

1992

# Gina M. Hill v. Dr. Carl Dickerson : Brief of Appellant

Utah Supreme Court

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THE COURT  
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

GINA M. HILL,  
Plaintiff/Appellant,

vs.

DR. CARL DICKERSON,  
Defendant/Appellee.

:  
:  
:  
:  
:

92-0271-CA

Case No. 910539-SC

Priority No. 16

APPEAL FROM ORDER OF DISMISSAL  
OF THE FIRST JUDICIAL DISTRICT COURT,  
BOX ELDER COUNTY, JUDGE W. BRENT WEST, PRO TEM

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FILED

MAR 26 1992

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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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GINA M. HILL,	:	
Plaintiff/Appellant,	:	
vs.	:	
DR. CARL DICKERSON,	:	Case No. 910539-SC
Defendant/Appellee.	:	Priority No. 16

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### JURISDICTIONAL STATEMENT

The above entitled appeal is from an order of dismissal with prejudice, which was granted by the First Judicial District Court, Box Elder County, State of Utah, in favor of Defendant. Plaintiff filed this appeal on December 6, 1991, pursuant to the provisions of Article VIII § 3 of the Constitution of Utah, U.C.A. § 78-2-2, and Rule 3 of the Utah Rules of Appellate Procedure, after a thirty (30) day extension to file the Notice of Appeal was granted on November 6, 1991.

### STATEMENT OF ISSUES FOR REVIEW AND STANDARD OF REVIEW

(1) Did the trial court commit reversible error by granting Defendant's Motion in Limine, or in the alternative, by denying Plaintiff's Motion for Continuance while granting Defendant's Motion in Limine? The standard of review for this issue is a review of the appropriateness of the exercise of the trial court's discretion. Bambrough v. Bethers, 552 P.2d 1286, 1290 (Utah 1976); Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 639 (Ct. App. Utah 1988). The standard for reviewing whether the trial court has properly exercised its discretion is the following:

... where the lower tribunal, acting within the scope of its authority, has conducted a hearing and arrived at a decision, the reviewing court will examine only the certified record; and will not interfere with matters of discretion or upset the actions of the lower

tribunal except upon a showing that the tribunal acted in excess of its authority or in a manner so clearly outside reason that its action must be deemed capricious and arbitrary.

Peatross v. Bd. of Comm'rs of Salt Lake Cty, 555 P.2d 281, 284 (Utah 1976) (footnotes omitted).

(2) Did the trial court commit reversible error in dismissing Plaintiff's Complaint with prejudice, based upon a procedural defect, thereby depriving her of her right to trial by jury and to have her claim adjudicated on the merits? The standard of review for this issue is a review of the appropriateness of the exercise of the trial court's discretion. Bambrough, 552 P.2d at 1290; Reeves, 764 P.2d at 639. The standard of reviewing whether the trial court has properly exercised its discretion is the following:

... where the lower tribunal, acting within the scope of its authority, has conducted a hearing and arrived at a decision, the reviewing court will examine only the certified record; and will not interfere with matters of discretion or upset the actions of the lower tribunal except upon a showing that the tribunal acted in excess of its authority or in a manner so clearly outside reason that its action must be deemed capricious and arbitrary.

Peatross, 555 P.2d at 284.

#### DETERMINATIVE RULE

"The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties." Rule 38(a), Utah Rules of Civil Procedure.



## STATEMENT OF THE CASE

### I. Nature of the Case.

This is a medical malpractice action brought by Plaintiff against Defendant for negligent dental treatment of Plaintiff between February of 1986 and April of 1988. (R. at 001-010.)

### II. Course of Proceedings Below.

On March 8, 1990, Plaintiff filed this dental malpractice action against Defendant, alleging that Defendant's treatment of Plaintiff's teeth, and Defendant's failure to refer Plaintiff to a specialist during the two year period of treatment, constituted dental malpractice. (R. at 001-010.) This action was initially scheduled for trial to commence on April 10, 1991. (R. at 063-065.) However, when Plaintiff's medical expert, Dr. Steve Larsen, reneged on his agreement to be her expert on the eve of trial, the lower court granted Plaintiff's first Motion for Continuance on April 9, 1991, continuing the trial to August 26, 1991. (R. at 161, 234.)

On August 14, 1991, Defendant refused to stipulate to an additional short continuance, after Plaintiff learned that her preferred expert, Dr. George Bagwell, would not be available on August 26, 1991. (R. at 230.) On August 19, 1991, by facsimile transmission to Defendant's counsel, Plaintiff designated Dr. Hollin Hiller, her second choice for expert witness. (R. at 230.)

In spite of the fact that both experts had been generally identified at the hearing on April 9, 1991, Defendant objected to Plaintiff's designation and moved the court in limine for an order precluding Plaintiff from calling Dr. Hiller as an expert witness at trial. (R. at 174-183, 235.)

The hearing on the Motion in Limine was initiated in a telephone conference with the lower court at the Circuit Court chambers of Judge West in Ogden, Utah, on August 23, 1991, the audio tape of which was subsequently lost or misplaced. (R. at 235; absence of transcript of August 23, 1991, hearing as part of the record.) In that telephone conference, Plaintiff's counsel also moved the court for a short continuance of the trial date to allow Defendant time to formally depose Dr. Hiller. Although the court reserved its ruling until the following Monday, the first day of trial, the court encouraged the parties to settle and encouraged Defendant's counsel to conduct the deposition of Dr. Hiller by telephone; however, Defendant's counsel chose not to do so. (R. at 235.)

### **III. Disposition in the Court Below.**

On the morning of trial, August 26, 1991, the court below granted Defendant's Motion in Limine and denied Plaintiff's Motion for Continuance. The lower court further dismissed this action with prejudice, based upon the lack of any expert testimony. (R. at 203-219.)

### STATEMENT OF THE FACTS

1. Between February of 1986 and April of 1988, Defendant performed root canals on two of Plaintiff's teeth. Beginning in March of 1986, Plaintiff began having irritation and pain in the first tooth in which a root canal was performed in February of 1986. (R. at 002-003, 121-122.)

