

2006

Kathryn Sohm v. Dixie Eye Center : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KATHRYN SOHM,

Plaintiff-Appellant,

vs.

DIXIE EYE CENTER, RONALD L.
SNOW, M.D. and JEFFREY R. RICKS,
O.D.,

Defendant-Appellees.

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BRIEF OF APPELLANT

Case No.: 20060274 CA

APPEAL FROM A FINAL ORDER OF THE FIFTH DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH,
THE HONORABLE RAND L. BEACHUM, PRESIDING

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FILED
UTAH APPELLATE COURT
SEP - 6 2006

KATHRYN SOHM,)	
)	
Plaintiff-Appellant,)	BRIEF OF APPELLANT
)	
vs.)	
)	
DIXIE EYE CENTER, RONALD L.)	Case No.: 20060274 CA
SNOW, M.D. and JEFFREY R. RICKS,)	
O.D.,)	
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Defendant-Appellees.)	
)	

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III. JURISDICTION

This appeal is taken from an Order granting Defendants' Motion for Summary Judgment entered on February 21, 2006 in the Fifth Judicial District Court by the Honorable G. Rand Beachum. This court has jurisdiction of this appeal pursuant to Section 78-2a-3 (2) (j) of the Utah Code Ann. 1953, as amended.

IV. STATEMENT OF THE ISSUES & STANDARD(S) OF REVIEW

Did the trial court commit reversible error in the standard it employed to determine whether Mrs. Sohm met her burden with respect to establishing the damages element of a prima facie negligence claim?

Did the trial court commit reversible error in granting Defendants' Motion for Summary Judgment and ruling that the testimony provided by Mrs. Sohm's medical expert was insufficient to satisfy the damages element of a prima facie negligence claim?

Did the trial court commit reversible error in granting summary judgment in favor of Defendants on an issue that was not raised by the Defendants and that neither party had an opportunity to brief?

"On review of a summary judgment . . . the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to him." Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991). An appellate court accords no deference to a trial court's legal

conclusions given to support the grant of summary judgment, but reviews them for correctness.” Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108 (Utah 1991).

V. THE ISSUES ON APPEAL WERE PRESERVED IN THE TRIAL COURT

The issues on appeal were preserved in the trial court, to the extent possible,¹ in Plaintiff’s Memorandum opposing Defendants’ Motion for Summary Judgment (Rec. 318-422); oral argument advanced by Plaintiff in opposition to Defendants’ Motion for Summary Judgment (Attached as Exhibit C); and Plaintiff’s Notice of Appeal, appealing the Fifth District Court’s Ruling and Order granting summary judgment in Defendants’ favor (Rec. 470-71).

VI. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings & Disposition in Court Below.

This case arises out of medical negligence committed by the Defendants in the care and treatment they provided to Plaintiff Kathryn Sohm. Mrs. Sohm was diagnosed with glaucoma and began receiving treatment for glaucoma in 1980. Defendants treated Ms. Sohm for her glaucoma for a period of six years beginning in September, 1995 through July, 2001. During this six year period, Defendants failed to properly manage Mrs.

¹The trial court granted summary judgment on grounds other than those raised by the Defendants in their Motion for Summary Judgment. However, the trial court’s ruling was apparently based upon the arguments and evidence presented by the parties in support of and opposition to said Motion for Summary Judgment. Accordingly, the issues raised as a result of the trial court’s ruling are preserved in the memoranda and arguments advanced by the parties in support of and opposition to Defendants’ Motion for Summary Judgment.

Sohm's glaucoma and, particularly during the last year of treatment provided by Defendants, committed numerous breaches of the standard of care in their treatment and management of Mrs. Sohms glaucoma. As a result of Defendants' negligent care, Mrs. Sohms sustained irreversible damage to her optic nerve and permanent loss of vision.

Mrs. Sohms medical expert, Robert Stein, M.D., testified during his deposition that Defendants breached the applicable standard of care in the medical treatment they provided to Mrs. Sohms. He further testified that to a reasonable degree of medical probability Defendants' respective breaches of the standard of care proximately caused Mrs. Sohms to sustain damage to her eyes, including a permanent loss of vision.

Following Dr. Stein's deposition, Defendants filed a Motion for Summary Judgment on the grounds that Mrs. Sohms had failed to establish **causation** because Dr. Stein was unable to testify to a reasonable degree of medical probability with respect to the percentage of vision loss Mrs. Sohms would have experienced **in the absence** of any negligence. Mrs. Sohms opposed Defendants' Motion for Summary Judgment and oral argument was heard by the trial court.

After reviewing the memoranda and evidence submitted by the parties and hearing oral argument, the trial court declined to grant summary judgment on the issue of causation raised by the Defendants, specifically stating that "[o]n the proximate cause element, I find sufficient testimony in the deposition of Dr. Stein for Plaintiff to avoid summary judgment." (Rec. 446-450, 462-64). Notwithstanding the trial court's

conclusion that Plaintiff met her burden on the sole issue raised and challenged by Defendants in their Motion for Summary Judgment, the trial court granted summary judgment in favor of Defendants on the altogether separate issue of damages, finding that “Plaintiff has failed to provide any expert testimony which would allow a jury to understand all of the possible causes of Plaintiff’s vision loss and then to reach a just verdict as to the damage which was caused by Defendant’s negligence.” (Rec. 449). The trial court further concluded that “it is not sufficient for Plaintiff to simply provide expert evidence that negligence proximately caused damage.” (Rec. 449, 463). Mrs. Sohm appeals the trial court’s Ruling and Order granting Summary Judgment in favor of the defendants.

B. Statement of the Facts.

1. Plaintiff Kathryn Sohm was diagnosed with glaucoma and began receiving treatment for glaucoma in 1980. (Rec. 333, 411-12)

2. Defendants treated Plaintiff for her glaucoma for a period of six years beginning in September, 1995 through July, 2001. During that six year period, Dr. Snow obtained only two visual field tests on Mrs. Sohm. (Rec. 333, 407)

3. According to Plaintiff’s expert, Dr. Robert Stein, the standard of care requires the administration of a visual field test anywhere from every three to six months or, at a minimum, once per year. (Rec. 333, 368)

4. Defendant Snow testified in his deposition that regular and timely visual field tests were not obtained because Mrs. Sohm failed to show for two of the tests. (Rec. 334, 407)

5. Contrary to Defendant's Snow's initial testimony, he later admitted that he only asked Mrs. Sohm to submit to Visual Field Tests on three occasions during his six years of treatment, to wit: September 12, 1995, September 2, 1997 and March 7, 2001. (Rec. 334, 355-63, 418-21)

6. Of the three Visual Field Tests requested, Mrs. Sohm missed the one scheduled for September, 1997, but had one performed in September, 1995 and another in April, 2001 (rescheduled from the March 7, 2001 date). Id.

7. When Mrs. Sohm missed the Visual Field Test in September, 1997, Defendant Snow admits that he did not attempt to reschedule the test. (Rec. 334, 407-08, 415-16)

8. Defendant Snow further admits that he did not request or schedule a Visual Field Test for Mrs. Sohm at all during calendar years 1996, 1998, 1999 and/or 2000. (Rec. 334, 418)

9. Plaintiff's expert, Dr. Robert Stein, testified in his deposition that the standards in this country for treating glaucoma require observation and monitoring of three things, to wit: the appearance of the optic nerve, the intraocular pressures, and the visual field tests. In Dr. Stein's opinion, not one of these particular measurements can

stand alone. Glaucoma “is a wily disease and requires the utmost vigilance to make sure that it’s under control.” (Rec. 335, 367)

10. According to Dr. Stein, Defendant Snow breached the applicable standard of care in failing to conduct regular, serial visual field tests in his treatment of Mrs. Sohm’s glaucoma. (Rec. 335, 368)

11. At the time of Plaintiff’s initial visit to Defendant Snow’s office, in September, 1995, Defendant acknowledges that Plaintiff’s intraocular pressures were 16 and 17 and that her glaucoma was well controlled. (Rec. 335, 355-63)

12. In fact, Defendant Snow recommended that Mrs. Sohm continue with her current glaucoma medications and made no changes to her medications at that time. Id.

13. Plaintiff’s next appointment with Dr. Snow was seven months later in April, 1996, at which time Dr. Snow noted intraocular pressures of 24 and 22 and concluded that Mrs. Sohm’s glaucoma was under “adequate to marginal control.” Despite the rise in pressures and the change from well controlled glaucoma to “adequate to marginal” controlled glaucoma, Dr. Snow did not alter Mrs. Sohm’s medications and simply recommended that she continue as usual with the same medication regimen. (Rec. 335, 413)

14. Over the course of the next three years, Plaintiff’s glaucoma continued to be generally and most often classified by Defendant Snow as under “adequate to marginal” control. (Rec. 336, 355-63)

15. Then, in June, 2000, Mrs. Sohm's intraocular pressures significantly increased, and Defendant Snow characterized her glaucoma as "under **inadequate** control." (Rec. 336, 355-63)

16. Prior to June, 2000, the highest intraocular pressure recorded by Dr. Snow for Mrs. Sohm's right eye was 29 and her left eye was 22 (excluding the tensions taken of the left eye following the cataract removal and Yag laser procedures performed in May, 1996 and May, 1999 respectively). Id.

17. On June 7, 2000, however, Mrs. Sohm had intraocular pressures of 60 and 46. Five days later, her pressures were still at 35 and 29. Dr. Snow characterized Mrs. Sohm's glaucoma as under **inadequate** control on that visit. (Rec. 336, 355-63)

18. Thereafter, Mrs. Sohm saw Dr. Snow for appointments on July 10, 2000, July 31, 2000, August 7, 2000, December 14, 2000, February 9, 2001 and April 18, 2001. On each of those appointments, with the exception of the appointment in August, Mrs. Sohm's intraocular pressures remained at the highly elevated levels of: 30/32; 36/35; 30/26; 34/38 and 42/40 and her glaucoma continued to be classified as under **inadequate** control by Dr. Snow. Id.

19. During Mrs. Sohm's February 9, 2001 appointment, her pressures were 34 and 38. In spite of these extremely elevated pressures, as well as Dr. Snow's inability to bring the pressures back down to an adequate level after months and months of attempting to do so through the administration of eye drop medications, Dr. Snow's plan

set forth in his chart following this visit was for Mrs. Sohm to return to his office for a recheck in 4-6 months and to continue with her eye-drop medications. (Rec. 337, 355-63)

20. Notwithstanding this recommendation, Mrs. Sohm was seen for an appointment two months later on April 18, 2001. During this appointment, Mrs. Sohm's intraocular pressures were 42 and 40 (after drops that morning). (Rec. 337, 355-63)

21. Additionally, Mrs. Sohm had a visual field test at that time that showed a significant change and/or dramatic loss of her visual field.

22. In spite of Mrs. Sohm's significantly elevated pressures, and the visual field test results, Dr. Snow scheduled a cataract surgery, with a recommendation to consider a filtering surgery (trabeculectomy) to address her glaucoma after the cataract removal. He also instructed Mrs. Sohm to "continue current glaucoma medications" in spite of the fact that they had failed to bring her pressures down since her last appointment. (Rec. 337, 355-63)

23. Dr. Snow admitted during his deposition that it was his recommendation that Mrs. Sohm have her right cataract removed **before** having a trabeculectomy and/or any other surgical procedure that would address her glaucoma. (Rec. 338, 422)

24. In the expert opinion of Dr. Stein, it was a breach of the standard of care in this particular case to perform the cataract surgery before a trabeculectomy to bring Mrs. Sohm's pressures under control. Specifically, Dr. Stein testified that "it was apparent that

the intraocular pressure was fairly elevated at the time prior to that surgery. It's generally not indicated to perform a cataract operation before considering the definitive lowering of the intraocular pressure." (Rec. 338, 370)

25. Furthermore, Dr. Stein testified that it would not be reasonable to perform a cataract surgery before performing a trabeculectomy in this case because Mrs. Sohm's visual field test taken one month prior to her surgery showed significant damage that her glaucoma had caused, and "there is no reason to subject [her optic] nerves to the potential for elevated eye pressure following surgery." (Rec. 338, 375)

26. Even Dr. Snow admits that it is possible to see pressures go up with a cataract surgery. (Rec. 338, 414)

27. Notwithstanding the "out of control" nature of Mrs. Sohm's glaucoma and the visual field test results indicating a substantial change in Mrs. Sohm's visual field, in May, 2001, Defendant Snow performed surgery on Mrs. Sohm to remove a cataract from her right eye. Prior to the surgical procedure, the intraocular pressure in Mrs. Sohm's left eye was recorded as 54. There was no measurement recorded with respect to the intraocular pressure of Mrs. Sohm's right eye prior to surgery. (Rec. 339, 355-63)

28. Following Mrs. Sohm's right cataract removal, her intraocular pressures continued to remain uncontrolled. At the time of her one-week post-op visit, her pressures measured 31 and 47. Id.

