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**Pace v. Swerdlow: Can Expert Witnesses Face Liability for Changing Their Minds -  
The Tenth Circuit Weighs in on the Element of Proximate Cause in a Claim of  
Expert Negligence**

# PACE V. SWERDLOW: CAN EXPERT WITNESSES FACE LIABILITY FOR CHANGING THEIR MINDS? THE TENTH CIRCUIT WEIGHS IN ON THE ELEMENT OF PROXIMATE CAUSE IN A CLAIM OF EXPERT NEGLIGENCE

## INTRODUCTION

Expert witnesses are a necessary component of the legal system because many claims involve technical facts that would be beyond the understanding of judges and juries without expert testimony.<sup>1</sup> Expert witnesses are also pervasive throughout the legal system.<sup>2</sup> For example, a “recent survey of California civil jury trials determined that at least one expert testified in eighty-six percent of all cases, with two or more opposing experts testifying in fifty-seven percent of the trials.”<sup>3</sup> Courts, motivated by a desire to obtain objective expert testimony, have historically held experts immune from liability based on their activities as experts.<sup>4</sup> However, expert negligence has increasingly become a problem.<sup>5</sup> Thus, courts have recently begun to erode expert immunity and allow claims against experts for alleged negligence—this trend is particularly true regarding so-called “friendly” experts (experts subjected to suits instigated by the same party that retained them).<sup>6</sup>

Liability for friendly expert negligence is sometimes referred to as the “Pottery Barn Rule”: you break it, you buy it.<sup>7</sup> However, it remains unclear what exactly a friendly expert must do to “break” a case. This is because friendly expert negligence is a relatively nascent cause-of-action whose precedent is still “developing, unsettled, lacking in uniformity,

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1. Eric G. Jensen, *When “Hired Guns” Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. REV. 185, 186-87 (1993); see also Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 465 (1999); Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts?*, 17 REV. LITIG. 393, 395 (1998).

2. Mary Virginia Moore, Gary G. Johnson & Deborah F. Beard, *Liability in Litigation Support and Courtroom Testimony: Is it Time to Rethink the Risks?*, 9 J. LEGAL ECON. 53, 54 (1999); see also Jensen, *supra* note 1, at 186-87.

3. Lubet, *supra* note 1, at 465.

4. Andrew Jurs, *The Rationale for Expert Witness Immunity or Liability Exposure and Case Law Since Briscoe: Reasserting Immunity Protection for Friendly Expert Witnesses*, 38 U. MEM. L. REV. 49, 51-52 (2007); see also Randall K. Hanson, *Witness Immunity Under Attack: Disarming “Hired Guns”*, 31 WAKE FOREST L. REV. 497, 497-98 (1996).

5. Moore, Johnson & Beard, *supra* note 2, at 55.

6. Hanson, *supra* note 4, at 499 (“Six states have decided recent cases involving lawsuits against [friendly] expert witnesses. Four of these six states have held [friendly] expert witnesses accountable for their actions and have narrowly construed the protection of witness immunity.” (footnote omitted)); see also Jurs, *supra* note 4, at 63.

7. Jurs, *supra* note 4, at 51.

and, in many jurisdictions, nonexistent.”<sup>8</sup> Consequently, there is little consensus regarding the elemental requirements necessary to establish a claim for friendly expert negligence.<sup>9</sup> However, synthesis of the minor amount of existing case law reveals that such a claim is generally based upon principles of professional negligence, tort liability, and breach of contract.<sup>10</sup>

Generally, to establish a *prima facie* claim of friendly expert negligence the plaintiff must allege: (1) that the plaintiff was a person to whom the expert owed a duty of care or with whom there was privity, (2) the applicable standard of care or contract for services, (3) that the witness breached the standard of care or breached the contract, (4) that the conduct of the defendant in failing to use the appropriate standard of care or in breaching the contract was a proximate cause of the injury or damage of which the plaintiff complains (injury or damage in the context of friendly expert negligence most often occurs in the form of an adverse result at a hearing or trial for the party that retained the expert), and (5) that witness immunity does not apply to the facts and circumstances of the case in the plaintiff’s jurisdiction.<sup>11</sup>

Of the elements, proximate cause is one of the most difficult to establish.<sup>12</sup> Much of the difficulty surrounding proximate cause arises out of the discrepancy between the legally prescribed role of experts as objective translators of technical facts, and the actual (or at least perceived) role of many friendly experts as advocates for the party that retained them.<sup>13</sup> While plaintiffs may feel it is the duty of their well-paid friendly experts to testify in an expected manner and to effectively persuade on their behalf, no liability exists for friendly experts who simply fail to “deliver” an expected opinion, or to persuade a judge or jury.<sup>14</sup> Thus, for

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8. Kathleen L. Daerr-Bannon, *Cause of Action for Negligence or Malpractice of Expert Witnesses*, 17 CAUSES OF ACTION 2D 263 (2008).

9. *See id.*

10. *See id.*

11. *Id.*

12. MOLLY TREADWAY JOHNSON, CAROL KRAFFKA & JOE S. CECIL, EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 4 (2000), [http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/\\$file/ExpTesti.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf) (citing a survey of federal civil trials, which found that expert testimony was needed to establish causation and damages in 64% of trials versus the reasonableness of the party’s action (34%), and the standard of care owed by a professional (25%)).

