

2008

Jonathan Hall v. Jason Steimle : Brief of Appellee Jason Steimle

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JONATHAN HALL,	:	
	:	
Plaintiff/Appellant,	:	
	:	
v.	:	
	:	APPEAL NO. 20080486-CA
JASON STEIMLE,	:	
	:	
Defendant/Appellee.	:	
	:	
	:	
	:	

BRIEF OF APPELLEE JASON STEIMLE

On Appeal From the Granting of Summary Judgment in Favor
of the Appellee in the Fourth District Court, Utah County,
Judge James R. Taylor

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Jason Steimle

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF ISSUES	1
DETERMINATIVE LAW	2
STATEMENT OF THE CASE	2
A. NATURE OF THE CASE	2
B. COURSE OF PROCEEDINGS	2
C. DISPOSITION IN TRIAL COURT	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	5
ARGUMENT	6
I. THE FORM OF THE JONATHAN HALL BRIEF REQUIRES DISMISSAL	6
A. LEGAL STANDARD	6
B. THE JONATHAN HALL BRIEF FAILS TO PROPERLY CITE TO THE RECORD	7
II. BECAUSE MR. HALL FAILED TO DESIGNATE A CAUSATION EXPERT, THE TRIAL COURT CORRECTLY DISMISSED HIS CLAIMS	7

A.	Expert Testimony Is Necessary to Establish a Causal Link Between the Motor Vehicle Accident and Plaintiff's Alleged Injuries	8
B.	Mr. Hall Misconstrues Utah Case Law Regarding the Need for Expert Testimony on Causation	11
C.	Mr. Hall Cannot Rely on Treating Physicians to Provide Causation Testimony	13
III.	THERE IS NO GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT	15
	CONCLUSION	16
	ADDENDA	A, B, C

TABLE OF AUTHORITIES

CASES:

<i>Beard v. K-Mart Corp.</i> , 2000 UT App 285, 12 P.3d 1015	2, 8, 10-12
<i>Christensen v. Munns</i> , 812 P.2d 69 (Utah App. 1991)	1
<i>Fox v. Brigham Young University</i> , 2007 UT App 406, 176 P.3d 446	1, 2, 9-11
<i>Harline v. Barker</i> , 912 P.2d 433 (Utah 1996)	1
<i>Jackson v. Colston</i> , 209 P.2d 566 (Utah 1949)	10
<i>Jordan v. Smoot</i> , 380 S.E.2d 714 (Ga. App. 1989)	12
<i>Patey v. Lainhart</i> , 1999 UT 31, 977 P.2d 1193	7
<i>Pete v. Youngblood</i> , 2006 UT App 303, 141 P.3d 629	13, 14
<i>Smith v. Paiz</i> , 84 P.3d 1272 (Wyo. 2004)	14
<i>State v. Reiners</i> , 803 P.2d 1300 (Utah App. 1990)	6
<i>Steele v. Board of Review of Industrial Comm’n</i> , 845 P.2d 960 (Utah App. 1993)	6
<i>Thomas v. Consol. Rail Corp.</i> , 169 F.R.D. 1, 2 (D. Mass. 1996)	14
<i>Walton v. Gallbraith</i> , 166 N.W.2d 605 (Mich. App. 1969)	12
<i>West Valley City v. Majestic Investment Co.</i> , 818 P.2d 1311 (Utah App. 1991)	6

STATUTES:

Utah Code Ann. § 78A-4-103(2)(j) (2008).	1
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RULES:

Rule 24, Utah Rules of Appellate Procedure	1, 2, 6, 7
Rule 24(a)(7), Utah Rules of Appellate Procedure	5, 6, 7
Rule 24(e), Utah Rules of Appellate Procedure	5, 7
Rule 26, Utah Rules of Civil Procedure	13
Rule 26(a)(2), Utah Rules of Civil Procedure	14
Rule 26(a)(3), Utah Rules of Civil Procedure	13
Rule 42(a), Utah Rules of Appellate Procedure	1

JURISDICTION

The Utah Court of Appeals has jurisdiction pursuant to the Order of Transfer from the Utah Supreme Court dated June 4, 2008 issued according to Rule 42(a) of the Utah Rules of Appellate Procedure. *See also*, § 78A-4-103(2)(j). Utah Code Ann. (2008).

STATEMENT OF ISSUES

1. WAS THE BRIEF OF JONATHAN HALL SO DEFICIENT IN COMPLYING WITH THE UTAH RULES OF APPELLATE PROCEDURE THAT THE APPEAL SHOULD BE DENIED OR DISMISSED?

The standard of review for the sufficiency of a brief is to compare the brief with Rule 24 and determine whether it complies therewith. *Christensen v. Munns*, 812 P.2d 69 (Utah App. 1991).

2. WAS THE TRIAL COURT CORRECT IN GRANTING SUMMARY JUDGMENT WHERE JONATHAN HALL, WHO WAS INVOLVED IN A SEPARATE INCIDENT WHICH COULD HAVE CAUSED HIS ALLEGED INJURIES, FAILED TO DESIGNATE AN EXPERT ON CAUSATION?

The Trial Court's determination that Jonathan Hall failed to establish a prima facie case on the element of causation is a question of law reviewed for correctness. *Fox v. Brigham Young University*, 2007 UT App 406, ¶14, 176 P.3d 446.

DETERMINATIVE LAW

Rule 24, Utah Rules of Appellate Procedure, controls the resolution of whether Plaintiff's brief is procedurally sufficient for appellate review. The text of the rule is in Addendum "A". This Court's holdings in *Fox v. Brigham Young University*, 2007 UT App 406, 176 P.3d 446 and *Beard v. K-Mart Corp.*, 2000 UT App 285, 12 P.3d 1015 control resolution of whether the Trial Court correctly dismissed Jonathan Hall's claims against Jason Steimle. The text of the foregoing cases is in Addendum "B".

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a personal injury case wherein Jonathan Hall seeks compensation for alleged injuries and damages relating to a December 11, 2000 motor vehicle accident.

B. COURSE OF PROCEEDINGS

The Complaint was filed on December 9, 2004 in the Fourth District Court. (R. at 3-5). Defendant, Jason Steimle, answered on March 2, 2006. (R. at 30-33).

After discovery was completed, and all deadlines for designating experts had passed, Jason Steimle filed a motion for summary judgment. The motion for summary judgment, with which this brief is concerned, was filed on December 7, 2007. (R. at 121-130). The Trial Court granted that motion at oral argument on March 25, 2008 with the formal Order

entered on April 23, 2008. (R. at 171, 176-78). This appeal was taken on May 27, 2008. (R. at 180).

C. DISPOSITION IN TRIAL COURT

The Trial Court granted Jason Steimle's Motion for Summary Judgment upon finding that Jonathan Hall was required to designate a causation expert regarding whether the motor vehicle accident at issue caused the injuries for which he seeks compensation. The Trial Court held that because Jonathan Hall failed to designate a causation expert, he could not establish that the December 2000 motor vehicle accident caused the injuries at issue in his complaint. (R. at 176-78).

STATEMENT OF FACTS

In the early morning hours of December 11, 2000, Jonathan Hall was riding as a passenger in Jason Steimle's vehicle as they traveled from Rexburg, Idaho to Salt Lake City, Utah. Prior to reaching Salt Lake City, the weather had been clear. (R. at 4-5, 116, 135).

As the vehicle approached the 33rd South off-ramp on I-15, Mr. Steimle saw that a car was off the road. In response, Mr. Steimle slowed his vehicle from freeway speeds to about 40 to 45 miles per hour. (R. at 4-5, 118).

Mr. Steimle's vehicle then began to slide on black ice. After sliding 20 to 30 yards, the vehicle collided with the retaining wall of the off-ramp. (R. at 117-18). Due to the weather conditions, Jonathan Hall was surprised there was black ice on the road. (R. at 115).

At the point of impact, Mr. Hall's head moved to the side. His head did not hit a window or any other objects inside the vehicle. (R. at 113-14). Mr. Hall did not go to the hospital after the accident. (R. at 134).

Although there is some confusion in the record, it appears Mr. Hall presented to the Anderson Chiropractic Center with complaints of neck pain on December 11, 2000. (R. at 132).¹

Mr. Hall had already consulted with Dr. Anderson regarding his neck pain prior to the motor vehicle accident at issue (the "MVA"). On October 4, 2000, just two months prior to the MVA, Mr. Hall received a chiropractic assessment from Anderson Chiropractic Center, at which time he complained of neck and back pain, rating his neck pain at a 4 on a scale from 1 to 10. At that time, Mr. Hall was assessed as having chronic cervical dorsal myofascial pain syndrome with C7/T1 subluxation, as well as thoracic and ankle dysfunction. (R. at 107).

Regarding pre-existing neck and back injuries, Mr. Hall stated the following in response to discovery requests: "Plaintiff had a whiplash injury in the summer of 1998/1999 when he dove into a shallow lake. He was treated by Dr. Frank Smith [in Wichita, Kansas].

¹During his deposition, Mr. Hall could not recall whether he experienced neck pain the morning after the incident or a couple of days later. (R. at 132-33). Nevertheless, the precise timing of Mr. Hall's alleged neck pain is not material to this appeal.

He sustained a back injury and whiplash injury from hitting his chin on the lake bed.” (R. at 104-05).

On December 9, 2004, Plaintiff initiated this lawsuit, asserting negligence claims against Mr. Steimle in connection with the December 2000 MVA. (R. at 4-5).

In his Complaint, Mr. Hall alleges he “suffered permanent injuries to his neck and back,” caused by Mr. Steimle’s alleged negligence. (R. at 4).

Under the Trial Court’s Amended Stipulated Scheduling Order, Plaintiff’s expert reports were due on June 1, 2007. Plaintiff neither designated nor otherwise provided an expert report to the Trial Court or Mr. Hall’s counsel. (R. at 99-100, 177).

SUMMARY OF ARGUMENTS

The Trial Court’s ruling on Mr. Steimle’s Motion for Summary Judgment should be upheld based on the following:

First, Mr. Hall’s brief fails to provide any citation to the Record and therefore fails to comply with Rules 24(a)(7) and 24(e) of the Utah Rules of Appellate Procedure. Accordingly, Mr. Hall’s appeal should be dismissed.

Second, the Trial Court correctly held that Mr. Hall was required to designate an expert in order to meet his prima facie burden on the element of causation. Prior to the December 2000 MVA, Mr. Hall suffered a whiplash injury when he dove into a shallow lake. Because Mr. Hall was still treating for neck pain just prior to the MVA, he cannot establish

his neck problems were caused by the MVA absent expert testimony. Because Mr. Hall never retained an expert to render an opinion on causation, the Trial Court correctly dismissed his claims.

ARGUMENT

I. THE FORM OF THE JONATHAN HALL BRIEF REQUIRES DISMISSAL

A. LEGAL STANDARD

Rule 24 of the Utah Rules of Appellate Procedure makes clear that an appellant's brief "shall be supported by citations to the record...." Utah R. App. P. 24(a)(7).

The mandatory language of Rule 24 has long been enforced by this Court. For example, in *State v. Reiners*, 803 P.2d 1300 (Utah App. 1990), this Court stated that a brief must have some support for every contention made in the brief. A brief must also develop appellate arguments and explicitly tie those arguments to the Record. *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311 (Utah App. 1991). Furthermore, the failure to make a concise statement of facts and citation to the pages in the Record where those facts are supported will result in this Court assuming the correctness of the judgment below. *Steele v. Board of Review of Industrial Comm'n*, 845 P.2d 960 (Utah App. 1993).

B. THE JONATHAN HALL BRIEF FAILS TO PROPERLY CITE TO THE RECORD

Mr. Hall's brief fails to follow the requirements of Rule 24(a)(7) and 24(e) of the Utah Rules of Appellate Procedure. Mr. Hall does not provide this Court with a single citation to the official Record. Instead, Mr. Hall adopts his own procedure of placing documents he believes to be relevant in the addendum to the brief and then simply citing to that addendum. A reading of Rule 24 and the case law cited above shows that this Court has a reasonable standard of anticipating briefing will be completed in compliance with Rule 24. Rule 24 is structured to allow this Court to review the case without shifting the work to the Court of Appeals to compensate for deficiencies in the legal advocacy of the brief. Mr. Hall's brief fails to meet that standard. As explained above, failure to cite to the official record has been found sufficient alone to dismiss or affirm an appeal.