29 Dr. Stein is critical of Dr. Snow's failure to follow up again with Mrs. Sohm in a day or two instead of telling her to come back in one week. (Rec. 339, 377)

30. At the time of her two week post op visit, her intraocular pressures measured 19 and 36. (Rec. 339, 355-63)

31. In addition to the high intraocular pressures, Mrs. Sohm also reported pain, redness, swelling and "milky" vision during her post-operative appointments. She also complained to Dr. Snow that she could not see out of her right eye. (Rec. 339, 355-63 and 400)

32. Mrs. Sohm's next appointment was on June 29, 2001. During this appointment, her intraocular pressures measured 60 and 48. (Rec. 340, 355-63)

33. Even Dr. Snow testified during his deposition that when a pressure hits 60, "you have to wonder what's going on." (Rec. 340, 410)

34. Dr. Snow further admitted during his deposition that intraocular pressures of 60 could be damaging the optic nerve. (Rec. 340, 417)

35. According to Dr. Stein, he is unaware of any eye that can tolerate that level of pressure for any length of time. (Rec. 340, 378)

36. During Mrs. Sohm's June 29, 2001 appointment, Dr. Snow characterized her glaucoma as "out of control." (Rec. 340, 355-63)

37. In spite of Mrs. Sohm's critical situation, and Dr. Snow's own characterization of her glaucoma as "out of control", Dr. Snow did nothing with respect

to providing Mrs. Sohm with emergent treatment or referring her to another medical care provider for surgical intervention. Instead, he reduced the pressure in her right eye only (with side-port drainage from the surgical site), discontinued her steroid medication and told her to come back in **two weeks**. (Rec. 341, 355-63)

38. Dr. Stein testified that he has “never heard of an eye that can tolerate that pressure for any length of time. Yet, Dr. Snow asked the patient to return in two weeks. **I believe that to be completely out of line.**” (Rec. 341, 378)

39. According to Dr. Stein, Defendant Snow’s failure to treat Mrs. Sohm’s glaucoma as an emergent condition during the June 29, 2001 appointment was a breach of the standard of care and proximately caused the loss of vision she sustained. In his deposition, Dr. Stein compared the manner in which Dr. Tuck handled the situation when Mrs. Sohm presented to his office two months later with almost the identical intraocular pressures as she presented to Dr. Snow during the June 29, 2001 appointment:

You might extrapolate this entry and overlay it to the entry of the subsequent treater, Dr. Tuck, in Virginia with almost very similar findings, very high pressure, out of control. One doctor, Dr. Snow, chose to essentially ignore the emergent problem. Dr. Tuck, on the other hand, treated it as it should have been, as an acute, emergency requiring immediate attention.”

(Rec. 341, 371-72)

40. Dr. Stein further testified that it was “imperative to definitively make sure that the pressure was lowered immediately after surgery so as not to create any further nerve damage.” (Rec. 342, 376-77)

41. Following Mrs. Sohm's June 29, 2001 appointment, Dr. Snow left town on vacation.

42. Thereafter, on July 9, 2001, Mrs. Sohm was in agony with her eyes and went to Defendants' office to see Dr. Snow. She had been experiencing pain all night and believed she needed medical attention. Defendant Snow's office informed Mrs. Snow that Dr. Snow was out of town, but told her that she could come back later and see Dr. Ricks. (Rec. 342, 400)

43. Accordingly, Mrs. Sohm returned to the office that same day for an appointment with Dr. Ricks. On that occasion, Mrs. Sohm's intraocular pressures measured 38 in both eyes. (Rec. 342, 355-63)

44. In addition, she presented with a number of complaints and problems, and expressed serious concern to Dr. Ricks regarding the condition of her eyes. She explained to Dr. Ricks that she was very upset because she could not see well and her eye was hurting her. She asked him what he could do for her. (Rec. 342, 401)

45. Dr. Ricks seemed very casual about Mrs. Sohm's high pressures and told her he could give her another drop. He also told her that she needed an attitude adjustment and wrote her a Poem entitled "Medication for Attitude" on a prescription pad. The poem read: For every problem under the sun, there is a solution or there is none. If there is one hurry and find it, if there is none, never mind it. Id.

46. Dr. Ricks then told her that she needed to make an appointment to see Dr. Snow when he returned from vacation in “10 days or so.” (Rec. 343, 401)

46. According to Dr. Stein, the standard of care required Dr. Ricks to either follow Mrs. Sohm on a day-to-day basis to verify that her pressures were dropping quickly or to refer her for a more aggressive treatment elsewhere. (Rec. 343, 381)

47. Mrs. Sohm acknowledges that she did not make another appointment to see Dr. Snow when he returned from his vacation because she was not satisfied with the care she had been receiving. Under the circumstances, Mrs. Sohm felt that she needed to have someone else look at her eyes. Mrs. Sohm’s daughter in Roanoke Virginia had told her that there was an excellent glaucoma specialist there that she should see. Consequently, when Defendants failed to address Mrs. Sohm’s needs and/or respond to her post-operative complaints regarding high pressures, pain, irritation and an inability to see very well, she decided to go to Virginia to visit her daughter and see the glaucoma specialist there. (Rec. 343, 402-03)

48. Mrs. Sohm believed she had time to get in to see another physician for a second opinion because Defendants had been so casual about her condition and had not indicated to Mrs. Sohm that there was any urgency with respect to the condition of her eyes. (Rec. 343, 404) In the interim, she continued to take the drops prescribed by Defendants. Id.

49. The first appointment Mrs. Sohm was able to get was in early September, 2001, at which time she saw Dr. Tuck. According to Mrs. Sohm, Dr. Tuck was alarmed at her extremely high pressures and immediately referred Plaintiff to Dr. Cotter for emergent treatment. (Rec. 344, 405)

50. Dr. Cotter immediately brought Plaintiff's pressures down and scheduled her for emergent trabeculectomy procedures in both eyes. (Rec. 344, 405)

51. Dr. Cotter stated in a letter to Alan Crandall, M.D. that Mrs. Sohm's "markedly elevated intraocular pressures caused Mrs. Sohm to develop atrophy of the neuroretinal rim which is contributing to the visual field deterioration." (Rec. 344, 389-91)

52. Although the excellent care and treatment provided by Dr. Cotter has arrested Mrs. Sohm's glaucoma and stabilized the condition of her eyes, the damage caused by Defendants' failure to properly treat Mrs. Sohm's glaucoma, prior to the time she became a patient of Dr. Cotter's, is significant. Mrs. Sohm described her current condition as follows:

I am legally blind in my right eye. Both of my eyes are in constant misery on a daily basis. My left eye is like looking through a fog. My eyes water, and I feel like a cotton ball is in my right eye. (I wear an eye-patch much of the time). I must wear sunglasses in my house and outside most of the time. Extreme glare from light in both eyes are foggy and images look like a white out. I see only slight images.

Because Defendant Ricks seemed so unconcerned about my condition and elevated eye-pressures, and reassured me that I was fine and was in need of a change of attitude only, rather than medical attention, I did not seek emergency treatment at that time. I have since learned that Zion Eye Institute (Dr. Lewis) in St. George, a competitor of Dr.

Snow's Eye Center, could have taken care of my eyes and lowered my eye pressures at that critical time if Defendant Ricks had only referred me to them.

My condition, as a result of the damage done to my eyes from my glaucoma that was allowed to go unchecked and untreated, as well as the lens replacement surgery, has completely changed my life. I now require assisted living. I can no longer drive; I cannot enjoy and seldom watch television or movies; I cannot cook; I cannot read; I cannot play the piano or sew; I cannot paint or draw anymore. These are all activities that I engaged in on a daily basis prior to my surgery with Dr. Snow. I also lost a potential career that I had planned to engage in with my daughter. We had planned to start an art business for the sale of our paintings and drawings. Inasmuch as I can no longer paint or draw, I have been unable to engage in that business endeavor. I used to be very active, happy and totally independent before the damage to my eyes. Now, I am inactive, suffer from depression and am totally dependent upon others to assist me in taking care of myself and my needs on a daily basis.

(Rec. 344-45).

53. Dr. Stein previously testified during his deposition that it is his expert opinion to a reasonable degree of medical probability that the breaches committed by Defendants, as more fully set forth herein, are responsible for the damage to Mrs. Sohm's eyes and the significant loss of vision she sustained in her right eye. (Rec. 345, 387-88)

54. Dr. Stein graduated from the Chicago Medical School in 1976 with his medical degree and went on to complete his Internship and Residency in Ophthalmology at Rush-Presbyterian St. Luke's Medical Center in Chicago, Illinois. (Rec. 327, 392-93, and 424-25²)

²Please Note that the Trial Clerk made an error in numbering the record. Pages 424-433 are repeated twice in the record, and the executed Affidavit of Plaintiff's expert witness, Robert M. Stein, M.D. is located at the second set of pages numbered 424-430 in the Record on Appeal.

55. Dr. Stein has been an Assistant Professor at Rush Medical College from 1979 to the present and received his Board Certification from the American board of Ophthalmology in 1983. (Rec. 327, 393 and misnumbered 425)

56. Currently, Dr. Stein is an Attending Physician in Ophthalmology at Rush-Presbyterian St. Luke's Medical Center in Chicago, Illinois and Rush North shore Medical Center in Skokie, Illinois. (Rec. 327, 393 and misnumbered 425)

57. During his medical career, he has had extensive experience in multiple ophthalmic surgical procedures with an emphasis on cataract surgery with intraocular lens implantation and anterior segment surgery including corneal transplants and refractive surgery. (Rec. 327, 393 and misnumbered 425)

58. He also maintains a private medical practice in general ophthalmology and is active in teaching residents in training at Rush-Presbyterian St. Luke's Medical Center. (Rec. 328, 393 and misnumbered 425)

59. He is a member of the American Academy of Ophthalmology (Fellow), the American Medical Association, the American Society of Cataract and Refractive Surgery, the Illinois State Medical Society, Chicago Medical Society and Chicago Ophthalmological Society. (Rec. 328, 393 and misnumbered 425)

60. He has published and lectured in his field of expertise and has enjoyed memberships in ISMIE Risk Management Subcommittee on Ophthalmology; Quality Assessment committee of SHARE Health Plan of Illinois; Quality Improvement

Committee of United Healthcare of Illinois and has also acted as a consultant for the Illinois State Medical Inter-insurance Exchange (reviewing closed malpractice cases for the Physician's Review and Evaluation Committee). (Rec. 328, 393-94 and misnumbered 425-26)

61. He has never previously testified as a Plaintiff's expert and, in his expert review of medical malpractice cases, he has, as a general rule, always stood firmly with the defense. With respect to this case, however, he has agreed to testify as an expert witness on behalf of the Plaintiff, Kathryn Sohm, due to the compelling nature of the negligence committed by the Defendants in this matter. (Rec. 328, 394 and misnumbered 426)

62. In arriving at his opinions in this case, he reviewed all of Ms. Sohm's medical records generated by the Defendants in this case as well as the medical records documenting the care she received from the physicians that treated her subsequent to the care she received from the Defendants, including the records of the Moran Eye Center, the Vistar Eye Center, Dr. Cotter, Dr. Tuck, Zion Eye Institute, and Dr. Newman. He has also reviewed the depositions of Mrs. Sohm, Dr. Cotter and Dr. Newman. (Rec. 329, 394 and misnumbered 426)

63. In Dr. Stein's expert opinion, Mrs. Sohm's case has significant merit in that there were numerous breaches of the standard of care in the treatment that was provided to her by the Defendants. (Rec. 329, 394 and misnumbered 426)

64. It is also Dr. Stein's expert opinion, to a reasonable degree of medical probability, that the Defendants' breaches of the standard of care caused Mrs. Sohm to sustain substantial and permanent damage to her vision. (Rec. 329, 394 and misnumbered 426)

65. In Dr. Stein's deposition, he identified multiple breaches of the standard of care on the part of the Defendants including, without limitation, the following:

- a. Defendant Snow failed to conduct serial visual field tests in a timely fashion;
- b. Defendant Snow failed to adequately and properly document the appearance of the optic nerve during routine visits;
- c. Defendant Snow failed to adequately and definitively lower Mrs. Sohm's intraocular pressures, particularly prior to the performance of the cataract surgery on Mrs. Sohm's right eye;
- d. Defendant Snow failed to perform and/or refer Mrs. Sohm for a trabeculectomy on her right eye either prior to or in conjunction with the cataract surgery in May, 2001;
- e. Defendant Snow subjected Mrs. Sohm's right eye to an increase in pressure by performing a cataract surgery at a time when her pressures were already highly elevated and her recent visual field test showed a significant change in Mrs. Sohm's visual field.
- f. Defendant Snow failed to adequately and properly control Mrs. Sohm's glaucoma and allowed her intraocular pressures to remain consistently high and inadequately controlled for more than a year;
- g. Both Defendants failed to give proper attention to Mrs. Sohm's wildly fluctuating intraocular pressures along with her discomfort following her cataract surgery in May, 2001;
- h. Defendant Snow essentially ignored Mrs. Sohm's emergent condition on June 29, 2001, when he acknowledged in his own records that her pressures were "out of control" and proceeded with essentially the same treatment regimen that had been previously, and unsuccessfully, employed to regulate her pressures;
- i. Defendant Ricks ignored Mrs. Sohm's emergent condition on July 9, 2001, when her pressures continued to remain at an elevated level, by failing to refer her for emergent care, and/or failing to adequately

lower and continue to monitor Mrs. Sohm's pressures on a day to day basis to make sure that the pressures came down and stayed down.

(Rec. 329-31, 394-96 and misnumbered 426-28).