2. Over the next two years, Plaintiff had continual pain and other problems with this tooth. Defendant continued to prescribe Penicillin VK to Plaintiff intermittently over that two year period. In January of 1988, Defendant also initiated a second root canal on a second tooth, which also caused irritation and pain to Plaintiff. (R. at 003, 121-122.)

3. In April of 1988, upon the recommendation of her gynecologist, Dr. Parkinson, Plaintiff terminated her treatment by Defendant and sought assistance from Dr. Steve Larsen, an endodontist, and Dr. Stewart Wilkinson, an oral surgeon. (R. at 004, 122.)

4. On March 8, 1990, Plaintiff filed this dental malpractice action against Defendant, alleging that Defendant's treatment of Plaintiff's teeth, and Defendant's failure to refer Plaintiff to a specialist during the two year period of treatment, constituted dental malpractice. This matter was initially scheduled for trial to commence on April 10, 1991. (R. at 001-010, 063-065.)

5. No formal discovery, including depositions, interrogatories, requests for production of documents, or request for admissions, was ever conducted in this action. (R. at 001-289.)

6. In preparation for trial of this matter, Walter Merrill, from the office of counsel for Plaintiff, met with Dr. Steve Larsen and discussed with him Plaintiff's desire to hire him as her expert witness. Dr. Larsen quoted \$250.00 per hour for in-court testimony and agreed to be Plaintiff's expert. Plaintiff's counsel then designated Dr. Larsen as Plaintiff's expert, although such designation was due approximately one month earlier. However, Defendant's Expert Witness List was due March 8, 1991, but was not provided until April 19, 1991, a month and a half late. (R. at 067-069, 072-074, 228-229.)

7. On April 4, 1991, Douglas Durbano, Plaintiff's counsel, visited with Dr. Larsen by telephone concerning his testimony at the coming trial. Dr. Larsen confirmed to counsel that the standard of care had been breached, not only in the actual performance of the root canals, but also in the failure to refer Plaintiff out to a specialist within the first 6 months of treatment. Dr. Larsen indicated for the first time that he was concerned about the effect his expert testimony might have on future referrals from dentists in his community. The conversation was concluded with the understanding that counsel would contact

Dr. Larsen once more the first of the following week concerning the scheduling of his testimony at the trial. (R. at 233-234.)

8. On April 5, 1991, Dr. Larsen called Mr. Durbano's office but, in his absence, talked with Mr. Merrill. Dr. Larsen stated to Mr. Merrill that he simply could not be Plaintiff's expert in this matter. Mr. Merrill immediately went to work to find a substitute expert and located one in Durango, Colorado, Dr. George Bagwell, and another in Idaho Falls, Idaho, Dr. Hollin Hiller. However, both experts needed more notice than Plaintiff could provide with the trial to commence on April 10, 1991. (R. at 229.)

9. Plaintiff immediately made a motion before the trial court for a continuance of the trial date, which motion was heard before the Honorable Judge Newey on April 9, 1991. The lower court found that to commence the trial of this matter on April 10, 1991, under the circumstances would be prejudicial to Plaintiff and granted Plaintiff's Motion for Continuance. The trial was continued until August 26, 1991. Plaintiff's counsel informed Defense counsel, in open court, of her two potential expert witnesses and the trial court ordered the parties to exchange new witness lists, identifying their expert witnesses, within 10 days after the hearing. (R. at 161, 234.)

10. After the hearing on April 9, 1991, the parties entered into concentrated settlement negotiations, pursuant to which the

parties agreed that Plaintiff would not need to designate which of the two experts she would be using until failure of the negotiation efforts. A confirming letter was sent to counsel for Defendant on April 24, 1991, a copy of which is attached as Exhibit "A" to the Affidavit of Walter T. Merrill. (R. at 229, 287.)

11. Pursuant to the settlement negotiations, a mediation conference was conducted at Western Arbitration on June 28, 1991. However, the mediation conference was unsuccessful in producing a settlement of this matter. (R. at 234.)

12. In an effort to reduce the cost of an expert, Plaintiff's counsel attempted to find a local expert during the next several weeks after the mediation conference. However, all dentists contacted by Plaintiff's counsel refused to be the expert witness for Plaintiff. (R. at 229.)

13. Having had no success in finding a local expert, and with the settlement prospects becoming more unlikely, counsel for Plaintiff contacted Dr. Bagwell, Plaintiff's preferred expert, on August 12, 1991, to confirm his availability. However, although Dr. Bagwell had stated before that he only required 10 days notice, Dr. Bagwell was not available on the dates scheduled for the trial of this matter, starting on August 26, 1991. Although counsel for Plaintiff attempted immediately, he was not able to contact Defendant's counsel until August 14, 1991, to communicate

that Dr. Bagwell, identified earlier as the expert from Durango, Colorado, would not be available on the scheduled trial dates. Plaintiff's counsel requested that counsel for Defendant stipulate to a short continuance until Dr. Bagwell would be available, but Defendant's counsel denied the request and stated for the first time that it was too late to designate an expert and that he would object to any designation of an expert witness. (R. at 230.)

14. On August 15, 1991, Plaintiff's counsel contacted Dr. Hiller, the expert previously identified from Idaho Falls, to discuss his availability. Upon ascertaining Dr. Hiller's availability, Plaintiff's counsel revised the witness list and telefaxed the revised list with a cover letter to counsel for Defendant on August 19, 1991, a copy of which is attached at Exhibit "B" to the Affidavit of Walter T. Merrill. Plaintiff's counsel stated that Dr. Hiller would be available for deposition anytime that week. (R. at 171-173, 230, 288.)

15. Plaintiff's counsel telefaxed a second letter to Defendant's counsel on August 22, 1991, attached as Exhibit "C" to the Affidavit of Walter T. Merrill, identifying what Dr. Hiller's testimony would be at trial, and again stating his availability for interview or deposition. (R. at 230-231, 289; absence of transcript of August 23, 1991, hearing as part of the record.)

