

2010

# Kim Dahl v. Brian C. Harrison : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Steve S. Christensen; Benjamin K. Lusty; Attorneys for Appellant.

Ben W. Lieberman; Attorney for Appellee.

---

## Recommended Citation

Brief of Appellee, *Kim Dahl v. Brian C. Harrison*, No. 20100553 (Utah Court of Appeals, 2010).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/2418](https://digitalcommons.law.byu.edu/byu_ca3/2418)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

KIM DAHL,

Plaintiff-Appellant,

v.

BRIAN C. HARRISON, *et al.*,

Defendants-Appellees.

**BRIEF OF APPELLEES**

App. Ct. No. 20100553

Dist. Ct. No. 070403005

Appeal from the State of Utah Fourth District Court, Utah County, Provo Division

Oral Argument Requested

Steve S. Christensen (#06156)  
Benjamin K. Lusty (#12159)  
CHRISTENSEN THORNTON PLLC  
136 East South Temple, Suite 1400  
Salt Lake City, Utah 84111  
Telephone: (801) 303-5800

*Attorney for Appellant*

Ben W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN, PLC  
1371 East 2100 South, Suite 200  
Salt Lake City, Utah 84105  
Telephone: (801) 864-5228  
E-mail: ben@bwilllaw.com

*Attorney for Appellees*

FILED  
UTAH APPELLATE COURTS  
FEB 25 2011

## **TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES</b>	iii
<b>STATEMENT OF JURISDICTION</b>	1
<b>STATEMENT OF THE ISSUES</b>	2
<b>STATEMENT OF THE CASE</b>	4
I. SUMMARY OF CASE AND PROCEEDINGS	4
A. The Underlying Divorce Action	4
B. The Legal Malpractice Action (This Case)	5
II. STATEMENT OF MATERIAL FACTS	7
<b>SUMMARY OF THE ARGUMENT</b>	13
<b>ARGUMENT</b>	16
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DAHL'S EXPERT DISCLOSURES AND REPORTS AND DENYING DAHL'S REQUEST TO EXTEND THE EXPERT DISCOVERY DEADLINE.	16
A. The Trial Court Was Under No Obligation to Grant Dahl Additional Time for Expert Disclosures for a Second Time.	16
B. Dahl's Expert Reports Did Not Comply With Rule 26 and Were Properly Stricken.	19
1. The Expert Reports Were Grossly Deficient.	19
2. The Trial Court did not Abuse its Discretion in Enforcing the Plain Language of Rule 37(f) and Refusing to Relieve Dahl of the Consequences of Her Non-Compliant Disclosures.	21

3.	The Trial Court Did Not Err in Denying the Motion to Allow Expert Testimony At Trial.	23
II.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DAHL'S MOTION TO EXTEND FACT DISCOVERY NOR IN GRANTING HARRISON'S MOTION FOR A PROTECTIVE ORDER.	25
A.	The Trial Court was Within its Discretion to Deny an Extension of Fact Discovery.	25
B.	The Trial Court was Within its Discretion to Grant Harrison's Motion for a Protective Order.	26
III.	THE TRIAL COURT DID NOT ERR IN SANCTIONING DAHL FOR FILING A FRIVOLOUS MOTION.	27
A.	Dahl's Challenge to the Trial Court's Bad Faith Finding Fails Because She Has not Marshaled the Evidence.	27
B.	The Trial Court Was Within its Discretion to Sanction Dahl and Christensen Under its Inherent Powers.	27
C.	The Trial Court's Alternative Basis for Sanctioning Plaintiff—Utah Code Ann. § 78B- 5-825—Was not Clearly Erroneous.	29
IV.	THE TRIAL COURT'S RULING SHOULD ALSO BE UPHOLD BECAUSE DAHL FAILED TO PRESENT ANY FACT AT TRIAL THAT COULD SUPPORT A FINDING OF CAUSATION ON ANY OF HER CLAIMS.	30
	<b>CONCLUSION</b>	33
	<b>ADDENDUM</b>	<i>Exitus</i>

## TABLE OF AUTHORITIES

### STATUTES

Utah Code Ann. § 78B-5-825 .....	29, 30
----------------------------------	--------

### RULES OF COURT

Utah R. Civ. P. 11 .....	30
Utah R. Civ. P. 26 .....	<i>passim</i>
Utah R. Civ. P. 37 .....	13, 21-24

### CASES

<i>Arnold v. Curtis</i> , 846 P.2d 1307, 1310 (Utah 1993) .....	16, 19, 22
<i>Bailey v. Bayles</i> , 2002 UT 58, 52 P.3d 1158 .....	3, 33
<i>Barnard v. Wassermann</i> , 855 P.2d 243 (Utah 1993) .....	29
<i>Bowie Mem'l Hosp. v. Wright</i> , 79 S.W.3d 48 (Tex. 2002) .....	20-21
<i>Boyce v. Marble</i> , 1999 UT 71, 982 P.2d 565 .....	18-19
<i>Brodeur v. McNamee</i> , 2005 WL 1774033 (N.D.N.Y. July 27, 2005) .....	26
<i>Chevola v. Cellco Partnership</i> , 2007 WL 3379779 (M.D. Fla. November 14, 2007) .....	26
<i>Dugan v. Jones</i> , 615 P.2d 1239 (Utah 1980) .....	22-23
<i>Dunn v. McKay, Burton, McMurray and Thurman</i> , 584 P.2d 894, 896 (Utah 1978) .....	31-32
<i>Epling v. UCB Films, Inc.</i> , 2001 WL 584355 (D. Kan. April 2, 2001) .....	26

<i>Erbe Elektromedizin GmbH v. Canady</i> .....	26
2006 WL 3387176 (W.D. Pa. November 21, 2006)	
<i>Golden Meadows Properties, LC v. Strand</i> .....	13, 16
2010 UT App 257, ¶ 11, 241 P.3d 375	
<i>Howard v. Howard</i> , 601 P.2d 931 (Utah 1979) .....	11 n.1
<i>H.U.F. v. W.P.W.</i> , 2009 UT 10, 203 P.3d 943 .....	2-3, 33
<i>Jackson v. Colston</i> , 209 P.2d 566 (Utah 1949) .....	31
<i>Jacobsen v. Deseret Book Co.</i> 287 F.3d 936 (10th Cir. .... 2002)	20, 23
<i>Jim Boast Dodge, Inc. v. Daimler Chrysler Motors</i> <i>Co., LLC</i> , 2007 WL 4409781 (M.D. Fla. January 16, 2007) .....	26
<i>Robertson's Marine, Inc. v. I4 Solutions, Inc.</i> , 2010 UT App 9, 223 P.3d 1141 .....	32
<i>Rohan v. Boseman</i> , 2002 UT App 109, 46 P.3d 753 .....	14, 22, 28-29
<i>Shaw Resources Ltd., L.L.C. v. Pruitt, Gushee &amp;</i> <i>Bachtell, P.C.</i> , 142 P.3d 560 (Utah Ct. App. 2006) .....	30-31
<i>Steffensen v. Smith's Mgmt. Corp.</i> , 862 P.2d 1342 (Utah 1993). .....	31
<i>Welsh v. Hospital Corp. of Utah</i> , 2010 UT App 171, 235 P.3d 791 .....	13, 17-18

## **STATEMENT OF JURISDICTION**

Appellees Brian C. Harrison and Brian C. Harrison, P.C. (collectively "Appellees" or "Harrison") agree with Appellant Kim Dahl ("Appellant" or "Dahl") that this Court has jurisdiction to hear and determine this appeal pursuant to Utah Code Ann. § 78A-4-103.

## **STATEMENT OF THE ISSUES**

Issue I (Presented by Appellant). 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.

**Appellees' Response:** Appellees do not dispute Appellant's definition of the issue or preservation, but do dispute the implication in the "Standard of Review" subsection wherein Appellant implies that a trial court may only have denied Appellant's motion to extend expert discovery upon a finding of "willfulness, bad faith ... fault, or persistent dilatory tactics frustrating the judicial process." (Appellant's Br. at 3.) This dispute is discussed in detail *infra* in Argument § I.

Issue II (Presented by Appellant). 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.

**Appellees' Response:** Appellees do not dispute Appellant's definition of the issue, standard of review, or preservation for Issue II.

Issue III (Presented by Appellant). 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.

**Appellees' Response:** Appellees do not dispute Appellant's definition of the issue, or preservation. The standard of review apparently unintentionally omits a few important words, making that section confusing. To be clear, whether a litigant is entitled to attorney's fees under a particular statute is reviewed under a clearly erroneous standard. *Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845. *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 15, 178 P.3d 922 ("We defer to the trial court's factual finding of bad faith unless it is clearly erroneous."). Appellees agree that to the extent the trial court awarded attorney's 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.

Issue IV (Additional Issue Presented by Appellees). Whether, even if there was error by the trial court, the error was harmless, or the judgment should be affirmed on other grounds.

Standard of Review: "Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943. Additionally, an appellate court may affirm the judgment appealed from if it is sustainable on any legal



ground or theory apparent on the record. *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10-13, 52 P.3d 1158.

Supporting Authority: *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943; *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10-13, 52 P.3d 1158.

Statement of Preservation: Because an error may always be deemed harmless by the appellate court, and because an appellate court may always affirm the trial court's judgment on alternative grounds, preservation is not applicable. *See H.U.F.*, 2009 UT 10, ¶ 44; *Bailey*, 2002 UT 58, ¶ 10 ("It is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.").

## STATEMENT OF THE CASE

### **I. SUMMARY OF CASE AND PROCEEDINGS**

#### **A. The Underlying Divorce Action**

This is a legal malpractice action involving Dahl, the client and the plaintiff, and Harrison, the attorney and defendant. Dahl retained Harrison to represent her in a divorce proceeding, *Dahl v. Dahl*, Civil No. 064402232, pending before the Utah Fourth District Court, Provo Division (the “Underlying Divorce Action”). Dahl’s husband had made very serious allegations of child abuse and other outrageous conduct against her, and prior to her being served with the divorce petition, Dahl’s husband had succeeded in obtaining an *ex parte* temporary restraining order (the “ex parte TRO”) enjoining her from contact with their children and setting a hearing on the *ex parte* TRO for November 2, 2006, a week after its entry.

Upon being served with the divorce paperwork, Dahl retained Harrison, and during the initial interviews, Dahl admitted to striking the children when they “deserved it” and making comments to the children like, “Pick this stuff up. I am not your damn nigger.” With this concerning information, Harrison strategized about how to best protect Dahl’s rights. Harrison advised Dahl that a continuance of the November 2, 2006 hearing would be best so that Dahl could enroll in parenting classes and show the divorce court that she was turning over a new leaf. With Dahl’s informed consent, Harrison appeared in court on November 2, 2006, and entered into a stipulation on her behalf (the “Stipulation”). The Stipulation, *inter alia*, allowed Dahl temporary supervised visitation,

in part to protect her from additional allegations against her, and expressly preserved all rights and arguments for a future hearing.

Within a few days, new allegations surfaced of more outrageous conduct of Dahl, and a fresh motion was filed in the Underlying Divorce Action. By November 9, 2006, Dahl and Harrison mutually agreed that their attorney-client relationship was at an end. Harrison withdrew and new counsel entered an appearance for Dahl, and the continued hearing on the *ex parte* TRO went forward on November 16, 2006, with Dahl represented by the new counsel. A few weeks later, Dahl's replacement counsel withdrew and was replaced by Steve S. Christensen ("Christensen"), her current counsel. The Underlying Divorce Action continued to go poorly for Dahl. Further allegations were made against her and further orders restraining her were entered. Trial in the Underlying Divorce Action was held in the fall of 2009, though the case continues to be actively litigated at the trial court and appellate level to this day.

#### **B. The Legal Malpractice Action (This Case)**

On October 11, 2007, Christensen, as counsel for Dahl, filed a legal malpractice action against Harrison ("this case" or the "Legal Malpractice Action"), alleging that Dahl did not authorize the Stipulation and that the Stipulation the cause of every adverse ruling in the Underlying Divorce Action. The parties stipulated to a scheduling order, which was proposed by Dahl, to govern discovery in the case. It provided for an April 7, 2008 fact discovery cutoff, and a May 5, 2008 deadline for Dahl's expert witness disclosure.

Harrison diligently pursued his discovery during the discovery period. Dahl responded to Harrison's written discovery and appeared for deposition, but she did not take any discovery of her own. On April 7, 2008, the date of the fact discovery cutoff, Dahl served written discovery upon Harrison but made no motion to extend fact discovery at that time. Five weeks after fact discovery had expired, and in the face of a motion for summary judgment filed by Harrison, Dahl filed a motion to extend discovery. By this time, Dahl's expert disclosure deadline had also passed with no disclosure or report produced. The trial court denied the Dahl's motion to extend fact discovery but granted Dahl an extension until September 8, 2008, to disclose experts.

On September 8, 2008, Dahl made an expert disclosure that was grossly deficient, providing no real information about the opinions of the experts or the bases for any opinions. Harrison moved to strike the disclosure, and the trial court granted the motion after hearing on December 16, 2008, finding that Utah R. Civ. P. 37(f) provided an automatic exclusion of the deficient reports, and Dahl had not met the good cause or harmlessness exceptions of Rule 37(f). Less than six weeks after the hearing granting the motion to strike, Dahl filed a "Motion to Allow Expert Testimony at Trial." This motion presented no new evidence or argument. It addressed the same issues just ruled upon by the trial court on December 16, 2008; indeed, most of Dahl's brief was a "cut and paste job"—*i.e.*, a verbatim restatement of generic arguments from her previous memorandum in opposition to the motion to strike and her prior memorandum supporting continuance of the discovery deadlines. The trial court denied the motion and found it to be frivolous

and in bad faith. Harrison was awarded attorneys' fees and costs incurred in preparing the response.

Ultimately, this case went to the first phase of a bifurcated bench trial in October of 2009. The trial court found in favor of Harrison on liability, making the second phase of the trial, damages, unnecessary. In addition to finding the absence of expert testimony to be fatal to Dahl's claims, the trial court also found, *inter alia*, that Dahl had failed to produce any factual evidence of causation whatsoever on any of her claims.

## **II. STATEMENT OF MATERIAL FACTS**

1. Dahl filed her complaint in this matter on October 11, 2007.
2. At the outset of the case, Dahl proposed a scheduling order, to which Harrison agreed. It was entered as a stipulated scheduling order by the trial court. (R. 141-44.)
3. It provided for an April 7, 2008 fact discovery cutoff, and a May 5, 2008 deadline for Dahl's expert witness disclosure. (*Id.*)
4. On November 20, 2007, Harrison moved to disqualify Christensen and his firm from representing Dahl in this case, primarily due to the fact that Christensen's representation of Dahl in the Underlying Divorce Action made him a material witness for trial in the Legal Malpractice Action. No stay of the case was requested by either party pending the outcome of the motion to disqualify.
5. Harrison diligently pursued his discovery as the motion to disqualify was pending, serving written discovery requests and taking Dahl's deposition. Dahl

responded to Harrison's written discovery and appeared for deposition, but she did not take any discovery of her own.

6. On April 7, 2008, the date of the fact discovery cutoff, Dahl served written discovery upon Harrison but made no motion to extend fact discovery at that time.

7. On April 25, 2008, Harrison filed for summary judgment.

8. Five weeks after fact discovery had expired, and in the face of the motion for summary judgment filed by Harrison, Dahl filed a motion to extend discovery. (R. 392-95.) By this time, Dahl's expert disclosure date had also passed without any disclosure. The trial court denied the motion as to fact discovery but granted Dahl until September 8, 2008 to disclose experts. (Transcript of August 7, 2008 Hearing 36:21 - 37:10.) The trial court also granted Harrison's motion for a protective order concerning the written discovery requests served on the last day of the discovery period, finding that they were not timely served. (*Id.* 23:5-18, 31:6-22; see also R. 609-610 (trial court's written order on discovery motions heard August 7, 2008).)

9. On September 8, 2008, Dahl made an expert disclosure that was grossly deficient, providing no real information about the opinions of the experts or the bases for any opinions. (R. 578-82.)

10. Specifically, Dahl's "Expert Witness Reports" included the following names (along with addresses and telephone numbers): Martin Olsen, Clark Nielsen, John Brough, Mohammad Alsolaimaui, M.D., Lisa Stout, M.D., and Alan Jeffery, M.D. (*Id.*)

11. With regard to Martin Olsen, Dahl stated:

- a. The witness will testify as to the standard of care owed to a client by an attorney engaged in private family law practice.
- b. The witness is expected to give an opinion that Plaintiff was damaged, the causation of the damages, and the extent of the damages in this case. He will also testify that the Defendant failed to meet its professional duty of care. He may offer rebuttal testimony to any evidence asserted by the Defendants.
- c. The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, and his knowledge of the accepted standards of care among private practitioners of family law in the state of Utah.
- d. The witness is an attorney who has engaged in the private practice of family law in the state of Utah for seventeen (17) years.
- e. The witness will charge \$225.00 an hour for his study and \$225.00 an hour for his testimony.
- f. Any deposition given by the witness will be produced if not included on his c.v.

(*Id.*)

12. In the same Expert Witness Report, Dahl used exactly the same words to describe Clark Nielsen's expert testimony, except that he had practiced for 32 years. No additional information was included for either Mr. Olsen or Mr. Nielsen. (*Id.*)

13. In the same Expert Witness Report, Dahl listed no other experts who would testify regarding (1) the appropriate standard of care owed to a client by an attorney engaged in private family law practice, (2) causation, and (3) damages. (*Id.*)

14. Harrison moved to strike the disclosure as non-compliant with Rule 26, and Dahl opposed the motion, requesting more time to prepare complete reports. (*See, e.g.,*

R. 600-607; Transcript of December 16, 2008 Hearing 18:11-13.) The trial court specifically addressed Dahl's request for more time and rejected it in no uncertain terms. (Transcript of December 16, 2008 Hearing 29:23 - 31:6.) At the end of rejecting Dahl's request for more time, the trial court stated:

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 plaintiff more time over the objection of the defendant.

(*Id.* 31:13-16.)

15. Less than six weeks after the hearing granting the motion to strike and rejecting Dahl's request for more time, Dahl filed a "Motion to Allow Expert Testimony at Trial." (R. 961-62.) This motion addressed the same issues just ruled upon by the trial court on December 16, 2008; indeed, most of Dahl's brief was a "cut and paste job"—*i.e.*, a verbatim restatement of generic arguments from her previous memorandum in opposition to the motion to strike and her prior memorandum supporting continuance of the discovery deadlines. (*Compare* R. 980-82 *with* R. 600-01 and R. 408-09.)

16. At a March 12, 2009 hearing on the Motion to Allow Expert Testimony at Trial, the trial court ruled from the bench, denying the motion and finding that Dahl's motion was essentially a motion to reconsider the prior ruling on the motion to strike. The trial court additionally found (1) that Dahl had cited no grounds which justified reconsideration of the court's prior ruling on the motion to strike, (2) that there was no reason to grant her more time to disclose expert witnesses, and (3) that, under Rule 37 and Dahl's failure to properly disclose her expert witnesses, there was no reason to allow her to introduce expert testimony at trial. (Transcript of March 12, 2009 Hearing 37:4-



39:4.) Finally, the trial court found that Dahl's motion was frivolous, and expressly adopted the reasoning contained in Harrison's brief that the motion was meritless and filed in bad faith. (*Id.* 38:25 - 39:4.) It awarded attorney's fees to Harrison. (*Id.* 38:17 - 39:4.) The trial court signed the proposed findings, conclusions and order denying Dahl's Motion to Allow Testimony of Expert Witnesses at Trial on April 14, 2009. (R. 1053-57.)

17. Pursuant to the trial court's orders, trial went forward on October 26-27, 2009, without any expert testimony from Dahl's proposed expert witnesses regarding the standard of care, causation, and damages.

