

2008

Kim Fratto v. Dr. Thomas M. McNeilis; Fr. A. Scott Devous; Hensley Family Medical Center, Inc.; Linda R. Hensley; Renette Hensley; John Does 1-5 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KIM FRATTO,

Petitioner/Appellee,

vs.

DR. THOMAS M. MCNEILIS; FR. A. SCOTT  
DEVOUS; HENSLEY FAMILY MEDICAL  
CENTER, INC.; LINDA R. HENSLEY;  
RENETTE HENSLEY; AND JOHN DOES 1  
THROUGH V

Respondents/Appellants.

Case Nos.: 20080473-CA

Third District Court No.: 050919567

Priority

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**BRIEF OF APPELLANTS LINDA R. HENSLEY AND  
HENSLEY FAMILY MEDICAL CENTER, INC.**

---

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UTAH APPELLATE COURTS  
SEP 11 2008**

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## **TABLE OF CONTENTS**

	<u>Page</u>
<b>TABLE OF CONTENTS</b> .....	ii
<b>TABLE OF AUTHORITIES</b> .....	iii
<b>JURISDICTION</b> .....	1
<b>ISSUES AND STANDARD OF REVIEW</b> .....	1
<b>DETERMINATIVE PROVISIONS</b> .....	2
<b>STATEMENT OF THE CASE</b> .....	2
<b>Nature of the Case</b> .....	2
<b>Course of Proceedings</b> .....	2
<b>Statement of Facts</b> .....	3
<b>SUMMARY OF THE ARGUMENT</b> .....	4
<b>ARGUMENT</b> .....	5
<b>I.    THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT       DENIED THE APPELLANT’S MOTION TO SET ASIDE</b> .....	5
<b>II.   THE COURT ABUSED ITS DISCRETION BY VIOLATING UCA 78-14-18</b> .....	9
<b>III.  THE COURT ABUSED ITS DISCRETION BY FAILING TO RELY ON       EXPERT TESTIMONY</b> .....	11
<b>CONCLUSION</b> .....	12
<b>ADDENDUM</b> .....	14

## **TABLE OF AUTHORITIES**

<u>Beard v K-Mart Corp.</u> , 12 P.3d 1215, 1019-1020 (Utah App. 2000) . . . . .	11
<u>Interstate Excavating Inc. v Agla Dev. Corp.</u> , 611 P.2d 369, 371 (Utah 1980) . . . . .	6,9
<u>Jensen v IHC Hospitals, Inc.</u> , 82 P.3d 1076, 1095-1096 (Utah 2003) . . . . .	5,11
<u>Lund v Brown</u> , 11 P.3d 277 (Utah 2000) . . . . .	1, 7
<u>Lundahl v Quinn</u> , 67 P.3d 1000, 1002 (2003) . . . . .	7
<u>Sohm v Dixie Eye Center</u> , 166 P.3d 614 (Utah App. 2007) . . . . .	2,11
<u>Wilson Supply, Inc. V Fradan Mfg. Corp.</u> , 54 P.3d 1177, 1181 (Utah 2002) . . . . .	2

## **STATUTES**

78-2a-3, Utah Code Ann. . . . .	1
78-14-18, Utah Code Ann . . . . .	2, 4, 5, 9, 10, 12

## **RULES**

U.R.C.P. §3.4(c) . . . . .	3, 8
U.R.C.P. §3.4(d) . . . . .	3, 8
U.R.C.P. §8.4(d) (Rec. 511) . . . . .	3, 8
U.R.C.P. §59 . . . . .	2
U.R.C.P. §60 . . . . .	2

## **JURISDICTION**

The Utah Court of Appeals has jurisdiction pursuant to UCA 78-2a-3.

## **ISSUES AND STANDARD OF REVIEW**

### Issues

1. Did the district court abuse its discretion in not setting aside the default judgment?
2. Did the district court err in relying on Appellee's testimony that immediately after the incident, Appellant admitted liability for the incident?
3. Did the district court err in awarding damages in a medical malpractice action without a basis in expert evidence?

