2006

Kathryn Sohm v. Dixie Eye Center, Ronald L. Snow, and Jeffry R. Ricks : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

KATHRYN SOHM, Plaintiff/Appellant, vs. DIXIE EYE CENTER, RONALD L. SNOW, M.D. and JEFFRY R. RICKS, O.D., Defendants/Appellees.	Case No. 20060274-CA

JOINT BRIEF OF APPELLEES

Appeal from the Final Order of the Fifth Judicial District Court of Washington County, State of Utah
The Honorable Rand L. Beachum, District Court Judge

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PARTIES TO THE PROCEEDING

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUE & STANDARD OF REVIEW

Issue: In this medical malpractice action, did the District Court properly grant Defendants' Motion for Summary Judgment based on Plaintiff's failure to meet her prima facie burden to show, by expert testimony, that Plaintiff suffered non-speculative damages where Plaintiff's medical expert "cannot measure, describe, compare, quantify, isolate, gauge, estimate, apportion, or delimit damages which may have been proximately caused by Defendants' negligence." (R449).

Standard of Review: On appeal from a summary judgment motion, the appellate court reviews the facts and inferences in the light most favorable to the nonmoving party. See Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). Whether a party is entitled to summary judgment presents a question of law and the appellate court grants no deference to the trial court's legal conclusions and reviews them for correctness. See Higgins, 855 P.2d at 235; Stangl v. Ernst Home Center, 948 P.2d 356, 360 (Utah Ct. App. 1997). However, a party may not create an issue of fact by opposing a motion for summary judgment with an affidavit that conflicts with deposition testimony. Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

None.

ISSUE PRESERVED IN THE DISTRICT COURT

Defendants do not dispute that the issue in this case was preserved for appeal, but dispute Plaintiff's assertion that "the trial court granted summary judgment on grounds other than those raised by the Defendants in their Motion for Summary Judgment." Defendants' primary argument in the motion for summary judgment and at oral argument was that "Plaintiff has failed to establish the required element of causative damages" (R170), which was the very argument upon which the District Court based its decision.

On appeal, Plaintiff relies on Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 to argue the District Court erred. This case was not mentioned in any of the briefing on the motion or at oral argument, and thus the District Court did not have the benefit of Plaintiff's argument below. Her arguments as related to Tingey are therefore waived.

STATEMENT OF THE CASE

This is a medical malpractice action involving an 84 year old woman who has suffered from glaucoma since 1962. In 1995, she sought treatment from Defendants, who are eye care professionals in St George, Utah. Plaintiff stopped seeing Defendants in 2001 when she moved to Virginia and did not obtain any eye care for two months, despite having been told to follow-up in 10 days. In 2003, she initiated this action, alleging Defendants negligently treated her glaucoma and caused her to lose some of her vision.

After completion of discovery, Defendants moved for summary judgment, arguing plaintiff failed to meet her burden of proof because her medical expert could not testify to any reasonable degree of medical probability what alleged damages were a causal result of Defendants' care. The District Court granted Defendants' motion on the basis that any jury award for Plaintiff would necessarily be based on speculation. The Court found that "[i]f Dr. Stein [Plaintiff's expert] 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." (R449)

Plaintiff argues for the first time on appeal that a doctrine borrowed from automobile personal injury actions should be applied to trump well-established case law governing medical malpractice actions in Utah. She argues that this doctrine relieves her of her obligation to establish, through expert testimony, that some identifiable injury was caused by Defendants' alleged negligence.

Plaintiff's arguments are not consistent with Utah law that requires medical malpractice Plaintiffs to establish each element of a negligence claim. Furthermore, in medical malpractice actions, in order to satisfy the Plaintiff's burden, expert testimony is generally required. This Court should affirm the District Court's granting of Defendants' Motion for Summary Judgment as Plaintiff failed to meet her prima facie burden to allow

this case to proceed to a jury and Plaintiff's new argument on appeal has no application to the facts and circumstances of this case.

RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

With respect to the issue on appeal, causation, no dispute exists as to the key material facts in this matter: No medical expert has articulated what damages Plaintiff has suffered as the result of the Defendants' alleged negligent care. Plaintiff's statement of facts running from pages 4-23 in her brief focus on the standard of care and are largely irrelevant to the issues on appeal. See Rule 24(k) of the Utah Rules of Appellate Procedure. The District Court commented that in the briefing below there was "some excessive involvement with irrelevancies such as the element of breach of the standard of care." (R446).

Although the parties dispute whether defendants' treatment of Plaintiff's glaucoma breached the standard of care, this issue is irrelevant to this appeal. The only issue is whether Plaintiff has met her burden of proof to establish causation through expert testimony. Plaintiff's own medical expert testified that (1) glaucoma patients may have received excellent healthcare and still may suffer vision loss (R243), and (2) he cannot state what Plaintiff's vision would be if she had received the care he believes she should have received from Defendants. (R251,253,268)

Plaintiff's "Statement of Facts" section also mingles Plaintiff's expert's testimony made during his deposition with those statements he made in a subsequent affidavit in

opposition to Defendants' Motion for Summary Judgment. In making its ruling, the District Court found the timing of Plaintiff's expert's testimony significant.