18. After the bench trial of this case, the trial court made detailed factual findings in a Memorandum Decision dated January 6, 2010. (R. 1436-68.)

19. Therein, the trial court made a detailed assessment of credibility, stating that "the testimony of the defendants' witnesses is generally more credible, consistent, and trustworthy" and offering detailed reasons for the assessment. (R. 1464.)

20. Dahl did not object to those findings of fact or the assessment of credibility, nor does her appeal challenge the trial court's ruling on these bases.<sup>1</sup>

21. Based upon the Findings of Fact and Memorandum Decision dated January 6, 2010, as well as all evidence presented at trial of the case on October 26-27, 2009, the trial court entered Conclusions of Law. (R. 1713-18.)

---

<sup>1</sup> Because Dahl does not challenge the facts and credibility assessment on appeal, they are conclusively established for the purposes of this appeal. *See Howard v. Howard*, 601 P.2d 931, 935 (Utah 1979) (absent valid objection to findings of fact by trial court, those findings of fact are deemed conclusive on appeal).

22. The trial court concluded that Dahl had failed on the elements of breach and causation for all of her claims for relief. Specifically, the trial court found that the failure of Dahl to provide expert testimony was fatal to each of her claims. (R. 1713-16, ¶¶ 6, 14, 23 (emphasis added).)

23. Independently, the trial court also concluded that Dahl's claims failed factually because (1) "she failed to present *any* evidence that she would have benefited but for the Stipulation" and (2) "she failed to present *any* evidence that any injury she suffered was the foreseeable result of the Stipulation." (R. 1713-16, ¶¶ 7-8, 15-16, 24-25 (emphasis added).)

24. The Conclusions of Law were drafted by counsel for Harrison. Prior to their entry, Dahl made a series of objections, which the trial court considered prior to entry of the Conclusions of Law. (R. 1487-90.) Dahl never objected to paragraphs 7-8, 15-16, 24-25 on the basis she felt she had produced such evidence at trial. (*See id.*)

## SUMMARY OF THE ARGUMENT

Issue I. Trial courts have broad discretion to manage their cases, including deadlines in pretrial scheduling orders. *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶ 11, 241 P.3d 375. Dahl argues that the trial court abused its discretion in declining to extend the expert discovery deadlines at her request and over Harrison's objections a second time so as to allow her to produce an expert report that complied with Utah R. Civ. P. 26. In doing, she relies heavily on *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, 235 P.3d 791, and she reads *Welsh* so broadly that, if her interpretation was adopted, it would effectively strip the trial court of most of its case management discretion. To the contrary, the *Welsh* court recognized the facts of that case as unique, expressly distinguishing it from "others of this type"—i.e., from the typical case-management discretionary ruling by a trial court. *Welsh* had the following facts not present in this case (1) a change of counsel within days of the expert discovery deadline; (2) a motion for enlargement of time filed before the expert discovery deadline; (3) obstruction of discovery by the opposing party; (4) no claim of prejudice by the opposing party; and (5) a strange docket entry stating that a motion for extension of time was granted, which was relied upon. No such facts are present here. Dahl had the opportunity to disclose experts properly and in a timely manner and had no just cause for the failure. Accordingly, the trial court was within its discretion not to extend the expert disclosure deadline further. The trial court properly found that the plain language of Rule 37(f) provided for their automatic exclusion of Dahl's deficient expert reports, and Dahl had not shown harmlessness or good cause for her failure to comply with Rule 26.

Issue II. Akin to Issue I, the trial court was within its broad discretion to refuse to extend the fact discovery period. Dahl's motion for an extension of fact discovery was filed five weeks after the close of fact discovery under the then-operative case management order, and Harrison had already filed a motion for summary judgment. The deadlines in the then-operative case management order were proposed by Dahl, and she did literally no discovery in the case during the discovery period. She served written discovery on the last day of the fact discovery period, which is not timely. Accordingly, the trial court was within its discretion not to extend the fact discovery deadline and grant Harrison's motion for a protective order on the untimely written discovery.

Issue III. Dahl's Motion to Allow Expert Testimony at Trial was an abuse of the trial process. It was a rehashing of a precise issue that was decided less than six weeks prior, and not only that, in deciding the issue against Dahl earlier, the trial court had based the ruling in part on a finding that Dahl and her counsel had willfully failed to obey orders of the Court concerning expert disclosure. The Motion to Allow Expert Testimony at Trial was needless and unnecessary, wasteful of judicial resources, and it had no good-faith basis. The trial court was within its powers, both equitable and statutory, to award Harrison costs and attorneys' fees incurred in defending against the motion. *See Rohan v. Boseman*, 2002 UT App 109, ¶¶ 33-40, 46 P.3d 753 (affirming sanction of attorneys' fees for frivolous refiling of motion for continuance that had been denied 17 days earlier). Moreover, Dahl failed to marshal the evidence supporting the trial court's finding of frivolousness and bad faith, and as a result, she cannot challenge it. *See id.*

Issue IV. Harrison submits that it is not even a close case that the trial court was within its broad discretion to enter the orders that are the subject of Issues I-III. However, even to the extent that there was some error, the error was harmless. Even if Dahl had an expert at trial, that expert could not create facts or evidence. In complex cases, there is a knowledge gap between fact and conclusion for laypeople. An expert only assists the trier of fact in bridging that gap, helping the trier of fact come to a conclusion supported by the factual evidence. The trial court concluded, independent of the failure to provide expert testimony, that Dahl's claims also failed because of a lack of *any* evidence on causation. Because Dahl failed to present any evidence on causation, whether she had an expert at trial would not have yielded a different conclusion at the end of the trial. There was no factual evidence on the other side of the bridge. Likewise, because the only relevant information that Harrison possessed in this case was on the issues of duty and breach, further fact discovery would not have yielded evidence on causation.

## ARGUMENT

### **I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DAHL'S EXPERT DISCLOSURES AND REPORTS AND DENYING DAHL'S REQUEST TO EXTEND THE EXPERT DISCOVERY DEADLINE.**

#### **A. The Trial Court Was Under No Obligation to Grant Dahl Additional Time for Expert Disclosures for a Second Time.**

It is axiomatic that trial courts are vested with broad case-management discretion, and cases finding abuse of that discretion are unusual. *See Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶ 11, 241 P.3d 375 (trial court did not abuse its discretion by striking untimely affidavits). Case management orders “are necessary to expedite the flow of cases through the court system and should not be lightly disregarded.” *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993) (affirming refusal to consider untimely expert affidavit because it was untimely). This appeal presents plain-vanilla case-management rulings by the trial court that are precisely the sort that are within the trial court’s broad discretion.

In this case, the first expert discovery deadline, which was initially proposed by Dahl and stipulated to by Harrison, came and went without Dahl making an expert disclosure or moving to extend the expert disclosure deadlines. After that deadline had passed, Dahl moved for an extension of the discovery deadlines. In her brief filed June 11, 2008, she argued to the trial court that “[l]egal malpractice is a highly fact sensitive issue yielding complex issues of duty, breach and causation.” (R. 519.) Even though Dahl’s motion was untimely, the trial court generously granted Dahl a four-month extension of time to produce expert reports. On that new deadline, despite the fact she

had acknowledged the complexities of the case in a brief three months earlier, Dahl again did not take the expert deadline seriously. She produced bare-bones reports that did not comply with Rule 26(a)(3)(B). (See R. 578-82.) Dahl's only requests for more time came after the disclosure expert deadline.

Dahl relies heavily on *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, 235 P.3d 791 and seeks to have this Court broaden *Welsh* to a degree that would strip away most of the trial court's case-management discretion. The *Welsh* court specifically noted how unusual the facts of that case were, and those unusual facts are not present here.

Specifically:

- The *Welsh* plaintiff had retained new counsel within four days of the expert discovery deadline. *Id.* ¶ 4. Actually, a calendar reflects it was the day before Thanksgiving, and expert disclosures were due the following Monday, though the proximity to Thanksgiving is not mentioned in the opinion. Conversely, in this case, Dahl had the same counsel throughout the case.
- The *Welsh* plaintiff moved for an extension of time prior to the expert discovery deadline. *Id.* Here, all of Dahl's requests for extension of time were after her expert discovery deadlines had passed.
- The *Welsh* plaintiff alleged that the defendant had inhibited discovery. *Id.* Here, Dahl makes no allegation that Harrison stood in her way to take any discovery she chose consistent with the schedule and procedural rules.

- The trial court in *Welch* entered a docket entry stating that the motion for extension of time was granted, the clerk telephoned the *Welch* plaintiff's counsel to inform them the motion was granted, and counsel relied upon the trial court's representation that the motion was granted. *Id.* ¶¶ 7-8. Here, there was no false-positive ruling from the trial court.
- The *Welsh* defendant never argued to the trial or appellate court that it would be prejudiced if the motion was granted. *Id.* ¶ 16. Indeed, it specifically admitted at oral argument that the case "was not promptly moved along by either party." *Id.* ¶ 13. Here, Harrison did promptly move the case along, complying with all deadlines. Harrison argued that he would be prejudiced by the further delay, and the trial court agreed and specifically found Harrison would be prejudiced if the motion was granted.

Likewise, Dahl's reliance on *Boyce v. Marble*, 1999 UT 71, 982 P.2d 565 is incorrect. In *Boyce*, the plaintiff had properly disclosed experts, but one of his experts had withdrawn unexpectedly after the deadlines and shortly before trial. *Id.* ¶ 4. The *Boyce* court specifically noted that the plaintiff had not violated any discovery orders, *id.* ¶ 11, and concluded that the plaintiff's predicament was just one of those "unforeseen circumstances" for which discovery orders ought to be flexible. *Id.* ¶ 10. Here, there was nothing unforeseen or sympathetic about Dahl's situation. Dahl specifically recognized the complexities of this case months before the deadline, (R.



519), yet she did nothing to take the expert disclosure rules seriously. The trial court was within its discretion to refuse to reward her for it.

Accordingly, this case is nothing like *Welch* or *Boyce*. This is a case where Dahl was dilatory at best while Harrison did nothing to stand in her way beyond requesting compliance with discovery rules and orders of court. This case is much more analogous to *Arnold v. Curtis*, where the Utah Supreme Court found that the trial court was within its discretion to refuse to consider an expert affidavit “filed in derogation of the scheduling order.” *Arnold*, 846 P.2d at 1310. Like *Arnold*, the trial court in this case was well within its broad discretion to deny Dahl a second extension of the expert discovery deadlines.

**B. Dahl’s Expert Reports Did Not Comply With Rule 26 and Were Properly Stricken.**

1. The Expert Reports Were 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 Rule 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, Dahl's expert "reports" were so deficient that they realistically amounted to no disclosure at all. She merely gave names and extremely vague and generalized topics upon which the expert *may* opine. She cited nothing that any expert actually reviewed to form the basis of his or her opinion; instead, Dahl merely stated that the expert's opinion "will be based" on essentially everything in the case. As a corollary, the "reports" failed to state any link between fact and conclusion. *Cf. Bowie Mem'l Hosp.*, 79 S.W.3d at 52 (expert must identify link between fact and conclusion in report). The "reports" also failed to state qualifications of any of the experts with any meaningful specificity. This is far from stating a response to the standard expert interrogatories that a Rule 26(a)(3)(B) report is intended to replace. *See* Utah R. Civ. P. 26, Advisory Notes.

In short, nothing in the expert "reports" was even remotely informative of opinions of an "expert," bases of any opinion, or qualifications of an "expert" to render any such opinion. Dahl was 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. Thus, the trial court properly found that the "reports" did not comply with Rule 26(a)(3)(B).

2. The Trial Court did not Abuse its Discretion in Enforcing the Plain Language of Rule 37(f) and Refusing to Relieve Dahl of the Consequences of Her Non-Compliant Disclosures.

At the outset, it is important to note that the trial court did not impose a sanction upon Dahl in striking her expert reports and not allowing her to present expert testimony at trial. The issue before the trial court was exclusion under Utah R. Civ. P. 37(f). **Rule**

*37(f) is self-executing.* Because the trial court ruled that Dahl did not comply with Rule 26(a)(3)(B), the trial court ruled that those reports were automatically excluded pursuant to Rule 37(f). It did not, as Dahl argues, “choose an inappropriate sanction.” By operation of Rule 37(f), the trial court had no choice.

Rule 37(f) is crystal clear that improper disclosures *automatically* lead to exclusion, and the burden is on the improperly-disclosing party to show harmlessness or good cause to escape exclusion. The trial court specifically ruled that Dahl had shown neither, and thus she was not saved from Rule 37(f)’s automatic exclusion. The trial court was well within its broad discretion to determine that Dahl had not shown the required harmlessness or good cause; indeed, Dahl does not marshal any evidence to suggest that she made such a showing, nor does she argue that the trial court should have found her excepted from Rule 37(f). *See Rohan*, 2002 UT App 109, ¶ 35 (party challenging trial court’s finding must marshal evidence supporting a finding).

Additionally, Dahl’s heavy reliance on *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980) is misplaced for at least three reasons. First, *Dugan* was decided before the 1999 overhaul to the Utah Rules of Civil Procedure, which added the self-executing exclusion of Rule 37(f) that is at issue here. *See Utah R. Civ. P. 26, Advisory Notes* (discussing interplay of Rules 26 and 37 in the then-new rules); *Arnold*, 846 P.2d at 1309-10 (specifically distinguishing *Dugan* on the basis that it was decided under old civil procedure rules). Under the current Utah Rules of Civil Procedure, unlike in the 1970s when *Dugan* was first filed, exclusion is automatic and the burden is on the improperly-disclosing party to show harmlessness or good cause. *Dugan* goes through no

harmlessness or good cause analysis because that rule did not exist. Second, the *Dugan* court's overarching concern was that the trial court's pretrial order, made 11 months before trial, was not reduced to writing, *Dugan*, 615 P.2d at 1244-45, a situation not present here. Third, *Dugan* did not deal with improperly-disclosed expert reports but the failure to produce a pretrial expert witness list 15 days before trial. *Dugan* did not discuss disclosures of expert opinions, nor expert discovery at all. *See id.*

Moreover, while no finding of willfulness or bad faith is required under Rule 37(f), the trial court did find that Dahl had willfully disobeyed orders of the court with respect to expert disclosures. (Statement of Material Facts, *supra*, ¶ 14 (citing Transcript of December 16, 2008 Hearing 31:13-16).) Dahl has failed to marshal any evidence to suggest otherwise. Simply put, Dahl gave the trial court no reason to relieve her from Rule 37(f)'s automatic exclusion, and the trial court was not required to do so. Actually, it would have been abuse of discretion for the trial court to allow expert testimony at trial without the clear prerequisite of a Rule 26-compliant report or a finding of harmlessness or good cause as to why one was not produced. *See Jacobsen*, 287 F.3d at 953.

3. The Trial Court Did Not Err in Denying the Motion to Allow Expert Testimony At Trial.

In connection with her opposition to the trial court's ruling on December 16, 2008, concerning her deficient expert reports, Dahl, both in her briefing and at oral argument requested more time to prepare complete reports. (*See, e.g.*, R. 600-607; Transcript of December 16, 2008 Hearing 18:11-13.) The trial court specifically addressed Dahl's

request for more time and rejected it. (Transcript of December 16, 2008 Hearing 29:23 - 31:6.) At the end of rejecting Dahl's request for more time, the trial court stated:

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 plaintiff more time over the objection of the defendant.

(Transcript of December 16, 2008 Hearing 31:13-16.)

Less than six weeks after the trial court so sharply rejected her request for more time to disclose experts, Dahl filed a "Motion to Allow Expert Testimony at Trial." That motion cited nothing new—no new evidence, argument, or anything else—that had come up since December 16, 2008. Notably, much of the text of her memorandum was generic and was copied and pasted verbatim from her prior motions requesting more discovery. Dahl was just asking for more time, again, and citing no supportable basis, again. (*See* R. 961-62, 980-83.)

For the same reasons as the trial court was within its discretion to refuse to relieve Dahl from Rule 37(f)'s automatic exclusion concerning her incomplete expert reports and untimely request for extension, the trial court was within its discretion to deny the same requested relief when it was presented less than six weeks later.<sup>2</sup>

---

<sup>2</sup> The trial court found the Motion to Allow Expert Testimony at Trial frivolous and Dahl was sanctioned. She appeals the sanction as well, which is discussed *infra* at Argument, Section III.

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DAHL'S MOTION TO EXTEND FACT DISCOVERY NOR IN GRANTING HARRISON'S MOTION FOR A PROTECTIVE ORDER.**

**A. The Trial Court was Within its Discretion to Deny an Extension of Fact Discovery.**

The trial court's refusal to extend fact discovery is another plain-vanilla discretionary ruling that it was clearly permitted to make. The deadline had passed by five weeks by the time Dahl filed her motion to extend it, and she had taken no discovery during the discovery period. As she did at the trial court, Dahl's appellate brief cites only generic authority that "discovery is broad" and is intended to "elicit facts" and the like in support of her assertion that the trial court abused its discretion in denying her untimely motion to extend fact discovery. She cites no authority, and Harrison is aware of none, stating that a trial court abuses its discretion when it denies more time for discovery for a dilatory party that files an untimely motion.

Dahl also advances the argument that was rejected by the trial court that Harrison's motion to disqualify her counsel affected her ability to take discovery. It did not. She could have initiated discovery while the motion was pending. Harrison did. She *chose* not to. She could have requested a stay pending the determination of the motion. She could have initiated discovery in the two months between February 6, 2008, when the motion to disqualify was resolved by stipulation, (*see* R. 152), and April 7, 2008, the fact discovery cutoff. She could have moved for an extension of discovery during those two months. She did none of these things, and the trial court properly

refused to reward her for it. Neither the motion to disqualify, nor anything else, warranted extension of the fact discovery period.

**B. The Trial Court was Within its Discretion to Grant Harrison's Motion for a Protective Order.**

The first time Dahl attempted any discovery in this case was when she served written discovery requests on the date of the fact discovery cutoff. While the Utah Rules of Civil Procedure are silent on whether such discovery is timely, courts from other jurisdictions have repeatedly held that they are untimely because they must have been served so that responses were due before discovery is complete. *See 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. Celco 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).



Harrison submits that this issue comes up so frequently in civil litigation that, as a matter of policy, this Court should include in a published opinion for this case that the trial court was affirmatively correct in determining that discovery requests are untimely unless served so that responses were due before discovery is complete. The completion of fact discovery is the most important discovery deadline. It is critical to other deadlines in the case. Experts rely on facts elicited in fact discovery, which is supposed to be a “closed universe” after the fact discovery deadline. Rule 26’s presumptive case management deadline for expert disclosures is 30 days after the close of fact discovery. Utah R. Civ. P. 26 (a)(3)(C). Serving discovery requests on the last day of fact discovery means that the responses (which presumably contain new facts) would be due contemporaneously with expert reports, inviting unnecessary delay and burden upon the litigants, their experts, and the trial courts. Clear and binding authority in this regard would benefit the State of Utah’s litigants and judiciary.

Regardless of whether this Court expressly ratifies the trial court’s decision, the trial court was within its discretion to interpret the Utah Rules of Civil Procedure in conformity with the above-cited authorities from other jurisdictions and grant Harrison’s motion for a protective order. Holding that the trial court abused its discretion in granting the protective order would only reward dilatory litigants and counsel, and it would give obstreperous litigants and counsel a way to delay trial court proceedings by waiting to serve discovery requests until the final day of fact discovery so that expert discovery would inevitably be disrupted. Obviously, this is contrary to the policy and goals of this State.

