

2010

# Kim Dahl v. Brian C. Harrison, an individual; and Brian C. Harrison, P.C., a Utah professional corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KIM DAHL,

Appellant,

vs.

BRIAN C. HARRISON, an individual;  
and BRIAN C. HARRISON, P.C., a Utah  
professional corporation,

Appellees.

APPEAL

Appellate Case No. 20100553

District Court No. 070403005

Brief of Appellant

Appeal from the Fourth District Court, Utah County, Judge Claudia Laycock

Oral Argument Requested

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**JAN 26 2011**

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## **STATEMENT SHOWING JURISDICTION OF THE APPELLATE COURT**

Jurisdiction is conferred upon the Utah Court of Appeals, under Utah Code Annotated § 78A-4-103, to hear appeals from the district court involving cases transferred to the Court of Appeals from the Supreme Court.

## **STATEMENT OF THE ISSUES**

**Issue I.** Whether the trial court abused its discretion when it denied Ms. Dahl's motion to extend the deadline for designation of expert witnesses and for the submission of initial expert witness reports and whether the trial court erred by striking Ms. Dahl's expert witness reports without leave to amend, even though trial had not been set.

Standard of review. "Trial courts have broad discretion in managing the cases assigned to their courts." *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791 (quoting *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775). As part of that discretion, rule 16 of the Utah Rules of Civil Procedure allows the trial court to set dates for the completion of discovery and expert discovery. *See* Utah R. Civ. P. 16(b)(3) and Utah R. Civ. P. 26. Rule 16 also authorizes the trial court to impose the sanctions listed in Rule 37(b)(2) of the Utah Rules of Civil Procedure if the party fails to obey a scheduling or pretrial order. Utah R. Civ. P. 16(d). Under Rule 37, excluding evidence is one of the sanctions that may be imposed on a party who violates Rule 16. However, before the trial court can impose discovery sanctions under Rule 37, the court must find on the part of the noncomplying party "willfulness, bad faith . . . fault, or persistent dilatory tactics frustrating the judicial process." *Welsh*, 2010 UT App 171, ¶ 9 (citing *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997)). Once that

finding is made, the choice of an appropriate discovery sanction is primarily the responsibility of the trial judge. Appellate courts will only disturb a discovery sanction if abuse is clearly shown. *Id.* (quoting *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957).

Supporting Authority. Rule 16 of the Utah Rules of Civil Procedure, *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791; *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775; *Kilpatrick v. Bullough Abatement Inc.*, 2008 UT 82, 199 P.3d 957; *Boice v. Marble*, 1999 UT 71, 982 P.2d 565; *Normandeau v. Hanson Equip., Inc.*, 2007 UT App 382, 174 P.3d 1; *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260 (Utah Ct. App. 1997); *Debry v. Cascade Enters.*, 879 P.2d 1353, 1361 (Utah 1994); *Berrett v. Denver & Rio Grande W. R.R.*, 830 P.2d 291, 293 (Utah Ct. App. 1992); *Utah Dept. of Transp. v. Osguthorpe*, 892 P.2d 4, 8 (Utah 1995).

Statement of Preservation. The issue regarding the Motion to Strike Expert Witnesses and Motion for leave to amend is preserved on the Record at 607, 769, and 1742 18-31.

Issue II. Whether the trial court abused its discretion in denying Ms. Dahl's Motion to Extend Factual Discovery which was filed almost eighteen months prior to trial and a full year before the pretrial conference in which a trial date was calendared.

Standard of review. Trial courts have broad discretion in managing the cases assigned to their courts." *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791; *Butterfield v. Okubo*, 790 P.2d 94 (Utah Ct. App. 1990). As part of that

discretion, rule 16 of the Utah Rules of Civil Procedure allows the trial court to set dates for the completion of discovery. *See* Utah R. Civ. P. 16(b)(3).

Supporting Authority. Rule 16, Utah Rules of Civil Procedure; Rule 26, Utah Rules of Civil Procedure; *Welsh*, 2010 UT App 171; *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775.

Statement of Preservation. The issue of extending fact discovery is preserved on the Record at 393, 395, and 554.

Issue III. Whether the trial court improperly awarded attorney fees as a sanction against Ms. Dahl for filing a motion to extend the deadline for the designation of experts and for the submission of initial expert reports.

Standard of review. Appellate courts give no deference to the trial court's determination as to whether attorney fees. *Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845. However, "[w]hether a claim was brought in bad faith is a question of fact that appellate courts review under a clearly erroneous standard. *Edwards v. Powder Mountain Water and Sewer*, 2009 UT App 185, ¶ 13, 214 P.3d 120; *see also Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 8, 122 P.3d 556. The trial court's determination that an action lacks merit, however, is a question of law that this court reviews for correctness. *Edwards*, 2009 UT App 185, ¶ 13; *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 939 n. 3 (Utah 1998). To the extent the trial court awarded attorney fees pursuant to its equitable powers, the appropriate standard for reviewing equitable awards of attorney fees is abuse of discretion. *Fisher*, 2009 UT App 305, ¶ 8; *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148.

Supporting Authority. UTAH CODE ANN. § 78B-5-825; *Doctor's Co. v. Drezga*, 2009 UT 60, 218 P.3d 598; *In re Olympus Constr., L.C.*, 2009 UT 29, ¶ 8, 215 P.3d 129; *Edwards v. Powder Mountain Water and Sewer*, 2009 UT App 185; 214 P.3d 120.

Statement of Preservation. The issue of improper award of attorneys fees under Utah Code Ann. § 78B-5-825 is preserved on the Record at 947, 1057 and 1741 29-39.

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

### **UTAH CODE ANN.**

78B-5-825. Attorney fees -- Award where action or defense in bad faith -- Exceptions.

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1)

### **Utah Rules of Civil Procedure**

#### **Rule 11**

Reproduced verbatim in the addendum.

#### **Rule 16(b)(3)**

Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:

...

to complete discovery.

#### **Rule 16(d)**

Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2).

#### Rule 26(b)(2)

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

...

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

#### Rule 37(b)(2)

Sanctions by court in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, , 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.

#### Rule 37(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).

### **STATEMENT OF THE CASE**

On October 24, 2006, Ms. Dahl was served simultaneously with the divorce complaint and an ex parte temporary restraining order (TRO) that had already been entered in favor of her husband, Charles Dahl. On October 27, 2006, Ms. Dahl retained Brian Harrison as an attorney to represent her in the divorce matter. The representation of Kim Dahl by Brian Harrison in that divorce action was the issue below in this legal malpractice case.

The hearing on whether to grant the TRO was set for November 2, 2006. Prior to the hearing Mr. Harrison informed Ms. Dahl that there was insufficient time to prepare for the hearing and as a result, he wanted to seek a continuance of two weeks. She told Mr. Harrison she would defer to his recommendation. Mr. Harrison then informed Ms. Dahl that she need not appear at the divorce hearing set for November 2, 2006.

It was undisputed that Mr. Harrison, outside of Ms. Dahl's presence and without informing Ms. Dahl ahead of time of proposed terms of the stipulation, entered into a stipulation at the November 2, 2006 hearing. The terms of the stipulation provided for the adoption of the restrictions in the TRO for an indefinite time, including the temporary surrender of custody, even though she had been a stay at home mother all of the children's lives and even though there was no finding of abuse or neglect. In

addition, Mr. Harrison stipulated to additional restrictions that were not briefed and were not before the court on that day. The additional restrictions included that Ms. Dahl would vacate the marital home which she had sole possession of at that time so that Mr. Dahl be awarded immediate use of the home and that Ms. Dahl be required to submit to supervised visitation, the supervisor being Mr. Dahl's brother.

Ms. Dahl was removed from the marital home later on November 2, 2006 and not permitted to return. Ms. Dahl hired Rodney Parker to replace Mr. Harrison a short time after November 2, 2006. At a later hearing before Judge Taylor to request an evidentiary hearing on the matter of temporary custody, Judge Taylor concluded among other things that the custody order was in place as a result of the stipulation of the parties. He denied the request for an evidentiary hearing. The stipulation caused Ms. Dahl and her children significant suffering and displaced Ms. Dahl from stable housing, causing her significant economic injury.

On October 11, 2007, Ms. Dahl filed a complaint against Mr. Harrison alleging breach of contract, breach of fiduciary duty, and negligence. On November 21, 2007, after agreeing to a scheduling order, Mr. Harrison filed a motion to disqualify Ms. Dahl's counsel which was resolved by stipulation on February 6, 2008. On January 4, 2008, the court signed a stipulated scheduling order that closed fact discovery on April 7, 2008. The order set a deadline of May 5, 2008, for Ms. Dahl to disclose any expert witnesses. Trial was not scheduled at this time. On April 28, 2008, Mr. Harrison submitted a Motion for Summary Judgment, which was later denied. On May 12, 2008, Ms. Dahl filed motions with the trial court seeking amendment of the scheduling order. The court

held oral argument on the motions to extend discovery on August 7, 2008. The court denied Ms. Dahl's request to reopen fact discovery. The court extended expert discovery until September 8, 2008 for Ms. Dahl to submit her expert disclosures and reports.

Ms. Dahl submitted her expert disclosures on September 8, 2008 for two legal experts, Clark Nielsen and Martin Olsen. Mr. Harrison moved to strike the disclosures pursuant to rule 37(f) because the expert reports did not include adequate description of the experts' opinions. Ms. Dahl opposed the motion to strike on the grounds that a discovery sanction was inappropriate where there had been no attempt by Mr. Harrison to meet and confer, and where there was no showing of prejudice, willfulness or bad faith. Trial had not been scheduled at this point.

On December 16, 2008, the court held oral argument on the motion to strike. At that hearing Ms Dahl's counsel orally requested that the court receive an amended expert report from Martin Olsen and asked alternatively for the court to consider a motion to extend time to prepare further detailed disclosures and reports. The court declined to receive the amended report and "strongly hinted" that it would not grant a motion to extend expert discovery if it were filed.

On, January 23, 2009, Ms. Dahl filed her second motion for extension of time to file amended expert disclosures and reports, or alternatively, to allow her designated experts to testify at trial. As of the date of that motion, trial had not yet been set. Ms. Dahl argued in support of her affirmative motion for an extension of time and that no prejudice would result as a trial date had yet to be set. The Court denied this motion, and

awarded costs and fees to Mr. Harrison on the basis that the motion was frivolous. The court set trial for the first time at a pretrial conference on June 30, 2009.

At the pretrial conference, the court also bifurcated the trial so that issues of liability would be tried separately from the issue of causation and damages. A two day bench trial was held on October 26 and 27, 2009, limited solely to the issues of liability. Following the presentation of evidence, the Court found in favor of Mr. Harrison on each of Ms. Dahl's causes of action and dismissed the case. The Court entered its conclusions of law and order of dismissal on June 1, 2010 and a final judgment of court costs on June 21, 2010.

#### **STATEMENT OF RELEVANT FACTS**

1. On October 24, 2006, Plaintiff Kim Dahl's husband, Charles Dahl, filed a Petition for Divorce in the Fourth Judicial District under case number 064402232.

(Record at 11.)

2. Along with the Petition for Divorce, Mr. Dahl filed a Motion for an Ex Parte Temporary Restraining Order limiting Ms. Dahl's contact with her children. (*Id.*)

3. On October 24, 2006, Ms. Dahl was served with a Complaint for Divorce and the Ex Parte Temporary Restraining Order ("TRO"). (Record at 10.)

4. At the time she was served, Ms. Dahl had no notice or inclination that Mr. Dahl had been planning to file for divorce. (*Id.*)

5. Prior to the date she was served with the TRO, Ms. Dahl had never been reported by anyone for abusing or neglecting her children, or for giving them medication

not prescribed by their physician and father, Charles Dahl, or by any other licensed physician. (Record at 9.)

6. Based upon the unsubstantiated allegations in the affidavits of Charles Dahl and Rosemond Blakelock, Mr. Dahl's attorney, representing that permanent and irreparable harm may come to the children if the TRO did not issue, the District Court entered an Ex Parte Temporary Restraining Order without notice to Ms. Dahl. (*Id.*)

7. The Ex Parte Temporary Restraining Order prohibited Ms. Dahl from removing the children from the temporary care, custody, and control of the Mr. Dahl, or removing either child from his or her school. (*Id.*)

8. The Ex Parte Temporary Restraining Order did not order Ms. Dahl to leave the marital home. (Record at 9.)

9. The District Court scheduled an Order to Show Cause on November 2, 2006 before Commissioner Patton to review the TRO. That hearing was Ms. Dahl's first opportunity to be heard on the court's restraining order. (Record at 10.)

10. After being served with the Complaint and the Temporary Restraining Order, Ms. Dahl went to attorney Brian Harrison of Brian C. Harrison, P.C. to discuss the papers which had been served upon her. (Record at 9.)

11. After reviewing the documents, Mr. Harrison told Ms. Dahl that he would represent her, but that she needed to deposit a \$5,000 retainer with Brian C. Harrison, P.C. (*Id.*)

12. Ms. Dahl promptly secured the funds for the retainer and delivered them to Mr. Harrison. (*Id.*)

13. Between the retainer payment and the other money Ms. Dahl was able to secure, Ms. Dahl deposited \$12,146.05 with Brian C. Harrison, P.C. (Record at 8.)

14. During one of the initial consultations, Mr. Harrison counseled Ms. Dahl to sign up for parenting classes. (*Id.*)

15. Mrs. Dahl took the advice of Mr. Harrison and signed up for the classes. (*Id.*)

16. Of utmost concern to Ms. Dahl was the hearing scheduled for November 2, 2006. (*Id.*)

17. When Ms. Dahl discussed the hearing with Mr. Harrison, he told her that he could not be ready for the hearing on November 2, 2006 and that it would be continued. (*Id.*)

18. Mr. Harrison informed Ms. Dahl that because the November 2, 2006 hearing would be continued, she would not need to appear. (*Id.*)

19. Despite Mr. Harrison's representation to Ms. Dahl that she did not need to attend the hearing on November 2, 2006, Mr. Harrison entered into a stipulation on Ms. Dahl's behalf. Mr. Harrison did so without any further attempt to contact Ms. Dahl before or during the hearing, without Ms. Dahl's knowledge or consent, and outside of her presence. The stipulation that Mr. Harrison agreed to on Ms. Dahl's behalf adopted the restrictions in the TRO pending a new hearing. The stipulation further adopted additional restrictions including removing Ms. Dahl from the marital home and restricting her parent time with the children to supervised visitation, the supervisor being Mr. Dahl's brother. (*Id.*)

20. On November 7, 2006, the District Court Commissioner and Judge signed an Order consistent with the terms of the stipulation. (*Id.*)

21. After Mr. Harrison entered into a stipulation extending the TRO, removing Ms. Dahl from the marital home and restricting her parent time with the children to supervised visitation, Ms. Dahl retained Rodney Parker to represent her in the divorce action. (Record at 7.)

22. Mr. Harrison sent portions of Ms. Dahl's file, including privileged information, to the martial home, even though he knew that Ms. Dahl did not reside there and that she was then represented by Rodney Parker. (*Id.*)

23. On or about November 9, 2006, Mr. Harrison sent a final bill to Ms. Dahl stating that he had worked on her case for 27 hours between the dates of October 26, 2006 through November 9, 2006. (*Id.*)

24. Ms. Dahl filed the current action on October 11, 2007, alleging breach of contract, breach of fiduciary duty, and negligence. (Record at 12.)

25. Mr. Harrison filed his Answer and Affirmative Defenses on November 1, 2007. (Record at 24.)

26. After agreeing to a scheduling order, Mr. Harrison filed a Motion to Disqualify Ms. Dahl's counsel on November 21, 2007. (Record at 30.) On January 4, 2008, the court signed a stipulated scheduling order that closed fact discovery on April 7, 2008. (Record at 144.) The order set a deadline of May 5, 2008, for Ms. Dahl to disclose any experts. (*Id.*) Trial was not scheduled at this time.

27. On January 8, 2008, oral argument was set for the motion to disqualify to occur on March 14, 2008. (Record at 147). This motion was later withdrawn on February 6, 2008 by stipulation of the parties.

28. Ms. Dahl propounded discovery including interrogatories and a request for production of documents on April 7, 2008. (*See* Record at 194). Mr. Harrison then filed a Motion for Protective Order requesting that because the discovery could not be responded to within the fact discovery period, the court should order that Mr. Harrison was not required to respond to the discovery requests. (*Id.* At 193-94).

29. On April 28, 2008, Mr. Harrison submitted a Motion for Summary Judgment, which was later denied. (Record at 391, 717.) On May 15, 2008, Ms. Dahl filed motions with the trial court seeking amendment of the scheduling order. (Record at 393, 395, 401, 409.) The court held oral argument on August 7, 2008, and the court denied Ms. Dahl's request for further time for fact discovery. (Record at 554.) The court did extend expert discovery deadlines, giving Ms. Dahl until September 8, 2008, to submit her expert disclosures. (*Id.*)

30. Ms. Dahl submitted her expert disclosures on September 8, 2008. Mr. Harrison, without any attempt to meet and confer as required under Utah R. Civ. P. 37(a) moved to strike the expert disclosures pursuant to Rule 37(f) alleging that the disclosures lacked adequate description of the experts' opinions. (Record at 556, 562, 573.) Ms. Dahl opposed this motion on the grounds that a discovery sanction was inappropriate where there had been no attempt by the parties to meet and confer, and where there was

no showing of prejudice (since the matter was not set for trial), willfulness, or bad faith. (Record at 607.)

31. On December 16, 2008, the court held oral argument on the motion to strike. (Record at 769.) At this hearing, Ms. Dahl's counsel orally requested that the court receive an amended report from Martin Olsen which the court denied. (Record at 1742 18:9-13; 30:20-31:6.) In addition, Ms. Dahl's counsel asked if the court would consider a motion for leave to amend. The court "strongly hinted" that it would deny a motion for leave if it were brought. (Record at 1741 38:17-24). The trial court granted the motion to strike Ms. Dahl's expert report. (Record at 1742 30:20-31:6).

32. On January 23, 2009, Ms. Dahl filed a written request for extension of time to file the expert disclosures and reports. (Record at 947.) As of the date of that motion, trial had not yet been set. Ms. Dahl argued in her affirmative motion for an extension of time and that no prejudice would result to Mr. Harrison as trial had yet to be scheduled. The trial court denied this motion and awarded costs and fees to Mr. Harrison even though no Rule 11 motion had been served or filed. (Record at 1057.)

33. On June 30, 2009, the court set the first trial date in this case. (Record at 1162.) The court also bifurcated trial into two parts—liability would be tried first and the issues of causation and damages would follow at a separate trial date. (*Id.*) A two day bench trial on liability issues only was set for October 26 and 27, 2009. (Record at 1400, 1402.)

34. Even though trial issues were limited for the first time on June 30, 2009, the court did not reopen fact or expert discovery on the limited issues after bifurcation. No

fact discovery had been permitted by the court between April 7, 2008 and trial on October 26, 2009. (Record at 1162.)

35. Following the presentation of evidence on October 26 and 27, 2009, the court found in favor of Mr. Harrison on each of Ms. Dahl's causes of action and dismissed the case. (Record at 1718.) The trial court entered its conclusions of law and order of dismissal on June 1, 2010 and a final judgment of costs on June 21, 2010. (Record at 1718, 1722.)

### **SUMMARY OF THE ARGUMENT**

Issue I: The trial court abused its discretion in granting Mr. Harrison's Motion to Strike Expert Witnesses. A trial court's decision to strike expert witnesses is "extreme in nature and . . . should be employed only with caution and restraint." *Welsh v. Hospital Corporation of Utah*, 2010 UT App 171, ¶ 10, 235 P.3d 791 (quoting *Berrett v. Denver & Rio Grande W. R.R.*, 830 P.2d 291, 293 (Utah Ct. App. 1992)) (omissions in original). The trial court abused its discretion by choosing an inappropriate remedy. In this case, Ms. Dahl met the deadline for expert disclosures set by the trial court, a trial date had not been set, expert designations could have been amended, and there would have been ample time for deposition of the experts and designation of rebuttal experts if needed. Before imposing the drastic sanction of limiting evidence, the court should have at the very least required the moving party to comply with Rule 37(a) and the duty to meet and confer informally before seeking discovery sanctions. Because this case required expert testimony, the court's decision to strike the expert witness disclosures was fatal to Ms. Dahl's case and essentially gutted her legal malpractice claim. When the court finally set

trial and limited the trial issues, the court should have reconsidered the sanction of striking expert witnesses and permitted discovery that could have been accomplished in the four months preceeding trial.

The trial court abused its discretion when it denied Ms. Dahl's request for an extension of time to amend the expert designations and/or permission for expert testimony even if the extension of time was not granted. The trial court had the discretion to grant the motion, even after an expiration of a stipulated deadline. Further, the denial of the motion and exclusion of the expert testimony from the trial was an "extreme sanction" that effectively decided the outcome of the case before it ever went to trial. *See Welsh*, 2010 UT App 171, ¶ 17. Because the trial date had yet to be set, plenty of time remained to complete the expert reports, conduct the necessary discovery, and still allow both sides to be ready for trial.

This motion was not in essence a motion for reconsideration because the prior request had been granted. Even though the court believes that it "hinted" that it would deny such a motion, Ms. Dahl had the right to bring the motion in writing and set forth her argument for relief. Further, the "hint" by the trial court would not have been enough to preserve the issue for appeal. The trial court should have decided the motion on its merits, and under *Boice*, the trial court should have granted Ms. Dahl leave to amend her disclosures. *See Boice v. Marble*, 1999 UT 71, 982 P.2d 565.

Issue II: The trial court abused its discretion when it denied Ms. Dahl's motion to extend fact discovery. While the rules of civil procedure allow the trial court to set the

dates for completion of discovery, this discretion should be exercised in favor of allowing the trial court to determine the facts and resolve the issues directly and fairly.

Because a motion to disqualify counsel for Ms. Dahl covered the bulk of the factual discovery period, it was an abuse of discretion for the trial court not to grant an extension once the motion had been withdrawn by Mr. Harrison. The trial court improperly imposed a harsh sanction by closing fact discovery over 18 months before trial and more than 12 months before a trial date was determined. No prejudice would have resulted to Mr. Harrison if the court had granted the motion for extension of time. When the court finally set trial and limited the trial issues, the court should have reconsidered the denial of fact discovery and permitted discovery that could have been accomplished in the four months preceeding trial.

Issue III: The trial court legally erred when it awarded Mr. Harrison attorneys fees under Utah Code Ann. § 78B-5-825 because this section applies only to causes of action, not motions. Even if § 78B-5-825 somehow applied in this circumstance, Mr. Harrison had not prevailed on the cause of action at that point, the claims asserted by Ms. Dahl had merit, and her cause of action was not brought in good faith. Applying this statute to motions would obviate the requirements of Rule 11 of the Utah Rules of Civil Procedure, that a party like Ms. Dahl must receive prior notice and the opportunity for her to withdraw the motion. Mr. Harrison did not comply with Rule 11; therefore he should be precluded from seeking sanctions for a motion he deems to be frivolous.

Further, the trial court abused its discretion in awarding attorney fees under its equitable powers. None of the specific equitable exceptions to the general rule that a

prevailing party is only entitled to attorney fees when authorized by contract or statute apply in this case.

### ARGUMENT

Appellant, Kim Dahl, respectfully requests that this court reverse the determinations of the trial court below because the lower court improperly denied her motion to amend designation of expert witnesses, struck her expert reports, denied an extension of time to conduct fact discovery, and improperly granted an award of attorneys fees. For these reasons, Ms. Dahl respectfully requests that this case be remanded to the trial court for additional discovery and a new trial on the bifurcated issue of liability.

- I. The trial court abused its discretion by denying Ms Dahl's motion to extend the deadline for the designation of experts and for the submission of initial expert reports and by striking Ms. Dahl's expert reports without leave to amend, even though trial had not been set.

This Court reiterated just last year that “a trial court’s discretion to exclude expert witness testimony is not absolute. ‘Excluding a witness from testifying is . . . extreme in nature and . . . should be employed only with caution and restraint.’” *Welsh v. Hospital Corporation of Utah*, 2010 UT App 171, ¶ 10, 235 P.3d 791 (quoting *Berrett v. Denver & Rio Grande W. R.R.*, 830 P.2d 291, 293 (Utah Ct. App. 1992)) (omissions in original). Given that trial had not been scheduled, there was ample time for Mr. Harrison to depose Ms. Dahl’s experts and designate rebuttal experts, if needed, the trial court abused its discretion in this case when it excluded Ms. Dahl’s experts. *See Welsh*, 2010 UT App 171, ¶ 16 (noting that even though there was a delay in designating experts, the other side

would have had time to “depose those experts, designate rebuttal experts, and otherwise prepare for trial) (quoting *Boice v. Marble*, 1999 UT 71, ¶ 10, 982 P.2d 565).

