

1996

# Leslie Scot McNair v. Daniel Farris : Brief of Appellant

Utah Court of Appeals

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LESLIE SCOT McNAIR,  
Plaintiff and Appellant,  
vs.  
DANIEL FARRIS,  
Defendant and Appellee.

BRIEF OF APPELLANT

APPEAL  
FROM THE THIRD JUDICIAL DISTRICT COURT  
COUNTY OF SALT LAKE, STATE OF UTAH  
HONORABLE HOMER F. WILKINSON, JUDGE

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LIST OF PARTIES

The caption of this case contains the names of all parties to the most recent proceeding before the court whose order is sought to be reviewed.

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### JURISDICTION

This appeal is from the district court of a matter over which the Court of Appeals did not have original jurisdiction under Subsection 78-2a-3(2) of the Utah Code. Hence the Supreme Court had jurisdiction in this matter pursuant to Subsection 78-2-2(3)(j) of the Utah Code. However, the Supreme Court transferred this matter pursuant to Subsection 78-2-2(4) of the Utah Code, and thus this Court has jurisdiction in accordance with Subsection 78-2a-3(2)(j) of the Utah Code.

The Notice of Appeal filed April 8, 1996 complied with Rule 3(a) of the Utah Rules of Appellate Procedure, allowing appellate review of the Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for a Continuance, dated and entered in this matter on December 29, 1995; and the Order Denying Plaintiff's Motion for a New Trial and to Set Aside Judgment, dated and entered in this matter on March 11, 1996. Record at (R.) 166.

### STATEMENT OF THE ISSUES

#### STANDARD OF REVIEW AND EVIDENCE OF PRESERVATION

The appellant and plaintiff Leslie Scot McNair (McNair) asserts that the pertinent issues and the corresponding standard of review are as follows, and that these issues were preserved as indicated:

1. Must a defendant automobile operator moving for



summary judgment bear an initial burden to present evidence where (A) the basis for the motion is that the plaintiff injured pedestrian has not met any pleaded threshold requirement for suing for general damages, and (B) the motion is not ruled upon until the time of pretrial? This is a question of law, with no need for deference to the district court's conclusions. Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229 (Utah 1995). This standard of review remains the same when an error of law is pointed out in a motion for new trial, since it is an abuse of discretion not to correct an error of law made in granting a motion for summary judgment. Doty v. Town of Cedar Hills, 656 P.2d 993, 997 (Utah 1982).

This failure by Farris to bear his burden as the moving party was raised in McNair's Memorandum in Support of Motion for New Trial and to Set Aside Judgment dated January 8, 1996 (R. 108-112), in the Reply Memorandum in Support of Motion for New Trial and to Set Aside Judgment dated January 29, 1996 (R. 144-146), and in the Hearing on Plaintiff's Motion for New Trial and Request to Set Aside Judgment held February 23, 1996 (R. 175-179, 188-190).

2. Has an injured pedestrian sufficiently shown the existence of a genuine issue of material fact by pleading permanent disability and stating at pretrial that he still has pain and problems more than a year after the injury and is hoping to be examined before trial by a medical provider where (A) the automobile operator has moved for summary judgment on the basis

of the unsubstantiated assertion that the pedestrian has no permanent disability or permanent impairment based upon objective findings to satisfy the threshold requirements for a suit for general damages, (B) the motion is not ruled upon until the time of pretrial, and (C) the medical provider has been named in discovery but not identified as an expert witness, and no order has required such identification? This is a question of law, with no need for deference to the district court's conclusions. Walker Drug, supra.

McNair pled that the negligence of Farris caused him permanent disability. R. 2. He also presented evidence of pain and residual problems and asserted that the jury could determine therefrom that McNair suffered permanent disability or permanent impairment based upon objective findings. This is found in the record of the Pre-Trial Conference held December 8, 1995 (R. 159, 161), in McNair's Memorandum in Support of Motion for New Trial and to Set Aside Judgment dated January 8, 1996 (R. 111-112), in the Affidavit of Leslie S. McNair dated January 10, 1996 (R. 123), and in the Hearing on Plaintiff's Motion for New Trial and Request to Set Aside Judgment held February 23, 1996 (R. 187-189).

