

2006

Kim Fratto v. Dr. Thomas M. McNeilis, Dr. A. Scott Devous, Hensley Family Medical Center, Inc., Linda R. Hensley, Renette Hensley : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIM FRATTO,

Plaintiff/Appellee,

vs.

DR. THOMAS M. MCNEILIS; DR. A.)
SCOTT DEVOUS; HENSLEY FAMILY)
MEDICAL CENTER, INC.; LINDA R.)
HENSLEY; RENETTE HENSLEY; AND)
JOHN DOES I THROUGH V,)

Defendants/Appellants.)

BRIEF OF APPELLEE

Appellate Case No. 20060598-CA

Appeal from a Default Judgment entered by the Third Judicial District Court for Salt Lake County, The Honorable Denise P. Lindberg, presiding.

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IN THE UTAH COURT OF APPEALS

KIM FRATTO,)	
)	BRIEF OF APPELLEE
Plaintiff/Appellee,)	
)	
vs.)	Appellate Case No. 20060598-CA
)	
DR. THOMAS M. MCNEILIS; DR. A.)	
SCOTT DEVOUS; HENSLEY FAMILY)	
MEDICAL CENTER, INC.; LINDA R.)	
HENSLEY; RENETTE HENSLEY; AND)	
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I

PARTIES TO THE PROCEEDING

The Parties to this proceeding are:

Kim Fratto

Plaintiff/Appellee

Linda R. Hensley

Defendant/Appellant

Dr. Thomas M. McNeilis; Dr. A. Scott Devous; Hensley Family Medical Center, Inc.; Linda R. Hensley; and Renette Hensley were all parties to the proceeding in the district court. Only Linda R. Hensley is a party to this appeal.

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IV

JURISDICTION

Jurisdiction is derived from Utah Code Ann. Section 78A-4-103(2)(j).

V

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Whether Appellant timely moved the trial court to set aside the default of Linda Hensley entered on October 3, 2007. R. 525-527.
2. Whether the trial court properly exercised its discretion in striking the answer of Linda Hensley and entering her default.
3. Whether the entry of Linda Hensley's default established the allegations of negligence and causation set forth in the complaint.
4. Whether negligence and causation can be contested at a Rule 55(b)(2) hearing on damages after entry of a party's default.
5. Whether the court properly exercised its discretion in awarding plaintiff damages in the sum of \$66,213.07.
6. Whether Appellee is entitled to an award of costs and attorney's fees pursuant to the provisions of Rule 33, Utah Rules of Appellate Procedure.

Issues one, three and four are questions of law, and are reviewed for correctness. *Orton v. Carter*, 970 P.2d 1254, (Utah 1998); *State v. Pena*, 869 P.2d 932 (Utah 1994).

Issues two and five are questions left to the discretion of the trial court and are determined by an abuse of discretion standard. *State v. Pena, supra*.

Issue six is addressed to the discretion of this court. *Wilde v. Wilde*, 969 P.2d 438 (Utah App. 1998).

These issues were preserved for appeal in plaintiff's motion to compel discovery and supporting memoranda filed November 1, 2006, R. 196-201; in the trial court's minute entry of December 20, 2006 R. 213-215; in the February 7, 2007 order of the trial court, R. 221-223; in plaintiff's motion for sanctions and supporting memoranda filed July 12, 2007, R. 428-436; the minute entry of the court entered September 21, 2007, R. 516; the order of the trial court dated October 3, 2007, R. 525-527; and the trial court's findings of fact and conclusions of law entered January 17, 2008, R. 644-649.

VI

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,

RULES AND REGULATIONS

1. Utah Code Ann. Section 78A-4-103(2)(j).
2. Utah Code Ann. Section 78-14-18.
3. Rule 37, Utah Rules of Civil Procedure.
4. Rule 55(b)(2), Utah Rules of Civil Procedure.
5. Rule 60(b), Utah Rules of Civil Procedure.
6. Rule 33, Utah Rules of Appellate Procedure.

7. Rule 3.3(a)(1), Utah Rules of Professional Conduct.

VII

STATEMENT OF THE CASE

A. Nature of the Case.

This is a medical negligence case which was filed by Kim Fratto against Linda and Renette Hensley, and the Hensley Family Medical Center. Plaintiff received laser treatments at the clinic for a medical condition known as perforating caratosis pylorus which is sometimes referred to as feliculitis. R. 720 at 6-7. Plaintiff was burned by the laser while having a treatment on August 7, 2004.

On July 20, 2006, plaintiff served written discovery on the Hensley defendants. R. 131-132. Defendants failed to respond. On October 31, 2006, plaintiff filed a motion to compel answers to the discovery requests and asked for sanctions in the form of an award of attorney's fees. R. 196-210. Defendants failed to respond.

On December 20, 2006, the court granted the motion to compel discovery and signed a written order on February 7, 2007 ordering defendants to produce the documents within fifteen days. R. 213-215, 221-223. The defendants did not respond. The court scheduled a hearing on sanctions for March 8, 2007 to consider the sanction of attorney's fees for plaintiff.

On March 8, 2007 Linda and Renette Hensley, together with their attorney Terry Spencer, attended the sanctions hearing. R. 748 at 4:15-18. Mr. Spencer told the court

that he had not responded to the discovery requests because he had been forbidden to do so by his client Linda Hensley. R. 748 at 10:10-19, 11:1-14, 13:1-4. He said Linda Hensley told him to give no information to plaintiff and to stop work on the case. *Id.* Neither Linda nor Renette Hensley objected to his statements, nor did they say the statements were untrue.¹

The court ordered the Hensleys to provide plaintiff with answers to the discovery requests within fifteen days. R. 748 at 21-27.

The court determined both Linda Hensley and Mr. Spencer were culpable and awarded sanctions jointly against defendants and their attorney. R. 481.

On September 21, 2008, the court filed a minute entry granting plaintiff's July 12, 2007 motion for sanctions. In the minute entry the court stated:

Notwithstanding an express Court order and sanctions, the Hensley defendants continue to stonewall the discovery process. The Court considers their behavior to be contemptuous. Given that intermediate sanctions have failed to secure these defendants' compliance, the Court now grants Plaintiff's motion to strike the answer of the Hensley defendants and enter default judgment against defendant Linda R. Hensley..... R. 516.

¹ At the March 8, 2008 hearing the Hensleys did not object to the statements of Mr. Spencer, nor did they deny that they told him not to provide any information to plaintiff. In fact, Mr. Spencer argued in subsequent memoranda on the issue of awarding attorney's fees against him personally, that he had an ethical duty to follow the instructions of his client not to provide any information to plaintiff. R. 261-265.

