

2005

June W. Cox Pete v. Dr. Robert L. Youngblood : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE
ROBERT L. YOUNGBLOOD,
M.D.

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Case No. 20050268-CA

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APPEAL FROM SUMMARY JUDGMENT AND ORDER DENYING
MOTION FOR JURY TRIAL, ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY,
THE HONORABLE J. DENNIS FREDRICK, PRESIDING

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IN THE UTAH COURT OF APPEALS

JUNE W. COX PETE,

Appellant,

v.

DR. ROBERT L. YOUNGBLOOD

Appellee.

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**BRIEF OF APPELLEE
ROBERT L. YOUNGBLOOD,
M.D.**

Case No. 20050268-CA

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MOTION FOR JURY TRIAL, ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY,
THE HONORABLE J. DENNIS FREDRICK, PRESIDING**

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ADDENDUM

Rule 26, Utah Rules of Civil Procedure A

Rule 37, Utah Rules of Civil Procedure B

Rule 38, Utah Rules of Civil Procedure C

Rule 39, Utah Rules of Civil Procedure D

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Whether summary judgment was correctly granted by the trial court when plaintiff/appellant June Cox Pete (“Mrs. Pete”) failed to present any evidence by competent or admissible expert testimony to support the three required elements for her *prima facie* claim of medical malpractice against defendant/appellee Robert L. Youngblood, M.D. (“Dr. Youngblood”). This issue was raised in Dr. Youngblood’s Memoranda in Support of Motion for Summary Judgment. (R. at 103-112, 173-182.)

Standard of Review: Utah appellate courts review a summary judgment determination "for correctness, granting no deference to the [district] court's legal conclusions." Hansen v. AOL, Inc., 2004 UT 62, ¶ 6, 96 P.3d 950. This Court may, however, affirm on any ground available to the district court, even if it is not one relied upon below. Debry v. Noble, 889 P.2d 428, 444 (Utah 1995).

II. Whether the trial court abused its discretion by striking the affidavit of an expert witness, pursuant to Rule 37, Utah R. Civ. P., when Mrs. Pete disclosed her intent to utilize the expert for the first time after summary judgment was filed – after the scheduling order deadlines had passed and after Mrs. Pete had certified the case as ready

for trial. This issue was raised in Dr. Youngblood's Memoranda in Support of Motion for Summary Judgment and Motion to Strike. (R. at 164-166, 173-183, 215-219.)

Standard of Review: Utah appellate courts review a trial court's award of sanctions under Rule 37 for an abuse of discretion. Featherstone v. Schaerrer, 2001 UT 86, ¶ 31, 34 P.3d 194; Tuck v. Godfrey, 1999 UT App 127, ¶ 15, 981 P.2d 407, cert. denied, 984 P.2d 1023 (Utah 1999).

III. Whether the trial court correctly determined that the doctrine of *res ipsa loquitur* had no application to this case, where Mrs. Pete did not plead a cause of action for *res ipsa loquitur*, and she failed to establish the foundation necessary to proceed on a *res ipsa* claim. This issue was raised in Dr. Youngblood's Memoranda in Support of Motion for Summary Judgment. (R. at 183-188.)

Standard of Review: Whether Mrs. Pete has established the requisite foundation for *res ipsa loquitur* is a question of law. Walker v. Parish Chemical Co., 914 P.2d 1157, 1161 (Utah Ct. App. 1996). A trial court's legal conclusions are reviewed for correctness. Wilson Supply Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶ 11, 54 P.3d 1177. This Court may, however, affirm on any ground available to the district court, even if it is not one relied upon below. Debry v. Noble, 889 P.2d 428, 444 (Utah 1995).

IV. Whether the trial court abused its discretion by denying Mrs. Pete's untimely jury demand under the facts of this case. This issue was raised in Dr. Youngblood's

Objection to Mrs. Pete's Demand for Jury (R. at 30-35) and his Memorandum in Opposition to Mrs. Pete's Motion for Jury Trial. (R. at 52-55.)

Standard of Review: A trial court's decision denying an untimely jury demand is reviewed for abuse of discretion. Aspenwood, L.L.C. v. C.A.T., L.L.C., 2003 UT App 28, ¶ 33, 73 P.3d 947, cert. denied, 72 P.3d 685 (Utah 2003).

PROVISIONS OF RULES

Rules 26, 37, 38 and 39 of the Utah Rules of Civil Procedure are of importance to this appeal, copies of which are attached hereto as Addendum A, B, C and D, respectively.

STATEMENT OF THE CASE

A. Nature of the Case.

Mrs. Pete's Complaint alleges one cause of action against Dr. Youngblood for "negligence/medical malpractice" arising out of care he provided to her in 1970.

(R. At 3-9.) She did not file a jury demand with her Complaint, or timely thereafter.

Mrs. Pete moved the trial court to relieve her of her jury trial waiver, and the trial court exercised its discretion and denied her motion.

Mrs. Pete thereafter failed to designate an expert by the February 20, 2004 deadline established by the trial court. Mrs. Pete was relieved of the fatal effect of this failure on September 28, 2004, when the trial court held an Order to Show Cause hearing and allowed the parties an additional 30-days to wrap up this case and certify it as ready for

trial. Mrs. Pete did not designate an expert in this 30-day period and filed a Certificate of Readiness for Trial without ever disclosing an expert witness.

Dr. Youngblood filed a Motion for Summary Judgment, seeking dismissal of Mrs. Pete's malpractice claim on the basis that Mrs. Pete failed to designate an expert, as required under Utah law to state a *prima facie* case of medical negligence. (R. at 103-112.) In opposition, Mrs. Pete attempted to create an issue of fact regarding the standard of care in order to avoid summary judgment by 1) submitting the affidavit of one of Mrs. Pete's treating physicians, Dr. Paul Doxey, and of her dentist, Troy Savant, D.D.S., neither of whom had been disclosed as expert witnesses; and 2) arguing in the alternative that expert testimony was unnecessary for her to proceed against Dr. Youngblood on a newly-asserted *res ipsa* theory. (R. at 127-154.) Dr. Youngblood moved to strike the Affidavits as untimely, pursuant to Rules 26 & 37, Utah R. Civ. P. (R. at 164-166, 175-182.)

