

2014

**Michael S. Robinson, Plaintiff/Appellant, vs. Jones Waldo
Holbrook & McDonough, p.c.; Stephen C. Clark, and Melissa M.
Bean, Defendants/Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL S. ROBINSON,

Plaintiff/Appellant,

VS.

JONES WALDO HOLBROOK &
MCDONOUGH, P.C., STEPHEN C.
CLARK, and MELISSA M. BEAN,

Defendants/Appellees.

Appellate Case No. 20140213-CA

District Court Case No. 110415662

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court, Salt Lake County, Utah
Honorable Charlene Barlow, Presiding

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STATEMENT OF JURISDICTION

Pursuant to Utah R. App. P. 42(a), the Utah Supreme Court transferred this case to this Court on March 24, 2014. [R. 738-40.] This Court has jurisdiction pursuant to Utah Code § 78A-4-103(2)(j).

ISSUES

1. Did the district court err in holding plaintiff to previously established deadlines and denying plaintiff's motion for continuance under Utah R. Civ. P. 56(f), where plaintiff presented no explanation, by affidavit or otherwise, why he had failed to pursue discovery during the 21 months the case had been pending; and where plaintiff's motion for additional time failed to describe specific proposed discovery or how it would aid position to summary judgment?

Standard of Review: Utah appellate courts "apply an abuse of discretion standard in reviewing the denial of a Rule 56(f) motion and overturn it only if the denial of the motion exceeds the limits of reasonability." *Petersen v. Riverton City*, 2010 UT 58, ¶ 25, 243 P.3d 1261 (internal quotation marks and citation omitted); *Campbell, Maack & Sessions v. Debry*, 2001 UT App 397, ¶ 6, 38 P.3d 984.

2. In the absence of affidavits or other evidence, including expert testimony, to support plaintiff's claims of legal malpractice and causation, did the district court err in holding that no evidence suggested defendants' representation fell below the applicable standard of care, and that plaintiff's alleged damages were caused by his own failure to even attempt to comply with the divorce court's orders?

Standard of Review: In reviewing a grant of summary judgment, this Court reviews the trial court's legal conclusions for correctness. *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶ 19, 194 P.3d 931. The Court should "determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." *Harline v. Barker*, 912 P.2d 433, 438 (Utah 1996) (internal quotation marks and citation omitted).

STATEMENT OF THE CASE

This is a legal malpractice case. Mr. Robinson sued Jones Waldo, Mr. Clark, and Ms. Bean (collectively "Jones Waldo"), alleging they mishandled their representation of Mr. Robinson in connection with his divorce. [R. 1-14.] In short, Mr. Robinson alleges that the defendants should have ensured that the settlement of his divorce was contingent on his ability to refinance a parcel of commercial real estate that was awarded to him in the settlement.

Mr. Robinson, acting *pro se*, filed his Complaint on October 31, 2011. [R. 1-32.] He retained counsel some three months later, in February 2012. [R. 724.]

On January 2, 2013, the trial court entered a Stipulated Discovery Plan and Scheduling Order ("Scheduling Order"). [R. 177-80.] The Scheduling Order set a fact discovery deadline of June 28, 2013, and required Mr. Robinson to designate experts by July 26, 2013. [R. 178.]

On April 8, 2013, after 13 months of representation, Mr. Robinson's counsel withdrew. [R. 61-63, 268-69.] Jones Waldo immediately filed a Notice to Appear or Appoint Counsel. [R. 270-72.]

From October 2011 to July 2013, Mr. Robinson pursued only minimal discovery, designated no experts, and failed to file or make any request to extend the discovery or expert designation deadlines. [*See generally* R. 207-91, 726.]

On July 28, 2013, after the expiration of discovery and expert disclosure deadlines, Jones Waldo filed a motion for summary judgment. [R. 497-99.] Mr. Robinson responded with a motion for extension of time to conduct discovery under Rule 56(f), but did not oppose the facts or arguments presented in support of summary judgment. [R. 504-08.]

On February 12, 2014, the trial court issued a written order denying Mr. Robinson's Rule 56(f) motion and granting Jones Waldo's motion for summary judgment. [R. 724-28.]

STATEMENT OF FACTS

A. The Underlying Divorce Settlement.

In 2007, Mr. Robinson retained Jones Waldo to represent him in a divorce proceeding against his ex-wife, Debra Robinson. [R. 2-3, 195.] During the course of their marriage, the couple had acquired multiple real estate properties. The most valuable property was the "Phoenix Plaza," a strip mall in St. George. [R. 3.] Throughout much of 2007, Mr. Robinson and Ms. Robinson personally negotiated, without the assistance of counsel, in an effort to agree upon the division of various real properties in which they both claimed an interest. [*See* R. 3, 195.] They eventually agreed to participate in a mediation, which was scheduled for November 2, 2007. [R. 3.]

Several days prior to the scheduled mediation, Ms. Robinson gave Mr. Robinson an analysis of income and occupancy rates of the Phoenix Plaza, as well as her estimate that the Phoenix Plaza was worth \$7.5 million. [R. 4.] She gave this document both to Mr. Robinson and his Certified Public Accountant. [R. 715.]

On November 1, 2007, the day before the scheduled mediation, Ms. Robinson's counsel emailed Ms. Bean a proposed stipulation for discussion at the mediation. [R. 4.] According to Mr. Robinson, this draft stipulation "generally reflected the principles that the parties agreed on in their discussions leading up to the mediation sessions." [*Id.*] The draft stipulation, in relevant part, awarded Mr. Robinson title to the Phoenix Plaza, subject to his obligation to refinance the mortgage on the Plaza in order to pay Ms. Robinson approximately \$1.8 million. [R. 5, 6, 20.] That same day, Ms. Bean sent Ms. Robinson's proposed stipulation to Mr. Clark to request his comments. [R. 561-62.] Mr. Clark replied:

There probably ought to be some protections in the event [Mr. Robinson] is unable notwithstanding his "best efforts" to refinance the Phoenix Plaza. At a minimum there should be a cap on the interest under [Section] 16.B [of the draft stipulation]. If for some reason he can't refinance within the next year, he ends up owing her 20% interest, and it just keeps climbing? His incentive to refi is captured at the already-high 10% rate, so I'm not sure why he would agree to tack on an additional amount every month, but at a minimum there needs to be a cap or some kind of out if for some reason he can't refinance. [R. 562.]

