

2006

Joseph Fox and Linda Fox v. Brigham Young University, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH R. FOX and LINDA A. FOX,

Plaintiffs/Appellants,

v.

BRIGHAM YOUNG UNIVERSITY, INC., a
Utah Corporation,

Defendant/Appellee.

Court of Appeals No. 20061132

District Court No. 040401488

BRIEF OF APPELLEE

**APPEAL FROM A JUDGMENT OF THE
FOURTH DISTRICT COURT
HONORABLE FRED D. HOWARD**

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**FILED
UTAH APPELLATE COURTS
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<p>JOSEPH R. FOX and LINDA A. FOX,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>BRIGHAM YOUNG UNIVERSITY, INC., a Utah Corporation,</p> <p>Defendant/Appellee.</p>	<p>Court of Appeals No. 20061132</p> <p>District Court No. 040401488</p>
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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to the provisions of *Utah Code Ann.* § 78-2a-3(2)(j) (Rep. Vol. 9 2002). The Utah Court of Appeals has jurisdiction subject to assignment by the Utah Supreme Court under *Utah Code Ann.* § 78-2-2(4) (2006).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

First Issue (Causation)

Whether the trial court erred in its Findings of Fact on causation that:

(A) “The only facts concerning causation or the mechanism of injury in the instant case that may be ascertained by the ordinary use of the senses by a lay witness are that Linda Fox was descending the stairs and she fell. (Findings of Fact and Conclusions of Law, Record 918, 916, ¶10.)

(B) “No lay witness can, by the ordinary use of the lay witness’s senses, testify that whether the fall of Linda Fox was or was not caused by the symptomatic medical condition of Linda Fox’s knee.” (Findings of Fact and Conclusions of Law, Record 918, 916, ¶10.)

(C) “Linda Fox fell without physical intervention of any actor.” (Findings of Fact, Record, ¶11.)

(D) “No person inspected the stairs after Linda Fox’s alleged fall to determine the condition of the stair Linda Fox was on when she allegedly fell.” (Findings of Fact, Record 915, ¶13.)

(E) “Plaintiffs do not know which stair Linda Fox was on when she allegedly fell.” (Findings of Fact, Record 916, ¶14.)

STANDARD OF REVIEW

First Issue (Causation)

The standard of review when considering on appeal the Findings of Fact of a trial court is the clearly erroneous standard. “To mount a successful attack on the trial court’s findings of fact, an appellant must marshal all the evidence in support of the trial court’s findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. *See, e.g., Charlton v. Hackett*, 11 Utah 2d 389, 390, 360 P.2d 176 (1961); *Hutcheson v. Gleave*, Utah, 632 P.2d 815 (1981); *Kohler v. Garden City*, Utah, 639 P.2d 162, 165 (1981); *Hal Taylor Associates v. UnionAmerica, Inc.*, Utah, 657 P.2d 743 (1982).” *Scharf v. BMG Corporation*, 700 P.2d 1068, 1070 (Utah, 1985).

Issue Not Preserved in the Trial Court. Mr. and Mrs. Fox claim that the Findings of Fact set forth above were in error and that Mr. and Mrs. Fox preserved that issue in the trial court. They did not. As to the paragraph 10 of the Findings of Fact and Conclusions of Law (designated as paragraph A, above) nothing in the Transcript of the Bench Trial contains a representation that Mr. and Mrs. Fox would present evidence concerning causation or the mechanism of injury that a lay witness would be able to, with the ordinary use of the senses, determine more than that Linda Fox was descending the stairs, and she fell (R. 924).

Mr. and Mrs. Fox did not preserve the issue set forth in paragraph B, above, in the trial court. The transcript (R. 924) contains no representation that testimony would be adduced that a lay witness could, by the ordinary use of the lay witness’s senses, testify whether the fall of Mrs. Fox was or was not caused by the symptomatic medical condition of Mrs. Fox’s knee (R. 924). As is set forth below, the Record is replete with verification of Mrs. Fox’s pre-existing,

symptomatic medical condition. This appears in the uncontested portions of the Findings of Fact where the Court found: that Mrs. Fox had been told by Dr. Richard Jackson that Mrs. Fox would require a future knee replacement (R. 917, ¶3); in the Spring of 2003, Dr. Richard Jackson had x-rayed Mrs. Fox's right knee and reported to her that her right knee was missing cartilage and diagnosed Mrs. Fox with an arthritic knee (R. 917, ¶4); prior to the April 20, 2004, fall, Mrs. Fox had some cartilage missing in her right knee due to osteoarthritis (R. 916, ¶6); before her fall on April 20, 2004, Mrs. Fox reported having pain on the lateral side of her right knee; (R. 916, ¶7); and prior to Mrs. Fox's fall on April 20, 2004, Mrs. Fox was diagnosed with having some joint space narrowing in her right knee (R. 916, ¶8).

The issue of whether Mrs. Fox fell without physical intervention of any actor (paragraph C, above) was not preserved as an issue in the trial court. There is nothing in the record that indicates or references any third party who in some way intervened to cause Mrs. Fox to fall. Brigham Young University (BYU) cannot cite to the record in this instance because there is no portion of the record that would reflect the absence of this information.

Mr. and Mrs. Fox did not preserve as an issue in the trial court whether or not a person inspected the stairs after Mrs. Fox's alleged fall to determine the condition of the stair Mrs. Fox was on when she allegedly fell (paragraph D, above). Mr. Fox represented to the trial court that two days after Mrs. Fox fell, he examined the stairway and took photographs to show the general deterioration of the stairs. "[Mr. Fox] took photographs of the stairs not knowing exactly where [Mrs. Fox] had fallen." He further represented that after Mrs. Fox was released from the hospital, about three weeks later, they went to the stairs and found that the stairs had been completely rebuilt. (R. 924, p. 19, lines 3-13).

Mr. and Mrs. Fox did not preserve in the trial court the issue that “Plaintiffs did not know which stair Linda Fox was on when she allegedly fell” (paragraph E, above). As is set forth in the immediately preceding paragraph of this brief, when Mr. Fox went to the stairs, he did not know exactly where Mrs. Fox had fallen (R. 924, p. 19, lines 8 & 9). Mrs. Fox testified in an affidavit that she did not know the exact location where she fell (R. 316, ¶21).

Second Issue (Conclusions of Law)

Whether the trial court erred in concluding that:

(A) “... the Plaintiffs had no witness who could testify as to the condition of the stairs and had no witness who could testify as to whether or not the stairs were dangerous ...” (Conclusions of Law, R., p. 915, ¶1).

(B) “The Plaintiffs’ determination that they would call no expert witnesses on any subject, including but not limited to: a. Causation/mechanism of injury; and b. Linda Fox’s medical condition before and after her alleged fall on April 29, 2004; precluded evidence that Linda Fox’s fall was not caused by her symptomatic, pre-existing, osteoarthritic, joint narrowing, knee which had loss of cartilage.” (Conclusions of Law, R. 915, ¶2).

(C) “In the absence of any expert witness who could opine as to whether Mrs. Fox fell because of her symptomatic, pre-existing condition as described above or for some other cause, the Plaintiffs cannot sustain their burden of proof as to causation.” (Conclusions of Law, R. 914, ¶4).

(D) “In the absence of any healthcare provider who could opine as to the reasonable necessity of any healthcare received by the Plaintiff Linda Fox, the Plaintiffs cannot sustain their burden of proof as to damages.” (Conclusions of Law, R. 914, ¶5).

(E) “Joseph R. Fox’s claim is for loss of consortium. Because Linda A. Fox cannot sustain her burden of proof as to causation nor as to damages, the Plaintiff Joseph R. Fox’s claim for loss of consortium fails.” (Conclusions of Law, R. 914, ¶6).

The standard of review for Conclusions of Law is that Conclusions of Law are reviewed by the Appellate Court for correctness. *Scharfv. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

Issue Not Preserved in the Trial Court. Mr. and Mrs. Fox did not preserve the Second Issue (Conclusions of Law) in the trial court.

Mr. and Mrs. Fox did not preserve the issue of whether or not they had a witness who could testify as to the condition of the stairs and whether or not the stairs were dangerous. Mr. and Mrs. Fox stipulated the case would be tried without any expert of any kind including an expert on causation/mechanism of injury. (R. 917, ¶2(a)). Furthermore, as is set forth above, both Mr. and Mrs. Fox said they did not know the location of where Mrs. Fox allegedly fell (R. R. 316, ¶21). Without knowing the location where Mrs. Fox allegedly fell, no witness could testify as to the condition of that stair.

Mr. and Mrs. Fox did not preserve the issue of whether or not Mrs. Fox’s fall was or was not caused by her symptomatic, pre-existing, osteoarthritic, joint narrowing, knee which had a loss of cartilage (paragraph B, above). Mr. and Mrs. Fox stipulated that they would have no expert witness. There is no representation that Mr. or Mrs. Fox were prepared to call any witness

who, on their own, could testify that Mrs. Fox's fall was not caused by her symptomatic, pre-existing, osteoarthritic, joint narrowing, knee which had a loss of cartilage. Mr. and Mrs. Fox did not provide to the court any statutory or case law which would have sufficiently alerted the court to a contrary legal position. (R. 924).

The issue of whether, in the absence of any expert witness who could opine as to whether Mrs. Fox fell because of her symptomatic, pre-existing, osteoarthritic, joint narrowing, knee which had a loss of cartilage as described above, or for some other cause, Mr. and Mrs. Fox could or could not sustain their burden of proof as the causation was not preserved in the trial court. There is no citation by Mr. or Mrs. Fox to any statutory or case law that was presented to the court during the November 14, 2006, bench trial to support their side of this proposition (R. 924).

Mr. and Mrs. Fox did not preserve the issue of whether, in the absence of any healthcare provider who could opine as to the reasonable necessity of any healthcare received by Mrs. Fox, Mr. and Mrs. Fox could or could not sustain their burden of proof as to damages. Mr. and Mrs. Fox were, apparently, prepared to testify that they received certain bills allegedly arising out of Mrs. Fox's alleged injuries, and this was preserved on the Record (R. 924, p. 16, lines 23-25). There is nothing in the Record to the effect that Mr. or Mrs. Fox could opine as to the reasonable necessity of the healthcare, nor the reasonable value of the bills.

Mr. and Mrs. Fox did not preserve the issue of whether or not Mr. Fox's claim for loss of consortium would fail if Mrs. Fox could not sustain her burden of proof as to causation and as to damages. Mr. and Mrs. Fox did not argue the loss of consortium issue to the court (R. 924, Index, Sheet 2, second column (the word "consortium" does not appear in the transcript)).

Third Issue (Validity of UCA § 78-27-33, as amended).

Whether the trial court was correct in holding that UCA §78-27-33, as amended, was impliedly repealed and was unconstitutional on its face as being inconsistent with Utah Rules of Evidence, Rule 801(d)(2) and Rule 803(4).

This issue was preserved in the trial court.

**CONSTITUTIONAL PROVISION, STATUTE AND RULE
WHOSE INTERPRETATION IS DETERMINATIVE**

The constitutional provision, statute and rule whose interpretation may be determinative of this appeal is set forth below. They are determinative only of the Third Issue presented by Mr. and Mrs. Fox.

**A. Article VIII, Section 4. [Rulemaking power of Supreme Court
– Judges pro tempore – Regulation of practice of law.]**

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by the constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

B. 78-27-33. Statement of injured person – When inadmissible as evidence.

Except as otherwise provided in this act, any statement, either written or oral, obtained from an injured person within 15 days of an occurrence or while this person is confined in a hospital or sanitarium as a result of injuries sustained

in the occurrence, and which statement is obtained by a person whose interest is adverse or may become adverse to the injured person, except a peace officer, shall not be admissible as evidence in any civil proceeding brought by or against the injured person for damages sustained as a result of the occurrence, unless:

(1) a written verbatim copy of the statement has been left with the injured party at the time the statement was taken; and

(2) the statement has not been disavowed in writing within fifteen days of the date of the statement or within fifteen days after the date of the injured person's initial discharge from the hospital or sanitarium in which the person has been confined, whichever date is later.

Utah Court Rules

C. Preliminary Note

On October 7, 1977, at the request of the Utah Supreme Court, the Utah State Bar Commission established a special committee to examine whether the Federal Rules of Evidence should be adopted by practice before the courts of the State of Utah. The committee was composed of Parker M. Nielson, Chairman, the Honorable D. Frank Wilkins, the Honorable Ronald O. Hyde, the Honorable George E. Ballif, Professor Ronald N. Boyce, Professor Edward L. Kimball, Ramon M. Child and Stephen B. Nebeker. Ronald J. Yengich and Virginius Dabney were subsequently added to the committee.

The Committee met pursuant to the foregoing appointment, and recommended adoption of the Federal Rules of Evidence by the Superior Court pursuant to the general judicial powers contained in the Constitution of the United States. Article VIII, Section 1 to supervise inferior courts, and pursuant to the statutory rulemaking power of the Supreme Court contained in Utah Code Annotated, Section 78-2-4 (1953). It was the view of the Committee that, while the legislature may not enlarge judicial powers beyond those prescribed by the Constitution of Utah, *Robinson v. Durand*, 36 Utah 93, 104 Pac. 760 (1908), the power to promulgate rules is within the general judicial powers conferred by Article VIII, Section 1. Any existing statutes inconsistent with these rules, if and when these rules are adopted by the Supreme Court, will be impliedly repealed.

The effort in proposing these rules, as with the Federal Rules of Evidence on which they are based, is not to codify the law of evidence, but to formulate guides from which the law of evidence can grow and develop. These rules therefore

supply a fresh starting place for the law of evidence and do not present an ultimate end.

The numbering and test of these rules conform to the Federal Rules of Evidence as promulgated by the Congress of the United States, effective July 1, 1975; except (1) where modifications of the text were made necessary by the fact that these rules govern state rather than federal proceedings and (2) in a small number of instances in which the rule adopted was considered sufficiently superior to the federal rule to justify departure from the objective of uniformity between Utah and federal rules. Where such modifications have been necessary, numbering consistent with the Federal Rules has been maintained. Unless modified, reference to the notes of the Advisory Committee to the Federal Rules of Evidence is pertinent to the meaning and effect of these rules, together with notes of the Advisory Committee to these rules.

“The issue of ‘whether a statute is constitutional’ is a question of law, which we review for correctness, giving no deference to the trial court.” *State v. Daniels*, 2002 UT 2, p. 30, 40 P.3d 611; *see also State v. Kell*, 2002 UT 19, p. 50, P.3d 1019; *Grand County v. Emery County*, 969 P.2d 421, 422 (Utah 1998). Furthermore, to the extent we are making a determination of a statute’s constitutionality, the “statute is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality.” *Utah Sch. Bds. Ass’n v. State Bd. of Educ.*, 2001 UT 2, p. 9, 17 P.3d 1125 (quotation and citation omitted); *see also Daniels*, 2002 UT 2 at p. 30. *Grand County v. Emery County*, 2002 UT 57; 52 P.3d 1148 (Utah 2002).

STATEMENT OF THE CASE

Nature of the Case. Mr. and Mrs. Fox allege that Mrs. Fox was injured on April 20, 2004, when she fell on the west stairs at the northerly end of the Harmon Conference Center (hereunder “the stairs”) as she descended the stairs. (R. 917, ¶1, *see also* R. 740 & 739, ¶8). Mrs. Fox sought recovery for special and general damages she allegedly suffered on April 20, 2004.

(R. 37-31). Mr. Fox, a disbarred attorney (R. 782, ¶5 and R. 776 “Order”), sought to recover for loss of consortium (R. 32 and 31, ¶31). BYU denied it was liable to either Mr. or Mrs. Fox. (R. 171-169).

Disposition in Court Below. On December 12, 2006, the Court below entered a “Judgment of Dismissal with Prejudice” (R. 921-919). The Judgment of Dismissal with Prejudice was based upon Findings of Fact and Conclusions of Law entered December 12, 2006 (R. 913-912). In general terms, the Judgment of Dismissal with Prejudice and the Findings of Fact and Conclusions of Law determined that because: the Plaintiffs stipulated they would try this case without any expert witness of any kind on any subject; Mrs. Fox had a symptomatic, pre-existing, osteoarthritic, joint narrowing knee; and that there would be no testimony that anyone had inspected the stairs after Mrs. Fox’s alleged fall to determine the condition of the stair Mrs. Fox was on when she allegedly fell; that the Plaintiffs could not sustain their burden of proof as to causation nor as to damages. Because Mrs. Fox’s claim failed, Mr. Fox’s claim for loss of consortium also failed (R. 913-912). On December 12, 2006, the Court also entered an Order Denying Plaintiffs’ Objections to the Testimony of Noah Converse and Scott Starr, with Accompanying Exhibits. Mr. and Mrs. Fox’s objection was based upon Utah Code Ann. §78-27-33, a statutory rule of evidence which, under certain conditions, if enforceable, would make statements of an injured person inadmissible as evidence in a civil proceeding (R. 911-906).

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Mr. and Mrs. Fox allege that Mrs. Fox was injured on April 20, 2004, when she fell on the west stairs at the northerly end of the Harmon Conference Center (hereinafter “the stairs”) as she descended the stairs (R. 917, ¶1; *see also* R. 740 & 739, ¶8). Mrs. Fox does not know the exact location where she fell. (R. 316, ¶21). During oral arguments Mr. Fox conceded that he did not know exactly where Mrs. Fox had fallen either (R. 924, p.19, lines 8 & 9).

While Mrs. Fox was being attended to by the emergency medical services (EMS) personnel on the stairs, Mrs. Fox reported to them:

(A) there was no cartilage in her knee due to arthritis;

(B) her knee went out as she was going down the stairs;

(C) she fell down only one stair;

(D) her knee just went out on her as she was going down the stairs and she did not hold BYU responsible; and

(E) that the stairs where she fell are too narrow and have always been dangerous. (R. 739, ¶11).

The emergency medical services personnel did not observe any loose metal nosings on the stairway where Mrs. Fox fell on April 20, 2004. (R. 738, ¶15). Where Mrs. Fox fell is consistent with a knee that gave out and inconsistent with someone who tripped and fell. (R. 738, ¶17). While being treated by the emergency medical services personnel, Mrs. Fox self reported as part of her past medical history that she had arthritis in her right knee (the leg that was injured) and she further self reported that her knee just went out on her as she was going down the stairs. (R. 737, ¶20). Mrs. Fox was transported in a van supplied by BYU to the Utah Valley Regional

Medical Center by the emergency medical services personnel. (R. 737, ¶19). Upon arrival at the Utah Valley Regional Medical Center, Mrs. Fox and her son noted that on April 19, 2004, they were talking and had expressed surprise that Mrs. Fox had not had a serious problem or injury with her knee. (R. 737, ¶19). Approximately one year prior to her fall, Mrs. Fox had been examined by Dr. Jackson for pain in her right knee. (R. 755, ¶2). Dr. Jackson reported that Mrs. Fox had arthritis in the knee and was missing some cartilage. (R. 755, ¶2). Dr. Jackson reported that Mrs. Fox, at some time in the future, would probably have to have her knee replaced but that she should put off the replacement as long as possible. (R. 755, ¶2).

