Plaintiff's counsel reiterated the severability of the issues by saying "We claim three things. This woman wasn't adequately instructed at the commencement and the threshold of this case. She wasn't given adequate advice when the telephone call took place, and the follow-up, which is the final, final controlling issue here, was not had" (R. 919). It was never suggested to the jury by either party that Plaintiff needed to prove each of these claims in order to prevail.

Plaintiff could have chosen to narrow the issues by limiting the trial itself to the sole question of whether Dr. Haslam advised Plaintiff that she could safely ski. Defendant's deposition, taken in 1981, sets forth his denial of the telephone call and his admission that such advice, if given, would violate the standard of care. This standard was confirmed, without exception, by Doctors Dunn, Hess, Coleman and Crosland, all of whom were deposed before trial. Instead of relying on this single factual issue and using the

uncontroverted standard of care, Plaintiff chose, as was her privilege, to substantially broaden the medical and factual issues via her expert witness, Dr. John Cranston.

As stated above, Dr. Cranston's criticism of defendant was multifaceted. His scattergun approach to Defendant's claimed failures gave the jury many aspects of treatment to evaluate, far beyond the alleged advice regarding skiing.

In reviewing the evidence, the jury may have concluded that Defendant did not advise Plaintiff that she could ski, but that he should have scheduled her for regular follow-up examinations and x-rays. The jurors may have found Defendant's advice regarding the limitations for Plaintiff to use with her hip or his instructions on the nature and fit of the components to be inadequate. They may have even been influenced by the allegations of below standard conduct raised by Dr. Cranston which tangentially related to Plaintiff's claims, such as failure to schedule her for an appointment following the wedding reception and alleged telephone call. It is impossible to now isolate the basis for their decision.

Plaintiff asks this Court to interpret the jury finding beyond what it is to a finding that Defendant told Plaintiff to go ahead and ski. As we have argued, this is a specious

position that flies in the face of the actual fact and the instructions by the Court. It is fruitless and beyond the role of the judiciary to speculate as to the minds of the jurors; the issue is simply does the evidence support the verdict.

Plaintiff chose not to request a special interrogatory on the issue of whether Defendant had advised her that she could safely ski. She submitted three proposed verdict forms to the court, none of which asked the jury to make a specific finding on that issue. Such an interrogatory, if requested, would have been discretionary with the court. Absent its use, it cannot be stated that the jury found Defendant advised Plaintiff that she could ski.

II.

THERE WAS AMPLE EVIDENCE TO SUPPORT THE TRIAL COURT'S SUBMISSION OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK TO THE JURY.

A. Skiing is a Sport that Carries Inherent Risks and Dangers.

The evidence presented at trial established what is commonly and generally known - that skiing is a dangerous sport. Plaintiff's witness, Ken Herrick, a member of the Powder Mountain Volunteer Ski Patrol for thirteen years, testified that people are frequently hurt while skiing, and

that "it's tradition that you break your leg skiing" (R. 634). This was confirmed by the medical witnesses at trial, and Plaintiff herself testified that she knew when she started participating in the sport that people got hurt and broke their legs while skiing (R. at 572).

The common knowledge that skiing is dangerous was recognized by the Utah Legislature when it enacted Utah Code Annotated 78-27-52(1), 1953 as amended. While not controlling here, the statute does reflect Utah's recognition of the well known risks of skiing. The statute reads:

> 1) "Inherent risks of skiing" means those dangers or conditions which are an integral part of the sport of skiing, including, but not limited to: changing weather conditions, variations or steepness in terrain; snow or ice conditions; surface or sub-surface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski within his own ability.

The inherent dangers of the sport are also noted throughout the case law concerning ski accidents. See the Annot., 24 A.L.R.3d 1447 "Skier's Liability for Injuries to or Death of Another Person" (1969), which states: "One of the basic rules applying to sports participants generally is that a person who takes part in a sport, accepts the dangers that inhere in it insofar as they are obvious and necessary."

The dangers known to exist in skiing were recognized by the Tenth Circuit Court of Appeals in LaVine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977). Plaintiff, an expert skier, was struck by her instructor when she stopped on the ski hill. Her knee was shattered. The jury found the instructor free of negligence and the Plaintiff free of contributory negligence. The Plaintiff argued that the collision itself conclusively established both the Defendant's negligence and the Plaintiff's right to recover. The appellate court disagreed, noting:

> It is true that the jury in a ski slope case tends to view the entire skiing scene as one involving a high degree of hazard in which the skier assumes a degree of risk by merely taking to the slopes. This is an attitude which tends to be persuasive in injuries which involve participation in sports. Assuming this is the attitude, it is inappropriate for us to reach out, so to speak, in an effort to change the result. The jury has considered the case, and this court has not acted so as to prejudice the appellant. The verdict must stand.