Valuation was Mr. Robinson's primary concern, and after evaluating information from Ms. Robinson, his CPA, and several realtors he telephoned during the mediation [R. 715], and being fully aware that he could take more time to verify the information provided by Ms. Robinson, Mr. Robinson (and Ms. Robinson) signed a Stipulation and

Property Settlement Agreement (“Settlement Agreement”) on November 2, 2007. [R. 30-31, 684.]

The Settlement Agreement awarded Mr. Robinson title to the Phoenix Plaza, subject to his obligation to refinance the Phoenix Plaza and pay Ms. Robinson approximately \$1.8 million. [R. 20.] The agreement provided that Mr. Robinson “shall file the loan refinance application within 15 days of the date of this Agreement [R. 21-22], and provided for interest to accrue on the \$1.8 million obligation at a flat 8% rate if the refinancing was not completed within 120 days [R. 21]. In other words, in the weeks leading up to an as-yet-unknown nationwide real estate crash, Mr. Robinson agreed to take real estate and to give Ms. Robinson cash.

On November 5, 2007, the first business day after he signed the Settlement Agreement, Mr. Robinson called and emailed Ms. Bean to express his desire to “stop” the Settlement Agreement from becoming effective, alleging Ms. Robinson had “gross[ly] overvalue[d]” the Phoenix Plaza. [R. 311, 354, 561.] Even though Mr. Robinson expressed “buyer’s remorse,” Ms. Bean repeatedly advised Mr. Robinson of the importance of filing a loan application as set forth in the Settlement Agreement. For example, on November 29, 2007, Ms. Bean asked Mr. Robinson by email, “[Ms. Robinson] said she would work with you on getting a good deal on the mortgage—are you two working on this?” [R. 651.] On December 5, 2007, Ms. Bean told Mr. Robinson, “[i]t appears that we need to get moving on [the refinance] immediately Have you filed a loan application?” [R. 658.] On December 9, 2007, Ms. Bean advised Mr. Robinson “our time at this point is running on your refinancing of the Plaza and I would advise you to move

forward on doing so.” [R. 662.] On December 10, 2007, Ms. Bean advised Mr. Robinson, “I would encourage you to continue using your best efforts to refinance.” [R. 666]. On October 11, 2008, Mr. Clark again advised Mr. Robinson to “get an application for the refinancing of the Plaza on file and pursue it as vigorously as you can.” [R. 676.]

Mr. Robinson “admit[ted] that he and his attorneys/the Defendants discussed the need to file an application to refinance the Phoenix Plaza Property,” and “both Ms. Bean and Mr. Clark suggested that Plaintiff should attempt to submit an application.” [R. 685-86.] Mr. Robinson’s emails reveal that he did not submit the application because he was gambling that interest rates would drop. [R. 594, 651-52.] For example, on November 29, 2007, Mr. Robinson stated: “We are working on it, but rates have been doing a bit of a roller-coaster. If I can lock a rate slightly below the 6% mark, I will. Making progress, but I may still need an additional month or two.” [R. 651.] Mr. Robinson reasoned that “most analysts think that rates will drop in December and, again, in January.” [R. 652.] Ms. Bean responded back, “my concern is that rates might just as well go up and then you would also be in a mess and want to totally redo the deal.” [R. 654.]

Notwithstanding the advice of Ms. Bean and the express requirement of the Settlement Agreement that he do so, Mr. Robinson never filed a refinance application within the fifteen days after signing the Settlement Agreement or at any time since. [See R. 369, 686.] On February 22, 2008, Ms. Robinson provided Mr. Robinson with the financial report that Mr. Robinson claimed was necessary to submit an application. [R. 412, 716.] Mr. Robinson, however, still did not submit an application to refinance. [See R. 312, 369.]

On February 7, 2008, Ms. Robinson filed a motion in the underlying divorce case to enter a decree consistent with the Settlement Agreement. [R. 7-8, 312, 357-58.] In her motion, Ms. Robinson argued that Mr. Robinson had “no excuses for failing to fill out a loan application because he actually needed no financial statements or other accounting information until . . . after the application was submitted [and Mr. Robinson] has his own direct access to that information.” [R. 8.] In partial response to Ms. Robinson’s motion, and in view of Mr. Robinson’s request that Jones Waldo attempt to undo the Settlement Agreement, Jones Waldo filed a motion to set aside the Settlement Agreement. [R. 312, 360-63.]

Ms. Bean and Mr. Clark, however, explained in emails to Mr. Robinson the low probability of setting aside the Settlement Agreement he had voluntarily signed:

We can only get this agreement set aside if we prove that Debra [Ms. Robinson] committed active fraud or concealment--part of the difficulty is that you had access to all the deposits and anything else that you wanted to review and you also had the same access to the CPA and your realtor for input. . . . [U]nless we can prove fraud or concealment, we don’t have a strong basis for setting aside the deal otherwise and their position will be that you simply want a new deal. [R. 662; *see also* R. 676.]

On November 17, 2008, the divorce court denied the motion to set aside the Settlement Agreement, entered an order enforcing its terms, and entered a divorce decree that incorporated those terms. [R. 365-70, 376-89.] The court found that “Mr. Robinson did not do what he specifically agreed to do [in the Settlement Agreement] to initiate the refinance process. None of us will ever know given that, whether had he done so, the refinance would or would not have occurred.” [R. 369.]

Mr. Robinson terminated Jones Waldo's representation shortly after the November 17, 2008, ruling and retained new counsel to appeal the ruling. [R. 10-11.] The Utah Court of Appeals affirmed the decision of the divorce court and "note[d] that Husband's ability to provide evidence that performance was impossible or highly impracticable is severely limited where he never actually applied for a loan as contemplated, let alone having done so in the time frame set forth by the [Settlement Agreement]." [R. 400; *Robinson v. Robinson*, 2010 UT App. 96, ¶ 12, n.4, 232 P.3d 1081.] Mr. Robinson's petition for writ of certiorari to the Utah Supreme Court was denied. [R. 11.]

Notwithstanding the exhaustion of his appeals, Mr. Robinson still failed to comply with the Settlement Agreement. The trial court in the divorce proceeding eventually entered a \$2.3 million judgment against him. [R. 11, 314.]

