2018

JAMES PRIEUR, Petitioner and Appellant, vs. THE ENSIGN GROUP, INC., Defendant and Appellee. : Brief of Appellant

Utah Court of Appeals

Allen M. Young; attorney for appellant.

Stephen T. Hester, Kimberley L. Hansen; attorneys for appellee.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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JAMES PRIEUR,	:	
	:	
Petitioner and Appellant,	:	
	:	Appeal No. 20180704-CA
vs.	:	
	:	
THE ENSIGN GROUP, INC.,	:	
	:	
Defendant and Appellee.	:	

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APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, HON. JAMES BRADY

BRIEF OF APPELLANTS

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TABLE OF AUTHORITIES CITED

CASE AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

RULES CITED

IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW

Utah's Appellate Courts have long held that stipulated-to agreements are to be ratified by the Court. The Utah Supreme Court's held that, unless there are issues for judicial determination in the stipulation, "ordinarily, courts are bound by stipulations between parties." First of Denver Mortg. Inv'rs v. C. N. Zundel & Assocs., 600 P.2d

521, 527 (Utah 1979).[1]

Furthermore, the Court of Appeals has noted that '[t]here is an institutional hesitancy to relieve a party from a stipulation negotiated and entered into with the advice of counsel,' Birch v. Birch, 771 P.2d 1114, 1116 (Utah Ct.App.1989).

Pursuant to Russell v. Standard Corp., 898 P.2d 263, 364 (Utah 1995), the standard or review in this matter is that the factual allegations are accepted as true, and all reasonable inferences are drawn from them in a light most favorable to Plaintiff. The propriety of the Court's dismissal of Appellant's case, despite the stipulated agreement between the parties, is a question of law, and is reviewed for correctness, giving no particular deference to the trial court. This issue was preserved for appeal by Plaintiff's Motion for New Trial; Plaintiff's Motion for Relief from the court's Minute Order as to the Parties January 2, 2017 Stipulation; Motion to Reopen Discovery; and Plaintiff's Motion for Relief from Orders on Motions in Limine (R 341-359; 410-425; 426-441; 442-472)

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[1] The term "judicial determination" is a nebulous one. Although Plaintiffs were unable to find a more definite description of what items are ripe for judicial determination, a case involving a stipulation in a contract case noting time extensions noted that judicial determination is unnecessary as "Such an exception is not applicable in this case." Lloyd v. Lloyd, 2009 UT App 314, 221 P.3d 884, 886, Fn. 1.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

STATEMENT OF NATURE OF THE CASE

This is an appeal from the Order and Judgment of the Fourth District Court, Provo Department, Utah County, granting Defendant's Motion for Summary Judgment pursuant to Rule 56(a) U.R.C.P. This is an action pursuant to Utah Code Ann. 78B-3-403 seeking compensation for Medical Malpractice.

STATEMENT OF FACTS

References herein are to the Record of this Case, No. 130400555 (R.).

This medical malpractice case arose out of the care and treatment received by Appellant's decedent, Sharon Horen ("Ms. Horen"), at Central Utah Clinic and Defendant Orem Rehabilitation and Skilled Nursing ("Orem Rehab"). On October 15, 2010, Ms. Horen was seen by John Walker, a nephrology APRN, at Central Utah Clinic for examination following an observed change in Ms. Horen's condition at Orem Rehab. During this visit, Mr. Walker wrote an order for STAT labs to be performed on Ms. Horen and Ms. Horen was returned to Orem Rehab with the order. Ms. Horen's blood was drawn and the STAT lab results were faxed to Orem Rehab at approximately 7:14 p.m. on that same day. The STAT lab results indicated that Ms. Horen had a serum potassium level of 8.6-a "high panic" value.

The staff at Orem Rehab failed to notice, report, or otherwise act on the STAT

labs. Mr. Walker likewise failed to follow up on his order. As a result, none of Ms. Horen's health care providers were made aware of her serum potassium level of 8.6. Just after midnight on October 16, 2010, Ms. Horen was found minimally responsive by Orem Rehab staff. Following transport to Utah Valley Regional Medical Center, and pursuant to Ms. Horen's advanced directive, no therapeutic treatments were administered and Ms. Horen expired on October 16, 2010.

During Discovery in the underlying matter, the parties, jointly having failed to complete discovery, and expressing a desire to settle the matter formed stipulations to extend discovery. On March 26, 2015, the parties stipulated to extend discovery. See Third Stipulated Statement to Extend Fact Discovery. (R. 69-71). In that Stipulation, the parties anticipated concluding fact discovery on June 30, 2015. See Id.

The parties were unable to complete fact discovery within the anticipated June 30, 2015 deadline, including Appellee's request to conduct Appellant James Prieur's deposition on September 25, 2015. The parties continued attempting to resolve this matter without incurring additional costs and using Court resources. In September of 2015, Defendants agreed that they breached the standard of care, prepared a Stipulation to that effect. (R.87-90)

Shortly thereafter, Appellee expressed interest in attempting to mediate this case prior to incurring expert discovery costs. (R. 410-425). The parties scheduled a

mediation to take place on July 11, 2016, which was postponed at the request of defense counsel for personal reasons. See Id.

The parties were able to reschedule the mediation to take place on August 25, 2016, with Lew Quigley as the mediator. However, the parties were unable to reach an agreement on the date of the mediation, and Mr. Quigley continued communicating with both parties in an attempt to resolve the matter without further litigation.

Toward the end of 2016, Mr. Quigley informed Appellant's previous counsel, Brandon Kidman, that settlement on this case would be unlikely. See Id. Mr. Kidman then reached out to Defendants' counsel in order to come up with a new discovery plan now that a resolution to the case without proceeding with litigation was unlikely. See id.

The parties were able to finalize a new Stipulation and submitted a proposed case management order to the Court that would assist in allowing the case to move forward. (R. 120-122). Both parties anticipated that expert discovery would not begin until early 2017. Id. The parties anticipated that Plaintiffs would disclose their experts on February 28, 2017. Id. On January 30, 2017, the Court declined to sign the proposed order, entering a note that discovery had closed. (R. 123-125)

On February 21, 2017, before the stipulated-to February 28, 2017 deadline, the Court entered a Notice of Final Pre-trial Conference, indicating that fact discovery

had ended on June 30, 2015 and all discovery and dispositive motions were due by October 30, 2015. The Court ruled on three Motions in Limine and a Motion for Summary Judgment brought by Appellees after the Court's January 30, 2017 order without oral argument. (R. 235-250).

SUMMARY OF ARGUMENTS

Appellant's Petition respectfully requests that the Court grant relief from the District Court's order granting Summary Judgment. The Order is based wholly on the fact that Appellant had failed to present expert testimony in this matter. However, Appellant's "failure" to submit the requested evidence was due to the fact that the parties had repeatedly agreed to settle the matter and to extend the applicable discovery period. This agreement was memorialized in the fully executed agreement between the parties to extend discovery entered into on January 24, 2017. The Utah Supreme Court has noted that courts are typically bound by a parties' stipulation, unless that stipulation requires a judicial determination. The parties' agreement to extend the time for discovery in this matter should have been ratified by the Court and it was error for the Court to refuse to recognize the agreement between the parties.

