

1992

Gina M. Hill v. Dr. Carl Dickerson : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

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

David G. Williams; Terence L. Rooney; Snow, Christensen & Martineau; Attorney for Appellee.

Douglas M. Durbano; Walter T. Merrill; Durbano & Associates; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Hill v. Dickerson*, No. 920271.00 (Utah Supreme Court, 1992).

https://digitalcommons.law.byu.edu/byu_sc1/4236

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO. 920271

UTAH SUPREME COURT

BRIEF

IN THE UTAH SUPREME COURT

GINA M. HILL,

Plaintiff/Appellant,

vs.

DR. CARL DICKERSON,

Defendant/Appellee.

92-0271-CA

Case No. 910539
900000135

Priority No. 16

BRIEF OF THE APPELLEE

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

DAVID G. WILLIAMS (A3481)
TERENCE L. ROONEY (A5789)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Defendant/
Appellee, Dr. Carl Dickerson

DOUGLAS M. DURBANO (#4209)
WALTER T. MERRILL (#6003)
DURBANO & ASSOCIATES
3340 Harrison Blvd., #200
Ogden, Utah 84403
Telephone (801) 621-4111
Attorneys for Plaintiff/
Appellant, Gina M. Hill

IN THE UTAH SUPREME COURT

GINA M. HILL,

Plaintiff/Appellant,

vs.

Case No. 910539
900000135

DR. CARL DICKERSON,

Priority No. 16

Defendant/Appellee.

BRIEF OF THE APPELLEE

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

DAVID G. WILLIAMS (A3481)
TERENCE L. ROONEY (A5789)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Defendant/
Appellee, Dr. Carl Dickerson

DOUGLAS M. DURBANO (#4209)
WALTER T. MERRILL (#6003)
DURBANO & ASSOCIATES
3340 Harrison Blvd., #200
Ogden, Utah 84403
Telephone (801) 621-4111
Attorneys for Plaintiff/
Appellant, Gina M. Hill

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	7
ARGUMENT	9
I THE TRIAL COURT'S DECISION TO DENY PLAINTIFF'S MOTION FOR CONTINUANCE AND GRANT DEFENDANT'S MOTION IN LIMINE WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE AFFIRMED	9
A. <u>Review of a Motion for Continuance and a Motion in Limine</u>	9
B. <u>The Trial Court's Decision to Grant Dr. Dickerson's Motion in Limine and Deny Plaintiff's Second Motion for Continuance</u> . .	11
C. <u>Plaintiff's Arguments</u>	16
1. <u>The Trial Court's Decision to Deny plaintiff's Motion for Continuance</u> . . .	16
2. <u>Plaintiff's Untimely Named Expert Witness</u>	17
3. <u>Plaintiff's Need for Expert Testimony</u> . .	19
4. <u>Record of the Trial Court Proceedings</u> . .	21
II PLAINTIFF'S SECOND ISSUE PRESENTED IN HER BRIEF, THAT THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THIS ACTION WITH PREJUDICE, IS SUBSTANTIVELY THE SAME AS HER FIRST ISSUE	21
CONCLUSION	23
ADDENDUM A - TRANSCRIPT OF HEARING DATED AUGUST 26, 1991	
ADDENDUM B - ORDER DATED OCTOBER 7, 1991	

TABLE OF AUTHORITIES

CASES

<u>Adroit v. Electric Mutual Liability Ins. Co.,</u> 542 P.2d 810 (Ariz. 1975)	1, 9
<u>Bertram v. Harris,</u> 423 P.2d 909 (Alaska 1967)	13
<u>Butterfield v. Okubo,</u> 750 P.2d 94 (Utah App. 1990)	22
<u>Chadwick v. Nielsen,</u> 763 P.2d 817 (Utah App. 1988)	22
<u>Christenson v. Jewkes,</u> 761 P.2d 1375 (Utah 1988)	1, 9
<u>Fredrickson v. Maw,</u> 119 Utah 385, 227 P.2d 772 (1951)	20
<u>Grand Real Estate, Inc. v. Sirignano,</u> 676 P.2d 642 (Ariz. App. 1983)	10
<u>Hardy v. Hardy,</u> 776 P.2d 917 (Utah App. 1989)	1, 9
<u>Hoopiiaina v. Intermountain Health Care,</u> 740 P.2d 270 (Utah App. 1987)	23
<u>In Re Estate Gardner,</u> 505 P.2d 50 (Colo. App. 1972)	1, 10, 13
<u>Kalmus v. Kalmus,</u> 230 P.2d 57 (Calif. App. 1951)	12
<u>Lancaster v. Chemi-Cote Perlite Corporation,</u> 511 P.2d 673 (Ariz. App. 1973)	10
<u>Mascaro v. Davis,</u> 741 P.2d 938 (Utah 1987)	21
<u>Nixdorf v. Hicken,</u> 612 P.2d 348 (Utah 1980)	19, 20, 21, 22
<u>Peatross v. Board of Com'rs of Salt Lake City,</u> 555 P.2d 281 (Utah 1976)	10