B. The Malpractice Action.

Mr. Robinson sued Jones Waldo for malpractice on October 31, 2011, generally alleging that Mr. Clark and Ms. Bean failed to adequately advise and represent him in connection with the November 2, 2007 mediation. [See R. 4-7.] From the time he filed his Complaint on October 31, 2011, through the date of the court-ordered discovery deadline of June 28, 2013, Mr. Robinson conducted almost no discovery. He made no effort to take any depositions, and he did not appear at the deposition of Ms. Robinson.¹ He did

¹ Mr. Robinson's assertion that he convinced his divorce counsel to attend Ms. Robinson's deposition is incorrect. [R. 554.] No one appeared at Ms. Robinson's deposition on Mr. Robinson's behalf. Unfortunately (but inconsequentially), the trial court record does not reflect this.

not designate any experts by the appointed deadline, and he failed to file or make any request to extend the discovery or expert deadlines. [See R. 514-15, 730-32.]

On July 29, 2013, after the discovery and expert disclosure deadlines expired, Jones Waldo filed its motion for summary judgment. [R. 497-99.] Jones Waldo argued that summary judgment was appropriate for two reasons: First, Mr. Robinson had failed to designate an expert to opine that Jones Waldo's conduct fell below the applicable standard of care. Second, Jones Waldo argued that Mr. Robinson could not provide any evidence that the alleged malpractice caused his alleged damages, because (1) Ms. Robinson would never have agreed to the provision Mr. Robinson now claims Jones Waldo should have put in the Settlement Agreement; (2) Mr. Robinson's own actions—specifically, his failure to attempt to refinance the Phoenix Plaza—were the cause of the divorce judgment against him; (3) there was no evidence that Mr. Robinson would have obtained a better outcome absent the alleged malpractice; and (4) collateral estoppel barred Mr. Robinson's loss-causation theory. [R. 318-30.] Jones Waldo served the motion to Mr. Robinson at his address of record. [R. 268, 331, 499.]

Mr. Robinson did not request any extension of time from Jones Waldo to oppose the motion for summary judgment.² Instead, he filed a Rule 56(f) Motion for Extension

² Mr. Robinson argues that Jones Waldo's counsel ignored his request for an extension of time to respond to the motion for summary judgment, and in doing so likely violated the Standards of Professionalism and Civility. [See, e.g., App. Bf. 11-12, 51; R. 547, 549, 703.] That is incorrect. Counsel for Jones Waldo received two informational emails from Mr. Robinson's counsel, Mr. Kimball. Mr. Kimball's first email stated that "*I will be filing* a request for extension of time to respond to your motion today. If you would like to discuss this matter today, please feel free to contact me." [R. 567 (emphasis added).] Mr. Kimball's second email stated that "[i]t *may be* that I will ask for more time . . .

of Time to Respond to Summary Judgment. In that motion and in subsequent briefs in support of his motion, Mr. Robinson made no attempt to dispute or set forth a separate statement of additional facts to controvert any of the facts presented in Jones Waldo's motion for summary judgment. Nor did Mr. Robinson present any argument to oppose Jones Waldo's arguments in favor of summary judgment. Instead, in Mr. Robinson's opening brief, he asserted that he was unaware Jones Waldo had filed a motion for summary judgment, and argued that he needed additional time for discovery because he had been unable to retain new counsel for months. [See R. 502-10.] In his reply memorandum, Mr. Robinson asserted that his new counsel would like to depose Ms. Bean and Mr. Clark, that he had retained an expert—albeit providing no information on the expert's qualifications, anticipated testimony, or anticipated timing of a report—and that he could not previously depose Ms. Bean because of his difficulty in acquiring counsel. [See R. 546-56.]

On February 12, 2014, the district court issued a written ruling denying Mr. Robinson's Rule 56(f) motion and granting Jones Waldo's motion for summary judgment. In denying Mr. Robinson's Rule 56(f) motion, the trial court ruled that (1) Mr. Robinson was "required to follow the discovery plan and designate expert witnesses by July 26,

given the several hundred pages you have filed and my still nascent familiarity with the facts. But it is too soon to do more than briefly speculate on that supposition. Please advise." [R. 569 (emphasis added).] These emails were informational. They did not request an extension of time. Moreover, this argument is a red herring. If Mr. Kimball believed Jones Waldo's counsel to be uncooperative or unresponsive, he could have moved the trial court for an extension of time to respond to the summary judgment. He did not do so.

2013”; (2) Mr. Robinson’s “original counsel withdrew in April and he had over three months to retain new counsel and either comply with the discovery plan and scheduling order to seek to amend the plan”; (3) Mr. Robinson “missed the deadline to designate any expert witnesses; he has missed all subsequent deadlines and cut off dates”; and (4) Mr. Robinson “did not present a sufficient basis to excuse his lack of diligence in completing discovery.” [R. 726.]

Having denied the motion for continuance, the court turned to the merits of Jones Waldo’s motion for summary judgment. The court granted the motion, on the basis that (1) Mr. Robinson “has not filed any affidavits or other evidence which raise an issue of disputed material fact to survive a motion for summary judgment”; (2) without an expert witness, Mr. Robinson “cannot demonstrate that the defendants’ representation of him in his divorce action fell below the applicable standard of care”; and (3) “the affidavits, emails, and other evidence presented by defendants in support of their motion demonstrate that plaintiff cannot show that any alleged breach by defendants caused any loss to him.” [R. 726-27.] Specifically, the trial court stated,

Based upon his failure to even attempt to comply with the Stipulation [*i.e.*, his settlement agreement with Debra Robinson], this Court and other courts have ruled against [Mr. Robinson] in other cases. [Mr. Robinson] cannot show that any actions by defendants have caused the financial losses he is facing. As other courts have held, his failure to even attempt to comply with the Stipulation ha[s] been the cause of his losses.

[R. 727.]

SUMMARY OF ARGUMENT

The trial court's denial of Mr. Robinson's Rule 56(f) motion was not an abuse of discretion. Mr. Robinson never explained how further discovery would uncover disputed facts for opposing summary judgment. He never described a viable theory for opposing summary judgment even if his request for more discovery had been allowed. Mr. Robinson was also dilatory. After nearly two years of litigation, during most of which Mr. Robinson *was* represented by counsel, and for several months after his counsel withdrew, Mr. Robinson made almost no effort to pursue the case. He had no good explanation for this prolonged passivity. In contrast, Jones Waldo relied on the trial court's Scheduling Order, honored the applicable discovery deadlines and diligently pursued discovery. Accordingly, the trial court's conclusion that Mr. Robinson "did not present a sufficient basis to excuse his lack of diligence" [R. 726] was correct, and its denial of Mr. Robinson's Rule 56(f) motion should be affirmed.