16. Defendant objected to Plaintiff's witness list and moved the trial court in Limine for an order precluding Plaintiff

from calling Dr. Hiller as an expert witness at trial. The hearing on the Motion in Limine was initiated in a telephone conference with the lower court, at the Circuit Court chambers of Judge West, who was presiding due to the illness of Judge Gunnell, on August 23, 1991, the audio tape of which was subsequently lost or misplaced. In that telephone conference, counsel for Plaintiff also moved the trial court for a short continuance of the trial date. Although Judge West reserved his ruling until the following Monday, the first day of trial, he did state in the telephone conference that Plaintiff needed an expert witness, that continuance of the trial was unlikely, and he encouraged the parties to settle the matter and encouraged counsel for Defendant to depose Dr. Hiller by telephone; however, Defendant's counsel chose not to do so. (R. at 174-183, 235; absence of transcript of August 23, 1991, hearing as part of the record.)

17. The hearing on Defendant's Motion in Limine and Plaintiff's Motion for Continuance was concluded the morning of trial, August 26, 1991, at which time the trial court made the following findings:

(a) that Plaintiff was in need of an expert in order to establish the standard of care in a case of this nature;

(b) that the need for an expert was clear and obvious from the beginning;



(c) that designation of the expert witness to be used by Plaintiff on August 19, 1991, created extreme prejudice to Defendant;

(d) that without notice to the trial court, the parties could not agree to deviate from the order of the lower court requiring expert witnesses to be designated within 10 days after the hearing in April;

(e) that upon designation of Plaintiff's expert, Defendant desired to take the expert's deposition and was encouraged by the trial court to do so, but refused to do so on the basis of lack of time;

(f) that all through this action, there had been no formal discovery;

(g) that if Plaintiff were to go forward with her evidence without an expert, the trial court would direct a verdict in favor of Defendant; and

(h) that the trial in this matter has been continued once and that Judge West was unsure how many times to continue the trial of this matter.

The trial court then granted Defendant's Motion in Limine and denied Plaintiff's Motion for Continuance. Judge West further dismissed this action with prejudice, based on the lack of any expert testimony. (R. at 191-202, 203-219.)

### SUMMARY OF ARGUMENT

The trial court committed reversible error in denying Plaintiff's Motion for Continuance while granting Defendants Motion in Limine. The lower court's denial of the Motion for Continuance was based in part upon the fact that the trial had been continued once before. However, the prior continuance was not based upon any fault of Plaintiff or her counsel and should not have been a consideration in the Judge's ruling on her second Motion for Continuance. The trial court, in denying Plaintiff's Motion for Continuance, ruled that without notice to the lower court, the parties could not agree to deviate from a prior order of the trial court requiring designation of expert witnesses by April 19, 1992. This ruling is inconsistent with the law and requires reversal of the Order entered October 7, 1991.

The Order should also be reversed because the trial court failed to recognize the exception to the requirement of expert testimony, which exception should have been applied to the case at bar. Reversal of the trial court's Order is also supported by Defendant's conduct in reaching an agreement that Plaintiff's expert would not need to be designated until negotiations failed, and continuing to loll Plaintiff into that impression, while Defendant intended to deny any such agreement before the lower court. Based upon a prior ruling of this Court, the trial court should have denied Defendant's Motion in Limine, precluding expert

testimony on behalf of Plaintiff. For all of the reasons stated herein, the Order entered October 7, 1991 should be reversed.

In dismissing Plaintiff's Complaint, the lower court has denied Plaintiff her right to a trial by jury and her right to have her claim adjudicated on the merits. However, the conduct of the parties throughout the proceedings of this lawsuit precludes such a harsh and permanent remedy. For that reason, the lower court's Order entered October 7, 1991, should be reversed.

#### ARGUMENT

##### **I. The Trial Court Abused its Discretion by Denying Plaintiff's Motion for Continuance While Granting Defendant's Motion in Limine.**

While the trial court has substantial discretion in deciding whether to grant continuances, in making such determination, the trial court must act reasonably. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). If the action of the trial court is deemed capricious or arbitrary, the trial court's order must be reversed. Peatross, 555 P.2d at 284. It has been held that "[d]enial of a motion for continuance constitutes an abuse of discretion 'when a party has been deprived of a substantial right or seriously prejudiced.'" Siggelkow v. Siggelkow, 643 P.2d 985, 986-87 (Alaska 1982) (citation omitted). In the case at bar, the trial court's Order dated October 7, 1991, has deprived Plaintiff of her substantial right of not only trial by jury but also to have her claim adjudicated on the merits. The extreme prejudice

which this Order has caused Plaintiff requires reversal of the trial court's Order. Id.

The trial court's denial of Plaintiff's Motion for Continuance was based at least in part upon a finding that the trial had been continued once and Judge West didn't know how many more times he could continue it. (R. at 217.) However, the first continuance of the trial in this matter was not due to either Plaintiff's negligence or her counsel's lack of preparation. Plaintiff had made firm arrangements with Dr. Steve Larsen to be her expert witness in this action. It was only when Dr. Larsen reneged on his agreement on the eve of trial that Plaintiff was forced to move for a continuance, which Motion was communicated to the office of Defendant's counsel the same day Dr. Larsen reneged. The Honorable Judge Newey, sitting on the bench at the time, agreed that the loss of her expert was not Plaintiff's doing, found that to commence the trial the following day under the circumstances would be prejudicial to Plaintiff, and therefore, granted Plaintiff's first Motion for Continuance. Because Judge West's denial of Plaintiff's second Motion for Continuance was based upon the fact that the trial had been continued once before, the Order entered October 7, 1991, dismissing Plaintiff's Complaint with prejudice, should be reversed.