The issue of a potential examination to further establish permanent impairment was raised and examined in McNair's Memorandum In Support of Motion for Continuance of Trial Date (R. 74-75) and the Affidavit of John L. Black (R. 78), each dated November 22, 1995, at the Pre-Trial Conference (R. 157-158,

162-163), in McNair's Memorandum dated December 13, 1995 (R. 88), in his Memorandum in Support of Motion for New Trial and to Set Aside Judgment dated January 8, 1996 (R. 111-112), and in the Affidavit of Leslie S. McNair dated January 10, 1996 (R. 123-124).

3. Must a dismissal be without prejudice where (A) an injured pedestrian has sued a automobile operator for general and special damages, (B) the automobile operator has been granted summary judgment on the basis that the injured pedestrian cannot prove at trial any of the threshold requirements for a suit for general damages, (C) the motion is made after the matter has been set for trial and is granted at the time of pretrial, and (D) the pedestrian states that he still has pain and problems more than a year after the injury and is planning on obtaining medical attention in the very near future? This is a question of law, with no need for deference to the district court's conclusions. Id.

McNair urged that any dismissal should be without prejudice at the Pre-Trial Conference held December 8, 1995 (R. 160), in McNair's Memorandum dated December 13, 1995 (R. 88), in his Memorandum in Support of Motion for New Trial and to Set Aside Judgment dated January 8, 1996 (R. 113-114), in the Reply Memorandum in Support of Motion for New Trial and to Set Aside Judgment dated January 29, 1996 (R. 146-147), and in the Hearing on Plaintiff's Motion for New Trial and Request to Set Aside Judgment held February 23, 1996 (R. 180).

Thus the record shows that each question "was timely presented to the trial court in a manner sufficient to obtain a ruling thereon." Franklin Financial v. New Empire Develop. Co., 659 P.2d 1040, 1045 (Utah 1983).

DETERMINATIVE LAW

STATUTES, ETC., TO BE INTERPRETED

The constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative consist of the following:

Section 31A-22-309(1) of the Utah Code:

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability or permanent impairment based upon objective findings;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of \$3,000.

Rule 16 of the Utah Rules of Civil Procedure (URCP):

**Rule 16. Pretrial conferences, scheduling, and management conferences.**

(a) **Pretrial conferences.** In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted

for lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating the settlement of the case; and

(6) considering other matters as may aid in the orderly disposition of the case.

(b) **Scheduling and management conferences.**

...

(c) **Final pretrial or settlement conferences.** In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) **Sanctions.** If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 56 of the Utah Rules of Civil Procedure:

**Rule 56. Summary judgment.**

(a) **For claimant.** ...

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought,

may, at any time, move with or without supporting affidavits, for a summary judgment in his favor as to all or any part thereof.

(c) **Motion or proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.**

...

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable. ...**

(g) **Affidavits made in bad faith. ...**

#### STATEMENT OF THE CASE

The defendant and appellee Daniel Farris (Farris) was operating an automobile and ran over McNair's foot, breaking a

couple of bones. McNair began receiving medical attention for his injury, and filed this action. He planned on paying for the needed surgery with his expected recovery from Farris.

McNair's attorney thought that a broken bone was sufficient to allow recovery of general damages. However, the Complaint also alleged the existence of permanent disability.

Farris moved for summary judgment with a supporting affidavit dealing only with the fact that medical expenses had not exceeded \$3,000. He addressed the allegation of permanent disability outside of the affidavit in conclusory terms. This motion was granted at pretrial in the face of arguments that McNair still had pain and problems more than a year after the injury and was hoping to be examined before trial by a medical provider.

In denying a subsequent motion for a new trial, the trial court excused Farris's failure to carry his burden to show an absence of permanent disability by emphasizing that the ruling took place at pretrial and no evidence had been produced by McNair. However, no pretrial order required McNair to have named an expert or otherwise have produced evidence before the trial.

The facts in more detail are as follows:

1. On October 10, 1994 in Salt Lake City, Utah, defendant Farris drove an automobile over the foot of plaintiff McNair. R. 1-2.

2. McNair filed a Complaint dated October 17, 1994 in Third District Court in Salt Lake County, Utah, stating that

Farris had been negligent and that McNair should have a judgment against him for the damage and loss arising from the injuries he caused McNair to suffer. R. 1-3.

