

2010

# Heather E. Brussow v. William T. Webster : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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HEATHER E. BRUSSOW,

Appellant/Plaintiff,

vs.

WILLIAM T. WEBSTER,

Appellee/Defendant.

Appellate Case No. 20100426-CA

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**BRIEF OF APPELLEE**

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**Appeal from the Third District Court, Salt Lake County, State of Utah,  
the Honorable Tyrone E. Medley.**

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FILED  
UTAH APPELLATE COURTS

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## **LIST OF ALL PARTIES TO THE PROCEEDING**

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## **JURISDICTIONAL STATEMENT**

The Utah Supreme Court had original jurisdiction of this case pursuant to Utah Code Ann. § 78A-3-102(3)(j). The Utah Supreme Court subsequently assigned this case to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4) by Order dated May 27, 2010. The Utah Court of Appeals now has jurisdiction of this case pursuant to the Utah Supreme Court's assignment and Utah Code Ann. § 78A-4-103(2)(j).

## **QUESTIONS PRESENTED FOR REVIEW**

### **I. Did the trial court abuse its discretion in striking Plaintiff's untimely designation of fact and expert witnesses?**

- a. Standard of Review: Utah appellate courts review a trial court's ruling on a motion to strike under an abuse of discretion standard. *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775; *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 54, 221 P.3d 256.
- b. Preservation of Issue: Defendant preserved this issue in its Motion to Strike (R. at 372-73), Memorandum in Support of Motion to Strike (R. at 374-77), and Reply Memorandum in Support of Motion to Strike (R. at 405-09).

### **II. Did the trial court err in granting Defendant's Motion for Summary Judgment?**

- a. Standard of Review: Summary judgment is proper when "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). "Summary judgments present for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues. Thus, [this Court] accord[s] no deference to the trial court, but review[s] its conclusions for correctness." *McNair v. Farris*, 944 P.2d 392, 394 (Utah Ct. App. 1997).

- b. Preservation of Issue: Defendant preserved this issue in its Motion for Summary Judgment (R. at 288-89), Memorandum in Support of Motion for Summary Judgment (R. at 290-349), Reply Memorandum in Support of Motion for Summary Judgment (R. at 378-85), and the trial court's Findings of Fact, Conclusions of Law, and Order on Defendant's Motion for Summary Judgment and Motion to Strike (R. at 428-31).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND  
REGULATIONS**

**Utah Rules of Civil Procedure 26(a)(3)(A)**

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

**Utah Rules of Civil Procedure 37(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.

**Utah Rules of Civil Procedure 37(f)**

If a party fails to disclose a witness, document or other material as required by Rule 26(a) . . . 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).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This case arises out of a motor vehicle collision between the parties that occurred on or about July 18, 2003. Plaintiff claims to have sustained various injuries and damages in the subject accident. Defendant claims that the accident was not his fault. After several years of litigation and several scheduling orders, and after all discovery deadlines had passed, Defendant filed a Motion for Summary Judgment based on Plaintiff's failure to designate fact and expert witnesses. In response, Plaintiff filed untimely designations of fact and expert witnesses, prompting Defendant to file a Motion to Strike those untimely designations. The trial court granted the Motion to Strike and the Motion for Summary Judgment, and this appeal ensued.

### **Facts and Procedural Details**

On or about July 18, 2003 at a relatively short time past midnight, Plaintiff was traveling northbound on 2300 East in Salt Lake City, Utah, as a passenger in a vehicle driven by Whitney Isaacson. (R. at 2.) At around the same time, Defendant was operating a vehicle southbound on 2300 East. (R. at 2.) When both parties arrived at the intersection of 2300 East and 3300 South, the vehicle in which Plaintiff was a passenger turned left (westward) in front of Defendant's vehicle, resulting in a collision. (R. at 2.)

As a result of this accident, Plaintiff claims to have sustained injuries to her neck, back, right wrist, right foot, and experienced headaches and migraines. (R. at 292, 321-22.) Plaintiff treated with approximately twelve different medical providers, including a massage therapist, physical therapist, several medical doctors, a doctor of osteopathic

medicine, a chiropractor, and an acupuncturist. (R. at 293, 323-24.) Plaintiff also claims to have required right wrist surgery, despite the fact that her first complaints of right wrist pain occurred approximately seventeen months after the subject accident. (R. at 293-94, 348.) However, causation of Plaintiff's medical complaints were complicated by a previous motor vehicle accident (R. at 342) where she complained of pain to her neck, low back, in between her shoulders, shoulders, arms, hands, hips, legs, knees, feet, and chest, and also complained of headaches, dizziness, and nervousness/depression (R. at 345-46). Plaintiff had also hit her head on three separate occasions prior to the subject accident which caused her to lose consciousness each time. (R. at 338.)

