

2010

Heather E. Brussow v. William T. Webster : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH
IN THE UTAH COURT OF APPEALS

HEATHER E. BRUSSOW,

Plaintiff/Appellant,

V

WILLIAM T. WEBSTER,

Defendant/Appellee.

BRIEF OF APPELLANT

Appeal No. 2010 0426 - CA

(Dist Judge T Medley)

BRIEF OF APPELLANT HEATHER E. BRUSSOW

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**FILED
UTAH APPELLATE COURTS**

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STATEMENT OF JURISDICTION

URAP 4 and 22(a) confers jurisdiction upon the appellate court. URAP(c)(2).

STATEMENT OF ISSUES PRESENTED

I

The principal issue, as was relied on by Webster below, was whether the injured party's cause of action should be summarily dismissed and summary judgment granted for the inability to establish causation and damages without an expert testimony.

II

The correlative issue below was whether the injured party's belatedly filed designations of expert and factual witnesses, pursuant to URCP 37, warranted the Draconian sanction of the striking of her designations and resulting procedural dismissal of the case by summary judgment rather than a more reasonably measured alternative reparative order provided for by URPC 37 that would protect Webster and still provide Brussow with the opportunity to obtain the fundamental right not to be barred from redress for an injury done to her as preserved in the Utah Constitution, Article 1, Section 11.

STANDARD OF REVIEW

This is a timely appeal from a final order of summary disposition and to strike entered on 30 March 2010 dismissing the case on procedural grounds with no other claims or parties remaining

before the trial court for adjudication and no underlying claims for the trial court, hence res judicata is inapplicable since the dismissal was grounded on a procedural deficiency. URAP 9(c)(5)(A) & (c)(5)(B).

The dismissal below was on a dispositive motion pursuant to URCP 56 and the seminal issue presently is the application of that court rule that is purported to be the determinative precedent. URAP 9(c)(7) & (c)(7)(A). The applicable standard of appellate review of an order of dismissal upon a motion for summary judgment is no deference to the lower court, and de novo review applies since contested facts may not be decided and the ruling may only be made upon the law. URAP 9(c)(7)(B). *Blue Cross*, 779 P2d 634 (Ut 1989), *Durham*, 571 P2d 1332 (Ut 1977).

STATEMENT OF THE CASE AND OF THE SEMINAL FACTS

Brussow's factual Complaint, filed 22 September 2005, sets forth a cause of action for negligence against Webster resulting from his operation of the truck that collided head on with a smaller vehicle in which Brussow was a front seat passenger on 17 July 2003. Record, pp 1-9, Complaint. The complaint was filed well before the four year limitation on negligence actions. Webster filed his motion for summary judgment and memorandum on 14 September 2009. Record, pp 388-349.

The four eyewitnesses, including the parties to the action, who occupied the vehicles that collided were deposed and their testimony preserved by transcript. Record, pp 41, 50-52, 56-58, 60-61, 64-65, 66-68, 69-71, & 72-73, 100. Interrogatories and requests for production of documents were propounded and responded to by the parties. Record, pp 23-24, 25, 26-27

(Production of releases by Brussow for her medical records including Dr. Hansen), Various scheduling stipulations and orders were entered due to delay interposed by substitutions of Webster's counsels throughout the pendency of the action. Record, pp 32-33, 34-35, 37-38, & 39-40. Indeed the 24 March 2009 amended scheduling order was stipulated to courteously and cooperatively by Brussow to allow Webster additional time beyond that set in the 18 May 2006 Order Extending Discovery Cut-off Date in which to obtain his own expert medical examiner to assess Brussow's medical injuries, he having been provided Brussow's treating physician/expert's medical evaluation, and so Webster would be better able to reasonably discuss settlement of the case. Record, pp 204-207 & 36. Webster had omitted from his 16 March 2007 Designation of Expert Witnesses, # 3, a medical expert/evaluator. Record, pp 79-99. Webster hired Michael B. Chung, M.D. who performed a brief medical examination of Brussow on 23 February 2009 and who completed his 42 page evaluation in March 2009. Chung's evaluation was filed with Webster's Designation on 29 May 2009. Record, pp 212-284.

