

2009

Morgan v. IHC : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MIDGE MORGAN,

Plaintiff-Appellant,

vs.

INTERMOUNTAIN HEALTH CARE,
INC., IHC LDS HOSPITAL and JOHN
AND JANE DOES I-XX,

Defendants-Appellees.

**BRIEF OF
DEFENDANTS-APPELLEES**

Case No. 20091044-CA

Appeal from the Judgment of the Third Judicial District Court
County of Salt Lake

The Honorable LA Dever, District Court Judge, Presiding
District Court Case No. 050918581

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STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Issue: Whether the trial court correctly dismissed the plaintiff's medical negligence claims on summary judgment when she admitted that she had pre-existing injuries to her shoulder, she alleged that medical malpractice caused injury to her shoulder, and she did not retain any experts to support her claims.

Standard of Review: The Court "review[s] the district court's grant of a motion for summary judgment for correctness." *Overstock.com, Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶ 12, 192 P.3d 858. Rule 56 (c) provides that judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Although the Court considers the facts in the light most favorable to the nonmoving party, to defeat a motion for summary judgment, any alleged issue of fact must be material. *Overstock.com, Inc.*, 2008 UT 55, ¶ 12.

Preservation of Issue: The issue involved in this appeal stems from the trial court's decision to grant summary judgment for the defendants on November 7, 2009. (R. 440-445.)

STATEMENT OF THE CASE

A. Nature of the Case

Midge Morgan ("Morgan") filed an action against Intermountain Health Care Inc. and LDS Hospital (collectively the "Hospital") on October 20, 2005. (R. 1-16.) In the Complaint, Morgan alleges that she suffered shoulder injuries as a result of the care she received from Rebecca Davis, RN, ("Nurse Davis") on February 27, 2003 while she was recovering from cervical spine surgery at the Hospital. (*Id.*) Specifically, Morgan alleges that the rotator cuff in both of her shoulders was damaged when Nurse Davis attempted to assist her to the bathroom. (*Id.*)

Significantly, Morgan had a long history of shoulder problems before she was admitted to the Hospital on February 26, 2003. Moreover, she complained of problems with her shoulders before her surgery, while she was in the recovery room and on the nursing unit before Nurse Davis became involved in her care. (R. 203-210, 425; Morgan Add. 3 - 2, 12, 18, 22.) Morgan has never disputed that she suffered from pre-existing shoulder problems. (R. 441-442.)

B. Course of Proceedings and Disposition in the Trial Court

During discovery, Morgan failed to identify an expert witness to testify about the standard of care a nurse must follow when moving a patient recovering from spinal surgery, but *more importantly*, she did not identify an expert witness who could support the causation element of her case. (R. 440-445.) On the other hand, the Hospital identified Kathleen Baldwin, RN, MSN, PhD. ("Nurse Baldwin"), an experienced

surgical nurse and Bruce Evans, MD ("Dr. Evans"), an orthopedic surgeon certified by the American Board of Orthopaedic Surgery. (R. 130-132.)

In an affidavit, Nurse Baldwin opines that Nurse Davis fully met the standard of care. (R. 402-405.) Also, Dr. Evans opines that, based on his review of the medical records, radiology films and deposition testimony, neither Nurse Davis nor any LDS Hospital employee caused Ms. Morgan's alleged shoulder injuries or current shoulder problems. (R. 424-427.) Specifically, Dr. Evans states that Morgan's shoulder problems pre-existed her admission to LDS Hospital. (R. 425.) Dr. Evans expounds by stating that it is hard to imagine how Nurse Davis could tear both rotator cuffs at the same time as Morgan claims. (*Id.*) Further, the mechanism or way in which Morgan alleges the injury occurred is inconsistent with the type of injury she claims. (R. 426.) Finally, Dr. Evans opined that "Morgan's age and medical history are entirely consistent with the natural sequence of how rotator cuffs are commonly torn." (*Id.*)

On June 19, 2009, the Hospital moved the trial court to dismiss Morgan's Complaint because, without expert testimony, she could not prove the standard of care applicable to the Hospital, breach of the standard of care, or that any such breach caused Morgan's injury. (R. 192.) After considering the briefing by the parties with respect to the Motion for Summary Judgment, the trial court dismissed Morgan's claims against the Hospital. (R. 440-445.) The trial court noted that while Morgan claims that she does not need expert testimony to prove her claims against the Hospital, she never disputed her previous shoulder injuries. (R. 442.) As a result, relying on *Fox v. Brigham Young University*,

Inc., 2007 UT App 406, 176 P.3d 446, the trial court ruled that "lay testimony is not sufficient to explain whether [Morgan's] injuries were the result of a previous injury and surgery or the act of a nurse." (R. 443-444.)