3. The said Complaint specified that the injuries, damage and loss included (a) fracture of bones in left foot; (b) injury to soft tissues in left foot and ankle; (c) permanent disability; (d) pain and suffering, both mental and physical, past and future; (e) medical bills, past and future; and (f) loss of earnings and earning capacity. R. 2.

4. In response, Farris filed an Answer and Demand for Jury Trial dated November 1, 1994. R. 7-12.

5. The parties then each pursued discovery. R. 13-56.

6. During the course of this discovery, Farris explored the issue of permanent disability in the deposition taken of McNair on February 9, 1995. The following is recorded on page 38 of the transcript of that deposition and affirmed as true in a subsequent affidavit executed by McNair and filed with the trial court:

Q. So, you got a release, then to go back to work recently; is that right?

A. Yes.

Q. And do you anticipate further treatment?

A. I don't know.

Q. Do you have a pending appointment with Dr. Gordon?

A. No.

Q. Has he told you anything along the lines that you are going to have a permanent injury, or did he give you any indication of what the future will hold?

A. No.

Q. At the present time, Lee, do you have -- what problems are you having with your foot?

A. Extreme soreness. I have a problem with



balance. The foot is weaker now. My leg is weaker, now, in fact, from being casted. I suppose that will come back. It is still very, very sore. It was crushed and it was crushed slowly. The tire was turning and grinding on it. It is taken a lot longer to heal. It is not one simple injury, you know. Had I tripped and snapped a bone, you know, perhaps it would be simpler.

R. 123.

7. McNair filed a Certification of Readiness for Trial.

R. 57-58. On September 26, 1995 the trial court responded by setting December 11, 1995 as the date of the jury trial, and scheduling a pretrial conference for December 8, 1995. R. 59.

8. Farris then filed a Motion for Summary Judgment dated November 17, 1995. R. 61.

9. Farris's Motion was based on the fact that McNair had not yet incurred medical expenses in the amount of \$3,000. Thus he had not satisfied one of the alternative threshold requirements under the no-fault law listed in Section 31A-22-309 of the Utah Code. R. 63-68.

10. McNair's attorney had been under the impression that a fracture was still sufficient under the statute to allow a claim for general damages. R. 123.

11. Therefore, McNair responded with a Motion for Continuance of Trial Date, dated November 22, 1995. R. 72-73.

12. In his supporting Memorandum, McNair acknowledged that his medical expenses to date were less than \$3,000. R. 74. However, he pointed out that he could still meet the threshold by proving "permanent disability or permanent impairment based upon objective findings" as found in Section 31A-22-309(1)(c). R. 74.

He sought a continuance to be better able to do that. R. 74-76.

13. Farris filed a Reply Memorandum dated November 29, 1995, and included therein the unsupported assertion that there was no "evidence to suggest that the plaintiff will be found to have a permanent disability or permanent impairment for the fractures of the left third and fourth metatarsal of his foot." R. 81-82.

14. At the pretrial conference on December 8, 1995, McNair's counsel reviewed the difficulties encountered in obtaining a doctor's opinion as to permanent impairment based on the pain and problems McNair still suffered, and indicated that if the Motion for Summary Judgment were to be granted, it should be without prejudice. R. 157-158, 160.

15. The trial court initially denied the Motion for Summary Judgment, but indicated that if there were no permanent injury shown at trial, McNair might have to pay the jury fees. R. 162.

16. McNair's counsel offered to have the Motion granted in the event a doctor were to tell him that afternoon that there was no permanent injury. R. 162.

17. Farris's counsel argued that discovery had been conducted for months, that no evidence had been presented before the Court that there was a permanent impairment, that medical records had been provided but no experts designated, and that the Motion was ripe for an immediate ruling. R. 162-163.

18. However, no order had been entered requiring

designation of expert witnesses. R. 1-84. Furthermore, the names of the doctors attending McNair, and whom he intended to see, were on those medical records provided to Farris. R. 78, 157, 163.

19. Based on the fact that a ruling was indeed due on the Motion, and deciding it was well-taken, the trial court granted Farris's Motion for Summary Judgment. R. 164.

20. Despite McNair's subsequent objection (R. 86), the trial court executed an Order finding no cause of action, with prejudice. R. 99-100.