Plaintiff filed her Complaint in this matter on or about September 22, 2005. (R. at 1-7.) On or about January 27, 2006, the trial court entered an Order approving the case management order submitted by both parties. (R. at 22.) This Order required Plaintiff to designate expert witnesses by May 24, 2006. (R. at 20.) Just days before this deadline, by stipulation of the parties and Order of the court, the time was extended for Plaintiff to designate expert witnesses until October 1, 2006. (R. at 36.) The parties subsequently conducted depositions of the named parties and witnesses, the last of which occurred on March 21, 2007. (R. at 114.) For the next twelve months, Defendant's counsel sent Plaintiff's counsel four separate letters requesting the return of signed medical releases from the Plaintiff so that Defendant could obtain the relevant medical records, and Plaintiff failed to respond to each of these four letters. (R. at 114-15, 129-138.) In fact, despite these several attempts, Defendant's counsel had absolutely no actual communication or contact with Plaintiff's counsel for one year. (R. at 114-15.)

On February 27, 2008, the trial court scheduled an order to show cause hearing to be held on April 30, 2008 to determine whether this case should be dismissed for failure to prosecute. (R. at 103). Coincidentally, three weeks later on March 20, 2008, Plaintiff's counsel finally contacted Defendant's counsel's office wishing to respond to the request for medical releases. (R. at 115.) On that same day, Defendant's counsel wrote a letter to Plaintiff's counsel in response and made the following statement: "I find it troubling that it took the court's notice of the order to show cause to get you to respond to our numerous attempts to proceed with discovery in this matter." (R. at 145.) Later that same afternoon, counsel for the parties conducted a telephone conference to discuss the medical releases and an independent medical examination. (R. at 116.) During that conversation, Plaintiff's counsel stated that he wanted these issues resolved prior to "next week's hearing." (*Id.*) Defense counsel then informed Plaintiff's counsel that the Order to Show Cause hearing was not scheduled for "next week," but that it was scheduled for "next month," referring to the April 30, 2008 hearing. (*Id.*)

Despite the letter and the telephone conference, neither Plaintiff nor her counsel appeared at the order to show cause hearing, prompting the trial court to dismiss the case without prejudice. (R. at 163-64.) However, five and one-half months later, on October 16, 2008, the trial court granted Plaintiff's Motion to Set Aside Dismissal based on the finding that Plaintiff's counsel had suffered a life-threatening health condition which precipitated events which led to the failure to docket the order to show cause hearing in Plaintiff's counsel's calendaring system. (R. at 197-200.) In doing so, the trial court

ordered: “Counsel and parties should govern themselves accordingly, and move this case forward expeditiously without delay.” (R. at 199.)

The trial court subsequently entered a new case management order which required Plaintiff to designate expert witnesses by May 15, 2009 and fact witnesses by June 5, 2009. (R. at 205.) Once again, Plaintiff failed to designate any fact or expert witnesses, and based on such failure, Defendant filed his Motion for Summary Judgment on September 14, 2009. (R. at 288-89.) One month later, in response to Defendant’s Motion for Summary Judgment, Plaintiff filed her designation of fact and expert witnesses. (R. at 359-60.) Defendant then filed a Motion to Strike the untimely designations and supporting memoranda. (R. at 372-77, 405-09.) The trial court subsequently granted Defendant’s Motion to Strike, and because Plaintiff had no expert witnesses to present at trial, granted Defendant’s Motion for Summary Judgment based on Plaintiff’s inability to establish causation of her injuries or the reasonableness and necessity of her medical treatment. (R. at 428-31.)

## **SUMMARY OF ARGUMENTS**

### **I**

The trial court did not abuse its broad discretion in striking Plaintiff’s untimely designation of fact and expert witnesses. Plaintiff had three separate opportunities to designate fact and expert witnesses, and failed to do so. Utah appellate courts have long upheld trial court rulings excluding expert witnesses based on the presenting party’s failure to disclose such experts pursuant to rule 26(a)(3). A failure to disclose fact and expert witnesses subjects an offending party to sanctions under rule 37(f), which prevents



a party from using a witness at any hearing unless the failure to disclose was harmless or a party has good cause for the failure. Here, Plaintiff's failure to disclose resulted in prejudice to Defendant by inhibiting his ability to defend against Plaintiff's claims based on the close of discovery, the length of time that had elapsed since commencement of the litigation, and the effect of the passage of time on witnesses' memories, and the loss of the ability to obtain rebuttal experts and depose witnesses that had not been disclosed. Additionally, Plaintiff offered no good cause for the failure to designate fact and expert witnesses. Thus, the trial court was well within its broad discretion in striking Plaintiff's untimely designation of fact and expert witnesses.