STATEMENT OF THE FACTS¹

A. Morgan has a long history of shoulder problems.

While Morgan claims in her Complaint that she "had no previous injuries, damages or defects in either shoulder prior to February 26, 2003," when she was recovering from cervical spine surgery (R. 4), the medical record and her deposition testimony reveal that this is not true. Morgan had shoulder surgery when her right shoulder was previously dislocated. (R. 203-204.) Morgan told her doctor in 2001 that she still suffered from pain in her right shoulder as a result of this surgery. (R. 207-208; Morgan Add. 3 - 12².) Morgan also described pain in her shoulders following the automobile accident that led to her back surgery. (R. 205-206; *see also* Morgan Add. 3 - 2.) When Morgan applied for PIP benefits in June 1998, she noted that she had shoulder pain. (R. 206.) During her deposition, Morgan also explained that she may have suffered a fall and was kicked by a

¹ In her statement of facts, Morgan has included immaterial testimony. As a result, the Hospital has not specifically addressed every allegation raised in Morgan's brief. Even though the Hospital has not addressed every immaterial fact raised by Morgan, the Hospital does not concede the veracity of the facts set forth by Morgan, especially Morgan's version of the events with respect to the care she received from Nurse Davis.

² While Morgan included medical records with the addendum to her brief that were not included in the record and that were never submitted to the trial court, these records only corroborate the material facts before the trial court set forth in deposition testimony and affidavit. Also, contrary to Morgan's assertions, these medical records show Morgan's history of shoulder problems. (*See, e.g.*, Morgan Add. 3 - 2, 12, 18, 22.)

horse before she underwent back surgery at the Hospital. (R. 209-210.)

More importantly, when Morgan was admitted to the Hospital on February 26, 2003 for her back surgery, she complained of pain in her shoulders *before* surgery and continued to complain of shoulder pain in the recovery room *immediately following* surgery. (R. 425.) Additionally, she complained of bilateral shoulder pain when she was first admitted to the nursing floor. (*Id.*; Morgan Add. 3 - 22.)

B. Morgan's shoulder problems preexisted her alleged encounter with Nurse Davis.

Dr. Evans, a physician practicing medicine in the State of Utah who is certified by the American Board of Orthopaedic Surgery, was asked to offer an opinion as to whether Nurse Davis, or any other employee of the Hospital caused or contributed to Morgan's alleged shoulder injury. (R. 394.) Specifically, Dr. Evans was asked whether Nurse Davis caused the injuries of Morgan when she attempted to assist Morgan to the bathroom. (*Id.*) After reviewing the medical record, radiology films and deposition testimony, it is Dr. Evans' opinion, based upon his education, training and experience, that neither Nurse Davis nor any Hospital employee caused Morgan's alleged shoulder injuries. (*Id.*) Specifically, it is his opinion that Morgan's shoulder problems pre-existed her admission to the Hospital. (*Id.*)

C. The manner in which Morgan claims that her injury occurred is inconsistent with the type of injury she alleges.

In his Affidavit, Dr. Evans opines:

[I]t is hard to imagine that both rotator cuffs could be torn at the same time.

In short, the alleged mechanism in which Morgan claims that her shoulders were injured is not consistent with her injury. Rotator cuff tearing is most commonly associated with a deceleration injury which did not happen [in] the manner Ms. Morgan described.

