

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., and
HCA Health Services of Utah, dba St. Mark's
Hospital : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

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

Jackson Howard; Fred D. Howard; Leslie W. Slaugh; Howard, Lewis and Petersen; Attorneys for Appellants.

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

Recommended Citation

Brief of Appellant, *James T. Dikeou, Helen K. Dikeou, Theodore "Ted" James Dikeou v. Michael D. Dowdall, M.D., Jeffrey S. Osborn, M.D., HCA Health Services of Utah, St. Mark's Hospital*, No. 930182 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5063

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals 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.

930182

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

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.	:	

BRIEF OF APPELLANTS

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

JACKSON HOWARD,
FRED D. HOWARD, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR APPELLANTS

DAVID H. EPPERSON and
JARYL L. RENCHER, for:
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, UT 84110-2970

ATTORNEYS FOR APPELLEE

FILED

MAY 14 1993

COURT OF APPEALS

LIST OF PARTIES

All parties are shown on the case caption. Defendant Michael D. Dowdall, M.D., who is not a party to this appeal, was represented below by Philip R. Fishler of Strong & Hanni, Salt Lake City. Defendant HCA Health Services of Utah, Inc., dba St. Mark's Hospital, is also not a party to this appeal; HCA was represented below by David W. Slagle and Elizabeth King of Snow, Christensen & Martineau, Salt Lake City.

TABLE OF CONTENTS

LIST OF PARTIES	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
ISSUES PRESENTED	1
DETERMINATIVE PROVISIONS	2
STATEMENT OF THE CASE	3
A. <u>Nature of the Case</u>	3
B. <u>Course of Proceedings and Disposition Below</u>	3
C. <u>Statement of Facts</u>	5
SUMMARY OF ARGUMENT	8
ARGUMENT	9
POINT I	
SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE AFFIDAVIT OF J. FRED BUSHNELL CREATED A FACTUAL ISSUE CON- CERNING DR. OSBORN'S NEGLIGENCE.	9
POINT II	
THE TECHNICAL NONCOMPLIANCE WITH RULE 4-501 DID NOT WARRANT DISMISSAL OF PLAINTIFFS' CASE.	17
POINT III	
BOLSTERING THE RECORD AFTER THE DECISION ON SUMMARY JUDGMENT WAS IMPROPER.	19
CONCLUSION	20
ADDENDUM	
A. Affidavit and Curriculum Vitae of J. Fred Bushnell, M.D.	
B. Minute Entry, April 17, 1992.	
C. Order, May 8, 1992	
D. Summary Judgment and Order, May 8, 1992	
E. Stipulation and Order for Dismissal	
F. Rule 4-501, Utah Code of Judicial Administration	

TABLE OF AUTHORITIES

Cases Cited:

<u>Berrett v. Denver and Rio Grande Western RR Co.</u> , 830 P.2d 291 (Ct. App.), <u>cert. denied</u> , 836 P.2d 1383 (Utah 1992)	2
<u>Burton v. Youngblood</u> , 711 P.2d 245 (Utah 1985)	11
<u>Butterfield v. Okubo</u> , 831 P.2d 97 (Utah 1992)	2, 10
<u>Chadwick v. Nielsen</u> , 763 P.2d 817 (Utah Ct. App. 1988)	9
<u>Franklin Financial v. New Empire Development Co.</u> , 659 P.2d 1040 (Utah 1983)	20
<u>Harley v. Catholic Medical Center of Brooklyn and Queens, Inc.</u> , 88 Misc. 2d 126, 386 N.Y.S.2d 955 (Sup. Ct. 1976), <u>aff'd</u> , 57 A.D.2d 827, 394 N.Y.S.2d 62 (App. Div. 1977)	12
<u>King v. Searle Pharmaceuticals, Inc.</u> , 832 P.2d 858 (Utah 1992)	10
<u>Moore v. Pacific Northwest Bell</u> , 662 P.2d 398 (Wash. Ct. App. 1983)	20
<u>Nixdorf v. Hicken</u> , 612 P.2d 348 (Utah 1980)	9
<u>Olson v. Park-Craig-Olson, Inc.</u> , 815 P.2d 1356 (Utah Ct. App. 1991)	2, 20
<u>Reserve Insurance Co. v. Pisciotta</u> , 640 P.2d 764 (Cal. 1982)	20
<u>Slayton v. Brunner</u> , 633 S.W.2d 29 (Ark. 1982)	11
<u>Themy v. Seagull Enterprises, Inc.</u> , 595 P.2d 526 (Utah 1979)	10
<u>Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc.</u> , 30 Utah 2d 187, 515 P.2d 446 (1973)	18
<u>Winegar v. Froerer Corp.</u> , 813 P.2d 104 (Utah 1991)	5

Statutes and Rules Cited:

Utah Code Ann. § 78-2-2(3)(j) (Supp. 1992)	1
Utah Code Ann. § 78-2-2(4) (Supp. 1992)	1
Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1992)	1
Utah Code Jud. Admin. Rule 4-501	2, 4, 17, 19
Utah Code Jud. Admin. Rule 4-504	19
Utah R. Civ. P. 1(a)	18
Utah R. Civ. P. 6(e)	4
Utah R. Civ. P. 56(c)	18, 20
Utah R. Evid. 702	10

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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.	:	

BRIEF OF APPELLANTS

JURISDICTION

This is an appeal as of right from a final judgment in a civil case in the district court. Jurisdiction was conferred on the Utah Supreme Court by Utah Code Ann. § 78-2-2(3)(j) (Supp. 1992). As authorized by § 78-2-2(4), the Supreme Court transferred the case to the Court of Appeals on or about March 30, 1993. The Court of Appeals has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED

1. Were there disputed factual issues which precluded summary judgment, where the affidavit of plaintiffs' expert affirmatively showed that he had expertise helpful to the court

concerning defendant's failure to give proper care to the decedent? The propriety of summary judgment and the admissibility of the expert's affidavit both present legal issues which are reviewed for correctness, with no deference to the trial court. Butterfield v. Okubo, 831 P.2d 97, 102 (Utah 1992).

2. Does a technical non-compliance with the procedural requirements of Rule 4-501 justify the trial court in disregarding obvious factual disputes, where the record plainly shows that the facts are disputed? This Court should review to determine if the trial court abused its discretion. See Berrett v. Denver and Rio Grande Western RR Co., 830 P.2d 291, 293 (Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1992).

3. Did the trial court err in purporting to bolster the record after having granted defendant's motion for summary judgment? This presents a question of law to be reviewed de novo by the court. See Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah Ct. App. 1991).

DETERMINATIVE PROVISIONS

A copy of Rule 4-501 of the Utah Code of Judicial Administration is reproduced in the addendum. Appellants are not aware of any other constitutional provisions, statutes, ordinances, rules, or regulations, whose interpretation is determinative of the issues on appeal.

STATEMENT OF THE CASE

A. Nature of the Case. This is a civil medical malpractice action.

B. Course of Proceedings and Disposition Below. James and Helen Dikeou, acting individually and as the parents and heirs of their deceased son, Ted Dikeou, filed their Complaint and Jury Demand on July 22, 1991. (R. 2-7.) Named as defendants were Dr. Michael P. Dowdall, the emergency room physician, who allegedly failed to properly treat Ted Dikeou, causing his death; St. Mark's Hospital, where Ted Dikeou was taken for treatment prior to his death; and Dr. Jeffrey S. Osborn, Ted Dikeou's cardiologist, who allegedly misprescribed medication for Ted Dikeou, thereby causing his death. (Id.)

Following a scheduling conference held February 11, 1992, the court gave plaintiffs approximately one month, until March 16, 1992, to designate their witnesses, including expert witnesses. (R. 127, 130-31.) Two weeks before the time that plaintiffs were to have designated their experts, defendant Osborn moved for summary judgment on the ground that plaintiffs had not yet designated an expert witness able to establish breach of the duty of care and causation. (R. 132-34, 135-203.) Plaintiffs timely served their designation of witnesses on March 16, 1992 (R. 218) and responded to Osborn's motion for summary judgment ten days later, on March 26, 1992. (R. 225-251.) Plaintiffs' response was

based primarily on the affidavit of J. Fred Bushnell, M.D., an emergency room physician. (R. 232-237.)