The trial court also correctly granted Jones Waldo's summary judgment motion. Mr. Robinson had made no effort to oppose the motion for summary judgment. Given the lack of any opposition, the trial court properly accepted Jones Waldo's proffered facts as true. The record also supports the trial court's conclusion that an expert witness was necessary to establish the standard of care and breach. Whether Jones Waldo should have counselled Mr. Robinson against accepting a divorce settlement in which he received property and agreed to refinance it in order to buy his wife out of her equity is not *per se* unreasonable—it happens every day. Whether something about this transaction or

the complexity of this case made it different is certainly not within the ordinary experience of lay jurors, so expert testimony was needed.

Finally, even assuming Ms. Robinson would have agreed to a different deal—a proposition she expressly rejected in her deposition [R. 316-17, 421-24]—the outcome is completely speculative because Mr. Robinson never applied for the financing and because the record provides no evidence of what a different outcome might have looked like. Rather than apply for refinancing, Mr. Robinson chose to gamble on interest rates. The lower court acted correctly in accepting the divorce court’s conclusion that Mr. Robinson’s “failure to even attempt to comply with the stipulation [has] been the cause of his losses.”

ARGUMENT

I. THE DENIAL OF MR. ROBINSON’S RULE 56(f) MOTION WAS NOT AN ABUSE OF DISCRETION.

The trial court denied Mr. Robinson’s Rule 56(f) motion because (1) Mr. Robinson was “required to follow the discovery plan and designate expert witnesses by July 26, 2013”; (2) Mr. Robinson’s “original counsel withdrew in April and he had over three months to retain new counsel and either comply with the discovery plan and scheduling order to seek to amend the plan”; (3) Mr. Robinson “missed the deadline to designate any expert witnesses; he has missed all subsequent deadlines and cut off dates”; and (4) Mr. Robinson “did not present a sufficient basis to excuse his lack of diligence in completing discovery.” [R. 726.]

According to the Utah Supreme Court, “[w]e review the denial of a rule 56(f) motion for an abuse of discretion.” *Overstock.com, Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶ 20, 192 P.3d 858. “We will not reverse the district court’s decision to grant or deny a rule 56(f) motion for discovery unless it ‘exceeds the limits of reasonability.’” *Id.* (quoting *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1242-43 (Utah 1994)).

Some of the relevant factors in determining whether a rule 56(f) motion is warranted include . . . (1) an examination of the party’s rule 56(f) affidavit to determine whether the discovery sought will uncover disputed material facts that will prevent the grant of summary judgment or if the party requesting discovery is simply on a “fishing expedition,” (2) whether the party opposing the summary judgment motion has had adequate time to conduct discovery and has been conscientious in pursuing such discovery, and (3) the diligence of the party moving for summary judgment in responding to the discovery requests provided by the party opposing summary judgment.

Overstock, ¶ 21; *see also Crossland*, 877 P.2d at 1243 (“the trial court need not grant rule 56(f) motions that are dilatory or lacking in merit”); *Jensen v. Smith*, 2007 UT App 152, ¶ 2, 163 P.3d 657 (“a court should not grant a rule 56(f) motion to protect a party from its own lack of diligence or from the merits of the motion for summary judgment”).

Here, all three *Overstock* factors strongly favor denying Mr. Robinson’s Rule 56(f) motion, and the trial court did not exceed the “limits of reasonability” in so doing.

A. **Mr. Robinson has never explained how further discovery would uncover disputed material facts for opposing summary judgment.**

As to the first *Overstock* factor, the Utah Supreme Court has required that the Rule 56(f) affidavit do more than merely recite the conclusion that additional discovery will help a party resist summary judgment:

Simply asserting that more discovery is needed and that a proper response to the motion for summary judgment is impossible due to the other party's failure to cooperate with discovery requests is inadequate to overcome summary judgment. . . . Parties must offer more than conclusory assertions to demonstrate the existence of a genuine issue for trial, and cannot justify further discovery without providing a viable theory as to the nature of the facts they wish to obtain.

Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 57, 70 P.3d 1 (quotation marks and tions omitted); *see also Riddle v. Celebrity Cruises, Inc.*, 2004 UT App 487, ¶ 17, 105 P.3d 970 (“[T]he trial court properly refused to allow [plaintiff] to conduct further discovery because [plaintiff] failed to explain in his affidavit how additional discovery would aid in his opposition to summary judgment.”).

Here, Mr. Robinson sought to depose Ms. Bean and Mr. Clark. Mr. Robinson failed, however, to meet his burden to show how this proposed discovery would uncover disputed material facts to aid in opposing summary judgment. The only explanation by way of affidavit³ was contained in Mr. Robinson's supplemental affidavit offered in connection with his reply memorandum in support of the motion for additional time:

If I can depose Bean I can ask her to explain the attached emails, and I anticipate her responses will give me the information to better oppose a summary judgment motion. I also want to ask Clark if he feels that Bean adequately followed his advice to protect my interests. I don't know exactly how long this would take [R. 554.]

³ In his “Sur Sur Response Memorandum” he also stated he desired to depose Mr. Clark and Ms. Bean to ask them questions such as “why mediation was attempted without having accurate financial information and valuation information regarding the marital properties in advance of the mediation” and “why was the settlement document not revised to contain appropriate representations and warranties with safeguards concerning leases and property values?” [R. 704.]

