2018

MATT LOCKIN, Appellee, v. DIEGO CUILUPA-KAPLUM, Appellant. : Brief of Appellant

Utah Court of Appeals

Edward W. McBride; attorney for appellant.
Randall G. Phillips; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

MATT LOCKIN, Appellee, v. DIEGO CUILUPA-KAPLUM, Appellant.	: : : : : : : : :	**APPELLANT'S OPENING BRIEF** Case No. 20180230-CA

APPELLANT'S OPENING BRIEF

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LIST OF ALL PARTIES

Plaintiff: Matt Lockin

Defendant: Diego Ciulupa-Kaplun

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INTRODUCTION

This matter involved the enforcement of Rule 26's disclosure requirements. Plaintiff was permitted to testify about medical opinions, causation and permanency despite never providing any notice or disclosure of the same. The trial court did not evaluate the untimely disclosure under the proper standard – good cause/no prejudice – but instead allowed Plaintiff to testify. This violates the spirit of Rule 26 and undermines the purpose of the rule altogether.

STATEMENT OF ISSUES

1. Did the trial court err in denying defendant's motion in limine where plaintiff failed to provide initial disclosures and pre-trial disclosures in accordance with U.R.C.P. 26?

i) Standard of Review: Abuse of discretion. Lawrence v. MountainStar Healthcare, 2014 UT App 40, ¶ 16, 320 P.3d 1037.

ii) Preserved in record at R. 180, motion in limine.

2. Did the trial court err in allowing Plaintiff to offer opinion evidence, and not requiring and medical expert, regarding causation, treatment and damages?

i) Standard of Review: Abuse of discretion. Lawrence v. MountainStar Healthcare, 2014 UT App 40, ¶ 16, 320 P.3d 1037.

ii) Preserved in record at R. 426, trial objections.

STATEMENT OF THE CASE

This matter arises from an incident which occurred at Solitude Resort on March 7, 2014. The parties were involved in an altercation wherein Defendant struck Plaintiff in the nose.

On September 3, 2014, Plaintiff filed his complaint against Defendant in which he alleges that the incident caused him permanent physical injury, psychological injury and the need for future medical treatment. (R. 1-5) On September 29, 2014, Defendant filed his answer, pro se. (R. 10-11) On October 1, 2014, a Notice of Event Due Dates was issued which ordered Plaintiff to provided initial disclosures by October 13, 2014. (R. 12) On May 9, 2015, Plaintiff filed a Motion for Partial Summary Judgment as to liability. (R. 13) On June 8, 2015, fact discovery ended.

On September 10, 2015, the parties entered into a stipulation regarding liability. (R. 53) That same day, Plaintiff filed a first request for a hearing as to damages, one month prior to the expert discovery deadline. (R. 55) Plaintiff never disclosed an expert witness.

An evidentiary hearing was set for February 16, 2016, and subsequently rescheduled for March 23, 2016. On March 18, 2016, Defendant filed bankruptcy placing an automatic stay on the case. (R. 69) On August 8, 2017, the Bankruptcy Court granted Plaintiff relief from the stay, thereby allowing this matter to proceed.

On August 9, 2017, Plaintiff again requested an evidentiary hearing. (R. 73)

On September 7, 2017, a scheduling conference was held and the matter was set for a November 2, 2017.

On October 27, 2017, Plaintiff filed a motion to continue the evidentiary hearing on the basis that 1) the plaintiff is unable to attend due to employment; and, 2) the plaintiff has not been able yet to obtain the results of an MRI to determine whether he suffered a traumatic brain injury. (R. 88) On that same day Defendant filed his objection to the continuance, noting that Plaintiff had never made any disclosures in the case. (R. 96)

In the memo, Plaintiff's counsel states:

> "With respect to the potential "Traumatic Brain Injury," without the subject MRI and physicians report, it is unknown at this time as to whether or not the Plaintiff suffered a "Traumatic Brain Injury," and if so, what caused such. The mere possibility of the Plaintiff suffering a "Traumatic Brain Injury," was newly discovered. Specifically, had it not been for the Plaintiff's mother's statements to counsel as to the Plaintiff's "dramatic personality changes,"
>
> Plaintiff's counsel would never have known about such. Such were unknown until such time, as the Plaintiff was not aware of and/or was in denial of said "personality changes," As a matter of fairness and equity to the Plaintiff, the

victim of a horrific assault, the mere existence of a "Traumatic Brain Injury" should be at least determined.