Brussow's expert, Keith Hansen, DC and Board Certified Impairment Rater, thoroughly examined her on 2 October 2003 close in time to the collision and thereafter drafted his Comprehensive Consultation and Examination report, a copy of which was provided Webster and appears as Exhibit 6 of defendant's Memorandum in Support of Motion for Summary Judgment. Record, pp 337-349. Dr. Chung's report cites Dr. Hansen's evaluation. as well as the medical records of various other treating physicians and physical therapists that had treated Brussow and whose records had been obtained through the releases provided to Webster while Webster's counsel, Leo McGee, was still in the case. Record, pp 26-27. Both Hansen's and

Chung's written evaluations opine that the head, neck and back injuries sustained by Brussow were a result of the 18 July 2003 collision of the vehicles. Record, PP 236 & 340. Likewise Brussow's Affidavit in opposition to the motion for summary judgment avers that she was a licensed Utah Emergency Medical Technician and as a result of her training regarding automobile and other impact trauma as a mechanism of injury that the head, neck and back injuries that she sustained were a direct result of the collision and her striking the windshield with her face and arm, she being asymptomatic prior to the collision.

Upon the court's granting of Webster's premature motion to strike Brussow's disclosures/designations it also ruled that without the testimony of treating physician and expert. Keith Hansen DC and Board Certified Impairment Rater Brussow could not prove her head neck and back injuries were caused by the collision and hence the motion for summary judgment dismissing the case should be granted as well.

SUMMARY OF ARGUMENTS

I

Brussow's auto negligence case should not have been dismissed where Webster filed no affidavits supporting his Rule 56 motion and disputed genuine issues of material fact regarding whether Brussow's head, back and neck injuries were caused by the collision existed and the report of Webster's expert and Brussow's rebutting affidavit supported the injuries or damage to Brussow's body resulted from the collision.

II

Brussow's belated designation of fact witnesses, most of which had already been deposed, and of an expert witness should not have been struck due to excusable inadvertence of counsel in scheduling the deadline in his computer ledger and filing them, notwithstanding the content of the belated disclosures substantially mirrored those filed by Webster, where Webster contrary to URCP 37 failed in good faith to confer or attempt to confer with the opposing counsel about not making the disclosure of factual and expert witnesses in an effort to secure that disclosure without court action and failed to file a certification that Webster, as the movant, before bringing the motion to strike before the court prematurely obtained from the court a Draconian remedy by instead rushing to the courthouse with a motion to strike and for summary judgment notwithstanding discovery was still open for an additional two months after the due date for the disclosures during which Webster could have had that information, and where the final pretrial and the trial had not been scheduled in the case..

I

APPLICABLE LEGAL PRECEDENT AND DISCUSSION

URCP 56. Summary judgment states in pertinent part:

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaims, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

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

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. **It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.**

(e) - (g)

Article I, Section 11 of the Utah Constitution mandates in pertinent part:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due process of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

For this reason the courts should be reticent to summarily dispose of an otherwise meritorious case premised upon a procedural inadvertence that could be readily remediated, since summary judgment is not a question of the truth of contested facts, it is a question of law . *Higgins v Salt Lake County*, 855 P2d 231, 235 (Ut 1993).

The moving party, Webster, had an initial burden of informing the trial court of the basis for the motion and identifying the portions of the pleadings or supporting documents which were believed to demonstrate an absence of a genuine issue of material fact. *Celotex Corp v Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Nonetheless Webster knew both the medical opinions of his expert and of Brussow's treating physician and expert, along with the content of Brussow's affidavit rebutting the principal thrust of Webster's motion for summary judgment espousing that Brussow lacked adequate proof that her injuries were caused by the auto collision, substantiated the nexus between Brussow's injuries and a collision since he had possession of Chung's and Hansen's report's and Brussow's affidavit, as did the district judge, if the court justly struck Hansen and his opinion, and it did not, as a witness for a belated designation, Brussow still could have called Webster's designated expert who concluded the causal link, or Brussow, a licensed EMT who knew she was asymptomatic prior to the impact of the collision and her face and right arm with the windshield could have testified that the mechanism injury was consistent with the physical damage and pain that she sustained during and after the collision.

Summary judgment still may be inappropriate since the moving party still must show that there

is no genuine issue of material fact in contention and that the moving party is entitled to judgment as a matter of law, even in cases where the non-moving party fails to properly respond to the URCP 56 motion, and Brussow did not fail to respond. *Dupler v Yates*, 351 P2d 624, 636 (1960).

The party moving for summary judgment must establish a right to judgment based on the applicable law regarding the undisputed material issues of fact and failure on the part of the moving party to meet this initial burden may render summary judgment inappropriate. URCP 56. *Transamerica Cash Reserve, Inc. v Dixie Power & Water, Inc.*, 789 P2d 24, 25 (Ut 1990). Material issues of fact regarding causation are plainly disputed with regard to Chung and Hansen's report's which were appended to pleadings in the record and Brussow's rebutting affidavit, all of which the lower court should if reviewed before erroneously granting the motion for summary judgment.