21. Through new counsel, McNair filed a Motion for New Trial, pointing out that Farris had never carried his burden in moving for summary judgment, that there was a viable issue of fact for trial, and that prejudice should not have attached. R. 105-116.

22. That motion was denied, with the trial court emphasizing how little time had remained before trial. R. 190-194.

23. Thereafter McNair instituted this appeal. R. 166.

#### SUMMARY OF ARGUMENTS

1. In moving for summary judgment, Farris did not carry his burden of proving there was no genuine issue regarding the no-fault threshold.

Farris supplied no affidavit affirming that McNair did not suffer permanent disability or permanent impairment as a

result of being injured by Farris. His motion could not be properly granted in the absence of such an affidavit.

His burden of proof was not lightened as the time of trial neared and a final pretrial was held.

2. In his opposition to the summary judgment motion unsupported by an affidavit regarding permanent impairment, McNair raised a genuine issue of material fact through his pleadings and by stating at pretrial that he still had pain and problems more than a year after the injury.

There was no special knowledge required of an expert to assist the trier of fact in determining whether McNair's symptoms evidenced permanent disability or permanent impairment.

Nevertheless, McNair's assertion of this issue of fact was bolstered by his expected examination before trial by a medical provider. The fact that the provider was not identified as an expert witness was irrelevant since he was named in discovery and since the court had not ordered such identification.

3. A dismissal at pretrial for failure to meet the threshold requirements should not be with prejudice. McNair never had a trial at which to prove the threshold requirements were met.

Furthermore, a dismissal with prejudice could prevent recovery for special damages, and would prohibit recovery of general damages despite imminent satisfaction of the threshold requirements.

ARGUMENT

1. IN MOVING FOR SUMMARY JUDGMENT, FARRIS DID NOT CARRY HIS BURDEN OF PROVING THERE WAS NO GENUINE ISSUE REGARDING THE NO-FAULT THRESHOLD.

Farris had the initial burden.

The initial burden in a motion for summary judgment is on the moving party. It is not enough for that party to make bare allegations that the non-moving party has no evidence to support its position.

McNair alleged in his Complaint that "plaintiff was caused to and continues to suffer from ... (c) Permanent disability." R. 2.

This allegation, if proven at trial, would allow McNair to maintain a cause of action for general damages pursuant to Section 31A-22-309 of the Utah Code.

However, Farris in his Motion for Summary Judgment and supporting material did not address this allegation. The closest he came was the unsupported allegation that McNair's injuries did not constitute a "serious impairment of bodily function." R. 66. The affidavit supporting the Motion only dealt with an alternative basis found in that Section of the Code, namely, "(e) medical expenses to a person in excess of \$3,000."

As indicated above, Farris had explored the issue of permanent disability in the deposition taken of McNair on February 9, 1995. He knew of this evidence concerning the residual effects of McNair's injury, but he did not marshal it

for the court's benefit.

Farris also failed to provide the court with an affidavit to show that there was no permanent disability. This was the burden that Farris, as the moving party, had to carry.

The case of Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229 (Utah 1995) is instructive on this point. In that case, the issue was whether damage occurred within three years prior to the filing of the action. If it did, the statute of limitation did not bar an action by the Walkers based on a continuing nuisance.

La Sal moved for summary judgment, claiming the Walkers had produced no evidence of such recent damage. However, the opinion noted that the Walkers had no duty to produce such evidence in the absence of an affidavit demonstrating that no damage had occurred that recently.

[A]s the moving party, La Sal had the initial burden to present evidence that the Walkers did not sustain such damage, and the Walkers were under no obligation to present opposing evidence until La Sal met that burden. See K & T, Inc. v. Koroulis, 888 P.2d 623, 628 (Utah 1994); see also Utah R. Civ. P. 56(e). Because La Sal failed to present evidence that the Walkers did not sustain any damage within three years prior to the filing of their complaint, the Walkers may not be penalized for failing to present evidence in opposition. Id. at 1233.

Therefore, the Supreme Court reversed the summary judgment that had been granted on that issue.

In the case cited in that quote, K & T, Inc. v. Koroulis, 888 P.2d 623 (Utah 1994), summary judgment was reversed on the same basis.

In the K & T case, Montana Brand had to show that there were no disputed material issues of fact regarding its lack of actual knowledge. The company supplied an affidavit that no one was informed by First Security Bank, and an affidavit from Koroulis that he didn't inform anyone. However, the company did not supply an affidavit showing that it did not acquire this knowledge from some other source.