Id. at 735.

While a skier does not blanketly assume the risk of any possible injury that may happen on the slope, he or she does assume the obvious risks inherent in the sport, such as injury stemming from bad weather conditions, heavy snow, or simply falling on the hill. Plaintiff argues, however, that

the trial court improperly presented the issues of contributory negligence and assumption of risk to the jury on the particular facts of this case. In view of the dangers of the sport itself and the evidence presented at trial, both defenses were appropriate.

B. The Facts Sustained the Submission of the Issue of Contributory Negligence to the Jury.

The standard for determining whether the issue of contributory negligence should be submitted to a jury was outlined by this Court in Simpson v. General Motor Corp., 24 Utah 2d 301, 303, 470 P.2d 399, 401, (1970). The Court held:

> Consideration of the justification of submitting the issue of contributory negligence is analogous to making the same determination as to primary negligence: whether there is a basis in the evidence upon which reasonable minds could conclude that the plaintiff was negligent in that he failed to exercise that degree of care which an ordinary, reasonable and prudent person would have observed under the circumstances.

The following evidence presented at trial justified the submission of the issue of contributory negligence to the jury:

Plaintiff chose to ski on a day when conditions were less than ideal. As stated earlier, the skies were overcast, snow had fallen the night before, and the slope was not packed, but only partially groomed. The light was not very good. It had been snowing recently and the Ski Patrol

Incident Form lists the snow conditions as heavy powder. Plaintiff skied the Drifter run which contained areas of beginner, intermediate and expert terrain. Plaintiff's safety bindings did not release during the fall and were not examined.

The "Patient's Description of the Incident" on the Ski Patrol Incident Form states "making a turn to the right, left ski edge caught, went straight downhill resulting in doing the splits, falling to her knees with her skis extended".

Defendant maintains the jury could reasonably have concluded that plaintiff contributed to her own injury by skiing under the conditions stated.

The court instructed the jury on the issue as follows: "Contributory negligence is negligence on the part of a person injured which, cooperating with the negligence of another, assists in proximately causing his own injury" (Instruction No. 6, R. 276). The court was clear in directing the jury that defendant had the burden of proving that Plaintiff was negligent or assumed the risk of her injuries and also of proving that Plaintiff's act was a proximate cause of her injuries. (Instruction No. 4, Appendix 7, R. 274). These instructions correctly stated the basis for the defense, together with its burden of proof. The issue was in all respects correctly presented to the jury.

C. Submission of the Defense of Assumption of Risk was Proper on the Facts of This Case.

The trial court was also justified in presenting the issue of assumption of risk to the jury. In Rigtrup v. Strawberry Water Users Ass'n,, 563 P.2d 1247 (Utah 1977), this Court stated that assumption of risk remains a viable defense under Utah law. The Court held:

> [I]t requires but little reflection to see that where there is a known danger, the risk of which is voluntarily assumed by a party, such action may well fall within the lack of care which constitutes negligence and also may be correctly termed an assumption of risk. If such be the situation, the party should be charged with the responsibility for his conduct, by whatever term it may be called; and the comparative negligence statute quoted above should be applied as the trial court correctly did in this case.

Id. at 1250.

The evidence presented at trial showed a sufficient basis from which the jury could conclude that Plaintiff was aware of the dangers of skiing, that she had been instructed not to subject her hip to twisting or loading, and that she voluntarily chose to participate in the sport. As such, there was sufficient evidence to justify submitting an instruction of assumption of risk to the jury.

Plaintiff excepted to the defense and alleges error in the trial court's refusal to give the following instruction when the issue was allowed to go to the jury:

> Instruction No. 17. You are instructed that defendant has alleged in his answer as a defense that plaintiff assumed the risks incident to her skiing activities. In this connection, you are further instructed that plaintiff in legal contemplation cannot be held to have assumed the risks incident to her accident unless defendant proves by a preponderance of the evidence:
>
> 1. That plaintiff was given medical advice before the accident that there was an unusual risk to her total hip replacement if she were to ski; and
>
> 2. That having knowledge of such risk, she nevertheless undertook to ski and to assume said risk in disregard of said medical advice.

The trial court properly refused Plaintiff's requested instruction. The language would have required Defendant to prove that he specifically told Plaintiff not to ski. As stated earlier, Defendant testified that he advised her not to twist, run or lift with the hip, but did not talk with her specifically about skiing. If Plaintiff was aware that she was to avoid these activities, it is reasonable to conclude that she would be assuming the risk of injury if she undertook them, whether or not she had been specifically advised as to skiing.