After arriving at Utah Valley Regional Medical Center, Mrs. Fox reported to Dr. Douglas C. Murdock that at BYU while going down stairs, her right knee suddenly gave out and she collapsed down to the ground falling down some steps. She landed on that same knee and had a lot of discomfort and pain in that localized region. (R. 751, under “History of Present Illness”). That same day and while still at the Utah Valley Regional Medical Center, Mrs. Fox reported to Dr. Jonathan R. Faux that while on the stairs at BYU, her knee gave out from underneath her in a varus type deformity and further reported that she had pain in the knee mostly on the lateral side prior to this and had a diagnosis of osteoarthritis and had joint space narrowing. (R. 747, under “History of Present Illness”). In April, 2004, Mrs. Fox’s Admission Diagnosis, and Discharge Diagnosis, were: (1) right tibial plateau fracture; and (2) lateral compartment knee degenerative joint disease. (R. 744, under both Admission Diagnosis and Discharge Diagnosis).

At the Utah Valley Regional Medical Center, Mrs. Fox had surgery on her leg and had a fixator installed. (R. 924, p. 15, lines 20-22). Mrs. Fox is not qualified to say what was done to

her other than to say that a fixator was installed on her leg. (R. 924, p. 15, lines 23-25 and p. 16, line 1).

Course of Proceedings. This matter was scheduled for a bench trial on November 14, 2006. The Plaintiffs stipulated they would try this case without any expert witness of any kind on any subject, including but not limited to: (a) causation/mechanism of injury; and (b) Mrs. Fox's medical condition before and after her alleged fall on April 20, 2004. (R. 917, ¶2),

Prior to trial, the Defendant had taken the trial testimony of the emergency medical services personnel (Noah Converse) attending Mrs. Fox immediately after she fell. (R. 853-852 and R. 857-856 and R. 924, p. 44, line 12 through p. 47, line 6).

The Plaintiffs objected to the admission of the trial testimony of Mr. Converse, taken before the trial, and the admission of the emergency medical services reports that would recite the statements of Mrs. Fox made on the stairs to the emergency medical services personnel on April 20, 2004, the substance of which are set forth above and come from R. 739, ¶11, a-e, R. 738, ¶15 & 17, and R. 737, ¶19 & 20. The Plaintiffs sought to exclude that evidence based upon a foundational objection claiming that under §78-27-33 an injured person's statement cannot be admitted into evidence unless a written verbatim copy of the statement had been left with the injured party at the time the statement was taken; and the statement had not been disavowed in writing within 15 days of the date of the statement or within 15 days after the date of the injured person's initial discharge from the hospital or sanitarium in which the person has been confined, whichever date is later. (R. 924, p. 46, lines 19-25 and p. 47, lines 1-13).

SUMMARY OF ARGUMENTS

First Issue (Causation) and Second Issue (Conclusions of Law)

Mr. and Mrs. Fox have failed to marshal the evidence in support of the trial court's findings as required by *Scharf, supra*. Mr. and Mrs. Fox have also failed to preserve this issue in the trial court as required by Utah Rules of Appellate Procedure, Rule 24(a)(5)(A).

The causal relationship between an injury and the subsequent need for surgery is an issue requiring expert medical testimony. A plaintiff alleging such a causal relationship bears the burden of proving proximate cause and can only do so by presenting expert medical testimony establishing the probability of such a connection. Mr. and Mrs. Fox stipulated that there would be no such testimony. Furthermore, no one inspected the stairs after Mrs. Fox's alleged fall and Mrs. Fox does not know which stair she was on when she fell. Therefore, Mrs. Fox could not testify as to what the negligent condition of the stair was upon which she fell. Further, there was no expert to testify whether the condition of Mrs. Fox's knee or the condition of the stair was the proximate cause of Mrs. Fox's fall.

Third Issue (Validity of Utah Code Ann., 78-27-33, as amended)

Mr. and Mrs. Fox objected to testimony of the emergency medical services personnel who attended her on the stairs on April 20, 2004. Mr. and Mrs. Fox's objection was based upon Utah Code Ann., §78-27-33, a statutory rule of evidence which, under certain conditions, if enforceable, would make statements of an injured person inadmissible as evidence in a civil proceeding. Mr. and Mrs. Fox allege that the conditions set forth in the statute apply. For the purpose of the trial court's order, the court assumed that the conditions set forth in the statute

existed. The trial court denied Mr. and Mrs. Fox's objection because the statute was unconstitutional pursuant to the Utah State Constitution, Article VIII, Section 4, quoted above, and as interpreted by the Utah Supreme Court in its September 10, 1985, per curiam order filed September 10, 1985, also quoted above, and further augmented by the Preliminary Note to the Utah Court Rules quoted above. This statutory rule of evidence is inconsistent with and is superceded by Utah Rules of Evidence, Rule 801(d)(2) and 803(4).

ARGUMENT

First Issue (Causation)

Mr. and Mrs. Fox asked this Court to find that the trial court erred in entering the Findings of Fact, paragraphs 10, 11, 13 and 14. Paragraphs 10, 13 and 14 of the Findings of Fact recite the Court's decision that, although Mrs. Fox was descending the stairs and fell, that no one inspected the stairs where Mrs. Fox fell to determine the condition of the stair on which she fell. The Court further determined that the Plaintiff did not know which stair Mrs. Fox was on when she allegedly fell. Rule 602 of the Utah Rules of Evidence prohibits Mrs. Fox from testifying where she fell and the condition of the stair. It states, in its entirety:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. (Amended effective October 1, 1992).

Because Mrs. Fox does not know where she fell and because she did not have anyone who was able to inspect the stair, she could not testify that the condition of the stair caused her fall. Without knowing the condition of the stair, there could be no finding of fact that the stair

was defective. This is particularly so in light of Mrs. Fox's symptomatic, pre-existing, osteoarthritic, joint narrowing, knee that had loss of cartilage. Without someone to testify how the stair condition could have caused Mrs. Fox to fall, there could be no plausible evidence that a defective stair caused her to fall. Without such a defective stair, there could be no proximate cause.

While proximate causation is generally an issue for the jury, a trial court may rule as a matter of law on the issue if: “(1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation.” *Id.* (quoting *Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 487 (Utah App. 1991), *aff'd*, 862 P.2d 1342 (Utah 1993)). *Bansasine v. Bodell*, 927 P.2d 675, at 676 (Utah App. 1996).

Mr. and Mrs. Fox admitted they did not know the exact stair upon which Mrs. Fox fell and admitted that no one inspected the exact stair upon which Mrs. Fox fell, thus the causation of her fall would have been left to the finder of fact's speculation.

Second Issue (Conclusions of Law)

The Court found, as a matter of law, that because there was no expert to opine as to whether Mrs. Fox fell because of her symptomatic, pre-existing, osteoarthritic, joint narrowing, knee that has lost cartilage, or for some other cause, that Mr. and Mrs. Fox could not sustain their burden of proof as to causation. In *Beard v. K-Mart Corporation*, 12 P.3d 1015, 1018 (Utah App. 2000), the Court held “... Beard argues that she was not required to put on expert medical evidence. Beard claims that under Utah law, expert medical opinions are generally only required in medical malpractice cases. We disagree.”

The *Beard* court goes on to state at page 1019:

“The question as to whether such pain and injury resulted from the blow is within the common knowledge and experience of lay witnesses and could be properly submitted to the jury. What is missing in the evidence, however, is the link between the injury suffered and the necessity of the surgeries. In Utah, in all but the most obvious cases, testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury. *See generally Denney v. St. Mark’s Hosp.*, 21 Utah 2d 189, 442 P.2d 944 (1968); *Moore v. Denver & Rio Grande W. R. R. Co.*, 4 Utah 2d 255, 292 P.2d 849 (Utah 1956); *Chief Consol. Mining Co. v. Salisbury*, 61 Utah 66, 210 P.2d 929 (1922).

“The need for positive expert testimony to establish a causal link between the defendants’ negligent act and the plaintiff’s injury depends upon the nature of the injury. Where the injury involves obscure medical factors which are beyond an ordinary lay person’s knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury.”

In this case there is neither expert medical testimony to establish a link between anything BYU did and Mrs. Fox’s alleged injuries, but there is no expert testimony to establish a causal link between Mrs. Fox’s fall and the treatment which she had. Whether or not she needed to have a fixator placed on her leg is beyond the ken of a lay person.

Third Issue (Validity of Utah Code Ann., 78-27-33, as amended)

Mr. and Mrs. Fox objected to the testimony of the emergency medical service personnel (Noah Converse and Scott Starr) and to the admission of the Utah EMS Incident Report and the Brigham Young University Police Department EMS Incident Table with Accompanying Report as exhibits, insofar as the testimony or the exhibits include a written or oral statement taken by the emergency medical service personnel while attending Mrs. Fox on April 20, 2004. The objection was based upon Utah Code Ann., §78-27-33, *supra*, a statutory rule evidence.

Article VIII, Section 4 [Rulemaking Power of the Supreme Court – Judges pro tempore – Regulation of practice of law], of the Utah Constitution grants to the Utah Supreme Court the

right to adopt rules of evidence to be used in courts of the state of Utah. The Utah State Legislature may amend the Rules of Evidence as adopted by the Supreme Court only by a vote of two-thirds of all members of the Legislature. The Preliminary Note to the Utah Court Rules states: "Any existing statutes inconsistent with these rules [of evidence], if and when these rules are adopted by the Supreme Court, will be impliedly repealed."

The Utah Supreme Court ordered on September 10, 1985, in a Per Curiam decision:

Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the court adopts all existing statutory rules of procedure and evidence not inconsistent or superceded by rules of procedure and evidence heretofore adopted by this court. Effective as of July 1, 1985.

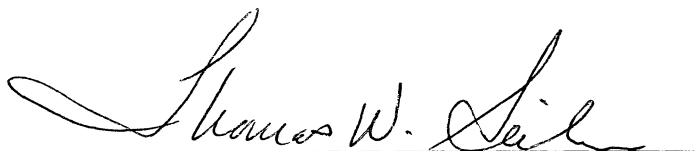
Impliedly, the Utah Supreme Court does not adopt any existing statutory rules of evidence which are inconsistent or superceded by the Utah Rules of Evidence. That being the case, Section 78-27-33 is unconstitutional and has no force and effect.

CONCLUSION

BYU respectfully requests that the trial court be affirmed in all respects.

DATED this 14th day of June, 2007.

ROBINSON, SEILER & ANDERSON, LC

A handwritten signature in black ink, reading "Thomas W. Seiler", written over a horizontal line.

THOMAS W. SEILER
Attorneys for Appellee

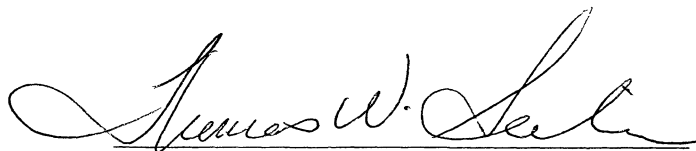
CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2007, I caused the original and 8 true and correct copies of the foregoing Brief of Appellee to be filed with the Utah Court of Appeals and 2 copies to be mailed, first class, postage prepaid, to:

Joseph R. Fox, Plaintiff and Appellant
1149 East 1630 South
Spanish Fork, UT 84660

and to

Linda A. Fox, Plaintiff and Appellant
1149 East 1630 South
Spanish Fork, UT 84660

A handwritten signature in cursive script, reading "Thomas W. Seale", written over a horizontal line.

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has duties as provided by law.

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice determines. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice may delegate responsibilities to the associate chief justice as consistent with law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-2-1; L. 1969, ch. 247, § 1; 1986, ch. 47, § 40; 1988, ch. 248, § 4; 1990, ch. 80, § 4.

Cross-References. — Chief justice, Utah Const., Art. VIII, Sec. 2.

Disqualification in particular case, Utah Const., Art. VIII, Sec. 2.

Judicial nomination and selection, Title 20A, Chapter 12.

Membership on board of control of state law library, § 9-7-301.

Proceedings unaffected by vacancy, § 78-7-21.

Qualifications of justices, Utah Const., Art. VIII, Sec. 7.

Retirement, Utah Const., Art. VIII, Sec. 15; Title 49, Chapters 17 and 18; §§ 78-8-103, 78-8-104.

Salary, Utah Const., Art. VIII, Sec. 14.

COLLATERAL REFERENCES

Utah Law Review. — Note, Death Qualification and the Right to an Impartial Jury Under the State Constitution: Capital Jury Selection in Utah After *State v. Young*, 1995 Utah L. Rev. 365.

Am. Jur. 2d. — 20 Am. Jur. 2d Courts §§ 67, 68.

C.J.S. — 21 C.J.S. Courts § 111 et seq.; 48A C.J.S. Judges §§ 3, 7, 8, 21 to 25, 85.

78-2-1.5, 78-2-1.6. Repealed.

Repeals. — Section 78-2-1.5 (L. 1969, ch. 225, § 2), relating to salaries of Supreme Court justices, was repealed by Laws 1971, ch. 182, § 4.

Section 78-2-1.6 (L. 1979, ch. 134, § 1; 1981, ch. 156, § 1), relating to salaries of justices, was repealed by Laws 1981, ch. 267, § 2, effective July 1, 1982.

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;

- (d) final orders of the Judicial Conduct Commission;
 - (e) final orders and decrees in formal adjudicative proceedings originating with:
 - (i) the Public Service Commission;
 - (ii) the State Tax Commission;
 - (iii) the School and Institutional Trust Lands Board of Trustees;
 - (iv) the Board of Oil, Gas, and Mining;
 - (v) the state engineer; or
 - (vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
 - (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);
 - (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
 - (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
 - (i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;
 - (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
 - (k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.
- (4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:
- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
 - (b) election and voting contests;
 - (c) reapportionment of election districts;
 - (d) retention or removal of public officers;
 - (e) matters involving legislative subpoenas; and
 - (f) those matters described in Subsections (3)(a) through (d).
- (5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).
- (6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1; 1992, ch. 127, § 11; 1994, ch. 191, § 2; 1995, ch. 267, § 5; 1995, ch. 299, § 46; 1996, ch. 159, § 18; 2001, ch. 302, § 1.

Repeals and Reenactments. — Laws 1986, ch. 47, § 41 repeals former § 78-2-2, as enacted by Laws 1951, ch. 58, § 1, relating to original appellate jurisdiction of Supreme Court, and enacts the above section.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, inserted “or charge” in Subsection (3)(i) and made stylistic changes.

Cross-References. — Chief justice to preside over impeachment of governor, § 77-5-2.

Election contest appeals, §§ 20A-4-406.

Extraordinary writs, Utah Const., Art. VIII, Sec. 3; U.R.C.P. 65B Utah R. App. P. 19.

Jurisdiction, Utah Const., Art. VIII, Sec. 3.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments
in Utah Law — The Utah Court of Appeals,
1988 Utah L. Rev 150

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

History: C. 1953, 78-2a-2, enacted by L.
1986, ch. 47, § 45; 1988, ch. 248, § 7.

NOTES TO DECISIONS

Stare decisis.

A rule of law pronounced by a panel of the Court of Appeals governs all later cases involving the same legal issues decided by other

panels of that court and all courts of lower rank *Renn v Utah State Bd of Pardons*, 904 P2d 677 (Utah 1995)

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
 - (b) in aid of its jurisdiction.
- (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
 - (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
 - (c) appeals from the juvenile courts;
 - (d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
 - (e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;
 - (f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
 - (g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;
 - (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;
 - (i) appeals from the Utah Military Court; and
 - (j) cases transferred to the Court of Appeals from the Supreme Court.
- (3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.
- (4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49; 2001, ch. 255, § 20; 2001, ch. 302, § 2.

Amendment Notes. — The 2001 amend-

ment by ch. 255, effective April 30, 2001, added “parent-time” in Subsection (2)(h).

The 2001 amendment by ch. 302, effective April 30, 2001, inserted “or charge” in Subsection (2)(e) and made stylistic changes.

This section has been reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

NOTES TO DECISIONS

Testimony at trial.

Subdivision (a) provides that a court-appointed expert may be called as a trial witness,

but this is not mandatory *Merriam v Merriam*, 799 P.2d 1172 (Utah Ct App 1990)

COLLATERAL REFERENCES

A.L.R. — Right of indigent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, tech-

nician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 A.L.R.4th 388.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

ARTICLE VIII. HEARSAY**Rule 801. Definitions.**

The following definitions apply under this article:

(a) *Statement*. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. A “declarant” is a person who makes a statement.

(c) *Hearsay*. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay*. A statement is not hearsay if:

(d)(1) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant’s testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(d)(2) *Admission by party-opponent*. The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Amended effective October 1, 1992.)

Advisory Committee Note. — Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of “hearsay” in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have

been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See *California v. Green*, 399 U.S. 149 (1970), with respect to confrontation problems under the Sixth Amendment to the United States Constitution. Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language “or the witness denies having made the statement or has forgotten” and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence (1971). The Utah court has been liberal in its interpretation of the applicable rule in this

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rules 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

NOTES TO DECISIONS

Allegation of facts required
 Allegation of prejudice required
 Application
 Purpose.
 Cited.

Allegation of facts required.

Because defendant did not allege any facts in support of his ineffective assistance claim, the appellate court would not remand the case for an evidentiary hearing. It would be improper to remand a claim under this rule for a fishing expedition. *State v. Garrett*, 849 P.2d 578 (Utah Ct. App.), cert. denied, 860 P.2d 943 (Utah 1993).

Allegation of prejudice required.

In hearing under this rule, criminal defendant has burden of showing that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, a more favorable result would have been obtained; defendant, convicted of raping his daughter and sentenced to a term of 15 years to life, failed to demonstrate that trial or appellate counsel's ineffectiveness deprived him of the ability to raise meritorious arguments on appeal. *State v. Reyes*, 2001 UT 66, 31 P.3d 516.

Application.

Under this rule, appellate courts need no longer treat the question of an adequate record as a necessary threshold issue; if the record is inadequate in any fashion, ambiguities or deficiencies resulting from the inadequacy will be construed in favor of a finding that counsel

performed effectively. *State v. Litherland*, 2000 UT 76, 12 P.3d 92.

Defendant's motion to withdraw his guilty plea in a murder trial was timely filed, the matter was never adjudicated on the merits, and the trial court retained jurisdiction; therefore, the Supreme Court amended the remand to give the trial court jurisdiction to hear defendant's motion to withdraw his guilty plea on the merits. *State v. Lovell*, 2005 UT 31, 114 P.3d 575.

Purpose.

A Rule 23B motion for remand is a specialized motion, available only in limited circumstances, to supplement the record with known facts needed for an appellant to assert an ineffectiveness of counsel claim on direct appeal, and if the facts already appearing in the record are sufficient to make the claim, a remand is not needed. If defendant merely hopes to discover evidence suggesting ineffectiveness, a remand is not allowed, because the purpose of the rule is not to hold a "mini-trial" on ineffectiveness of counsel. *State v. Johnston*, 2000 UT App 290, 13 P.3d 175.

Cited in *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997), cert. granted, 945 P.2d 1118 (Utah 1997); *State v. Bredehoft*, 966 P.2d 285 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999); *State v. Simmons*, 2000 UT App 190, 398 Utah Adv. Rep. 7; *State v. Mecham*, 2000 UT App 247, 9 P.3d 777.

Rule 24. Briefs.