A. *The trial court abused its discretion when it chose an inappropriate sanction by striking Ms. Dahl’s Expert Disclosures and Reports.*

The trial court abused its discretion when it granted Mr. Harrison’s Motion to Strike Ms. Dahl’s Expert Disclosures and Reports as a discovery sanction almost 11 months before trial. While it is true that the choice of an appropriate discovery sanction is primarily the responsibility of the trial judge, this court will disturb that discovery sanction if abuse of discretion is shown. *Welsh v. Hospital Corp.*, 2010 UT App 171, ¶ 9, 235 P.3d 791. The recent case of *Welsh* clearly sets forth the premise that the exclusion of expert witnesses is an extreme sanction and effectively decides the outcome of a legal malpractice case before ever beginning trial. *See Welsh*, 2010 UT App 171, ¶ 17 (finding that the prejudice to the plaintiffs if their experts were excluded would be “potentially devastating”).<sup>1</sup>

This Court has previously stated that “expert testimony may be helpful, and in some cases necessary, in establishing the standard of care required in cases dealing with the duties owed by a particular profession.” *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997) (citing *Wycalis v. Guardian Title*, 780 P.2d 821, 826

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<sup>1</sup> Before the trial court imposed its discovery sanction under Rule 37, the trial court should have found Ms. Dahl was willful, acted in bad faith, or used persistent dilatory tactics that frustrated the judicial process. *See Welsh*, 2010 UT App 171, ¶ 9 (citing *Morton v. Continental Baking Co.*, 938 P.3d 271, 274 (Utah 1997)). However, as stated by this court in *Welsh*, “[w]e need not resolve the question of willfulness” if “we conclude that the trial court abused its discretion in its ‘choice of an appropriate sanction.’” *Id.* (quoting *Morton*, 938 P.2d at 275).

n.8 (Utah Ct. App. 1989)). The *Preston* Court acknowledged that “[i]n some cases, expert testimony may be unnecessary where the propriety of the defendant’s conduct ‘is within the common knowledge and experience of the layman.’” *Id.* at 263-64 (quoting *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980)). However, the trial court determined below that “this is a legal malpractice case which required expert testimony.” (Record at 1446.) Further, the trial court determined that the “failure to present any expert testimony was, indeed, fatal to [Ms. Dahl’s] claims in this legal malpractice case.” (Record at 1439.) Therefore the failure to present expert testimony on Ms. Dahl’s claims of legal malpractice rendered the second phase of this bifurcated trial as to the issue of damages “unnecessary.” (Record at 1713.)

Knowing that expert testimony in this case would be determinative, the trial court abused its discretion and effectively gutted Ms. Dahl’s legal malpractice case when it imposed the extreme sanction of disallowing expert testimony. This sanction was not employed with “caution and restraint” as required by *Welsh*. *Id.* ¶ 10.

B. *The trial court abused its discretion by placing any inconvenience to Mr. Harrison in extending discovery ahead of the extreme prejudice to Ms. Dahl.*

This Court in *Welsh* determined that because the nonmoving party had time to depose the experts, designate rebuttal experts, and otherwise prepare for trial, any prejudice would be minimized. *Welsh*, 2010 UT App 171, ¶ 16. Similarly, Mr. Harrison had ample time to depose the two experts listed by Ms. Dahl, designate any rebuttal experts, and otherwise prepare for trial. Mr. Harrison would “suffer no prejudice” if the trial court had permitted Ms. Dahl’s two experts to testify at trial. *See id.* at ¶ 17.

However, comparatively the prejudice to Ms. Dahl was completely “devastating” and this Court should find, as in the *Welsh* case, that the trial court abused its discretion by striking Ms. Dahl’s experts without leave to amend their reports. *Id.*

The facts of *Dugan v. Jones* are analogous, in most respects, to the instant case. “In determining whether to modify a pretrial order in the interest of justice, the court should consider the possible prejudicial effects of its enforcement of the order.” *Dugan v. Jones*, 615 P.2d 1239, 1244 (Utah 1980). The court in *Dugan* held that “the trial court abused its discretion, under the circumstances of this case, in excluding testimony from defendants’ experts.” *Id.* In *Dugan*, the trial court precluded expert witness testimony because the defendants had failed to disclose any expert witnesses prior to trial. *Id.* The trial court then found at trial that the lack of expert witness testimony relating to damages prevented the court from finding damages. *Id.*

The *Dugan* court reasoned that because the pretrial order to disclose expert witnesses was not written down, because the case was not being tried in front of a jury, and because there were alternative sanctions that could have been used, the trial court abused its discretion in preventing the defendant’s expert witnesses from testifying. *Id.*

Ms. Dahl did comply with the court ordered date to disclose expert witnesses. Like *Dugan*, there was no jury to be empanelled in this case and the “inconvenience to the court . . . [would] not [have] outweigh[ed] the prejudice to [Ms. Dahl], resulting from the exclusion of [her] experts.” *Id.* Additionally, there were other sanctions available to the trial court beyond striking expert testimony which is critical to prove legal

malpractice. *Id.*; see also *Posner v. Equity Title Ins. Agency*, 2009 UT App 347, ¶ 23, 222 P.3d 775 (courts have discretion to employ alternative sanctions in lieu of exclusion).

The court's refusal to allow the timely designated expert witnesses to testify or to allow Ms. Dahl leave to amend their reports was an abuse of discretion. See *Welsh*, 2010 UT App 171, ¶ 17. Therefore, this Court should remand this case back to the trial court for a new trial on the issue of liability.

C. *The trial court abused its discretion when it denied Ms. Dahl's January 23, 2009 Motion to Allow Expert Witnesses at Trial.*

1. The trial court improperly determined that Ms. Dahl's Motion to Allow Testimony of Expert Witnesses at Trial was a motion to reconsider the trial court's previous ruling.

After the trial court struck her expert witnesses, Ms. Dahl then filed her written Motion to Allow Testimony of Expert Witnesses at Trial on January 23, 2009 to ask the court for additional time to designate her expert witnesses for trial in order to amend their reports. (Record at 947.) This expert testimony was critical to the case. The trial court had stricken the experts in response to Mr. Harrison's objections to the sufficiency of the opinions in their reports. (Record at 1742 16:21-17:12.) Ms. Dahl sought not to designate new witnesses but to amend their designations to more fully comply with Rule 26 regarding the opinions of the same witnesses. (Record at 1057.) Ms. Dahl's motion to extend time for designation of experts would not have caused further delays in the trial because the trial date had not been set.

In ruling on this motion the trial court suggested that the January 23, 2009 motion was really a motion for reconsideration of the trial court's decision on December 16,

2008, even though the trial court itself admitted in the hearing on the written motion that “this is not a second motion for plaintiff.” (Record at 1741 37:8-10.) Ms. Dahl’s previous motion to extend expert discovery deadlines had been granted by the court on August 7, 2008. Ms. Dahl had every right to bring a motion to ask for additional relief when she had not been denied previously.

Further, this January 23, 2009 motion to extend time was asking for different relief than Mr. Harrison’s motion that was decided on December 16, 2008; therefore, it could not be considered a motion for reconsideration. Mr. Harrison moved to strike what had previously been designated while Ms. Dahl’s subsequent motion asked for leave to amend. A motion to strike may be followed by a motion for leave to amend. The first does not preclude the second. Given the gravity of this decision, the court should first have decided the January 23, 2009 motion to extend expert discovery on its merits not based on a procedural determination that the form of the motion was a motion for reconsideration.

2. The trial court should have decided the motion on its merits, and under *Boice*, the trial court should have granted Ms. Dahl leave to amend her disclosures.

Had the court considered the merits of Ms. Dahl’s January 23, 2009 motion, the trial court should have granted the motion. If the court had granted the January 23, 2009 motion, there would have been no prejudice to the Mr. Harrison because trial date had yet to be set. Plenty of time remained to re-designate expert witnesses, amend the expert reports, conduct the necessary discovery, and allow counsel to designate rebuttal experts for trial. On the other hand, the extreme exclusion by the trial court was “devastating”

and decided the outcome of Ms. Dahl's legal malpractice case before ever beginning the trial. *See Welsh*, 2010 UT App 171, ¶ 19. The prejudice to Ms. Dahl in denying her motion was not justified by any benefit to the court or opposing party.

The present situation is analogous to the case of *Boice v. Marble* where the Utah Supreme Court made a distinction between failing to obey a scheduling order and asking for leave to designate a new expert. 199 UT 171, ¶ 11. In *Boice*, the plaintiff had designated his psychiatry expert prior to the court's deadline. *Id.* After the deadline, the plaintiff sought leave to substitute a new expert after his previous expert had decided not to testify. *Id.* The plaintiff sought leave to substitute two months prior to the trial date. *Id.* The Supreme Court held that the substitution of a new expert two months prior to trial did not unfairly prejudice the defendant as there was ample time to depose the new expert and prepare rebuttal experts. *Id.* The Court further stated that even if defendant would be harmed by the late designation, the rules allow for a continuance and the trial court could have granted that for good cause. *Id.*

Under *Boice*, the Supreme Court found that two months before trial was adequate time to designate a rebuttal expert after a new designation by the moving party. *See Welsh v. Hospital Corporation of Utah*, 2010 UT App 171, ¶ 10, 235 P.3d 791 (justice and fairness may require that a trial court allow a party to designate expert witnesses, conduct discovery, or perform tasks covered by the scheduling order after the expiration of the imposed deadline); *see also Boice v. Marble*, 1999 UT 71, ¶ 10, 982 P.2d 565. The court's order denying leave to amend the actual report in this case was over 10 months before trial. Since the designation in *Boice* would "not unfairly prejudice the defendant

as there was ample time to depose the new expert and prepare rebuttal expert”, the same result should have been reached here where the expert was identified more than fourteen months before trial. *Boice v. Marble*, 199 UT 171, ¶ 11. The trial court concluded that prejudice would result if Ms. Dahl was permitted to amend her expert witness disclosures. (Record at 1742 31:11-16.) However, the trial court did not address the fact below that trial had not been scheduled yet and that “prejudice is minimized where the opposing party has time to depose those witnesses, designate rebuttal witnesses and prepare for trial.” *Welsh*, 2010 UT App 171, ¶ 16 (citing *Normandeau v. Hanson Equip., Inc.*, 2007 UT App 382, ¶ 26, 174 P.3d 1). As was the case in *Welsh*, Mr. Harrison “had time to depose those experts, designate rebuttal experts and otherwise prepare for trial.” *Id.* Therefore, this court should reverse and remand for a new trial.

In sum, while the trial court had a “commendable desire to move this case forward,” the forgoing factors, taken as a whole, should constrain this Court to conclude that the trial court abused its discretion in excluding Ms. Dahl’s expert witnesses from trial. *See id.* ¶ 19. This court should reverse the trial court’s decision to deny Ms. Dahl’s January 23, 2009 motion to extend time to designate an expert witness for trial and remand this case and direct that further discovery and time for designation of witnesses be permitted.

II. The Trial Court abused its discretion when it denied Ms. Dahl’s Motion to Extend Factual Discovery and granted Mr. Harrison’s Protective Order.

The complaint in this case was filed on October 11, 2007. (Record at 12.) On January 4, 2008, the court signed a stipulated scheduling order that closed fact discovery

on April 7, 2008. Ms. Dahl propounded discovery including interrogatories and a request for production of documents on April 7, 2008. Mr. Harrison filed a Motion for Protective Order requesting that because the discovery could not be responded to within the fact discovery period, the court should order that Mr. Harrison was not required to respond to the discovery requests. On May 12, 2008, Ms. Dahl filed a motion to extend factual discovery. At a hearing on August 7, 2009, the trial court granted Mr. Harrison's Motion for Protective Order and denied Ms. Dahl's motion to extend factual discovery.

Discovery which will aid in identifying, narrowing and clarifying the issues should be liberally permitted. *Macris & Assoc., Inc. v. Neways, Inc.*, 2006 UT App 33, ¶ 10, 131 P.3d 263. The purpose of the rules of civil procedure pertaining to discovery "is to make the procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities." *Rahofy v. Steadman*, 2010 UT App 350, ¶ 7, ---P.3d--- (quoting *Cannon v. Salt Lake Reg'l Med. Ctr., Inc.*, 2005 UT App 352, ¶ 7, 121 P.3d 74). Additionally, the purpose of the rules pertaining to discovery is to allow the trial court to determine the facts and resolve the issues directly, fairly, and expeditiously as possible. *Id.* (citing *Cannon*, 2005 UT App 352, ¶ 8.)

This Court reviews a trial court's ruling on discovery issues for abuse of discretion. *Menzies v. Galetka*, 2006 UT 81, ¶ 59, 150 P.3d 480. As part of that discretion, rule 16 of the Utah Rules of Civil Procedure allows the trial court to set dates for the completion of discovery. *See* Utah R. Civ. P. 16(b)(3). However, this discretion should be exercised in favor of allowing the trial court to determine the facts and resolve the issues directly and fairly. *See Cannon*, 2005 UT App 352, ¶ 8.

In this case, the trial court should have exercised its discretion in favor of allowing factual discovery that would properly allow the trial court to determine the facts of this case and resolve the issues fairly. Instead, the trial court abused its discretion by denying the request to extend factual discovery when no trial date had been set and sufficient time remained for factual discovery to be completed. The trial court abused its discretion in granting a protective order rather than granting the motion to extend factual discovery. The cases in which appellate courts have upheld protective orders and denied additional time for discovery have had extreme factual scenarios, nothing like the one at hand. *See e.g., Richards v. Brown*, 2009 UT App 315, ¶¶ 55-56, 222 P.3d 69 (upholding a protective order and denying additional discovery because party failed to participate in scheduling order and trial was less than two weeks away);

The trial court abused its discretion by adopting a rigid approach that thwarted the uncovering of facts relating to this case. For instance, the trial court, in granting the protective order, found that Mr. Harrison had the right to expect Ms. Dahl to work within the time frame. (Record 1743 31:20-23.) The trial court also summarily concluded that there would be prejudice to Mr. Harrison because if the court granted an extension, he would be required to “delay everything” and to answer the interrogatories. (Record 1743 (Tr: 31:20-23, 32:2-7). However, the court did not mention the extreme prejudice to Ms. Dahl in denying the extension of fact discovery. Rather, the trial court overstated the prejudice to Mr. Harrison. No trial had been set. Ample time existed to complete fact discovery.

Additionally, this Court should note that a few weeks after the complaint was filed in this case, Mr. Harrison filed a Motion to Disqualify Ms. Dahl's counsel. (Record at 30.) Oral argument was set for this motion on March 14, 2008. (Record at 147.) Counsel for Ms. Dahl understandably held off on its factual discovery efforts once Mr. Harrison filed a motion to disqualify counsel for Ms. Dahl. The doctrine of equitable estoppel provides that "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *Youngblood v. Auto-Owners Ins. Inc.*, 2005 UT App 154, ¶ 12, 111 P.3d 829 (quoting *United Am. Life Ins. Co. v. Zions First Nat'l Bank*, 641 P.2d 158, 161 (Utah 1982)). The delay alone of over 80 days caused by the pending Motion to Disqualify should have been grounds to extend the already very abbreviated fact discovery deadlines in this case.

Since fact discovery as scheduled was to close on April 7, 2008, Ms. Dahl had less than 30 days to propound written discovery after the Motion to Disqualify was resolved and have it due prior to the discovery cut off date. Ms. Dahl's counsel prepared and propounded written discovery 60 days after the Motion to Disqualify was resolved. Mr. Harrison's Motion for Summary Judgment was filed on April 28, 2008, after the close of fact discovery. (Record at 163.) The Motion for Summary Judgment was later denied. (Record at 717.) On May 15, 2008, Ms. Dahl filed a Motion to Amend the Scheduling Order to allow additional time for fact and expert discovery. This motion was granted as to expert discovery and denied as to fact discovery on August 7, 2008.

Counsel for Ms. Dahl represented that due to Mr. Harrison's Motion to Disqualify, counsel decided to "wait and see what happens" with the motion. (Record at 1743 13:16-14:5.) Counsel also noted that after the Motion to Disqualify was withdrawn on February 6, 2008, there remained only 58 days for fact discovery. (*Id.* at 15:24-16:7.) Under the doctrine of equitable estoppel, Ms. Dahl's counsel reasonably determined to wait on initiating discovery in this case while the Motion to Disqualify counsel was pending. This coupled with the fact that no trial date had been set in this case and the Motion to Disqualify was filed less than 30 days after the complaint was answered constituted good cause to adjust the discovery deadlines.

Under Rule 26, the default discovery timeline for fact discovery is 240 days after first appearance by the defendant. Rule 26 Advisory Committee Notes. Mr. Harrison filed his Answer and Affirmative Defenses on November 1, 2007. (Record at 24.) At the very least, due to the intervening Motion for Disqualification, the trial court should have implemented the default discovery provision allowing Ms. Dahl 240 days after the Mr. Harrison answered to complete fact discovery which would have given the parties approximately 90 additional days for discovery. This would have allowed time for the discovery Ms. Dahl's counsel propounded to Mr. Harrison to have been answered. Instead, the trial court refused to permit any fact discovery following April 7, 2008—even though the first trial date was subsequently set for approximately 18 months from that date on October 26 and 27, 2009. This case turned on the strength of the claims of each party as to the events on November 2, 2006. Ms. Dahl was prejudiced at trial because she was not able to discover the facts surrounding Mr. Harrison's claims.

This court should remand this case back to the district court for a new trial on the issue of liability in order to allow Ms. Dahl a fair opportunity to discover the pertinent facts of this case. The court limited the issues to liability only on June 30, 2009. With this very limited focus at trial, the parties could have easily accomplished the needed discovery in the remaining 120 days before trial. However, the court abused its discretion and refused to reopen discovery, even at that point.

III. The Trial Court erred by awarding Mr. Harrison \$2,400 in attorneys fees for Ms. Dahl's filing her Motion to Allow Expert Testimony.

On January 23, 2009, Ms. Dahl filed a second request for extension of time to file the expert disclosures and reports, or alternatively, to allow her designated experts to testify at trial. Ms. Dahl's first motion to extend the time for designation of experts had been granted by the court on August 7, 2008. As of the date of the second motion to extend time to amend her designation of experts, trial had not yet been set. The trial court denied this second motion, and awarded costs and fees to Mr. Harrison for the reasons Mr. Harrison claimed in his attorney fee motion.<sup>2</sup> As a general rule, attorney fees may be awarded to the prevailing party only when such action is permitted by either

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<sup>2</sup>Ms. Dahl notes that the trial court put her in an untenable position. As part of its validation for awarding attorney fees, the trial court says it "strongly hinted" during a pretrial conference on January 23, 2009, that it would not grant such a motion for extension of time on the expert designations. (Record 1741 36:20-24). On the one hand, had Ms. Dahl taken the strong hint and not filed her motion, she would not have preserved the issue for appeal. An issue needs to be formally presented to the trial court and denied before it can be appealed; otherwise the issue would be waived. See *Arbogast Family Trsut v. River*, 2008 UT App 277, ¶ 10, 191 P.3d 39. On the other hand, since the court had apparently decided the issue before having it briefed, Ms. Dahl took the risk that presenting the motion would upset the court and be summarily denied. A strong hint that a motion will be denied should not bar a party from bringing such a motion or expose her to sanction.

statute or contract. *Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 44, --- P.3d---; *Olsen v. Lund*, 2010 UT App 353, ¶ 6, ---P.3d---; *Posner v. Equity Title Ins. Agency, Inc.*, 2009 P.3d 775, ¶ 26, 222 P.3d 775; *Utahns for Better Dental Health-Davis, Inc. v. Rawlings*, 2007 UT 97, ¶ 5, 175 P.3d 1036.

Mr. Harrison has not shown that attorney fees were permitted either by statute or contract. Mr. Harrison, in his Motion for Attorney's Fees and Costs, argued that attorney's fees could be awarded under one of two options: pursuant to Utah Code Ann. § 78B-5-825 or pursuant to the trial court's "inherent equitable power to award reasonable fees." The trial court, in awarding attorney fees, stated "I adopt the reasoning found in the motion for attorney fees and costs." (Record at 1174 39:1-4). Therefore, the trial court awarded the attorney fees pursuant to § 78B-5-825 and/or the court's "inherent equitable powers. However, the trial court could not properly award attorney fees under either approach.

*A. The trial court erred when it awarded Mr. Harrison attorney fees and costs under Utah Code Ann. § 78B-5-825 for a motion.*

The trial court erred when it awarded attorneys fees under Utah Code Ann. § 78B-5-825. Section 78B-5-825 states that "[i]n civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the *action or defense to the action* was without merit and not brought or asserted in good faith." UTAH CODE ANN. § 78B-5-825 (1) (emphasis added). "Whether the trial court properly interpreted the legal prerequisites for awarding attorney fees under section [78B-5-825] is a 'question of law' that we 'review ... for correctness.'" *Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 8,

122 P.3d 556 (quoting *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d

1201 (holding that statutory interpretation presents a legal question)).

“According to the plain language of section 78-27-56 [renumbered as section 78B-5-825], three requirements must be met before the court shall award attorney fees: (1) the party must prevail, (2) the claim asserted by the opposing party must be without merit, and (3) the claim must not be brought or asserted in good faith.” *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 9, 178 P.3d 922, *certiorari denied* 189 P.3d 1276 (citing *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1225 (Utah Ct.App.1991)).

1. Utah Code Ann. § 78B-5-825 pertains to causes of action, not motions.

Ms. Dahl filed a motion, not a “claim” or “action.” Accordingly, the trial court could not award attorneys fees under this statute. “Action” is defined as “[a] civil or criminal judicial proceeding.” *Black's Law Dictionary* 26 (Abridged 8th ed. 2005).

“Claim” is defined as “[t]he aggregate of operative facts giving rise to a right enforceable by a court” or “[t]he assertion of an existing right” or “[a] demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.” *Black's Law Dictionary* 204-05 (Abridged 8th ed. 2005). All of the above definitions of action or claim denotes the filing of the cause of action or the claim for relief.

The trial court erred as a matter of law when it granted Mr. Harrison's motion for attorneys fees under Utah Code Ann. § 78B-5-825. The court expressly found that the

motion and not the claim itself was frivolous.<sup>3</sup> In fact, the court had previously denied Mr. Harrison's Motion for Summary Judgment on the claim. (Record at 717.)

The extension of § 78B-5-825 to include motions filed without merit obviates the requirements of Rule 11 of the Utah Rules of Civil Procedure which specifically designates the prerequisites for sanctions on frivolous filings, including motions. Rule 11 requires that the moving party serve the offending party with a motion and permit the offending party 21 days to withdraw the paper (motion) prior to filing the motion with the court. *See* Utah R. Civ. P. 11. If the paper (motion) is withdrawn, Rule 11 precludes a sanction from being imposed. In this case, opposing counsel did not notify Ms. Dahl that they were seeking Rule 11 sanctions, nor did Mr. Harrison claim Rule 11 sanctions in their motion for attorney's fees filed on February 9, 2009. (Record at 986.) Because the claim was neither frivolous nor brought in bad faith, the Defendant should be precluded from seeking a sanction under § 78B-5-825. A vague claim for an attorney fee sanction alleging a frivolous motion without compliance with Rule 11 should likewise be denied since it denied Ms. Dahl of due process and the opportunity to withdraw her motion.

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<sup>3</sup> Mr. Harrison claimed in his motion for attorney fees that the case of *Rohan v. Boseman*, 2002 UT App 109, 46 P.3d 753 stands for the proposition that § 78B-5-825 is applicable to the filing of motions as well as the filing of claims or causes of action. In *Rohan*, this court agreed with the trial court's award of attorneys fees under the statute when the trial court awarded fees for bringing a renewed motion for continuance or voluntary dismissal under the ADA. *Rohan*, 2002 UT App 109, ¶ 37-38. There is little to no reasoning as to why the attorney fee award was upheld or what arguments were made against such a result under § 78B-5-825. No other cases since *Rohan* have applied § 78B-5-825 to a motion. In addition, the facts are distinguishable. The plaintiff's motion in the *Rohan* was filed the day before trial. *Id.* Here, the motion to allow Ms. Dahl's expert witnesses to testify was filed ten (10) months before trial and six months before trial was even set.

Further, Ms. Dahl denies that her motion was frivolous. As set forth above, the motion was necessary to the presentation to her case and was brought six months prior to the pretrial date on which the court gave notice of trial.

2. Ms. Dahl's cause of action was brought in good faith.

Mr. Harrison has also failed to establish that he prevailed on the cause of action, that the claim asserted by Ms. Dahl was without merit, and that the claim brought by her was not brought in good faith. First, while Mr. Harrison did prevail on his objection to allow Ms. Dahl's witnesses the opportunity to testify at trial, he had not prevailed at trial on the cause of action when the attorney fees were awarded. Second, Mr. Harrison argued that Ms. Dahl's motion relating to expert witnesses was without merit, not that her claims of legal malpractice and breach of contract were meritless. Third, there was no finding by the court that Ms. Dahl's claims were brought in bad faith. Fourth, the court made no findings that the motion for extension of time to designate experts was brought in bad faith.

For the reasons outlined above, the trial court erred when it awarded Mr. Harrison attorney fees and costs under Utah Code Ann. § 78B-5-825. Section 78B-5-825 applies to claims and actions not motions. Further, Mr. Harrison failed to show, and the court failed to make findings on, the three factors necessary for an awarded of fees under this statute. If Mr. Harrison believed he was entitled to fees for Ms. Dahl's motion, he was required to comply with Rule 11. Therefore, this court should reverse the award of attorneys fees under § 78B-5-825.

B. *The court abused its discretion by awarding attorneys fees under its inherent equitable powers.*

To the extent the trial court based its award of attorney fees on its inherent equitable powers, it has also abused its discretion. A trial court abuses its discretion when it improperly awards attorney fees under its equitable powers. *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148 (“the appropriate standard for reviewing equitable awards of attorney fees is abuse of discretion”).