Furthermore, Plaintiff has failed to present any argument that supports her contention that the trial court abused its broad discretion. Plaintiff erroneously claims that Defendant failed to comply with rule 37(a)(2)(A) by not conferring with Plaintiff prior to seeking a discovery sanction under rule 37(f). Defendant did not file a motion to compel, and was therefore relieved of any requirement to confer with Plaintiff prior to seeking an order striking the untimely witness designations. Secondly, the mere fact that Defendant had obtained Plaintiff's medical records did not alleviate Plaintiff from complying with rule 26(a)(3). Therefore, the trial court properly exercised its broad discretion in striking Plaintiff's untimely designation of fact and expert witnesses.

## II

The trial court properly granted Defendant's Motion for Summary Judgment. There are two primary bases supporting the trial court's decision. First, without expert medical testimony, Plaintiff could not establish the element of causation of her

negligence claim. The injuries she complains of fall outside the common knowledge of a layperson, requiring expert medical testimony. Plaintiff also has not established that her experience as an EMT qualified her to do anything other than recognize and stabilize traumatic injuries—qualifications that fall far short of the standard necessary to prove causation. Even Dr. Chung’s opinions would not have been available to Plaintiff because there would have been no need to call Dr. Chung as a witness for the defense, and Plaintiff did not designate Dr. Chung as her own expert.

Second, without expert testimony, Plaintiff could not establish the element of damages of her negligence claim. Even if Plaintiff were somehow allowed to testify that her claimed injuries arose from this accident, her training as an EMT would not have qualified her to testify as to the reasonableness and necessity of her extensive medical treatment, ranging from massage therapy to acupuncture, which also included a wrist surgery. Plaintiff has presented no evidence of the reasonableness of these treatments. Additionally, there are numerous factors which complicated Plaintiff’s claim of damages, including a prior motor vehicle accident which resulted in similar complaints, a gap in treatment of approximately seventeen months related to Plaintiff’s wrist surgery, and other prior trauma that resulted in three separate occasions where Plaintiff lost consciousness. These complicating factors would require a jury to speculate as to the reasonableness and necessity of complex medical treatment. Therefore, the trial court properly granted Defendant’s Motion for Summary Judgment based on Plaintiff’s failure to establish her damages through admissible evidence.

## ARGUMENTS

### **I. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN STRIKING PLAINTIFF’S UNTIMELY DESIGNATION OF FACT AND EXPERT WITNESSES.**

It is well settled under Utah law that trial courts have broad discretion in the management of cases before them. *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 262 (Utah Ct. App. 1997); *Berrett v. Denver & Rio Grande W. R.R. Co.*, 830 P.2d 291, 293 (Utah Ct. App. 1992). This broad discretion includes determining discovery sanctions “because trial courts must deal first hand with the parties and the discovery process.” *Glacier Land Co., L.L.C. v. Claudia Klawe & Assocs., L.L.C.*, 2006 UT App 516, ¶ 35, 154 P.3d 852 (quoting *Hales v. Oldroyd*, 2000 UT App 75, ¶ 15, 999 P.2d 588). Additionally, pursuant to rule 37 of the Utah Rules of Civil Procedure, trial courts have broad discretion in “selecting and imposing sanctions for discovery violations. . . .” *Koller*, 943 P.2d at 262 (citing Utah R. Civ. P. 37 and *Morton v. Continental Baking Co.*, 938 P.2d 271, 273-75 (Utah 1997)).

In this case, Plaintiff had the opportunity to designate expert witnesses on three separate occasions as ordered by the trial court—May 24, 2006, October 1, 2006, and May 15, 2009—but failed to do so. (R. at 20, 36, and 205.) The Utah Rules of Civil Procedure required Plaintiff to disclose expert witnesses, reports, substance of facts and opinions, summary of grounds for each opinion, qualifications of the expert, a list of publications authored by the expert within the last ten years, the compensation to be paid for the testimony, and a listing of cases to which the expert previously testified. *See Utah*

R. Civ. P. 26(a)(3)(B). Rule 37 addresses the consequences of Plaintiff's failure and states in pertinent part:

If a party fails to disclose a witness, document or other material as required by Rule 26(a) . . . 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).

Utah R. Civ. P. 37(f).

Here, the trial court specifically found that Plaintiff had not provided the court with any good or just cause for the failure to designate fact and expert witnesses by the three previous deadlines. (R. at 429.) The trial court also found that Defendant was prejudiced by Plaintiff's failure to designate any witnesses by not having the opportunity to depose the untimely designated witnesses, by the long passage of time, and because witnesses' memories fade over time, each of which impaired Defendant's ability to defend against Plaintiff's claims. (R. at 430.) These findings were also made with an understanding of the procedural history of this case.<sup>1</sup> In light of these findings, the trial court exercised its broad discretion and struck Plaintiff's untimely designation of fact and expert witnesses. In response, Plaintiff argues two points: (A) that Defendant failed to confer with Plaintiff prior to seeking sanctions under rule 37, and (B) that Defendant already had records from Plaintiff's untimely designated expert, Hansen D.C. (Appellant's Br. 12-14.) Each of these arguments lacks merit.