66. As stated in his deposition, it is Dr. Stein's expert opinion to a reasonable degree of medical probability that the breaches set forth herein are responsible for the damage to Mrs. Sohm's eyes and the significant loss of vision she sustained in her right eye. (Rec. 331, 387-88, 396 and misnumbered 428)

67. During his deposition, counsel asked Dr. Stein to testify with respect to "percentages" in relation to how much better Mrs. Sohm's vision would be today if she had not been subjected to negligent care as well as "percentages" in relation to how much of the damage to her eyes was caused by the Defendants' negligence. As he testified during his deposition, he cannot, nor could any intellectually honest physician, testify to a reasonable degree of medical probability with respect to "percentages" of damage caused by the Defendants' negligence or that would have existed, if any, in the absence of negligence. (Rec. 331, 396-97 and misnumbered 428-29)

68. On the other hand, Dr. Stein did testify in response to this line of questioning that "there's a much greater likelihood that [Mrs. Sohm] would not have suffered these visual field losses to this degree had there been intervention." (Rec. 331, 397 and misnumbered 429)

69. He further testified that in the absence of negligence, her vision could have been “dramatically better.” (Rec. 332, 397 and misnumbered 429)

70. He also testified that while it is “hard to estimate how much, [sic] she certainly with aggressive treatment might not have had any field loss at all.” (Rec. 332, 397 and misnumbered 429)

71. In response to Dr. Stein’s opinion that it was possible that with aggressive treatment Mrs. Sohm may not have experienced any loss of visual field, counsel asked him if he could state that with any specificity to a reasonable degree of medical probability, and he responded that “I can’t really do that.” (Rec. 332, 397 and misnumbered 429)

72. While Dr. Stein cannot testify that in the absence of negligence, Mrs. Sohm would not have sustained any loss to her visual field, he **can testify to a reasonable degree of medical probability that in the absence of the Defendants’ negligence, Mrs. Sohm’s vision would be significantly better than it is today.** (Rec. 332, 397 and misnumbered 429)

73. Similarly, while Dr. Stein cannot testify to a reasonable degree of medical probability as to the exact “percentage” or “proportion” of damage that was caused as a result of the breaches of care that he has articulated, he **can unequivocally testify to a reasonable degree of medical probability (as he already did in his deposition) that**

the negligence of the Defendants damaged Mrs. Sohm's eyes and caused her to sustain a loss of vision. (Rec. 332-33, 397-98 and misnumbered 429-30)

74. In Dr. Stein's expert opinion, and to a reasonable degree of medical probability, **the Defendants' many instances of negligent treatment and breaches of the standard of care resulted in a direct consequence to the health and condition of Mrs. Sohm's eyes and caused her to sustain both a significant and a permanent loss of vision that she would not have otherwise sustained in the absence of their negligence. (Rec. 333, 398 and misnumbered 430)**

VII. SUMMARY OF THE ARGUMENT

Summary Judgment is generally inappropriate to resolve claims of negligence and, in particular, issues concerning damages which are usually left to the exclusive province of the jury. In the present case, Plaintiff has presented a prima facie case of negligence against Defendants with respect to all elements of her claim, including the damages resulting from the defendants' negligence. At a minimum, issues of fact exist with respect to Plaintiff's damage claim that preclude the entry of summary judgment as a matter of law.

The trial court erred in the burden of proof it required of Plaintiff with respect to establishing the damages element of her negligence claim. In order to establish a prima facie negligence claim, Utah law does not require Plaintiff to prove what her condition would be in the absence of the defendants' negligence or prove with precision the exact

amount of damages attributable to the defendants. See, Tingey v. Christensen, 987 P.2d 588 (Utah 1999). Indeed, if a plaintiff suffers from an injury and/or a chronic condition (such as Plaintiff's glaucoma) that is exacerbated by the negligent act of another, the Utah Supreme Court has stated that if a jury can find a reasonable basis for apportioning damages between the preexisting condition and the subsequent tort, it should do so. Tingey, 987 P.2d at 592. However, the Court held that if the jury finds it impossible to apportion damages between the preexisting condition and the defendant's negligence, "it should find that the tortfeasor is liable for the entire amount of damages." Id. (Emphasis added). Furthermore, once a Plaintiff has established the "fact of damage," the defendant bears the risk of any uncertainty with respect to the "amount of damage," and "the defendant is not allowed to escape liability because the amount of damage cannot be proved with precision." Tingey, at 592. Accordingly, Plaintiff's claim does not fail and summary judgment should not have been granted because Plaintiff's expert is unable to testify with respect to what her vision would be in the absence of negligence and/or identify the precise "percentage" of damage attributable to the defendants' negligent care.

The opinions given by Plaintiff's expert witness are more than sufficient to satisfy the burden of proof with respect to the damages element of her claim. The testimony provided by Plaintiff's expert is unequivocal with respect to the fact of damage resulting from the defendants' negligence. Indeed, Plaintiff's expert, Robert Stein, M.D., testified during his deposition, and subsequently by Affidavit, that the defendants' many breaches

of the standard of care (which he discussed at length) proximately caused Mrs. Sohm to sustain significant and permanent damage to her eyes, including a permanent loss of vision. Any equivocation on the part of Plaintiff's expert was expressed only with respect to what her condition would be in the absence of negligence and/or the precise "percentage" of damage attributable to the defendants' negligence.

Based upon the rule of law set forth by the Utah Supreme Court in Tingey, the trial court's criticisms of the Plaintiff's expert do not cause Plaintiff's claim to fail or form a proper basis for the granting of summary judgment in this case. Accordingly, the trial court erred in granting summary judgment and its Order should be reversed.

VIII. ARGUMENT

A. The Standards Required for Summary Judgment Have Not Been Met.

Summary judgment is generally inappropriate to resolve claims of negligence and should be employed only in the most clear cut case. White v. Deseelhorst, 879 P.2d 1371 (Utah 1994). With respect to the burden of proof, this Court has stated that "it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact." Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1282, 1292 (Utah App. 1996). In the present case, the trial court granted summary judgment in favor of the defendants in spite of clear and unequivocal sworn expert testimony, by both deposition and affidavit, that the defendants' many breaches of the applicable standard of care in their treatment of the plaintiff proximately caused injury

and damage to the plaintiff. See, Relevant Excerpts of Dr. Stein's Deposition (Rec. 366-388) and Affidavit of Robert M. Stein, M.D. (Rec. 424-430—misnumbered).

Under Utah law, a negligence claim requires the plaintiff to establish four elements:

“ . . . that the defendant owed the plaintiff a duty; that defendant breached the duty; that the breach of the duty was the proximate cause of Plaintiff's injury; and that there was in fact injury.”

Steffensen v. Smith's Management Corporation, 820 P.2d 482 (Utah App.) In the present case, Plaintiff has met each and every one of these elements. It is also well established that there can be more than one proximate cause of the same injury. Id. In such cases, it is not the burden of the plaintiff to provide expert testimony to apportion the damages attributable to each proximate cause. Rather, that is a question of fact that rests within the exclusive province of the jury. Id.

Plaintiff has provided expert testimony that the defendants' breaches of the standard of care are responsible for the dramatic and permanent loss of vision she experienced following a cataract surgery performed by Defendant Snow. (Rec. 387-88) The medical evidence and fact and expert testimony on record in this case (particularly when viewed in a light most favorable to the plaintiff) create, at a minimum, material issues of fact with regard to the damages resulting from the defendants' negligent care. These issues of fact must be determined by a jury and necessarily preclude the entry of

summary judgment in this case. Based upon the foregoing, the trial court's order granting summary judgment in favor of the defendants should be reversed.

B. Utah Law Does Not Require the Plaintiff to Prove What Her Condition Would Be in the Absence of the Defendant's Negligence or to Apportion or Prove the "Percentage" of Her Damages Attributable to the Defendants.

The trial court erred in the burden of proof it required of Plaintiff with respect to establishing her damages. In support of their Motion for Summary Judgment, Defendants argued that Plaintiff must be able to offer expert testimony with respect to what her vision would have been in the absence of negligence and/or what "percentage" of her injury is attributable to the Defendants. The trial court agreed. This is not, nor has it ever been, a standard of proof required to establish the damage element of a negligence claim. In fact, contrary to the defendants' contentions, if a plaintiff suffers from an injury and/or a chronic condition (such as Plaintiff's glaucoma) that is exacerbated by the negligent act of another, Utah courts have held that "the defendant should not escape liability because the amount of damage cannot be proved with precision." Tingey v. Christensen, 987 P.2d 588, 592 (Utah 1999) (Citations omitted) (Emphasis Added).³

³ This rule of law is not limited to claims of negligence but has been uniformly applied in commercial and other types of cases as well. See: Bastian v. King, 661 P.2d 953, 956 (Utah 1983) (holding that "it is generally recognized that some degree of uncertainty in the evidence of damages will not suffice to relieve a defendant from recompensing a wronged plaintiff" and ". . . it is the wrongdoer that must assume the risk of some uncertainty."); Terry v. Panek, 631 P.2d 896, 898 (Utah 1981) (holding that ". . . the fact that the evidence upon which a court awards damages is sparse is no reason to deny all recovery for a wrong."); Registered Physical Therapists, Inc. v. Jepson, 584 P.2d 857, 849 (Utah 1978) (holding that "where damages are attributable to the wrong of the

In Tingey v. Christensen, the Plaintiff was involved in an automobile accident that aggravated pre-existing injuries, conditions and/or ailments. In light of her pre-existing conditions, Mrs. Tingey requested that the trial court give the following jury instruction:

Where a pre-existing condition exists which has been aggravated by the accident it is your duty, if possible, to apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. *But if you find that the evidence does not permit such an apportionment, then the defendant is legally responsible for the entire ailment or disability.*

Tingey, at 591 (Emphasis added). The trial court declined to give this instruction. On appeal, the Utah Supreme Court held that the trial court erred in not giving the proposed instruction and that the proposed rule of law stated therein “**is correct, and we adopt it.**” Id at 592 (Emphasis added). The Court cited and relied upon the following legal principles in support of its decision:

[F]irst, a tortfeasor takes a tort victim as he or she finds the victim (citations omitted); second, a tortfeasor should bear the burden of uncertainty in the amount of a tort victim’s damages (citations omitted); and third, once the fact of damage is established, ‘a defendant should not escape liability because the amount of damage cannot be proved with precision.’ (citations omitted)

Tingey, at 592 (Emphasis added); see also: Robinson v. All-Star Delivery, Inc., 992 P.2d 969, 972 (Utah 1999). The legal principles cited in the Tingey decision are directly

defendant and are only uncertain as to amount, they will not be denied even though they are difficult of ascertainment.”); and Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983) (ruling that it would be “unjust to deny recovery where the *fact* of injury or loss can be proved simply because there is difficulty in assessing its *amount*.”)

relevant to the case at hand and contradict the trial court's ruling that "it is not sufficient for Plaintiff to simply provide expert evidence that negligence proximately caused damage." See: Ruling, page 4 (Rec. 449); and Order, page 2 (Rec. 463).

In the present case, Mrs. Sohm suffered from chronic glaucoma. (Rec. 333, 411-12) Notwithstanding her chronic glaucoma, her vision had remained stable and unaffected by her glaucoma for many years until she received negligent care from the defendants. (Rec. 335, 355-63, 412) Plaintiff's expert witness, Robert Stein, M.D., testified in his deposition and by affidavit that Defendants' negligent care proximately caused Mrs. Sohm to sustain permanent damage and loss of vision. (Rec. 366-88 and misnumbered 424-430) In so testifying, Dr. Stein unequivocally established the **fact of damage**. When asked what Mrs. Sohm's eyesight would have been in the absence of negligence, Dr. Stein testified that with aggressive care, she may have sustained no loss of vision at all. (Rec. 332, 397 and misnumbered 429) Because Dr. Stein was unwilling to testify with precision with respect to how Mrs. Sohm's glaucoma might have progressed or not progressed in the absence of the Defendants' negligence, or assign a specific percentage to the amount of vision loss attributable to the defendants' negligence, the defendants contend and the trial court ruled that Plaintiff's claim fails.

Under Tingey, however, if any uncertainty exists with respect to the damage caused by the Defendants' negligent care, that is an uncertainty that must be borne by the Defendants. Tingey, 987 P.2d at 592. Furthermore, once the "fact of damage" has been

established, as it has in the instant case, the defendant is not permitted to escape liability because the “amount of damage” cannot be proved with precision. Id.

After considering the three legal principles cited and discussed above, the Tingey Court held as follows:

We hold that if a jury can find a reasonable basis for apportioning damages between a preexisting condition and a subsequent tort, it should do so; however, if the jury finds it impossible to apportion damages, it should find that the tortfeasor is liable for the entire amount of damages.