(R. 425-426.) Dr. Evan also explains:

Further, Ms. Morgan's age and medical history are entirely consistent with the natural sequence of how rotator cuffs are commonly torn. For example, over time, the medical record indicates that Ms. Morgan developed neck problems and bone spurs. Her neck problems were likely caused by the motor vehicle accident she was involved in 1998. When her neck became painful, the large shoulder musculature became weaker due to nerve compromise. The rotator cuffs in her shoulders naturally had to work harder to compensate, leading to a thicker tendon or tendonitis from overuse. Once thickened they came in contact with the acromium which caused impingement and inflammation, all of which resulted in loss of blood supply and degenerative tearing of her rotator cuffs.

(R. 426) In summary, Dr. Evans concludes, "[I]t is my opinion to a reasonable degree of medical probability that the incident described in Ms. Morgan's Complaint did not cause or contribute to her alleged injury or current medical condition." (*Id.*) Moreover, Morgan's treating physician have not opined, to a reasonable degree of medical probability, that any action on the part of the hospital caused or contributed to Morgan's alleged injury.

D. The knowledge necessary to position, move and transport post-operative cervical spine patients, such as Morgan, is not possessed by the ordinary layperson.

Nurse Baldwin is a registered nurse with a doctorate degree in nursing. (R. 392.)

Nurse Baldwin was asked by counsel for the Hospital to review Morgan's medical records and deposition testimony pertinent to this case and to offer an opinion as to whether the

nurses who cared for Morgan during her stay at the Hospital met the standard of care.

(*Id.*) In reponse, Nurse Baldwin offered an opinion that the actions of Nurse Davis met the standard of care when she attempted to help Morgan to the bathroom on February 27, 2003. (R. 393.)

Further, as a registered nurse and nursing educator, Nurse Baldwin is familiar with the standard of care applicable to nurses caring for patients recovering from cervical spine surgery. (*Id.*) Nurse Baldwin also possesses knowledge of the special skills and training nurses receive in order to properly move and transport such patients. (*Id.*) In fact, part of the nursing curriculum and a significant part of the fundamentals course at Nurse Baldwin's university involve teaching student nurses to properly position, move and transport patients in acute care settings. (*Id.*) According to Nurse Baldwin, the skills required to position, move and transport post-operative cervical spine patients, such as Morgan, are not within the common knowledge of a lay person. (*Id.*) For that reason, family members and friends are advised not to perform such duties. (*Id.*)

E. Nurse Davis acted in compliance with the orders issued by Morgan's doctor.

When Nurse Davis attempted to help Morgan move to the bathroom, she was acting in compliance with orders from Morgan's treating physician. Morgan's treating physician, Steven Warner, M.D., had written an order on February 26, 2003 that Morgan could move without restrictions, and on February 27, 2003, he wrote an order that Morgan should meet with a physical therapist. (R. 422, 423.) The medical records show that on February

26, 2003, Morgan's doctor ordered "activity: Ad Lib" after her surgery, which means Morgan had no restriction in her activity. (R. 422; *see also* Morgan Add. 3 - 20.) Also, the next day, February 27, 2003, the day Morgan alleges she was injured by Nurse Davis, Dr. Warner ordered the nurse caring for Morgan to mobilize her for a consultation with a physical therapist. (R. 423; Morgan Add. 3 - 21.) After reviewing the record, Nurse Baldwin feels that it was entirely appropriate, given Morgan's condition and given the orders from Morgan's treating physician, for Nurse Davis to attempt to ambulate her to the bathroom on February 27, 2003. (R. 394.)

SUMMARY OF THE ARGUMENT

The dispositive question for this appeal is whether the trial court erred by granting summary judgment on Morgan's claims of medical malpractice when she did not retain any expert to support her claims. To prevail in this lawsuit, Morgan must prove with expert testimony that her injuries were caused by the Hospital's alleged breach of the standard of care with expert testimony.

The requirement of expert testimony with respect to causation is clear-cut in this case because of Morgan's pre-existing injuries. Morgan admitted during discovery that she has suffered with shoulder pain for many years before her alleged shoulder injury at the Hospital occurred. As explained by *Fox v. Brigham Young University, Inc.*, 2007 UT App 406, 176 P.3d 446, expert testimony is required to explain whether Morgan's shoulder injuries were caused from her prior injuries or because of the actions of a nurse at the Hospital. Without expert testimony, a jury would be required to speculate about the

causes of Morgan's injuries.