<u>Reeves v. Geigy Pharmaceutical, Inc.,</u> 764 P.2d 636 (Utah App. 1988)	23
<u>Reliance National Life Insur. Co. v. Caine,</u> 555 P.2d 276 (Utah 1976)	10
<u>Salazar v. Ehmann,</u> 505 P.2d 387 (Colo. App. 1972)	13
<u>State Ex Rel. Carroll v. Junker,</u> 482 P.2d 775 (Wash. 1971)	11

STATUTES

Utah Code Ann. § 78-2-2(j)	1
----------------------------	---

JURISDICTION

Jurisdiction for this appeal is conferred upon this Court by Utah Code Annotated § 78-2-2(j).

STATEMENT OF ISSUES

1. Was the trial court's decision to deny plaintiff's Motion for Continuance and grant defendant's Motion in Limine an abuse of discretion. A trial court has substantial discretion in deciding whether to grant continuances. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). The trial judge's action in denying a continuance will not be reversed on appeal unless the court has abused that discretion by acting unreasonably.

Hardy v. Hardy, 776 P.2d 917, 926 (Utah App. 1989). The trial court also has broad discretion to permit or deny the testimony of witnesses. Christenson v. Jewkes, *supra*; Adroit v. Electric Mutual Liability Ins. Co., 542 P.2d 810, 815 (Ariz. 1975); In Re Estate of Gardner, 505 P.2d 50, 52 (Colo. App. 1972).

STATEMENT OF THE CASE

This is a dental malpractice action arising from treatment provided by defendant Dr. Carl Dickerson ("Dr. Dickerson") to plaintiff from February 1986 through April 1988. (R. at 1-8).

This matter was originally set for trial on April 10, 1991. (R. at 62). Two days before trial, plaintiff's counsel requested a continuance of the trial based on their representation that the treating dentist on whom they were relying to testify as an expert witness at trial declined to testify. Based on plaintiff's representations, and in spite of the added expense and inconvenience to defendant, the trial court granted plaintiff's

first Motion for continuance on April 9, 1991, one day before trial. (R. at 164-166).

This matter was reset for trial to begin on August 26, 1991, and the parties were ordered by the trial court to exchange new expert witness lists, identifying their expert witnesses by April 19, 1991. (R. at 164-166). There was no provision in the trial court's Order for additional time to identify new fact witnesses. The trial court also ordered that all discovery be completed twenty (20) days before trial. (R. at 165).

On August 19, 1991 plaintiff mailed her new witness list to defendant, naming a new expert witness and six new fact witnesses. (R. at 171-173) (Plaintiff incorrectly states in her brief, at page 9, that she telefaxed this information to defendant). Upon receipt of plaintiff's untimely Witness List on or about August 22, 1991, defendant filed an objection to plaintiff's designation of new witnesses and a Motion in Limine to preclude plaintiff from calling her newly named expert witness and the six newly identified fact witnesses at trial. (R. at 174-183). Defendant's Objection to Plaintiff's Witness List and Motion in Limine were heard by the trial court on Friday, August 23, 1991 by telephone conference hearing and again on August 26, 1991 at the commencement of trial. (R. at 184, 199-219). At that time, plaintiff verbally moved the trial court for a second continuance of the trial date.

After hearing argument from the parties and reviewing the memoranda submitted, the trial court denied plaintiff's Motion for Continuance and granted defendant's Motion in Limine. (R. at 199-

202). The trial court found that plaintiff's untimely designation of witnesses, both fact and expert, was in violation of the court's Order. The trial court further found that defendant would be seriously prejudiced if the untimely identified witnesses were allowed to testify. Based on the lack of expert testimony, plaintiff's case was dismissed. (R. at 199-202).

On or about November 12, 1991, plaintiff filed a Motion for Relief from Order. (R. at 226-250). Plaintiff's Motion for Relief from Order was denied by the trial court on December 12, 1991. (R. at 280-282, 284-286).

STATEMENT OF FACTS

1. This is an action alleging dental malpractice. The action was commenced on March 8, 1990 and arises from dental care provided to plaintiff by Dr. Dickerson from February 1986 through April 1988. (R. at 1-8).

2. Plaintiff specifically alleges that Dr. Dickerson improperly filled cavities, failed to properly treat problems in plaintiff's teeth and failed to refer plaintiff to a specialist. (R. at 5).

