

1993

James T. Dikeou and Helen K. Dikeou, individually  
and as the natural parents and heirs of the estate of  
Theodore "Ted" James Dikeou, deceased v. Michael  
D. Dowdall, M.D., Jeffrey S. Osborn, M.D., HCA  
Health Services of Utah, dba St. Mark's Hospital :  
Reply Brief

Utah Court of Appeals

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David H. Epperson; Jaryl L. Rencher; Hanson, Epperson and Smith; Attorneys for Appellee.

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DOCKET NO. 930182 IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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JAMES T. DIKEOU and HELEN K.	:	
DIKEOU, individually and as	:	
the natural parents and heirs	:	
of the estate of THEODORE	:	
"TED" JAMES DIKEOU, deceased,	:	
 Plaintiffs-Appellants	:	Case No. 930182-CA
 vs.	:	Oral Argument
	:	Priority 15
 MICHAEL D. DOWDALL, M.D.,	:	
<u>JEFFREY S. OSBORN, M.D.,</u> and	:	
HCA HEALTH SERVICES OF UTAH,	:	
dba ST. MARK'S HOSPITAL,	:	
 Defendants-Appellee.	:	

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REPLY BRIEF OF APPELLANTS

---

APPEAL FROM THE SUMMARY JUDGMENT OF THE  
THIRD DISTRICT COURT OF SALT LAKE COUNTY, UTAH,  
THE HONORABLE RICHARD H. MOFFAT

---

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FRED D. HOWARD, and  
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ATTORNEYS FOR APPELLEE

**FILED**  
Utah Court of Appeals

AUG 30 1993

  
Mary T. Noonan  
Clerk of the Court

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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IN THE COURT OF APPEALS  
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JEFFREY S. OSBORN, M.D., and : Priority 15  
HCA HEALTH SERVICES OF UTAH, :  
dba ST. MARK'S HOSPITAL, :

Defendants-Appellee.

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**DETERMINATIVE PROVISIONS**

Appellants are not aware of any constitutional provisions, statutes, ordinances, rules, or regulations, whose interpretation is determinative of the issues on appeal other than the provision cited in appellants' opening brief.

**ARGUMENT**

**POINT I**

THE DISTRICT COURT ERRED WHEN IT GRANTED DR.  
OSBORN'S MOTION TO STRIKE THE AFFIDAVIT OF DR.  
BUSHNELL, THE DIKEOUS' EXPERT.

This Court reviews conclusions of law for legal correctness and gives no deference to the district court's judgment. Grover v. Grover, 839 P.2d 871, 873 (Utah Ct. App. 1992); accord Scharf v.

BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Dr. Osborn claims that an abuse of discretion standard of review should be applied to the trial court's decision to strike Dr. Bushnell's affidavit, and cites as support In re Estate of Justheim, 824 P.2d 432, 436 (Utah Ct. App. 1991); and Anton v. Thomas, 806 P.2d 744, 746 (Utah Ct. App. 1991). Both cases involved evidentiary rulings made at trial, and are not applicable to evidentiary rulings made in considering a motion for summary judgment. Utah cases consistently apply a non-deferential standard of review to all aspects of a ruling on summary judgment, including evidentiary issues on which the trial court might have discretion if the issue were raised at trial. See Butterfield v. Okubo, 831 P.2d 97, 102-03 (Utah 1992).

Dr. Osborn asserts in his brief that the trial court properly struck the affidavit of Dr. Bushnell because

(1) it failed to demonstrate that the affiant was competent and capable to testify as to the standard of care required of a cardiologist specializing in electrophysiology such as Dr. Osborn in this case; (2) the affidavit lacked foundation, (3) it was based on hearsay, (4) it did not demonstrate the same criteria exist for cardiologists and emergency room medicine physicians, (5) it was based on speculation, and (6) it did not accurately state the evidence from the record.

(Appellee's Brief p. 30.) None of these conclusions endures analysis.

A. Dr. Bushnell qualifies as an expert witness.

The first and fourth objections raised by Dr. Osborn are essentially identical, and challenge Dr. Bushnell's qualifications

to testify concerning Dr. Osborn's malpractice. Utah law ordinarily requires expert witnesses in medical malpractice cases to practice medicine in the same field as the physician against whom they testify. See Burton v. Youngblood, 711 P.2d 245, 248 (Utah 1985). This rule has an exception. An expert witness may competently testify upon laying sufficient foundation to demonstrate that the expert's field of medical practice and the defendant's share a method of treatment--and thus, a standard of care. See id.; accord Arnold v. Curtis, 846 P.2d 1307, 1310 (Utah 1993).