Still Webster's motion memorandum evaded this burden and inappropriately shifted the burden to the non-moving party, complaining about the averment in plaintiff's verified affidavit that incorporates by reference the pivotal material facts that are also in the complaint of which the plaintiff obviously has personal knowledge, for instance that the acute nature of her face, neck, and back pain and injuries resulted from the violence of the front end collision of Webster's truck with the smaller automobile in which she was a passenger and the immediate impact of her arm and face into the windshield and instantaneous acute pain to her arm, back and neck were related to that collision.

Summary judgment is only appropriate “ 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). In making its determination the court must considered that not only the affidavits but the pleadings, admissions, and depositions. *Lundberg v Backman*, 337 P2d 433 (Ut 1959). *Oberhansky v Sprouse*, 751 P2d 1155, 1156 (Ut App 1988) holds under Utah R.Civ.P. 56(c), summary judgment shall be rendered only “... 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.”

Hence, pursuant to URCP 56(c), the pleadings, exhibits appended thereto, like the experts’ evaluations and the affidavits, to the extent that they set forth facts admissible in evidence, bear on the determination of whether a genuine issue of material fact exists that would preclude summary judgment. *Rainford v Rytting*, 451 P2d 769 (Ut 1969).

Affidavits and depositions submitted in support of and in opposition to a motion for summary judgment may be used only to determine whether a material issue of fact exists, not to determine whether one party's case is less persuasive than another's or is not likely to succeed in a trial on the merits. It is factually and legally logical that Brussow, a Utah licensed emergency technician trained to treat acute trauma resulting from high impact automobile and other collisions, could testify on her own under the circumstances of the collision in this case that her acute injuries were of a type and her immediate pain was of an intensity directly resulting from the collision of

which she was a victim and that her pleading and affidavit about this is sufficient to stave off that she could not prove causation.

When evaluating a motion for summary judgment the court must consider all of the facts and evidence presented, and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion. to determine if the undisputed facts before the court establish whether a summary judgment is proper matter of law, *Katzenberger v State*, 735 P2d 405, 408 (Ut App 1987), accordingly the facts set out in the affidavits should be construed as clarification of the general statements contained in the complaint where those allegations set forth a cause of action. *Lundberg v Backman*, 337 P2d 433 (Ut 1959). *Atlas Corp v Clovis Nat'l. Bank*, 737 P2d 225, 229 (Utah 1987) also holds the facts and inferences in affidavits and in the pleadings be construed in the light most favorable to the non-moving party.

Consequently this precedent requires the court not only to accept circumstantial evidence that may be inferred from other facts in favor of Brussow, but moreover to presume as true any implication that could be derived from the admissible facts that might give rise to a recovery by plaintiff on the claim. Naturally and logically the non-moving party may include circumstantial evidence in the rebutting affidavit.

While cases like *Jones v Hinkle*, 611 P2d 733, 736 (Ut 1980) and *Walker v Rocky Mountain Recreation Corp.*, 29 Utah 2d 274 teach that mere assumptions or conclusions in an affidavit are insufficient to establish a genuine issue of fact, since such sheer speculation could be factually groundless, averments logically premised on the totality of factually based circumstances

contained in verified pleadings or an affidavit would suffice as admissible circumstantial evidence, especially where they comport with the opinions of experts attached to the pleadings filed by Webster, and even Webster's expert's positive opinion regarding the nexus between the collision and Brussow's injuries to her head, neck and back

URE 401 establishes that relevant evidence is information having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without information URE 402 provides all relevant evidence is admissible and URE 601 indicates that Brussow as the plaintiff is competent to be a witness and give testimony about direct evidence about what she personally experienced, about which she knows, and about the logical inferences she drew from her personal knowledge and background as an EMT

Consequently relevant circumstances from which the jury may infer conclusions are more probable than not, in consideration of the totality of the factual circumstances, are admissible as circumstantial evidence tending to establish the cause of action Obviously circumstantial evidence alone is even acceptable to satisfy the beyond reasonable doubt standard of proof applicable in criminal cases, while the standard in the instant case is merely a preponderance of the evidence 30 Am Jur 2d Evid 1125, 1126 (1967)

CONCLUSION AND RELIEF SOUGHT

Where there is some information that supports the elements of the claim inferences can logically be derived from those circumstances if they have a basis in logic and reasonable human experience sufficient in quality and quantity to assist, and satisfy, the trier of fact to decide whether the relevant evidence meets the standard of proof of causation of Brussow's impact injuries.