Therefore, "Montana Brand failed to meet its affirmative burden, as the party moving for summary judgment, of establishing that there were no disputed material issues of fact." Id. at 628.

In the case of Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986), one of the five justices joining the majority, Justice White, wrote in a concurring opinion to clearly describe the burden of the moving party in a motion for summary judgment:

I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. Id. 477 U.S. at 328, 106 S.Ct. at 2555 (White, J., concurring). (Emphasis added.)

This concurring opinion is cited for these principles by Justice Brennan, in a dissenting opinion joined by Chief Justice Burger and Justice Blackmun, two of the three other dissenters:

Plainly, a conclusory assertion that the

nonmoving party has no evidence is insufficient. See ante, at 2555 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Id. 477 U.S. at 332, 106 S.Ct. at 2557 (Brennan, J., dissenting). (Emphasis added.)

Farris supplied no affidavit affirming that McNair did not suffer permanent disability or permanent impairment.

Unless and until Farris properly met his burden to demonstrate the absence of a material fact, McNair had no obligation to bring forth evidence of a permanent disability. So how can his failure to fulfill this obligation which he did not yet have demonstrate a purported absence of an issue as to that fact and shift the burden to McNair to then bring forth such evidence?

Farris could have borne his burden in one of two ways. He could have shown that the pleadings raised no such issue, or he could have provided admissible evidence that there was no permanent disability.

Farris could not show that the pleadings did not raise the issue, since McNair alleged in his Complaint that "plaintiff was caused to and continues to suffer from ... (c) Permanent disability." R. 2. Furthermore, Farris did not provide any evidence that there was no permanent disability.

Thus Farris utterly failed to carry the burden required of a party making a motion for summary judgment.

Farris could have had an independent medical examination of McNair and thereby obtained evidence of a lack of permanent



injury, if indeed there was none. He failed to do so. Rather, he did not address the specific allegation of permanent injury at all, making only the bare assertion, "Injuries claimed by plaintiff do not constitute a 'serious impairment of bodily function' and do not meet the threshold requirements of the no-fault automobile insurance act." R. 66.

In the case cited by Farris in support of his motion, Zoldas v. Louise Cab Corp., 489 N.Y.S.2d 468 (A.D.1 Dept. 1985), the moving parties not only marshalled all evidence showing the seriousness of the injury, but the affidavit of their neurologist finding no abnormalities. They had borne their burden. Farris here has provided no such evidence.

Since there was no affidavit or other evidence that McNair did not have a permanent disability, Farris's burden as the moving party was not met. Thus McNair could not be penalized for failing to provide evidence in opposition.

Farris's burden was not any less at pretrial held shortly before trial.

The trial court indicated at the hearing on McNair's Motion for a New Trial that he agreed with the foregoing principles of the law, but that they did not apply at the time of pretrial, a few days before trial. R. 190-191.

However, as McNair stated to the trial court, there is nothing in the rules or case law indicating that the movant's burden is decreased if the summary judgment motion is made just before trial. R. 188.

Clearly Rule 56 URCP draws no distinction based upon the time remaining before trial.

Rule 16(c) URCP does refer to the time of trial, indicating a final pretrial should be held as close to the time of trial as reasonable. It specifies that trial counsel should be present, and the parties should be available.

The notice of the final pretrial was just that, merely a notice of the time, place and date. R. 59. Plaintiff and his counsel were present. R. 157. Thus there was compliance with Rule 16(c).

Rule 16(a) URCP deals with pretrial conferences in general. It lists purposes for pretrial conferences, which in summary are to manage the case for purposes of efficiency and settlement. The rule does not change the law applicable to summary judgment motions.

Finally, Rule 16(d) addresses sanctions. The grounds listed for sanctions are essentially first, the failure to obey an order or second, the failure to appear ready to participate as required by the rule.

Generally, the failure to obey an order is the basis for sanctions under Rule 16. The rule references parts of Rule 37(b) as examples of appropriate sanctioning orders. That rule also deals with sanctions for disobedience of a court order.