Although the order of the trial court pursuant to the hearing on April 9, 1991, required the parties to exchange expert witness

lists within 10 days after the hearing, as a result of concentrated settlement negotiations, the parties agreed that Plaintiff would not need to designate which of the two experts identified at the hearing she would be using, until the settlement negotiations failed. A confirming letter was sent to Defendant's counsel on April 24, 1991, a copy of which is attached as Exhibit "A" to the Affidavit of Walter T. Merrill. (R. at 287.) Defendant made no reference to this agreement or the confirming letter throughout the proceeding below, apparently hoping the trial court would ignore the arrangement, which it did. However, attorneys have the implied authority and authorization to enter into stipulations and agreements with opposing counsel respecting matters of procedure. In Interest of Holt, 625 P.2d 398, 401 (Idaho 1981); In re Adoption of Coggins, 537 P.2d 287, 290 (Ct. App. Wash. 1975); Linsk v. Linsk, 449 P.2d 760, 762 (Cal. 1969); 7 Am. Jur. 2d Attorneys at Law § 150.

Since the order, requiring the parties to designate expert witnesses within 10 days of the April hearing, was purely procedural in nature, the agreement that Plaintiff need not designate her expert witness until settlement negotiations had failed was a valid and enforceable agreement between the parties. However, in denying Plaintiff's Motion for Continuance concerning the second trial date, the lower ruled that without notice to the lower court, the parties could not agree to deviate from the order

of the trial court requiring expert witnesses to be designated within 10 days after the April hearing. (R. at 216.) This ruling is totally inconsistent with the law, is an abuse of discretion, and requires the reversal of the trial court's Order entered October 7, 1991.

The trial court's denial of Plaintiff's Motion for Continuance was also based upon a finding that Plaintiff's need for an expert to establish the standard of care was clear and obvious from the beginning. Although this is the general rule, this Court has carved out an exception to that rule, that if the jury finds that the propriety of the treatment received is within their common knowledge and experience, they may rely on their own ideas concerning the standard of care and whether Defendant complied with that standard. Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980). Plaintiff has always contended that Defendant's failure to refer Plaintiff to a specialist within no more than six months after commencement of treatment is such an obvious breach of the standard of care that it falls within the exception created in Nixdorf. The trial court's failure to recognize this exception also serves as a basis upon which the Order entered October 7, 1991, should be reversed.

The conduct of the parties prior to August 26, 1991, also supports reversal of the dismissal below. When Dr. Larsen reneged on his agreement on the eve of trial, Plaintiff's counsel

frantically searched for a substitute expert. At the April hearing, Plaintiff's counsel reported to the trial court that he had located two possible experts, one in Durango, Colorado, and another in Idaho Falls, Idaho, although neither could prepare in time for trial. Thus, Defendant knew since April 9, 1991, that Plaintiff would be designating one of these two experts when such designation was required. Plaintiff did not designate which expert she would retain within 10 days of the April hearing, pursuant to the agreement between the parties discussed above.

Defendant's counsel argued at the August hearing that the designation of Plaintiff's expert was triggered when the mediation conference held on June 28, 1991, failed to produce a settlement. However, the mediation conference was only part of the settlement negotiation efforts and was not the culmination of such efforts. Whether or not this was Defendant's understanding, the understanding was never communicated to Plaintiff and Plaintiff continued, even after the mediation conference, to labor under the impression that the designation of her expert witness was not yet required. If Defendant believed that the agreement terminated at the end of June, Defendant should have demanded at that time that Plaintiff designate her expert, rather than continue to lull Plaintiff into the impression that designation of her expert witness was still not required.

As the second trial date approached, on August 12, 1991, two weeks prior to trial, Plaintiff's counsel contacted the previously identified expert in Durango, Colorado, Dr. George Bagwell, who was Plaintiff's preferred expert. However, although Dr. Bagwell had previously stated that he only required 10 days notice, Dr. Bagwell was not available on the dates scheduled for the trial of this matter, starting on August 26, 1991. Although counsel for Plaintiff attempted immediately, he was not able to contact Defendant's counsel until August 14, 1991 concerning Dr. Bagwell's unavailability. Plaintiff's counsel requested that Defendant's counsel stipulate to a short continuance until Dr. Bagwell would be available, but Defendant's counsel refused to do so and stated for the first time that he would object to any designation of an expert witness.

On August 15, 1991, Plaintiff's counsel contacted Dr. Hiller, the expert previously identified from Idaho Falls, to discuss his availability. Upon ascertaining Dr. Hiller's availability, Plaintiff's counsel revised the expert witness list and transmitted by facsimile the revised list with a cover letter to Defendant's counsel on August 19, 1991, seven days before trial. Plaintiff's counsel stated in the letter that Dr. Hiller was available for deposition any time that week. (R. at 288.) The trial court later also urged Defendant's counsel to depose Dr. Hiller. However, Defendant's counsel flatly refused to do so.



This Court has already ruled that it was not an abuse of discretion for a trial court to allow testimony of an expert who is designated only five days before trial, but who was made available for interview or deposition, when the other party simply chose not to take advantage of either option. Christenson, 761 P.2d at 1377-78. Thus, in the case at bar, the trial court's grant of Defendant's Motion in Limine, disallowing any testimony from Dr. Hiller, can be viewed as an abuse of discretion in and of itself. Id. However, the granting of Defendant's Motion in Limine, in combination with the denial of Plaintiff's Motion for Continuance, was a clear abuse of discretion, supporting reversal of the trial court's Order entered October 7, 1991. In addition, lack of a complete record, due to the transcript of the August 23, 1991, hearing being lost or misplaced, provides additional support for the reversal of the Order.

**II. The Trial Court Abused its Discretion in Dismissing this Action with Prejudice.**

"The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties." Rule 38(a), Utah Rules of Civil Procedure. The trial court should have done everything possible to insure Plaintiff's right to have a jury determine the factual issues of her claim, which is one in law. Corbet v. Cox, 517 P.2d 1318, 1319-20 (Utah 1974). Throughout the proceedings of this lawsuit, neither party conducted formal discovery, including depositions, interroga-

tories, requests for production of documents, or requests for admissions. This was done in a mutual effort to keep costs at a minimum in the hopes of effectuating a settlement.