ARGUMENT

POINT I

THE COURT'S DECISION TO REFUSE TO RATIFY THE PARTIES STIPULATED-TO AGREEMENT TO EXTEND DISCOVERY WAS ARBITRARY AND CAPRICIOUS.

In this case, the District Court failed to allow Appellant to submit their expert disclosures within the timeframe agreed upon by the parties. The parties initially entered into a Stipulation and the Court signed a Case Management Order extending fact discovery through June 30, 2015. *See* Third Stipulated Statement to Extend Fact Discovery, Ct. Docket. However, due to scheduling conflicts and Defendants' request to continue fact discovery efforts, the parties were unable to complete discovery within the June 30, 2015 deadline.

Not only had the parties been pursuing settlement opportunities, litigation was actively being prepared for as well, as deposition were scheduled by both parties. Following these depositions, the parties agreed to narrow the triable issues in this case by entering into a stipulation in which Appellee agreed to admit breaching the standard of care. In the process of preparing that Stipulation, defense counsel indicated to Appellant that they were not ready to proceed into expert discovery, and that they desired to attempt mediation before incurring expert discovery costs. The mediation ultimately failed and mediation efforts ended in December 2016.

Following the parties' failure to resolve this case through the mediator,

Plaintiffs' previous counsel, Brandon Kidman, attempted to contact defense counsel in order to move forward with expert discovery. Mr. Kidman sent a follow-up email to defense counsel on January 12, 2017, again attempting to set a timeline for expert discovery now that mediation failed. Defense counsel responded on that day, and agreed to review Plaintiffs' proposal for completing expert discovery.

In that email, defense counsel expressly stated that in the stipulation "we need to make sure it indicates that the fact discovery deadline has passed and that we are now moving into expert discovery." On January 24, 2017, the parties agreed that February 28, 2017 would be a reasonable deadline for the parties' burden of proof expert disclosures.

Before the February 28, 2017 deadline, and despite the good faith efforts by the parties to resolve the case in the most amicable and cost-effective way, the Court declined the parties' stipulated request to move into expert discovery. On January 30, 2017, the Court declined to sign the Stipulated proposed Order, with a minute entry that stated, "the discovery period has closed. The parties do not show good cause for the delays in this case. This case should either be dismissed, or proceed to trial without further delay." *See* minute entry, Ct. Docket. Then on February 21, 2017, the Court entered a Notice of Final Pretrial Conference,

reiterating its denial of the parties' stipulated request. *See* Ct. Docket.

This refusal to honor the stipulated-to agreement between the parties runs contrary to the Utah Supreme Court's holding that, unless there are issues for judicial determination in the stipulation, "ordinarily, courts are bound by stipulations between parties." First of Denver Mortg. Inv'rs v. C. N. Zundel & Assocs., 600 P.2d 521, 527 (Utah 1979).

Furthermore, the Court of Appeals has noted that '[t]here is an institutional hesitancy to relieve a party from a stipulation negotiated and entered into with the advice of counsel,' Birch v. Birch, 771 P.2d 1114, 1116 (Utah Ct.App.1989). Likewise, the Utah Supreme Court has noted that a Court may only set aside a stipulation in certain circumstances—none of which are present in the instant case. The stipulation in this case was agreed upon by parties' counsel, and was not "inadvertent." But most importantly, there was no request by either party to rescind the stipulation.

[A] court has the discretion to set aside a stipulation under certain conditions. **First, the party seeking relief from the stipulation must request it by motion from the trial court**. Second, the motion to repudiate the stipulation must be timely filed. Third, it must show that the stipulation was **"entered**

into *inadvertently* or *for justifiable cause.*" Inadvertence cannot be the basis for repudiation when the mistake was " 'due to failure to exercise due diligence, [or if it could] have been avoided by the exercise of ordinary care.' We have also noted that "[i]t is unlikely that a stipulation signed by counsel and filed with the court was entered into inadvertently." Fourth, the lower court must state its basis for relieving the parties of the stipulation. ("In the absence of any *articulated* 'justifiable cause,' we must reverse the withdrawal of the stipulation."

Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm'n, 2001 UT 11, ¶ 21, 20 P.3d 287, 293 (Internal Citations Omitted) (Emphasis Added).

Neither party asked for the stipulation to be repudiated. There was certainly no motion filed to repudiate the stipulation. And finally, the stipulation was entered into with the assistance of counsel. Likewise, the parties' stipulation in this matter was not dependent upon a judicial determination in any form. The parties had been diligent in pursuing settlement in this matter and had communicated with each other on the need for discovery—including to commence expert discovery.

Furthermore, there was no contention between the parties that discovery had been completed. The Court's decision to terminate discovery in the matter was unwarranted as the parties were of one accord as to the need for further discovery.

Based upon this unanimity of purpose of the parties and the lack of any need for judicial determination by the Court, it should have allowed the parties' stipulated-to agreement to stand.

POINT II

THE COURT'S SUMMARY JUDGMENT ORDER SHOULD BE OVERTURNED AS IT WAS BASED UPON THE ARBITRARY AND CAPRICIOUS REFUSAL TO ALLOW PLAINTIFF'S TO PRESENT EXPERT TESTIMONY

As a result of the Court's refusal to allow the parties to move into expert discovery, as anticipated and agreed upon by the parties, Appellee filed a Summary Judgment Motion, arguing that the case should be dismissed since Plaintiffs had not disclosed any experts. The Court granted Appellee's Motion, and dismissed Appellant's claims.

For these reasons, the Court of Appeals should grant Petitioner's petition and reverse the District Court's Summary Judgment Order. This will allow the parties to conduct expert discovery, as anticipated and stipulated by the respective parties, and allow the case to proceed to a fair trial for all the parties involved.

Furthermore, in the Court's Notice of Final Pre-trial Conference, the Court scheduled a hearing on any pre- trial motions for April 17, 2017. Appellee filed several motions, including Motions in Limine as well as a Summary Judgment Motion. Appellant opposed those motions, and Appellee filed replies to those

motions. Appellant was planning on arguing against those motions on April 17, 2017, as scheduled by the Court.

However, the Court ruled on the motions, including the Summary Judgment Motion, prior to the scheduled oral arguments, and ordered the case "dismissed" on April 12, 2017. By canceling the oral arguments and dismissing this case prior to the scheduled oral arguments, the Court prevented Appellant from being able to fully argue and present their opposition to Appellee's motions, including its Summary Judgment Motion.

Without oral argument, Appellant was unable to have a fair opportunity to fully defend against Appellee's motions, including their Summary Judgment Motion. The Court's actions in this matter were arbitrary, and, in the case of the Court's refusal to ratify the stipulated-to agreement regarding extending discovery, violated the Appellate Court's findings on the issue.

Any failure of Appellant to disclose experts was the result of Appellant's attempts to cooperate with Appellee and reliance on Appellee's representations regarding expert discovery. The Court's denial of the stipulated expert discovery deadline, as well as Defendants' request for summary judgment based on the lack of expert disclosures, prevented Appellant from fully litigating his case before the bar. Petitioner was denied this opportunity, despite working with Appellee throughout the litigation process. As such, Appellant is entitled to an evidentiary hearing without a

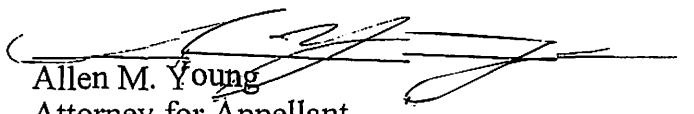
preconceived determination.