13. *See* Lubet, *supra* note 1, at 467 (“The single most important obligation of an expert witness is to approach every question with independence and objectivity.”). *But see* Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. ON REG. 253, 257 (2001) (describing that, in reality, experts “are paid to be ‘effective,’ but not necessarily to be nonpartisan or even honest”); JOHNSON, KRAFFKA & CECIL, *supra* note 12, at 6 (citing a survey of federal judges and attorneys who ranked “experts abandon objectivity and become advocates for the side that hired them” as the most significant problem with expert testimony in federal civil trials).

14. *See, e.g.,* Schaffer v. Donegan, 585 N.E.2d 854, 860 (Ohio Ct. App. 1990) (“‘A witness has a duty to appear and testify truthfully concerning his knowledge or belief.’ [A Party] may not turn that principle to support their argument that they had a right to expect that [their expert] would testify as to what [the party] regarded to be the truth, and that his failure to do so constituted a breach of contract. Fundamentally, no witness can be required to testify . . . to anything other than the truth

each claim of friendly expert negligence, a court must inquire as to whether the alleged negligence arises out of the expert's objective or contractual duties, or whether the complaint stems merely from the expert's effectiveness as an advocate. The Tenth Circuit Court of Appeals engaged in this type of inquiry in the recent case of *Pace v. Swerdlow*.<sup>15</sup>

In *Pace*, the Tenth Circuit held that a change of opinion by a friendly expert, on the eve of a summary judgment hearing, was not, as a matter of law, insufficient evidence of proximate cause in a negligence claim against the expert.<sup>16</sup> The Tenth Circuit reached its decision in *Pace*, in part, because facts existed to suggest that the expert's change of opinion was ill-timed and grounded in fear and intimidation rather than compelling new evidence that had come to light.<sup>17</sup>

Part I of this Comment provides a broad look at the issues and significant cases involving expert witness liability and immunity. Part II recounts the Tenth Circuit's decision in *Pace*. Part III analyzes *Pace* and offers guidance for future courts in analyzing causation in claims of friendly expert negligence involving a change of opinion by the expert.

## I. BACKGROUND

### A. History and Expansion of the Doctrine of Expert Immunity

The Tenth Circuit avoided directly addressing the issue of expert immunity in *Pace*. Nonetheless, many of the policy implications underlying expert immunity permeate the majority opinion in *Pace*, as well as Judge Gorsuch's partial concurrence and partial dissent. Thus, a brief review of the doctrine of expert immunity is beneficial before evaluating *Pace*.

Expert immunity was born out of general witness immunity.<sup>18</sup> The touchstone authority concerning witness immunity is the U.S. Supreme Court's decision in *Briscoe v. LaHue*.<sup>19</sup> In *Briscoe*, the Court granted absolute immunity to fact witnesses in criminal trials—even in the event of perjury.<sup>20</sup> In general, state and federal courts have interpreted *Briscoe* broadly and have expanded immunity to include additional witness cate-

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as he sees it . . . . The same is expected of expert witnesses. While [the party] may have expected [their expert] would testify in accordance with his previous statements to them . . . that did not change his paramount obligation to speak the truth.”).

15. 519 F.3d 1067 (10th Cir. 2008).

16. *Id.* at 1074; *see also id.* at 1075 (Gorsuch, J., concurring in part, dissenting in part).

17. *See id.* at 1075 (majority opinion) (“Plaintiffs have sufficiently alleged that Defendant’s change of position, as well as the timing of that change of position, proximately caused the state court’s grant of summary judgment . . . .”) (emphasis added); *see also id.* at 1076 (“Dr. Swerdlow changed his opinion we are encouraged to surmise, because he feared counsel’s ‘meanness’ and threat to attack Dr. Swerdlow’s medical license.”) (Gorsuch, J., concurring in part, dissenting in part).

18. Jurs, *supra* note 4, at 51-52 (describing the expansion of witness immunity).

19. 460 U.S. 325 (1983).

20. *Id.* at 345-46.

gories such as: fact witnesses for their pretrial statements, expert witnesses against suits instigated by the adverse party ("hostile" experts), expert witnesses appointed by the court, and expert witnesses retained by all parties.<sup>21</sup>

The rationale underlying the expansion of immunity generally consists of two major policy considerations: (1) that imposing witness liability may result in witness self-censorship, which in turn could threaten the fact-finding (and truth-finding) abilities of judges and juries, and (2) that witness testimony already contains sufficient checks in the form of the oath to tell the truth, the threat of perjury, the oversight of the trial judge, and, perhaps most importantly, the process of cross-examination.<sup>22</sup> However, despite these policy considerations, granting witness immunity, particularly expert immunity, is not without problems. The next subsection details some of these problems.