Rather than providing this Court with Record evidence in order to support his arguments, Mr. Hall improperly expects this Court to verify his arguments by searching the Record on its own. Accordingly, Mr. Hall's appeal should be dismissed for failure to follow the fundamental rules of presenting an argument to this Court.

II. BECAUSE MR. HALL FAILED TO DESIGNATE A CAUSATION EXPERT, THE TRIAL COURT CORRECTLY DISMISSED HIS CLAIMS

Because Mr. Hall failed to present expert testimony to establish prima facie evidence of causation, the Trial Court correctly granted Mr. Steimle's Motion for Summary Judgment.

According to the Utah Supreme Court, “[c]ausation is one of the critical elements of any negligence action.” *Patey v. Lainhart*, 977 P.2d 1193, 1197 (Utah 1999). In the present action, Mr. Hall is unable to prove that the December 2000 MVA caused injuries to his neck and back. Accordingly, the Trial Court properly dismissed his claims.

A. Expert Testimony Is Necessary to Establish a Causal Link Between the Motor Vehicle Accident and Plaintiff’s Alleged Injuries

Mr. Hall seeks damages for “permanent injuries to his neck and back,” as well as medical expenses allegedly related to the MVA. However, any causal link between the December 2000 accident and Mr. Hall’s alleged injuries is beyond an ordinary lay person’s knowledge, which required Mr. Hall to present expert causation testimony. The Utah Court of Appeals addressed this precise issue in *Beard v. K-Mart Corporation*, 2000 UT App 285, 12 P.3d 1015.

In *Beard*, the plaintiff was injured in a K-Mart store when an employee struck her in the head with his elbow as he attempted to start a lawnmower. *Id.* at ¶2. Thereafter, the plaintiff sought damages relating to surgeries, which she alleged were necessitated by the accident. *Id.* Although the plaintiff retained an expert, he was unable to testify to a degree of medical probability that the accident at K-Mart caused the need for the surgeries. *Id.* at ¶3. The Utah Court of Appeals held that the plaintiff was therefore unable to prove the accident caused the need for surgery:

In Utah, in all but the most obvious cases, testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury. Where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, **there must be expert testimony that the negligent act probably caused the injury.**

The diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons. Thus, we conclude expert testimony on this medical causation issue was required before the issue of damages arising from these surgeries was submitted to the jury.

Id. at ¶16. (emphasis added) (citations omitted).

The Court of Appeals recently revisited this issue in the case of *Fox v. Brigham Young University*, 2007 UT App 406, 176 P.3d 446. In *Fox*, the plaintiffs brought suit against BYU for negligence and loss of consortium, alleging BYU had negligently maintained stairs on its property, which caused the plaintiff to slip, fall, and break her leg. *Id.* at ¶8. Prior to the accident, the plaintiff had been diagnosed with osteoarthritis in her right knee. *Id.* Before trial, the plaintiffs conceded they would not be presenting expert testimony, asserting that lay testimony was sufficient because the injury and damages experienced were within the realm of common experience. *Id.* at ¶9. Based on the plaintiffs' pre-existing condition, BYU brought a motion in limine, arguing expert testimony was required to establish a causal link between the incident at BYU and the plaintiff's injuries. *Id.* at ¶8. The trial court, recognizing the dispositive nature of BYU's motion in limine, converted the motion to one

for dismissal. *Id.* at ¶10. The trial court held that the plaintiffs “could not sustain their burden of proof as to causation and damages because [plaintiffs’] lay witness testimony was insufficient to establish their prima facie case.” *Id.* at ¶11. The trial court noted that “it had been presented with two plausible theories of causation – failure of an osteoarthritic knee or defective stairs – and, absent expert testimony, the court would have to use speculation to choose between the two theories.” *Id.*

The Utah Court of Appeals affirmed, emphasizing that the “causal connection between the alleged negligent act and the injury is never presumed and ... this is a matter the plaintiff is always required to prove affirmatively.” *Id.* at ¶21 (quoting *Jackson v. Colston*, 209 P.2d 566, 568 (Utah 1949)).

Based on the foregoing law in Utah, the *Fox* court held: “[the plaintiff’s] lay testimony would not have been sufficient to determine whether the need for her medical treatment, the surgery and attachment of the fixator, was caused by BYU’s allegedly defective stairs or the failure of her own arthritic knee.” *Id.* at ¶23. Because the plaintiff’s lay testimony was insufficient, “the trial court correctly ruled that [the plaintiff] had failed to prove the element of causation.” *Id.*

Like the plaintiffs in *Beard* and *Fox*, Mr. Hall was required to retain an expert to testify that the December 2000 MVA caused permanent injuries to his neck and back. Furthermore, expert testimony was required to establish a causal link between the MVA and

Mr. Hall's medical expenses. It is undisputed that prior to the accident at issue, Mr. Hall suffered a whiplash injury when he dove into a shallow lake. After that incident, Mr. Hall sought medical treatment from Dr. Smith in Wichita, Kansas for neck and back pain. As of October 2000, just two months prior to the MVA, Mr. Hall presented to Dr. Anderson with continued complaints of neck and back pain, rating his neck pain at a 4 on a scale from 1 to 10. At that time, Mr. Hall was assessed as having chronic cervical dorsal myofascial pain syndrome with C7/T1 subluxation, as well as thoracic dysfunction.

Based on the complexity of Mr. Hall's alleged neck and back injuries, an ordinary lay person would be forced to speculate as to whether the December 2000 MVA caused any injuries. Moreover, any such lay person would have to speculate as to the necessity of Plaintiff's medical expenses. Under Mr. Hall's theory of the case, the finder of fact would have to simply guess what caused Mr. Hall's injuries: (1) Mr. Hall's lake-diving accident; or, (2) the December 2000 accident. Accordingly, Mr. Hall is unable to prove the element of causation. As was the case in *Beard and Fox*, Mr. Hall was required to provide expert testimony on the issue of causation. Because Mr. Hall failed to designate an expert on causation, the Trial Court correctly dismissed his claims.

B. Mr. Hall Misconstrues Utah Case Law Regarding the Need for Expert Testimony on Causation

Mr. Hall argues that, under Utah law, "cases involving injuries to the neck, back and shoulder resulting from car accidents involve medical damages within the common

experience of a layperson.” (Hall Brief, p. 11). In order to support this assertion, Mr. Hall cites two cases from other jurisdictions, *Jordan v. Smoot*, 380 S.E.2d 714 (Ga. App. 1989) and *Walton v. Gallbraith*, 166 N.W.2d 605, 606 (Mich. App. 1969).² Both cases are factually distinguishable from the present case.

In *Jordan*, the undisputed evidence showed that the plaintiff had never been under medical care for similar injuries prior to the auto accident in question. 380 S.E.2d at 714. Similarly, in *Walton*, the Michigan Court of Appeals emphasized that the plaintiff had experienced “no previous neck or back pains” and that the pain began “on the day after the accident.” 166 N.W.2d at 606. Because neither of the plaintiffs sought medical treatment for similar injuries prior to the motor vehicle accidents in question, the *Walton* and *Jordan* courts correctly found that no expert testimony was required on causation.

To the contrary, in this case Mr. Hall suffered neck and back injury prior to the December 2000 accident. Indeed, Plaintiff was still actively treating for neck pain in October 2000, just two months prior to the accident. Accordingly, the *Walton* and *Jordan* cases are distinguishable from, and therefore inapplicable to, the present action.

²These same cases were addressed in *Beard v. K-Mart Corporation*, 2000 UT App 285, 12 P.3d 1015. The *Beard* court ultimately dismissed their applicability, since “they involve[d] medical damages within the common experience of a layperson.” *Id.* at ¶13.

C. Mr. Hall Cannot Rely on Treating Physicians to Provide Causation Testimony

In his opening brief, Mr. Hall argues he has designated Dr. Anderson, one of his treating physicians, as a fact witness. (Hall Brief, p. 12). Mr. Hall argues that “Dr. Anderson’s testimony concerning observable changes to Mr. Hall’s condition versus his condition prior to the accident on December 11, 2000 is sufficient to establish a prima facie case of negligence.” (Id.) Contrary to Mr. Hall’s argument, treating physicians offering expert opinions must be designated in accordance with Ut. R. Civ. P. 26 under Utah law.

In *Pete v. Youngblood*, 2006 UT App. 303, 141 P.3d 629, the plaintiff brought medical malpractice claims against her plastic surgeon based on his alleged failure to remove gauze packing from a wound site. *Id.* at ¶¶3-4. During the discovery phase, the plaintiff designated several treating physicians as individuals likely to have discoverable information. *Id.* at ¶5. However, the plaintiff did not designate any expert witnesses by the deadline imposed under the applicable scheduling order. *Id.* at ¶6. The defendant thereafter filed a Motion for summary judgment, arguing that the plaintiff had not designated any expert to opine as to the appropriate standard of care and breach. *Id.* In response, the plaintiff offered the affidavit of one of her treating physicians, opining as to the standard of care. *Id.* The trial court granted the defendant’s motion for summary judgment on the grounds that the plaintiff offered no expert testimony. *Id.* On appeal, the plaintiff argued that “treating physicians are always exempt from the [expert disclosure] requirements of rule 26(a)(3).” *Id.* at ¶11.

This Court rejected that argument, holding:

To the extent a treating physician simply provides a factual description of his or her personal observations during treatment, the testimony is not opinion evidence and no identification of the treating physician as an expert is required. If, however, the treating physician also offers an opinion as to the standard of care or whether that standard has been breached, the testimony is no longer simply factual.

Id. at ¶13 (case citations omitted). In reaching its holding, the Court of Appeals also found support from other jurisdictions:

If [treating physicians] only testify as to what they observed and did within the physician-patient relationship, then they would be fact witnesses; if, in addition to testifying about the facts, the treating physicians offered an opinion, then they would be expert witnesses.

Id. at ¶14 (quoting *Smith v. Paiz*, 84 P.3d 1272, 1275-76 (Wyo. 2004)). *See also Thomas v. Consol. Rail Corp.*, 169 F.R.D. 1, 2 (D. Mass. 1996) (case cited by Utah Court of Appeals, **requiring disclosure and an expert report where treating physician offered opinion on causation**: “a treating physician who has formulated opinions going beyond what was necessary to provide appropriate care for the injured party steps into the shoes of a retained expert for purposes of rule 26(a)(2)”).

In the present action, it is undisputed Mr. Hall neither designated an expert nor submitted any expert reports. Therefore, under the plain language of *Youngblood*, Mr. Hall’s treating physicians may not offer any opinions as to the cause of his injuries. Because Mr.

Hall is unable to provide any evidence on causation, the Trial Court properly granted Mr. Steimle's Motion for Summary Judgment.

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT

Mr. Hall argues two disputed facts should have precluded the Trial Court from granting Mr. Steimle's Motion for Summary Judgment: (1) when Mr. Hall began experiencing pain after the December 2000 accident; and (2) the location, type, and severity of the pain experienced by Mr. Hall following the accident. (Hall Brief, p. 12). Both issues are immaterial to Mr. Steimle's Motion for Summary Judgment.

Mr. Hall argues that Mr. Steimle's causation arguments are "based upon the fact that there was a gap of a couple days between the accident and when Mr. Hall began seeking treatment." (Hall Brief, p. 13). As set forth above, Mr. Steimle's causation argument has nothing to do with Mr. Hall's date of treatment. Indeed, fact seven of Mr. Steimle's Memorandum in Support of Motion for Summary Judgment stated that Mr. Hall obtained treatment on December 11, 2000, the same day as the accident. The confusion regarding Mr. Hall's treatment comes from his own deposition testimony, wherein he stated he may not have begun experiencing pain for a couple of days after the accident. Either way, Mr. Hall's first date of treatment is irrelevant to Mr. Steimle's arguments on appeal, as well as his Motion for Summary Judgment before the Trial Court. Rather than basing his causation arguments on Mr. Hall's first date of treatment, Mr. Steimle bases his argument on Mr. Hall's

pre-existing injuries and treatment, coupled with his failure to obtain an expert on causation. Thus, the date Mr. Hall first began treatment after the December 2000 accident is irrelevant to his inability to establish causation.