On October 3, 2008, the court entered an order granting the motion for sanctions and entered default against Linda Hensley. R. 525-527. The court held a hearing on January 14, 2008, pursuant to Rule 55(b)(2) of the Utah Rules of Civil Procedure, for the purpose of taking evidence on damage issues and awarding a money judgment. R. 561.

Following the hearing, the court issued detailed findings of fact and conclusions of law which determined plaintiff's damages. R. 644-649.

An amended judgment was entered which awarded damages against Linda Hensley in the amount of \$66,631.17. R. 651-653.

Linda Hensley moved for a new trial and to set aside her default. In support she filed the affidavit of her new attorney. R. 661-666, 687.

The affidavit of Hensley's attorney set forth facts which were contrary to the true facts, and also contrary to admissions made in the March 8, 2007 sanctions hearing. Plaintiff's attorney wrote a Rule 11 letter to attorney Kanell asking him to withdraw the motion and affidavit. (Addendum, exhibit 1). Plaintiff moved to strike Kanell's affidavit. R. 691-695.

Prior to counsel filing the Rule 11 motion, the trial court filed a minute entry denying defendant's motions. R. 643, 707. An order denying the motion for a new trial was entered on April 28, 2008. R. 709-710. No order was entered on the motion to set aside the default because it was withdrawn by counsel. R. 711-712.

Notice of appeal was filed on May 8, 2008. R. 714-715.

B. Statement of Facts.

1. On July 20, 2006, plaintiff made discovery requests and served them upon defendants Linda Hensley, Renette Hensley and the Hensley Family Medical Center. R. 131-132.

2. When no timely response was received, Plaintiff's counsel sent a letter requesting responses to the discovery requests to counsel for defendants. Said correspondence was mailed on September 21, 2006. R. 210.

3. On October 31, 2006, plaintiff filed and served on defendants a motion to compel discovery. R. 196-210.

4. The defendants did not respond.

5. On December 20, 2006, the court made a minute entry granting the motion to compel. R. 213-215.

6. On January 25, 2007, plaintiff requested a hearing on the amount of attorney's fees to be awarded pursuant to the findings of the minute entry of December 20, 2006. R. 216-217.

7. On February 7, 2007, the court entered an order requiring Linda Hensley to provide the documents requested by plaintiff within fifteen days. R. 221-222.

8. On February 16, 2007, Terry Spencer filed a motion for leave to withdraw as counsel for defendants. R. 243-245.

9. On February 21, 2007, the court denied the motion to withdraw by minute entry. R. 246-47.

10. On March 8, 2007, the court held a hearing on sanctions related to entry of the December 20, 2006 order granting the motion to compel discovery. R. 248, 748.

11. At the March 8, 2007 hearing defendants Linda and Renette Hensley were present in court and represented by their counsel, Terry Spencer. R.748 at 4:15-18.

12. Terry Spencer told the court that he was forbidden by Linda Hensley to file responses. R. 748 at 10:10-19, 11:1-14, 13:1-4.

13. Terry Spencer told the court that he deemed himself bound to follow the directions of his clients not to provide any information in discovery. R. 748 at 11:1-14.

14. The court directed defendants Linda and Renette Hensley and the Hensley Family Medical Center to provide answers to plaintiff's outstanding discovery requests within fifteen days. R. 248; 748 at 21-27.

15. At the March 8, 2007 hearing, the court allowed Mr. Spencer to withdraw as counsel for the Hensley defendants. R. 248; 748 at 27:3-6.

16. Following the March 8, 2007 hearing, plaintiff sent notices to appoint counsel to defendants. R. 249-260.

17. Defendants failed to file responses to plaintiff's outstanding discovery requests.

18. The court granted the motion for imposition of fees and made a minute entry allowing Mr. Spencer to withdraw as counsel, ordered defendants to answer the discovery requests within fifteen days, and allowed counsel to submit memoranda on the issue of whether fees should be awarded against Mr. Spencer for the willful refusal of he and the defendants to respond to plaintiff's discovery requests. R. 248.

19. Counsel submitted memoranda on the issue of whether the attorney's fee sanction should also include Mr. Spencer. R. 261-265, 270-274.

20. On July 12, 2007, having received no responses to the outstanding discovery, plaintiff filed a motion for sanctions asking that defendants' answer be stricken and default entered. R. 428-436.

21. The Hensley defendants failed to respond to the plaintiff's motion for sanctions and plaintiff submitted the motion to the court for decision on August 1, 2007. R. 478.

22. On September 21, 2007, the court filed a minute entry granting plaintiff's July 12, 2007 motion for sanctions. R. 516.

23. On October 3, 2007, the court granted plaintiff's motion for sanctions, and struck the answer of Linda Hensley, and entered her default, and ordered a Rule 55(b)(2) damages hearing. R. 525-527.

24. On November 5, 2007, the trial court sent notice that a hearing on damages would be held on January 14, 2008. R. 561-563.

25. On January 14, 2008, the trial court held an evidentiary hearing on damages pursuant to Rule 55(b)(2) of the Utah Rules of Civil Procedure. R. 635, 720.

26. Defendants were represented at that hearing by Ted Kanell.

27. The January 14, 2008 hearing was one hundred three (103) days after entry of default. Nevertheless, Mr. Kanell asked the court to set aside the default. R. 635, 720 at 4:1-5.

28. No motion to set aside the default was filed before the January 14, 2008 hearing.

29. The court declined to set the default aside citing the reasons previously set forth in her minute entry of September 21, 2007. R. 516, 720 at 4:1-5.

30. On January 17, 2008, following the damages hearing, the trial court entered detailed findings of fact, conclusions of law, and awarded damages to plaintiff. R. 644-649.

31. The trial court entered judgment for plaintiff and against Linda Hensley and the Hensley Family Medical Center on February 5, 2008. R. 651-653.

32. On February 19, 2008, defendant Linda Hensley filed motions to set aside the default entered October 3, 2007 and requested a new trial. R. 661-670. The motions were supported by an affidavit of attorney Kanell. R. 687-690.

33. On February 20, 2008, plaintiff filed a motion to strike portions of Kanell's affidavit. R. 691-695.

34. On February 22, 2008, plaintiff filed her memorandum in opposition to the motion for a new trial. R. 696-698.

35. No response to the motion to set aside the default judgment was filed by plaintiff because plaintiff had demanded a withdrawal pursuant to Rule 11. (Addendum exhibit 1). Defense counsel agreed to withdraw the motion and no response to the motion was ever filed. R. 711.

36. On April 18, 2008, the court filed a minute entry denying the motion for a new trial. R. 707-708.

37. A formal order denying the motion for a new trial was entered April 28, 2008. R. 709-710.

38. Notice of Appeal was filed June 23, 2008. R. 714-715.

VIII

SUMMARY OF THE ARGUMENTS

POINT I

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION UNDER RULE 37 TO STRIKE THE ANSWER OF DEFENDANTS AND ENTER A DEFAULT AGAINST THEM.

