

1993

L. Diane Turner v. Craig H. McQueen, M.D., and Utah Orthopaedic Associates and Sports Medicine: Brief of Appellee

Utah Court of Appeals

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J. Ray Barrios, Jr., P.C.

David W. Slagle; Snow, Christensen and Martineau.

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BRIEF

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DOCKET NO. 930187CA

IN THE UTAH COURT OF APPEALS

L. DIANE TURNER,

Plaintiff/Appellant,

vs.

Case No. 930187-CA

Argument Priority 15

CRAIG H. McQUEEN, M.D., and
UTAH ORTHOPAEDIC ASSOCIATES &
SPORTS MEDICINE CLINIC

Defendants/
Appellees.

ADDENDUM TO BRIEF OF APPELLEES

Appeal from the Third Judicial District Court of
Salt Lake County, The Honorable Leslie Lewis, District Judge

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Utah Court of Appeals

JUN 09 1993


Mary T. Noonan
Clerk of the Court

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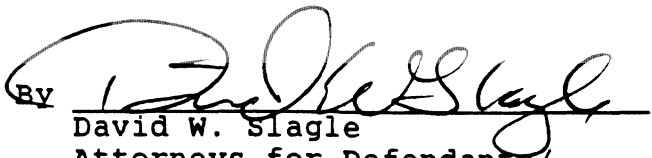
Defendants/
Appellees.

ADDENDUM TO BRIEF OF APPELLEES

Defendants/Appellees hereby submit their Addendum to Brief
of Appellees in the above-entitled case.

DATED this 9 day of June, 1993.

SNOW, CHRISTENSEN & MARTINEAU

By 
David W. Slagle
Attorneys for Defendants/
Appellees

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Tab 1

equity case, the jury will serve only in an advisory capacity unless both parties have clearly consented to accept a jury verdict. *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980).

Trial court did not commit prejudicial error by allowing a jury to sit in an equity proceeding where the jury was retained merely as an advisory jury to consider the sole question of the reasonableness of plaintiff's reliance on defendant's act. *Tolboe Constr. Co. v. Staker Paving & Constr. Co.*, 682 P.2d 843 (Utah 1984).

Trial by consent.

—Equity.

—Motion for directed verdict.

Where the case was essentially one in equity but the parties and court appeared to have consented to presenting their case to a jury whose verdict would have "the same effect as if trial by jury had been a matter of right," under Subdivision (c), the determination of whether a directed verdict was proper was to be tested by the same rules governing cases at law. *Willard M. Milne Inv. Co. v. Cox*, 580 P.2d 607 (Utah 1978).

Trial by court.

—Waiver of bench trial.

Even though former statute providing for trial by court in absence of demand for jury was couched in mandatory terms, and a party might have an absolute right to have the issues tried by the court, the right could be

waived, as by proceeding to trial before a jury. *Houston Real Estate Inv. Co. v. Hechler*, 47 Utah 215, 152 P. 726 (1915).

—Waiver of jury trial.

Where it did not appear that any demand for a jury trial was made, or that any objection or exception was made at any time during trial against right of the court to try the case without a jury, it would be presumed on appeal that a trial by jury was waived. *Perego v. Dodge*, 9 Utah 3, 33 P. 221 (1893), *aff'd*, 163 U.S. 160, 16 S. Ct. 971, 41 L. Ed. 113 (1896).

Trial by jury.

—Grant of jury trial.

—Absence of demand.

Court did not abuse its discretion in granting jury trial to defendant, under this rule, over plaintiff's objections although defendant had not made proper demand for jury trial under Rule 38, where plaintiff was not prejudiced thereby. *James Mfg. Co. v. Wilson*, 15 Utah 2d 210, 390 P.2d 127 (1964).

—Right.

—Quiet title action.

This rule gives the right to have any legal issue of fact tried by a jury upon proper demand, and plaintiff in an action to quiet title to mining claims was entitled to a jury trial on issues of fact. *Holland v. Wilson*, 8 Utah 2d 11, 327 P.2d 250 (1958).

Cited in *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 305 P.2d 480 (1956).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Jury §§ 57, 58; 75A Am. Jur. 2d Trial § 714 et seq.

C.J.S. — 50 C.J.S. Juries §§ 98 to 105; 88 C.J.S. Trial §§ 20, 203, 547 et seq.

A.L.R. — When does jeopardy attach in a non-jury trial, 49 A.L.R.3d 1039.