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court

LEXSEE 927 P.2D 675



Positive

As of: Jun 13, 2007

Somchay Bansasine, as guardian for P.K., a minor, Plaintiffs and Appellants, v. Lucas Bodell and Lang Rajsavong, individuals, Defendants and Appellees.

Case No. 960077-CA

COURT OF APPEALS OF UTAH

927 P.2d 675; 303 Utah Adv. Rep. 27; 1996 Utah App. LEXIS 111

November 15, 1996, FILED

PRIOR HISTORY: [**1] Third District, Salt Lake Department, Division I. The Honorable Anne Stirba.

court decided that a gunshot was not within the scope of the risk created by the driver's actions.

DISPOSITION: The trial court properly granted defendant's motion for summary judgment. Affirmed.

OUTCOME: The court affirmed the summary judgment in favor of the driver.

CASE SUMMARY:

LexisNexis(R) Headnotes

PROCEDURAL POSTURE: Plaintiff guardian and minor sought review of the decision of the Third District Court, Salt Lake Department, Division I (Utah), which granted summary judgment in favor of defendant driver in the guardian and minor's action that alleged that the negligence of the driver resulted in the death of the minor's father.

OVERVIEW: The driver was involved in an altercation with another driver, and the other driver shot at the driver's vehicle and the minor's father was killed. The trial court concluded that the firing of the gun was an intervening and superseding act that cut off any liability of the driver. The court affirmed. The court held that the only issue on appeal was whether the driver's reckless driving was the proximate cause of the injury. On appeal the guardian and minor claimed that the trial court erred in its determination because the driver should have been able to have foreseen that if he drove recklessly and rudely, someone might have fired a weapon into his car, injuring his passenger. The court held that the trial court was correct when it determined that a reasonably jury could not have found that the driver's actions were the proximate cause of the death of the minor's father. The

Civil Procedure > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

[HN1] Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Because the issue of summary judgment is a question of law, an appellate court reviews the trial court's decision for correctness, giving no deference to the trial court's resolution of the legal issues presented.

Civil Procedure > Summary Judgment > Appellate Review > General Overview

Torts > Negligence > Causation > General Overview

Torts > Negligence > Duty > General Overview

[HN2] A prima facie case of negligence requires proof of four elements: (1) defendant owed plaintiff a duty of care; (2) defendant breached that duty; (3) defendant's breach of duty was the actual and proximate cause of

plaintiff's injury; and (4) plaintiff suffered damages as a result of defendant's breach of duty.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Negligence > Causation > Proximate Cause > Intervening Causation

[HN3] Proximate cause is that cause which, in natural and continuous sequence, unbroken by efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury. While proximate causation is generally an issue for the jury, a trial court may rule as a matter of law on the issue if: (1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation.

Torts > Negligence > General Overview

[HN4] A more recent negligent act may relieve the liability of a prior negligent actor under the proper circumstances.

Torts > Negligence > General Overview

[HN5] Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

COUNSEL: Daniel F. Bertch, Salt Lake City, for Appellants.

Lynn S. Davies and Kent W. Hansen, Salt Lake City, for Appellees.

JUDGES: Before Judith M. Billings, Judge, James Z. Davis, Associate Presiding Judge, Pamela T. Greenwood, Judge.

OPINION BY: JUDITH M. BILLINGS

OPINION

[*676] OPINION

BILLINGS, Judge:

Plaintiff Somchay Bansasine, as guardian for P.K., appeals the trial court's summary judgment dismissing her negligence claim against defendant Lang Rajsavong. Specifically, Bansasine claims a reasonable juror could find that Rajsavong's reckless driving was the actual and proximate cause of a driver, angered by Rajsavong's driving, shooting P.K.'s father, a passenger in Rajsavong's car. We affirm.

FACTS

Rajsavong was driving northbound on Interstate 15 with plaintiff's father when Lucas Bodell drove up close behind them, blinding Rajsavong with his lights. Rajsavong changed lanes, letting Bodell pass. Angered at being blinded, Rajsavong got behind Bodell [*2] and flipped on his high beams. He then sped up, passed Bodell, and changed back into the lane in which Bodell was driving. In response, Bodell drove up parallel to Rajsavong on the passenger side. Rajsavong then sped up to seventy-five miles per hour only to have Bodell follow suit. As Bodell caught up with Rajsavong, plaintiff's father made an obscene gesture at Bodell. Bodell pulled out a gun and displayed it in his palm. Rajsavong sped up in an effort to get away from Bodell. As Bodell drove by in his truck, Rajsavong heard a "bang," and plaintiff's father told Rajsavong that he had been shot. Rajsavong took plaintiff's father to a hospital, where he later died.

Plaintiff brought suit against Rajsavong, claiming Rajsavong's reckless driving resulted in the death of her father. Defendant filed a motion for summary judgment claiming defendant's actions were not, as a matter of law, the proximate cause of plaintiff's injuries. The trial court granted the motion, concluding Bodell's firing of a gun was an intervening and superseding act cutting off any liability of Rajsavong. Plaintiff appeals.

ANALYSIS

[HN1] "Summary judgment is appropriate only when no genuine issues of material fact [*3] exist and the moving party is entitled to judgment as a matter of law." *K & T, Inc. v. Koroulis*, 888 P.2d 623, 626-27 (Utah 1994). Because the issue of summary judgment is a question of law, we review the trial court's decision for correctness, giving "no deference to the trial court's resolution of the legal issues presented." *Id.* at 627.

[HN2] A prima facie case of negligence requires proof of four elements: (1) defendant owed plaintiff a duty of care; (2) defendant breached that duty; (3) defendant's breach of duty was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result of defendant's breach of duty. *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 600-01 (Utah App. 1995). Defendant conceded, for purposes of summary judgment, that he owed plaintiff a duty, he breached that duty, and

plaintiff suffered injuries. Thus, the only issue on appeal is whether defendant's "reckless driving" was the proximate cause of plaintiff's injury.

[HN3] Proximate cause is ""that cause which, in natural and continuous sequence, (unbroken by efficient intervening cause), produces the injury and without which the result would not have occurred. It is the [*4] efficient cause--the one that necessarily sets in operation the factors that accomplish the injury."" *Id.* (quoting *Mitchell v. Pearson Enters.*, 697 P.2d 240, 246-47 (Utah 1985) (quoting *State v. Lawson*, 688 P.2d 479, 482 n.3 (Utah 1984))). While proximate causation is generally an issue for the jury, a trial court may rule as a matter of law on the issue if: "(1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation." *Id.* (quoting *Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 487 (Utah App. 1991), *aff'd*, 862 P.2d 1342 (Utah 1993)).

[*677] In the instant case, the trial court ruled that reasonable persons could not disagree that Bodell's intentional (or negligent) ¹ firing of a gun at plaintiff's father was an intervening and superseding cause which cut off any responsibility of defendant. On appeal, plaintiff claims the trial court erred in making this determination because defendant should have been able to foresee that if he drove recklessly and rudely, someone might fire a weapon into [*5] his car, injuring his passenger. We disagree.

1 As alternative causes of action, plaintiff claimed both that the gun was fired intentionally and that it was fired accidentally.

Utah courts have consistently recognized that [HN4] "a more recent negligent [or criminal/intentional] act may . . . relieve the liability of a prior negligent actor under the proper circumstances." *Steffensen*, 820 P.2d at 488 (citation omitted). These circumstances arise when the more recent negligent or criminal act was unforeseeable to the first negligent actor. *Id.* If, on the other hand, the subsequent criminal or negligent act was "foreseeable to the prior actor, both acts are concurring causes and the prior actor is not absolved of liability." *Id.*; see also *Mitchell*, 697 P.2d at 246 (Utah 1985). Thus, the question becomes whether Rajsavong could reasonably have foreseen plaintiff's father being shot as a result of his alleged "reckless" and rude driving.

We conclude the trial court was correct in determining that [*6] a reasonable juror could not have found that defendant's driving was the proximate cause of the death of plaintiff's father. ² We agree that a reasonable juror could not find that defendant should foresee that

another driver on the road would fire a gun into his car simply because he shined his high beams on that person, passed him, then sped up as the driver tried to approach. ³ If such a response were so common as to make it foreseeable, the streets and highways of this country would be empty.

2 Plaintiff claims the following three cases mandate that we determine it was error to take this case from the jury: *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1257 (Utah 1996) (determining that when car dealership has history of thefts and yet continues to keep keys in cars and does nothing to improve security, it may be foreseeable that a thief would steal a car, drive recklessly while being pursued by police, and injure a bystander); *Mitchell v. Pearson Enters.*, 697 P.2d 240, 246-47 (Utah 1985) (holding on proper facts hotel's inaction in providing security could be proximate cause of wrongful death of patron killed by intruder); *Steffensen v. Smith's Management Corp.* 820 P.2d 482, 489 (Utah App. 1991) (concluding injury to customer during chase of shoplifter could be a foreseeable consequence of negligent training of personnel in pursuit of shoplifters), *aff'd*, 862 P.2d 1342 (Utah 1993). While we agree that these cases help set the parameter of the law dealing with proximate cause in the context of summary judgment, we find all three cases distinguishable. In each of the three cases the *specific* facts of each case could lead a reasonable juror to conclude that the actions resulting from the defendants' negligence were not extraordinary and hence, were foreseeable. In this case, however, we conclude the shooting was an extraordinary reaction to rude driving, thereby making the result unforeseeable.

[**7]

3 We express no opinion as to the added effect of an obscene gesture in relation to the facts of this case with the exception of noting that it was the plaintiff's father who made the obscene gesture to the shooter, and that it was this gesture that immediately precipitated the shooter brandishing the gun.

Plaintiff next claims that it is enough to prove only that defendant could have foreseen the general risk of harm that occurred. Specifically, plaintiff argues that defendant could reasonably foresee that aggressive behavior of some kind might be a response to his rude driving, which is exactly what occurred although the specific action was different from what might reasonably be expected, i.e., a car accident or running the defendant off the road. While we agree that "only the general nature of the injury need be foreseeable," *Steffensen v. Smith's*

Management Corp, 862 P.2d 1342, 1346 (Utah 1993), plaintiff goes too far in defining what "general nature" means. As the *Restatement (Second) of Torts* § 442B (1965) states:

[HN5] Where the negligent conduct of the actor creates or increases the [**8] risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is [**678] *not within the scope of the risk created by the actor's conduct*.

(Emphasis added.) Although we recognize that many aspects of today's society are becoming more violent and confrontational, we cannot conclude that a gunshot is within the scope of the risk created by defendant's rude and reckless driving.

Finally, plaintiff argues that defendant only needed to be able to foresee the injury that occurred, i.e., death, and not the specific means that caused that injury. In particular, plaintiff claims that because death was a foreseeable outcome of reckless driving--such as through a collision or being run off the road--it does not matter that the death resulted from a gunshot. Plaintiff misperceives the law. While plaintiff again correctly states that only the "general nature of the injury need be foreseeable," *Steffensen*, 862 P.2d at 1346, plaintiff misunderstands its

meaning. In this case, the general nature [**9] of the injury is not death. Rather, death is the result of the injury; the injury was a gunshot wound. Thus, as above, for plaintiff to prevail, defendant must have been able to foresee that his reckless driving might lead to a shooting. As previously stated, defendant could not have foreseen this result, and thus, his reckless driving could not have been the proximate cause of plaintiff's injuries.

CONCLUSION

The trial court properly held that under the facts of this case, defendant could not have foreseen that his "reckless driving" would lead to another driver firing a weapon into his car. As such, the trial court properly granted defendant's motion for summary judgment. We therefore affirm.

Judith M. Billings, Judge

CONCUR BY: JAMES Z. DAVIS, PAMELA T. GREENWOOD.

CONCUR

WE CONCUR:

James Z. Davis, Associate Presiding Judge

Pamela T. Greenwood, Judge

LEXSEE 12 P.3D 1015



Analysis
As of: May 17, 2007

Darlene Beard, Plaintiff and Appellee, v. K-Mart Corporation, Defendant and Appellant.

Case No. 20000095-CA

COURT OF APPEALS OF UTAH

2000 UT App 285; 12 P.3d 1015; 406 Utah Adv. Rep. 3; 2000 Utah App. LEXIS 86

October 19, 2000, Filed

PRIOR HISTORY: [***1] Third District, Salt Lake Department. The Honorable Tyrone Medley.

COUNSEL: M. David Eckersley, Salt Lake City, for Appellant William R. Rawlings, Draper, for Appellee.

JUDGES: Before Judith M. Billings, Judge. WE CONCUR: Gregory K. Orme, Judge. William A. Thorne, Jr., Judge.

OPINION BY: JUDITH M. BILLINGS

OPINION

[**1016] BILLINGS, Judge:

[*P1] Defendant/appellant K-Mart Corporation (K-Mart) appeals the trial court's denial of its motion for a partial directed verdict. We reverse and remand for a new trial.

FACTS

[*P2] On September 15, 1996, plaintiff/appellee Darlene Beard (Beard) was injured in a K-Mart store when a K-Mart employee struck her in the head with his elbow as he attempted to start a lawnmower. As she fell toward the floor, she felt a severe headache, as well as pain in her wrists, knee, and ankle. She visited her doctor the following day, complaining of head, neck, knee, and foot pain, and continued to have severe headaches, a sore neck, aching hands, and leg and foot pain. Beard saw a number of doctors and ultimately underwent a number of surgeries. Beard sued K-Mart for its employee's [***2] negligence in striking her. Three surgeries, performed on

her neck and wrists by Dr. Robert Peterson, are at issue in this appeal. K-Mart asserts these surgeries are not causally connected to the accident at its store.

[*P3] At trial, Beard testified that her neck and wrist problems began when she was struck in the head at K-Mart. In addition, her family physician and her surgeon Dr. Peterson testified "there was a chronologic association for the time of the incident [at K-Mart] to the time of the onset of symptoms." However, Dr. Peterson testified that he could not say to a degree of reasonable medical probability that the accident at K-Mart caused the need for either her neck or wrist surgeries.

[*P4] At the close of Beard's case, K-Mart moved for a partial directed verdict, arguing Beard had not presented sufficient evidence [**1017] to permit the jury to find that her need for the neck and wrist surgeries was the proximate result of the injuries she had suffered at K-Mart. ¹ The trial court denied K-Mart's motion, and the jury awarded Beard \$ 431,290.22 in damages.

¹ Both parties characterize K-Mart's motion as one for a directed verdict; however, the motion was effectively one requesting a jury instruction excluding consideration of the evidence regarding the neck and wrist surgeries.

[***3] **STANDARD OF REVIEW**

[*P5] "When reviewing any challenge to a trial court's denial of a motion for directed verdict, we review "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground as-

2000 UT App 285, *; 12 P.3d 1015, **;
406 Utah Adv. Rep. 3; 2000 Utah App. LEXIS 86, ***

serted for directing a verdict." *Mahmood v. Ross*, 1999 UT 104, P16, 990 P.2d 933 (quoting *White v. Fox*, 665 P.2d 1297, 1300 (Utah 1983) (quoting *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1165 (Utah 1983))). If we conclude Beard did raise a material fact precluding judgment against her as a matter of law, we must affirm the trial court's denial of K-Mart's motion and uphold the jury's verdict. *See id.*

ANALYSIS

[*P6] K-Mart argues Beard failed to present expert medical testimony establishing that her need for neck and wrist surgeries was caused by K-Mart's negligence. The essence of K-Mart's argument is that Beard's own testimony and the general testimony of her doctors that she did not suffer neck and wrist complaints before the injury at K-Mart is insufficient [***4] as a matter of law to allow the jury to consider whether these surgeries were a result of K-Mart's negligence. K-Mart argues that only expert medical testimony that the need for her surgeries was proximately caused by K-Mart's negligence will suffice. Thus, K-Mart argues the trial court erred in not directing a verdict in its favor and removing this evidence from the jury's consideration.

[*P7] K-Mart relies on *Denney v. St. Mark's Hospital*, 21 Utah 2d 189, 442 P.2d 944 (1968), for the proposition that "if the expert evidence offered on the issue of medical causation is simply that a particular injury *could* have resulted from a particular accident, but not that it probably did, such testimony is insufficient for submission of the issue to the jury." In *Denney*, the plaintiff had undergone neck surgery and was having x-rays taken of her lumbar spine for unrelated treatment when a medical technician forcefully pushed her neck close to her knees, allegedly causing a feeling like an electric shock in the back of her neck. *See Denney*, 442 P.2d at 944-45. Two days later, she suffered a stroke. *See id.* More than four months later, the [***5] plaintiff told her neurologist that her neck had been forced forward during the spinal x-rays. *See id.* The following year, a spinal fusion was performed and a neck nerve severed to relieve pain. *See id.* The plaintiff alleged the x-ray technician's negligence was responsible for her ailments. *See id.* At trial, she testified as to the feeling in her neck when the technician pushed on it, and to continuing pain, numbness, and loss of vision after the incident. *See id.* Additionally, her neurologist testified that the force used by the technician could cause disc problems, but on cross-examination admitted it was a "medical probability" that her ailments were the result of the stroke. *Id.*

[*P8] The Utah Supreme Court sustained the trial court's directed verdict in favor of the hospital. *See id.* at 946. The court stated:

in those cases which depend upon knowledge of the scientific effect of medicine, the results of surgery, or whether the attending physician exercised the ordinary care, skill and knowledge required of doctors in the community which he serves, must ordinarily be established by the testimony of physicians and surgeons.

...

The only facts [***6] in the instant case which may be ascertained by the ordinary use of the senses of a lay witness are that the technician moved plaintiff's body, and that the back of her head hurt. No lay witness [**1018] can by the ordinary use of his senses say that the complaints of the plaintiff, including the hurting in the back of her head, was caused by this claimed adjustment of her position on the x-ray table.

Id. (quoting *Fredrickson v. Maw*, 119 Utah 385, 387, 227 P.2d 772, 774 (1951)). The court concluded that the plaintiff's evidence did not show that her injuries were the result of the negligence of the technician. *See* 442 P.2d at 947.

[*P9] K-Mart also relies on *Moore v. Denver & Rio Grande Western Railroad Company*, 4 Utah 2d 255, 292 P.2d 849 (1956). In *Moore*, the plaintiff's doctor testified that "it was possible" that plaintiff's accident had caused a ruptured lumbar disc and nerve pressure. 292 P.2d at 850. The doctor estimated a five percent permanent disability "based in part on the predictability of exacerbation and remission of pain" over time. *Id.* The defendant moved to strike the doctor's testimony, arguing that "possibilities" [***7] were not probative, but the trial court denied the motion. *Id.* An instruction taking consideration of a ruptured disc from the jury on the basis that no competent evidence had been given on the matter was likewise refused by the trial court. *See id.*

[*P10] On appeal, the defendant argued that the doctor's testimony was "insufficient to provide a question of the existence of an injured disc." *Id.* The Utah Supreme Court recognized that the doctor's testimony regarding the permanency of the plaintiff's disability was "linked to the possibility of a disc injury" and was a significant part of the plaintiff's case. *Id.* The court stated: "Under these circumstances, if the proof of such an injury falls short of that required under our law, then an instruction to that effect should have been given the jury." *Id.* at 850-51. The court noted that under longstanding Utah law, a "plaintiff retains the burden of proving his damages by competent evidence to an extent where the trier of fact could discover that which is *probably* true." *Id.* at 851 (emphasis added). The court agreed with the plaintiff that there was evidence of some injury, but stated:

the jury [***8] was allowed to speculate upon the existence of a disc injury, which may be determinative of the important element of permanency of the injury when no affirmative evidence was offered on this issue. Although the medical testimony indicated that the symptoms showed a nerve irritation, and that such symptoms were consistent with the existence of a disc injury, we cannot discover in the witness' words anything more than their corollary that, under the circumstances a disc injury was not impossible.