Further, Morgan must prove with expert testimony the standard of care and breach of the standard of care. The care at issue in this case -- moving a post-operative cervical spine patient as permitted by a doctor's order -- is not within the common knowledge of a lay person. Therefore, because Morgan needed experts to support her claims so she could carry her burden of proof, and because she did not retain any experts to support her claims, Morgan's claims fail as a matter of law, and the trial court did not err when it granted summary judgment in favor of the Hospital.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED MORGAN'S CLAIMS OF MEDICAL NEGLIGENCE ON SUMMARY JUDGMENT BECAUSE MORGAN FAILED TO OBTAIN EXPERT TESTIMONY TO ESTABLISH THAT HER INJURIES WERE CAUSED BY THE ALLEGED NEGLIGENCE OF THE HOSPITAL.

In Utah, to successfully maintain a medical malpractice action, a plaintiff must prove through expert testimony the standard of care, breach of that standard of care, and that the injury was proximately caused by the alleged breach. *See Dalley v. Utah Valley Regional Medical Center*, 791 P.2d 193, 195 (Utah 1990). Utah law requires expert testimony in nearly all medical malpractice cases because "issues of fact which are outside the knowledge and experience of lay persons must be established by expert testimony." *Hoopiiaina v. Intermountain Health Care*, 740 P.2d 270, 271 (Utah Ct. App. 1987). If a plaintiff fails to provide expert testimony regarding a defendant's standard of care, breach of that standard of care, and causation as to plaintiff's injuries, summary

judgment is appropriate. *Dikeou v. Osborn*, 881 P.2d 943, 946 (Utah Ct. App. 1994) ("A plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the three prongs of the prima facie case justifies a grant of summary judgment to the defendant.").

In her brief, Morgan argues that because she styled one of her claims of relief as "negligence" rather than "medical malpractice," she does not need to prove her claim with expert testimony. (Br. of App. 30.) Specifically, Morgan argues that because "expert testimony is not required to prove [n]egligence," the trial court erred when it granted the Hospital's motion for summary judgment based on the fact that she did not have expert testimony to support her claims. Morgan's argument exalts style over substance.

"Whether a case is classified as ordinary negligence or medical malpractice is not determinative of whether expert testimony is required." *Cunningham v. Riverside Health System, Inc.*, 99 P.2d 133, 136 (Kan. Ct. App. 2004). Even when a cause of action is styled as "simple" negligence rather than "medical malpractice," expert testimony is necessary when medical care is at issue because the "issues of fact . . . are outside the knowledge and experience of lay persons" *Hoopiaina*, 740 P.2d at 271.

An exception to the general requirement of expert testimony in medical malpractice cases exists under Utah law. Utah courts have recognized that "expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman."

Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980) (holding that expert testimony is not

required to establish negligence when a needle is left within a patient after a surgery); *see also Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988) ("Due to the technical and complex nature of a medical doctor's services, expert medical testimony must be presented at trial in order to establish the standard of care and proximate cause - *except in unusual circumstances.*")(emphasis added). As explained by the *Chadwick* court, the common knowledge exception does not remove the requirement for expert testimony to show that the negligence at issue *caused* the alleged injuries if the issues of causation are not within the common knowledge and experience of the layman. 763 P.2d at 822. "In other words, while it may be common knowledge that a reasonable medical practitioner would not leave a needle in a patient's body, it requires expert testimony to establish that the lost needle is causing" plaintiff's alleged injuries. *Id.*

Here, Morgan did not designate a standard-of-care expert or a causation expert to support her case. Instead, Morgan has argued that she does not need expert testimony to meet her burden of proof because the issues in this case are within the common knowledge and experience of the typical juror. Not only would typical jurors be unable to understand the nursing techniques at issue in this case, but they would also be unable to understand the issues surrounding causation in light of Morgan's prior injuries to her shoulder and the mechanism by which such injuries occur. Without expert testimony, the fact finder would be required to resort to speculation when making a decision on whether the alleged negligence caused Morgan's injuries. *See Fox v. Brigham Young University, Inc.*, 2007 UT App 406, 176 P.3d 446; *see also Cunningham*, 99 P.3d at 137 ("[W]hen a

plaintiff has pre-existing conditions that may have caused the alleged injury, expert testimony is necessary to show that the negligent conduct caused the injury.").