The Rigtrup decision, cited above, held that since assumption of the risk was not abolished under Utah law, it was not error to submit an instruction on the doctrine to the

jury. Assumption of the risk is part of the assessment of negligence that is properly reserved for the jury. Id. at 1251. Instruction No. 7 adopted by the trial court in this case followed the Rigtrup format by specifically informing the jurors that assumption of the risk is a doctrine of law within the concept of comparative negligence. The full text of the instruction reads:

> Instruction No. 7. Assumption of risk is a doctrine of law encompassed within the concept of comparative negligence. This doctrine will not permit a party who is doing wrong to place the blame on another and recover therefor. Assumption of risk is a voluntary and unreasonable exposure to a known danger, or a danger that should have been known to a reasonable person in the same or similar position.

(R. 277).

In this case, Plaintiff's knowledge and appreciation of the dangers involved in her skiing was a question for the jury. The trial court acted properly in submitting the defense as an issue to be determined at trial.

D. A Physician-Patient Relationship Does Not Bar Application of Contributory Negligence and Assumption of Risk in Appropriate Medical Malpractice Suits.

It is beyond dispute that contributory negligence is a proper defense in medical malpractice actions. 61 Am. Jur. 2d, Physicians and Surgeons, Section 302 (1981), outlines the application of the defense as follows:

> The creation of the relation of physician and patient gives rise to reciprocal duties to exercise due care: that of the physician to his patient, and that of the patient to his physician and himself in relation to the physician's treatment in endeavoring to effect a cure. Thus, it has been said that it is the duty of the patient to use such care as a person of ordinary prudence would ordinarily use in circumstances like his own, and that if he fails to do this he cannot hold the physician answerable for the consequences of his own want of ordinary care.

Id. at 448.

Plaintiff argues, however, that under the cases she cites, the defense was improperly applied here.

Both Halverson v. Zimmerman, 232 N.W. 754 (N.D. 1930) and Schoonover v. Holden, 87 N.W. 754 (Iowa 1901) cited by Plaintiff deal with improper jury instructions which sought to extend a patient's duty beyond the duty of due care universally recognized by law. In Halverson the Defendant doctor argued that the patient had a duty to seek treatment elsewhere when he became aware that he was not receiving proper care from the Defendant. The appellate court rejected the instruction, citing the language quoted in Plaintiff's brief that a patient has no duty to distrust his physician or appeal to others to ascertain the quality of care being received.

In Schoonover a defendant physician likewise sought an instruction that the jury had to consider the plaintiff's personal knowledge of her condition and whether she had contacted other physicians to verify the defendant's medical conclusions. The appellate court rejected this instruction, noting that "the court in its own instructions gave the jury the correct rule as to her contributory negligence and this was sufficient." Id. at 737.

In the present case, no such instructions seeking to expand the duties of a patient were requested. The instructions on negligence dealt only with the standard of reasonable care traditionally used in negligence suits (Instruction No. 5, R. 275, Appendix 8).

Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979) also cited by Plaintiff, deals exclusively with the issue of a patient's assumption of the risk of a particular medical procedure, not assumption of the risk of a dangerous sport like skiing. Defendant has never raised the defense of assumption of risk in reference to any aspect of his medical care. Accordingly the issues in Morrison do not parallel those here.

Los Alamos Medical Center, Inc. v. Coe, 58 N.W. 686, 275 P.2d 175 (1954) 50 A.L.R.2d 1033, stands for the

proposition that contributory negligence was not shown to the extent that it would bar plaintiff's recovery as a matter of law. In Los Alamos, as here, contributory negligence was a factual issue reserved for the jury.

If Plaintiff had abandoned her other allegations of negligence and proceeded solely on the claim of the advice regarding skiing, her arguments under the cases she cites would be more persuasive. Even then, Defendant submits, these affirmative defenses would have been viable issues. There is a distinction between following a doctor's order (as in the cases cited by Plaintiff) and simply seeking approval or acquiescence in an activity Plaintiff had decided, for her own reasons, to pursue. Each person is responsible for her own actions, and even in that assumed scenario, defense counsel could properly call into question both the fact of skiing, and the particular factual circumstances of this accident as bearing on comparative negligence and assumption of risk.

This Court is not being called upon to decide that narrow issue, however. With Plaintiff's decision to include several claims of medical error, the jury was required to evaluate all aspects of Defendant's treatment in assessing whether he was negligent. If their finding of negligence was

based on any of these other allegations, the questions of contributory negligence and assumption of risk address a completely independant act by Plaintiff, not related to any claimed advice by Dr. Haslam that she could safely ski.