3. Pursuant to the pre-trial settlement conference held on January 8, 1991, and based on the fact that settlement of the case was unsuccessful, this matter was originally set for trial, commencing Wednesday, April 10, 1991. (R. at 62-66).

4. Two days before trial, plaintiff's counsel contacted defendant's counsel and the trial court and verbally requested a

continuance of the trial. A hearing was scheduled for April 9, 1991, one day before trial. (R. at 164-166, 239, 252).

5. At the hearing before the trial court on April 9, 1991, plaintiff's counsel represented that they had been relying on Dr. Steven Larsen, an endodontist who treated plaintiff, to testify as an expert witness and that on Friday, April 5, 1991 Dr. Larsen advised them he would not testify as an expert witness against Dr. Dickerson, or at least would not give them the opinions they desired. He was a treating dentist and therefore could have been subpoenaed to testify at trial. Based on the representations of plaintiff and in spite of the added expense and inconvenience to defendant, plaintiff's Motion for Continuance was granted and the trial was continued to August 26, 1991. In granting the continuance the trial court, Judge Newey, found that expert testimony was required for plaintiff to establish a prima facie case. Plaintiff did not dispute this. (R. at 164-166, 238-239, 252).

6. At the April 9, 1991 hearing, plaintiff's counsel also represented they had contacted two dentists outside of Utah who were not identified, but who were supposedly willing to testify as expert witnesses although neither had reviewed the records, that they could make a decision concerning which one they would call and identify him within ten days, and would thereafter make the expert available for deposition. (R. at 239, 252).

7. During the aforementioned hearing, the trial court ordered the parties to exchange new expert witness lists,

identifying their expert witnesses within ten days of the date of the hearing (April 9, 1991). There was no provision in the trial court's Order for additional time to identify new fact witnesses. The trial court also ordered that all discovery be completed twenty (20) days before trial. (R. at 164-166).

8. Defendant served his expert witness list on April 19, 1991, in accordance with the trial court's Order. (R. at 162-163).

9. On April 23, 1991, counsel for both parties had a telephone conference regarding settlement. Plaintiff's counsel requested that they be allowed to defer retaining and designating their expert witness until settlement could be explored. Defendant's counsel agreed. (R. at 192).

10. On June 28, 1991, as a culmination of the settlement discussions, a mediation conference was conducted at Western Arbitration. However, the mediation was unsuccessful. At the conclusion of the mediation meeting all offers had been rejected and no further offers of settlement were made by either party up to the commencement of trial. There were no settlement discussions during the two months between June 28, 1991 and the trial. (R. at 213-214, 239).

11. On August 19, 1991, five business days before trial, plaintiff mailed a new Witness List to defendant. (Plaintiff incorrectly states in her brief, at page 9, that she telefaxed this information to defendant). The new Witness List named a new expert witness and six additional fact witnesses, never previously identified. (R. at 171-173).

witness and six additional fact witnesses, never previously identified. (R. at 171-173).

12. Upon receipt of plaintiff's untimely Witness List on or about August 22, 1991 (two business days before trial), defendant filed an objection to plaintiff's designation of new witnesses and a Motion in Limine to preclude plaintiff from calling her newly named expert witness and the six newly identified fact witnesses at trial. (R. at 174-183).

13. Defendant's Objection to Plaintiff's Witness List and Motion in Limine were heard by the trial court on Friday, August 23, 1991 by telephone conference hearing and again on August 26, 1991 at the commencement of trial. (See Transcript of April 26, 1991 hearing, attached as Addendum "A"; R. at 184, 199-219).

14. After hearing argument from the parties and reviewing the memoranda submitted by the parties, the trial court found 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 the court's Order dated April 29, 1991. (R at 199-219).

15. The trial court further found that defendant would be seriously prejudiced if the witnesses first identified by plaintiff on August 19, 1991 were allowed to testify. (R. at 199-219).

16. At the commencement of the trial, the trial court found that expert testimony would be required for plaintiff to establish a prima facie case to be submitted to a jury. Plaintiff did not dispute or object to this finding. Therefore, without waiving any

rights with respect to the trial court's ruling on the Motion in Limine and Motion for Continuance, plaintiff suggested and agreed that the trial court should dismiss the case rather than have plaintiff present her case without expert testimony and have the trial court direct a verdict against her. (R. at 199-219).

17. The trial court's Order sustaining defendant's Objection to Plaintiff's Witness List and granting defendant's Motion in Limine; denying plaintiff's oral Motion for Continuance; and dismissing this case with prejudice, was entered by the trial court on October 7, 1991. (See October 7, 1991 Order attached as Addendum "B"; R. at 199-202).