STATEMENT OF FACTS

A. The Parties

1. Plaintiff lives in Virginia and is 84 years old. (R195,199) She suffers from cataracts, diabetes, and high blood pressure. (R196, 204, 205, 217) Plaintiff has a family history of glaucoma and first started going to a doctor for treatment of her eye conditions in approximately 1963, over 40 years ago. (R216) She has been taking glaucoma medications for about 20 years. (R216)

2. Defendant Dr. Snow obtained his Medical Degree in 1974 and completed a residency in Ophthalmology in 1979. (R232-33) He is board-certified in his speciality. (R233)

3. Defendant Dr. Ricks graduated with a Doctor of Optometry Degree from Southern California College of Optometry in 1986. (R224). Dr. Ricks has worked at the Dixie Eye Center for the last 15 years. (R224)

4. Plaintiff sought treatment from Defendants for her glaucoma beginning in 1995 and continuing through 2001. (R241-42) At her last appointment with either of the Defendants, she acknowledged that Dr. Ricks told her that she needed to make a follow-up appointment with Dr. Snow "in 10 days or so." (R207,211) She did not keep this

appointment. (R208-09) Instead, she moved to Virginia and waited over two months before going to another eye physician. (R210,213-14,242)

B. Non-Negligent Causes of Vision Loss

5. Glaucoma is a degenerative eye disease with no known cure. (R221-22) Glaucoma is a leading cause of vision loss in the United States. Due to the degenerative nature of the disease, it tends to inflict the greatest damage on the elderly. (R256,268-69) Glaucoma's effect on people, however, varies widely based on several characteristics of an individual. (R163,249)

6. Plaintiff's Ophthalmology expert, Dr. Robert Stein, and one of Plaintiff's treating Ophthalmologist, Steven S. Newman, M.D. (R215-223) both consistently testified that even with the best of care, a person with glaucoma may suffer loss of vision from the disease. (R223,243)

7. After the Defendants' treatment, Plaintiff moved to Virginia and sought care from Dr. Newman. Dr. Newman testified as follows:

(a) Dr. Newman is a neuro-ophthalmologist and conducts orbital and oculoplastic surgery. He is a professor of Ophthalmology at the University of Virginia Health Systems in Charlottesville, Virginia. (R158)

(b) Plaintiff's eye problems are probably caused by her glaucoma, although he could not rule out a variety of other causes of optic nerve pathology. (R218)

(c) Regardless of whether treatment is successful in reducing eye pressures in glaucoma patients, there is no guarantee that you can stop the progression of the glaucoma. (R219)

(d) As patients age, they are more at risk for age-related macular degeneration, corneal problems, and dry-eye problems. (R220)

(e) Glaucoma is a progressive disease and probably the second leading cause of blindness in the world. (R221)

(f) **Patients like Plaintiff may have received *excellent* healthcare along the way and still have experienced the loss of vision that Plaintiff now has.** (R223)

8. Plaintiff's own Ophthalmology expert, Dr. Robert Stein, testified as follows:

(a) Dr. Stein reviewed the medical records and depositions of Plaintiff. (R24)

(b) Dr. Stein opined that Dr. Snow and Dr. Ricks should have provided more definitive care and been more aggressive in attempting to lower Plaintiff's eye pressures. (R241,246-47,260) **He acknowledged, however, that loss of vision such as that suffered by Plaintiff can occur even with the best of care.** (R243)

(c) Chronic glaucoma is generally a condition of aging and can be present at varying degrees. Some patients can sustain higher levels of eye pressure without damage to the optic nerve, while other people can get optic nerve damage even when pressures are within normal ranges. (R256) Plaintiff was on the more difficult side in terms of obtaining good control of her pressures. (R256)

(d) Dr. Stein has had glaucoma patients like Plaintiff who were difficult to control in terms of eye pressures. (R250-51) Some of these difficult glaucoma patients had eye pressures that were out of control **no matter what he did for them**. (R251)

(e) The impact of elevated eye pressure on an optic nerve is dependent upon a variety of factors, including the amount of pressure, the resilience of the optic nerve, the length of time the pressure is elevated, and whether there is intervening treatment to bring down the pressures. (R257-58)

(f) Dr. Stein acknowledged that Dr. Snow tried different things and adjusted Plaintiff's medications and that these efforts brought down Plaintiff's eye pressures. (R259)

(g) Between 1995 and April 2001, Plaintiff lost at least fifty percent of her vision. (R261) Some of this loss may have been from a cataract that had developed in her right eye. (R261-62) Another possibility for Plaintiff's loss of vision is the aging process of the blood vessels causing a lack of circulation. (R263) Other causes can be compressive diseases and tumors along the optic nerve extending back toward the brain area or her diabetes. (R263-65)

C. Plaintiff's Expert's Testimony

9. When he was deposed, Dr. Stein could not state what Plaintiff's vision would be if she had received the care he believes she should have received. Significantly, he testified as follows:

Q: Do you agree that even if Ms. Sohm had been treated as you believe she should have been treated, we can't say what her particular level of eye vision would be at this point.
A: No.
Q: Is that correct?
A: That's correct.

(R251)

10. Although Dr. Stein opined that there is a likelihood that Plaintiff would not have suffered visual field losses to the same degree had there been intervention and that it "could" and "might" have been better, when asked, **"Can you state that with any**

specificity to a reasonable degree of medical probability?" he responded, "I can't really do that." (R252-53)

11. **Both Doctors Newman and Stein opined that Plaintiff's vision loss could have occurred even without negligent care.** (R218-23, 251) In fact, both physicians recognized that patients have suffered similar vision loss even with the appropriate care. (R223,243) Although Dr. Stein was critical of Defendants' treatment, he was unable or unwilling during his deposition to rule out non-negligent causes of Plaintiff's vision loss or to assist Plaintiff in establishing a causal link between Defendants' treatment and Plaintiff's vision loss. (R251)

D. Pleadings

12. In October 2003, Plaintiff filed her Complaint asserting a claim for medical negligence against both defendant eye care professionals who cared for Plaintiff's chronic glaucoma, as well as their employer, Dixie Eye Center. (R1-8) Plaintiff's Complaint contends that "as a result of Defendants' negligence in failing to adequately and timely treat Plaintiff's glaucoma, Plaintiff has suffered permanent damage to her eyes and vision." (R7)