### **III. THE TRIAL COURT DID NOT ERR IN SANCTIONING DAHL FOR FILING A FRIVOLOUS MOTION.**

As stated above in Argument Section I.B.3, Dahl specifically requested more time for preparation of expert reports, and the trial court specifically and unequivocally rejected that request on December 16, 2008. In doing, the trial court ruled that Dahl had willfully failed to obey orders of the Court. Then, Dahl requested the same relief less than six weeks later, citing no new fact or law.<sup>3</sup> The trial court found that it was in bad faith and awarded costs and attorneys' fees incurred in defending the motion to Harrison.

#### **A. Dahl's Challenge to the Trial Court's Bad Faith Finding Fails Because She Has not Marshaled the Evidence.**

In challenging a trial court's findings of bad faith, a party "is required to marshal the evidence, citing the appellate court to all the evidence supporting the trial court's ruling." *Rohan*, 2002 UT App 109, ¶ 35. Here, Dahl merely disagrees with the trial court and argues that her motion was in good faith. She has made no attempt to comply with the marshalling requirement and thus this Court should conclude that the record supports the finding of bad faith. *See id.*

#### **B. The Trial Court Was Within its Discretion to Sanction Dahl and Christensen Under its Inherent Powers.**

Courts of general jurisdiction, like the district court here, possess "inherent equitable power to award reasonable attorney fees when [ ... ] appropriate in the interest of justice and equity." *Id.* ¶ 34 (affirming sanction of attorneys' fees for frivolous

---

<sup>3</sup> In a footnote of her brief, Dahl states for the first time on appeal that the purpose of the motion was to preserve her right to appeal. Her right was already preserved, and she never stated preservation as a basis for the motion to the trial court in response to Harrison's motion for sanctions.

refilling of motion for continuance that had been denied 17 days earlier). This inherent power includes the “power to impose monetary sanctions on attorneys who by their conduct thwart the court’s scheduling and movement of cases through the court.”

*Barnard v. Wassermann*, 855 P.2d 243, 249 (Utah 1993). Akin to *Rohan* where a sanction was affirmed when a repeat motion was filed within weeks, the trial court was within its discretion to determine that, in the interest of justice and equity, Harrison should be awarded costs and attorney’s fees incurred in connection with responding to this repeat motion, especially since the trial court had already found Dahl and Christensen to have willfully failed to obey orders of the court. The trial court found bad faith on behalf of Dahl and Christensen in connection with the motion—a finding that is clearly supported by the record, (*see* Statement of Material Facts, *supra*, ¶¶ 9-16), and Dahl cannot contest that finding due to her failure to meet the marshalling requirement. *See Rohan*, 2002 UT App 109, ¶ 35.

**C. The Trial Court’s Alternative Basis for Sanctioning Plaintiff—Utah Code Ann. § 78B-5-825—Was not Clearly Erroneous.**

Utah Code Ann. § 78B-5-825 was also a proper alternative basis for an award of attorneys’ fees. While Dahl is correct that that statute uses the word “action,” the court in *Rohan* affirmed an attorneys’ fees award under the same statute, specifically and separately under the statute. *Id.* ¶¶ 38-40 (“We agree with the trial court that Rohan’s renewed motion ... was frivolous and without basis in law or fact. Thus, the first requirement of [the bad faith statute] was met.”). Thus, *Rohan* interprets Utah Code Ann.

§ 78B-5-825 to be broader than just the merits of the ultimate claims and defenses. *See id.*

Dahl also argues that an interpretation of Utah Code Ann. § 78B-5-825 that includes motions would subsume Utah R. Civ. P. 11. Dahl is wrong. Rule 11 applies to counsel, not parties. The purpose of the statute is to have a statutory basis to sanction parties for bad faith and meritless positions. The statute properly supplements Rule 11; together, they allow a trial court to sanction either litigants, their counsel, or both for abuses of the litigation process. They are important tools for the trial courts to police both counsel and litigants.

For those reasons, the trial court was correct in using Utah Code Ann. § 78B-5-825 as an alternative basis for sanctions.

**IV. THE TRIAL COURT'S RULING SHOULD ALSO BE UPHeld  
BECAUSE DAHL FAILED TO PRESENT ANY FACT AT TRIAL  
THAT COULD SUPPORT A FINDING OF CAUSATION ON ANY OF  
HER CLAIMS.**

Finally, while Harrison submits that it is not even a close case that the trial court was within its broad discretion to enter the orders that are the subject of Sections I-III above, even to the extent that there was some error, the error was harmless or the judgment should be affirmed on an independent ground that Dahl failed to present facts at trial to demonstrate causation.

Obviously, Dahl was required to prove a causal connection between some wrongful act by Harrison and an injury she sustained. *See, e.g., Shaw Resources Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C.*, 142 P.3d 560, 569 (Utah Ct. App. 2006)

(affirming summary judgment on legal malpractice claim in favor of law firm where plaintiff failed to demonstrate causation); *Jackson v. Colston*, 209 P.2d 566, 568 (Utah 1949) (“It is fundamental that the burden rests upon the plaintiff to establish the causal connection between the injury and the alleged negligence of the defendant.”). Likewise, proximate causation requires proof that the injury was foreseeable. *See Steffensen v. Smith’s Mgmt. Corp.*, 862 P.2d 1342, 1346 (Utah 1993).

“In legal malpractice actions based on breach of fiduciary duty, clients must show that if the attorney had adhered to the ordinary standards of professional conduct and had not breached fiduciary duties, the client would have benefited.” *Shaw Resources*, 142 P.3d at 569. In Utah, causation or the connection between fault and damages in legal malpractice actions “cannot properly be based on speculation or conjecture.” *Dunn v. McKay, Burton, McMurray and Thurman*, 584 P.2d 894, 896 (Utah 1978) (granting directed verdict in favor of law firm in legal malpractice action for the plaintiff’s failure to show causation).

For example, in *Dunn*, the Utah Supreme Court affirmed the trial court’s grant of a directed verdict in favor of a law firm representing a client in a divorce and custody dispute. *Id.* at 895-97. There, lawyer had failed to effectuate proper service upon the opposing party, and the delay in service allowed the opposing party to relocate to Florida and establish jurisdiction there. *Id.* at 895. The Court held that the delay in service did not, as a matter of law, cause injury to the plaintiff because there was no evidence that the result of the custody proceedings would have been different, nor that legal expenses would have been unnecessary, absent the lawyer’s conduct. *Id.* at 897.

Here, the same analysis applies. To prove causation, Dahl was required to put forward admissible evidence showing that the adverse child-custody orders in the Underlying Divorce Action were not actually based upon the divorce court's analysis of the best interests of the her children but rather were based upon the Stipulation, and that there would have been a different result without the Stipulation. *Id.* at 895-97. She presented no such evidence. Independent of the rulings on expert testimony, the trial court specifically found that Dahl had "failed to present *any* evidence that she would have benefited but for the Stipulation" and that "she failed to present *any* evidence that any injury she suffered was the foreseeable result of the Stipulation." (R. 1713-16, ¶¶ 7-8, 15-16, 24-25 (emphasis added).) Dahl never objected to these findings before the trial court and does not object to them in this appeal, and thus she has waived any argument to the contrary. *See Robertson's Marine, Inc. v. I4 Solutions, Inc.*, 2010 UT App 9, ¶¶ 10-13, 223 P.3d 1141 (failure to challenge adequacy of findings before trial court constitutes waiver of the challenge for the purpose of appeal).

An expert does not create factual evidence. In complex cases, there is a knowledge gap between fact and conclusion for laypeople. An expert only assists the trier of fact in bridging that knowledge gap, helping the trier of fact come to a conclusion supported by the factual evidence. Because Dahl failed to present any evidence on causation, whether she had an expert at trial would not have yielded a different conclusion at the end of the trial. There was no factual evidence on the other side of the bridge.

Likewise, further fact discovery would not have changed the trial court's rulings on causation. The only relevant information that Harrison possessed in this case was on the issues of duty and breach. Whether the Stipulation caused any harm was always information that was in the control of Dahl or was part of the public record of the Underlying Divorce Action. An additional month or year of fact discovery would not have elicited any further evidence on causation.

For those reasons, any error was harmless, or in the alternative, the discovery rulings should be upheld on the alternative ground that Dahl failed to put forward any facts supporting the element of causation on any of her claim. *See H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943; *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10-13, 52 P.3d 1158.

### CONCLUSION

For the foregoing reasons, this Appeal should be dismissed, with costs taxed to Dahl.

Dated this 22 day of February, 2011.

LAW OFFICE OF BEN W. LIEBERMAN, PLC

By: 

Ben W. Lieberman

*Attorney for Defendants-Appellees*

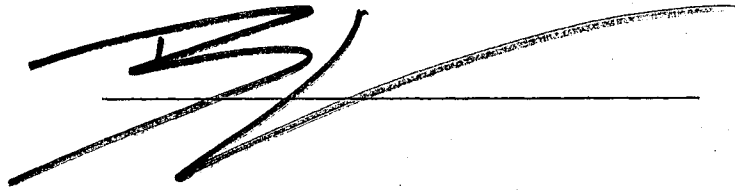
### CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 25 day of February, 2011, I hand delivered eight (8) copies of the foregoing brief and addendum, with a compact disc in conformity with Standing Order No. 8, to the Utah Court of Appeals. Additionally, I sent two (2) copies of the foregoing brief and addendum, with identical compact disc to the following person(s) as indicated below.

#### Attorneys for Plaintiff-Appellant:

Steve S. Christensen  
Benjamin K. Lusty  
CHRISTENSEN THORTON PLLC  
136 East South Temple, Suite 1400  
Salt Lake City, Utah 84111

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

A large, stylized handwritten signature in black ink, appearing to be 'B. L.', is written over a horizontal line.



# ADDENDUM

# **STATUTES AND RULES OF COURT**

West's Utah Code Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part V. Depositions and Discovery

**➔RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

**(a) Required disclosures; Discovery methods.**

(a)(1) *Initial disclosures.* Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A

party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) *Exemptions.*

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) 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.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) *Pretrial disclosures.* A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) *Form of disclosures.* Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) *Methods to discover additional matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

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

(b)(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) 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.

(b)(3) *Limitations.* The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(4) *Trial preparation: Materials.* Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(5) *Trial preparation: Experts.*

(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a

witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(5)(C) Unless manifest injustice would result,

(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(6) *Claims of Privilege or Protection of Trial Preparation Materials.*

(b)(6)(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b)(6)(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

**(c) Protective orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause



shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**(d) Sequence and timing of discovery.** Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party

is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

**(e) Supplementation of responses.** A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

**(f) Discovery and scheduling conference.**

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including--if the parties agree on a procedure to assert such claims after production--whether to ask the court to include their agreement in an order;

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

**(g) Signing of discovery requests, responses, and objections.** Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

**(h) Deposition where action pending in another state.** Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

**(i) Filing.**

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request

for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

CREDIT(S)

[Effective May 2, 2005; amended effective November 1, 2007; November, 2008.]

#### ADVISORY COMMITTEE NOTE FOR DISCOVERY RULES AMENDMENTS

**Objectives.** The 1999 amendments to Rules 16, 26, 30, 32 and 33 comprise a new model for discovery and case management in state court cases. The objective of the new model is simply to better manage litigation by planning. The amendments achieve this simple objective as follows:

They require the parties and encourage the judge to evaluate the case early in the process and to plan appropriate discovery;

They establish default deadlines and limits to govern those cases in which the parties cannot agree to a discovery plan and do not seek a judicial order; and

They require each party to disclose to other parties the names of persons with discoverable information supporting that party's claims or defenses, a description of documents supporting that party's claims or defenses, a computation of damages and the existence of insurance agreements.

The rule changes are intended to simplify discovery and promote full disclosure of discoverable information. The limits and deadlines specified in these rules are not intended to fit all cases. Parties should cooperate and stipulate to and courts should consider different deadlines and limits appropriate for specific cases. The rule changes that implement these objectives are as follows:

**Discovery and Scheduling Conference of the Parties. Rule 26(f).** The 1999 amendments require the parties to meet and confer about the case as soon as practicable after commencement of the action. (The deadline for filing the stipulated discovery plan effectively limits the time for the conference to within 46 days after the first answer is filed.) To help ensure

the case does not stall, the rule imposes on plaintiff's counsel the obligation to schedule the meeting and to submit to the court the discovery plan and order resulting from the meeting. At the meeting the parties settle what they can and develop a discovery plan for any remaining issues. At this point the content of the discovery plan is entirely within the control of the parties. The rule suggests elements commonly raised in the course of discovery, but counsel should tailor the discovery plan to meet the needs of the particular case. Within 14 days after the meeting, plaintiff's counsel prepares a stipulated discovery plan and order, which is submitted to the court for approval. If the parties cannot agree or can only partially agree to a stipulated discovery plan, the plaintiff must and any party may move for a discovery order. If the court does not order otherwise, the default deadlines and limits of the rules govern. Discovery proceeds in the normal course and in accordance with the discovery plan after the discovery and scheduling conference. The parties are required to meet once, but subsequent meetings, as necessary, to amend the discovery plan are not precluded.

A later-added party is bound by the discovery order but can conduct a discovery and scheduling conference to obtain a stipulated amendment to the original plan. If the parties will not stipulate to reasonable discovery by a later-added party, the court can order appropriate relief upon motion. The court should be sensitive to the nature, extent and timing of discovery by a later-added party.

### **Scheduling and Management Conference with the Court. Rule**

**16(b).** The 1999 amendments provide that any party can file a motion for a discovery order on issues the parties cannot agree upon, and the court will rule upon that motion. Any party may seek a scheduling and management conference with the court, but, because of large caseloads, the rules permit the court to decline the conference. By conducting a scheduling and management conference, however, the court has the opportunity early in the process to evaluate the case and manage it accordingly, to explore mediation and settlement, to resolve disputes over the nature and extent of discovery, and to identify issues collateral to the litigation. It is not anticipated that judges will manage a case contrary to the stipulation of the parties. However, the court's interest in case management is independent of that of the parties, and the court needs the discretion independently to manage the case, especially when the parties cannot agree.

The scheduling and management conference is designed to encourage the parties and the court to take earlier and better control of the litigation. If possible, the trial date should be set at this conference as well as dates for all of the necessary pretrial steps and any modifications to the presumptions established by the discovery rules.



To avoid possible confusion surrounding the multiplicity of objectives of the various conferences with the court, the amendments delete the long list of objectives found in the former rule, which the committee determined are adequately covered under subsection (a). The objectives remain sound. The scheduling and management conference is a particular type of conference with specified and limited objectives. Any other conference prior to trial is properly called a pretrial conference and the objectives are more varied. In addition to the objectives in the rule itself, the following objectives may be appropriate:

- (1) forming and simplifying issues and eliminating frivolous claims and defenses;
- (2) obtaining admissions of fact and stipulations to documents;
- (3) obtaining stipulations or rulings on the admissibility of evidence;
- (4) referring matters to mediation or other alternative dispute resolution;
- (5) adopting special procedures for managing actions that may involve complex issues of fact or law, multiple parties, or unusual proof problems; and
- (6) the form and substance of a pretrial order.

**Required Initial Disclosures. Rule 26(a).** The 1999 amendments require each party to provide to all other parties the names of persons with discoverable information supporting that party's claims or defenses, a description of documents supporting that party's claims or defenses, a computation of any damages it claims and any insurance that may satisfy some or all of any judgment. This exchange of information occurs within 14 days after the discovery and scheduling conference of the parties. A party can only disclose that which is known at the time. As further information is developed, the party is under a duty to supplement the initial disclosures. If a party fails to comply with the disclosure rule, Rule 37(f) requires the court to prohibit the use of the witness or evidence at trial unless the failure was harmless or there is good cause for the failure. The court may order any other sanction it determines to be appropriate and Rule 37(f) provides some examples.

**Expert reports.** Rule 26(a)(3). Unlike the Federal Rules of Civil Procedure, an expert's report need not be written and signed by the expert. The report may be signed by the witness or the party. In addition to the qualifications

of the expert, the report must 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, and a summary of the grounds for each opinion. In effect, the report will serve in lieu of responses to standard interrogatories. The committee considered but decided not to adopt the federal rule governing expert reports. Both plaintiffs' attorneys and defense attorneys reported on the high cost of reports by experts, the growth of non-practicing experts as a profession, and the need to depose experts regardless of a written report. 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. For genetics testing in paternity cases, compliance with Utah Code Title 78B, Chapter 15, Part 5 is sufficient to satisfy the expert report requirement unless a party objects and specifically requests a report under the rule.

**Exempt cases. Rule 26(a)(2).** The scope of the exemption is very limited. If a case is exempt, the parties do not need to meet and confer under Rule 26(f), and they do not need to disclose under Rule 26(a)(1). All other discovery provisions apply to exempt cases. All information subject to mandatory disclosure in a non-exempt case is subject to discovery using traditional methods in an exempt case. The committee did not seek to exempt simple cases. The rule amendments benefit simple as well as complex litigation. The only exempt cases are those identified in Rule 26(a)(2).

**Depositions. Rule 30.** The party taking the deposition may designate and pay for any method of recording the deposition. Any other party may designate and pay for an additional method of recording. The rule prohibits argumentative and suggestive objections.

**Default Deadlines and Limits.** The discovery rules establish presumptive deadlines and limits, the purpose of which are to encourage stipulations to deadlines and limits suitable to the needs of the particular case. If the discovery needs of the parties are not equivalent, the court, in entering a discovery order, should consider whether the presumptive deadlines and limits are being used by one party to frustrate legitimate discovery. The discovery rules establish the following new deadlines and limits, *any of which can be modified by stipulation of the parties or order of the court:*

Procedure	Deadline or Limitation
Discovery and scheduling conference of the parties	Held as soon as practicable after commencement of the action. (The deadline for filing the stipulated discovery plan



	effectively limits the time for the conference to within 46 days after the first answer is filed.)
Stipulated discovery plan and order	Submit to court within 14 days after the discovery and scheduling conference but in no event more than 60 days after the first answer is filed.
Required initial disclosures	Provide within 14 days after the discovery and scheduling conference.
Supplement required initial disclosures	At appropriate intervals.
Amend response to interrogatories, request for production or request for admission	Seasonably.
Initial disclosures by later added party	Provide within 30 days after being served.
Motion by later added party to amend the discovery plan	File within a reasonable time after being joined.
Number of depositions oral and written	Ten per side.
Review and modify record of deposition	Within 30 days after notice that record is available but only if deponent requested opportunity to review record prior to completing deposition.
Interrogatories	No more than 25 questions, including discrete subparts.
Fact discovery	Begins after the parties conduct their discovery and scheduling conference. Closes 240 days after first appearance by a defendant.
Identify expert witnesses and disclose expert reports	Within 30 days after close of fact discovery.
Identify rebuttal expert and disclose rebuttal expert reports	Within 60 days after disclosure by other party of expert identity and report.
Deposition of expert witness	Conduct within 60 days after disclosure of the expert's report.
Certify that case is ready for trial	File immediately upon the close of all discovery.
Pretrial disclosure of "will call" and "may call" witnesses, deposition testimony, and exhibits	Provide at least 30 days prior to trial.
Objections to pretrial disclosures	File within 14 days after pretrial disclosure.
Trial	Schedule as soon after certificate of readiness as is mutually convenient for court and parties.

**Code of Judicial Administration.** Rules 4-104 and 4-502 are being repealed and the provisions of those rules are being integrated into the Rule of Civil Procedure. The certificate of readiness for trial required by 4-104 is now in URCP 16(b) and the restrictions on filing discovery documents with the court are now in Rule 26(i).

The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

West's Utah Code Annotated Currentness  
State Court Rules

^¶ Utah Rules of Civil Procedure (Refs & Annos)

^¶ Part V. Depositions and Discovery

**→RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY;  
SANCTIONS**

**(a) Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) *Motion.*

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

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) *Expenses and sanctions.*

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

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(b) Failure to comply with order.**

(b)(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(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.