Osborn moved to strike the affidavit of Dr. Bushnell. (R. 252-53.) Plaintiffs timely filed their response to the motion to strike on April 16, 1992. (R. 273-86.) In a signed minute entry filed the next day, the court granted both defendant's motion for summary judgment and the motion to strike the affidavit of Dr. Bushnell. (R. 287-90.) In the minute entry, the court stated it had reviewed certain memoranda but gave no indication it had reviewed plaintiffs' memorandum in opposition to the motion to strike, filed the day before the ruling. (Id.) The formal Summary Judgment and Order was entered May 8, 1992. (R. 340-43.)

Following the court's signed minute entry granting summary judgment, defendant sought to bolster the record by including additional materials which defendant claimed supported the summary judgment. (R. 297-98.) The motion was filed May 8, 1992, and the court entered an order granting the motion on the same day (R. 338-39), several days prior to the time plaintiffs' response to the motion would have been due.¹

The case against the remaining two defendants was settled on or about July 21, 1992. (R. 356.) An order dismissing the case

¹The certificate of service attached to the motion indicates that it was hand delivered to plaintiffs' counsel on Friday, May 1, 1992. Plaintiffs' response would have been due no sooner than Monday, May 11, 1992. Utah Code of Judicial Administration, Rule 4-501(1)(b); Utah R. Civ. P. 6(e). Pursuant to Rule 4-501(1)(d), the court should not have decided the matter until after submission of a notice to submit for decision.

was entered September 14, 1992. (R. 358-60.) Plaintiffs timely filed their Notice of Appeal on October 13, 1992. (R. 362-64.)

C. Statement of Facts. As is appropriate in a summary judgment proceeding, the following facts are stated in the light most favorable to plaintiffs, and reasonable inferences are drawn in plaintiffs' favor where appropriate. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

Ted Dikeou had a moderately common condition identified as the Wolff-Parkinson-White syndrome (WPW), which relates to an abnormal electrical conduction system in the heart. (R. 138, ¶ 6.) With proper medical treatment, he would likely have achieved a normal life expectancy. (Id.); (R. 155.) Dr. Osborn, a cardiologist (R. 153), had treated Ted Dikeou for this condition since 1988. On the evening of February 20, 1990, Ted Dikeou called Dr. Osborn and reported that his heart was beating fast. Ted said that he had recently changed asthma medicines and thought the change may be the cause of the increased heart beat. (R. 156.) Dr. Osborn advised Ted to lie down for an hour to see if the symptoms would abate without further treatment. (R. 248.)

Ted's heart beat did not slow down, and he called Dr. Osborn again early in the morning of February 21, 1990. (R. 156.) Dr. Osborn told him he needed a routine injection to slow his heart. (R. 248.) Ted and Dr. Osborn discussed where Ted could obtain the injection. Ted inquired whether it would be alright to go to the emergency room at St. Mark's Hospital, because it was close to his

home. Dr. Osborn informed Ted that Dr. Osborn did not have staff privileges at St. Mark's Hospital, but stated that it would be fine if Ted went there for treatment. (R. 157, 183, 248.)

Ted Dikeou walked into the emergency room at St. Mark's Hospital. (R. 173.) He was able to converse with the emergency room physician in a normal manner. (R. 187.) When Ted's mother, Helen Dikeou, suggested that the emergency room physician call Dr. Osborn, Ted gave him the telephone number for Dr. Osborn. (R. 167.)

Dr. Dowdall, the emergency room physician, called Dr. Osborn and discussed Ted's condition with him. Dr. Dowdall reported that Ted was in paroxysmal atrial tachycardia (PAT). (R. 158.) Dr. Osborn made no effort to verify the diagnosis but suggested that the appropriate treatment was IV Verapamil. (Id.)

In fact, Ted was not suffering from PAT, but was in atrial fibrillation. (R. 159.) This was revealed by the monitor strip from the EKG (R. 199), and Dr. Osborn presumably could have determined that had he gone to the hospital to verify Dr. Dowdall's diagnosis. Verapamil is not an appropriate medication for someone experiencing atrial fibrillation. (R. 160.)

As a result of the improper medication given to Ted, he went into cardiac arrest. The hospital staff performed CPR and electrical defibrillation. (R. 190.) The efforts at overcoming the effect of the medication were unsuccessful, and Ted left the

emergency room in a coma. (R. 168.) He passed away March 2, 1990.
(See R. 4.)

Dr. Dowdall, the emergency room physician, would liked to have had Ted Dikeou at another hospital so that he could be treated directly by Dr. Osborn, his cardiologist. (R. 190.) Dr. Osborn claimed that he could not treat him at the St. Mark's emergency room, because he lacked privileges there. (R. 157, 160.) Although Dr. Osborn advised Ted Dikeou that he lacked privileges at St. Mark's, he did not advise him against going there. (R. 157, 183.) Had Dr. Osborn requested, he undoubtedly would have been granted courtesy privileges to treat his patient in this emergency situation. (R. 235, ¶ 21.) Dr. Osborn in fact did later go to St. Mark's prior to Ted's death and examined Ted, reviewed his medical records, and spent some time reviewing his condition with Mr. and Mrs. Dikeou. (R. 162.)

Dr. Osborn's refusal to provide adequate treatment and diagnosis for his patient resulted in the death of Ted Dikeou. (R. 236.) Dr. Osborn knew or should have known that the medication provided to Ted Dikeou by Dr. Dowdall was inappropriate for his condition. (R. 235.) The excuse given by Dr. Osborn for not treating his patient, that he did not have staff privileges at St. Mark's, was just an excuse and could have been easily overcome. Dr. Osborn could have received courtesy staff privileges, or he could have otherwise provided for the adequate treatment of his patient. (R. 235-36.)

SUMMARY OF ARGUMENT

This case was decided on a motion for summary judgment. All reasonable inferences from the depositions and affidavits should have been drawn in favor of the plaintiffs, and any doubt as to the propriety of summary judgment should have been resolved in favor of plaintiffs.

Plaintiffs have the burden to present expert testimony showing that Dr. Osborn's treatment of Ted Dikeou fell below the applicable standard of care. Although Dr. Osborn was a cardiologist, the primary issue in this case was not unique to the specialty of cardiology, but rather involved the relationship between a patient's primary physician and the emergency room personnel. Plaintiffs fulfilled their burden by presenting the affidavit of J. Fred Bushnell, M.D., an emergency room physician with extensive practice in Utah and other states. Dr. Bushnell's affidavit affirmatively showed that he was familiar with the standard of care applicable to Dr. Osborn. The trial court erred in failing to read the affidavit in the light most favorable to plaintiffs and in striking the affidavit and granting summary judgment.

Plaintiffs' failure to strictly comply with the procedural requirements of Rule 4-501 did not justify entry of summary judgment against plaintiffs. The record clearly showed disputed issues of fact. The trial court erred in mechanically enforcing the provisions of the rule.

Summary judgment must be based on the documents on file at the time the decision is made. The trial court made its decision when it issued a signed minute entry granting the summary judgment. Defendant's attempt to bolster the record after the fact was improper, and the trial court erred in granting the defendant's motion to add to the record.

ARGUMENT

POINT I

SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE AFFIDAVIT OF J. FRED BUSHNELL CREATED A FACTUAL ISSUE CONCERNING DR. OSBORN'S NEGLIGENCE.

In response to Dr. Osborn's motion for summary judgment, plaintiffs had the burden of providing medical testimony to establish the standard of care applicable to Dr. Osborn, a breach of that standard, and resulting damages. Nixdorf v. Hicken, 612 P.2d 348, 351 (Utah 1980); Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah Ct. App. 1988). Plaintiffs fulfilled that burden by offering the Affidavit of J. Fred Bushnell, M.D. (R. 232-37, copy in addendum.) The trial court erroneously held that Dr. Bushnell, whose primary specialty was emergency room medicine, was not competent to testify concerning the standard of care applicable to Dr. Osborn, a cardiologist.