B. Course of Proceedings and Disposition in Trial Court.

By Minute Entry the trial court determined the Doxey Affidavit was untimely and exercised its discretion under Rule 37, Utah R. Civ. P., to strike it. (R. at 228-229.) The trial court also determined that the doctrine of *res ipsa loquitur* had no application to this case. (Id.) Further, "because this case requires the presentation of expert testimony and

none has been provided, summary judgment is appropriate.” (Id.) An Order and Summary Judgment was entered February 15, 2005. (R. at 238-239.)

C. Statement of Facts.

In addition to those facts stated in the Brief of Appellant, the following additional facts are undisputed and material to the issue before the Court.

1. On or about August 9, 1970, Mrs. Pete was injured when her horse fell on her, and she was airlifted from Nevada (the site of her injury) to St. Mark’s Hospital in Salt Lake City, Utah. (R. at 4, 116.)

2. Dr. Youngblood, a fully trained plastic surgeon practicing in the Salt Lake area, was on call and performed surgery on Mrs. Pete at St. Mark’s Hospital to repair her multiple and severe facial injuries, which included fractured maxilla, nasal bones, orbit, mandible, and maxilla, as well as a crushed sinus cavity. (R. at 4-5, 118-123.)

3. On or about December 23, 2001, Mrs. Pete alleges to have discovered gauze in her sinus area, and claims that it was left there by Dr. Youngblood during his 1970 surgery. (R. at 4-5.)

4. On February 6, 2003, Mrs. Pete filed a Complaint alleging one cause of action for “negligence/medical malpractice” against Dr. Youngblood. (R. at 3-9.)

5. Mrs. Pete did not demand a jury or pay the statutory jury fee with her Complaint, or within ten days after service of Dr. Youngblood’s Answer. (Id.)

6. On or about August 25, 2003, without motion or leave of Court, Mrs. Pete filed a Demand for Jury, requesting for the first time a trial by jury. (R. at 28-29.)

7. On August 28, 2003, Dr. Youngblood filed and served an Objection to Mrs. Pete's Demand for Jury. (R. at 30-35.)

8. On September 15, 2003, Mrs. Pete filed a Motion for Jury Demand, which was opposed by Dr. Youngblood. (R. at 36-41, 46-51.)

9. The trial court denied Mrs. Pete's Motion for Jury Trial, concluding she waived her right to a jury trial by failing to file a timely demand, and did not demonstrate sufficient justification for the trial court to exercise its discretion pursuant to Rule 39(b), Utah R. Civ. P., to relieve her of that waiver. (R. at 58, 62-63.)

10. Mrs. Pete filed Rule 26(a) initial disclosures and therein set forth the names of her medical care providers as "individuals likely to have discoverable information." (R. at 221-222.)

11. The trial court set February 20, 2004 as the deadline for Mrs. Pete to identify retained experts. (R. at 42-44.)

12. Mrs. Pete failed to designate an expert by the February 20, 2004 deadline, nor did she request an extension of time in which to do so. (R. at 109.)

13. On September 28, 2004, the trial court held an Order to Show Cause hearing and allowed the parties an additional 30-days in which to wrap up this case and certify it as ready for trial. (R. at 100.)

14. The following day, Dr. Youngblood served a set of written discovery on Mrs. Pete, specifically asking for names of expert witnesses. (R. at 101.)

15. Mrs. Pete refused to respond to Dr. Youngblood's discovery requests because "the fact discovery deadline in this case expired April 21, 2004." (R. at 191-192.)

16. Mrs. Pete filed a Certificate of Readiness for Trial, certifying that discovery was complete and the only thing remaining to do was try this case. (R. at 125-126.)

17. Mrs. Pete never designated an expert witness, or identified any treating physician as a witness who would offer expert testimony. (R. at 109.)

18. On September 29, 2004, Dr. Youngblood filed a Motion for Summary Judgment, seeking dismissal of Mrs. Pete's medical malpractice claim on the basis that Mrs. Pete failed to designate an expert, as required under Utah law to state a *prima facie* case of medical negligence. (R. at 103-117.)

19. In opposition to this Motion for Summary Judgment, Mrs. Pete attempted to create an issue of fact regarding the standard of care on two bases: 1) by submitting the affidavit of one of her treating physicians, Paul Doxey, M.D. ("Dr. Doxey") addressing

standard of care issues,¹ and then 2) by arguing in the alternative that expert testimony is nevertheless unnecessary to proceed against Dr. Youngblood on a newly-asserted *res ipsa loquitur* theory. (R. at 127-154, 195.)

20. Dr. Youngblood moved to strike the Affidavits. (R. at 164, 173-200, 215-226.)

21. The trial court granted Dr. Youngblood's Motion to Strike, pursuant to Rules 26 and 37, Utah Rules of Civil Procedure, stating:

In the instant matter the Doxey Affidavit was not submitted until after the Mrs. Pete certified this case for trial. Moreover, this was the first time Defendant learned of Mrs. Pete's intent to utilize Dr. Doxey as an expert witness. In light of the aforementioned, the Court finds the Affidavit to be untimely and, accordingly it is stricken.

(R. at 228.)

22. The trial court further stated: "after reviewing the record in this matter, the Court is not persuaded the doctrine of *res ipsa loquitur* has any application." (Id.)

23. Given that Mrs. Pete lacked expert testimony to state a *prima facie* claim of medical negligence, the trial court entered an Order and Summary Judgment in favor of Dr. Youngblood. (R. at 238-239.)