The lower court's ruling that Defendant's right to depose Plaintiff's expert should be enforced did not take into account the past conduct of the parties, including the agreement concerning designation of Plaintiff's expert. The trial court simply did not have the adequate grounds necessary "to apply the harsh and permanent remedy' of a dismissal with prejudice." Intermountain Phy. Med. v. Micro-Dex, 739 P.2d 1131, 1133 ( Ct. App. Utah 1987) (citation omitted). In the absence of any significant prejudice to Defendant, and to prevent devastating prejudice to Plaintiff, the trial court should not have dismissed this action with prejudice. The trial court's dismissal of this action with prejudice was an abuse of discretion and should be reversed by this Court.

**CONCLUSION**

For the reasons set forth above, Appellant respectfully requests the Utah Supreme Court to reverse the Order of the trial court denying her Motion for Continuance and dismissing this action with prejudice.

RESPECTFULLY SUBMITTED this 25 day of March, 1992.


DURBANO & ASSOCIATES

  
\_\_\_\_\_  
DOUGLAS M. DURBANO  
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Attorneys for Plaintiff/Appellant

**PROOF OF SERVICE**

I DO HEREBY CERTIFY, that I mailed a true and correct copy of the foregoing BRIEF OF THE APPELLANT to David G. Williams, Terence L. Rooney, SNOW, CHRISTENSEN & MARTINEAU, #10 Exchange Place, 11th Floor, P.O. Box 3000, Salt Lake City, Utah, 84145, postage prepaid on this 25 day of March, 1992.

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## ADDENDUM A

DAVID G. WILLIAMS - A3481  
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Attorneys for Defendant  
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Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

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IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY  
STATE OF UTAH

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GINA M. HILL,

Plaintiff,

vs.

DR. CARL DICKERSON,

Defendant.

ORDER

Civil No. 900000135 PI

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This matter came on for trial on August 26, 1991 at 10:00 a.m. before the Court, the Honorable W. Brent West presiding. Defendant's Objection to Plaintiff's Witness List and Motion in Limine dated August 22, 1991 was heard by the Court on August 23, 1991 by telephone conference hearing and again on August 26, 1991 at the commencement of trial. The Court, after hearing argument from the parties and reviewing the memoranda submitted by the parties, finds that the designation of new fact witnesses and the designation of an expert witness by plaintiff on August 19, 1991, was untimely and in violation of this Court's Order dated April 29, 1991. The Court further finds that defendant would be seriously

prejudiced if the witnesses first identified by plaintiff on August 19, 1991 were allowed to testify.

At the commencement of trial, plaintiff advised the Court that in view of the Court's ruling granting defendant's Motion in Limine, plaintiff would not have an expert witness at trial and could not offer any expert testimony. The Court found that the issues presented in this case regarding the applicable standard of care, whether the standard of care was breached and causation are not within the common knowledge or experience of lay persons and expert testimony would therefore be required for plaintiff to make a prima facie case which could be submitted to the jury. Therefore, without waiving any rights with respect to the Court's rulings, plaintiff suggested and agreed that the Court should dismiss the case rather than have plaintiff present her case without expert testimony and then direct a verdict against her.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant's Objection to Plaintiff's Witness List is sustained and his Motion in Limine dated August 22, 1991 is granted.

2. Plaintiff's oral motion for continuance made on August 26, 1991 at the commencement of trial is denied.

3. This matter is dismissed with prejudice based on the lack of any expert testimony establishing the applicable standard of care, any breach of the applicable standard of care or, injury caused by a breach of the applicable standard of care.

4. Defendant is awarded costs in the sum of \$\_\_\_\_\_.

DATED this 7 day of Oct, 1991.

BY THE COURT:

15/  
W. Brent West  
District Judge

APPROVED AS TO FORM:

DURBANO & ASSOCIATES

\_\_\_\_\_  
Douglas M. Durbano  
Attorneys for Plaintiff




AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE        )


PATRICIA C. WHITE, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant herein; that she served the attached ORDER (Case Number 900000135 PI, First Judicial District Court of Box Elder County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas M. Durbano  
Paul H. Johnson  
Attorneys for Plaintiff  
3340 Harrison Blvd., Suite 200  
Ogden, Utah 84403

and causing the same to be mailed first class, postage prepaid, on the 27<sup>th</sup> day of August, 1991.

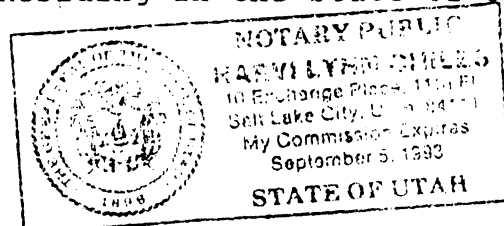
  
\_\_\_\_\_  
Patricia C. White

SUBSCRIBED AND SWORN to before me this 27<sup>th</sup> day of August, 1991.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing in the State of Utah

My Commission Expires:

12/15/93



## ADDENDUM B

COPY

IN THE FIRST JUDICIAL DISTRICT COURT

BOX ELDER COUNTY, STATE OF UTAH

GINA M. HILL.

Plaintiff.

vs.

DR. CARL DICKERSON.

Defendant.

Civil No. 900000135

BE IT REMEMBERED that on the 26th day of August, 1991. the above-referenced matter came on for trial in the Box Elder County Courthouse, 01 South Main, Brigham City, Utah, commencing at the hour of 11:00 o'clock a.m., the Honorable W. Brent West presiding.

APPEARANCES:

For the Plaintiff:

DOUGLAS M. DURBANO  
Attorney at Law  
Harrison Professional Plaza  
3340 Harrison Blvd.  
Suite 200  
Ogden, Utah 84403

For the Defendant:

DAVID G. WILLIAMS  
Snow, Christensen & Martineau  
Attorneys at Law  
1100 Newhouse Building  
#10 Exchange Place  
Salt Lake City, Utah 84111

RODNEY M. FELSHAW  
Registered Professional Reporter  
01 South Main  
Brigham City, UT 84302

1           THE CLERK: Case number 900000135. Gina M. Hill  
2 vs. Dr. Carl Dickerson. Counsel, please state your  
3 appearances for the record.