The discretion of a trial court to deal with discovery abuses and grant sanctions has been amply explained by Utah courts. *E.g., Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997); *Tucker Realty, Inc. v. Nunley*, 396 P.2d 410, 412, 16 Utah 2d 97,

100 (1964); *Tuck v. Godfrey*, 981 P.2d 407 (Ut. App. 1999) *cert. den.*, 984 P.2d 1023; *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah App. 1997).

The discretion to enter a default for discovery abuses is very broad and will only be disturbed if the trial court's action is without support in the record, or is a plain abuse of discretion. *Tucker Realty, Inc. v. Nunley*, 396 P.2d at 412. The trial court is given very broad discretion to impose sanctions for discovery abuse because it must deal first hand with the parties and the discovery process. *Morton v. Continental Baking Co.*, *supra* at 274.

The trial court struck Linda Hensley's answer and entered default on October 3, 2007 as a sanction for her continuing willful refusal to comply with discovery orders which had been entered by the court. R. 516, 525. Hensley does not claim that this sanction was an abuse of discretion. Rather, she claims the court abused its discretion by refusing to vacate the default when requested. Brief at Point I A. Hensley fails to document any evidence in the record to support her claim that she was justified in ignoring the court's order.

Hensley's argument of substantial justification is without merit. She relies upon precedent that is inapposite. None of the cases cited in her brief deal with a default that was entered for repeated discovery abuses.

POINT II

THE ENTRY OF DEFAULT AGAINST DEFENDANTS ON OCTOBER 3, 2007

ESTABLISHED THE NEGLIGENCE OF DEFENDANTS. THE ONLY REMAINING ISSUE WAS THE AMOUNT OF DAMAGES TO BE AWARDED.

Upon entry of Linda Hensley's default on October 3, 2007, R. 525, the allegations of negligence in the complaint were deemed admitted. *Utah Ass'n of Credit Men v. Bowman*, 38 Utah 326, 113 P. 63 (1911); *Skachy v. Calcados Orthope SA*, 952 P.2d 1071, 1076 (Utah 1998); *Williams v. Barber*, 765 P.2d 887 (Utah 1998); *Mendoza v. Schlossman*, 87 A.D.2d 606, 448 N.Y.S.2d 45 (App. Div. 1982). The only matter left to be determined was the amount of damages that should be awarded. *Id.*

Thus by entry of the default, the issues of the defendant's negligence and the merits of the underlying claim are settled in favor of the plaintiff. *Id.*

The Rule 55(b)(2) hearing held on January 14, 2008 was convened solely to determine the amount of damages to be awarded. R. 720 at 1:7-12. The court took evidence at the January 14, 2008 hearing, and rendered a damages judgment against defendant.

On appeal from such a default judgment, a defendant may properly contest the sufficiency of the complaint and its allegations to support the judgment, or may contest

the sufficiency of the evidence to support the amount of the judgment, but no independent proof of the allegations of negligence is required because the factual allegations are deemed admitted by entry of the default. *Skachy v. Calcados Orthope SA, supra*; *Williams v. Barber, supra*; *Mendoza v. Schlossman, supra*.

POINT III

THE COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING DAMAGES TO PLAINTIFF IN THE SUM OF \$66,213.07.

Hensley argues that the trial court abused its discretion by not requiring expert testimony at the damages hearing to establish the standard of care, breach of the standard of care, injury proximately caused by the breach of the standard of care, and damages. Brief at Point III. Hensley cites no authority to support the proposition that in a Rule 55(b)(2) damages hearing after entry of a default, expert testimony is necessary to establish the amount of damages suffered by the plaintiff.

By striking the answer and entering default as a sanction for discovery abuse, negligence and proximate cause are admitted. *Skachy v. Calcados Orthope SA, supra*; *Williams v. Barber, supra*; *Mendoza v. Schlossman, supra*.

Plaintiff's amended complaint alleged that Linda and Renette Hensley negligently burned the arms of plaintiff during their application of laser therapy on August 7, 2004, R. 150 at ¶ 34, and that as a result she was damaged, R. 150 at ¶ 35. The default admits these allegations.

At the damages hearing on January 14, 2008, the court heard evidence on damage issues only. R. 720 at 5-70, 724a

Injuries were established at the January 14, 2008 hearing by evidence which showed damage within the common knowledge and experience of layman. A layman could easily see evidence of the burns and it is within the common knowledge of layman that a laser can cause burns. Therefore expert testimony was not required to establish that the burns, which manifested immediately following the laser treatment, R. 720 at 10-13, were caused by Hensley's laser treatment. *Beard v. K-Mart Corp.*, 12 P.3d 1015, 2000 UT App. 285; *Nixdorf v. Hicken*, 612 P.2d 348 (Utah 1980).

Since the necessary foundation for an award of damages is established by striking Hensley's answer and the entry of her default, only the amount of damage was left to be determined at the January hearing. Hensley does not argue that the amount of damages awarded was inappropriate. She argues only that damages cannot be established without expert testimony. None of Hensley's cases support the proposition that expert testimony is necessary to establish damages at a Rule 55(b)(2) damages hearing following entry of default. Thus the award of damages made by the trial court must be affirmed.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY VIOLATING UTAH CODE ANN. SECTION 78-14-18.

Hensley argues that it was an abuse of discretion to allow testimony at the damages hearing which reflected an admission of liability by Linda Hensley. She claims such is a violation of Utah Code Ann. Section 78-14-18. This claim lacks merit for two reasons. First, the testimony in question was given without any objection by Hensley. Second, the testimony was offered only for the purpose of establishing damages.

Hensley argues that the testimony, quoted at pages 9-10 of her brief, violates the prohibition of Utah Code Ann. Section 78-14-18. However, she did not object during the hearing. R. 720 at 9-12. Thus, Hensley failed to preserve for appeal any claim that the testimony was improper.

An appellate court will refuse to consider issues raised for the first time on appeal. *E.g., Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996); *State v. Holgate*, 10 P.3d 346, 350, 2000 UT 74; *State v. Montoya*, 937 P.2d 145, 149-150 (Utah App. 1997). Hensley failed to make or preserve in the trial court any claim that the trial court allowed evidence in violation of Section 78-14-18. Since no mention of this issue was made to the trial court, Hensley cannot now argue it as a basis for reversing the judgment on appeal. *Id.*

The Rule 55(b)(2) evidentiary hearing was convened only to establish damages. R. 720 at 1:7-12. The testimony quoted at pages 9-10 of Hensley's brief was received without objection as part of the evidence offered to prove pain and suffering.