¹ Mrs. Pete also submitted the Affidavit of her dentist, Troy Savant, D.D.S., but the Savant Affidavit does not go to standard of care issues and cannot create an issue of fact to avoid summary judgment, and is thus not addressed herein. (See R. at 151-152.)

SUMMARY OF ARGUMENT

I.

Summary judgment was warranted and correctly granted by the trial court. The only potential issue of fact on summary judgment was created by the Doxey Affidavit. It was well-within the trial court's discretion to strike the Doxey Affidavit, pursuant to Rule 37, Utah Rules Civil Procedure, when Mrs. Pete neither disclosed the identity of Dr. Doxey as someone who may be used to present expert testimony in accordance within the court-ordered disclosure deadline, or before Mrs. Pete certified the case as ready for trial. Absent the untimely Doxey Affidavit, Mrs. Pete failed to raise any genuine issue of material fact and summary judgment was warranted as a matter of law.

II.

Mrs. Pete waived her right to a jury trial, and under the case facts it was well-within the trial court's broad discretion to deny her untimely request for jury trial.

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT.

In evaluating whether a genuine issue of material fact exists for purposes of summary judgment, the Court must consider the standard of proof at trial on each element of the Mrs. Pete's claims. Robinson v. Intermountain Health Care, Inc., 740

P.2d 262, 264 (Utah Ct. App. 1987). A plaintiff who alleges a claim for medical malpractice does not establish a *prima facie* case until he can show, by competent evidence: (1) the standard of care by which the defendant doctor's conduct is to be measured; (2) the defendant's breach of that standard of care; and (3) that such departure was the proximate cause of injury to the Mrs. Pete. Robb v. Anderton, 863 P.2d 1322, 1327 (Utah Ct. App. 1993); Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah Ct. App. 1988).

A medical malpractice plaintiff must establish each of these elements through competent expert testimony to withstand summary judgment. Dalley v. Utah Valley Regional Medical Ctr., 791 P.2d 193, 195 (Utah 1990); Robb, 863 P.2d at 1325; Chadwick, 763 P.2d at 821.

A plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the three prongs of the *prima facie* case justifies a grant of summary judgment to the defendant.

Dikeou v. Osborn, 881 P.2d 943, 946 (Utah Ct. App. 1994).

In this case, Ms. Pete failed to designate an expert by the February 20, 2004 deadline established by the trial court, nor did she request an extension of time in which to do so. The trial court gave her a chance to avoid the fatal effect of this failure to designate when, on September 28, 2004, it held an Order to Show Cause hearing and allowed the parties an additional 30-days in which to wrap up this case and certify it as ready for trial. (R. at 100) Mrs. Pete filed a Certificate of Readiness for Trial, without ever designating

an expert witness, or identifying any treating physician as a witness who would offer expert testimony. (R. at 125-126.) Dr. Youngblood accordingly moved for summary judgment on the basis that absent expert testimony Ms. Pete could not make a *prima facie* case of medical negligence, and thus her claim against Dr. Youngblood failed as a matter of law. (R. at 103-105, 127-154.) Under these facts, summary judgment was warranted.

A. It was Well-Within the Trial Court's Discretion to Strike the Doxey Affidavit, Which Created the Only Potential Issue of Fact on Summary Judgment.

In opposition to Dr. Youngblood's Motion for Summary Judgment, Mrs. Pete attempted to create a factual dispute by proffering the affidavit of Paul Doxey, M.D. (R. at 127-135, 153-154.) Therein, Dr. Doxey opines regarding the standard of care. (R. at 154) The Doxey Affidavit created the only potential issue of fact on summary judgment, as no other facts were disputed. (R. at 175-177.)

Dr. Youngblood moved to strike the Doxey Affidavit as untimely. (R. at 164-166, 173-184.) The trial court granted the Motion and struck the Doxey Affidavit pursuant to Rule 26 and 37, Utah Rules of Civil Procedure, stating:

In the instant matter the Doxey Affidavit was not submitted until after the Mrs. Pete certified this case for trial. Moreover, this was the first time Defendant learned of Mrs. Pete's intent to utilize Dr. Doxey as an expert witness. In light of the aforementioned, the Court finds the Affidavit to be untimely and, accordingly it is stricken.

(R. at 228.) An Order and Summary Judgment was thereafter entered. (R. at 238-239.)

Rule 26 of the Utah Rules of Civil Procedure governs disclosure of expert testimony and states:

A party shall disclose to the other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705, Utah Rules of Evidence.

Utah R. Civ. P. 26(a)(3)(A) (emphasis added). Contrary to Mrs. Pete's contention, expert disclosures are not limited to retained experts; Rule 26(a)(3) requires disclosure of "any person" who may be used at trial to present expert testimony. Id. Further, these disclosure "shall be made within 30 days after expiration of fact discovery," or as stipulated by the parties or ordered by the Court. Id. at 26(a)(3)(C). Mrs. Pete failed to do so.

Rule 37 prevents a party from using as evidence any expert witness that has not been disclosed as required by Rule 26(a). It states:

If a party fails to disclose a witness . . . as required by Rule 26(a) . . . that party shall not be permitted to use the witness, document or other materials at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

Utah R. Civ. P. 37(f) (emphasis added).

The Utah Rules of Civil Procedure give the trial court discretion to impose Rule 37 sanctions for parties who fail to obey a scheduling order "as are just," where necessary to assure timely and orderly disposition of the case. Utah R. Civ. P. 16 & 37(b)(2); accord Depew v. Sullivan, 2003 UT App 152, ¶ 35, 71 P.3d 601; Gorostieta v. Parkinson, 2000 UT 99, ¶ 31, 17 P.3d 1110; Arnold v. Curtis, 846 P.2d 1307, 1310 (Utah 1993). Trial courts have broad discretion in determining Rule 37 sanctions "[b]ecause trial courts must deal first hand with the parties" Hales v. Oldroyd, 2000 UT App 75, ¶¶ 14-15, 999 P.2d 588. "Thus, appellate courts will interfere with the exercise of such discretion when 'abuse of that discretion [is] clearly shown.'" Id. (quoting Morton v. Continental Baking

Co., 938 P.2d 271, 274 (Utah 1997)); accord Featherstone v. Schaerrer, 2001 UT 86, ¶ 31, 34 P.3d 194 (Utah appellate courts review a trial court's award of sanctions under Rule 37 for an abuse of discretion); Tuck v. Godfrey, 1999 UT App 127, ¶15, 981 P.2d 407 (same). A trial court's abuse of discretion in selecting which sanction to impose may be shown "only if there is either an erroneous conclusion of law or no evidentiary basis for the trial court's ruling." Morton, 938 P.2d at 274.