**(c) Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

**(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** 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 (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule

34, after proper service of the request, the court on motion may take any action authorized by Subdivision (b)(2).

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

**(e) Failure to participate in the framing of a discovery plan.** If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).

**(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).

**(g) Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

CREDIT(S)

[Amended effective January 1, 1987; November 1, 1999; November 1, 2000; April 1, 2002; November 1, 2007.]

U.C.A. 1953 § 78B-5-825

Formerly cited as UT ST § 78-27-56

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

▣ Chapter 5. Procedure and Evidence

▣ Part 8. Miscellaneous (Refs & Annos)

➔ **§ 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).

CREDIT(S)

Laws 2008, c. 3, § 857, eff. Feb. 7, 2008.

# UNREPORTED CASES



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

**H**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 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



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

the last day of discovery to be untimely, such that Defendants are not required to respond to the same.

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

END OF DOCUMENT

Not Reported in F.Supp.2d, 2007 WL 3379779 (M.D.Fla.)  
(Cite as: 2007 WL 3379779 (M.D.Fla.))

**H**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 § I.F.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. Cellco Partnership  
Not Reported in F.Supp.2d, 2007 WL 3379779  
(M.D.Fla.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2005 WL 1774033 (N.D.N.Y.)  
(Cite as: 2005 WL 1774033 (N.D.N.Y.))

**H**Only the Westlaw citation is currently available.

United States District Court,  
N.D. New York.  
Dale R. BRODEUR, Sr., Plaintiff,  
v.  
Sean MCNAMEE, et al., Defendants.  
Dale R. BRODEUR, Sr., et al., Plaintiffs,  
v.  
William BRODEUR, Defendant.

No. 3:02-CV-823 NAM/DEP, 3:02-CV-846  
NAM/DEP.  
July 27, 2005.

Office of Ronald Cohen, New York, New York, for  
Plaintiffs, Ronald Cohen, of counsel.

Coughlin, Gerhart Law Firm, Binghamton, New  
York, for Defendant McNamee, Richard B. Long, of  
counsel.

Office of Terence O'Leary, Walton, New York, for  
All Remaining Defendants, Terence O'Leary, of  
counsel.

#### DECISION AND ORDER

PEEBLES, Magistrate J.

\*1 These separate but related actions spring from a business dispute involving members of the Brodeur family, as well as certain of their businesses and affiliates, which has spawned extensive litigation in both the federal and state courts. The two actions now before this court, both of which have been pending for over three years, have been fiercely litigated, presenting discovery disputes at nearly every turn.

The latest dispute centers around plaintiffs' service of requests for admissions shortly before the close of discovery and their application for a determination that by virtue of their failure to serve timely responses, certain of the defendants have admitted the facts set forth in those requests. Defendants oppose plaintiffs' motion, arguing that because they were not served more than thirty days prior to the discovery deadline imposed under the court's case management order, the requests were untimely and,

as such, no response was required.

#### I. BACKGROUND

On July 29, 2004 I issued a uniform pretrial scheduling order in each of these two cases establishing certain deadlines including, *inter alia*, the requirement that all discovery in the actions be completed by February 18, 2005.<sup>FN1</sup> Civil Action No. 3:02-CV-846 (NAM/DEP), Dkt. No. 43; Civil Action No. 3:02-CV-823 (NAM/DEP), Dkt. No. 52. The discovery deadline in the two cases was later extended by me on January 24, 2005 to March 31, 2005, and again on March 21, 2005 until April 29, 2005-the currently operative discovery deadline. *See* Civil Action No. 3:02-CV-823 (NAM/DEP) Entries dated January 18, 2005 and March 21, 2005; Civil Action No. 3:02-CV-846 (NAM/DEP) Entries dated January 24, 2005 and March 21, 2005.

FN1. Those scheduling orders superseded earlier case management orders issued in the action by my predecessor, then-Magistrate Judge Gary L. Sharpe.

At intervals over the time period spanning from April 14, 2005 until April 29, 2005, plaintiffs sent defendants various requests for admissions, pursuant to Rule 36 of the Federal Rules of Civil Procedure, seeking admission of sixty-five separately stated facts. Those requests, which followed the service of three prior sets of requests for admissions in this action and additional such requests in a separate but related state court suit, went unanswered by defendants William Brodeur and Northeast Fabricators, LLC, despite the passage of more than thirty days.<sup>FN2</sup> The failure of those defendants to respond to the disputed requests has led plaintiffs' counsel to seek this court's assistance in enforcing them through the entry of an order deeming the facts set forth within them to have been admitted by the defaulting defendants.

FN2. The disputed requests for admissions were directed to defendants William Brodeur and Northeast Fabricators, LLC, who are jointly represented by a single attorney, and Sean McNamee, who is separately represented. Those requests have apparently been answered by defendant

Not Reported in F.Supp.2d, 2005 WL 1774033 (N.D.N.Y.)  
(Cite as: 2005 WL 1774033 (N.D.N.Y.))

McNamee, despite their alleged untimeliness.

## II. DISCUSSION

At the heart of the pending dispute is the requirement under this court's local rules and uniform pretrial scheduling orders that all discovery requests in a case must be served sufficiently in advance of the discovery deadline to allow for service of timely responses prior to the assigned discovery deadline. Northern District of New York Local Rule 16.2; Civil Action No. 3:02-CV-823 (NAM/DEP) Dkt. No. 52, ¶ 6; Civil Action No. 02-CV-846 (NAM/DEP) Dkt. No. 43, ¶ 6. Defendants maintain that these provisions control and render plaintiffs' requests for admissions fatally defective, thereby obviating their need to respond to the untimely requests. Plaintiffs counter that requests for admissions are not discovery devices, and thus may be served at any time prior to trial without regard to the governing uniform pretrial scheduling orders and local rule provisions.<sup>FN3</sup>

<sup>FN3</sup> Plaintiffs also argue that by virtue of their failure to object to the untimeliness of the requests for admissions in issue, defendants have waived their right to resist answering them on this basis. I reject this contention. If, as defendants now argue, the requests for admissions were subject to the governing discovery cut-off provisions, they were void *ab initio* as a result of the fact that they were not served sufficiently in advance of the discovery deadline to permit timely responses, and no objection on this basis was required to preserve the timeliness argument.

\*2 It is true, as plaintiffs argue, that requests for admissions are not discovery devices in the traditional sense. While discovery mechanisms such as requests for document production, interrogatories, and depositions typically seek to uncover information for use in pursuing or defending against a litigated claim, requests for admissions serve the distinctly different purpose of assisting the parties and the court to narrow the factual issues to be presented for determination in connection with such a claim, either on motion or at trial. See *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 77 (N.D.N.Y.2003) (Treece, M.J.); see also *Booth Oil Site Admin. Group v. Safety-Kleen Corp.*, 194 F.R.D. 76, 79

(W.D.N.Y.2000); *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 42 (S.D.N.Y.1997). Rule 36 "is not properly speaking a discovery device, rather it is 'a procedure for obtaining admissions for the record of facts already known' by the seeker." *Dubin v. E.F. Hutton Group Inc.*, 125 F.R.D. 372, 375 (S.D.N.Y.1989) (citing and quoting 8 C. Wright & Miller, *Federal Practice and Procedure* § 2252 (1970)).

Despite this functional differentiation, the question of whether a request for admissions should be considered a discovery device is one on which the courts, including within this circuit, are markedly divided. Contrast *Henry*, 212 F.R.D. at 77 (holding that requests for admissions are not discovery devices); *T. Rowe Price Small-Cap Fund, Inc.*, 174 F.R.D. at 42 (same); *Dubin*, 125 F.R.D. at 375 (same) with *Revlon Consumer Prods., Corp. v. Estee Lauder Cos., Inc.*, No. 00 CIV.5960, 2001 WL 521832, at \*1 (S.D.N.Y. May 16, 2001) ("There should be no doubt that Requests for Admissions pursuant to Fed.R.Civ.P. 36 are a discovery device[.]"). This schizophrenic approach appears to be owing at least in part to placement of the rule governing requests for admissions within the portion of the Federal Rules of Civil Procedure between Rule 26 and Rule 37, a section generally considered as reserved to pretrial discovery. See *Revlon Consumer Prods. Corp.*, 2001 WL 521832, at \*1.

Notwithstanding the uncertainty surrounding whether a request for admissions is properly regarded as a discovery device, the majority of courts which have addressed the precise issue now presented have concluded that requests for admissions should be subject to case management discovery deadlines. *Revlon Consumer Prods. Corp.*, 2001 WL 521832, at \*1 ("Even if Rule 36 RFAs were not a true discovery device, the Court holds that the discovery cut-off date should apply to RFAs as well as more procedural discovery devices."); *Bailey v. Broder*, No. 94 Civ. 2394, 1997 WL 752423, at \*3 (S.D.N.Y. Dec. 5, 1997) ("While there is some disagreement as to the issue among districts across the country, in this circuit there is not, and the courts have consistently held that requests for admission are to be made within the discovery deadline.") (collecting cases); *Giraldi v. Mann*, No. 93-CV-693, 1995 WL 574451, at \*4 (N.D.N.Y. Sept. 22, 1995) (Pooler, J.) ("The magistrate judge acted appropriately in not considering the

Not Reported in F.Supp.2d, 2005 WL 1774033 (N.D.N.Y.)  
(Cite as: 2005 WL 1774033 (N.D.N.Y.))

requests for admissions for two reasons: 1) the requests were not filed until May 6, 1994, after the deadline for discovery had passed[.]; see also Wright, Miller & Marcus, Federal Practice and Procedure § 2257 (2005 Supp.) ("Even though they are not technically discovery requests, requests for admissions have been held subject to discovery cut off dates."). But see Greenfield v. Mem'l Sloan Kettering Hosp., No. 95 Civ. 7658, 2000 WL 351395, at \*5 (S.D.N.Y. Apr. 5, 2000) ("There is apparently no clearly defined precedent [on the question of whether requests for admissions are governed by discovery deadlines] from the Second Circuit [.]"). Having carefully examined the conflicting authority regarding this issue, I find that the interests of promoting orderly and efficient litigation are best served by subjecting requests for admissions to case management discovery deadlines, and therefore join those several courts which have adopted this position. And, from this finding it follows that requests for admissions are also included among the devices contemplated under Local Rule 16.2 as having to be served sufficiently in advance of the prescribed discovery cutoff to permit timely responses to be served prior to that deadline.

\*3 Admitting of some ambiguity surrounding the issue, I am tempted to overlook the untimeliness of the requests in issue and to require defendants to provide responses to those requests, following District Judge Thomas Duffy's reasoning in *Greenfield*, based upon his perception in that case that the question of whether requests for admissions were subject to the assigned discovery deadline had been left unaddressed by the court when discussing scheduling issues. 2000 WL 351395, at \*5. Given the extent of discovery demands previously served by the plaintiffs in this case and the related state court action, however, as well as my review of the disputed requests, which are both numerous and seem to extend in scope well beyond what I would expect as being necessary to accomplish the potentially productive purpose to be served by Rule 36, I choose not to exercise my discretion to overlook the untimeliness of those requests. Based upon my extensive involvement in this case, I believe that all parties have had a fair and adequate opportunity to engage in pretrial discovery, and to prepare for motion practice and for trial.

### III. SUMMARY AND ORDER

The desirable ends of promoting orderly and ef-

ficient litigation of matters pending in this court are best served by treating requests for admissions, though not discovery devices in the traditional sense, as being subject to the court's requirement that discovery in an action be completed on or before an assigned deadline, and additionally that all discovery requests be served sufficiently in advance of that deadline to permit timely responses before the assigned discovery cutoff. Accordingly, plaintiffs' request for an order deeming the facts set forth in the five sets of requests for admissions now in dispute to have been admitted by the defendants will be denied, and defendants' cross-motion for a protective order will be granted.

Based upon the foregoing, it is hereby

ORDERED, that plaintiffs' request pursuant to Rule 36 of the Federal Rules of Civil Procedure for a declaration that the facts set forth in the five requests for admissions served on and after April 14, 2005 be deemed admitted by the defendants (02-CV-823, Dkt. No. 100) is DENIED; and it is further

ORDERED, that defendants' cross-motion for a protective order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, excusing them from the requirement of responding to the disputed request for admissions on the basis of their untimeliness (02-CV-823, Dkt. No. 105) is hereby GRANTED; and it is further

ORDERED, that the clerk is directed to promptly forward copies of this order to the parties' respective attorneys by electronic means.

N.D.N.Y., 2005.

Brodeur v. McNamee

Not Reported in F.Supp.2d, 2005 WL 1774033  
(N.D.N.Y.)

END OF DOCUMENT



Not Reported in F.Supp.2d, 2007 WL 4409781 (M.D.Fla.)  
(Cite as: 2007 WL 4409781 (M.D.Fla.))

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., Or-  
lando, FL, for Plaintiff.

C. Everett Boyd, Jr., Dean Bunch, Sutherland, Asbill  
& Brennan, LLP, Tallahassee, FL, for Defendant.

### ORDER

MARK A. PIZZO, United States Magistrate Judge.

\*1 THIS CAUSE is before the Court on Plain-  
tiff's Motion to Compel Proper Responses to Plain-  
tiff's Second Request to Produce (doc. 25) and De-  
fendant'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

Not Reported in F.Supp.2d, 2007 WL 4409781  
(M.D.Fla.)

END OF DOCUMENT

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

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 <sup>FN1</sup>; (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.

<sup>FN1</sup>. 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 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 ser-

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

vices. 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*

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 neces-



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

sary 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 preparation 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 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 dis-

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

covery 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. 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 entirety.

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 circumstances 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

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

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' 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 in-

formation 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

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

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 requests 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



FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2008 MAY 15 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)

**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.

**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 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.

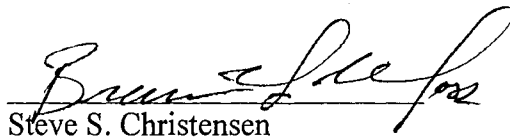
APPROVED and SO ORDERED this 4th day of Jan, <sup>2008</sup>~~2007~~

BY THE COURT:

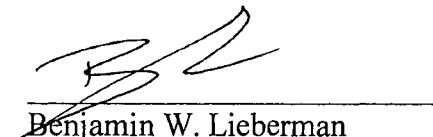
  
Claudia Jayore  
Fourth District Court

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](mailto:ssc@hclawfirm.net); [bmoss@hclawfirm.net](mailto:bmoss@hclawfirm.net); [jsteele@hclawfirm.net](mailto:jsteele@hclawfirm.net); and for Defendants: [bwl@bmgttrial.com](mailto:bwl@bmgttrial.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*

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.



**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

---

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.

# **COURT RECORD (CASE FILINGS)**

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

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 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 surreply (Doc. # 186 in No. 98-4226) be hereby denied.

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

IT IS SO ORDERED.

D.Kan., 2001.  
Epling v. UCB Films, Inc.  
Not Reported in F.Supp.2d, 2001 WL 584355  
(D.Kan.)

END OF DOCUMENT

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

the plaintiffs. Plaintiff Hladky contends that the magistrate erred in reaching 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.

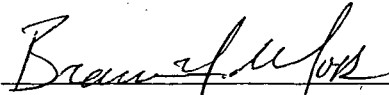
With the court's decision reversing the magistrate's award of sanctions, the court finds that this motion is moot.

#### 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.

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)  
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)



---

FILED IN  
4<sup>TH</sup> 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)  
**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.

**PLAINTIFF'S MOTION FOR FURTHER  
DISCOVERY**

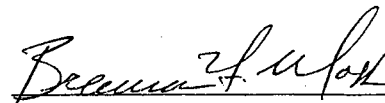
Civil No. 070403005

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.

DATED this 12 day of May, 2008.

HIRSCHI CHRISTENSEN, PLLC



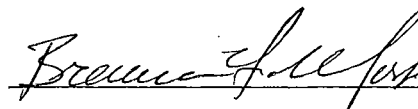
STEVE S. CHRISTENSEN

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@bmgtrial.com](mailto:bwl@bmgtrial.com)



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)  
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.

**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



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.

**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.

**FILED**  
OCT 02 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**PROPOSED BY:**

Ben W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN, P.C.  
1390 South 1100 East, Suite 201  
Salt Lake City, Utah 84105  
Tel: (801) 906-5551  
Fax: (800) 886-3653  
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.

**ORDER OF COURT REGARDING  
PENDING MOTIONS**

Civil No. 070403005

Judge Claudia Laycock

---


This matter comes before the Court on five pending motions: (1) Defendants' Motion for a Protective Order; (2) Plaintiff's Motion to Amend Scheduling Order; (3) Plaintiff's Motion for Rule 56(f) Continuance; (4) Defendants' Motion to Strike; and (5) Defendants' Motion for Summary Judgment. Upon consideration of said motions, based upon the briefs, argument of counsel, and the entire record in this case, and as stated in further detail on the record at the August 7, 2008 hearing, the Court rules as follows:

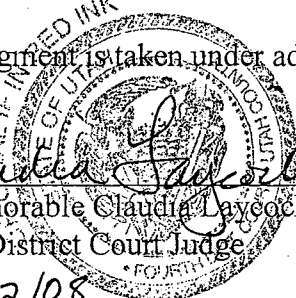
1. Defendants' Motion for a Protective Order is **GRANTED**. Defendants need not respond to written discovery served by Plaintiff on the date of the fact discovery cut-off. All discovery was to be completed by that date, and thus because responses would have been due after the fact discovery cut-off, requests are untimely.

2. Plaintiff's Motion to Amend Scheduling Order is **GRANTED IN PART AND DENIED IN PART**. To the extent this motion requested modification of the fact discovery deadline, it is denied for failure to show good cause. To the extent it requested modification of the expert discovery deadline, the motion is granted. The expert discovery deadlines are reset as follows:

Plaintiff's Expert Disclosures and Reports:	September 8, 2008
Defendants' Expert Disclosures and Reports:	October 6, 2008
Rebuttal Reports:	October 20, 2008
Expert Deposition Deadline:	November 7, 2008

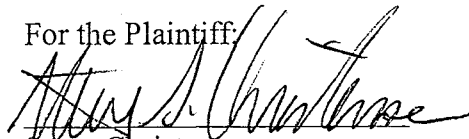
3. Plaintiff's Motion for a Rule 56(f) Continuance is **DENIED** for failure to show good cause.
4. Defendants' Motion to Strike is **GRANTED**. Exhibits 5 and 6 to Plaintiff's Memorandum in Opposition to Summary Judgment are stricken pursuant to Utah R. Civ. P. 37(f).
5. Defendants' Motion for Summary Judgment is taken under advisement.

  
The Honorable Claudia Laycock  
Fourth District Court Judge  
10/2/08

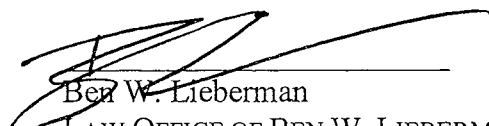


Agreed as to form:

For the Plaintiff:

  
Steve Christensen  
Brennan Moss  
HIRSCHI CHRISTENSEN, PLLC

For the Defendants:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of August, 2008, I sent a copy of **ORDER OF COURT REGARDING PENDING MOTIONS** 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
-

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.

**PLAINTIFF'S EXPERT WITNESS  
REPORT**

Civil No. 070403005

Judge Laycock

Plaintiff Kim Dahl does hereby submit the following expert witness report:

1) Martin Olsen, 8142 S State Street, Midvale, Utah 84047, 801-255-8067.

a) The witness will testify as to the standard of care owed to a client by an attorney engaged in private family law practice.

b) The witness is expected to give an opinion that Plaintiff was damaged, the causation of the damages, and the extent of the damages in this case. He will also testify that the Defendant



failed to meet its professional duty of care. He may offer rebuttal testimony to any evidence asserted by the Defendants.

c) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, and his knowledge of the accepted standards of care among private practitioners of family law in the state of Utah.

d) The witness is an attorney who has engaged in the private practice of family law in the state of Utah for seventeen (17) years.

e) The witness will charge \$225.00 an hour for his study and \$225.00 an hour for his testimony.

f) Any deposition given by the witness will be produced if not included on his c.v.