13. After completion of discovery, Defendants moved for summary judgment arguing that Plaintiff could not establish a causal link between the alleged negligence on the part of Defendants and her claimed damages. (R156-172)

14. In support of their motion, Defendants submitted affidavits of two experts, both of whom opined that Plaintiff could not establish causation without resorting to speculation. (R269-272,273-75,303-05) Defendant Jeffrey R. Ricks, O.D. retained William Bogus, O.D. to review all of the relevant medical records and depositions in this case and to render opinions. (R269-72) Dr. Bogus testified by affidavit that he was a licensed optometrist practicing in Salt Lake City, Utah, and was familiar with the Plaintiff's allegations in this lawsuit. Dr. Bogus noted Plaintiff's extensive history of glaucoma, which covered at least 23 years and included evaluations by at least six different doctors and over 80 office visits. In contrast to Plaintiff's extensive history of treatment, Dr. Ricks' treatment of Plaintiff was limited to only two examinations. (R269-72)

15. Based upon his background, education, training, experience, and review of the relevant records in this case, Dr. Bogus opined that Dr. Ricks complied fully with the applicable standard of care for an optometrist under the circumstances and time frame in which he cared for Plaintiff. (R271) Furthermore, Dr. Bogus stated that Dr. Ricks did not cause Plaintiff's claimed damages and injuries in this case. (R271)

16. With respect to causation, Dr. Bogus reviewed the deposition of Plaintiff's expert, Dr Robert Stein, and noted that Dr. Stein could not say what Plaintiff's level of vision would be if she had been treated as Dr. Stein believed she should have been treated. (R271) Based on his expert medical opinion, Dr. Bogus agreed with Dr. Stein

and stated that, given Plaintiff's age, chronic condition, intervening events, lack of compliance, and the care of other treating providers, any of the preceding factors could have caused Plaintiff's vision loss. (R271)

17. Defendant Ronald L. Snow, M.D., retained an expert, Kuldev Singh, M.D., to review all of the relevant medical records and depositions in this case and to render opinions. (R273-75) Dr. Singh provided an affidavit in support of Defendants' motion for summary judgment, which provided the following foundation for his opinions: (1) he is a licensed ophthalmologist in California (R274); (2) he is national Board Certified in Ophthalmology (R274); (3) he is a professor of Ophthalmology at Stanford University (R278); (4) he reviewed all of Plaintiff's medical records and the deposition transcripts of Plaintiff, Dr. Newman, Dr. Snow, Dr. Ricks and Dr. Stein. (R274)

18. Based on his review of the foregoing materials and his skill and experience as a licensed ophthalmologist and considering Plaintiff's more than 20 year history of glaucoma, the nature of this disease, Plaintiff's advanced age, her lack of compliance to instructions given by Dr. Snow, Dr. Ricks, and other physicians, Dr. Singh stated it would require pure speculation to causally relate any vision loss suffered by Plaintiff to any act or omission alleged against either Dr. Snow or Dr. Ricks. (R274)

19. Supported by Dr. Bogus's and Dr. Singh's expert opinions, Defendants

requested that the District Court grant them summary judgment because Plaintiff's expert's opinions failed to create a triable issue of fact with respect to causation and would have required the jury to speculate in making any award. (R171)

E. Plaintiff's Attempt to Create an Issue of Fact by Submitting a Contradictory Subsequent Affidavit from Dr. Stein.

20. In opposing Defendants' Motion for Summary Judgment, Plaintiff produced an affidavit from Dr. Stein. Dr. Stein's affidavit, however, did not rule out or account for the possibilities of vision loss due to non-negligent causes. (R397 ¶¶16-19).

21. Dr. Stein's affidavit offered vague testimony that Defendants' care was the cause of **some** of Plaintiff's loss of vision. (R397-98). To the extent Dr. Stein's affidavit attempts to establish a causal link and rules out other non-negligent causes of Plaintiff's vision loss, Dr. Stein's affidavit necessarily contradicts his deposition testimony.[1]

22. In opposing Defendants' motion for summary judgment on the issue of

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[1] (Compare R243) (vision loss in a case like Ms. Sohm's can occur even with the best of care); R245 (patient compliance could cause fluctuations); R250-53 (cannot rule out non-negligence; difficult glaucoma patients may have out of control eye pressures no matter what you do for them; cannot say what her particular level of eye vision would be without negligence); R254-56 (patient compliance issues and critical timing; patient did not return to Dr. Snow in 7-10 days as instructed and instead went two months before receiving eye care); R257-58 (variety of non-negligent factors that could cause problems including resilience of optic nerve, intervening treatment, thickness of cornea); R261-62 (Plaintiff's cataract could cause vision loss); R263-65 (additional non-negligent causes including aging process of the blood vessels, compressive diseases, metabolic conditions, ischemic blood supply due to age, the patient's diabetes) **with** R397-98 (affidavit attempting to establish causation, including "may" have had no loss, "could" have been dramatically better).

proximate cause, Plaintiff focused substantially on the facts relating to the standard of care and Defendants' treatment and care of her glaucoma. (R320-27)

23. Dr. Stein testified that he cannot testify to a reasonable degree of medical probability what damages may have been caused by Defendants' supposed negligence. (R396-97). Dr. Stein stated in his affidavit that Plaintiff's vision *may* have been "significantly" or "substantially" better and that it would not have been damaged "to this degree" without ever defining what these statements mean. (R397-98)

F. The District Court's Granting of Motion for Summary Judgment.

24. Defendants' Motion for Summary Judgment was fully briefed and submitted to the District Court. Oral argument was held on November 23, 2005. At oral argument, the parties focused on the issue of damages caused by the asserted negligence, and the District Court took the motion under advisement. (Tr. at 35)

25. The District Court issued its Ruling, granting Defendants' motion because it concluded Plaintiff had not met her burden of proof and any jury award would necessarily be based on speculation. (R446-49). In its Ruling, the District Court stated:

> Dr. Stein's testimony entirely fails to identify or establish what damages was caused by Defendants' alleged negligence. . . .
>
> . . . 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.
>
> . . . 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.