4           MR. DURBANO: Douglas M. Durbano, appearing for  
5 the plaintiff.

6           MR. WILLIAMS: David J. Williams of Snow,  
7 Christensen & Martineau for Dr. Dickerson, the  
8 defendant.

9           THE COURT: This is the time set for trial. I'd  
10 first like to address the ladies and gentlemen called  
11 here for jury service. I appreciate you being here.  
12 I know it was somewhat of a short notice to make your  
13 appearance here this morning to help us in resolving  
14 this particular case. I appreciate you taking your  
15 time to do that.

16                   It will not be necessary for us to keep  
17 you any later here this morning. I've been called  
18 upon to make a decision on a legal matter and I have  
19 ruled on that and we're going to put that on the  
20 record here this morning. The net effect of my ruling  
21 will be to take this case away from the necessity of  
22 being tried today and move it along on the channels of  
23 justice as it goes forward.

24                   I understand, Mr. Bailiff, they have all  
25 been paid and taken care of.

1           MR. BAILIFF: No, sir. They'll get the pay as  
2 they go out.

3           THE COURT: Okay. Clerk, I don't know, is there  
4 a possibility they'll be called again?

5           THE CLERK: Because they've made an appearance  
6 they will be excused and are finished for this term.

7           THE COURT: This will complete your jury service,  
8 even though you didn't actually get to sit as a jury.  
9 Your being here means you won't be called again on the  
10 next rotation. You are all excused with my heartfelt  
11 thanks and I appreciate you being here this morning.  
12 I hope we didn't break up your day too badly. Thank  
13 you.

14                   (All prospective jurors out of the courtroom.)

15           THE COURT: Mr. Durbano, Mr. Williams, that  
16 brings us to the matter now that we need to make a  
17 record about. Since last Friday, when we had a  
18 conference call, we've been discussing the issue of  
19 whether or not plaintiff in this particular case  
20 timely complied with Judge Gunnell's, or Judge Newey's  
21 order, in regards to disclosure of expert witnesses  
22 and witnesses in preparation for this trial.

23                   According to the order that was signed by  
24 the judge, all discovery and notification of witnesses  
25 in this case was supposed to have been complied with

1 clear back in April. I believe it was within ten days  
2 after. Let me look at it.

3 Yes. I show that on the 8th day of  
4 January 1991, Judge Gunnell made an order indicating  
5 that plaintiff needed to supply her expert witness  
6 list to the defendant by February 8th, 1991, and the  
7 defendant was to provide his expert witness list by  
8 March 8th, 1991.

9 My understanding is that on August 19th,  
10 four days -- actually, a week prior to the trial date,  
11 but four days prior to when we had our hearing, the  
12 defendant was notified in fact that the plaintiff had  
13 selected an expert and was going to ask that that  
14 expert be allowed to testify here in the trial.

15 MR. DURBANO: Could I clarify one point for the  
16 record?

17 THE COURT: Yes.

18 MR. DURBANO: The actual order that I think the  
19 judge wants -- the court wants to refer to is the one  
20 that was granted in August. The order in January was  
21 complied with. We identified one of the treating  
22 physicians as the expert witness and it was the day  
23 before trial that that treating physician became  
24 reluctant and indicated his unwillingness to testify  
25 and so we asked for a continuance and the court

1 granted us ten days to appoint a second expert  
2 witness.

3 THE COURT: That was in April?

4 MR. DURBANO: Yes, April. I'm sorry, I said  
5 August.

6 THE COURT: All right. Mr. Durbano submitted his  
7 list on behalf of the plaintiff, the expert witnesses,  
8 and Mr. Williams, on behalf of the defense, filed an  
9 objection. Mr. Durbano filed a response to the  
10 objection and you argued that to me on Friday.

11 I gave you my feeling Friday, in the  
12 telephone conference call that we had, that, one, I  
13 was of the opinion that the plaintiff was in need of  
14 an expert in order to establish the standard of care  
15 in a case of this nature: two, to me it was clear and  
16 obvious from the beginning that an expert would be  
17 necessary in this particular case; three, I felt that  
18 there was extreme prejudice by the late notice or  
19 indication of an expert. It was also clear to me that  
20 in their discussions and in their conversations both  
21 counsel indicated that once the plaintiff identified  
22 their expert that the defendant did want to engage in  
23 formal discovery.

24 Mr. Durbano, in fairness to your side of  
25 the case, I am also aware that all through this case

1 there has been little or no depositions and that  
2 discovery has been of an informal nature.

3 I'll now give each counsel an opportunity  
4 to address the issue and make any record that you  
5 would like to make on this case, starting first with  
6 Mr. Durbano.

7 MR. DURBANO: Thank you, Your Honor. I  
8 appreciate the opportunity because, as the court has  
9 noted, without the ability to call an expert witness  
10 for today's trial, the court has indicated in  
11 chambers, at least, that it would be inclined to grant  
12 a directed verdict at the end of plaintiff's case,  
13 essentially eliminating the need for a trial. That,  
14 therefore, is the basis of our decision to allow the  
15 court to dismiss the jury and not go forward with the  
16 testimony.

17 I would point out to the court that in our  
18 last conversation, and I believe it was on the record,  
19 is that correct, last Friday's conversation?

20 THE COURT: That was taped.

21 MR. DURBANO: On the record the court encouraged  
22 the defendant to take the telephone deposition of Dr.  
23 Hiller to avoid any potential surprise. I would  
24 indicate that the defense counsel chose not to and  
25 thus came to court today knowing that he was not going



1 to take the deposition of Dr. Hiller, notwithstanding  
2 that he did have the opportunity and we did make Dr.  
3 Hiller available.