### *B. The Problem of "Hired Guns"*

In addition to immunity, experts are additionally protected by the general absence of any binding standards regulating the quality or truthfulness of their testimony.<sup>23</sup> As a result, expert witnesses are often regarded as "mercenaries, hired guns, or as witnesses whose opinions are for sale to the highest bidder,"<sup>24</sup> and their testimony is often viewed with distrust by judges and juries.<sup>25</sup> Skepticism surrounding expert testimony also stems from the economic reality that experts, unlike ordinary witnesses, are engaged in a voluntary—and often very lucrative—commercial undertaking where market forces influence the type of testimony provided.<sup>26</sup> Professor Jeffrey Harrison summarizes the problem as follows:

Unlike virtually any other business, expert witnesses are not typically held accountable in either tort or contract law for their commercial activities. This means that many are inclined to deliver what the market demands—partisan, biased, or plainly dishonest testimony—without concern for the costs this testimony may impose on others.

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21. Jurs, *supra* note 4, at 55-60.

22. See, e.g., Jurs, *supra* note 4, at 56 (analyzing the rationale of the Ninth Circuit Court of Appeals).

23. See Lubet, *supra* note 1, at 465-67.

24. Masterson, *supra* note 1, at 395.

25. Harrison, *supra* note 13, at 256; see also Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1114 (1991). However, despite growing distrust in the objectivity of expert testimony, there is evidence indicating that expert testimony nonetheless remains significant in determining the outcome of trials. See Jensen, *supra* note 1, at 188 (citing studies showing that seventy-one percent of polled jurors in criminal trials felt expert testimony made a difference in the verdict, and additional studies finding that thirty-six percent of polled jurors in civil trials felt expert testimony "greatly" influenced the verdict, while only thirteen percent felt the expert testimony made no difference).

26. Harrison, *supra* note 13, at 314.

This immunity from the internalization of the social cost of their testimony is hard to reconcile with any moral or economic standard.<sup>27</sup>

The combination of immunity and minimal regulation has resulted in a lack of quality-control regarding expert testimony. Additionally, many experts are expected—and paid—to be persuasive advocates for the party that retains them.<sup>28</sup> Indeed, empirical studies confirm that attorneys shop for experts who are good salespersons as well as technically proficient.<sup>29</sup> In response to this problem, many courts have begun to erode—or at least refuse to expand—expert immunity.<sup>30</sup> This is especially true regarding friendly experts because courts, in general, have found the underlying policy arguments for shielding friendly experts less persuasive than those for shielding hostile experts.<sup>31</sup>

### *C. Reluctance to Expand Immunity to Friendly Experts*

Six years after *Briscoe*, in *Bruce v. Byrne-Stevens & Assoc. Engineers, Inc.*,<sup>32</sup> the Washington Supreme Court—broadly interpreting *Briscoe* and its progeny—became the first court in the country to extend immunity to friendly experts.<sup>33</sup> However, since *Bruce*, nearly every court that has examined the issue has denied immunity to friendly experts.<sup>34</sup>

The general rationale supported by courts rejecting immunity for friendly experts was articulated by the California Court of Appeals in the case of *Mattco Forge v. Arthur Young & Co.*, where the court presented four principal reasons for denying friendly experts immunity: (1) granting immunity to friendly experts does not encourage them to testify truthfully, but instead has the opposite effect by shielding negligent experts from liability; (2) prior case law suggests that witness immunity exists to protect adverse witnesses from suit by opposing parties after a lawsuit ends, not to protect one's own experts; (3) a claim against a friendly expert is analogous to a malpractice claim against a party's attorney after a lawsuit, therefore, if witness immunity applied in its broadest interpretation, attorneys would also be shielded, a notion that no court would embrace; and (4) many of the judicial system's guarantees of truthful testimony (e.g. cross-examination) only logically apply to hostile witnesses.<sup>35</sup>

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27. *Id.* at 253.

28. *Id.* at 257; *see also* Jensen, *supra* note 1, at 188-89; Lubet, *supra* note 1, at 468.

29. Harrison, *supra* note 13, at 262.

30. *See* Jurs, *supra* note 4, at 52.

31. *Id.*; *see also* Hansen, *supra* note 4, at 499-500.

32. 776 P.2d 666 (Wash. 1989).

33. Jurs, *supra* note 4, at 52.

34. *Id.*

35. *Id.* at 67-69 (summarizing the rationale of the California Court of Appeals in *Mattco*).

II. *PACE V. SWERDLOW*<sup>36</sup>A. *Facts and Procedural History*

Angie Putnam died following her breast augmentation surgery at the Intermountain Health Center ("IHC") in Salt Lake City, Utah.<sup>37</sup> After Putnam's death, her parents and heirs, Thomas A. Pace and Karol Pace, filed a medical malpractice suit in Utah state court against Putnam's doctors.<sup>38</sup> The principal defendant in the suit was Putnam's attending anesthesiologist, Dr. Steven Shuput.<sup>39</sup> Dr. Shuput discharged Putnam after her surgery despite allegations that "she was having difficulty breathing and was experiencing pain of nine on a scale of ten."<sup>40</sup> Putnam died the night of her release; the exact cause of her death was never determined.<sup>41</sup>