Mr. Robinson never explained what information he expected to obtain from Ms. Bean, or how it might defeat a summary judgment motion that was based on failure to identify an expert witness on the applicable standard of care. The same is true of Mr. Clark's "feelings" about the situation, and in any event his feelings are irrelevant. This did not present a legitimate theory to oppose the motion for summary judgment. *See Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841 (Utah Ct. App. 1987) ("[A] conclusory assertion that the scheduled depositions were expected to produce matter essential to resolution of defendant's motion smacks of a fishing expedition for purely speculative facts."); *Holmes v. American States Ins. Co.*, 2000 UT App 85, ¶ 27, 1 P.3d 552 (affirming denial of a Rule 56(f) motion where additional discovery sought would not be relevant to the legal issues presented in summary judgment).⁴

B. The trial court properly found Mr. Robinson did not present a sufficient basis to excuse his lack of diligence.

As to the second *Overstock* factor, the trial court found that Mr. Robinson "did not present a sufficient basis to excuse his lack of diligence in completing discovery." [R. 726.] That conclusion was based on specific findings regarding Mr. Robinson's various delays in prosecuting the entire case. In view of the totality of these facts and circumstances, the trial court concluded that Mr. Robinson "did not present a sufficient basis to

⁴ *See also Jones ex rel Jones v. Bountiful City Corp.*, 834 P.2d 556, 561-62 (Utah Ct. App. 1992) (affirming the denial of a Rule 56(f) motion because additional discovery on issues sought were irrelevant); *American Towers Owners Ass'n Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1195 (Utah 1996) (affirming the denial of a Rule 56(f) motion because, even if facts as believed were discovered, it would have been irrelevant).

excuse his lack of diligence in completing discovery.” [Id.] This was not an abuse of discretion.

Mr. Robinson’s failure to comply with the expert disclosure deadline reflected a similar lack of diligence. Mr. Robinson stated for the first time in his Rule 56(f) reply brief that “Plaintiff has retained an expert, Orson West Esq., and assumes Defendants would like to depose him as well.” [R. 548; *see also* R. 550, 564 (providing no further information on Mr. West).] Beyond this brief reference, Mr. Robinson has failed to reveal anything else about his expert, leaving the trial court and Jones Waldo to speculate about what type of witness he was, what topics he might have addressed, and what he might have said about them. This vague, passing reference to an expert provided the trial court no information on how the proposed expert might affect summary judgment.

Ignoring his lack of diligence, Mr. Robinson asserts that trial court’s denial of his Rule 56(f) motion was “clearly based on the length of time that it took Robinson to retain new counsel.” [App. Bf. 47.] He contends that any failure on his part to diligently pursue discovery or amend the discovery deadlines arose because “he was intimidated by the process and felt his time was better served by seeking counsel.” [R. 550.] Those excuses, however, do not explain his lack of diligence in pursuing discovery for the 13 months when he was represented by counsel.

In *Gudmundson v. Del Ozone*, 2010 UT 33, 232 P.3d 1059, Ms. Gudmundson changed counsel nearly two years after the commencement of the suit. The new counsel appeared eight days before the close of fact discovery. The defendants filed summary judgment motions after the discovery deadline. Ms. Gudmundson sought leave under

Rule 56(f) to conduct additional discovery, arguing that she had just obtained new counsel, and the discovery would reveal evidence relevant to her claims. The district court denied her Rule 56(f) motion and granted defendants' summary judgment motions. The Utah Supreme Court affirmed:

Although Ms. Gudmundson's current counsel entered an appearance only eight days before the close of fact discovery, Ms. Gudmundson has not sufficiently demonstrated that her former counsel was incompetent or otherwise unable to diligently perform the needed discovery. She has not shown *why* her former counsel could not perform the needed discovery. . . .

Although rule 56(f) motions are to be granted liberally, in this case, Ms. Gudmundson's failure to adequately explain the lack of diligence does not convince us that the district court exceeded the limits of reasonability when it denied the motion.

Id. ¶¶ 22-23 (emphasis in original).

Similarly here, Mr. Robinson focuses on the three months between the withdrawal of his counsel and new counsel's entry of appearance, but he ignores his inactivity during the preceding 17 months. For 13 of those months, he was represented by counsel. It was the failure to pursue the case during the entire 21 months from filing, not just the final three months, that the trial court found to evidence a lack of diligence. It was well within its discretion. *See Dahl v. Harrison*, 2011 UT App 389, ¶ 27, 265 P.3d 139 (affirming trial court's conclusion that Ms. Dahl "had been dilatory and that her request for an extension of the fact discovery deadline was not founded in fact or in reason.").

C. Mr. Robinson has not alleged that Jones Waldo failed to respond diligently to discovery.

As to the third *Overstock* factor, Mr. Robinson has not argued that his alleged need for additional discovery was caused by delays attributable to Jones Waldo. Accordingly, this factor weighs in favor of affirmance as well.

D. The trial court properly considered Mr. Robinson's pro se status.

Mr. Robinson's arguments rest in large part on his claim that the trial court exceeded "the limits of reasonableness" because it failed to give him special treatment as a *pro se* litigant. That contention is without merit.

Mr. Robinson's argument ignores the fact that he was represented for thirteen months, but still did not diligently pursue the case. Moreover, under Utah law, "although a *pro se* litigant should be accorded every consideration that may reasonably be indulged, we will ultimately hold him to the same standard of knowledge and practice as any qualified member of the bar." *Midland Funding, LLC v. Pipkin*, 2012 UT App 185, ¶ 2, 283 P.3d 541 (quotation omitted). The Utah Supreme Court has warned that "reasonable indulgence is not unlimited indulgence." *Allen v. Friel*, 2008 UT 56, ¶ 11, 194 P.3d 903. In recognition of this principle, the trial court held that "[w]hile *pro se* litigants should be accorded every consideration that may reasonabl[y] be indulged, they are bound to follow the rules of civil procedure just as counsel are."

If these pronouncements are to mean anything, they must permit the trial court to enforce scheduling orders and other deadlines against *pro se* litigants. Here, the trial court did not exceed "the limits of reasonableness" by expecting Mr. Robinson either to

comply with the discovery plan or to seek to amend the plan. Nor did it exceed “the limits of reasonableness” by concluding that Mr. Robinson should not have missed the court-ordered deadlines.

E. Mr. Robinson’s request for relief under Rule 6(b) or Rule 37 has been waived and is contrary to established law.

For the first time on appeal, Mr. Robinson contends that his Rule 56(f) motion “could actually be considered” under Rule 6(b) or perhaps Rule 37. [See App. Bf. 47-48.] Those arguments were not made below and have been waived. See *438 Main Street v. Easy Heat Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (“to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on the issue. . . . Issues that are not raised at trial are usually deemed waived.”).