SUMMARY OF ARGUMENTS

The trial court's decision to deny plaintiff's Motion for Continuance and grant defendant's Motion in Limine was a proper exercise of discretion and should be affirmed. A trial court has substantial discretion in deciding whether to grant continuances, and in excluding witnesses not properly designated, and will not be reversed on appeal unless the court has acted unreasonably and its' decision is arbitrary and capricious. A trial court's exercise of discretion will be affirmed if that discretion has substance in believable, admissable evidence.

In this instance, the trial court's decision was reached after hearing argument from the parties and reviewing the memoranda submitted by the parties. The trial court considered numerous factors, including the impact of its decision on both parties, the fact that the case had been pending a long time, the fact that the

for both parties regarding when settlement negotiations occurred and ended, the fact that the need for an expert witness to establish a prima facie case had been known to plaintiff since the April 9, 1991 hearing, the time available to defendant between plaintiff's designation of witnesses and trial to take depositions, the prejudice to each party, the interests of the Court and the reasonable expectations, interests and rights of the parties. (R. at 199-219).

After addressing these concerns, the trial court found 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 the court's Order dated April 29, 1991. The trial court further found that defendant would be seriously prejudiced if the witnesses first identified by plaintiff on August 19, 1991 were allowed to testify. Finally, the trial court noted that the responsibility and burden of providing an expert witness in this case has been with the plaintiff from day one. (R. at 199-219).

The trial court also found, and plaintiff did not dispute, that expert testimony would be required for plaintiff to establish a prima facie case to be submitted to a jury. Therefore, plaintiff suggested and agreed that the trial court should dismiss the case rather than have plaintiff present her case without expert testimony and have the trial court direct a verdict against her. R. at 199-219).

There is no evidence that the trial court acted arbitrarily, capriciously or unreasonably. All of the relevant factual and

legal considerations were taken into account by the trial court prior to reaching its decision. Moreover, plaintiff had abundant time in which to prepare her case and present expert testimony. The evidence establishes that the trial court's exercise of discretion in this instance was made after carefully reviewing the facts and circumstances and was based on believable, admissible evidence. Therefore, the trial court's order denying plaintiff's Motion for Continuance and granting defendant's Motion in Limine should be affirmed.

ARGUMENT

I

THE TRIAL COURT'S DECISION TO DENY PLAINTIFF'S MOTION FOR CONTINUANCE AND GRANT DEFENDANT'S MOTION IN LIMINE WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE AFFIRMED.

A. Review of a Motion for Continuance and a Motion in Limine.

The sole issue for review on appeal is whether the trial court's decision to deny plaintiff's Motion for Continuance and grant defendant's Motion in Limine was an abuse of discretion.

The law is clear in Utah that the trial court has substantial discretion in deciding whether to grant continuances. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). The trial judges action in denying a continuance will not be reversed on appeal unless the court has abused that discretion by acting unreasonably. Hardy v. Hardy, 776 P.2d 917, 926 (Utah App. 1989). The trial court also has broad discretion to permit or deny the testimony of witnesses. Christenson v. Jewkes, supra; Adroit v. Electric Mutual

Liability Ins. Co., 542 P.2d 810, 815 (Ariz. 1975); In Re Estate of Gardner, 505 P.2d 50, 52 (Colo. App. 1972).

A trial court's exercise of discretion will be affirmed if that discretion has substance in believable, admissable evidence. Reliance National Life Insur. Co. v. Caine, 555 P.2d 276, 277 (Utah 1976). The standard for reviewing a trial court's exercise of discretion has previously been addressed in Peatross v. Board of Com'rs of Salt Lake City, 555 P.2d 281, 284 (Utah 1976):

[W]here 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. (citations omitted) (emphasis added).

Thus, to reverse a trial court's exercise of discretion, the appellant must establish that the trial court acted unreasonably and that its decision was arbitrary and capricious.

Other state courts have reached similar holdings regarding the standard of review by an appellate court when reviewing a trial court's exercise of discretion. The Arizona Court of Appeals stated it would not substitute its discretion for that of the trial court and that the trial court is presumed to be correct if there is a reasonable basis in the record to sustain the exercise of its discretion. Grand Real Estate, Inc. v. Sirignano, 676 P.2d 642, 648 (Ariz. App. 1983); Lancaster v. Chemi-Cote Perlite Corporation, 511 P.2d 673 (Ariz. App. 1973). The Washington Supreme Court came to a similar conclusion:

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (citations omitted).

State Ex Rel. Carroll v. Junker, 482 P.2d 775, 784 (Wash. 1971).

In this instance, there is no evidence that the trial court acted arbitrarily, capriciously or unreasonably, or that its decision was based on untenable grounds.