Dr. Barry N. Swerdlow, a licensed anesthesiologist, contacted the Paces' lawyer and offered his services as an expert witness.<sup>42</sup> The Paces retained Swerdlow as their expert and provided him with Putnam's medical records.<sup>43</sup> After reviewing the records, Swerdlow's opinion was recorded in an affidavit, which stated that "based upon a reasonable degree of medical certainty, Dr. Shuput and IHC Surgical Center did breach the appropriate standard of care when releasing Angela Putnam under the circumstances . . . ."<sup>44</sup> Further, Swerdlow suggested that instead of being discharged, Putnam should have been transferred to a nearby hospital for overnight observation, and that pursuant to a reasonable degree of medical certainty, "if she had been monitored overnight, it is very likely that she would be alive today."<sup>45</sup> The affidavit also concluded that "as a direct and proximate result of her premature discharge, Putnam died."<sup>46</sup>

After recording Swerdlow's affidavit, the Paces' lawyer wrote a letter to Swerdlow requesting that he review Dr. Shuput's written discovery responses which detailed Dr. Shuput's reasons for discharging Putnam.<sup>47</sup> Swerdlow did not ask to alter his own affidavit after reviewing Dr. Shu-

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36. 519 F.3d 1067 (10th Cir. 2008).

37. *Id.* at 1068.

38. *Id.*

39. *Id.* at 1069 n.1.

40. *Id.* at 1068.

41. *Id.*; see also *Pace v. Swerdlow*, No. 2:06CV27DAK, 2006 WL 5778247, at \*1 (D. Utah May 23, 2006).

42. *Pace*, 519 F.3d at 1068-69.

43. *Id.* at 1069.

44. *Id.* (quoting Appellate Brief, Exhibit A, at 2, ¶ 5, *Pace v. Swerdlow* 519 F.3d 1067 (10th Cir. 2008) (No. 06-4157)).

45. *Id.* (quoting Appellate Brief at 3 ¶ 15, *Pace*, 519 F.3d 1067 (No. 06-4157)). This statement was a handwritten correction by Swerdlow to the original sentence composed by the Paces' lawyer that read: "If she had been monitored overnight, she would be alive today." *Id.*

46. *Id.* (quoting Appellate Brief at 4 ¶ 18 *Pace*, 519 F.3d 1067 (No. 06-4157)).

47. *Id.*



put's comments.<sup>48</sup> In addition, the Paces' lawyer also provided Swerdlow with a copy of Dr. Shuput's deposition transcript.<sup>49</sup>

Despite his strong support for the Paces' claim in his affidavit, Swerdlow was not a strong witness for the Paces at his deposition by Dr. Shuput's counsel.<sup>50</sup> When asked whether he felt it was ethical to testify against another anesthesiologist without first reviewing that person's deposition, Swerdlow responded, "I think it would have been good for me to have seen it, and I did not ask for it. I did not think to ask for it. And I wouldn't comment upon the ethics thereof."<sup>51</sup> Swerdlow also stated that he had never testified in trial, and that he was "a relative novice at this whole thing."<sup>52</sup> As to causation, Swerdlow testified that he could not say within a reasonable degree of medical certainty that Putnam would be alive if she had been hospitalized, only that she would have had an increased probability of survival.<sup>53</sup> Swerdlow concluded that his "ultimate opinion here is that discharging this patient with severity of pain, as documented in the PACU [Post Anesthesia Care Unit] record, was not something that a prudent physician in Dr. Shuput's situation should have done."<sup>54</sup> However, Swerdlow also admitted that "Dr. Shuput was not required under the standard of care to read [Putnam's] pain score," and that if Dr. Shuput "was reassured that [Putnam's] pain was moderate, reasonable, then he doesn't need to look at [her pain score],"<sup>55</sup> and "would not have breached the standard of care"<sup>56</sup> if he felt Putnam was not at that level of pain severity.

Following his deposition, Swerdlow called the Paces' lawyer and complained that Dr. Shuput's counsel was "mean" and had threatened to report him to the American Society of Anesthesiologists.<sup>57</sup> Swerdlow also stated that "he did not want problems with his license."<sup>58</sup> Swerdlow then asked the Paces' lawyer for a copy of Dr. Shuput's deposition.<sup>59</sup> The Paces' lawyer provided a copy, as well as copies of the depositions of two IHC nurses.<sup>60</sup> After receiving these documents, Swerdlow cut off contact with the Paces and their lawyer and—without consulting either the Paces or their lawyer—composed an addendum to his original affida-

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48. *Id.*

49. *Id.* Swerdlow claimed he did not receive a copy of Dr. Shuput's deposition transcript until after his own deposition by Dr. Shuput's counsel; however, because the case came to the Tenth Circuit as an appeal of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court construed the facts in the light most favorable to the Paces. *Id.* n.2.

50. *Id.* at 1069.

51. *Id.* (quoting Appellate Brief at 57, *Pace*, 519 F.3d 1067 (No. 06-4157)).

52. *Id.* at 1069-70 (quoting Appellate Brief at 55, 65, *Pace*, 519 F.3d 1067 (No. 06-4157)).

53. *Id.* at 1070.

54. *Id.*

55. *Id.* (quoting Appellate Brief at 58-59, *Pace*, 519 F.3d 1067 (No. 06-4157)).