Id. at 259, 292 P.2d at 851. Because there was a strong likelihood the jury considered the permanency of the injury to have been proven by expert testimony, the court reversed the jury's verdict in favor of the plaintiff, holding that a limiting instruction should have been given. *See id.*

[*P11] In the instant case, K-Mart argues that although Beard testified her neck and wrist problems began at the time of her injury at K-Mart, her belief that her neck and wrist surgeries were, therefore, the result of that incident cannot overcome the failure of the medical evidence to substantiate that belief.

[*P12] In contrast, Beard argues she was not required to put on [***9] expert medical evidence. Beard claims that under Utah law, expert medical opinions are generally only required in medical malpractice cases. We disagree.

[*P13] Beard presents cases from other jurisdictions holding that expert medical testimony is not required to submit to the jury questions about the need for medical treatment and expenses. *See, e.g., Jordan v. Smoot*, 191 Ga. App. 74, 380 S.E.2d 714, 715 (Ga. Ct. App. 1989); *Polaco v. Smith*, 376 So. 2d 409, 409-10 (Fla. Ct. App. 1979); *Walton v. Gallbraith*, 15 Mich. App. 490, 166 N.W.2d 605, 606 (Mich. Ct. App. 1969). However, we conclude these cases are factually distinguishable as they involve medical damages within the common experience of a layperson.

[*P14] In *Smoot*, the plaintiff sued the defendant for injuries she sustained in an automobile collision. *See* 380 S.E.2d at 714. Her case consisted of "her testimony and that of the responding police officer, pictures of her damaged car, and her medical bill." *Id.* The [**1019] plaintiff testified that she visited a chiropractor the day of the accident and following the accident and that the [***10] chiropractic treatments had given her relief. *See id.* The trial court directed a verdict for the defendant "on the ground that plaintiff had failed to prove a prima facie personal injury case because she had not introduced expert medical testimony" connecting the collision and her injuries. *Id.* The Georgia Court of Appeals reversed, stating "where, as here, there is no significant lapse of time

between the injury sustained and the onset of the physical condition for which the injured party seeks compensation, and *the injury sustained is a matter which jurors must be credited with knowing by reason of common knowledge*, expert medical testimony is not required." *Id.* (emphasis added).

[*P15] Beard also relies on *Walton v. Gallbraith*, 15 Mich. App. 490, 166 N.W.2d 605 (Mich. Ct. App. 1969). In *Walton*, the plaintiff sued the defendant for neck, back, and shoulder injuries caused by a car accident. *See* 166 N.W.2d at 605. At trial, no physician testified for the plaintiff, and the defendant "objected to the admission into evidence of bills for medicine and treatment on the ground that there was no showing that they were causally connected with the . . . [***11] accident." *Id.* The defendant also requested an instruction to exclude the jury's consideration of the bills. *See id.* The trial court denied both motions, and the jury awarded the plaintiff \$ 3500 in damages. *See id.* On appeal, the defendant argued it was error to introduce plaintiff's medical bills. *See id.* The plaintiff, on the other hand, argued "that a causal connection between the accident and the injury may be shown without expert testimony." *Id.* at 605-06. The court stated:

A brief review of the function of the jury leads us to the conclusion that plaintiff's position is the correct one. Her testimony emphasizes the facts that there were no previous neck or back pains and that they began the day after the accident.

In a situation such as this, *it should be clear to men of common experience that the cause of the injuries was the accident and no expert was needed to demonstrate this fact.*

Id. at 606 (emphasis added). Therefore, the court sustained the jury's verdict in favor of the plaintiff. *See id.*

[*P16] In this case, the question is not whether the accident at K-Mart caused Beard injury, but rather whether injuries sustained [***12] as a result of the accident at K-Mart required the neurological surgeries performed on Beard's neck and wrists. Beard was properly permitted to testify that the accident in the store caused pain and injury. The question as to whether such pain and injury resulted from the blow is within the common knowledge and experience of lay witnesses and could properly be submitted to the jury. What is missing in the evidence, however, is the link between the injuries suffered and the necessity of the surgeries. In Utah, in all but the most obvious cases, testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury. *See generally Denney v. St. Mark's Hosp.*, 21 Utah 2d 189, 442 P.2d

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944 (1968); *Moore v. Denver & Rio Grande W. R. R. Co.*, 4 Utah 2d 255, 292 P.2d 849 (Utah 1956); *Chief Consol. Mining Co. v. Salisbury*, 61 Utah 66, 210 P. 929 (1922). Certainly whether the need for complex neurological surgery was a result of the accident at K-Mart is not within the common experience of laypersons. As stated in *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 722 P.2d 819, 824 (Wash. Ct. App. 1986): [***13]

The need for positive expert testimony to establish a causal link between the defendants' negligent act and the plaintiff's injury depends upon the nature of the injury. Where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury.

722 P.2d at 824. "The diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons." *Eberhart v. Morris Brown College*, 181 Ga. App. 516, 352 S.E.2d 832, 834 (Ga. Ct. App. 1987). Thus, we conclude expert testimony on this medical causation issue was required before the issue [**1020] of damages arising from these surgeries was submitted to the jury.

[*P17] Plaintiff alternatively contends that even if she was required to put on expert medical testimony that her need for neck and wrist surgeries was caused by the accident at K-Mart, she introduced adequate expert medical testimony.

[*P18] Dr. Peterson, the surgeon who performed Beard's neck surgery and both wrist surgeries, [***14] testified extensively regarding the causes of Beard's neck pain, wrist pain, and his surgical treatment of them:

A: The question is, you know, what the cause is. *The answer is, basically, I have no way of proving anything.* But the association is that Mrs. Beard came to me and -- and, more or less, was a person who was doing well prior to this incident at K-Mart and since that time has been suffering a rather significant problem which could be -- you know, which was associated with some significant anatomic compromise in her neck. And from my standpoint, there was a chronologic association from the time of the incident to the time of the onset of the symptoms.

Q [by Beard's counsel]: What do you mean by chronological association?

A: Happened at the same time. . . . To my knowledge, [Beard] did not have these complaints prior to being hit at K-Mart.

...

Q: Can you interpret for us what you found on the MRI? . . .

A: Bone spur.

Q: What causes bone spurs?

A: Well, sort of the same thing that causes a bunion, irritation, disk -- an old disk herniation which has receded, abnormal movement, local irritation.

Q: Is that also the aging process as well?

A: Being on a planet [***15] with gravity.

...

Q [by K-Mart's counsel]: You performed neck surgery on Darlene Beard because she had marginal osteophytes in her neck, bone spurs.

A: That's essentially correct.

Q: Those were pre-existing to September 15, 1996.

A: That would be my best guess.

Q: In fact, you termed, in your deposition, that as a severe form of degenerative disk disease; is that correct?

A: That's correct.

Q: *All of that was pre-existing long before this K-Mart incident ever happened?*

A: *No argument.*

Q: Do you know how long?

A: Have no idea.

Q: Do you know how they got there?

A: As mentioned previously in testimony, it is essentially concomitant with being on a planet with gravity long enough. But it has to do with local irritation and other potential compromises such as trauma.

Q: *You don't know whether it was trauma, whether it was heredity, whether it was wear and tear, whether it was gravity -- as to how those bone spurs got there.*

A: *Absolutely no idea.*

...

Q: *And you're not saying to the jury, to a degree of reasonable medical probability, that this incident at K-Mart caused such a condition in her neck; isn't that correct?*

A: *No, I'm not telling [***16] the jury that at all.*

Q: *You just don't know, do you?*

A: *No.*

[*P19] When questioned about the wrist surgery, Dr. Peterson testified:

Q: *Do you have any reason to believe that any other incident, other than the accident of 9-15-96, may have caused this condition?*

A: *No.*

Q: *Okay. Could trauma cause that*

A: *Trauma -- trauma can cause carpal tunnel syndrome. At least certainly aggravate pre-existing condition.*

...

Q: *Okay. And so, you're not telling the jury, again, to any degree of reasonable probability that her carpal tunnel was caused by this incident at K-Mart; isn't that correct?*

A: *That's correct.*

[**1021] [*P20] We simply cannot say from the record before us that the expert medical testimony was sufficient to allow the jury to consider whether Beard's surgeries were necessitated by K-Mart's negligence and if so what damage she suffered as a result of those sur-

geries.² Without the required expert medical opinion linking the injury to the necessity of the surgery, a jury would simply be speculating about a linkage that is beyond its knowledge and experience. The expert medical testimony merely established a chronological [***17] relationship between the accident and her symptoms. No expert medical testimony was received that the neck and wrist surgeries were necessitated by her accident. Thus, it was error for the trial judge not to grant a directed verdict removing these issues from the jury. Therefore we must reverse and remand for a new trial.

2 Counsel for K-Mart conceded and we conclude that Beard will have an opportunity on remand to offer competent expert medical testimony on the issue of whether the accident at K-Mart either caused the need for her neck and wrist surgeries or exacerbated a pre-existing condition which necessitated the surgeries.

Judith M. Billings, Judge

[*P21] WE CONCUR:

Gregory K. Orme, Judge

William A. Thorne, Jr., Judge

LEXSEE 52 P.3D 1148



Analysis

As of: May 17, 2007

**Grand County, Plaintiff, Appellee, and Cross-Appellant, v. Emery County and the
City of Green River, Defendants, Appellants, and Cross-Appellees.**

No. 20010044

SUPREME COURT OF UTAH

2002 UT 57; 52 P.3d 1148; 450 Utah Adv. Rep. 21; 2002 Utah LEXIS 84

June 25, 2002, Filed

PRIOR HISTORY: [***1] Seventh District, Moab Dep't. The Honorable Lyle R. Anderson.

for election review and the trial court's attendant interpretation of *section 17-2-8 of [***2] the Utah Code.*

DISPOSITION: Reversed and remanded.

BACKGROUND

COUNSEL: W. Scott Barrett, Logan, for Grand County.

David A. Blackwell, Castle Dale, for Emery County.

Gerald H. Kinghorn, David J. Burns, Salt Lake City, for Green River.

JUDGES: RUSSON, Justice. Chief Justice Durham, Associate Chief Justice Durrant, Justice Howe, and Justice Wilkins concur in Justice Russon's opinion.

OPINION BY: RUSSON

OPINION

[**1150] *RUSSON, Justice:*

[*P1] Emery County and the City of Green River ("Green River") appeal the trial court's declaratory judgment in favor of Grand County declaring that *section 17-2-6(2) of the Utah Code* is unconstitutional under *article XI, section 3 of the Utah Constitution*, and appeal the trial court's failure to certify the election results approving Emery County's annexation of that portion of Green River located within Grand County ("Green River portion of Grand County") pursuant to their petition for election review. Grand County cross-appeals the trial court's grant of Emery County and Green River's petition

[*P2] This appeal arises out of a long-standing controversy between neighboring Grand County and Emery County and Green River, which straddles those counties' common border. The Green River portion of Grand County, with the consent and encouragement of Emery County, petitioned the relevant county legislative bodies to be annexed by Emery County, the desired result being that all of Green River would be located in Emery County instead of spread across two counties. These same parties were before this court in 1998 in connection with the same underlying controversy. In that case, *Grand County v. Emery County*, 969 P.2d 421 (Utah 1998), Grand County successfully challenged a previous version of *section 17-2-6*, the statute at issue in this appeal, in an attempt to thwart Emery County's annexation of the Green River portion of Grand County. While the underlying controversy between the counties remains the same, the statutory framework within which the battle rages has been changed by the Utah Legislature through the subsequent enactment of House Bill 49 ("H.B. 49"), H.B. 49, 53d Leg., Gen. Sess., 2000 Utah Laws 115, during the 2000 [***3] general session. The constitutionality of the amended statutory scheme is the central subject of this appeal.

PROCEDURAL HISTORY

[*P3] On August 3, 2000, Grand County filed an action seeking declaratory and injunctive relief against Emery County and Green River related to Emery

County's attempt to annex the Green River portion of Grand County. On September 1, 2000, Grand County moved for a preliminary injunction in an effort to prevent Emery County and Green River's annexation proposal from being submitted to the voters of Emery County and the voters of the Green River portion of Grand County. The trial court denied Grand County's motion for injunctive relief but directed any party wishing to challenge the results of the election to petition for election review at the appropriate time after the election. The annexation proposal was submitted [**1151] to the relevant voters in the 2000 general election.

[*P4] After the election, Grand County refused to certify the election with regard to the annexation proposal. Emery County and Green River petitioned for election review on December 1, 2000, to compel certification of the voters' approval of the annexation proposal. The trial [***4] court consolidated Grand County's original action for declaratory judgment with the petition for election review.

[*P5] On December 14, 2000, the trial court granted Emery County and Green River's petition for election review and determined that the relevant annexation statute, *sections 17-2-6 and -8 of the Utah Code*, requires approval of an annexation proposal by a majority of the voters in the area of the city or town to be annexed and the annexing county, and that in the 2000 general election, a majority of the voters in Emery County and the Green River portion of Grand County had approved the proposal. Despite this determination, the trial court refused to certify the election results because it simultaneously held *section 17-2-6(2) of the Utah Code*, the statute pursuant to which the election was held, unconstitutional, and consequently, granted Grand County its requested declaratory relief. The trial court ruled that *section 17-2-6(2) of the Utah Code* was unconstitutional because it violated the "general law" provision of *article XI, section 3 of the Utah Constitution*. The parties timely appealed.

STANDARD OF REVIEW

[*P6] The issue of "whether a statute is constitutional [***5] is a question of law, which we review for correctness, giving no deference to the trial court." *State v. Daniels*, 2002 UT 2, P30, 40 P.3d 611; *see also State v. Kell*, 2002 UT 19, P50, ___ P.3d ___; *Grand County v. Emery County*, 969 P.2d 421, 422 (Utah 1998). Furthermore, to the extent we are making a determination of a statute's constitutionality, the "statute is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality." *Utah Sch. Bds. Ass'n v. State Bd. of Educ.*, 2001 UT 2, P 9, 17 P.3d 1125 (quotation and citation omitted); *see also Daniels*, 2002 UT 2 at P30. Additionally, because interpreting the Utah Constitution pre-

sents a question of law, we review the trial court's determination for correctness and give no deference to its legal conclusions. *State v. Casey*, 2002 UT 29, P19, 44 P.3d 756; *Cache County v. Prop. Div. of State Tax Comm'n*, 922 P.2d 758, 766 (Utah 1996).

ANALYSIS

I. CONSTITUTIONALITY OF THE ANNEXATION STATUTE

[*P7] On appeal, Emery County and Green River first argue that the trial court erred in [***6] granting Grand County declaratory judgment that *section 17-2-6(2)* is unconstitutional. In ruling that *section 17-2-6(2)* is unconstitutional, the trial court concluded that *section 17-2-6(2)*'s requirement--that a county wishing to annex a portion of the territory from an adjoining county must first acquire a concurrent resolution passed by a two-thirds majority of both houses of the legislature approving the annexation proposal and then the governor's signature approval on such a resolution--violated the "general law" provision of *article XI, section 3 of the Utah Constitution*, which establishes the general procedure and voting requirement regarding county annexations and the legislature's power to delineate the conditions of the annexation process. *See Utah Const. art. XI, § 3*.

[*P8] Emery County and Green River maintain that *section 17-2-6(2)*, H.B. 49, which amended *section 17-2-6*, and House Concurrent Resolution 6, H. Con. Res. 6, 53d Leg., Gen. Sess., 2000 Utah Laws 1660-61--the resolution passed by the legislature approving the annexation proposal--either are not "special laws," or in the case of the concurrent resolution, is not a "law" at all, and therefore, they do [***7] not violate article XI, section 3.

[*P9] *Article XI, section 3 of the Utah Constitution* provides:

No territory shall be stricken from any county unless a majority of the voters living in such territory, as well as of the county to which it is to be annexed, shall vote therefor, and then only under such [**1152] conditions as may be prescribed by general law.

Utah Const. art. XI, § 3.

[*P10] This provision sets forth the basic requirements and framework for annexation and delegates to the legislature the authority to dictate the conditions under which annexation may occur. However, the legislature's power to set those conditions is limited by the provision in that the legislature may prescribe such conditions only "by general law." *Id.*

[*P11] Pursuant to this constitutional provision, the legislature enacted title 17, chapter 2 of the Utah Code.

Specifically, *section 17-2-6* prescribes the conditions under which one county can annex a portion of the territory of an adjoining county. This section of the statute sets forth two different annexation methods.

[*P12] The first annexation method (the "traditional method") allows for a majority of the voters in [***8] an area of a county to petition their county legislative body to allow the area in which they live to be annexed by an adjoining county. *Utah Code Ann. § 17-2-6(1)(a)*. The county legislative body, upon receiving such a petition in accordance with the provisions of the statute, must submit the annexation proposal to the voters of the county from which territory is to be annexed and to the voters of the county to which the territory is to be annexed. *Id. § 17-2-6(1)(b)*. Under this annexation method, an annexation proposal is approved if "a majority of those voting in each county have voted in favor of [the] annexation." *Id. § 17-2-8(2)(a)* (Supp. 2001).

[*P13] The second or alternative annexation method (the "amended alternative method"), which is at issue in this case, was amended by the passage of H.B. 49 during the 2000 general session of the legislature. The amended alternative method provides for a similar petition process but goes further and sets forth a modified and supplemental procedure applicable where the area seeking to be annexed shares a common boundary with the annexing county and where the area proposed to be annexed (1) "is [***9] located within a city or town whose boundaries extend into the proposed annexing county," (2) "is contiguous to the portion of the city or town that is located within the proposed annexing county," and (3) "includes all of the city or town that is within the county from which the area is proposed to be taken." *Utah Code Ann. § 17-2-6(2)(a)(i)(A)-(C)*. Under these circumstances, one county can annex a portion of an adjoining county if "by a two-thirds vote of each house, the Legislature passes a concurrent resolution" approving the annexation proposal, *id. § 17-2-6(2)(a)(ii)*, the governor signs the concurrent resolution, *id. § 17-2-6(2)(a)(iii)*, and an economic analysis of the annexation proposal is conducted and the analysis demonstrates that the cost and revenue effects of the annexation proposal fall within the specific parameters described in the statute, *id. § 17-2-6(2)(b)*. In an election on an annexation proposal brought under the amended alternative method, an annexation proposal is approved if "a majority of voters living in the area proposed for annexation" and "a majority of voters living in the county to which the area is proposed to [***10] be annexed have voted in favor of annexation." *Id. § 17-2-8(2)(b)*.

[*P14] In order to determine if *section 17-2-6*, as amended by H.B. 49, is constitutional under article XI, section 3, we must determine if it is a general law. The standards for evaluating challenged legislation under the

"general law" provisions of the Utah Constitution are set forth in *Utah Farm Bureau Insurance Co. v. Utah Insurance Guaranty Ass'n*:

A general law applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation particular to themselves in the matters covered by the laws in question. On the other hand, special legislation relates either to particular persons, places, or things or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied. . . . The constitutional prohibition of special legislation does not preclude legislative classification, but only requires the classification to be reasonable.