Appellant's claim that the court violated Utah Code Ann. Section 78-14-18 is not supported by the record and has no merit.

POINT V

DEFENDANTS' FAILED TO FILE A MOTION TO SET ASIDE THE DEFAULT ENTERED ON OCTOBER 3, 2007 WITHIN THE TIME ALLOWED BY RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE.

On October 3, 2007, the trial court struck Hensley's answer and entered her default as a sanction for her repeated refusals to abide by discovery orders issued by the court. *See* R. 213-215; 221-222; 248; 516; 525; 748 at 7:3-6. No Rule 60(b) motion to set aside the default was filed prior to the January 14, 2008 hearing.

On February 19, 2008, Hensley first filed a written motion to set aside the default. R. 661-663. Counsel later withdrew the motion. R. 711-712. No written order was entered on the motion to set aside the default because it was withdrawn.²

²In the minute entry dated April 18, 2008, R. 707, the court commented that to the extent the motion for a new trial was an effort to get her to reconsider her entry of default on October 2, 2007, she declined to do so. The motion for a new trial was denied, R. 709, and no order was ever entered on the motion to set aside the default which has been withdrawn. R. 711-712.

Default was entered October 3, 2007, and no motion to set aside the default was filed within the time allowed by U.R.C.P. Rule 60(b). In her February 19, 2008 motion to set aside the default, Hensley recognized that the default was originally entered October 3, 2007 and that the judgment on the default was entered after the January 14, 2008 damages hearing. R. 661. In this appeal, Hensley fails to distinguish between entry of the default, which occurred on October 3, 2007, R. 525, and entry of judgment on the default which occurred on February 5, 2008. R. 651-653. No motion to set aside the default was ever filed within the time allowed by Rule 60(b). The motion to set aside the underlying October 3, 2007 default was eventually withdrawn. R. 711-713.

Because no motion to set aside the default entered on October 3, 2007 was filed within the time frame allowed by Rule 60(b) of the Utah Rules of Civil Procedure, the trial court had no discretion to set the underlying default aside. *Swallow v. Kennard*, 183 P.3d 1052, 1057, 2008 UT App 134.

POINT VI

THE APPEAL OF THIS CASE IS FRIVOLOUS AND APPELLEE IS ENTITLED TO RECOVER COSTS AND ATTORNEY'S FEES PURSUANT TO RULE 33, UTAH RULES OF APPELLATE PROCEDURE.

Hensley's appeal is frivolous. U.R.A.P. 33(b). Her arguments are not grounded in fact. The relief she requests is not warranted by existing law. Hensley has not made any argument to extend, modify, or reverse existing law.

The Statement of the Case and Facts sections of Hensley's Brief fail to tell the true story of what happened in the trial court. Hensley repeatedly refused to answer the discovery requests. At the March 8, 2007 hearing the trial court expressly ordered Hensley to provide the discovery responses within fifteen days. She ignored this order. Plaintiff filed a second motion for sanctions on July 12, 2007. Hensley failed to respond.

On September 21, 2007, more than six months after being ordered to respond to the discovery requests, the court made a minute entry granting the motion to compel. R.

516. The court stated in the minute entry:

Notwithstanding an express Court order and sanctions, the Hensley defendants continue to stonewall the discovery process. The Court considers their behavior to be contemptuous. Given that intermediate sanctions have failed to secure these defendants' compliance, the Court now grants Plaintiff's motion to strike the answer of the Hensley defendants and enter default judgment against defendant Linda R. Hensley..... *Id.*

Counsel for defendants failed to accurately describe these facts to this Court. An intentional omission of material facts is a violation of counsel's duty of candor to the court. Rule 3.3(a)(1), Utah Rules of Professional Conduct; *C.f. Chen v. Stewart*, 123 P.3d 416, 427, n.7, 2005 UT 68. Hensley's appeal is not grounded in fact and is frivolous.

Hensley makes no good faith argument that the trial court abused its discretion in striking her answer and entering her default. She cites no authority to support an argument that her challenge to entry of the default was timely. She cites no pertinent facts which would justify her longstanding willful refusal to provide discovery responses even after being personally ordered by the court to do so. She provides no authority to support her

claim that there was “reasonable justification” for her refusal to follow the court’s order and respond to the discovery requests.

The law is clear. A court may properly exercise its discretion by striking pleadings and entering a default. *Morton v. Continental Baking Co., supra; Tucker Realty, Inc. v. Nunley, supra; Tuck v. Godfrey, supra; Preston & Chambers, P.C. v. Koller, supra.*

Hensley fails to cite a single case for the proposition that when negligence and proximate cause have been established through entry of a default, there must be expert testimony to support the damages awarded by the court.

Hensley’s Brief makes no argument for the extension, modification, or reversal of any existing Utah law.

Given Hensley’s failure to provide this Court with a candid explanation of the reasons why the trial court struck her answer, and then arguing the merits of her appeal based on a skewed version of the facts without authority to support her claim that the entry of her default was an abuse of discretion under the facts of this case, there is adequate basis for the court finding that her appeal is frivolous. *O’Brien v. Rush*, 744 P.2d 306 (Utah 1987).

IX

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION UNDER RULE 37 TO STRIKE THE ANSWER OF DEFENDANTS AND ENTER A DEFAULT AGAINST THEM.

Hensley argues that the trial court abused its discretion by denying her motion to set aside the default, and by denying her motion for a new trial. Appellant's Brief at Point I. Hensley argues, without citation to authority, that the trial court's discretion to strike pleadings and enter default for abuses of discovery pursuant to U.R.C.P. 37 is different than its discretion under a U.R.C.P. 60(b) motion to set aside a default entered as a sanction for discovery abuses. Brief at 5. The discretion of a trial court to deal with discovery abuses and grant sanctions has been amply explained by Utah courts. *E.g.*, *Morton v. Continental Baking Co.*, *supra*; *Tucker Realty, Inc. v. Nunley*, *supra*; *Tuck v. Godfrey*, *supra*; *Preston & Chambers, P.C. v. Koller*, *supra*.

The discretion to enter a default for discovery abuses is very broad and will only be disturbed if the trial court's action is without support in the record, or is a plain abuse of discretion. *Askew v. Hardman*, 918 P.2d 469, 472 (Utah 1996); *Tucker Realty, Inc. v. Nunley*, 396 P.2d at 412. The trial court is given very broad discretion to impose sanctions

for discovery abuse because it must deal first hand with the parties and the discovery process. *Morton v. Continental Baking Co.*, *supra* at 274.

The trial court struck Hensley's answer and entered default on October 3, 2007 as a sanction for her continuing willful refusal to comply with discovery orders which had been entered by the court. R. 516, 525. Hensley does not claim that this sanction was an abuse of discretion. Rather, she claims the court abused its discretion by refusing to later vacate the default. Brief at Point I A. Hensley fails to document any evidence in the record to support her claim that she was justified in ignoring the court's order.