56. *Id.* (quoting Appellate Brief at 62, *Pace*, 519 F.3d 1067 (No. 06-4157)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

vit in which he directly reversed his support of the Paces' claim, and instead supported Dr. Shuput's defense.<sup>61</sup> Specifically, Swerdlow stated that it was now his opinion that "Dr. Shuput's care of Ms. Putnam—and specifically his decision to discharge her from the Intermountain Surgery Center . . . —was within the standard of care."<sup>62</sup> Swerdlow simultaneously faxed his addendum to both the Paces' lawyer and Dr. Shuput's counsel—again without first consulting the Paces or their lawyer—on the eve of the summary judgment hearing, which Dr. Shuput had filed a motion for days earlier.<sup>63</sup>

With the summary judgment hearing only a day away, the Paces attempted to contact Swerdlow about his change of position, but were unable to do so.<sup>64</sup> The Paces also sent a letter to Swerdlow demanding that he repair the damage he had done to their case.<sup>65</sup> At the summary judgment hearing, the Paces were granted a brief continuance.<sup>66</sup> When Swerdlow remained uncooperative, the Paces moved for another continuance, withdrew Swerdlow as their expert, and filed a motion to designate a new expert witness.<sup>67</sup> The Paces did not file a memorandum opposing Dr. Shuput's motion for summary judgment.<sup>68</sup> The state court denied the Paces' motions and granted summary judgment to Dr. Shuput.<sup>69</sup>

The Paces did not appeal the decision, and instead commenced a suit against Swerdlow, again in Utah state court, alleging that his abrupt change of position on the eve of the summary judgment hearing caused the dismissal of their underlying malpractice suit against Dr. Shuput.<sup>70</sup> Specifically, the Paces alleged seven separate claims: (1) professional malpractice, (2) fraud, (3) negligent misrepresentation, (4) breach of fiduciary duty, (5) breach of contract, (6) breach of the implied covenant of good faith and fair dealing, and (7) negligent infliction of emotional distress.<sup>71</sup>

Swerdlow, a California resident, removed the case to federal court under diversity jurisdiction and filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing three grounds for dismissal: (1) that the doctrine of expert immunity barred the Paces from bringing any suit against him, (2) that all seven of the Paces' claims collectively failed as a matter of law for lack of proximate cause because his modified testimony was not the sole or primary reason for dismissal of their underlying case, and

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61. *Id.*

62. *Id.* at 1071 (quoting Appellate Brief at 71-72, *Pace*, 519 F.3d 1067 (No. 06-4157)).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

(3) that each of the Paces' seven claims failed individually as a matter of law on independent grounds.<sup>72</sup>

The Federal District Court for the District of Utah granted Swerdlow's motion to dismiss on all seven claims, holding that his change of opinion was not the proximate cause for dismissal of the Paces' underlying malpractice case.<sup>73</sup> The district court explained that even without his addendum, Swerdlow's original affidavit was not convincing enough to withstand summary judgment because it contained conflicting testimony concerning proximate cause.<sup>74</sup> Specifically, the district court concluded that Swerdlow's statements—"if she had been monitored overnight, it is very likely that she would be alive today," and "as a direct and proximate result of her premature discharge, Putnam died"—contradicted each other and were fatal to the Paces' suit before the addendum.

The district court also found that the Paces' failure to oppose the motion for summary judgment contributed as much as anything to the state court granting summary judgment to Dr. Shuput.<sup>75</sup> The district court declined to rule on the controversial issue of friendly expert immunity because it presented an issue of first impression under Utah law, and because the lack of proximate cause was dispositive as a matter of law to each of the Paces' claims, rendering a decision on immunity unnecessary.<sup>76</sup>

## *B. Decision*

### *1. Majority Opinion*

The Tenth Circuit Court of Appeals reversed the decision of the district court, holding (1) that given the procedural posture of the case as an appeal of a 12(b)(6) motion to dismiss, the district court had improperly drawn critical inferences against the Paces, and (2) that the Paces had alleged facts that, if proven, would be sufficient to establish the element of proximate cause in their case against Swerdlow.<sup>77</sup>

Judge Briscoe, writing for the majority, began by explaining the two-part procedural lens that is employed when considering a dismissal under Fed. R. Civ. P. 12(b)(6): the court must (1) "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff";<sup>78</sup> and (2) "look to the specific allegations in the complaint to determine whether they plausibly support

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72. *Id.* at 1068, 1071-72.

73. *Id.* at 1072.

74. *Id.*

75. *Id.* (quoting *Pace v. Swerdlow*, 2006 WL 5778247, at \*3-4 (D. Utah May 23, 2006), *rev'd*, 519 F.3d 1067 (10th Cir. 2008)).

76. *Id.*

77. *Id.* at 1073.