Utah case law has recognized a small number of specific equitable exceptions to the general rule that a prevailing party is only entitled to attorney fees when authorized by contract or statute. These exceptions consist of the following: (1) when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons; (2) in class action cases where nonparty class members benefit financially from the successful efforts of only a few litigants; (3) when a beneficiary sues a trustee for violation of the trust and obtains a recovery for all other beneficiaries affected by that violation; (4) where a private party’s litigation vindicates a strong or socially important public policy (the so called “private attorney general” action); (5) where a plaintiff’s litigation confers a substantial benefit on members of an ascertainable class; (6) when a insurer breaches an insurance contract; (7) where a defendant’s breach of contract foreseeably causes a plaintiff to incur attorney fees in litigation with a third party (the “third-party litigation” exception); and (8) where an insurer files a complaint against its own absent insured that would adversely affect the interests of an innocent third party. *See Macris & Associates, Inc. v. Neways, Inc.*, 60 P.3d 1176, 1179 n.8 (Utah Ct. App. 2002) (citations omitted) (identifying exceptions 1-

7); *Doctor's Company v. Drezga*, 2009 UT 60, 218 P.3d 598 (Utah 2009) (developing exception 8).

This case is not a class action lawsuit nor has it benefitted the members of an ascertainable class. This case has not vindicated a socially important public policy. This case is not a lawsuit against a trustee by a beneficiary, nor is it a lawsuit between an insurance company and an insured. This case does not involve a breach of contract that has caused a party to incur attorneys fees in litigation with a third party.

The only recognized exception that can be applied to a private dispute that does not involve insurance companies and does not affect anyone other than the parties involved would be when a party acted in bad faith, vexatiously, wantonly, or for oppressive reasons. This exception is not applicable here. Defendant did not argue and the court did not find that Ms. Dahl acted in bad faith, vexatiously, wantonly, or for oppressive reasons when she filed her second motion to extend time within which to designate experts and serve their report. The court did find that the filing was frivolous. However, that appears to be based on the conclusion of the court that the motion was filed even though the court “strongly hinted” that it would be denied and that the court considered the motion to be more of a request for reconsideration of the motion to strike the earlier designation of experts. (Record at 1741 38:17-24.) Because the court had not previously denied a motion to extend expert discovery, this was not in reality a motion for reconsideration. Further, even though a court believes that a designation of an expert does not comply with the rules it does not follow that a party is precluded from seeking

the opportunity to bring such designations into compliance. In this case, Ms. Dahl did just that.

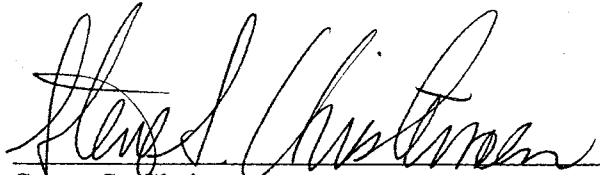
After her designations were stricken, and nine full months before trial was convened in this case, she sought leave to amend her designations. The designations of experts were later determined to be absolutely necessary to prove Ms. Dahl's claim so the motion for leave to amend such could not be frivolous. Further, since such a request had not been previously denied, it could not have been vexatious or considered oppressive. Because the very narrow exception to the need for a statutory basis for an award of attorneys fees did not apply in this case, the court abused its discretion by awarding attorneys fees under its inherent equitable powers.

### CONCLUSION

This Court should reverse the determinations of the trial court below because the lower court abused its discretion in denying Ms. Dahl's motion to extend time to designate expert witnesses, in failing to grant an extension to allow Ms. Dahl to conduct fact discovery, and in improperly awarding attorneys fees without a statutory basis. Ms. Dahl respectfully requests that this case be remanded to the trial court for additional discovery and a new trial on the bifurcated issue of liability.

Respectfully submitted this 26<sup>th</sup> day of January, 2011.

**CHRISTENSEN | THORNTON, PLLC**



Steve S. Christensen

Benjamin K. Lusty

*Attorneys for Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **APPELLANT'S BRIEF** was mailed to the following on the 26<sup>th</sup> day of January, 2011:

Ben W. Lieberman (11456)  
Law Office of Ben W. Lieberman, PLC  
1371 East 2100 South  
Salt Lake City, UT 84105



## **ADDENDUM**

**Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.**

**(a) Signature.**

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

**(b) Representations to court.** By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

**(c)(1) How initiated.**

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law

firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

**FILED**

JAN 04 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

Steve S. Christensen (U.S.B. No. 6156)  
Brennan H. Moss (U.S.B. No. 10267)  
Jeffrey J. Steele (U.S.B. No. 10606)  
**HIRSCHI CHRISTENSEN, PLLC**  
Attorneys for Plaintiff  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111  
Telephone: (801) 322-0593  
Facsimile: (801) 322-0594

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IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,

Plaintiff,

vs.

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

**[PROPOSED] SCHEDULING  
ORDER**

Case No. 070403005  
Judge Laycock

The parties have met and conferred in accordance with Rule 26(f)(1). The Court hereby enters the following Scheduling Order based upon the parties' stipulation:

**SCHEDULING ORDER**

1. **INITIAL DISCLOSURES:** Initial disclosures required under U.R.C.P. 26(a)(1) shall be exchanged by the parties by November 19, 2007.

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2. **DISCOVERY:** Discovery is necessary on the following subjects: Plaintiff's claims and damages; Defendants' claims and defenses to Plaintiff's claims; and other matters as needed.

a. **FACT DISCOVERY:** Fact discovery shall be completed by no later than April 7, 2008.

b. **EXPERT DISCOVERY:** Expert designations and reports shall be due under Utah Rules of Civil Procedure 26(a)(3) as follows:

i. Designation of expert witnesses is due by Plaintiff on May 5, 2008, and by Defendants on June 2, 2008.

ii. Rebuttal reports from both parties are due on or before June 16, 2008.

iii. The deadline to depose all experts for both parties shall be July 14, 2008.

c. **METHODS/LIMITATIONS OF DISCOVERY:** The parties may utilize the following discovery methods:

i. twenty Five (25) interrogatories per party, unless otherwise stipulated by the parties;

ii. requests for Admissions, as provided by the Rules;

iii. requests for Production of Documents, as provided by the Rules; and

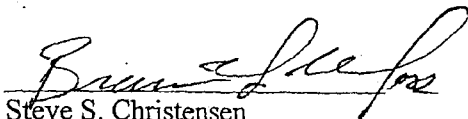
iv. no more than fifteen (15) oral exam depositions, unless otherwise stipulated by the parties.

3. **SUPPLEMENTATION:** Supplementation to discovery under Utah Rule of Civil Procedure 26(e) shall be due 30 days from the time the party learns that prior disclosures or responses to discovery are incomplete or incorrect.

4. **AMENDMENT OF THE PLEADINGS:** The parties shall have until February 4, 2008, to join additional parties or to amend pleadings.

5. **PRETRIAL CONFERENCE:** The parties request a pretrial conference in August 2008.
6. **ALLOCATION OF FAULT:** The cutoff date for filing a notice to allocate fault pursuant to Rule 9(l) of the Utah Rules of Civil Procedure is February 4, 2008.
7. **DISPOSITIVE MOTIONS:** The cutoff date for filing dispositive, or potentially dispositive motions is April 28, 2008.
8. **SETTLEMENT:** The potential for settlement at this time is unknown.
9. **ALTERNATIVE DISPUTE RESOLUTION:** The potential for resolution of this matter through the Court's alternative dispute resolution program is unknown at this time.
10. **WITNESS AND EXHIBIT LISTS:** The final lists of witnesses and exhibits, or objections thereto, are due in accordance with Utah Rule of Civil Procedure 26(a)(4).
11. **TRIAL:** The parties will be ready for trial by August 2008. The estimated length of trial is five (5) days.
12. **SERVICE:** So long as a hard-copy is sent within 24 hours via U.S. Mail, the parties may serve each other through email at the following address: for Plaintiff: ssc@hclawfirm.net; bmooss@hclawfirm.net; jsteele@hclawfirm.net; and for Defendants: bwl@bmgtrial.com.

DATED: 11/9/07

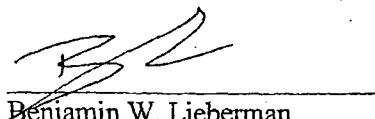
  
Steve S. Christensen

Brennan H. Moss

Jeffrey J. Steele

*Attorneys for Plaintiff*

DATED: 11/7/07

  
Benjamin W. Lieberman

*Attorney for Defendants*

APPROVED and SO ORDERED this 4th day of Jan, <sup>2008</sup>~~2007~~

BY THE COURT

Claudia Fayork  
Fourth District Court



Fourth Judicial  
District Court

APR 28 2008

State of Utah  
FILED Clerk

Benjamin W. Lieberman (#11456)  
BURBIDGE, MITCHELL & GROSS  
215 South State Street, Suite 920  
Salt Lake City, Utah 84111  
Telephone: (801) 355-6677

*Attorneys for Defendants*

ORIGINAL

IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

KIM DAHL,

Plaintiff,

v.

BRIAN C. HARRISON, an individual; and  
BRIAN C. HARRISON, P.C., a Utah  
corporation,

Defendants.

**DEFENDANTS' CONSOLIDATED  
MOTION FOR PROTECTIVE ORDER  
AND SUPPORTING MEMORANDUM**

Case No. 070403005  
Judge Claudia Laycock

Defendants Brian C. Harrison and Brian C. Harrison, P.C., hereby move the Court for a protective order in this matter. In support therefor, Defendants state:

1. On or about January 4, 2008, the Court entered the Parties' stipulated scheduling order in this matter. As stated therein, fact discovery in this matter closed on April 7, 2008.
2. On April 7, 2008, the day of the fact discovery cutoff, Plaintiff served her First Set of Interrogatories and Request for Production of Documents upon Defendants by postal mail and e-mail. (See Exhibit A.) Per the Utah Rules of Civil Procedure, Defendants' responses would be

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due on May 12, 2008, five weeks after the fact discovery cutoff.

3. Plaintiff's discovery requests are untimely pursuant to the Court's Scheduling Order. For Plaintiff's requests to be timely, they had to have been served so that responses were due before discovery was complete. *Erbe Elektromedizin GmbH v. Canady*, 2006 WL 3387176, at \*1 (W.D. Pa. November 21, 2006) (finding that "all discovery initiatives shall be served within sufficient time to allow responses to be completed prior to the close of discovery. Based upon the same, I find Plaintiffs' discovery initiatives served on the last day of discovery to be untimely, such that Defendants are not required to respond to the same."); *Chevola v. Cellco Partnership*, 2007 WL 3379779, at \* 1 (M.D. Fla. November 14, 2007) ([T]he completion date for discovery means just that—all discovery must be completed by that date. Hence, interrogatories, as an example, must be served more than thirty days prior to the completion date to permit the opposing party to respond before the discovery deadline."); *Jim Boast Dodge, Inc. v. Daimler Chrysler Motors Co., LLC*, 2007 WL 4409781, at \*1 (M.D. Fla. January 16, 2007) (same); *Brodeur v. McNamee*, 2005 WL 1774033, at \*2-3 (N.D.N.Y. July 27, 2005)(same); *Epling v. UCB Films, Inc.*, 2001 WL 584355 (D. Kan. April 2, 2001) (same).<sup>1</sup>

4. Because Plaintiff's discovery requests were not served to allow ample time for Defendants to respond within the fact discovery period, Plaintiff's requests are untimely. *See id.* As such, the Court should grant Defendants' motion for a protective order and order that Defendants do not have to respond to Plaintiff's untimely discovery requests.

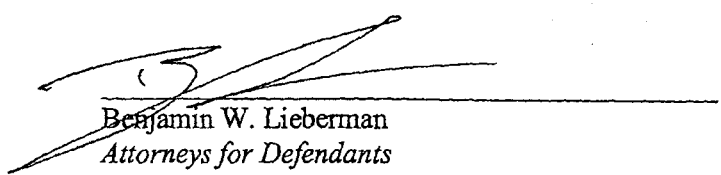
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1 Copies of these unpublished federal district court decisions are attached hereto as Exhibit B.

Respectfully submitted this 24 day of April, 2008.

BURBIDGE, MITCHELL & GROSS

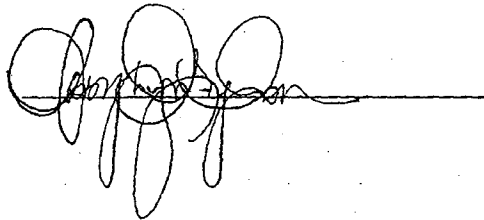


Benjamin W. Lieberman  
*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **DEFENDANTS' CONSOLIDATED MOTION FOR PROTECTIVE ORDER AND SUPPORTING MEMORANDUM** was hand delivered on the 25 day of April, 2008, to the following:

Steve S. Christensen  
Brennan H. Moss  
Hirschi Christensen, PLLC  
136 East South Temple, Suite 850  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Brian Harrison", is written over a horizontal line.

P:\Clients\Harrison, Brian 3010\0701-v. Kim Dahl\Pleadings\Motion and Memo for Protective Order.doc

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Steve S. Christensen (U.S.B. No. 6156)  
Brennan H. Moss (U.S.B. No. 10267)  
Jeffrey J. Steele (U.S.B. No. 10606)  
**HIRSCHI CHRISTENSEN, PLLC**  
Attorneys for Plaintiff  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111  
Telephone: (801) 322-0593  
Facsimile: (801) 322-0594

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IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,

Plaintiff,

vs.

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

**PLAINTIFF'S FIRST SET OF  
INTERROGATORIES AND REQUEST  
FOR PRODUCTION OF DOCUMENTS**

Civil No. 070403005

Judge Laycock

Respondent Kim Dahl, by and through her counsel of record, Hirschi Christensen, PLLC, in accordance with Rules 26 and 34 U.R.C.P., hereby submits her First Request for Production of Documents to Defendants, and requests that Defendants Brian C. Harrison and Brian C. Harrison, P.C. produce to the offices of Hirschi Christensen, legible copies of all documents and things requested in the following Request for Production of Documents within thirty (30) days after service hereof.

**INSTRUCTIONS**

For the purposes of this Request, the following definitions shall govern these Requests for Production of Documents absent clear indication to the contrary:

1. The terms "you" and "your" refers to Defendant Brian C. Harrison, his employees, agents, attorneys, accountants, or any one else acting by through or under the Brian C. Harrison

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direction; it also refers to Defendant Brian C. Harrison, P.C. its employees, agents, attorneys, accountants, or any one else acting by through or under Brian C. Harrison, P.C.'s direction.

2. Other terms pertaining to the parties, documents, events, or occurrences referenced in the pleadings of the parties shall have the meanings ascribed to them in such pleadings.

3. The terms "document" or "documents" mean every writing, recording and photograph as those terms are defined in Utah R. Evid. 1001 and every database that can be used to generate any writing or recording as defined in the Utah Rules of Evidence, and includes legible copies or reproductions of any of the foregoing wherever the original is not available or wherever the copy or reproduction contains any entry or notation not present on the original or otherwise similarly differs from the original.

4. The term "identify" or "identity" when used with reference to a document(s) shall mean to state with respect to each such document:

- a) The title and number of pages of the document;
- b) The date appearing thereon and the date of the document's preparation, if known;
- c) The name(s), address(es), and title(s) of the document's author(s) and signer(s);
- d) The name(s), address(es), and title(s) of the person(s) to whom the document was addressed or distributed;
- e) A further general description of the document so it can be distinguished from other similar documents; and
- f) The physical location of the document and the name(s) and address(es) of the custodian(s) thereof.

5. The term "identify" or "identity" when used with reference to a person shall mean to state with respect to each such person:

- a) The person's name, address, and telephone number;
- b) The present employer, occupation, and business address of the person;
- c) If the person is not a natural person, the type of entity and the state under whose authority it exists; and
- d) Any other information helpful in ascertaining the location or identity of the person.

6. The term "relating to" shall mean pertaining to, referring to, concerning, reflecting, describing, evidencing, constituting, or in any way logically or factually connected with the matter discussed.

7. The phrase "state the factual basis" means to provide a detailed summary of the facts, information, and matters which you presently believe support or tend to support such claim, allegation or statement. Such summary should include, when applicable, appropriate references to dates, times, persons and documents.

8. The term "person" shall mean any natural person and any firm, corporation, association, partnership, or other legal, business or government entity, and shall include the plural as well as the singular.

9. "All," "every," and "each" shall be construed as all, every, and each.

10. The connectives "and" and "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

11. The use of the singular form of any word includes the plural and vice-versa.
12. Singular masculine pronouns have a non-restrictive meaning and are used to refer to a person, as defined herein, or either or neither gender.
13. For each and every request for production of documents, please provide true and correct copies, of which all portions are clear, concise, and legible.
14. If you are entitled to and do elect to produce documents pursuant to Rule 33(d) of the Utah Rules of Civil Procedure, instead of identifying the documents as requested by a particular Interrogatory, you are required to produce such documents in the manner set forth in Rule 33(d) and are required to produce every original, every copy of the original where the original is not available, and every non-identical copy of the document in your possession, custody or control.
15. To the extent that you object to any interrogatory, set forth the reasons therefore. Should your objection be made to only part of any interrogatory, you must completely answer the remainder of that interrogatory. If you claim privilege as grounds for not answering any interrogatory you must make the claim expressly and describe the nature of the information or communication not disclosed in a manner that will enable other parties to assess the applicability of the privilege. Therefore, as to each interrogatory or part thereof which you refuse to answer on the basis of a claim of privilege, provide the following information:
  - a) The privilege(s) claimed;
  - b) Specific facts upon which each claim of privilege is based;
  - c) If a document is involved, identify that document; and
  - d) If the privilege concerns an oral communication, identify that communication.

16. For each and every interrogatory or request, include at the end of each answer the specific name of each and every person who has direct and personal knowledge of said answer; and provide the home and business address and telephone number for such person or persons.

### **INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify any communications that you had with Mrs. Dahl while you acted as her counsel. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 2:** Identify any communications that you had with other persons while you acted as her legal counsel which related to Mrs. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 3:** Identify any communications that you have had with Rosemond Blakelock which related to Mrs. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 4:** Identify any communications that you have had with Dr. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 5:** Identify all cases in which you have appeared or consulted that have involved Rosemond Blakelock.

**INTERROGATORY NO. 6:** Identify all the cases in which you have appeared or consulted in that relate to Dr. Charles Dahl.

**INTERROGATORY NO. 7:** Identify all facts which support your denial of the allegation that you entered into the "Stipulation" without Mrs. Dahl's knowledge or consent.

**INTERROGATORY NO. 8:** Identify the basis and the reasons that you recommended to Mrs. Dahl to sign up for anger management and parenting classes.

**INTERROGATORY NO. 9:** Identify all facts which support your denial of the allegation that you told Mrs. Dahl that because the November 2, 2006 hearing would be continued, she would not need to appear.

**INTERROGATORY NO. 10:** Identify the evidence that needed to be gathered in order to put Mrs. Dahl in the best possible position in front of the court at the November 2, 2006 hearing, as asserted in paragraph 40 of your Answer.

**INTERROGATORY NO. 11:** Identify all the facts that support your assertion that Mrs. Dahl violated the terms of court-ordered supervised visitation and refused to follow Mr. Harrison's counsel..

**INTERROGATORY NO. 12:** Identify all the reasons you claim that Mrs. Dahl's claims are barred by the doctrine of *in pari delicto* or unclean hands.

**INTERROGATORY NO. 13:** Identify all the reasons you claim that Mrs. Dahl's damages are a result of her own actions.

**INTERROGATORY NO. 14:** Identify all the reasons you claim that Mrs. Dahl's damages were caused by intervening causes.

**INTERROGATORY NO. 15:** Identify all the reasons you claim that Mrs. Dahl's damages were the product of circumstances over which you had no control.

**INTERROGATORY NO. 16:** Identify all the reasons you claim that Mrs. Dahl's claims are barred by waiver, estoppel, or laches.

**INTERROGATORY NO. 17:** Identify all the reasons you claim that Mrs. Dahl has failed to mitigate her damages.

**INTERROGATORY NO. 18:** Identify all times in which you have been covered by malpractice insurance. Include in your answer the dates in which you were covered, and the name of the malpractice carrier.

#### **REQUEST FOR PRODUCTION OF DOCUMENTS**

**REQUEST NO. 1:** Produce all documents relating to your representation of Kim Dahl.

**REQUEST NO. 2:** Produce all documents relating to every agreement, document, or other writing that was executed by the parties, or either of them, to engage the employment of Brian C. Harrison or Brian C. Harrison, P.C. for Kim Dahl.

**REQUEST NO. 3:** Produce all documents relating to your claim that you had authority to represent Mrs. Dahl in case number 064402232.

**REQUEST NO. 4:** Produce all documents relating to your claim that Mrs. Dahl consented to your entry into the "Stipulation" in case number 064402232 on November 2, 2006.

**REQUEST NO. 5:** Produce all documents relating to your claim that Mrs. Dahl authorized you to your enter into the "Stipulation" in case number 064402232 on November 2, 2006.

**REQUEST NO. 6:** Produce all documents, notes, memoranda, or other writings relating to case number 064402232.

**REQUEST NO. 7:** Produce all documents relating to any communications between you and Dr. Charles Dahl, or her claim.

**REQUEST NO. 8:** Produce all documents relating to any communications between you and Rosemond Blakelock, or her agent, which related to Mrs. Dahl.

**REQUEST NO. 9:** Produce all documents relating to any conversations between you and Mrs. Dahl.

**REQUEST NO. 10:** Produce all documents relating to any billing or invoicing charged to Mrs. Dahl for your legal counsel and representation.

**REQUEST NO. 11:** Produce a list of each case in which you have represented clients against parties represented by Rosemond Blakelock.

**REQUEST NO. 12:** Produce all the files that relate to your answer to interrogatory number 6 above.

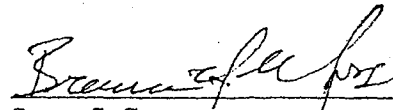
**REQUEST NO. 13:** Produce each document relating to any business dealings you have had, you have, or plan to have, with Dr. Charles Dahl.

**REQUEST NO. 14:** Produce each document relating to any doctor-patient relationship, or any other relationship, you have had, you have, or plan to have with Dr. Dahl.

**REQUEST NO. 15:** Produce all documents relating to your answer of interrogatory number 10.

DATED this 7 day of April, 2008.

HIRSCHI CHRISTENSEN, PLLC



STEVE S. CHRISTENSEN  
BRENNAN H. MOSS

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 Not Reported in F.Supp.2d, 2006 WL 3387176 (W.D.Pa.)  
 (Cite as: Not Reported in F.Supp.2d, 2006 WL 3387176)

Page 1

**H**

Erbe Elektromedizin GmbH v. Canady  
 W.D.Pa., 2006.

Only the Westlaw citation is currently available.

United States District Court, W.D. Pennsylvania.

ERBE ELEKTROMEDIZIN GMBH, Erbe USA,  
 Inc., and Conmed Corporation, Plaintiffs,  
 v.

Dr. Jerome CANADY and Canady Technology,  
 LLC., Defendants.

Civil Action No. 05-1674.

Nov. 21, 2006.

Gabriela I. Coman, Laurence E. Fisher, Philip G. Hampton, II, Dickstein Shaprio LLP, Washington, DC, Leland P. Schermer, Leland Schermer & Associates, P.C., Pittsburgh, PA, John G. Powers, Hancock & Estabrook, Syracuse, NY, for Plaintiffs.

Brad R. Newberg, Christopher F. Winters, Newberg & Winters, Vienna, VA, Timothy R. Dewitt, Alexandria, VA, Daniel M. Darragh, Mark A. Grace, Cohen & Grigsby P.C., Pittsburgh, PA, for Defendants.

#### MEMORANDUM OPINION and ORDER

AMBROSE, Chief District Judge.

\*1 Plaintiffs have filed a Motion to Compel Response to its Discovery Requests, or in the Alternative, Extend the Discovery Deadline to Permit the Response to the Already-Served Requests. (Docket No. 98). By way of background, on March 9, 2006, counsel, in compliance with this Court's local patent rules, filed a Rule 26(f) report with a proposed fact discovery completion date of October 27, 2006. (Docket No. 25). On October 27, 2006, the last day of fact discovery, Plaintiffs propounded discovery upon Defendants. Defendants object to this discovery arguing that it is untimely and requested a telephone conference with this Court. (Docket No. 103). During a telephone conference regarding the timeliness of said discovery, I granted Plaintiffs leave to file a Brief supporting their position.

(Docket No. 96). Thereafter, I called counsel back and requested that Plaintiffs indicate in their Motion a time line of the discovery that they had taken in this case.

I first note that Plaintiffs failed to supply this Court with a time line of the discovery they had taken in this case. *See*, Docket No. 98. Defendants, however, responded to the same indicating that prior to October 27, 2006, Plaintiffs only discovery initiatives were served on March 10, 2006. (Docket No. 103, p. 2). In other words, between March 10, 2006, and the last day of discovery, October 27, 2006, Plaintiffs propounded no other discovery in this case. *Id.*

In support of their Motion to Compel, Plaintiffs cite to two cases out of the Eastern District of Pennsylvania.<sup>FN1</sup> I am not persuaded by the rationale of the cases. Further, I find them to be distinguishable from the within matter. Specifically, the cases cited by Plaintiffs were out of the Eastern District of Pennsylvania and not subject to this court's local patent rules, whereas the within matter is governed by the Local Patent Rules for the Western District of Pennsylvania.