2) Clark Nielsen, 215 S State Street, Suite 650, Salt Lake City, Utah 84111, 801-413-1600.

a) The witness will testify as to the standard of care owed to a client by an attorney engaged in private family law practice.

b) The witness is expected to give an opinion that Plaintiff was damaged, the causation of the damages, and the extent of the damages in this case. He will also testify that the Defendant failed to meet its professional duty of care. He may offer rebuttal testimony to any evidence asserted by the Defendants.

c) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, and his knowledge of the accepted standards of care among private practitioners of family law in the state of Utah.

d) The witness is an attorney who has engaged in the private practice of family law in the state of Utah for thirty two (32) years.

e) The witness will charge \$225.00 an hour for his study and \$225.00 an hour for his testimony.

f) Any deposition given by the witness will be produced if not included on his c.v.

3) John Brough, Clift Building, Suite 310, 10W. Broadway Salt Lake City, UT 84101.

a) The witness will testify as to the amount of all damages suffered by plaintiff in this case.

He may offer rebuttal testimony to any evidence asserted by the Defendants.

b) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, and his knowledge of accounting practices.

c) The witness is expected to testify as to the amount and extent of economic damages suffered by the Plaintiff in this case, as well as the methods for computation of these damages.

d) The witness is an economic and valuation expert who has testified previously as an expert witness.

e) The witness will charge \$240.00 an hour for his study and preparation and \$240.00 for his testimony.

f) Any deposition given by the witness will be produced if not included on his c.v.

4) Mohammad Alsolaimain, M.D., 1055 N. 500 W. Provo, UT 84604, (801) 374-1268.

a) The witness will testify as to the causation of physical injuries suffered by the Plaintiff in this case. He may offer rebuttal testimony to any evidence asserted by the Defendants.

b) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, his observation and treatment of Plaintiff, and his knowledge of medicine.

c) The witness is a physician licensed to practice medicine in the state of Utah.

d) The witness' fees for testimony and study are currently unknown.

e) Any deposition given by the witness will be produced if not included on his c.v.

5) Lisa Stout, M.D., 181 E. 5600 S., Suite 130 Murray, UT 84107, (801) 266-8664.

a) The witness will testify as to the causation of physical injuries suffered by the Plaintiff in this case. She may also offer rebuttal testimony to any evidence asserted by the Defendants.

b) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, her observation and treatment of Plaintiff, and her knowledge of medicine.

c) The witness is a physician licensed to practice medicine in the state of Utah.

d) The witness' fees for testimony and study are currently unknown.

e) Any deposition given by the witness will be produced if not included on his c.v.

6) Alan Jeffery, M.D., M.D., 1055 N. 500 W. Provo, UT 84604, (801) 374-1268.

a) The witness will testify as to the causation of physical injuries suffered by the Plaintiff in this case. He may offer rebuttal testimony to any evidence asserted by the Defendants.

b) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, his observation and treatment of Plaintiff, and his knowledge of medicine.

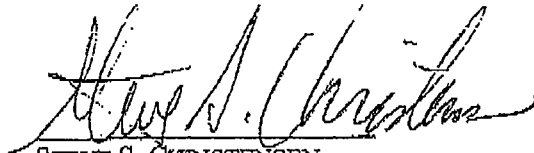
c) The witness is a physician licensed to practice medicine in the state of Utah.

d) The witness' fees for testimony and study are currently unknown.

e) Any deposition given by the witness will be produced if not included on his c.v.

DATED this 8<sup>th</sup> day of September, 2008.

HIRSCHI CHRISTENSEN, PLLC



STEVE S. CHRISTENSEN

BRENNAN H. MOSS

2008 OCT -21 P 11:28

*Attorneys for Plaintiff Kim Dahl*

1957

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.*

///

///

///

///

**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.

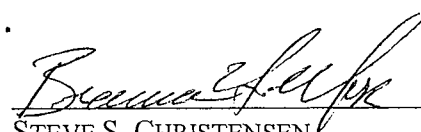
**REQUEST NO. 15:** Produce all documents relating to your answer of interrogatory number 10. Answers to the above discovery will facilitate a fair trial by the full disclosure of all relevant testimony and evidence. Therefore, the Court should deny Defendants' Motion for a Protective Order.

### 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



## 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.

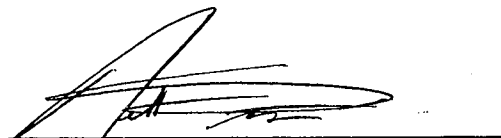
Importantly, no trial has been set in instant case. Nor has the deadline for discovery of expert witnesses concluded. Accordingly, Defendants are not prejudiced in the slightest by Plaintiff’s expert disclosures. This is especially true given that Plaintiff has agreed to supplement to disclosures. Accordingly,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

A handwritten signature in black ink, appearing to read "Steve S. Christensen", is written over a horizontal line.

Steve S. Christensen

Jeffrey J. Steele

Brennan H. Moss

*Attorneys for Plaintiff*

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY  
109 JAN 23 A 10:49

Steve S. Christensen (U.S.B. No. 6156)  
Matthew B. Anderson (U.S.B. No 9877)  
Steven A. Clayton (U.S.B. No. 10448)  
**HIRSCHI CHRISTENSEN, PLLC**  
Attorneys for Plaintiff  
136 East South Temple, Suite 1400  
Salt Lake City, Utah 84111  
Telephone: (801) 303-5800  
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.

**MOTION TO ALLOW TESTIMONY OF  
EXPERT WITNESSES AT TRIAL**

Civil No. 070403005

Judge Laycock

Plaintiff, by and through her Counsel of Record, respectfully moves this Court to Allow Testimony of Her Expert Witnesses at Trial. The grounds for this Motion, as more fully set forth in an accompanying memorandum, filed concurrently herewith, is that Plaintiff has produced the report of Martin Olsen to Defendant prior to trial setting and there is sufficient time to depose this witness. Further, the Plaintiff only had one month in which to prepare an expert witness report from the time of the court's order on August 7, 2008 extending the scheduling order. As there has not yet been a trial date set, no prejudice will result to the Defendants should the Court allow an extension of time.

DATED this 23<sup>rd</sup> day of January, 2009.

**HIRSCHI CHRISTENSEN, PLLC**

A handwritten signature in black ink, appearing to read "Steve S. Christensen", written over a horizontal line.

**Steve S. Christensen**  
*Attorney for Plaintiff*



4TH DISTRICT COURT  
PROVO DEPARTMENT

2009 JAN 25 P 6:34

Steve S. Christensen (U.S.B. No. 6156)  
Matthew B. Anderson (U.S.B. No. 9877)  
Steven A. Clayton (U.S.B. No. 10448)  
**HIRSCHI CHRISTENSEN, PLLC**  
136 East South Temple, Suite 1400  
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; BRIAN C.  
HARRISON, P.C.

Defendants.

**PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF HER MOTION TO ALLOW  
TESTIMONY OF EXPERT WITNESSES  
AT TRIAL**

Civil No. 070403005

Judge Laycock

Plaintiff, by and through her Counsel of Record, respectfully submits this Memorandum in Support of Her Motion to Allow Testimony of Expert Witnesses at Trial.

**INTRODUCTION AND STATEMENT OF FACTS**

On September 8, 2008, the Defendants moved this Court to Strike the Plaintiff's Designation of Expert Witnesses and accompanying Expert Witness Reports. This Court later granted the Defendants' motion. The Plaintiff's designation of expert witnesses and expert

witness reports were due on September 8, 2008, pursuant to an amended scheduling order. The original scheduling order required submission of the expert witness reports by May 5, 2008. On August 7, 2008, the Court granted the Plaintiff's motion for an extension of time to file expert witness reports and designations, setting the deadline as September 8, 2008. Plaintiff produced a designation of witnesses attached hereto as Exhibit A on September 8, 2008. Plaintiff also produce an expert witness report on September 8, 2008. Plaintiff produced a supplemental expert witness report on December 12, 2008 for Martin Olsen as requested by opposing counsel, attached as Exhibit C hereto. The Court has not yet scheduled a trial date in this matter.

#### ARGUMENT

***This Court Should Grant an Extension of Time to File Expert Witness Disclosures  
because no Prejudice Will Result***

Trial Court's have broad discretion in discovery matters, including the extension of deadlines. This discretion, however, must be guided by, and comply with the general policies and purposes underlying discovery. 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 extending the time in which the Plaintiff may make expert witness disclosures, 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. Accordingly, this Court should exercise its discretion in a manner most calculated to lead to a fair trial.

The central focus of inquiry in this matter is to ensure a fair trial to both parties. Accordingly, the Court, when determining whether to allow expert disclosures past deadlines, should focus its inquiry on prejudice to the opposing party. If there is little or no prejudice to the opposing party from allowing expert witness disclosures, the Court's interest in affording a fair trial favors fully exposing facts, evidence, and information that will most accurately resolve the parties' dispute.

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 *Christenson* 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.

The facts in this case demonstrate that this Court should exercise its discretion to allow Plaintiff to provide expert witness testimony at trial. A liability expert, Martin Olsen has produced a supplemental report. Further a damage witness, Clark Nielsen is willing to produce a supplemental report. The other experts were not retained in the course of litigation and are not

required to file further reports unless the court so orders. The court has not ordered reports from the experts who were not retained for litigation.

In this case there has not yet been a trial date set. Accordingly, the Defendants would be afforded sufficient time, opportunity, and information to prepare fully for trial. In *Christenson*, the Utah Supreme Court held that a disclosure as late as 5 days previous to trial was sufficient because the opposing party had access informally to the witness and had an opportunity to depose the witness. Plaintiff does not anticipate providing expert witness disclosures as late as 5 days on the eve of trial. In fact, given the current state of litigation, the Defendants would likely have months to review expert disclosures, and prepare strategy accordingly.

The Plaintiff, moreover, has not been dilatory. The Plaintiff was unable to meet the original deadline because the underlying action is extremely complex and is believed to comprise 8 volumes in the court's file. Further, because a Motion for Summary Judgment was pending, it was unclear whether the expense of expert review of the file would be useful for the client. If this court requires further disclosure, an appropriate amount of time should be permitted for this purpose.

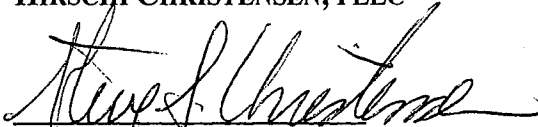
The Plaintiff was unable to prepare expert disclosures upon the second deadline, moreover, because it had insufficient time, and was uncertain as to whether it could present these disclosures in the first place. Accordingly, it would be both fair and equitable for this Court to allow an extension of time in which to file the Plaintiff's expert disclosures.

#### CONCLUSION

Because no prejudice would result to the Defendant, and because the Plaintiff has not yet had a full opportunity to prepare expert disclosures, this Court should allow Plaintiffs experts which were designated on September 8, 2008 to testify at trial.

DATED this 23<sup>rd</sup> day of January, 2009.

HIRSCHI CHRISTENSEN, PLLC



Steve S. Christensen

Matthew B. Anderson

Steven A. Clayton

*Attorneys for Plaintiff*

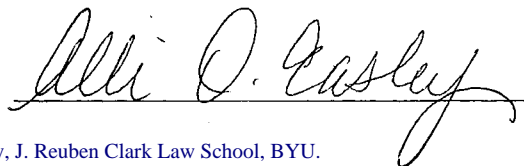
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **PLAINTIFF'S**

**MEMORANDUM IN SUPPORT OF HER MOTION TO ALLOW TESTIMONY OF EXPERT WITNESSES**

**AT TRIAL** was hand delivered on this 23<sup>rd</sup> day of January, 2009, to the following:

Benjamin W. Lieberman (#11456)  
LAW OFFICE OF BEN W. LIEBERMAN, P.C.  
1371 East 2100 South, Suite 200  
Salt Lake City, UT 84105  
Email: [ben@bwlw.com](mailto:ben@bwlw.com)  
*Attorney for Defendants*



**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*

---

**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.

**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

---

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.

### **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<sup>00</sup>, which the Court finds is the amount of Defendants' reasonable attorneys' fees and costs incurred in defending against

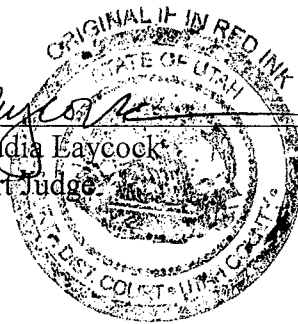
*filed in and initialed in*

20195

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 Laycock  
Fourth District Court Judge



Agreed as to form:

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

**FILED**

**JAN 06 2010**

**4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY**

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

**KIM DAHL,**

Plaintiff,

vs.

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

Defendants.

**FINDINGS OF FACT and  
MEMORANDUM DECISION**

CASE NO. 070403005

DATE: 6 January 2010

Judge Claudia Laycock

Division 3

This matter came before the court for a two-day bench trial on October 26 and 27, 2009, which was the first phase in a two-part bifurcated trial. In her complaint, the plaintiff, Kim Dahl ("Mrs. Dahl"), brought three causes of action based on legal malpractice, asserting that the defendants, Brian C. Harrison and Brian C. Harrison, P.C. ("Mr. Harrison"), breached professional, fiduciary, and contractual duties. This first phase of trial was limited to issues concerning liability, specifically, breach and causation.

At the conclusion of the plaintiff's case-in-chief, Mr. Harrison moved for judgment as a matter of law. The court heard arguments related to the motion, reserved jurisdiction to rule on the motion later, and asked the parties for further briefing on the issue raised—specifically, whether the plaintiff's failure to present any evidence or expert testimony regarding the standard of care in this legal malpractice trial was fatal to the plaintiff's claims. Mr. Harrison then presented his case, and the court heard the rest of the evidence and closing arguments.

Having considered the testimony, evidence, arguments presented at trial, and the parties' additional briefing related to Mr. Harrison's motion for judgment as a matter of law, the court is ready to rule in this matter. For convenience, and because of the overarching issue regarding expert testimony, the court combines the findings of fact related to the motion for judgment as a matter of law and the overall issues from trial.

#### RELEVANT PROCEDURAL HISTORY

1. Mrs. Dahl filed her complaint in this matter on October 11, 2007.
2. At a hearing on August 7, 2008 the court granted Mrs. Dahl's request for additional time to file her expert disclosures and reports. The new deadline established by the court was September 8, 2008.
3. On September 8, 2008 Mrs. Dahl filed her *Designation of Expert Witnesses*, which included the following names (along with addresses and telephone numbers): Martin Olsen, Clark Nielsen, John Brough, Mohammad Alsolaimain, M.D., Lisa Stout, M.D., and Alan Jeffery, M.D.
4. On that same date Mrs. Dahl filed her *Expert Witness Report*. With regard to Martin Olsen, she wrote:
  - (a) The witness will testify as to the standard of care owed to a client by an attorney engaged in private family law practice.
  - (b) The witness is expected to give an opinion that Plaintiff was damaged, the causation of the damages, and the extent of the damages in this case. He will also testify that the Defendant failed to meet its professional duty of care. He may offer rebuttal testimony to any evidence asserted by the Defendants.
  - (c) The witness' opinions will be based upon a review of all information obtained through discovery, the testimony of the parties, and his knowledge of

the accepted standards of care among private practitioners of family law in the state of Utah.

(d) The witness is an attorney who has engaged in the private practice of family law in the state of Utah for seventeen (17) years.

(e) The witness will charge \$225.00 an hour for his study and \$225.00 an hour for his testimony.

(f) Any deposition given by the witness will be produced if not included on his c.v.

5. In the same *Expert Witness Report*, Mrs. Dahl used exactly the same words to describe Clark Nielsen's expert testimony, except that he had practiced for 32 years. No additional information was included for either Mr. Olsen or Mr. Nielsen.

6. In the same *Expert Witness Report*, Mrs. Dahl listed no other experts who would testify regarding (1) the appropriate standard of care owed to a client by an attorney engaged in private family law practice, (2) causation, and (3) damages.

7. Mr. Harrison filed his *Motion to Strike Plaintiff's Expert Disclosures and Reports Pursuant to Utah R. Civ. P. 37(f)* on September 18, 2008. After briefing was complete, the court heard oral arguments on the motion on December 16, 2008.

8. At the December 16, 2008 hearing the court ruled from the bench, granting the *Motion to Strike*, finding that the disclosures and reports (as quoted above) did not comply with the requirements of Utah R. Civ. P. 26(a)(3)(B).

9. After dealing with Mrs. Dahl's objections to the proposed order, the court signed the *Order Granting Motion to Strike Plaintiff's Expert Disclosures and Reports* on March 5, 2009.

10. In the meantime, on January 23, 2009 Mrs. Dahl had filed her *Motion to Allow Testimony of Expert Witnesses at Trial*. After briefing was complete, the court heard oral arguments on the motion on March 12, 2009.

11. At the March 12, 2009 hearing the court ruled from the bench, denying the *Motion to Allow Testimony of Expert Witnesses at Trial*, finding that Mrs. Dahl's motion was essentially a motion to reconsider the court's prior ruling on the defendants' *Motion to Strike*. The court additionally found (1) that Mrs. Dahl had cited no grounds which justified reconsideration of the court's prior ruling on the *Motion to Strike*, (2) that there was no reason to grant her more time to disclose expert witnesses, and (3) that, under Rule 37 and Mrs. Dahl's failure to properly disclose her expert witnesses, there was no reason to allow her to introduce expert testimony at trial. Finally, the court found that Mrs. Dahl's motion was frivolous and awarded attorney's fees to Mr. Harrison.

12. The court signed the proposed findings, conclusions, and order denying Mrs. Dahl's *Motion to Allow Testimony of Expert Witnesses at Trial* on April 14, 2009.

13. Pursuant to the court's orders, the trial went forward on October 26–27, 2009 without any expert testimony from Mrs. Dahl's proposed expert witnesses re: the standard of care, causation, and damages.<sup>1</sup>

---

<sup>1</sup>The court also struck other expert witnesses through the above-mentioned rulings.

## THE COURT'S ASSESSMENT OF CREDIBILITY

After reviewing the testimony of the witnesses at trial and considering the credibility of the witnesses, the court finds that the testimony of the defendants' witnesses is generally more credible, consistent, and trustworthy. The court finds the testimony of Samantha Stokes to be impartial, credible, and extremely helpful in assessing Mrs. Dahl's and Mr. Harrison's credibility. Ms. Stokes' testimony was consistent with Exhibit I, her handwritten notes to Mr. Harrison (as dictated by Mrs. Dahl), which were written at 4:10 p.m. on November 2, 2006, after the hearing before Commissioner Patton.

These handwritten notes contradict Mrs. Dahl's testimony that, after talking to Mr. Harrison after the November 2, 2006 hearing, she decided to fire him. The court is persuaded that Mrs. Dahl was content with Mr. Harrison's efforts at that hearing and that she wanted Mr. Harrison to continue as her attorney—even asking him to work on her case for 4–5 hours per day. Therefore, the following findings of fact reflect the court's findings that Ms. Stokes' and Mr. Harrison's memories were more accurate than Mrs. Dahl's memory and that they were more credible witnesses.

## FINDINGS OF FACT

1. This action for legal malpractice arises from an underlying divorce action between Dr. Charles Dahl ("Dr. Dahl") and Mrs. Dahl, which Dr. Dahl filed on October 24, 2006. The Dahls have two children, a daughter (now age 14) and a son (now age 9). The divorce action is entitled *Dahl v. Dahl*, case no. 064402232.