On appeal, Mrs. Pete wholly fails to address the fact that the trial court struck the Doxey Affidavit pursuant to Rule 37 of the Utah Rules of Civil Procedure. (R. at 228-229, 238-239.) Thus, contrary to Mrs. Pete's characterization, the issue on appeal is whether the trial court abused its discretion when it granted the Motion to Strike the Doxey Affidavit pursuant to Rule 37. The facts of this case demonstrate it did not.

On September 15, 2003, the trial court approved the Attorney's Planning Meeting Report prepared by Mrs. Pete's attorney, establishing February 20, 2004 as the deadline for Mrs. Pete to identify expert witnesses. Undisputedly, Mrs. Pete failed to identify any experts by this designation deadline and did not seek an extension of time in which to do so. Indeed, Mrs. Pete did nothing to pursue this matter until the trial court noticed an Order to Show Cause Hearing, requiring Mrs. Pete to appear on September 28, 2004 and show cause why her case should not be dismissed. Instead of dismissing this case at that time, as would have been the trial court's prerogative to do for failure to miss all of the scheduling deadlines, the trial court allowed Mrs. Pete 30-days to wrap this case up and to certify it as ready for trial or suffer the penalty of dismissal. (R. at 100.) During this 30-day period, Mrs. Pete made no expert witness designation. Mrs. Pete filed a Certificate of

Readiness for Trial, certifying that all discovery was complete, without ever identifying any witness anticipated to offer expert testimony. (R. at 125-126.) Dr. Youngblood properly moved for summary judgment. (R. at 103-113.)

On November 18, 2004, Mrs. Pete filed a Memorandum in Opposition to Summary Judgment, supported by the affidavit of Dr. Paul Doxey, an otolaryngologist who treated Mrs. Pete in December 2001. (R. at 127-135, 153-154.) Therein, Dr. Doxey opined regarding the standard of care applicable to Dr. Youngblood, proffered by Mrs. Pete in an attempt to create an issue of fact and avoid summary judgment in this case. (R. at 154.) Receipt of this Affidavit was the first time Dr. Youngblood learned of Mrs. Pete's intent to utilize Dr. Doxey as an expert witness. (R. at 179.)

Introduction of expert testimony of an undesignated expert after Mrs. Pete has filed a Certificate of Readiness for Trial is in clear derogation of the Rules of Civil Procedure and the trial Court's scheduling deadlines. An appropriate sanction for failure to comply with a scheduling order or to disclose a witness is excluding an untimely designated expert. Arnold, 846 P.2d at 1310; accord Utah R. Civ. P. 37(f). Mrs. Pete provided the trial court with no justification or good cause to relieve Mrs. Pete of Rule 37(f) sanctions for this failure to disclose, nor is there any.

To the contrary, Mrs. Pete filed the Complaint February 6, 2003, and had ample time to investigate this case and determine the witnesses needed before summary judgment was filed in October of 2004. The crux of any medical negligence case is expert testimony; Axiomatic from the outset of litigation was the fact that Mrs. Pete would need an expert witness. Mrs. Pete had two chances to designate: Before the original scheduling

order deadlines, and during the additional 30-days this Court granted to conclude discovery. There is no apparent reason, and none has ever been offered, why Mrs. Pete could not and did not identify Dr. Doxey as an expert witness prior to the discovery cut-off and certifying this case as ready for trial.

Under the facts of this case, it cannot be said that no reasonable person would not take the view adopted by the trial court to strike the Doxey Affidavit as untimely. Indeed, the Utah Rules of Civil Procedure require it. Specifically, Rule 26(a)(3)(A) states “a party shall disclose” the identity of “any person who may be used at trial to present” expert testimony. Utah R. Civ. P. 26(a)(3)(A) (emphasis added). These disclosure “shall be made within 30 days after expiration of fact discovery,” or as stipulated by the parties or ordered by the Court. Id. at 26(a)(3)(C) (emphasis added). And, Rule 37 states that “[i]f party fails to disclose a witness as required by Rule 26(a) . . . that party shall not be permitted to use the witness” Utah R. Civ. P. 37(f) (emphasis added).

Mrs. Pete does not claim she properly designated Dr. Doxey as an expert witness, but instead contends her Rule 26(a)(1) Initial Disclosures should be deemed sufficient to satisfy her expert witness disclosure obligation, since Mrs. Pete identified all of her care providers therein.² Reciting the names of Mrs. Pete’s care providers in Rule 26(a)(1)

² Mrs. Pete’s assertion that she “identified her expert witnesses and provided defendant with their reports in her initial disclosures,” (Aplt. Br. p. 21), is flatly incorrect. Mrs. Pete has undisputedly made no expert disclosure, and has served no expert reports. Forwarding copies of medical records does not satisfy the specific expert report requirements of Rule 26(a)(3)(B), Utah Rules of Civil Procedure.

Nevertheless, contrary to Mrs. Pete’s contention, Dr. Youngblood has never

initial disclosures as persons who may have discoverable information does not, however, satisfy the separate requirement of Rule 26(a)(3) to file and serve a proper expert witness designation pleading. If Mrs. Pete's contention were true, then no party would ever need to designate expert witnesses if they included the name of that witness in their Rule 26(a)(1) initial disclosures. This would be contrary to the requirements of the Utah Rules of Civil Procedure and create an unworkable scenario.