4 I would point out that on April 24th,  
5 1991, there was an exchange of correspondence between  
6 our office and Mr. Williams's office where we  
7 confirmed that the hiring by both parties of an expert  
8 witness would be waived at that time, based upon the  
9 parties having finally initiated settlement  
10 negotiations and were entering into an arbitration or  
11 mediation effort, so that no expert witnesses would be  
12 required until complete failure of our negotiation  
13 efforts, as the letter states. At this date I still  
14 do not know when complete failure of the negotiations  
15 occurred. We were negotiating up to and including  
16 today.

17 I think that the defendant in this case  
18 has always known, based upon Judge Newey's previous  
19 ruling, that the plaintiff intended to call either an  
20 expert from Colorado, which was the original expert  
21 designated at the hearing, who would possibly be  
22 available for trial, or in the alternative that Dr.  
23 Hiller would be called from Idaho if the expert from  
24 Colorado was unavailable. As trial got closer it  
25 became evident that Dr. Hiller's schedule would

1 accommodate better the trial setting and Dr. Hiller  
2 was selected and we notified defense counsel of that  
3 selection.

4 I don't believe it came as a surprise. I  
5 believe that defense counsel and the defendant has  
6 known all along that we would anticipate calling an  
7 expert, based upon the previous ruling of the court  
8 that an expert would be required.

9 Therefore, while I recognize the court has  
10 indicated that it might be prejudicial to the  
11 defendant because they have not had an opportunity to  
12 depose the expert, I believe that the prejudice must  
13 be borne by the defendant and that if they have not  
14 done so it's because of their own waiver or failure to  
15 do so.

16 To perfectly clear up the record, not only  
17 has there not been any depositions in this case, there  
18 have never been any formal interrogatories, requests  
19 for admissions or requests for production of  
20 documents. The entire case has been handled  
21 informally, until the eleventh hour when the defendant  
22 now insists upon a formal deposition of the  
23 plaintiff's expert.

24 Last but not least, while it may be  
25 prejudicial, and I underline the word may, for the

1 defendant not to have deposed Dr. Hiller, for us to be  
2 precluded from having an expert is more than  
3 prejudicial, it defeats our entire case.

4           With that, I would again urge the court to  
5 grant either a motion for continuance, which I would  
6 make right now, and allow this case to be heard at a  
7 later date when the defendant has had an opportunity  
8 to depose Dr. Hiller, or in the alternative ask the  
9 court to reconsider its in chambers motion and order  
10 that the plaintiff be allowed to put on her testimony  
11 including the expert witness Dr. Hiller.

12           Thank you.

13           THE COURT: Mr. Williams.

14           MR. WILLIAMS: Thank you, Your Honor. Our motion  
15 was filed the very day that I received the designation  
16 of expert witness and, I might note, six additional  
17 fact witnesses who had never been identified in any  
18 form prior to the witness list dated August 19th. We  
19 acted within one day, and that was two business days  
20 before trial that I received the names of an expert  
21 witness and six additional fact witnesses.

22           Addressing counsel's points about  
23 discovery, when this case was in the early stages  
24 plaintiff indicated she were not going to call an  
25 expert witness in this case. We indicated to them

1 that if they didn't we wouldn't and we would both rely  
2 on the treating dentist. That's why no formal  
3 discovery was done. We both were able to talk with  
4 the treating dentist. We had meetings with each other  
5 to hear what the parties were going to say.

6 But once the plaintiff indicated she would  
7 call an expert witness it was made known clearly that  
8 we would require a formal deposition of that expert  
9 witness. Counsel has not denied that, I don't  
10 believe. No one disputes that. That's when we were  
11 here in court before Judge Newey, when the plaintiff  
12 sought the first continuance in this case just one day  
13 before trial, I think. We'd prepared and were ready  
14 to go to trial and the plaintiff came in and wanted a  
15 continuance. Judge Newey gave them that break at that  
16 time, because he recognized that they might have a  
17 problem putting on a case without an expert witness.  
18 In fact, he so ruled and I think they agreed and said  
19 they needed a continuance and it was granted.

20 At that time it was clearly made known  
21 that formal depositions would be required. The judge  
22 recognized that and set a deadline ten days from then  
23 to designate the expert witnesses and set a discovery  
24 cut off 20 days before trial, all discovery to be  
25 completed by that time.

1                   We then designated our expert witness. We  
2 filed, in accordance with the court's order, a  
3 designation naming our expert witness. The plaintiff  
4 didn't.

5                   They then contacted me and said we would  
6 like to try and settle this case without incurring  
7 additional expenses and I told them that's okay, we  
8 can try to settle the case. We've gone through great  
9 efforts to try and resolve the matter with them. At  
10 no time have there been any discussions about that  
11 since the mediation meeting in Salt Lake several weeks  
12 ago. There haven't been any ongoing discussions since  
13 that time. I want the record to be clear that there  
14 have not been continuing settlement negotiations up to  
15 today, as was suggested by counsel. That's not the  
16 case. When we left the attempted mediation in Salt  
17 Lake everything broke off and that was it. Until the  
18 court's ruling today there was never another offer  
19 made by the plaintiff or another request by them to us  
20 for an offer, or another offer made by us. Excuse me,  
21 until the hearing with the court on Friday that never  
22 occurred.

23                   So to suggest that there has somehow been  
24 continuing settlement negotiations that justified not  
25 complying with the court's order is wrong. There were

1 not after that. Even if there had been, certainly  
2 nobody can claim it's reasonable to wait until three  
3 or four business days before trial to designate an  
4 expert that they know the other side wants to depose.

5 Our position, obviously, is that it would  
6 be highly prejudicial to Dr. Dickerson to have to  
7 proceed without knowing what an expert witness on  
8 standard of care and causation is going to say.  
9 Additionally, there were six fact witnesses named and  
10 we don't have any idea what they were supposed to say.  
11 We had a right to take their depositions, but  
12 obviously they had to be named early enough for us to  
13 do that.