987 P.2d at 592 (Emphasis added). This holding is significant to the present case for a number of reasons. First of all, the holding makes it clear that it is up to the jury, not the Plaintiff, to apportion damages between those caused by the defendants’ negligent care and those resulting from her preexisting glaucoma. Second, it reaffirms that the defendants, not the Plaintiff, bears the burden of uncertainty, if any exists, in the amount of Mrs. Sohm’s damages that can be attributed to the defendants. It is also clear from this holding that the Plaintiff is not required to produce expert testimony with respect to what “percentage” of damage is attributable to the defendants’ negligence and what percentage of damage would have occurred in the absence of negligence as a result of her pre-existing chronic condition.⁴

⁴At the hearing on Defendants’ Motion for Summary Judgment, Plaintiff’s counsel asserted that to require plaintiffs suffering from chronic, pre-existing conditions (such as Mrs. Sohm’s glaucoma in instant case) to prove what his or her condition would be in the absence of negligence would be, in many instances, to require the impossible and would thereby preclude that entire class of Plaintiffs (individuals with preexisting, chronic conditions) from ever being able to assert claims for medical negligence. (See: Transcript,

Finally, and of greatest import to the issue on appeal, is the Court's holding that if the jury is unable to apportion damages between the defendants' negligence and a preexisting condition, the Plaintiff's claim **DOES NOT FAIL** as a matter of law as the defendants and the trial court concluded in the instant case. Rather, in such an instance, the jury is **required** by law to hold the defendants legally responsible for the **ENTIRE** injury and/or damage suffered by the Plaintiff. Tingey, 987 P.2d at 592.

Based upon the foregoing, it is clear that the trial court held Plaintiff to the wrong burden of proof with respect to her damages in this case and erred in granting summary judgment in favor of the defendants. Accordingly, the trial court's entry of summary judgment in this case should be reversed.

C. The Testimony of Dr. Stein Satisfies Plaintiff's Burden with Respect to Her Damages.

The trial court erred in finding that Dr. Stein's expert testimony was insufficient evidence of the damage caused by the Defendants' negligence. Dr. Stein testified during his deposition that it is his expert opinion to a reasonable degree of medical probability that the numerous breaches of the standard of care committed by Defendants, as more fully set forth in the Statement of Facts, supra, damaged Mrs. Sohm's eyes and are responsible for the loss of vision she sustained. (Rec. 332-33, 387-88, 397-98 and misnumbered 428-30) (Rec. 428-430–misnumbered) There is nothing equivocal about

page 21, attached as Exhibit C) To require this level of proof would be manifestly unjust and would set an "unholy precedent." Id.

this statement or Dr. Stein's opinion that Defendants' negligent care resulted in injury and damage to Mrs. Sohm. Id. The extent of the damage Mrs. Sohm experienced as a result of the Defendants' negligence is best articulated by her in her vivid description of the changes she experienced in her vision (set forth in detail in the Statement of Facts, paragraph 52, above), following the surgery performed by Defendant Snow in May, 2001 and during the ensuing months as Defendants repeatedly failed to address her concerns or bring her pressures under control. The changes and damages described by Mrs. Sohm speak directly to the loss of vision Dr. Stein attributes to Defendants' negligent care.⁵

In spite of Dr. Stein's unequivocal opinions with respect to the damage caused by the Defendants' negligence, the trial court found as follows:

On the issue of damages, however, Dr. Stein entirely fails to identify or establish what damage was caused by Defendants' alleged negligence. While the parties all attempted in various ways to have Dr. Stein explain what damage may have occurred due to the Defendants' alleged negligence, he failed to do so. Dr. Stein could not identify any damage—by type, extent or nature—that a jury could use as a basis of an award for damages. Dr. Stein was unable to make even vague assertions to a reasonable medical probability. If Dr. Stein cannot measure, describe, compare, quantify, identify, isolate, gauge, estimate, apportion or delimit the damages which may have been caused by Defendants' alleged negligence, no jury can be expected to do so without engaging in rank speculation.

(See: Order, paragraph 3, attached as Exhibit B)

⁵See also: Opinion of treating Physician, Dr. Cotter, who has given the opinion that Mrs. Sohm's "markedly elevated intraocular pressures caused Mrs. Sohm to develop atrophy of the neuroretinal rim which is contributing to the visual field deterioration." (Rec. 344, 389-91)

Plaintiff asserts that the trial court's criticisms of Dr. Stein's opinions, as set forth in the trial court's Order quoted above, are inapplicable to the testimony he has given with respect to the damages caused by the defendants' negligence and pertain only to Dr. Stein's inability to predict, with certainty, what Mrs. Sohm's condition would be in the absence of the defendants' negligence. This assertion is borne out upon a review of the specific statements made by Dr. Stein with which the defendants and the trial court have taken issue.

For example, Defendants asked Dr. Stein if he could testify with respect to "what [Mrs. Sohm's] particular level of eye vision would be at this point" if she had not been subjected to the negligent treatment of Defendants. In response thereto, Dr. Stein answered "No." Defendants did not ask Dr. Stein, however, if he had an opinion with respect to whether her vision would be better if the negligence had not occurred. Instead Defendants wanted Dr. Stein to commit himself to testimony regarding a "particular level of eye vision." While Dr. Stein could not predict the particular level of vision Plaintiff would have today if she had not been subjected to negligent care, he has testified that it is his expert opinion, to a reasonable degree of medical probability, that Plaintiff's vision would most certainly be better than it is today if she had not been subjected to Defendants' negligent care. (Rec. 332, 397 and misnumbered 429)

Dr. Stein has also testified that while it is "hard to estimate how much, [sic] she certainly with aggressive treatment might not have had any field loss at all." (Rec 333,

379, 397 and misnumbered 429) Defendants and the trial court take issue with this opinion because when Defendants asked Dr. Stein if he could verify that to a reasonable degree of medical probability, he testified that he “can’t really do that.” (Rec. 332, 380, 397 and misnumbered 429) With regard to this statement, it is important to note that Utah law does not **require** Dr. Stein to verify to a reasonable degree of medical probability that Plaintiff’s glaucoma would not have progressed in the absence of negligence. Rather, Plaintiff is only required to offer expert testimony to a reasonable degree of medical probability that the defendants’ negligence caused Plaintiff to sustain injury and/or damage. Dr. Stein has so opined during his deposition, and by Affidavit as well, and Plaintiff has satisfied her burden in this regard. See, Relevant Excerpts of Dr. Stein’s Deposition (Rec. 366-388) and Affidavit of Robert M. Stein, M.D. (Rec. 424-430-misnumbered).

Again, Plaintiff’s burden of proof does not require her to produce expert testimony with respect to what the status of a chronic medical condition would be in the absence of the Defendants’ negligence and/or to verify to a reasonable degree of medical probability that the pre-existing condition would not have worsened at all. Accordingly, the equivocal nature of the two statements made by Dr. Stein during his deposition, as discussed above, is irrelevant and does not provide a valid basis for the granting of summary judgment.

Defendants' final criticism of Dr. Stein's testimony is his unwillingness to quantify the "percentage or proportion" of the damage that was caused as a result of the Defendants' breaches of care. During his deposition, counsel asked Dr. Stein to testify with respect to "percentages" in relation to how much better Mrs. Sohm's vision would be today if she had not been subjected to negligent care as well as "percentages" in relation to how much of the damage to her eyes was caused by the Defendants' negligence. In response thereto, Dr. Stein has testified that he cannot, nor could any intellectually honest physician, testify to a reasonable degree of medical probability with respect to "percentages" of damage caused by the Defendants' negligence or that would have existed, if any, in the absence of negligence. (Rec. 331, 396-97 and misnumbered 428-29)

On the other hand, Dr. Stein did testify in response to this line of questioning that "there's a much greater likelihood that [Mrs. Sohm] would not have suffered these visual field losses to this degree had there been intervention." (Rec. 331, 379, 397 and misnumbered 429) He further testified that in the absence of negligence, her vision could have been "dramatically better" (Rec. 332, 379, 397 and misnumbered 429) and with aggressive treatment, she might not have sustained "any" loss of visual field at all (Rec. 332, 379, 397 and misnumbered 428). Utah law does not require Plaintiff's expert to quantify the "percentage or proportion" of the damage caused by the Defendants' negligence. Apportionment of liability, if there is any in this case, is within the exclusive

province of the jury. It is not required of experts, and it is not a valid basis to grant summary judgment in this matter. Based upon the foregoing, it is clear that Dr. Stein's opinions are sufficient to establish the damages element of Plaintiff's negligence claim. Accordingly, the trial court's order granting summary judgment on this issue should be reversed.

As set forth in the preceding section of Plaintiff's argument, the Plaintiff's claim is not dependent upon her ability to apportion her damages between her pre-existing condition of glaucoma and the damage caused by the Defendants' negligent care. In fact, if the jury is unable to apportion Mrs. Sohm's damages between the negligence of the Defendants and her preexisting glaucoma, the jury is required by law to hold the defendants legally responsible for the entire damage. See, Tingey v. Christensen, 987 P.2d 588 (Utah 1999). Accordingly, the trial court erred in finding the testimony of Plaintiff's expert to be insufficient to withstand summary judgment, and the Order granting summary judgment in favor the defendants should be reversed.

D. The Affidavit of Dr. Stein Does Not Contradict His Deposition Testimony and Should Not be Excluded Under Webster v. Sill.

The trial court's conclusion that the affidavit of Dr. Stein contradicts his deposition testimony and cannot therefore be used to create a genuine issue of fact is in error. Specifically, the trial court is critical of Dr. Stein's statement in his affidavit that in the absence of the Defendants' negligence, Mrs. Sohm's vision would be significantly better today. (Rec. 429--misnumbered) During the taking of Dr. Stein's deposition, defense

counsel did not ask if Mrs. Sohm's vision would, in general, be better or worse in the absence of the defendants' negligence. Instead, defense counsel insisted that Dr. Stein testify as to the "particular level" of vision that Plaintiff would have in the absence of negligence. Notwithstanding Dr. Stein's inability to testify as to a "particular level" of vision in the absence of negligence, he has testified to the following:

(1) It is my opinion, **to a reasonable degree of medical probability, that in the absence of the Defendants' negligence Mrs. Sohm's vision would be significantly better than it is today.** (A question that was not asked during his deposition) (Rec. 332, 397 and misnumbered 429); and

(2) In my opinion, and to a reasonable degree of medical probability, **the Defendants' many instances of negligent treatment and breaches of the standard of care resulted in a direct consequence to the health and condition of Mrs. Sohm's eyes and caused her to sustain both a significant and a permanent loss of vision that she would not have otherwise sustained in the absence of their negligence.** (Rec 333, 398 and misnumbered 430).

Neither of these statements contradicts anything Dr. Stein testified to during his deposition and should be allowed to stand.

E. The Trial Court Erred in Granting Summary Judgment On the Issue of Damages.

In the present case, the defendants moved for summary judgment on the grounds that Plaintiff failed to establish a causal connection between the defendants' breaches of

the standard of care and her injuries and damages. Ruling against the defendants on the sole issue raised in their Motion, the trial court stated “[o]n the proximate cause element, I find sufficient testimony in the deposition of Dr. Stein for Plaintiff to avoid summary judgment.” See: Ruling, page 2, attached as Exhibit A; and Order, page 2, attached as Exhibit B. Notwithstanding the trial court’s conclusion that Plaintiff met her burden on the sole issue raised and challenged by Defendants in their Motion for Summary Judgment, the trial court granted summary judgment in favor of Defendants on the altogether separate issue of damages, finding that “Plaintiff has failed to provide any expert testimony which would allow a jury to understand all of the possible causes of Plaintiff’s vision loss and then to reach a just verdict as to the damage which was caused by Defendants’ negligence.” Ruling, page 4, attached as Exhibit A. The trial court further concluded that “it is not sufficient for Plaintiff to simply provide expert evidence that negligence proximately caused damage.” Ruling, page 4 and Order, Page 2, attached as Exhibits A and B respectively.

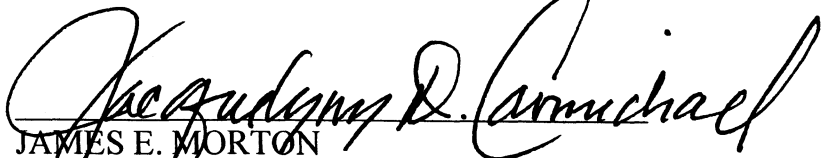
Plaintiff asserts that the trial court erred in granting summary judgment on grounds that were neither raised in the Defendants’ moving papers nor argued at the hearing on Defendants’ Motion. Inasmuch as the Defendants’ Motion for Summary Judgment was brought on the issue of causation only, and the trial court found that Plaintiff had met her burden with respect to causation, Defendants’ Motion for Summary Judgment should have been denied.

IX. CONCLUSION

Based upon the foregoing, Plaintiff respectfully asserts that the standards required for summary judgment have not been met; that the trial court erred in the burden of proof it required of Plaintiff with respect to the damages element of her negligence claim; that the trial court erred in concluding that the testimony of Plaintiff's expert witness, Robert M. Stein, M.D., was insufficient to establish Plaintiff's damage claim; and that the trial court erred in granting summary judgment in favor of the defendants. Plaintiff has presented sufficient evidence of her damages to survive summary judgment and, at a minimum, when the evidence is construed in a light most favorable to the Plaintiff, there are material issues of fact that preclude the entry of summary judgment in this matter. Accordingly, Plaintiff hereby requests that the trial court's Order granting Summary Judgment in favor of Defendants be reversed.

DATED this 6th day of September, 2006.