FN1. The cases cited by Plaintiffs are *Mines v. City of Phil.*, No. 93-3052, 1994 U.S. Dist. LEXIS 9776, at \*2 (E.D.Pa. July 18, 1994), and *Laurenzano v. Lehigh Valley Hospital, Inc.*, No. 00-02621; 2003 U.S. Dist. LEXIS 13258, at \*6-7 (E.D.Pa. July 28, 2003).

This Court's Local Patent Rules provide a Model Scheduling Order, which sets forth the following:

(10) The parties shall complete fact discovery by, all interrogatories, depositions, requests for admissions, and requests for production *shall be served within sufficient time to allow responses to be completed prior to the close of discovery.*

*See*, United States District Court for the Western

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 (Cite as: Not Reported in F.Supp.2d, 2006 WL 3387176)

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District of Pennsylvania Local Patent Rules, Appendix C, ¶ 10 (emphasis added). According to their Rule 26(f) Report, counsel used the above Model Scheduling Order in preparing their Rule 26(f) Report. See, Docket No. 25. Thus, there can be no doubt that counsel was aware that "complete" means just that—that all discovery initiatives shall be served within sufficient time to allow responses to be completed prior to the close of discovery. Based upon the same, I find Plaintiffs' discovery initiatives served on the last day of discovery to be untimely, such that Defendants are not required to respond to the same.

Not Reported in F.Supp.2d, 2006 WL 3387176  
 (W.D.Pa.)

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Plaintiffs request, in the alternative, that if such initiatives are determined to be untimely, this Court extend the discovery deadline to permit the responses to the already served initiatives. (Docket No. 98). I decline to grant such relief. According to Defendants, the initiatives propounded upon them include 71 document requests, 8 interrogatories, 243 requests for admissions, 9 notices of personal depositions, and a Rule 30(b)(6) notice of deposition listing 62 categories. (Docket No. 103, p. 2). This is an extensive amount of discovery.<sup>FN2</sup> Plaintiffs offer no reason for why they waited until the last day of discovery to serve the same. Moreover, I believe that such extensive initiatives would not be completed within 30 days. As a result, the discovery period for this case would be extended well beyond the time period reasonably contemplated by the local patent rule and this Court. Consequently, Plaintiffs' Motion to Compel is denied.

FN2. According to Defendants, it comprises 98% of Plaintiffs' discovery initiatives. (Docket No. 103, p. 1).

\*2 THEREFORE, this 21st day of November, 2006, after careful consideration and for the reasons set forth within, it is ordered that Plaintiffs' Motions to Compel (Docket No. 98) is denied.

W.D.Pa., 2006.  
 Erbe Elektromedizin GmbH v. Canady

Westlaw.

Slip Copy  
 Slip Copy, 2007 WL 3379779 (M.D.Fla.)  
 (Cite as: Slip Copy, 2007 WL 3379779)

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H

Chevola v. Celco Partnership  
 M.D.Fla., 2007.

Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,  
 Tampa Division.

Sandra CHEVOLA, Plaintiff,

v.

CELLCO PARTNERSHIP d/b/a Verizon Wireless,  
 Defendant.

No. 8:06-cv-1312-T-30MAP.

Nov. 14, 2007.

James E. Aker, Icard, Merrill, Cullis, Timm, Furen  
 & Ginsburg, PA, Sarasota, FL, for Plaintiff.  
 Gregory Alan Hearing, Thompson, Sizemore &  
 Gonzalez, PA, Tampa, FL, for Defendant.

### ORDER

MARK A. PIZZO, United States Magistrate Judge.

\*1 This cause is before the Court on Plaintiff's Motion to Compel (doc. 31). The motion, filed two and a half months after the discovery cutoff date, asks this Court to compel responses to Plaintiff's First Set of Interrogatories and production of documents in response to Plaintiff's Second, Third, and Fifth Request to Produce. This motion is untimely and is therefore denied.

This district follows the rule that the completion date for discovery means just that—all discovery must be completed by that date. Middle District Discovery (2001) at § 1F.1 (emphasis in rule). Hence, interrogatories, as an example, must be served more than thirty days prior to the completion date to permit the opposing party to respond before the discovery deadline. *Id.* If the parties agree to conduct discovery after the Court's discovery deadline, they cannot expect the Court to resolve their post-deadline discovery disputes. *Id.* Moreover, the Court expects the parties to address discovery disputes promptly-before the discovery deadline

passes or soon thereafter. See *Pushko v. Klebener*, 2007 WL 2671263 (M.D.Fla.2007) ("Motions to compel must be brought in a timely manner."); *AB Diversified Enterprises, Inc. v. Global Transport Logistics, Inc.*, 2007 WL 1362632 \*1 (S.D.Fla.2007) ("[A] motion to compel filed more than two months after the discovery cutoff is clearly untimely."); see also *Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 200-201 (E.D.Mich.2002) (reviewing cases from various districts citing general principle); *Sales v. State Farm Fire and Casualty Co.*, 632 F.Supp. 435 (N.D.Ga.1986) (motion to compel filed after the close of discovery was untimely).

The Defendant asserts that it timely responded to Plaintiff's Second Request to Produce (served on May 24, 2007), her Third Request to Produce (served on June 14, 2007), and her Fifth Request to Produce and First Set of Interrogatories (both served on June 27, 2007). See Defendant's Response to Plaintiff's Motion to Compel, doc. 51, at 12. However, the Plaintiff made no objection to the discovery responses until September 11, 2007-nearly a month and a half after the July 27, 2007, discovery cutoff. While the delay between September 11, 2007, and the filing of this motion on October 15, 2007, is fairly attributable to negotiations between the parties and the Defendant's request for additional time to consider the Plaintiff's arguments, there is no justification for Plaintiff's failure to make any objection prior to September 11, 2007. Accordingly, it is

### ORDERED:

1. Plaintiff's Motion to Compel (doc. 31) is DENIED.

DONE and ORDERED.

M.D.Fla., 2007.

Chevola v. Celco Partnership  
 Slip Copy, 2007 WL 3379779 (M.D.Fla.)

Slip Copy  
Slip Copy, 2007 WL 3379779 (M.D.Fla.)  
(Cite as: Slip Copy, 2007 WL 3379779)

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 Slip Copy, 2007 WL 4409781 (M.D.Fla.)  
 (Cite as: Slip Copy, 2007 WL 4409781)

Page 1

**C**  
 Jim Boast Dodge, Inc. v. Daimler Chrysler Motors  
 Co., LLC  
 M.D.Fla., 2007.

Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,  
 Tampa Division.

JIM BOAST DODGE, INC., d/b/a Bob Boast  
 Dodge, a Florida Corporation, Plaintiff,  
 v.

DAIMLER CHRYSLER MOTORS COMPANY,  
 LLC f/k/a Chrysler Motors Corporation, a  
 Delaware corporation, Defendant.  
 No. 8:05-CV-1999-T-30MAP.

Jan. 16, 2007.

Named Expert: Joseph F. Roesner

William G. Osborne, William G. Osborne, P.A.,  
 Orlando, FL, for Plaintiff.  
 C. Everett Boyd, Jr., Dean Bunch, Sutherland, As-  
 bill & Brennan, LLP, Tallahassee, FL, for Defend-  
 ant.

### ORDER

MARK A. PIZZO, United States Magistrate Judge.

\*1 THIS CAUSE is before the Court on Plaintiff's Motion to Compel Proper Responses to Plaintiff's Second Request to Produce (doc. 25) and Defendant's Motion to Exclude Testimony by Plaintiff's Proposed Expert (doc. 21). A hearing was held on the matter on January 16, 2007.

This district follows the rule that the completion date for discovery means just that *all discovery must be completed by that date*. Middle District Discovery (2001) at § I.F.1 (emphasis in rule). Hence, requests for production, as an example, must be served more than thirty days prior to the completion date to permit the opposing party to respond before the discovery deadline. *Id.*; see also FED. R. CIV. P. 34(b). If the parties agree to conduct discovery after the Court's discovery deadline, they cannot expect

the Court to resolve their post-deadline discovery disputes. *Id.* Moreover, the Court expects the parties to address discovery disputes promptly before the discovery deadline passes or soon thereafter. See *Ellison v. Windt*, 2001 WL 118617 (M.D.Fla.2001) (motion to strike filed after discovery deadline untimely); see also *Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 200-201 (E.D.Mich.2002) (reviewing cases from various districts citing general principle); *Sales v. State Farm Fire and Casualty Co.*, 632 F.Supp. 435 (N.D.Ga.1986) (motion to compel filed after the close of discovery was untimely).

Accordingly, it is ORDERED:

1. Plaintiff's Motion to Compel Proper Responses to Plaintiff's Second Request to Produce (doc. 25) is DENIED.

2. Defendant's Motion to Exclude Testimony by Plaintiff's Proposed Expert (doc. 21) is DENIED WITHOUT PREJUDICE.

3. Plaintiff's Expert Report is due January 30, 2007.

4. Defendant's Expert Report is due February 13, 2007.

5. No other deadlines set forth in the Court's Case Management and Scheduling Order (Doc. 12) are affected by this Order.

DONE AND ORDERED.

M.D.Fla., 2007.

Jim Boast Dodge, Inc. v. Daimler Chrysler Motors  
 Co., LLC  
 Slip Copy, 2007 WL 4409781 (M.D.Fla.)

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 (Cite as: Not Reported in F.Supp.2d, 2006 WL 3387176)

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**H**

Erbe Elektromedizin GmbH v. Canady  
 W.D.Pa., 2006.

Only the Westlaw citation is currently available.

United States District Court, W.D. Pennsylvania.  
 ERBE ELEKTROMEDIZIN GMBH, Erbe USA,  
 Inc., and Conmed Corporation, Plaintiffs,  
 v.

Dr. Jerome CANADY and Canady Technology,  
 LLC., Defendants.

Civil Action No. 05-1674.

Nov. 21, 2006.

Gabriela I. Coman, Laurence E. Fisher, Philip G. Hampton, II, Dickstein Shaprio LLP, Washington, DC, Leland P. Schermer, Leland Schermer & Associates, P.C., Pittsburgh, PA, John G. Powers, Hancock & Estabrook, Syracuse, NY, for Plaintiffs.  
 Brad R. Newberg, Christopher F. Winters, Newberg & Winters, Vienna, VA, Timothy R. Dewitt, Alexandria, VA, Daniel M. Darragh, Mark A. Grace, Cohen & Grigsby P.C., Pittsburgh, PA, for Defendants.

#### MEMORANDUM OPINION and ORDER

AMBROSE, Chief District Judge.

\*1 Plaintiffs have filed a Motion to Compel Response to its Discovery Requests, or in the Alternative, Extend the Discovery Deadline to Permit the Response to the Already-Served Requests. (Docket No. 98). By way of background, on March 9, 2006, counsel, in compliance with this Court's local patent rules, filed a Rule 26(f) report with a proposed fact discovery completion date of October 27, 2006. (Docket No. 25). On October 27, 2006, the last day of fact discovery, Plaintiffs propounded discovery upon Defendants. Defendants object to this discovery arguing that it is untimely and requested a telephone conference with this Court. (Docket No. 103). During a telephone conference regarding the timeliness of said discovery, I granted Plaintiffs leave to file a Brief supporting their position.

(Docket No. 96). Thereafter, I called counsel back and requested that Plaintiffs indicate in their Motion a time line of the discovery that they had taken in this case.

I first note that Plaintiffs failed to supply this Court with a time line of the discovery they had taken in this case. *See*, Docket No. 98. Defendants, however, responded to the same indicating that prior to October 27, 2006, Plaintiffs only discovery initiatives were served on March 10, 2006. (Docket No. 103, p. 2). In other words, between March 10, 2006, and the last day of discovery, October 27, 2006, Plaintiffs propounded no other discovery in this case. *Id.*

In support of their Motion to Compel, Plaintiffs cite to two cases out of the Eastern District of Pennsylvania.<sup>FN1</sup> I am not persuaded by the rationale of the cases. Further, I find them to be distinguishable from the within matter. Specifically, the cases cited by Plaintiffs were out of the Eastern District of Pennsylvania and not subject to this court's local patent rules, whereas the within matter is governed by the Local Patent Rules for the Western District of Pennsylvania.

FN1. The cases cited by Plaintiffs are *Mines v. City of Phil.*, No. 93-3052, 1994 U.S. Dist. LEXIS 9776, at \*2 (E.D.Pa. July 18, 1994), and *Laurenzano v. Lehigh Valley Hospital, Inc.*, No. 00-02621; 2003 U.S. Dist. LEXIS 13258, at \*6-7 (E.D.Pa. July 28, 2003).

This Court's Local Patent Rules provide a Model Scheduling Order, which sets forth the following:

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*See*, United States District Court for the Western

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Page 2

District of Pennsylvania Local Patent Rules, Appendix C, ¶ 10 (emphasis added). According to their Rule 26(f) Report, counsel used the above Model Scheduling Order in preparing their Rule 26(f) Report. See, Docket No. 25. Thus, there can be no doubt that counsel was aware that "complete" means just that—that all discovery initiatives shall be served within sufficient time to allow responses to be completed prior to the close of discovery. Based upon the same, I find Plaintiffs' discovery initiatives served on the last day of discovery to be untimely, such that Defendants are not required to respond to the same.

Not Reported in F.Supp.2d, 2006 WL 3387176  
 (W.D.Pa.)

END OF DOCUMENT

Plaintiffs request, in the alternative, that if such initiatives are determined to be untimely, this Court extend the discovery deadline to permit the responses to the already served initiatives. (Docket No. 98). I decline to grant such relief. According to Defendants, the initiatives propounded upon them include 71 document requests, 8 interrogatories, 243 requests for admissions, 9 notices of personal depositions, and a Rule 30(b)(6) notice of deposition listing 62 categories. (Docket No. 103, p. 2). This is an extensive amount of discovery.<sup>FN2</sup> Plaintiffs offer no reason for why they waited until the last day of discovery to serve the same. Moreover, I believe that such extensive initiatives would not be completed within 30 days. As a result, the discovery period for this case would be extended well beyond the time period reasonably contemplated by the local patent rule and this Court. Consequently, Plaintiffs' Motion to Compel is denied.

FN2. According to Defendants, it comprises 98% of Plaintiffs' discovery initiatives. (Docket No. 103, p. 1).

\*2 THEREFORE, this 21st day of November, 2006, after careful consideration and for the reasons set forth within, it is ordered that Plaintiffs' Motions to Compel (Docket No. 98) is denied.

W.D.Pa., 2006.  
 Erbe Elektromedizin GmbH v. Canady

Westlaw.

Not Reported in F.Supp.2d  
 Not Reported in F.Supp.2d, 2001 WL 584355 (D.Kan.)  
 (Cite as: Not Reported in F.Supp.2d, 2001 WL 584355)

Page 1

P

Epling v. UCB Films, Inc.  
 D.Kan., 2001.

Only the Westlaw citation is currently available.

United States District Court, D. Kansas.

Willard D. EPLING, Plaintiff,

v.

UCB FILMS, INC., f/k/a UCB Cello, Inc., Defendant.

Paula K. HLADKY, Plaintiff,

v.

UCB FILMS, INC., Defendant.

Paula K. HLADKY, Plaintiff,

v.

UCB FILMS, INC., Defendant.

Nos. 98-4226-RDR, 98-4227-RDR, 00-4062-RDR.

April 2, 2001.

#### MEMORANDUM AND ORDER

ROGERS.

\*1 These cases are presently before the court upon the following motions: (1) plaintiffs' petitions for review of magistrate's order dated August 7, 2000 FN1; (2) plaintiffs' petitions for review of magistrate's order dated August 31, 2000; (3) plaintiffs' petitions for review of magistrate's order dated September 22, 2000; (4) plaintiffs' petitions for review of magistrate's order dated January 24, 2001; and (5) plaintiff Hladky's petition for review of magistrate's order dated January 31, 2001. Having carefully reviewed the arguments of the parties, the court is now prepared to rule.

FN1. In connection with this motion, the parties have filed several other motions. Plaintiffs have filed a motion to strike defendant's amended motion to file surreply. The defendant has filed a motion for the court to disregard plaintiffs' response to defendant's surreply. The court has now read both the surreply and the response to

the surreply. Little purpose would now be served in granting these motions. Accordingly, the court shall deny both of these motions. The court, however, certainly does not wish to encourage the filing of surreplies and responses to surreplies. In addition, the court warns plaintiffs' counsel that leave to file a response to a surreply is necessary prior to filing such a pleading. In this instance, the court will waive that requirement, but this requirement should be complied with in the future.

As the court has explained in the past, these cases have long and tortured histories. This is indeed remarkable because the cases are actually quite simple. These cases involve allegations of refusal to hire. Actions containing such allegations are usually among the quickest and easiest in the area of employment discrimination. Discovery is generally simplified. The motions presently under consideration clearly indicate that these cases have not fallen into the quick and simple category. These cases have been beset with problems from the outset. The instant motions suggest that the parties, particularly the plaintiffs, fail to understand how the discovery process should work. The following comments have some application here: "Courts have long understood that the administration of justice will be gravely jeopardized unless the discovery and disclosure systems are largely self-executing. The resources of the courts would be taxed upon endurance if more than a tiny percentage of discovery or disclosure proceedings generated disputes that judges were forced to resolve." 7 Moore's Federal Practice, § 37.23 (3d ed.2000).

An exhaustive and exhausting review of the record reveals considerable bickering and acrimony between counsel. It is clear that the magistrate has been confronted with unusually contentious counsel, and we commend him on the enormous restraint he has exercised in presiding over these cases. The court hopes that counsel will make every

Not Reported in F.Supp.2d  
 Not Reported in F.Supp.2d, 2001 WL 584355 (D.Kan.)  
 (Cite as: Not Reported in F.Supp.2d, 2001 WL 584355)

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effort in the future to work together to prepare these cases for trial or final disposition.

The court shall now provide some background on these cases. For many years, Dupont, Inc. and Flexel, Inc. operated a cellophane manufacturing plant in Tecumseh, Kansas. In 1996, Flexel closed the plant and terminated all of its employees. UCB Films, Inc. purchased the plant and began seeking employees in 1997. Adecco, an employment agency, acted as agent for UCB in the hiring process by providing administrative testing and employment services. Willard Epling and Paula Hladky are husband and wife. They had previously worked at the Tecumseh plant for a number of years as coating operators. Each applied for the position of coating operator. UCB did not offer a job to either one.

The court's standard of review concerning a magistrate judge's determination of a nondispositive issue is whether the decision has been shown to be "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a). The moving party must show that the magistrate's order is "clearly erroneous or contrary to law." *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir.1997). The "clearly erroneous" standard requires that the court affirm the decision of the magistrate unless "on the entire evidence [the court] is left with the definite conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); see also *Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1462 (10th Cir.1988).

#### PLAINTIFFS' PETITION FOR REVIEW OF AUGUST 7, 2000 ORDER

\*2 On August 7, 2000, the magistrate issued a fifty-seven page order concerning a number of discovery disputes. Plaintiffs seek review of almost every adverse ruling contained in that order. Some of the objections raised by the plaintiffs concern key issues in the discovery process, i.e., the scope of the

discovery of the defendant's employment records, while others refer to very specific and sometimes inconsequential matters.

The court does intend to address the issues raised by the parties, but in the interests of time, the discussions will be limited.

#### *Defendant's Motions for Protective Orders*

Plaintiff served a subpoena duces tecum on Shirley Martin-Smith, the owner of Adecco, requesting that she produce nine categories of documents relating to the employment applications of all individuals who applied for employment with UCB from July through December 1997. The defendant sought a protective order under Fed.R.Civ.P. 26(c) to quash the subpoena requests. UCB argued that the documents should not be produced because it had ownership and control over them. Plaintiffs responded that UCB did not have standing to object to a subpoena served on a third party.

The magistrate agreed with the arguments made by the plaintiffs. The magistrate denied the defendant's motions for protective orders. The magistrate, however, failed to address whether plaintiffs were entitled to sanctions. Plaintiffs contend in this motion that the court should now award fees and expenses to them. The defendant suggests that the plaintiffs are not entitled to fees and expenses because its position was "substantially justified."

The court finds that this issue should be remanded to the magistrate for consideration of whether attorney's fees and expenses should be awarded to the plaintiff. The court believes that the magistrate simply overlooked this issue. We believe that the magistrate should have the first opportunity to consider it since he is thoroughly familiar with the background of the motions for protective order.

#### *Plaintiffs' Motions to Compel Responses to Defendant's Objections to Duces Tecum Deposition Subpoenas and Notices*

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In April and early June 1999, plaintiffs served deposition notices and subpoenas duces tecum on Jim Oldham, Bob Morris, Jeanne Hippe and Larry Montgomery, four management employees of UCB. UCB objected to the document requests contained in the notices/subpoenas on the grounds that they were unintelligible, overbroad, vague, ambiguous, unduly burdensome and irrelevant. UCB also objected to the notice/subpoena served on Montgomery because it did not afford UCB thirty days to respond to the document requests. In response, plaintiffs filed motions to compel the production of the requested documents and sought permission from the court to reopen the four depositions if, and when, such documents were produced. Both parties sought sanctions against the other.

In his order, the magistrate overruled the majority of UCB's objections and ordered the production of documents pertaining to the hiring of coating operators from July 1997 to the present. In addition, the magistrate granted plaintiffs' request to reopen the depositions of Oldham, Morris and Hippe for questioning concerning the forthcoming coating operator documents, but denied the request to reopen Montgomery's deposition. The magistrate denied plaintiffs' request to reopen Montgomery's deposition because they had not provided him with the thirty days necessary to produce documents as required by Fed.R.Civ.P. 30(b)(5) and 34. Finally, the magistrate denied the parties' cross-motions for sanctions.

\*3 Plaintiffs contend that the magistrate erred in refusing to reopen Montgomery's deposition and in refusing to award expenses in connection with the filing of the motions to compel. Plaintiffs assert that they should have been allowed to reopen Montgomery's deposition because they would have had the necessary documents if the defendant had produced those documents for the other depositions. They further argue that they did not take contrary positions concerning the scope of their discovery requests. Thus, they contend that they were entitled to fees and expenses in connection with the prepar-

ation of responses to defendant's objections to duces tecum subpoenas and the retaking of the depositions of Oldham, Morris and Hippe.

In denying the plaintiffs' requests to reopen Montgomery's deposition, the magistrate ruled as follows:

Plaintiffs did not provide Montgomery with the requisite thirty days to provide the documents. While the Court has ruled that this failure to give the requisite notice relieved Defendant of producing the requested documents at his deposition, Defendant still had the obligation to object and/or produce the documents within the thirty-day time period. Since Defendant did timely serve objections to the Montgomery requests and the Court has overruled those objections, Defendant must still produce the documents (as limited by Plaintiffs to the individuals hired for the Coating Operator positions). The Court does not find, however, that Defendant has the obligation to re-produce Montgomery for his deposition since Defendant had no obligation in the first place to produce the documents at his June 14, 1999 deposition. The Court will therefore deny Plaintiffs' requests to reopen Montgomery's deposition.

In denying sanctions to the plaintiffs, the magistrate noted that the plaintiffs had taken contrary positions as to the scope of information sought, i.e., at the time of depositions, plaintiffs claimed they were requesting information pertaining to all applications for all open positions, while in their reply briefs to the motions to compel, they claimed to have sought information pertaining only to the hiring of coating operators. The magistrate indicated that he would have agreed with the defendant that plaintiffs' requests were overbroad if plaintiffs had continued to insist that they were entitled to all applications for all positions at the plant. The magistrate found in plaintiffs' favor on the motions to compel only because he determined that plaintiffs had narrowed their requests in the reply briefs. In sum, the magistrate found it unjust to impose sanctions against the defendant because of the contrary positions taken

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by the plaintiffs as to the scope of the document requests.

The court has carefully evaluated the record, the magistrate's order concerning these issues, and the arguments of the parties. The court does not find that the magistrate's decisions were clearly erroneous or contrary to law.

*Plaintiffs' Motions to Compel Disclosure and Discovery of Specific Documents*

\*4 In June 1999, plaintiffs filed motion to compel disclosure and discovery of specific documents. In particular, the motions sought production of a spreadsheet prepared by Gina Berti, former office manager of Adecco, and a "client file" maintained at Adecco's office. Plaintiffs also sought to reopen Berti's deposition if, and when, the court ordered these documents to be produced.

In his order, the magistrate ordered discovery of both the spreadsheet and the "client file" upon the condition that the information in each be limited to plaintiffs' prospective employing unit, the coating department. To ensure the limitation on the scope of discovery, the magistrate permitted UCB to redact or remove any information from these documents that concerned positions outside the coating department. In addition, the magistrate ordered Berti's deposition to be reopened for purposes of questioning her about coating department information contained in these documents. The magistrate refused to award sanctions to either of the plaintiffs concerning these motions to compel.

Plaintiffs contend that the magistrate erred in (1) limiting the scope of discovery; (2) not imposing judicial oversight over defendant's redaction of documents; and (3) not awarding expenses in connection with the filing of the motions to compel.

The court shall first consider the scope of discovery issue. Plaintiffs argue that the magistrate has unduly restricted discovery contrary to established Tenth Circuit law. Plaintiffs contend that they are

entitled to discovery of all information regarding individuals who applied for jobs at the Tecumseh plant. The defendant had originally argued that the scope of discovery should be limited to include only the applicants for coating operator positions. The magistrate rejected the arguments of both sides and determined that discovery would encompass all positions within the coating department, not just the coating operator positions. The issue of the appropriate scope of discovery arises frequently in the motions for review filed by plaintiffs.