Dr. Bushnell's affidavit fits within this exception. The district court incorrectly focused on whether Dr. Bushnell belongs to the same field of medical practice as Dr. Osborn. (R. 341). Plaintiffs' primary complaint against Dr. Osborn centers on his decision not to personally examine Ted Dikeou on the night of February 20-21, 1990. (See R. 5; Appellants' Br. at 12-13). So the more accurate question is whether Dr. Bushnell can demonstrate enough "knowledge, skill, experience, training, or education," Utah R. Evid. 702, regarding the relationship between emergency room physicians and primary physicians to competently testify whether Dr. Osborn failed to meet the applicable standard of care when he failed to treat Ted Dikeou personally. (See R. 156-60). Dr. Bushnell's training as a specialist in emergency room medicine (R. 233, 239-40) amply qualifies him to speak on that question as an expert. (See R. 235.) The relevant standard of care has nothing to do with methods of treatment unique to cardiology or electrophysi-



ology. Instead it has to do with a set of methods and duties with which Dr. Bushnell and Dr. Osborn are equally familiar: the relationship between a primary physician whose patient has checked into a hospital and the emergency room physician who must treat him. Because Dr. Bushnell's affidavit demonstrates a sufficient foundation of expertise in this area of common experience, skill, and training, it fits within a recognized exception to the general rule. See Burton v. Youngblood, 711 P.2d 245, 248 (Utah 1985). In this case, Dr. Bushnell does not need to practice cardiology to qualify as an expert.

B. Dr. Bushnell's affidavit contains sufficient foundation to survive a motion to strike.

To survive a motion for summary judgment, experts' affidavits must contain "factual support for the experts' conclusions." Butterfield v. Okubo, 831 P.2d 97, 103 (Utah 1992) (emphasis added).

Dr. Bushnell noted the specific factual grounds on which he based his opinions:

8. I have reviewed the medical records on Theodore James "Ted" Dikeou from the private practice of Jeffrey S. Osborn, M.D., and from St. Mark's Hospital Emergency Room for the treatment rendered to Ted Dikeou on the night of February 20-21, 1990.

9. I have also read transcripts of the depositions of Mrs. Helen Dikeou, Dr. Jeffrey S. Osborn and Dr. Michael D. Dowdall.

10. Having read and studied the documents listed above, I have formed a professional opinion as to the standard of medical

care applicable in this case and whether Doctors Osborn and Dowdall adhered to that standard of care in their treatment of Ted Dikeou.

(R. 233) (emphasis added). It would have been unduly cumbersome for Dr. Bushnell to list each fact on which he based his opinions. Instead he makes it abundantly clear that his opinions are based not on past experience or ungrounded assertions--but on the facts of this case. Even under the stringent Butterfield test, which requires expert affidavits to include "not only the expert's opinion but also the specific facts that logically support the expert's conclusion," Dr. Bushnell's affidavit provides the necessary foundation. Butterfield v. Okubo, 831 P.2d 97, 104 (Utah 1992).

C. As an expert witness, Dr. Bushnell may rely on hearsay.

An expert witness may base his opinion on hearsay if it comprises facts "of a type reasonably relied on by experts in the witness's field of expertise." Barson v. E.R. Squibb & Sons, 682 P.2d 832, 839 (Utah 1984). The district court admitted that an expert witness may rely on hearsay, while insisting that Dr. Bushnell was unqualified to testify against Dr. Osborn. "Even given a presumption of the ability to rely on hearsay to an expert's testimony said affidavit does not meet the criteria required to enable him [Dr. Bushnell] to be able to testify as to the standard of care required for a physician specializing in the same specialty as Dr. Osborn." (R. 341). As the district court

itself admits, Dr. Bushnell's reliance on medical records and deposition testimony is legally permitted.

D. Paragraphs 11-23 of Dr. Bushnell's affidavit are neither speculative nor factually incorrect.

An expert witness may rely on data "of a type reasonably relied on by experts in the witness's field of expertise," Barson v. E.R. Squibb & Sons, 682 P.2d 832, 839 (Utah 1984), and he is qualified to testify by reason of his "knowledge, skill, experience, training, or education . . . ." Utah R. Evid. 702. Without belaboring the point, Dr. Bushnell's affidavit evinces his careful reading of the record and his long experience with emergency room medicine. To the extent Dr. Bushnell makes inferences, they are based on the same experience and training that qualify him to testify at all. It would be contrary both to law and good policy to ask an expert witness to state his opinions without making the kinds of inferences that his experience equips him to make. That Dr. Bushnell's conclusions rely on such inferences is the natural product of his work as an expert.