In *Fox*, Mrs. Fox and her husband sued Brigham Young University for negligence and loss of consortium after she injured her knee when she descended a staircase at the university and fell. *Id.* ¶ 2. After her fall, EMTs arrived to assist her, and they noted obvious swelling and deformity in the plaintiff's right knee. *Id.* ¶ 4. They also noted 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." *Id.* Mrs. Fox told 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." *Id.* ¶ 5.

Before trial, the University brought a motion in limine asserting that the plaintiffs' claims failed because they did not have expert testimony to establish a prima facie case of negligence. *Id.* ¶ 8. In response, the plaintiffs admitted that they did not have expert testimony to support their case, but that the injuries suffered by Mrs. Fox to her knee "were within the realm of common experience" and that expert testimony was not required. *Id.* ¶ 9. The trial court agreed with the University's position, and converted the motion in limine to one for dismissal pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. *Id.* ¶ 10. The trial court ruled that the plaintiffs could not sustain their burden of proof as to causation and damages without expert testimony. *Id.* ¶ 11. The trial court explained that "it has 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.*

On appeal, the *Fox* court held that 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." *Id.* ¶ 23. The *Fox* court explained 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.* ¶ 21 (quotation and internal ellipses omitted).

"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, thus leaving causation to jury speculation." *Id.* (internal quotations and citations omitted). "[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.* ¶ 22 (quotation omitted). As a result, because Mrs. Fox's own admissions to the EMTs after her injury "tied the cause of her fall to medical factors sufficiently complicated to be beyond the ordinary senses and common experience of a layperson," and because she did not have expert testimony to prove her prima facie element of causation, the trial court did not err when it dismissed her case. *Id.* ¶ 23.

Similarly, in this case, by her own admissions, Morgan has tied the cause of her injury to medical factors complicated enough to be beyond the ordinary senses and common experience of the typical juror. Morgan had shoulder surgery when her right shoulder was previously dislocated. (R. 203-204.) Morgan told her doctor in 2001 that

she still suffered from pain in her right shoulder as a result of this surgery. (R. 207-208; Morgan Add. 3 - 12.) Morgan also described pain in her shoulders following the automobile accident she suffered in 1998. (R. 205-206; *see also* Morgan Add. 3 - 2.) When Morgan applied for PIP benefits in June 1998, she noted that she had shoulder pain. (R. 206.) During her deposition, Morgan also explained that she may have suffered a fall and was kicked by a horse before she underwent back surgery at the Hospital. (R. 209-210.) When Morgan was admitted to the Hospital in February 2003 for her back surgery, she continued to complain of pain in her shoulders before surgery, in the recovery room and when she was admitted to the nursing floor. (R. 425.)

Because of the complex nature of shoulder injuries and the mechanism in which they occur, as well as the fact that Morgan had preexisting shoulder problems, her treating physicians would not offer an opinion on the cause of Morgan's injuries. For example, while Dr. Warner, the physician who performed Morgan's back surgery, said it was "possible" that Morgan's rotator cuffs were torn in the Hospital, he could not say it was "probable" or "more likely than not." (R. 288.)³ Based on x-ray films of Morgan's shoulders, he could not say that Morgan suffered her shoulder injury in late February

³ In her brief, Morgan cites to testimony from Dr. Warner to support her claim that Nurse Davis caused her shoulder injuries. (Br. of App. 29.) The record reveals, however, that Dr. Warner never testified that it was more probable than not that Morgan's shoulder injuries were caused by the actions of Nurse Davis. (R. 288-289.) Instead, after stating that he did not know the cause of Morgan's injuries, Dr. Warner engaged in speculation and conjecture regarding the cause of her injuries. Significantly, Morgan has not argued that Dr. Warner would support her case with expert testimony on the issues of causation and breach of the standard of care, but instead she has consistently argued that expert testimony is not required to support her case.