[**1153] *564 P.2d 751, 754 (Utah 1977)*; see also *73 Am. Jur. 2d Statutes § 5 (1974)*. Furthermore, [***11] where the legislature has made such a legislative classification, the classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act. . . .

....

. . . If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional.

Utah Farm Bureau Ins. Co., 564 P.2d at 755-56 (quotations omitted). In other words, a law is a general law where, to the extent it makes a classification, that classification (1) is reasonable and (2) applies and operates uniformly as to all members composing the class.

[*P15] *Section 17-2-6*, as amended by H.B. 49, is a general law. It is clear that the amended alternative method provided for in *section 17-2-6(2)* creates a legislative classification and differentiates between portions of counties generally and those portions that are cities or towns that straddle county boundaries. Neither of [***12] the parties disputes the reasonableness of this classification.

[*P16] While the plain language of H.B. 49 does not provide an express indication of the legislature's basis for differentiating between portions of counties generally that seek annexation and those areas of counties that are portions of cities or towns that straddle county lines that seek annexation, and there does not appear to be any legislative history associated with H.B. 49 to guide us, it is not difficult to discern from the language of the bill and the statute that the legislature was con-

cerned about keeping cities and towns wholly within a single county instead of two counties. The cities and towns belonging to the class occupy the unique position of straddling a county boundary and falling within two counties.¹ The purpose of the legislation is to provide an additional, and in some respects easier, method of annexation for the cities and towns caught in the awkward position of straddling a county line. The legislature did not arbitrarily include or exclude members from the class to which the statute is applicable, but instead, included only members to which the purpose of the statute might apply. Therefore, [***13] the legislature's basis for differentiating between the members of the class subject to *section 17-2-6(2)* and other portions of counties in general "bears a reasonable relation to the purposes to be accomplished by the act" and is otherwise reasonable. *Utah Farm Bureau Ins. Co.*, 564 P.2d at 756.

1 There are presently four cities/towns that fall into the class created by the statute. While the number of members of the class may be relatively small, this does not render the law in question "special." 73 *Am. Jur. 2d Statutes* § 10 (1974). Moreover, as populations grow and shift, and as cities and communities expand, new members of the class may come into existence.

[*P17] As to the "uniform operation" requirement for general laws, Grand County essentially argues that *section 17-2-6(2)* was enacted specifically to address the Green River situation and that the statute will not operate uniformly as to the other members of the class because the statute includes no legal standards related to [***14] the passage of a concurrent resolution by the legislature or approval of such a resolution by the governor. Grand County argues that under the statutory scheme as it now stands, there is no guarantee that any of the other class members will be able to successfully lobby the legislature and the governor for passage and approval of a concurrent resolution similar to the one secured by Emery County and Green River in this case. Grand County's arguments are unavailing.

[*P18] *Section 17-2-6(2)* applies uniformly to the members of the class. As previously indicated, there are four cities/towns that are presently members of the class. One of those class members, Green River, has successfully employed the procedure provided for in the statute. Any of the other class members may utilize the *section 17-2-6(2)* procedures in the same manner as Green River did. Under the uniform operation of the statute, those class members would be [***154] required to lobby the legislature for a concurrent resolution, to secure the governor's signature of such a resolution, to conduct the required economic analysis, and ultimately to gain the approval of a majority of the voters living in the appropri-

ate areas. [***15] The procedure for the class members is identical. Green River was afforded no special treatment in the application of the law, and there is no indication that any other class member would be treated any differently or required to meet any disparate burdens. The mere fact that Emery County and Green River were successful in utilizing the amended alternative method does not render the statute a special law.

[*P19] Grand County further argues that even if the underlying annexation statute is a general law, the concurrent resolution passed by the legislature and signed by the governor is a special law, or has the effect of a special law, since such a resolution is required by the underlying statute and no vote on annexation can go forward without the resolution. The trial court appeared to endorse essentially the same argument when it concluded in its memorandum decision that the "concurrent resolution approved by the Governor is functionally indistinguishable from legislation." We disagree.

[*P20] The concurrent resolution is not a "law" and therefore is not subject to the "general law" limiting language of article XI, section 3 because a resolution of the Utah Legislature [***16] is not legislation and does not have the force or effect of law. *Salt Lake City v. State Tax Comm'n*, 813 P.2d 1174, 1177 (Utah 1991); 73 *Am. Jur. 2d Statutes* § 3 (1974) ("The general rule is that a joint or concurrent resolution adopted by the legislature is not a statute, [and] does not have the force or effect of law . . .").

[*P21] Nor does the requirement of a concurrent resolution passed by the legislature and signed by the governor transform the underlying general law into a special one. The concurrent resolution required as part of the amended alternative method has no effect of law. It neither grants nor denies annexation to a city or town or county. It merely represents a condition precedent to an annexation proposal brought under the amended alternative method being presented to the relevant voters in the county or area to be annexed. *Article XI, section 3 of the Utah Constitution* clearly indicates that such conditions may be set by the legislature.

[*P22] Finally, in its memorandum decision the trial court characterized the requirement of a concurrent resolution as giving the "last word on any county boundary change" to the legislature [***17] and the governor instead of to the voters. This is incorrect.

[*P23] We read the plain language of the statute "as a whole," interpreting its provisions "in harmony with other provisions in the same statute and 'with other statutes under the same and related chapters.'" *Lyon v. Burton*, 2000 UT 19, P17, 5 P.3d 616 (quoting *Roberts v. Erickson*, 851 P.2d 643, 644 (Utah 1993) (per curiam)). The trial court's analysis and conclusion ignore the pres-

ence of the traditional method in *section 17-2-6(1)*. The concurrent resolution requirement does not give the legislature and the governor the "last word" on county boundary changes because a city or town that is unsuccessful in utilizing the procedures of the amended alternative method in *section 17-2-6(2)* by not acquiring a concurrent resolution from the legislature, or for that matter, an economic analysis that meets the requirements of the amended alternative method, would always have recourse to the traditional method found in *section 17-2-6(1)*, which is free from all of the additional requirements of the amended alternative method.

[*P24] Therefore, the trial court erred when it concluded as [***18] a matter of law that *section 17-2-6*, as amended by H.B. 49, was an unconstitutional "special law" because the legislative classification made by the statute has a reasonable basis that is reasonably related to the purposes of the statute and because the statute applies and operates uniformly as to the members of the class.

II. INTERPRETATION OF "VOTERS"

[*P25] On cross-appeal, Grand County challenges the trial court's conclusion that *section 17-2-8 of the Utah Code* requires that an [**1155] annexation proposal brought pursuant to *section 17-2-6(2)* receive a majority of the votes of those who actually voted on the annexation proposal in the area to be annexed and in the annexing county in order to be approved. Emery County and Green River appeal the trial court's refusal to certify the result of the election in accordance with the trial court's interpretation of the statute and its determination that the annexation proposal received the required electoral approval.

[*P26] Grand County argues that the statute should be interpreted to require that an annexation proposal brought under *section 17-2-6(2)* receive a majority of the votes of "registered" voters in the area to be annexed [***19] and in the annexing county in order to be approved. Grand County supports its position by noting that the legislature amended the language of *section 17-2-8(2)(b)* that sets forth the standard for approval of an annexation proposal brought pursuant to *section 17-2-6(2)*. Prior to the legislature's amendment of *section 17-2-8(2)(b)* through the enactment of H.B. 49, the standard of approval for an annexation proposal brought pursuant to either subsection 17-2-6(1) or subsection 17-2-6(2) was the same "majority of those voting" standard. The amendment altered the language setting forth the approval standard for *section 17-2-6(2)* annexation proposals from a majority of "those voting" in the area proposed for annexation and in the county to which the area is to be annexed, *Utah Code Ann. § 17-2-8(2)(b)* (1999), to a majority of "voters living" in those two areas, *Utah Code Ann. § 17-2-8(2)(b)* (Supp. 2001). Grand County argues

that the legislature amended the language of the statute to require approval of a majority of "voters living" in the relevant areas in order to impose a higher standard than the majority of "those voting" requirement. [***20] In Grand County's view, the new language inserted by the legislature requires a majority of "registered" voters in the relevant areas even if those registered voters failed or chose not to vote on the annexation proposal in question. Under Grand County's statutory interpretation of *section 17-2-8*, the amended language of *section 17-2-8(2)(b)* cannot be interpreted to set the same standard of approval for an annexation proposal as the "majority of those voting" language in *section 17-2-8(2)(a)* which was left unaffected by H.B. 49's amendment. If the two phrases are interpreted as meaning the same thing, *section 17-2-8(2)(a)* becomes redundant with *section 17-2-8(2)(b)* and the change in the language was unnecessary. In other words, according to Grand County, the legislature's decision to change the language was purposeful and the change would not have been made unless some different meaning and standard was in fact intended.

[*P27] The voting requirement associated with county annexation is constitutionally mandated and defined. *See Utah Const. art. XI, § 3*. The legislature has the authority to set the conditions of annexation by general law, but it does not have the authority [***21] to establish or modify the voting requirement set forth in the plain language of article XI, section 3. Because the voting requirement is constitutionally intended and described, and because the language of the statute and the constitution are identical, we interpret the constitutional language and impute that meaning to the same language used by the legislature in the statute. *See Odd Fellows' Bldg. Ass'n v. Naylor*, 53 Utah 111, 114, 177 P. 214, 215 (1918); *see also People ex rel. Baird v. Tilton*, 37 Cal. 614, 622 (1869) ("The same construction should be given to the same language used in the same connection, in reference to a similar subject matter, when used in a statute, as when used in the Constitution."); *People ex rel. Akin v. The Butler St. Foundry & Iron Co.*, 201 Ill. 236, 66 N.E. 349, 355 (Ill. 1903) ("When [a] statute is couched in the same language as the Constitution, the language of the statute will receive the same construction as that of the Constitution . . ."). In the case at hand, the legislature's use of the exact language of the constitution suggests that it intended the language of *section 17-2-8(2)(b)* and [***22] *section 17-2-6(2)(a)(iv)(A)-(B)* to have the same meaning and effect as the language of the constitution. *See State v. Woodcock*, 168 Vt. 588, 719 A.2d 32, 32 (Vt. 1998). As a result, we need not address Grand County's arguments based on the interpretation of the statute or the legislature's intent in amending the language of the statute but rather focus our analysis on [**1156] the meaning and interpretation of the constitutional provision.

2002 UT 57, *; 52 P.3d 1148, **;
450 Utah Adv. Rep. 21; 2002 Utah LEXIS 84, ***

[*P28] As previously recited, article XI, section 3 prohibits the territory of one county from being annexed by another county "unless a majority of the voters living in such territory, as well as of the county to which it is to be annexed, shall vote therefor." *Utah Const. art. XI, § 3*.

[*P29] "In interpreting the state constitution, we look primarily to the language of the constitution itself . . ." *State v. Gardner*, 947 P.2d 630, 633 (Utah 1997). Therefore, our starting point in interpreting a constitutional provision is the textual language itself. See *State v. Casey*, 2002 UT 29, P 20, 44 P.3d 756; *Utah Sch. Bds. Ass'n v. State Bd. of Educ.*, 2001 UT 2, P13, 17 P.3d 1125; [***23] *In re Inquiry Concerning a Judge (Young)*, 1999 UT 6, P62, 976 P.2d 581 (Stewart, J., dissenting). "We need not inquire beyond the plain meaning of the [constitutional provision] unless we find it ambiguous." *Casey*, 2002 UT 29 at P20.

[*P30] The language at issue here is clear and unambiguous. "Voter" is defined as a "person who engages in the act of voting." *Black's Law Dictionary* 1571 (7th ed. 1999). Under this definition, article XI, section 3 requires a majority of persons who engage in the act of voting who live in the territory to be annexed, as well as those who live in the county to which that territory is to be annexed, to vote in favor of an annexation proposal in order for it to be approved. In other words, the group of voters of which a majority is required consists merely of those who exercise the right to vote on the annexation proposal in question at the election in which the annexation proposal is offered for a vote. The number of votes cast at the ballot box itself is the basis for determining a majority, as opposed to the number of those possessing the qualifications to vote or those registered to vote in the annexing [***24] county or area to be annexed but who do not actually vote. Those citizens who fail or choose not to vote are presumed to assent to and acquiesce in the expressed will of the majority. This interpretation of the meaning and effect of the phrase "majority of voters" is consistent with the well-settled, general rule of American election law concerning the method of computing a majority and with the long-standing interpretations of similar constitutional language by the highest courts of our kindred states.²

² *Citizens' Sav. & Loan Ass'n v. Perry County*, 156 U.S. 692, 712, 39 L. Ed. 585, 15 S. Ct. 547 (1895) ("It is well settled by the decisions of this court where a majority of those voting at an election . . . vote in favor of [a proposition] for the purpose of registration [or certification] it will be presumed that such majority so voting is a majority of all the legal voters living in the municipality at the time of the election . . ."); *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L. Ed. 416

(1877) ("All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares."); *Glover v. Hot Springs Kennel Club, Inc.*, 230 Ark. 544, 323 S.W.2d 902, 905 n.4, 907 (Ark. 1959) (interpreting constitutional and statutory language of "majority of the voters of the county" and "majority of the qualified electors of such county" as meaning "a majority of those voting on the proposition" (citations omitted)); *Vance v. Austell*, 45 Ark. 400, 406-07 (1885) (endorsing and applying reasoning of *County of Cass v. Johnston*, 95 U.S. 360, 24 L. Ed. 416); *People ex rel. Mitchell v. Warfield*, 20 Ill. 159, 164-65 (1858) (interpreting Illinois constitution's language requiring majority of voters of county to approve relocation of county seat as meaning majority of "voters of the county . . . who . . . vote at the election" and as excluding "other voters of the county who were detained from the election by absence or sickness, or [who] voluntarily absented themselves from the polls"); *In re Todd*, 208 Ind. 168, 193 N.E. 865, 872-77 (Ind. 1935) (interpreting "voter" and "elector" in Indiana constitution and holding that group of voters of which majority is required consists of those who exercise right to vote); *Walker v. Oswald*, 68 Md. 146, 11 A. 711, 713 (Md. 1887) ("It has been settled, both in England and in this country, by an almost, if not quite, unbroken current of judicial decisions from the time of Lord MANSFIELD to the present day, that when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote."); *Taylor v. Taylor*, 10 Minn. 107, 116, 10 Gilf. 81-17 (1865) (interpreting Minnesota constitutional provision requiring that laws changing established county lines be approved by majority of electors of county to be affected and rejecting as manifestly inconvenient and absurd position that provision requires absolute majority of those qualified to vote in county at time of election); *Louisville & Nashville R.R. Co. v. County Ct.*, 33 Tenn. 637, 691-93 (1854) (holding that when approval of proposition is referred "to the decision of a majority of the 'voters of a county,' [that phrase] cannot be understood [to] mean anything more than those who see fit to exercise the privi-

lege [of voting on the proposition]"); 26 *Am. Jur. 2d Elections* § 406 (1996) ("In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result."); George W. McCrary, *A Treatise on the American Law of Elections in McCrary on Elections* § 208 (4th ed. 1897) ("Where a statute [or constitutional provision] requires a question to be decided . . . by the votes of 'a majority of the voters of a county,' this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by the majority of the votes cast The 'voters of the county' referred to by all such statutes [or constitutional provisions] are necessarily the voters who vote at the election, since the result in each case must be determined by a count of the ballots cast and not by an inquiry as to the number not cast.").

[**25] [**1157] [*P31] Grand County's interpretation of the constitutional language would essentially read the word "registered" into article XI, section 3 of the constitution, and consequently, require that the number of those voting in favor of the annexation proposal be a majority of those registered to vote in the annexing county and the area to be annexed instead of a majority of those voters from the relevant areas who actually voted on the annexation proposition during the election. This would effectively allow those registered voters in the two areas who did not actually vote to be counted as votes against the annexation proposal. Such a method of computing whether a majority of voters have approved a proposition or have elected a candidate would be contrary to the plain meaning of the constitutional provision and the long-established general rule.³

3 It is worth noting that the general rule as stated herein for computing a majority of voters in an election can be modified by legislative enactment to require a greater majority. The legislature may require a two-thirds majority of voters or a majority of "registered" voters; however, it

may do so only where granted the authority by the constitution and then only through explicit and clear language. As previously discussed, article XI, section 3 does not give the legislature authority to modify the voting requirement or approval standard set forth in the constitutional provision. In any event, it appears that the legislature was not attempting to modify or increase the majority required for approval of a *section 17-2-6(2)* annexation proposal, but rather, merely attempting to implement the stated voting requirement and standard as it appears in article XI, section 3 by using the constitution's exact language.

[**26] [*P32] Therefore, the trial court correctly concluded that only a majority of those voting on the annexation proposal in Emery County and the Green River portion of Grand County needed to vote in favor of the annexation proposal for it to be approved. However, the trial court erred in not certifying the results of the election in accordance with this standard and its determination that the required electoral approval had been achieved.

CONCLUSION

[*P33] For the foregoing reasons, the trial court erred in declaring that *section 17-2-6(2) of the Utah Code* is unconstitutional because it violates the "general law" provision of *article XI, section 3 of the Utah Constitution*. Therefore, the trial court's grant of declaratory judgment to Grand County is reversed. Furthermore, the trial court also erred when it refused to certify the annexation proposal election results consistent with its finding that the annexation proposal had received the approval of the required majority of voters in Emery County and the Green River portion of Grand County. The case is remanded for further proceedings consistent with this opinion and the trial court's previous finding that the annexation [**27] proposal received the required electoral approval.

[*P34] Chief Justice Durham, Associate Chief Justice Durrant, Justice Howe, and Justice Wilkins concur in Justice Russon's opinion.

LEXSEE 700 P.2D 1068



Positive

As of: Jun 13, 2007

K. J. SCHARF; dba Western Leasing, Plaintiff and Respondent, v. BMG CORPORATION, Vernon R. Erickson, Michael R. Erickson, and Bruce V. Erickson, Defendants and Appellants

No. 18963

Supreme Court of Utah

700 P.2d 1068; 1985 Utah LEXIS 836; 40 U.C.C. Rep. Serv. (Callaghan) 1932

April 16, 1985, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment from the trial court (Utah). The trial court granted a deficiency judgment against defendant after plaintiff sold equipment that plaintiff had leased to defendant.

OVERVIEW: Defendant leased two pieces of equipment from plaintiff. The equipment consisted of a hydraulic shear and a lathe. When defendant defaulted on the leases, plaintiff repossessed and sold the equipment. Plaintiff thereafter sought and was granted a deficiency judgment on the difference between the balance owing on the leases and the amount realized from the sale of the equipment. Defendant appealed the grant of a deficiency judgment. Defendant claimed plaintiff's sale of the equipment was not commercially reasonable, and plaintiff's notice of sale did not constitute reasonable notification under Utah law. The court disagreed. In affirming the deficiency judgment, the court held that plaintiff made reasonable and diligent efforts to sell the equipment for a commercially reasonable price. The court also found that plaintiff's notice to defendant regarding the sale was sufficient.

OUTCOME: The court found plaintiff's efforts commercially reasonable and affirmed the award of the deficiency judgment.