## POINT II

### THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT WHEN THERE REMAIN GENUINE ISSUES OF MATERIAL FACT.

Summary judgment should be granted only when there are no genuine issues of material fact, and an appellate court reviews a grant of summary judgment for legal correctness, giving the district court no particular deference. See Transamerica Cash

Reserve, Inc. v. Dixie Power and Water, Inc., 789 P.2d 24, 25-26 (Utah 1990) (citations omitted). This Court must "view facts and inferences in the light most favorable to the losing party . . . ." Rollins v. Petersen, 813 P.2d 1156, 1158 (Utah 1991). In a medical malpractice action plaintiffs usually must provide expert witness testimony to show the elements of negligence, including the standard of care, breach, causation, and injury. See Hoopiaina v. Intermountain Health Care, 740 P.2d 270, 271 (Utah Ct. App. 1987).

Applying these principles to the facts of this case shows that the district court erred by granting summary judgment when there remains a genuine issue of material fact.

A. The affidavit creates an issues of fact regarding breach of the standard of care.

The Dikeous have maintained from their complaint onward that Dr. Osborn's failure to treat Ted Dikeou in person caused Mr. Dikeou's untimely death. (See R. 5). They have repeated that claim in their principal brief to this Court. "In summary, the issue in this case was whether Dr. Osborn could and should have made a personal examination and diagnosis of the decedent's condition, rather than relying solely on the diagnosis of the emergency room physician." (Appellants' Br. at 16). Because Dr. Bushnell's affidavit was improperly stricken, the salient issue of this case was properly addressed by an expert witness.

Dr. Bushnell states the standard of care applicable to Dr. Osborn. In the following paragraph Dr. Bushnell describes the

night of February 20-21, 1990, Ted Dikeou's unusual arrhythmia, and Dr. Osborn's response.

13. Dr. Osborn was aware of the unique nature of this occurrence, and by his own testimony noted that this prolonged episode warranted further testing, investigation and treatment of Ted Dikeou's prolonged tachycardia--a presentation made gravely ominous by Ted's known diagnosis of Wolff-Parkinson-White syndrome. This is the standard of medical care which applies to Dr. Jeffrey Osborn.

(R. 234) (emphasis added). By this sentence Dr. Bushnell means that Dr. Osborn's physician-patient relationship with Ted Dikeou, combined with Dr. Osborn's awareness of the unusual threat posed by Mr. Dikeou's tachycardia, obligated Dr. Osborn to pursue "further testing, investigation and treatment . . . ." (Id.) The duty of a primary physician to personally treat his or her patient is well-recognized:

A physician, in the absence of an agreement to the contrary, is, during the existence of the relationship of physician and patient, under a duty to give to the patient all necessary care as long as the case requires attention, and an unwarranted lack of diligence in attending the patient after assumption of the case for treatment renders the physician liable for damages. The courts are in general agreement that this principle properly states the test of care to be applied in determining a physician's liability for lack of diligence in attending a patient.

C.T. Drechsler, Annotation, Liability of Physician for Lack of Diligence in Attending Patient, 57 A.L.R.2d 379, 388 (1958).

Dr. Bushnell's affidavit squarely states that Dr. Osborn breached this standard of care.

Despite his professional relationship with Ted Dikeou and his awareness that further action on his part was required, Dr. Osborn failed to appreciate the

seriousness of this occurrence, failed to investigate the change in his patient's symptoms, failed to recommend that Ted Dikeou meet him at the hospital where Dr. Osborn has staff privileges and in general, failed to respond in any manner to his patient's condition.

(R. 234). Dr. Osborn's own testimony verifies this version of events, albeit in a more favorable light. (See R. 156-60).

Dr. Osborn has naturally attempted to defend his inaction. When asked why he didn't personally examine Ted Dikeou and prescribe something more appropriate than Verapamil, Dr. Osborn replied, "I would not feel comfortable going to St. Mark's and doing that. I did not have the privileges." (R. 160). Dr. Bushnell's affidavit demolishes this excuse. Based on his training in emergency medicine, (See R. 235), Dr. Bushnell gives five responses to Dr. Osborn's claim that his lack of staff privileges at St. Mark's Hospital prevented him from treating Ted Dikeou in person: (1) St. Mark's Hospital would have "undoubtedly" granted Dr. Osborn courtesy privileges if he would have asked to treat his patient (Id.); (2) Dr. Osborn could have asked to care for Ted in consultation with the emergency room physician, Dr. Dowdall (see R. 236); (3) "Dr. Osborne [sic] could have requested that Ted [Dikeou] be transferred to a hospital of Dr. Osborn's choice . . ." (R. 235); (4) Dr. Osborn could have insisted that Dr. Dowdall consult with the cardiologist on duty at St. Mark's Hospital before treating Ted Dikeou any further (see id.); and (5) in any event, Dr. Osborn himself admitted that St. Mark's Hospital let him see