(R447-48 (emphasis added)).

26. The District Court further stated: "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 reach a just verdict as to the damage which was caused by Defendants' negligence." (R447-48).

27. Plaintiff initiated this appeal of the District Court's decision by arguing, for the first time, that Utah law does not require her to apportion the cause of her vision loss between the numerous possible causes set forth by the parties' medical experts and Plaintiff's treating physicians or even to establish to a degree of medical probability what vision loss was caused by Defendants' alleged negligence. (R470-71)

SUMMARY OF ARGUMENTS

In order to defeat a properly supported motion for summary judgment in a medical malpractice action, Plaintiff is required to present expert testimony establishing to a reasonable degree of medical probability the fact of damages caused by alleged negligence. The fact of damages, as required by the Utah Supreme Court, refers to

evidence that links Defendants' care and treatment of Plaintiff to some demonstrable injury resulting from Defendants' negligent care. Plaintiff's expert testified that even with the best of care and in the absence of negligence, the natural progression of glaucoma could cause the vision loss that Plaintiff has experienced. Plaintiff's expert could not rule out or account for, non-negligent causes of Plaintiff's vision loss and could only testify in terms of possibilities rather than probabilities.

Realizing her expert had failed to establish the causal link between Defendants' care and her vision loss during his deposition, Plaintiff attempted to create an issue of fact by submitting an affidavit from her expert in opposition to Defendants' Motion for Summary Judgment. To the extent the affidavit attempts to set forth a causal link, it necessarily contradicts the deposition testimony of plaintiff's expert where he was unable to state causation to any degree of reasonable medical probability (although asked to do so several times in several different ways). Accordingly, the District Court properly granted Defendants' Motion for Summary Judgment and concluded Plaintiff could not establish the fact of damages in relation to Defendants' care. Without this proof, the District Court properly concluded that any jury award in favor of Plaintiff would necessarily be based on unsupported speculation and conjecture. On appeal, Plaintiff now attempts to improperly shift the burden of proof of causation onto Defendants.

ARGUMENT

I. PLAINTIFF CANNOT MEET HER BURDEN OF PROOF TO ESTABLISH A CAUSAL LINK BETWEEN HER INJURIES AND DEFENDANTS' CARE.

A. The District Court Correctly Concluded that Plaintiff Could Not Establish a Prima Facie Case of Medical Malpractice.

In order to establish a claim for medical malpractice, Utah law requires a Plaintiff to prove each of the following elements: (1) the standard of care applicable to the health care provider under similar circumstances; (2) a breach of the standard of care; (3) that Plaintiff's injury was proximately caused by negligence and (4) that damages occurred as a result of the negligence. See Kent v. Pioneer Hosp., 930 P.2d 904, 906 (Utah Ct. App. 1997). In most cases, a Plaintiff is required to prove each of these elements through expert testimony.[2] Utah law requires expert testimony in order to prove matters which "are outside the knowledge and experience of lay persons . . . ." Hoopiiaina v. Intermountain Health Care, 740 P.2d 270, 271 (Utah Ct. App. 1987) (although hospital admitted to giving Plaintiff wrong drug, Plaintiff failed to provide expert testimony that

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[2] See Butterfield v. Okubu, 831 P.2d 97,101-02 (Utah 1992) (setting forth requisites for expert's affidavit on standard of care and causation to survive motion for summary judgment); Huggins v. Hicken, 6 Utah 2d 233, 310 P.2d 523, 526 ("The evidence must be substantial and must, in cases of this complex type, have foundation in expert medical testimony."); Kent v. Pioneer Hosp., 930 P.2d 904, 906 (Utah Ct. App. 1997) ("Because of the complex issues involved in a determination of proximate cause in a medical malpractice case, the Plaintiff must provide expert testimony establishing the health care provider's negligence proximately caused Plaintiff's injury.").

wrong drug caused any injuries).[3] Often, a medical malpractice Plaintiff will demonstrate a causal connection between Defendants' care and Plaintiff's injury by ruling out or at least accounting for other possible causes of the injury.[4]

"The rule is well established in this jurisdiction that where 'the proximate cause of the injury is left to conjecture, the Plaintiff must fail as a matter of law.'" Thurston v. Workers Compensation Fund, 83 P.3d 391, 397 (Utah Ct. App. 2003); Mahmood v. Ross, 1999 UT 104, ¶22, 990 P.2d 933 (citations omitted). Because Plaintiff could not establish a causal link between Defendants' care and her vision loss and because any jury award in this medical malpractice action would necessarily be based on speculation, the District Court properly granted summary judgment to Defendants.