2. Along with the divorce petition, Dr. Dahl filed a motion for an ex parte temporary restraining order ("TRO"), alleging that Mrs. Dahl was putting the Dahls' young children in danger and requesting exclusive temporary custody. In support thereof, Dr. Dahl filed a 65-paragraph affidavit including allegations that Mrs. Dahl was engaging in physical and emotional abuse of the children.

3. In his affidavit, Dr. Dahl made many allegations about Mrs. Dahl's treatment of the children. The following list is representative of his allegations:

a. On October 11, 2006 Mrs. Dahl said to her daughter, "Pick this stuff up, I am not your damn nigger."

b. Previous to that date, Mrs. Dahl had stated to her daughter that she would "cram your homework up your damn ass."

c. Mrs. Dahl had given her daughter a prescription medication (amitriptylline) for restless leg syndrome. This medication had never been prescribed for the daughter, nor had any doctor ever diagnosed the daughter with restless leg syndrome. Mrs. Dahl, when confronted by Dr. Dahl, had refused to stop giving her daughter the medication. Mrs. Dahl also increased or changed her daughter's various medications without a doctor's order.

d. The Dahls' daughter reacted to her mother's verbal abuse on July 24, 2006 by stating that she wanted to kill herself.

e. Mrs. Dahl had also stated that she wanted to kill herself during that same episode.



f. On December 25, 2005 Mrs. Dahl's anger at Dr. Dahl resulted in her repeated use of foul language in front of the children and her destruction of several drinking glasses, a glass clock, and a computer keyboard.

g. On March 16, 2006 Mrs. Dahl had called their daughter a "shithead and a jerk," which was followed by Mrs. Dahl slapping the child in the face. Their son also reported to Dr. Dahl that he had seen Mrs. Dahl slap his sister 8 times.

h. Dr. Dahl claimed that his wife's "abuse and outbursts are increasing in number and intensity and [he was] afraid for the safety and welfare of [their] children."

i. Mrs. Dahl required her son to sleep in the same bed with her in a bedroom separate from where Dr. Dahl slept.

j. Their daughter's psychiatrist had advised Dr. Dahl to remove the Dahls' daughter from Mrs. Dahl's presence because the present circumstances were harming the daughter.

4. Dr. Dahl also filed an order to show cause regarding temporary physical custody, supervised visitation, temporary use and possession of the marital home, restraint of Mrs. Dahl regarding removal of the children from school, and appointment of a custody evaluator. The same affidavit supported his order to show cause.

5. The TRO motion and the order to show cause were granted, and on October 24, 2006 Judge James R. Taylor issued the *Ex Parte Restraining Order* restraining Mrs. Dahl from any contact with the children. A hearing on the ex parte order and the order to show cause was set for November 2, 2006 (the "November 2 hearing") before Commissioner Tom Patton of the Fourth District Court. The ex parte order specifically stated:

(a) [Mrs. Dahl is] hereby restrained from removing the minor children from the temporary care, custody and control of the Petitioner.

(b) [Mrs. Dahl is] hereby restrained from removing either minor child from his/her school, for any reason and restrained from contacting the minor children at his/her school.

6. Mrs. Dahl was served with the complaint, TRO, order to show cause and other documents on Wednesday, October 25, 2006. She first met with and retained Mr. Harrison to represent her in the divorce and custody proceedings on Thursday, October 26, 2006. She had already been served with the above-mentioned documents. Mrs. Dahl paid Mr. Harrison \$5,000 as a retainer and signed a retainer agreement. No copy of the retainer agreement was produced during discovery or during trial.

7. Mr. Harrison graduated from the law school at Brigham Young University in 1976 and has been practicing law since that same year. His practice now consists of approximately 50% domestic law. About 80% of his domestic practice clients are females.

8. At the initial appointment, Mr. Harrison and Mrs. Dahl discussed the allegations made by Dr. Dahl in his affidavit, her admission that she had occasionally used bad language with the children, and that she had struck the children. She told Mr. Harrison that when she struck the children they had "deserved it." She admitted that she had made the statement found in paragraph 8 of the affidavit: "Pick this stuff up, I am not your damn nigger." He advised her that this behavior had to stop and recommended that she enroll in anger management classes and parenting classes to improve her position in the custody case.

9. Mrs. Dahl and Mr. Harrison also discussed the following information: the children's dates of birth, their ages, the date of the marriage, the parties' assets (real and personal property),

medical insurance, pension and retirement funds, possible child support and alimony amounts, and the documents that had been filed by Dr. Dahl.

10. Mr. Harrison advised Mrs. Dahl that he wanted to continue the November 2 hearing, so that she could enroll in the classes he had recommended and so that he could be better prepared for the hearing. Mrs. Dahl agreed to this plan. She viewed Mr. Harrison as an expert, had retained him to get her children back, and intended to follow his advice in order to accomplish that goal.

11. After the appointment ended, Mr. Harrison studied Dr. Dahl's affidavit in order to formulate a plan for Mrs. Dahl's defense against her husband's claims. He concluded that Mrs. Dahl would never get the children back into her custody unless she changed her behavior. Based upon his years of experience in representing female divorce clients, Mr. Harrison believed that Commissioner Patton and the judges at the Fourth District Court would not give the children to Mrs. Dahl under these circumstances. He wanted time to rehabilitate Mrs. Dahl through the classes he had suggested. He believed that, through the classes, Mrs. Dahl would get the children back, especially since she had been a full-time stay-at-home mother and she claimed that Dr. Dahl was a workaholic.

12. Mr. Harrison spoke with Rose Blakelock ("Ms. Blakelock"), Dr. Dahl's attorney, by telephone on that same date, informing her that he desired to continue the November 2 hearing. They also discussed the possibility of "fashioning" a temporary agreement at the November 2 hearing, but did not discuss any terms.

13. Mr. Harrison also met with Mrs. Dahl on Friday, October 27, 2006. Among other topics, he asked her if she had made arrangements to take the classes; she responded that she had made some initial calls in that regard.

14. He met again with Mrs. Dahl on Monday, October 30, 2006. On that date she brought him a suitcase full of financial documents, including tax returns and other financial records. He talked to her regarding retaining James Blaylock as an accountant to work with them on the case. He believes that he had Mrs. Dahl take the suitcase of documents to Mr. Blaylock; he does not remember taking the suitcase to Mr. Blaylock himself.

15. During a subsequent meeting on October 31, 2006, Mr. Harrison also spoke with Mrs. Dahl about Ms. Blakelock's acquiescence to the continuance of the November 2 hearing. They also discussed leaving temporary custody with Dr. Dahl, leaving the children in the marital home, and mutual restraint by the parties regarding disparaging remarks. Mr. Harrison also reminded Mrs. Dahl how important it was to rehabilitate herself regarding her wrongful conduct with the children and that she needed to change for the benefit of the children. Mrs. Dahl did not object to the proposed terms of the stipulation for the November 2 hearing. She also understood that she needed to change her conduct with the children. She understood that this was a temporary stipulation which would give her time to enroll in her classes, give Mr. Harrison time to prepare, and would continue the hearing for just two weeks. Mrs. Dahl agreed that this course of action was wise. Mr. Harrison and Ms. Blakelock were still discussing issues regarding supervised visitation, phone contact with the children, and the administration of the children's medications by Dr. Dahl.

16. During that same meeting, Mr. Harrison also informed Mrs. Dahl that there would be additional legal fees and that she needed to bring in more money. She brought in \$7,000, part of which was refunded later.

17. On Tuesday, October 31, 2006 Mr. Harrison spoke with Ms. Blakelock again. They discussed Mr. Harrison's desire for a continuance, as well as the following: temporary custody with Dr. Dahl, temporary possession of the marital home by Dr. Dahl, temporary supervised visitation, restraining derogatory remarks by the parties about the other party, the possibility of Mrs. Dahl taking care of the children in the home while Dr. Dahl was at work, and temporary financial support issues. Ms. Blakelock agreed that she would try to get a support check for Mrs. Dahl from her client.

18. Mr. Harrison also spoke with Mrs. Dahl by telephone on Wednesday, November 1, 2006 about the proposed stipulation and its various elements. He explained that this was the stipulation that he intended to enter into at the November 2 hearing. This conversation lasted about 15–20 minutes. He told Mrs. Dahl that she did not have to be present at the hearing and that he could act on her behalf without her presence. She did not want to come to the hearing; he told her that the next hearing would be the important hearing for her to attend. Mrs. Dahl was happy that he was going to try to get some additional provisions for her benefit.

19. On November 1, 2006 Mr. Harrison sent a \$3,000 retainer to Mr. Blaylock, the accountant.

20. On Thursday, November 2, 2006 Mr. Harrison arrived early for the hearing. He met with Ms. Blakelock, who brought with her a typed stipulation, to which Mr. Harrison and

Ms. Blakelock added additional language regarding visitation, telephone contact, and the administration of the children's medications. The handwriting on the documents (other than the signatures) is Ms. Blakelock's writing. The two attorneys signed the *Stipulation* and presented it to Commissioner Patton for his approval.

21. Among other provisions, the *Stipulation* included the following language:

1. Petitioner recognizes that the Respondent needs additional time to prepare for any hearings regarding temporary custody.
2. Therefore, the parties agree that the Petitioner shall be awarded the temporary physical custody of the minor children. The Respondent has not yet answered the Complaint nor the Affidavit of the Petitioner regarding his request for temporary custody and therefore, by making this agreement, neither party is relinquishing his/her claims regarding the issue of custody during the pendency of the proceedings.
3. Without an admission of any of the allegations in the Petitioner's Complaint or Affidavit, the parties agree that Respondent shall be awarded supervised visitation with the parties' minor children . . .

...

7a. The Respondent shall be entitled to visit the minor children in the marital home from the time school is out until Petitioner returns home. Respondent shall see the children every other Saturday and Sunday from 9AM-5PM . . .

22. There was no language in the *Stipulation* which referred to the TRO or to a continuance of the TRO.

23. At that hearing Commissioner Patton noted that he had read through all of the documents filed by Dr. Dahl and that this was a matter that could not have been heard in the 15 minutes that had been scheduled that day. The hearing would have taken much more time, in his estimation. He discussed with the attorneys the probable need for more than 15 minutes for the next hearing and urged the attorneys to set the next hearing for an afternoon calendar (3:00 p.m.)

"so that we have enough time to give this the proper consideration." Ms. Blakelock responded

that she and Mr. Harrison understood that “there’s nothing going to be simple about this case, either the finances or the custody . . . And that’s the reason that we—it’s reasonable for Mr. Harrison to be allowed to prepare.” The parties did not schedule the next hearing at that time.

24. Commissioner Patton and Judge Anthony Schofield (through a stamped signature) signed the subsequent order on November 7, 2006. Mr. Harrison also signed that order, approving it as to form. The order included the terms of the *Stipulation* without variation.

25. Immediately after the conclusion of the November 2 hearing, Mr. Harrison called Mrs. Dahl from either the courthouse or his office and reported to her what had happened at the hearing. He went through each of the paragraphs of the *Stipulation* and explained them to Mrs. Dahl. She did not express any opposition to the *Stipulation* he had entered on her behalf.

26. Mrs. Dahl agreed that supervised visitation was a good idea, in that it would protect her from further allegations. She did not object to having Dr. Dahl’s brother act as the supervisor; she thought that he would be good and reasonable. She understood that (1) this *Stipulation* would give Mr. Harrison the time to prepare for a future hearing, (2) that she was giving up nothing by agreeing to these terms, (3) that this *Stipulation* was only temporary, and (4) the future hearing would determine custody and the other provisions on a longer-termed basis.

27. Mrs. Dahl also approved of the paragraph that allowed her to be in the marital home from the time school was out until Dr. Dahl returned home from work. She also did not object to Dr. Dahl administering the medications to the children.

28. During that conversation, Mr. Harrison told Mrs. Dahl to immediately vacate the marital home. She understood and did not oppose that provision of the *Stipulation*.

29. Mr. Harrison's practice was to file a counter-affidavit in response to the opposing party's affidavit. That is what he probably would have done, had he continued to represent Mrs. Dahl. Mr. Harrison believed that he could have gone forward with the hearing on November 2, 2006, but that it was much to Mrs. Dahl's benefit to take the recommended classes and "cure her bad acts" so that she could get temporary custody of her children. He also believed that there would have been a benefit in allowing Mr. Blaylock 2–3 weeks to prepare a financial analysis of the parties' marital estate.

30. At about 4:00 p.m. on November 2, 2006 Mrs. Dahl dropped off more documents (letters from friends about her fitness as a mother) for Mr. Harrison. She spoke to Samantha Stokes, who was the receptionist at the office building in which Mr. Harrison shared/rented office space. Ms. Stokes is not paid directly by Mr. Harrison.

31. At Mrs. Dahl's direction, Ms. Stokes wrote Mr. Harrison the following note (on three post-it-notes):

Brian,  
Kim brought these in—their documents to prove she is a fit mother—and she'll continue to bring documentation in to prove so—so please don't ask her what is this (?) She also wants to know if your still considering taking her on full time ~ she would like a \$ figure of how much it would cost her! She is very serious about this! She brought these in about 4:10 p.m. on 11/2/2006 if you have questions on what I wrote please let me know

~ Samantha



Didn't understand—thought after they were married it was “theirs” so—she will have to pay her husband back—this \$4,000 will go towards the \$5500.00 ~ She wants to enter into a contract where you guarantee 4-5 hrs a day on her case.<sup>2</sup>

32. Mrs. Dahl stood over Ms. Stokes as she wrote the note to Mr. Harrison and even instructed Ms. Stokes to double-underline certain words, as seen above. Ms. Stokes did not find that Mrs. Dahl seemed upset about anything that had happened earlier that day; Mrs. Dahl was only frustrated that Mr. Harrison would not take her case full-time. Mrs. Dahl brought up the topic of full-time representation each time she came into the office.

33. On November 2, 2006 Ms. Blakelock wrote a check for \$4,000 from her trust account to Mrs. Dahl. The “memo” line indicates that it was for “Nov. support.” According to Ms. Blakelock’s letter to Mr. Harrison (dated that same date), she was going to have this check hand-delivered to Mr. Harrison’s office. This is, apparently, the check that Mrs. Dahl did not take with her, according to the note from Ms. Stokes. Mr. Harrison mailed the \$4,000 check to Mrs. Dahl on November 9, 2006.

34. Mr. Harrison also spoke with Mrs. Dahl on Friday, November 3, 2006. They discussed visitation for the weekend. He reviewed each of the paragraphs of the *Stipulation* with her.

35. On Monday, November 6, 2006 Mr. Harrison spoke with Mrs. Dahl. She did not advise him that there had been any problems with Dr. Dahl and the children over the weekend.

---

<sup>2</sup>The court has copied Ms. Stokes’ notes without correction of spelling and punctuation errors.

He later spoke with Ms. Blakelock about the weekend visitation, which Ms. Blakelock claimed had not gone very well.

36. On Tuesday, November 7, 2006 Mr. Harrison also spoke with Mrs. Dahl about her counseling and the proposed classes and reviewed the file.

37. On Wednesday, November 8, 2006 Ms. Blakelock faxed Mr. Harrison a letter advising him—among other things—that she would be getting a date for the next hearing. The two attorneys phoned the commissioner's office together and obtained a hearing date, November 16, 2006. This was earlier than Mr. Harrison had planned for the next hearing, but Ms. Blakelock's threat of another restraining order gave him no choice but to move the date up.

38. On November 8, 2006 Mr. Harrison also received from Ms. Blakelock a new affidavit from Dr. Dahl, in which Dr. Dahl explained his version of the events of the weekend and alleged that Mrs. Dahl had violated the terms of the *Stipulation*.

39. Mr. Harrison spoke with Mrs. Dahl about the new affidavit. Mrs. Dahl did not dispute the allegations, and she did not appear to believe that they were serious or problematic. Mr. Harrison concluded at that time that Mrs. Dahl was an unmanageable client, in that she had violated the terms of the *Stipulation* reached by the parties and their attorneys.

40. By November 9, 2006 Mr. Harrison and Mrs. Dahl had mutually agreed that their attorney/client relationship was at an end. Mr. Harrison signed his *Withdrawal of Counsel* on that same date, but did not file it until November 17, 2006.

41. On October 9 or 10, 2006 Mr. Harrison received a call from Rodney Parker, who later entered his appearance on behalf of Mrs. Dahl and appeared at the November 16, 2006 hearing.

42. At the November 16, 2006 hearing, Ms. Blakelock attempted to address Dr. Dahl's request to amend the TRO, while Mr. Parker sought to set the *Stipulation* aside. However, due to Mrs. Dahl's untimely service of evidence essential to the issue, Commissioner Patton declined to address the validity of the *Stipulation*, nor did he address the amendment of the TRO. He informed the parties that the hearing would need to be continued so that both sides would have a fair opportunity to prepare and present their positions. The focus of the hearing quickly shifted to the terms of visitation and the identity of the third-party supervisor.

43. Mr. Parker argued during the November 16 hearing that supervision of Mrs. Dahl's visits with her children was unwarranted. Commissioner Patton noted that Dr. Dahl's new allegations of abuse by Mrs. Dahl were presently just allegations, but he still saw a benefit in using ACAFS to supervise visitation. He presumed that the allegations were false, and his intent in using ACAFS was to protect Mrs. Dahl from any further allegations.

44. Because of the allegations of child abuse, Commissioner Patton also appointed a *guardian ad litem*, Kelly Peterson. The commissioner further stated:

. . .between the last hearing and this hearing, we now have new accusations against your client [Mrs. Dahl]. Even though the visitation was supervised, I now have new allegations being made against your client.

And you know what happens if I allow your client unsupervised visitation before we come back? Before we get back, and then have a whole new set of

new allegations, which then means the next hearing has to be continued because Mr. Peterson has to examine those allegations.

So for purposes of today and the ruling I'm about to make, I'm going to assume that the allegations being made are false, because if they are false, I must protect your client from further false allegations being made. Otherwise, I can't hold that hearing. . .

And for the record, I am not finding – because I – my thin pancake doesn't have two sides. And I haven't heard the sides, any of the sides. I'm just finding, that if I were to believe [Mrs. Dahl], and all these allegations are false, I still have to have a professional, a third-party expert so that she can't be accused of anything else falsely. . .

. . . I'm considering the fact that the allegations have been made, and that they are false allegations. And I will not have new false allegations made about your client before we get – can even get back. That's what the order is based on. It is what it is.

45. At the conclusion of this hearing, Commissioner Patton scheduled the divorce matter for a hearing on the pending issues (including custody and possession of the marital home) for December 19, 2006.

46. On November 17, 2006 Mr. Harrison mailed a letter to Mrs. Dahl, which included a billing summary and a refund check for \$3,746.05. Even at that time, he still used the address of the marital home as her mailing address, as she had never provided him with any other address.

47. On November 17, 2006 Mr. Harrison also filed his *Withdrawal of Counsel* with the court.

48. At the December 19, 2006 hearing, which started at 3:21 p.m. and ended at 5:46 p.m.,<sup>3</sup> both parties and the guardian ad litem, Kelly Peterson, had an opportunity to proffer testimony regarding custody, visitation, and possession of the marital home before Commissioner Patton. Mr. Peterson prefaced his comments to the court by stating, “I think . . . every . . . third-party professional . . . that I’ve spoken with that has met her [Mrs. Dahl], and myself included . . . believes that there are some fairly significant mental health concerns, we don’t know what.” He then proffered the testimony of Dr. Coates, who was one of the children’s psychiatrists, and Kaydeen Jensen from ACAFS. He mentioned Dr. Gentry, who was also in the courtroom, but did not proffer Dr. Gentry’s testimony—apparently relying upon Dr. Gentry’s written testimony, which had been offered to the court. After proffering their testimony, Mr. Peterson recommended to the commissioner that the “current temporary order ought to remain in effect, uh, regarding supervision . . . pending the custody evaluation.”