Ted Dikeou and review Ted's records three days later<sup>1</sup>. (See R. 235-36, 160). This admission and the existence of feasible alternatives leave Dr. Osborn without a defense for his inaction on the night of February 20-21, 1990. Dr. Osborn breached his standard of care.

B. The affidavit establishes causation.

Dr. Osborn claims as an aside in his brief that plaintiffs' failed to establish the element of causation. (Appellee's Brief pp. 27-28.) Dr. Bushnell's affidavit also states the key element of causation. "Dr. Osborn suggested the administration of medication to Ted Dikeou that night [of February 20-21, 1990] without confirming the condition for which he was prescribing, thereby playing a major role in the exacerbation of Ted's condition and his subsequent cardiac arrest, coma and death." (R. 235).

Dr. Bushnell's statement that Dr. Osborn prescribed medication "without confirming the condition for which he was prescribing" means that Dr. Osborn's failure to personally examine Ted Dikeou caused Ted Dikeou's death. (See id.). Dr. Osborn has admitted that he would have prescribed something different than Verapamil if he would have known Dr. Dowdall's diagnosis of paroxysmal atrial

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<sup>1</sup>Dr. Osborn self-servingly characterizes this visit as only a social visit, but does not deny that he review Ted Dikeou's medical chart while there. (Appellee's brief p. 36.) Mr. Dikeou account of that occasion is that Dr. Osborn both "examined Ted" and "spent some time talking to us about his condition as he saw it." (R. 162.) Mr. Dikeou's version obviously controls for purposes of summary judgment.

tachycardia (PAT) was incorrect. "Hypothetically, if he [Dr. Dowdall] had mentioned atrial fibrillation my response for treatment would be--have been different than Verapamil." (R. 160). By this statement Dr. Osborn admits that his failure to examine Ted Dikeou personally led to the misprescription of Verapamil, which in turn led to Ted Dikeou's early death.

Also, by "exacerbation," Dr. Bushnell clearly refers to causation. Ted Dikeou had Wolff-Parkinson-White (WPW) syndrome (See R. 157), a cardiac disorder that can be controlled with proper treatment. (See R. 155.) When Dr. Bushnell refers to Dr. Osborn's inaction as "exacerbating" Ted Dikeou's condition, a reasonable inference is that he means that the misprescription of Verapamil exacerbated Ted Dikeou's WPW syndrome. (See R. 234-35). This statement establishes the necessary element of causation, linking Dr. Osborn's breach of his standard of care with Ted Dikeou's death.

Given these statements from Dr. Bushnell's affidavit, which this Court must construe in the light most favorable to plaintiffs, there remains a genuine issue of material fact as to Dr. Osborn's role in Ted Dikeou's untimely death. The district court erred when it granted summary judgment.



### POINT III

#### THE DIKEOUS DID NOT ADMIT THAT ONLY A CARDIOL- OGIST COULD TESTIFY CONCERNING THE STANDARD OF CARE APPLICABLE TO DR. OSBORN.

Both in its minute entry of April 17, 1992 and its summary judgment of May 8, 1992, the district court said that the Dikeous had "patently admitted that they have no expert to provide testimony necessary to show that Dr. Osborn's involvement in the treatment of the decedent . . . did not rise to the standard required under Utah law in order for plaintiffs [the Dikeous] to sustain their burden of proof." (R. 341; R. 288) Dr. Osborn repeats this charge on appeal.

[P]laintiffs admitted under oath that plaintiffs believed that the interrogatory concerning the substance of the allegation against Dr. Osborn was "best answered by a medical expert in the field of cardiology, and in response [attach] a copy of a letter opinion from Michael D. Lesh, M.D., a cardiologist contacted by Plaintiff's attorney."