EISENBERG, GILCHRIST & MORTON



JAMES E. MORTON

JACQUELYNN D. CARMICHAEL

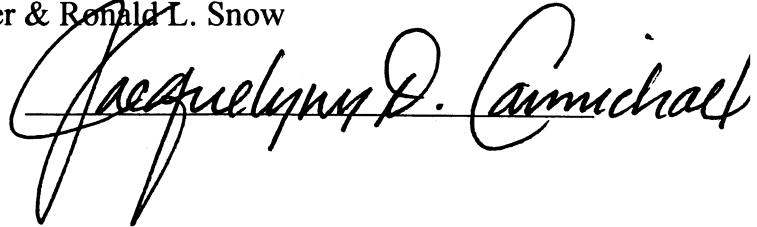
Attorneys for Plaintiff/Appellant Kathryn Sohm

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2006, I caused two true and correct copies of the foregoing Brief of Appellant to be served, by hand-delivery, upon the following:

Stephen W. Owens
Epperson & Rencher
Attorney for Appellee Jeffrey R. Ricks, O.D.
10 West 100 South, Suite 500
Salt Lake City, Utah

Christian W. Nelson, Esq.
Richards, Brandt, Miller & Nelson
Attorney for Appellees Dixie Eye Center & Ronald L. Snow
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Salt Lake City, Utah 84110

A handwritten signature in black ink, reading "Jacquelyn D. Carmichael". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

X. ADDENDUM

Ruling on Defendants' Motion for Summary Judgment

Attached as Exhibit A

Order on Defendants' Motion for Summary Judgment

Attached as Exhibit B

Transcript of Oral Argument on Defendants' Motion
For Summary Judgment

Attached as Exhibit C

Tab A

FILED
FIFTH DISTRICT COURT
2006 JAN 24 PM 3:19
WASHINGTON COUNTY

IN THE FIFTH DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

KATHRYN SOHM,

Plaintiff,

RULING ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

vs.

DIXIE EYE CENTER, et al.,

Defendants.

Civil No. 030501946
Judge G. Rand Beacham

This matter came before me pursuant to "Defendants' Motion for Summary Judgment." The parties filed their respective memoranda and supporting materials, and I heard oral arguments. I have now studied the memoranda, affidavits, excerpts from deposition transcripts and other materials, and I have considered the legal authorities cited by the parties. Having fully considered the matter, and lacking time to write more, I have decided to grant Defendants' Motion with this brief explanation.

Defendants assert that Plaintiff's medical expert "does not and cannot establish the element of causative damages and was unable to state, within a reasonable degree of medical probability, what level of vision Plaintiff would have had if Defendants had complied with what he believes to be the standard of care." *Defendants' Motion for Summary Judgment*, p. 2. This involves two elements of Plaintiff's negligence claim, proximate cause and damages. I have had some difficulty ascertaining the precise facts and issues regarding these issues, because of (a) the parties' efforts to "spin" statements made by expert witnesses and (b) some excessive involvement with irrelevancies such as the element of breach of the standard of care. Most of the parties' effort is spent on the

proximate cause issue, but I find the damages issue to be dispositive.

On the proximate cause element, I find sufficient testimony in the deposition of Dr. Stein for Plaintiff to avoid summary judgment. Dr. Stein did testify, in response to a leading question, that he could conclude, to a reasonable medical probability, that Defendants' alleged breaches of the standard of care in fact caused damage to Plaintiff's vision. *Deposition of Stein*, p. 117, l. 23 to p. 118, l. 2. Dr. Stein's affidavit is, to this extent, consistent with his deposition testimony: "I can unequivocally testify to a reasonable degree of medical probability . . . that the negligence of the Defendants damaged Mrs. Sohm's eyes and caused her to sustain a loss of vision." *Affidavit of Stein*, ¶ 21. I agree with Defendants that some of Dr. Stein's other statements are equivocal and uncertain and, without more, would be insufficient to satisfy Plaintiff's burden to avoid summary judgment. In the entire context of Dr. Stein's testimony, however, I find a sufficient issue regarding proximate cause to prevent summary judgment.

On the issue of damages, however, Dr. Stein's testimony entirely fails to identify or establish what damage was caused by Defendants' alleged negligence. Much of the argument on this issue relates to the nature of Defendants's questions as to "percentages" or "proportion" of damages caused by Defendants' negligence, to which Plaintiff heartily objects, as in the Stein affidavit: "I cannot, nor could any intellectually honest physician, testify to a reasonable degree of medical probability with respect to 'percentages' of damage caused by the Defendants' negligence" *Affidavit of Stein*, ¶ 15.

While that statement may or may not be correct, Plaintiff's problem is that, without some expert to identify the damage caused by Defendants' alleged negligence, a jury would be left with

nothing but speculation as a basis for any damages award. Dr. Stein agreed that there were several other possible or probable causes which may have contributed to Plaintiff's vision loss, but he was unable or unwilling to opine as to their relative causal effects. This is not to suggest that Plaintiff's expert must directly answer a question about "percentages," but Plaintiff must produce some expert who is willing to tell the jury what damage was caused by Defendants.

On this issue, Dr. Stein himself was speculating. He was adamant that some damage was caused by Defendants, but he never identified any damage—by type, extent, or nature—that a jury could use as the basis of an award. His most direct testimony on the subject was that, but for Defendants' negligence, Plaintiff's vision "could have been dramatically better," that "with aggressive treatment [Plaintiff] might not have had any field loss at all," and other such conjectural statements. Ultimately, Dr. Stein was unable to make even such vague assertions to a reasonable degree of medical probability. *Deposition of Stein*, p. 74, l. 13 to p. 75, l. 6 (emphasis added).

Even in the "last-ditch" effort of his affidavit, he only added: "I can testify to a reasonable degree of medical probability that in the absence of the Defendants' negligence, Mrs. Sohm's vision would be significantly better than it is today." *Affidavit of Stein*, ¶ 20. This, too, fails to raise a genuine issue of fact or of law. First, this affidavit statement is somewhat contrary to Dr. Stein's deposition testimony that he could not opine as to what Plaintiff's vision would now be even if she had been treated according to his opinion of competent care, and a genuine issue cannot be created by filing an affidavit in contradiction to a witness's prior testimony. *Webster v. Sill*, 675 P.2d 1170 (Utah 1983). Second, what Dr. Stein stated in his affidavit with regard to Defendants' negligence could be stated with similar certainty with regard to each of the other possible causes of Plaintiff's

vision loss, such as the glaucoma itself, Plaintiff's advanced age, and Plaintiff's occasional noncompliance with Defendants' recommendations.

CONCLUSION

It is not sufficient for Plaintiff simply to provide expert evidence that negligence proximately caused damage. Plaintiff must also provide expert evidence as to what damage was proximately caused.

Plaintiff has failed to provide any expert testimony which would allow a jury to understand all of the possible causes of Plaintiff's vision loss and then to reach a just verdict as to the damage which was caused by Defendants' negligence. If Dr. Stein cannot measure, describe, compare, quantify, identify, isolate, gauge, estimate, apportion or delimit the damages which may have been proximately caused by Defendants' negligence, no jury can be expected to do so without indulging in rank speculation. There is no genuine issue of material fact on this point, and Defendants are entitled to judgment as a matter of law.

Accordingly, Defendants' Motion for Summary Judgment is hereby granted. Defendants' counsel should submit an appropriate judgment.

Dated this 23 day of January, 2006.


JUDGE G. RAND BEACHAM

STATE OF UTAH }
COUNTY OF WASHINGTON } :SS

"I certify that this document or record, is a full true, and correct copy of the original, on file in this office."

Date February 8, 2006

By June B. Smith
Deputy Court Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 25 day of Jan, 2006, I provided true and correct copies of the foregoing RULING to each of the attorneys/parties named below by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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DEPUTY CLERK OF COURT

Tab B

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FEB 21 2006
FIFTH DISTRICT COURT
WASHINGTON COUNTY

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IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

KATHRYN SOHM,

Plaintiff,

vs.

DIXIE EYE CENTER, RONALD L. SNOW,
M.D. and JEFFREY R. RICKS, O.D.,

Defendants.

**ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

Case No. 030501946
Judge G. Rand Beacham

On January 24, 2006, Defendants' Motion for Summary Judgment came before the Court. Plaintiff was represented by her counsel of record, James E. Morton. Defendant Dr. Jeffrey R. Ricks was represented by his counsel of record, Stephen W. Owens. Dr. Ronald L. Snow and Dixie Eye Center were represented by their counsel of record, Christian W. Nelson. Having reviewed the matter at issue, including Defendants' Motion and related memoranda, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Defendants'

Reply Brief in Support of their Motion for Summary Judgment, and after oral argument presented by the parties, the Court hereby finds as follows:

1. In order to present a prima facie cause of action of medical negligence, expert testimony regarding the issue of proximate cause and damages is necessary. It is not sufficient for Plaintiff to simply provide expert evidence that negligence proximately caused damage. Plaintiff must also provide expert evidence as to what damage was proximately caused by the alleged negligence.

2. Plaintiff has presented expert testimony through Dr. Robert Stein on issues of both proximate causation and damages. Concerning proximate cause, Dr. Stein has presented sufficient testimony to support Plaintiff's claims to survive Defendants' Motion for Summary Judgment.

3. On the issue of damages, however, Dr. Stein entirely fails to identify or establish what damage was caused by Defendants' alleged negligence. While the parties all attempted in various ways to have Dr. Stein explain what damage may have occurred due to Defendants' alleged negligence, he failed to do so. Dr. Stein could not identify any damage - by type, extent, or nature-that a jury could use as a basis of an award for damages. Dr. Stein was unable to make even vague assertions to a reasonable medical probability. If Dr. Stein cannot measure, describe, compare, quantify, identify, isolate, gauge, estimate, apportion or delimit the damages which may have been caused Defendants' alleged negligence, no jury can be expected to do so without

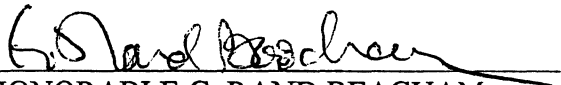
indulging in rank speculation. Furthermore, Plaintiff has no expert witness other than Dr. Stein to identify the damage caused by Defendants' alleged negligence.

4. Plaintiff attempted to bolster Dr. Stein's testimony by submitting an affidavit wherein Dr. Stein testifies that absent Defendants' acts or omissions, Plaintiff's vision would be significantly better today. However, Dr. Stein's affidavit is somewhat contradictory to his deposition testimony wherein he stated that he could not opine as to what Plaintiff's vision would be without the alleged negligent acts or omissions of Defendants. Consistent with Webster v. Sill, 675 P.2d 1170 (Utah 1983), the Court finds that a genuine issue of fact cannot be created by filing an affidavit in contradiction of a witnesses' prior testimony. Moreover, statements by Dr. Stein regarding Defendants' alleged negligence could be made with similar certainty about each of the other possible or probable causes of Plaintiff's vision loss, which include the progressive nature of glaucoma, plaintiff's advanced age and plaintiff's non-compliance among other things.

ACCORDINGLY, the Court grants Defendants' Motion for Summary Judgment with prejudice and on the merits.

Dated this 21 day of Feb., 2006.

BY THE COURT:


HONORABLE G. RAND BEACHAM
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order On Defendants' Motion For Summary Judgement was mailed, first-class, postage prepaid, on this _____ day of _____, 2006 to the following:

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Tab C

IN THE FIFTH JUDICIAL DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH

KATHRYN SOHM,

Plaintiff,

vs.

DIXIE EYE CENTER, et al,

Defendants.

Case No. 030501976

ORIGINAL

Hearing
Electronically Recorded on
November 23, 2005

BEFORE: THE HONORABLE G. RAND BEACHAM
Third District Court Judge

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UTAH APPELLATE COURTS

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P R O C E E D I N G S

(Electronically recorded on November 23, 2005)

(Court already in session when recorder was turned on)

THE COURT: (Inaudible) Sohm vs. Dixie Eye Center and others. It's file 030501946. We have Counsel here. Who represents whom?

MR. MORTON: James Morton for plaintiff, your Honor.

THE COURT: Okay.

MR. NELSON: Chris Nelson for Dr. Snow.

MR. OWENS: Stephen Owens for Dr. Ricks.

THE COURT: All right. We have your names on the calendar; everyone is here. I appreciate getting the courtesy copies. I've reviewed those. So I guess we will start with the defendant's argument.

MR. NELSON: Thank you, your Honor. Again, my name is Chris Nelson. I represent Dr. Snow. By way of background, your Honor, Ms. Sohm, the plaintiff in this matter, is 85-years-old. She suffers from glaucoma. She was diagnosed with glaucoma 40 years ago -- over 40 years ago in 1963. She began taking glaucoma medications 25 years ago in 1980.

Glaucoma, your Honor, is a progressive disease of a person's eyes, and there are different types of glaucoma. Glaucoma is the second leading cause of blindness in the world. Vision loss or impairment due to glaucoma is characteristically associated with a cupping of the neural retinal rim. I'm not

1 sure I completely understand that, your Honor, but as the doctors
2 have described this, that cupping or excavation can extend -- and
3 usually does extend to the rim of the retina. When you see that,
4 there's usually associated vision loss.