Plaintiffs are aware of the standards relating to expert witness affidavits. Notwithstanding language that affidavits are to be liberally construed in the light most favorable to the party

opposing summary judgment, e.g., Themy v. Seagull Enterprises, Inc., 595 P.2d 526, 528-29 (Utah 1979), and that all doubts be resolved in favor of proceeding to trial, King v. Searle Pharmaceuticals, Inc., 832 P.2d 858, 865 (Utah 1992), the Utah Supreme Court has imposed stiffer requirements on expert witness affidavits than would be required if the expert were present in person. Butterfield v. Okubo, 831 P.2d 97, 102 (Utah 1992). An expert witness at trial can testify without detailing the underlying facts or data, unless in the fluid give-and-take of trial the judge or opposing party require greater foundation. In a summary judgment affidavit, however, the expert is required to anticipate possible foundation objections and affirmatively show the facts reviewed and the basis for the expert opinion. Id.

The affidavit of Dr. Bushnell satisfies this stringent test. Dr. Bushnell had practiced in Utah and had extensive experience in other states and foreign countries. (R. 240-43.) He detailed the records he had reviewed to become familiar with the facts (R. 233 ¶¶ 8-9), and restated the important facts in giving his opinion. (R. 233-36 ¶¶ 11-23.)

Rule 702 of the Utah Rules of Evidence states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Consistent with this rule, a medical practitioner in one field has knowledge which "will assist the trier of fact" concerning the practice in another medical specialty, if the expert affirmatively shows that he or she is familiar with the standard of care applicable to the other specialty. Burton v. Youngblood, 711 P.2d 245, 248 (Utah 1985).

A related aspect of this rule is that a specialist in one field may testify concerning the negligence of a specialist in another field if the negligence relates to an issue not within the specialty. Slayton v. Brunner, 633 S.W.2d 29 (Ark. 1982), illustrates this exception. Slayton suffered a cardiac arrest and died following surgery performed by Brunner. Brunner moved for summary judgment and submitted expert testimony to show he was not negligent. The plaintiff opposed the motion with the affidavit of an anesthesiologist. The defendant argued and the trial court held that an anesthesiologist could not testify concerning the standard of care applicable to a surgeon. The Arkansas Supreme Court disagreed:

Appellee Brunner argues that Dr. King, an anesthesiologist, is not qualified to testify as an expert in the specialty of surgery. However, both are medical school graduates licensed to practice in their respective states. Appellant does not allege that appellee was negligent in performing the actual surgical procedure used to repair the ventral hernia and remove the marlex mesh. Negligence is alleged in procedures performed or omitted before and after the actual surgery.

633 S.W.2d at 30. The court reversed the summary judgment and remanded for trial. Accord Harley v. Catholic Medical Center of Brooklyn and Queens, Inc., 88 Misc. 2d 126, 386 N.Y.S.2d 955, 957 (Sup. Ct. 1976), aff'd, 57 A.D.2d 827, 394 N.Y.S.2d 62 (App. Div. 1977) (doctor of another specialty qualified to testify if "the inquiry falls within his expertise, as distinguished from his specialty.") (emphasis by the court).

The issue in the instant case concerned the relationship between the patient's regular physician and an emergency room physician, an area well within Dr. Bushnell's expertise. The claimed negligence in this case did not deal with an issue unique to Dr. Osborn's specialty. Dr. Osborn, a cardiologist, was the decedent's primary physician. The decedent entered St. Mark's Hospital for treatment of a heart problem. Dr. Osborn consulted with the St. Mark's emergency room physician by telephone, but declined to provide necessary personal diagnosis because he did not have staff privileges at St. Mark's. The emergency room physician told Dr. Osborn by telephone that the decedent was experiencing paroxysmal atrial tachycardia (PAT). Based on this information, Dr. Osborn concurred with the emergency room physician's proposed treatment.

In fact, the decedent was experiencing atrial fibrillation, not PAT, and the proposed treatment only exacerbated the problem. Dr. Osborn testified that had he received correct information, he would have given different advice. (R. 160.) A reasonable

inference is that had Dr. Osborn personally examined his patient rather than relying on the diagnosis of a non-cardiologist, he would have discovered the decedent's actual condition and would have given correct advice.

The issue, therefore, is whether Dr. Osborn could and should have personally examined the decedent. Dr. Osborn testified the reason he didn't was because he lacked staff privileges. (R. 160.) This excuse was contradicted by Dr. Bushnell's affidavit:

2. I am a medical doctor, have been a physician for 36 years (since 1955) and am currently a physician specialist and consultant in emergency medicine.

. . . .

7. I am specialty qualified in Emergency Medicine. I am also board eligible in Quality Assurance and Utilization Review. (Please refer to submitted curriculum vitae.)

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.

11. Jeffrey S. Osborn, M.D., was Ted Dikeou's personal physician, and as such, was the physician best informed as to Ted Dikeou's

heart condition, his general health and medical history.

12. Twice during the evening of February 20-21, 1990, before his arrival at St. Mark's Hospital, Ted Dikeou had phoned Dr. Osborn regarding his rapid heart rate. By Dr. Osborn's own deposition testimony, this is the first time Ted's Wolff-Parkinson-White Syndrome had manifested itself over a prolonged period, as all prior incidents had been of short duration and resolved spontaneously with rest.

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.

14. Dr. Osborn was aware of Ted Dikeou's asthma and was informed by Ted Dikeou that he had taken asthma medication earlier that evening. Dr. Osborn was also aware of the specific medications which Ted Dikeou took and was aware that these medications can trigger a rapid heart beat as well as cause irregularities in the cardiac rhythm, which would be especially significant for someone with Wolff-Parkinson-White Syndrome.

15. 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.

16. Once Ted Dikeou arrived at St. Mark's Hospital, Dr. Michael D. Dowdall began treatment which was based on improper evalua-

tion of Ted Dikeou's heart monitor pattern, which treatment, rather than relieving Ted's symptoms, exacerbated them.

17. Dr. Dowdall phoned Dr. Osborn for his expertise and advice in dealing with Ted Dikeou's heart condition. In his deposition, Dr. Dowdall testified that he had confidence in Dr. Osborn's advice.

18. At the time of Dr. Dowdall's phone call, Dr. Osborn was put on further notice that his patient, Ted Dikeou, was continuing to have a rapid heart beat, even after Ted had received one dose of verapamil intravenously. This indicated an even longer period of unresolved medically serious rapid ventricular heart rate associated with his Wolff-Parkinson-White Syndrome. Again Dr. Osborn failed to respond by going to the emergency room to confirm or modify Dr. Dowdall's monitor diagnosis. Dr. Osborne [sic] should have known now, if not before, that aspects of this medical problem were inconsistent and required a reevaluation by Dr. Osborne [sic] in person. Dr. Osborne [sic] could have requested that Ted be transferred to a hospital of Dr. Osborn's choice or that Dr. Dowdall seek guidance from the cardiologist on call at St. Mark's Hospital immediately and before ordering or agreeing to additional therapy.

19. Dr. Osborn suggested the administration of medication to Ted Dikeou that night 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.

20. As a physician specialist in emergency medicine, I am aware of the relationship between emergency physicians and other doctors who do and do not have hospital privileges at a particular facility.

21. Dr. Osborn has stated he did not come to St. Mark's Hospital because he did not have staff privileges there. In my experience, Dr. Osborn would undoubtedly have been granted courtesy hospital privileges if he had

presented himself at St. Mark's Hospital to assist or consult in the treatment of his patient, Ted Dikeou. In fact, a few days later, by Dr. Osborn's deposition testimony, he did appear at St. Mark's Hospital and was permitted to check on Ted Dikeou and review his medical records. Another method is frequently used in the emergency department to surmount the problem of participation by a physician who does not have pre-approval of hospital privileges. It is for the emergency physician to consult with any physician who comes to the hospital and together they can decide about a patient. The resulting decisions and therapy are then implemented by the emergency physician's orders.

. . . .

23. In my professional opinion, both Dr. Jeffrey S. Osborn and Dr. Michael D. Dowdall were negligent in their treatment of Ted Dikeou and failed to meet the applicable standards of medical care.

(R. 232-36) (*italics added*).

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. The issue concerns the relationship between a primary care physician and the emergency room physician. The issue also concerns whether Dr. Osborn could have provided a personal examination where he did not have staff privileges. The issue of Dr. Osborn's practice in the area of his specialty is of only secondary concern, because Dr. Osborn himself admitted that further testing was necessary and had he received correct information he would have given different advice. All these matters were within the professional expertise of Dr.

Bushnell.² The trial court erred in striking Dr. Bushnell's affidavit and in granting summary judgment to Dr. Osborn.