(Appellee's Br. at 37-38).

the passage that Dr. Osborn quotes should be considered in context. It occurs in Plaintiff Helen K. Dikeou's Answers to Defendant Osborn's Interrogatories. The interrogatory and the relevant part of Ms. Dikeou's answer appear below:

INTERROGATORY NO. 2: With reference to paragraph 20 of plaintiff's complaint, please state each and every fact or basis upon which it is claimed that; (a) Dr. Osborn was negligent in that he failed to properly ascertain the true condition of the patient; (b) that he failed personally to examine the patient and satisfy himself concerning the diagnosis of Dr. Dowdall; (c) that he mis-prescribed the medication to be given; and (d) that he failed to promptly and properly respond to the adverse conditions that developed to the patient after

hospital personnel followed his diagnosis and doctor's orders.

ANSWER: Plaintiff objects to this Interrogatory as it requires Plaintiff to make medical judgments beyond the scope of her education, training and expertise. Plaintiff believes that this Interrogatory is *best* answered by a medical expert in the field of cardiology, and in response, attaches a copy of a letter opinion from Michael D. Lesh, M.D., a cardiologist contacted by Plaintiff's attorneys to evaluate the care given to Theodore "Ted" Dikeou, and which opinion will be supplemented hereafter.

(R. 305-06) (emphasis added).

On its face, Ms. Dikeou's statement cannot be taken to mean what the district court and Dr. Osborn say it means. "Best answered" does not mean "can only be answered." The first phrase indicates a preference, the second a requirement. A fair reading of Ms. Dikeou's statement shows that she preferred Dr. Osborn to rely on Dr. Lesh's letter rather than on her lay opinion. To construe Ms. Dikeou's preference as an admission that she has no case without a cardiologist requires logic that not only leads, but leaps.

Besides, even if Ms. Dikeou had clearly said that she thought she needed a cardiologist to make out her prima facie case, her statement should not have affected the court's decision. Courts have discretion to admit expert witness testimony based on the law, not on a lay person's opinion. The district court erred if it permitted its misreading of Ms. Dikeou's statement to influence its decision to strike Dr. Bushnell's affidavit.

#### POINT IV

##### DOCKETING STATEMENTS NEED NOT CONTAIN ALL ISSUES THAT APPELLANTS RAISE IN THEIR BRIEF.

An appellant waives any issue not raised in his or her appellate brief. See Smith v. Batchelor, 832 P.2d 467, 470 n.4 (Utah 1992). This rule, while reasonable and necessary when applied to briefs, is unduly harsh if applied to docketing statements. Docketing statements serve five chief purposes. They help the appellate and supreme courts assign cases to the proper court, decide when cases ought to be certified to the supreme court, classify cases to accurately determine their priority, grant summary dispositions when proper, and make calendar assignments. See Utah R. App. P. 9. Given the 21-day time period within which to file docketing statements, id., requiring appellants to list all issues serves neither the purposes for which docketing statements are required nor the appellants, whose rushed attempt to provide a complete catalogue of issues probably would result in poor lawyering.

Dr. Osborn relies In Re Estate of Justheim, 824 P.2d 432 (Utah Ct. App. 1991), to support his argument that the Dikeous' issue has been untimely presented. There this Court understandably refused to review an issue that had been presented neither to the trial court, nor in the docketing statement, nor in the principal brief. Id. at 437. In fact, the court determined that the party trying to present the issue for its review had waived the issue at trial. Id.


The facts of Justheim differ from the facts of this case in nearly every detail. The Dikeous challenged the lower court's grant of Dr. Osborn's motion for filing of discovery responses. (R. 346-50). While they did not list that issue in their docketing statement, they raised and discussed it in their principal brief to this Court. (See Appellants' Br. at 19-20). Finally, because this case was decided on the memoranda, see R. 287-89, 340-42, the Dikeous had no trial at which to waive the issue they have presented for review. Justheim does not apply, given these facts.

This Court should disregard Dr. Osborn's argument and review the lower court's decision to supplement the record three weeks after it granted summary judgment.

#### CONCLUSION

This Court should reverse the trial court's order striking Dr. Bushnell's affidavit, vacate the summary judgment, and remand the case for a jury trial on the merits.

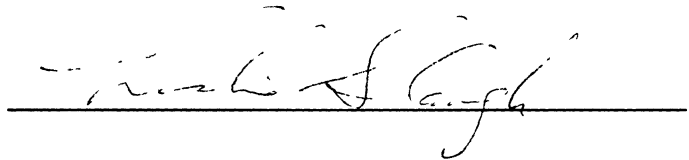
DATED this 26<sup>th</sup> day of August, 1993.

  
\_\_\_\_\_  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiffs

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 26<sup>th</sup> day of August, 1993.

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Jaryl L. Rencher, Esq.  
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A handwritten signature in dark ink, appearing to read "David H. Epperson", is written over a horizontal line.

S:DIKEOU.REP