

2010

Iris M. Spafford, and Earl S. Spafford v. Granite Credit Union, A Utah Corporation : Reply Brief

Utah Court of Appeals

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DEC 20 2010

IN THE UTAH COURT OF APPEALS

IRIS M. SPAFFORD, and
EARL S. SPAFFORD

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Plaintiffs/Appellants,

vs.

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Case No. 20100086-CA

GRANITE CREDIT UNION,
A Utah Corporation,

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Defendant/Appellee.

District Court Case No.
07911059

APPELLANTS' REPLY BRIEF

APPEAL FROM A DECISION AND ORDER DENYING MOTION TO RECUSE OR OTHERWISE DISQUALIFY THE TRIAL COURT AND GRANTING MOTION FOR SUMMARY JUDGMENT, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE TYRONE MEDLEY PRESIDING.

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INTRODUCTION

Appellants have only addressed those issues Appellees chose to argue in its Brief. These selected issues are tantamount to conceding the correctness of the Spafford’s legal position. All exhibits in the opening brief are incorporated herein.

- Appellees concede that on a motion for summary judgment, the Appellate Court grants “[n]o deference to the district court’s conclusions, and construe all facts and all reasonable inferences in the light most favorable to the nonmoving party”. Bodell Const. Co. v. Robbins, 2009 UT App 52, ¶ 16, 215 P.3d 933.
- Appellees concede that “[o]n a motion for summary judgment, a trial court should not weigh whether disputed material issues of fact exist”. Bear River Mut. Ins. Co v. Williams, 2006 UT App 500, 153 P.3d 798, 802.
- Appellees concede that a jury could infer from photographs that an asphalted modified area may present a dangerous condition and a foreseeable risk of harm to travelers. (Appellants’ Exhibit 1). Rose v. Provo City, 2003 UT App. 77, 67 P.3d 1017, 1024.
- Appellees apparently concede that they had foreknowledge of the use of Clarence Kemp and his opinion . Appellants’ expert witness, as evidenced by Granite’s own expert witness report, via Mr. Smiltneek made specific reference to the opinions of Clarence Kemp and his employer, Forsgren & Associates, a total of *three times in a four page report*, at the time of Granite’s expert witness designation. R. 304-324; Exhibit 3

- By its own admission, Appellee concedes that there were variable elevation differences between the parking lot pavement at the site of the accident, ranging between two to nine inches. R. 428-443, ¶ 14, et seq.; Exhibit 6. While Mr. Smiltneek tries to explain away the height variance on the step, this clearly creates an inference of duty and breach which should be construed in favor of the Spaffords.
- Appellees clearly concede “[t]hat the right to jury trial in civil cases is guaranteed by Article 1, section 10 of the Utah Constitution”. Intern. Harvester Credit Corp., v. Pioneer Tractor and Implement, Inc., 626 P.2d 418 (Utah 1981).

REPLY TO GRANITE’S STATEMENT OF THE FACTS: It was argued in

¶ 7 of Appellee’s Statement of the Facts that “no significant changes had been made to the parking area since its construction”. Appellee’s Brief, p. 7. The Appellant takes issue with this statement and refers the court to the testimony of Granite Chief Operating Officer, Curtis Dolman, who testified under oath, that Granite had not only owned, controlled and maintained the property, including the parking lot adjacent to the credit union from the beginning, R. 460, 670; Exhibit 5 to Opposition to Summary Judgment, ¶ 7; but that he personally conducted periodic inspections of the property, at least twice per year, to address repair and maintenance modifications to the asphalt during Granite’s ownership of the property. R. 660; Appellants’ Exhibit 8, pp. 33-34. ***Mr. Dolman further testified*** that Granite made modifications to the asphalt during its ownership of the property. R. 660, ¶ 8. He testified: “I don’t know and don’t know of any repairs except asphalt replacement kinds of things. R. 660, ¶ 8. Surely his periodic inspections of the property to specifically address maintenance and repair gives

rise to an inference of duty, on the part of Granite, to provide a safe path of ingress and egress for patrons to the credit union. At the very least this creates a favorable and reasonably inference clearly within the purview of the jury or finder of fact. Cf. Trujillo v. Utah Dept. of Transp., 1999 UT App. 227, 986 P.2d 752-63. (It is a jury question if a contractor's work on behalf of a landowner proximately causes an injury at the behest of The employer).

REPLY TO GRANITE'S PROCEDURAL HISTORY: Page 12, ¶ 39 of Granite's brief inaccurately characterizes the October 9, 2009 filing of the Spaffords' Motion for Enlargement of Time to designate their experts, as being "nearly 5 months After the deadline had expired". They cite to R. 625-36. *This assertion is grossly inaccurate.* Despite this time delay embellishment, by actual statement or by inference, The Spaffords' acted in good faith, with due diligence, as demonstrated below:

<u>Action Taken:</u>	<u>Date of Filing:</u>	<u>Days Which Transpired:</u>
Deadline to Designate Expires.	May 16, 2009,	(Sat., runs 5/18/09).
Withdrawal of Nielson & Senior	June 10, 2009 (R. 242-243)	24
Pro Se Appearance of Spaffords	June 29, 2009 (R. 246-247)	18
Appellant Designates Expert	August 3, 2009 (R. 304-324)	36
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Thus, from the time of Counsel's withdrawal, 53 days transpired; if the untimely designation looks back to Monday, May 18, 2009, 79 days transpired before Spaffords designated their expert. This is a far cry from the appellee's argument of "[n]early 5 months after the deadline had been filed". *Such an assertion is simply untrue.* And from

the time the appellants entered their pro se appearance, it was a short 36 days before their expert was formally designated and 79 days, (including time while represented by counsel), before the deadline passed. These dates are well established on the Appellate Court docket, and such an assertion alone is a violation of Rule 24(k). The requirement of “accuracy” is also a component of the rule and Granite should be bound by this provision.