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<sup>1</sup> This case was previously dismissed based on Plaintiff's failure to appear at an order to show cause hearing referenced in the "Facts" section of Appellee's Brief. Despite a letter from Defendant's counsel and a telephone conference explaining that the trial court had scheduled the order to show cause hearing, the trial court exercised its broad discretion in setting aside the dismissal of this case and giving Plaintiff the benefit of the doubt.

**A. Plaintiff Erroneously Concludes That Defendant Was Required to Comply With Rule 37(a)(2)(A) Prior to Filing a Motion to Strike.**

Plaintiff cites to Rule 37(a)(2)(A) for the proposition that Defendant was required to confer in good faith with Plaintiff prior to moving the trial court for an order striking Plaintiff's untimely fact and expert witness designations. (Appellant's Br. 12-14.)

However, Rule 37(a)(2)(A) does not apply to this case. This rule states:

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.

Utah R. Civ. P. 37(a)(2)(A) (emphasis added). In this case, Defendant never filed a motion to compel, and therefore did not have to meet the requirements of this rule. *See Rukavina v. Sprague*, 2007 UT App 331, ¶ 8, 170 P.3d 1138 (“[S]ubsection (f) of rule 37 is independent of the motion to compel procedure outlined in rule 37(a).”). Plaintiff misconstrues the scope of rule 37(a)(2)(A) and asks this Court to improperly apply it to Defendant's Motion to Strike.

Importantly, this Court has previously addressed and upheld trial court rulings striking expert witnesses based on a party's failure to disclose such experts pursuant to rule 26 as a discovery sanction without inquiry as to whether the parties conferred in good faith. *See Johnson v. Gold's Gym*, 2009 UT App 76, ¶¶ 13-14, 206 P.3d 302 (upholding trial court's ruling striking plaintiff's expert witness for failure to disclose expert report); *Rukavina*, 2007 UT App 331 at ¶ 8 (recognizing a trial court's discretion in excluding evidence or imposing sanctions under rule 37 for failure to comply with rule

26(a)); *Pete v. Youngblood*, 2006 UT App 303, ¶¶ 11, 18, 141 P.3d 629 (holding that trial court did not abuse its broad discretion in striking affidavit of expert who had not been disclosed and had not provided a report). Indeed, “[t]here is nothing in this provision mandating that a motion to compel and subsequent court order granting such a motion be prerequisites for the sanctions specified in rule 37(f).” *Rukavina*, 2007 UT App 331 at ¶ 8. As in this case, “[Plaintiff’s] attorney’s failure to abide by the trial court’s discovery orders provide[s] ample grounds for the imposition of discovery sanctions.” *Id.* This Court should therefore disregard Plaintiff’s claim that Defendant should have conferred in good faith prior to seeking an order from the trial court striking Plaintiff’s untimely designation of fact and expert witnesses.

**B. Defendant’s Receipt of Medical Records Does Not Alleviate Plaintiff From Complying With the Requirements of Rule 26(a)(3).**

Plaintiff also erroneously argues that the trial court erred in striking her untimely designation of fact and expert witnesses because Defendant already had her medical records. This argument appears to insinuate that Plaintiff had substantially complied with rule 26(a)(3) and that perhaps Defendant suffered no prejudice by Plaintiff’s failure to submit formal designations of witnesses. In *Pete v. Youngblood*, this Court addressed a similar argument and held the following:

*Formal disclosure of experts is not pointless. Knowing the identity of the opponent’s expert witnesses allows a party to properly prepare for trial. The failure to disclose experts prejudiced [defendant] because there are countermeasures that could have been taken that are not applicable to fact witnesses, such as attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because*

of the absence of a report. In sum, we agree with the district court that even treating physicians and treating nurses must be designated as experts if they are to provide expert testimony.

2006 UT App 303 at ¶ 15 (emphasis in original). Without these designations, Defendant did not know which witnesses should have been deposed. Consistent with this issue of prejudice, the trial court ruled that “[w]ithout fact and expert designations, Defendant was not required to depose all or even some of the individuals identified in Plaintiff’s discovery responses.” (R. at 430.) Thus, having Plaintiff’s medical records did not alleviate Plaintiff from complying with rule 26(a)(3), and the trial court was well within its broad discretion in striking Plaintiff’s untimely fact and expert witness designations.

## **II. THE TRIAL COURT PROPERLY GRANTED DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.**

Summary judgment is proper when “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). “Summary judgments present for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues. Thus, [this Court] accord[s] no deference to the trial court, but review[s] its conclusions for correctness.” *McNair v. Farris*, 944 P.2d 392, 394 (Utah Ct. App. 1997). Based on this standard of review, this Court should conclude that the trial court properly granted Defendant’s Motion for Summary Judgment.