It is important to note that Plaintiff effectively argued to the jury that if they found Defendant advised Plaintiff that she could ski, she would not be negligent for following that advice. In closing argument, Plaintiff's attorney told the jury:

> Whether she was contributorily negligent for going up there and skiing, depends on whether she had advice to not do that kind of activity, not perform, or worse still, advice that she could go and do that, because there again, if there was an absence of proper instruction, then she would have no particular reason not to go up there and ski. And on the other hand, if she received instruction that it was all right, then by following that instruction, she couldn't possibly be negligent, because the only claim could be then that she was negligent for following the advice and instruction of the doctor. She didn't know the risk. You can't assume the risk that you don't know about. She hasn't been told what the risk was. She hasn't been advised of the risk. And so I would say that the defense folds.

(R. 921).

The jury rejected Plaintiff's argument and barred Plaintiff from recovery.

E. Plaintiff Has Failed to Meet the Requirements for Reversal of a Jury Verdict on Appeal.

Plaintiff's assignments of error are governed by well-established principles of appellate review. The test established by this Court for determining whether a jury verdict should be reversed is set forth in Rowley v. Graven Brothers & Company, 26 Utah 2d 448, 491 P.2d 1209 (1971). The Court stated:

> The mandate of our law is that we do not reverse for mere error or irregularity. We do so only if the complaining party has been deprived of a fair trial. The test to be applied is: Was there error or irregularity such that there is a reasonable likelihood to believe that in its absence there would have been a result more favorable to him? If upon a survey of the whole evidence this question must be answered in the negative, then there is no justifiable basis for reversal of a judgment.

Id. at 451, 491 P.2d at 1211.

Rule 61 of the Utah Rules of Civil Procedure prohibits reversal of a judgment unless an act or omission of the Judge is inconsistent with substantial justice. Moreover, it must be established that such act or omission was prejudicial such that in its absence there is a reasonable likelihood of a different result. Utah Rules of Civil Procedure, Rule 61.

This Court has also stated that it will upset a jury verdict "only upon a showing that the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome." Bundy v. Century Equipment Co., 692 P.2d 754, 758 (Utah 1984), citing E. A. Strout Western Realty Agency v. W. C. Fay and Son, 665 P.2d 1320, 1322 (1983).

Although the evidence at trial was in conflict, there is substantial evidence to support the jury's determination that Plaintiff contributed to her injury or assumed its risk. The parties have each had a fair opportunity to fully present their claims to the jury. The Court adequately set forth the theories of each party and stated the principles of Utah law governing their determination. There have been no acts or omissions of the trial court which could be deemed inconsistent with substantial justice. The trial was fair and the verdict should stand.

III.

PLAINTIFF SHOULD NOT BE GRANTED JUDGMENT IN HER FAVOR OR A NEW TRIAL ON THE ISSUE OF DAMAGES.

A. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion for a New Trial.

In a proper case, a new trial may be granted on less than all of the issues. However, as stated in 58 Am. Jur. 2d, New Trial, Section 27 (1971):

> It has been said that the instances in which a new trial upon the issue of damages alone may be proper are comparatively infrequent, and that the right to a new trial limited to the issue of damages is one which should be exercised sparingly and with great caution.

This court expressed its reluctance to overturn a trial court's ruling on a motion for a new trial in Page v. Utah Home Fire Ins. Co, 15 Utah 2d 257, 391 P.2d 290 (1964). Page involved an action to recover on two insurance policies when a building was destroyed by fire. The plaintiff was denied recovery on either policy. The trial judge determined that the issues on the policies should have been submitted to the jury separately and ordered a new trial on the issue of whether the plaintiff failed to disclose material facts when applying for the $10,000 policy. This Court upheld the trial court's ruling, noting that decisions to grant a new trial will not be reversed on appeal absent a manifest abuse of discretion. The Court held:

> The broad discretionary power of the trial court in the granting or denying of new trials is well established. This is necessarily so to allow the court an opportunity to cause re-examination or correction of jury verdicts or findings which it

> believes to be in error or where there is substantial doubt that they were fairly tried. And we have repeatedly expressed our reluctance to interfere with its judgment in such matters unless the action is clearly unreasonable and arbitrary.

Id. at 261, 391 P.2d at 292.

No abuse of discretion has been established in Judge Hyde's refusal to grant Plaintiff's motion for a new trial. From his first-hand view of the evidence and proceedings, Judge Hyde has approved the trial proceedings. No abuse of discretion has been shown in that decision.