On October 30, 2017, Defendant filed his motion in limine seeking to preclude Plaintiff from using any evidence for failing to provide both initial disclosures and pre-trial disclosures, pursuant to URCP 26. (R. 180)

On November 1, 2017, Plaintiff filed his own Motion in Limine wherein it stated:

> "The Defendant has never provided the Plaintiff with any disclosures, nor any document, nor any form of evidence, nor any information as to what the Defendant intends to present at trial."
>
> "It is patently obvious that NO "good cause" exists for the Defendant not providing the Plaintiff with anything, nor is said failure "harmless." Based upon the Defendant's complete and total lack of compliance with any aspect of Rule 26, and the overwhelming prejudice imposed upon the Plaintiff, by being forced to expect solely and only the unexpected at trial, the Defendant should be prohibited from having any witness testify and be barred from presenting any evidence at trial."

(R. 204)

On November 1, 2017, Plaintiff filed his Rule 26 pre-trial disclosures wherein his proposed testimony included "the nature and extent of the Plaintiff's injuries; past, present and future treatment; (sic) that the Plaintiff has had or may have which are

reasonably related to the subject incident and are necessary for the Plaintiff's treatment; medical bills and lien . . ." (R. 210)

On November 7, 2017, the parties appeared before the trial court. Plaintiff argued that the documentation provided was "all we have" and "[t]hat's all we've ever intended to, to present all along. . . . we substantially complied in that we gave them all of the records we have. (R. 408-409)

The trial court denied Defendant's motion in limine (the court characterized it as a motion to dismiss) and proceeded with hearing. (R. 459)

Plaintiff Matt Lockin testified about the incident and his damages. (R. 418) The salient portions of Plaintiff's testimony are listed as follows.

- Plaintiff had problems breathing through his nose his entire life, prior to the 2007 septoplasty. (R. 421)
- Plaintiff has had approximately six visits to his surgeon, including follow-up after surgery.
- Plaintiff had diagnostic images of his nose from these visits.
- Plaintiff has sought treatment for breathing problems form his general practitioner who he visits regularly, including one month before trial
- Plaintiff treated with a psychiatrist, whose name he could not remember, six times after this incident. (R. 441)

- Plaintiff testified that the surgery was "absolutely necessary" and that if they would not have done it, he wouldn't be able to breathe out of one side of his nose. (R. 423)
- Plaintiff stated he was not able to breathe despite having the surgery because of the scar tissue and because of the fact that it was a revisionary surgery, he was not able to breathe as well as he could prior to the surgery. (R. 423)
- Plaintiff stated that "it's going to be that way for the rest of my life." (R. 428)
- Plaintiff stated that to this day he does not breathe as well as he did, and that he snores "louder than you can imagine", which he stated he did not do prior to this incident. (R. 431)

The district court issued its Memorandum Decision on November 14, 2017 and entered Judgment against Defendant in the amount of $30,870.73. On February 27, 2018, the judgment was amended to reflect special damages of $27,380.00. (R. 371)

ARGUMENT

1. **The trial court erred in failing to preclude Plaintiff from offering evidence at trial in light of his failure to provide initial disclosures and untimely service of pre-trial disclosures.**

Rule 26 of the Utah Rules of Civil Procedure requires parties, without waiting for a discovery request, to serve on the other parties:

a. each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

b. a copy of all documents . . . in the possession or control of the party that the party may offer in its case-in-chief, . . .

c. a computation of any damages claimed and a copy of all discoverable documents or

evidentiary material on which such computation is based. . .

d. a copy of any agreement under which any person may be liable to satisfy part or all of a judgment. . .

e. a copy of all documents to which a party refers in its pleadings (Id.).

Section (d)(4) provides that "[i[f a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure." In this matter, the district court did not make a finding of "good cause" or that the failure was "harmless."

The committee notes indicate that:

"the disclosure requirements and timing seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party

may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

With respect to medical record disclosure, the notes state:

"For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined."

If a party is going to offer "opinion testimony" the notes state:

"The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions."

"The rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule

26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition."

Defendant submits that the trial court failed to apply the appropriate standard to Plaintiff's untimely designation. There was never any finding of "reasonable justification" or "harmlessness" of the information.

Clearly Defendant suffered prejudice as a result. First, there was no disclosure regarding the fact that Plaintiff himself would offer opinion evidence regarding the success, necessity and outcome of the surgical procedure. This is further complicated by the fact that Plaintiff never provided full copies of medical records from his surgeon and other treating physicians.

Rule 26 is designed to reduce litigation costs. Trial courts are encouraged to enforce its provisions. "To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure." (Committee notes)

In this matter the failure to disclose was prejudicial and should have resulted in an order precluding Plaintiff from offering any evidence at trial. Therefore, the district court should be reversed.

2. The district court erred in allowing Plaintiff to provide expert opinion testimony.

In Utah, the need for positive expert testimony to establish a causal link between the defendant's negligent act and the plaintiff's injury depends on the nature of the injury. Thus, where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury. It is only in the most obvious cases that a plaintiff may be excepted from the requirement of using expert testimony to prove causation. *See, Hansen v. Harper Excavating, Inc.*, 2014 UT App 180, para. 10, 332 P.3d 969.