POINT II

THE TECHNICAL NONCOMPLIANCE WITH RULE 4-501 DID NOT WARRANT DISMISSAL OF PLAINTIFFS' CASE.

Defendant argued below and the trial court held that plaintiffs had admitted away their case by failing to respond to defendant's factual assertions using the precise format specified by Rule 4-501 of the Utah Code of Judicial Administration. The relevant portions of the rule state:

(2) Motions for summary judgment.

(a) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party

²Even if this Court were to conclude that there was some technical defect in Dr. Bushnell's description of his familiarity with the applicable standard of care, this Court should hold that a reasonable inference from the description given is that Dr. Bushnell did have the requisite familiarity. At trial, if a party object to testimony for lack of foundation, the witness can give further testimony to cure the defect. The same flexibility is not available with an affidavit. It is extremely difficult to anticipate every conceivable objection to an affidavit. This Court should rule that reasonable inferences should be drawn from foundational testimony the same as from substantive testimony.

contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

This rule must be read in light of Utah R. Civ. P. 56(c), which permits granting summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case, the depositions, interrogatory answers, and affidavits did reveal issues of fact, including whether Dr. Osborn could have treated Ted Dikeou at St. Mark's, whether Dr. Osborn made a reasonable effort to determine if Dr. Dowdall's diagnosis of PAT was accurate, whether Dr. Osborn should have been altered to the inaccuracy of the diagnosis because the medication given was not having the desired effect, and the ultimate issue of whether Dr. Osborn was negligent. Plaintiffs' entire memorandum opposing summary judgment was devoted to showing that Dr. Osborn's factual assertions were controverted.

Utah R. Civ. P. 1(a) requires that the rules be construed to promote justice, a concept the Utah Supreme Court has long recognized. Thomas J. Peck & Sons, Inc. v. Lee Rock Products,

Inc., 30 Utah 2d 187, 515 P.2d 446, 449-50 (1973) ("The pleadings are never more important than the cause that is before the court . . .") It is apparent from the trial court's ruling that it in fact decided the case on the merits, and that the comments concerning the failure to satisfy Rule 4-501 were make-weight. It would have been an abuse of discretion to have decided the case solely on the procedural failure where the facts were obviously disputed. If the trial court's ruling is based on the technical defect, the judgment must be reversed.

POINT III

BOLSTERING THE RECORD AFTER THE DECISION ON SUMMARY JUDGMENT WAS IMPROPER.

The trial court granted defendant's motion for summary judgment by minute entry dated April 22, 1992. On April 29, 1992, defendant made a motion to bolster the record by adding plaintiffs' answers to two different sets of interrogatories. The court granted the motion by order entered May 8, 1992. The order was procedurally and substantively improper.

The order was procedurally improper because the court ruled before plaintiffs had an opportunity to respond. The motion was served by hand delivery on May 1, 1992. Pursuant to Rule 4-501 of the Utah Code of Judicial Administration, plaintiffs had ten days, until May 11, to respond. The trial court had already granted the motion before plaintiffs' response was due. Also violated was Rule 4-504 of the Utah Code of Judicial Administration, which prohibits

proposed orders from being submitted to the judge prior to submission to opposing counsel.

The order was substantively improper because Utah R. Civ. P. 56(c) requires that a ruling on summary judgment be based on the documents on file at the time of the ruling. This is inappropriate because on review of the trial court's decision, the appellate court should consider only the record that was before the trial court at the time of its decision. Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah Ct. App. 1991). See also Reserve Insurance Co. v. Pisciotto, 640 P.2d 764 (Cal. 1982); Moore v. Pacific Northwest Bell, 662 P.2d 398 (Wash. Ct. App. 1983) ("A court reviewing a dismissal on summary judgment is confined to examining the record properly before the trial court.") In addition, the Utah Supreme Court has recognized that "[g]enerally, issues raised for the first time in post-judgment motions are raised too late to be reviewed on appeal." Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983).

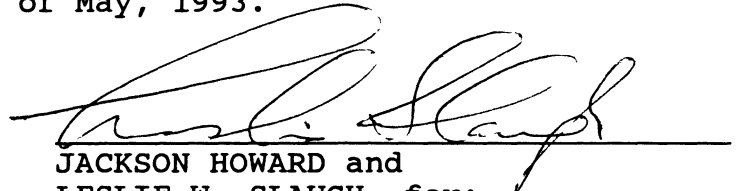
The trial court's decision should be judged solely by the documents which were before the court at the time of decision. Allowing either side to supplement the record after decision would be bad policy. The order enlarging the record should be vacated.

CONCLUSION

Although defendant Dr. Osborn was a cardiologist, his negligence revolved around his interaction with the emergency room physician, rather than the practice of his specialty per se.

Plaintiffs' expert, Dr. Bushnell, was an eminent emergency room physician and fully competent to testify concerning Dr. Osborn's negligence. The summary judgment should be reversed, the order enlarging the record vacated, and the matter remanded for trial.

DATED this 12th day of May, 1993.

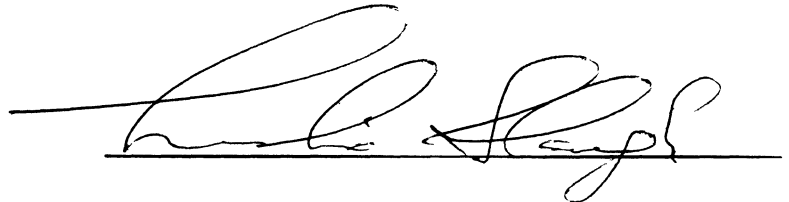


JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 12th day of May, 1993.

David H. Epperson, Esq.
Jaryl L. Rencher, Esq.
Hanson, Epperson & Smith
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, UT 84110-2970



JACKSON HOWARD (1548) and
FRED D. HOWARD (1547), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 19,899
q:bushnell.aff

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAMES T. DIKEOU and HELEN K.	:	
DIKEOU, individually and as the	:	
natural parents and heirs of the	:	AFFIDAVIT OF
estate of THEODORE "TED" JAMES	:	J. FRED BUSHNELL, M.D.
DIKEOU, deceased,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
MICHAEL D. DOWDALL, M.D.,	:	
JEFFREY S. OSBORN, M.D., and	:	
HCA HEALTH SERVICES OF UTAH,	:	Civil No. 919004651CV
INC., d/b/a ST. MARK'S	:	Judge: Richard H. Moffat
HOSPITAL,	:	
	:	
Defendants.	:	

STATE OF CALIFORNIA)
 : ss.
COUNTY OF ORANGE)

J. Fred Bushnell, M.D., being first duly sworn, deposes and states as follows:

1. I live in Laguna Niguel, California.
2. I am a medical doctor, have been a physician for 36 years (since 1955) and am currently a physician specialist and consultant in emergency medicine.

**PLAINTIFF'S
EXHIBIT**

3. In 1951, I graduated from Brigham Young University with a Bachelor of Arts degree in mathematics.

4. Following my undergraduate college studies I attended Stanford University medical school, where I graduated in 1955.

5. I completed a surgical internship at George Washington University Hospital, Washington, D.C. in 1956.

6. My medical post graduate training includes academic residencies and fellowships at George Washington University Hospital (General Surgery) and University of California, Los Angeles (Surgical Oncology followed by Diagnostic Radiology).

7. I am specialty qualified in Emergency Medicine. I am also board eligible in Quality Assurance and Utilization Review. (Please refer to submitted curriculum vitae.)

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.

11. Jeffrey S. Osborn, M.D., was Ted Dikeou's personal physician, and as such, was the physician best informed as to Ted Dikeou's heart condition, his general health and medical history.

12. Twice during the evening of February 20-21, 1990, before his arrival at St. Mark's Hospital, Ted Dikeou had phoned Dr. Osborn regarding his rapid heart rate. By Dr. Osborn's own deposition testimony, this is the first time Ted's Wolff-Parkinson-White Syndrome had manifested itself over a prolonged period, as all prior incidents had been of short duration and resolved spontaneously with rest.

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.

14. Dr. Osborn was aware of Ted Dikeou's asthma and was informed by Ted Dikeou that he had taken asthma medication earlier that evening. Dr. Osborn was also aware of the specific medications which Ted Dikeou took and was aware that these medications can trigger a rapid heart beat as well as cause irregularities in the cardiac rhythm, which would be especially significant for someone with Wolff-Parkinson-White Syndrome.