Discretion of district court under Rule 39(b)

of Federal Rules of Civil Procedure, authorizing it to order jury trial notwithstanding party's failure to make seasonable demand for jury, 6 A.L.R. Fed. 217.

Key Numbers. — Jury ⇐ 25; Trial ⇐ 10, 134, 367 et seq.

Rule 40. Assignment of cases for trial; continuance.

(a) **Order and precedence.** The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) **Postponement of the trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) **Taking testimony of witnesses present.** If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same

effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32 (c)(3)(A) and (B)].

Compiler's Notes. — Following the amendment of Rule 32, effective January 1, 1987, the reference to Rule 32(c)(1) and (2), at the end of Subdivision (c), should now be to Rule 32(c)(3)(A) and (B).

Subdivision (a) of this rule is similar to Rule 40, F.R.C.P.

Cross-References. — Amendment of pleadings to conform to evidence, continuance upon, U.R.C.P. 15(b).

NOTES TO DECISIONS

ANALYSIS

Postponement.

- In general.
- Absence of party.
- Discretion of court.
- Inability of counsel to attend trial.
- Unavoidable absence.
- New theory of case.
- Procedural delays.
- Supporting affidavits.
- Unavailable witness.
- Lack of diligence.
- Need.

Cited.

Postponement.

—In general.

To grant one party continuance after continuance to the prejudice of the other party would be patently unfair. This is especially true when such continuances are being granted to the plaintiff who has triggered the time constraints of litigation by bringing the suit in the first place. It is equally unfair to allow a party to name new witnesses several days before trial. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

—Absence of party.

Continuance would not be granted because of absence of a party, unless he was a material witness, and, if so, the facts expected to be proved by him had to be stated under oath, unless the oath was waived. It was also necessary that party had used due diligence to be present at the trial. *McGrath v. Tallent*, 7 Utah 256, 26 P. 574 (1891).

Refusal of trial court to postpone trial was not abuse of discretion where case was set down for trial, and had once before been continued because of absence of party who was principal witness, and second continuance was sought by attorney who was not of record in case. *Lancino v. Smith*, 36 Utah 462, 105 P. 914 (1909).

Refusal to grant continuance in personal injury case was an abuse of discretion where plaintiff was not able to attend the trial because of his physical condition, there was no evidence of malingering by the plaintiff, and the plaintiff's testimony was essential to his case. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

—Discretion of court.

Denial of motion for continuance was within discretion of trial court. *Sharp v. Canakis Gianoulakis*, 63 Utah 249, 225 P. 337 (1924).

Trial courts have substantial discretion in deciding whether to grant continuances.

Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988).

—Inability of counsel to attend trial.

The inability of counsel to be present at the time set for trial does not necessarily entitle his client to a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

—Unavoidable absence.

When counsel has made timely objections, given necessary notice, and has made a reasonable effort to have the trial date changed for good cause, it would be an abuse of discretion not to grant a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

—New theory of case.

Continuance could be obtained to develop a theory of the case suggested after issue joined and before trial. *Tiernan v. Trewick*, 2 Utah 393 (1877).

—Procedural delays.

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although trial date had been set for four months, motion for continuance was not filed until nine days before trial. *First Sec. Bank v. Johnson*, 540 P.2d 521 (Utah 1975).

—Supporting affidavits.

Subdivision (b) does not require affidavits to accompany a motion for continuance. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

—Unavailable witness.

—Lack of diligence.

Where subpoena for absent witness was not placed in hands of an officer for service until the morning the case was called for trial, though it had been set for several weeks, and the witness had testified at a former trial, continuance was denied. *Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson*, 30 Utah 126, 83 P. 731 (1906).

In malpractice action, motion for continuance based on plaintiff's inability to serve subpoena on vacationing medical witness was properly denied, where plaintiff had made no effort to depose witness and had never contacted witness for the purpose of testifying. *Maxfield v. Fishler*, 538 P.2d 1323 (Utah 1975).

After plaintiff had been granted one continuance because of unavailability of her preferred expert witness, and her second request for a continuance several months later was solely due to her own failure to retain and designate a new expert witness in a timely man-

Tab 2

set aside must proffer some defense of at least sufficient ostensible merit to justify a trial on that issue. *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976).