B. The Trial Court's Decision to Grant Dr. Dickerson's Motion in Limine and Deny Plaintiff's Second Motion for Continuance.

The trial court carefully considered all of the relevant facts and circumstances before coming to its decision regarding the Motion in Limine and requested continuance. (R. at 199-219).

Although plaintiff asserts that the trial court failed to consider the fact that there had been little formal discovery conducted in this case, the trial court expressly considered that as a factor in its decision. (R. at 207-208). The trial court heard arguments from counsel for both parties and considered the impact of its decision on the parties. It considered the amount of time the case had been pending, the fact that there already had been one continuance, the reason for the first continuance, the representations of counsel for both parties regarding when settlement negotiations occurred and ended, the fact that the need for an expert witness to establish a prima facie case had been known to plaintiff since the April 9, 1991 hearing before the trial court, the time available to defendant between plaintiff's designation of witnesses and trial to take depositions, the

prejudice to each party, the interests of the court and the reasonable expectations, interests and rights of the parties. (R. at 203-219).

After carefully considering all of these factors the court concluded and found: that plaintiff's designation of new fact witnesses and an expert witness was untimely and in violation of the court's order; that defendant would be seriously prejudiced if these witnesses were allowed to testify; 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. Based on the lack of expert testimony to be presented by plaintiff, the matter was dismissed. (R. at 199-202).

These findings are reasonable and supported by evidence before the court. The trial court's findings were clearly carefully considered and not arbitrary, capricious or an abuse of discretion.

In an early California court of Appeals case, Kalmus v. Kalmus, 230 P.2d 57 (Calif. App. 1951), the court affirmed the trial court's denial of a motion for continuance and discussed the policy considerations behind its decision:

Because of the necessity for orderly, prompt and effective disposition of litigation and the loss and hardship to the parties to an action, as well as to witnesses therein, it becomes and is a part of the bounden duty of the trial judge, in the absence of some weighty reason to the contrary, to insist upon cases

being heard and determined with as great promptness as the exigencies of the case will permit.

Id. at 63.

Further, in the matter of In Re Estate Gardner, 505 P.2d 50 (Colo. App. 1972), the Colorado Court of Appeals upheld the trial court's refusal to allow the testimony of a witness, either as an expert or as a lay witness, who was not listed in the pretrial order nor added as a witness within the time requirements set forth in the pretrial order. In reaching its decision, the court relied on the rationale provided by the trial court:

The court refused to allow him to testify as an expert and then caveators requested that he be allowed to testify as a lay witness. This was also refused. The court then stated there had been ample time to list witnesses and that proponent would be prejudiced and deprived of time to prepare for trial if the witness were allowed to testify.

The purpose of such pre-trial disclosure of witnesses is to enable all parties to prepare for trial. (citation omitted) Under C.R.C.P. 16 wide discretion is vested in the trial court to determine whether a witness who has not been listed on the pre-trial order and whose name has not been disclosed to the opposing party may testify. The court did not abuse its discretion in refusing to allow Dr. Murchison to testify.

Id. at 51-52. (See also Salazar v. Ehmann, 505 P.2d 387 (Colo. App. 1972); wherein the Court of Appeals upheld the trial court's decision to sustain plaintiff's objection to allowing the testimony of one of defendant's witnesses who had not been named as a witness pursuant to the pretrial order.)

The Alaska Supreme Court reached the same decision in Bertram v. Harris, 423 P.2d 909 (Alaska 1967), where they upheld the trial court's refusal to allow the testimony of a witness who had not

been timely named in the pretrial memorandum. In reaching its decision, the court discussed the purpose behind the pretrial naming of witnesses:

Pre-trial procedure is intended to assist the trial judge by simplifying the issues, making necessary amendments to the pleadings, obtaining admissions, limiting the number of expert witnesses and considering and making a determination on any other matter that will aid in the fair and orderly disposition of the action. . . .

A requirement that all parties disclose the names and addresses of all witnesses intended to be called works to the advantage of both sides in completing discovery proceedings, eliminating surprise and shortening the trial. The practice is commonly followed in the Federal court and is to be encouraged in the courts of this state.

Id. at 916.

In this instance, plaintiff's expert witness was not identified to defendant until August 22, 1991 (two business days before trial). Defendant was severely prejudiced by this untimely designation. There was not reasonable time for defendant to depose plaintiff's expert witness. There was also no time for defendant to perform a background or professional investigation on plaintiff's expert, as is customarily done with medical experts.

Defendant would have been faced with cross examining a medical/dental expert at trial with no deposition transcript to use, and without knowing specifically what the expert's opinions and bases for opinions were. Further, defendant would have had to cross examine six additional fact witnesses with no deposition transcripts and no knowledge of their trial testimony. This would

cross examine six additional fact witnesses with no deposition transcripts and no knowledge of their trial testimony. This would have resulted in a basic deprivation of defendant's right to adequately prepare a defense.