LexisNexis(R) Headnotes

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Creditor Misbehavior > General Overview

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Disposition of Collateral

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Notice of Sale

[HN1] See Utah Code Ann. § 70A-9-504(3) (1953, 1980 ed.).

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Notice of Sale

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Public Sale

Contracts Law > Secured Transactions > Default > Foreclosure & Repossession > Notice Requirements

[HN2] See Utah Code Ann. § 70A-9-504(3) (1953, 1980 ed.).

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

[HN3] To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favor-

able to the court below, the evidence is insufficient to support the findings.

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN4] The standard of review for conclusions of law differs from that applicable to factual findings; an appellate court accords conclusions of law no particular deference, but reviews them for correctness.

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Creditor Misbehavior > Commercially Reasonable Conduct

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Public Sale

[HN5] Utah Code Ann. § 70A-9-504(3) requires that a disposition of collateral must be commercially reasonable in every aspect.

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Public Sale

[HN6] See Utah Code Ann. § 70A-9-507(2).

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Notice of Sale

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > Foreclosure & Repossession > Public Sale

[HN7] Utah Code Ann. § 70A-9-504(3) provides that reasonable notice should specify whether the sale is to be public or private. Further, if a sale is private, reasonable notice must specify the time after which the sale is to be made. Utah Code Ann. § 70A-9-504(3) (1953, 1980 ed.).

COUNSEL: [**1] Roy G. Haslam, Salt Lake City, for Petitioner.

Bryce E. Roe, Salt Lake City, for Respondent.

JUDGES: Zimmerman, Justice, wrote the opinion. We concur: Gordon R. Hall, Chief Justice, Richard C. Howe, Justice, Christine M. Durham, Justice. Stewart, Justice, concurs in the result.

OPINION BY: ZIMMERMAN

OPINION

[*1069] Defendant Vernon R. Erickson personally guaranteed leases on two pieces of repossessed equipment. He appeals from a deficiency judgment entered against him after the lessor, Kathy Scharf, sold the equipment. Erickson claims that Scharf's sale of the equipment was not "commercially reasonable" and that the notice of sale actually given did not constitute "reasonable notification," all as required by section 70A-9-504(3) of the Code. U.C.A., 1953, § 70A-9-504(3) (1980 ed.). For the reasons set forth below, we affirm.

In the spring of 1979, Scharf, doing business as Western Leasing, leased a \$33,000 Summit hydraulic shear and an \$18,000 Victor lathe to BMG Corporation. Michael R. and Bruce V. Erickson, the principals of BMG, and their father, Vernon R. Erickson, executed personal guarantees of faithful performance under the lease agreements. In April of 1980, BMG [**2] Corporation defaulted on the payments due under both leases, and on September 5, 1980, Scharf repossessed the equipment with the Ericksons' consent. On October 1, 1980, Scharf sold the lathe for \$6,000, and approximately a week later, she sold the shear for \$19,000. She then brought an action pursuant to section 70A-9-504(2) of the Code, seeking to recover the difference between the balance owing on the leases and the amount realized from the sale of the equipment.

At the October 8, 1982, trial, counsel for Vernon Erickson, the only defendant remaining in the action, argued that the sale of the equipment failed to comply with section 70A-9-504(3) of the Code, which gives a secured party the right to dispose of collateral after default. In pertinent part, that section provides: [HN1] "Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." U.C.A., 1953, § 70A-9-504(3) (1980 ed.). The same section also describes the notice that must be given to the debtor when collateral is disposed of:

[HN2] Unless collateral is perishable [**3] or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor.

Id.

Erickson asserted at trial that the method, manner, and timing of the sale all failed to meet section 70A-9-

700 P.2d 1068, *; 1985 Utah LEXIS 836, **;
40 U.C.C. Rep. Serv. (Callaghan) 1932

504(3)'s standard of commercial reasonableness. He also asserted that the notice was technically deficient because it failed to state whether the sale would be public or private and did not specify a date, time, and location for the sale. These inadequacies, according to Erickson, prejudiced him by denying him the opportunity to arrange a sale on more favorable terms.

After hearing the testimony, the trial court entered detailed factual findings supporting its conclusions that the sale was private, that it was conducted in a commercially reasonable manner, that the notification met the statutory standard of reasonableness, that the prices received for the equipment reflected its reasonable market value, and that any deficiencies in notice [**4] were not prejudicial to defendant. The trial court entered a deficiency judgment for Scharf in the amount of \$54,310.21 and awarded her \$3,500 in attorney fees.

On appeal, Erickson again argues that the sale was not commercially reasonable and that the notice was inadequate under the statute, attacking both the trial court's factual findings and its legal conclusions. The challenges to the factual findings can be disposed of readily. Erickson makes numerous arguments based on the facts as he presented them to the trial [*1070] court, rather than on the facts as found by that court. However, at no point does he even discuss the detailed findings entered by the lower court that contradict his factual assertions. With respect to these matters, we take as our starting point the trial court's findings and not Erickson's recitation of the facts. [HN3] To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. *See, e.g., Charlton v. Hackett*, 11 [**5] *Utah* 2d 389, 390, 360 P.2d 176 (1961); *Hutcheson v. Gleave*, *Utah*, 632 P.2d 815 (1981); *Kohler v. Garden City*, *Utah*, 639 P.2d 162, 165 (1981); *Hal Taylor Associates v. UnionAmerica, Inc.*, *Utah*, 657 P.2d 743 (1982). Erickson has not begun to carry that heavy burden. Nowhere does he marshal the evidence supporting his version of the facts, much less the evidence supporting the trial court's findings. Under these circumstances, we decline to further consider Erickson's attack on the factual findings.

We next consider Erickson's claim that the trial court erred in its conclusions of law. [HN4] The standard of review differs from that applicable to factual findings; we accord conclusions of law no particular deference, but review them for correctness. *See, e.g., Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc.*, *Utah*, 596 P.2d 1033, 1036 (1979); *Betenson v. Call Auto & Equipment Sales, Inc.*, *Utah*, 645 P.2d 684, 686 (1982). Erickson first attacks the trial court's conclusion

that, as a matter of law, the sale was commercially reasonable. [HN5] Section 70A-9-504(3) of the Code requires that a disposition of collateral must be commercially reasonable in every [**6] aspect. Erickson claims that section 70A-9-507(2) describes what is necessary to satisfy the standard of commercial reasonableness. It provides:

[HN6] The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either [1] sells the collateral in the usual manner in any recognized market therefor or [2] if he sells at the price current in such market at the time of his sale or [3] if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

U.C.A., 1953, § 70A-9-507(2) (1980 ed.). Erickson argues that for a sale to have been commercially reasonable, it must have been handled in one of the three modes set out in the above-quoted section. He then asserts that under the facts as he perceives them, none of these three standards have been met. His argument is without merit. Even if we were to assume that the facts as found by the lower court do not [**7] show that the collateral was disposed of in one of the three specified modes, Erickson's argument fails because the three types of disposition set out in section 70A-9-507(2) are examples only; they are not the exclusive method of authorized disposition.

This provision of our Code is identical to its Uniform Commercial Code counterpart. In interpreting provisions of our Code, we often turn to the official comments of the Uniform Commercial Code for guidance. The official comment to the section at issue here disposes of Erickson's argument. "None of the specific methods of disposition set forth in subsection (2) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable." U.C.C. § 9-507, comment 2 (1981).

Since the statutory standard of commercial reasonableness cannot be measured with a bright-line test, whether any particular sale is commercially reasonable is to be determined on a case-by-case basis. That determination depends on whether the circumstances of the sale

and the manner and business context in which it occurred [*1071] support a conclusion that the sale was [**8] conducted in a commercially reasonable manner. In this case, the facts found by the trial court provide ample support for the legal conclusion that the sale was commercially reasonable.

Erickson also contends that the notice of sale provided by Scharf did not comport with the statutory requirements and, therefore, that no deficiency judgment can be had under the provisions of section 70A-9-504(2) of the Code. He relies on several technical deficiencies in the letter that operated as a notice of the sale. The September 8, 1980, letter informed him that the equipment had been repossessed and demanded that he pay the total outstanding indebtedness. It also stated that "the equipment . . . will be sold on September 30, 1980, unless the amounts due under the lease agreement have been paid." (Emphasis added.) Erickson points out two problems with the letter. First, it did not specify whether the sale was to be public or private. Second, the equipment was not sold on September 30th as announced in the letter; one item was sold on October 1st, and the other was sold on October 9th.

The letter was technically deficient in both respects. [HN7] Section 70A-9-504(3) of the Code provides [**9] that reasonable notice should specify whether the sale is to be public or private. Further, if a sale is private, as this one was found to be, reasonable notice must specify "the time *after which*" the sale is to be made. U.C.A., 1953, § 70A-9-504(3) (1980 ed.) (emphasis added). Scharf's notice stated the day *on which* the sale was to occur, while the actual sales occurred one day and nine days, respectively, after the date fixed in the notice.

In addition to relying on the technical deficiencies in the notice to protect him from the deficiency judgment, Erickson claims that he was prejudiced because he could have used the several days that elapsed between the date the sale was to have occurred and the date it actually occurred to find a buyer who would pay a higher price. His notice contention is without merit. In *Pioneer Dodge Center, Inc. v. Glaubensklea, Utah*, 649 P.2d 28 (1982), the debtor received notice that her repossessed truck would be auctioned off at 11:00 a.m. on a specified day; instead, the truck was sold at 10:00 a.m. Because the debtor did not show up at 11:00 a.m., we held that she was not prejudiced by the error. *Id.* at 29. By looking beyond [**10] the technicalities of the notice requirement to its essential purpose, *Pioneer Dodge* made it plain that the formal elements of the notice requirement must not be followed to the frustration of its purpose. "The purpose of the notice requirement is for the protection of the debtor, by permitting him to bid at the

sale, or arrange for interested parties to bid, and to otherwise assure that the sale is conducted in a commercially reasonable manner." *FMA Financial Corp. v. Pro-Printers, Utah*, 590 P.2d 803, 807 (1979). The notice requirement gives the debtor the opportunity to actively protect his interests.

In the present case, the purpose of the notice requirement was adequately satisfied, and Erickson has shown no prejudice from the technical deficiencies. Throughout the period from April of 1980, when the lessees first defaulted, through October, when the sales occurred, Erickson and the other guarantors did nothing to secure purchasers for the equipment or otherwise protect their interests. The findings of the trial court established that Erickson at no time showed any interest in the disposition of the collateral. Scharf took all the initiative in disposing of the equipment. [**11] She diligently sought out potential buyers and eventually arranged to sell the shear to Tan-Dem Machinery for the highest bid received--\$17,000. On September 30th, well after Erickson had received his written notice, Scharf once again took the initiative, this time telephoning Erickson and informing him of the imminent sale. Erickson approved the bid. The sale to Tan-Dem fell through. About a week later, on October 9th, Scharf sold the shear to another party for \$19,000, \$2,000 more than Tan-Dem had offered.

[*1072] Because Erickson made no effort at any time to procure a buyer for either piece of equipment and had approved the sale of the shear on the day set forth in the notice for less than was eventually obtained, we cannot find that he was prejudiced by either the technical defects in the notice or the slight delay in the sale. In fact, since he acquiesced to the lower bid, the delay actually worked to his advantage by lessening the deficiency by \$2,000. Under these circumstances, we conclude that the notice was reasonable.

The deficiency judgment entered by the lower court against Erickson is therefore affirmed. In light of the facts that the leases involved in [**12] this matter provided for an award of attorney fees to Scharf in any action necessary to enforce the leases and the trial court awarded them to her in connection with the proceedings below, we remand the case for determination of reasonable fees in connection with this appeal as well. *Management Services Corp. v. Development Associates, Utah*, 617 P.2d 406, 409 (1980).

WE CONCUR: Gordon R. Hall, Chief Justice, Richard C. Howe, Justice, Christine M. Durham, Justice.

Stewart, Justice, concurs in the result.

Thomas W. Seiler, #2910
Lori D. Huntington #6252
ROBINSON, SEILER & ANDERSON, LC
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FILED
Fourth Judicial District Court
of Utah County, State of Utah

12/12/06 *WJS* Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOSEPH R. FOX and LINDA FOX,

Plaintiffs,

vs.

BRIGHAM YOUNG UNIVERSITY, a Utah
corporation,

Defendant.

**ORDER DENYING PLAINTIFFS'
OBJECTIONS TO TESTIMONY OF
NOAH CONVERSE AND SCOTT
STARR WITH ACCOMPANYING
EXHIBITS**

Civil No. 040401488

Division 5
Judge Fred D. Howard

The above-entitled matter came on regularly for Trial on Tuesday, November 14, 2006, before the above-entitled Court, the Honorable Fred D. Howard, Fourth District Court Judge, presiding. The Plaintiffs were present, pro se. The Defendant was present and represented by its counsel of record, Thomas W. Seiler of Robinson, Seiler & Anderson, LC, and David B. Thomas, Office of General Counsel, Brigham Young University.

Upon oral motion, the Plaintiffs objected to the testimony of Noah Converse and Scott Starr and to the Utah EMS Incident Report and the Brigham Young University Police Department EMS Incident Table with Accompanying Report insofar as the testimony or the exhibits included a written or oral statement taken by Mr. Converse or Mr. Starr in their capacity as volunteer Brigham Young University Emergency Medical Service personnel attending to the Plaintiff Linda A. Fox on April 20, 2004, on the west stairs at the northerly end of the Harmon Conference Center (hereinafter “the stairs”) to the effect that:

1. There was no cartilage in Linda A. Fox’s right knee due to arthritis;
2. Linda A. Fox’s right knee went out on her as she was going down the stairs;
3. Linda A. Fox fell down only one stair;
4. Over and over again the Plaintiff Linda A. Fox said words to the effect that her knee just went out on her as she was going down the stairs and that she did not hold Brigham Young University responsible; and

5. Over and over again the Plaintiff Linda A. Fox said that the stairs are too narrow and have always been dangerous. (See, generally, the Affidavit of Noah Converse with accompanying Exhibits dated February 15, 2005.)

The Plaintiffs Foxes’ objection was based upon Utah Code Annotated, §78-27-33, a statutory rule of evidence which, under certain conditions, if enforceable, would make statements of an injured person inadmissible as evidence in a civil proceeding. The Plaintiffs allege that the conditions set

forth in Utah Code Annotated, §78-27-33 apply. For the purpose of this Ruling, and for that purpose only, the Court assumes that the Plaintiffs are accurate in that regard.

The Court denies the objection. In so doing, the Court relies, in part, upon the following:

1. Utah State Constitution, Article VIII, Section 4, which states, in part:

“The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. ...”

2. On September 10, 1985, the Utah Supreme Court filed a pro curium order in the matter of In Re: Rules of procedure and evidence to be used in the courts of this state. In pertinent part, that order states:

“Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory Rules of Procedure and Evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.”

3. The Preliminary Note to the Utah Court Rules states, in part:

“Any existing statutes inconsistent with these rules ... will be impliedly repealed.”

4. The testimony and exhibits objected to by the Plaintiffs are admissions by a party opponent pursuant to Utah Rules of Evidence, Rule 801(2).

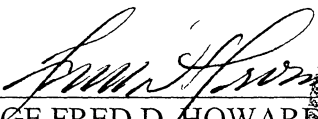
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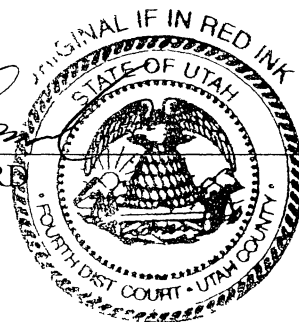
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5. The testimony and exhibits objected to by the Plaintiffs are, pursuant to Rule 803(4), an exception to the hearsay rule as a statement for the purposes of medical diagnosis or treatment.

DATED this 12 day of December, 2006.

BY THE COURT:


JUDGE FRED D. HOWARD
Fourth District Court



CERTIFICATE OF DELIVERY

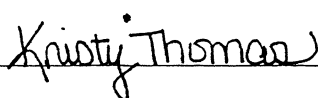
I hereby certify that a true and correct copy of the **ORDER DENYING PLAINTIFFS' OBJECTIONS TO TESTIMONY OF NOAH CONVERSE AND SCOTT STARR WITH ACCOMPANYING EXHIBITS** was delivered, this 21st day of November, 2006, addressed as follows and in the manner indicated:

Linda A. Fox
1149 East 1630 South
Spanish Fork, UT 84660

X - via U.S. Mail, postage pre-paid
_____ - via Facsimile (____) _____
_____ - via Hand Delivery

Joseph R. Fox
1149 East 1630 South
Spanish Fork, UT 84660

X - via U.S. Mail, postage pre-paid
_____ - via Facsimile (____) _____
_____ - via Hand Delivery



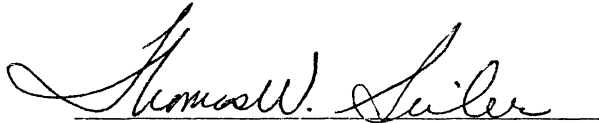
NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

TO: LINDA A. FOX and JOSEPH R. FOX:

Please take notice that the undersigned attorney for Defendant will submit the above and foregoing **ORDER DENYING PLAINTIFFS' OBJECTIONS TO TESTIMONY OF NOAH CONVERSE AND SCOTT STARR WITH ACCOMPANYING EXHIBITS** to the Honorable Fred D. Howard for his signature upon the expiration of five (5) days from the date of this notice, plus three days for mailing, unless written objection is filed prior to that time pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this _____ day of November, 2006.

ROBINSON, SEILER & ANDERSON


THOMAS W. SEILER
Attorney for Defendant

FILED
Fourth Judicial District Court
of Utah County, State of Utah

12/12/06 ~~11/81~~ Deputy

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Lori D. Huntington #6252
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOSEPH R. FOX and LINDA FOX, Plaintiffs, vs. BRIGHAM YOUNG UNIVERSITY, a Utah corporation, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 040401488 Division 5 Judge Fred D. Howard
--	---

The above-entitled matter came on regularly for Trial on Tuesday, November 14, 2006, before the above-entitled Court, the Honorable Fred D. Howard, Fourth District Court Judge, presiding. The Plaintiffs were present in person and appeared pro se. The Defendant was present and represented by its counsel of record, Thomas W. Seiler of Robinson, Seiler & Anderson, LC, and David B. Thomas, Office of General Counsel, Brigham Young University. Certain evidence

was proffered. The parties advised the Court fully in the premises and does, hereby, enter the following:

FINDINGS OF FACT

1. The Plaintiffs allege that the Plaintiff Linda A. Fox was injured on April 20, 2004, when she fell on the west stairs at the northerly end of the Harmon Conference Center (hereinafter “the stairs”) as she descended the stairs.

2. The Plaintiffs stipulated they would try this case without any expert witness of any kind on any subject, including but not limited to:

a. Causation/mechanism of injury; and

b. Mrs. Fox’s medical condition before and after her alleged fall on April 20, 2004.

3. In the Spring of 2003, Linda A. Fox had been told by Dr. Richard Jackson that Linda would require a future knee replacement. (Linda Fox deposition, p.16: 11-14.)

4. In the Spring of 2003, Dr. Richard Jackson had x-rayed Linda Fox’s right knee and reported to her that her right knee was missing cartilage and diagnosed Linda Fox with an arthritic knee. (Linda Fox deposition, p.17:6; Affidavit of Linda Fox, April 7, 2005, ¶2 (hereinafter referred to as “Fox Affidavit.”))