In addressing Plaintiff’s negligence claim, the trial court correctly noted that she could only prevail if she first established a prima facie case of negligence, which requires

a showing of causation and damages. Plaintiff's failure to designate any fact and expert witnesses prevented her from establishing these two elements of her negligence claim, requiring dismissal as a matter of law.

**A. Plaintiff Could Not Establish the Element of Causation in Her Negligence Claim.**

Under Utah law, a party must establish the element of causation in order to recover on a claim for negligence. *See Fox v. Brigham Young Univ.*, 2007 UT App 406, ¶ 21, 176 P.3d 446. “[T]he causal connection between the alleged negligent act and the injury is never presumed and this is a matter the plaintiff is always required to prove affirmatively.” *Id.* at ¶ 21 (quoting *Jackson v. Colston*, 209 P.2d 566, 568 (Utah 1949)). “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.’” *Fox*, 2007 UT App 406 at ¶ 21 (internal quotations and citations omitted).

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



‘the most obvious cases’ that a plaintiff may be excepted from the requirement of using expert testimony to prove causation.” *Fox*, 2007 UT App 406 at ¶ 22 (quoting *Beard*, 2000 UT App 285 at ¶ 16).

**1. Plaintiff’s Injury Claims Fall Outside the Common Knowledge of Laypersons.**

In the present case, Plaintiff complains of injuries which fall outside of the common knowledge of laypersons, requiring expert medical testimony. In her Complaint, Plaintiff claims to have suffered from permanent injuries, including injuries to her neck, back, shoulders, and right wrist. (R. at 5.) In her Complaint, Plaintiff claims that she suffered “permanent physical injuries and serious impairments of bodily functions . . . .” (*Id.*) Plaintiff also claims to have necessitated a wrist surgery as a result of the subject accident. (R. at 321-22.) However, the evidence also shows that Plaintiff had numerous accidents in which she suffered losses of consciousness prior to the subject accident. Furthermore, Plaintiff was involved in a prior motor vehicle accident in which she claimed injuries to her neck, low back, in between her shoulders, shoulders, arms, hands, hips, legs, knees, feet, and chest, and also complained of headaches, dizziness, and nervousness/depression. (R. at 345-46.) Further complicating matters was the fact that Plaintiff first complained of wrist pain approximately seventeen months after the subject accident, representing a considerable delay in treatment. (R. at 348.) These complicating factors place this case outside the common knowledge of a layperson and into an area requiring expert testimony. Fortunately, this Court has previously addressed similar

situations and has held that expert testimony was necessary in order to establish the element of causation.

In *Fox*, the plaintiff descended down some stairs in the Harman Building at Brigham Young University when she slipped and was unable to use her right leg. *Fox*, 2007 UT App 406 at ¶ 2. When the EMTs arrived, they observed that the plaintiff's right knee was swollen and had deformities on both sides of her leg. *Id.* at ¶ 4. While assessing her, the plaintiff told the EMTs that "she felt her right knee go out as she was going down[,] " "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.* at ¶ 5. The trial court subsequently dismissed plaintiff's claim based on her failure to provide expert testimony to establish a prima facie case of causation. *Id.* at ¶ 14.

In upholding dismissal of plaintiff's claim, the *Fox* court stated that plaintiff's claim "is not a case that is excepted from the requirement that a plaintiff use expert testimony to establish a causal link between the defendant's negligent act and her injury." *Id.* at ¶ 23. In support of this conclusion, the court explained that plaintiff's own admission that her knee "gave out" and that she had a pre-existing condition of osteoarthritis to her knee, "tied the cause of her fall to medical factors sufficiently complicated to be beyond the ordinary senses and common experience of a layperson." *Id.* Although the court recognized that the plaintiff "could testify that she descended the stairway, fell, and experienced pain, she needed expert testimony to establish her prima facie case of causation and to prevent the fact-finder from resorting to speculation." *Id.*

Likewise, this Court addressed a similar situation in *Hall v. Steimle*, where it dismissed the plaintiff's claim of negligence based on a failure to designate expert witnesses to establish causation. 2009 WL 2569266 (Utah Ct. App. Aug. 20, 2009) (unpublished opinion). The plaintiff claimed that his injuries were different than the injuries complained of in *Fox*, and that they involved "medical damages within the common experience of a layperson such that expert witness testimony is not required to establish causation." *Id.* at \* 1. In responding to this argument, the court stated:

[Plaintiff's] negligence suit, while presenting different injuries and causation issues than those in *Fox* and *Beard*, is still not an obvious case. [Plaintiff's] negligence case is complicated by a previous diving injury in the summer of 1998 or 1999 when [he] suffered whiplash because he dove into a shallow lake. On October 4, 2000, about two months *before* the motor vehicle accident, [plaintiff] presented to Anderson Chiropractic complaining of neck and back pain. In his complaint, [plaintiff] alleges that he suffered permanent neck and back injuries as a result of the motor vehicle accident. It is beyond the ordinary knowledge and common experience of a layperson, given the history of [plaintiff's] neck and back pain, to determine whether the diving incident or the motor vehicle accident caused [plaintiff's] neck and back injuries, permanent or otherwise.