Thus the case of Arnold v. Curtis, 846 P.2d 1307 (Utah 1993) upheld a sanction where there was noncompliance with an order. On the other hand, the case of Berrett v. Denver and Rio

Grande W. R., 830 P.2d 291 (Utah App. 1992), cert. denied, 836 P.2d 1383 (Utah 1992) found an abuse of discretion where the trial court excluded testimony of an expert witness in the absence of a court order setting a deadline for naming such witnesses.

In the instant matter, there was no prior order. Hence no sanctions could be based on a failure to obey an order.

As to the other basis for sanctions, the failure to appear ready to participate as required by the rule, both McNair and his attorney were present at the time set. R. 157. They were both ready and willing to participate as required by the rule. There was no mention of any failure on their part to participate in settlement discussions or otherwise at the pretrial.

Obviously the trial court had concerns that McNair would be unprepared for trial, and that perhaps he could not carry his burden at that time. R. 162. In fact, he felt that if McNair could not go forward to prove his case on the day of trial, the lack of preparation might well warrant assessment of additional costs. R. 162.

However, no scheduling order had been violated because there was none. McNair and his attorney adequately prepared for and participated at pretrial. Thus there were no grounds for sanctions under Rule 16 URCP.

There is no penumbra to the rules which will allow a trial court to say at the final pretrial, "I do not believe you

will have the evidence you need for a prima facie case at trial, so your case is dismissed," even when adding the phrase, "since there is a summary judgment motion pending against you." The rules applicable to motions for summary judgment cannot be abrogated in that manner.

The case of Jepson v. State Dept. of Corrections, 846 P.2d 485 (Utah App. 1993) stands for the proposition that a case may be filed before the threshold requirements of Section 31A-22-309 are met. It states that the injured party has until the time of trial, not just until pretrial, to prove compliance with those requirements.

Thus McNair never had a duty to produce evidence of a permanent injury. It was an error of law for the trial court to dismiss his action for failing to produce such evidence in compliance with a burden he did not have.

The trial court was evidently correct in concluding that Farris's Motion was timely and deserved a ruling. R. 164. However, the appropriate and correct ruling would have been a denial. As it was, McNair faced an unwarranted surprise and ambush in having to carry a burden at pretrial which under the law he was not required to carry until trial.

2. IN HIS OPPOSITION TO THE SUMMARY JUDGMENT MOTION UNSUPPORTED BY AN AFFIDAVIT REGARDING PERMANENT IMPAIRMENT, MCNAIR RAISED A GENUINE ISSUE OF MATERIAL FACT.  
McNair could rely on his pleadings.

Since Farris had not used any affidavits to support his

position regarding permanent injury, McNair was entitled to rely upon the Complaint to raise an issue of fact.

As indicated above, McNair alleged in his Complaint that "plaintiff was caused to and continues to suffer from ... (c) Permanent disability." R. 2.

The case of Gadd v. Olson, 685 P.2d 1041, 1045 (Utah 1984) stated:

When read in light of section (b) of Rule 56, which provides that the party moving for summary judgment may do so "with or without supporting affidavits," it is clear that the section (e) requirement that a party opposing the summary judgment motion file counter-affidavits applies only when the moving party has elected to and has filed affidavits in support of the motion. If, as in this case, the moving party chooses not to or simply fails to file affidavits, section (e) is inapplicable.

The case of Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 4-5, 354 P.2d 559 (1960), stated:

A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor.

Evidence showed that McNair had permanent disability or impairment.

As indicated above, McNair stated the following in his deposition:

Q. So, you got a release, then to go back to work recently; is that right?

A. Yes.  
 Q. And do you anticipate further treatment?  
 A. I don't know.  
 Q. Do you have a pending appointment with Dr. Gordon?  
 A. No.  
 Q. Has he told you anything along the lines that you are going to have a permanent injury, or did he give you any indication of what the future will hold?  
 A. No.  
 Q. At the present time, Lee, do you have -- what problems are you having with your foot?  
 A. Extreme soreness. I have a problem with balance. The foot is weaker now. My leg is weaker, now, in fact, from being casted. I suppose that will come back. It is still very, very sore. It was crushed and it was crushed slowly. The tire was turning and grinding on it. It is taken a lot longer to heal. It is not one simple injury, you know. Had I tripped and snapped a bone, you know, perhaps it would be simpler.