5. On April 20, 2004, Linda Fox told the Emergency Medical Service volunteers who attended to her that her knee went out as she was going down the stairs. (Affidavit of Noah Converse, ¶11, b.)

6. Prior to the April 20, 2004, fall, the Plaintiff Linda A. Fox had some cartilage missing in her right knee due to osteoarthritis. (Plaintiffs' Answers to Defendant's First Request for Admissions and Request for Production of Documents, Request No. 11.)

7. Before her fall on April 20, 2004, the Plaintiff Linda A. Fox reported having pain on the lateral side of her right knee. (Plaintiffs' Answers to Defendant's First Request for Admissions and Request for Production of Documents, Request No. 13.)

8. Prior to Linda Fox's fall on April 20, 2004, the Plaintiff Linda A. Fox was diagnosed with having some joint space narrowing in her right knee. (Plaintiffs' Answers to Defendant's First Request for Admissions and Request for Production of Documents, Request No. 14.)

9. The Plaintiffs had, prior to Trial, determined not to call any expert witnesses and rested upon their theory that all elements of the Plaintiffs' claims could be provided for by lay testimony.

10. The only facts concerning causation or the mechanism of injury in the instant case that may be ascertained by the ordinary use of the senses by a lay witness are that Linda Fox was descending the stairs and she fell. No lay witness can, by the ordinary use of the lay witness's senses, testify that whether the fall of Linda Fox was or was not caused by the symptomatic medical condition of Linda Fox's knee.

11. Linda Fox fell without the physical intervention of any actor.

12. The Plaintiffs' claims were all based solely on alleged negligence of the Defendant.

13. No person inspected the stairs after Linda Fox's alleged fall to determine the condition of the stair Linda Fox was on when she allegedly fell.

14. Plaintiffs do not know which stair Linda Fox was on when she allegedly fell.

CONCLUSIONS OF LAW

1. Inasmuch as the Plaintiffs had no witness who could testify as to the condition of the stairs and had no witness who could testify as to whether or not the stairs were dangerous, the Plaintiffs agreed that there would be no expert testimony regarding the condition of the stairs.

2. The Plaintiffs' determination that they would call no expert witnesses on any subject, including but not limited to:

a. Causation/mechanism of injury; and

b. Linda Fox's medical condition before and after her alleged fall on April 29, 2004; precluded evidence that Linda Fox's fall was not caused by her symptomatic, pre-existing, osteoarthritic, joint narrowing, knee which had loss of cartilage.

3. The Plaintiffs had not pled, with specificity, any portion of the Provo City Building Code in connection with this case nor had they named any person who could testify as to whether or not the stairs conformed to the Provo City Building Code. Therefore, pursuant to Rule 9(i), Utah Rules of Civil Procedure, the Court could not find that the stairs failed to conform to safety requirements of the building code.

4. In the absence of any expert witness who could opine as to whether Mrs. Fox fell because of her symptomatic, pre-existing condition as described above or for some other cause, the Plaintiffs cannot sustain their burden of proof as to causation.

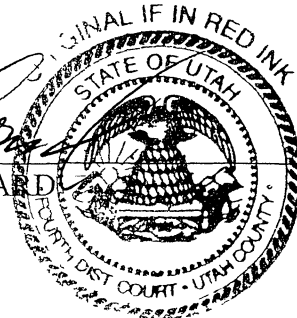
5. In the absence of any healthcare provider who could opine as to the reasonable necessity of any healthcare received by the Plaintiff Linda Fox, the Plaintiffs cannot sustain their burden of proof as to damages.

6. Joseph R. Fox's claim is for loss of consortium. Because Linda A. Fox cannot sustain her burden of proof as to causation nor as to damages, the Plaintiff Joseph R. Fox's claim for loss of consortium fails.

DATED this 12 day of December, 2006.

BY THE COURT:


JUDGE FRED D. HOWARD
Fourth District Court



Approved as to form:

LINDA A. FOX -- Plaintiff

JOSEPH R. FOX -- Plaintiff

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the **FINDINGS OF FACT AND CONCLUSIONS OF LAW** was delivered, this 21st day of November, 2006, addressed as follows and in the manner indicated:

Linda A. Fox
1149 East 1630 South
Spanish Fork, UT 84660

 X - via U.S. Mail, postage pre-paid
 - via Facsimile ()
 - via Hand Delivery

Joseph R. Fox
1149 East 1630 South
Spanish Fork, UT 84660

 X - via U.S. Mail, postage pre-paid
 - via Facsimile ()
 - via Hand Delivery

Kristy Thomas

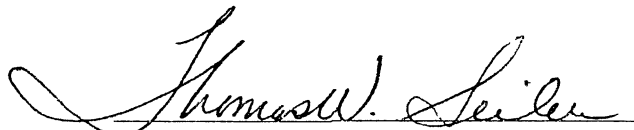
NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

TO: LINDA A. FOX and JOSEPH R. FOX:

Please take notice that the undersigned attorney for Defendant will submit the above and foregoing Findings of Fact and Conclusions of Law to the Honorable Fred D. Howard for his signature upon the expiration of five (5) days from the date of this notice, plus three days for mailing, unless written objection is filed prior to that time pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 21st day of November, 2006.

ROBINSON, SEILER & ANDERSON


THOMAS W. SEILER
Attorney for Defendant

G\SEILER\BYU - Fox\FOF & COL wpd

FILED
Fourth Judicial District Court
of Utah County, State of Utah

12/12/06 MSJ Deputy

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

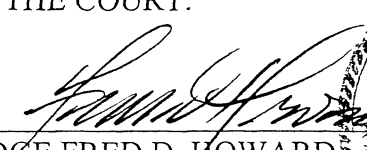
STATE OF UTAH

JOSEPH R. FOX and LINDA FOX, Plaintiffs, vs. BRIGHAM YOUNG UNIVERSITY, a Utah corporation, Defendant.	JUDGMENT OF DISMISSAL WITH PREJUDICE Civil No. 040401488 Division 5 Judge Fred D. Howard
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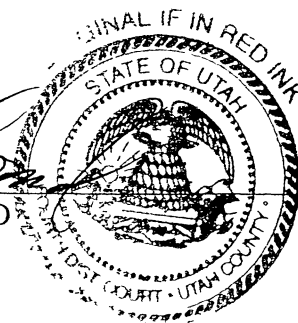
The Court having heretofore entered its Findings of Fact and Conclusions of Law does, hereby, grant the Defendant's oral motion to dismiss and dismisses the Plaintiffs' Complaint, the causes of action therein, and all of the Plaintiffs' claims against the Defendant, with prejudice and upon the merits.

DATED this 12 day of December, 2006.

BY THE COURT:



JUDGE FRED D. HOWARD
Fourth District Court



CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the **JUDGMENT OF DISMISSAL WITH PREJUDICE** was delivered, this 21st day of November, 2006, addressed as follows and in the manner indicated:

Linda A. Fox
1149 East 1630 South
Spanish Fork, UT 84660

X - via U.S. Mail, postage pre-paid
_____ - via Facsimile (____) _____
_____ - via Hand Delivery

Joseph R. Fox
1149 East 1630 South
Spanish Fork, UT 84660

X - via U.S. Mail, postage pre-paid
_____ - via Facsimile (____) _____
_____ - via Hand Delivery

Kristy Thomas _____

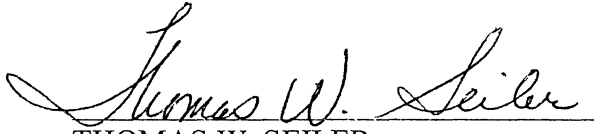
NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

TO: LINDA A. FOX and JOSEPH R. FOX:

Please take notice that the undersigned attorney for Defendant will submit the above and foregoing Judgment of Dismissal with Prejudice to the Honorable Fred D. Howard for his signature upon the expiration of five (5) days from the date of this notice, plus three days for mailing, unless written objection is filed prior to that time pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 21st day of November, 2006.

ROBINSON, SEILER & ANDERSON


THOMAS W. SEILER
Attorney for Defendant

Fourth Judicial District Court
of Utah County, State of Utah

1/25/07 ML Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

JOSEPH R. FOX, et al,
Plaintiff,

VS.

BRIGHAM YOUNG UNIVERSITY,
Defendant.

ORIGINAL

Case No. 7040401488 PI

Bench Trial
Electronically Recorded on
November 14, 2006

BEFORE: THE HONORABLE FRED D. HOWARD
Fourth District Court Judge

APPEARANCES

For the Plaintiff: Joseph R. Fox
(Appearing pro se)

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P R O C E E D I N G S

(Electronically recorded on November 14, 2006)

THE COURT: Please be seated. Good morning.

MR. FOX: Good morning, your Honor.

MS. FOX: Good morning.

THE COURT: Let me call the case and have you make your appearance. This is case No. 040401488, the matter of Mr. Joseph R. Fox and Linda A. Fox, plaintiffs, versus Brigham Young University, defendant. I'll note for the record Mr. and Mrs. Fox are here. Good morning.

MS. FOX: Good morning.

MR. FOX: Good morning.

THE COURT: Mr. Seiler?

MR. SEILER: Tom Seiler for BYU, your Honor. I have with me David Thomas from General Counsel's Office at BYU who is co-counsel, and we also have Glen Johns from the Risk Management Office.

THE COURT: Good morning. Thank you for your appearance and your preparations today. This is the time set for trial in this case. We did -- I wish to make a record regarding our communication yesterday afternoon. Thank you for being available. I'm sorry for that late discussion, but it was an important one that came to mind about the question of recusing.

Are you prepared to address that question at this time?

MR. SEILER: I am, your Honor.

1 MR. FOX: Yes.

2 MR. SEILER: Your Honor, would you like me to restate
3 what happened yesterday, if that's --

4 THE COURT: I have a record so I don't think that's
5 necessary.

6 MR. SEILER: Oh.

7 THE COURT: I just want to know what Mr. Fox's position
8 is. I need to make a record on that position.

9 MR. FOX: I think we'd prefer to go forward with it,
10 your Honor, in view of our discussions.

11 THE COURT: You're not asking that I recuse myself?

12 MR. FOX: That's correct.

13 THE COURT: Very good. Thank you. And that's true for
14 both of you, Ms. Linda as well?

15 MS. FOX: Yes.

16 THE COURT: All right. Thank you. All right. Before
17 we proceed, in review of the case something that is concerning to
18 the Court that I wish to address that I think is of large
19 importance is this motion in limine regarding causation that may
20 have a large impact on this case, so I assume we should address
21 this. I had thought we might have you argue that motion at this
22 time.

23 MR. SEILER: Thank you, your Honor.

24 THE COURT: That may shape the case. So I'll hear from
25 you, Mr. Seiler and then I assume I would hear from Mr. Fox.

1 MR. FOX: Yes.

2 MR. SEILER: Your Honor, we have in this case an
3 allegation that Mrs. Fox as she was descending the stairs at
4 Brigham Young University at Harmon Conference Center, which is
5 sort of at the north end of campus, that she -- her allegation is
6 that she fell on those stairs. We believe she did fall on those
7 stairs. However, the question is why did she fall. There has
8 been no expert wit -- or expert disclosure in this matter, and I
9 would cite the Court most easily to the plaintiff's response to
10 our defendant's motion in limine in their fact paragraph,
11 paragraph 1 where it says, "Neither the plaintiffs nor the
12 defendant have identified expert witnesses as required by Utah
13 Rules of Civil Procedure 26(a)(3) on the case management order
14 herein." So if -- I don't know if the Court has found that.

15 THE COURT: Yes.

16 MR. SEILER: In fact, I have a courtesy copy.

17 THE COURT: I'm okay. I've got it.

18 MR. SEILER: So we know that there is no expert
19 disclosure and that it should have been -- it was required by
20 both the rule and by the case management order.

21 Did the Court have a chance to read that motion
22 yesterday -- that memo?

23 THE COURT: I have.

24 MR. SEILER: Okay. In this instance what is the
25 mechanism of injury? There is many things that we do not know .

1 and that really are not within the canon of the average person.
2 We don't know the rate at which metal -- that the metal screws
3 deteriorate. Now the claim is -- there's two claims, two
4 different opposing claims. One is Mrs. Fox in one affidavit says
5 that she tripped and fell. Another one says that she slipped and
6 fell, that her foot went out from underneath her.

7 In any event, the claim must be that there was something
8 wrong with the -- something on the tread. There has to be
9 something wrong with something on the tread in order for their
10 claim to have any validity at all.

11 In this instance we have no -- we don't have any proof
12 of that, and here's why we don't. We don't know what the
13 location was. We asked in affidavit form and in deposition form
14 what caused -- you know, what was wrong with the stair. We don't
15 know that. We don't know where the stair was that she fell upon.
16 She says in her affidavits that she doesn't know the exact
17 location. We have no one who inspected the stair tread. No one
18 looked at it. No one knows whether it was -- no one -- there's
19 nobody that's going to sit on the witness stand and say, "I saw
20 that stair tread," or "I saw that metal nosing and it was
21 defective in these ways, 1, 2, 3," whatever. There just isn't
22 anybody that will say that.

23 We don't have any person who will say, "This is the rate
24 at which metal nosings deteriorate and the rate at which they
25 should be replaced." That testimony is not before the Court.

1 There is no witness that will say that.

2 We have -- when I say we have no expert, we also have no
3 expert on how she was injured, that is whether she was injured
4 because her osteoarthritic knee gave way or because something
5 else made her fall. We don't have any testimony about that. The
6 closest you might have is you might say, "Well, what about the
7 medical doctors, what about what they had to say."

8 Those people are people identified according to the
9 plaintiff's responses to the request for production of documents.
10 They're identified in the initial disclosures, which are called
11 names of individuals likely to have discoverable evidence, Rule
12 26. That's what -- that's the pleading that's referred to. In
13 each of the --

14 THE COURT: Well, is that test -- is that record going
15 to be before the Court? I mean you've --

16 MR. SEILER: It's part of -- I believe it's part of the
17 file, your Honor.

18 THE COURT: And that's my question. You made reference
19 to this -- I noted in your motion, for example, page 8 you say,
20 "Doctor -- Linda Fox reported to the emergency room physician
21 Dr. Murdoch that her right knee suddenly gave out. She collapsed
22 down to the ground," and then IHC preliminary, "She fell, her
23 knee came out from underneath her." Is that a citation, then, to
24 the medical records?

25 MR. SEILER: It will be a citation to -- and I believe

1 that if the doctors come -- and we didn't subpoena them. The
2 plaintiff may have. If they come that's what they will say.

3 THE COURT: Okay.

4 MR. SEILER: But it's interesting, your Honor, and I can
5 give the Court a copy of the pleading just so that it's handy for
6 the Court. I've got one for you, Mr. Fox, just so you don't have
7 to get up. It says --

8 THE COURT: I guess the question I have is how does that
9 testimony become of record for this motion?

10 MR. SEILER: Oh, because it's admitted by the plaintiff,
11 Mrs. Fox, in her deposition that's attached to --

12 THE COURT: It is?

13 MR. SEILER: Yes.

14 THE COURT: She's admitted that --

15 MR. SEILER: Yes.

16 THE COURT: -- those statements to the physician?

17 MR. SEILER: She admits that those statements appear in
18 the record -- in the medical record.

19 THE COURT: Not that she made those statements?

20 MR. SEILER: She disagrees somewhat with what the
21 statement says. That's actually not the point of what I was
22 about to say, though, your Honor. You must have some medical
23 testimony about what caused her injury, and this is what they say.
24 about those experts. Again, they said, "We don't have any
25 experts." This is what they say the doctors are going to

1 testify. They're going to say testimony and documents concerning
2 medical services rendered. They're not going to say causation.
3 They don't ever say that any of these doctors -- and there's a
4 list of them, most of them on page 2 of --

5 THE COURT: Can I back up again?

6 MR. SEILER: Yes, your Honor.

7 THE COURT: Have the -- I didn't read the disclosure on
8 the exhibits. Have they cited the medical records as exhibits
9 they intend to offer?

10 MR. SEILER: Yes.

11 THE COURT: It's expected these records would come in,
12 then?

13 MR. SEILER: Yes.

14 THE COURT: I see.

15 MR. SEILER: But they --

16 THE COURT: And these statements are taken from those
17 records?

18 MR. SEILER: Exactly.

19 THE COURT: I see.

20 MR. SEILER: And those -- in fact, those exhibits --
21 those medical records are part of the exhibits to their initial
22 disclosures as they produced them at that point. They also
23 produced them as part of the exhibits that they delivered to us
24 as part of this trial.

25 THE COURT: Am I given to understand, then, that the

1 records include important information about treatment she
2 received for her injuries?

3 MR. SEILER: Yes.

4 THE COURT: And that they also contained what would be
5 considered a history of the patient?

6 MR. SEILER: Yes.

7 THE COURT: Or -- and she may dispute the statements
8 made, but those are statements recorded?

9 MR. SEILER: Yes.

10 THE COURT: Is that correct?

11 MR. SEILER: That's correct.

12 THE COURT: I see.

13 MR. SEILER: What they don't say is the cause of the
14 injury --

15 THE COURT: I understand.

16 MR. SEILER: -- other than saying that her foot gave out
17 from under her -- her knee gave out, I believe, is the actual
18 term. So that's what they say about that. We think that you
19 must have some causation testimony. You have the plaintiffs
20 saying they don't know exactly where she fell. You have no one
21 testifying as to the condition, that they inspected the stair or
22 any group of those stairs as to what that condition is. You
23 don't have --

24 THE COURT: They don't have testimony of something that
25 would alert BYU as to the defect on the stair?

1 MR. SEILER: They do not. The very closest you come is
2 there is some testimony that you could hear noise as you walked
3 up, but that's it. Afterwards there is testimony that Mr. Fox
4 went on April 23rd -- this fall occurred on April 20 --

5 THE COURT: Well, that's more duty than causation, isn't
6 it? Well, again, maybe it's both.

7 MR. SEILER: Well, it's also causation, your Honor. If
8 there's not a defect in the stair that caused the accident --

9 THE COURT: Yeah, okay.

10 MR. SEILER: -- how could there -- you know, how could
11 it be the cause of it?

12 THE COURT: All right.

13 MR. SEILER: We know there's a defect in the knee
14 because there's plenty of testimony about or plenty of
15 documentation about that.

16 The very best in answer to the one question the Court
17 had, the very closest you have to any defect in the stairs is not
18 a defect as to the stair that Mrs. Fox fell on because we don't
19 know what stair that was. It is rather Mr. Fox saying he went on
20 the 23rd, some three days after her fall and saw some loose metal
21 treads. So he may have seen some some other time, but there is
22 no testimony to the effect that the metal treads he saw that were
23 loose were at the location she fell because he testifies in his
24 affidavit and in his deposition, I believe also, but at least in
25 his affidavit and the request for -- answers to request for

1 production of documents, "I don't know the location of her fall."

2 She admits she doesn't know the location of her fall.

3 She says it was on -- this stair has three cascading
4 sets of stairs with two landings in between them. There's a
5 group of stairs and then there's a landing, a group of stairs and
6 a landing. Mrs. Fox says that she believes it was approximately
7 in the middle of a group of stairs of the la -- and approximately
8 on the -- probably on the bottom of the three sets. So that's
9 the most you have. You don't have anybody say, "We" -- or you
10 don't have her saying, "I saw either before or after I fell on
11 that stair this defect." It does not occur.