Notwithstanding this waiver, under Rule 6(b), “the court may, for good cause, extend the time . . . on a motion made after the time has expired if the party failed to act because of excusable neglect.” Under Utah law, however, “excusable neglect requires some evidence of diligence in order to justify relief.” *Jones v. Layton/Okland*, 2009 UT 39, ¶ 20, 214 P.3d 859 (applying “excusable neglect” standard of Rule 60(b)). In light of the district court’s findings of lack of diligence, Mr. Robinson’s Rule 6(b) argument would therefore be unavailing even if it had not been waived.

The newly raised Rule 37 argument also lacks merit. Mr. Robinson contends that the trial court abused its discretion by exceeding its broad discretionary “sanction”

ers under Rule 37 when it denied Mr. Robinson an extension to designate an expert witness—in effect excluding his expert.

First, Mr. Robinson’s Rule 37 argument is factually incorrect. Mr. Robinson asserts that on August 16, 2014, he moved the trial court for “two extensions,” one for time to conduct discovery and another to allow the late designation of an expert witness. [App. Bf. 47.] This misstates the record. Mr. Robinson’s August 16, 2014 motion only moved for additional time to conduct discovery with no mention of any expert witness. [See R. 500-10.] Mr. Robinson only mentioned an expert, for the first time, in his Rule 56(f) motion reply brief by vaguely stating “Plaintiff has retained an expert, Orson West Esq., and assumes Defendants would like to depose him as well.” [R. 548, 550, 564.] There was never a request for an extension of the deadline to designate experts. Nor did the court apply Rule 37 sanctions to exclude any expert. Rather, the motion only focused on the need for further discovery under Rule 56(f). The trial court properly ruled on the motion in view of the standards for Rule 56(f).

Second, Mr. Robinson’s Rule 37 argument is incorrect as a matter of law. In *Callister v. Snowbird Corp.*, 2014 UT App 243, the Court recently held that a “denial of a motion to extend deadlines is not a sanction under rule 37” *Id.* ¶ 32. This Court refused to apply Rule 37 standards, applied the normal “abuse of discretion” standard, affirmed the trial court’s refusal to extend the deadline to designate experts, and affirmed the trial court’s grant of summary judgment based on failure to timely designate an expert. *Id.* ¶¶ 15, 21, 30-34.

II. THE TRIAL COURT CORRECTLY GRANTED JONES WALDO'S MOTION FOR SUMMARY JUDGMENT

In order to sustain a legal malpractice action, a plaintiff must plead and prove “(i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages.” *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996). Jones Waldo moved for summary judgment on the elements of breach and causation. At the trial court level, Mr. Robinson did not oppose Jones Waldo's motion for summary judgment. Rather, Mr. Robinson only moved the trial court for more time to conduct discovery under Rule 56(f). As explained above, the trial court properly denied that Rule 56(f) motion.

What remained was Jones Waldo's unopposed motion for summary judgment. The trial court granted the motion because (1) “[w]ithout an expert witness, [Mr. Robinson] cannot demonstrate that the defendants' representation of him in his divorce action fell below the applicable standard of care”; (2) “the affidavits, emails, and other evidence presented by defendants in support of their motion demonstrate that plaintiff cannot show that any alleged breach by defendants caused any loss to him”; and (3) “[a]s other courts have held, his failure to even attempt to comply with the [Settlement Agreement] ha[s] been the cause of his losses.” [R. 726-27.]

Now, for the first time on appeal, Mr. Robinson, argues that: (1) the trial court has an independent obligation to ferret out from the record whether issues of fact exist before granting summary judgment; (2) there is no need for an expert to prove breach of the duty

of care; and (3) there are issues of fact associated with causation. Those arguments were not presented to the trial court. As such, they are waived. *Stevens v. Wall*, 2011 UT App 372, ¶¶ 3-4, 264 P.3d 568 (holding that appellant’s failure to oppose the summary judgment motion in the trial court results in a waiver of the challenge to the summary judgment on appeal); *see also Olsen v. Park-Craig-Olsen, Inc.*, 815 P.2d 1356, 1358 (Utah Ct. App. 1991) (declining to consider arguments that were not raised at the trial court in the opposition to summary judgment). “Merely mentioning an issue does not preserve it; the issue must be specifically raised, with relevant legal authority, in a manner that alerts the court to the need to correct the error.” *Brady v. Park*, 2013 UT App 97, ¶ 38, 302 P.3d 1220.

A. **The trial court has no obligation to ferret out facts and make arguments for Mr. Robinson.**

Having failed to oppose the summary judgment motion, Mr. Robinson contends that “courts must examine the entire record submitted to determine whether there are any issues of fact.” [App. Bf. 40.] The Utah Court of Appeals, however, has specifically rejected Mr. Robinson’s assertion. An “assertion that a trial court has an independent duty to ferret out opposing facts in prior pleadings in the record when a party fails to respond to a summary judgment motion is contrary to the rules.” *See In re Estate of Kuhn*, 2008 UT App 400, at 3, 2008 WL 4748195, *2 (unpublished).

Under Rule 7(c)(3)(A), a memorandum supporting a motion for summary judgment “shall contain a statement of material facts as to which the moving party contends no genuine issue exists. . . . Each fact set forth in the moving party’s memorandum is

deemed admitted for the purpose of summary judgment unless controverted by the responding party.” Rule 7(c)(1) states that “a party opposing the motion shall file a *randum* in opposition [within 14 days.]” And under Rule 56(e), if the summary judgment motion is properly supported, “an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response . . . must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.”

In *Campbell, Maack & Sessions v. Debry*, 2001 UT App 397, 38 P.3d 984, tiff law firm CMS sued defendant Ms. Debry for failure to pay for CMS’s representation of Ms. Debry in a divorce action. Ms. Debry counterclaimed for malpractice. At the close of discovery, CMS filed a motion for summary judgment, seeking dismissal of the counterclaim. Ms. Debry did not file an opposition to the summary judgment motion, instead filing a Rule 56(f) motion for additional time. The trial court denied the Rule 56(f) motion and granted CMS’s motion for summary judgment. *Id.* ¶¶ 4-5.

[W]hen a party . . . fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant’s affidavit affirmatively discloses the existence of such an issue.

Here, in the face of CMS’s motion for summary judgment, Debry failed to submit either an affidavit or any other acceptable evidentiary materials to rebut the motion. Accordingly, the trial court properly assumed that no genuine issues of material fact existed and correctly proceeded to determine whether CMS was entitled to summary judgment as a matter of law.