### Standards of Review

The Motion to Set Aside should be reviewed on an abuse of discretion standard. However, the district court's discretion in rejection the motion to set aside is not as broad as its discretion in entering the default. Lund v Brown, 11 P.3d 277 (Utah 2000)(citing 11 Wright et al., Federal Practice and Procedure § 2857, at 257-58 (2d ed. 1995)).

"To sustain a medical malpractice action, a plaintiff must demonstrate '(1) the standard of care by which the [physician's] conduct is to be measured, (2) breach of that standard by the [physician], (3) injury that was proximately caused by the physician's negligence, and (4) damages. . . . 'Because of the complex issues involved in a . . . medical malpractice case,' the plaintiff is required to prove the standard of care and

proximate cause through expert testimony.” Sohm v. Dixie Eye Center, 166 P.3d 614, 619 (Utah 2007). Findings of fact are reviewed on a clearly erroneous standard, while legal conclusions are reviewed for correctness, without deference to the district court. Wilson Supply, Inc. v. Fradan Mfg. Corp., 54 P.3d 1177, 1181 (Utah 2002).

## **DETERMINATIVE PROVISIONS**

UCA 78-14-18

Rule 59 of the Utah Rules of Civil Procedure

Rule 60 of the Utah Rules of Civil Procedure

## **STATEMENT OF THE CASE**

### Nature of the Case and Course of Proceedings

The underlying case is a medical malpractice case. The Plaintiff brought the action against the defendants, including the Appellant, for damages purportedly arising from a laser hair removal incident. The Appellant denied the allegations in her original Answer. After the Answer was filed, and while the Appellant was represented by prior counsel, the Appellee issued discovery requests. Those discovery requests were not timely answered by the Appellant. The Appellant’s prior counsel withdrew as counsel in August 2007. In August 2007, the court ruled that Appellant’s prior counsel acted improperly and in violation of the Rules of Professional Conduct in failing to respond to discovery. The Appellant represented herself, pro se, from August to September 2007, when her Answer was stricken and default was entered due to the Appellant’s failure to respond to outstanding discovery. After an evidentiary hearing, the Appellee was

awarded \$66,213.07. The Appellant filed a Motion to Set Aside the Default and a Motion for a New Trial, which were rejected by the court. Thereafter, the Appellant filed the appeal.

#### Statement of Facts

1. The court issued a minute entry on August 29, 2007 finding that Appellant's prior counsel, at a minimum, violated the Utah Rules of Professional Conduct by failing to comply with the court's orders and rules (Rule 3.4(c)), failure to respond to discovery (Rule 3.4(d)), and engaging in conduct prejudicial to the administration of justice (Rule 8.4(d)). (Rec. 511)
2. On September 21, 2007, after Appellant's prior counsel had withdrawn in August 2007, and while Appellant was acting pro se, the court struck the Appellant's Answer for failure to cooperate with discovery, and entered the Appellant's default. (Rec. 516).
3. An evidentiary hearing was held on January 14, 2008 to establish damages. (Rec. 571).
4. No expert testimony was submitted at the evidentiary hearing. (Rec. 644-649).
5. On January 17, 2008, the court entered its Findings of Fact, Conclusions of Law and Order explicitly relying on evidence of a conversation in which Appellant purportedly admitted liability to the Appellee. (Rec. 645).
6. On February 5, 2008, entered an amendment to the final judgment. (Rec. 658-660).



7. On February 19, 2008, the Appellant timely filed her Motion to Set Aside Default and Motion for New Trial. (Rec. 661-666).

### **SUMMARY OF ARGUMENT**

The district court's rejection of the Appellant's Motion to Set Aside and Motion for a New Trial was an abuse of discretion. The Motion to Set Aside was timely filed, it provided reasonable justification for the failure to act which resulted in the default, and it established doubt as to the appropriateness of the default. The Motion to Set Aside showed that prior counsel improperly failed to respond to discovery, and also violated three separate rules of professional conduct. At the time the default was entered, not only was the Appellant representing herself pro se, but the merits of the case had yet to be heard. Additionally, the district court's discretion is limited when considering a Motion to Set Aside, particularly when the merits have not been fully considered. Under such circumstances, and under such limited discretion, the district court abused its discretion in not setting aside the default judgment.