The record in this instance clearly establishes that the trial court denied plaintiff's second Motion for Continuance after carefully evaluating the relevant facts; finding that plaintiff's designation of new fact witnesses and an expert witness violated the court's order and that defendant would be seriously prejudiced if these witnesses were allowed to testify. The trial court also noted that the responsibility and burden of providing an expert witness in this case has been with the plaintiff from day one. (R. at 199-219).

The trial court exercised its discretion after a thorough consideration of the relevant factual circumstances and principles of law. Its decision to deny plaintiff a second continuance was based on believable, admissible evidence and was clearly within its discretion, particularly after previously granting plaintiff one continuance on the eve of the first trial. Moreover, plaintiff had abundant time in which to prepare her case and timely provide for expert testimony. Plaintiff has failed to meet her burden of establishing that the trial court abused its' discretion and acted arbitrarily and capriciously. Thus, the trial court's order denying plaintiff's Motion for Continuance and granting defendant's Motion in Limine should be affirmed.

C. Plaintiff's Arguments.

1. The Trial Court's Decision to Deny plaintiff's Motion for Continuance.

Plaintiff argues in her brief that the first continuance of the trial was not due to her negligence or her counsel's lack of preparation, and because of this the first continuance should not have been considered by the trial court when ruling on plaintiff's second Motion for Continuance. (See plaintiff's Brief at 14). To begin with, there is no authority in support of the position that the trial court should not consider the first continuance as a factor in its decision.

Further, it is plaintiff's responsibility to insure prior to trial that her witnesses will be available. This is particularly true when it involves an expert witness in a malpractice case such as this, where the trial court had previously ruled that expert testimony was required to establish a prima facie case.

Finally, the trial court considered a number of factors in reaching its decision to deny plaintiff's second Motion for Continuance, not just the fact that there already had been one continuance. (R. at 207, 217-218).

Among those other factors considered by the trial court, which are already referred to above, are the following: plaintiff's violation of the court's order and the extreme prejudice to the defendant; the impact of its decision on the parties; the amount of time the case had been pending; the representations of counsel for both parties regarding when settlement negotiations occurred and

ended; the fact that the need for an expert witness to establish a prima facie case had been known to plaintiff since the April 9, 1991 hearing before the trial court; the time available to defendant between plaintiff's designation of witnesses and trial to take depositions; the prejudice to each party; the interests of the Court and the reasonable expectations, interests and rights of the parties. (R. at 199-219).

2. Plaintiff's Untimely Named Expert Witness.

Plaintiff also argues that there was an agreement between the parties that she would not need to designate her experts until settlement negotiations had failed, and that the trial court ignored this. (See plaintiff's Brief at 15). This is incorrect, as the trial court specifically addressed this issue, hearing from both parties when the second Motion for Continuance was argued. (R. at 207-219). Plaintiff further asserts that defendant made no reference to this agreement in the proceedings below. This is also incorrect, as can be seen from the record of the proceedings below. (R. at 211-214). Defendant specifically addressed and disagreed with plaintiff's assertions that settlement negotiations had been ongoing and she would not have to name her expert witness. (R. at 211-214).

Defendant did agree, on April 23, 1991, to allow plaintiff's counsel to defer retaining and designating their expert witness until settlement of the case could be explored. (R. at 192). However, as a culmination of the settlement discussions, a mediation conference was conducted at Western Arbitration on June

28, 1991. The mediation was unsuccessful. At the conclusion of the mediation meeting all offers had been rejected and no further offers of settlement were made by either party up to the commencement of trial. There were no settlement discussions between June 28, 1991 and the trial. (R. at 213-214, 239).

Both parties knew this case was going to trial. It is not Defendant's responsibility to insure that plaintiff comply with the court's order by timely naming her witnesses. Although Dr. Dickerson was accommodating to plaintiff regarding her designation of an expert, he certainly could not be expected to wait until only a few days before trial for plaintiff to designate her expert. Particularly since the trial court had ordered that all discovery be completed twenty (20) days before trial, which was well after the unsuccessful mediation meeting and last settlement discussion. (R. at 164-166).

Despite the fact that formal discovery had been limited, plaintiff knew throughout the case that Defendant wanted to depose her expert witness. (R. at 212). This was clearly known at the time of the first continuance, when the trial Judge set a deadline to designate expert witnesses in ten days and set a discovery cutoff of twenty days before trial. (R. at 212).