As to the second “disputed” fact, Mr. Hall’s testimony regarding the pain he experienced after the December 2000 accident is also immaterial. Mr. Hall is not a medical expert. He is unable to offer testimony regarding whether the December 2000 accident, or his early lake-diving incident, caused his alleged injuries. Only a medical expert is able to offer such testimony. Even with Mr. Hall’s self-serving testimony, a fact finder would still be forced to speculate as to whether the December 2000 accident or Mr. Hall’s lake-diving incident caused his injuries. Because Mr. Hall failed to designate an expert to provide opinions regarding causation, he is unable to establish a causal link between the December 2000 MVA and his alleged injuries.

CONCLUSION

The Trial Court’s ruling on Mr. Steimle’s Motion for Summary Judgment should be affirmed.

DATED this 2 day of February, 2009.

KIPP AND CHRISTIAN, P.C.



NAN T. BASSETT
GARY T. WIGHT

CERTIFICATE OF MAILING

I hereby certify that I caused to be mail, postage prepaid, this 2nd day of February,
2009, two true and correct copies of the foregoing to the following:

Rex I. Eagar
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Provo, Utah 84604

A handwritten signature in cursive script, reading "Nancy Thomas", written over a horizontal line.

ADDENDUM

- A. Rule 24, Utah Rules of Appellate Procedure, Rule 26, Utah Rules of Civil Procedure and Rule 42(a), Utah Rules of Appellate Procedure
- B. *Fox v. Brigham Young University*, 2007 UT App 406, 176 P.3d 446 and *Beard v. K-Mari Corp.*, 2000 UT App 285, 12 P.3d 1015.
- C. Utah Code Ann. §78A-4-103(2)(j) 2008
- D. Order Granting Defendant's Motion for Summary Judgment

Addendum “A”

Rule 24, Utah Rules of Appellate Procedure

Rule 26, Utah Rules of Civil Procedure

Rule 42(a), Utah Rules of Appellate Procedure

C

West's Utah Code Annotated Currentness

State Court Rules

⌕ Utah Rules of Appellate Procedure (Refs & Annos)

⌕ Title V. General Provisions

→ **RULE 24. BRIEFS**

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) **Summary of arguments.** The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) **An argument.** The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) **A short conclusion stating the precise relief sought.**

(a)(11) **An addendum to the brief or a statement that no addendum is necessary under this paragraph.** The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief,

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion, in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service, and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant, or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No

further briefs may be filed except with leave of the appellate court

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as “appellant” and “appellee.” It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as “the employee,” “the injured person,” “the taxpayer,” etc

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the

motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

CREDIT(S)

[Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004; April 1, 2006; November 1, 2006; April 1, 2008.]

Current with amendments effective November 1, 2008

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West's Utah Code Annotated Currentness

State Court Rules

⌕ Utah Rules of Civil Procedure (Refs & Annos)

⌕ Part V. Depositions and Discovery

→ **RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Required disclosures; Discovery methods.

(a)(1) *Initial disclosures.* Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) *Exemptions.*

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative

agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) *Pretrial disclosures.* A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the

court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) *Form of disclosures* Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) *Methods to discover additional matter* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, written interrogatories, production of documents or things or permission to enter upon land or other property, for inspection and other purposes, physical and mental examinations, and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) *In general* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

(b)(3) *Limitations* The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,

(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or

(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(4) *Trial preparation Materials* Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(5) *Trial preparation Experts*

(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(5)(C) Unless manifest injustice would result,

(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule, and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(6) *Claims of Privilege or Protection of Trial Preparation Materials*

(b)(6)(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to

assess the applicability of the privilege or protection

(b)(6)(B) Information produced If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had,

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place,

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery,

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters,

(c)(5) that discovery be conducted with no one present except persons designated by the court,

(c)(6) that a deposition after being sealed be opened only by order of the court,

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way,

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discov-

ery

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan

(f)(2) The plan shall include

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made,

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues,

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced,

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including--if the parties agree on a procedure to assert such claims after production--whether to ask the court to include their agreement in an order,

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed,

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party, and

(f)(2)(G) any other orders that should be entered by the court

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b)

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

CREDIT(S)

[Effective May 2, 2005; amended effective November 1, 2007; Comment amended effective November 1, 2008.]
Current with amendments effective November 1, 2008

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West's Utah Code Annotated Currentness

State Court Rules

⌚ Utah Rules of Appellate Procedure (Refs & Annos)

⌚ Title VI. Certification and Transfer Between Courts

→ RULE 42. TRANSFER OF CASE FROM SUPREME COURT TO COURT OF APPEALS

(a) Discretion of Supreme Court to Transfer. At any time before a case is set for oral argument before the Supreme Court, the Court may transfer to the Court of Appeals any case except those cases within the Supreme Court's exclusive jurisdiction. The order of transfer shall be issued without opinion, written or oral, as to the merits of the appeal or the reasons for the transfer.

(b) Notice of Order of Transfer. Upon entry of the order of transfer the Clerk of the Supreme Court shall give notice of entry of the order of transfer by mail to each party to the proceeding and to the clerk of the trial court. Upon entry of the order of transfer, the Clerk of the Supreme Court shall transfer the original of the order and the case, including the record and file of the case from the trial court, all papers filed in the Supreme Court, and a written statement of all docket entries in the case up to and including the order of transfer, to the Clerk of the Court of Appeals.

(c) Receipt of Order of Transfer by Court of Appeals. Upon receipt of the original order of transfer from the Clerk of the Supreme Court, the Clerk of the Court of Appeals shall enter the appeal upon the Court of Appeals docket. The Clerk of the Court of Appeals shall immediately give notice to each party to the proceeding and to the clerk of the trial court that the appeal has been docketed and that all further filings will be made with the Clerk of the Court of Appeals. The notice shall state the docket number assigned to the case in the Court of Appeals.

(d) Filing or Transfer of Appeal Record. If the record on appeal has not been filed with the Clerk of the Supreme Court as of the date of the order of transfer, the Clerk of the Supreme Court shall notify the clerk of the trial court that upon completion of the conditions for filing the record by that court, the clerk shall transmit the record on appeal to the Clerk of the Court of Appeals. If, however, the record on appeal has already been transmitted to and filed with the Clerk of the Supreme Court as of the date of the entry of the order of transfer, the Clerk of the Supreme Court shall transmit the record on appeal to the Clerk of the Court of Appeals within five days of the date of the entry of the order of transfer.

(e) Subsequent Proceedings Before Court of Appeals. Upon receipt by the Clerk of the Court of Appeals of the order of transfer and the entry thereof upon the docket of the Court of Appeals, the case shall proceed before the Court of Appeals to final decision and disposition as in other appellate cases pursuant to these rules.


(f) Finality of Order of Transfer. An order of transfer, when entered by the Clerk of the Supreme Court, is fi-

nal and shall be subject to reconsideration only in the Supreme Court and only on jurisdictional grounds.

ADVISORY COMMITTEE NOTE

Former Rules 4A and 4B have been renumbered as Rules 42 and 43 respectively and included in a new title governing the certification and transfer of cases between courts. The amendments make uniform the practices followed by the two appellate courts in transferring cases.

LIBRARY REFERENCES

Courts  483 to 488.

Westlaw Key Number Searches: 106k483 to 106k488.


C.J.S. Courts §§ 193 to 202.

NOTES OF DECISIONS


Exhaustion of state remedies 2

Law of case 1

1. Law of case

State Supreme Court's prior denial of motion to supplement record to include depositions which had not been published in trial court record constituted the law of the case and would not be reconsidered by Court of Appeals after case was transferred to it by Supreme Court. *Conder v. A.L. Williams & Associates, Inc.*, 1987, 739 P.2d 634. Courts  99(6)

2. Exhaustion of state remedies

Petitioner's original appeal to Utah Supreme Court, which was transferred to Utah Court of Appeals, did not constitute exhaustion of state remedies, for purposes of federal habeas corpus; transfer process was an overflow mechanism and not a review on the merits. *Utah Rules App.Proc., Rule 42. Dulin v. Cook*, 1992, 957 F.2d 758. Habeas Corpus  363

Rules App. Proc., Rule 42, UT R RAP Rule 42

Current with amendments effective November 1, 2008

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Addendum “B”

Fox v. Brigham Young University, 2007 UT App 406, 176 P.3d 446.
and *Beard v. K-Mart Corp.*, 2000 UT App 285, 12 P.3d 1015.

H

Court of Appeals of Utah.
 Joseph R. FOX and Linda A. Fox, Plaintiffs and
 Appellants,
 v.
 BRIGHAM YOUNG UNIVERSITY, a Utah non-
 profit corporation, Defendant and Appellee.
No. 20061132-CA.

Dec. 28, 2007.

Background: Slip and fall victim sued university alleging negligence that caused her to fall down steps on campus. University moved to dismiss on grounds that expert testimony was required by plaintiff to prove causation and plaintiff was relying solely on her own testimony. Plaintiff moved to limit admissibility of university emergency medical technician's report. The Fourth District Court, Provo Department, Fred D. Howard, J., granted the motion to dismiss and denied motion in limine. Plaintiff appealed.

Holdings: The Court of Appeals, Bench, P.J., held that:

(1) statements made to university emergency medical technicians regarding plaintiff's fall were admissible, and

(2) plaintiff was required to submit expert medical testimony to make prima facie case for causation.

Affirmed.

West Headnotes

[1] Evidence 157 ⚡128

157 Evidence

157IV Admissibility in General

157IV(B) Res Gestae; Excited Utterances

157k124 Acts and Statements of Person Sick or Injured

157k128 k. Statements to Physicians.

Most Cited Cases

Statements made by plaintiff regarding her medical condition and the nature of her fall down some steps on campus to university emergency medical technicians (EMTs) were admissible in negligence action against university, even though there was statutory prohibition on admission of such statements taken by adversary unless a copy was left with the plaintiff and the plaintiff did not disavow the statement; rule of evidence permitted admission of statements made for medical diagnosis to adversary and limited application of the statute. West's U.C.A. § 78-27-33; Rules of Evid., Rule 803(4).

[2] Negligence 272 ⚡1550

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)1 Burden of Proof

272k1550 k. In General. Most Cited

Cases

Negligence 272 ⚡1568

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)1 Burden of Proof

272k1568 k. Proximate Cause. Most

Cited Cases

Plaintiffs carry the burden of establishing a prima facie case of negligence, including proximate and actual causation of the injury.

[3] Negligence 272 ⚡1568

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)1 Burden of Proof

272k1568 k. Proximate Cause. Most

Cited Cases

Negligence 272 ⚡1599

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)2 Presumptions and Inferences

272k1599 k. Proximate Cause. Most Cited Cases

The causal connection between the alleged negligent act and the injury is never presumed and is a matter the plaintiff is always required to prove affirmatively.

[4] Negligence 272 ↪ 1713

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1712 Proximate Cause

272k1713 k. In General. Most Cited Cases

Although the question of proximate causation is generally reserved for the jury, the trial court may rule as a matter of law on this issue if there is no evidence to establish a causal connection between the alleged negligent act and the injury, thus leaving causation to jury speculation.

[5] Negligence 272 ↪ 1675

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)5 Weight and Sufficiency

272k1674 Proximate Cause

272k1675 k. In General; Degrees of Proof. Most Cited Cases

Where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding as to whether the defendant's negligent act caused the injury, there must be expert testimony that the negligent act probably caused the injury; the testimony of lay witnesses in such cases regarding the need for specific medical treatment is inadequate to submit the issue to the jury, and it is only in the

most obvious cases that a plaintiff may be excepted from the requirement of using expert testimony to prove causation.

[6] Colleges and Universities 81 ↪ 5

81 Colleges and Universities

81k5 k. Powers, Franchises, and Liabilities in General. Most Cited Cases

Plaintiff's fall on university steps was caused by medical factors sufficiently complicated to be beyond the ordinary senses and common experience of a layperson, and thus, expert medical testimony was required to establish prima facie case for causation of her broken leg, where plaintiff initially attributed the fall to her knee "going out" and she admitted that she had preexisting osteoarthritis in her knee.

West Codenotes

Limited on Preemption GroundsWest's U.C.A. § 78-27-33

*447 Joseph R. Fox and Linda A. Fox, Spanish Fork, Appellants Pro Se.

Thomas W. Seiler, Provo, for Appellee.

Before BENCH, P.J., McHUGH and THORNE, JJ.