The scope of discovery "is limited only by relevance and burdensomeness." *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir.1980). Discovery in employment discrimination cases depends heavily upon the particular circumstances of the case. A court may establish appropriate limits in order to balance the needs and rights of both plaintiff and defendant. The Tenth Circuit has not, as suggested by plaintiffs, adopted a policy of always allowing plant-wide discovery in employment discrimination actions. See *Joslin Dry Goods Co. v. EEOC*, 483 F.2d 178 (10th Cir.1973) (in disparate impact case, Tenth Circuit affirms district court's order limiting discovery to single store where plaintiff employed rather than permitting broader discovery company-wide to all stores). Rather, the Tenth Circuit has recognized that district courts have broad discretion in discovery matters, and have examined the relevance and the burdensomeness of the request. In the context of investigating an individual complaint of disparate treatment, such as exists in the instant cases, the Tenth Circuit has recognized that discovery may appropriately be limited to employment units, departments and sections in which employees similarly situated to plaintiff are employed. *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir.1979) (limiting discovery in gender discrimination case to plaintiff's department); see also *Haselhorst v. Wal-Mart Stores, Inc.*, 163 F.R.D. 10 (D.Kan.1995) (discovery limited to employing unit); *Earley v. Champion International Corp.*, 907 F.2d 1077 (11th Cir.1990) (limiting discovery in Title VII cases to employing unit); *Marshall v.*

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*Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir.1978) (where individual case of disparate treatment is alleged, focus in discovery should be on employing unit or work unit). To justify the court's consideration beyond the employing unit or work unit, the plaintiff must show a more particularized need and relevance. *Haselhorst*, 163 F.R.D. at 11.

\*5 The court does not find the magistrate's decision to limit discovery to the coating department clearly erroneous. The court finds that the magistrate properly concluded that plaintiffs had not shown a particularized need and relevance for the plant-wide discovery. In sum, the court finds no basis to the objections offered by the plaintiffs.

The court also does not find that the magistrate's decision not to impose any judicial oversight over the defendant's redactions of the spreadsheet and client file was clearly erroneous. The court is in agreement with the defendant that this is a matter that can be managed by the parties.

Finally, we shall address the issue of sanctions. This presents an interesting question. The facts are not in dispute. The motion filed by plaintiff Hladky was entitled "Motion to Compel Disclosure of Specific Documents and for Sanctions." The motion and accompanying memorandum, however, failed to address the issue of sanctions. The motion filed by plaintiff Epling did not mention sanctions either in its title or anywhere in the motion or accompanying memorandum. Under these circumstances, the magistrate determined that plaintiffs had not requested sanctions. In addition, he determined that sanctions should not be awarded because he did not grant the motions in their entireties.

Sanctions shall be allowed when a motion to compel discovery is granted or if the requested discovery is provided after the filing of the motion, unless the court finds that the motion was filed without the movant making a good faith effort to obtain the discovery, or that the opposing party's nondisclosure was substantially justified, or that other circum-

stances make the award of expenses unjust. Fed.R.Civ.P. 37(a)(4)(A). Expenses may be apportioned among the parties in a just manner where the motion to compel is granted in part and denied in part. Fed.R.Civ.P. 37(a)(4)(C).

Given the language of Rule 37(a)(4)(A), the court does not agree with the magistrate that a party needs to request sanctions when filing a motion to compel under Rule 37. There is a presumption in favor of expense shifting sanctions under Rule 37(a)(4)(A). Unless an exception applies, the rule provides that sanctions should be applied. Accordingly, we do not see that the rule requires a request or argument for sanctions. Nevertheless, the court does not find the magistrate's decision not to award sanctions clearly erroneous. If a motion to compel discovery is granted in part and denied in part, the court may apportion expense shifting sanctions among parties "in a just manner." Fed.R.Civ.P. 37(a)(4)(C). The motions filed by the plaintiffs were granted in part and denied in part. The magistrate declined to enter sanctions. This court does not find that this decision was clearly erroneous.

#### *Plaintiffs' Motions to Compel Disclosure and Discovery and for Sanctions*

In June 1999, plaintiffs filed motions to compel disclosure and discovery of interrogatories and requests for production of documents to defendant. The majority of the defendant's objections to plaintiffs' discovery requests focused on the aforementioned dispute over the scope of discovery, i.e., whether plaintiffs were entitled to discover information regarding all applicants for all positions at UCB from July 1997 to the present. The defendant also objected to the number of interrogatories propounded by each plaintiff because they exceeded the number permitted by Fed.R.Civ.P. 33(a). In their motions, plaintiffs again requested sanctions for filing the motions.

\*6 The magistrate once again held that discovery was limited to information pertaining to plaintiffs'

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prospective employing unit, the coating department. He further ruled that the number of interrogatories for both plaintiffs exceeded the number permitted by the Federal Rules of Civil Procedure. He estimated that the number of interrogatories propounded by Epling, including subparts, ranged from 25 to 168 interrogatories, while the number propounded by Hladky ranged from 21 to 89 separate interrogatories. He ordered plaintiffs to select twenty-five from those already propounded to resubmit to the defendant. In addition to his general rulings, the magistrate made numerous determinations on the scope of the individual requests for production of documents. Finally, he denied plaintiffs' request for sanctions under Fed.R.Civ.P. 37(a)(4)(C).

In this motion, plaintiffs contend that the magistrate erred in (1) limiting plaintiffs' discovery to information pertaining to their prospective employing unit, the coating department; (2) determining that the interrogatories exceeded the number allowed by Rule 33 and requiring them to repropound only twenty-five interrogatories; (3) denying several of their requests for production of documents; and (4) denying their request for sanctions.

The court has carefully considered all of the arguments raised by the plaintiffs. We find no merit to any of them. The court finds that the magistrate carefully and properly ruled on each of the aforementioned matters. The court does not find that any of these rulings were clearly erroneous.

#### *Plaintiffs' Motions to File Amended Complaints*

In July 1999, plaintiffs sought to amend their complaints to add retaliation claims and to amend their age discrimination claims to include allegations that they both sought "any job" at the Tecumseh plant. The magistrate denied these motions as untimely. In December 1999, plaintiffs sought leave to file second amended complaints to add UCB, Inc. as a defendant. Epling also sought leave to amend to add four new plaintiffs. The magistrate also denied the motions to amend as untimely. He further

denied motions to add UCB, Inc. as a defendant as futile. In this motion, plaintiffs contend that the magistrate erred in denying their motions to amend. Plaintiffs argue, inter alia, that the magistrate failed to consider whether the defendant would suffer any prejudice as a result of granting either motion to amend.

While leave to amend "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), the decision "is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). "[A] district court acts within the bounds of its discretion when it denies leave to amend for 'untimeliness' or 'undue delay.' Prejudice to the opposing party need not be shown also." *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir.1987).

\*7 After considering all of the facts surrounding the motions to amend filed by both plaintiffs, the court does not find that the magistrate's decisions to deny the motions to amend based on untimeliness were clearly erroneous or contrary to law. The court believes the magistrate thoroughly examined the issues and reached a decision within the bounds of his discretion. Given this decision, the court finds it unnecessary to address the rulings made by the magistrate concerning the futility of the proposed amendments. Moreover, the court notes that recent events have rendered portions of the motions to amend moot. The court has denied motions to dismiss in two cases filed by the plaintiffs after these cases that raised many of the allegations contained in the motions to amend.

#### *Plaintiffs' Motions to Determine Sufficiency of Responses to Admissions*

On June 16, 1999, plaintiffs served requests for admission upon the defendant. The deadline for serving discovery requests was June 15, 1999. In August 1999, plaintiffs sought to determine the sufficiency of the defendant's responses to the requests for admissions. The defendant objected to the re-

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quests for admissions, arguing that they were untimely served. The magistrate agreed. The magistrate denied the plaintiffs' motion to determine the sufficiency of the responses to the requests for admissions. The magistrate determined that the requests for admissions were a form of discovery and that they were untimely because they had been served after the discovery deadline. The magistrate stated that, in order to be timely, the requests needed to be served on or before May 13, 1999, so that responses could be filed prior to the discovery deadline. The magistrate also granted defendant's request for sanctions.

Plaintiffs contend that the magistrate erred in finding the requests for admissions untimely and in imposing sanctions. Plaintiffs assert that requests for admission are not discovery tools and were, therefore, not subject to the discovery deadline established by the magistrate. Plaintiffs further argue that sanctions should not have been imposed because past practices in this court and precedent from other jurisdictions supported the position taken by them before the magistrate.

The question of whether discovery deadlines apply to requests for admission is the subject of much dispute. Compare *Jarvis v. Wal-Mart Stores, Inc.*, 161 F.R.D. 337, 339 (N.D.Miss.1995) (requests for admission are a form of discovery and are therefore subject to the discovery deadline) with *O'Neill v. Medad*, 166 F.R.D. 19, 21 (E.D.Mich.1996) (requests for admissions are not general discovery device and therefore are not subject to discovery deadlines) and *Hurt v. Coyne Cylinder Co.*, 124 F.R.D. 614, 615 (W.D.Tenn.1989) (same) and with *Kershner v. Beloit Corp.*, 106 F.R.D. 498, 499 (D.Maine 1985) (requests for admissions are subject to discovery deadline but should be answered even if untimely unless opposing party shows some prejudice).

\*8 Having reviewed this contradictory precedent, none of which comes from the Tenth Circuit or the District of Kansas, the court is persuaded that the decision of the magistrate was not clearly erroneous

or contrary to law. The court, however, does find that the magistrate's decision to award sanctions was clearly erroneous. The magistrate found the arguments of the plaintiffs frivolous and disingenuous. We cannot agree. The state of the law on this issue is clearly unsettled. The court finds that the arguments of the plaintiffs were substantially justified. We believe that the imposition of sanctions under these circumstances was inappropriate. See *Bieganek v. Wilson*, 110 F.R.D. 77, 78 (N.D.Ill.1986). Accordingly, the court shall vacate the award of sanctions to the defendant on this issue.

#### *Plaintiffs' Motions for Extension of Expert Disclosure and Discovery Deadline*

In June 1999, plaintiffs moved to extend the expert disclosure deadlines by sixty days. The magistrate denied the motion. The court does not find that this decision was clearly erroneous or contrary to law.

#### PLAINTIFF HLADKY'S PETITION FOR REVIEW OF MAGISTRATE'S ORDER OF AUGUST 31, 2000

In response to the magistrate's order of August 7, 2000, the defendant produced approximately 20,000 pages of documents to plaintiffs. The defendant photocopied these documents and provided them to plaintiffs in eight large boxes. Plaintiffs complained about the method of the defendant's production. On August 31, 2000, the magistrate held a hearing to address plaintiffs' complaints. At that time, plaintiffs argued that Fed.R.Civ.P. 34(b): (1) required the defendant to organize and identify documents to correspond with the categories in plaintiffs' document requests; and (2) produce original documents rather than copies. The magistrate denied plaintiffs' complaints, finding that the defendant had adequately complied with the requirements of Rule 34(b). The magistrate found no merit to the arguments raised by the plaintiffs. Plaintiff Hladky contends that the magistrate erred in reach-

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ing this decision.

The court does not find the decision of the magistrate clearly erroneous. The court fails to find, based upon the information presented, that the documents produced by the defendant were not produced as they were kept in the ordinary course of business. In addition, the court finds nothing in Rule 34 that requires that a party produce originals rather than copies. In sum, plaintiff's petition for review shall be denied.

#### PLAINTIFFS' PETITION FOR REVIEW OF MAGISTRATE'S ORDER DATED SEPTEMBER 22, 2000

In his order of August 7, 2000, the magistrate ruled that the appropriate scope of discovery was the coating department of the Tecumseh plant for the time period from July 1997 through the present. The magistrate also ruled that the defendant did not have standing to object to or quash the subpoena duces tecum served by plaintiffs on Shirley Martin-Smith. Plaintiffs had previously served a subpoena duces tecum on Martin-Smith requesting all application documents of all individuals who applied for any positions at the Tecumseh plant during the time period from July 1997 through December 1997. On or about September 11, 2000, plaintiffs issued an amended subpoena duces tecum on Shirley Martin-Smith. Plaintiffs requested all application documents for all positions for the time period from July 1997 through the present. The defendant responded with a motion to enforce the magistrate's August 7th order.

\*9 The magistrate granted the defendant's motion to enforce. The magistrate held that while plaintiffs were allowed to once again serve their deposition notice on Martin-Smith, they were not permitted to obtain documents concerning all positions at the Tecumseh plant because discovery had been limited to the coating department, plaintiffs' employing unit.

In this motion, plaintiffs contend that the magistrate erred in limiting the subpoena to documents concerning the coating department. Plaintiffs contend that they should have been allowed to proceed on the requests of the prior subpoena (with an expansion of the discovery time frame as established in the magistrate's August 7th order) because the magistrate had ruled that the defendant had no standing to quash the subpoena.

This motion again raises the scope of discovery issue. Again and again, plaintiffs have suggested that discovery should be expanded to the entire plant because "all hiring decisions between July 1997 and the present have been made by the human resources managers Michael Machell and Jenne Hippe under the direct supervision of UCB vice president Joseph Wilbanks." As correctly pointed out by the defendant, plaintiffs have never cited to any portion of the record to support the quoted material. Moreover, the defendant has repeatedly cited to evidence suggesting that the quoted material has no basis in fact.

Once again, the court does not find that the magistrate's decision was clearly erroneous. The magistrate has demonstrated a thorough understanding of these cases and the issues involved. Accordingly, this motion shall also be denied.

#### PLAINTIFFS' MOTION FOR REVIEW OF MAGISTRATE'S ORDER OF JANUARY 24, 2001

In his order of August 7, 2000, the magistrate held that the defendant was entitled to expenses, including attorney's fees, incurred in responding to plaintiffs' motions to determine the sufficiency of the responses to their requests for admissions. On January 24, 2001, the magistrate awarded sanctions to the defendant in the amount of \$2,390.48. In this motion, plaintiffs object to the amount awarded.

With the court's decision reversing the magistrate's award of sanctions, the court finds that this motion is moot.

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PLAINTIFF HLADKY'S PETITIONS FOR REVIEW OF MAGISTRATE'S ORDER OF JANUARY 31, 2001

On January 12, 2001, plaintiff Hladky filed a motion to take the noticed depositions of Joe Gaynor and Joe Wilbanks telephonically. The defendant opposed the plaintiff's motion and filed a motion for protective order. On January 31, 2001, the magistrate denied plaintiff's motion and granted defendant's motion. The magistrate determined that (1) plaintiff had not met her initial burden of demonstrating a legitimate reason for taking the deposition by telephone; and (2) telephonic depositions were not appropriate due to the complexity of the case and number of documents requested.

In her petitions for review, plaintiff contends that the magistrate erred in denying her motion to take the depositions of Wilbanks and Gaynor by telephone. Plaintiff argues initially that there was no need for her to state a legitimate reason for the need to take a deposition by telephone because the need was obvious, i.e., to save costs. Plaintiff further contends that the legal and factual bases for denying her motion were inaccurate.

\*10 Rule 30(b)(7) provides that "the court upon motion may order that a deposition be taken by telephone." As a general rule, this court believes that telephonic depositions should be broadly permitted. We are not convinced as suggested by the magistrate that a litigant must affirmatively state a reason for the taking of a deposition by telephone. The court notes that in *Cressler v. Neuenschwander*, 170 F.R.D. 20 (D.Kan.1996), a case relied upon by the magistrate, Judge Saffels stated that a "party seeking to depose a witness telephonically must present a legitimate reason for its request." *Cressler*, 170 F.R.D. at 21. While we agree in substance with this statement, we are not persuaded that each case requires the statement of a reason because the purpose for taking a deposition by telephone is obvious in most cases, i.e., the savings of time and costs. In this case, where plaintiff sought to take the depositions of individuals who

were located in Atlanta, Georgia, we believe that the purpose was readily evident. Accordingly, the court finds the magistrate's decision to deny plaintiff's motion for this reason clearly erroneous.

Once a motion to take a deposition by telephone is filed, the burden shifts to the other side to show why the depositions should proceed in the traditional manner. *Cressler*, 170 F.R.D. at 21. Here, the defendant suggested that these depositions should not be taken by telephone because of the complexity of the case and the number of documents requested by the plaintiff. The magistrate agreed. Based upon information presently before the court, we cannot say that the magistrate's decision was clearly erroneous. Accordingly, this motion shall also be denied.

IT IS THEREFORE ORDERED that plaintiffs' petitions for review of the magistrate's order of August 7, 2000 (Doc. # 132 in No. 98-4226 and Doc. # 136 in No. 98-4227) be hereby granted in part and denied in part. On remand, the magistrate shall (1) consider whether sanctions should be awarded to plaintiffs in connection with defendant's motions for protective orders and (2) vacate the award of sanctions to defendant in connection with plaintiffs' motions to determine sufficiency of responses to admissions.

IT IS FURTHER ORDERED that plaintiff Hladky's petition for review of the magistrate's order of August 31, 2000 (Doc. # 155 in No. 98-4226) be hereby denied.

IT IS FURTHER ORDERED that plaintiffs' petitions for review of the magistrate's order of September 22, 2000 (Doc. # 165 in No. 98-4226) be hereby denied.

IT IS FURTHER ORDERED that plaintiffs' petitions for review of the magistrate's order of January 24, 2001 (Doc. # 228 in No. 98-4226) be hereby denied as moot.

IT IS FURTHER ORDERED that plaintiff Hladky's petitions for review of the magistrate's order of

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January 31, 2001 (Doc.56 and 57 in No. 00-4062)  
be hereby denied.

IT IS FURTHER ORDERED that plaintiffs' motion  
to strike defendant's amended motion to file sur-  
reply (Doc. # 186 in No. 98-4226) by hereby denied.

\*11 IT IS FURTHER ORDERED that defendant's  
motion to disregard plaintiffs' response to defend-  
ant's surreply (Doc. # 211 in No. 98-4226) be  
hereby denied.

IT IS SO ORDERED.

D.Kan.,2001.  
Epling v. UCB Films, Inc.  
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STATE OF UTAH  
UTAH COUNTY  
2008 MAY 15 P 5:35

Steve S. Christensen (U.S.B. No. 6156)  
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IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,

Plaintiff,

vs.

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

**PLAINTIFF'S MOTION TO AMEND  
SCHEDULING ORDER**

Civil No. 070403005

Judge Laycock

Plaintiff Kim Dahl, by and through her attorneys of record, Hirschi Christensen, PLLC, does hereby move this Court for an Order amending the Scheduling Order so that all discovery deadlines will be moved back three months. The grounds for this motion, as more fully set forth in the in the accompanying Consolidated Memorandum in Support of the Motion for Further Discovery, Motion to Amend the Scheduling Order, and in Opposition to Defendants' Motion for Protective Order, are that Plaintiff needs more time to seek responses to her outstanding discovery and to take the deposition of the Defendants.

000393

DATED this 12 day of May, 2008.

HIRSCHI CHRISTENSEN, PLLC

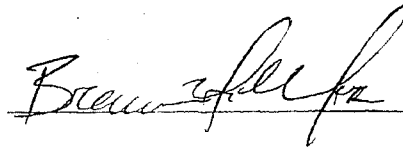


STEVE S. CHRISTENSEN  
BRENNAN H. MOSS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **PLAINTIFF'S MOTION TO AMEND SCHEDULING ORDER** was sent via U.S. Mail and e-mail on the 12th day of May, 2008, to the following:

Benjamin W. Lieberman (#11456)  
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4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

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IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,

Plaintiff,

vs.

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

PLAINTIFF'S MOTION FOR FURTHER  
DISCOVERY

Civil No. 070403005

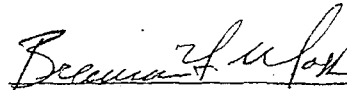
Judge Laycock

Plaintiff Kim Dahl, by and through her attorneys of record, Hirschi Christensen, PLLC, and pursuant to Rule 56(f) does hereby move this Court for an Order allowing for further discovery prior to its determination of Defendants' Motion for Summary Judgment. The grounds for this motion, as more fully set forth in the accompanying Consolidated Memorandum in Support of the Motion for Further Discovery, Motion to Amend the Scheduling Order, and in Opposition to Defendants' Motion for Protective Order, are that further discovery and depositions will expose the facts and illuminate the issues presented in Defendants' Motion for Summary Judgment. This Motion is also supported by the Declaration of Brennan H. Moss.

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DATED this 12 day of May, 2008.

HIRSCHI CHRISTENSEN, PLLC



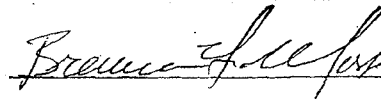
STEVE S. CHRISTENSEN  
BRENNAN H. MOSS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of PLAINTIFF'S MOTION FOR FURTHER

DISCOVERY was sent via U.S. Mail and e-mail on the 12th day of May, 2008, to the following:

Benjamin W. Lieberman (#11456)  
BURBIDGE, MITCHELL & GROSS  
215 South State Street, Suite 920  
Salt Lake City, Utah 84111  
Telephone: (801) 355-6677  
Email: [bwl@bmgttrial.com](mailto:bwl@bmgttrial.com)



FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2008 MAY 15 P 5:35

Steve S. Christensen (U.S.B. No. 6156)  
Brennan H. Moss (U.S.B. No. 10267)  
Jeffrey J. Steele (U.S.B. No. 10606)  
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Attorneys for Plaintiff  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111  
Telephone: (801) 322-0593  
Facsimile: (801) 322-0594

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IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,

Plaintiff,

**vs.**

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

**DECLARATION OF BRENNAN H.  
MOSS IN SUPPORT OF PLAINTIFF'S  
MOTION FOR FURTHER DISCOVERY**

Civil No. 070403005

Judge Laycock

1. I am currently counsel of record for Plaintiff Mrs. Dahl and have personal knowledge of the matters set forth herein.
2. On April 7, 2008, Mrs. Dahl served upon Defendants discovery requests consisting of interrogatories and request for production of documents.
3. On April 25, 2008, Defendants served upon counsel for Mrs. Dahl a Motion for Summary Judgment and a Motion for a Protective Order protecting them from having to answer discovery.
4. The discovery propounded upon defendants relates to the issues raised in their motion for summary judgment.
5. Mrs. Dahl propounded the following interrogatories:

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- a. **INTERROGATORY NO. 1:** Identify any communications that you had with Mrs. Dahl while you acted as her counsel. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.
- b. **INTERROGATORY NO. 2:** Identify any communications that you had with other persons while you acted as her legal counsel which related to Mrs. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.
- c. **INTERROGATORY NO. 3:** Identify any communications that you have had with Rosemond Blakelock which related to Mrs. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.
- d. **INTERROGATORY NO. 4:** Identify any communications that you have had with Dr. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication
- e. **INTERROGATORY NO. 5:** Identify all cases in which you have appeared or consulted that have involved Rosemond Blakelock.
- f. **INTERROGATORY NO. 6:** Identify all the cases in which you have appeared or consulted in that relate to Dr. Charles Dahl.
- g. **INTERROGATORY NO. 7:** Identify all facts which support your denial of the allegation that you entered into the "Stipulation" without Mrs. Dahl's knowledge or consent.
- h. **INTERROGATORY NO. 8:** Identify the basis and the reasons that you recommended to Mrs. Dahl to sign up for anger management and parenting classes.

- i. INTERROGATORY NO. 9: Identify all facts which support your denial of the allegation that you told Mrs. Dahl that because the November 2, 2006 hearing would be continued, she would not need to appear.
- j. INTERROGATORY NO. 10: Identify the evidence that needed to be gathered in order to put Mrs. Dahl in the best possible position in front of the court at the November 2, 2006 hearing, as asserted in paragraph 40 of your Answer.
- k. INTERROGATORY NO. 11: Identify all the facts that support your assertion that Mrs. Dahl violated the terms of court-ordered supervised visitation and refused to follow Mr. Harrison's counsel..
- l. INTERROGATORY NO. 12: Identify all the reasons you claim that Mrs. Dahl's claims are barred by the doctrine of *in pari delicto* or unclean hands.
- m. INTERROGATORY NO. 13: Identify all the reasons you claim that Mrs. Dahl's damages are a result of her own actions.
- n. INTERROGATORY NO. 14: Identify all the reasons you claim that Mrs. Dahl's damages were caused by intervening causes.
- o. INTERROGATORY NO. 15: Identify all the reasons you claim that Mrs. Dahl's damages were the product of circumstances over which you had no control.
- p. INTERROGATORY NO. 16: Identify all the reasons you claim that Mrs. Dahl's claims are barred by waiver, estoppel, or laches.
- q. INTERROGATORY NO. 17: Identify all the reasons you claim that Mrs. Dahl has failed to mitigate her damages.

r. **INTERROGATORY NO. 18:** Identify all times in which you have been covered by malpractice insurance. Include in your answer the dates in which you were covered, and the name of the malpractice carrier.