2003. (*Id.*) Along the same lines, Dr. Metcalf, who performed Morgan's shoulder surgeries, explained that it is difficult to determine when Morgan's injuries occurred, and said that he "couldn't tell . . . whether or not [Morgan] tore her rotator cuff last week or five years ago." (R. 213-214.) Morgan's own testimony and the testimony of her treating physician both show that because of the nature of her complicated shoulder injuries, expert testimony is required to link the alleged negligent act by the Hospital's employee to Morgan's injuries.

Morgan relies on *Bowman v. Kalm*, 2008 UT 9, 179 P.3d 754, to support her argument that she does not need to provide expert testimony to be able carry the burden of proof on her claims against the Hospital. In *Bowman*, the ex-husband of a deceased patient brought medical malpractice and wrongful death claims against the patient's psychiatrist. *Id.* ¶ 4. The patient was killed from asphyxiation when a dresser was pulled on top of her after she took medication from her psychiatrist that allegedly made her clumsy. *Id.* ¶¶ 2 - 3. When the plaintiff failed to provide any expert testimony on the issue of causation, the defendant "moved for summary judgment, which the district court granted." *Id.* ¶ 5. On appeal, the *Bowman* court reversed the district court's decision, and noted that the "causal connection between a decedent made clumsy due to a doctor's negligence, and that decedent's death due to a dresser being pulled on top of her, is not one that requires specialized medical knowledge." *Id.* ¶ 13. As a result, the *Bowman* court reversed the district court, and held that the issue of causation in that case fell "with the common knowledge exception, expert testimony is not necessary on the proximate

cause element." *Id.* ¶ 15.

Unlike the patient in *Bowman*, however, Morgan suffered from pre-existing injuries that may have caused the injuries at issue in this case and there is expert testimony from Dr. Evans that the mechanism of the injury Morgan claims is inconsistent with the way such injuries generally occur. Because the patient in *Bowman* did not suffer from pre-existing conditions, the holding in *Bowman* is inapplicable to this case.

Instead, the trial court correctly ruled that expert testimony was required when pre-existing issues are at issue based on the holding of *Fox v. Brigham Young University, Inc.*, 2007 UT App 406, a case that Morgan did not even cite in her opening brief, which is curious considering that the trial court spent half of its written ruling analyzing and applying the holding of *Fox* case to this case. (R. 440-444.) Therefore, because Morgan could not provide an expert that could take the causation element of her case out of the realm of speculation, the trial court did not err when it dismissed her claims on summary judgment and this appeal should be summarily dismissed.

II. MORGAN'S CLAIMS ALSO FAIL BECAUSE SHE FAILED TO OBTAIN EXPERT TESTIMONY TO ESTABLISH THE STANDARD OF CARE AND BREACH OF THE STANDARD OF CARE.

As explained above, Utah law requires expert testimony in nearly all medical malpractice cases because "issues of fact which are outside the knowledge and experience of lay persons must be established by expert testimony." *Hoopiiaina*, 740 P.2d at 271. Also as explained above, Utah courts have recognized that "expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the

treatment received is within the common knowledge and experience of the layman."

Nixdorf, 612 P.2d at 352.

The common knowledge exception does not apply in this case. Expert testimony is needed to establish the standard of care a nurse operates under when she must position, move and transport post-operative cervical spine patients. According to Nurse Baldwin, an expert retained by the Hospital, a nurse must use specialized knowledge when she positions, moves, and transports post-operative cervical spine patients. (R. 393.) How to move a patient shortly after spinal surgery is not the sort of knowledge a lay person would possess. (*Id.*) As Nurse Baldwin explained, part of the nursing curriculum at her university involves teaching student nurses to properly position, move and transport patients in acute care settings. (*Id.*) For that reason, family members and friends are advised not to move a patient while she is in the Hospital recovering from spinal surgery. (*Id.*) Therefore, contrary to Morgan's assertions, the care at issue in this case requires specialized medical knowledge, and Morgan must employ expert testimony to establish the standard of care and whether the standard of care was breached.