Secondly, the court erred when it issued its order subsequent to the January 8, 2008 evidentiary hearing. Based upon the testimony of Appellee, Appellee's friend, and Appellee's husband, the court awarded medical expenses and pain and suffering of \$66,213.07. The Appellee testified that the Appellants admitted liability immediately after the incident occurred. The district court specifically cited this testimony as a Finding of Fact supporting its award of \$66,213.07. In doing so, the district court violated UCA 78-14-18, which specifically makes inadmissible

“any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant . . . if it: (a) expresses: (i) apology, sympathy, commiseration, condolence, or compassion; or (ii) a general sense of benevolence; or (b) describes: (i) the sequence of events relating to the unanticipated outcome of medical care; (ii) the significance of events; or (iii) both.”

By admitting and relying on testimony in direct violation of UCA 78-14-18, and in relying on the same, court abused its discretion.

Thirdly, the court erred in awarding damages in a medical malpractice case without relying on expert evidence to establish reasonableness and necessity, which is required under Utah law. Jensen v IHC Hospitals, Inc., 82 P.3d 1076, 1095-1096 (Utah 2003).

### **ARGUMENT**

#### **I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT’S MOTION TO SET ASIDE.**

Appellee’s Motion for Summary Disposition attempted to frame the issue on appeal as to whether the district court abused its discretion in entering the default. That is not the issue. The issue on appeal is whether the court abused its discretion in rejecting the Appellant’s Motion to Set Aside, which was filed 10 days after the default had been entered. The distinction is important because the court’s discretion in entering the default differed from the discretion it had in rejecting the Motion to Set Aside. While the court may have been justified in entering the default, the court was not justified in rejecting the Motion to Set Aside after being apprised of information making

the default inappropriate. Specifically, the Appellant justified her previous failures which had led to the default. It was an abuse of discretion for the district court to ignore this information and refuse to set aside the default.

**A. Under the Circumstances, the Appellant's Acts Were "Reasonably Justified," Warranting Vacating the Default.**

Under Utah law, default judgments should be allowed to stand only under certain circumstances. Most importantly, the court has explained that default judgments:

are not favored in the law, especially where a party has timely responded with challenging pleadings. When that has been done some caution should be observed to see that the party is not taken advantage of. Speaking generally about such problems, it is to be kept in mind that access to the courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well-ordered society. . . .

The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. To that end, the courts are generally indulgent toward the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside. Consistent with the objective just stated, where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with law and justice.

Interstate Excavating Inc., v Agla Dev. Corp., 611 P.2d 369, 371(Utah 1980)(Emphasis added). According to the Utah Supreme Court, the Appellant was required to meet two requirements after the default was entered. First, the Appellant was required to timely

respond by challenging the default. Second, the Appellant must show, in that challenge, a reasonable justification to excuse the failure to act which led to the default. The Appellant met both of these requirements. Appellant filed a timely Motion to Set Aside. The bases for the Motion to Set Aside “reasonably justifi[ed]” the Appellant’s failures, and thereby created a doubt as to the appropriateness of the default. The court abused its discretion in not setting aside the default.

Utah courts have explained that a court’s discretion to deny a motion to set aside is more limited than its discretion to grant it, particularly where the movant’s case has not been fully considered. Lund v Brown, 11 P.3d 277 (Utah 2000)(citing 11 Wright et al., Federal Practice and Procedure § 2857, at 257-58 (2d ed. 1995)(stating, “There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits. Based on the remedial nature of Rule 60(b), the discretion of the district court to deny a motion for relief is limited.”)). The district court abused its discretion in refusing to set aside the default, despite the fact that 1) the merits of the case had never been considered, 2) a timely challenge had been filed, and 3) there was “reasonable justification” for “doubt” as to whether the default should be set aside.

Finally, Utah courts are generally “lenient with pro se litigants. Individuals have a right to represent themselves without being compelled to seek professional assistance. Where they are largely strangers to the legal system, courts are understandably loath to sanction them for a procedural misstep here or there.” Lundahl v. Quinn, 67 P.3d 1000,

1002 (2003). The Appellant had been acting pro se since August 2007. Her Answer was stricken by the court in September 2007. As a stranger to the legal system, the court should have been lenient with the Appellant's failure to respond. Instead of affording such leniency, the court struck the Answer and entered the default.