Plaintiff also asserts in her brief that she made her untimely named expert witness available for deposition prior to trial and that counsel for Dr. Dickerson chose not to take the deposition. (See plaintiff's Brief at 8-9). This assertion is only partially accurate, as plaintiff made her expert available for a telephone

deposition only. (R. at Exhibit "B" of supplemental record). Moreover, the offer to depose plaintiff's expert by telephone was not received until August 22, 1991 (two business days before trial). Finally, the offer indicated that plaintiff's expert would be available later in the week, which only could have meant one to two business days before trial (Thursday or Friday).

3. Plaintiff's Need for Expert Testimony.

Plaintiff's next argument is that the trial court should be reversed because it failed to recognize an exception to the general rule that expert testimony is required to establish a prima facie case in an action for dental malpractice, citing Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980). (See plaintiff's Brief at 16). However, the trial court (Judge Newey and Judge West) informally advised plaintiff that expert testimony appeared necessary in this case, but the issue was never disputed by plaintiff. (R. at 207, 209-210, 217). Moreover, on each occasion when plaintiff requested a continuance of the trial, she argued it was necessary because she couldn't present a case without an expert witness.

Plaintiff's argument that the exception noted in Nixdorf should apply in this instance is directly contradictory to her other argument, that the trial court abused its discretion by denying her Motion for Continuance. The only reason for each of plaintiff's Motions for Continuance was so she could present an expert witness to testify at trial. If she did not need an expert to establish her case, as she argues in her brief, then she would

not have needed the first continuance or have asked the trial court for a second continuance.

Further, plaintiff has presented no evidence that the exception to the need for expert testimony is applicable in this instance. She asserts in paragraph 22 of her complaint that Dr. Dickerson was negligent in the following ways: filled cavities in her teeth with low grade composite fillings, known to cause leakage, and to encourage decay in teeth; failure to treat problems in her teeth properly; his prescription of Penicillin VK to her regularly over the course of a two-year period; and his failure to refer her to a specialist. (R. at 5). These allegations do not create the type of situation envisioned by the Court in Nixdorf, which held the following:

Specifically, expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the laymen. The loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies this type of treatment. We explained in Fredrickson v. Maw, 119 Utah 385, 388, 227 P.2d 772, 773 (1951):

Whether a surgical operation was unskillfully or skillfully performed is a scientific question. If, however, a surgeon should lose the instrument with which he operates in the incision . . . , it would seem as a matter of common sense that scientific opinion could throw little light on the subject.

Id. at 352.

The facts in this case, and the allegations of negligence referred to above in plaintiff's complaint, clearly do not present the type

of scenario contemplated by the Court in Nixdorf where expert testimony would be unnecessary.

Finally, as noted above, two different judges from the trial court specifically stated that the need for plaintiff to present expert testimony to establish a prima facie case was obvious from the beginning. (R. at 207, 209-210, 217). At no time did plaintiff dispute this by arguing that she could proceed without an expert or except to the court's finding.

4. Record of the Trial Court Proceedings.

Finally, plaintiff asserts that the lack of a complete record, the transcript or tape of the August 23, 1991 telephone hearing, also supports reversal of the trial court's order. (See plaintiff's brief at 19). However, plaintiff fails to state what evidence is missing from this hearing that would support her position. Moreover, this Court has previously held that when crucial matters are not in the record, the missing portions are presumed to support the trial judge. Mascaro v. Davis, 741 P.2d 938, 943 (Utah 1987).

II

PLAINTIFF'S SECOND ISSUE PRESENTED IN HER BRIEF, THAT THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THIS ACTION WITH PREJUDICE, IS SUBSTANTIVELY THE SAME AS HER FIRST ISSUE.

Plaintiff asserts in her brief that there is a second issue to be considered on appeal; namely, whether the trial court's dismissal of her action with prejudice, based upon a "procedural defect" (lack of expert testimony), was reversible error. (See

plaintiff's Brief at 2, 19-20). However, this is in substance the same issue as the first issue. If the denial of plaintiff's Motion to Continue was not an abuse of discretion, the dismissal was clearly appropriate.

As stated above, at the commencement of the trial on August 26, 1991 the trial court found that expert testimony would be required for plaintiff to establish a prima facie case to be submitted to a jury. (R. at 199-202). Plaintiff never disputed that expert testimony was necessary. In fact, if expert testimony was not necessary, plaintiff would not have needed a continuance. Rather, plaintiff suggested and agreed that the trial court should dismiss the case rather than have plaintiff present her case without expert testimony and have the court direct a verdict against her. These events are recorded in the trial court's order of October 7, 1991. (R. at 199-202). Thus, plaintiff was given an opportunity to proceed with her case and chose not to because she acknowledged it would have been futile.