OPINION

BENCH, Presiding Judge:

¶ 1 Plaintiffs Joseph and Linda Fox (the Foxes) appeal the trial court's dismissal of their claims against Defendant Brigham Young University (BYU) for their failure to present expert testimony to prove the cause of Mrs. Fox's injury. The Foxes also appeal the trial court's order denying their objections to the admission of an affidavit and an accident report prepared by BYU volunteer emergency medical technicians (EMTs) on the grounds that the admission of such evidence violates Utah Code section 78-27-33. See Utah Code Ann. § 78-27-33 (2002). The trial court properly admitted the EMTs' report and correctly concluded that Utah Code section 78-27-33 was impliedly modified insofar as it is inconsistent with rule 803(4) of the

Utah Rules of Evidence. And, because the *448 EMTs' report contains Mrs. Fox's admissions that her pre-existing medical condition was a factor in her fall, the trial court correctly concluded that the nature of her injury was sufficiently complex as to require an expert to establish a prima facie case on the element of causation. We therefore affirm.

BACKGROUND

¶ 2 On April 20, 2004, Mrs. Fox entered BYU's campus and went to the Harman Building to purchase a ticket for an upcoming conference. As Mrs. Fox left the Harman Building, she descended the west stairway and fell. After falling, Mrs. Fox was unable to stand or use her right leg. A passerby noticed Mrs. Fox and sought help.

¶ 3 In response to the request for help, EMTs arrived and examined Mrs. Fox. The EMTs were volunteers for the Emergency Medical Services team at BYU. BYU provides the van that the EMTs use to respond to field calls, and the EMTs are based in BYU's student center, the Wilkinson Center.

¶ 4 When the EMTs arrived at the steps of the Harman Building, they found Mrs. Fox in a seated position on the stairs. They observed that Mrs. Fox's right knee was obviously swollen and that there was deformity on both sides of her leg. They also noted that there was no external trauma to her leg or knee, such as scrapes or scuff marks, and that Mrs. Fox's pants were not ripped or torn.

¶ 5 While the EMTs were assessing her condition and treating her, Mrs. Fox repeatedly stated to them that she felt her right knee go out as she was going down. She explained to the EMTs that she fell down only one stair, that she had been previously diagnosed with osteoarthritis in her right knee, and that there was some missing cartilage in that knee. Mrs. Fox also stated that she did not hold BYU responsible, but that she had always felt that the stairs by the Harman Building were too narrow and have always been dangerous.

¶ 6 Mrs. Fox's statements, the EMTs' medical observations, and the treatment given at the scene of the fall were transcribed in a report, which Mrs. Fox signed, and were also recounted in an affidavit submitted by one of the responding EMTs. The EMTs applied a vacuum splint to Mrs. Fox's leg and transported her to the Utah Valley Regional Medical Center Emergency Room. She was admitted to the medical center and informed that she had a broken right leg. She then underwent surgery, during which a fixator was attached to her leg.

¶ 7 Several days after Mrs. Fox's fall, Mr. Fox went to the Harman Building and examined the stairs. He noted that there was some cracking in the stairs' cement and that some of the metal nosings on the stairs were loose. He took pictures of the cement and nosings, as well as the general area where he believed Mrs. Fox had fallen. No further examination of the stairs took place because they were replaced shortly thereafter, an improvement that had been scheduled prior to Mrs. Fox's fall.

¶ 8 The Foxes subsequently brought suit against BYU for negligence and loss of consortium, asserting that BYU had negligently maintained the stairs outside the Harman Building and that the defective stairs had caused Mrs. Fox to slip, fall, and break her leg. Prior to the scheduled bench trial, BYU brought a motion in limine asserting, among other things, that the negligence claim failed because the Foxes did not have expert testimony to establish their prima facie case. Specifically, BYU contended that the only facts relating to the element of causation within Mrs. Fox's ordinary senses, as a lay witness, were that she was descending the stairs and fell. BYU urged that, by her admissions to the EMTs, Mrs. Fox had introduced a medically complex pre-existing condition—osteoarthritis—as a potential factor in her fall. BYU therefore argued that the biomechanics involved in her fall, the medical cause of her injuries, and the need for the treatment she received were not within the ordinary senses of any layperson.

¶ 9 The Foxes conceded that they would not be

presenting expert testimony at the bench trial. However, they asserted that lay testimony was sufficient to establish their prima facie case because the injury and damages Mrs. Fox experienced were within the realm of common experience and because *449 there was no significant lapse of time between the injury and the onset of the physical condition for which Mrs. Fox sought compensation. The Foxes also objected to the admissibility of the EMTs' report and the affidavit, arguing that Utah Code section 78-27-33 prohibits the admission of statements made by an injured person that were obtained by agents of her adversary, unless certain procedures are followed. The Foxes asserted that these procedures were not followed and BYU conceded as much at the pre-trial hearing.

¶ 10 The trial court agreed with BYU's position and, recognizing the dispositive nature of the issues presented in the motion in limine, converted the motion to one for dismissal pursuant to rule 41(b) of the Utah Rules of Civil Procedure. The trial court concluded that the EMTs' report and the affidavit were admissible under rule 803(4) of the Utah Rules of Evidence because they contained statements made by Mrs. Fox for purposes of medical diagnosis and treatment. The trial court held that, to the extent that Utah Code section 78-27-33 is inconsistent with rule 803(4), the statute was impliedly repealed by virtue of the Utah Constitution.

¶ 11 The trial court also ruled that the Foxes could not sustain their burden of proof as to causation and damages because Mrs. Fox's lay witness testimony was insufficient to establish their prima facie case. In making this ruling, the court noted that it had been presented with two plausible theories of causation—failure of an osteoarthritic knee or defective stairs—and, absent expert testimony, the court would have to use speculation to choose between the two theories. The trial court also ruled that Mr. Fox's loss of consortium claim failed because it was dependent on the viability and success of Mrs. Fox's negligence claim. Given the failure of both causes of action, the trial court dismissed the Foxes' suit

with prejudice.

ISSUES AND STANDARDS OF REVIEW

¶ 12 The Foxes claim that the trial court erred by determining that Utah Code section 78-27-33 was partially repealed by the Utah Supreme Court's adoption of rule 803(4) of the Utah Rules of Evidence. “ ‘A constitutional challenge to a statute presents a question of law, which we review for correctness.... When addressing such a challenge, this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality.’ ” *State v. Morrison*, 2001 UT 73, ¶ 5, 31 P.3d 547 (omission in original) (quoting *State v. Lopes*, 1999 UT 24, ¶ 6, 980 P.2d 191).

¶ 13 Further, the Foxes argue that the trial court erred by admitting the EMTs' report and the affidavit containing Mrs. Fox's out-of-court statements because the statements were procured by agents of the Foxes' adversary, BYU. “The standard of review when considering the admissibility of out-of-court statements under the Utah Rules of Evidence depends on ‘whether the trial court's analysis involves a factual or legal determination or some combination thereof.’ ” *State v. Parker*, 2000 UT 51, ¶ 13, 4 P.3d 778 (quoting *Hansen v. Heath*, 852 P.2d 977, 978 (Utah 1993)). “Whether a statement was made for purposes of medical diagnosis or treatment is a mixed question of law and fact.”

Hansen, 852 P.2d at 978. Thus, where the trial court's analysis “involves a factual determination that the statement was indeed made to aid medical diagnosis,” *id.* at 978-79, this court will “apply a clearly erroneous standard of review to those [factual] findings,” *Parker*, 2000 UT 51, ¶ 13, 4 P.3d 778. But where the court's analysis involves a legal determination, such determination will be reviewed “for correctness.” *Hansen*, 852 P.2d at 979.

¶ 14 Finally, the Foxes claim that the trial court erred in dismissing their suit against BYU for failure to present expert testimony to establish a prima facie case on the element of causation. “As with a

directed verdict, whether dismissal was appropriate for failure to make a prima facie case is a question of law reviewed for correctness.” *Grossen v. DeWitt*, 1999 UT App 167, ¶ 8, 982 P.2d 581. “An appellate court will not reverse the findings of fact of a trial court sitting without a jury unless they are ... clearly erroneous.” *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998) (omission in original) (internal quotation marks omitted). Furthermore, “we review a trial court’s legal ***450** conclusions for correctness, according the trial court no particular deference.” *Id.*

ANALYSIS

I. Admissibility of the EMTs’ Report

¶ 15 The Foxes claim that the EMTs’ report and the affidavit were inadmissible because they included out-of-court statements that were obtained in violation of Utah Code section 78-27-33 and that the statute has not been impliedly repealed, even partially, by the Utah Supreme Court’s adoption of rule 803(4) of the Utah Rules of Evidence. The Utah Constitution grants the supreme court the power to “adopt rules of procedure and evidence to be used in the courts of the state.” Utah Const. art. VIII, § 4. In 1985, the supreme court used its constitutional power to adopt the Federal Rules of Evidence. See *In Re: Rules of procedure and evidence to be used in the courts of this state*, 18 Utah Adv. Rep. 3 (Utah 1985). At the same time, the supreme court adopted only those previously existing statutory rules of procedure and evidence that were “not inconsistent with or superseded by [the new] rules of procedure and evidence.” *Id.* In doing so, the supreme court made clear that “[a]ny existing statutes inconsistent with these rules ... will be impliedly repealed.” Utah R. Evid. Preliminary Note; see, e.g., *State v. Fulton*, 742 P.2d 1208, 1217 (Utah 1987) (noting that the adoption of rule 601 of the Utah Rules of Evidence impliedly repealed section 78-24-2(2) and its presumption of incompetency for

children under ten years of age). In order for the legislature to “amend the Rules of Procedure and Evidence adopted by the Supreme Court,” it may only do so “upon a vote of two-thirds of all members of both houses.” Utah Const. art. VIII, § 4.

¶ 16 Utah Code section 78-27-33 existed at the time the supreme court adopted the new set of rules of evidence. Pursuant to this statute, a statement “obtained from an injured person within 15 days of an occurrence ... by a person whose interest is adverse” is not admissible evidence unless the adverse person leaves a “written verbatim copy of the statement ... with the injured party at the time the statement was taken,” and the injured party does not disavow the statement “in writing” within a specified time. Utah Code Ann. § 78-27-33 (2002). This statute was enacted in 1973. See Act of February 23, 1973, ch. 208, § 2, 1973 Utah Laws 709.^{FN1}

FN1. Although the statute was amended in 1998, after the supreme court’s adoption of the rules of evidence, the amendment was minor and does not signal the legislature’s attempt to amend the rules of evidence adopted by the supreme court. The statute, as originally written, allowed statements procured by a “law enforcement officer” to be admitted, regardless of whether the law enforcement officer was adverse or may become adverse to the injured party. In 1998, the legislature merely substituted the phrase “peace officer” for “law enforcement officer.” See Act of March 4, 1998, ch. 282, § 82, 1998 Utah Laws 1019. Moreover, the house bill that brought about the amendment was aimed at modifying the Utah Code with respect to peace officers. See Act of March 4, 1998, ch. 282, 1998 Utah Laws 978 (describing the act as “relating to public safety; modifying and clarifying the various classifications of peace officers and the requisite training and certification; making technical changes; and providing a coordination

clause"). The bill cannot be construed, as the Foxes assert, as intended to address inconsistencies between Utah Code section 78-27-33 and the Utah Rules of Evidence.

¶ 17 Since 1985, however, rule 803(4) of the Utah Rules of Evidence permitted the admission of "[s]tatements made for purposes of medical diagnosis or treatment," as well as statements "describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof," despite the fact that such statements may be hearsay. Utah R. Evid. 803(4). The only other qualification is that the statements must be "reasonably pertinent to diagnosis or treatment."

Id. "If the statement meets both qualifications, it is admissible because of the 'patient's strong motivation to be truthful' when discussing his or her medical condition with a doctor." *Hansen v. Heath*, 852 P.2d 977, 979 (Utah 1993) (quoting Fed.R.Evid. 803(4) advisory committee's note).^{FN2}

FN2. Statements made for purposes of medical diagnosis and treatment "need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Fed.R.Evid. 803(4) advisory committee's note.