CONCLUSION

This case is before this Court on review of the order of Summary Judgment granted against Appellant by the Court under Rule 56(a). Petitioner and Appellee had a fully executed stipulation which the Court chose not to ratify. There is no compelling reason to refuse ratification of the parties' stipulation. As such, the Court's order of summary judgment should be reversed, and the matter should be remanded to the District Court for an evidentiary hearing.

DATED this 11th day of January, 2019.

BIGHORN LAW.



Allen M. Young
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2018, Appellant served a true and correct copy of the foregoing **APPELLANT BRIEF** upon the parties listed below via email.

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CERTIFICATE OF COMPLIANCE

I, Allen M. Young, certify that this Brief complies with URAP 24(a)(11)(A) paragraph (g), governing the number of pages or words in the instant brief.

I also certify that this Brief complies with Rule 24 (a)(11)(B) Rule 21, governing public and private records.

Allen M. Young
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

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APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, HON. JAMES BRADY

ADDENDUM TO BRIEF OF APPELLANTS

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INDEX TO ADDENDUM

URCP 56

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(c)(1) Supporting factual positions. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2) Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) Materials not cited. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it without prejudice;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmoving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a)

(i) a final order or decree resulting from:

(A) a formal adjudicative proceeding of a state agency; or

(B) a special adjudicative proceeding, as described in Section 19-1-301.5; or

(ii) an appeal from the district court review of an informal adjudicative proceeding of an agency other than the following:

(A) the Public Service Commission;

(B) the State Tax Commission;

(C) the School and Institutional Trust Lands Board of Trustees;

(D) the Division of Forestry, Fire, and State Lands, for an action reviewed by the executive director of the Department of Natural Resources;

(E) the Board of Oil, Gas, and Mining; or

(F) the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

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IN THE FOURTH DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMES PRIEUR, DAN PRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY AND AS HEIRS OF SHARON HOREN, DECEASED,

PLAINTIFFS,

V.

THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION & NURSING CENTER; THE ENSIGN GROUP, INC DBA OREM REHABILITATION & SKILLED NURSING; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C.; SCRYVER MEDICAL SALES & MARKETING, INC.

DEFENDANTS.

THIRD STIPULATED STATEMENT TO EXTEND FACT DISCOVERY

Civil No.: 130400555

Judge Fred D. Howard

Plaintiffs and Defendants (the "Parties"), by and through their respective counsel, jointly represent that additional time is needed to conduct fact discovery in this case. This discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case.

Accordingly, the parties hereby stipulate to an extension of the deadline for fact discovery to June 30, 2015. For deadlines that follow after completion of fact discovery, the parties will abide by the deadlines as outlined in Rule 26 of the Utah Rules of Civil Procedure.

DATED this 26th day of March, 2015.

ANDERSON KIDMAN

/s/ Brandon Kidman

BRANDON L. KIDMAN
Attorneys for Plaintiffs

DATED this 26th day of March, 2015.

WILLIAMS & HUNT

/s/ Stephen Hester

STEPHEN T. HESTER
Signed with permission
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached THIRD STIPULATED STATEMENT TO EXTEND FACT DISCOVERY in Case No. 130400555 before the Fourth Judicial District Court for Utah County, State of Utah, was served upon the parties listed below either via electronic notification or U. S. Mail, first class postage prepaid, on the 26TH day of March, 2015.

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IN THE FOURTH DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMES PRIEUR, DAN PRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY AND AS HEIRS OF SHARON HOREN, DECEASED,

PLAINTIFFS,

V.

THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION & NURSING CENTER; THE ENSIGN GROUP, INC DBA OREM REHABILITATION & SKILLED NURSING; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C.; SCRYVER MEDICAL SALES & MARKETING, INC.

DEFENDANTS.

STIPULATED WRITTEN STATEMENT SHOWING GOOD CAUSE

Civil No.: 130400555

Judge Fred D. Howard

COMES NOW, the Parties, by and through counsel, hereby submit the following stipulated written statement showing good cause why this action should not be dismissed.

1. This action was commenced in April, 2013.
2. An Amended Complaint was filed in June of 2013.
3. An Answer was filed on behalf of Defendants in August of 2013.
4. In October, 2013, Plaintiffs propounded written discovery upon Defendants.
5. Defendants needed additional time to respond to certain discovery requests, so after counsel for the parties conferred, an extension of time was granted for Defendants to answer.
6. Defendants served their responses in December, 2013, and late January of 2014.
7. Defendants propounded written discovery upon Plaintiffs in February, 2014.
8. Plaintiffs needed additional time to respond to certain discovery requests, so after counsel for the parties conferred, an extension of time was granted for Plaintiffs to answer.
9. Plaintiffs served their responses to Defendants' discovery requests in June, 2014.
10. Defendants wished to depose Dr. Terry Hammond, which deposition took place on May 19, 2014.
11. Defendants also expressed the desire to take the deposition of one of Ms. Sharon Horen's heirs.
12. Counsel for the parties conferred with one another regarding this deposition and which heir the Defendants wished to depose.
13. In November of 2014, Defendants let Plaintiffs know that they would like to take the deposition of James Prieur.
14. Defendants have deposed James Prieur.

15. Defendants are prepared to stipulate to a breach of the duty of care.

16. Defendants' counsel has been preparing said stipulation for Plaintiffs' review, but has not been able to finish the stipulation.

17. Defendants' counsel is hopeful that the stipulation will be done in the next couple of weeks.

18. Counsel for the parties have amicably stipulated to extensions of fact discovery deadlines in order to accommodate these actions.

19. That once the stipulation is finalized, the parties are prepared to move this case forward into the next phase of discovery.

DATED this 5th day of January, 2016.

ANDERSON KIDMAN

/s/ Brandon Kidman

BRANDON L. KIDMAN
Attorneys for Plaintiffs

DATED this 5th day of January, 2016.

COHNE KINGHORN

/s/ Stephen T. Hester

STEPHEN T. HESTER
Signed with permission
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached WRITTEN STATEMENT SHOWING GOOD CAUSE in Case No. 130400555 before the Fourth Judicial District Court for Utah County, State of Utah, was served upon the parties listed below via electronic notification.

Counsel for Defendants

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111 East Broadway, 11th Floor
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/s/ Brandon Kidman

Employee of Anderson // Kidman

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Attorneys for the Plaintiffs

IN THE FOURTH DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMES PRIEUR, DAN PRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUAL and as heirs of SHARON HOREN, deceased, Plaintiffs, v. THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION &NURSING CENTER; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION & SKILLED NURSING; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C.; SCRYVER MEDICAL SALES & MARKETING, INC. Defendants.	**MOTION FOR RELIEF FROM THE COURT'S MINUTE ORDER AS TO THE PARTIES' JANUARY 24, 2017 STIPULATION** Civil No.: 130400555 Judge James Brady

Plaintiffs, by and through counsel and pursuant to Rule 60 of the Utah Rules of Civil Procedure, submit the following Motion for Relief from the Court's Minute Order as to the Parties' January 24, 2017 Stipulation.