6. Mrs. Dahl propounded the following request for production of documents upon Defendants.

- a. **REQUEST NO. 1:** Produce all documents relating to your representation of Kim Dahl.
- b. **REQUEST NO. 2:** Produce all documents relating to every agreement, document, or other writing that was executed by the parties, or either of them, to engage the employment of Brian C. Harrison or Brian C. Harrison, P.C. for Kim Dahl.
- c. **REQUEST NO. 3:** Produce all documents relating to your claim that you had authority to represent Mrs. Dahl in case number 064402232.
- d. **REQUEST NO. 4:** Produce all documents relating to your claim that Mrs. Dahl consented to your entry into the "Stipulation" in case number 064402232 on November 2, 2006.
- e. **REQUEST NO. 5:** Produce all documents relating to your claim that Mrs. Dahl authorized you to your enter into the "Stipulation" in case number 064402232 on November 2, 2006.
- f. **REQUEST NO. 6:** Produce all documents, notes, memoranda, or other writings relating to case number 064402232.
- g. **REQUEST NO. 7:** Produce all documents relating to any communications between you and Dr. Charles Dahl, or her claim.
- h. **REQUEST NO. 8:** Produce all documents relating to any communications between you and Rosemond Blakelock, or her agent, which related to Mrs. Dahl.
- i. **REQUEST NO. 9:** Produce all documents relating to any conversations between you and Mrs. Dahl.

j. REQUEST NO. 10: Produce all documents relating to any billing or invoicing charged to Mrs. Dahl for your legal counsel and representation.

k. REQUEST NO. 11: Produce a list of each case in which you have represented clients against parties represented by Rosemond Blakelock.

l. REQUEST NO. 12: Produce all the files that relate to your answer to interrogatory number 6 above.

m. REQUEST NO. 13: Produce each document relating to any business dealings you have had, you have, or plan to have, with Dr. Charles Dahl.

n. REQUEST NO. 14: Produce each document relating to any doctor-patient relationship, or any other relationship, you have had, you have, or plan to have with Dr. Dahl.

o. REQUEST NO. 15: Produce all documents relating to your answer of interrogatory number 10.

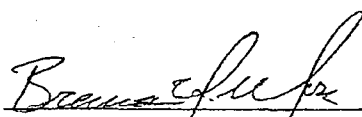
7. In addition to the discovery propounded on April 7, 2008, Mrs. Dahl would like to take the testimony of the Defendants to ask questions relating to their conversations with Mr. Dahl, Mr. Dahl's attorney, and the issues presented in their Motion for Summary Judgment.

8. Answers to the above discovery will facilitate a fair trial by the full disclosure of all relevant testimony and evidence.

9. I certify under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED this 12 day of May, 2008

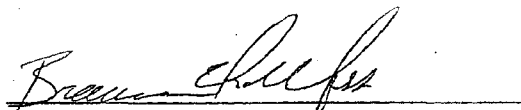
HIRSCHI CHRISTENSEN, PLLC

By   
Brennan H. Moss

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **DECLARATION OF BRENNAN H. MOSS**  
**IN SUPPORT OF PLAINTIFF'S MOTION FOR FURTHER DISCOVERY** was sent via U.S. Mail  
and e-mail on the 12th day of May, 2008, to the following:

Benjamin W. Lieberman (#11456)  
BURBIDGE, MITCHELL & GROSS  
215 South State Street, Suite 920  
Salt Lake City, Utah 84111  
Telephone: (801) 355-6677  
Email: [bwl@bmgtrial.com](mailto:bwl@bmgtrial.com)

A handwritten signature in cursive script, appearing to read "Brennan H. Moss", is written over a horizontal line.

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2008 MAY 15 PM 5:35

Steve S. Christensen (U.S.B. No. 6156)  
Brennan H. Moss (U.S.B. No. 10267)  
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**HIRSCHI CHRISTENSEN, PLLC**  
Attorneys for Plaintiff  
136 East South Temple, Suite 850  
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Telephone: (801) 322-0593  
Facsimile: (801) 322-0594

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IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

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KIM DAHL,

Plaintiff,

vs.

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

**PLAINTIFF'S CONSOLIDATED  
MEMORANDUM IN SUPPORT OF HER  
MOTION FOR FURTHER DISCOVERY,  
MOTION TO AMEND THE  
SCHEDULING ORDER, AND IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR A PROTECTIVE ORDER**

Civil No. 070403005

Judge Laycock

Plaintiff Kim Dahl, by and through her attorneys of record, Hirschi Christensen, PLLC, does hereby submit the following Consolidated Memorandum in Support of the Motion for Further Discovery, Motion to Amend the Scheduling Order, and in Opposition to Defendants' Motion for Protective Order,

**I. THE COURT SHOULD AMEND THE SCHEDULING ORDER TO ALLOW FOR  
MORE DISCOVERY**

Pursuant to Rule 26(f) (1), the parties met and conferred regarding following scheduling deadlines. As part of the meeting, the parties agreed that all fact discovery would be completed no later than April 7, 2008. When Plaintiff entered into the stipulation, it was overly optimistic about the time frame in which discovery could be completed. However, due to Motions filed in this case, and the time

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constraints by other cases, it is apparent that Plaintiff needs more time to complete fact discovery and therefore has requested the Court to amend the Scheduling Order to move all discovery dates back by three months.

The purpose of discovery is to expose the facts and illuminate the issues. See Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”). Utah’s discovery rules are aimed at “facilitating fair trials with full disclosure of all relevant testimony and evidence,” Roundy v. Staley, 984 P.2d 404, 408 (Utah Ct. App. 1999), and are designed so “the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible.” Ellis v. Gilbert, 429 P.2d 39, 40 (Utah 1967). By amending the Scheduling Order by moving all discovery dates back by three months, the Court will allow the parties to gather all relevant facts for the case, and will benefit the court by giving it the information it needs to determine the facts and resolve the issues.

Therefore, in the interest of exposing the facts and illuminating the issues, the Court should grant Mrs. Dahl’s request to amend the scheduling order by moving the discovery deadlines back by three months.

## **II. THE COURT SHOULD ORDER DEFENDANTS TO ANSWER OUTSTANDING DISCOVERY AND TO SUBMIT TO A DEPOSITION**

Pursuant to Rule 56(f) of the Utah Rules of Civil Procedure, Defendants moved for an order from the Court to Order Defendants to answer outstanding discovery and to submit to a deposition. The outstanding discovery goes to the heart of the issues in Defendants’ Motion for Summary Judgment and they should provide answers prior to any consideration of summary judgment.

Specifically, Plaintiff propounded discovery to Defendants asking them to (1) identify any communications that they have had with Mr. Dahl's counsel which related to Mrs. Dahl; (2) identify any communications that they have had with Dr. Dahl; (3) identify all cases in which they have appeared or consulted that have involved Mr. Dahl's attorney; (4) identify all the cases in which they have appeared or consulted in that relate to Dr. Charles Dahl; (5) produce all documents relating to any communications between them and Dr. Charles Dahl; (6) produce all documents relating to any communications between them and Mr. Dahl's attorney or her agent, which related to Mrs. Dahl; (7) produce a list of each case in which they have represented clients against parties represented by Mr. Dahl's attorney; (8) produce each document relating to any business dealings they have had, they have, or plan to have, with Dr. Charles Dahl; and (9) produce each document relating to any doctor-patient relationship, or any other relationship, they have had, they have, or they plan to have with Dr. Dahl. The response to the outstanding discovery will be essential to expose the facts and illuminate the issues with respect to Defendants' Motion, the Court should order them to answer the discovery prior to considering the their Motion for Summary Judgment.

### **III. THE COURT SHOULD DENY DEFENDANTS MOTION FOR A PROTECTIVE ORDER**

For the reasons stated in sections I and II above, the Court should deny Defendants' Motion for a Protective Order. Plaintiff has propounded discovery upon Defendants that will serve to expose the facts and illuminate the issues of the case. Specifically, Plaintiff has propounded the following interrogatories and requests for production of documents upon Defendants:

**INTERROGATORY NO. 1:** Identify any communications that you had with Mrs. Dahl while you acted as her counsel. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 2:** Identify any communications that you had with other persons while you acted as her legal counsel which related to Mrs. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 3:** Identify any communications that you have had with Rosemond Blakelock which related to Mrs. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication.

**INTERROGATORY NO. 4:** Identify any communications that you have had with Dr. Dahl. Include in your answer the date of the communication, the place the communication took place, the people present, and the subject matter of the communication

**INTERROGATORY NO. 5:** Identify all cases in which you have appeared or consulted that have involved Rosemond Blakelock.

**INTERROGATORY NO. 6:** Identify all the cases in which you have appeared or consulted in that relate to Dr. Charles Dahl.

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**INTERROGATORY NO. 8:** Identify the basis and the reasons that you recommended to Mrs. Dahl to sign up for anger management and parenting classes.

**INTERROGATORY NO. 9:** Identify all facts which support your denial of the allegation that you told Mrs. Dahl that because the November 2, 2006 hearing would be continued, she would not need to appear.

**INTERROGATORY NO. 10:** Identify the evidence that needed to be gathered in order to put Mrs. Dahl in the best possible position in front of the court at the November 2, 2006 hearing, as asserted in paragraph 40 of your Answer.

**INTERROGATORY NO. 11:** Identify all the facts that support your assertion that Mrs. Dahl violated the terms of court-ordered supervised visitation and refused to follow Mr. Harrison's counsel..

**INTERROGATORY NO. 12:** Identify all the reasons you claim that Mrs. Dahl's claims are barred by the doctrine of *in pari delicto* or unclean hands.

**INTERROGATORY NO. 13:** Identify all the reasons you claim that Mrs. Dahl's damages are a result of her own actions.

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**INTERROGATORY NO. 17:** Identify all the reasons you claim that Mrs. Dahl has failed to mitigate her damages.

**INTERROGATORY NO. 18:** Identify all times in which you have been covered by malpractice insurance. Include in your answer the dates in which you were covered, and the name of the malpractice carrier.

**REQUEST FOR PRODUCTION OF DOCUMENTS**

**REQUEST NO. 1:** Produce all documents relating to your representation of Kim Dahl.

**REQUEST NO. 2:** Produce all documents relating to every agreement, document, or other writing that was executed by the parties, or either of them, to engage the employment of Brian C. Harrison or Brian C. Harrison, P.C. for Kim Dahl.

**REQUEST NO. 3:** Produce all documents relating to your claim that you had authority to represent Mrs. Dahl in case number 064402232.

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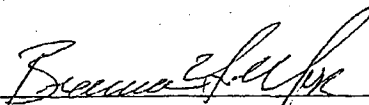
Answers to the above discovery will facilitate a fair trial by the full disclosure of all relevant testimony and evidence. Therefore, the Court should deny Defendants' Motion for a Protective Order.

#### CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's Motion to Amend the Scheduling Order, Motion for Further Discovery, and deny Defendants' Motion for a Protective Order.

DATED this 12 day of May, 2008.

HIRSCHI CHRISTENSEN, PLLC

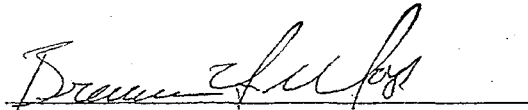


STEVE S. CHRISTENSEN  
BRENNAN H. MOSS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **PLAINTIFF'S CONSOLIDATED  
MEMORANDUM IN SUPPORT OF HER MOTION FOR FURTHER DISCOVERY, MOTION  
TO AMEND THE SCHEDULING ORDER, AND IN OPPOSITION TO DEFENDANTS'  
MOTION FOR A PROTECTIVE ORDER** was sent via U.S. Mail and e-mail on the 12th day of  
May, 2008, to the following:

Benjamin W. Lieberman (#11456)  
BURBIDGE, MITCHELL & GROSS  
215 South State Street, Suite 920  
Salt Lake City, Utah 84111  
Telephone: (801) 355-6677  
Email: [bwl@bmgtrial.com](mailto:bwl@bmgtrial.com)



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Benjamin W. Lieberman (#11456)  
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Salt Lake City, Utah 84111  
Telephone: (801) 355-6677

*Attorneys for Defendants*

ORIGINAL

IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

KIM DAHL,

Plaintiff,

v.

BRIAN C. HARRISON, an individual; and  
BRIAN C. HARRISON, P.C., a Utah  
corporation,

Defendants.

DEFENDANTS' CONSOLIDATED:

- (1) REPLY MEMORANDUM IN  
SUPPORT OF THEIR MOTION  
FOR PROTECTIVE ORDER;  
AND
- (2) MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S  
RULE 56(F) MOTION FOR  
FURTHER DISCOVERY AND TO  
AMEND THE SCHEDULING  
ORDER

Case No. 070403005  
Judge Claudia Laycock

INTRODUCTION

In their Motion for Protective Order, Defendants made a *prima face* demonstration that Plaintiff's discovery requests were untimely and that a protective order should be granted. In her response, Plaintiff does even attempt to dispute this fact. Instead, Plaintiff makes generic

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arguments that the discovery will “facilitate a fair trial,” and she fails to support any argument with anything more than a declaration from her attorney offering the same generic conclusions. Specifically, she fails to show any good cause for her untimeliness. Likewise, she fails to offer any adequate explanation as to why she failed to pursue *any* discovery in this case in a timely manner. As such, her opposition to Defendants’ motion for protective order fails.

Similarly, Plaintiff has moved to extend the fact discovery cutoff and delay the Court’s ruling on Defendants’ motion for summary judgment with no showing of good cause, or even a citation to the good cause standard. This is because Plaintiff cannot show any good cause. She conducted *no discovery* in this case during the *five months* of fact discovery in this matter, a period which was *proposed by Plaintiff* and stipulated to by Defendants. During that time, Plaintiff never noticed or even inquired about taking a single deposition. Other than her untimely written discovery, she never even attempted to take any discovery whatsoever. She now moves for additional time five weeks after the close of fact discovery and after her responses to Defendants’ summary judgment motion and motion for protective order were past due. Accordingly, having exercised no diligence in pursuing discovery, she cannot now, five weeks after the fact discovery cutoff and on the eve of summary judgment, obtain more time. Accordingly, her motions to extend discovery and delay resolution of Defendants’ summary judgment motion should be denied.

## ARGUMENT

### **I. THE COURT SHOULD GRANT DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**

In opposition to Defendants' Motion for Protective Order, Plaintiff does not dispute that her discovery requests are untimely, nor does she offer any explanation as to why she waited *five months* to serve any discovery in this matter. Her only argument in opposition to entry of a protective order is that additional discovery will facilitate a fair trial. If this sort of conclusory argument was adequate, no protective order could ever be entered. Obviously, Plaintiff must show more; she must demonstrate that the scheduling order should be amended to allow further time for her to conduct discovery, which in turn requires a "particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981). Plaintiff has not, and cannot, make such a showing. *See also infra*, Argument, Part II (addressing Plaintiff's failure to show good cause in more detail). Thus, she cannot defeat Defendants' motion for protective order.

### **II. THE COURT SHOULD DENY DEFENDANTS' MOTIONS TO AMEND THE SCHEDULING ORDER AND DELAY RESOLUTION OF SUMMARY JUDGMENT**

#### **A. Plaintiff Has Failed to Demonstrate Good Cause or Diligence to Warrant Further Discovery.**

Modification of a scheduling order may only be obtained by a showing of "good cause" or "manifest injustice." *See Lewis v. Moultrie*, 627 P.2d 94, 97 (Utah 1981) (establishing that pre-trial orders may be modified prior to trial for good cause); *Reich v. Christopoulos*, 256 P.2d 238, 241 (Utah 1953) (amendment of pretrial order may be had if it is necessary to avoid

“manifest injustice.”) (quoting Utah R. Civ. P. 16). Again, as stated and supported above, “good cause” contemplates a “particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *Gulf Oil*, 452 U.S. at 102 n.16. *Cf. also, e.g., In re Terra Intern., Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (applying Federal law – “stereotyped and conclusory statements” insufficient to show good cause); *Welch v. Welch*, 828 A.2d 707, 709 (Conn. Super. Ct. 2003) (applying Connecticut law – “Good cause must be based upon a particular and specific demonstration of fact, as distinguished from stereo typed and conclusory statements.”); *Ballard v. Herzke*, 924 S.W.2d 652, 659 (Tenn. 1996) (applying Tennessee law – “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not amount to a showing of good cause. Mere conclusory allegations are insufficient.”)

Further, in deciding whether to amend the Scheduling Order, the appropriate question to ask is not whether Plaintiff desires additional discovery. Instead, the question properly presented to the Court is whether Plaintiff has shown that, even with the exercise of diligence, she could not have completed this discovery. *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995). Indeed, even under Utah R. Civ. P. 6, Plaintiff must show “cause” for such an extension. Plaintiff is wholly unable to show good cause for extension of the discovery cutoff.

Plaintiff merely says that she needs more time to conduct discovery that she should have conducted months ago. She claims that she was “overly optimistic” about the schedule in this case and that “other matters” have precluded work on this case. These generic arguments are precisely the sort that fail to establish “good cause.” *See id.*; *Gulf Oil*, 452 U.S. at 102 n.16.

In sum, Plaintiff’s purported basis for extension and delay in this case falls far short of

even the most liberal interpretation of “cause.” Accordingly, her motion to amend the scheduling order and delay consideration of Defendants’ summary judgment motion should be denied.

**B. Plaintiff’s Motion is Untimely**

Plaintiff filed the instant motions for amendment of the scheduling order and for further discovery five weeks after the fact discovery cutoff. To the extent Plaintiff perceived that the scheduling order was “overly optimistic” or that “other matters” were interfering with discovery in this case, she should not have waited until five weeks after the fact discovery cutoff and after Defendants filed a motion for summary judgment. She never raised any of these issues until fact discovery was complete, Defendants’ motion for summary judgment was pending, and her responses to the summary judgment motion and the motion for protective order were past due. The Court should not permit her to raise these objections now.

**C. Plaintiff’s Request Under Rule 56(f) Fails for the Same Reasons**

Rule 56(f) is subject to the same good cause standard:

[T]he prophylaxis of Rule 56(f) is not available merely for the asking. A litigant who seeks to invoke the rule must act with due diligence to show that his predicament fits within its confines. To that end, the litigant must submit to the trial court an affidavit or other authoritative document showing (i) good cause for his inability to have discovered or marshalled [sic] the necessary facts earlier in the proceedings; (ii) a plausible basis for believing that additional facts probably exist and can be retrieved within a reasonable time; and (iii) an explanation of how those facts, if collected, will suffice to defeat the pending summary judgment motion.

*We add a further caveat: Rule 56(f) is not designed to give relief to those who sleep upon their rights.* Consequently, a party seeking to derive the benefit of Rule 56(f) must demonstrate due diligence both in conducting discovery before

the emergence of the summary judgment motion and in pursuing an extension of time once the motion has surfaced.

*Rivera-Torres v. Rey-Hernandez*, 502 F.3d 7, 10-11 (1st Cir. 2007) (emphasis added, internal citations omitted); *accord York v. Tenn. Crushed Stone Ass'n*, 684 F.2d 360, 363 (6th Cir. 1982) (affirming denial of Rule 56(f) motion); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869, 894 (S.D.N.Y. 1997) (stating that "party seeking additional discovery must demonstrate with specificity all of the following: 1) the nature of the uncompleted discovery ...; and 2) how these facts are reasonably expected to create a genuine issue of material fact; and 3) what efforts the affiant has made to obtain these facts; and 4) why those efforts were unsuccessful").

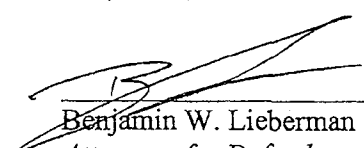
Clearly, Plaintiff has failed to demonstrate good cause by any stretch of the term. Thus, her Rule 56(f) request should be denied.

### CONCLUSION

For the foregoing reasons, Defendants' Motion for Protective Order should be granted, and Defendants motions to amend the scheduling order and for additional discovery should be denied.

Respectfully submitted this 28 day of May, 2008.

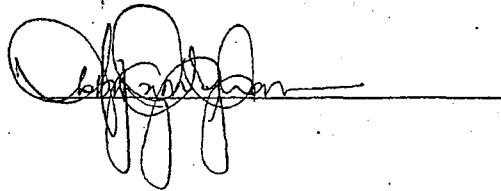
BURBIDGE, MITCHELL & GROSS

  
Benjamin W. Lieberman  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **DEFENDANTS' CONSOLIDATED: (1) REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER; AND (2) MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RULE 56(F) MOTION FOR FURTHER DISCOVERY AND TO AMEND THE SCHEDULING ORDER** was hand delivered on the 28<sup>th</sup> day of May, 2008, to the following:

Steve S. Christensen  
Brennan H. Moss  
Hirschi Christensen, PLLC  
136 East South Temple, Suite 850  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Brennan H. Moss", is written over a horizontal line.

th Judicial District Court  
of Utah County, State of Utah

Deputy  
8/7/08

4TH DISTRICT COURT - PROVO  
UTAH COUNTY, STATE OF UTAH

---

KIM DAHL, : MINUTES  
Plaintiff, : MOTIONS FOR S.J., ET AL  
: :  
vs. : Case No: 070403005 MP  
: :  
BRIAN C HARRISON PC Et al, : Judge: CLAUDIA LAYCOCK  
Defendant. : Date: August 7, 2008

---

Clerk: joyc

PRESENT

Defendant(s): BRIAN C HARRISON  
Plaintiff's Attorney(s): STEVE S CHRISTENSEN  
Defendant's Attorney(s): BENJAMIN W LIEBERMAN  
Audio  
Tape Number: 08-201 31 Tape Count: 8:37

---

HEARING

This matter comes before the Court for various Motions.

The Court addresses all parties stating a minor relationship when the Court was a Prosecutor for the State of Utah. The Court believes there is no conflict and intends to continue handling this matter. No objection is stated by Mr. Lieberman.

Mr. Christensen states he believes there is no conflict, however, would like to advise his client. Court recesses in order for Mr. Christensen to contact his client.

COUNT: 8:49

Court resumes with all parties present and ready to proceed.

Mr. Christensen advises he was unable to contact his client. Mr. Christensen request a continuance.

Mr. Lieberman opposes a continuance and requests the hearing move forward today.

Court denies a continuance, however, reserves any concerns at this time.

Mr. Lieberman argues the issue of the Amended Scheduling Order. Response by Mr. Christensen followed by Mr. Lieberman.

Case No: 070403005  
Date: Aug 07, 2008

---

Augment ensues regarding the issues of defendant's Motion for Protective Order and Plaintiff's issue regarding Rule 56(f). Regarding Rule 56(f), the Court states the plaintiff has failed to take care of discovery issues. Plaintiff's Motion is denied. Regarding the issue of defendant's Protective Order, Motion is granted.

Regarding the issue of an Amended Scheduling Order. The Court rules for partial amendment. Designation of plaintiff's expert witnesses is extended to September 8, 2008. Designation of defendant's expert witnesses is extended to October 20, 2008.

Depositions of all expert witnesses are to be concluded by November 7, 2008. Request for a Pretrial Conference on this matter should be submitted as soon as discovery is complete.

Mr. Lieberman to prepare the Amended Scheduling Order.

Mr. Lieberman addresses the issues regarding Motions for Summary Judgment and Motion to Strike. Response by Mr. Christensen follows strongly requesting an Evidentiary Hearing be held. Mr. Christensen requests these Motions be denied by the Court.

Final argument by Mr. Lieberman.

The Court was unable to review the audio conducted at previous hearings which are germane to findings. Mr. Lieberman does have transcripts of these two hearings, and per the Court's request, will provide a copy of the November 2, 2006 and April 20, 2007 hearings.

Regarding the issue of Motion to Strike, the Court refers to Rules 26(a), (e) and 37(f). Court finds the Plaintiff is not permitted to use certain exhibits. Motion to Strike in relation to exhibits 5 and 6 is granted by the Court.

Motion for Summary Judgment is under advisement. Mr. Lieberman to prepare the Order regarding Motion to Strike.

COUNT: 11:01

End time.

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY *MA*  
2009 SEP 18 P 2:06

Ben W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN, P.C.  
331 South Rio Grande Street, Suite 302  
Salt Lake City, Utah 84101  
Tel: (801) 746-0911  
Fax: (801) 746-4398  
E-mail: ben@bwllaw.com

*Attorney for Defendants*

---

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

---

KIM DAHL;

Plaintiff,

v.

BRIAN C. HARRISON, an individual;  
and BRIAN C. HARRISON, P.C., a Utah  
professional corporation;

Defendants.

**DEFENDANTS' MOTION TO  
STRIKE PLAINTIFF'S EXPERT  
DISCLOSURES AND REPORTS  
PURSUANT TO  
UTAH R. CIV. P. 37(F)**

Civil No. 070403005

Judge Claudia Laycock

---

Defendants Brian C. Harrison and Brian C. Harrison, P.C. (collectively "Defendants")  
hereby move the Court for an order striking Plaintiff's expert disclosures and reports pursuant to  
Utah R. Civ. P. 37(f).

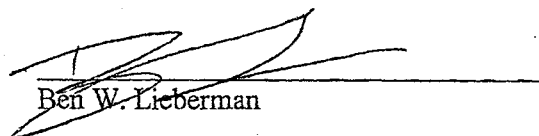
This motion is based upon the fact that Plaintiff's expert disclosures and reports were  
void of any substance and failed to meet the disclosure requirements of Utah R. Civ. P.  
26(a)(3)(B), and thus they are automatically stricken pursuant to Utah R. Civ. P. 37(f).

- 000573

This motion is supported by the memorandum filed contemporaneously herewith and the exhibits attached thereto.

Respectfully submitted this 15th day of September, 2008, by:

LAW OFFICE OF BEN W. LIEBERMAN, P.C.