Utah law allows a jury to award damages when Plaintiff establishes a causal connection that is based on reasonable probabilities; however, "'the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities

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[3] See also Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 266 (Utah Ct. App. 1987) ("When . . . the probabilities of a situation are outside the realm of common knowledge, expert evidence may be used to establish the necessary foundational probabilities."); Schmidt v. Intermountain Health Care, Inc., 635 P.2d 99, 101 (Utah 1981) (jury could properly find that Plaintiff's injury were caused by some other non-negligent act rather than alleged negligence)

[4] See Dalley v. Utah Valley Reg'l Med. Ctr., 791 P.2d 193, (Utah 1990); Talbot v. Dr. W.H. Groves' Latter-Day Saints Hosp., Inc., 21 Utah 2d 73, 440 P.2d 872, 873; see also Ballow v. Monroe, 699 P.2d 719, 722-23 (Utah 1985) (Plaintiff offered no testimony that defendant was negligent and admitted that non-negligent conduct may have caused fire to occur).

the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate.'" Mahmood v. Ross, 1999 UT 104, ¶22, 990 P.2d 933 (citation omitted). In no instance may a Plaintiff satisfy her burden of proof by simply offering vague expert testimony that Defendants' care may have caused some of the alleged injury.

In order "to withstand summary judgment, Plaintiff must at least create a material issue of fact as to whether the [alleged negligence] was the proximate cause of [the injury], **and** that [Plaintiff], in fact, suffered damages as a result." Kent v. Pioneer Hosp., 930 P.2d 904, 907 (Utah Ct. App. 1997) (emphasis added) (summary judgment upheld, finding nurse's affidavit was sufficient to establish breach, but nurse was not competent to establish that breach caused nerve damage). The Plaintiff's failure to produce evidence to establish any of the required elements justifies a grant of summary judgment. See Kent, 930 P.2d at 906; Forrest v. Eason, 123 Utah 610, 261 P.2d 178, 180 (1953).

Consistent with Utah law cited above, the District Court in this case required Plaintiff to provide expert testimony to establish that Defendants' care and treatment of Plaintiff was the cause of her damages. The District Court stated: "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." (R447-48)

On appeal, Plaintiff now argues, for the first time, that the case of Tingey v. Christensen[5] relieves her of her burden to establish a prima facie case of **medical** negligence. Plaintiff argues that she does not need to establish the cause of her vision loss, even though there is no dispute that Plaintiff suffered from glaucoma for at least 20 years before she began treating with Defendants and in spite of the progressive nature of glaucoma. Plaintiff claims that requiring her to meet this burden forces her to provide percentages of damages attributable to Defendants' alleged negligence. The District Court, however, did not require Plaintiff to provide percentages of damages attributable to Defendants' alleged negligence. Rather, the trial court ruled: "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**." (R448)

In Anderson v. Nixon, the Utah Supreme Court discussed the quantum of proof necessary to establish a causal connection between a health care provider's negligence and a Plaintiff's injury. See id., 104 Utah 262, 139 P.2d 216, 220, overruled on other grounds by Swan v. Lamb, 584 P.2d 814 (Utah 1978). In Anderson, the Plaintiff alleged the physician was negligent in failing to treat him for a blood infection which ultimately

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[5] Tingey involves allegations of negligence related to an automobile accident. It is not a medical negligence action. Indeed, Plaintiff fails to cite a single case involving medical malpractice allegations in support of her arguments in this matter.

resulted in amputation of a portion of his leg. See id. Finding that the Plaintiff failed to produce sufficient expert testimony to link the negligence with the injury, the Utah Supreme Court stated:

> There was no expert evidence in this case that if defendant had done these things at that time the condition which caused the eventual amputation of Plaintiff's leg could have been avoided. No expert testified that had Dr. Nixon recognized the symptoms of osteomyelitis he could have alleviated or cured it by using the ordinary skill, care, and knowledge of a physician practicing in that vicinity.

Id. at 220.

In Anderson, the Utah Supreme Court recognized that the cause and cure of osteomyelitis are peculiarly within the knowledge of medical experts and not a matter of common knowledge. Id. Significantly, the Court went on to state: "In this case there was no evidence that anything Dr. Nixon did or failed to do after osteomyelitis developed caused the end result. In the absence of such expert testimony there is nothing upon which a jury can base its finding on the proximate cause of the injury." Id. Furthermore, in King v. Searle Pharmaceuticals, Inc., 832 P.2d 858, 862 (Utah 1992), the Court stated: "The law is clear that an undesired complication or result from medical treatment does not by itself imply that the result was caused by someone's breach of a duty of due care." Id. (citing Talbot v. Dr. W.H. Groves' Latter-Day Saints Hosp., Inc., 21 Utah 2d 73, 440 P.2d 872, 873 (1968)).

As in Anderson, in order to satisfy her burden regarding causation, Plaintiff must present expert testimony to establish that if Defendants had provided the care Plaintiff alleges was appropriate, she would not have suffered the same loss of vision in any event.[6] Significantly, however, Plaintiff's own expert witness and one of her treating doctors both testified that Plaintiff could have suffered the same loss of vision that she experienced even with the best of care. Like the expert in Anderson, Plaintiff's own expert, Dr. Stein, could not state that anything Defendants did or did not do caused Plaintiff's vision loss. Thus, Plaintiff failed to show that it was Defendants' negligence, rather than some other cause, that led to her vision loss. In short, as was argued below, Plaintiff's reliance on the fact that she lost vision due to her glaucoma while under Defendants' care is insufficient to satisfy her burden of proof on the element of causation.