B. A New Trial Should Not Be Granted On the Issue of Damages.

This is not the type of case when a new trial could properly be granted on the issue of damages alone. It is not a case where the jury awarded Plaintiff a low sum in damages which she seeks to increase. Rather, it is a case where the jury specifically ruled that she was to receive no recovery. The jury was accurately instructed as to the ramifications of their finding Plaintiff and Defendant equally negligent. (See Instruction No. 30, Appendix 9). Their unanimous intent to award no damages recovery was placed on the record following their return of the special verdict form to the court. After noting the jury's failure to address the question of damages, Judge Hyde asked:

The Court:	The end result of your verdict, as I take it is, you feel both of them contributed and there should be no recovery, right? Is that what you're saying.
Jurors:	(All respond in the affirmative).
The Court:	All of you?
Jurors:	(All respond in the affirmative).

(R. 971).

Plaintiff is asking that this intent be disregarded and that the Court strike their answers to questions 3, 4 and 6 on the Special Verdict Form. This amounts to a request that the Court strike the jury verdict, enter judgment in Plaintiff's favor and grant a new trial on damages alone, all without the benefit of having observed and evaluated the testimony of witnesses on matters sharply contested at trial. The dangers of this practice were noted by Justice Streissguth in his dissent in Lee v. Zaske, 213 Minn. 244, 6 N.W.2d 793 (1942), a case cited as precedent by Plaintiff. In Lee a decedent was found contributorily negligent when he was struck by a car in an auto-pedestrian accident. The Minnesota Supreme Court found a total absence of proof of negligence on decedent's part (as distinguished from our case) and found defendant had been prima facie negligent under a statute for having faulty brakes. The court found

the evidence of negligence conclusive and ordered a new trial on the issue of damages only. Id. at 796.

Justice Streissguth concurred in granting a new trial, but dissented to limiting the issue to damages only. He noted that to do so would amount to the equivalent of entering a judgment in the plaintiff's favor when no such motion had been made during or after trial. Justice Streissguth reasoned:

> The practice of excluding from a new trial issues which have been determined satisfactorily on the first trial has frequently been followed by this court. [Citations omitted]. In each of these cases the original verdict of the jury upon the excluded issues was left undisturbed, not entirely brushed aside and a diametrically opposite decision on the facts substituted therefor. The new trial on the one issue was without interference with the jury's findings on the other issue. [Citations omitted]. So, in cases where juries have allowed inadequate or excessive damages, this court has repeatedly allowed their verdict to stand on the issue of liability, granting new trials only on the issue of damages; but that is not what the majority here proposes to do. It proposes to substitute its verdict on the main issue for the verdict of the jury, and this is an action at law in which a jury trial is a fundamental right.

Id. at 797.

In similar fashion, Plaintiff here is not asking this Court to leave the other issues undisturbed, but is rather asking that all matters be reversed except the findings in her favor on the issues of negligence and causation.

Sturm, Ruger & Co., Inc., v. Day, 615 P.2d 621 (Alaska 1980), also cited by plaintiff, notes:

> It has been held that a partial new trial will not be permitted "when a tangled or complex fact situation would make it unfair to one party to determine damages apart from liability, or where, 'there is reason to think that the verdict may represent a compromise among jurors with different views on whether the defendant was liable.' [Citations omitted]. Vizzini V. Ford Motor Co., 569 F.2d 754, 760 (3d. Cir. 1977).

Id. at 623.

In Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701, (1961), also cited in plaintiff's brief, this Court upheld the trial court's decision to grant a new trial when it appeared clear from the evidence that the jury had not understood the law regarding damages. This Court refused, however, to allow the trial to be limited the issue of damages only, noting:

> Although the order granting a new trial on damages only is permitted by our Rules of Civil Procedure, we think that justice and fairness in this case require a new trial on all the issues and not merely on the amount of damages.

Id. at 355, 366 P.2d at 704.

In the other Utah case cited by Plaintiffs, Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216 (Utah 1980), this Court upheld a jury verdict finding Plaintiff 30%

negligent and Defendant 70% negligent. Plaintiff had argued that there was no basis in evidence for finding her negligent and that the issue should not have been presented to the jury. On review, this Court found there was at least some credible evidence in the record to establish negligence. The Court stated:

> While the degree of negligence attributed to the plaintiff may arguably have been high, as the District Court observed, in view of the evidence in this case, it is within the prerogative of the jury to make that determination, and we do not overturn a jury verdit if there is any credible evidence on which reasonable minds could conclude as the jury did.

Id. at 1220.