Ben W. Lieberman

*Attorney for Defendants*

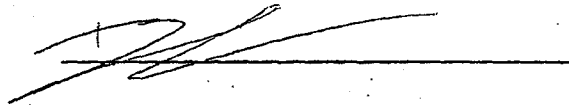
**CERTIFICATE OF SERVICE**

I hereby certify that on the 15 day of September, 2008, I sent a copy of **DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXPERT DISCLOSURES AND REPORTS PURSUANT TO UTAH R. CIV. P. 37(F)** to the following person(s) as indicated below.

Attorneys for Plaintiff:

Steve Christensen  
Brennan Moss  
HIRSCHI CHRISTENSEN, PLLC  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111

- ☒ U.S. Mail
- ☐ Overnight Mail
- ☐ Fax
- ☐ Electronic Mail
- ☐ Hand Delivery

A handwritten signature in black ink, appearing to be "JH", is written over a horizontal line.

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY  
MA

SEP 10 P 2:06

Ben W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN, P.C.  
331 South Rio Grande Street, Suite 302  
Salt Lake City, Utah 84101  
Tel: (801) 746-0911  
Fax: (801) 746-4398  
E-mail: ben@bwllaw.com

*Attorney for Defendants*

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

KIM DAHL,  
Plaintiff,

v.

BRIAN C. HARRISON, an individual;  
and BRIAN C. HARRISON, P.C., a Utah  
professional corporation,

Defendants.

**DEFENDANTS' MEMORANDUM  
IN SUPPORT OF THEIR MOTION  
TO STRIKE PLAINTIFF'S EXPERT  
DISCLOSURES AND REPORTS  
PURSUANT TO  
UTAH R. CIV. P. 37(F)**

Civil No. 070403005

Judge Claudia Laycock

**INTRODUCTION**

On August 7, 2008, the Court heard five pending motions; four primarily related to discovery matters and one for summary judgment.<sup>1</sup> The central issue with respect to the discovery motions was that Plaintiff, who had conducted no discovery prior to the fact discovery

<sup>1</sup> The Court ruled from the bench on the discovery motions and took the motion for summary judgment under advisement.

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deadline and who missed her deadline to disclose experts, requested further time for discovery. At the August 7 Hearing, the Court ruled against Plaintiff in nearly every respect on the discovery matters, but it did allow Plaintiff further time to disclose experts.

Despite being given this extra time by the Court to make expert disclosures, Plaintiff failed to make proper expert disclosures when the time came to do so. Indeed, Plaintiff's expert disclosures and "reports" listed barely more than the witness's name and failed to state the proposed opinion or basis of the opinion. As such, her expert disclosures and "reports" fail to meet requirements of Utah R. Civ. P. 26(a)(3)(B), and they should be stricken pursuant to Utah R. Civ. P. 37(f).

#### **STATEMENT OF FACTS**

1. The initial scheduling order in this matter was set by stipulation in early November, 2007. It provided, *inter alia*, a deadline of May 5, 2008, for Plaintiff to disclose any experts.
2. Plaintiff's May 5, 2008 expert disclosure deadline came and went, and Plaintiff failed to disclose any expert.
3. On May 12, 2008, Plaintiff filed motions with the Court for amendment of the scheduling order and for a continuance of the summary judgment proceedings pursuant to Utah R. Civ. P. 56(f).
4. On August 7, 2008, the Court held oral argument on all pending motions, including Plaintiff's request to amend the scheduling order. The Court denied Plaintiff's request for further time for fact discovery, but it did extend the expert discovery deadlines. It gave

Plaintiff until September 8, 2008, to serve her expert disclosures and reports.

5. Despite being granted this extension, Plaintiff failed to make proper expert disclosures when the time came to do so. The expert disclosures and “reports” that she did serve were utterly incomplete, providing the purported experts’ names and little more. (*See* Plaintiff’s Expert Reports (Exhibit A).) Not a single report by any of the experts is included, nor is any specific opinion stated, nor any basis therefor, nor is any curriculum vitae attached. (*See id.*)

6. For example, Plaintiff purported to disclose two experts, Messrs. Olsen and Nielsen, regarding the standard of care owed to a client by a lawyer in private family law practice. (*See id.*) Yet, Plaintiff never identifies what that opinion is or the grounds for that opinion. (*See id.*) Nor does Plaintiff state anything about the qualifications of either witness other than the number of years each has been in practice. (*See id.*) Likewise, Plaintiff purports to offer their testimony for the conclusions that “Plaintiff was damaged, the causation of the damages, and the extent of the damages,” yet she never states the basis of those vague and conclusory opinions beyond stating that these individuals’ opinions *will be* based on “all information obtained through discovery ...” (*See id.*)

7. Plaintiff also purports to disclose a damages expert, John Brough. (*See id.*) Again, Plaintiff merely states that Mr. Brough will testify as to the amount of damages, but she never identifies any specific amount or computation, nor any specific basis for the undisclosed opinion. (*See id.*) Moreover, disclosure of Mr. Brough’s qualifications merely states that he is “an economic and valuation expert” and has testified as an expert before, without identifying when and where as required by Rule 26. (*See id.*) Plaintiff never states the basis of the vague

and conclusory opinions beyond stating that these individuals' opinions *will be* based on "all information obtained through discovery ... ." (*See id.*)

8. Lastly, Plaintiff purports to disclose three doctors as experts who will testify about "causation of physical injuries suffered by the Plaintiff." (*See id.*) Nothing therein identifies any opinion, any specific basis, or any relevant qualifications of any witness beyond their status as a doctor. (*See id.*) And again, Plaintiff never states the basis of the vague and conclusory opinions beyond stating that these individuals' opinions *will be* based on "all information obtained through discovery ... ." (*See id.*)

9. On September 10, 2008, counsel for Defendants notified Plaintiff of the shortcomings of her disclosures and invited her to serve complete reports. (*See* September 10, 2008 Letter from Ben W. Lieberman to Brennan H. Moss (Exhibit B).) Plaintiff failed to do so within the proposed timeframe. Indeed, she did not respond at all.

## ARGUMENT

### I. PLAINTIFF'S EXPERT DISCLOSURES ARE GROSSLY DEFICIENT.

Utah R. Civ. P. 26(a)(3) governs the disclosure of expert testimony in civil cases. With respect to experts retained specifically for a given matter, which is the case here, Utah R. Civ. P. 26(a)(3)(B) requires a written report also be disclosed, and it outlines what that report must contain:

The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and

a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Utah R. Civ. P. 26(a)(3)(B).

The purpose of an expert report is to allow the opposing party sufficient information about the expert's opinion such that the opposing party may adequately prepare for trial.

*Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir. 2002). The Advisory Notes to Utah R. Civ. P. 26 indicate that the purpose of the expert report is to "serve in lieu of responses to standard interrogatories." Utah R. Civ. P. 26, Advisory Notes. The Rule 26 Advisory Notes go on to state:

*The expert should not be permitted to testify at variance with the report*, regardless whether the expert or the party prepares or signs it. For this reason, the committee believes the expert should prepare and sign the report whenever possible and should always review and approve the report.

*Id.* (emphasis added).

In *Jacobsen*, the Tenth Circuit Court of Appeals addressed similarly inconclusive and incomplete expert reports to those at issue here, and it reversed the district court's refusal to strike them, stating in part:

"[Expert] reports are intended not only to identify the expert witness, but also to set forth the substance of the direct examination. Such disclosure is necessary to allow the opposing party a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses."

*Id.* (internal quotation marks and citations omitted). The *Jacobsen* court went on to state that, "[i]f the experts are allowed to testify on the basis of their incomplete reports, [the plaintiff] will be prejudiced. Absent more complete disclosure by the experts, [the plaintiff's] prejudice cannot be cured." *Id.* at 954. See also *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002)

("[T]he expert must explain the basis of his statements to link his conclusions to the facts.").

Here, Plaintiff's expert "reports" are so deficient that they realistically amount to no disclosure at all. She has merely given names and extremely vague and generalized topics upon which the expert may opine. (See Statement of Facts ¶¶ 6-8.) She cites nothing that any expert actually has reviewed to form the basis of his or her opinion; instead, Plaintiff merely states that the expert's opinion "will be based" on essentially everything in the case. (See *id.*) As a corollary, the "reports" fail to state any link between fact and conclusion, likely because no expert has actually reviewed any fact. Cf. *Bowie Mem'l Hosp.*, 79 S.W.3d at 52 (expert must identify link between fact and conclusion in report). Plaintiff also fails to state qualifications of any of the experts with any meaningful specificity. (See *id.*) This is far from stating a response to the standard expert interrogatories that Rule 26(a)(3)(b) is intended to replace. See Utah R. Civ. P. 26, Advisory Notes.

Plaintiff's deficient expert reports cause prejudice to Defendants in a number ways. First, Defendants cannot prepare for the trial testimony and cross-examination of these experts based on the "reports" provided. Second, Defendants will not be able to impeach any of these "experts" at trial with the "reports" because they are so vague and conclusory. Third, the Court will not be able to judge whether any of these individuals testifies inconsistently with the "reports" because they are so vague and conclusory and void of substance. Cf. Utah R. Civ. P. 26, Advisory Notes ("The expert should not be permitted to testify at variance with the report ..."). Fourth, not knowing any actual opinions or the bases therefor, Defendants cannot determine whether one or more experts of their own are necessary to rebut these vague,

conclusory, and hypothetical opinions. Fifth, Defendants will be required to depose each of the experts to learn *anything* about his or her testimony, leading to significant wasted time and expense. Sixth, the strong implication of the “reports” is that the “experts” have conducted no review at this time, but instead that their opinions “will be based” on review of discovery materials and the like.

In sum, there is nothing in Plaintiff’s expert “reports” that is even remotely informative of opinions of an “expert,” bases of any opinion, or qualifications of an “expert” to render any such opinion. Plaintiff is required to disclose a presently-held opinion of an expert with sufficient detail to substitute for responding to standard interrogatories, not one is vague, void of substance, nor one that is hypothetical in that it may arise after a future review of relevant materials.

## **II. PLAINTIFF’S EXPERT DISCLOSURES AND REPORTS FALL UNDER RULE 37(F)’S AUTOMATIC EXCLUSIONARY PROVISION.**

Where a party fails to make a proper expert disclosure, that party is precluded from using the evidence at trial:

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).

Utah R. Civ. P. 37(f) (emphasis added). Because Plaintiff’s expert disclosures fail Rule 26(a)(3)(B), they are subject to Rule 37(f)’s automatic exclusionary provision. Moreover, having already given Plaintiff one extension of the expert discovery deadline, and Defendants

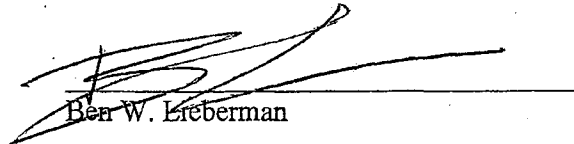
having given her notice and an opportunity to cure the deficient reports, (*see* SOF ¶ 9), the Court should not allow Plaintiff any further time to make any further disclosure. To the extent this case survives summary judgment, Defendants are prepared to proceed to trial forthwith. Any such trial should occur without Plaintiff's proposed expert testimony due to her failure to comply with Rule 26(a)(3)(B).

### **CONCLUSION**

For the foregoing reasons, Defendants' motion to strike should be granted.

Respectfully submitted this 15th day of September, 2008, by:

LAW OFFICE OF BEN W. LIEBERMAN, P.C.



Ben W. Lieberman

*Attorney for Defendants*

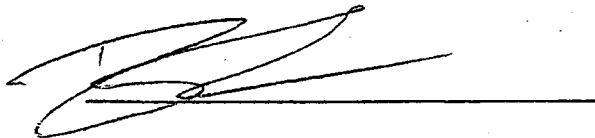
**CERTIFICATE OF SERVICE**

I hereby certify that on the 15 day of September, 2008, I sent a copy of  
**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO  
STRIKE PLAINTIFF'S EXPERT DISCLOSURES AND REPORTS PURSUANT  
TO UTAH R. CIV. P. 37(F)** to the following person(s) as indicated below.

**Attorneys for Plaintiff:**

Steve Christensen  
Brennan Moss  
HIRSCHI CHRISTENSEN, PLLC  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111

- ☒ U.S. Mail
- ☐ Overnight Mail
- ☐ Fax
- ☐ Electronic Mail
- ☐ Hand Delivery



4TH DISTRICT COURT  
PROVO DEPARTMENT  
2008 OCT -2 P 11:27

Steve S. Christensen (U.S.B. No. 6156)  
Brennan H. Moss (U.S.B. No. 10267)  
Jeffrey J. Steele (U.S.B. No. 10606)  
**HIRSCHI CHRISTENSEN, PLLC**  
Attorneys for Plaintiff  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111  
Telephone: (801) 322-0593  
Facsimile: (801) 322-0594

---

IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,  
Plaintiff,

vs.

BRIAN C. HARRISON; BRIAN C.  
HARRISON, P.C.

Defendants.

**AFFIDAVIT OF STEVE S. CHRISTENSEN  
IN OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE PLAINTIFF'S  
EXPERT DISCLOSURES AND REPORTS**

Civil No. 070403005  
Judge Laycock

COUNTY OF SALT LAKE       )  
  : ss  
STATE OF UTAH                )

Affiant, STEVE S. CHRISTENSEN, having been duly sworn, deposes and states under oath as follows:

1. I am an attorney for Kim Dahl in the above referenced matter.
2. I can testify to the facts in this affidavit based on my own personal knowledge.
3. Based on information and belief, the facts set forth in Defendants' Motion to Strike are not in dispute and do not relate to substantive issues in this litigation.

0598

4. On Monday, September 15, 2008, three (3) business days after a request to supplement our expert report was sent to us, I corresponded with Ben Lieberman, counsel for Mr. Harrison. I indicated to Mr. Lieberman that we were willing to supplement our expert report as he had requested.

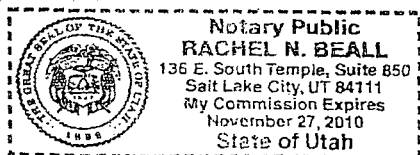
5. Mr. Lieberman indicated that it was too late; his Motion to Strike had already been filed. He was not willing to agree to the extension of time requested. A true and correct copy of my correspondence with Mr. Lieberman including my email to him and his response is attached to this affidavit as Exhibit "A" and incorporated herein by this reference.

6. Based on Mr. Lieberman's request, we are in the process of obtaining updated expert witness reports.

DATED this 1<sup>st</sup> day of October 2008.

  
Steve S. Christensen

SUBSCRIBED and sworn to before me this 1<sup>st</sup> day of October 2008.



  
A Notary Public Commissioned in the State of UT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **AFFIDAVIT OF STEVE S. CHRISTENSEN IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXPERT DISCLOSURES AND REPORTS** was sent via email, and U.S. Mail, postage prepaid, on this 1<sup>st</sup> day of October, 2008, to the following:

Benjamin W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN  
331 South Rio Grande Street, Ste. 302  
Salt Lake City, UT 84101  
E-mail: [ben@bwllaw.com](mailto:ben@bwllaw.com)  
*Attorney for Defendants*

  
An employee of HIRSCHI CHRISTENSEN, PLLC

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# Exhibit "A"

000595

Steve Christensen

---

**From:** Ben Lieberman [ben@bwlaw.com]  
**Sent:** Monday, September 15, 2008 4:09 PM  
**To:** 'Steve S. Christensen'  
**Subject:** RE: Dahl v. Harrison

Steve,

The motion has already been put in the mail to the Court. In the letter, I made sure to underline the deadline and give you two and a half days to respond. No one responded to me on this issue, though Brennan responded to me on other matters regarding this case. To be frank, the reports were the farthest thing I have ever seen from what the Rules require.

Though I am generally first in line to grant extensions out of courtesy, I have already spent my client's money to file this motion, and given that Plaintiff has already been granted a four month extension of this deadline over our objection, I cannot agree to your proposal.

Ben

---

**From:** Steve S. Christensen [mailto:SSC@HCLawFirm.net]  
**Sent:** Monday, September 15, 2008 3:15 PM  
**To:** ben@bwlaw.com  
**Subject:** Dahl v. Harrison

Ben,

I am receipt of your letter requesting further information regarding our expert witness designation. We are gathering additional information in order to satisfy your request. I see that you gave us until last Friday to respond. It will take us another 11 days to comply with your request. Please allow us this additional amount of time.

Because of the shortness of time set by the court's scheduling order, we propose that the parties stipulate to extend the discovery dates by 3 weeks following our designation in order to allow you sufficient time to conduct your review and depositions.

Steve S. Christensen  
Hirschi Christensen, PLLC  
136 E. South Temple, Ste. 1400  
Salt Lake City, Utah 84111  
Tel. (801) 303-5800  
Fax (801) 322-0594

**CONFIDENTIALITY NOTICE:** This electronic message transmission contains information from the law firm of Hirschi Christensen, PLLC, which may be confidential or privileged. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited. If you have received this electronic transmission in error, please notify me by telephone (801-303-5800) or by electronic mail ([ssc@hclawfirm.net](mailto:ssc@hclawfirm.net)) immediately.

**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

4TH DISTRICT COURT  
PROVO DEPARTMENT

2008 OCT - 2 P 11: 28

Steve S. Christensen (U.S.B. No. 6156)  
Jeffrey J. Steele (U.S.B. No. 10606)  
Brennan H. Moss (U.S.B. No. 10267)  
**HIRSCHI CHRISTENSEN, PLLC**  
136 East South Temple, Suite 850  
Salt Lake City, Utah 84111  
Telephone: (801) 322-0593  
Facsimile: (801) 322-0594

*Attorneys for Plaintiff Kim Dahl*

---

IN THE FOURTH DISTRICT COURT, STATE OF UTAH  
UTAH COUNTY, PROVO DIVISION

---

KIM DAHL,

Plaintiff,

vs.

BRIAN C. HARRISON, an individual; and  
BRIAN C. HARRISON, P.C., a Utah  
corporation,

Defendants.

**OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE PLAINTIFF'S  
EXPERT DISCLOSURES AND REPORTS**

Civil No. 070403005  
Judge Claudia Laycock

COMES NOW Plaintiff Kim Dahl, by and through her attorneys of record, and hereby submits her Opposition to Defendants' Motion to Strike Plaintiff's Expert Disclosures and Reports, as follows:

**STATEMENT OF FACTS**

1. Trial has not been set in this matter. *See Case Docket.*
2. A pretrial has not been requested or scheduled in this matter.

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3. The scheduling order requires Plaintiff's expert disclosures by September 8, 2008.

4. Plaintiff produced her expert witness report on or about September 8, 2008. *See* Exhibit A to the Motion to Strike.

5. On or about September 10, 2008, counsel for Defendants sent a letter to counsel for Plaintiff by email stating that he felt the expert reports were deficient under U.R.C.P. 26(a)(3)(B), and requesting supplementation of the reports by Friday, September 12, 2008, two (2) days later. *See* Exhibit B to the Motion to Strike.

6. On Monday, September 15, 2008, three (3) business days after the letter from counsel for Defendants was sent, Mr. Christensen, counsel for Plaintiff, corresponded with counsel for Defendants regarding supplementation of the expert reports. *See* the Affidavit of Steve S. Christensen in Opposition to Defendants' Motion to Strike Expert Disclosures and Reports (the "Christensen Affidavit"), ¶ 4. Mr. Christensen agreed to supplement the expert reports as requested. *Id.*

7. Counsel for Defendants indicated that it was too late and that he had already filed the instant motion. *Id.* at ¶ 5. Counsel for Defendants further indicated that he would not grant Plaintiff any time to supplement the expert reports even though Plaintiff proposed a stipulation to extend expert discovery in order to give Defendants more time to conduct expert discovery. *Id.*

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## ARGUMENT

### **1. Defendant's Motion is Premature As Defendants Failed To Attempt To Resolve This Matter In Good Faith**

As noted by Defendants, Rule 26(a)(3)(B) of the Utah Rules of Civil Procedure governs the disclosure of expert witness reports, and states:

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

U.R.C.P. 26(a)(3)(B).

The Defendants' Motion to Strike purports to be based on U.R.C.P. 37(f). However, the remedy sought by the pleading derives from U.R.C.P. Rule 37(b)(2)(C). Rule 37(f) of the Utah Rules of Civil Procedure provides that a court shall not admit witnesses, documents, or other materials which have not been disclosed in accordance with Rule 26(a). The Rule also permits the court to impose additional sanctions "upon motion" and as "authorized by Subdivision (b)(2)," which sanctions include striking of pleadings, dismissal of actions, entry of default, finding of contempt, and payment of attorneys fees. U.R.C.P. 37(b)(2). Rule 37(f) is primarily drafted to describe the court's ability to limit evidence. However, no evidence is being offered at

this time. Rule 37(f) also allows for a motion for sanctions through Rule 37(b)(2). However, Rule 37(b)(2) disclosure sanctions are appropriately reserved for when a party has not complied with a court order compelling disclosure obtained through Rule 37(a). See *id.* The court should require Defendant to comply with Rule 37(b) to the extent that Defendants are seeking to claim 37(b)(2) sanctions through Rule 37(f).

In turn Rule 37(b)(2) incorporates Rule 37(a)(2) which requires that a moving party certify good faith attempts to resolve the dispute prior to seeking court involvement. Because plaintiff has failed to demonstrate that he has made a good faith effort to secure further disclosure without court action in accordance with U.R.C.P. Rule 37(a)(2)(A), he should not be able to seek sanctions by motion.. Thus, Defendants' motion to strike is both premature and inappropriate.

This approach to the discovery rules would be consistent with the court's policy to encourage good faith cooperation between the parties during discovery, Rule 37(a)(2)(A) mandates that a movant seeking an order to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the party . . . in an effort to secure the disclosure without court action."

Defendants have not acted in good faith in attempting to resolve this issue without resorting to judicial intervention. Indeed, Defendants made only a token effort to address their concern before filing the instant motion. It is undisputed that Defendants gave Plaintiff only two business days to respond to the request for supplementation. See Exhibit A to the Christensen Affidavit. When contacted by Plaintiff's counsel, counsel for Defendants indicated that the

instant motion had already been mailed for filing, suggesting that he had prepared the motion without even waiting to see if Plaintiff would respond. Moreover, when Plaintiff agreed to comply with the request for supplementation, counsel for Defendants would not agree and chose instead to continue pursuing their motion.

2. **The Motion To Strike Fails Due To Plaintiff's Compliance, A Lack Of Fault And A Lack Of Prejudice**

Defendants' Motion to Strike fails for several reasons. First, Plaintiff's expert disclosures substantially complied with the Rules. Second, Defendants have not reasonably attempted to resolve this matter prior to filing their Motion to Strike. Third, Defendants have suffered absolutely no prejudice as a result of Plaintiff's expert disclosures and reports, and will not suffer any prejudice if the Court grants Plaintiff more time to revise said reports. For the foregoing reasons, which are set forth more fully below, the Court should deny Defendants' Motion to Strike, or in the alternative, provide Plaintiff with additional time to revise her expert reports.

a. **Plaintiff's Expert Reports Substantially Complied With Rule 26(a)(3)(B)**

As noted above, Rule 26(a)(3)(B) requires an expert reports to disclose (i) the subject matter of the on which the expert is expected to testify; (ii) the substance of the facts and opinions to which the expert is expected to testify; 9iii) a summary of the grounds for each opinion; (iv) the qualifications of the witness; (v) the compensation to be paid; and (vi) a listing of other cases in which the witness has testified. U.R.C.P. 26(a)(3)(B).

Plaintiff's expert witness reports substantially complied with all of the foregoing elements. *See* Exhibit A to the Motion to Strike. Indeed, the expert reports specifically address each of the foregoing categories. Despite Defendants' argument that the reports are "grossly deficient," at worst the reports provide sufficient information to allow Defendant to determine the purpose of the experts, whether a deposition will be required, whether rebuttal experts will be required, etc.

Moreover, Plaintiff readily agreed to supplement the reports but was not given time from the Defendants to do so. *See* the Christensen Affidavit, ¶¶ 4-6.

b. Plaintiff Has Not Acted With Willfulness, Bad Faith Or Fault

In addition, the case law of this jurisdiction requires that before issuing discovery sanctions the Court first find that Plaintiff has acted in willful disobedience to an order, acted in bad faith or fault, or otherwise demonstrated persistent dilatory tactics in the litigation.

*Coxey*, 112 P.3d at 1246.

Trial courts have broad discretion in determining discovery sanctions. *Hales v. Oldroyd*, 999 P.2d 588, 592 (Utah App. 2000). However, "[b]efore the court imposes discovery sanctions under rule 37, it must find on the part of the noncomplying party, willfulness, bad faith, or fault, or persistent dilatory tactics frustrating the judicial process." *Coxey v. Fraternal Order of the Eagles, Aerie 2742*, 112 P.3d 1244, 1246 (Utah 2005); citing *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997), *W.W. & W.B. Gardner*, 568 P.2d at 738; *see also Hales v. Oldroyd*, 999 P.2d 588, 592 (Utah App. 2000); *Wright v. Wright*, 941 P.2d 646 (Utah App. 1997).

There is no evidence of bad faith, willfulness, fault or persistent dilatory tactics before the Court. Defendants have not even made allegations as to fault. Accordingly, the Motion to Strike should be denied.

c. Defendants Are Not Prejudiced By Allowing Plaintiff To Supplement

Rule 37(f) governs discovery sanctions related to the failure to disclose and states:

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).