78. *Id.* (quoting *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007)).

a legal claim for relief.”<sup>79</sup> Given this procedural lens, the court determined that the district court improperly concluded that the two statements in Swerdlow’s affidavit addressing causation—the statements, “if she had been monitored overnight, it is very likely that she would be alive today,” and “as a direct and proximate result of her premature discharge, Putnam died”—were in conflict.<sup>80</sup> Instead, the court concluded that the phrase “very likely” denoted a high degree of probability, and thus was perfectly consistent with the later statement concerning proximate cause.<sup>81</sup>

The court also held that the Paces had alleged facts that, if proven, would be sufficient to establish the element of proximate cause in their case against Swerdlow.<sup>82</sup> The court began this portion of its analysis by reviewing the element of proximate cause under Utah law:

Proximate cause 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 accomplish the injury.”<sup>83</sup> Further, there can be more than one proximate cause of an injury so long as each is a concurrent contributing factor in causing the injury.<sup>84</sup>

Under such a standard, the court concluded that Swerdlow’s original affidavit would almost certainly have enabled the Paces to survive Dr. Shuput’s motion for summary judgment.<sup>85</sup> Additionally, the court noted the fact that under Utah law, “it is well established that the question of proximate cause is generally reserved for the jury,” and “only in rare cases may a trial judge rule as a matter of law on the issue of proximate causation.”<sup>86</sup>

The court also noted that under Utah’s proximate cause standard, the Paces were not required to allege facts demonstrating that Swerdlow’s change of opinion was *the* proximate cause of the state court’s decision to dismiss their underlying malpractice claim against Dr. Shuput, but only that Swerdlow’s change of opinion was *a* proximate cause of that decision; that is, that Swerdlow’s change of opinion was a “con-

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79. *Id.* (quoting *Alvarado*, 493 F.3d 1210 at 1215).

80. *Id.*

81. *Id.* at 1074.

82. *Id.* at 1073.

83. *Id.* (quoting *Steffensen v. Smith’s Mgmt. Corp.*, 820 P.2d 482, 486 (Utah Ct. App. 1991)).

84. *Id.* at 1073-74 (citing *Anderson v. Parson Red-E-Mix Paving Co.*, 24 Utah 2d 128, 467 P.2d 45, 46 (1970); *Jacques v. Farrimond*, 14 Utah 2d 166, 380 P.2d 133, 134 (1963)).

85. *Id.* at 1074. On this point, the court highlighted the fact that “[t]ellingly, Dr. Shuput did not view the affidavit as being weak. Rather in his motion for summary judgment filed in the medical malpractice action, Dr. Shuput’s proximate cause argument relied upon [Swerdlow’s] deposition testimony—not [Swerdlow’s] affidavit.” *Id.*

86. *Id.* (quoting *Steffensen*, 820 P.2d 482 at 486).

current contributing factor” to the state court’s decision to dismiss their suit.<sup>87</sup>

The court also rejected the district court’s conclusion that the Paces’ failure to file a memorandum in opposition of Dr. Shuput’s motion for summary judgment contributed as much as anything to the dismissal of their case.<sup>88</sup> Under Utah law, expert testimony is required to establish causation in all medical malpractice cases where the cause of death is not obvious.<sup>89</sup> Thus, the court concluded that the Paces’ omission was irrelevant because at that point—i.e. following Swerdlow’s change of opinion—they were without an expert witness, and only a day away from the summary judgment hearing.<sup>90</sup>

Ultimately, the court remanded the case to the district court for further proceedings consistent with its opinion.<sup>91</sup> The court stated that, on remand, the district court was free to examine the additional questions raised by Swerdlow’s defense, such as whether each of the Paces’ claims failed independently on other grounds, or whether the Paces’ claims were collectively barred by immunity, including whether the latter question should be certified to the Utah Supreme Court.<sup>92</sup>

## 2. Judge Gorsuch’s Partial Concurrence and Partial Dissent

Judge Gorsuch authored a partial concurrence and partial dissent to the majority’s opinion.<sup>93</sup> As a preliminary matter, Judge Gorsuch concurred with the majority’s analysis of the proximate cause issue, including the majority’s conclusion that Swerdlow did not demonstrate, as a matter of law, that his initial affidavit was so weak or contradictory that it would have necessarily failed to defeat summary judgment in the Paces’ underlying malpractice suit.<sup>94</sup> However, Judge Gorsuch recounted the fact that the court was free to affirm the verdict of the district court on any ground supported by the record, and stated that the case should not have been decided on the issue of proximate cause because a review

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87. *See id.*

88. *Id.*

89. *Pace v. Swerdlow*, No. 2:06CV27DAK, 2008 U.S. Dist. LEXIS 32718, at \*10 (D. Utah May 22, 2006).

90. *Pace*, 519 F.3d at 1075.

91. *Id.*

92. *Id.* Swerdlow did in fact bring his case again in the federal district court as a motion to dismiss based on witness immunity or, alternatively, that the issue of witness immunity should be certified to the Utah Supreme Court. The federal district court denied Swerdlow’s motion to dismiss based on witness immunity, but granted his motion to certify the issue of witness immunity to the Utah Supreme Court (Order of the Federal District Court for the District of Utah, Nov. 14, 2008, available on PACER). However, before the Utah Supreme Court ruled on the certification issue, the parties settled.

93. *Pace*, 519 F.3d at 1075.