Furthermore, all doctors involved in this case have identified many potential causes of Plaintiff's loss of vision. In its ruling, the District Court recognized that

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[6] See Dalley v. Utah Valley Reg'l Med. Ctr., 791 P.2d 193, (Utah 1990) ("[R]es ipsa loquitur is an evidentiary doctrine aiding in the proof of negligence; it has no bearing on the issue of causation, which must be separately and independently established . . . ." (quoting Anderton v. Montgomery, 607 P.2d 828, 834 (Utah 1980))); see also Chadwick v. Nielsen, 763 P.2d 817, 822 (Utah Ct. App. 1988); King, 832 P.2d at 862 ("when the circumstances and the probabilities as to the causative factors of an accident lie within the ken of experts, expert evidence is necessary to establish a foundation that gives rise to an inference of negligence."); Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990) (Plaintiff failed to present any evidence contradicting Defendants' expert's opinions that injury could have resulted in the absence of negligence and that other non-negligent sources could cause the condition).

Plaintiff's expert could not rule out other causes, or explain the causal relationship between the multiple possible causes of Plaintiff's alleged damages, stating: "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 causal effects." (R447-48) The District Court summarized its ruling, stating: "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 reach a just verdict as to the damage which was caused by Defendants' negligence." (R447-48 (emphasis added)). As in Anderson, Plaintiff's expert's testimony is insufficient to create an issue of fact for the jury.

Likewise, in Talbot v. Dr. W.H. Groves' Latter-Day Saints Hospital, Inc., the Utah Supreme Court determined a medical malpractice Plaintiff failed to meet his burden under the doctrine of res ipsa loquitur because he could not establish the cause of his injury and he left open the possibility of non-negligent causes. See Talbot, 440 P.2d at 874. A Plaintiff cannot satisfy the burden of proof by pointing out two **possible** causes or suggesting that Defendants' care might have caused some of the injury.[7] Thus, in all medical malpractice cases, including even res ipsa loquitur cases, the Utah Supreme

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[7] See also Forrest v. Eason, 123 Utah 610, 261 P.2d 178, 180 (1953) (rejecting Plaintiff's argument that if injury arises from two or more causes, one of which is health care provider's negligence, then it presents a jury question).

Court has consistently required a Plaintiff to prove a causal link between the negligence and the injury.[8] In this case, the District Court correctly concluded that Plaintiff could not meet her burden.

B. The District Court Properly Required Plaintiff's Expert to Come Forward With More Than Speculation To Find Defendants' Care More Likely Than Not Caused Identifiable Damages.

In making its ruling, the District Court correctly noted that the causal relationship between Defendants' treatment and Plaintiff's vision loss was outside the knowledge of the jury. The District Court ruled Plaintiff's expert had to assist the jury in establishing a causal link between Defendants' care and Plaintiff's injuries. At a minimum, this burden required, to a reasonable medical probability, evaluating other potential non-negligent causes and demonstrating a link between Defendants' care and Plaintiff's injuries. Plaintiff's expert, however, could not rule out or otherwise account for other causes and, in fact, admitted that non-negligent conduct and even the progressive nature of glaucoma itself could have caused Plaintiff's vision loss. Thus, the District Court correctly ruled that the jury could not render a judgment for Plaintiff without resorting to unsupported conjecture or speculation. The District Court's ruling is consistent with "[t]he general

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[8] See Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 266 (Utah Ct. App. 1987) (Plaintiff could not establish a causal connection between negligence and her injury, nor could she rule out non-negligent potential causes of her injury); see also Nixdorf v. Hicken, 612 P.2d 348, 354 n.17 (Utah 1980) (applying res ipsa loquitur to relieve Plaintiff of her burden with respect to standard of care but noting that expert testimony would be required to establish proximate cause).

rule regarding the certainty of an expert's opinion [which] is that the expert many not give an opinion which represents a mere guess, speculation, or conjecture." Thurston v. Workers Compensation Fund of Utah, 2003 UT App 438, ¶20, 83 P.3d 391.

In Arnold v. Curtis, the Utah Supreme Court affirmed the trial court's grant of summary judgment to a doctor because Plaintiff's expert's affidavit failed to establish causation. See Arnold, 846 P.2d 1307, 1310 (Utah 1993). The Defendants' expert had opined that "in any event, had an earlier diagnosis been made, the outcome would have been the same . . . ." Id. Finding Plaintiff's expert's affidavit deficient, the Court stated: "The affidavit of [Plaintiff's expert] is devoid of any statement of proximate cause and in no way counters or contradicts the opinion of [Defendants' expert] that an earlier diagnosis of [Plaintiff's injury] would not have permitted earlier treatment or surgery for that condition." Id.[9]

Likewise, in this case, Plaintiff has failed to meet her burden of proof when faced with Defendants' Motion for Summary Judgment. "Just because there is proof that *some* of the claimed injury and loss was caused by the breach of duty does not necessarily mean that *all* damages resulted from the breach." Dunn v. Cadiente, M.D., 516 N.E.2d 52, 55

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[9] See also Dunn v. McKay Burton, McMurray & Thurman, 584 P.2d 894 (Utah 1978) (no evidence that attorney's negligence caused Plaintiff's damages); Clark v. Farmers Ins. Exch., 893 P.2d 598, 601 (Utah Ct. App. 1995) (expert testimony that "the facts of this total accident are so vague and unidentifiable that it is really hard to be precise in coming to any conclusion because there's . . . no precise data on which to draw those conclusions.").

(Ind. 1988) (emphasis in original) (holding Plaintiff failed in his burden of proof and not entitled to recover for all of his injuries where Plaintiff's expert admitted that some of Plaintiff's injuries were inevitable and may not relate to doctor's negligence).