RELIEF REQUESTED

Plaintiffs are requesting relief from the Court's Minute Order of January 30, 2017 declining to ratify the parties' January 24, 2017 stipulation to extend discovery in this matter. Rule 60 of the Utah Rules of Civil Procedure provide Plaintiffs with a legal avenue to request that the Court reverse its ruling on these Orders. *See* U.R.C.P. 60(b).

As set forth more fully below, pursuant to Rule 60(b), the Court is empowered to reverse its ruling, and in fact, it should reverse its prior decision in this matter, because its refusal to ratify the parties' stipulation was not based upon a need for judicial determination. This refusal cut off the agreed upon avenue to conducting discovery in this case. As such, Plaintiffs respectfully request that the Court GRANT Plaintiffs' Motion under Rule 60(b) of the Utah Rules of Civil Procedure, and allow the parties to proceed with discovery, pursuant to their agreement.

STATEMENT OF FACTS

1. On March 26, 2015, the parties stipulated to extend discovery. *See* Third Stipulated Statement to Extend Fact Discovery, Ct. Docket.

2. In that Stipulation, the parties anticipated concluding fact discovery on June 30, 2015. *See id.*

3. The parties were unable to complete fact discovery within the anticipated June 30, 2015 deadline, including Defendants' request to conduct Plaintiff James Prieur's deposition on September 25, 2015. *See* Amended Notice of Taking Deposition of James Prieur, filed August 25, 2015, Ct. Docket.

4. The parties continued attempting to resolve this matter without incurring additional costs and using Court resources. *See* Brandon Kidman Declaration, ¶ 8, attached hereto as Exhibit A.

5. Shortly after Mr. Prieur's September 25, 2015 deposition, Defendants agreed that they breached the standard of care, and agreed to prepare a Stipulation to that effect. *See* Stipulated Written

Statement Showing Good Cause, dated January 5, 2016, Ct. Docket; Kidman Decl., ¶ 9, Ex. A.

6. As of January 2016, Plaintiffs were still waiting for Defendants to provide a draft of the stipulation admitting breach of the standard of care. *See id.*; Kidman Decl., ¶ 10, Ex. A.

7. Defendants expressed interest in attempting to mediate this case prior to incurring expert discovery costs. *See* Kidman Decl., ¶ 11, Ex. A.

8. The parties scheduled a mediation to take place on July 11, 2016, which was postponed at the request of defense counsel for personal reasons. *See* Kidman Decl., ¶ 13-14, Ex. A.

9. The parties were able to reschedule the mediation to take place on August 25, 2016, with Lew Quigley as the mediator. *See* Kidman Decl., ¶ 15-16, Ex. A.

10. The parties were unable to reach an agreement on the date of the mediation, and Mr. Quigley continued communicating with both parties in an attempt to resolve the matter without further litigation. *See* Kidman Decl., ¶ 16, Ex. A.

11. Toward the end of 2016, Mr. Quigley informed Plaintiffs' previous counsel, Brandon Kidman, that settlement on this case would be unlikely. *See* Kidman Decl., ¶ 17, Ex. A.

12. Mr. Kidman then reached out to Defendants' counsel in order to come up with a new discovery plan now that a resolution to the case without proceeding with litigation was unlikely. *See* Kidman Decl., ¶ 18, Ex. A; Kidman December 29, 2016 email, attached hereto as Exhibit B.

13. After Mr. Kidman did not hear any response from Defendants' counsel, and the Court issued a Notice of Intent to Dismiss, he sent a follow-up email to Defendants' counsel. *See* Kidman Decl., ¶ 19, Ex. A; Kidman January 12, 2017 email, Ex. B.

14. Defendants' counsel responded, apologizing for not responding to the December 29, 2016 email, and agreed to entering into a new stipulation governing expert discovery, specifically stating, "we need to make sure it indicates that the fact discovery deadline has passed and that we are now moving into expert discovery." *See* Kidman Decl., ¶ 20, Ex. A; Stephen Hester January 12, 2017

email, Ex. B.

15. The parties were able to finalize a new Stipulation and submitted a proposed case management order to the Court that would assist in allowing the case to move forward. *See* Kidman Decl., ¶ 21, Ex. A.

16. Both parties agreed to postpone expert discovery and the expensive costs associated with expert discovery in an effort to use resources to resolve this case with further unnecessary costs. *See* Kidman Decl., ¶ 11, Ex. A.

17. Both parties anticipated that expert discovery would not begin until early 2017. *See* Kidman Decl., ¶ 11 & 20-21, Ex. A; Hester January 12, 2017 email, Ex. B; Stipulation and Proposed Order filed January 24, 2017, Ct. Docket.

18. The parties anticipated that Plaintiffs would disclose their experts on February 28, 2017. *See* Kidman Decl., ¶ 21, Ex. A; Stipulation and Proposed Order filed January 24, 2017, Ct. Docket.

19. On January 30, 2017, the Court declined to sign the proposed order, entering a note that discovery had closed. *See* Ct. Docket.

ARGUMENT

Pursuant to Rule 60, Plaintiffs request that the Court grant their Motion for relief from the Court's January 30, 2017 Minute Order, for the reasons set forth below.

I. PURSUANT TO RULE 60(b), THE COURT SHOULD STRIKE ITS PRIOR MINUTE ORDER AS TO THE PARTIES STIPULATION ON DISCOVERY

Rule 60(b) of the Utah Rules of Civil Procedure states:

> **(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon just terms, the court may relieve a party or its legal representative from a judgment, order, or proceeding for the following reasons:
> **(b)(1) mistake, inadvertence, surprise, or excusable neglect;**
> (b)(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> **(b)(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or other misconduct of an opposing party;**

(b)(4) the judgment is void;
(b)(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application; or
(b)(6) any other reason that justifies relief.

Plaintiffs respectfully request that the Court grant relief from its prior Order as to the fully executed agreement between the parties to extend discovery entered into on January 24, 2017. The Utah Supreme Court has noted that courts are typically bound by a parties' stipulation, unless that stipulation requires a judicial determination. The parties' agreement to extend the time for discovery in this matter can be and should be ratified by the Court. As such, a reconsideration of the Court's January 30, 2017 minute order is warranted.

A. The Parties' Stipulation was not Repudiated by Either Party, as such, it Should have Been Upheld by the Court

In this case, the District Court failed to allow Plaintiffs to submit their expert disclosures within the timeframe agreed upon by the parties. The parties initially entered into a Stipulation and the Court signed a Case Management Order extending fact discovery through June 30, 2015. *See* Third Stipulated Statement to Extend Fact Discovery, Ct. Docket. However, due to scheduling conflicts and Defendants' request to continue fact discovery efforts, the parties were unable to complete discovery within the June 30, 2015 deadline.

Not only had the parties been pursuing settlement opportunities, litigation was actively being prepared for as well. Defendants scheduled a deposition of Defendants on September 25, 2015. *See* Amended Notice of Taking Deposition of James Prieur, filed August 25, 2016, Ct. Docket. Likewise, Plaintiffs scheduled deposition of Defendants' 30(b)(6) designee for September 30, 2016. *See* Notice of Deposition of the Defendants Pursuant to Utah Rule of Civil Procedure 30(B)(6), filed August 25, 2016, Ct. Docket.