Hensley's argument of substantial justification is without merit. She relies upon precedent that is inapposite. None of the cited cases deal with a default that was entered for repeated discovery abuses or violation of a court order.

Hensley has been less than candid with the court in her attempts justify her actions. Instead of explaining her willful refusal to provide requested information, R. 748 at 10:10-19, 11:1-14, 13:1-4, she attempts to shift the blame for failure to respond to her prior counsel. Brief at 8. However, her counsel did not respond to the discovery requests because Linda Hensley told him not to provide any information to plaintiff. R. 748 at 10:10-19; 11:1-14; 13:1-4. Even after being personally ordered by the court to provide the requested information, R.748 at 21:4-7; 23:3-22; 25-27, Hensley refused. Moreover, she failed to respond to plaintiff's second motion for sanctions. R 428-436.

Hensley has produced no evidence in the record to support her claim that she was reasonably justified in refusing to answer the discovery, that the court abused its discretion by entering her default, or that the court abused its discretion by refusing to set the default aside.

In *Preston & Chambers, P.C. v. Koller, supra*, this court held that under Rule 37(d), a trial court may properly enter the sanction of default against a party for failing to comply with discovery requests. To set aside such a default, a party must establish a clear abuse of that discretion by establishing that the trial court made an erroneous conclusion of law or that there was no basis in the evidence to support the trial court's ruling. *Id. See, Askew v. Hardman, supra; Morton v. Continental Baking Co., supra; Tuck v. Godfrey, supra.*

Hensley says "the failure to provide discovery was overwhelmingly the consequence of prior counsel's failure to act." Brief at 8. She neglects to tell the court that her prior counsel did not respond to discovery because he was following her express instructions. R. 748 at 10:10-19, 11:1-14, 13:1-4. Hensley claims her position is supported by a ruling of the court. Not so. The court ruled both the attorney and the client were responsible for the delays, and that Hensley was culpable. *E.g., R. 481, 516, 644.* Hensley has made no showing in the record which would establish an abuse of discretion by the trial court in this case. The trial court's refusal to set aside the default and default judgment were within her discretion and should be affirmed.

POINT II

THE ENTRY OF DEFAULT AGAINST DEFENDANTS ON OCTOBER 3, 2007 ESTABLISHED THE NEGLIGENCE OF DEFENDANTS. THE ONLY REMAINING ISSUE WAS THE AMOUNT OF DAMAGES TO BE AWARDED.

Hensley argues at Point III of her brief that the trial court abused its discretion by not requiring expert testimony to show a breach of the standard of care. Defendant argues that a malpractice case cannot be submitted for a determination of damages until expert testimony has established that there was a breach of the standard of care and that the breach was a proximate cause of the injuries complained of by plaintiff.

While as a general proposition Hensley's argument is correct, no such evidence and proof is necessary in a default situation because by striking Hensley's answer and entering her default on October 3, 2007, the negligence allegations of the complaint are deemed admitted. *Utah Ass'n of Credit Men v. Bowman, supra; Skachy v. Calcados Orthope SA, supra; Williams v. Barber, supra; Mendoza v. Schlossman, supra.* Once default has been entered, the allegations of negligence in the complaint are admitted. The only matter left to be determined is the amount of damages that should be awarded. *Id.*

The factual allegations of a complaint are deemed admitted by entry of a default. If the facts pled in the complaint establish a valid legal basis for the relief sought by a non-defaulting party, then the court may grant the relief requested. *Skachy v. Calcados Orthope SA*, 952 P.2d at 1076. Thus, where a default judgment is entered against a

defendant in a medical malpractice action, both the issues of the defendant's negligence and the merits of the underlying claim are settled in favor of the plaintiff. *Utah Ass'n of Credit Men v. Bowman, supra; Skachy v. Calcados Orthope SA, supra; Williams v. Barber, supra; Mendoza v. Schlossman, supra.*

The Rule 55(b)(2) hearing held on January 14, 2008 was convened solely to determine the amount of damages to be awarded. R. 720 at 1:7-12. The court took evidence at the January 14, 2008 hearing, and based thereon rendered a damages judgment against defendant. On appeal from such a default judgment, a defendant may properly contest the sufficiency of the complaint and its allegations to support the judgment, or may contest the sufficiency of the evidence to support the amount of the judgment, but no independent proof of the allegations of negligence is required because the factual allegations of the complaint are deemed admitted by entry of the default. *Id.*

POINT III

THE COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING DAMAGES TO PLAINTIFF IN THE SUM OF \$66,213.07.

Hensley argues that the trial court abused its discretion by not requiring expert testimony to establish the standard of care, breach of the standard of care, injury proximately caused by the standard of care, and damages. Brief at Point III. Hensley cites to Utah cases to support the general proposition that expert testimony is necessary to prove a malpractice case. However, Hensley cites no authority to support the proposition

that in a Rule 55(b)(2) hearing held after entry of a default, expert testimony is necessary to establish the amount of damages suffered by the plaintiff.

As set out in Point II above, by striking the answer and entering default as a sanction for discovery abuse, the issues relating to negligence and proximate cause are admitted. The default serves to admit the facts respecting liability and causation which have been pled in the complaint (Point II above). Plaintiff's amended complaint alleged that Linda R. Hensley and Renette Hensley negligently burned the arms of plaintiff during their application of laser therapy on August 7, 2004, R. 150 at ¶ 34, and that as a result she was damaged. R. 150 at ¶ 35.

Citing *Beard v. K-Mart Corp.*, *supra*, Hensley argues "only after expert evidence has been introduced to establish the standard of care and proximate cause may the matter be submitted for the determination of damages." The *Beard* case is inappropo because the entry of Hensley's default obviated any need to present evidence on the violation of the standard of care. The only issue at the Rule 55(b)(2) hearing on January 14, 2008 was the amount of damages suffered by plaintiff.

Defendant's argument that there was no competent evidence of damage without expert testimony is simply not true. At the hearing, the court heard evidence from three witnesses. R. 720 at 5-70. The court received into evidence exhibit 3 which contained the deposition of Dr. Ralph Bradley, plaintiff's dermatologist, and photographs of plaintiffs burns. R. 720 at 14:4, 724a.

The occurrence of the burns was shown by testimony of plaintiff and her husband. R. 720 at 10-13, 17, 68-70. The burn photographs, R. 724a, were taken within 1-2 days of the burn incident. R. 720 at 13:5-11. Plaintiff's claim of injury was that immediately following her laser treatment, the burns manifested themselves on her arms and legs. The evidence presented at the January 14, 2008 hearing supported this claim.