**i. The Appellant's Challenge was Timely**

The Motion to Set Aside challenged the court's default arguing that the Appellant's failures to act in discovery were justified. The final judgment was amended on February 5, 2008. The Motion to Set Aside was timely filed on February 19, 2008, 10 working days after it was entered.

**ii. "Reasonable Justification" Was Shown Through Evidence of Counsel Misconduct or Negligence.**

The Motion to Set Aside should have been granted because it was "reasonably justifi[ed]" by the circumstances, as evidenced by the district court's own prior ruling. In addition to the fact that the Appellant had been acting pro se for only a matter of weeks before the court struck the Answer and entered her default, the failure to provide discovery was overwhelmingly the consequence of prior counsel's failure to act. Such is not merely an allegation, but is established by the district court's own ruling in August 2007. The district court found that, at a minimum, Appellant's prior counsel violated the Utah Rules of Professional Conduct by failing to comply with the courts orders and rules (Rule 3.4(c)), failure to respond to discovery (Rule 3.4(d)), and engaging in conduct prejudicial to the administration of justice (Rule 8.4(d)). (Rec. 511).

Counsel misconduct or negligence has been held sufficient to justify setting aside a default. See Interstate Excavating Inc. Based on this established case law and the fact that it was Appellant's prior counsel that was overwhelmingly at fault for the discovery failures, there was "reasonable justification" for the Appellant's failures. Interstate Excavating Inc., at 371. The "reasonable justification" was sufficient to at least establish "doubt about whether a default should be set aside." Id. Under Utah law, that doubt should have been resolved by setting aside the default judgment. Id.

The existence of "reasonable justification" sufficient to establish "doubt" is particularly apparent, as explained above, in light of the facts that 1) the court's discretion is limited when considering motions to set aside, 2) the Appellant was a pro se litigant when the default was entered, and 3) the merits of the case had not been reached. Under such circumstances, the rejection of the Motion to Set Aside was an abuse of discretion.

## **II. THE COURT ABUSED ITS DISCRETION BY VIOLATING UCA 78-14-18.**

The evidentiary hearing held on January 8, 2008 and involved testimony from Appellee. Appellee testified as follows:

Q. Okay. So tell us what happened that day.

A. . . . I went to the clinic for my scheduled treatment. Linda [Appellee] was really busy that day. . . . she said she was gonna have Renette start me, get me ready.

Q. And who is Renette?

A. Her daughter.

Q. Okay. Did she start you?

- A. She prepped me and then Linda said she wanted her to start the laser treatment so she did, in fact, start the treatments.
- Q. Okay. Then, then what happened?
- A. It was, it was burning a little bit. . . and Renette did my left arm and started on my right arm and then Linda came in and took over.
- Q. Okay, and then after Linda took over, what happened?
- A. She retreated my right arm. . . I told her it was hurting. . . I told her Renette already did it. . .
- Q. Okay. Then what happened?
- A. Then she moved on to start treating my legs. My arms started to get really red. . . I was in a lot of pain. . . and my left arm started to blister. . . Renette wasn't in the room at the time because she'd left when Linda took over. Renetter came back in and looked at my arms and said, "Oh my God, did I do that?" And Linda said, "No, I did."

(January 18, 2008 Transcript, pgs. 10-11). Based upon this specific testimony of Appellee, the court awarded \$66,213.07 against the Defendant. (Rec. 648). This testimony evidence, however, is conversation between the Appellee and Appellant in which Appellee claims Appellant admitted liability for medical malpractice. UCA 78-14-18 specifically makes inadmissible "any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant . . . if it: (a) expresses: (i) apology, sympathy, commiseration, condolence, or compassion; or (ii) a general sense of benevolence; or (b) describes: (i) the sequence of events relating to the unanticipated outcome of medical care; (ii) the significance of events; or (iii) both." By admitting such conversation as evidence, by including it as a Finding of Fact, and by relying on it as a basis for the award, the district court acted in direct violation of UCA 78-14-18. The district court thereby abused its discretion.