REPLY TO GRANITE’S SUMMARY OF ARGUMENT AND REQUEST TO

STRIKE UNDER RULE 24(k): *Many of the factual and procedural arguments*

addressed in Granite’s Disputed Statement of the Facts and Procedural History above are by this reference incorporated herein. Again, for brevity’s sake, the appellant will not repeat the same argument. But there is one comment in the summary of argument that should be addressed: The return to Utah R. App. P. 24(k), by a litigant who, early on in these proceedings, urged the court to “. . . affirm the judgment below without reaching the merits of the appeal. . . .”(Appellee’s Motion to Strike Appellants’ Brief, p. 2, July 27, 2010). It is apparent that by its own admission, **Granite does not want this matter heard on the merits under any circumstances.** In response to the earlier motion, on August 19, 2010, the court correctly ruled that the brief’s primary deficiency was its failure to cite to the record. It afforded the Appellants twenty days to correct this deficiency, and the Spaffords have fully complied with the Court Order. *In the summary of its argument*, Appellee states: “There is no Utah authority supporting the Spafford’s argument that a motion to disqualify must be handled on a strictly *ex parte* basis. Finally, Spafford’s argument, which represents an attack on the integrity of GCU’s counsel and the District Court, violates Utah R. App. 24(k)”. *At the outset*, the Appellant’s Opening Brief likely cites probably the only Utah Authority which attempts to distinguish

between a motion or an action on a Utah R. Civ. P. 63(b) Motion to Disqualify. The Court, in State of Utah v. Poteet, 692 P.2d 760, 763-764 (Utah 1984), clearly states that “[a]lthough Rule 63(b) does not designate the procedure therein as one done by motion, the filing of the affidavit more clearly resembles a motion in its implementation and effect than it resembles an action. . . *it is neither a motion nor an action.*” Id. (emphasis added). And the logical extension of this holding is to conclude that the trial court or the Presiding Judge are the only individuals who may address a motion to disqualify; it impliedly precludes additional filings from a party to the proceeding. (see Appellants’ Opening Brief, pp. 28-29). The filing prejudiced the Appellants and effectively impaired their Due Process Right to Neutrality before the Trial Judge. *Moreover*, characterization of the Appellants’ argument was scandalously characterized by Granite as a “**novel contention**”. (Appellee’s Brief, p. 41). Such comments are burdensome at best and scandalous on its very face. And as Granite’s brief continues, it cites to comments made in Appellant’s original brief, which was stricken, and then corrected by the Appellants’ subsequent filing. Surely, it was never the Appellate Court’s intent to make their earlier ruling retroactive. For these, and other reasons we urge the court to disregard Granite’s repetitive yet subtle attempt to inflame the court and its continued attempts to have the Appellants’ Brief stricken. **Utah R. App. P. 24(k) reads in pertinent part:** “*All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matter*”. (emphasis added). In short, not only should the Appellate Court be alert to any scandalous matter, but it should also focus upon the

accuracy of the facts and the law cited by each respective party. ***One statement lacking in accuracy***, cited by appellees in violation of the rule, is on page 28 of appellee's brief in which it expressly denied a scintilla of evidence concerning the oral discovery stipulation of counsel. As stated by Granite: ". . .[t]hey have never presented a single piece of documentary evidence indicating the existence of such a stipulation". This statement is inaccurate. Not one, but two affidavits were filed with the court, sworn and notarized under oath by Spafford's prior counsel, Nielsen & Senior. R. 744-747; 987-990; Appellants' Exhibits 8 and 9. Accordingly, appellees have given inaccurate information to the court, in violation of Rule 24(k), which can otherwise be clearly documented. Their argument goes on: ***The Spaffords have been accused of a lack of due diligence. This too is inaccurate as evidenced by the time line above on pages 3 and 4 above, clearly demonstrating a 36 day delay from the time they appeared until the time they designated their expert, and a 63 day delay from the time they appeared until the time of the filing of a motion to enlarge date for expert designation.*** This is far different than the protracted time line erroneously argued by Granite. Granite quotes extensively from page 43 of the Appellants' brief, that was stricken and, accordingly, is not now before the Appellate Court, (Utah App. Order, 8/19/2010). Surely the order of this court to refile the brief was not intended to penalize any comments made prior to the order. ***On the same topic***, page 30 of the current Appellants' Brief states that it was an abuse of process to oppose the motion to recuse after entry of the final judgment. In its motion points out that Granite candidly acknowledged that its motion was likely moot; which clearly gives rise to the clear