94. *Id.* (Gorsuch, J., concurring in part, dissenting in part).

of the Paces' complaint revealed several other grounds upon which to affirm the decision of the district court.<sup>95</sup>

Judge Gorsuch also expressed concern about the policy implications of the majority's decision: "[a]llowing this claim to march along sends the message to would-be expert witnesses: [b]e wary—very wary—of changing your mind, even when doing so might be consistent with, or compelled by, the standards of your profession."<sup>96</sup> Additionally, Judge Gorsuch took issue with the fact that the Paces had never demonstrated that "another expert, provided with all the information available to Swerdlow at the time he changed his opinion, still would've thought Dr. Shuput engaged in malpractice,"<sup>97</sup> and thus concluded that there existed "*no* facts suggesting that any responsible physician, after reviewing the full record, would've thought Dr. Shuput's conduct constituted malpractice."<sup>98</sup>

Judge Gorsuch further noted that the Paces themselves stated that the reason for their dissatisfaction with Swerdlow was his failure to "deliver" the expert testimony he had promised them all along,<sup>99</sup> and warned of the potential fall-out from creating a precedent that encourages expert witnesses to "deliver" testimony as opposed to presenting their unbiased opinions:

Parties already exert substantial influence over expert witnesses, often paying them handsomely for their time, and expert witnesses are, unfortunately and all too frequently, already regarded in some quarters as little more than hired guns. When expert witnesses can be forced to defend themselves in federal court beyond the pleading stage simply for changing their opinions—with no factual allegation to suggest anything other than an honest change in view based on a review of new information—we add fuel to this fire. We make candor an expensive option and risk incenting experts to dissemble rather than change their views in the face of compelling new information. The loser in all this is, of course, the truth-finding function and cause of justice our legal system is designed to serve.<sup>100</sup>

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95. *Id.*

96. *Id.* at 1077.

97. *Id.* at 1076.

98. *Id.*

99. *Id.* at 1077.

100. *Id.* Additionally, Judge Gorsuch stated that even if the court were to put aside the lack of factual allegations related to Swerdlow's misconduct, many of the Paces' claims nonetheless lacked additional essential elements necessary to survive a 12(b)(6) dismissal. For example, the fact that the Paces never alleged any fear of physical injury as a result of Swerdlow's conduct, but nonetheless asserted a claim of negligent infliction of emotional distress, which, under Utah law, requires an allegation that the plaintiff feared physical injury or peril as a result of the defendant's negligence. *Id.* at 1077-78.

## III. ANALYSIS

*A. Pace Suggests There are Right and Wrong Ways for Friendly Experts to Change Their Opinions*

In *Pace*, the Tenth Circuit held that Swerdlow's change of opinion was not, as a matter of law, insufficient evidence of proximate cause.<sup>101</sup> However, importantly, *Pace* does not suggest that *any* change of opinion by a friendly expert is sufficient to establish a prima facie proximate cause link in a negligence suit against the expert. Clearly, the manner in which Swerdlow changed his opinion influenced the court's decision, as did his alleged motivations for the change.<sup>102</sup> Specifically, Swerdlow waited a month to announce his change of opinion,<sup>103</sup> and his announcement came on the eve of summary judgment via direct fax to opposing counsel.<sup>104</sup> Further, allegations existed to suggest that the reasons behind Swerdlow's change of opinion were grounded in fear and intimidation rather than in a compelling new piece of medical evidence.<sup>105</sup> Had Swerdlow kept the lines of communication open between himself and the Paces once he began to doubt his earlier testimony, had he not waited until the eve of the summary judgment hearing to announce his change of opinion, and, most importantly, had he refrained from faxing his addendum directly to opposing counsel, the court would undoubtedly have had a more difficult time concluding that his conduct was potentially actionable.<sup>106</sup>

*B. Looking Forward*

The decision to recognize a cause-of-action for friendly expert negligence remains a matter of state law, as do the contours of such an action. However, the proximate cause analysis in *Pace*, having come from the Tenth Circuit, will likely be regarded as considerable persuasive authority when assessing causation in future claims of friendly expert neg-

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101. *Id.* at 1074; *see also id.* at 1075 (Gorsuch, J., concurring in part, dissenting in part).

102. *See id.* at 1075 ("Plaintiffs have sufficiently alleged that Defendant's change of position, as well as the timing of that change of position, proximately caused the state court's grant of summary judgment . . .") (emphasis added); *see also id.* at 1076 ("Dr. Swerdlow changed his opinion, we are encouraged to surmise, because he feared counsel's 'meanness' and threat to attack Dr. Swerdlow's medical license.") (Gorsuch, J., concurring in part, dissenting in part).

103. *Id.* at 1069, 1071 (Swerdlow's deposition by Dr. Shuput's counsel was on January 4; however, he did not fax his addendum until February 11).

104. *Id.* at 1071.

105. *Id.* at 1070; *see also id.* at 1076 (Gorsuch, J., concurring in part, dissenting in part).

106. Although it is impossible to know what the Tenth Circuit might have done, it is interesting to note that the Ohio Court of Appeals, in deciding one of the only other claims of friendly expert negligence ever to turn on a change of opinion by the expert, held, in part, that the expert's change of opinion was not the cause of the plaintiffs having to prematurely settle their suit because the expert (1) changed his opinion based on a new piece of medical evidence that had come to his attention, (2) reported his change of opinion to his hiring party as soon as he made up his mind, and (3) did not communicate with the opposing party. *See Schaffer v. Donegan*, 585 N.E.2d 854, 857, 860 (Ohio Ct. App. 1990); *see also Schaffer v. Donegan*, Case No. CA 9108, 1986 Ohio App. LEXIS 5382, at \*3 (Ohio Ct. App. Jan 21, 1986).

ligence involving a change of opinion by the expert.<sup>107</sup> Thus, the ultimate impact of *Pace* will depend on how the decision is applied in similar cases in jurisdictions that recognize a cause-of-action for friendly expert negligence. This section argues that *Pace*, although correctly decided, should be narrowly interpreted and its application restricted to cases involving only very similar facts.