49. Ms. Blakelock next addressed the commissioner, informing him that Dr. Dahl agreed with Mr. Peterson’s recommendation. Dr. Dahl’s attorney addressed further visitation issues, addressing the previous proffer from Dr. Coates and Kaydeen Jensen.

50. Mr. Parker (after a recess and a brief interruption by Mr. Peterson), addressed the court, proffering Mrs. Dahl’s testimony, as well as testimony from Mrs. Dahl’s sister, Stacy Tucker, and Claudia Teres.

---

<sup>3</sup>The court takes judicial notice of the docket in the underlying divorce action, which is available to the court in house and to the public online.

51. As Commissioner Patton made his ruling regarding custody and possession of the home, he considered, through the statutory factors, the proffered testimony he had heard. He first found that Mrs. Dahl had been the primary caretaker for the minor children.

52. With regard to the current placement of the children, the commissioner stated:

Time with parent pending trial or during appeal, well, this has not been pursuant to a stipulation of the parties and it has not really been based on an evidentiary hearing, it's really been based on an ex-parte order that was obtained by one of the parties, so I'm not willing to hold that for or against either party.

Commissioner Patton further stated:

Conspicuous by its absence are any of the professionals involved with the children coming before the court and having their testimony proffered on behalf of the mother. Instead, I have the daughter's therapist's testimony being proffered that he is of the opinion, based on a relationship that goes back several years, that the father should have temporary custody. I have Dr. Gentry, whose testimony which I, I understand there's a lot of allegations and shots being taken, and allegations being made about our other professional, Kaydeen, and about our *guardian ad litem*, but basically, I've got four professionals before the court, including ACAFS, that's including the *guardian ad litem*, including Dr. Coates, including Dr. Gentry, who has significant concerns about the mother having temporary custody.

And I have a variety of allegations, but what I'm not convinced is, is that those four professionals got together and somehow formed a conspiracy to all make recommendations for the father. I have no reason to believe that. And the real concern that they all, if you narrow it all down, would appear to be that they are concerned about the mother's ability to provide stability for these children while this is pending. And I'll be honest with you. I probably and may very well have made a decision different than I'm going to make had it been one professional, that I have four professionals whose opinions I give a great deal of credit to and more important, I'm being told the mother had a bad day at ACAFS. People who go through divorce have bad days. That's why the court put ACAFS in place. And I believe the professional involved, that the mother lacks the ability at this time to provide the stability for the children, and more particularly, even to leave them out of it. And children aren't getting divorced. On that one factor alone, and

this court's belief that the father has prevailed upon the court in convincing the court that the mother lacks the ability at this time for whatever reason to provide that type of stability that the children need, the court is awarding temporary care, custody, and control of the parties' minor children to the father on a temporary basis.

... because I'm awarding [the father] custody, I'm awarding him possession of the home.

53. The issue of temporary custody and possession of the marital home was finally heard by Judge Taylor on April 20, 2007. After a lengthy hearing, Judge Taylor overruled Mrs. Dahl's objection to Commissioner Patton's recommendation (from the December 19, 2006 hearing).

54. From the court's "in house" docket search, the court takes judicial notice of the following information: the underlying divorce action was tried on the following dates before Judge Taylor during September through November, 2009: September 15 (pretrial motions), 22, 29, 30; October 5, 7, 19, 20, 23. Closing arguments were heard by Judge Taylor on November 16, 2009. Judge Taylor issued a *Partial Ruling* on December 8, 2009. A hearing on attorneys fees is scheduled for February 10, 2010. Numerous motions have been filed since the last day of trial.

## DISCUSSION

### I. The Defendants' Motion for Judgment as a Matter of Law

As indicated in the opening paragraph of this decision, this phase of the trial was limited to issues concerning liability—specifically, breach and causation. The argument made and, ultimately, the question posed by Mr. Harrison at the conclusion of Mrs. Dahl's case was: Was

the plaintiff's failure to present any expert testimony on the issues of the standard of care regarding breach and causation fatal to her claims in this legal malpractice case?

The court agrees with both parties that Utah law generally requires expert testimony in legal malpractice cases. The most recent Utah case found by the court—although a medical malpractice case not written for official publication—is instructive. Judge James R. Taylor of this same district court was upheld when he ruled on summary judgment that the plaintiff had “failed to establish a prima facie case of causation by not designating an expert witness.” *Hall v. Steimle*, 2009 UT App 224U, para. 3. Indeed, the Utah Court of Appeals noted that “[i]t is only in ‘the most obvious cases’ that a plaintiff may be excepted from the requirement of using expert testimony to prove causation.” *Id.* (quoting and relying upon *Fox v. Brigham Young University*, 2007 UT App 406 ¶ 22, 176 P.3d 446 and *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 16, 12 P.3d 1015).

The Utah appellate courts do not treat legal malpractice cases differently. “[I]n a legal malpractice action, expert testimony is generally required.” *Rogers v. Mitchell*, 2003 UT App 45U, para. 1 (citing *Preston & Chambers v. Koller*, 943 P.2d 260, 263–64 & n.3 (Utah Ct. App. 1997)). It is only “where the propriety of the defendant’s conduct is within the common knowledge and experience of the layman” that expert testimony may not be required. *Preston & Chambers, P.C.*, 943 P.2d at 263–64 (internal citations omitted). The appellate court noted in *Preston* that “[e]xpert testimony may also be required to establish the duties owed by practicing attorneys to their clients, especially in cases involving complex and involved allegations of malpractice.” *Id.* at 263. Clearly, expert testimony will be generally required to establish both

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU  
Machine-generated OCR, may contain errors.



the standard of care and causation in medical and legal malpractice cases, especially where the issues presented are not within the common knowledge and experience of the layman.

Although the parties in this case agree regarding the above-cited principles, they disagree regarding the characterization of the underlying divorce case as either simple or complex. If this malpractice case is characterized as a simple case within the common knowledge and experience of the layman, then no expert testimony was required and the court should grant Mr. Harrison's motion for judgment as a matter of law. Otherwise, if characterized as a complex case requiring expert testimony, the motion succeeds and the court should dismiss the case for Mrs. Dahl's failure to provide expert testimony.

For the reasons explained below, the court finds that this is a legal malpractice case which required expert testimony.

**A. Was the propriety of Mr. Harrison's conduct within the common knowledge and experience of the layperson?<sup>4</sup>**

Mrs. Dahl argues that this is a simple case because she gave Mr. Harrison explicit instructions which he disobeyed by entering the *Stipulation* without her authority. Mrs. Dahl's arguments presuppose that the court agrees with her version of the facts presented at trial. However, the court has rejected her claim that Mr. Harrison entered into the *Stipulation* without her consent and has found that he consulted with her before the November 2 hearing and entered into the *Stipulation* with her express consent, after she had agreed to follow his advice. The

court has also found that she approved of his actions and continued to seek his full-time representation on the afternoon of November 2, 2006.

Even had the court adopted Mrs. Dahl's version of the facts, expert testimony would have been necessary, as the propriety of Mr. Harrison's conduct was not within the common knowledge and experience of the layperson.

The underlying custody case began with a 65-paragraph affidavit from Dr. Dahl which claimed outrageous and destructive behavior on the part of Mrs. Dahl with regard to her treatment of her husband and their children. The affidavit also provided information about their complex finances: income for Dr. Dahl, imputed income for Mrs. Dahl, business loans, other debts, investments, real property, and other assets. At first glance, any reader of Dr. Dahl's affidavit would have correctly assumed that this was going to be a hotly contested custody battle and that a sizable marital estate—probably in the millions of dollars—was at stake.

Dr. Dahl's affidavit also alleged that their daughter had her own psychiatrist, that the daughter had threatened suicide, that Mrs. Dahl had slapped the daughter repeatedly, that Mrs. Dahl was administering prescription medicine to the daughter that had not been prescribed, and that Mrs. Dahl was increasing or changing the daughter's dosages without a doctor's order. Dr. Dahl's desire for custody was allegedly supported by his daughter's psychiatrist.

Would the average layperson have easily understood the legal issues presented to Mr. Harrison when Mrs. Dahl appeared at his office with Dr. Dahl's affidavit and the other documents in her hands? The answer is clearly *no*. Would the average layperson have the

knowledge and experience to second-guess Mr. Harrison's actions in attempting to help Mrs. Dahl regain custody of her children. Again, the answer is clearly *no*.

As demonstrated by the docket in the underlying divorce action, the hearing before Commissioner Patton on December 19, 2006, at which the parties proffered their evidence regarding temporary custody of the children, went for almost 2 ½ hours. Indeed, the defendants' exhibit B indicates that the transcript for that hearing was 89 pages long. Yet, Mrs. Dahl faults Mr. Harrison for not attempting to do in a 15-minute-long hearing (as scheduled) after just 4 business days of preparation (October 26, 27, 31, and November 1, 2006) what her second attorney, Rod Parker, attempted to do in a 2 ½-hour hearing after more than one month's preparation. Even then, after one month's preparation, Mrs. Dahl's second attorney was not successful in obtaining custody for his client.

The matter of temporary custody was not finally settled until the parties appeared before Judge Taylor on April 20, 2007. At that point in the underlying litigation, Mrs. Dahl was represented by Steve S. Christensen, who has also represented her in this malpractice litigation. At the conclusion of that hearing, Judge Taylor adopted Commissioner Patton's December 19, 2006 recommendation with regard to temporary custody and left the children in Dr. Dahl's care, with supervised visitation to Mrs. Dahl. Defendants' exhibit C, page 50. Mr. Christensen was no more successful than Mr. Harrison thought he probably would have been on November 2, 2006.

Further complicating the issues facing Mr. Harrison was the fact that the Fourth District Court had (and still has) a domestic court commissioner, Tom Patton, who heard TROs and

temporary-order hearings for the judges and who made recommendations to the judges at the conclusions of those hearings.<sup>5</sup> Could a layperson second-guess Mr. Harrison's attempts to prepare Mrs. Dahl for hearings before the commissioner as opposed to hearings before the judge assigned to the underlying divorce action? Again, the answer is *no*.

Mrs. Dahl also argues that Mr. Harrison committed malpractice because he failed to understand and apply Rules 65A and 101 of the Utah Rules of Civil Procedure. Despite her argument that a layperson could analyze and judge Mr. Harrison's actions in the divorce action, she supports this claim in her post-trial memorandum with a complex argument under those rules. Also, in oral argument at the conclusion of the trial, she found Mr. Harrison at fault for failing to recognize that Ms. Blakelock should have filed a motion for temporary orders under Rule 101, rather than the order to show cause which was filed. No layperson could deal adequately with these arguments without the aid of expert testimony.

This court finds that the propriety of Mr. Harrison's conduct was clearly not within the common knowledge and experience of the layperson. The complexities of the underlying divorce action, its issues, the parties, and the decisions facing Mr. Harrison could not have been easily understood by a layperson of common knowledge and experience. The propriety of Mr. Harrison's actions on behalf of Mrs. Dahl could have only been understood by a layperson through the aid of expert testimony. Expert testimony was certainly required to establish the

---

<sup>5</sup>Since the inception of the underlying divorce case, the Fourth District Court has been fortunate to add a second part-time commissioner, Josh Faulkner.

duties owed by Mr. Harrison to Mrs. Dahl, whether Mr. Harrison breached those duties, and whether he caused any damage to Mrs. Dahl.

**B. Does it make any difference that this case was tried to the bench?**

Obviously, a trial court judge is not a layperson. So, does it make any difference in the court's analysis that this malpractice case was tried to the bench, rather than to a jury? This court finds that it does not.

Although Utah case law does not address this point directly, it is clear from a reading of the above-mentioned cases that the Utah appellate courts do not make a distinction between the trial court and a jury when considering the necessity of expert witnesses in legal or medical malpractice cases.

For instance, in *Hall v. Steimle*, Judge Taylor's decision on summary judgment was affirmed, when he dismissed the plaintiff's case for failure to designate an expert witness. *Id.* This was a case that was not decided by a jury, because the trial court dismissed it as a result of a successful summary judgment motion.

The issue of expert testimony also came before the trial court (Judge Fred Howard of the Fourth District Court) in *Fox v. Brigham Young University* in a motion in limine, which the court converted to a Rule 41(b) motion to dismiss. *Id.* at P10. The motion was argued before the scheduled bench trial began. *Id.* at P8. In that case, Judge Howard dismissed the plaintiffs' negligence and loss of consortium claims for their failure to present (or plan to present) expert testimony at the bench trial. *Id.* at P23.

The trial court's decision denying the plaintiffs' motion for summary judgment was also affirmed in *Rogers v. Mitchell* because of their failure to provide expert testimony as to the appropriate standard of care. *Id.* Lastly, in *Preston & Chambers, P.C. v. Koller*, the trial court's dismissal of the defendant's counterclaims upon the plaintiff's motion for summary judgment was upheld, due to the defendant's failure to designate an expert witness to establish the attorney's standard of care. *Id.* at 260.

In all of the above-listed cases, the expert testimony issue was decided before trial by the trial court, regardless of any future intention by the parties to try the case to a jury. Although neither the parties nor the court were able to find any Utah cases which directly answer the above question regarding bench vs. jury trials, the court finds that the case cited by Mr. Harrison is very helpful. In *Lentino v. Fringe Emp. Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979), the United States Court of Appeals for the Third Circuit addressed the question and concluded that the identity of the fact finder makes no difference. "We conclude, however, that the better approach is to apply the same requirement to both bench and jury trials." *Id.* at 481.

After applying the exact same legal standard as is applied in Utah—the general requirement of expert testimony and the "simple case" exception, the *Lentino* court reasoned:

First, although the judge may be competent to evaluate defendant's conduct in light of the relevant standard of care, the actual standard of care itself is a question of fact that is best left to the presentation of evidence with the opportunity for cross-examination and rebuttal. (Citations omitted.)

Second, we do not believe that a practicable standard exists which takes into account the trial judge's knowledge. Such a subjective standard, which would allow the trial judge to use his own knowledge if he were familiar with the appropriate standard of conduct, would

effectively change a question of factfinding into one of discretion and require appellate courts to undertake the unwanted task of evaluating the trial judge's personal knowledge. (Footnote omitted.)

Finally, in the interest of uniformity, we prefer not to unnecessarily establish a different substantive requirement for bench trials than for jury trials.

Accordingly, we conclude that the trial judge was correct in holding that expert testimony is required in bench trials of legal malpractice claims except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons.

*Id.*

This court finds the *Lentino* court's reasoning persuasive—and quite comforting. Simply put, this court is not interested in stepping into the shoes of expert witnesses in an effort to determine facts without the opportunity for cross-examination and rebuttal, nor is this court desirous of using its own subjective experience to determine the appropriate standard of care in a complex legal malpractice case. This court agrees with Mr. Harrison that it would be improper and dangerous for counsel or Utah's appellate courts to scrutinize a judge's background, experience, and knowledge to determine whether a judge could set the appropriate standard of care. Finally, this court agrees with the *Lentino* court that there is no reason to establish a different substantive requirement for bench trials than for jury trials.

Therefore, there should be no difference in the requirement of expert testimony in a bench trial as opposed to a jury trial. It makes no difference in the end that this case was tried to the bench; Mrs. Dahl should have provided expert testimony to establish the standard of care and causation elements.

## II. The Three Causes of Action

So, in the end, was the plaintiff's failure to present any expert testimony on the issues of the standard of care regarding breach and causation fatal to her claims in this legal malpractice case? The court finds that Mrs. Dahl's failure to present any expert testimony was, indeed, fatal to her claims in this legal malpractice case.

Mrs. Dahl asserted three causes of action in relation to her representation by Mr. Harrison: (1) negligence, (2) breach of fiduciary duty, and (3) breach of contract. Negligence and breach of fiduciary duty as causes of action in a legal malpractice case are closely related, diverging only at the element of duty. "An action for breach of a promise is governed by rules of contract rather than rules of legal malpractice." *Bennet v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 18 (Utah 2003) (quoting, Ronald E. Mallen & Jeffery M. Smith, *Legal Malpractice* § 8.5, at 590 (4<sup>th</sup> ed. 1996)).

### A. Negligence and Breach of Fiduciary Duty

To prevail on her causes of action for negligence and breach of fiduciary duty, Mrs. Dahl must show: (1) the existence of an attorney-client relationship, (2) a duty arising from that relationship, (3) breach of that duty, (4) a causal connection between the breach and the harm suffered, and (5) actual damages. *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996).

There is no argument between the parties that an attorney-client relationship existed between Mrs. Dahl and Mr. Harrison. However, Mrs. Dahl failed to present any expert testimony as to the duty or standard of care that arose from that attorney-client relationship. Without expert



testimony as to the standard of care, it is difficult, if not impossible, for the court to determine whether Mr. Harrison breached his duty to Mrs. Dahl.

Nevertheless, the court's *Findings of Fact* clearly demonstrate that Mr. Harrison spoke with Mrs. Dahl before the hearing about his intention to seek a continuance and to enter into a stipulation regarding temporary custody and temporary possession of the marital home. Before he entered into the *Stipulation* on November 2, 2006, he spoke with Mrs. Dahl about its provisions and then acted with her approval. He spoke with her after the hearing, informed her as to what had happened, went over all of the paragraphs of the *Stipulation*, instructed her to leave the marital home, and, again, received her approval of his actions. She then came to his office and dictated a note to the office receptionist, again asking him to take her case on a full-time basis, which further indicated her approval of his actions on her behalf.

Without expert testimony as to causation, Mrs. Dahl's causes of action for negligence and breach of fiduciary duty also fail. Therefore, the court finds that the plaintiff, Mrs. Dahl, has failed to carry her burden of proof as to three of the four elements of these two causes of action which were tried in this first part of the bifurcated trial. The court grants judgment to the defendants on these two causes of action.

#### **B. Breach of Contract**

To prevail on her breach of contract claim, Mrs. Dahl must show: (1) the existence of a valid and enforceable contract; (2) performance by Mrs. Dahl; (3) breach of an express promise by Mr. Harrison, and (4) damages to Mrs. Dahl resulting from the breach. *Bennett v. Jones*,

*Waldo, Holbrook, & McDonough*, 70 p.3d 17, 26 (Utah 2003) (quoting Ronald E. Mallen & Jeffrey M Smith, *Legal Malpractice* § 8.5, at 590 (4<sup>th</sup> ed. 1996)).

In all respects, it appears to the court that this cause of action was thrown away by the plaintiff. Mrs. Dahl's pretrial brief does not address this cause of action, nor does the post-trial brief. All arguments at the conclusion of the trial centered upon the first two causes. The court finds it impossible to find any facts that establish the elements of breach of contract in this matter.

Although Mr. Harrison testified that Mrs. Dahl signed a retainer agreement, no such agreement was produced during discovery or at trial. The court has nothing before it which would explain what the terms of any contract—written or oral—between the parties <sup>ce</sup> ~~was~~ <sup>were</sup>. The court finds that Mrs. Dahl provided no proof at trial as to what the contract's provisions were—if an actual contract existed.

Mrs. Dahl clearly performed to some extent by paying Mr. Harrison his initial retainer fee of \$5,000, plus another \$7,000. However, the court finds no evidence that Mr. Harrison breached an express promise to Mrs. Dahl or that such a breach of an express promise caused any damage to Mrs. Dahl. If there were damages, that element was reserved for the second portion of this bifurcated trial.

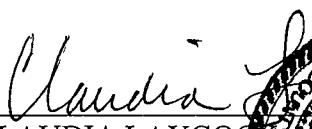
Therefore, the court finds that the plaintiff, Mrs. Dahl, has failed to carry her burden of proof as to two of the three elements of this cause of action which were tried in this first part of the bifurcated trial. The court grants judgment to the defendants on breach of contract cause of action.