inference that such a filing, and such timing, appeared to be an effort to curry favor with the trial court. Appellants' contention to the contrary embody logic and public policy. Such arguments are proper in the premises. *Moreover*, these arguments are necessary and proper to support the Spafford's contention that on remand they will be deprived of their Constitutional Right to Neutrality, unless the case is reassigned. And while this argument is carried forward on pages 33 and 34 of Appellants' Opening Brief, it is tempered with the quote that: "[t]his stringent rule may sometimes bar trial by judges who have no actual bias, and who would do their very best to weigh the scales of justice equally between contending parties". In re Murchison, 349 U.S. 133, 136 (1955). Surely a Constitutional argument, such as this, is proper and is neither scandalous nor burdensome, even if it does contain reference to public policy, Granite is again in error. *Another complaint* is made by Granite, **again taken out of context**, about language to the effect that the court acted out of expediency seemingly to clear its case load. What the brief actually states, **"in context"** follows: "The trial court abused its discretion in striking the Spaffords' expert witness' affidavit, without consideration for a lesser sanction that resulted in manifest injustice to the Spaffords. The court failed to consider mitigating circumstances; foreknowledge by Granite of the complete witness report; and seemingly acted out of expediency, seemingly to clear its case load". *We submit* that, in context, such a statement is entirely appropriate. *Finally*, the issue of accuracy is again raised when Granite accused the Appellants, on pages 32 and 33 of their Opening Brief, of making "unfounded allegations" without evidentiary basis, that the docketing statement was altered after the fact. As a point of fact, these are not mere allegations, but

are documented in the Addenda to Appellant's Opening Brief and will be discussed and further documented in the present Reply Brief under the Right to a Neutral Forum Due Process analysis. See addenda O & P, in Appellants' Opening Brief. **Page 45 of Appellee's Brief** violates Utah R. App. P. 24(k) by using the scandalous characterization of Appellants' recusal argument as **"rank speculation"**. Such a surprising statement is unprofessional at best and is a clear violation of Utah R. App. P. 24(k). *This Appellate Panel* is well aware that sometimes attorneys or litigants have opposing viewpoints. As in the present case, when properly phrased in arguing actual physical evidence; in arguing public policy on unsettled matters; and when argued "in context" there should be no room for clamoring for Rule 24(k) sanctions. These litigants are confident that a decision on the merits of the present case are meritorious. Nonetheless, after a review of the foregoing, Granite's brief is the only brief which should be stricken.

THE TRIAL COURT ABUSED ITS DISCRETION IN SANCTIONING THE SPAFFORDS WHEN THERE WAS NO EVIDENTIARY BASIS FOR THE

RULING: Granite has argued that the elements of negligence were not met on the issues of duty and causation, and that in any event, requiring expert testimony on these issues was somehow harmless error. Appellee's logic is flawed. In a 2008 decision, the Utah Supreme Court embodied one additional standard of review in determining if there has been an abuse of discretion by the trial judge: "An abuse of discretion may be demonstrated by showing that the district court relied on 'an erroneous conclusion of law' or that there was 'no evidentiary basis for the trial court's ruling.'" Kilpatrick v. Bullough Abatement, Inc., 2008 UT 82, 199 P.3d 957, 965. *In the context of discovery,*

after dismissing the plaintiffs' claims, the Kilpatrick court reversed the dismissal, noting the trial court's abuse of discretion arose out of its lack of an evidentiary basis for dismissal that was willful. "The willfulness requirement cannot be satisfied by showing mere prejudice. Rather, there must be evidence that the noncompliance order was the product of willful failure". Id., Accord, In Re Teleglobe Communications Corp., 392 B.R. 561, 578-79 (Bkrtcy.D. Del. 2008) ("[t]hat the sanction for the preclusion of evidence is a harsh punishment which should be imposed only in the most extreme circumstances"). *In the present case*, there is not a scintilla of willfulness on the part of Appellants in belatedly certifying the Spafford's expert witness. In fact, 36 days after their pro se appearance, the witness was certified. It cannot be reasonably argued that the Appellants showed any demonstration of willfulness whatsoever. *As in the present case*, the Kilpatrick Court noted that there was neither minute entry nor written finding of willfulness, bad faith, fault or dilatory tactics. Similarly, the Spafford's acted with diligence, even securing an order of mediation within 30 days after their initial appearance, which had been ordered one year earlier, but disregarded by both counsel, presumably under their oral discovery agreement. The Kilpatrick court cited the case of Nephi City v. Hansen, 779 P.2d 673, 675 (Utah 1989) which identified specific rules of construction in interpreting statutes and terms of art, noting that in this list, willfulness, bad faith, and persistent dilatory tactics all involve intentional behavior. "*Thus, the meaning of 'fault' should not be interpreted to include unintentional behavior*". Id. (emphasis added). The court went on to adopt the Tenth Circuit approach which distinguished "willful failure" from "involuntary compliance". Citing M.E.N. v. Control

Fluidics, Inc., 834 F.2d 869, 873 (10th Cir. 1987). As in Kilpatrick, there is neither a minute entry nor finding from the Trial Court that the failure to timely designate was somehow willful, as defined by the Appellate Court, on the part of the Spaffords. Moreover, a mere claim of prejudice to the appellee alone will not suffice. Kilpatrick at 965. *It is also instructive to note* a string citation by the Kilpatrick Court demonstrating under what circumstances the imposition of sanctions is proper; none of which are even remotely applicable to the facts before this court. Id. at 967. Accordingly, the trial court's failure to make a finding of willfulness rises to the level of an abuse of discretion and the judgment, entered without evidentiary basis, should be reversed.