*451 [1] ¶ 18 Therefore, there exists an inconsistency as to the admissibility of evidence in the limited circumstance where the injured party's adversary retains bona fide medical personnel who obtain statements from the injured party for the purpose of medical diagnosis and treatment. Rule 803(4) of the Utah Rules of Evidence permits the admission of all statements made for the purpose of medical diagnosis and treatment, such as Mrs. Fox's statements to the BYU EMTs, regardless of whether the medical personnel to whom the statements were made are adverse to the injured party or simply neutral. Without the requisite notice, however, Utah Code section 78-27-33 would not permit the admission of statements made for the

purpose of medical diagnosis and treatment when the statements are made to medical personnel who also serve as agents of the injured party's adversary.

¶ 19 The facts of the instant case highlight the inconsistency between rule 803(4) of the Utah Rules of Evidence and Utah Code section 78-27-33. Here, the trial court correctly concluded that the EMTs responding to Mrs. Fox's fall, while volunteers, were nonetheless agents of BYU because they worked under BYU's name, used equipment supplied by BYU, and operated from BYU's buildings. *See Nelson v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 935 P.2d 512, 512 (Utah 1997) (acknowledging that a person may be a "volunteer agent" of a principal); *see also* Restatement (Third) Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."). BYU is, undoubtedly, Mrs. Fox's adversary in the present suit. Furthermore, the court committed no clear error by finding that Mrs. Fox's statements to the EMTs were in fact made for the purpose of receiving a medical diagnosis of her condition and treatment of her injury.

¶ 20 Given this inconsistency, we conclude that rule 803(4) of the Utah Rules of Evidence partially repealed, or in other words, limited the applicability of Utah Code section 78-27-33. We emphasize, however, that Utah Code section 78-27-33 is invalid only to the extent that it is inconsistent with rule 803(4), i.e., in the very narrow circumstance where an adversary retains bona fide medical personnel who obtain statements from injured persons for the limited and exclusive purpose of medical diagnosis and treatment. In circumstances where statements obtained by a potentially adverse party are not for purposes of medical diagnosis and treatment, there is no inconsistency between the rule of evidence and Utah Code section 78-27-33, and the statute remains viable.

II. Dismissal for Lack of Expert Testimony

[2][3][4] ¶ 21 The Foxes contend that expert testimony was not required to establish a prima facie case regarding the cause of Mrs. Fox's injuries because her fall, broken leg, and subsequent medical treatment were temporally connected and within the common knowledge and experience of a layperson. Plaintiffs carry the "burden [of] establish[ing] a prima facie case of negligence," *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 601 (Utah Ct.App.1995), including "proximate and actual causation of the injury," *id.* at 600; *see also Jackson v. Colston*, 116 Utah 295, 209 P.2d 566, 568 (1949) ("It is fundamental that the burden rests upon the plaintiff to establish the causal connection between the injury and the alleged negligence of the defendant."). "[T]he causal connection between the alleged negligent act and the injury is never presumed and ... this is a matter the plaintiff is always required to prove affirmatively." *Jackson*, 209 P.2d at 568. Although "the question of proximate causation is generally reserved for the jury," *Clark*, 893 P.2d at 601 (internal quotation marks omitted), "the trial court may rule as a matter of law on this issue ... if ... there is no evidence to establish a causal connection, thus leaving causation to jury speculation," *id.* (quoting *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 487 (Utah Ct.App.1991)).

[5] ¶ 22 In Utah, "[t]he need for positive expert testimony to establish a causal link between the defendants' negligent act and *452 the plaintiff's injury depends on the nature of the injury." *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 16, 12 P.3d 1015 (internal quotation marks omitted). Thus, "[w]here the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury." *Id.* (citations and internal quotation marks omitted). In such cases, the "testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury." *Id.* It is

only in "the most obvious cases" that a plaintiff may be excepted from the requirement of using expert testimony to prove causation. *Id.*

[6] ¶ 23 Mrs. Fox's slip-and-fall negligence suit is not a case that is excepted from the requirement that a plaintiff use expert testimony to establish a causal link between the defendant's negligent act and her injury. At the scene of Mrs. Fox's fall, she first attributed the cause of her fall to the fact that her knee "gave out." She admitted to the EMTs that she had been diagnosed with a pre-existing condition, osteoarthritis, in that same knee. Thus, by her own initial explanation of the cause of her fall and her admission of an osteoarthritic condition, Mrs. Fox tied the cause of her fall to medical factors sufficiently complicated to be beyond the ordinary senses and common experience of a layperson. Mrs. Fox's lay testimony would not have been sufficient to determine whether the need for her medical treatment, the surgery and attachment of the fixator, was caused by BYU's allegedly defective stairs or the failure of her own arthritic knee. Although Mrs. Fox could testify that she descended the stairway, fell, and experienced pain, she needed expert testimony to establish her prima facie case of causation and to prevent the fact-finder from resorting to speculation. Absent this expert testimony, the trial court correctly ruled that Mrs. Fox had failed to prove the element of causation and her negligence claim failed as a matter of law.^{FN3}

FN3. We note that, in this case, it was the plaintiff herself who presented the two theories of causation. By highlighting these dueling theories and emphasizing that under one theory BYU's alleged negligence was not the cause of Mrs. Fox's fall, BYU was not presenting an affirmative defense, such as an intervening cause, for which it would have carried the burden of proof.

Compare Nixdorf v. Hicken, 612 P.2d 348, 353 n. 15 (Utah 1980) (indicating that an "intervening cause may be used as a de-

fense against the plaintiff's proof of proximate causation"), with *State v. Malaga*, 2006 UT App 103, ¶ 22, 132 P.3d 703 (distinguishing between a defense that contemplates an intervening force as the cause of the injury and a defense that presents an alternative version of events "which does not implicate intervening causes at all"); see also *Seale v. Gowans*, 923 P.2d 1361, 1363 (Utah 1996) (stating that defendants have the burden of proof with respect to affirmative defenses). Rather, BYU was refuting the Foxes' preferred theory and reminding the court that "the burden of proof is on the plaintiff to show that the injury was negligently caused by [the] defendant, [and that] it is not enough to show the injury ... might have occurred from negligence and many other causes." *Baxter v. Snow*, 78 Utah 217, 2 P.2d 257, 265 (1931) (internal quotation marks omitted). Thus, "[w]hen a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, [the plaintiff's] proof tends to establish neither." *Id.* (internal quotation marks omitted).

¶ 24 The trial court also correctly ruled that Mr. Fox's claim for loss of consortium failed because it was dependent on the success of Mrs. Fox's negligence claim. Under Utah statute, a "spouse's action for loss of consortium ... [is] derivative from the cause of action in behalf of the injured person[,] and ... it may not exist in cases where the injured person would not have a cause of action." Utah Code Ann. § 30-2-11(5)(a), (b) (2007). Mr. Fox's loss of consortium claim ceased to exist when Mrs. Fox's negligence claim failed.

CONCLUSION

¶ 25 The trial court did not err in admitting the EMTs' report and the affidavit because they contained admissible hearsay pursuant to rule 803(4) of

the Utah Rules of Evidence. Although Utah Code section 78-27-33 may have barred such reports, that statute is inconsistent with rule 803(4) and impliedly modified to the extent of the inconsistency. The trial court did not err in dismissing the Foxes' negligence claim for failure to present expert testimony on the *453 element of causation because the factors associated with Mrs. Fox's fall and injury were sufficiently medically complex to require such testimony. Because the loss of consortium claim was dependent on the viability of the negligence claim, the trial court properly dismissed it as well.

¶ 26 We affirm.

¶ 27 WE CONCUR: CAROLYN B. McHUGH and WILLIAM A. THORNE JR., Judges.

Utah App., 2007.

Fox v. Brigham Young University

176 P.3d 446, 229 Ed. Law Rep. 256, 594 Utah Adv. Rep. 10, 2007 UT App 406

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H

Court of Appeals of Utah.
Darlene BEARD, Plaintiff and Appellee,
v.
K-MART CORPORATION, Defendant and Appel-
lant.
No. 20000095-CA.
Oct. 19, 2000.

Customer sued store for negligence after being accidentally struck by elbow of employee. The Third District Court, Salt Lake Department, Tyrone Medley, J., denied store's motion for partial directed verdict on damages issue and entered judgment upon jury verdict for customer. Store appealed. The Court of Appeals, Billings, held that: (1) expert testimony was required to establish that store's negligence caused the need for customer to undergo three surgeries subsequently performed on her neck and wrists; and (2) surgeon's testimony was insufficient to show store's negligence caused conditions requiring surgery.

Reversed and remanded for new trial.

West Headnotes

[1] Evidence 157 ⚡ 568(2)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k568 Opinions of Witnesses in General

157k568(2) k. Mental Condition or Capacity. Most Cited Cases

In all but the most obvious cases, testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury.

[2] Evidence 157 ⚡ 478(1)

157 Evidence

157XII Opinion Evidence

157XII(A) Conclusions and Opinions of Witnesses in General

157k478 Mental Condition or Capacity

157k478(1) k. In General. Most Cited

Cases

Diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons.

[3] Damages 115 ⚡ 185(1)

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k185 Personal Injuries and Physical Suffering

115k185(1) k. In General. Most Cited

Cases

Need for positive expert testimony to establish a causal link between the defendants' negligent act and the plaintiff's injury depends upon the nature of the injury; where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury.

[4] Damages 115 ⚡ 185(1)

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k185 Personal Injuries and Physical Suffering

115k185(1) k. In General. Most Cited

Cases

Damages 115 ⚡ 191

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k191 k. Expenses. Most Cited Cases

Expert testimony was required, in negligence action by customer who was accidentally struck by elbow of store employee, to establish that store's negligence caused the need for customer to undergo three complex neurological surgeries subsequently performed on her neck and wrists.

[5] Evidence 157 571(9)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(9) k. Cause and Effect.

Most Cited Cases

Customer who was accidentally struck by elbow of store employee failed to present sufficient expert testimony that store's negligence caused the need for surgeries subsequently performed on her neck to alleviate pain from bone spurs and on her wrists for carpal tunnel syndrome, where surgeon testified to a chronological association between accident and onset of symptoms but did not testify to reasonable degree of medical certainty that accident caused the conditions addressed by the surgeries.

*1016 M. David Eckersley, Prince, Yeates & Geldzahler, Salt Lake City, for Appellant.
William R. Rawlings, Draper, for Appellee.

Before Judges BILLINGS, ORME, and THORNE.

OPINION

BILLINGS, Judge:

¶ 1 Defendant/appellant K-Mart Corporation (K-Mart) appeals the trial court's denial of its motion for a partial directed verdict. We reverse and remand for a new trial.

FACTS

¶ 2 On September 15, 1996, plaintiff/appellee Darlene Beard (Beard) was injured in a K-Mart store

when a K-Mart employee struck her in the head with his elbow as he attempted to start a lawnmower. As she fell toward the floor, she felt a severe headache, as well as pain in her wrists, knee, and ankle. She visited her doctor the following day, complaining of head, neck, knee, and foot pain, and continued to have severe headaches, a sore neck, aching hands, and leg and foot pain. Beard saw a number of doctors and ultimately underwent a number of surgeries. Beard sued K-Mart for its employee's negligence in striking her. Three surgeries, performed on her neck and wrists by Dr. Robert Peterson, are at issue in this appeal. K-Mart asserts these surgeries are not causally connected to the accident at its store.

¶ 3 At trial, Beard testified that her neck and wrist problems began when she was struck in the head at K-Mart. In addition, her family physician and her surgeon Dr. Peterson testified "there was a chronological association for the time of the incident [at K-Mart] to the time of the onset of symptoms." However, Dr. Peterson testified that he could not say to a degree of reasonable medical probability that the accident at K-Mart caused the need for either her neck or wrist surgeries.

¶ 4 At the close of Beard's case, K-Mart moved for a partial directed verdict, arguing Beard had not presented sufficient evidence *1017 to permit the jury to find that her need for the neck and wrist surgeries was the proximate result of the injuries she had suffered at K-Mart.^{FN1} The trial court denied K-Mart's motion, and the jury awarded Beard \$431,290.22 in damages.

^{FN1} Both parties characterize K-Mart's motion as one for a directed verdict; however, the motion was effectively one requesting a jury instruction excluding consideration of the evidence regarding the neck and wrist surgeries.