### **III. THE COURT ABUSED ITS DISCRETION BY FAILING TO RELY ON EXPERT TESTIMONY.**

Under Utah law “to prove medical malpractice, a plaintiff must establish ‘(1) the standard of care by which the (physician's) conduct is to be measured, (2) breach of that standard by the (physician),’ (3) injury that was proximately caused by the physician's negligence, and (4) damages. Jensen v IHC Hospitals, Inc., 82 P.3d 1076, 1095-1096 (Utah 2003). Further, “[u]nless ‘the propriety of the treatment received is within the common knowledge and experience of the layman,’ the plaintiff is required to prove the standard of care through an expert witness who is qualified to testify about the standard.” Additionally, the subsequent determination of damages must likewise be based upon expert testimony, rather than mere speculation of lay persons. Sohm v. Dixie Eye Center, 166 P.3d 614 (Utah App. 2007). “Because of the complex issues involved in a . . . medical malpractice case,” the plaintiff is required to prove the standard of care and proximate cause through expert testimony.” Id., at 619. Only after expert evidence has been introduced to establish the standard of care and proximate cause may the matter be submitted for the determination of damages. See Beard v. K-Mart Corp., 12 P.3d 1215, 1019-1020 (Utah App. 2000). “Without the required expert medical opinion linking the injury to the necessity of the [medical treatment], a jury would simply be speculating about a linkage that is beyond its knowledge and experience. The expert medical testimony merely established a chronological relationship between the accident and her symptoms. No expert medical testimony was



received that the [medical treatment] w[as] necessitated by her accident.” Id. at 1021. Lacking the necessary expert evidence, the damages award in the case at bar was purely speculative. Medical expenses which were ordered as part of the Judgment were hearsay, incompetent and should have been excluded.

The Appellee failed to provide any expert evidence upon which the court could find that the standard of care had been breached, and consequently, the damages awarded were purely speculative. By issuing its order in the complete absence of required expert evidence, the district court abused its discretion and committed error.

### **CONCLUSION**

This matter has never been heard on the merits. The court entered an order striking the Answer and entering default against the Appellant at a time the Appellant was representing herself pro-se for the first time during litigation. The delay in answering discovery, which led to the striking of the Answer and the entering of the default, was the result of prior counsel’s misconduct. Such was even formally recognized by the district court. Under such circumstances, the Appellant’s failure to respond to discovery was reasonably justified, and therefore, sufficient to make the appropriateness of the default doubtful. To refuse to set aside the default under such circumstances was an abuse of discretion.

The court also erred in basing its judgment upon testimony that the Appellant immediately admitted liability for the alleged injury. Reliance on such testimony directly contradicts UCA 78-14-18.

Finally, the court incorrectly entered judgment without expert testimony as required under Utah law. There was no evidence upon which the court could find that the standard of care had been breached, and no evidence that would make damages anything other than pure speculation.

DATED THIS 11 day of September, 2008.

**PLANT, CHRISTENSEN & KANELL, PC**

A handwritten signature in dark ink, appearing to read 'Theodore E. Kanell', is written over a horizontal line.

Theodore E. Kanell  
Attorney for Defendant, Linda R. Hensley

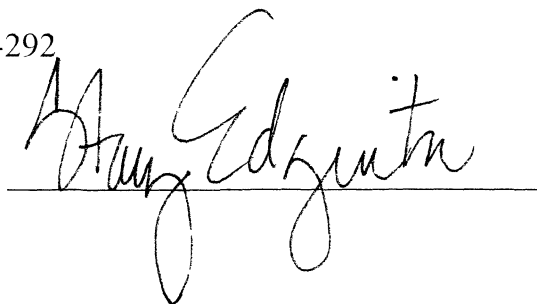
## **ADDENDUM**

No addendum is needed.

**CERTIFICATE OF MAILING**

I hereby certify that on the 11<sup>th</sup> day of September, 2008, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was mailed to the following:

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Edward T. Wells  
Mel S. Martin, PC  
5282 South Commerce Drive, #D-292  
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A handwritten signature in cursive script, reading "Harry Edgerton", is written over a horizontal line.