U.R.C.P. 37(f). Rule 37(f) specifically states that failure to disclose is grounds for striking a witness “unless the failure to disclose is harmless ...” U.R.C.P. 37(f). Here, the failure to disclose is harmless and does not prejudice Defendants in any way.

Notably, there was a disclosure and expert reports were provided. As noted above, the reports were arguably and demonstrably substantially compliant with Rule 26(a)(3)(B). Even if they were not sufficient, Defendants have not suffered any harm as a result, and Plaintiff should be granted the opportunity to supplement.

Indeed, in *Christenson v. Jewkes*, 761 P.2d 1375 (Utah 1988) the Utah Supreme Court reviewed the decision of a trial court to allow an expert witness to testify at trial that was not disclosed until five days before trial, and no expert report was provided until the day before trial. The *Christenseon* Court upheld the trial court’s decision to allow the expert testimony because “the expert was made available to the [opposing party] either for an informal interview or for a

deposition” and there was therefore no prejudice resulting from the untimely expert disclosures.

*Christenson v. Jewkes*, 761 P.2d at 1377-78.

Importantly, no trial has been set in instant case. Nor has the deadline for discovery of expert witnesses concluded. Accordingly, Defendants are not prejudiced in the slightest by Plaintiff’s expert disclosures. This is especially true given that Plaintiff has agreed to supplement to disclosures. Accordingly, the Motion to Strike should be denied.

#### CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that the Court deny the Motion to Strike Plaintiff’s Expert Disclosures and Reports. In the alternative, if the Court grants Defendants’ Motion to Strike, Plaintiff hereby requests that she be granted sufficient time to revise her expert reports.

DATED this 2<sup>nd</sup> day of October, 2008.

HIRSCHI CHRISTENSEN, PLLC



Steve S. Christensen

Jeffrey J. Steele

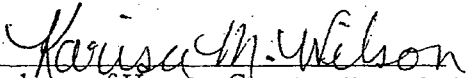
Brennan H. Moss

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXPERT DISCLOSURES AND REPORTS** was sent via email, and U.S. Mail, postage prepaid, on this 2<sup>nd</sup> day of October, 2008, to the following:

Benjamin W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN  
331 South Rio Grande Street, Ste. 302  
Salt Lake City, UT 84101  
E-mail: [ben@bwilllaw.com](mailto:ben@bwilllaw.com)  
*Attorney for Defendants*

  
An employee of HIRSCHI CHRISTENSEN, PLLC

FILED

DEC 16 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

4TH DISTRICT COURT - PROVO  
UTAH COUNTY, STATE OF UTAH

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KIM DAHL, : MINUTES  
Plaintiff, : ORAL ARGUMENTS  
: :  
: :  
VS. : Case No: 070403005 MP  
: :  
BRIAN C HARRISON PC Et al, : Judge: CLAUDIA LAYCOCK  
Defendant. : Date: December 16, 2008

---

Clerk: raelenec

PRESENT

Plaintiff's Attorney(s): STEVE S CHRISTENSEN  
Defendant's Attorney(s): BENJAMIN W LIEBERMAN  
Audio  
Tape Number: 08-201 49 Tape Count: 10.25

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HEARING

TAPE: 08-201 49 COUNT: 10.25

This matter comes before the Court for Oral Arguments. The Court and both parties discuss the filings of opposition and reply. Mr. Lieberman states Mr. Christensen stated via e-mail that he was ready to move forward with the Motion to Compel.

The Court takes a brief recess for Mr. Lieberman to pull up his e-mail and print out the e-mail between both parties.

COUNT: 10.34

Court resumes. The Court reviews the e-mail and states the parties will move forward with the arguments of Motion to Strike and Motion to Compel.

Mr. Lieberman addresses the Court regarding Motion to Strike, untimely filing of documents, Rule 26(a) (3) (b) and disclosure rules. Mr. Christensen addresses the Court regarding Motion to Strike, designation of expert witnesses, requests filing of reports of expert witnesses be extended until January 2009. Mr. Lieberman responds. The Court reviews the file and the case management order.

The Court makes findings and grants the Motion to Strike. <sup>A</sup> to the

u

Case No: 070403005  
Date: Dec 16, 2008

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request for attorney's fees the Court denies the request. Mr. Lieberman is to prepare the Findings of Fact and Conclusions of Law and Order in this matter.

Mr. Lieberman addresses the Court regarding Motion to Compel, attempt to remove protective order issue and opposition memorandum. The Court takes a brief recess.

COUNT: 11.43

Mr. Christensen addresses the Court regarding protective order in case #064402232, copies of documents, motion is defective and request to deny motion. Mr. Lieberman responds.

The Court makes findings and denies the Motion to Compel. Mr. Lieberman is allowed to make an appointment to go over and inspect Mr. Christensen's file numbers 070403005 and 064402232.

Mr. Christensen is to prepare the Findings of Fact and Conclusions of Law and Order in this matter.

# MISSING DOCUMENT

Motion to Allow Testimony of Expert Witnesses  
at Trial

Filed January 21, 2009

20947

FILED

4TH DISTRICT COURT - PROVO  
UTAH COUNTY, STATE OF UTAH

March 12, 2009

KIM DAHL, : MINUTES  
Plaintiff, : ORAL ARGUMENT  
vs. :  
BRIAN C HARRISON PC Et al, : Case No: 070403005 MP  
Defendant. : Judge: CLAUDIA LAYCOCK  
: Date: March 12, 2009

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

Clerk: raelenec

PRESENT

Defendant(s): BRIAN C HARRISON

Plaintiff's Attorney(s): STEVE S CHRISTENSEN

Defendant's Attorney(s): BENJAMIN W LIEBERMAN

Audio

Tape Number: 09-201 15 Tape Count: 1.36

HEARING

TAPE: 09-201 15 COUNT: 1.36

This matter comes before the Court for Oral Argument. Mr. Christensen addresses the Court regarding motion for trial by jury and prejudice issue. Mr. Lieberman addresses the Court regarding motion for trial by jury. Mr. Christensen responds.

The Court makes findings and adopts the argument of Mr. Lieberman and denies the motion for trial by jury. Mr. Lieberman is to prepare the findings of fact and order in this matter.

COUNT: 2.28

Mr. Christensen addresses the Court regarding motion to allow testimony of expert witness at trial. Mr. Lieberman addresses the Court regarding motion to allow testimony of expert witness at trial. Mr. Christensen responds.

The Court makes findings and adopts the argument of Mr. Lieberman and denies the motion to allow testimony of expert witness at trial. The defendant is granted attorney fees and costs as to this matter.

Mr. Lieberman is to prepare the findings of fact and order in this matter. Both parties are to file a list of witnesses and a brief paragraph regarding what the witness will testify about by 03/31/09.

Pretrial Conference is scheduled.

Case No: 070403005  
Date: Mar 12, 2009

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PRETRIAL CONFERENCE is scheduled.

Date: 04/20/2009

Time: 09:00 a.m.

Location: Second Floor, Rm 201  
FOURTH DISTRICT COURT  
125 N 100 W  
PROVO, UT 84601

Before Judge: CLAUDIA LAYCOCK

**FILED**

APR 14 2009

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**Proposed by:**

Ben W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN, PLC  
1371 East 2100 South, Suite 200  
Salt Lake City, Utah 84105  
Telephone: (801) 505-0585  
Toll-Free Telephone (877) 460-6661  
Toll-Free Fax: (800) 886-3653  
E-mail: ben@bwllaw.com

*Attorney for Defendants*

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

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KIM DAHL;

Plaintiff,

v.

BRIAN C. HARRISON, an individual;  
and BRIAN C. HARRISON, P.C., a Utah  
professional corporation;

Defendants.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER DENYING PLAINTIFF'S  
MOTION TO ALLOW EXPERT  
TESTIMONY AT TRIAL AND  
GRANTING DEFENDANTS'  
MOTION FOR ATTORNEYS'  
FEES AND COSTS**

Civil No. 070403005

Judge Claudia Laycock

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This matter comes before the Court on Plaintiff's Motion to Allow Expert Testimony at Trial and on Defendants' related Motion for Attorneys' Fees and Costs. For the reasons set forth below and those stated at the March 12, 2009 hearing on these motions, the Court denies Plaintiff's motion and grants Defendants' motion for their attorneys' fees and costs.

4001057

### FINDINGS OF FACT

1. The initial scheduling order in this matter was set by stipulation in early November, 2007. It provided, *inter alia*, a deadline of May 5, 2008, for Plaintiff Kim Dahl ("Plaintiff") to disclose any experts.
2. Plaintiff's May 5, 2008 expert disclosure deadline came and went, and Plaintiff failed to disclose any expert.
3. On May 12, 2008, Plaintiff filed motions with the Court for amendment of the scheduling order and for a continuance of the summary judgment proceedings pursuant to Utah R. Civ. P. 56(f).
4. On August 7, 2008, the Court held oral argument on all pending motions, including Plaintiff's request to amend the scheduling order. The Court denied Plaintiff's request for further time for fact discovery, but it did extend the expert discovery deadlines. It gave Plaintiff until September 8, 2008, to serve her expert disclosures and reports.
5. Despite being granted this extension, Plaintiff failed to make proper expert disclosures when the time came to do so. The expert disclosures and reports that she did serve were failed utterly by any standards, providing the purported experts' names and little more.
6. On September 18, 2008, Defendants Brian C. Harrison and Brian C. Harrison, P.C. (collectively, "Defendants") moved to strike Plaintiff's Expert Disclosures and Reports pursuant to Utah R. Civ. P. 37(f) (the "Motion to Strike"). Plaintiff filed her opposition memorandum to the Motion to Strike on October 2, 2008. Defendants filed their reply memorandum on October 14, 2008.

7. On December 16, 2008, the Court held oral argument on the Motion to Strike.

The Court granted the motion and found a willful failure on the part of Plaintiff to carry this case forward and to obey the orders of the Court.

8. At the December 16, 2008 hearing, Plaintiff requested more time to prepare proper disclosures and reports, which the Court specifically rejected at that time.

9. The Court ordered Ben W. Lieberman, counsel for Defendants, to prepare a written order memorializing the Court's order from the bench. Mr. Lieberman did so, and sent the order to Mr. Christensen. Plaintiff objected to the proposed order, but only as to the preliminary language regarding how long of an extension Plaintiff had been given by the Court on August 7, 2008. Plaintiff did not object to the proposed order's language indicating that the motion to strike was granted and the expert disclosures stricken.

10. Less than six weeks after her expert disclosures were stricken by the Court, Plaintiff filed the instant motion, which raises issues materially identical to those already decided in the context of the Motion to Strike.

#### CONCLUSIONS OF LAW

1. The Court finds Plaintiff's Motion to Allow Expert Testimony at Trial is in essence a motion for reconsideration of the Court's prior order striking Plaintiff's expert disclosures.

2. Plaintiff's Motion to Allow Expert Testimony at Trial cites no basis that would warrant reconsideration of the prior order on the Motion to Strike.

3. The Court finds no basis to grant Plaintiff more time to disclose experts, and thus declines to do so.

4. The Court finds no basis to allow Plaintiff to introduce expert testimony at trial, given the fact that Utah R. Civ. P. 37(f) clearly and unequivocally requires proper disclosure as a condition precedent to admission of evidence.

5. Because these issues had already been specifically decided six weeks prior, the Court finds that Plaintiff's Motion to Allow Expert Testimony at Trial is frivolous.

6. In such cases, the Court has statutory power under Utah Code Ann. § 78B-5-825 to award reasonable attorney fees and costs.

7. Additionally, Court has the inherent equitable power to award reasonable attorney fees and costs when it deems appropriate in the interest of justice and equity.

8. Utilizing these statutory and equitable powers, the Court grants Defendants their reasonable attorneys' fees and costs incurred in defending against Plaintiff's Motion to Allow Expert Testimony at Trial and in bringing their own motion for recovery of such fees and costs.

#### ORDER OF COURT

For the foregoing reasons and the reasons stated on the record at the March 12, 2009 hearing, it is hereby ORDERED that Plaintiff's Motion to Allow Expert Testimony at Trial is DENIED, and Defendants' Motion for Attorneys' Fees and Costs is GRANTED.

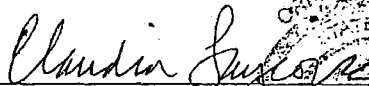
It is further ORDERED that, within fifteen (15) days of the date of this Order, Plaintiff's counsel shall pay to Defendants the sum of \$ 2,458.64 *cl*, which the Court finds is the amount of Defendants' reasonable attorneys' fees and costs incurred in defending against

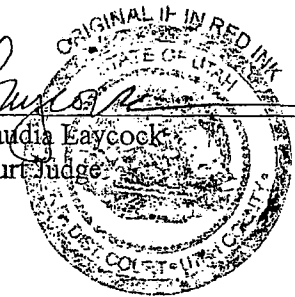
701054

*filled in and initialed in open court on April 20, 2009.*

Plaintiff's Motion to Allow Expert Testimony at Trial and in bringing their own motion for recovery of such fees and costs.

SO ORDERED this 14<sup>th</sup> day of April, 2009, by:

  
The Honorable Claudia Faycock  
Fourth District Court Judge



Agreed as to form:

\_\_\_\_\_  
Steve Christensen  
Attorney for Plaintiff

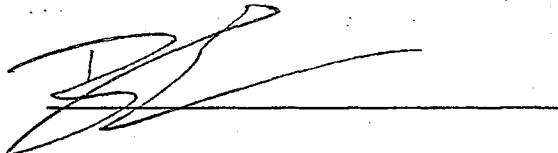
CERTIFICATE OF SERVICE

I hereby certify that on the 31<sup>ST</sup> day of March, 2009, I sent a copy of the foregoing to the following person(s) as indicated below.

Attorneys for Plaintiff:

Steve S. Christensen  
Matthew B. Anderson  
Steven A. Clayton  
HIRSCHI CHRISTENSEN, PLLC  
136 East South Temple, Suite 1400  
Salt Lake City, Utah 84111

- ☒ U.S. Mail
- ☐ Overnight Mail
- ☐ Fax
- ☐ Electronic Mail
- ☐ Hand Delivery

A handwritten signature in black ink, appearing to be "J. Christensen", written over a horizontal line.

NOTED  
FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY 48

FOURTH DISTRICT COURT, PROVO DEPARTMENT

UTAH COUNTY, STATE OF UTAH

2009 AUG 31 A 2:00

E-FILED 8/29/10

KIM DAHL,

: Case No. 070403005

Plaintiff,

: Appellate Court No. 20100553

v

BRIAN C. HARRISON, P.C.,

Defendant.

: With Keyword Index

ORAL ARGUMENT MARCH 12, 2009

BEFORE

THE HONORABLE CLAUDIA LAYCOCK

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way

Sandy, Utah 84092

801-523-1186

ORIGINAL

1741

MR. CHRISTENSEN: It doesn't, Your Honor.

THE COURT: Okay. That helps because I didn't think that was anything that was framed by your motion and your memorandum.

MR. CHRISTENSEN: Maybe that's a question the Court wants to decide later but -

THE COURT: Well, if it's not before me now - right? Let's stick with what's before me today.

MR. CHRISTENSEN: We'll raise that late. On the issues regarding -

THE COURT: And that takes us right back to Pete vs. Youngblood I believe, but a different issue. But I don't think that's before me today. I think as I look at your memorandum, your first point and your first argument is this Court should grant an extension of time to file expert witness disclosures because no prejudice will result. That's your first argument and after that it's your conclusions. So I think that's where we're going.

MR. CHRISTENSEN: I'm prepared to discuss that, Your Honor.

THE COURT: Okay, let's discuss that.

MR. CHRISTENSEN: Your Honor, up until this point obviously the Court has heard a motion to exclude an expert witness report and the Court granted that motion. Our request is that the Court now allow us sufficient time to

designate experts and to have them available to counsel to depose, to have additional time to prepare an expert witness report if the Court so requires or to allow them to testify based on making them available for their depositions. I don't know that the Court has made a ruling about witnesses, expert witnesses not being helpful in this case and so we ask the Court to determine that expert witness testimony would be helpful to the Court in resolving this matter since the Court will be making the decision and make adequate accommodations so that the parties can have those witnesses available and give the Court that additional benefit at trial. Again, we have time, trial has not been set, there's no reason why the parties cannot conduct expert discovery and expert disclosures sufficient to have both parties prepared and ready to go at the time of trial. I don't think it's uncommon to have expert discovery done in the last month before trial and so because we believe that it is doable, feasible and we believe it would be helpful to the Court, we ask the Court to make allowance and to also allow those witnesses to testify at trial.

THE COURT: Thank you.

MR. LIEBERMAN: I don't know that I can distinguish very well between this motion and our motion for attorney's fees because I think this is abuse. I think this is abuse of the process. These are precisely the issues that were before

THE COURT: No, we're fine.

Mr. Christensen.

MR. CHRISTENSEN: Your Honor, this could not be a request for reconsideration because it's our first motion.

THE COURT: Well, it's essentially a reiteration of your arguments against their Motion to Strike.

MR. CHRISTENSEN: And we're not trying to hide that from the Court. The arguments are parallel but not -

THE COURT: Not parallel, Mr. Christensen, they're identical, Mr. Christensen.

MR. CHRISTENSEN: Okay, I'm not trying to hide that from the Court -

THE COURT: We've been here and done this.

MR. CHRISTENSEN: I understand that, Your Honor. It's identical but the request of relief is not identical. The motion brought by Mr. Harrison, by Mr. Lieberman on Mr. Harrison's behalf was extremely narrow. All they asked the Court to do was to strike the expert reports.

THE COURT: Which as a natural result, disallows their testimony. You can't put them on if they haven't had notice.

MR. CHRISTENSEN: Well, I don't know. The Court did not make that statement at the hearing. The Court has not ruled on that issue.

THE COURT: I didn't need to.

1 MR. CHRISTENSEN: Say that again.

2 THE COURT: I didn't need to. If you don't provide  
3 them with the reports the rule doesn't allow it to go  
4 anywhere from there.

5 MR. CHRISTENSEN: Your Honor, I think that the  
6 request to allow testimony is a different request than the  
7 request to strike their reports. If the Court believes that  
8 one leads to the other, then I understand your ruling. But I  
9 still the question is worth asking, I think it's worth  
10 answering for the Court so that we know whether we can put  
11 expert witnesses on the stand at trial because that question  
12 has not been asked and it has not been answered by the Court  
13 up to this point.

14 THE COURT: Well, I think, if I recall you got a  
15 pretty strong reaction from me when you told me that you were  
16 going to file this motion. I think I was pretty surprised.  
17 All right. Anything else?

18 MR. CHRISTENSEN: No. I mean, I think it's  
19 procedurally proper and necessary. The arguments are not  
20 different from the arguments we made before but the relief  
21 requested is different and we ask the Court to instruct us as  
22 to whether the Court will allow expert witnesses who are  
23 hired for the purpose of litigation to testify at trial under  
24 any circumstances, whether it be by deposition, by submitting  
25 reports or for just in the interest of justice. That's

Anything else, Mr. Christensen?

MR. CHRISTENSEN: May I?

THE COURT: Yeah.

MR. CHRISTENSEN: Your Honor, on the one hand I understand what the Court is thinking in terms of if I've stricken expert reports, then something has to happen before testimony can be given at trial but that's what this request is all about. I mean, there is no rule that says once I grant a motion to grant expert reports, ipso facto, there's not going to be any expert testimony at trial and our request today is asking the Court under it's equitable jurisdiction to allow expert testimony at trial. That request has not been made, I think it's appropriate for that request to be made. I think it's appropriate for the Court to allow that testimony. This Court has equitable jurisdiction and whether a witness testifies at trial is in the sound discretion of the Court but I don't think that we can just assume that the Court has ruled on that when the Court hasn't and there's no rule that answers that question. It's not a mathematical equation. It's a question of how this Court wants to conduct trial and manage its calendar and decide who testifies at trial and had Mr. Lieberman put in his motion we asked the Court to strike all expert testimony at trial, and the Court did, then that would have solved the problem. But we're asking the Court now to allow that testimony and answer that

question.

That's all I have. Thank you.

THE COURT: Thank you.

I think this is a Motion for Reconsideration which motions are frowned upon by the Supreme Court. I think it Justice Nehring that said that the proliferation of these motions was like the proliferation of cheat grass or something like that. Although this is not a second motion for the plaintiff, it is the second go round on the very same issue. His responses to the defendant's motion to strike his expert witness reports are the same as his responses here.

As I look at Rule 37F, it says, "Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26A" which is exactly what I found at our previous hearing, "or to amend the prior response" which doesn't apply here, "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." I found neither of those. I did not find that the failure to disclose was harmless and I did not find that the plaintiff showed good cause for the failure to disclose.

The only wiggle room that's allowed under this rule is the next sentence, "In addition to or in lieu of this sanction, the Court may order any other sanction including

NOTED

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
CLERK'S OFFICE

FOURTH DISTRICT COURT, PROVO DEPARTMENT

UTAH COUNTY, STATE OF UTAH

2010 AUG 31 A 2:00  
FILED 8/29/10

KIM DAHL,

: Case No. 070403005

Plaintiff,

: Appellate Court No. 20100553

v

BRIAN C. HARRISON, P.C.,

Defendant.

: With Keyword Index

MOTION HEARING DECEMBER 16, 2008

BEFORE

THE HONORABLE CLAUDIA LAYCOCK

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER  
1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

ORIGINAL

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1           Your Honor, I do believe that we have a duty to  
2 supplement. I do believe he's entitled to that information  
3 and I represent to this Court that we're going to do that  
4 diligently, that we have continued to do it even though he  
5 would not agree with us to do it.

6           THE COURT: Well, it's now December, it's now mid-  
7 December. What have you got for him this far? Apparently  
8 one.

9           MR. CHRISTENSEN: Got one but I'm trying to - I've  
10 talked at length with the other two experts that need to  
11 submit supplements. If I could have until the first Monday  
12 in January I will have supplements for the other two experts  
13 to him and so I request the Court to allow us to do that.

14          THE COURT: All right. Anything else?

15          MR. CHRISTENSEN: I don't believe that a sanction  
16 is available because there's been no allegation of bad faith  
17 and that's required under 37F as well.

18          And finally, even though I think Christensen/Jewkes  
19 is a case, an extreme, we're not arguing that the Court  
20 should wait until five days before trial and let us  
21 supplement all that time. It stands for the proposition that  
22 if there is time for them to get the information in order to  
23 prepare for trial, then there's not prejudice and if we can  
24 have until the first Monday in January, there's no way they  
25 could be prejudiced because they will have time to get the

plaintiff's designation of expert witnesses other than perhaps what they're going to charge per hour and what their area of opinion might be if and when it is obtained. I find that Mr. Lieberman certainly had a reason to object to this expert witness report.

Now, let's deal with the issue of whether or not he appropriately dealt with the requirements of 37, Rule 37 in filing his motion. 37A(2)(a), "If a party fails to make a disclosure required by Rules 26A, 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."

Normally I would expect a certification with the either part of an affidavit or at the very least, part of a motion attached with some sort of either an affidavit or in this case a letter. What I have in this case is a letter that was mailed via electronic mail it says on September 10, 2008 and there's apparently no argument with that. And in that Mr. Lieberman addresses the various issues. Quotes Rule 26A(3)(b); notes that the plaintiff never identifies what the opinion of the experts is with regard to Messrs. Olsen and Nielsen. He lists the problems, explains the problems. This is a one and a half page letter. It talks about Mr. Brough

time we get done, we're going to back right where we were a year previous.

In all honesty, I thought I was overly kind in granting the motion when we met in July. This is a case that has now been going for well over a year - well, I can't tell you when the complaint was filed because I've only got the second file and I did notice that in the printout of the docket that was included on the other motion that the related case is moving along. There are things being filed repeatedly. Maybe not repeatedly, not that they're being repeated in their filings but all kinds of matters are being filed, all kinds of hearings are being held at the same time that nothing is happening on the discovery for the plaintiffs in this case as to their experts. That's not my problem. This case is my problem. I mean, what I'm saying is, if the plaintiff is too busy with the other case, that's not something I can deal with. Plaintiff chose to file this case and we're going to keep it moving.

So as far as substantial compliance, I find there was substantial compliance with the meet and confer rule. I find that at this point in this litigation for the plaintiff to now in December, have finally filed what the parties are calling a supplement to expert reports that were due on September 8, that's not satisfactory and I don't find that the defendant in this matter should have to wait until after

the first of the year to finally get what should have been filed on September 8 in a timely manner after the Court gave the plaintiff four more months to do what the Court now wants to have - or what the plaintiff now wants to have accomplished by the first of the year. So, for those reasons I'm going to grant the motion.

As to attorney's fees, I don't find it's appropriate under the rules to surprise Mr. Christensen with a request for attorney's fees at this state and so I'm going to deny the request for attorney's fees.

And as to prejudice or harm to the defendant, I do base my decision in this matter on the fact that the defendant is harmed. I find that there is a willful failure on the plaintiff to carry this case forward and to obey the orders of the court, with the Court having given the plaintiff more time over the objection of the defendant.

But, I find that a request for attorney's fees at this point based on bad faith is ill timed and lately timed and I'm not going to take an additional motion on it. That was the choice that the defendant made in filing the motion.

Okay, I have another hearing at 10:30 that's starting in five minutes if the gentleman shows up but let's move on quickly. If he comes, all we're doing is taking his agreement on a divorce and we may break. I have a meeting at noon that I have to be at. So let's move to the other issue