STANDARD OF REVIEW

¶ 5 “When reviewing any challenge to a trial court’s denial of a motion for directed verdict, we review ‘the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict.’ ”

Mahmood v. Ross, 1999 UT 104, ¶ 16, 990 P.2d 933 (quoting *White v. Fox*, 665 P.2d 1297, 1300 (Utah 1983) (quoting *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1165 (Utah 1983))). If we conclude Beard did raise a material fact precluding judgment against her as a matter of law, we must affirm the trial court’s denial of K-Mart’s motion and uphold the jury’s verdict. *See id.*

ANALYSIS

¶ 6 K-Mart argues Beard failed to present expert medical testimony establishing that her need for neck and wrist surgeries was caused by K-Mart’s negligence. The essence of K-Mart’s argument is that Beard’s own testimony and the general testimony of her doctors that she did not suffer neck and wrist complaints before the injury at K-Mart is insufficient as a matter of law to allow the jury to consider whether these surgeries were a result of K-Mart’s negligence. K-Mart argues that only expert medical testimony that the need for her surgeries was proximately caused by K-Mart’s negligence will suffice. Thus, K-Mart argues the trial court erred in not directing a verdict in its favor and removing this evidence from the jury’s consideration.

¶ 7 K-Mart relies on *Denney v. St. Mark’s Hospital*, 21 Utah 2d 189, 442 P.2d 944 (1968), for the proposition that “if the expert evidence offered on the issue of medical causation is simply that a particular injury *could* have resulted from a particular accident, but not that it probably did, such testimony is insufficient for submission of the issue to the jury.” In *Denney*, the plaintiff had undergone neck surgery and was having x-rays taken of her lumbar spine for unrelated treatment when a medical technician forcefully pushed her neck close to her

knees, allegedly causing a feeling like an electric shock in the back of her neck. *See Denney*, 442 P.2d at 944-45. Two days later, she suffered a stroke. *See id.* More than four months later, the plaintiff told her neurologist that her neck had been forced forward during the spinal x-rays. *See id.* The following year, a spinal fusion was performed and a neck nerve severed to relieve pain. *See id.* The plaintiff alleged the x-ray technician’s negligence was responsible for her ailments. *See id.* At trial, she testified as to the feeling in her neck when the technician pushed on it, and to continuing pain, numbness, and loss of vision after the incident. *See id.* Additionally, her neurologist testified that the force used by the technician could cause disc problems, but on cross-examination admitted it was a “medical probability” that her ailments were the result of the stroke. *Id.*

¶ 8 The Utah Supreme Court sustained the trial court’s directed verdict in favor of the hospital. *See id.* at 946. The court stated:

in those cases which depend upon knowledge of the scientific effect of medicine, the results of surgery, or whether the attending physician exercised the ordinary care, skill and knowledge required of doctors in the community which he serves, must ordinarily be established by the testimony of physicians and surgeons.

The only facts in the instant case which may be ascertained by the ordinary use of the senses of a lay witness are that the technician moved plaintiff’s body, and that the back of her head hurt. No lay witness *1018 can by the ordinary use of his senses say that the complaints of the plaintiff, including the hurting in the back of her head, was caused by this claimed adjustment of her position on the x-ray table.

Id. (quoting *Fredrickson v. Maw*, 119 Utah 385, 387, 227 P.2d 772, 774 (1951)). The court concluded that the plaintiff’s evidence did not show

that her injuries were the result of the negligence of the technician. *See id.* at 947.

¶ 9 K-Mart also relies on *Moore v. Denver & Rio Grande Western Railroad Company*, 4 Utah 2d 255, 292 P.2d 849 (1956). In *Moore*, the plaintiff's doctor testified that "it was possible" that plaintiff's accident had caused a ruptured lumbar disc and nerve pressure. *Id.* at 850. The doctor estimated a five percent permanent disability "based in part on the predictability of exacerbation and remission of pain" over time. *Id.* The defendant moved to strike the doctor's testimony, arguing that "possibilities" were not probative, but the trial court denied the motion. *Id.* An instruction taking consideration of a ruptured disc from the jury on the basis that no competent evidence had been given on the matter was likewise refused by the trial court. *See id.*

¶ 10 On appeal, the defendant argued that the doctor's testimony was "insufficient to provide a question of the existence of an injured disc." *Id.* The Utah Supreme Court recognized that the doctor's testimony regarding the permanency of the plaintiff's disability was "linked to the possibility of a disc injury" and was a significant part of the plaintiff's case. *Id.* The court stated: "Under these circumstances, if the proof of such an injury falls short of that required under our law, then an instruction to that effect should have been given the jury." *Id.* at 850-51. The court noted that under long-standing Utah law, a "plaintiff retains the burden of proving his damages by competent evidence to an extent where the trier of fact could discover that which is *probably* true." *Id.* at 851 (emphasis added). The court agreed with the plaintiff that there was evidence of some injury, but stated:

the jury was allowed to speculate upon the existence of a disc injury, which may be determinative of the important element of permanency of the injury when no affirmative evidence was offered on this issue. Although the medical testimony indicated that the symptoms showed a nerve irritation, and that such symptoms were consistent with the existence of a disc injury, we cannot discover in

the witness' words anything more than their corollary that, under the circumstances a disc injury was not impossible.

Id. at 259, 292 P.2d at 851. Because there was a strong likelihood the jury considered the permanency of the injury to have been proven by expert testimony, the court reversed the jury's verdict in favor of the plaintiff, holding that a limiting instruction should have been given. *See id.*

¶ 11 In the instant case, K-Mart argues that although Beard testified her neck and wrist problems began at the time of her injury at K-Mart, her belief that her neck and wrist surgeries were, therefore, the result of that incident cannot overcome the failure of the medical evidence to substantiate that belief.

¶ 12 In contrast, Beard argues she was not required to put on expert medical evidence. Beard claims that under Utah law, expert medical opinions are generally only required in medical malpractice cases. We disagree.

¶ 13 Beard presents cases from other jurisdictions holding that expert medical testimony is not required to submit to the jury questions about the need for medical treatment and expenses. *See, e.g., Jordan v. Smoot*, 191 Ga.App. 74, 380 S.E.2d 714, 715 (1989); *Polaco v. Smith*, 376 So.2d 409, 409-10 (Fla.Ct.App.1979); *Walton v. Gallbraith*, 15 Mich.App. 490, 166 N.W.2d 605, 606 (1969). However, we conclude these cases are factually distinguishable as they involve medical damages within the common experience of a layperson.

¶ 14 In *Smoot*, the plaintiff sued the defendant for injuries she sustained in an automobile collision. *See* 380 S.E.2d at 714. Her case consisted of "her testimony and that of the responding police officer, pictures of her damaged car, and her medical bill." *Id.* The *1019 plaintiff testified that she visited a chiropractor the day of the accident and following the accident and that the chiropractic treatments had given her relief. *See id.* The trial court direc-

ted a verdict for the defendant “on the ground that plaintiff had failed to prove a prima facie personal injury case because she had not introduced expert medical testimony” connecting the collision and her injuries. *Id.* The Georgia Court of Appeals reversed, stating “where, as here, there is no significant lapse of time between the injury sustained and the onset of the physical condition for which the injured party seeks compensation, and *the injury sustained is a matter which jurors must be credited with knowing by reason of common knowledge*, expert medical testimony is not required.” *Id.* (emphasis added).

¶ 15 Beard also relies on *Walton v. Gallbraith*, 15 Mich.App. 490, 166 N.W.2d 605 (1969). In *Walton*, the plaintiff sued the defendant for neck, back, and shoulder injuries caused by a car accident. *See id.* at 605. At trial, no physician testified for the plaintiff, and the defendant “objected to the admission into evidence of bills for medicine and treatment on the ground that there was no showing that they were causally connected with the ... accident.” *Id.* The defendant also requested an instruction to exclude the jury's consideration of the bills. *See id.* The trial court denied both motions, and the jury awarded the plaintiff \$3500 in damages. *See id.* On appeal, the defendant argued it was error to introduce plaintiff's medical bills. *See id.* The plaintiff, on the other hand, argued “that a causal connection between the accident and the injury may be shown without expert testimony.” *Id.* at 605-06. The court stated:

A brief review of the function of the jury leads us to the conclusion that plaintiff's position is the correct one. Her testimony emphasizes the facts that there were no previous neck or back pains and that they began the day after the accident.

In a situation such as this, *it should be clear to men of common experience that the cause of the injuries was the accident and no expert was needed to demonstrate this fact.*

Id. at 606 (emphasis added). Therefore, the court

sustained the jury's verdict in favor of the plaintiff. *See id.*

[1][2][3][4] ¶ 16 In this case, the question is not whether the accident at K-Mart caused Beard injury, but rather whether injuries sustained as a result of the accident at K-Mart required the neurological surgeries performed on Beard's neck and wrists. Beard was properly permitted to testify that the accident in the store caused pain and injury. The question as to whether such pain and injury resulted from the blow is within the common knowledge and experience of lay witnesses and could properly be submitted to the jury. What is missing in the evidence, however, is the link between the injuries suffered and the necessity of the surgeries. In Utah, in all but the most obvious cases, testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury. *See generally Denney v. St. Mark's Hosp.*, 21 Utah 2d 189, 442 P.2d 944 (1968); *Moore v. Denver & Rio Grande W.R.R. Co.*, 4 Utah 2d 255, 292 P.2d 849 (1956); *Chief Consol. Mining Co. v. Salisbury*, 61 Utah 66, 210 P. 929 (1922). Certainly whether the need for complex neurological surgery was a result of the accident at K-Mart is not within the common experience of laypersons. As stated in *Riggins v. Bechtel Power Corp.*, 44 Wash.App. 244, 722 P.2d 819, 824 (1986):

The need for positive expert testimony to establish a causal link between the defendants' negligent act and the plaintiff's injury depends upon the nature of the injury. Where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury.

Id. at 824. “The diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons.” *Eberhart v. Morris Brown College*, 181 Ga.App. 516, 352 S.E.2d 832, 834 (1987). Thus, we conclude expert testimony on this medical causa-

tion issue was required before the issue *1020 of damages arising from these surgeries was submitted to the jury.

[5] ¶ 17 Plaintiff alternatively contends that even if she was required to put on expert medical testimony that her need for neck and wrist surgeries was caused by the accident at K-Mart, she introduced adequate expert medical testimony.

¶ 18 Dr. Peterson, the surgeon who performed Beard's neck surgery and both wrist surgeries, testified extensively regarding the causes of Beard's neck pain, wrist pain, and his surgical treatment of them:

A: [T]he question is, you know, what the cause is. *The answer is, basically, I have no way of proving anything.* But the association is that Mrs. Beard came to me and-and, more or less, was a person who was doing well prior to this incident at K-Mart and since that time has been suffering a rather significant problem which could be-you know, which was associated with some significant anatomic compromise in her neck. And from my standpoint, there was a chronologic association from the time of the incident to the time of the onset of the symptoms.

Q: [by Beard's counsel]: What do you mean by chronological association?

A: Happened at the same time.... [T]o my knowledge, [Beard] did not have these complaints prior to being hit at K-Mart.

Q: Can you interpret for us what you found on the MRI?

A: Bone spur.

Q: What causes bone spurs?

A: Well, sort of the same thing that causes a bunion, irritation, disk-an old disk herniation

which has receded, abnormal movement, local irritation.

Q: Is that also the aging process as well?

A: Being on a planet with gravity.

...

Q: [by K-Mart's counsel]: You performed neck surgery on Darlene Beard because she had marginal osteophytes in her neck, bone spurs.

A: That's essentially correct.

Q: Those were pre-existing to September 15, 1996.

A: That would be my best guess.

Q: In fact, you termed, in your deposition, that as a severe form of degenerative disk disease; is that correct?

A: That's correct.

Q: *All of that was pre-existing long before this K-Mart incident ever happened?*

A: *No argument.*

Q: Do you know how long?

A: Have no idea.

Q: Do you know how they got there?

A: As mentioned previously in testimony, it is essentially concomitant with being on a planet with gravity long enough. But it has to do with local irritation and other potential compromises such as trauma.

Q: *You don't know whether it was trauma, whether it was heredity, whether it was wear and tear, whether it was gravity-as to how those bone spurs got there.*

A: *Absolutely no idea.*

...