R. 123.

That excerpt alone, when viewed in the light most favorable to McNair, shows that McNair was capable of producing evidence at trial which would have sustained a judgment in his favor.

As indicated above and as McNair argued at the pretrial, he still had symptoms, he still had pain and other problems. R. 157. The jury would not have needed more than the testimony and demonstrative evidence provided by McNair to reasonably conclude, based upon objective findings, that McNair was suffering from a permanent disability or permanent impairment.

Expert testimony was not required.

McNair produced an affidavit in support of his motion for continuance, describing efforts in connection with another medical examination. R. 77-78. The fact that such efforts to

obtain an additional medical examination had not yet been successful would not have justified granting Farris's motion.

An expert medical opinion is only needed where the fact to be found cannot be based on "the common knowledge and experience of the layman." Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980).

This Court more recently discussed the necessity for expert testimony in Salt Lake City S. D. v. Galbraith & Green, 740 P.2d 284 (Utah App. 1987).

The issue in that case was whether there was a breach by an insurance consultant of its duty to provide legal advice. The Court set forth the following principles as the basis for its holding that expert testimony was not required to show the standard of care:

If the matter at issue in the case is one which requires special knowledge not held by the trier of fact, expert evidence must be presented. If, however, the matter is one which is within the knowledge of the average trier of fact, no expert testimony is required. [Citations.]

Expert testimony is not required "simply because the circumstances are outside the average juror's experience if the other evidence is such as to present the issues in terms which the jury can be expected to understand." [Citation.] If the jury is capable of understanding the primary facts of the case and drawing correct conclusions from them, no expert testimony is required. Id. at 289.

Here, the injury was over a year old. Since McNair was still suffering a disability at the time of trial, the jury would be qualified to reasonably and justifiably find that the

disability was permanent. This issue was not so technical as to have required expert opinion.

An expert witness would likely have testified.

Had the date for trial remained set, it is likely that McNair and his treating physicians would have made extraordinary efforts and would have presented expert testimony at trial concerning the permanency and extent of McNair's injuries.

In arguing against McNair's Motion for a New Trial, Farris stated that it was irrelevant that McNair had until the time of trial to produce his evidence, since the date set for trial had passed. R. 134. Thus Farris once again urged the trial court to penalize McNair for failing to carry a burden he did not have. McNair had until the trial to produce evidence of permanent injury. Once the trial court denied McNair a trial, he had no duty to produce such evidence before the date previously set for the trial.

Farris emphasized to the judge at pretrial that no expert witness had been designated. However, there was no order requiring such designation. Moreover, McNair informed the trial court that the names of the doctors he had seen and planned on consulting with had been furnished to Farris. R. 78, 157, 163.

Thus there was no basis for excluding as witnesses the doctors McNair planned to see. As mentioned above, the case of Berrett v. Denver and Rio Grande W. R., 830 P.2d 291 (Utah App. 1992), cert. denied, 836 P.2d 1383 (Utah 1992) found an abuse of discretion where the trial court excluded testimony of an expert



witness in the absence of a court order setting a deadline for naming such witnesses.

3. A DISMISSAL AT PRETRIAL FOR FAILURE TO MEET THE THRESHOLD REQUIREMENTS SHOULD NOT BE WITH PREJUDICE.

The statute provides for general damages upon meeting the threshold.

Not only was the summary judgment dismissing the action an error in law, but it was error to dismiss the case with prejudice.

Farris cited the case of Tucker v. Walker, 335 So.2d 636 (Fla. App. 1976), for the proposition that a dismissal for failure to meet the no-fault threshold requirements should be with prejudice. R. 94.

It is true that the Tucker opinion upheld a dismissal with prejudice. However, in so doing, it distinguished two prior cases where the ruling was that the dismissal should have been without prejudice. The basis of the distinction was that in Tucker the issues were resolved against the claimant by a jury.

Likewise another case cited by Farris, Coughlin v. LaBounty, 354 N.W.2d 48 (Minn. App. 1984), involved a situation where the facts had been found by a jury.

In the instant matter, McNair sought to present his case to a jury, including proof of his satisfaction of the threshold requirements, but he never got that chance.

One of the prior cases cited and distinguished by Tucker was Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974).