Following these depositions, the parties agreed to narrow the triable issues in this case by entering into a stipulation in which Defendants agreed to admit breaching the standard of care. *See* Stipulated Written Statement Showing Good Cause, dated January 5, 2016, Ct. Docket. In the process

of preparing that Stipulation, defense counsel indicated to Plaintiffs that they were not ready to proceed into expert discovery, and that they desired to attempt mediation before incurring expert discovery costs. *See* Kidman Decl., ¶ 11, Ex. A. The mediation ultimately failed and mediation efforts ended in December 2016. *See* Kidman Affidavit, ¶ 17-18; Kidman December 29, 2016 email, Ex. B.

Following the parties' failure to resolve this case through the mediator, Plaintiffs' previous counsel, Brandon Kidman, attempted to contact defense counsel in order to move forward with expert discovery. *See* Kidman Affidavit, ¶ 17-18; Kidman December 29, 2016 email, Ex. B. Mr. Kidman sent a follow-up email to defense counsel on January 12, 2017, again attempting to set a timeline for expert discovery now that mediation failed. *See* Kidman Affidavit, ¶ 19; Kidman Jan. 12, 2017 email, Ex. B. Defense counsel responded on that day, and agreed to review Plaintiffs' proposal for completing expert discovery. *See* Kidman Decl., ¶ 20, Ex. A; Hester January 12, 2017 email, Ex. B. In that email, defense counsel expressly stated that in the stipulation "we need to make sure it indicates that the fact discovery deadline has passed and that we are now moving into expert discovery." *See id.* On January 24, 2017, the parties agreed that February 28, 2017 would be a reasonable deadline for the parties' burden of proof expert disclosures. *See* Kidman Decl., ¶ 21, Ex. A Stipulation and Proposed Order filed January 24, 2017, Ct. Docket.

Before the February 28, 2017 deadline, and despite the good faith efforts by the parties to resolve the case in the most amicable and cost-effective way, the Court declined the parties' stipulated request to move into expert discovery. On January 30, 2017, the Court declined to sign the Stipulated proposed Order, with a minute entry that stated, "the discovery period has closed. The parties do not show good cause for the delays in this case. This case should either be dismissed, or proceed to trial without further delay." *See* minute entry, Ct. Docket. Then on February 21, 2017, the Court entered a Notice of Final Pretrial Conference, reiterating its denial of the parties' stipulated request. *See* Ct. Docket.

This refusal to honor the stipulated-to agreement between the parties runs contrary to the Utah Supreme Court's holding that, unless there are issues for judicial determination in the stipulation, "ordinarily, courts are bound by stipulations between parties." First of Denver Mortg. Inv'rs v. C. N. Zundel & Assocs., 600 P.2d 521, 527 (Utah 1979).[1]

Furthermore, the Court of Appeals has noted that '[t]here is an institutional hesitancy to relieve a party from a stipulation negotiated and entered into with the advice of counsel,' Birch v. Birch, 771 P.2d 1114, 1116 (Utah Ct.App.1989). Likewise, the Utah Supreme Court has noted that a Court may only set aside a stipulation in certain circumstances—none of which are present in the instant case. The stipulation in this case was agreed upon by parties' counsel, and was not "inadvertent." But most importantly, there was no request by either party to rescind the stipulation.

> [A] court has the discretion to set aside a stipulation under certain conditions. **First, the party seeking relief from the stipulation must request it by motion from the trial court.** Second, the motion to repudiate the stipulation must be timely filed. Third, it must show that the stipulation was **"entered into *inadvertently* or *for justifiable cause.*"** Inadvertence cannot be the basis for repudiation when the mistake was " 'due to failure to exercise due diligence, [or if it could] have been avoided by the exercise of ordinary care.' We have also noted that "[i]t is unlikely that a stipulation signed by counsel and filed with the court was entered into inadvertently." Fourth, the lower court must state its basis for relieving the parties of the stipulation. ("In the absence of any *articulated* 'justifiable cause,' we must reverse the withdrawal of the stipulation."
>
> Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm'n, 2001 UT 11, ¶ 21, 20 P.3d 287, 293 (Internal Citations Omitted) (Emphasis Added).

Neither party asked for the stipulation to be repudiated. There was certainly no motion filed to repudiate the stipulation. And finally, the stipulation was entered into with the assistance of counsel. Likewise, the parties' stipulation in this matter was not dependent upon a judicial determination in any form. The parties had been diligent in pursuing settlement in this matter and had communicated with each other on the need for discovery—including to commence expert

[1] The term "judicial determination" is a nebulous one. Although Plaintiffs were unable to find a more definite description of what items are ripe for judicial determination, a case involving a stipulation in a contract case noting time extensions noted that judicial determination is unnecessary as "Such an exception is not applicable in this case." Lloyd v. Lloyd, 2009 UT App 314, 221 P.3d 884, 886, Fn. 1.

discovery. Furthermore, there was no contention between the parties that discovery had been completed. The Court's decision to terminate discovery in the matter was unwarranted as the parties were of one accord as to the need for further discovery.

Based upon this unanimity of purpose of the parties and the lack of any need for judicial determination by the Court, it should have allowed the parties' stipulated-to agreement to stand. As such, based upon this understandable, but mistaken decision by the Court, striking of its January 30, 2017 order is appropriate.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Rule 60 Motion and strike its prior January 30, 2017 Minute Order as to the Parties' Stipulation.

DATED this 26th day of July, 2018.

BIGHORN LAW

/s/ Allen M. Young

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2018, Plaintiffs served a true and correct copy of the foregoing **MOTION FOR RELIEF FROM THE COURT'S MINUTE ORDER AS TO THE PARTIES' JANUARY 24, 2017 STIPULATION** upon the parties listed below via electronic notification.

Stephen T. Hester
Kimberley L. Hansen
COHNE KINGHORN
111 East Broadway, 11th Floor
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Phone: 801-363-4300
shester@cohnekinghorn.com
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EXHIBIT A

David E. Brown, #13155
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Attorneys for the Plaintiffs

IN THE FOURTH DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMES PRIEUR, DAN PRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY and as heirs of SHARON HOREN, deceased, Plaintiffs, v. THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION &NURSING CENTER; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION & SKILLED NURSING; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C.; SCRYVER MEDICAL SALES & MARKETING, INC. Defendants.	**DECLARATION OF BRANDON KIDMAN** Civil No.: 130400555 Judge Fred D. Howard

I, Brandon Kidman, declare under criminal penalty of the State of Utah that the foregoing is true and correct.

1. I am over the age of 18 years old and I have personal knowledge of the information contained herein.

2. I am former counsel for Plaintiffs in the above-captioned lawsuit.

3. While litigating this case, I had worked together with Defendants' counsel, cooperating with the defense during discovery in an effort to bring this case to an amicable solution.

4. In working with defense counsel, the parties, on occasion, needed additional time as they worked together to attempt to resolve this case.

5. On March 26, 2015, the parties anticipated being able to complete fact discovery by June 30, 2015, and filed a Stipulation and proposed Order granting the extension for discovery, which the Court eventually signed.

6. During that time, Defendants wished to depose one of the plaintiffs, James Prieur.

7. Defendants were unable to depose Mr. Prieur by June 30, 2015, so the parties continued fact discovery beyond that timeframe, and Defendants deposed Mr. Prieur on September 25, 2015.