### III. Conclusion

The court grants judgment to the defendants on all three causes of action, thereby dismissing this action in favor of the defendants. The court orders the attorney for the defendants to prepare conclusions of law and an order of dismissal consistent with this decision.

Dated the 6<sup>th</sup> day of January, 2010.

Case No. 070403005

  
CLAUDIA LAYCOCK  
Fourth District Court Judge



**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah  
6/1/10 *pe* Depu

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) 864-5228  
Toll-Free Telephone (888) 797-7770  
Fax: (801) 532-2270  
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.

**CONCLUSIONS OF LAW AND  
ORDER OF DISMISSAL**

Civil No. 070403005

Judge Claudia Laycock

Decision

Based upon the Court's Findings of Fact and Memorandum Opinion dated January 6, 2010, <sup>and incorporating the Findings of Fact and Memorandum Decision</sup> as well as all evidence presented at trial of this matter on October 26-27, 2009, the Court enters the following Conclusions of Law:

1. Plaintiff's first claim for relief, legal malpractice based upon negligence, requires proof of five elements: (1) an attorney-client relationship; (2) a duty of the attorney to the client arising from their relationship; (3) a breach of that duty; (4) a causal connection between the breach of duty and the resulting injury to the client; and (5) actual damages. *Christensen & Jensen, PC v. Barrett & Daines*, 2008 UT 64, ¶ 22, 194 P.3d 931.
2. The parties do not dispute the existence of an attorney-client relationship, so that element is deemed to be satisfied.
3. Plaintiff has failed to satisfy the "duty" element of her negligence-based claim because she failed to present expert testimony at trial to define the scope of the duty under the circumstances of this case. *See Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 264 (Utah Ct. App. 1997); *Rogers v. Mitchell*, 2003 UT App 45, 2003 WL 21295215, at \*1 (unreported).
4. Plaintiff has failed to satisfy the "breach" element of her negligence-based claim because she failed to present expert testimony at trial to demonstrate that any duty had been breached. *See Preston & Chambers*, 943 P.2d at 264; *Rogers*, 2003 UT App 45, 2003 WL 21295215, at \*1.
5. Plaintiff has also failed to satisfy the "breach" element of her negligence-based claim because she approved the material terms of the *Stipulation*. (See January 6, 2010 Findings of Fact and Memorandum Opinion at 31.)

claim because she failed to present expert testimony at trial to demonstrate that any she suffered any injury caused by a breach of a standard of care. *See Preston & Chambers*, 943 P.2d at 264; *Rogers*, 2003 UT App 45, 2003 WL 21295215, at \*1.

7. Plaintiff has also failed to satisfy the “causation” element of her negligence-based claim because she failed to present any evidence that she would have benefited but for the *Stipulation*. *See Dunn v. McKay, Burton, McMurray and Thurman*, 584 P.2d 894, 896 (Utah 1978).

8. Plaintiff has also failed to satisfy the “causation” element of her negligence-based claim because she failed to present any evidence that any injury she suffered would have been the foreseeable result of the *Stipulation*. *See Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1346 (Utah 1993).

9. The Court makes no finding on the final element of her negligence-based claim because damages had been reserved for a second phase of trial, which is now unnecessary.

10. Plaintiff's second claim for relief, breach of fiduciary duty in the context of an attorney-client relationship, requires proof of the following four elements: (1) an attorney-client relationship; (2) breach of the attorney's fiduciary duty to the client; (3) causation, both actual and proximate; and (4) damages suffered by the client. *Christensen & Jensen*, 2008 UT 64, ¶ 23.

11. The parties do not dispute the existence of an attorney-client relationship, so that element is deemed to be satisfied.

12. Plaintiff has failed to satisfy the second element of her fiduciary-duty-based claim because she failed to present expert testimony at trial to define the scope of the fiduciary duty under the circumstances of this case or to demonstrate that any such duty was breached. *See*

*Preston & Chambers*, 943 P.2d at 264; *Rogers*, 2003 UT App 45, 2003 WL 21295215, at \*1.

13. Plaintiff has also failed to satisfy second element of her fiduciary-duty-based claim because she approved the material terms of the *Stipulation*. (See January 6, 2010 Findings of Fact and Memorandum Opinion at 31.)

14. Plaintiff has failed to satisfy the “causation” element of her fiduciary-duty-based claim because she failed to present expert testimony at trial to demonstrate that any she suffered any injury caused by a breach of a standard of care. See *Preston & Chambers*, 943 P.2d at 264; *Rogers*, 2003 UT App 45, 2003 WL 21295215, at \*1.

15. Plaintiff has also failed to satisfy the “causation” element of her fiduciary-duty-based claim because she failed to present any evidence that she would have benefited but for the *Stipulation*. See *Dunn*, 584 P.2d at 896.

16. Plaintiff has also failed to satisfy the “causation” element of her fiduciary-duty-based claim because she failed to present any evidence that any injury she suffered was the foreseeable result of the *Stipulation*. See *Steffensen*, 862 P.2d at 1346.

17. The Court makes no finding on existence of damages under her fiduciary-duty-based claim because damages had been reserved for a second phase of trial, which is now unnecessary.

18. Plaintiff’s third claim for relief, breach of contract, requires proof of the following four elements: (1) a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the express promise by the defendant; and (4) damages to the plaintiff resulting from the breach. *Christensen & Jensen*, 2008 UT 64, ¶ 24.

19. Given the absence of evidence submitted by Plaintiff on the contract-based claim.

the Court deems it impossible to find in her favor on any of the elements. (See January 6, 2010 Findings of Fact and Memorandum Opinion at 32.)

20. Specifically, while the parties do not dispute the existence of an attorney-client relationship, there was little, if any, evidence presented as to what the express terms of the contract were, assuming a contract existed. (See *id.*)

21. Plaintiff has failed to satisfy the “breach” element of her contract-based claim because she failed to present evidence of express contract terms and failed to present expert testimony at trial to define the scope of the duties allegedly breached by Defendants under any contract that may have existed. See *Preston & Chambers*, 943 P.2d at 264; *Rogers*, 2003 UT App 45, 2003 WL 21295215, at \*1.

22. Plaintiff has also failed to satisfy the “breach” element of her contract-based claim because she approved the material terms of the *Stipulation*. (See January 6, 2010 Findings of Fact and Memorandum Opinion at 31.)

23. ~~Plaintiff has failed to satisfy the “causation” element of her contract-based claim because she failed to present expert testimony at trial to demonstrate that any she suffered any injury caused by the breach of an express contract term. See *Preston & Chambers*, 943 P.2d at 264; *Rogers*, 2003 UT App 45, 2003 WL 21295215, at \*1.~~

24. Plaintiff has also failed to satisfy the “causation” element of her contract-based claim because she failed to present any evidence that she would have benefited but for the *Stipulation*. See *Dunn*, 584 P.2d at 896.

25. Plaintiff has also failed to satisfy the “causation” element of her contract-based claim because she failed to present any evidence that any damages she suffered would have been



the foreseeable result of the *Stipulation*. See *Steffensen*, 862 P.2d at 1346.

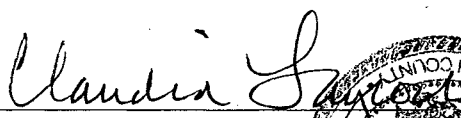
26. The Court makes no finding on existence of damages under her contract-based claim because damages had been reserved for a second phase of trial, which is now unnecessary.


27. Plaintiff's fourth claim for relief is for punitive damages. Utah law allows punitive damages to "be awarded only if ... it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." Utah Code Ann. § 78B-8-201(1)(a) (2008).

28. Plaintiff has failed to demonstrate liability on any of the previous claims, which is fatal to her claim for punitive damages.

On the basis of the foregoing conclusions and previously-entered Findings of Fact, it is hereby **ORDERED** that this case is dismissed with prejudice in its entirety.

Dated: 1 June 2010

  
The Honorable Claudia LaCock  
Fourth District Court Judge



# **COURT RECORD (HEARINGS)**

NOTED  
FILED  
FOURTH DISTRICT COURT, PROVO DEPARTMENT COURT  
STATE OF UTAH  
UTAH COUNTY Ky  
2010 AUG 31 A 12:00  
E-FILED 8/29/10

UTAH COUNTY, STATE OF UTAH

---

KIM DAHL, : Case No. 070403005  
 :  
Plaintiff, : Appellate Court No. 20100553  
 :  
v :  
 :  
BRIAN C. HARRISON, P.C., :  
 :  
Defendant. : With Keyword Index

---

MOTION HEARING AUGUST 7, 2008

BEFORE

THE HONORABLE CLAUDIA LAYCOCK

---

---

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

ORIGINAL

1 were to be exchanged by the parties by November 19, 2007 and  
2 my memory of the rules is, once the initial disclosures are  
3 exchanged, you can start your discovery. The discovery on  
4 Page 2 as outlined, 2(a) is that fact discovery shall be  
5 completed no later than April 7, 2008. And I emphasize the  
6 words 'fact discovery shall be completed'. It's not fact  
7 discovery shall be sent out. It is fact discovery shall be  
8 completed and I believe that's the language that's actually  
9 used in the rule which contemplates you send it out early  
10 enough that you get your answers back and if you're doing  
11 interrogatories or requests for production, that you get the  
12 response and then you can get your depositions done whenever  
13 during that time period. But my experience in this court is  
14 that everyone treats this as a completion date. It's written  
15 as a completion date, not as a "we shall send it out by this  
16 date" and that's the way I read this here, that fact  
17 discovery shall be completed by no later than November 7,  
18 2008.

19 B, talks about expert discovery. There's some  
20 overlapping here. Well, in a sense because in order to know  
21 who your expert witnesses were going to be, you would have to  
22 be working on that during the fact discovery time period but  
23 the designation of expert witnesses was due for the plaintiff  
24 on May 5<sup>th</sup> and for the defendant on June 2<sup>nd</sup>, with rebuttal  
25 reports due by June 16 and the deadlines to depose all

1           So, for those rules - I'm sorry, for those reasons  
2 I find that the plaintiff has been dilatory, that the request  
3 is not founded in fact or in reason and that there is no good  
4 cause for the Court to grant the 56F motion. So I deny that  
5 motion for those reasons.

6           As to the protective order, the argument of the  
7 plaintiff is that it's unfair for the defendant to say that  
8 they can't or don't want to answer the discovery that was  
9 propounded by the plaintiff on the last day of the time  
10 period because they certainly could if they wanted to answer  
11 the interrogatories. I don't think that's the issue and I  
12 don't think that's what the rules contemplate. The bottom  
13 line is that the defendants are the ones who are standing  
14 here at this point with clean hands as to this argument.  
15 They did their discovery, they did it timely, they completed  
16 it within the time period. It wasn't their job to make the  
17 other side do the work that needed to be done. It wasn't  
18 their job to remind the plaintiff that she had discovery she  
19 might want to do and the time element was put in place by the  
20 parties and I think that they have a right to expect, the  
21 defendants have a right to expect the plaintiff to work  
22 within that time frame.

23           They are prejudiced. This is a matter that has  
24 been filed by the plaintiff. This is a matter that should  
25 keep moving regardless of what's happening on the other case

1 indicated the part that raises the issue. I think it is not  
2 prejudicial to the other party to conduct an expert  
3 deposition at this point when we haven't even had a pretrial  
4 in this matter but I think the important point is these  
5 dispositive motions have been pending before the Court. It  
6 seems like it would be an unusual thing to require the  
7 parties to continue to assume that that motion was not  
8 pending. I mean, I can see an argument that that would just  
9 be overly litigious and wasting the party's resources without  
10 knowing which direction the Court is going to go. It seems  
11 as far as the expert discovery goes, it is a very reasonable  
12 interpretation by the Court to allow an extension of those  
13 portions that had not expired when the motions were filed,  
14 when the motion for summary judgment was filed.

15 THE COURT: Anything else?

16 MR. CHRISTENSEN: No.

17 THE COURT: Solely on the basis that the request  
18 was to extend all deadlines by 30 days, I'm sorry, by three  
19 months?

20 MR. CHRISTENSEN: Three months.

21 THE COURT: And because I think there might have  
22 been an implication there that this had to be decided before  
23 the parties would have to designate, I'm going to grant in a  
24 partial manner the request to amend the scheduling order.  
25 I'm going to move - I've got to get the right page here - the

1 designation of expert witnesses to 30 days from today. Today  
2 is August 7, so that would be September 7 for the plaintiff.

3 I need a calendar.

4 Sorry. I don't have everything at my fingertips  
5 like I do downstairs. August 7 would be Thursday the 7<sup>th</sup> -  
6 I'm sorry, today and I just wanted to see what September 7  
7 was going to be. That's a Sunday. Okay. Let's make it by  
8 Monday, September 8, plaintiff will designate its expert  
9 witnesses and you did it approximately a month later on this  
10 one so let me find a weekday, October 6 would be the deadline  
11 for defendant's designation of expert witnesses and then you  
12 went two weeks, so rebuttal reports from both parties would  
13 be due Monday, October 20<sup>th</sup> and then you went a month to  
14 depose all experts. So let's look for about November 20,  
15 Monday, November 7<sup>th</sup> would be the deadline to depose all  
16 experts. And previously you had the cutoff for dispositive  
17 or potentially dispositive motions for April 28. I don't see  
18 any reason to change that and I would ask you to request a  
19 pretrial conference as soon as your discovery is complete.  
20 Okay?

21 And so Mr. Lieberman, I'll ask you to prepare the  
22 amended scheduling order.

23 MR. LIEBERMAN: Sure, Your Honor.

24 THE COURT: Okay, we're running out of time here  
25 folks. Let's deal with the Motion to Strike and the Motion

NOTED  
FILED IN  
4TH DISTRICT COURT  
ST. JOSEPH  
COUNTY  
FOURTH DISTRICT COURT, PROVO DEPARTMENT

UTAH COUNTY, STATE OF UTAH

2008 DEC 31 A 12:00  
E-FILED 8/29/10

KIM DAHL,

Plaintiff,

v

BRIAN C. HARRISON, P.C.,

Defendant.

: Case No. 070403005

:

: Appellate Court No. 20100553

:

:

:

:

:

: With Keyword Index

MOTION HEARING DECEMBER 16, 2008

BEFORE

THE HONORABLE CLAUDIA LAYCOCK



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

1 and also addresses the medical experts, "lastly, the  
2 disclosures related to the medical experts are likewise  
3 inadequate." He notes in the last paragraph that there is a  
4 tight window of time and there was. I was trying to get this  
5 case moving and so he requested that within the next two days  
6 that plaintiff would provide complete expert reports and then  
7 the last paragraph, the last sentence is "Please consider  
8 this our attempt to meet and confer on this matter prior to  
9 any motion practice." And when he doesn't hear back from  
10 them by Friday at 5:00, he files the motion, sends off the  
11 motion.

12           It's not as clean as an affidavit would have been  
13 but it's included with the motion and I'm persuaded that by  
14 letter, he did attempt to give notice and to get compliance  
15 with the rule. I'm also persuaded that the fact that I must  
16 consider the fact that I gave the plaintiff four more months  
17 to take care of this problem and this issue of discovery with  
18 regard to the experts and what happened at the end was last  
19 minute and poorly done and that the four months I allowed so  
20 that the reports could be done and the experts could be on  
21 board, amounted to nothing because obviously this was all  
22 done at the last minute.

23           The suggestion of the plaintiff is that I give him  
24 until the beginning of January and then that will kick  
25 everything back as pointed out by Mr. Lieberman and by the

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

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

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

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

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

11 And as to prejudice or harm to the defendant, I do  
12 base my decision in this matter on the fact that the  
13 defendant is harmed. I find that there is a willful failure  
14 on the plaintiff to carry this case forward and to obey the  
15 orders of the court, with the Court having given the  
16 plaintiff more time over the objection of the defendant.  
17 But, I find that a request for attorney's fees at this point  
18 based on bad faith is ill timed and lately timed and I'm not  
19 going to take an additional motion on it. That was the  
20 choice that the defendant made in filing the motion.

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

FOURTH DISTRICT COURT, PROVO DEPARTMENT

UTAH COUNTY, STATE OF UTAH

NOTED

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2009 AUG 21 A 2:00

E-FILED 8/29/10

KIM DAHL,

Plaintiff,

v

BRIAN C. HARRISON, P.C.,

Defendant.

: Case No. 070403005

: Appellate Court No. 20100553

: With Keyword Index

ORAL ARGUMENT MARCH 12, 2009

BEFORE

THE HONORABLE CLAUDIA LAYCOCK

1 question.

2 That's all I have. Thank you.

3 THE COURT: Thank you.

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

12 As I look at Rule 37F, it says, "Failure to  
13 disclose. If a party fails to disclose a witness, document  
14 or other material as required by Rule 26A" which is exactly  
15 what I found at our previous hearing, "or to amend the prior  
16 response" which doesn't apply here, "that party shall not be  
17 permitted to use the witness, document, or other material at  
18 any hearing unless the failure to disclose is harmless or the  
19 party shows good cause for the failure to disclose." I found  
20 neither of those. I did not find that the failure to  
21 disclose was harmless and I did not find that the plaintiff  
22 showed good cause for the failure to disclose.

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

1 payment of reasonable costs and attorney's fees. Any order  
2 permitted under subpart B(2a, b or c, and informing the jury  
3 of the failure to disclose." None of that was requested by  
4 the plaintiff at the time we heard the other motion. I don't  
5 think that I have to take the extra step that he wants me to  
6 take when the rule is so clear that the parties shall not be  
7 permitted to use the witness, document, or other material at  
8 any hearing. I made the appropriate findings. I made it  
9 very clear that I thought and found, not just thought, that I  
10 found that the plaintiff had failed to comply with Rule  
11 26A(3)(b) and (c) and my memory is I read through all of that  
12 as Mr. Lieberman claimed and then I went over to 37F and I  
13 read through that and I made all the findings and made it  
14 very clear that I was striking the expert reports which meant  
15 without the expert reports, there wouldn't be anything to do  
16 with experts.

17 So, I deny the Plaintiff's Motion to Allow  
18 Testimony by her expert witnesses and I grant the Defendant's  
19 Motion for Attorney's Fees and Costs finding that this was a  
20 frivolous motion, that it should not have been filed and at  
21 the very least I gave the attorney for plaintiff a very  
22 strong hint at a previous hearing that this was a surprise to  
23 me and that I didn't think it was a valid motion when he  
24 mentioned that he was filing it.

25 So I adopt the reasoning found in Mr. Lieberman's

1 response to the motion and I adopt the reasoning found in his  
2 motion for attorney's fees and costs, for the cost of his  
3 client in having to respond to this motion from the  
4 plaintiff.

5 All right. So, that takes care of those motions  
6 and that leaves us with the Certificate of Readiness for  
7 trial. As far as I'm concerned, counsel, discovery is  
8 closed, the issue of experts is closed. Is there anything  
9 else in your opinion, Mr. Christensen, that needs to be done  
10 before I set this matter for trial?

11 MR. CHRISTENSEN: No, Your Honor.

12 THE COURT: Same question for you, Mr. Lieberman.

13 MR. LIEBERMAN: No, Your Honor, we're ready.

14 THE COURT: Okay, how long is it going to take to  
15 try this case?

16 MR. LIEBERMAN: From our prospective, Your Honor,  
17 for our portion of the case I anticipate a day and half of  
18 testimony and cross.

19 THE COURT: From your side.

20 Okay. Mr. Christensen?

21 MR. CHRISTENSEN: We anticipate approximately nine  
22 days, Your Honor.

23 THE COURT: Why?

24 MR. CHRISTENSEN: Because -

25 THE COURT: Tell me who your witnesses are going to