5 Glaucoma is also associated with higher than normal
6 intraocular pressures of the eye, and those pressures can be
7 relieved sometimes; sometimes they can't be. The pressure --
8 there's some debate whether or not that pressure is caused by
9 the glaucoma, or whether the glaucoma causes the pressure. A
10 doctor's ability to control those pressures, your Honor, depends
11 on the type of glaucoma that the patient is suffering from, the
12 person's medical history, whether they're compliant with taking
13 medications and seeing the doctor, and the progression of the
14 disease itself.

15 Ms. Sohm had been undergoing treatment for several
16 years before she came to see Dr. Snow and Dr. Ricks. They began
17 treating her in 1995, and they continued treatment until 2001.
18 In 2003 Ms. Sohm brought this action against both Dr. Ricks and
19 Dr. Snow for medical negligence.

20 The basis of the motion generally, your Honor, that
21 was filed by the defendants is that Ms. Sohm has not been able
22 and cannot establish a causal relationship between her injury,
23 and that's her vision to -- or impairment to her vision, and the
24 care that either was or was not provided based on the allegations
25 that Ms. Sohm has made by Dr. Snow and Dr. Ricks.

1 There's some question after reading the memoranda
2 that we received from Ms. Sohm's Counsel as to whether or not the
3 defendants can even pursue that -- this type of a motion. Again,
4 it's based on lack of causation between the injury and the care
5 in question.

6 In our opening briefs, your Honor, we cited several
7 cases that number one, state that in order to establish a
8 prima facie case or cause of action of negligence for medical
9 malpractice the plaintiff has the burden to establish this causal
10 relationship between the injury and a breach of the standard of
11 care. In medical malpractice cases that has to be established by
12 expert testimony or evidence because it's beyond the experience
13 of the jury. If the plaintiff can't meet this burden then
14 dismissal of the cause of action is appropriate.

15 Two weeks ago, your Honor -- if I could approach. I've
16 got a copy of a case that just came down.

17 THE COURT: Okay.

18 MR. NELSON: Your Honor, this just was issued less
19 than two weeks ago. It's a case that addresses causation, and
20 it's -- was addressed by the Utah Court of Appeals. It's the
21 Tri -- excuse me -- Tri Salt (phonetic) case. In that case the
22 plaintiffs opened a movie theater in Utah County, and they
23 retained the defendant -- it's a financial company -- to help in
24 providing consultation and financing for that movie theater.

25 Later another movie theater was opened by another

1 company and the same services by the same defendant company
2 were retained. The plaintiffs allege that as a result of the
3 defendant's help, the second theater took away people that went
4 to movies from the first theater, and they experienced a loss in
5 their profit. The case was dismissed on summary judgment by the
6 trial Court based on a lack of causation argument like we're
7 making here today, your Honor.

8 The argument that the plaintiff had made in that case
9 was that as soon as the second movie theater opened the first
10 theater began to experience this loss in profits. There was some
11 question about whether they could prove an actual relationship
12 between those loss of profits as something the defendant did.

13 On page 6 of the opinion the Court talks about the
14 causal element of a negligence cause of action. Down a couple
15 of lines there it says, "Utah Courts have held that summary
16 judgment on the issue of causation is appropriate,
17 notwithstanding the general rule that causation is a jury
18 question, when the plaintiff cannot show that a jury could
19 conclude without speculation that the injury would not have
20 occurred but for the defendant's breach." That's exactly what
21 we're talking about in this motion, your Honor, before the Court.

22 In that case the Court went on to say that, "Because of
23 the issues therein -- financial issues -- expert testimony was
24 required to establish this causal link." That's the same as this
25 medical malpractice case. So I think based on the ruling -- not

1 just this ruling, your Honor, but prior rulings by the appellate
2 courts in Utah, this is the type of motion that can be addressed
3 by summary judgment.

4 MR. MORTON: Your Honor, if I could interrupt for just
5 a moment, and I don't mean to be impolite. I'm -- it's very
6 difficult to argue about a case that you haven't seen until it
7 was handed to you (inaudible). I haven't read the case. I don't
8 confess to have discovered it before now, but I would have
9 appreciated a copy of it before just now. I thumbing through it
10 and I'm trying to read it, but I'm not sure it's comparing apples
11 with apples.

12 THE COURT: Yeah.

13 MR. MORTON: And (inaudible).

14 MR. NELSON: Your Honor, and I appreciate that. I don't
15 like to be handed a case on the day of the hearing, either. The
16 only reason I knew about this case is my office was involved, and
17 like I say, it came down less than two weeks ago. It's not
18 different, though, than the cases we cited in our brief.

19 THE COURT: Uh-huh.

20 MR. NELSON: The law is not unique to this case, and so
21 it's not unusual; but there are similarities with this case. So
22 I understand what Counsel is saying, but it's not a different
23 situation than the cases we've cited in our opening brief.

24 Okay. Turning to the facts, then, of this case, your
25 Honor, we have deposed three, I believe -- at least two of

1 Ms. Sohm's treating physicians outside of Dr. Ricks and Dr. Snow.
2 Ms. Sohm has retained an expert witness. The defendants have
3 retained their own expert witnesses. We have all that testimony
4 now and evidence, and now it's time to decide whether Ms. Sohm
5 can reach that causal link and establish that causal link between
6 her injury and conduct of the defendants.

7 One of the doctors that was deposed is a Dr. Cotter,
8 treating doctor of Ms. Sohm. Recall, your Honor, that vision
9 loss can be caused by things beyond just glaucoma, and there's
10 some question about whether glaucoma is the cause in Ms. Sohm's
11 case of her vision loss. Dr. Cotter -- and I'll read this in a
12 second -- talked about the fact that maybe her vision loss is
13 due to ischemia of the optic nerve; in other words, death or
14 impairment to the optic nerve rather than glaucoma.

15 On pages 46 and 47 of his deposition -- and we've
16 attached this, your Honor, to our brief. A question was asked:

17 Q. Have you seen patients with some
18 eye conditions that Ms. Sohm is experiencing?

19 A. I've seen patients with glaucoma where
20 the vision -- visual field loss and is out of
21 proportion to the cupping.
22 That's what I talked about earlier in the neural retina
23 rim.

24 A. With that intraocular pressures, it
25 is fairly uncommon in my experience.

1 Q. What would cause that condition?

2 A. Well, part of what we need to explore --
3 you know, right after I got done operating with
4 Ms. Sohm she went away. One thing that can cause
5 that is somebody has an acute rapid rising of
6 intraocular pressure and sustained at that level,
7 that can actually cause ischemia to the nerve, and
8 in (inaudible) kill the nerve.

9 That's different than glaucoma, your Honor. Dr. Cotter
10 went on to explain that because he didn't know what was causing
11 her vision problems he thought that she ought to be evaluated by
12 another physician. On pages 16 and 17 of Dr. Cotter's deposition
13 he said -- again, talking about his inability to decide what was
14 causing the vision problems.

15 A. There, you know, this creates a bit of
16 a dilemma because as you may or may not be aware,
17 characteristically in glaucoma there is an evacuation
18 of the neural retinal rim, which is path --
19 I'm going to mispronounce this.

20 A. -- pathognomonic with glaucoma.

21 Q. Which you didn't find here?

22 A. Which I did not. I did not find an excess
23 here to match the visual field.

24 Q. All right.

25 A. In other words, the visual field loss

1 was out of proportion to the amount of excavation.

2 And he goes on to talk about this ischemia. So
3 Dr. Stephen Newman evaluated Ms. Sohm, and he talked about
4 these reasons for her vision loss as well. This doesn't even
5 have anything to do, your Honor, with the care provided by the
6 defendants. It's trying to understand and explain why she's
7 having these vision problems and whether or not it's even
8 glaucoma.

9 In his report Dr. Newman said -- this is -- I believe
10 this is attached to our brief. If not, his testimony, which I'll
11 read in a minute, is regarding this issue. "There is no question
12 that she has optic neuropathies in both eyes, right worse than
13 left; presumably related at least in part to glaucomatous
14 damage." Presumably.

15 "She has a long history of elevated intraocular
16 pressures, some increase in cupping, an arcuate visual fields
17 with construction, all of which are compatible with glaucoma. The
18 preserved central acuity OS," -- that refers to, I believe, the
19 right eye -- "is most compatible with glaucomatous etiology, as
20 is the history of preserved central acuity with the other eye,
21 (inaudible) glaucomatous damage that is even more advanced."

22 Then he says, "The hooker is the relative lack of
23 cupping and possible diffused nerve fiber bundle dropout in one
24 of the eyes. I can't rule out some other cause of optic nerve
25 pathology, but I'd be quite surprised if anything else turned

1 up." So again, Dr. Newman is not really sure what's causing
2 her vision problems. He think it's glaucoma, but he can't be
3 certain.

4 He goes on later in his deposition, your Honor, to
5 explain that he thinks that it probably is glaucoma, but he also
6 recommended a study to evaluate that, and that study was never
7 done to my knowledge.

8 So that's the first issue, whether or not glaucoma is
9 even causing these problems. That's what she was treating with
10 Dr. Snow and Dr. Ricks for. Assuming, your Honor, that glaucoma
11 is the cause of Ms. Sohm's vision problems, Dr. Newman -- again,
12 one of her treating doctors -- on pages 54 and 55 of his
13 deposition -- this is attached to our briefs, your Honor --
14 was asked this question.

15 Q. I take it you've seen patients like
16 Ms. Sohm have received excellent care along the
17 way and --

18 A. Yes.

19 Q. -- are still in her position.

20 A. Absolutely. I have plenty of patients
21 like her that have lost vision in one eye from
22 glaucoma. Whether that's because they don't take
23 their medicines or don't follow directions, whether
24 it happens -- or whether it happens even if they
25 take medicines and follow directions.

1 He went on to say, your Honor, that even with the best
2 of care she may still be in the same condition that she's in
3 today with her vision.

4 Dr. Styne, who is the expert that was retained by the
5 plaintiff, Ms. Sohm, in the case was asked similar questions. On
6 page 30 -- and we've cited all these references, your Honor, in
7 our brief, but on page 30 of his deposition he was asked:

8 Q. Would you agree generally, Doctor, that
9 this loss of vision in a case like Ms. Sohm's can
10 occur even with the best of care?

11 His answer:

12 A. Yes.

13 This is Ms. Sohm's expert. Later this exchange took
14 place.

15 Q. Do you agree that even if Ms. Sohm
16 had been treated as you believe she should have
17 been treated we can't say what her particular
18 level of vision would be at this point?

19 A. No.

20 Q. Is that correct?

21 A. That's correct.

22 Q. Do you have an opinion, for instance,
23 that if she had been treated like you believe she
24 should have been treated she would have had a 20
25 percent better vision than she does today? Or do

1 you have any -- or do you have no opinion on
2 those issues?

3 There is an objection by me, your Honor, that it
4 required speculation. The answer was:

5 A. There is a much greater likelihood
6 that she would not have suffered these visual field
7 losses to this degree had there been intervention.

8 Q. It's too this degree that I'm trying to
9 figure out. Do you have an opinion that the degree
10 of her eye loss, had she been treated appropriately,
11 would have been a certain percentage better or any
12 comment on that or not?

13 A. I believe in this day and age it could
14 have been dramatically better.

15 Q. Can you put that in terms of any kind of
16 scale you want to put it into?

17 A. It's hard to estimate how much, but
18 she certainly with aggressive treatment might not
19 have had any visual field loss at all. She could
20 have had varying degrees of visual field loss. It
21 could have extended to a situation where she
22 essentially had no loss of visual field.

23 Q. Can you state that with any specificity
24 to a reasonable degree of medical probability?

25 A. I really can't do that.

1 You can see from those questions we were trying to
2 get some kind of a quantification or some kind of an evaluation
3 of how much visual field loss, if any, was related to the
4 defendant's care or the allegations of the breaches of the
5 standard of care. Dr. Styne, Ms. Sohm's own expert, couldn't do
6 that. Whether in any kind of a range, by percentages, he just
7 wasn't able to do that.

8 Finally, on page 119 of his testimony a question was
9 asked:

10 Q. Well, she sustained some damage to her
11 eyes from the time she started treating with these
12 doctors. We've established that. The percentage
13 and proportion of the damage that was caused as a
14 result of the breaches of care that you articulated,
15 you are unable to quantify; is that fair?

16 A. That's correct.

17 This is similar to the Tri Salt case that I referred to
18 earlier where the movie theater opened and the profits began to
19 drop after that. The timing was there, but there was no causal
20 link established by experts. That's what we have in this case by
21 plaintiff's own expert.

22 THE COURT: Well, the plaintiff tries to make the
23 distinction that in the one instance you're talking about whether
24 there is a causal relationship, and the other instance you're
25 talking about whether you can put a specific number or percentage

1 on it.

2 MR. NELSON: Right, and I recall those arguments, your
3 Honor. As you can see from those questions of Dr. Styne, the
4 first question that was asked was could he establish any causal
5 link, and finally, the concluding question on page 119 that I
6 just read asks that same question. He wasn't able to do that.

7 To further help him refine that, we said, "Well, help us
8 either by percentage or by any range you want to give us. Help
9 articulate, if you can, what degree of harm or injury was caused
10 by the defendant's care." So the question was asked to help
11 refine that, but he still couldn't do it. So I think both
12 questions were asked.