The injuries which were established at the January 14, 2008 hearing were shown by evidence which showed damage within the common knowledge and experience of a layman. A layman could easily see evidence of the burns and it is within the common knowledge of a layman that a laser can cause burns. Therefore no expert testimony was required to establish that the burns, which manifested immediately following the laser treatment, R. 720 at 10-13, were caused by Hensley's laser treatment. *Beard v. K-Mart Corp.*, *supra*; *Nixdorf v. Hicken*, *supra*.

The case of *Sohm v. Dixie Eye Center*, 2007 UT App. 235, 166 P.3d 614, does not support Hensley's argument. The *Sohm* court recognized that a finding of proximate cause necessarily includes a finding of identifiable injury, and then stated:

In *Judd v. Drezga*, the Utah Supreme Court noted that "damages are a question of fact, and . . . questions of fact are distinctly within the jury's province." This is a long-standing principle in Utah case law. Once the trial court determined that Plaintiff met the evidentiary threshold respecting proximate cause, or in other words, that Defendants' negligence may have been the proximate cause, at least in part, of Plaintiff's loss of vision, a jury was entitled to determine the extent of Plaintiff's damages. 12 P.3d at 619 (citations omitted).

Since the necessary foundation for an award of damages is established by striking Hensley's answer and the entry of her default, only the amount of damage was left to be determined by the court. Hensley does not argue that the amount of damages awarded was inappropriate. She argues only that damages cannot be established without expert testimony. None of Hensley's cases support the proposition that expert testimony is necessary to establish damages at a Rule 55(b)(2) damages hearing. Thus the award of damages made by the trial court must be affirmed.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY VIOLATING

UTAH CODE ANN. SECTION 78-14-18.

Hensley argues at Point II of her brief that it was an abuse of discretion to allow testimony at the Rule 55(b)(2) hearing which admitted liability and violated the provisions of Utah Code Ann. Section 78-14-18. This claim lacks merit for two reasons. First, the questioned testimony, quoted at pages 9-10 of the Hensley Brief, was given without objection. R. 720 at 9-10. Second, the testimony was offered at a damages hearing held pursuant to Rule 55(b)(2). It was not offered to prove defendant admitted liability, but only for the purpose of helping to establish damages.

Hensley argues that the testimony quoted at pages 9-10 violates the prohibition of Utah Code Ann. Section 78-14-18. However, she did not object. Thus, Hensley failed to preserve for appeal any claim that the testimony was improper. Hensley argues that the

testimony quoted at pages 9-10 of her brief is “conversation between the Appellee and Appellant in which Appellant claims Appellee admitted liability for medical malpractice.” Brief at 10. Plaintiff never argued that the quoted evidence showed an admission of liability.

Hensley did not object to the testimony when it was received. She did not claim that the trial court erred and violated Section 78-14-18 in her post-trial motions or memoranda. This issue appeared for the first time in Hensley’s appeal.

The general rule is that an appellate court will refuse to consider issues raised for the first time on appeal. *E. g., Monson v. Carver, supra; State v. Holgate, supra.* In order to preserve an issue for appeal, a litigant must make an objection and direct the trial court’s attention to any claimed error in such a way that the court is given an opportunity to correct the error. *State v. Montoya, supra.* Hensley failed to make or preserve in the trial court any claim that the trial court accepted evidence in violation of Section 78-14-18. Since no mention of this issue was made to the trial court, she cannot now argue it as a basis for reversing the judgment in this case. *Id.*

The reference to this testimony in the court’s findings, R. 645 ¶ 4, was made to support the court’s finding that the burns were readily apparent on the date of injury. It was not used for the purpose of establishing an admission of liability. Nowhere in the record does plaintiff ever argue or proffer this evidence to the court on the issue of

liability. There was no need to offer evidence of liability. That was established by entry of the default on October 3, 2007. *See* Point II above.

Appellant's Point II is simply a non-issue which was not preserved for appeal, is not supported by the record, and has no merit.

POINT V

DEFENDANTS' FAILED TO FILE A MOTION TO SET ASIDE THE DEFAULT ENTERED ON OCTOBER 3, 2007 WITHIN THE TIME ALLOWED BY RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE.

By order of the court entered on October 3, 2007, the trial court struck Hensley's answer and entered her default. R. 525. It was a sanction for continued failure to abide by discovery orders issued by the court. *See* R. 213-215; 221-222; 248; 516; 525; 748 at 7:3-6. Following entry of the default, the matter was set for a Rule 55(b)(2) damages hearing on January 14, 2008. At the hearing on January 14, 2008, counsel for Linda Hensley had a conversation with the court about setting aside the default as follows:

MR. KANELL: . . . Just for the record I did call up Mr. Wells because as he said I've known Ed for probably 30 years and I asked him if he would be willing to stipulate to set aside the default and he said no. I am here today, maybe to ask Your Honor to set aside the default. But after reading the minutes that happened and also reviewing the transcript, I'm of the opinion that you probably would say no to that.

THE COURT: You are correct. R. 720 at 3-4.

No motion to set aside the default was filed prior to the January 14, 2008 hearing. On February 19, 2008, one hundred and thirty nine (139) days after entry of the default of Linda Hensley, counsel filed a formal motion to set aside the default. R. 661-663. Counsel later withdrew the motion. R. 711-712. No written order was entered on the motion to set aside the default because it was withdrawn.³ *Id.*

Defendant argues in her brief, at page 5, that the issue on appeal is “whether the court abused its discretion in rejecting appellant’s motion to set aside the judgment which was filed 10 days after the default judgment had been entered.” In the motion appellant recognized that the default was entered October 3, 2007 and that the judgment on the default was entered after the January 14, 2008 hearing. R. 661. In this appeal, appellant fails to distinguish between entry of the default, which occurred on October 3, 2007, R. 525, and entry of judgment on the default which occurred on February 5, 2008. R. 651-653. No motion to set aside the default was ever filed within the time allowed by Rule 60(b). The motion to set aside the underlying default was withdrawn. R. 711-713.

Because no motion to set aside the default entered on October 3, 2007 was filed within the time frame allowed by Rule 60(b) of the Utah Rules of Civil Procedure, the

³In the minute entry dated April 18, 2008, R. 707, the court commented that to the extent the motion for a new trial was an effort to get her to reconsider her entry of default on October 2, 2007, she declined to do so. The motion for a new trial was denied, R. 709, and no order was ever entered on the motion to set aside the default which has been withdrawn. R. 711-712.

trial court had no discretion to set it aside. *Swallow v. Kennard, supra*. The only issue properly before this Court is whether the trial court abused its discretion by refusing to set aside the judgment to allow another trial on the issue of damages. *Id.*

POINT VI

THE APPEAL OF THIS CASE IS FRIVOLOUS AND APPELLEE IS ENTITLED TO RECOVER COSTS AND ATTORNEY'S FEES PURSUANT TO RULE 33, UTAH RULES OF APPELLATE PROCEDURE.