15. 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.

16. Once Ted Dikeou arrived at St. Mark's Hospital, Dr. Michael D. Dowdall began treatment which was based on improper evaluation of Ted Dikeou's heart monitor pattern, which treatment, rather than relieving Ted's symptoms, exacerbated them.

17. Dr. Dowdall phoned Dr. Osborn for his expertise and advice in dealing with Ted Dikeou's heart condition. In his deposition, Dr. Dowdall testified that he had confidence in Dr. Osborn's advice.

18. At the time of Dr. Dowdall's phone call, Dr. Osborn was put on further notice that his patient, Ted Dikeou, was continuing to have a rapid heart beat, even after Ted had received one dose of verapamil intravenously. This indicated an even longer period of unresolved medically serious rapid ventricular heart rate associated with his Wolff-Parkinson-White Syndrome. Again Dr. Osborn failed to respond by going to the emergency room to confirm or modify Dr. Dowdall's monitor diagnosis. Dr. Osborne should have known now, if not before, that aspects of this medical problem were inconsistent and required a reevaluation by Dr. Osborne in person. Dr. Osborne could have requested that Ted be transferred to a hospital of Dr. Osborn's choice or that Dr. Dowdall seek guidance from the cardiologist on call at St. Mark's Hospital immediately and before ordering or agreeing to additional therapy.

19. Dr. Osborn suggested the administration of medication to Ted Dikeou that night 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.

20. As a physician specialist in emergency medicine, I am aware of the relationship between emergency physicians and other doctors who do and do not have hospital privileges at a particular facility.

21. Dr. Osborn has stated he did not come to St. Mark's Hospital because he did not have staff privileges there. In my experience, Dr. Osborn would undoubtedly have been granted courtesy hospital privileges if he had presented himself at St. Mark's Hospital to assist or consult in the treatment of his patient, Ted Dikeou. In fact, a few days later, by Dr.

Osborn's deposition testimony, he did appear at St. Mark's Hospital and was permitted to check on Ted Dikeou and review his medical records. Another method is frequently used in the emergency department to surmount the problem of participation by a physician who does not have pre-approval of hospital privileges. It is for the emergency physician to consult with any physician who comes to the hospital and together they can decide about a patient. The resulting decisions and therapy are then implemented by the emergency physician's orders.

22. Dr. Dowdall also failed to meet the applicable standard of medical care in his diagnosis and treatment of Ted Dikeou. Dr. Dowdall made a mistake and failed to read Ted's cardiac pattern correctly, misinformed Dr. Osborn of the nature of the monitor pattern and administered to Ted Dikeou inappropriate medications which not only failed to relieve his problem, but which caused further sensitization of Ted Dikeou's heart, leading to his cardiac arrest, coma and death.

23. In my professional opinion, both Dr. Jeffrey S. Osborn and Dr. Michael D. Dowdall were negligent in their treatment of Ted Dikeou and failed to meet the applicable standards of medical care.

DATED this 20th day of March, 1992.

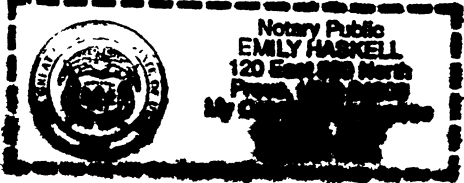

J. FRED BUSHNELL, M.D.

SUBSCRIBED and sworn to before me this ____ day of _____, 1992.

NOTARY PUBLIC

Sworn and verified to me by telephone communication this 26 day of March, 1992,
pursuant to Utah Code Annotated § 69-1-2, and I therefore attach my seal as Notary Public.

Emily Haskell
NOTARY PUBLIC

A rectangular notary seal stamp with a dashed border. On the left is a circular emblem featuring a star and the words "NOTARY PUBLIC" and "STATE OF UTAH". To the right of the emblem, the text reads: "Notary Public", "EMILY HASKELL", "120 East 900 North", "Provo, UT 84601", and "My Comm. Expires 12/31/93".

CURRICULUM VITAE

PERSONAL INFORMATION

J. FRED BUSHNELL, M. D.
13 Parkman Road
Laguna Niguel, California 92677-4115

Telephones (714) 496-5112 Fax 248-7120

Date of Birth August 4, 1928
Place of Birth Meadow, Utah, USA

EDUCATION

1941 - 1945 GRADUATE Provo High School, Provo, Utah.
1945 - 1951 B.A. DEGREE Brigham Young University, Provo, Utah.
Major Mathematics, Minor English.
1951 - 1955 M.D. DEGREE Stanford University School of Medicine, Stanford,
California 94305.
1955 - 1956 INTERNSHIP IN SURGERY George Washington University Hospital,
Washington, D.C.
1956 - 1957 RESIDENT IN GENERAL SURGERY George Washington University
Hospital, Washington, D.C.
1962 SURGICAL GRADUATE RESEARCH FELLOW Cancer
Chemotherapy, UCLA Medical Center, Los Angeles, California.
1962 - 1963 RESIDENT IN DIAGNOSTIC RADIOLOGY, UCLA Medical Center, Los
Angeles, California.

HONORS

Dean's List Honors Brigham Young University.
Newell Scholar four years at Stanford.
Newhouse Scholar three years at Stanford.

LANGUAGES

ARABIC - spoken in social and medical situations.
ENGLISH - native language with advanced study.
GERMAN - two years university level study.
ITALIAN - basics for social dialogue.
MEDICAL LATIN and MEDICAL GREEK - basic study.
SPANISH - fluent with correct grammar, both verbal and written.

SPECIAL SEMINARS

1973 - 1974 STAT Seminars To Assist Teachers for graduate physicians entering
teaching. Created by the Graduate Research Division in Education,
USC.

RESEARCH ACTIVITIES

1962 - 1963

SURGICAL GRADUATE RESEARCH FELLOW Cancer Chemotherapy, UCLA. The cancer research project was part of a nationwide protocol designed to determine whether the combination of radiation therapy and radiomimetic chemotherapy drugs given concurrently would have a synergistic effect. Funded by U.S. Public Health Service Grant Number CYF - 6105.

With two other surgery specialists we operated the Advanced Breast Tumor Clinic and the Surgical Cancer Chemotherapy Clinic. We were consultants in cancer for the UCLA Medical Center.

1973 - 1974

USC RESEARCH PROGRAMS

QUALITY OF EMERGENCY CARE ASSESSMENT I was a principle member of the organization team to develop a protocol and obtain grant money for a study named: *A Project to Evaluate the Affect on Quality of Emergency Medical Care by the creation and use of a super paramedic or EMT III as part of a special emergency medical team.* HEW Contract Number 110-71-119.

APOMORPHINE-NALOXONE STUDY Researched, developed and obtained approval to test a protocol for an apomorphine naloxone study in the Department of Emergency Medicine. This was effective in treating overdose patients.

HYPERTENSION SCREENING PROJECT I was responsible for the work assignments of fifty Physician Assistant trainees. Organized a program for them to find and treat the asymptomatic hypertensive patients among the more than one thousand patients seen daily in the Emergency Department. This project was chosen as a scientific exhibit for the AMA convention in Chicago, June 1974.

HOSPITAL EMERGENCY SERVICES AUDIT I was the physician from Los Angeles County for this project: *An Audit of Hospital Emergency Departments* conducted by California Hospital Association through Hospital Council of Southern California. Funded by a grant from Regional Medical Programs Contract RMP -73-15 (E) - 146M.

PROFESSIONAL ORGANIZATIONS:

Salt Lake County Medical Society.

Los Angeles County Medical Society.

Foundation for Emergency Medical Education, Inc. Director.

CHARTER MEMBER American College Emergency Physicians.

Board Of Directors of California Chapter.
CHAIRMAN Research and Publication Committee.
Socio-Economic Committee
Hospital and Contracts Committee
Ethics Committee

000233

NATIONAL COUNSELOR representing the California Chapter of the American College of Emergency Physicians.

NATIONAL CONSULTANT IN EMERGENCY MEDICINE designated by the California Chapter of the American College of Emergency Physicians.