The only opinion testimony at trial was Plaintiff's undisclosed medical opinions. As noted, Plaintiff's testimony included the following:

- Plaintiff testified that the surgery was "absolutely necessary" and that if they would not have done it, he wouldn't be able to breathe out of one side of his nose. (R. 423)

- Plaintiff stated he was not able to breathe despite having the surgery because of the scar tissue and because of the fact that it was a revisionary surgery, he was not able to breathe as well as he could prior to the surgery. (R. 423)
- Plaintiff stated that "it's going to be that way for the rest of my life." (R. 428)
- Plaintiff stated that to this day he does not breathe as well as he did, and that he snores "louder than you can imagine", which he stated he did not do prior to this incident. (R. 431)

Plaintiff's undisclosed medical opinions are further complicated by the fact that he failed to disclose so many critical items related to his case. Again, as noted above, Plaintiff acknowledged the following facts and related missing items in his case.

- Plaintiff had problems breathing through his nose his entire life, prior to the 2007 septoplasty. (R. 421)
- Plaintiff has had approximately six visits to his surgeon, including follow-up after surgery.
- Plaintiff had diagnostic images of his nose from these visits.
- Plaintiff has sought treatment for breathing problems form his general practitioner who he visits regularly, including one month before trial.
- Plaintiff treated with a psychiatrist, whose name he could not remember, six times after this incident. (R. 441)

In light of Plaintiff's relevant but undisclosed medical history, and the substance of his medical opinions, it is apparent that this case is not one of "the most obvious cases." It required expert testimony.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the decision of the trial court.

DATED this 13th day of November, 2018.

EDWARD W. McBRIDE

/s/ Edward W. McBride

Edward W. McBride
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2018, a true and correct copy of the foregoing Appellant's Opening Brief was emailed to the following:

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/s/ Edward McBride

Edward W. McBride

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Opening Brief complies with rule 24 and 21 of the Utah Rules of Appellate Procedure.

/s/ Edward McBride

_____

Edward W. McBride

THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH	
Matthew Lockin, Plaintiff v. Diego Ciulupa-Kaplun, Defendant	Memorandum Decision Case No. 140906063 Judge Katie Bernards-Goodman

On November 2, 2017, the parties appeared before the Court for an evidentiary hearing to determine damages in this case.

Findings of Fact

1. On March 7, 2014, at Solitude Resort, Salt Lake County, Defendant intentionally struck Plaintiff in the face, causing a cut on Plaintiff's lip, breaking Plaintiff's nose and causing a deviated septum.
2. Approximately fifteen to thirty minutes prior to the battery, Plaintiff and Defendant had an altercation at the base of the ski hill that ended when Plaintiff pushed Defendant, causing Defendant to fall down.
3. "Defendant admits liability under the first cause of action (battery) and second cause of action (intentional infliction of emotional distress)." Stipulation of Liability and Mediation 1 (Aug. 27, 2015).
4. As a result of the injury, Plaintiff was unable to breathe through his nose.
5. Plaintiff underwent surgery on April 1, 2014, to correct the deviated septum.
6. Plaintiff suffered pain during the surgery.

7. Plaintiff experienced pain for approximately one month following the surgery, in part because of tubes that were temporarily placed in his nose.
8. Plaintiff also retains a scar of the cut on his lip, which makes him feel self-conscious and reminds him of the battery.
9. Plaintiff now refrains from sporting activities in which he used to participate for fear of additional injury to his nose.
10. As a result of the battery, Plaintiff has suffered emotional stress, including from the loss of sleep, nightmares, and flashbacks to the incident.
11. Plaintiff had previously had surgery for a deviated septum in 2007. The original deviated septum was a congenital condition.
12. Prior to the 2007 surgery, Plaintiff had difficulty breathing through his nose. After the 2007 surgery Plaintiff could breathe more easily through his nose.
13. All but $870.43 of the cost of the April 1, 2017, surgery was covered by Plaintiff's medical insurance provider.
14. Plaintiff filed a request for benefits with the Utah Office for Victims of Crime and received reimbursement for medical expenses in the amount of $751.40.
15. The Utah Office for Victims of Crime has subrogation rights to $751.40 of the damages awarded in this case.

Discussion

Battery

In this case, Defendant "admits liability under the first cause of action (battery)." Under Utah law,

> An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (b) a harmful contact with the person of the other directly or indirectly results."

Wagner v. State of Utah, 2005 UT 54, ¶ 16, 122 P.3d 599 (quoting Restatement (Second) of Torts § 13). "Subject to liability" is defined in the Restatement: "The words 'subject to liability' . . . denote the fact that the actor's conduct is such as to make him liable for another's injury, if (a) the actor's conduct is a legal cause thereof, and (b) the actor has no defense applicable to the particular claim." Restatement (Second) of Torts § 5. The comment to section 5 explains that

> [I]in order that the actor may be liable he must be subject to liability; but whether his subjection to liability will ripen into liability depends (1) upon whether the invasion of the other's legally protected interest results in a manner which makes the law regard it as just to hold the actor responsible for it and which, therefore, makes the actor's conduct the legal cause of the invasion, and (2) upon whether he has a defense which is applicable to the particular claim asserted by the other."