—**Setting aside proper.**

Where plaintiff served defendant with a summons, and left a copy with the defendant which was not the same as the original, the court had jurisdiction but sufficient confusion was created so that a motion to set aside the default judgment should have been granted and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action,

promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see *Central Bank & Trust Co. v. Jensen*, *supra*, and Rule 58A(d)).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
—Contents.
—Corporation.
—Experts.
—Inconsistency with deposition.
—Necessity of opposing affidavits.
—Resting on pleadings.
—Objection.
—Sufficiency.
—Hearsay and opinion testimony.
—Superseding pleadings.
—Unpleaded defenses.
—Verified pleading.
—Waiver of right to contest.
—When unavailable.
—Exclusive control of facts.
—Who may make.
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Appeal.
—Adversely affected party.
—Standard of review.
Attorney's fees.

Availability of motion.
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—Improper evidence.
—Proof.
—Weight of testimony.
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Issue of fact.
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—Deeds.
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Motion to dismiss.
Motion to reconsider.
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—Provision not jurisdictional.
—Waiver of defect.
Procedural due process.
Purpose.

Tab 3

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

L. DIANE TURNER,	:	COURT'S RULING
Plaintiff,	:	CIVIL NO. 910903939
vs.	:	
CRAIG H. McQUEEN, M.D., and	:	
UTAH ORTHOPAEDIC ASSOCIATES	:	
& SPORTS MEDICINE CLINIC,	:	
Defendants.	:	

A Notice to Submit having been filed, pursuant to Rule 4-501, Code of Judicial Administration, in connection with defendants' Motion for Summary Judgment and plaintiff's Motion for Extension of Time to Designate an Expert, the Court having reviewed the Motions, Affidavits and Memorandum in support and Reply Memorandum and the Memorandum in opposition, and the relevant law and being fully advised and finding good cause, rules as stated herein.

The plaintiff's Motion for Extension of Time to Designate Expert was made on or about September 21, 1992. The cut-off time for designation of experts was July 31, 1992. The discovery cut-off was October 9, 1992. Dr. Horne's

letter to plaintiff's counsel is dated September 11, 1992. The trial in this matter is set for November 30 and has been since July 20, 1992. The Court finds given these dates that the Motion is not timely or well-taken and denies the same.

The defendants' Motion for Summary Judgment is granted. The Court finds there are no material issues of fact precluding Summary Judgment as a matter of law. The law requires plaintiff to establish a violation of the medical standard of care by expert testimony and the plaintiff's designated expert, Dr. Horne, indicates he will not testify as to such a violation. Therefore, plaintiff cannot meet its burden of proof.

Ms. King is to draft the appropriate detailed Findings and Order of Dismissal.

Dated this 20 day of November, 1992



LESLIE A. ODENSEN
DISTRICT COURT JUDGE

Tab 4

FINDINGS OF FACT

1. This is a medical malpractice case arising out of arthroscopic knee surgery rendered to L. Diane Turner by Dr. Craig McQueen on June 19, 1989.
2. On August 10, 1989, plaintiff served a Notice of Intent to Commence a Malpractice Action against Dr. McQueen.
3. On August 23, 1989, plaintiff filed a Request for Prelitigation Review alleging that the respondents owed a duty to L. Diane Turner to treat and care for her in a manner that was consistent with the standards of the medical community in which they practice and that said respondents failed in their duty to properly treat and care for L. Diane Turner.
4. A prelitigation screening panel hearing was held as required by Utah Code Ann. § 78-14-12 (1953 as amended) on November 2, 1989.
5. A Summons and Complaint was served on defendants on June 24, 1991, and an Answer was timely filed.
6. Interrogatories were served by defendants on July 2, 1991, and a Second Set of Interrogatories specifically seeking information as to expert witnesses were served on January 29, 1992.
7. In response to the Second Set of Interrogatories, plaintiff identified Robert Horne, M.D. as the only expert witness prepared to testify regarding the standard of care.

8. In addition, defendants took the plaintiff's deposition on January 24, 1992, at which time she testified that Dr. Horne had never expressed any criticism of the care rendered by Dr. McQueen.

9. On the Court's own motion, a scheduling conference was held on July 20, 1992. During that scheduling conference the parties agreed to the following dates: (a) Plaintiff's witnesses (expert and otherwise) to be designated on July 31, 1992; (b) Defendants' expert witnesses (expert and otherwise) to be designated on August 10, 1992; (c) Discovery cut-off October 9, 1992 and (d) four-day jury trial set for November 30, 1992.

10. On July 31, 1992, plaintiff designated Dr. Robert Horne as the only medical expert witness prepared to testify on her behalf.