There is more than sufficient evidence to avoid summary judgment and for a jury to reasonably deduce from the circumstances about which Plaintiff has personal knowledge, as included in her complaint, affidavit and report of even Webster's own expert previously diagnosed in the February before the motion was heard, that Brussow's injuries were caused by the collision, even without Keith Hansen, D C's concurrence. Summary judgment was inappropriate and should be reversed, and Webster may have whatever additional records Keith Hansen DC may have and depose him if he wishes prior to trial.

II

APPLICABLE LEGAL PRECEDENT AND DISCUSSION

Webster filed a motion to strike Brussow's belatedly filed designations of factual and an expert witness, of whom Webster previously had knowledge years before, some of whom who were deposed, and most of whom are mirrored in Webster's own designations. Contemporaneously Webster filed a motion for summary judgment in anticipation of capitalizing on the motion to strike Brussow's expert, Keith Hansen, DC, who's evaluation Webster had received years before

and that is attached to Webster's pleadings. At no time did Webster's counsel ever confer with or attempt to confer with Brussow's counsel to obtain the disclosures which Webster asserted was essential to avoid taking action through the court by motion to compel for disclosure of that same information. Furthermore Webster failed to include, with his motion to strike the designations that Brussow belatedly filed, the prerequisite certification required in Rule 37.

URCP 37. Failure to make or cooperate in discovery, regarding a motion to compel or sanctions states in pertinent part:

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), **any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.**

(a)(2)(B) If a deponent fails to answer a question propounded ..., or a party fails to answer an interrogatory..., or ..., fails to ... permit inspection, the discovering party may move for an order compelling ... The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

(a)(3) - (4) . . .

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, **unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action**, or that the opposing party's nondisclosure, response, or objection was substantially justified,

(a)(4)(B) . . .

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order . . .

(b) Failure to comply with order.

(b)(2) Sanctions by court in which action is pending. If **a party fails to . . . designate . . . (a proxy), unless the court finds that the failure was substantially justified, the court in which the action is pending may take such action in regard to the failure as are just**, including the following:

(b)(2)(A) **deem the matter or any other designated facts to be established** for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) **prohibit the disobedient party** from supporting or opposing designated claims or defenses or **from introducing designated matters in evidence**;

(b)(2)(C) **strike pleadings** or parts thereof, **stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render judgment by default** against the disobedient party;

(b)(2)(D) **order the party or the attorney to pay the reasonable expenses**, including attorney fees, caused by the failure;

(b)(2)(E) **treat the failure to obey** an order, other than an order to submit to a physical or mental examination, **as contempt of court**; and

(b)(2)(F) instruct the jury regarding an adverse inference.

(c) Expenses on failure to admit.

(d) - (e)

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), **that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2). . . .**

The record of the hearing on the motion to compel indicates that the reason that Brussow's designations/disclosures were belatedly filed was due to inadvertence in his office since his staff person did not record all the dates in the amended scheduling order into counsel's computer scheduling program, Microsoft Outlook, and that any prejudice complained of by Webster was largely ameliorated since Brussow had already reported through discovery, by depositions, and by providing medical records, and by the report of Dr. Hansen, who her intended witnesses would be and the substance of their testimony.

CONCLUSION AND RELIEF SOUGHT

Since Webster failed or refused to provide the prerequisite certification for a remedy under Rule 37 and made no attempt to confer with Brussow's counsel to obtain the disclosure/designations regarding witnesses before running to the courthouse with two motions to capitalize on Webster's noncompliance with Rule 37, the order striking the belatedly filed designations should be reversed and the case returned to the district court judge for a less Draconian remedy than dismissal of this meritorious cause of action.

1 November 2010

A handwritten signature in black ink, reading "Franklin Richard Brussow". The signature is written in a cursive, flowing style. The first name "Franklin" is written with a large, stylized 'F'. The last name "Brussow" is written with a large, stylized 'B'. The signature is written over a horizontal line.

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STATE OF UTAH
IN THE UTAH COURT OF APPEALS

HEATHER E. BRUSSOW,

Plaintiff/Appellant,

V

WILLIAM T. WEBSTER,

Defendant/Appellee.

**CERTIFICATION OF SERVICE OF
APPELLANT'S BRIEF**

Appeal No. 2010 0426 - CA

(Dist Judge T Medley)

I hereby certify that on 1 November 2010 I served Appellant's Brief upon attorney for appellee, Rafael Seminario, 299 South Main, 15th Floor, Salt Lake City, Utah 84111 by U S Mail with First Class Postage pre-paid affixed thereto and by depositing same in a United States Mailbox.

1 November 2010



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