WHERE DISCOVERY SANCTIONS ARE CONCERNED, "IF THE FAULT LIES WITH THE ATTORNEYS, THAT IS WHERE THE IMPACT OF THE SANCTION SHOULD BE LODGED": Granite argues that pro se litigants enjoy no leeway whatsoever and that even pro se litigants should be held to the errors of their prior counsel, Nielsen & Senior in failing to timely designate the expert. On June 10, 2009, at the time of counsel's withdrawal, Mr. Spafford was advised that there were no pressing deadlines. R. 242-243. Unfortunately, the *written* deadline to certify experts was May 16, 2009, passing prior to counsel's withdrawal and the Spaffords were unaware, as these elderly litigants were, predictably, allowing their counsel to handle the case; particularly the discovery aspects of the case. "We believe that [a sanction] is unjust when it is imposed against a person who had absolutely no fault for the discovery violation at issue...."Id. The Kilpatrick Court cited the case of Depew v. Sullivan, 2003 UT App. 152, ¶ 36-37, 71 P.3d 601, wherein a party and his

attorney were sanctioned for failing to comply with discovery requests in producing a tax return. The Court of Appeals vacated and remanded the sanctions against the attorney for a factual finding as to whether the attorney was actually to be blamed for the discovery violation. “We believe that [a sanction] is unjust when it is imposed against a person who had absolutely no fault for the discovery violation at issue. . . .”

Id. In the present case the apparent discovery violation occurred without the knowledge of the Spaffords until after the fact. They were sanctioned for discovery violations of their counsel, and their case was dismissed, through no fault of their own. Again, the time for witness designation had run prior to the withdrawal of the Spaffords’ counsel. We urge the court to reverse the entry of summary judgment, based upon former counsel’s discovery error, which occurred outside the knowledge of the Spaffords, and to afford an opportunity to correct the discovery error of prior counsel.

THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING SUMMARY JUDGMENT WHEN RELYING UPON AN ERRONEOUS INTERPRETATION

OF LAW: It is undisputed that the trial court premised its entire ruling on the basis of Fox v. B.Y.U., 2007 UT App. 406, 176 P.3d 446. R. 1372-1375, pp. 70-71. In its ruling the court found that the Spafford’s had an obligation to provide *expert testimony* on both the elements of establishing a duty, as well as establishing proximate cause. In so doing, it reached and relied upon an erroneous interpretation of law that constitutes an abuse of discretion. See Carbaugh v. Asbestos Corp., 2007 UT 65, 167 P.3d 1063.

(finding an abuse of the district court’s discretion when an evidentiary decision was based upon an erroneous interpretation of the law). Therefore, the appellate analysis

should focus on the elements of the need for expert testimony in establishing the elements of duty and proximate cause, as misread by the trial court, in relying upon Fox v. B.Y.U.

General vs. Specific or Actual Proximate Cause: Granite has argued the propriety of the Trial Court's ruling on summary judgment on issues of breach and proximate cause. Such an argument is in error. At the outset, at no time was the issue of negligent maintenance raised in defendant's motion for summary judgment. Not in Granite's designation of expert report, (Exhibit '3'), nor in the Smiltneek expert witness affidavit. R. 428-443. It did not address any duty to maintain the property, nor did it address whether or not the property had properly been maintained. While it did limit itself to issues of design and construction defects, this is all it addressed. Negligent maintenance is one of the Spaffords' primary claims for relief. This Smiltneek omission alone, read in conjunction with the Spafford factual affidavit, should, at a minimum, create a disputed issue of fact and mandate a reversal of the entry of summary judgment. ***Moreover, by his own testimony***, Mr. Smiltneek noted the asymmetry of the asphalt as it steps up to the curb. R. 428-443, ¶¶ 14, 15; Exhibit '6'. He then continued to contradict his own testimony by stating that the curb was level. Such contradictory testimony should be inadmissible and the statement alone about the asymmetry of the curb creates an inference, in favor of the Spaffords, that the step was dangerous and defective. ***But there is another reason*** why the Trial Court's ruling was erroneous. As stated in Fox, both proximate and actual cause of the injury need be shown. Proximate cause has been defined by our Utah Courts as follows:

'Cause in fact' or 'but for' causation, means that if the harmful result would not have come about but for the negligent conduct, then there is a direct causal connection

between the negligence and the injury. . . By contrast, legal or proximate causation involves a determination that the nexus between the wrongful acts (or omissions) and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. In this sense, proximate causation, and hence liability, hinges on principles of responsibility, not physics. Thus, proximate causation is a determination that must be made in addition to a determination of cause in fact or ‘but for’ causation. Raab v. Utah Railway Company, 2009 UT 61, 221, P.3d 19, f. 7, cf., Dowell Div. of Dow Chem. v. Del-Rio DP, 761 P.2d 1380, (Utah 1988) (There may be an actual cause but not a proximate cause).