Like the cases cited above where courts have ruled that an expert's testimony is insufficient, in this case, Plaintiff's expert expresses his opinions merely in terms of "may" or "could." (R243-45,250,252-53,397). For example, Dr. Stein was critical of Defendants' care and opined that Defendants were not aggressive enough in their treatment of Plaintiff's glaucoma. (R260) Nevertheless, Dr. Stein's deposition testimony only indicated causal **possibilities** when asked specifically to explain this vague statement:

- Plaintiff's injuries could occur even with the best of care (R243);
- Plaintiff's fluctuating eye pressures could occur for variety of reasons, including lack of patient compliance (R244-45);
- Progression of glaucoma and deteriorating vision is matter of luck and he can't say what the future holds for Plaintiff in this case (R249);
- Injuries from glaucoma do not automatically equate to negligence (R250);
- Glaucoma can be difficult to control with even the best of care (R250-51);
- With aggressive treatment, Plaintiff might not have lost vision (R252);

- He cannot state with any medical certainty what her loss of vision may have been absent negligence (R252-53);
- Patient compliance could have been an issue, and non-compliance issues arose at a critical time (R254-55);
- Some patients can withstand higher eye pressures with no damage, and some patients have optic nerve damage when pressures are within normal ranges (R256);
- List of non-negligent factors that may cause elevated eye pressures (R257-58);
- He is uncertain as to effect of Plaintiff's unrelated cataract on her vision loss (R261)

Dr. Stein's deposition testimony unequivocally reveals that he was unable to state to a reasonable degree of medical probability that Plaintiff's partial loss of vision would not have occurred absent Defendants' alleged negligent care. As such, his opinions were merely possibilities and not probabilities. Under Utah law, where expert testimony is required to establish a Plaintiff's burden, expert testimony which only raises possibilities instead of probabilities is insufficient.

II. DR. STEIN'S AFFIDAVIT IS INCONSISTENT WITH AND CONTRADICTS HIS DEPOSITION TESTIMONY.

Utah law is well-settled that when a party takes a clear position in a deposition, he may not thereafter attempt to raise an issue of fact by his own affidavit which expressly or

impliedly contradicts his deposition testimony unless he can explain the discrepancy. See Best v. Daimler Chrysler Corp., 2006 UT App 304, ¶13, 141 P.3d 624; Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983). In Webster, "the Plaintiff filed an affidavit that impliedly, if not directly, contradicted a critical part of his [earlier] deposition." Id. at 1172. The Utah Supreme Court held that the affidavit should be excluded from the trial court's consideration and reasoned that a party may not create inconsistencies with his deposition testimony in the hopes of creating issues of fact. See id. The Court found that "[a] contrary rule would undermine the utility of summary judgment as a means for screening out sham issues of fact." Id. at 1173. Thus, as a general rule, an affidavit that disputes the affiant's prior deposition testimony should be disregarded by the court in ruling on a motion for summary judgment.[10]

After Defendants filed a motion for summary judgment supported by affidavits of two experts that relied, inter alia, on Dr. Robert Stein's testimony during his deposition, Plaintiff filed an affidavit of Dr. Stein in opposition to Defendants' Motion for Summary Judgment in attempt to create an issue of fact. Dr. Stein stated in his affidavit that Defendants' alleged breaches of the standard of care "resulted in a direct consequence to the health and condition of Plaintiff's eyes and caused her to sustain both a significant

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[10] See id.; see also Guardian State Bank v. Humpherys, 762 P.2d 1084, 1087 (Utah 1988); Continental Bank & Trust Co. v. Cunningham, 10 Utah 2d 329, 353 P.2d 168, 170 (1960); Gaw v. State By and Through Dept. of Transp., 798 P.2d 1130, 1140-41 (Utah Ct. App. 1990).

and a permanent loss of vision that she would not have otherwise sustained in the absence of their negligence." (R398) In contrast to his affidavit, however, Dr. Stein testified during his deposition that, even with the best of care, patients with glaucoma may suffer vision loss. (R252) Consistent with the premise that glaucoma may cause vision loss even with non-negligent treatment, Dr. Stein conceded that he could not state to a reasonable degree of medical probability whether Plaintiff would have suffered the same visual field losses she currently experiences even with the best of care. (R243-45, 249-58) He also admitted that he is unable to quantify the amount of vision loss or damage caused by the alleged breaches of the standard of care in this case. (R262).

In summary, to the extent Dr. Stein's affidavit attempts to establish a causal link between Plaintiff's vision loss and defendants' treatment of her glaucoma, his affidavit is necessarily contradicted his deposition testimony. See, infra, note 1. Plaintiff cannot create issues of fact to defeat summary judgment by proffering an affidavit which is inconsistent with or contradicts prior deposition testimony.

III. THIS COURT SHOULD DECLINE TO ADDRESS *TINGEY V. CHRISTENSEN* BECAUSE IT IS DISTINGUISHABLE AND SHOULD NOT APPLY TO MEDICAL MALPRACTICE ACTIONS.

In order to overcome summary judgment and eliminate her prima facie burden with respect to causation, Plaintiff now argues, for the first time, that a doctrine borrowed from automobile personal injury actions applies in this medical malpractice action.

Although Plaintiff failed to raise the argument below[11], she now claims it is Defendants' burden to apportion the vision loss caused by her pre-existing conditions (glaucoma, cataract, diabetes, noncompliance) and the vision loss caused by an alleged breach of the standard of care. Plaintiff relies on the automobile accident case of Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 to support her argument.

In addition to not addressing the burden of proof for medical malpractice claims, the procedural posture of Tingy is inapplicable to this case in which the District Court concluded Plaintiff cannot prove causation. In Tingey, the defendant conceded liability and admitted to causing the automobile accident in which the plaintiff was injured. As part of her claim, the plaintiff requested damages for aggravation of a pre-existing injury (unlike here where Plaintiff's vision problems could be caused by ongoing conditions). The District Court rejected the plaintiff's request to instruct the jury that if the jury could not apportion the damages than it could find the defendant liable for the entire amount. The Utah Supreme Court determined that Utah law supported the plaintiff's requested jury instruction, but found the error to be harmless. See id. at ¶15.