PROFESSIONAL BACKGROUND

1959 - 1961 HEBER CITY, UTAH. Private practice partnership. Associated with a General Surgeon and a General Practitioner

1964 - 1973 LOS ANGELES, CALIFORNIA.

Private practice solo. Emphasis on surgical management of major trauma victims, oncology patients and cancer chemotherapy. Practice later limited to the acute surgical management of major trauma patients.

Participated as part time staff for emergency services at Holy Cross Hospital, San Fernando, California; Riverside Hospital, North Hollywood, California; St. Frances Hospital, Lynnwood, California; Paramount General Hospital, Paramount, California; St. Joseph Hospital, Burbank, California.

TUMOR BOARD

Holy Cross Hospital, San Fernando, California.

St. Joseph Hospital, Burbank, California.

1973 - 1974 LOS ANGELES, CALIFORNIA. **PHYSICIAN SPECIALIST**
EMERGENCY MEDICINE, Department of Emergency Medicine, Los Angeles County University of Southern California Medical Center.

CLINICAL INSTRUCTOR OF EMERGENCY MEDICINE LAC - USC Medical Center. Responsible for clinical and didactic teaching of medical students, nurses, interns, residents, and paramedics.

CLINICAL COORDINATOR primarily responsible for the work assignments and both clinical and didactic instruction of Physician Assistant trainees in the Department of Emergency Medicine.

EXECUTIVE STAFF IN THE ACADEMIC DEPARTMENT OF
EMERGENCY MEDICINE, Los Angeles County University of Southern California Medical Center.

HEAD PHYSICIAN, Main Emergency Department, Los Angeles County USC Medical Center.

The Head Physician work position is unique. It requires conspicuous clinical performance plus total administrative responsibility for the thirty physicians providing care within the Emergency Department. The position includes other duties besides teaching and the efficient function of the emergency service. On the evening and night shifts THE HEAD PHYSICIAN has authority as acting medical director for all of the two thousand bed four hospital medical complex.

It requires a physician capable of making prompt decisions and prepared to make rapid diagnosis. The physician uses *triage by priority of need*, and treats or disposes the patients. The position is designed to *teach by example* the inherent differences in medical thinking needed by an emergency physician.

COMMITTEES LAC - USC MEDICAL CENTER

EXECUTIVE STAFF Committee Emergency Department.

Research Committee.
Peer Review Committee.
Education Committee - Library Committee.
Disaster Planning Committee, Senior Medical Operations Officer.
Quality Assessment Committee
Medical Care Evaluation Committee
Chart Review Committee.
Death Review Committee.

EMERGENCY MEDICINE REVIEW COMMITTEE for Los Angeles County Task Force to inspect and evaluate seventy-five hospitals applying for a County Emergency Aid Plan contract.

1975

PARAMOUNT, CALIFORNIA. DIRECTOR OF EMERGENCY DEPARTMENT and Paramedic Base Station Radio Operation.

CHAIRMAN Emergency Services Committee.

CHAIRMAN Regional Joint Paramedic Committee for Southeast Los Angeles County.

1976

NORWALK, CALIFORNIA. Director Emergency Department Norwalk Community Hospital.

1976 - 1977

RIVERSIDE, CALIFORNIA. RIVERSIDE COUNTY GENERAL HOSPITAL. Recruited to upgrade the emergency services to Departmental Status and to begin full time staffing by a group of Physician Specialists in Emergency Medicine. Teaching programs were organized for the house staff who rotated there from Loma Linda University Medical Center.

1977-1978	PASADENA, CALIFORNIA. Huntington Memorial Hospital. Six months full time consultation to evaluate feasibility of starting a residency program in Emergency Medicine.
1977	LIHUE, KAUAI, HAWAII. G.N. WILCOX HOSPITAL. EMERGENCY DEPARTMENT. Site evaluation to organize and improve the quality of their emergency services. Invited to join the Emergency Department staff of Kauai Medical Group at G.N. Wilcox Hospital in November 1977. (Previous locum tenens in June 1976 and June 1977.)
1977	NATIONAL BOARD EXAMINATION written as required by the State of Hawaii to obtain a permanent Hawaiian License. State of Hawaii Medical License Number 03325.
1978 - 1980	MISSION VIEJO, CALIFORNIA. MISSION COMMUNITY HOSPITAL. Full time staff Emergency Department. MISSION COMMUNITY HOSPITAL ACTIVITIES Certified as INSTRUCTOR in Advanced Cardiac Life Support (ACLS). In-service teaching of Paramedics and MICU nurses to bolster support to retain the Paramedic Base Station Radio. Assisted in audit of Paramedic receiving hospitals to select regional trauma centers for Orange County. Family Practice Committee. Core Committee Family Practice. Emergency Services Committee. Regional Paramedic Committee. CHAIRMAN Safety and Sanitation Committee. CHAIRMAN Disaster Planning Committee. EXECUTIVE MEDICAL STAFF COMMITTEE.
1978	RIYADH, SAUDI ARABIA. Consultation for International Medical Services, a private firm treating Western expatriate workers. <u>November-December 1978.</u>
1980 - 1983	TAIF, SAUDI ARABIA. <u>Director of Emergency Department and Chief of Ambulatory Services</u> Al Hada Hospital for the Ministry of Defense and Aviation. I was the Senior Medical Officer for this two billion dollar project to create a U.S. style tertiary referral and teaching medical complex in Taif, Saudi Arabia. Add on: Responsible for all medical disaster preparations for the third Pan Islamic Conference that hosted forty nation delegations in Taif. Spring 1981. Additional two billion dollar budget.
1983	QUEBEC, CANADA. Organized CANADA HEALTH SYSTEMS for Quebec, in association with John Bowen, President of NME International. This unique consortium of ten private firms joined with the Quebec government to export their health care industry.

- 1983 **LOS ANGELES, CALIFORNIA** Again with John Bowen, we prepared a business plan for a Network of Central City Instant Care Centers and plans for international expansion Presented to Mr Richard Eamer, President and Chairman of National Medical Enterprises.
- 1984 - 1985 **CERRITOS, CALIFORNIA.** Physician staff in start up of Cerritos Instant Care a National Medical Enterprises Instant Care Center.
- 1985 - 1988 **ORANGE, CALIFORNIA. MEDICAL DIRECTOR FOR THE ADMAR GROUP, INC.** Admar's health programs include a nation wide PPO, TPA service and a nation wide proprietary Medical Utilization Review program After three years as medical director this qualified me to write the board examination in the new speciality of **QUALITY ASSURANCE AND UTILIZATION REVIEW** (see addendum).
- 1988 **SOUTHERN CALIFORNIA EDISON COMPANY** Team member forming a PPO for employee health plan Worked in five SCE clinics to prepare QA evaluation.
- 1989 **TEGUCIGALPA, HONDURUS.** International Medical Corps, under contract with US State Department A I D , classified SECRET, requires security clearance.
- 1989 **BUSHNELL RESEARCH ASSOCIATES** formed Consultants in Medical Informatics for clinical medical practice Includes medical and technical writing Two edited medical books published.
- 1991 **SOUTH COUNTY COMMUNITY CLINIC**, San Juan Capistrano, California

On clinical staff and several committees, also as CONSULTANT.

1) MEDICAL QUALITY ASSURANCE

2) COMPUTERIZED MEDICAL INFORMATION MANAGEMENT

Identifying information fields for capture, storage and retrieval on Local Area Network (LAN).

Installing real time links with wide area networks for medical information retrieval system, eg direct tie to National Library of Medicine. (Requires training staff – includes 31 physician volunteers – in connection and search protocols.)