[A] jury would not, without resorting to speculation, be able to determine if [plaintiff's] neck and back pain was caused by the motor vehicle accident or the diving incident, or if the motor vehicle accident exacerbated a pre-existing condition. Testimony concerning a chronological relationship between the accident and [plaintiff's] neck and back pain is not sufficient, in this case, to establish causation.

(*Id.*) (internal footnote omitted) (emphasis in original).

Thus, like in *Hall*, a jury would have to speculate as to whether Plaintiff's neck and back pain were a result of the subject accident, or one of her many prior accidents. A

jury would also have to speculate as to whether Plaintiff may have suffered any permanent injury or whether she suffered an exacerbation of a pre-existing injury, issues outside the common knowledge of laypersons. Therefore, without any medical expert to establish causation of Plaintiff's complicated injury claims, Plaintiff cannot establish the element of causation, requiring this Court to uphold the trial court's grant of summary judgment.

**2. Plaintiff Cannot Establish the Element of Causation Based on Her Own Testimony as an EMT or Dr. Chung's Testimony.**

Plaintiff argues that even if her untimely designated expert were not allowed to testify, that she could have established the element of causation based on her training as an EMT or based on Dr. Chung's testimony. (Appellant's Br. 7.) These arguments lack merit. First, Plaintiff could only establish that she felt pain as a result of the accident, limiting her testimony to a chronological association between the accident and her pain complaints. The only evidence submitted by Plaintiff as to her qualifications is a single sentence in her affidavit which states: "8. I was a licensed Utah Emergency Medical Technician and was trained to recognize and stabilize traumatic injuries resulting from motor vehicle collisions and other violent impacts." (R. at 369.) Based on this statement alone, Plaintiff could not have established that the treatment she received falling outside the areas of *recognition* and *stabilization* were caused by this accident. Nor is there any evidence that her training as an EMT provided her with sufficient knowledge to determine which treatments would have been appropriate or which treatments were associated with pre-existing conditions. In short, there is no evidence to suggest that

Plaintiff's training as an EMT was sufficient to replace that of a medical doctor or other qualified treating physician.

Second, Plaintiff could not have relied on Dr. Chung's testimony because she did not timely designate Dr. Chung as an expert to support her claim. Without any experts to testify on Plaintiff's behalf, Defendant would not have called Dr. Chung as a witness because there would not have been any expert evidence for him to rebut. In short, Plaintiff should not have relied on Defendant to establish her own negligence claim. More importantly, without any expert to establish causation, Plaintiff could not have, and should not have, reached trial based on her inability to establish a prima facie claim for negligence. Thus, the trial court properly dismissed Plaintiff's negligence claim as a matter of law.

**B. Plaintiff Could Not Establish the Element of Damages in Her Negligence Claim.**

In order to prevail on a negligence claim, a party must establish damages. *Asael Farr & Sons Co. v. Truck Ins. Exch.*, 2008 UT App 315, ¶ 28, 193 P.3d 650. In addition to an inability to establish causation in this case, Plaintiff also cannot establish her damages without expert medical testimony, supporting the trial court's grant of summary judgment.

In *Beard v. K-mart Corp.*, this Court was asked to determine whether the trial court erred in allowing the jury to consider three surgeries that plaintiff had in relation to an accident where she was accidentally hit in the head by an employee who was attempting to start a lawn mower. 2000 UT App 285 at ¶¶ 2-3. The plaintiff failed to

establish any expert testimony as to whether her surgeries were necessitated by the accident, instead claiming that such necessity could be assumed based on her testimony of the chronological association between her pain complaints and the accident. *Id.* at ¶¶ 12, 15-16. The court responded:

In this case, the question is not whether the accident at K-Mart caused Beard injury, but rather whether injuries sustained as a result of the accident at K-Mart required the neurological surgeries performed on Beard's neck and wrists. Beard was properly permitted to testify that the accident in the store caused pain and injury. The question as to whether such pain and injury resulted from the blow is within the common knowledge and experience of lay witnesses and could properly be submitted to the jury. *What is missing in the evidence, however, is the link between the injuries suffered and the necessity of the surgeries. . . . Certainly whether the need for complex neurological surgery was a result of the accident at K-Mart is not within the common experience of laypersons.*

*Id.* at ¶ 16 (emphasis added).

Here, the Plaintiff could testify regarding the pain she experienced after the subject accident as this evidence is certainly within the common knowledge and experience of laypersons. However, as in *Beard*, Plaintiff could not establish the necessity of her wrist surgery because the need for surgery falls outside the common knowledge of laypersons. Thus, “[w]ithout the required expert medical opinion linking the injury to the necessity of the surgery, a jury would simply be speculating about a linkage that is beyond its knowledge and experience. The expert medical testimony merely established a chronological relationship between the accident and [plaintiff’s] symptoms.” *Id.* at ¶ 20.