Morgan relies on *Prairie v. University of Chicago Hospitals*, 698 N.E.2d 611 (Ill. Ct. App. 1998), a decision from Illinois, to argue that expert testimony is not required to establish the standard of care and breach of the standard of care in this case. (Br. of App. 23 - 30.) In *Prairie*, a patient underwent back surgery, and, following the surgery, the nurse caring from the patient violated an order given by the attending physician when the nurse moved the patient beyond what the patient could tolerate so the nurse could make

the patient's bed. *Id.* at 613-614. The patient sued the Hospital based on claimed injuries as a result of the nurse's actions. *Id.* at 613. While the patient was able to obtain "expert testimony regarding . . . proximate cause," *id.* at 615, the trial court granted summary judgment in favor of the defendant because the patient failed "to obtain expert testimony regarding the applicable standard of care and whether it was breached by the defendant," *id.* at 613. At issue on appeal was whether the patient needed expert testimony on the standard of care to satisfy her burden of proof in her medical malpractice case. *Id.* In holding that expert testimony was not required on the issue of the standard of care, the *Prairie* court "*emphasize[d]* that the order contained the explicit admonition that the plaintiff's activity was to be increased 'as tolerated'." *Id.* at 617 (emphasis added). Based on the fact that the nurse in *Prairie* acted outside the scope of a doctor's order while she moved the patient to perform the non-medical function of making a bed, the court ruled that expert testimony was not required to establish the standard of care and breach of the standard of care, but instead these issues could be properly left to the jury because they were in the common knowledge of a lay person. *See generally id.*

The case here differs from the *Prairie* case on two important points. First, unlike the *Prairie* case, Morgan has not retained an expert to establish the causation element of her case. Second, unlike the nurse whose care was at issue in *Prairie*, the nurse caring for Morgan did not act outside the scope of a doctor's order. Morgan's attending physician entered an order that Morgan had no restrictions on her activity. (R. 422, 423.) The nurses were also ordered to present Morgan for physical therapy on the day Morgan

alleges she was injured. (*Id.*) While expert testimony may not be needed to determine the standard of care when a nurse acts outside the scope of a doctor's order while moving a patient recovering from surgery, courts recognize that expert testimony is required to establish the standard of care when a nurse assists a patient following surgery in compliance with a doctor's order. *See Cunningham*, 99 P.3d at 138.

In *Cunningham*, the plaintiff, Cunningham, sued a hospital, Riverside, alleging that a nursing assistant "negligently twisted Cunningham's leg while assisting her into bed, causing her femur to break." *Id.* at 135-136. At the time of the incident, Cunningham was recovering from knee surgery, and was also diagnosed with "advanced degenerative joint disease" and "severe osteoarthritis" *Id.* After Cunningham failed to obtain medical expert testimony to support her claims, Riverside moved for summary judgment, and the trial court granted this motion. *Id.* On appeal, the *Cunningham* court affirmed the trial court's decision. While Cunningham argued that moving a patient does not require specialized knowledge and that she did not need expert testimony to establish the standard of care and breach of the standard of care, the *Cunningham* court disagreed, and held that expert testimony was required to prove not only causation, but also the appropriate standard of care, based in part on the fact "that the nurse's assistant was positioning Cunningham's immobilized leg in accordance with her doctor's recommendations for healing." *Id.* at 135.

Here, the knowledge required by Nurse Davis to move Morgan while she was recovering from back surgery is not within the common experience of a layperson,

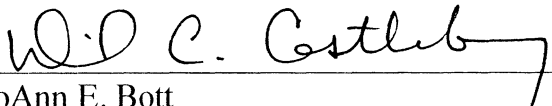
especially when Nurse Davis acted within the scope of orders issued by Morgan's attending physician. (R. 422, 423.) Accordingly, expert testimony is necessary for Morgan to prevail on her claims against the Hospital, and the trial court did not err when it dismissed Morgan's claims on summary judgment after she did not name any experts that could support her case.

CONCLUSION

For the foregoing reasons, the Hospital respectfully requests the Court to affirm the decision of the trial court.

DATED this 6th day of August, 2010.

MANNING, CURTIS, BRADSHAW & BEDNAR



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2010, I caused to be served in the manner indicated below a true and correct copy of **BRIEF OF DEFENDANT-APPELLEE** upon the following:

☐ VIA FACSIMILE
☒ VIA HAND DELIVERY
☐ VIA U.S. MAIL
☐ VIA FEDERAL EXPRESS
☐ VIA EMAIL

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