The Court went on to grant a new trial on the issue of the damages only, leaving the jury's division of negligence intact. It is important to note, however, that even on these facts, Chief Justice Crockett and Justice Hall dissented to limiting the new trial to the question of damages only. Justice Crockett's dissent reads:

> There is yet another reason why I think the Court's decision herein does not treat the parties fairly. If the verdict and judgment are unsound, the case should be remanded for trial on all issues. This is a prime example of the kind of case that the trial court and jury should have the entire picture relating to the contested issues in order to properly assess damages, if that becomes necessary. According to my experience and

> judgment, this type of situation can result in a lop-sided and unfair trial unless the parties each have the opportunity of presenting fully their evidence and contentions to the jury. Consistent with honoring the right of the parties to a trial by jury, I would affirm the judgment; but at the very least would not deprive the defendants the privilege of presenting their side of all disputed issues.

Id. at 1222.

Defendant maintains that judgment in this case should be affirmed, but that if a new trial is ordered, it must, in fairness, encompass all issues.

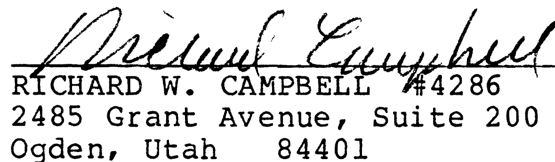
CONCLUSION

Based upon the facts and law stated herein, Respondent respectfully requests that the judgment be affirmed.

DATED this 30 day of July, 1987.

Respectfuly submitted,

CAMPBELL & NEELEY



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Ogden, Utah 84401

Attorney for Defendant-Respondent

APPENDIX

SKI AREA	Powder Mountain	INCIDENT NO.	199
LOCATION	Date 3/2/80	Time 2:43	A.M. (P.M.)

INJURED PERSON

Name Louese Mickelsen Age 43 Sex F
Address 512 Chambers Ht. 5'1 Weight 95
Phone 479-2354
Occupation House wife Guardian (if minor)

PATIENT'S DESCRIPTION OF INCIDENT

How Patient states incident occurred: Making turn to the right left ski edge caught went straight down hill resulting in doing the splits falling to her knees with her skiis extended
How Patient states he could have prevented accident: No comment KSA

WITNESS TO INCIDENT

Name: Don Herrick Address: 372 Wickerry Dr. Phone: 392-5989

PROBABLE INJURY

☒ FRACTURE ☐ SPRAIN ☐ DISLOCATION ☐ LACERATION ☐ OTHER (Explain)

Part of Body: ☐ Ankle ☒ Thigh ☐ Wrist ☐ Shoulder ☒ Right
☐ Leg ☐ Knee ☐ Hand ☐ Arm ☐ Back ☐ Left
☐ Other X Hip ☐ Elbow ☐ Neck ☐ Head

TREATMENT

First Aid Given on Hill: Splinted both legs — By whom: C. [illegible] K. [illegible] / S. Child [illegible]
Transportation to Patrol Room: ☒ Toboggan ☐ Self ☐ Other — By whom: B. [illegible] D. [illegible]
First Aid Given in Aid Area: Treat for shock — By whom: W. [illegible]
Skier's Condition: Poor
Similar Injury Occurred In 19
Follow Up Date 3-4-8[illegible]
I hereby acknowledge that I am Refusing to Allow Ski Patrol First Aid (Skier's Initials)
Skier's Signature: Le[illegible]
Doctor's Diagnosis
Narcotics Type Given: Dosage Times
Name of Doctor Who Attended Skier at Area

EXHIBIT D-1

DESTINATION and TRANSPORT

☐ HOME OR LODGE ☐ RETURNED TO SKIING ☐ AMBULANCE
☒ HOSPITAL St. Benedicts ☐ OTHER ☐ AUTO
Life Flight. left AREA at 3:30 pm ☐ OTHER

STATISTICAL DATA

LIFT INVOLVED Yes ☐ No ☒ Name of Lift — Life Operator — If YES, Complete Lift Incident Form.

SKI SCHOOL Type of Class N/A Instructor

SKIS ☒ OWNED ☐ BORROWED ☐ RENTED Rental Shop Setting Right
If rental from area, complete Rental Accident Form. Area Rental Number Setting Left

PLACE AND DESCRIPTION OF ACCIDENT SCENE

Description (include exact location, description thereof, weather, etc.)
200 yds. Above Lodge on Drifter

CONDITIONS CHECK ONE OR MORE

SNOW:
☒ POWDER ☐ CORN ☐ SOFT ☒ HEAVY ☐ OTHER
☐ ICY ☐ HARD ☐ CRUST
☐ PACKED POWDER ☐ GRANULAR ☐ DEEP
WEATHER: ☐ FAIR ☐ PARTLY CLOUDY ☒ CLOUDY ☐ SNOWING ____ WIND VELOCITY ____ TEMPERATU

SKIING ABILITY

☒ BEGINNER ☐ LOWER INTERMEDIATE ☐ INTERMEDIATE
☐ ADVANCED ☐ EXPERT ☐ RACER
Previous Days Skiing This Season Any Ski Area ____ This Ski Area
How many Times Have You Fallen Today? ☐ 0 ☒ (1) to 5 ☐ 6 to 10 ☐ 11 to 20 ☐ 20+

PATROLLER'S COMMENTS (Use Reverse Side for Additional Comments.)