In his partial concurrence and partial dissent, Judge Gorsuch voiced his concern that the majority's decision may discourage future experts from changing their testimony even when they encounter new evidence.<sup>108</sup> However, if *Pace* is applied narrowly, Judge Gorsuch's slippery-slope scenario seems unlikely to develop. This is because, in *Pace*, Swerdlow's conduct was more than merely borderline unreasonable—it was clearly egregious and reckless.<sup>109</sup> In particular, Swerdlow's actions of waiting a month to notify the Paces of his change of opinion, and faxing his addendum on the eve of summary judgment directly to opposing counsel without first consulting the Paces or their lawyer, were reckless by almost any standard. Thus, if restricted to the facts, an argument can be made that *Pace* places a very limited burden on future friendly experts who change their opinions—they need only have genuine motivations for their change of opinion (such as a compelling new piece of evidence that has come to light), and to avoid clear negligence in communicating such a change.

If *Pace* is applied more broadly, however, Judge Gorsuch's fears seem more realistic. Much of the danger in a broad application of *Pace* arises from the potential risk of lawyers shifting responsibility for their own negligence or malpractice onto friendly experts. For example, an argument can be made that an expert who fails to return phone calls or delays in reviewing relevant case documents, and then suddenly changes his or her opinion as a hearing or trial approaches, is negligent. However, an additional argument can be made that a lawyer who fails to monitor and replace such an expert is also negligent—and, in some cases, may be more responsible than the expert. This is because lawyers, not experts, are expected to be familiar with the inner workings of the legal system, and lawyers, not experts, have a duty of zealous representation to clients. Thus, it should remain the duty of lawyers to choose their ex-

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107. Interest in *Pace* is evidenced by the significant amount of coverage the case received from tort-related media outlets. See, e.g., Robert Ambrogi, Top 10 Expert Witness Cases of 2008, IMS ExpertServices, <http://www.ims-expertservices.com/newsletters/dec/top-10-expert-witness-cases-of-2008-120908.asp> (last visited Mar. 7, 2009) (naming *Pace* as the third most significant expert witness case of 2008).

108. *Pace*, 519 F.3d at 1077.

109. Indeed, Swerdlow's conduct was likely sufficiently egregious and reckless to constitute gross negligence, which under Utah law, is defined as "the failure to observe even slight care; it is the carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." *Pearce v. Utah Athletic Found.* 179 P.3d 760, 767 (Utah 2008) (quoting *Berry v. Greater Park City Co.*, 171 P.3d 442, 449 (Utah 2007)).



perts wisely, to guide their experts (no matter how experienced) through the litigation process, and, if necessary, to replace underperforming experts—even if the experts' behavior might independently be considered negligent. Therefore, in future claims of friendly expert negligence involving a change of opinion by the expert, the alleged negligence of the expert in changing his or her opinion should be considered against the diligence of the lawyer in preparing, guiding, and monitoring the expert. Only if the negligence of the expert is clearly egregious, and could not have been reasonably prevented by the lawyer, should the expert's conduct be found potentially actionable.

When applied to the facts in *Pace*, this proposed test supports the Tenth Circuit's decision. Swerdlow's total collapse at his deposition by opposing counsel suggests he was ill-informed and ill-prepared by his own counsel for the experience. Nonetheless, any lack of diligence in preparing Swerdlow by the Paces' lawyer was superseded by Swerdlow's own egregious conduct. That is, even if the lawyers were less than thorough in preparing Swerdlow, and even if they suspected that he was having doubts following his deposition by opposing counsel, there was little reason for them to anticipate that he would do something as reckless as faxing an addendum to opposing counsel, on the eve of summary judgment, without first consulting his hiring party's lawyers.

#### CONCLUSION

Under a narrow reading of *Pace*, experts are free to change their opinions in a case, but (1) must do so based on reasonable new developments in a case (such as compelling new evidence), and (2) must avoid clear negligence in communicating their change of opinion—an entirely sensible burden. Thus, if *Pace* is applied narrowly, no responsible expert need fear the Tenth Circuit's decision. Further, when evaluating causation in future claims of friendly expert negligence involving a change of opinion by the expert, courts should consider the alleged negligence of the expert in changing his or her opinion against any lack of reasonable diligence or lack of zealous representation by the plaintiff's counsel, and should require an act of clearly egregious conduct by the expert, which could not have been reasonably avoided by the lawyer, in order to recognize the change of opinion by the expert as a potential proximate cause. This test should be conducted both by the judge at the pleading stages and, if a trial follows, by a jury in the form of jury instructions. Such a test is desirable because it synthesizes a principle goal of tort law, that of shifting losses from less responsible to more responsible parties, with one of the principle tenets of lawyering, that of zealous representation.

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