Rule 33(b) of the Rules of Appellate Procedure provides that a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. In this case, the arguments by Hensley are not grounded in fact. The relief requested by Hensley is not warranted by existing law. Hensley has not made any argument to extend, modify, or reverse existing law. For these reasons, her appeal is frivolous.

A. HENSLEY'S APPEAL IS NOT GROUNDED IN FACT.

The Statement of the Case and Facts sections of Hensley's Brief fail to tell the true story of what happened in the trial court. This is not a case where a client was abandoned by her attorney and failed to comprehend what she needed to do to avoid a default. A review of the Appellee's Statement of the Case and Statement of Facts, all of which are fully documented in the record, shows that the initial discovery requests were not responded to by counsel because counsel chose to follow the express directive of Hensley

that he provide no information to the plaintiff. R. 748 at 10:10-19, 11:1-14, 13:1-4. The trial court at the March 8, 2007 hearing allowed Hensley's counsel to withdraw, but at the hearing, the court expressly ordered Hensley to provide the discovery responses within fifteen days.⁴ R. 748 at 21:4-7, 23:3-22, 26-27. Hensley ignored this order. A second motion for sanctions was filed on July 12, 2007. R. 428-436. Hensley ignored the motion.

Finally, on September 21, 2007, over six months after being verbally ordered to respond to the discovery requests, the court made a minute entry granting the motion to compel. R. 516. The court stated in the minute entry:

Notwithstanding an express Court order and sanctions, the Hensley defendants continue to stonewall the discovery process. The Court considers their behavior to be contemptuous. Given that intermediate sanctions have failed to secure these defendants' compliance, the Court now grants Plaintiff's motion to strike the answer of the Hensley defendants and enter default judgment against defendant Linda R. Hensley..... *Id.*

A formal order was entered October 3, 2007 and the Rule 55(b)(2) damage hearing was held January 18, 2008.

Counsel for defendants failed to accurately describe these facts to the Court. An intentional omission of material facts is a violation of his duty of candor to the court. *See*, Rule 3.3(a)(1), Utah Rules of Professional Conduct; *C.f. Chen v. Stewart*, 123 P.3d at 427, n.7. Thus, Hensley's appeal is not grounded in fact and meets the definition of a frivolous appeal set out in Rule 33 of the Rules of Appellate Procedure.

⁴The court had previously entered a written order on February 7, 2007 which ordered defendants to respond to the outstanding discovery within fifteen days. R. 221.

B. THE RELIEF SOUGHT IS NOT WARRANTED BY EXISTING LAW.

There is no good faith argument that the trial court abused its discretion in striking Hensley's answer and entering her default. Hensley cites no authority to support her claim that her actions were other than as recited by the court in its minute entry of September 21, 2007 granting the motion to strike her answer. R. 516. Clearly the sanctions imposed by the trial court were justified.

The cases cited by Hensley in support of her justification claims, do not support her position. *Interstate Excavating, Inc. v. Agla Dev. Corp.*, 611 P.2d 369 (Utah 1980) dealt with a claim that a notice of hearing had not been received. The appeals court gave the defendant the benefit of the doubt. *Lund v. Brown*, 11 P.3d 277 (Utah 2000) involved a bankruptcy filing where defendant believed proceedings had been stayed and did not file an answer. The appeals court felt the defendant's acts merited removing the default.

In both *Interstate Excavating* and *Lund*, the appeals court found excusable neglect and set aside the default. Neither case involved an intentional and willful refusal to comply with a court order for which a party was sanctioned.

Hensley cites *Lundahl v. Quinn*, 2003 UT 11, 67 P.3d 1000 for the proposition that courts should be lenient with *pro se* litigants. While this is true as a general proposition of law, it does not support the proposition that *pro se* litigants cannot properly be sanctioned in an appropriate case. In fact, the court in *Lundahl* granted sanctions against *Lundahl*, who appeared *pro se*.

Hensley cites no authority to support an argument that her challenge to entry of the default was timely. She cites to no pertinent facts which would justify her longstanding willful refusal to provide discovery responses even after being personally ordered by the court to do so. She provides no authority to support her claim that there was “reasonable justification” for her refusal to follow the court’s order and respond to the discovery requests.

Instead, she denies responsibility and claims the failure was the result of the negligence or misconduct of her counsel who was “overwhelmingly at fault for the discovery failures.” Brief at 9. Given the facts documented herein, it is clear that the failure to respond is not solely the fault of counsel who was merely following his client’s express directives not to provide information to plaintiff. R. 748 at 10:10-19, 11:1-14, 13:1-4. Hensley’s claim of “substantial justification” for her acts is made in bad faith. It has no merit.

Hensley’s claims of a violation of Utah Code Ann. Section 78-14-18 were not preserved in the trial court. *See* Point IV, above.

The law is clear that the trial court properly exercised its discretion in striking Hensley’s pleadings and entering her default. *Morton v. Continental Baking Co., supra*; *Tucker Realty, Inc. v. Nunley, supra*; *Tuck v. Godfrey, supra*; *Preston & Chambers, P.C. v. Koller, supra*.

Because entry of a default resolves negligence issues in favor of the plaintiff and leaves only damage issues to be determined, existing law does not support the claims of Hensley set forth in Point III. *See*, Points II and III herein. Hensley fails to cite a single case that would support the claim that under the facts of this case the trial court abused its discretion. Likewise, she fails to support the proposition that when negligence and proximate cause have been established through entry of a default, there must be expert testimony to support the damages awarded by the court.

C. HENSLEY HAS NOT ARGUED FOR EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW.

As set forth above, Hensley has cited no authority to support her claims that her actions were “substantially justified,” or that expert testimony is needed to establish damages at a Rule 55(b)(2) damages hearing held after entry of default.

Hensley’s Brief makes no argument for the extension, modification, or reversal of any existing Utah law.

D. THE APPEAL IS FRIVOLOUS.

Given the failure of Hensley to provide this Court with a candid explanation of the reasons why the trial court struck her answer, and then arguing the merits of her appeal based on a skewed version of the facts, there is adequate basis for the court finding that her appeal is frivolous. *O’Brien v. Rush, supra*.

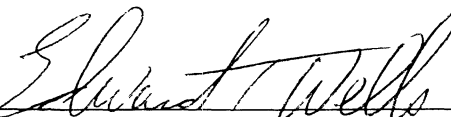
Hensley has not supported her contentions with applicable authority and has not argued for the extension, modification, or reversal of any existing Utah law. Therefore, the appeal is frivolous.