....

At a minimum, CMS presented a *prima facie* case that Debry had suffered no damage as a result of its representation. Accordingly, for De-

bry's claims to survive CMS's motion, the trial court properly required Debry to provide some evidence in support of the essential elements of her claim. In failing to submit either an affidavit or any other evidentiary materials, Debry effectively conceded that no genuine issues of material fact existed and accepted the facts presented by CMS. Therefore, the trial court properly concluded that Debry had suffered no damages as a result of CMS's representation.

Id. ¶¶ 16-17, 20 (citations and footnotes omitted).

In the present case, the trial court explicitly found Jones Waldo's summary judgment motion was properly supported, so Mr. Robinson could not rest upon mere allegations or denials in the pleadings. Jones Waldo presented a *prima facie* case that Mr. Robinson could not prove breach of the standard of care and causation of damages. The court appropriately expected Mr. Robinson to set forth specific facts showing that there were genuine issues for trial. He did not. As was proper under Rule 7(c)(3)(A), the trial court deemed the facts set forth in Jones Waldo's summary judgment admitted. And, in view of those facts, the trial court properly granted summary judgment for Jones Waldo.

B. Mr. Robinson's new arguments regarding breach of the applicable standard of care lack merit.

The Utah Court of Appeals has held that "expert testimony may be necessary to 'establish [] the standard of care required in cases dealing with duties owed by a particular profession,' especially 'where the average person has little understanding of the duties owed' by the particular profession at issue, or the 'case [] involv[es] complex . . . allegations'." *Posner v. Equity Title Ins. Agency Inc.*, 2009 UT App 347, ¶ 21, 222 P.3d 775 (citing *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997)). In its recent *Snowbird* case, this Court applied this standard to hold that expert testimony

was required to establish whether a ski resort operator had a duty to dig out snow or provide warning ropes to prevent a low-traveling ski tram from striking a skier on the ground. *See* 2014 UT App 243, ¶¶ 10, 15, 20-21. The Court reasoned that expert testimony is required if the standard of care involves “issues that do not fall within the mon knowledge and experience of lay jurors,” and the average person would not have knowledge of how a reasonable ski operator would act. *Id.* ¶¶ 19-20.

If an expert is required to show that a reasonable ski operator would rope off areas where a tram might collide with a standing skier, then an expert is certainly required to establish how a reasonable lawyer might handle a complex divorce settlement. In view of the complexity of this case and applicable law, the trial court properly recognized, and Mr. Robinson never disputed, that jurors would require expert testimony to aid them in understanding the applicable standard of care and breach of that standard. [*See* R. 726.]. For this reason, the trial court’s grant of summary judgment should be affirmed. *See Jensen v. Smith*, 2007 UT App 152, ¶ 6, 163 P.3d 657 (“Plaintiff’s argument that expert testimony was not required to prove his claim of medical malpractice was not raised before the trial court. We therefore need not discuss this argument.”).

In support of his proposition that no expert is required to establish breach in this case, Mr. Robinson cites *George v. Caton*, 93 N.M. 370, 600 P.2d 822, 829 (N.M. Ct. App. 1979), and *Nixondorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980). Those cases, however, are inapplicable to this case.

In *George*, the New Mexico Court of Appeals narrowly held that “[i]t does not require expert testimony to establish the negligence of an attorney who is ignorant of the

applicable statute of limitations.” 600 P.2d at 829. Here, the issues do not pertain to a statute of limitations or any other bright-line rule that implicates the absolute success or failure of a claim as in *George*.

In *Nixondorf*, the Utah Supreme Court held:

In the majority of medical malpractice cases the plaintiff must introduce expert testimony to establish this standard of care. Expert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen. However, this Court has recognized certain exceptions to the general rule requiring expert testimony. . . . The loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies this type of treatment.

612 P.2d at 352. Here, this is not a medical malpractice case where a doctor lost a surgical instrument in a patient—an act so obviously wrong that courts have recognized it as an exception to the requirement of expert testimony to establish the standard of care. Rather, it is undisputed that this case involves complex allegations, where “[e]xpert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.” *Id.*

Finally, Mr. Robinson claims for the first time on appeal that Mr. Clark established the standard of care in the portion of his email that said, “[t]here probably ought to be some protections in the event [Mr. Robinson] is unable notwithstanding his ‘best efforts’ to refinance the Phoenix Plaza” [R. 562.], and “[a]t a minimum there should be a cap on the interest” [R. 562.] But the email was simply advice given—it says nothing about the applicable standard of care. “An attorney is required to possess the legal knowledge and skills common to members of his profession, and to represent his client’s interest with competence and diligence. *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah

1982) (citations omitted). Whether Mr. Clark’s email describes the prevailing standard of care or a higher standard requires expert testimony. More to the point, the question in this case is not whether the email met the standard of care, but whether the advice given in connection with the ultimate settlement of the case—in which Mr. Robinson agreed to finance the property to cash his ex-wife out of it, and the escalating penalty interest Mr. Clark was worried about was replaced with a capped 8% interest rate—was consistent with the prevailing standard in similar cases. That standard is not within the common knowledge of lay jurors, so expert testimony was required.

C. **Mr. Robinson’s new arguments regarding causation and damages lack merit.**

“In a legal malpractice action, a plaintiff must plead and prove . . . a causal connection between the breach of duty and the resulting injury to the client.” *Harline*, 912 P.2d at 439.

In Utah, causation or the connection between fault and damages in legal malpractice actions cannot properly be based on speculation or conjecture. To prevail in legal malpractice actions, clients must establish actual cause—that but for the attorney’s wrong their loss would not have occurred—and proximate cause—that a reasonable likelihood exists that they would have ultimately benefited.

Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1291 (Utah Ct. App. 1996) (citation omitted). As the trial court properly found, Mr. Robinson failed to demonstrate that “any alleged breach by defendants caused any loss to him.” And further, Mr. Robinson’s “failure to even attempt to comply with the [Settlement Agreement has] been the cause of his losses.” [R. 726-27.]

1. Mr. Robinson ignored the counsel of Ms. Bean when he chose not to refinance.

Mr. Robinson asserts, without any citation to support his claims, that Jones Waldo instructed him “that he did not need to make a loan application within the 15 day time period” because Ms. Robinson had been the first to breach. [App. Bf. 45.] Mr. Robinson contends that, but for this instruction, he would have refinanced. And he contends that he sustained damages as a result of the failure to refinance. But the record contains no evidence to support such conjectures.