13 In addition to that -- and I understand that argument
14 that's been made, your Honor. In the responsive pleading that
15 Ms. Sohm filed, there's 28 pages of factual statements given;
16 it's quite lengthy. Of that 28 pages I counted only 13 paragraphs
17 that relate to the causal allegations that we've raised in our
18 motion for summary judgment. The other paragraphs -- several
19 pages -- have to do with Ms. Sohm's medical history and
20 allegations as to the breach of standard of care. That's a
21 different element. That's not the element that we're talking
22 about in our negligence in our cause of action.

23 The paragraphs that do talk about the causal element are
24 paragraphs 4(c), 7(k), 7(l), paragraph 11 and then paragraphs 13
25 through 21. Paragraph 4(c) states this: "Dr. Newman testified

1 to a reasonable degree of medical probability that Ms. Sohm's
2 optic neuropathy is the result of her glaucoma, and not any other
3 medical condition or disease."

4 Again, there's some debate about that, but that doesn't
5 tell us anything about the care of the defendants. That talks
6 about the disease and what's caused from the disease, glaucoma,
7 which she already had before the she saw the defendants.

8 The other paragraphs, your Honor, that I referenced that
9 do relate to the causal element of Ms. Sohm's negligence cause of
10 action arise because of Dr. Styne's affidavit that he submitted
11 after we filed our motion for summary judgment. We filed a reply
12 pleading, your Honor, addressing that; and I believe Utah law is
13 clear that you can't use an affidavit after a motion like this
14 has been filed to contradict a person's own deposition
15 testimony.

16 To the extent that Dr. Styne is doing that -- and I'm
17 not sure that he is doing that or trying to do that, but as you
18 read through his affidavit and compare that with his deposition
19 testimony, it appears that he's trying -- or Ms. Sohm is through
20 Dr. Styne trying to raise an issue of fact when I don't think
21 there was an issue by his deposition testimony on the causal
22 element of the case. So to the extent that there is a
23 contradiction, that can't be done under Utah law.

24 If the Court does choose to accept his affidavit -- by
25 the way, the copy I got is unsigned. I don't -- I've never

1 received a signed copy. It may be out there, but I've never
2 received a signed copy of Dr. Styne's affidavit.

3 THE COURT: I was going to ask if it was.

4 MR. MORTON: We did submit a notarized affidavit, and if
5 for some reason I didn't serve it, I apologize, but I --

6 MR. NELSON: I assumed it had been. I just --

7 MR. MORTON: It's identical to the unsigned one.

8 THE COURT: Right.

9 MR. NELSON: Thank you. To the extent your Honor is
10 willing to accept that affidavit, in the affidavit, again
11 Dr. Styne uses this language. "In the absence of negligence her
12 vision" -- Ms. Sohm's vision -- "could have been dramatically
13 better. It's hard to estimate" -- this is a quote -- "hard to
14 estimate how much better she would have been without -- with
15 aggressive treatment." Dr. Styne opined that, "It was possible
16 that with aggressive treatment Ms. Sohm may not have experienced
17 any loss of vision." So the affidavit includes that type of
18 language.

19 If Dr. Styne, your Honor, can't provide us any guidance
20 regarding the causal link between the injury and the care
21 provided by the defendants, he's a medically trained doctor --
22 specialist in this area, how can a jury, if this case is allowed
23 to go to the jury, make that decision? The jury is left to
24 speculate regarding this causal link, both as to whether or not
25 there is a causal link in the first place, and then the extent --

1 again, considering the preexisting nature of this disease that
2 Ms. Sohm had, the fact that it had -- it's progressive, the fact
3 that she sustained significant injury before she began treating
4 with Dr. Snow and Dr. Ricks, issues about compliance, non-
5 compliance, that kind of thing. That requires speculation under
6 the case law. The jury can't be allowed to speculate.

7 Finally, your Honor, I focused on the treating
8 doctor's testimony and with Dr. Styne, the plaintiff's expert,
9 but the defendants have their own experts. They've also said
10 that the determination of causation requires pure speculation.
11 Thank you, your Honor.

12 THE COURT: Thank you, Mr. Nelson.

13 MR. OWENS: I'll be brief, your Honor. Again, Steve
14 Owens for Dr. Jeffery Ricks who's an optometrist here in town who
15 actually only saw Ms. Sohm on two occasions.

16 There really is no dispute among the medical experts on
17 this fact that there can be no quantification of the damages that
18 are causally linked to this case. It's really not surprising why
19 because we're dealing with an 84-year-old person, and they've
20 testified that advanced age subjects are to more risk for loss of
21 eyesight. The nature of the disease, just glaucoma is a
22 progressive disease. She's had cataracts. She has diabetes,
23 which has implications for sight. She has high blood pressure,
24 which has high implications for sight. She has family history
25 issues for glaucoma. She has had 40 years of eyesight issues, 20

1 of which have been for glaucoma, and there are a number of other
2 conditions. She didn't go to certain appointments or didn't
3 follow up in a timely fashion.

4 She still has some vision in both eyes. In fact, she
5 has excellent vision in her left central vision. So not the
6 peripheral, but left central, and some vision in her right.
7 So it's not like we're dealing with a completely blind person.
8 So again, we're sort of what percentages of what percentage of
9 sight. She didn't have perfect vision when she came to see these
10 doctors.

11 These -- and then she's been to several doctors since
12 then. So when I went to Chicago with these gentlemen -- well,
13 with Chris and Jim's colleague, I was interested. He outlined
14 the breach stuff, and we'll let them assert that to the jury. I
15 was interested, and I think all the testimony that was read were
16 my specific questions. I wasn't trying to be tricky or anything.
17 I said, "Doctor, I need to know, what would she be seeing like if
18 she hadn't had these breaches of care that you're asserting?" He
19 said, "I can't say." I asked it every way possible that I knew
20 how. "You do it and give me a percentage or any scale that you
21 feel comfortable with." "I can't do it." "Can you say anything
22 within a reasonable degree of medical probability?" "I can't."

23 I wasn't trying to be tricky. I knew exactly what I was
24 trying to ask, and I think he understood it. He didn't say he
25 didn't understand it. He said, "No intellectually honest

1 physician could make that determination in this case." And on
2 that there is no dispute.

3 Now there is this effort -- and you should know, our
4 firm almost all does medical malpractice cases. I depose these
5 experts weekly almost, and I ask them the same question.
6 Sometimes they say, "Well, if that vascular surgeon hadn't have
7 messed up, more than likely than not this man wouldn't have lost
8 his leg." Or, "If that cancer had been found quicker, more
9 likely than not this man wouldn't have died." I mean I ask those
10 questions in every expert deposition I give. It's not a trick
11 question. I ask about the duty, breach, causation and damages.
12 That was the issue, and there was an effort, I think, in this
13 subsequent deposition to try to rehabilitate them. If you look
14 at the wording, he talks about --

15 THE COURT: You mean deposition or affidavit.

16 MR. OWENS: Excuse me, I do mean affidavit of Dr. Styne.
17 You know, there might have been none -- no loss. That doesn't
18 tell us anything, your Honor. It may have been better. That
19 doesn't tell us anything. Could have, might have, not to this
20 degree, but again -- and at one point he does say significant,
21 okay, so there's that term. What is significant loss? Is that
22 a one percent loss, or is that a 90 percent loss. What scale?
23 What does it even mean?

24 I think the affidavit needs to be looked at with the
25 deposition when he was being cross examined under oath in person

1 eyeball to eyeball. He said on multiple occasions he couldn't do
2 it. He can't tie that -- in a sense that engine -- railroad
3 engine to that caboose. He's trying to put that together, which
4 was all we were trying to get him to do.

5 Your Honor, a jury is not going to know. If these five
6 physicians, and I'm counting all our experts and these treaters
7 who can't put it together, who can't tie those two things
8 together, the breach and the damages, if they can't do it and
9 they've looked at every deposition, every affi -- and every
10 medical record, this jury of eight lay folks is going to say,
11 "What do we do? We don't know."

12 Even if they find all the damages, are they going to
13 base that on how much they like the witness? I don't know.
14 They're not going to do it on the science because the science
15 says no reasonable intellectual scientific evaluation can be
16 made of that. Trust me, these experts say it all the time.
17 It's not a unique question.

18 This idea -- it is clear from all the testimony this
19 vision can occur despite appropriate care. Someone in her
20 position who had great care can have her same vision. Your
21 Honor, this will be speculation to submit this to a jury, and I
22 think a jury is going to be confused as to what damages when each
23 of the experts is going to have to testify they don't know.

24 He'll say -- he may come in and say, "Well, not to this
25 degree," but what does that mean? We need to know, and without

1 it it's pure speculation. Thank you, your Honor.

2 THE COURT: Okay. Thank you, Mr. Owens.

3 MR. MORTON: Even though I had a very neatly organized
4 argument, your Honor, I think -- and I need to address some
5 things first. I believe the first item is this whole concept of
6 a standard where an expert is required to apportion with respect
7 to a person who has a chronic disease process what percentage of
8 harm is attributable to the negligence as opposed to the natural
9 disease process.

10 If that requires speculation, which I have something to
11 say about as well, then literally every person -- every plaintiff
12 in Mrs. Sohm's position, whether it be with glaucoma, diabetes or
13 any other condition that could worsen where someone could lose a
14 limb or someone could -- I mean diabetes is very common that
15 people start to suffer very grave consequences as time goes on.
16 Yet, you know, there are -- are we saying that they cannot be a
17 victim of medical malpractice because a doctor cannot say this is
18 attributable to the disease process and this is attributable to
19 the malpractice. So it sets an unwholly precedent because every
20 single person situated like that would be ineligible to prosecute
21 a medical malpractice case.

22 I think the one issue that would allow this to go to the
23 jury and allow the jury to deliberate on the contribution of the
24 malpractice as opposed to the natural progression of the disease
25 process is educating the jury with respect to the natural

1 progression of the disease process. Then you have to look at a
2 temporal issue. That temporal issue is this, that in the year
3 preceding this catastrophic loss of visual acuity -- and with
4 all due respect because I do have great respect for both of the
5 lawyers I'm dealing with here, but I have met and escorted
6 Kathryn Sohm who is functionally blind. She cannot see out of
7 her right eye.

8 When they talk about excellent central vision in the
9 left eye, she has no peripheral vision. She has a complete
10 inability to care for herself. She cannot cook. She cannot
11 clean. She cannot just do regular activities of daily living.
12 It's -- as Dr. Styne testified, she was permitted under the care
13 of Dr. Snow and Dr. Ricks to go for a year with extraordinary
14 high intraocular pressures, which he said literally puts someone
15 on the threshold of their eye almost exploding.

16 We even see comments in the medical record where alarm
17 is expressed by Dr. Snow, but he doesn't do anything about it.
18 He doesn't make any attempt to do anything other than continue
19 her on a medicine trial, which she's been on for a long time and
20 which has proven to be ineffective.

21 Then miraculously when she finally decides that she's
22 not getting any help, she goes to Virginia. Actually is treated
23 by Dr. -- first Dr. Tuck sees her and then she's referred to
24 Dr. Cotter, who is a nationally renowned glaucoma expert.

25 Dr. Cotter gets her in for an emergency surgery right

1 away, and this was done -- she has an immediate temporary
2 procedure done to drop her pressures, and then she's taken into
3 surgery. That's what should have happened.

4 The jury is going to be able to look at this compounding
5 of essentially tolerance of these extraordinarily high pressures
6 which every doctor in this case is going to have something to
7 say about. The -- and then that coupled with the fact that
8 she then -- a determination is made that because she also has
9 cataracts that Dr. Snow is going to do cataract surgery before
10 he does the surgery to address the glaucoma, which Dr. Styne
11 indicates was a horrible mistake. Then you have a catastrophic
12 loss of visual acuity.

13 Now if you're on a jury and you're following this time
14 line and let them say four years. There's been a discussion
15 about four years of glaucoma, 20 years of glaucoma. She's
16 followed by these doctors, I believe, seven years. Interestingly,
17 the last year she's followed she is -- I think one time may have
18 had pressures under 30, and 30 is considered a very high
19 pressure. As Dr. Styne put it, she was a time bomb. That time
20 bomb was ticking, and then ultimately you have this amazing
21 profound loss of visual acuity.

22 Counsel made reference to Dr. Newman and his deposition.
23 One of the things that gets discussed is even under the best of
24 care someone can lose visual acuity, and that can be attributable
25 to non-compliance of the patient or any number of things. This

1 is what -- and another thing that Mr. Nelson said was that
2 Dr. Newman could not rule out another disease process,
3 specifically an ischemic condition as opposed to glaucoma.

4 The way this worked in sequence is Dr. Newman was
5 actually Dr. Cotter's professor at the University of Virginia,
6 who is a highly specialized nationally renowned ophthalmologist.
7 He had referred, because of some unique findings with respect to
8 Mrs. Sohm, he had referred her to see Dr. Newman, and she did in
9 fact go see Dr. Newman.

10 When Dr. Newman was questioned in his deposition -- and
11 this page -- this is at Exhibit C on the opposition memorandum.
12 There's a question:

13 Q. You don't have any information to
14 indicate that Kathryn Sohm has not been compliant
15 in taking her --

16 A. Absolutely not.

17 MR. OWENS: Your answer again?

18 THE WITNESS: Absolutely not.

19 Q. Thank you. And I understand you can't
20 100 percent rule out some other cause of optic
21 nerve pathology, but can you tell me to a reasonable
22 degree of medical probability that it's more likely
23 than not that the etiology of her optic neuropathy
24 is in fact glaucoma?