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

JAMES T. DIKEOU and HELEN K.	:	MINUTE ENTRY
DIKEO, individually and as the	:	
natural parents and heirs of	:	Case No. 910904651 CV
the estate of THEODORE "TED"	:	
JAMES DIKEO, deceased,	:	JUDGE RICHARD H. MOFFAT
Plaintiffs,	:	
vs.	:	
MICHAEL D. DOWDALL, M.D.,	:	
JEFFREY S. OSBORN, and HCA	:	
HEALTH SERVICES OF UTAH,	:	
d/b/a ST. MARKS HOSPITAL,	:	
Defendants.	:	

The Court having considered the Motion for Summary Judgment and the memorandum and affidavits in support and in opposition thereto together with the Motion to Strike the Affidavit of J. Fred Bushnell, M.D. and the Memorandum in Support thereof and now being fully advised in the premises makes this its:

MINUTE ENTRY

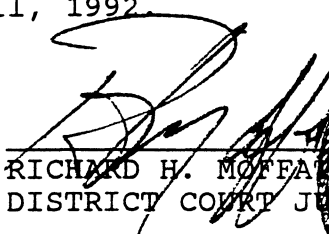
The Motion for Summary Judgment in favor of the defendant Jeffrey S. Osborn, M.D. is hereby granted. The Court is of the

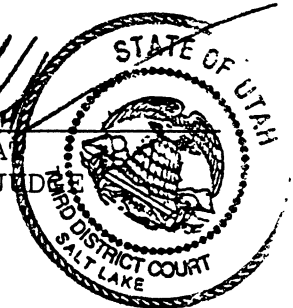
opinion for the reasons, inter alia, set forth in the Memorandum in Support of said Motion and the Joint Reply Memorandum in Support thereof that the plaintiffs have, by the record, patently admitted that they have no expert to provide testimony necessary to show that Dr. Osborn's involvement in the treatment of the decedant (there being no actual treatment by Dr. Osborn on the night that the damage to the decedant's heart occurred) did not rise to the standard required under Utah Law. In an attempt to satisfy this short coming after the filing of the Motion the plaintiffs filed the affidavit of J. Fred Bushnell, M.D.. An examination of that affidavit clearly indicates that Dr. Bushnell is not an expert in the same area of practice as Dr. Osborn. Further an examination of his opinion clearly reveals a lack of foundation and is also clearly based on hearsay. 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 to be able to testify as to the standard of the care required for a physician specializing in the same specialty as Dr. Osborn. Another deficiency of Dr. Bushnell's affidavit is that as to most of the content of paragraphs 11 through 23 the statements are based on speculation and further do not state the evidence as it appears from the record. Therefore, the Motion to Strike Dr. Bushnell's Affidavit is therefore granted. In addition, it should be noted

that the claim of allegations of fact being extant simply is not supported by the record. The memorandum of the defendants does not set forth the concise statement of the material issues of fact that are genuinely in issue as required by Rule 4-501 (2)(b) of the Utah Code of Judicial Administration. Further there is not a statement of each disputed fact as required in a separate numbered sentence nor are any of the facts specifically converted by admissible evidence and in fact the record reveals admission sufficient to support the Motion for Summary Judgment.

Counsel for the defendant Osborn will prepare an appropriate summary judgment and order.

DATED this 12th day of April, 1992.


RICHARD H. MOFFAT
DISTRICT COURT JUDGE



MAILING CERTIFICATE

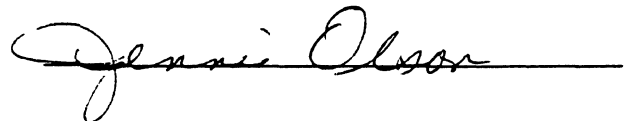
I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 20 day of April, 1992:

Jackson Howard
Fred D. Howard
HOWARD, LEWIS & PETERSON
Attorney for Plaintiff
P. O. Box 778
Provo, Utah 84603

Philip F. Fishler
STRONG & HANNI
Attorney for Defendant Dowdall
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

David H. Epperson
Jaryl L. Rencher
HANSON, EPPERSON & SMITH
Attorneys for Defendant Osborn
P. O. Box 2970
Salt Lake City, Utah 84110-2970

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
Attorney for Defendant HCA Health Services
P. O. Box 45000
Salt Lake City, Utah 84145

A handwritten signature in cursive script, appearing to read "Jennie Olson", is written over a horizontal line.

000290

MAY - 8 1992

DAVID H. EPPERSON #1000
JARYL L. RENCHER #4903
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant,
Jeffrey S. Osborn
4 Triad Center, Suite 500
Post Office Box 2970
Salt Lake City, Utah 84110-2970
(801) 363-7611

SALT LAKE COUNTY
By R. Groves Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

JAMES T. DIKEOU and HELEN K.)	
DIKEOU, individually and as)	
the natural parents and heirs)	
of the estate of THEODORE)	
"TED" JAMES DIKEOU, deceased,)	ORDER
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL D. DOWDALL, M.D.,)	Civil No. C91-4651
JEFFREY S. OSBORN, and)	
HCA HEALTH SERVICES OF UTAH,)	Judge Richard H. Moffat
d/b/a ST. MARKS HOSPITAL,)	
)	
Defendants.)	

The Court having considered the motion of Jeffrey S. Osborn, M.D., for filing of discovery responses and the fact that those matters sought to be included in the record have been submitted by plaintiffs themselves and finding good cause appearing therefor hereby

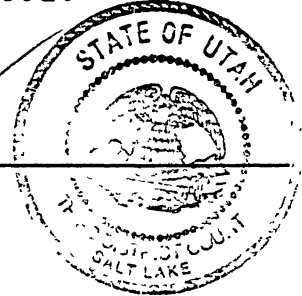
ORDERS, ADJUDGES and DECREES plaintiffs' answers to Dr. Osborn's interrogatories with attachment and plaintiffs' answers to interrogatories of defendant St. Marks Hospital are to

filed by the clerk of the Court and made a part of the record in this case.

DATED this 8th day of May, 1992.

BY THE COURT:

Richard H. Moffat
District Court Judge



CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 4th day of May, 1992, to:

Attorneys for Plaintiffs:

Jackson Howard, Esq.
Fred D. Howard, Esq.
Howard, Lewis & Petersen
120 East 300 North
Post Office Box 778
Provo, Utah 84603

(Hand-delivered 5-1-92)

Attorneys for Defendant, Michael D. Dowdall, M.D.:

Philip R. Fishler, Esq.
Strong & Hanni
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

Attorneys for Defendant, HCA Health Services of Utah, Inc., dba St. Mark's Hospital:

David W. Slagle, Esq.
Snow, Christensen & Martineau
Post Office Box 45000
Salt Lake City, Utah 84145

Brenda Hammond

MAY - 8 1992

DAVID H. EPPERSON #1000
JARYL L. RENCHER #4903
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant,
Jeffrey S. Osborn
4 Triad Center, Suite 500
Post Office Box 2970
Salt Lake City, Utah 84110-2970
(801) 363-7611

SALT LAKE COUNTY
By R. Grotz Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

JAMES T. DIKEOU and HELEN K.)	
DIKEOU, individually and as)	
the natural parents and heirs)	
of the estate of THEODORE)	
"TED" JAMES DIKEOU, deceased,)	SUMMARY JUDGMENT AND ORDER
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL D. DOWDALL, M.D.,)	Civil No. C91-4651
JEFFREY S. OSBORN, and)	
HCA HEALTH SERVICES OF UTAH,)	Judge Richard H. Moffat
d/b/a ST. MARKS HOSPITAL,)	
)	
Defendants.)	

The Court having considered the motion for summary judgment filed by Jeffrey S. Osborn, M.D., and the memorandum, exhibits and evidence in support thereof and the memorandum and affidavit offered in opposition thereto, together with Dr. Jeffrey S. Osborn's motion to strike the affidavit of J. Fred Bushnell, M.D., and the memoranda offered in support and opposition thereto, and the Court having reviewed and considered the record in this case (neither party having requested oral argument) and after being

fully advised in the premises and law and finding good and sufficient cause therefor hereby enters its Judgment and Order:

1. The Motion for Summary Judgment in favor of the defendant Jeffrey S. Osborn, M.D. is granted. The Court is of the opinion for the reasons, inter alia, set forth in the Memorandum in Support of said Motion and the Joint Reply Memorandum in Support thereof and in support of Jeffrey S. Osborn, M.D.'s Motion to Strike the Affidavit of J. Fred Bushnell, M.D., that the plaintiffs have, by the record, patently admitted that they have no expert to provide testimony necessary to show that Dr. Osborn's involvement in the treatment of the decedent (there being no actual treatment by Dr. Osborn on the night that the damage to the decedent's heart occurred) did not rise to the standard required under Utah law in order for plaintiffs to sustain their burden of proof.