Additionally, the law is clear in Utah that to make a prima facie case in a medical/dental malpractice case, the plaintiff must present competent evidence: (1) establishing the standard of care ordinarily exercised by other practitioners in the defendant's field of practice, (2) that the defendant departed from the applicable standard of care and (3) that such departure proximately caused the injury. Butterfield v. Okubo, 750 P.2d 94, 96-97 (Utah App. 1990); Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah App. 1988); Nixdorf v. Hicken, 612 P.2d 348, 351 (Utah 1980). These

three elements of the plaintiff's prima facie case must be established by competent expert testimony. Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 640 (Utah App. 1988); Hoopiiaina v. Intermountain Health Care, 740 P.2d 270, 271 (Utah App. 1987). Without such testimony, a plaintiff cannot proceed and the case must be dismissed.

If the thrust of plaintiff's argument is that the dismissal should not have been with prejudice, the argument is without merit and raises only the same issue previously discussed herein. A dismissal without prejudice would be the equivalent of a continuance, but freeing plaintiff from all prior pre-trial orders. Obviously, a dismissal without prejudice would have been senseless.

CONCLUSION

Based on the foregoing arguments and authorities, and because the trial court did not abuse its discretion, Dr. Dickerson requests that the trial court's Order be affirmed.

DATED this 24th day of April, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By Terence L. Rooney
David G. Williams
Terence L. Rooney
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four (4) copies of BRIEF OF THE APPELLEE, this 24TH day of April, 1992, to the following:

Douglas M. Durbano, Esq.
Walter T. Merrill, Esq.
DURBANO & ASSOCIATES
Attorneys for Plaintiff/Appellant
3340 Harrison Blvd., Suite 200
Ogden, UT 84403

SNOW, CHRISTENSEN & MARTINEAU

By Terence L. Rooney
David G. Williams
Terence L. Rooney
Attorneys for Defendant/Appellee

Tab A

COPY

1 IN THE FIRST JUDICIAL DISTRICT COURT
2 BOX ELDER COUNTY, STATE OF UTAH
3 GINA M. HILL,)
4 Plaintiff,)
5 vs.) Civil No. 900000135
6 DR. CARL DICKERSON,)
7 Defendant.)

8
9 BE IT REMEMBERED that on the 26th day of August,
10 1991, the above-referenced matter came on for trial in
11 the Box Elder County Courthouse, 01 South Main,
12 Brigham City, Utah, commencing at the hour of 11:00
13 o'clock a.m., the Honorable W. Brent West presiding.

14
15 APPEARANCES:

16 For the Plaintiff: DOUGLAS M. DURBANO
17 Attorney at Law
18 Harrison Professional Plaza
19 3340 Harrison Blvd.
 Suite 200
 Ogden, Utah 84403

20 For the Defendant: DAVID G. WILLIAMS
21 Snow, Christensen & Martineau
22 Attorneys at Law
 1100 Newhouse Building
 #10 Exchange Place
 Salt Lake City, Utah 84111

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

Case No. 90000135-35

OCT 7 1991

[Signature]

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,

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.)

16

17

18

19

20

* * *

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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.

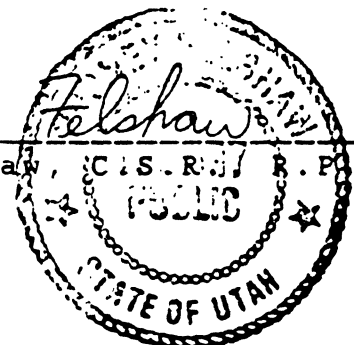
That said proceedings were reported by me in stenotype, and thereafter caused by me to be transcribed into typewriting; and that a full, true and correct transcription is set forth in the foregoing pages numbered from 2 to 16, inclusive.

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



My Commission Expires:
January 4, 1992

Tab B

BRIGHAM DISTRICT

SEP 17 1 40 PM '91

DAVID G. WILLIAMS - A3481
TERENCE L. ROONEY - A5789
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

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

GINA M. HILL,

Plaintiff,

vs.

DR. CARL DICKERSON,

Defendant.

ORDER

Civil No. 900000135 PI

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

900000135-32

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.

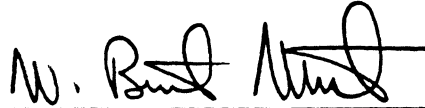
2. Plaintiff's oral motion for continuance made on August 26, 1991 at the commencement of trial is denied.

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.

DATED this 7th day of OCTOBER, 1991.

BY THE COURT:

A handwritten signature in black ink, appearing to read "W. Brent West", written over a horizontal line.

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 27th day of August, 1991.



Patricia C. White

SUBSCRIBED AND SWORN to before me this 27th day of August, 1991.



NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

09/05/93