Q: *And you're not saying to the jury, to a degree of reasonable medical probability, that this incident at K-Mart caused such a condition in her neck; isn't that correct?*

A: *No, I'm not telling the jury that at all.*

Q: *You just don't know, do you?*

A: *No.*

¶ 19 When questioned about the wrist surgery, Dr. Peterson testified:

Q: *Do you have any reason to believe that any other incident, other than the accident of 9-15-96, may have caused this condition?*

A: *No.*

Q: *Okay. Could trauma cause that?*

A: *Trauma-trauma can cause carpal tunnel syndrome. At least certainly aggravate pre-existing condition.*

...

Q: *Okay. And so, you're not telling the jury, again, to any degree of reasonable probability that her carpal tunnel was caused by this incident at K-Mart; isn't that correct?*

A: *That's correct.*

*1021 ¶ 20 We simply cannot say from the record before us that the expert medical testimony was sufficient to allow the jury to consider whether Beard's surgeries were necessitated by K-Mart's negligence and if so what damage she suffered as a result of those surgeries.^{FN2} Without the required expert medical opinion linking the injury to the necessity of the surgery, 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 neck and wrist surgeries were necessitated by her accident. Thus, it was error for the trial judge not to grant a directed verdict removing these issues from the jury. Therefore we must reverse and remand for a new trial.

FN2. Counsel for K-Mart conceded and we conclude that Beard will have an opportunity on remand to offer competent expert medical testimony on the issue of whether the accident at K-Mart either caused the need for her neck and wrist surgeries or exacerbated a pre-existing condition which necessitated the surgeries.

¶ 21 WE CONCUR: GREGORY K. ORME, Judge, and WILLIAM A. THORNE, Judge.
Utah App.,2000.
Beard v. K-Mart Corp.
12 P.3d 1015, 406 Utah Adv. Rep. 3, 2000 UT App 285

END OF DOCUMENT

Addendum “C”

Utah Code Ann. § 78A-4-103(2)(j) (2008)



Formerly cited as UT ST § 78-2a-3

West's Utah Code Annotated (currentness)

Title 78A Judiciary and Judicial Administration (Refs & Annos)

Chapter 4 Court of Appeals

→ **§ 78A-4-103. Court of Appeals jurisdiction**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

(a) to carry into effect its judgments, orders, and decrees, or

(b) in aid of its jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer,

(b) appeals from the district court review of

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies, and

(ii) a challenge to agency action under Section 63G-3-602,

(c) appeals from the juvenile courts,

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony,

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony,

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

CREDIT(S)

Laws 2008, c. 3, § 350, eff. Feb. 7, 2008; Laws 2008, c. 382, § 2210, eff. May 5, 2008.

HISTORICAL AND STATUTORY NOTES

Laws 2008, c. 3, § 1476, provides:

“Section 1476. Coordinating H.B. 78 with H.B. 63--Superseding amendments.

“If this H.B. 78 and H.B. 63, Recodification of Title 63 State Affairs in General, both pass, it is the intent of the Legislature that the amendments in this H.B. 78 supersede the amendments to the same sections in H.B. 63, except that the section renumbering and internal cross references to Title 63 in H.B. 63 supersede and shall replace the section numbering and references to Title 63 in H.B. 78 when the Office of Legislative Research and General Counsel prepares the Utah Code database for publication.”

Composite section by the Office of Legislative Research and General Counsel of Laws 2008, c. 3, § 350 and Laws 2008, c. 382, § 2210.

Prior Laws:

Laws 1986, c. 47, § 46.

Laws 1987, c. 161, § 304.

Laws 1988, c. 73, § 1.

Laws 1988, c. 210, § 141.

Laws 1988, c. 248, § 8.

Laws 1990, c. 80, § 5.

Laws 1990, c. 224, § 3.

Laws 1991, c. 268, § 22.

Laws 1992, c. 127, § 12.

Laws 1994, c. 13, § 45.

Laws 1995, c. 299, § 47.

Laws 1996, c. 159, § 19.

Laws 1996, c. 198, § 49.

Laws 2001, c. 255, § 20.

Laws 2001, c. 302, § 2.

C. 1953, § 78-2a-3.

CROSS REFERENCES

Military court, see §§ 39-6-15 and 39-6-16.

LIBRARY REFERENCES

Administrative Law and Procedure ☞ 651 to 686, 721 to 726.

Courts ☞ 207, 248, 483 to 488.

Westlaw Key Number Searches: 106k207; 106k248; 15Ak651 to 15Ak686; 15Ak721 to 15Ak726; 106k483 to 106k488.

C.J.S. Courts §§ 193 to 202.

C.J.S. Public Administrative Law and Procedure §§ 172 to 201, 204, 208 to 212, 218 to 219, 259 to 271.

UNITED STATES SUPREME COURT

Appellate jurisdiction,

Adoption, jurisdiction of Supreme Court, review of state court's interpretation of state law, due process, see *O'Connell v. Kirchner*, U.S. Ill. 1995, 115 S.Ct. 891, 513 U.S. 1303, 130 L.Ed.2d 873.

NOTES OF DECISIONS

In general 1

Administrative entity determinations 5

Appeals from courts not of record 3

Attorney fees 8

Criminal convictions 6

Extradition orders 7


Final judgments and orders 4


Issuance of prerogative or remedial writs 9

Mandamus 10


Original appellate jurisdiction, generally 2

1. In general


District court did not have appellate jurisdiction over defendant's challenge to circuit court orders binding defendants over for trial, in absence of any statutory delegation of appellate jurisdiction to district court; legislature vested appellate jurisdiction over circuit court proceedings in Court of Appeals. U.C.A.1953, 63-46b-15, 77-35-7, 78-2a-3(2)(d), 78-3-4(5). *State v. Humphrey*, 1990, 794 P.2d 496, certiorari granted 804 P.2d 1232, reversed 823 P.2d 464. Criminal Law  1018

Failure of defendant to file direct appeal before seeking postconviction relief was not a jurisdictional defect which would prevent the Court of Appeals from reviewing the district court's decision denying habeas corpus. U.C.A.1953, 78-2a-3(f). *Gomm v. Cook*, 1988, 754 P.2d 1226. Habeas Corpus  813


2. Original appellate jurisdiction, generally

Court of Appeals has original appellate jurisdiction over a district court's review of a city council's decisions on zoning issues. U.C.A.1953, 78-2-2(3)(j), 78-2a-3(2)(b)(i). *Bradley v. Payson City Corp.*, 2001, 17 P.3d 1160, 412 Utah Adv. Rep. 26, 413 Utah Adv. Rep. 13, 2001 UT App 9, certiorari granted 26 P.3d 235, vacated 70 P.3d 47, 472 Utah Adv. Rep. 12, 2003 UT 16. Zoning And Planning  741

3. Appeals from courts not of record

Magistrate was not "court of record," and thus Court of Appeals did not have jurisdiction over interlocutory appeal from magistrate's order binding defendant over for trial on refiled felony charge. Const. Art. 8, § 5; U.C.A.1953, 78-2a-3(2)(d). *State v. Fisk*, 1998, 966 P.2d 860, 353 Utah Adv. Rep. 34. Criminal Law  1023(3)

4. Final judgments and orders

Employer's petition for review was filed prematurely with Court of Appeals, before Labor Commission's final agency action denying employer's motion for reconsideration of award in favor of injured worker, despite fact that employer filed within statutorily specified period after motion was "considered denied" by Commission's inaction on motion, where Commission could and did change "considered denied" date to later date, and thus, Court lacked jurisdiction to consider employer's appeal. U.C.A.1953, 63-46b-1(9), 63-46b-13(3)(b), 78-2a-3(2)(a). *McCoy v. Utah Disaster Kleenup*, 2003, 65 P.3d 643, 467 Utah Adv. Rep. 23, 2003 UT App 49. Workers' Compensation  1875

5. Administrative entity determinations

Labor Commission's interim order finding that workers' compensation claimant qualified for permanent total disability was not final and appealable order, even though administrative rule stated that preliminary determination of permanent total disability, by Labor Commission or Appeals Board, was final agency action for purposes of appellate judicial review, where statute, which controlled over administrative rule, provided that finding by Commission of permanent total disability was not final, unless otherwise agreed by parties, until reemployment plan was prepared and considered, and parties agreed this had not occurred. *Target Trucking v. Labor Com'n*,

2005, 108 P.3d 128, 519 Utah Adv. Rep. 11, 2005 UT App 70. Workers' Compensation ⚡ 1833

Supreme Court has original appellate jurisdiction over district court review of land use decisions by local government entities, since Supreme Court has original appellate jurisdiction over orders over which the Court of Appeals does not have original jurisdiction, and Court of Appeals did not have original jurisdiction to hear challenges to land use decisions by municipal governing bodies; there was no statutory provision that expressly granted the Court of Appeals original jurisdiction over district court review of land use decisions by local governmental entities. U.C.A.1953, 78-2a-3(2)(b)(i). *Bradley v. Payson City Corp.*, 2003, 70 P.3d 47, 472 Utah Adv. Rep. 12, 2003 UT 16. Courts ⚡ 206(17.1)

Court of Appeals did not have jurisdiction to consider company's petition for review regarding conversion of citation proceeding based on hiring of unlicensed electricians to perform electrical construction work from informal to formal adjudicative proceeding by Department of Commerce, Division of Occupational and Professional Licensing; conversion order was not final order. U.C.A.1953, 63-46b-16, 78-2a-3(2)(a); U.C.A.1953(1993 Ed.), 58-55-2(32)(C). *Merit Elec. & Instrumentation v. Utah Dept. of Commerce, Div. of Occupational and Professional Licensing*, 1995, 902 P.2d 151. *Administrative Law And Procedure* ⚡ 704; *Licenses* ⚡ 41

Court of Appeals does not have jurisdiction to review orders that reserve something for further decision by agency. U.C.A.1953, 63-46b-16, 78-2a-3(2)(a). *Merit Elec. & Instrumentation v. Utah Dept. of Commerce, Div. of Occupational and Professional Licensing*, 1995, 902 P.2d 151. *Administrative Law And Procedure* ⚡ 704

“Collateral order doctrine,” which allows review of orders that conclusively determine disputed question, resolve important issue completely separate from merits of action, and are effectively unreviewable on appeal from final judgment would not be applied to appeal from administrative action. U.C.A.1953, 63-46b-16, 78-2a-3(2)(a). *Merit Elec. & Instrumentation v. Utah Dept. of Commerce, Div. of Occupational and Professional Licensing*, 1995, 902 P.2d 151. *Administrative Law And Procedure* ⚡ 704

Court of Appeals had jurisdiction over petition for extraordinary writ challenging denial of motion to recuse presiding officer of Division of Environmental Response and Remediation (DERR) based on fact that presiding officer was also staff attorney. U.C.A.1953, 63-46b-1(3)(a), 78-2a-3(1)(b). *V-1 Oil Co. v. Department of Environmental Quality, Div. of Solid and Hazardous Waste*, 1995, 893 P.2d 1093, certiorari granted 910 P.2d 425, reversed 939 P.2d 1192, 317 Utah Adv. Rep. 11. *Administrative Law And Procedure* ⚡ 657.1; *Environmental Law* ⚡ 634

Court of Appeals lacked jurisdiction to review decision by division of police officer standards and training (POST) not to pursue decertification of wildlife conservation officer; since POST did not conduct any formal proceedings, there was no final order resulting from formal adjudicative proceedings, and citizen's filing of complaint with POST did not require it to conduct formal proceedings. U.C.A.1953, 63-46b-1 et seq., 63-46b-16, 78-2a-3(2)(a). *Nielson v. Division of Peace Officer Standards and Training, (POST), Dept. of Public Safety*, 1993, 851 P.2d 1201. *Administrative Law And Procedure* ⚡ 704; *Game* ⚡ 6

Court of Appeals had jurisdiction to rule on whether the Tax Commission complied with remand order of the Supreme Court, notwithstanding claim of Commission that its decision on remand was not a final appealable order because decision called for a further proceeding; appeal was an enforcement proceeding to determine if Commission complied with remand order, and Supreme Court has jurisdiction by statute to issue all process necessary to carry into effect its orders; since case was transferred, Court of Appeals stood in shoes of Supreme

Court. U.C.A.1953, 78-2-2(2), 78-2a-3(1)(a), (2)(k). Amax Magnesium Corp. v. Utah State Tax Com'n, 1993, 848 P.2d 715, certiorari granted 860 P.2d 943, reversed 874 P.2d 840. Taxation ⚡ 2693