CONCLUSION

Premises considered, this Court should affirm the judgment entered by the trial court, and remand this matter back to the trial court with instructions to award costs and attorney's fees to plaintiff pursuant to the provisions of Rule 33 of the Utah Rules of Appellate Procedure.

Respectfully submitted this 10th day of November, 2008.

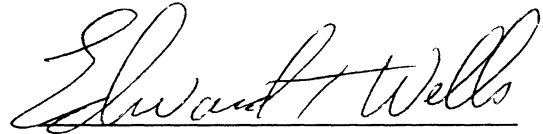
Mel S. Martin, P.C.

By 
Edward T. Wells
Attorney for Plaintiff/Appellee

Certificate of Hand Delivery

I certify that on the 10th day of November, 2008, I hand delivered two copies of Appellee's Brief in the above matter to the following:

Theodore E. Kanell
PLANT CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84180

A handwritten signature in cursive script, reading "Edward H. Wells", written over a horizontal line.

XI

ADDENDUM

Section 1.	Letter to Theodore Kanell with enclosures.	39
Section 2.	Utah Code Annotated.	43
Section 3.	Utah Rules of Civil Procedure.	44
Section 4.	Utah Rules of Appellate Procedure.	48
Section 5.	Utah Rules of Professional Conduct.	49

ADDENDUM SECTION 1

LETTER TO THEODORE KANELL DATED FEBRUARY 21, 2008

WITH ENCLOSURES.

LAW OFFICES

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February 21, 2008

Theodore E. Kanell
Plant Christensen & Kanell
136 East South Temple
Suite 1700
Salt Lake City, Utah 84111

Via Facsimile (801) 531-9747
Original by mail

Re: Fratto v. Hensley, case No. 050919567.

Dear Ted:

As a follow up to our telephone conversation, I am sending you a Rule 11 demand that you withdraw your motions for a new trial and to set aside the default. As I told you on the phone, if the information contained in your affidavit is the story told to you by your client, you need to listen to the tape from the March 8, 2007 sanctions hearing, where, in the presence of the Hensley defendants, counsel represented to the court that the reason discovery had not been responded to was that his clients had expressly forbidden him to respond to the discovery.

This is not, as appears to have been Ms. Hensley's representation to you, a case where the attorney did nothing because he wasn't paid.

The court sanctioned both your client and her attorney based upon a wilful failure to respond to discovery by both your client and Mr. Spencer.

For this reason, I believe your motion is in violation of Rule 11. Per your representation that upon receipt of my letter you would obtain the tape of that hearing and determine if the motion was warranted, I will not be required to respond to your motion unless you decide to move it forward. If you do move it forward, I will need the allotted ten days to respond.

If you have any questions, do not hesitate to call.

Respectfully,

/S/

MEL S. MARTIN, P.C.
Mel S. Martin (Bar No. 2102)
Edward T. Wells (Bar No. 3422)
5282 South Commerce Drive, #D-292
Murray, Utah 84107
Telephone: (801) 284-7278
Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH
450 SOUTH STATE STREET, SALT LAKE CITY, UTAH 84111

KIM FRATTO,)	
)	
Plaintiff,)	MOTION FOR SANCTIONS
)	UNDER RULE 11, UTAH RULES
vs.)	OF CIVIL PROCEDURE
)	
DR. THOMAS M. MCNEILIS; DR. A.)	
SCOTT DEVOUS; HENSLEY FAMILY)	Civil No. 050919567
MEDICAL CENTER, INC.; LINDA R.)	
HENSLEY; and RENETTE HENSLEY,)	Judge Lindberg
)	
Defendant.)	

Comes now Plaintiff, through Counsel, and moves the Court to enter Sanctions against Theodore E. Kanell, of the Firm of Plant Christensen & Kanell for his violation of Rule 11(b)(2) and (3), Utah Rules of Civil Procedure by filing motions for a new trial and to set aside default based upon the allegations set forth in the memorandum in support of motion to set aside default and the affidavit of Theodore E. Kanell filed therewith. Specific violations of Rule 11 are also based upon paragraph 5 of the affidavit, and

paragraph 2 of the fact statement in the memorandum in support of motion to set aside default. Rule 11(2) is also violated by asking the court to set aside the default entered on September 21, 2007 without stating a legal reason which would allow the granting of the motion under Rule 60(b).

DATED this 21st day of February, 2008.

MEL S. MARTIN, P.C.

Edward T. Wells
Attorney for Plaintiff

CERTIFICATE OF SERVICE

On this 21st day of February, 2008, I hereby certify I caused to be mailed, postage pre-paid, the foregoing **MOTION FOR SANCTIONS UNDER RULE 11, UTAH RULES OF CIVIL PROCEDURE** to the following:

Theodore E. Kanell
Plant Christensen & Kanell
136 East South Temple
Suite 1700
Salt Lake City, Utah 84111

Copy by Facsimile to (801) 531-9747

/s/
Edward T. Wells

ADDENDUM SECTION 2
UTAH CODE ANNOTATED

UTAH CODE ANNOTATED SECTION 78-14-18 (NOW RENUMBERED AS 78B-3-422)

- (1) As used in this section:
- (a) "Defendant" means the defendant in a malpractice action against a health care provider.
 - (b) "Health care provider" includes an agent of a health care provider.
 - (c) "Patient" includes any person associated with the patient.
- (2) In any civil action or arbitration proceeding relating to an unanticipated outcome of medical care, any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant shall be inadmissible as evidence of an admission against interest or of liability if it:
- (a) expresses:
 - (i) apology, sympathy, commiseration, condolence, or compassion; or
 - (ii) a general sense of benevolence; or
 - (b) describes:
 - (i) the sequence of events relating to the unanticipated outcome of medical care;
 - (ii) the significance of events; or
 - (iii) both.
- (3) Except as provided in Subsection (2), this section does not alter any other law or rule that applies to the admissibility of evidence in a medical malpractice action.

ADDENDUM SECTION 3

UTAH RULES OF CIVIL PROCEDURE

RULE 37

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

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

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was

filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

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

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

(b)(2)(A) deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

(b)(2)(C) strike pleadings or parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render judgment by default against the disobedient party;

(b)(2)(D) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(b)(2)(E) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(2)(F) instruct the jury regarding an adverse inference.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the

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

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court . on motion may take any action authorized by Subdivision (b)(2).

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

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

(g) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

RULE 55(b)(2)

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to

establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

RULE 60(b)

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ADDENDUM SECTION 4

UTAH RULES OF APPELLATE PROCEDURE

RULE 33

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

ADDENDUM SECTION 5

UTAH RULES OF PROFESSIONAL CONDUCT

RULE 3.3(a)(1)

(a) A lawyer shall not knowingly:

(a)(1) Make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.