8. Following that deposition, the parties continued attempting to resolve this matter without incurring additional costs and using Court resources.

9. Shortly after Mr. Prieur's September 25, 2015 deposition, Defendants agreed that they breached the standard of care, and agreed to prepare a Stipulation to that effect.

10. As of January 2016, Plaintiffs were still waiting for Defendants to provide a draft of the stipulation admitting breach of the standard of care.

11. Defendants' counsel indicated that they were not ready to proceed into expert discovery and that desired to mediate this matter before moving forward with expert discovery, and incurring those costs.

12. That due to these conversations and assurances, counsel for the Plaintiffs did not move forward with expert discovery issues before the two parties attempted to mediate this matter.

13. The parties worked together and scheduled a mediation for July 11, 2016.

14. That due to the wedding of one of Defendants' counsel, Defendants cancelled the July 11, 2016 mediation session.

15. The parties continued to work towards establishing a date for the mediation, which was eventually scheduled and held on August 25, 2016.

16. Once the initial mediation session proved unsuccessful, Lew Quigley, who conducted the mediation, reached out to counsel for Defendants on numerous occasions to see if a mediated settlement could be reached.

17. Late in 2016, Mr. Quigley informed me that Defendants' position had not changed and that a mediated settlement in this matter was unlikely.

18. Upon hearing said information, I reached out to counsel for Defendants in order to get discovery deadlines established and to start moving the case forward.

19. I again reached out to Defendants' counsel on January 12, 2017, having not received a response to the prior email, upon which I received a response from Defendants' counsel.

20. Defendants' counsel responded, apologizing for not responding to the December 29, 2016 email, and agreed to entering into a new stipulation governing expert discovery, specifically stating, "we need to make sure it indicates that the fact discovery deadline has passed and that we are now moving into expert discovery."

21. In January of 2017, defense counsel and I agreed to the following regarding fact and expert discovery:

> Accordingly, the parties hereby stipulate that no further fact discovery is needed and that fact discovery is now closed. The parties stipulate that Plaintiff's

> Rule 26(A)(4)(C)(i) disclosures will be due on February 28, 2017, and that for all other deadlines that follow, the parties will abide by the deadlines as outlined in Rule 26 of the Utah Rules of Civil Procedure.

See Stipulation and Case Management Order, filed the 24th of January, 2017.

22. Given the good working relationship Defendants' counsel and I had, I felt the stipulation establishing the deadline for expert discovery and disclosures for February 28, 2017, would move this case forward towards a resolution.

Executed on this 27th day of April, 2018.

/s/ Brandon Kidman

_____

Brandon Kidman

EXHIBIT B

Gmail by Google

Brandon Kidman <brandon@andersonkidmanlaw.com>

Horen v. Orem Rehab

15 messages

Brandon Kidman <brandon@andersonkidmanlaw.com> Thu, Dec 29, 2016 at 1:16 PM
To: Stephen Hester <shester@cohnekinghorn.com>

Hi Steve,

I hope that your holidays have been enjoyable.

It appears that we need to start moving this matter forward. Lew indicated that he contacted your office and there was no change in your client's position from the mediation. I think we just need to get some discovery deadlines established and start moving forward.

Thanks,

Brandon

—
Brandon Kidman, Esq.
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Orem, UT 84058
T: 801.669.6519
F: 801.224.8909

Brandon Kidman <brandon@andersonkidmanlaw.com> Thu, Jan 12, 2017 at 7:48 AM
To: Stephen Hester <shester@cohnekinghorn.com>
Cc: Nikki Bowen <nbowen@cohnekinghorn.com>

Hi Steve,

Hope that all is going well. I have not heard back from you regarding the email sent below. Additionally, I received the Notice of Intent to Dismiss from the Court. I prepared the attached Stipulation Showing Good Cause for your review. Will you please review it and let me know if I have your permission to sign and file it on your behalf.

Thanks,

Brandon
[Quoted text hidden]

1.11.17 Written Statement Showing Good Cause.docx
34K

Stephen Hester <shester@cohnekinghorn.com> Thu, Jan 12, 2017 at 5:41 PM
To: Brandon Kidman <brandon@andersonkidmanlaw.com>
Cc: Nikki Bowen <nbowen@cohnekinghorn.com>

Hi Brandon – sorry I didn't respond to your earlier email; not sure how I missed it. I'll take a look at the stip and get back to you. I haven't looked at it yet, but we need to make sure it indicates that the fact discovery deadline has passed and that we are now moving into expert discovery. I'll be in touch. Thanks.

Steve

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Brandon L. Kidman, No. 12573
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Email: brandon@andersonkidmanlaw.com
Attorneys for the Plaintiffs

IN THE FOURTH DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMESPRIEUR, DANPRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY AND AS HEIRS OF SHARONHOREN, DECEASED,

PLAINTIFFS,

V.

THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION &NURSING CENTER; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION & SKILLED NURSING;HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C.; SCRYVEL MEDICAL SALES & MARKETING, INC.

DEFENDANTS.

STIPULATION AND CASE MANAGEMENT ORDER

Civil No.: 130400555

Judge Fred D. Howard

Plaintiffs and Defendants (the "Parties"), by and through their respective counsel, jointly submit the following Stipulation and Case Management Order. This Stipulation and Order is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case.

Accordingly, the parties hereby stipulate that no further fact discovery is needed and that fact discovery is now closed. The parties stipulate that Plaintiff's Rule 26(A)(4)(C)(i) disclosures will be due on February 28, 2017, and that for all other deadlines that follow, the parties will abide by the deadlines as outlined in Rule 26 of the Utah Rules of Civil Procedure.

DATED this 24th day of January, 2017.

ANDERSON KIDMAN

/s/ Brandon Kidman

BRANDON L. KIDMAN
Attorneys for Defendants

DATED this 24th day of January, 2017.

Cohne Kinghorn

/s/ Stephen Hester

STEPHEN T. HESTER
Signed with permission
Attorneys for Defendants

SO ORDERED as of the date and per the official seal at the top of page 1.

Mark L. Anderson, No. 0105
Brandon L. Kidman, No. 12573
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Attorneys for the Plaintiffs

IN THE FOURTH DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMESPRIEUR, DANPRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY AND AS HEIRS OF SHARONHOREN, DECEASED,

PLAINTIFFS,

V.

THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. DBA OREM REHABILITATION &NURSING CENTER; THE ENSIGN GROUP, INCDBA OREM REHABILITATION & SKILLED NURSING;HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, DBA OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C.; SCRYVER MEDICAL SALES & MARKETING, INC.

DEFENDANTS.

STIPULATION AND CASE MANAGEMENT ORDER

Civil No.: 130400555

Judge Fred D. Howard

Plaintiffs and Defendants (the "Parties"), by and through their respective counsel, jointly submit the following Stipulation and Case Management Order. This Stipulation and Order is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case.

Accordingly, the parties hereby stipulate that no further fact discovery is needed and that fact discovery is now closed. The parties stipulate that Plaintiff's Rule 26(A)(4)(C)(i) disclosures will be due on February 28, 2017, and that for all other deadlines that follow, the parties will abide by the deadlines as outlined in Rule 26 of the Utah Rules of Civil Procedure.

DATED this 24th day ofJanuary, 2017.