Court of Appeals did not have jurisdiction, pursuant to statute granting Court jurisdiction to review final agency actions resulting from formal adjudicative proceedings, to review Division of Occupational and Professional Licensing's administrative law judge's denial of motion to dismiss unprofessional conduct petitions filed against person licensed to administer health facility, even though licensee had petitioned to have order reviewed by Division and such review was denied. U.C.A.1953, 13-1-12(1)(a), 63-46b-16(1). Barney v. Division of Occupational and Professional Licensing, Dept. of Commerce, 1992, 828 P.2d 542, certiorari denied 843 P.2d 516. Health ⚡ 223(1)

Court of Appeals would not defer ruling on jurisdictional issue until consideration of merits of appeal from administrative law judge's denial of motion to dismiss professional conduct petitions filed against person licensed to administer health facility, since Court's first duty was to determine whether it had jurisdiction. U.C.A.1953, 13-1-12(1)(a), 63-46b-16(1). Barney v. Division of Occupational and Professional Licensing, Dept. of Commerce, 1992, 828 P.2d 542, certiorari denied 843 P.2d 516. Health ⚡ 223(1)

Statute giving the Court of Appeals appellate jurisdiction over final orders and decrees of state and local agencies or appeals from the district court review of them defines the outermost limit of the Court of Appeals appellate jurisdiction and allows it to review agency decisions only when the legislature expressly authorizes a right of review. U.C.A.1953, 78-2a-3(2)(a). DeBry v. Salt Lake County Bd. of Appeals, 1988, 764 P.2d 627. Administrative Law And Procedure ⚡ 663; Administrative Law And Procedure ⚡ 681.1

In the absence of specific statute creating right to judicial review of order of county board of appeals, Court of Appeals had no jurisdiction. U.C.A.1953, 78-2a-3(2)(a). DeBry v. Salt Lake County Bd. of Appeals, 1988, 764 P.2d 627. Administrative Law And Procedure ⚡ 663

Court of Appeals had jurisdiction to hear appeal from district court order affirming administrative suspension of license to operate a cosmetology/barbering school. U.C.A.1953, 78-2a-3; U.C.A.1953, 58-1-36 (Repealed); Const. Art. 8, § 5; Const. Art. 8, § 9 (Repealed); Court of Appeals Rule 4A. Scientific Academy of Hair Design, Inc. v. Bowen, 1987, 738 P.2d 242. Administrative Law And Procedure ⚡ 681.1; Licenses ⚡ 38

6. Criminal convictions

State's ability to take appeal in criminal case is limited. Rules Crim.Proc., Rule 26(3). State v. Quinn, 1996, 930 P.2d 267, 305 Utah Adv. Rep. 17, 309 Utah Adv. Rep. 11, rehearing denied. Criminal Law ⚡ 1024(1)

State could not take interlocutory appeal of magistrate's order denying its request to enhance defendant's driving under the influence (DUI) charge to third-degree felony, as order did not fit within any of categories of appealable decisions. Rules Crim.Proc., Rule 26(3). State v. Quinn, 1996, 930 P.2d 267, 305 Utah Adv. Rep. 17, 309 Utah Adv. Rep. 11, rehearing denied. Criminal Law ⚡ 1024(9)

Supreme Court has jurisdiction over appeals from orders on petitions for extraordinary writ which challenge the conviction of or sentence for first-degree felony or capital felony. U.C.A.1953, 78-2-2(3)(j), 78-2a-3(2)(h). Neel v. Holden, 1994, 886 P.2d 1097. Habeas Corpus ⚡ 813

Because petitioner was not challenging his conviction or sentence, he should have appealed dismissal of his

habeas corpus petition to Court of Appeals rather than Supreme Court. U.C.A.1953, 78-2a-3(2)(g). Padilla v. Utah Bd. of Pardons, 1991, 820 P.2d 473. Courts 🔑 248

Supreme Court has jurisdiction over direct appeal of first degree or capital felony conviction and over petition for extraordinary writ used as substitute for direct appeal of such conviction or sentence; Court of Appeals has jurisdiction in all other cases. U.C.A.1953, 78-2a-3(2)(g). Northern v. Barnes, 1991, 814 P.2d 1148, certiorari granted 843 P.2d 1042. Courts 🔑 248; Criminal Law 🔑 1018; Criminal Law 🔑 1019; Criminal Law 🔑 1020

Writ challenging postconviction actions of Board of Pardons was properly before Court of Appeals where it did not challenge conviction in trial court or sentence; fact that defendant was serving sentence for first-degree felony did not require transfer to Supreme Court. U.C.A.1953, 78-2a-3(2)(g). Northern v. Barnes, 1991, 814 P.2d 1148, certiorari granted 843 P.2d 1042. Courts 🔑 248

When sentencing judge reduces conviction, appeal lies in court having jurisdiction of degree of crime recorded in judgment of conviction and for which defendant is sentenced, rather than degree of crime charged in information or found in verdict. U.C.A.1953, 76-3-402, 78-2-2(3)(i), 78-2a-3(2)(f). State v. Doung, 1991, 813 P.2d 1168. Criminal Law 🔑 1019

Under statute granting Court of Appeals original appellate jurisdiction over appeals from orders on petitions for extraordinary writs "involving a criminal conviction," Court of Appeals lacked original appellate jurisdiction of appeal from denial of extraordinary writ involving an interstate transfer of a prisoner, which bore no relation to the underlying criminal conviction except that, "but for" the conviction, he would not have been incarcerated in Arizona and then transferred to Utah. U.C.A.1953, 78-2a-3, 78-2a-3(2)(g). Ellis v. DeLand, 1989, 783 P.2d 559, transferred to 786 P.2d 231. Habeas Corpus 🔑 813

7. Extradition orders


Court of Appeals had subject matter jurisdiction over appeal by prisoner held for extradition to Idaho in Utah county jail from district court's denial of prisoner's petition for writ of habeas corpus, pursuant to statute providing subject matter jurisdiction of appeals from orders on petitions for extraordinary writs involving criminal convictions; language of the statute is sufficiently broad to include those cases in which criminal conviction is involved in habeas corpus proceeding to challenge extradition. U.C.A.1953, 78-2a-3(2)(g). Hernandez v. Hayward, 1988, 764 P.2d 993. Habeas Corpus 🔑 813


8. Attorney fees


When party who prevails on appeal in divorce action, yet was not awarded fees at trial, claims attorney fees on appeal solely on basis of new allegations of change in financial condition and those allegations are not a matter of record and have not been adjudicated by finder of fact, Court of Appeals cannot evaluate claim; prevailing party's claim for attorney fees on appeal based on allegation of need must be addressed by trial court to determine need of claiming spouse, ability of other spouse to pay, reasonableness of fees and amount, if any, to be paid. U.C.A.1953, 30-3-3, 78-2a-3. Schaumburg v. Schaumburg, 1994, 875 P.2d 598. Divorce 🔑 287

9. Issuance of prerogative or remedial writs


Supreme Court had jurisdiction, under statutory exception to Court of Appeals' jurisdiction over appeals from

orders on petitions for extraordinary writs challenging decisions of Board of Pardons, to hear original direct appeal from district court's unconditional order of release on prisoner's petition challenging decision made at his original parole grant hearing which fixed length of his prison stay for two first-degree felonies. U.C.A.1953, 78-2-2(3)(j), 78-2a-3(2)(g, h); Rules App.Proc., Rule 44. Preece v. House, 1994, 886 P.2d 508. Courts  248

Court of Appeals had jurisdiction over petition for extraordinary writ; by issuing writ sought by petition, court would only be carrying into effect its judgments, orders and decree in previous cases directing judge to comply with Rule 63(b) with respect to several of petitioner's cases. U.C.A.1953, 78-2a-3(1)(a); Rules Civ.Proc., Rule 63(b). Barnard v. Murphy, 1994, 882 P.2d 679. Courts  207.1

Where Court of Appeals had appellate jurisdiction over subject matter of divorce case in which petitioner who filed petition for extraordinary writ had been a party, Court of Appeals had authority to issue necessary writs in connection with that case, even if no appeal was pending. U.C.A.1953, 78-2a-3(1)(b). Barnard v. Murphy, 1994, 882 P.2d 679. Courts  207.1

10. Mandamus

Court's decision to grant or deny petition for extraordinary relief in nature of mandamus is discretionary with court to which petition is brought, in sense that it is never matter of right on behalf of applicant. V-I Oil Co. v. Department of Environmental Quality, Div. of Solid and Hazardous Waste, 1997, 939 P.2d 1192, 317 Utah Adv. Rep. 11. Mandamus  7

U.C.A. 1953 § 78A-4-103, UT ST § 78A-4-103

Current through 2008 Second Special Session, including results from the November 2008 General Election.

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ADDENDUM “D”

Order Granting Defendant’s Motion for Summary Judgment

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JONATHON HALL,

Plaintiff,

JASON STEIMLE,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Case No. 040403916

Judge James R. Taylor

Defendant's Motion for Summary Judgment was heard by this Court on March 25, 2008. Defendant Jason Steimle was represented by Gary T. Wight. Plaintiff Jonathon Hall was represented by Rex J. Egar.

Based upon the parties' memoranda and oral argument upon Defendant's Motion, this Court holds that Plaintiff's claims against Defendant should be dismissed with prejudice. Specifically, this Court's findings of fact and conclusions of law are as follows:

1. Plaintiff Jonathon Hall asserts negligence claims against Defendant Jason Steimle arising from a motor vehicle accident that occurred on December 11, 2000.

2. In the summer of 1998 or 1999, Plaintiff suffered a whiplash injury when he dove into a shallow lake.

3. Plaintiff received chiropractic treatment for the whiplash injury.

4. On October 4, 2000—just over two months before the December 2000 motor vehicle accident—Plaintiff presented to Anderson Chiropractic, complaining of neck and back pain.

5. In his Complaint, Plaintiff alleges that he suffered permanent neck and back injuries as a result of the December 2000 motor vehicle accident.

6. According to the Amended Stipulated Scheduling Order filed with this Court, Plaintiff's expert reports were due on June 1, 2007.

7. Plaintiff never filed an expert report in accordance with Rule 26 of the Utah Rules of Civil Procedure.

8. Under Utah law, where the injury in question involves obscure medical factors which are beyond an ordinary lay person's knowledge, there must be expert testimony that the negligent act probably caused the injury.

9. In light of Plaintiff's injuries and treatment prior to the December 2000 motor vehicle accident, Plaintiff was required to designate an expert on causation.

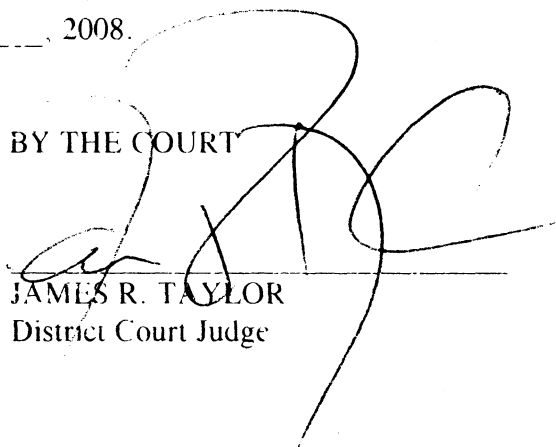
10. Because Plaintiff designated no expert on causation, he cannot provide evidence that the December 2000 motor vehicle accident caused the injuries described in his Complaint.

Accordingly, this Court ORDERS, ADJUDGES, AND DECREES:

1. Defendant's Motion for Summary Judgment is granted; and
2. Plaintiff's claims against Defendant are dismissed with prejudice.
3. Each party shall bear its own attorney's fees and costs associated with this motion.

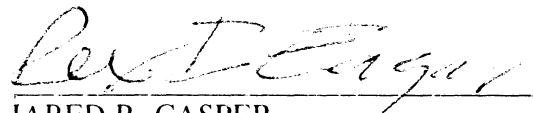
DATED this 23 day of April, 2008.

BY THE COURT


JAMES R. TAYLOR
District Court Judge

APPROVED AS TO FORM:

IVIE & YOUNG



JARED R. CASPER
REX I. EAGAR
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed on this 14th day of ~~March~~, 2008, postage prepaid, a copy of the foregoing **Order Granting Defendant's Motion for Summary Judgment** to the following:

~~David N. Mortensen~~ *RE*
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