Mrs. Pete's arguments in opposition to summary judgment demonstrate the propriety of striking the Doxey Affidavit. For example, on October 28, 2004, the same date as the Order to Show Cause hearing where the trial court granted the parties 30-days to wrap up discovery, Dr. Youngblood served a set of written discovery on Mrs. Pete, specifically asking for names of expert witnesses. (R. at 180-181, 191-192.) Mrs. Pete, however, refused to respond to these discovery requests because "the fact discovery deadline in this case expired April 21, 2004." (R. at 191-192.) Mrs. Pete should not be permitted to refuse to identify experts in response to well-taken discovery requests, then after the case is certified for trial, rely on the affidavit of an undesignated expert to withstand summary judgment. Additionally, if the deadline for Mrs. Pete to respond to Dr. Youngblood's discovery requests passed under the original scheduling order, as Mrs. Pete maintains, then the affidavit of Mrs. Pete's undesignated expert, submitted well past

contended that the lack of expert report by Dr. Doxey provides a grounds to strike the Doxey Affidavit. (See Aplt. Br. p. 21-22.) The expert report requirement of Rule 26(a)(3)(B) is, however, separate from the expert disclosure requirement of Rule 26(a)(3)(A), which served as a basis for the trial court's decision in this case. (R. at 228-229, 238-239.)

the expert designation deadline under the same scheduling order, is likewise impermissible.³

It was thus well-within the trial Court's discretion to strike the Doxey's Affidavit. In Arnold v. Curtis, 846 P.2d 1307 (Utah 1992),⁴ for example, the plaintiff sued Dr. Curtis for medical malpractice. Dr. Curtis moved for summary judgment and in opposition plaintiff filed an affidavit of a physician who had not been designated. Dr. Curtis moved to strike the affidavit on the basis that the doctor had not been designated as

³ Any argument regarding the propriety of the Youngblood Affidavit is irrelevant to the Motion for Summary Judgment now on appeal, which is premised on the fact that Mrs. Pete failed to designate an expert and thus cannot state a *prima facie* case of medical negligence, making summary judgment appropriate.

Nevertheless, Mrs. Pete's assertion that "the district court refused to strike the affidavit of Defendant, in which he offered expert testimony despite never identifying himself as an expert witness," (Aplt. Br. at 6), is mistaken. Mrs. Pete never moved the trial court to strike Dr. Youngblood's Affidavit, nor asked the trial court to rule upon the admissibility of the Youngblood Affidavit. As the propriety of the Youngblood Affidavit was never an issue before the trial court, is not properly before this Court on appeal. Pugh v. Draper City, 2005 UT 12, ¶ 18, 114 P.3d 546 ("It is well-established that we generally will not address issues raised for the first time on appeal")

⁴ Mrs. Pete's reliance on Boice v. Marble, 1999 UT 71, ¶ 12, 982 P.2d 565, 570, is unavailing and does not support her contention that the trial court's decision to strike Doxey Affidavit should be overturned. (Aplt. Br. at 20.) The Boice case involved two affidavits proffered by Boice in opposition to the defendant's Motion for Summary Judgment, which were stricken by the trial court for failure to provide sufficient foundation showing that the expert was qualified, *id.* at ¶ 17, not as a Rule 37 sanction because the affidavits were untimely and in contravention of the Rules of Civil Procedure and the case scheduling order. Boice provides no authority to suggest that in this case it was an abuse of discretion for the trial court to strike the Doxey Affidavit as a Rule 37 sanction.

an expert. The trial court refused to consider the affidavit and, without the opposing affidavit testimony, determined there was no issue of fact and summary judgment in favor of Dr. Curtis was granted. The Utah Supreme Court affirmed on appeal, holding “the trial court did not abuse its discretion in refusing to consider Dr. McHenry’s affidavit.” Id. at 1310.

As in Arnold, the appropriate remedy in this case was for the trial court to strike the untimely Doxey affidavit and preclude Mrs. Pete from utilizing expert testimony by Dr. Doxey to oppose summary judgment. Mrs. Pete apparently believes she is entitled to call as expert witnesses at trial persons whom she has never before identified and whom defendants have had no opportunity to depose. Such a result is contrary to the Utah Rules of Civil Procedure and the deadlines set by the trial court, and need not be countenanced by this Court. Dr. Doxey was correctly precluded from testifying and his Affidavit stricken. Any other conclusion would invite litigants to blind side their opponents. If a party is not required to disclose witnesses until after the case has been certified for trial, court deadlines become meaningless and trial preparation becomes impossible.

It was entirely reasonable and well-within the trial court’s discretion and to strike the Doxey Affidavit. Absent the untimely Doxey Affidavit, Mrs. Pete failed to raise any genuine issue of material fact in opposition to summary judgment. Mrs. Pete failed to designate an expert, as required under Utah law to state a *prima facie* case of medical negligence, and summary judgment was warranted and correctly granted by the trial court.

B. The Trial Court Correctly Determined the Doctrine of *Res Ipsa Loquitur* Had No Application to this Case and thus Mrs. Pete Was Not Relieved of her Burden to Establish her Claim of Medical Negligence with Expert Testimony.

Mrs. Pete attempts to overcome the fact that she failed to timely designate an expert by making the alternative argument that she does not need expert testimony to try this case, asserting a theory of *res ipsa loquitur*. (R. at 133-134.) The trial court correctly concluded, however, that the doctrine of *res ipsa loquitur* has no application to the this case. (R. at 228-229, 238-239.) This decision was correct and should be affirmed.

1. Mrs. Pete Failed to Plead *Res Ipsa Loquitur*.

The doctrine of *res ipsa loquitur* and common law negligence are two separate legal theories. See Brady v. Gibb, 886 P.2d 104, 106 (Utah Ct. App. 1994), cert. denied, 892 P.2d 13 (Utah 1995).