11. On August 7, 1992, defendants designed their experts and other medical witnesses.

12. On September 11, 1992, defendants moved for summary judgment on the grounds plaintiff failed to produce competent expert testimony necessary to prevail on her medical malpractice claim. Specifically, the evidence before the court was that the expert allegedly designated by the plaintiff, Dr. Robert Horne, had refused to testify on her behalf, and in fact believed the standards of care to have been met by the defendants. Defendants' Motion for Summary Judgment was supported by Affidavits from both Dr. Horne and Dr. Sherman Coleman.

13. On September 21, 1992, plaintiff filed a Motion in Opposition to Defendant's Motion for Summary Judgment and moved for an extension of time in which to designate an expert witness, based on Utah Rules of Civil Procedure, Rule 60(b).

14. On September 23, 1992, defendants filed a Reply Memorandum in support of their Motion for Summary Judgment.

15. Further pleadings ensued, including a response to defendants' Reply, a Supplemental Memorandum in support of the Motion for Summary Judgment, and an Affidavit filed by Elizabeth King. The matter was submitted for decision pursuant to Rule 4-501, Utah Code of Judicial Administration.

16. There is no evidence that the plaintiff or her attorney confirmed that Dr. Horne would act as her expert witness, testifying that the standard of care was not met by the defendant Dr. McQueen. The evidence indicates that Dr. Horne first learned that he had been appointed in this role when the defendants' attorneys called him to schedule his deposition.

17. The irrefuted evidence indicates Dr. Horne objected to being designated as an expert witness and claimed he was not critical of the care rendered. Further, there is no evidence before the Court that Dr. Horne had changed his mind or his position with regard to this question; he had simply never been asked to be plaintiff's expert witness.

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1. This action is a medical malpractice action against a health care provider which is governed by case law requiring expert testimony establishing a deviation from requisite standards of care which resulted in harm to the plaintiff.

2. This Court finds as a matter of law that there is insufficient evidence before the Court to support a prima facie claim against the defendants and, therefore, plaintiff cannot meet her burden of proof. Specifically, plaintiff's designated expert Dr. Horne, indicates he will not testify as to a violation of the medical standard of care. Without such testimony, plaintiff's Complaint fails as a matter of law and defendants' Motion for Summary Judgment is granted.

3. Plaintiff's Motion for an Extension of Time to Designate an Expert is untimely and is not well-taken in that the Motion was filed a full six weeks after the cut-off time for plaintiff's designation of experts. The Motion for an Extension is not supported by the facts or by case law. Plaintiff triggered the time constraints by filing her Notice to Commence a Medical Malpractice Claim against defendants. She had ample time and ample forewarning that she was required to produce expert testimony regarding the standard of care, a prima facie element of her case in chief. The Court finds and hereby holds that defendants should not be required to bear the burden of plaintiff's laxity, and finds no basis for a continuance.

ORDER

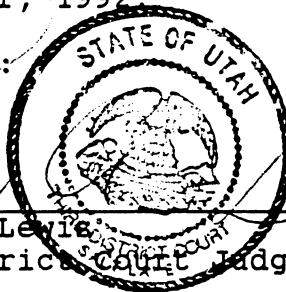
Based on the foregoing Findings of Fact and Conclusions of Law, as well as on the pleadings before the Court, the Court denies the plaintiff's Motion for an Extension of Time to Designate an Expert Witness, and grants the defendants' Motion for Summary Judgment, and orders that plaintiff's Complaint be, and the same is hereby, dismissed with prejudice pursuant to Rule 56, Utah Rules of Civil Procedure, with each party to bear its own costs.

DATED this 17th day of December, 1992.

BY THE COURT:

By 

Leslie A. Lewis
Third District Court Judge



APPROVED AS TO FORM:

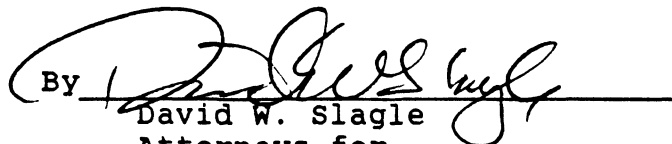
J. Ray Barrios
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Addendum to Brief of Appellees were mailed, first class, postage prepaid, on the 9 day of June, 1993 to:

J. Ray Barrios, P.C.
First American Title Building
330 East 400 South, Sute 250
Salt Lake City, Utah 84111

SNOW, CHRISTENSEN & MARTINEAU

By 
David W. Slagle
Attorneys for
Defendants/Appellees