25 A. Yes.

1 I -- you know, the problem is that this case is deemed
2 defended in sound bytes, and getting into the standard; questions
3 of negligence are frowned upon by the appellate court to be
4 disposed of on summary judgment, and in particular, questions of
5 causation.

6 With respect to the causation issue, it's generally
7 reserved for the jury, and if reasonable inferences can be drawn
8 from the evidence on the issue of causation, the matter then
9 needs to go to the fact finder. The standard is not -- there is
10 no standard imposed upon an expert witness to testify that this
11 percentage of the injury is the consequence of the malpractice;
12 this is attr -- the other percentage is attributable to something
13 else.

14 The only standard is is that there was a breach of the
15 standard of care that proximately caused an injury, and it's an
16 injury in fact. It doesn't have to be the entire injury. It
17 doesn't have to be -- a person can have a constellation of
18 injuries, but if in fact the doctor committed negligence and
19 it resulted in any injury -- and the record is replete with
20 statements from Dr. Styne and other treating physicians that in
21 fact this malpractice, this professional negligence, caused an
22 injury to Ms. Sohm.

23 It's curious how these questions about what degree of
24 visual acuity loss would she have sustained had there been no
25 negligence. That is a difficult question for anyone to answer.

1 Nobody can answer that. Nobody has a crystal ball, and every one
2 of these cases is unique. The reality is is that when you phrase
3 it that way, you're actually expected to -- you're expected to
4 be able to say that all people are exactly alike, they progress
5 exactly alike, they have these conditions which have typical
6 patterns they follow, and that's not the case with glaucoma.

7 THE COURT: How do you avoid having the jury very
8 possibly award damages for something not caused by the
9 professional?

10 MR. MORTON: It's a determination that needs to be made
11 by the jury not only with expert testimony where the expert is
12 going to hone in on a particular acts of malpractice, but then
13 also this temporal issue that I'm talking about. This is
14 something that is a rapid onset loss of visual acuity that --
15 and the jury can decide if it's coincidental. I think had that
16 question been asked in the deposition, I think it could have been
17 answered, or if more probably than not it was a result of
18 malpractice.

19 The law is also clear that there has to be a single
20 piece of sworn testimony in the form of an affidavit or
21 deposition or otherwise that says that to a reasonable degree of
22 medical probability this professional negligence caused injury,
23 and it's just injury in fact. It's within the province of the
24 jury to tease out these issues.

25 I've certainly had cases where juries have been

1 confronted with much more complex issues when it comes to
2 apportioning fault and attempting to relegate a certain degree of
3 fault to a particular defendant or -- in some instances someone
4 that goes on the verdict that may not have any responsibility at
5 all legally to respond, and that's what the jury system is all
6 about.

7 You have people who collectively make those types of
8 decisions. If the evidence is not satisfactory to go to the jury
9 after the plaintiff puts on her case in chief, then that's where
10 you intervene. To try and dispose of it on a summary judgment
11 motion, it's simply improvident. In particular, this whole
12 argument that people with chronic diseases are essentially
13 eliminated from filing medical malpractice cases would set a
14 completely unwholly precedent in the State of Utah or anywhere.
15 Unless you have any questions, your Honor, I'll submit it.

16 THE COURT: No. Thank you. I appreciate that.

17 Okay. Mr. Nelson?

18 MR. NELSON: Thanks, your Honor. Just briefly, that's
19 exactly -- this argument that when there's chronic disease
20 involved and different things that play that may explain why a
21 patient's condition is as it is, that's exactly why you need
22 expert testimony. That's why Utah law requires expert testimony
23 to sort through that. Allowing the case to go to the jury and
24 then after the evidences that we have now before us, present it
25 to the jury, that same evidence, and then leave it with your

1 Honor to decide at that point is exactly why we have summary
2 judgment motions and why we've raised these issues now before
3 your Honor.

4 The evidence that you have is the same evidence that's
5 going to be presented at trial. So that's why -- that's the
6 purpose of our motion.

7 As far as the high pressures, the intraocular pressures
8 and whether surgery should have been performed earlier or later,
9 these non-compliance issues, those are issues dealing with the
10 standard of care. There are factual disputes about that. That's
11 not what this motion is about. This motion is about the causal
12 link between the standard of care and the injury.

13 Dr. Newman -- Counsel read a portion of his deposition
14 about whether or not he had any comment about Ms. Sohm's non-
15 compliance. He said that he had only seen her once so he couldn't
16 comment on that. He didn't know. He didn't review all the
17 medical records. .

18 Also, as to whether or not she -- her vision loss is due
19 to the glaucoma, as I said earlier, he assumed that it was. I
20 think I read you a portion of the deposition about that. Then
21 the question was asked:

22 Q. In terms of glaucoma -- again, I take
23 it you've seen patients like Ms. Sohm that have
24 received excellent healthcare along the way and --
25 He interrupted and said:

1 A. Yes.

2 Q. -- are still in her position?

3 A. Absolutely. I have plenty of patients
4 like her that have lost vision in one eye from
5 glaucoma, whether that's because they don't take
6 their medicines or don't follow directions, or
7 whether it happens even if they take their medicines
8 and follow directions.

9 So in terms of glaucoma he was asked the question. He
10 said, you know, they may be still in her same position even when
11 they follow directions, even when they take the medications that
12 they're supposed to take.

13 So as the Court has ruled, "Summary judgment on the
14 issue of causation is appropriate when the plaintiff cannot show
15 that a jury could conclude without speculation that the injury
16 would not have occurred but for the defendant's breach." That's
17 why these questions were asked. Again, Dr. Styne was asked those
18 very questions. "But for the defendant's breach can you show,
19 absent speculation, what Ms. Sohm's condition would be?" Again,
20 the question was asked:

21 Q. Would you agree generally, Doctor --

22 This is Dr. Styne.

23 Q. -- that loss of vision in a case like
24 Ms. Sohm's can occur even with the best of care?

25 A. Yes.

1 That's a general reference to the standard of care
2 breaches that he had been talking about in his deposition.
3 Again, the concluding question of the deposition of Dr. Styne
4 was:

5 Q. Well, she sustained some damage from
6 her eyes from the time she started treating with
7 these doctors. We've established that. But the
8 percentage or proportion of the damage that was
9 caused as a result of the breaches of care that
10 you articulated, you're unable to quantify. Is
11 that fair?

12 A. That's correct.

13 Again, the standard in Utah is whether or not the
14 plaintiff can show without speculation that the injury would not
15 have occurred but for the defendant's breach. The expert has to
16 sort through all those questions, has to decide, well, this
17 vision loss is due to the defendant's breach. This had already
18 existed before she began treating with the defendants. This is
19 due to the progression of the disease or non-compliance; that's
20 why we need experts. With that help from the experts a jury can
21 only speculate, and that's not allowable under Utah law. Thank
22 you, your Honor.

23 THE COURT: So how do we deal with Mr. Morton's argument
24 that people then with chronic disease just are going to be at a
25 loss for a malpractice case, even if it actually occurs?

1 MR. NELSON: And I think the law does deal with that.
2 I think again -- and I do a lot of medical malpractice cases,
3 too. That's exactly again why we have experts to sort through
4 that issue to tell us, "Jury, this problem was caused by the
5 defendant's breach and care, this loss of a finger, this heart
6 attack," whatever; lack of taking medication that was not
7 prescribed that should have been. That's why we need experts.
8 That's why the Utah law is you've got to have experts testify
9 about these issues because a jury won't understand that, and an
10 expert will help us sort through those issues. Here we've got a
11 case where an expert can't help us sort through it. Thank you,
12 your Honor.

13 THE COURT: Thank you.

14 Mr. Owens?

15 MR. OWENS: Your Honor, we all can express sympathy for
16 Ms. Sohm's loss of vision. It's not the issue here. There is no
17 dispute as to the key material fact, which is the medical experts
18 cannot attribute or give any kind of guidance to a jury as to
19 what the causes of damages would be in this case.

20 Medical experts do this all the time, your Honor. I
21 have a case involving a fellow who was disabled, fell on the ice
22 and fractured his spine. They're saying he got substandard care
23 from the physiatrist and these folks who cared for his spine. I
24 asked these exact questions of their damages expert, and he said,
25 "He is 25 percent worse off than he would be otherwise."

1 Now he walked into my client's office in canes and he
2 kind of walked out with a walker, but these were the questions.
3 How much worse -- these medical experts do it all the time with
4 chronically injured people, how much worse off they were. We
5 didn't box Dr. Styne into saying you have to give us a
6 percentage. We said in any way that you can articulate, and
7 he said he couldn't.

8 The rehabilitation affidavit, now Styne talks about
9 not to this degree or that it was significant, but what does
10 that mean? Is a one percent loss of vision significant? I don't
11 know. He said that he was unable to say so.

12 This is a very complex patient. Just given her age,
13 her health conditions that go to eyesight -- high blood pressure,
14 cataracts, diabetes, and we need science -- these guys that come
15 in and tell us -- at least give us an opinion as to where they
16 are so that the jury can decide which of the opinions is
17 contrary. Here the jury is not going to get a disputed expert
18 opinion on how much damage was caused by it. We're not -- again,
19 we didn't pigeon hole him, "You have to give us a percentage
20 anyway you can." He said he couldn't.

21 This idea that this was caused by glaucoma, was kind of
22 this big issue versus other things. Assume that it was glaucoma.
23 I mean this is the fact most favorable to plaintiff. That
24 doesn't mean that they received substandard care, and it doesn't
25 mean that -- because people can get blindness from glaucoma even

1 when properly treated.

2 There was some implication that these healthcare
3 providers didn't do anything for Ms. Sohm while they were
4 treating her. That's clearly not the case. They were looking
5 in her eye with a microscope to look at nerves. They were
6 changing medications. Dr. Snow testified he discussed surgical
7 procedures with her, and they were talking, they were doing
8 things, and that's clear. The fact is she did not return for --
9 she was supposed to return in 10 days. If things had been worse,
10 for all we know Dr. Snow would have rushed her into surgery that
11 she had two months later.

12 So again, I think this is why all these factors leading
13 up to these key questions to Dr. Styne, you know, how you parcel
14 these 15 factors out and he said he couldn't. The jury is not
15 going to be able to, either. Thank you, your Honor.

16 THE COURT: Thank you, Mr. Owens.

17 MR. MORTON: Your Honor, brief opportunity for
18 (inaudible) rebuttal?

19 THE COURT: Sure.

20 MR. MORTON: Thank you. What the experts can do, and
21 this is a -- this is a situation where you're dealing with a
22 disease process, you're dealing with -- and it is true that there
23 can be a loss of visual acuity associated with glaucoma in the
24 absence of negligence. Is that loss a sudden onset? Is it
25 something that's progressive? Is it something -- and you go

1 through that history, and that's why the fact testimony in this
2 case and the expert testimony are inextricably intertwined.
3 You cannot separate the two.

4 You have to have the history of the patient combined
5 with the opinion of the expert to say, you know, this would fall
6 out of the realm. Dr. Styne references this in several instances
7 where he simply testifies that the -- and I'm -- I don't want
8 to fumble through this, but he summarizes one sentence after he's
9 just -- and I understand he's not using the magic words here.
10 After he summarizes his breaches of the standard of care, he
11 says, "Therefore, as a result I believe all of these things and
12 everything that led up to those final visits contributed to this
13 patient's dramatic loss of vision." Let me just see if I can --
14 he says, "There's a much greater likelihood that she would not
15 have suffered these visual field losses to this degree had there
16 been intervention."

17 We get hung up on this degree. I mean this woman is
18 functionally blind. It all culminated after tolerating a year
19 of just outrageous high pressures that were not responding to
20 the same treatments that were given. There was no attempt during
21 that year to do any emergency surgery or even recommend the same.

22 As a matter of fact, to demonstrate how cavalier they
23 were, you probably read Dr. Ricks little poem about attitude that
24 he wrote on a prescription pad and gave to -- it's in our brief.
25 It's very offensive because it shows that this is a condition

1 that was being treated so casually. "Come back in two weeks when
2 Dr. Snow is back from vacation." Dr. Styne is saying when you've
3 got pressures like this, when you've got this kind of problem
4 where the patient comes in and is complaining of pain and milky
5 vision and all of that, you don't tell them to come back in two
6 weeks.

7 She had these classic signs of build up to this loss
8 of visual acuity. So a jury could very easily find that her
9 condition was in fact brought about by medical negligence. It's
10 just not an appropriate issue to decide on summary judgment.

11 THE COURT: Thank you. Well, thank you, Counsel. I
12 have reviewed the memoranda. They're really excellently done,
13 and I appreciate the arguments. I have not read through the
14 depositions or the other things cited in the materials I have, so
15 I'll have to have time to do that, and I'll get a decision to you
16 in writing.

17 MR. MORTON: Thank you, your Honor.

18 THE COURT: Okay.

19 MR. NELSON: Thank you, your Honor.

20 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.


That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 8th day of June 2006.

My commission expires:
February 24, 2008


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