In addition to an inability to establish the necessity of her wrist surgery, Plaintiff also cannot establish the reasonableness and necessity of the numerous amounts and types of medical treatments she received. Plaintiff has not established through any evidence that her own experience as an EMT qualifies her to determine the reasonableness and necessity of physical therapy, chiropractic therapy, massage therapy, and acupuncture based on her pain complaints. Perhaps more importantly, Plaintiff cannot even establish that the amounts she was charged were reasonable.

In short, Plaintiff cannot establish that the treatment she received was reasonable, necessary, and related to the subject accident, and therefore cannot establish her damages. Laypersons' common knowledge does not entail an understanding of any of these treatment modalities, whether the different modalities should be experienced concurrently, how many treatments are reasonable, whether the amounts charged are reasonable, whether any diagnostic studies are reasonable or necessary, or whether any surgery was necessitated by the subject accident as opposed to any pre-existing condition. Therefore, Plaintiff cannot establish damages, entitling Defendant to summary judgment.

### **CONCLUSION**

The trial court properly granted Defendant's Motion to Strike Plaintiff's untimely designation of fact and expert witnesses and Defendant's Motion for Summary Judgment. The trial court used its broad discretion in determining that Plaintiff could not designate fact and expert witnesses long after the scheduling order deadline had passed, and even after having three separate opportunities to do so. The record shows that the trial court had previously used its broad discretion in allowing Plaintiff to set aside the prior

dismissal of this case, even when the evidence showed that Plaintiff's counsel did in fact have knowledge of the order to show cause hearing. The trial court's decision was also based on the finding that Plaintiff's failure was not harmless in that it prejudiced Defendant's ability to defend against Plaintiff's claims and that Plaintiff had not provided any good cause for her failure to timely designate fact and expert witnesses. Thus, the trial court properly exercised its broad discretion in striking Plaintiff's untimely witness designations.

The trial court also properly granted Defendant's Motion for Summary Judgment based on Plaintiff's inability to establish a prima facie case of negligence. Specifically, without expert medical testimony, Plaintiff could not establish causation or damages in her case. Even if Plaintiff were allowed to establish a chronological association between the accident and her injuries, a jury would have to speculate as to whether the extensive treatments she received were reasonable, necessary, and related to this subject accident, and not to pre-existing conditions and prior accidents. The nature of these various treatments, along with their complicating factors, takes this case out of the common knowledge of laypersons. Thus, the trial court correctly granted Defendant's Motion for Summary Judgment.


### **ADDENDUM**

Defendant has attached as an addendum the case of *Hall v. Steimle*, an unpublished opinion, for the Court's convenience.



DATED this 11th day of January, 2011.

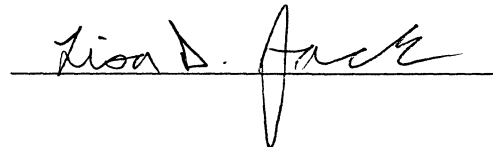
RICHARDS BRANDT MILLER NELSON

  
Lynn S. Davies  
Rafael A. Seminario  
*Attorneys for Appellee/Defendant*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was sent via US Mail postage pre-paid on this 11th day of January, 2011, to the following:

FRANKLIN RICHARD BRUSSOW  
P.O BOX 71705  
Salt Lake City, Utah 84171  
*Attorney for Appellant/Plaintiff*



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Not Reported in P.3d, 2009 WL 2569266 (Utah App.), 2009 UT App 224  
(Cite as: 2009 WL 2569266 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Utah.  
Jonathan HALL, Plaintiff and Appellant,  
v.  
Jason STEIMLE, Defendant and Appellee.

No. 20080486-CA.  
Aug. 20, 2009.

West KeySummaryDamages 115 185(1)

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k185 Personal Injuries and Physical  
Suffering

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

Given the injured party's history of neck and back pain, it was beyond the ordinary knowledge and common experience of a layperson to determine whether his diving incident or the motor vehicle accident caused his neck and back injuries; therefore, the injured party's negligence claim was dismissed since he failed to designate an expert witness on causation. About two months prior to the motor vehicle accident, the injured party went to a chiropractor complaining of neck and back pain he sustained from a diving injury. An expert witness was needed because a jury could not, without resorting to speculation, determine whether the injured party's neck and back pain was caused by the motor vehicle accident or the diving incident.

Fourth District, Provo Department, 040403916; The  
Honorable James R. Taylor.  
Rex I. Eagar, Provo, for Appellant.

Nan T. Bassett and Gary T. Wight, Salt Lake City,  
for Appellee.

Before Judges GREENWOOD, THORNE, and  
McHUGH.