(Record any statements made by injured and anything noted by patroller at the scene, i.e., unbuckled boots, etc. Include comments or Skier's Attitude toward Ski Patrol.)
Right Knee and hip surgery approx 5 yrs ago

PATROLMAN Completing Report Name Joan S. Howell Registration Number 104

PM 011 (Rev. 9/79) Yellow Copy Area Copy White Copy Patrol Copy

of hip was broken. She was a good victim in thi
She did not fuss but was worried about her
hip being broken Ken Herrick knew her & helped
her not to worry a great deal

There was Ken Dove from Life Flight who
came into the AID Room & checked her for
circulation. He requested that we remove her
boot & he checked her feet.

INSTRUCTION NO. 1

You are instructed that this is an action for medical malpractice filed by DaNiece Mikkelsen, the plaintiff, against Marlan J. Haslam, M.D.

The plaintiff alleges in her Complaint that she had been a patient of the defendant, Marlan J. Haslam, M.D., for the period of time from January, 1973, up to and including March, 1980. During that period of time, the plaintiff alleges that the defendant was negligent and provided medical services and advice that were below the standard of care for a doctor with the defendant's medical specialty as a board certified orthopedic surgeon.

more specifically, plaintiff alleges that the defendant was negligent in the following:

1 Improper diagnosis of the original condition and status of DaNiece Mikkelsen's hip and leg.

2) In failing to properly advise DaNiece Mikkelsen in the limitations that should be placed on her physical activity in light of the nature of the prosthetic device and its fit in her leg and hip area.

3) In advising DaNiece Mikkelsen in early 1979 that she could go skiing when Dr. Haslam knew or in the exercise of reasonable care should have known that such activity could not be safely undertaken by a woman whose hip was in the condition that Dr. Haslam knew or should have known it to be in at the time of the advice.

4) In improperly advising Mrs. Mikkelsen that she could go skiing without appropriate follow-up examinations sufficient to apprise himself of the condition that developed as a natural result of the surgery that was performed by Dr. Haslam.

5) In failing to perform physical and x-ray examinations on a regular basis of the hip and leg area where the total hip replacement procedure was performed in the months and years following said operation.

The plaintiff, DaNiece Mikkelsen, further alleges that these negligent acts either individually or jointly caused her injury, damage and loss. She further requests damages in her Complaint for loss of bodily function, pain and suffering, both mental and physical, loss of wages and wage earning capacity and for medical, doctor and hospital bills, as well as for the deformed and functionally impaired leg and hip. The plaintiff asks that judgment be entered against defendant in an amount for damages that is reasonable as determined by the jury.

In his Answer, the defendant, Marlan J. Haslam, M.D., states that he rendered medical care and treatment to the plaintiff, DaNiece Mikkelsen, on or about March, 1974, but denies that he continued to treat her thereafter until March of 1980. He generally denies all of the other allegations of neglect in plaintiff's Complaint. The defendant, Marlan J. Haslam, M.D., further asserts that plaintiff DaNiece Mikkelsen was contributorily negligent to a degree as great or greater

than his negligence. Defendant further states as a defense that the plaintiff knowingly and voluntarily assumed the risk of the injury and damages that she experienced. In further defense, the defendant alleges that the statute of limitations concerning his conduct has run.

The foregoing constitutes the allegations of the parties and is not to be taken by you as evidence in the case.

INSTRUCTION NO. 8

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplished the injury.

It may operate directly or through intermediate agencies or through conditions created by such agencies.

INSTRUCTION NO. 3

Plaintiff must carry the burden of proof on the following issues:

1) That defendant was negligent; and

2) that defendant's negligence was ~~the legal~~ a proximate cause of plaintiff's injuries and damages; and

3) the extent and amount of plaintiff's injuries and damages.

INSTRUCTION NO. 31

These instructions, though numbered separately, are to be considered and construed as one connected whole. Each instruction should be read and understood in reference to and as a part of the entire charge and not as though any one sentence or instruction separately were intended to state the whole law of the case upon any particular point. Moreover, the order in which the instructions are given has no significance as to their relative importance.