[O]ne who wishes to rely on that doctrine, as well as specifically assigned acts of negligence, must so plead, either by a separate count or by proper allegation to the effect that the negligence to be inferred from the general situation caused the injury, thereby notifying the other party that he intends to rely on the doctrine of *res ipsa loquitur*.

Loos v. Mountain Fuel Supply Co., 108 P.2d 254, 259 (Utah 1940). In Elg v. Fitzgerald, 547 P.2d 202 (Utah 1976), for example, the Utah Supreme Court affirmed the trial court's refusal to decide the case under the doctrine of *res ipsa loquitur* where "[t]he plaintiff pleaded only negligence, made no offer or request to amend her pleadings," and then failed to sustain her burden to establish negligence. Id. at 203.

Mrs. Pete filed this lawsuit on February 6, 2003, alleging one cause of action for "negligence/medical malpractice" against Dr. Youngblood. (R. at 3-9.) She does not

plead a theory of *res ipsa loquitur*. (Id.) Nor does Mrs. Pete make allegations indicating she intended to infer negligence from the general situation. (Id.) To the contrary, she alleges specific acts of negligence by naming Dr. Youngblood, identifying the mechanism of injury, and identifying how the injury occurred. (R. at 4-6, ¶¶ 10-22.) Mrs. Pete should not be permitted to switch legal theories after she has certified the case as ready for trial in an effort to avoid summary judgment.

2. *Res Ipsa Loquitur* Does Not Apply Where a Plaintiff Asserts Facts and Circumstances Which Establish the Allegedly Negligent Act.

The essence of the *res ipsa loquitur* doctrine is that it permits a plaintiff to establish a *prima facie* case where the plaintiff has no knowledge or evidence surrounding the injury or the alleged negligence. When the plaintiff does have that knowledge, reliance on *res ipsa* is inappropriate. The controlling case in this matter is Roylance v. Rowe, 737 P.2d 232 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987):

There is no room for the operation of *res ipsa loquitur* where the evidence of the case reveals all of the facts and circumstances of the occurrence and clearly establishes the precise allegedly negligent act which is the cause of plaintiff's injury.

Id. at 235. This is consistent with the judicial limitation of the *res ipsa* doctrine to “exceptional circumstances.” Robb v. Anderton, 863 P.2d 1322, 1327 (Utah Ct. App. 1993); Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264 (Utah Ct. App. 1987). A plaintiff is not automatically entitled to a trial on her *res ipsa* theories merely by alleging it. Robinson, 740 P.2d at 267.

Here, Mrs. Pete has specifically identified the facts and circumstances establishing the allegedly negligent act that caused her injury. Her claim is specific: Dr. Youngblood did not remove all of the gauze following her 1970 facial reconstruction surgery, which caused her sinus injury. (R. at 3-6.) Mrs. Pete identified Dr. Youngblood as the allegedly negligent actor, the object of injury, and how the injury occurred. (R. 4-6, ¶¶ 10-22.) This set of facts does not amount to “exceptional circumstances” justifying reliance on a *res ipsa* theory for inference of negligence. As a matter of law, therefore, she is not entitled to rely on *res ipsa* as an alternative theory of recovery.

3. Mrs. Pete is Additionally Unable to Establish the Foundation to Proceed on a *Res Ipsa* Claim.

Additionally, the doctrine of *res ipsa loquitur* cannot apply to this action as the requisite foundation is lacking. Contrary to Mrs. Pete’s assertion, invocation of *res ipsa* does not automatically relieve a plaintiff from the necessity of expert testimony. Rather, *res ipsa loquitur* is an evidentiary rule which essentially uses circumstantial evidence to raise an inference of negligence which amounts in itself to evidence of negligence. King v. Searle Pharmaceuticals, Inc., 832 P.2d 858, 861 (Utah 1992); Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 196 (Utah 1990). The essence of *res ipsa loquitur* is that it permits a plaintiff to establish a *prima facie* case where the plaintiff has no knowledge or evidence surrounding the injury or alleged negligence. In order to rely on *res ipsa loquitur* as “substitute evidence,” a plaintiff must establish an evidentiary foundation from which the inference of negligence can be drawn. There are three elements of that foundation:

- (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care;
- (2) the agency or instrumentality causing the accident was at the time of the accident under the exclusive management or control of the defendant;⁵ and
- (3) the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the accident.

King, 832 P.2d at 190.

“Ordinarily, a plaintiff must establish the foregoing evidentiary foundation through expert medical testimony.” Baczuk v. Salt Lake Regional Medical Center, 2000 UT App 225, ¶ 7, 8 P.3d 1037, cert. denied, 13 P.3d 599 (Utah 2000). Only when the medical issues are so common can the plaintiff rely on the common knowledge of laymen instead of expert medical testimony. Id. The foundation may not be based upon speculation, conjecture or a “mere choice of probabilities.” Walker v. Parish Chemical Co., 914 P.2d 1157, 1163 (Utah Ct. App. 1996).

In this case, Mrs. Pete’s allegation of negligence against Dr. Youngblood does not fall within the common knowledge of lay persons. Contrary to Mrs. Pete’s contention, retention of a foreign object is not per se negligence. Physicians can and do leave “foreign objects” in patients all the time without negligence, i.e., screws, metal plates, shunts, etc. Assuming Dr. Youngblood placed the gauze at issue, as alleged, the question in this case

⁵ Mrs. Pete cannot demonstrate that the gauze at issue was at all times in Dr. Youngblood’s exclusive control, and for this reason alone she cannot establish foundation necessary to implicate *res ipsa loquitur*. Indeed, given the thirty plus years between the date of surgery and the date Mrs. Pete alleges to have discovered the gauze, there is no basis to entitle her to the presumption that Dr. Youngblood even placed the gauze at issue.

would be whether, in 1970, it was negligent for Dr. Youngblood to fail to know that Mrs. Pete retained some gauze after he thought he had removed it.