There the Florida Supreme Court upheld the constitutionality of the threshold statute and the dismissal of the complaint filed. However, it stated that the dismissal must be without prejudice, since to hold otherwise would deprive the injured parties from the remedy allowed by the legislature for persons in their situation:

As noted earlier, the appellants in this action have now in fact exceeded the one thousand dollar "threshold" requirement of F.S. Sec. 627.737(2), F.S.A., and thus would be entitled, under the act, to pursue their claims for intangible damages for pain and suffering, etc., absent the trial court's order of dismissal prior to such a showing. To allow the earlier dismissal of the complaint with prejudice to stand would have the effect of depriving the appellants of their rights under the statute by virtue of dismissal of an action that had not accrued as of the time of dismissal. Under such an interpretation, the dismissal in the instant cause would bar all recovery despite qualification thereafter to sue. We find such a construction untenable and hold that the plaintiff may sue for such damages once the "threshold" has been crossed, so long as it is within the statute of limitations. Id. at 23.

This holding was followed in the case of Smith v. U. S. Fidelity and Guaranty Co., 305 So.2d 216 (Fla. App. 1974), where the depositions and written interrogatories revealed that the medical expenses were too low and that there was no evidence adduced to show any disability. That opinion found no error in the dismissal except that it was entered with prejudice.

**A dismissal without prejudice does not increase uncertainty.**

Farris urged that dismissal without prejudice would be bad policy. He argued that so doing would introduce considerable

uncertainty in the law, citing Jepson, supra. R. 133-134.

In Jepson, the uncertainty referred to was that of extending the statute of limitations to the distant future when the threshold might be crossed. There is no such problem when a case is dismissed without prejudice. The most the time for filing is extended beyond the normal statute of limitations is one year after dismissal. The pertinent statute, Section 78-12-40 of the Utah Code, extends the limitation period to that extent for practically every case dismissed without prejudice. There is no reason for the normal extension period to cause greater problems in the context of the no-fault threshold than in any other context.

In this case, McNair was injured in 1994 and had until 1998 to file initially. So a dismissal without prejudice would not have extended at all the time of uncertainty that Farris originally faced.

**A dismissal with prejudice could wrongfully preclude recovery of special damages.**

As indicated in the excerpt of McNair's deposition quoted above, McNair did not know in February of 1995 if future medical treatment would be necessary. Later, in view of his deteriorated condition, his doctor advised him to have surgery performed. R. 124.

No meeting of any threshold requirements is required in an action for actual medical expenses and lost wages. Allstate Ins. Co. v. Ivie, 606 P.2d 1197 (Utah 1980). Noon v. Smith, 829

P.2d 922 (Kan. App. 1992).

However, a dismissal with prejudice not only prevents any compensation for general damages, but may well also be considered res judicata so as to preclude McNair from receiving any compensation for medical expenses and other special damages beyond the limits of the personal injury protection payments.

This demonstrates another good reason for the courts to hold, as they have, that any dismissal for failure to meet the threshold requirements, except when the matter has gone to trial, must be without prejudice.

#### CONCLUSION

This Court should reverse the Order Granting Defendant's Motion for Summary Judgment, or in the alternative, it should reverse the Order Denying Plaintiff's Motion for a New Trial. The case should then be remanded for trial.

The basis for such a reversal is that in moving for summary judgment, Farris did not carry his initial burden of showing there was no genuine issue regarding the no-fault threshold. It was irrelevant that a ruling on his motion came at the time of final pretrial.

An additional and alternative basis is that even though he had no duty to do so, McNair raised a genuine issue of material fact by stating at pretrial that he still had pain and problems more than a year after the injury. Such evidence would support a finding of permanent disability or permanent

impairment. Expert testimony was also expected and permissible.

In the alternative, this Court should so reverse the aspect of prejudice. That is, the Court should rule that the dismissal of this action must be reentered without prejudice.


The basis for such a ruling is that McNair had until trial to prove the threshold requirements would be met and no trial was ever held.

Furthermore, McNair either has already satisfied one of the threshold requirements, or such satisfaction is imminent.

ADDENDUM

No addendum is necessary.

DATED this 13<sup>th</sup> day of September, 1996.

  
LYNN P. HEWARD  
Attorney for Plaintiff and Appellant

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing Brief were mailed to Joseph J. Joyce, 9 Exchange Place #600, Salt Lake City, UT 84111 on this 16<sup>th</sup> day of September, 1996.