Arguendo, the Smiltneek affidavit purportedly satisfied only the proximate cause element, but *not the actual cause in fact* element. This is because a mechanical engineer is not qualified to testify as to issues surrounding medical treatment or injury. Accord, Hankla, et al. v. Jackson, et al., 699 S.E.2d 610 (Ga. App. 2010). In any event, **the Spaffords do not concede that Granite has proven even proximate cause** by relying on the affidavit of its mechanical engineer. Mechanical experts are ordinarily not permitted to give opinions about the “precise cause of a specific injury”. Bowers v. Norfolk Southern Corp., 537 F.Supp.2d 1343, 1377, aff’d, (11th Cir. Ga. 2008); quoting Smelser v. Norfolk S. Ry. Co., 105 F.3d 299, 305 (6th Cir. 1997). Mechanical experts may render opinions as to general causation (the effect of a so called properly designed and constructed curb), but not as to specific causation (whether the curb or her own medical condition caused Mrs. Spafford’s injuries). An opinion on specific medical causation, as discussed in Fox, requires the identification and diagnosis of a **medical condition**, which demands the expertise and specialized training of a **medical doctor**. This arises out of the court’s gatekeeping function under Rule 702, in determining the reliability of an expert witness. *In the present case*, paragraph 19 of the Smiltneek affidavit states: “Mrs. Spafford’s backward fall indicated that she had no forward momentum, otherwise she would have fallen forward. Together, these things show that

Mrs. Spafford labored to step up onto the curb, **and was physically unable to complete the step, suggesting that her fall was caused by something in her own physical condition, and not by the condition of the pavement curb**, and sidewalk at the Property”. R. 432 (emphasis added). In making this assertion, *Smiltneek rendered a medical opinion, by a mechanical engineer*. Nowhere is he qualified as a medical doctor and nowhere does he indicate that he studied Mrs. Spafford’s medical records nor performed a physical examination upon her. “The expert’s bald assertion of validity is not enough”. Daubert v. Merrell Dow Pharmaceuticals, (on remand) 43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995). Without this medical testimony, the defendants have failed to identify undisputed facts in their assertion of both the general and specific causation called for in Fox. “Under the regime of Daubert. . . a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist”. Mitchell v. Gencorp, Inc., 165 F.3d 778, 783 (10th Cir. 1999). We submit that the conclusory statements made by Mr. Smiltneek about the physical condition of Mrs. Spafford was nothing more than unscientific speculation offered by a mechanical engineer, who lacked even a scintilla of medical training. And without a showing of **specific causation**, Granite failed in its attempt to adequately address a lack of proximate cause. **Moreover**, the affidavit of Earl Spafford (Exhibit 1) accurately and succinctly stated an adequate foundation and factual observation of the entire accident and surrounding premises. He was the only eye witness, and his affidavit, had it been properly considered by the trial court, was more than adequate to create

reasonable inferences to be construed in favor of the nonmoving party on each and every required element. Accordingly, the Trial Court abused its discretion, ruling erroneously and prematurely. Facts adequate to prove a lack of actual or specific, and proximate cause, were never before the court. *Mrs. Spafford's injuries were plain and obvious* (brain contusion, and fluid filling her lungs, as her head lay in a pool of blood), which does not require the test set forth in Fox, due to the nature of her obvious injuries.

“[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. . . It is only in ‘the most obvious cases’ that a plaintiff may be exempted from the requirement of using expert testimony to prove causation’”. Id. at 452. The Spafford case is precisely one of these most obvious cases, precluding the need for expert testimony, particularly on a medical issue that was not properly considered by the Trial Court.

Duty: Nowhere does the Fox decision require expert testimony to prove duty. This is simply a misreading of the case by the Trial Court, when it ruled in pertinent part:

“[I]’m satisfied that the Fox v. B.Y.U. case is controlled (sic), that any breach of duty or Causation must be established by expert testimony. And in the absence of expert testimony, plaintiff cannot establish two essential elements of their cause of action; consequently, as a matter of law, defendant is entitled to have this motion for summary judgment granted”. (R. 1372-1375, p. 71).

The court ignored the obvious lack of maintenance of the curb, asphalt and walkway, and extrapolated an element that was not even discussed in the Fox case, i.e., the requirement of expert testimony to prove duty in every negligence case, including claims of negligent maintenance. *And the obvious* nature of the neglected and asymmetrical

asphalt stepping up to the curb, as described in the affidavit of Earl Spafford (Exhibit 1) clearly lends itself to a condition so open and obvious that even a lay person could identify the problem. (“When more than one inference can be drawn as to what a reasonably prudent man would do under particular circumstances, particularly on the issue of duty; this creates an issue as one for the jury”). Baker v. Gibbons & Reed Co., 265 P.2d 1013, 1015 (Utah 1954). *The trial court abused its discretion* in requiring expert testimony for a condition that is apparent to a lay person. Accord, Williams v. Melby, 699 P.2d 723, 727 (Utah 1985) (Landlord had a duty to maintain safe exterior areas over which he maintained control. This is generally a question of fact reserved for the jury). And the site photographs attached to the Spafford affidavit gave rise to an additional inference of duty that should be construed in favor of reversal and remand. Accord, Rose v. Provo City, 2003 UT App. 77, 67 P.3d 1017, 1024. As stated in defendant’s answers to interrogatories, attached as an exhibit to Plaintiffs’ Opposition to Summary Judgment, Granite candidly acknowledged that “. . . [C]redit Union Management is responsibly for **periodically inspecting the parking lot and that maintenance and/or repair of the parking lot are performed on an as needed basis**”. R. 654-657; See Exhibit 7, Answer to Interrogatory 3. (emphasis added).