The procedure performed by Dr. Youngblood involved extensive wiring to reconstruct Mrs. Pete's shattered facial bones. (R. at 120-121.) Gauze can easily snag and tear on this wiring upon removal, and if retained, is undetectable absent patient symptoms. (Id.) In 1970 there was no radiopaque marker on the gauze. The only way for a physician to determine whether gauze was retained would have been to re-open the surgical site. (Id.) Surgical exploration of the newly-reconstructed sinus cavity to see if gauze was retained would be contrary to the healing process and, given the infrequency of such an occurrence, would not be indicated absent patient complaints.⁶ (Id.)

Whether Dr. Youngblood was negligent in failing to detect retained gauze under the fact of this case is simply not within a lay person's knowledge. In this case, expert witness testimony is required to show that Mrs. Pete's injury would not have occurred had Dr. Youngblood used due care. King, 823 P.2d at 862. Mrs. Pete failed to designate an expert to provide such testimony.

⁶ These facts distinguish this case from those cited by Mrs. Pete involving lost surgical instruments or sponges. (Aplt. Br. at 15-18.) Nor is the case of Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980) dispositive, as relied upon by Mrs. Pete, as the court there specifically declined to say that the loss of a surgical needle was negligent. Id.

POINT II.

MRS. PETE WAIVED HER RIGHT TO A JURY TRIAL AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO RELIEVE HER OF THIS WAIVER.⁷

On appeal, Mrs. Pete makes the additional argument that the trial court erred in denying her untimely request for a jury trial. (Aplt. Br. at 23-25.) Rule 38 of the Utah Rules of Civil Procedure identifies the procedure for demanding a jury trial and specifies the time within which the demand must be made. It provides:

Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Utah R. Civ. P. 38(b) (emphasis added). Rule 38 further provides that failure to file the fee and serve a timely demand “constitutes a waiver” of the right to jury trial. Id. at 38(d). In this case, there is no dispute that Mrs. Pete missed the ten-day jury demand deadline under Rule 38, of the Utah Rules of Civil Procedure. Under the plain language of Rule 38, Mrs. Pete waived her right to a jury trial. Utah R. Civ. P. 38(b); see Bennion v. Hansen, 699 P.2d 757, 758-59 (Utah 1985) (stating “a jury trial is ‘waived unless demanded.’ To avail oneself of this right, one’s demand must be timely and in accordance with applicable rule or statute.”)

⁷ This issue is irrelevant to the grant of summary judgment and provides no independent basis for reversal of the Order and Summary Judgment.

Rule 39, Utah Rules of Civil Procedure, allows “the court in its discretion” to order a trial by jury upon motion of a party. Utah R. Civ. P. 39(b). Mrs. Pete moved the trial court to relieve her of her waiver and allow her to demand a jury, acknowledging the decision to be discretionary with the trial court. (R. at 36-41.) The trial court denied this Motion (R. at 58), and entered an Order Denying Plaintiff’s Motion for Jury Trial, stating:

the Plaintiff waived her right to a jury trial by failing to file a timely demand in compliance with the provisions of Rule 38, Utah R. Civ. P., and that Plaintiff failed to demonstrate sufficient justification to persuade the Court to exercise its discretion pursuant to Rule 39(b), Utah R. Civ. P., to relieve her of that waiver.

(R. at 62-63.)

On appeal, Mrs. Pete asks this Court to overturn this Order. A trial court’s decision denying a party’s motion for jury trial is reviewed for abuse of discretion. Aspenwood, L.L.C. v. C.A.T., L.L.C., 2003 UT App 28, ¶ 33, 73 P.3d 947, cert. denied, 72 P.3d 685 (Utah 2003). Mrs. Pete argues that because the Federal District Court for the District of Utah held that “absent strong and compelling reasons to the contrary, a district court should exercise its discretion under Rule 39(b) and grant a jury trial.” (Aplt. Br. at 24.) In so arguing, Mrs. Pete wholly fails to point out the second part to the analysis:

This court has held that, absent strong and compelling reasons to the contrary, a district court should exercise its discretion under Rule 39(b) and grant a jury trial. Consistent with that guiding principle, we hold today that it would not be an abuse of discretion to deny relief pursuant to Rule 39(b)

when the failure to make a timely jury demand results from nothing more than mere inadvertence of the moving party.

Nissan Motor Corp. v. Burciaga, 982 F.2d 408, 409 (10th Cir. 1992) (emphasis added) (citations omitted); accord Faris v. Bexar County Bd. of Trustees, 925 F.2d 866, 873 (5th Cir.), cert. denied, 502 U.S. 866 (1991) (same).

Mrs. Pete fails to demonstrate that the trial court abused its discretion in denying her late jury trial request. To the contrary, it is well-within the trial court's discretion to deny a plaintiff's request for a jury demand, which is untimely made due to mere oversight and neglect. Nissan, 982 F.2d at 409 ; Scharnhorst v. Independent School Dist., 686 F.2d 637, 641 (8th Cir. 1982), cert. denied, 462 U.S. 1109 (1983). Specifically,

it has been held that mere inadvertence or bare oversight in failing to make a demand for jury trial within the time allowed by the applicable rule for making such demand as of right are insufficient grounds upon which the court may exercise its discretion to grant a jury trial.

Bank of Hawaii v. Shaw, 924 P.2d 544, 551 (Hawaii 1996) (affirming denial of untimely jury demand which was based on inadvertence or bare oversight); accord Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 987-988 (9th Cir. 1980) (holding denial of belated jury demand based on inadvertence and oversight not abuse of discretion).

Mrs. Pete presents no fact or argument to demonstrate that her failure to make a timely jury demand was caused by anything other than neglect, inadvertence or oversight.⁸

⁸ The case of Megadyne Med. Prods v. Aaron Med. Indus., 170 F.R.D. 28, (D. Utah 1996), cited by Mrs. Pete, provides no basis for suggesting the trial court in this case abused its discretion in denying her late jury trial demand under the facts at issue. To the contrary, Megadyne, under very different facts, reiterates that “[t]he trial court has broad discretion in determining whether to grant a jury trial.” Id. at 28.