14 With respect to the motion for a  
15 continuance, this case has been continued at their  
16 request once before already for the same reason. Dr.  
17 Dickerson has had this case hanging over his head for  
18 a long time now. The claim was first made in 1988.  
19 It involves treatment back in 1986. He's had a  
20 lawsuit hanging over his head, or a claim hanging over  
21 his head, for three years now. I don't know that any  
22 of us really appreciate what that does to a dentist or  
23 doctor, to have that hanging over his head, but it's  
24 been extremely disruptive to him and he has a right to  
25 have the thing end and another continuance at this

1 point would be highly prejudicial to him. We  
2 therefore resist the motion for continuance.

3 Thank you.

4 THE COURT: Mr. Durbano, any response?

5 MR. DURBANO: Finally, Your Honor, I still have  
6 never heard defense counsel or anyone from the  
7 defendant's side designate what date settlement offers  
8 ended or settlement discussions ended and we as  
9 plaintiff were alerted that settlement is over,  
10 designate your expert, let's get ready for trial.  
11 It's just always been a nebulous, well, sometime. I  
12 think, for the record, defense counsel should be  
13 required to state what date that occurred.

14 Secondly, any prejudice that may come to  
15 Dr. Dickerson because of an expert being designated,  
16 the specific name of an expert at least being  
17 designated three or four days before trial, could  
18 easily be cured by a very short continuance, while in  
19 the alternative, without a continuance my clients are  
20 not only prejudiced, but are out their day in court.  
21 My clients have suffered, Your Honor, and for the  
22 record, while it's true Dr. Dickerson has been faced  
23 with litigation, my clients have been faced with an  
24 injury that's now permanent.

25 That's all. Thank you.

1           THE COURT: Counsel. I'm not unmindful of the  
2 impact and the effect that this has had on both the  
3 plaintiff and on the defendant, but I must give a  
4 couple of comments from the court's position.

5           First of all, this case has been pending a  
6 long time and I know that that creates wear and tear  
7 on both parties. More importantly, the court orders  
8 in regards to discovery cut off dates and designation  
9 of witnesses was very clear. Both counsel chose to  
10 engage in informal discussions and settlement and  
11 chose to deviate from the court's record.

12           Mr. Durbano, you made a comment that at no  
13 point did the defense tell you when the settlement was  
14 cut off and therefore, to a certain extent, you feel  
15 that you should have additional time. But no one  
16 bothered to include the court in this, no one has  
17 bothered to notify the court and indicate that you  
18 were going to deviate from the order that was  
19 existing. The order is specific. It is crystal clear  
20 as to when cut off is to occur and when the witnesses  
21 are to be designated. There's no notice to the court  
22 or indication that you two have decided to do  
23 otherwise and continue your negotiations or continue  
24 on with the case.

25           In regards to the necessity of an expert,

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1 this court is of the opinion, from simply reading the  
2 case from day one, that it would be necessary in a  
3 malpractice or negligence nature of this suite,  
4 involving a professional, whether it be a dentist,  
5 lawyer, engineer, that the plaintiff needed an expert  
6 to set out the standard of care or the burden from  
7 which there must be some deviation in order to show  
8 negligence.

9           There was also a ruling on this, when both  
10 counsel thought this was going to go to trial without  
11 an expert and you would be able to use the attending  
12 dentist, the judge ruled early on in the game that he  
13 was of the opinion that it would be necessary to have  
14 an expert in order for the plaintiff to prevail.

15           My feeling is, waiting as long as we did,  
16 bringing all the people that we brought here for the  
17 trial, bringing in a judge, everything else, the court  
18 is of the opinion that it's going to enforce the  
19 discovery cut off deadlines that were in place. That  
20 results, I guess, in having the matter dismissed.

21           I'm denying your request for a  
22 continuance, Mr. Durbano. I don't know how many more  
23 times we can continue it. You can argue we've only  
24 had one continuance, we only need one more short one,  
25 but to me it's very clear that the responsibility and

1   burden of providing an expert witness in this case has  
2   been with the plaintiff from day one on this case.  
3   And even when plaintiff took the position that perhaps  
4   she could bet get by without one, the judge ruled that  
5   you would need an expert.

6                   Mr. Williams. if you'll prepare the order,  
7   since your side prevailed in this, I'll sign it. That  
8   will be all, counsel.

9           MR. WILLIAMS: Thank you. Your Honor.

10          THE COURT: Please submit it to Mr. Durbano for  
11   approval as to form before you submit it to me.

12          MR. WILLIAMS: I'll do that.

13          THE COURT: We'll be in recess.

14

15                                   (Concluded at 11:15 a.m.)

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C E R T I F I C A T E

STATE OF UTAH                    )  
                                      :   SS.  
COUNTY OF BOX ELDER)

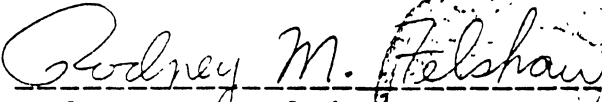
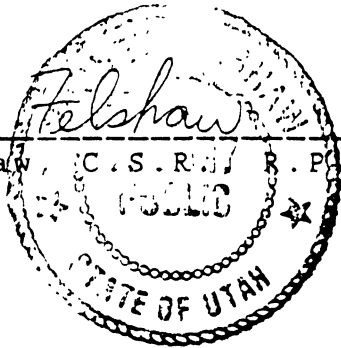
THIS IS TO CERTIFY that the proceedings in the captioned matter were taken before me, Rodney M. Felshaw, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing at Brigham City, Utah.

That said proceedings were reported by me in stenotype, and thereafter caused by me to be transcribed into typewriting; and that a full, true and correct transcription is set forth in the foregoing pages numbered from 2 to 16, inclusive.

I further certify that the original transcript was filed with the Court Clerk, First District Court, Brigham City, Utah.

I further certify that I am not associated with any of the parties to said matter and that I am not interested in the event thereof.

Witness my hand and official seal at Brigham City, Utah, this 30th day of August, 1991.

  
Rodney M. Felshaw, C.S.R., R.P.R.  


My Commission Expires:  
January 4, 1992