ANDERSON KIDMAN

/s/ Brandon Kidman

BRANDON L. KIDMAN

Attorneys for Defendants

DATED this 24th day ofJanuary, 2017.

Cohne Kinghorn

/s/ Stephen Hester

STEPHEN T. HESTER
Signed with permission
Attorneys for Defendants

SO ORDERED as of the date and per the official seal at the top of page 1.

FOURTH DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, PROVO DEPARTMENT 4/12/17 MT Deputy

JAMES PRIEUR, et al., Plaintiffs, v. THE ENSIGN GROUP, et al., Defendants.	**RULING RE: DEFENDANTS'MOTION FOR SUMMARY JUDGMENT** Case No. 130400555 Judge James Brady

This matter comes before the Court on *Defendants' Motion for Summary Judgment.* Defendants request the Court grant summary judgment in their favor because of Plaintiffs' failure to offer competent expert testimony to establish the proximate cause element of their medical negligence claim. Neither party requested oral argument and the issues have been authoritatively decided. *See* U.R.C.P. 7(h). Based on the Court's review of the documents on file and the motion associated memoranda, Defendants' Motion is GRANTED for the reasons that follow.

BACKGROUND

This medical malpractice case arose out of the care and treatment received by Plaintiffs' decedent, Sharon Horen ("Ms. Horen"), at Central Utah Clinic and Defendant Orem Rehabilitation and Skilled Nursing ("Orem Rehab"). On October 15, 2010, Ms. Horen was seen by John Walker, a nephrology APRN, at Central Utah Clinic for examination following an observed change in Ms. Horen's condition at Orem Rehab. During this visit, Mr. Walker wrote an order for STAT labs to be performed on Ms. Horen and Ms. Horen was returned to Orem Rehab with the order. Ms. Horen's blood was drawn and the STAT lab results were faxed to Orem Rehab at approximately 7:14 p.m. on that same day. The STAT lab results indicated that Ms. Horen had a serum potassium level of 8.6—a "high panic" value.

The staff at Orem Rehab failed to notice, report, or otherwise act on the STAT labs. Mr. Walker likewise failed to follow up on his order. As a result, none of Ms. Horen's health care providers were made aware of her serum potassium level of 8.6. Just after midnight on October 16, 2010, Ms. Horen was found minimally responsive by Orem Rehab staff. Following transport to Utah Valley Regional Medical Center, and pursuant to Ms. Horen's advanced directive, no therapeutic treatments were administered and Ms. Horen expired on October 16, 2010.

Plaintiffs' initial complaint was filed on April 13, 2013. During this four year time period the parties executed arguably four stipulations to extend discovery, yet Plaintiffs consistently failed to conduct discovery of any kind or designate any experts. After the Court issued its third Notice of Intent to Dismiss on January 4, 2017, the parties executed a second Stipulated Written Statement Showing Good Cause. The Court found there was no showing of good cause and that the discovery period had closed. The Court indicated that the case should either be dismissed or proceed to trial without further delay. Upon receiving no response from the parties, the Court set the case for a final pre-trial conference on April 17, 2017, requiring the parties to file any pre-trial motions by March 10, 2017. Defendants then filed this Motion for Summary Judgment.

RULING

Summary judgment is proper "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." U.R.C.P. 56(a). The Court initially notes that because Plaintiffs failed to dispute any of Defendants' alleged facts in their opposition memorandum, all of Defendants' statements of material fact are deemed admitted under U.R.C.P. 56(a)(4) which states, "each material fact set forth in the motion . . . that is not disputed is deemed admitted for the purposes of this motion."

I. Defendants' Entitlement to Judgment as a Matter of Law

A plaintiff in a medical malpractice case "must provide expert testimony establishing that the health care provider's negligence proximately caused plaintiff's injury." *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904, 906 (Utah Ct. App. 1997). Expert testimony in medical malpractice cases is crucial because the "causal link between the negligence and the injury [is] usually not within the common knowledge of the law juror" and expert testimony ensures "fact finders have adequate knowledge upon which to base their decisions." *Morgan v. Intermountain Health Care, Inc.*, 2011 UT App 253, ¶ 9, 263 P.3d 405. A limited "common knowledge" exception to this general rule applies "when the causal link between the negligence and the injury would be clear to a lay juror who has no medical training . . . ." *Id.* ¶ 10 (citations omitted).

During the four years that this case has been pending, Plaintiffs have failed to offer any competent expert testimony or even designate any expert witnesses despite being given ample opportunity to do so, and Plaintiffs are now precluded from offering any expert testimony. Given the Plaintiffs' decedent's underlying conditions and the timing and course of treatment by non-party health care providers, this case involves complex issues of causation and allocation of fault and the common knowledge exception does not apply. Because the common knowledge exception is inapplicable, and because Plaintiffs have not and cannot offer any competent expert testimony to establish the proximate cause element of their *prima facie* case at trial, Defendants are entitled to judgment as a matter of law.

Plaintiffs argue that their failure to disclose expert witnesses is harmless and that they have good cause for their failure, citing to U.R.C.P. 26(d)(4): "[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." However, Plaintiffs merely assert that their failure to disclose

expert witnesses is harmless and that they have good cause for their failure without supporting their assertion with argument, facts, or explanation of any kind.

Utah courts have consistently held that expert testimony must be timely disclosed and that failure to do so is prejudicial to an opposing party. *See Pete v. Youngblood*, 2006 UT App 303, ¶ 18, 141 P.3d 629; *Hansen v. Harper Excavating, Inc.*, 2014 UT App 180, ¶ 17, 332 P.3d 969. Because the Court finds Plaintiffs' failure to disclose expert witnesses is not harmless and that there is no showing of good cause, Defendants are entitled to judgment as matter of law.

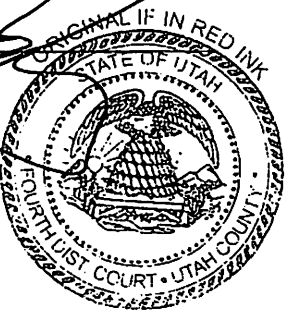
CONCLUSION

For the reasons stated above, the Court grants *Defendants' Motion for Summary Judgment*. Plaintiffs' claims are dismissed.

DATED this 12th day of April, 2017.

BY THE COURT:

James Brady
District Court Judge



CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 12 day of April, 2017 by email to the following:

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Deputy Court Clerk

FOURTH DISTRICT COURT, STATE OF UTAH 4/12/17 MT Deputy
UTAH COUNTY, PROVO DEPARTMENT

JAMES PRIEUR, et al., Plaintiffs. vs. THE ENSIGN GROUP, INC., et al., Defendants.	ORDER ON DEFENDANTS' MOTION FOR IN LIMINE RE: PLAINTIFFS EXPERT TESTIMONY Case No. 130400555 Judge James Brady

This case is before the Court on Defendants' motion to preclude Plaintiffs from presenting expert testimony at trial. This motion is based on Plaintiffs' failure to provide initial disclosures of expert witnesses, to supplement their disclosures and their failure to identify any expert witnesses during discovery. Plaintiffs oppose Defendants' motion claiming that there is no need to disclose expert witnesses because Defendants have admitted their breach of duty owed, and because their failure to disclose expert witnesses is justified. Plaintiffs' arguments are not persuasive. Defendants' motion is GRANTED.