Preservation or Standard of Review: Due to the exceptional circumstances surrounding this ruling, coupled with the plain error in misreading the Fox case, it is proper for the court to consider this and other issues that, without conceding as such, may not have been raised below. State v. Low, 2008 UT 58, 192 P.3d 867 (Utah 2008). In so doing the Appellate Court will avoid manifest injustice. And this manifest injustice was perpetuated

by the Trial Court's abuse of discretion in admitting the Smiltneek affidavit on the issue of Mrs. Spafford's physical condition, and then striking Mr. Spafford's affidavit based upon what is clearly plain error. State v. Ross, 2007 UT App. 89, 174 P.3d 628.

THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING OR WHOLLY

DISREGARDING THE AFFIDAVIT OF EARL SPAFFORD: Granite has argued

that the Trial Court acted properly in striking substantial portions of the Spafford

Affidavit. Such an argument is both factually and legally in error. A review of the

record clearly indicates that not just a portion of the affidavit, but the entire document

was wholly disregarded by the Trial Judge at the time of his ruling. The Court did state

that to the extent Mr. Spafford's affidavit rendered legal conclusions on the issue of

duty or proximate cause, it was stricken. But the Trial Court effectively ignored the

remaining contents of the affidavit. And as stated in State v. Velasquez, 672 P.2d 1254

(Utah 1983)," the court found that a motion to strike is '[n]ot an adequate substitute for

objection' when there is 'close intermingling of the admissible with the inadmissible

evidence'". Id. cited in 1985 Utah L. Rev. 63, Utah Rules of Evidence, 1983, 69, n. 19,

Boyce, Ronald N.; Kimball, Edward L. *A case heavily relied upon supporting the*

discretion to strike cited by Granite is Capital Assets Fin. Servs. v. Lindsay, 956 P.2d

1090 (Utah App. 1998). And it appears that the Trial Court, in wholly ignoring the

affidavit, by the legal effect of its ruling, went well beyond the holding in the present case.

The Capital Assets Fin. Servs. Court held that the Trial Judge had a legal obligation to

consider any content of the affidavit that had proper foundation and did not render

legal conclusions. *Id.* at 1094. *A careful perusal of the Spafford affidavit shows it is*

not replete with legal conclusions, as summarily argued by Granite. And a review of the affidavit indicates that it fully complied with Utah R. Evid. 701. It is marked Exhibit 1 for the Appellate Court's convenient reference. ¶ 1 of the Spafford affidavit indicates personal knowledge of the contents of the affidavit, noting that Mr. Spafford was an eye witness to the accident. Clearly, a proper foundation was laid for the affidavit, and such testimony would have been helpful to the trial court. The balance of the affidavit went directly to personal knowledge, giving rise to reasonable inferences of a breach and proximate cause on the part of Granite. Moreover, it establishes or, at a minimum, creates inferences of *actual or specific causation*, which should be construed in favor of the Appellants, thereby meriting an abuse of discretion by the Trial Court, in wholly ignoring the affidavit in its entirety. ***In holding*** that the portions of the affidavit lacking in expert testimony going to the issues of duty and proximate cause, the court abused its discretion, both in disregarding the underlying eye witness facts of the case, and in misconstruing the holding in Fox. A sampling of the affidavit testimony, as stated by Mr. Spafford, provides:

¶ 4. The asphalt sloped away from the step where she fell. It, like the step was in a state of disrepair. The entire outside area obviously was badly maintained. . .
 ¶ 6. . . The entire exterior of the facility including the extra step, both to the North was deteriorating with the edge of the step broken and loose, showing an obvious lack of maintenance and design. Even the concrete was displaced on the step. ¶ 7. . . handrail blocking egress or ingress was absent ¶ 8. . . I have also looked at the appended pictures, which are incorporated by reference in this Affidavit, and these have refreshed my recollection. These pictures were taken recently by Mr. Clarence Kemp, a licensed civil engineer. Having seen these pictures I then went to Granite Credit Union in order to verify what the pictures depict. I found that the pictures accurately portray the step and parking lot where Iris fell”.

Surely Mr. Spafford's personal observations of the actual fall and the sloping asphalt

in disrepair with broken steps, taken together with the appended photographs, give rise to multiple inferences in favor of the Spaffords of a duty, breach of duty, proximate and actual cause and damages. This testimony created disputed issues of fact that should be decided by the finder of fact, upon a full evidentiary hearing. Singleton v. Alexander, 431 P.2d 126 (Utah 1967) (Jury may draw inferences from competing evidence in a negligence case). *Granite has also argued* that Mr. Spafford's simple use of a tape measure to determine the variable curb heights, as referenced in the Smiltneek affidavit, exceeded his lay testimony. At the outset, **Mr. Smiltneek established by his own testimony** the variable asphalt heights as stepping up to the curb. Moreover, it is not rocket science to use a tape measure, as identified in the Spafford affidavit. (Ext, 1, ¶ 9). This is something that is used by such lay persons as an amateur woodworker, to a simple seamstress, or housewife who sews. Accord, Schreiter v. Wasatch Manor, Inc., 1994 UT App. ___, 871 P.2d 570, 574. ("Where the propriety of the defendant's action 'is within the common knowledge and experience of the layman. . . the guidance provided by expert testimony is unnecessary"); Roods v. Roods, 645 P.2d 640, 641-42 (Utah 1982) (lay testimony is not prohibited if it is "rationally based on the perception of the witness, and . . . helpful to a clear understanding of [the] testimony or determination of the fact in issue"). The Trial Court erred in wholly disregarding the testimony of Mr. Spafford in its entirety, in requiring expert testimony on issues of duty and proximate cause, and in ruling in a manner that resulted in manifest injustice to these litigants.

THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING THE AFFIDAVIT OF EXPERT CLARENCE KEMP: Granite has argued that the Trial

Court has broad discretion in striking a witness, when an expert is untimely designated.

In support of this argument they cite State of Utah v. Hollen, 2002 UT 35, 44 P.3d 794.

However, Hollen does not deal with scheduling orders, but instead focuses upon the admissibility and reliability of the admission of a witness' testimony, and it fails to deal with scheduling orders whatsoever. It is inapplicable. ***Granite has also relied heavily upon the unpublished opinion*** of Lippman v. Coldwell Banker and Salkin, 2010 UT App. 89, for a similar proposition, except that the failure to designate, and exclusion of a witness, was applied under the mechanics of Utah R. Civ. P. 37, as it relates to Rule 26(a)(3).

Lippman, although unpublished, does contain facts that distinguish it from the present case. In Lippman, the Order submitted to the Trial Court by Counsel misstated the requested extension from March 15, 2009 rather than May 31, 2008. This was an erroneous attempt to embrace an additional 10 month extension, by subterfuge or otherwise. The Court acted properly in withholding its equitable powers under the circumstances. Similar facts in the present case are nonexistent and are not before this Appellate Panel. ***A more applicable case*** to the present set of facts is Boice ex rel. Boice v. Marble, 982 P.2d 565 (Utah 1999). After Counsel failed to designate a witness in a timely fashion, due to unforeseen circumstances, the Boice court recognized that on occasion, when unforeseen circumstances arise, justice and fairness will require that a court allow a party to designate witnesses, or perform other discovery tasks, even after a court imposed scheduling order has expired. Id. at 568. *In the present case*, the Spaffords received their file and were handed a withdrawal of counsel *after* the written scheduling order for designation had expired, through no fault of their own. Their

attorneys, Neilsen & Senior, were not only under the good faith impression that there was an open ended flexible discovery schedule; they subsequently made this disclosure to Mr. Spafford, and filed sworn affidavits to that effect. At the time of their withdrawal Counsel stated that there were no pressing deadlines. (see Exhibit 9, ¶ 16). This writer would be hard pressed, in the present case, to surmise a more appropriate set of facts to warrant the court's use of its equitable powers for relief, as discussed in Boice. ***In addition***, Granite has argued that in any event, the Clarence Kemp affidavit content exceeded his expert report. It cites the opinion of Brumley v. Pfizer, Inc., 200 F.R.D. 596, 603 (S.D. Tex. 2001), an out of state ***trial court level*** opinion which should carry very little weight in this jurisdiction, and Poulis v. Smith, 388 F.3d 354 (1st Cir. 2004), which discussed, as in the present case, exclusion of evidence, as a sanction, may be mitigated by Rule 37(c)(1) (equivalent to our Utah R. Civ. P. 37(f)) "[i]f the proponents failure to reveal it was either substantially justified or harmless". **Granite cites no law from a Utah State Court** to otherwise justify the striking or limiting testimony that exceeds the expert's report. ***Indeed, on the issue of prejudice***, as noted by the Court in Welsh v. Hospital Corporation of Utah dba Lakeview Hospital, 2010 UT App 171, 235 P.3d 791, notwithstanding the plaintiffs' delay in designating experts, the hospital had time to depose the experts, designate rebuttal experts, and otherwise prepare for trial. While the hospital would suffer no prejudice if plaintiffs' experts were allowed to testify at trial, the prejudice to plaintiffs if their experts were excluded was potentially devastating.

As in the present case, Granite would have suffered no prejudice by a ruling allowing Clarence Kemp to submit his affidavit. Particularly when they had foreknowledge of the

expert's identify and his report and *actually referenced Mr. Kemp's opinion in Smiltneek's expert report a number of three times in a four page document.* (See Exhibit 3). *And similar to Welsh*, where the expert designation was 39 days late, in the present case the designation by the Spaffords designation was 53 days late, R. 304-324, after the pro se appearance and 79 days late from the date in the scheduling order. This writer is hard pressed to find a more compelling analogy. *On the issue of prejudice*, as in Welsh, the damage to the Spaffords' legal position and subsequent entry of summary judgment predicated thereupon, was devastating. Accord, Berrett v. Denver and Rio Grande WR, 830 P.2d 291, 292, (Utah App.1992). (Exclusion is a severe sanction that is "extreme in nature and . . . should only be employed with caution and restraint"). It is clear that the Trial Court committed an abuse of discretion when it employed this severe sanction, extreme in nature, over a short delay in designation. This matter should be reversed and remanded to correct this manifest injustice.