MEMORANDUM DECISION (Not For Official  
Publication)

THORNE, Associate Presiding Judge:

\*1 Jonathan Hall appeals from the district court's order granting summary judgment in favor of Jason Steimle and dismissing Hall's negligence claim with prejudice based on Hall's failure to designate an expert witness on causation. We affirm.

In a negligence claim, the plaintiff carries the burden of establishing a prima facie case, including proximate and actual causation of the injury. *See Fox v. Brigham Young Univ.*, 2007 UT App 406, ¶ 21, 176 P.3d 446. “[S]ummary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Crestwood Cove Apartments Bus. Trust v. Turner*, 2007 UT 48, ¶ 10, 164 P.3d 1247 (internal quotation marks omitted). When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference. *See Grapendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 5, 173 P.3d 166; *Blackner v. State, Dep't of Transp.*, 2002 UT 44, ¶ 8, 48 P.3d 949.

Hall asserts that the district court erred in determining that Hall failed to establish a prima facie case of causation by not designating an expert witness. Hall argues that his injuries, unlike those in *Fox v. Brigham Young University*, 2007 UT App 406, 176 P.3d 446, and *Beard v. K-Mart Corp.*, 2000 UT App 285, 12 P.3d 1015, involve medical damages within the common experience of a layperson such that expert witness testimony is not required to establish causation. Indeed, “[t]he need for positive expert testimony to establish a causal link between the defendants' negligent act and the plaintiff's injury depends on the nature of the injury.” *Fox*, 2007 UT App 406, ¶ 22, 176

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P 3d 446 (alteration in original) (quoting *Beard* 2000 UT App 285, ¶ 16, 12 P 3d 1015) However, “[i]t is only in ‘the most obvious cases’ that a plaintiff may be excepted from the requirement of using expert testimony to prove causation” *Id* (quoting *Beard* 2000 UT App 285, ¶ 16, 12 P 3d 1015)

Hall's negligence suit, while presenting different injuries and causation issues than those in *Fox* and *Beard*<sup>FN1</sup> is still not an obvious case. Rather, Hall's negligence case is complicated by a previous diving injury in the summer of 1998 or 1999 when Hall suffered whiplash because he dove into a shallow lake. On October 4, 2000, about two months before the motor vehicle accident, Hall presented to Anderson Chiropractic complaining of neck and back pain. In his complaint, Hall alleges that he suffered permanent neck and back injuries as a result of the motor vehicle accident. It is beyond the ordinary knowledge and common experience of a layperson, given the history of Hall's neck and back pain, to determine whether the diving incident or the motor vehicle accident caused Hall's neck and back injuries, permanent or otherwise.

FN1 The plaintiff in *Fox v Brigham Young University* 2007 UT App 406, 176 P 3d 446, broke her leg after a slip and fall. See *id* ¶ 6. This court affirmed the trial court's ruling that expert testimony was required to determine whether the need for her medical treatment was caused by the allegedly defective stairs or the plaintiff's own arthritic knee. See *id* ¶¶ 23-25.

The plaintiff in *Beard v K-Mart Corp* 2000 UT App 285, 12 P 3d 1015, suffered neck and wrist problems after being struck in the head and falling to the floor. See *id* ¶ 2. This court determined that without expert medical opinion linking the injury to the necessity of the surgery, a jury would be speculating about a linkage that is beyond its knowledge and experience. See *id* ¶ 20.

Although Dr. Anderson, Hall's treating chiropractor, was designated to testify concerning any observable changes to Hall's neck and back condition before and after the motor vehicle accident, a jury would not, without resorting to speculation, be able to determine if Hall's neck and back pain was caused by the motor vehicle accident or the diving incident, or if the motor vehicle accident exacerbated a pre-existing condition. Testimony concerning a chronological relationship between the accident and Hall's neck and back pain is not sufficient, in this case, to establish causation.<sup>FN2</sup> See *Beard* 2000 UT App 285, ¶ 20, 12 P 3d 1015 (determining that the trial court erred in failing to remove the issue of causation from the jury, stating that “expert medical testimony merely established a chronological relationship between the accident and [the plaintiff's] symptoms. No expert medical testimony was received that the neck and wrist surgeries were necessitated by her accident.”)

FN2 Hall also asserts that a genuine issue of material fact precludes summary judgment. Hall argues that there are factual disputes as to when Hall began experiencing pain following the motor vehicle accident and as to the location, type, and severity of the pain experienced after the accident. Such disputes, however, do not establish causation in this case in the absence of expert testimony.

\*2 The district court did not err in dismissing Hall's negligence claim for failure to present expert testimony on the element of causation because the circumstances and nature of Hall's neck and back injuries were sufficiently complex to require such testimony. As a result, we affirm the district court's summary judgment ruling in favor of Steimle.

WE CONCUR PAMELA T. GREENWOOD,  
Presiding Judge and CAROLYN B. McHUGH,  
Judge

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