Plaintiffs' misunderstand the import of Defendants' stipulation that they breached the standard of care regarding the care given to Ms. Sharon Horen. Plaintiffs claim because of this stipulation "[i]t is established that Defendants are liable for the death of Ms. Horen." This is incorrect. Plaintiff's stipulation is limited to duty and breach of that duty. It does not establish causation and therefor liability. Assuming Plaintiffs intend to present expert testimony at trial regarding issues of causation or damages, they had an obligation to disclose their expert witnesses and provide the information required by Rule 26 URCP.

Rule 26. General provisions governing disclosure and discovery.

. . .

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and 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: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

Plaintiffs' failed to disclose any expert witnesses either initially, or pursuant to Rule 26 following the close of the fact discovery period. Exclusion of testimony from undisclosed expert witnesses is addressed in Rule 26(d)(4). "If 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."

Plaintiffs claim to have good cause for their failure to disclose expert witnesses. They claim they were lulled into a sense of security by Defendants' representations to "work with them on discovery" and because they were engaged in settlement negotiations. Plaintiffs assertions are inadequate. The last stipulation of the parties extended fact discovery only until June 30, 2015. Thereafter Plaintiffs' obligation to disclose expert witnesses needed to be complied with. The court has no timely stipulation of the parties to extend discovery or disclosure of expert witnesses.

Even if there were a "working" relationship between counsel, it is irrelevant because

Plaintiffs' attorney was required to file such disclosures in writing and with the level of detail specified by the rules. *See Id.* R. 26(a)(5) (requiring that all initial, expert testimony, and pretrial disclosures "be made in writing, signed and served"). Plaintiffs have not met this obligation.

Plaintiffs have shown no good cause for their failure to identify expert witnesses.

Defendants' motion to exclude expert testimony at trial is GRANTED.

April 11, 2017

Judge James Brady

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 1304C0555 by the method and on the date specified.

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04/12/2017 /s/ MIKE TRONIER

Date: _____ _____

Deputy Court Clerk

FOURTH DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, PROVO DEPARTMENT 4/12/17 MT Deputy

JAMES PRIEUR, et al., Plaintiffs. vs. THE ENSIGN GROUP, INC., et al., Defendants.	ORDER ON DEFENDANTS' MOTION FOR IN LIMINE RE: DAMAGES Case No. 130400555 Judge James Brady

This case is before the Court on Defendants' motion to preclude Plaintiffs from presenting evidence related to their damages claims. The motion is based on Plaintiffs' failure to provide adequate initial disclosures of damages, to supplement their disclosures and their failure to provide a method of calculating damages in response to Defendants' discovery requests. Plaintiffs oppose Defendants' motion claiming that there is no need to disclose damage amounts, method of damage calculations or that their failure to disclose their calculation of damages is harmless. Plaintiffs are required by rule and case law to provide damage calculations in their disclosures and to supplement their disclosures during discovery to allow Defendants an opportunity to conduct discovery on that issue. Plaintiffs' argument that the failure to disclose damages is harmless is not persuasive. Defendants' motion is GRANTED.

Plaintiffs cite to the 1963 case of *Jorgensen v Gonzalez*, 383 P.2d 934, 936 (1963) for the position that ". . . the calculation of damages is properly left to the sound discretion of a jury of practical people upon the basis of the evidence and in light of their experience in the affairs of life." Unfortunately Plaintiffs misread *Jorgensen*. In that case, the issue was not the

requirement to disclose damage. The issue in *Jorgensen* was whether or not there is a limit on the amount of damages a jury hearing the evidence may award. *Jorgensen* provides no solace for a party who fails to disclose evidence of damage calculation under Rule 26.

The relevant portions of Rule 26 provide:

> **Rule 26. General provisions governing disclosure and discovery.**
>
> (a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.
> (a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), **a party shall, without waiting for a discovery request, serve on the other parties:**
> (a)(1)(A) . . .
> (a)(1)(C) **a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;**
> . . .
> (d)(4) **If 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 addition to the information provided in the initial disclosures, parties are required to supplement their initial disclosures to provide the required information when it becomes available to them. Failure to disclose, or to adequately supplement damage calculations can and does result in evidence being precluded at trial.

The Court of Appeals recently addressed the consequence of failing to disclose damages:

> Rule 26 of the Utah Rules of Civil Procedure requires litigants to make initial disclosures of certain fact witnesses, documents, and other information. *See* Utah R. Civ. P. 26(a)(1)(C) (2010). And rule 26(e)(1) requires a party "to supplement at appropriate intervals [initial] disclosures 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." *Id.* R. 26(e)(1). Finally, the rule provides that "a party shall, without awaiting a discovery request, provide to other parties ... a computation of any category of damages claimed by the disclosing

> party." *Id.* R. 26(a)(1)(C).
> . . .
> A plaintiff is required to prove both the fact of damages and the amount of damages." *Stevens–Henager Coll. v. Eagle Gate Coll.*, 2011 UT App 37, ¶ 16, 248 P.3d 1025. "To establish the fact of damages, '[t]he evidence ... must give rise to a reasonable probability that the plaintiff suffered damage.' " *Id.* (alteration and omission in original) (quoting *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985)). "While the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages, there still must be evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of damages." *TruGreen Cos., LLC, v. Mower Bros., Inc.*, 2008 UT 81, ¶ 15, 199 P.3d 929 (citation and internal quotation marks omitted). *Stevens–Henager,* 2011 UT App 37, ¶ 22, 248 P.3d 1025; *see also Bodell Constr. Co. v. Robbins,* 2009 UT 52, ¶ 36, 215 P.3d 933. If "factual contentions about the amount of damages ... require further investigation or discovery," the party must "undertake that investigation as early in the litigation process as is practicable." *Stevens–Henager,* 2011 UT App 37, ¶ 24, 248 P.3d 1025. And investigation and discovery must be completed according to the schedule set by the district court. *See id.; see also Bodell,* 2009 UT 52, ¶¶ 36–37, 215 P.3d 933.

Sleepy Holdings LLC v. Mountain W. Title, 2016 UT App 62, ¶¶ 13 14, 370 P.3d 963, 967

Plaintiffs' initial disclosures refer to damages only in general terms claiming they may be proven at trial. This form of disclosure is insufficient to comply with Rule 26. Plaintiffs responded to discovery requests for damage calculations by objecting to disclosing damages for various reasons, and reserving the right to supplement their response. (They did not supplement their response during the discovery period.)

Plaintiffs wrongly claim their failure to disclose evidence of damages is harmless. Failure to disclose calculations of damages precluded Defendants from conducting discovery regarding those calculations. Plaintiffs claim Defendants' stipulation that Defendants violated the standard of care, establishes the fact of damages. It does not. It establishes only that a duty owed was breached, not that damages were incurred by these plaintiffs. It also does not provide any

evidence of the amount of, or calculation of damages. Plaintiff has not provided the required damages disclosures within the time allowed by the court, or at any time in these proceedings.

Plaintiffs have shown no good cause for their failure to disclose their damages to Defendant.

Defendants' motion to exclude evidence related to Plaintiffs' damage claims is GRANTED.

April 11, 2017

Judge James Brady

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130400555 by the method and on the date specified.

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Date: 04/12/2017 /s/ MIKE TRONIER

Deputy Court Clerk