The only reason she has offered for not timely filing a jury demand is that she “intended” to, but did not because St Mark’s never filed a responsive pleading. (Aplt. Br. at 25.) This argument is, foremost, unavailing given that Mrs. Pete filed the Notice of Voluntary Dismissal of Defendant St. Mark’s Hospital on July 14, 2003 (R. at 26-27), but waited until August 25, 2003, to file a Demand for Jury, (R. at 28-29), and until September 15, 2003, to move the trial court under Rule 39 for a jury trial. (R. at 36-41.)

However, even accepting her excuse that her late jury demand was somehow related to her dismissal of St. Mark’s Hospital, the fact still remains that Mrs. Pete neglected, be it through oversight, inadvertence or mistake, to timely demand a jury. She did not do so with her Complaint, within 10-days of her Complaint, or within 10-days of Dr. Youngblood’s Answer. She did not even do so within 10-days of dismissing St. Mark’s Hospital. Mrs. Pete offers no justification other than inadvertence for timely making a jury demand. It was thus well-within the trial court’s discretion to deny her Motion for Jury trial. Indeed, if a plaintiff need only file a motion to undo a Rule 38 waiver, then the provisions of Rules 38 and 39 would become a nullity. There would be no point in imposing a waiver for failure to make a timely demand if that waiver could be overcome by simply making a later request.

Mrs. Pete’s conclusory claim that Dr. Youngblood will not be prejudiced by the grant of a jury trial is neither accurate nor sufficient, and it certainly does not establish an abuse of discretion. Dr. Youngblood consciously chose not to make a jury demand because of his preference to have the issues tried by the court. The Rules of Civil Procedure allow Dr. Youngblood as much right as Mrs. Pete to choose his fact finder, and

he exercised this right by refraining from filing a jury demand. Mrs. Pete's neglect does not justify deprivation of this right. Absent any significant basis by Mrs. Pete for undoing the trial court's denial of her late jury trial demand, the trial court's discretion should be honored.

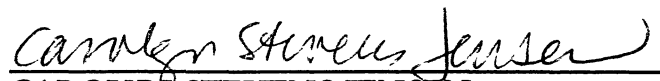
CONCLUSION

Mrs. Pete failed to designate an expert, then submitted the Doxey Affidavit after she certified this case as ready for trial and after Dr. Youngblood moved for summary judgment. The Doxey Affidavit was untimely and unfair. The trial court's decision to strike it was discretionary, and there is no evidence the trial court abused its discretion. Absent the Doxey Affidavit, there is no genuine issue of material fact. The doctrine of *res ipsa loquitur* has no application to this case, and summary judgment was warranted as a matter of law and properly granted. It should accordingly be affirmed on appeal.

DATED this 4th day of January, 2006.

WILLIAMS & HUNT

By


CAROLYN STEVENS JENSEN
Attorneys for Robert L. Youngblood, M.D.

ADDENDUM A

Utah Rules of Civil Procedure, Rule 26

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

■ Part V. Depositions and Discovery (Refs & Annos)

→ RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**(a) Required disclosures; Discovery methods.**

(a)(1) *Initial disclosures.* Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

Utah Rules of Civil Procedure, Rule 26

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to the practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) *Disclosure of expert testimony.*

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) *Pretrial disclosures.* A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) *Form of disclosures.* Unless otherwise stipulated by the parties or ordered by the court, all disclosures under

Utah Rules of Civil Procedure, Rule 26

paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) *Methods to discover additional matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery scope and limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) *Limitations.* The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(3) *Trial preparation: Materials.* Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(4) *Trial preparation: Experts.*

(b)(4)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

Utah Rules of Civil Procedure, Rule 26

(b)(4)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(4)(C) Unless manifest injustice would result,

(b)(4)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(4) of this rule; and

(b)(4)(C)(ii) With respect to discovery obtained under Subdivision (b)(4)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Utah Rules of Civil Procedure, Rule 26

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(D) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(E) any other orders that should be entered by the court.

Utah Rules of Civil Procedure, Rule 26

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(6), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy

ADDENDUM B

Utah Rules of Civil Procedure, Rule 37

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

■ Part V. Depositions and Discovery (Refs & Annos)

→ RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) *Expenses and sanctions.*

(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Utah Rules of Civil Procedure, Rule 37

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure

Utah Rules of Civil Procedure, Rule 37

to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.

ADDENDUM C



Utah Rules of Civil Procedure, Rule 38

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

■ Part VI. Trials

→RULE 38. JURY TRIAL OF RIGHT

(a) Right Preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[Amended effective January 1, 1987.]

ADDENDUM D



Utah Rules of Civil Procedure, Rule 39

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

■ Part VI. Trials

→RULE 39. TRIAL BY JURY OR BY THE COURT

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

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IN THE UTAH COURT OF APPEALS

JUNE W. COX PETE,

Appellant,

v.

DR. ROBERT L. YOUNGBLOOD

Appellee.

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CERTIFICATE OF SERVICE

(BRIEF OF APPELLEE ROBERT L.
YOUNGBLOOD, M.D.)

Case No. 20050268-CA

I hereby certify that on the 14th day of January, 2006 two (2) true and correct copies of the foregoing Brief of Defendant/Appellee Robert L. Youngblood, M.D., and a copy of this certificate, were mailed postage prepaid thereon, by first class mail in the United State mail, to Brian L. Olson, GALLIAN, WILCOX, WELKER & OLSON, L.C., 59 South 100 East, St. George, Utah 84770.

DATED this 14th day of January, 2006.

WILLIAMS & HUNT

By

Carolyn Stevens Jensen
CAROLYN STEVENS JENSEN
Attorneys for Robert L. Youngblood, M.D.