The Supreme Court's ruling was based on several legal principles. See id. at ¶14. Importantly, in terms of its application to this medical malpractice action, the Court relied

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[11] Plaintiff has waived the right to argue that Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 applies to this case by failing to raise this argument below. Accordingly, the Court should decline to consider its application here.

on the following: "once the fact of damage is established, 'a defendant should not escape liability because the amount of damage cannot be proved with precision.'" Id. Establishing the "fact of damage" necessarily includes establishing that the injury or damage was caused by Defendants' negligent conduct. In this matter, however, as Defendants argued to the District Court, Plaintiff cannot prove this causal relationship and so cannot prove the "fact of damage." Plaintiff's argument that the causal element of her vision loss must be assumed simply because she lost vision during the time frame she was in Defendants' care is inconsistent with well-established Utah law. Furthermore, her attempt to shift the burden of proof regarding causation is also contrary to Utah law.

In support of the motion for summary judgment, Defendants' experts, Doctors Bogus and Singh, opined that Plaintiff's injury may have resulted under even the best of care. Far from contradicting this opinion, and unlike the Plaintiff in Tingey, Plaintiff's own expert, Dr. Stein, agreed that Plaintiff may have suffered the same injuries even with non-negligent care. Furthermore, Plaintiff's expert could not remove the possibility that Plaintiff's own fault in failing to follow Defendants' recommendations may have caused or exacerbated her injuries. Finally, Plaintiff's treating doctor, Dr. Newman, confirmed all of the experts' opinions that even with non-negligent care Plaintiff could have experienced the same vision loss. The doctrine set forth in Tingey simply has no application to this case where Plaintiff has not proved the "fact of damages", including

the cause of her vision loss, and where she has ongoing conditions (including the progressive nature of glaucoma itself).

Furthermore, Tingey should not be applied to medical malpractice actions. Plaintiff's application of Tingey completely eviscerates the well-established burdens required of Plaintiffs in medical malpractice actions. Under Utah law, after establishing the standard of care and a breach of that standard, a medical malpractice Plaintiff must establish a causal connection between the breach and the resulting injuries. It is not sufficient to allege that the breach of the applicable standard of care caused all of Plaintiff's alleged damages and then shift the burden to Defendants to prove otherwise, as Plaintiff suggests in this case. Well-established Utah law places the burden on Plaintiff to establish a causal connection between the alleged breach and identifiable injuries and damages.

The application of Tingey to a medical malpractice case would result in a wholesale change to Utah law for medical malpractice actions. Unlike the motor vehicle drivers in Tingey, by definition medical patients (i.e. potential medical malpractice Plaintiffs) all have pre-existing and ongoing medical conditions. Applying Tingey would essentially force health care providers to assume liability for both the medical problem for which the patient originally sought care and any aggravation of that pre-existing condition. This places an impossible burden on physicians, essentially making them guarantors of successful care and unfairly shifts the burden of proof with respect to

causation. Under Plaintiff's argument, health care providers would bear the burden of trying to apportion damages and disproving liability for pre-existing conditions. This result is inconsistent with well-established Utah law, which puts this burden on Plaintiffs.

Moreover, Utah would not be well served by a rule that makes health care providers presumptively liable for damages flowing from their patients' pre-existing medical conditions. Such a rule would unfairly increase verdicts against healthcare providers and inevitably drive up medical malpractice insurance premiums – a result the Utah Legislature has consistently acted to prevent. See Utah Code Ann. § 78-14-1, *et seq.*

Plaintiff has not established the fact of damages to a reasonable degree of medical certainty because she cannot show to a reasonable medical probability what injury was caused by Defendants' care. Because Plaintiff's expert could not rule out or even account for other possible non-negligent causes, including Plaintiff's own fault, the District Court properly concluded any jury award would be based on speculation.

CONCLUSION

The issue on appeal is whether Plaintiff could establish a causal link between her alleged loss of vision and the Defendants' treatment of Plaintiff's glaucoma. Plaintiff presented expert testimony to try to establish a prima facie breach of the standard of care and damages caused by the breach. In order to withstand Defendants' Motion for

Summary Judgment, Plaintiff needed to also establish a causal link between the breach and her vision loss. It is not sufficient to allege a breach and damages and then assume the two are related, or ask the Court or jury to bridge the gap between the two. In this case, Plaintiff's expert testified as to other possible, non-negligent causes of Plaintiff's vision loss and was unable to account for them or provide any expert guidance for the fact finder as to how to evaluate the damages. Thus, he was only able to testify in terms of possibilities rather than probabilities. The District Court found this to be insufficient. Based on the foregoing, Defendants request this Court affirm the District Court's Motion for Summary Judgment in their favor.

RESPECTFULLY SUBMITTED this 1st day of November, 2006.

EPPERSON & RENCHER

Stephen W. Owens

RICHARDS, BRANDT, MILLER & NELSON

Christian W. Nelson
Brandon B. Hobbs
Zachary E. Peterson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument was mailed, first-class, postage prepaid, on this 3rd day of November, 2006 to the following:

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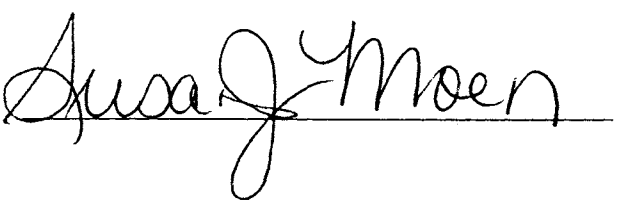

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