Indexed .....
JUL 7 12 05 PM '86
CLERK
WEBER COUNTY

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

DaNIECE MIKKELSON, Plaintiff, vs. MARLAN J. HASLAM, M.D., Defendant.	)	SPECIAL VERDICT Case No. 77934

We, the jury impaneled to try the issues in the above-entitled case, give the following answers to the questions propounded to us.

QUESTION NO. 1: Was defendant negligent as alleged by plaintiff?

YES _____

NO _____

QUESTION NO. 2: If your answer to Question No. 1 is "yes", was such negligence a cause of the injuries received by plaintiff?

YES _____

NO _____

QUESTION NO. 3: Was plaintiff negligent, or did she assume the risk of injury, by skiing?

YES _____

NO _____

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QUESTION NO. 4: If your answer to Question No. 3 is "yes", was such negligence or assumption of risk a cause of the injuries sustained by plaintiff?

YES X

NO ____

QUESTION NO. 5: Concerning only the evidence concerning damages and without being concerned with the effect of fault of either party on damages in answering this question, what amount of money would fairly and adequately compensate plaintiff for injury sustained as a result of the accident of March 2, 1980?

GENERAL DAMAGES: $__________

SPECIAL DAMAGES: $__________

If you have answered Questions No. 1 and 2 and have found that both plaintiff and defendant were negligent in a way that caused the injuries, answer the following question.

QUESTION NO. 6: Considering all of the negligence of plaintiff that you have found to be a cause of her injuries, and all of the negligence of defendant that you have found to be a cause of her injuries to total 100%, you will now allocate the 100% negligence between the parties. You will weigh the negligence of each party against the other party and determine

the relative negligence of each party in relation to the other. Your answer in percentages will reflect your decision. What part of that 100% do you find to be attributable to:?

PLAINTIFF: 50 %

DEFENDANT: 50 %

TOTAL: 100%

DATED this 1 day of ~~June~~, 1986.

[signature]
FOREMAN

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INSTRUCTION NO. ___

Defendant has the burden of proof on the following issues:

1) That plaintiff was negligent or assumed the risk of injury; and

2) that plaintiff's act was a proximate cause of plaintiff's injuries and damages.

If you find that both parties were negligent, it will then be your responsibility to compare the respective negligence of plaintiff and defendant in percentages in accordance with these instructions.

INSTRUCTION NO. 5

Negligence is the failure to do what a reasonable and prudent person would have done in the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or omitting to act.

The person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence only. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct.

INSTRUCTION NO. 32

You are instructed that in any injury case the total negligence of the plaintiff or defendant or both in causing or contributing to the plaintiff's injury may only total 100%. This means that a plaintiff may be 100% responsible for causing his own injuries; a defendant may be 100% responsible for causing the plaintiff's injuries or each may bear a percentage of responsibility for causing the plaintiff's injury, which combined may total no more than 100%

Therefore, if you find the defendant negligent in causing plaintiff's injuries then you shall assign a percentage to that portion of responsibility for the injuries falling on the defendant and to that portion of the responsbility for plaintiff's injuries falling on the plaintiff, if any, again totalling 100%.

In connection with any apportionment of negligence, you are instructed that an injured person cannot recover from a defendant who is claimed to be negligent unless the negligence of the injured person is less than the negligence of the defendant; for example:

Plaintiff 50% negligent Defendant 50% negligent	no recovery
Plaintiff 49% negligent Defendant 51% negligent	Plaintiff recovers 51% of damages
Plaintiff 25% negligent Defendant 75% negligent	Plaintiff recovers 75% of damages

However, you are to fill out the special verdict form section concerning the damages without regard to your assessment of the percentages of neglect. Any reduction in the damages is a function for the Court based upon your assessment of percentages of neglect and your assessment of the total damages without reduction as placed in the appropriate places on the special verdict form .

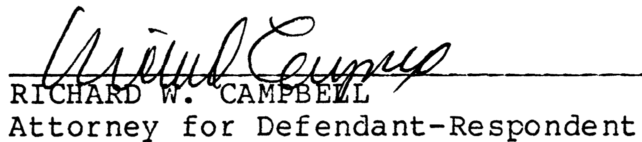
CERTIFICATE OF MAILING

I hereby certify that I mailed (4) true and correct copies of the following BRIEF OF RESPONDENT to:

Wayne L. Black
Susan B. Diana
BLACK & MOORE
261 East 300 South, Suite 300
Salt Lake City, Utah 84111

postage pre-paid, this 30 day of July, 1987.

CAMPBELL & NEELEY



RICHARD W. CAMPBELL
Attorney for Defendant-Respondent