Jones Waldo repeatedly and ardently advised Mr. Robinson to submit a refinance application. On November 29, 2007, Ms. Bean asked Mr. Robinson by email, “[Ms. Robinson] said she would work with you on getting a good deal on the mortgage--are you two working on this?” [R. 651.] On December 5, 2007, Ms. Bean told Mr. Robinson, “[i]t appears that we need to get moving on [the refinance] immediately Have you filed a loan application?” [R. 658.] On December 9, 2007, Ms. Bean advised Mr. Robinson “our time at this point is running on your refinancing of the Plaza and I would advise you to move forward on doing so.” [R. 662.] On December 10, 2007, Ms. Bean advised Mr. Robinson, “I would encourage you to continue using your best efforts to refinance.” [R. 666]. On October 11, 2008, Mr. Clark again advised Mr. Robinson to “get an application for the refinancing of the Plaza on file and pursue it as vigorously as you can[.]” [R. 676.] Even Mr. Robinson “admit[ted] that he and his attorneys/the Defendants discussed the need to file an application to refinance the Phoenix Plaza Property,” and “both

Ms. Bean and Mr. Clark suggested that Plaintiff should attempt to submit an application.”
[R. 685-86.]

Mr. Robinson’s emails reveal that he did not submit the application because he was gambling that interest rates would drop. [R. 594, 651-52.] On November 29, 2007, Mr. Robinson, in responding to Ms. Bean’s inquiry on the progress of the refinancing application, stated: “We are working on it, but rates have been doing a bit of a roller-coaster. If I can lock a rate slightly below the 6% mark, I will. Making progress, but I may still need an additional month or two.” [R. 651.] Mr. Robinson reasoned that “most analysts think that rates will drop in December and, again, in January,” [R. 652.] Ms. Bean responded back, “my concern is that rates might just as well go up and then you would also be in a mess and want to totally redo the deal.” [R. 654.]

It appears that Mr. Robinson relies on a March 17, 2008, email from Ms. Bean to Mr. Robinson for his proposition that Jones Waldo advised him that he did not need to file a loan application. The email, in relevant part, states:

I’m pulling the most current Utah cases on impossibility and first to breach so we can refocus our prior pleading to now state—now Debra [Ms. Robinson] has performed, but it is too late and her tardiness makes the agreement impossible to effect and because she was the first to breach (on the plaza, deer valley, etc), you don’t have to perform.

[R. 674.]

The text and context of this email demonstrate that Ms. Bean was explaining her desperate attempt to formulate an argument for the divorce court justifying Mr. Robinson’s non-performance of his refinance obligation. At the time of this email, Mr. Robinson and Jones Waldo were facing Ms. Robinson’s motion to enforce the Stipulation and

enter a decree of divorce. [R. 357-58.] Ms. Bean was explaining to Mr. Robinson the *arguments* she planned to make to the divorce court in an effort to have the Settlement Agreement set aside. She was not “advising” and never did advise Mr. Robinson that he need not file an application to refinance the Phoenix Plaza. To the contrary, Ms. Bean lamented in the second paragraph of her March 17, 2008, email that it would have been “far more effective to have documentation to support our argument re: impossibility which is why further support from the lender would be very helpful.” [R. 674.]

2. Even if Ms. Bean advised him not to refinance, Mr. Robinson still fails to prove that this advice caused his alleged damages.

Even assuming that Mr. Robinson is correct in his assertion that Ms. Bean told him not to attempt to refinance the Phoenix Plaza, Mr. Robinson’s argument still fails because Mr. Robinson has never presented an iota of evidence that he would somehow be better off today if Ms. Bean had not given this hypothetical advice. Rather, Mr. Robinson asks the court to speculate about what would have then occurred and what the ultimate outcome might have been, especially given the real estate crash of late 2007 and early 2008. As the divorce court aptly stated, “[n]one of us will ever know given that, whether he had done so [applied to refinance the Phoenix Plaza], the refinance would or would not have occurred.” [R. 369]; *see also Harline*, 912 P.2d at 439 (“[P]roximate cause issues can be decided as a matter of law . . . when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law.”).

Mr. Robinson further argues that Jones Waldo should have negotiated a better Settlement Agreement for him, and that if Ms. Robinson would not have agreed to a better

Settlement Agreement for Mr. Robinson, “then there would have been no agreement, and the divorce action would have gone to the divorce court for an equitable distribution of the parties’ assets.” [App. Bf. 26-27.] Mr. Robinson argues that he would have gotten a better deal from the divorce court. All of this is pure, unadulterated speculation with no evidentiary foundation.

The record establishes that Ms. Robinson would *not* have agreed to more favorable terms for Mr. Robinson in the Settlement Agreement. [R. 315-17, 420-28]. And Mr. Robinson has utterly failed to offer any evidence that he would have been better off if the case had not settled at mediation. Indeed, Mr. Robinson has made no attempt—neither at the trial level, nor in the Rule 56(f) motion papers, nor on appeal—to approach this issue.

Mr. Robinson’s appeal ultimately suffers the same defects that existed in the trial court. He did not, has not, and cannot establish a causal link between the alleged wrongdoing and his alleged damages. The trial court properly awarded summary judgment on this basis. *See Harline*, 912 P.2d at 439; *see also Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶¶ 25-32, 194 P.3d 931 (affirming trial court’s grant of summary judgment because plaintiffs failed to establish causation); *Breton v. Clyde Snow & Sessions*, 2013 UT App 65, ¶¶ 10-16, 299 P.3d 13 (affirming trial court’s grant of summary judgment because plaintiff caused his own harm).

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s denial of Mr. Robinson’s Rule 56(f) motion, and the grant of Jones Waldo’s summary judgment motion.

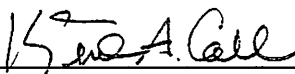
CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(1) because the brief contains 9,016 words, excluding parts of the brief exempted by Utah Rule App. P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font.

Respectfully submitted this 5th day of December, 2014.

SNOW, CHRISTENSEN & MARTINEAU



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CERTIFICATE OF SERVICE

I certify that on December 5, 2014, I mailed two copies of the foregoing BRIEF
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