2. In an attempt to satisfy this shortcoming after the filing of the Motion for Summary Judgment, the plaintiffs filed the affidavit of J. Fred Bushnell, M.D. An examination of that affidavit clearly indicates that Dr. Bushnell is not an expert in the same area of practice as Dr. Osborn. Further, an examination of his opinion clearly reveals a lack of foundation and is also clearly based on hearsay. 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 to be able to testify as to the standard of care required for a physician specializing in the same specialty as Dr. Osborn. Dr. Bushnell's affidavit is further deficient in that most of the content and statements of

paragraphs 11 through 23 are based on speculation and do not state the evidence as it appears from the record. Accordingly, Dr. Jeffrey S. Osborn's Motion to Strike Dr. Bushnell's Affidavit is granted.

3. In addition to the foregoing, the Court's rulings are also based on the following grounds:

(a) Plaintiffs' claims in their memoranda of allegations of fact being extant simply are not supported by the record.

(b) Plaintiffs' memoranda do not set forth a concise statement of material issues of fact that are genuinely in issue as required by Rule 4-501(2)(b) of the Utah Code of Judicial Administration.

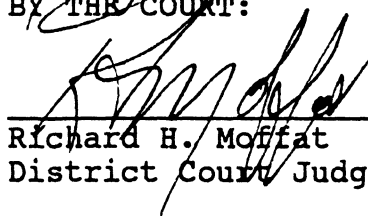
(c) As required by this Court's rules, plaintiffs have not offered a statement of each disputed fact in a separate numbered sentence nor are any of the facts of record specifically controverted by plaintiffs by admissible evidence; and in fact the record reveals evidence and admissions sufficient to support the Motion for Summary Judgment.

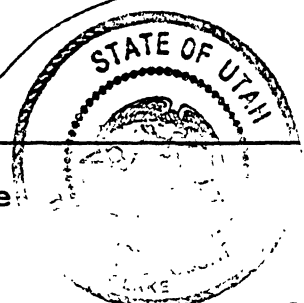
4. Summary judgment is granted Dr. Osborn with prejudice.

5. Dr. Osborn's Motion to Strike the Affidavit of J. Fred Bushnell, M.D., is likewise granted with prejudice.

DATED this 8 day of May, 1992.

BY THE COURT:


Richard H. Moffat
District Court Judge



CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 4th day of May, 1992, to:

Attorneys for Plaintiffs:

Jackson Howard, Esq. (Hand-delivered 5-1-92)
Fred D. Howard, Esq.
Howard, Lewis & Petersen
120 East 300 North
Post Office Box 778
Provo, Utah 84603

Attorneys for Defendant, Michael D. Dowdall, M.D.:

Philip R. Fishler, Esq.
Strong & Hanni
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

Attorneys for Defendant, HCA Health Services of Utah, Inc., dba St. Mark's Hospital:

David W. Slagle, Esq.
Snow, Christensen & Martineau
Post Office Box 45000
Salt Lake City, Utah 84145

Brenda Hammond

DIKEOU\JudgOrdr\90-380D

SEP 14 1992
Third Judicial District

SEP 14 1992

By: R. G. Galtas

Philip R. Fishler, #1083
STRONG & HANNI
Attorneys for Defendant,
Michael D. Dowdall, M.D.
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAMES T. DIKEOU and HELEN K. DIKEOU, individually and as the natural parents and heirs of the estate of THEODORE 'TED' DIKEOU, deceased,)	STIPULATION AND ORDER FOR DISMISSAL
)	
Plaintiffs,)	
vs.)	Civil No. 910904651 CV
)	
MICHAEL D. DOWDALL, M.D., HCA HEALTH SERVICES OF UTAH dba ST. MARK'S HOSPITAL,)	
)	
Defendants.)	Judge Richard H. Moffat

COMES NOW the plaintiffs and defendants in this case and by and through counsel stipulate and agree that this case may be dismissed with prejudice, with the parties to bear their respective costs. This stipulation and order of dismissal shall not prejudice plaintiff's claims against Jeffrey S. Osborn, M.D., including any rights of appeals, are hereby preserved.

DATED this 14th day of July, 1992.

HOWARD, LEWIS & PETERSEN,

By: Jackson Howard
Jackson Howard
Attorneys for Plaintiffs

000358

STRONG & HANNI

By: 

Philip R. Fishler
Attorneys for Defendant,
Michael D. Dowdall, M.D.

SNOW, CHRISTENSEN & MARTINEAU,

By: 

David W. Slagle
Attorneys for Defendant
HCA Health Services of Utah
d/b/a St. Mark's Hospital

ORDER FOR DISMISSAL

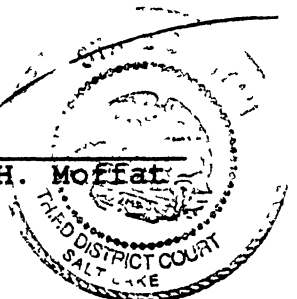
Based on the foregoing Stipulation of counsel and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to the foregoing Stipulation, this matter be and the same is hereby dismissed with prejudice, with the parties to bear their respective costs. This dismissal shall not prejudice plaintiff's claims against Jeffrey S. Osborn, M.D. including plaintiff's right to appeal any orders of the court heretofore entered against plaintiffs and in favor of Jeffrey S. Osborn, M.D.

DATED this 14th day of September 1992.

By the Court,


The Honorable Richard H. Moffat



CERTIFICATION OF MAILING

I hereby certify that on this 16 day of July, 1992, a true and correct copy of the foregoing document was mailed, postage prepaid to:

Jackson Howard
Fred Howard
HOWARD, LEWIS & PETERSEN
120 East 300 North Street
P. O. Box 778
Provo, Utah 84603

David W. Slagle
Elizabeth King
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145

K. Grotelas

1544.732/307943

Rule 4-408. Locations of trial courts of record.**Intent:**

To designate locations of trial courts of record.

Applicability:

This rule shall apply to all trial courts of record.

Statement of the Rule:

(1) Each county seat and the following municipalities are hereby designated as locations of trial courts of record: American Fork; Bountiful; Cedar City; Clearfield; Kaysville; Layton; Murray; Orem; Park City; Roosevelt; Roy; Salem; Sandy; Spanish Fork; West Valley City.

(2) Subject to limitations imposed by law, a trial court of record of any subject matter jurisdiction may hold court in any location designated by this rule. (Added effective January 1, 1992.)

ARTICLE 5.**CIVIL PRACTICE.****Rule 4-501. Motions.****Intent:**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims department of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) **Filing and service of motions and memoranda.**

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) **Motions for summary judgment.**

(a) **Memorandum in support of a motion.**

The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) **Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) **Expedited dispositions.** Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) **Telephone conference.** The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991.)

Rule 4-502. Discovery procedures in civil cases.
Intent:

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

Applicability:

This rule shall apply to the District, Juvenile and Circuit Courts.

Statement of the Rule:

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only the original certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with a copy of the proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with a copy of the proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court except as provided in this Code or upon order of the court for good cause shown.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30)

days before trial shall be presented to the judge assigned to the case upon notice to the other parties in the action. In exercising its discretion, the court shall take into consideration the necessity and reasons for such discovery, the diligence or lack of diligence of the parties seeking such discovery, whether permitting such discovery will prevent the case from going to trial on the scheduled date, or result in prejudice to any party. Nothing herein shall preclude or limit the voluntary exchange of information or discovery by stipulation of the parties at any time prior to the date set for trial, but in no event shall such exchanges or stipulations require a court to grant a continuance of the trial date.

(Amended effective January 15, 1990; April 15, 1991.)

Rule 4-503. Requests for jury instructions.

Intent:

To establish a uniform procedure for submitting and requesting jury instructions.

Applicability:

This rule shall apply to the District, Circuit and Justice Courts.

Statement of the Rule:

(1) All jury instruction requests shall be presented to the court five days prior to the scheduled trial date unless otherwise ordered by the court. The court, in its discretion, may allow the presentation of jury instructions at any time prior to the submission of the case to the jury. At the time of presentation to the court, a copy of the requested instructions shall be furnished to opposing counsel.

(2) Jury instruction requests must be in writing and state in full the instruction requested. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names and shall be entitled:

"Instruction No. ____"

The number of the request shall be written in lead pencil.

(3) If case citations are used in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without the citations. Citations may be provided upon separate sheets attached to the particular instruction to which the citation applies.

(Amended effective January 15, 1990.)

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.