Id. cmt. a. Under the Restatement, "[t]he word 'harm' is used . . . to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause." Restatement (Second) of Torts § 7. The comments explain that "it is only when the harm is legally caused by the acts or omissions of another that a person has . . . any legal rights in respect to the harm." *Id.* cmt. c.

By admitting liability for battery, Defendant has also admitted to harmful contact with Plaintiff. The issue before the Court is what harm Defendant legally caused to Plaintiff.

> In Utah, the need for positive expert testimony to establish a causal link between the defendants' negligent act and the plaintiff's injury depends on the nature of the injury. Thus, where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury. It is only in the most obvious cases that a plaintiff may be excepted from the requirement of using expert testimony to prove causation.

Hansen v. Harper Excavating, Inc., 2014 UT App 180, ¶ 10, 332 P.3d 969 (citations, quotation marks and alterations omitted).

In some aspects this case is one of "the most obvious cases." Some aspects of the harm Plaintiff complains of are well within the common experience of a layperson. *See Fox v. Brigham Young Univ.*, 2007 UT App 406, ¶ 23, 176 P.3d 446. No reasonable factfinder could conclude that a direct hit to the face was not the legal cause of harm to Plaintiff. Plaintiff testified that the hit caused him to lose consciousness momentarily, that when he regained consciousness he was on the floor and bleeding. Plaintiff further testified that after the assault he was unable to breathe through one side of his nose and that surgery partially corrected the problem. Furthermore, it is common understanding of a lay person that hitting another in the face with such force as to cause the other to lose consciousness may necessitate medical attention including possible surgery. It is also within common knowledge that surgery can be necessitated by injury and that surgery and recovery can be painful. These are not "obscure medical factors" requiring expert testimony. Here, Plaintiff testified that after the battery he had to wait for surgery, that the surgery was painful, that after the surgery he had tubes fixed in his nose for approximately one month to aid in recovery, and that he experienced pain during that time. Defendant is liable for this harm.

Intentional Infliction of Emotional Distress

In this case, Defendant "admits liability under the . . . second cause of action (intentional infliction of emotional distress." Under Utah law,

> To succeed on a claim of intentional infliction of emotional distress, a plaintiff must demonstrate that the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his

> actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

Cabaness v. Thomas, 2010 UT 23, ¶ 36, 232 P.3d 486 (citation and emphasis omitted).

Again, it is within the common knowledge of a layperson that intentional battery can cause emotional distress to another. Here, Plaintiff testified that after the assault he experienced a loss of sleep, nightmares, and flashbacks to the incident. This constitutes emotional distress, for which Defendant is liable.

Punitive damages

Generally,

> [P]unitive damages may be awarded only if compensatory or general damages are awarded and 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). "Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages: to punish past misconduct and to discourage future misconduct." Amount of Punitive Damages, MUJI 2d, CV2027. "Even if [a] trial court determine[s] that [a defendant]'s actions were the result of willful and malicious or intentionally fraudulent conduct, it has the discretion to award punitive damages, and likewise . . . to deny them." *Long v. Stutesman*, 2011 UT App 438, ¶ 36, 269 P.3d 178.

Attorney Fees

The request for attorney fees is not properly before the court. "A party may not make a motion in a memorandum opposing a motion or in a reply memorandum." Utah R. Civ. P. 7(n). Here, it appears that Plaintiff's first request for attorney fees appears in Plaintiff's Reply to

Defendant's Objection to Continue Evidentiary Hearing. Plaintiff did not raise the issue of attorney fees at the November 2, 2017, hearing, and Defendant has not had an opportunity to respond to the request.

Conclusion

For the reasons stated above, the Court concludes that Defendant's intentional battery was the legal cause of harm to Plaintiff. Additionally that Plaintiff suffered emotional distress as a result of Defendant's intentional acts. The extent of the harm Defendant caused is set forth in the Findings of Fact. The Court will not award punitive damages in this case.

The Final Judgment in this case is entered concurrently with this Memorandum Decision.

Dated 14 day of Nov, 2017.

By the Court

Judge Katie Bernards-Goodman
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140906063 by the method and on the date specified.

MANUAL EMAIL: EDWARD W MCBRIDE Ted.McBride@VF-LAW.com
MANUAL EMAIL: RANDALL G PHILLIPS attorneyrgp@gmail.com

11/14/2017 /s/ KATIE JOHNSON

Date: _____ _____

Deputy Court Clerk