APPELLANTS WERE DENIED THEIR STATE AND FEDERAL DUE PROCESS RIGHT TO BE HEARD BEFORE A NEUTRAL TRIBUNAL: After reviewing the Appellee's Brief, it is apparent that they have failed to address the well recognized Due Process Right to be heard before a neutral tribunal. Instead, in addressing the Marshall holding, they have cited one paragraph of dicta from a treatise that focuses upon recusal, and not upon this Fundamental Constitutional Right. Such an argument appears to be a red herring, and an attempt to take the focus away from this important Right to Due Process of Law. *This right to Neutrality* was first annunciated in Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182

(1980), expressly recognizing the requirement for neutrality in both civil and criminal proceedings before an impartial arbiter. In the present case, changes in the docketing statement, sealing the final judgment, and then unsealing the final judgment after the appeal was properly filed, (*Cf.* Exhibits O and P, and see both respective entries dated December 30, 2009), and the Trial Court's failure to notify Appellants of the entry of a final judgment, while perhaps an innocent oversight, created an appearance of impropriety. Moreover, it placed the timing of Appellants' jurisdictional filing of a Notice of Appeal in jeopardy. Appellants do not wish to suggest anything other than clerical error or oversight, but it does place the Constitutional Right to Neutrality properly before the Appellate Court. And it should be addressed by this Court, as the alteration of public documents occurred after the filing of the present appeal. This and other issues raised herein support the issue of Neutrality, particularly if the present matter is remanded to the original Trial Court. In Matthews v. Eldridge, 424 U.S. 319, 335 (1976), the court provided the following guidance in making this Neutrality determination: 1). The private action that will be affected by the official action; 2). the risk of a deprivation of such right if official action is not taken; and 3). the fiscal and administrative burden that such remedial action will impose upon the government. Id. Using this test and applying it as a backdrop to the present case, it is Appellants' request that the case be reversed and remanded for reassignment by the Presiding Judge. Under the guidance in Matthews, while no direct criticism is directed at the Trial Court, reassignment would preserve and protect Appellants' Right to Neutrality and would insulate the judiciary from criticism, real or imagined. *Moreover*, Appellants would be ensured of Neutrality in the present litigation; and the administrative or

fiscal burden of reassigning the case would be minimal, as a stroke of a pen is the primary governmental burden, by implementing this procedural safeguard. *The right to Neutrality has been further compromised* by Appellee's written advocacy in opposition to Appellants' motion to recuse or disqualify. We urge the Appellate Panel to rule on the side of this Fundamental Constitutional Right, out of an abundance of caution, in order to preserve and protect our precious system of justice. Cf. Rupp v. Grantsville City, 610 P.2d 338, 341 (Utah 1980)

APPELLANTS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO OPEN COURTS; REDRESS OF INJURIES; AND STATE DUE PROCESS:


At the outset, it has been argued by Granite that the Open Court's Provision only applies to legislative action. But the Utah Supreme Court disagrees with this assertion. As stated by the Court in Berry by and through Berry v. Beechcraft Aircraft, P.2d 670, 675, (Utah 1985), "[t]o a degree both provisions are complementary and even overlap, but they are not duplicative. Both act to restrict the power of the legislature and *the courts*. Id. (emphasis added). We submit that in unduly imposing the harshest of sanctions against the Spaffords, by striking the affidavit of their primary expert witness, by misinterpreting the holding of *Fox*, in further striking the testimony of Mr. Spafford, the Trial Court deprived Appellants of their chose in action, a property right protected by the Due Process Clause. Celebrity Club Inc., dba The Gatsby v. Utah Liquor Control Commission, 657 P.2d 1293, 1296 (Utah 1982). And in so ruling, the Trial Court took the case away and deprived the Appellants their right to be heard by the Finder of Fact, and further denied them

Open Access to the Courts. This right to a Jury Trial is a fundamental right that was denied by the Trial Court's erroneous misreading of the law on sanctions and on negligence, and denied the Spaffords their Constitutional Right to Redress of Injuries.

CONCLUSION AND PRECISE RELIEF SOUGHT: We urge the Appellate Court to restore the Fundamental Constitutional Right to Open Courts-Redress of Injuries, which embodies the Right to Jury Trial or Trial by the Finder of Fact, and the right to preservation of Appellants' chose in action under the Due Process Clause, by allowing a full and fair hearing on the merits; For an Order providing guidance to these and future litigants on the right of litigants to openly oppose a motion to recuse due to the Due Process requirement of Neutrality; For an Order referring this matter for reassignment by the Presiding Judge, because of what may be nothing more than innocent clerical error demonstrated by changes in key docket entries without notice, which nonetheless create an appearance of impropriety; and For an Order limiting and defining a fair reading of the Fox case and other matters related to the proper exclusion of witnesses. We further urge the Appellate Court, on remand, for the restoration of a Scheduling Order, to preserve any question about the certification of experts, and for such additional relief as may be proper in the premises in correcting this manifest injustice. We urgethe Court to provide this relief by entry of an Order reversing and remanding for a full hearing, before a Neutral Tribunal, on the merits.

Respectfully submitted this 20 day of December, 2010.


Earl S. Spafford, Attorney Pro Se


Iris M. Spafford, Attorney Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF** to be mailed, postage prepaid, to Anthony C. Kaye and Matthew L. Moncur, Ballard Spahr, this 20th day of December, 2010.


Earl S. Spafford