12 Now the second -- let's see if I can hit all that. Oh.
13 The second part of that motion is as to damages themselves. What
14 caused the damage? If you assume for a moment that Mrs. Fox
15 slipped on the stairs in some way, and even assume that there was
16 some negligence -- which there's no evidence of, but if you got
17 that far -- nobody has been set forth as an expert to say that
18 the injuries she sustained was caused by tripping or falling.
19 Rather, the other reasonable explanation is she had
20 osteoarthritis of the knee, and the medical techs say one of the
21 things that happen is your bones break. Indeed, the more likely
22 explanation is that her -- she stepped hard enough that her bone
23 broke. But there's no testimony one way or the other, and that
24 is not within the common canon of a lay person. We simply have
25 no 702 evidence, not one shred. Without that how do you say what

1 caused this injury?

2 I mean it's not as though there was a car accident and
3 you have people say, "Oh, I saw car A run the stop light and hit
4 car B." You have Mrs. Fox saying, "I went down the stairs and my
5 leg went out from underneath me," and that is the testimony.
6 That's it. There is no other causation. Without the causation
7 and without some leg of the damages, there is no way to go
8 forward, actually. Certainly the Court ought to order that there
9 be no lay testimony as to causation and no expert testimony as to
10 causation.

11 THE COURT: Well, this -- I mean I have another
12 question, then. This motion is couched as a motion in limine,
13 but it has seemingly a dispositive conclusion by your position.

14 MR. SEILER: Well, if -- I don't know what's left. If
15 you don't have anyone who can say, "I observed the fall and this
16 is what caused the fall," whatever that was, or someone who says,
17 "I'm an expert and I went back and looked at the stairs and
18 looked -- or looked at the knee and this is what caused" --

19 THE COURT: No, I mean my question is is that this is a
20 motion in limine, but it has the effect of --

21 MR. SEILER: Certainly, because I don't know what's left
22 in terms of testimony.

23 THE COURT: I see. All right.

24 MR. SEILER: Is there other questions the Court might
25 have?

1 THE COURT: No, I can't think of anything.

2 MR. SEILER: Thank you, your Honor.

3 THE COURT: Thank you for your time and effort.

4 Mr. Fox? Good morning.

5 MR. FOX: Good morning, your Honor. With respect to the
6 defendant's motion in limine, as I understand it, the motion --
7 the purpose of the motion was simply to control the presentation
8 of evidence and not to argue the merits of the case, but that's
9 where the defendant chose to go.

10 We believe that we can present sufficient evidence to
11 show a prima facie case using lay testimony. The evidence will
12 show that Mrs. Fox, as she descended the stairs in a reasonable
13 manner, that she stepped on a worn, loose metal nosing and her
14 foot slipped off the edge of the stair and she fell in a twisting
15 sitting motion and broke her leg.

16 As far as causation is concerned, we believe that that's
17 causation, that --

18 THE COURT: Could I ask you a couple of questions?

19 MR. FOX: Sure.

20 THE COURT: I had to say -- I've read your opposition
21 and understood that to be your position.

22 MR. FOX: Very good.

23 THE COURT: I assume that you don't take -- my, under --
24 my question is, I concluded from your pleading that you take the
25 position -- you don't dispute the idea that an expert might give

1 testimony on this, but you are here to present that testimony
2 in the form of lay testimony. You're not disputing that you do
3 not --

4 MR. FOX: That's correct.

5 THE COURT: -- designated an expert on the subject.

6 MR. FOX: We have designated an expert.

7 THE COURT: But you're presenting -- you intend to
8 present evidence of causation by virtue of lay testimony?

9 MR. FOX: That's correct.

10 THE COURT: Through lay testimony.

11 MR. FOX: That's correct.

12 THE COURT: The other question I had is I assume that
13 there is not a dispute about the admissibility of the medical
14 records.

15 MR. FOX: There is.

16 THE COURT: There is?

17 MR. FOX: Yes.

18 THE COURT: You do not intend to admit them?

19 MR. FOX: No.

20 THE COURT: So what is your proof of treatment?

21 MR. FOX: She was taken immediately from the stairs to
22 the hospital and was --

23 THE COURT: Is she just going to say what happened to
24 her?

25 MR. FOX: That's correct.

1 THE COURT: She's not presenting any evidence about how
2 she was treated, what she received?

3 MR. FOX: Well, she'll say what -- the treatment that
4 she received, that she was taken into surgery and they installed
5 an external fixator on her leg.

6 THE COURT: How can she present testimony about that?

7 MR. FOX: That's what happened to her.

8 THE COURT: How does she know that?

9 MR. FOX: We have photographs to show her condition as
10 she -- when she came out of surgery.

11 THE COURT: Well, that's my question. You're not going
12 to present any of this -- seemingly, that would require evidence
13 of people that know about those things.

14 MR. FOX: Know about what?

15 THE COURT: How she was treated. Was she awake when she
16 was treated?

17 MR. FOX: She went into surgery -- she was taken from
18 the -- she was taken from the stairs by BYU. She was taken to
19 the emergency room. From the emergency room she was admitted
20 into the hospital. While she was in the hospital they performed
21 surgery on her leg, installed a fixator, and that's the treatment
22 she received.

23 THE COURT: Okay, but she's not qualified to say what
24 they did to her because she doesn't --

25 MR. FOX: No, only that they installed a fixator on her

1 leg and that --

2 THE COURT: She had been told that they installed a
3 fixator on her leg, I assume.

4 MR. FOX: No, no, it was an external fix -- you'll see a
5 picture of it.

6 THE COURT: Okay.

7 MR. FOX: It's an external fixator. It's a metal frame
8 about three inches larger in diameter than her leg.

9 THE COURT: So it's a brace?

10 MR. FOX: And it was attached to her bone, and she wore
11 that fixator for 11 weeks. That was the treatment she received.

12 THE COURT: You don't intend to offer any medical
13 testimony as to how -- other than her statement of what she
14 observed.

15 MR. FOX: That's correct, and my statement that I saw
16 her with a fixator on in the hospital.

17 THE COURT: Yeah, okay. So --

18 MR. FOX: We have the photographs to show that.

19 THE COURT: -- you've got the observation and the
20 photographs of the fixator, but that's the testimony about --

21 MR. FOX: Medical bills that we received that we paid is
22 also --

23 THE COURT: Medical bills.

24 MR. FOX: Those are our damages, the medical bills and
25 the -- for the treatment that she received.

1 THE COURT: So these medical records you do not intend
2 to offer?

3 MR. FOX: Medical records from the doctors?

4 THE COURT: Yeah.

5 MR. FOX: No. In fact, we believe that they contain
6 statements of an injured person, which are not admissible, since
7 we never saw those records until a year after.

8 THE COURT: Who described the medical records? I
9 understood that you people had designated them.

10 MR. FOX: We did not designate them. We did not
11 designate them in our exhibits that we exchanged --

12 THE COURT: You have not.

13 MR. FOX: -- in September.

14 THE COURT: Okay. Go ahead.

15 MR. FOX: We did not identify any of those -- the
16 doctors.

17 THE COURT: Have the defense identified those as
18 exhibits?

19 MR. FOX: No.

20 THE COURT: They have not?

21 MR. FOX: Well, I take it back. In their exhibit list
22 they did have those medical records, yes.

23 THE COURT: All right. Go ahead.

24 MR. FOX: So our case is that we believe that we can
25 educe sufficient evidence for a prima facie case using our lay

1 testimony.

2 THE COURT: And really, the crux of this motion is what
3 you consider the law to be and whether that can be done by lay or
4 expert.

5 MR. FOX: That's correct.

6 THE COURT: Okay. Go ahead. I've interrupted you.
7 Excuse me.

8 MR. FOX: Well, if the Court's read -- I don't -- I
9 really don't have anything to add that's not in our memorandum,
10 so if you --

11 THE COURT: Let me ask you one other question if I
12 could, then.

13 MR. FOX: Sure.

14 THE COURT: What do you say about the defect on the
15 stair? Is it your position she will describe what she considers
16 to be the defect of the stair?

17 MR. FOX: She -- Mrs. Fox went there. She purchased a
18 ticket. She came down the stairs. She wasn't taking note -- I
19 mean she was just walking down the stairs. I mean you don't
20 normally take note of your position on the stairs or the
21 condition of the stairs --

22 THE COURT: What I meant is Mr. Seiler's argument about
23 causation relative to the stair; what do you say?

24 MR. FOX: The causation is that -- we'll present ev --
25 Ms. Fox's testimony that as she was coming down the stairs she

1 stepped on a metal nose and she heard the metal nose then
2 clatter, and her foot slipped off the metal nose and she fell.
3 I'll testify that two days after she fell I went to BYU to return
4 the ticket she had purchased. While I was there I examined the
5 stairway, and I took photographs of the stairs to show the
6 deterioration -- general deterioration of the stairs generally.
7 Of course, we didn't have any knowledge of the stairway before
8 that. Then I took photographs of the stairs not knowing exactly
9 where she had fallen. So after she had -- after she was released
10 from the hospital and had recovered sufficiently that we -- she
11 could travel -- it was about three weeks later -- we went to the
12 stairway and found that they had been replaced. The stairway had
13 been completely rebuilt.

14 THE COURT: Three weeks later?

15 MR. FOX: Well, it was actually started -- I believe the
16 construction started the 1st of May, around the 1st of May.

17 THE COURT: Following the fall?

18 MR. FOX: Following the fall. So it was within two
19 weeks of her fall that construction on the stairs had begun. So
20 there was no opportunity for us to obtain an expert or to inspect
21 the stairs otherwise, except for the photographs that I have. It
22 was in that time period between April 22nd and the 1st of May that
23 I took the photographs of the stairs, and that's the
24 documentation we have for the condition of the stairs.

25 THE COURT: Is there any evidence in this matter about

1 notice to BYU of the defective stair?

2 MR. FOY: Yes. A year before Mrs. Fox fell another
3 person fell on the stairs and broke his arm. At that time BYU
4 started a process of replacing the stairway. That will be in
5 testimony today. So from August -- I think the first request was
6 in August of 2003 to April of 2004, that process was ongoing to
7 replace the stairway.

8 THE COURT: To replace it. They were gradually
9 reconstructing the stairs?

10 MR. FOX: They weren't working on the stairs at all.
11 They --

12 THE COURT: What did you mean?

13 MR. FOX: They --

14 THE COURT: That process was what?

15 MR. FOX: Well, they go through -- apparently from the
16 documents I have they go through a process where someone requests
17 that some work be done. It has to go through an evaluation
18 process and a bid estimate process, and then they let it out for
19 bids. Then a contractor is selected, and then the work is
20 scheduled to be performed. The contract to repair the stairs in
21 this matter was signed on -- by the contractor on April 22nd, two
22 days after my wife fell.

23 THE COURT: To repair the stair, that meaning what?
24 They replace the treads or something?

25 MR. FOX: They rebuilt the stairs.

1 THE COURT: They rebuilt?

2 MR. FOX: They tore down the stairway and put a cap --
3 what they call a cap on it. They capped the stairs, added treads
4 and handrails.

5 THE COURT: In the interim did they maintain the stairs?

6 MR. FOX: I think there will be some evidence from the
7 defendant that they did make some repairs on the stairs. With
8 respect to the duty and breach issue is we'll -- the plaintiff
9 has -- or the defendant has admitted that they didn't give any
10 notice as to the defective condition of the stairs.

11 THE COURT: I don't understand that statement. The
12 defendant has admitted what?

13 MR. FOX: In request for admissions the defendant
14 admitted that no notice was given to Mrs. Fox regarding the
15 defective condition of the stairs. That was well known by the
16 defendant.

17 THE COURT: Okay. That was my question. The defective
18 condition which was well known is established by what testimony?

19 MR. FOX: It will be by the fact that they were -- first
20 of all, the condition of the stairs when she fell, or the
21 photographs I have. Also the fact that the defendant knew --

22 THE COURT: Well, that didn't put them on notice.

23 MR. FOX: No, but what put them on notice was eight
24 months earlier one of their employees fell on the stairs, tripped
25 on a metal nosing and fell. That put them on notice, and at that

1 point the process began to repla -- to repair the stairway in
2 total, to tear it down, recap it, whatever -- and they eventually
3 decided to recap the stairway -- what they call a recap, which is
4 they poured another layer of concrete over the steps and replaced
5 the metal nosings and added handrails that weren't there before.

6 THE COURT: I see.

7 MR. FOX: So I believe that's notice to the defendant
8 that the stairways were defective. Whether or not they acted
9 reasonably, that's a question the Court will have to decide. It
10 took them eight months to actually do the work. After my wife
11 fell it only took them two weeks to perform the actual work, or
12 to begin the actual work.

13 THE COURT: Your position is that she slipped, fell and
14 broke her leg?

15 MR. FOX: That's correct.

16 THE COURT: And her health condition has to do with the
17 bone structure of her leg?

18 MR. FOX: There will be no evidence on her preexisting
19 condition, your Honor. As far as I know there's no one competent
20 to testify regarding that.

21 THE COURT: Okay, but is that fact then I'm hearing as
22 described in the medical records, is that where it comes from?

23 MR. FOX: No. The doctors who examined her didn't
24 examine her with respect to her preexisting condition.

25 THE COURT: I didn't ask that. I'm wondering --

1 MR. FOX: Oh, I'm sorry.

2 THE COURT: -- where -- what's the source of this
3 condition that's been described?

4 MR. FOX: A year before Mrs. Fox fell -- approximately a
5 year before Mrs. Fox fell both she and I went to a doctor. I had
6 a problem with my knee; it was giving me some problems. She had
7 wanted to have her knee checked out. X-rays were taken of both
8 our knees. We went at the same time, so it was a family thing, I
9 guess. Anyway --

10 THE COURT: Well, at our age knees are a problem.

11 MR. FOX: Yeah. The doctor told her at that time that
12 she had some osteoarthritis in her right knee.

13 THE COURT: Her knee, not her leg bone?

14 MR. FOX: No, not her leg bone, in her knee. It was --
15 there was some missing cartilage in the knee. Partially -- there
16 was some partial cartilage missing.

17 THE COURT: Okay. I see.

18 MR. FOX: But he didn't restrict her activities or ask
19 her to -- or gave her any prescription medicine or anything like
20 that. He just simply said that sometime in the future her knee
21 would probably have to be replaced.

22 THE COURT: Okay. So you take the position her knee was
23 not unstable.

24 MR. FOX: I think the evidence will show that she
25 worked, she had a -- she worked at a manual labor job that

1 required her to carry heavy things, and her knee didn't give her
2 any problem. She exercised regularly. She --

3 THE COURT: But we don't have an expert that will speak
4 on that subject?

5 MR. FOX: There will be no medical testimony, your
6 Honor.

7 THE COURT: I see. Okay. Anything else?

8 MR. FOX: No, sir.

9 THE COURT: Thank you for your efforts.

10 Mr. Seiler?

11 MR. SEILER: Thank you, your Honor. One of the things
12 that the plaintiffs allege is that they will not have anyone
13 testify about whether or not any treatment that Mrs. Fox received
14 was reasonable and necessary. As to damages, Mrs. Fox is
15 incapable of testifying as to whether or not those medical
16 services were reasonable and necessary. She simply has no
17 expertise at all. She could not testify indeed that her bone was
18 broken. The bone didn't protrude out through the arm -- or
19 through the leg, I'm sorry. There's no testimony about that.
20 She went to the hospital with a leg that hurt and was large and
21 she came out with a fixator. She was presumably sedated when the
22 fixator was attached. For whatever reason the fixator may have
23 been attached, we don't know what that reason was.

24 We indeed have no testimony therefore that the arm is --
25 or that the leg was broken. I presumed that they would have --

1 you know, they identified some of the doctors as witnesses and I
2 figured they'd bring them. If they don't bring their doctors how
3 in the world are they going to say -- how is the Court going to
4 know what happened with that knee?

5 THE COURT: How -- what was the defense intention about
6 these medical records? You made reference in your motion --

7 MR. SEILER: Sure.

8 THE COURT: -- to these records. Are you going to put
9 these records in?

10 MR. SEILER: Well, we may run out and subpoena those
11 doctors if we have to, your Honor. If they intend to close their
12 case without having anyone testify that any treatment that she
13 got was reasonable and necessary how is there any damage? How
14 can there be any damage?

15 THE COURT: Well, I understand that. But that aside --
16 I'm speaking also of causation --

17 MR. SEILER: Sure.

18 THE COURT: -- and I understood your motion relied upon
19 this alternative medical condition proposition. How is that
20 established?

21 MR. SEILER: We'll end up -- right now apparently we
22 won't have them in the plaintiff's case, so we'll end up
23 subpoenaing Dr. Faux and Dr. Murdoch if the Court -- if the
24 plaintiffs survive a motion to dismiss at the end of the
25 plaintiff's case.

1 THE COURT: Have you identified these medical records?

2 MR. SEILER: Yes.

3 THE COURT: In your -- you have?

4 MR. SEILER: Yes.

5 THE COURT: All right.

6 MR. SEILER: Without objection. So we have -- you know,
7 we have this -- we have an injury to which there is no causation
8 testimony. We don't know what caused that at this point, any
9 more than you can say, "When I fell my side hurt and after that
10 the doctor told me my rib was broken." She fell --

11 THE COURT: Let me see if I can get the record
12 established. I don't know if we've got a dispute about this
13 record, and then I could make a decision about the law.

14 MR. SEILER: Okay.

15 THE COURT: This seems to turn on the law not so much on
16 the facts. You take the position that it requires an expert to
17 present this causation testimony.

18 MR. SEILER: Both as to the defect in the stair, if any,
19 and --

20 THE COURT: The medical --

21 MR. SEILER: -- as to whatever --

22 THE COURT: The treatment.

23 MR. SEILER: -- medical treatment she may have received.

24 THE COURT: All right. If I can interrupt you, Mr. Fox,
25 you -- I've heard your position. You do not agree with that

1 position. You take the position, do you not, that a lay
2 person -- Ms. Fox will testify as to her condition, the fixator
3 and the treatment she received?

4 MR. FOX: Yes.

5 THE COURT: And the bills that she received and paid?

6 MR. FOX: Yes.

7 THE COURT: Do you -- you do not dispute, then, in terms
8 of Mr. Seiler's position that it's likely in this trial that he
9 would call -- who's the doctor, Mr. Fox?

10 MR. SEILER: Dr. Faux and Dr. Murdoch.

11 THE COURT: Fox and Faux. We've got Dr. Faux.

12 MR. FOX: His name is spelled differently, F-a-u-x.

13 THE COURT: Different name spelling.

14 MR. FOX: No relation.

15 THE COURT: Okay. But he treated her. I would assume
16 those medical records would come in on his testimony relative to
17 treatment. Is that true?

18 MR. FOX: That's possible.

19 THE COURT: Well --

20 MR. FOX: If the records come in I don't see how it's
21 going to aid --

22 THE COURT: Do I have to hear this testimony to get to
23 that, though?

24 MR. FOX: First of all, he wasn't identified as an
25 expert witness so under the rules I don't believe he can testify

1 as an expert at this late date.

2 THE COURT: But that's foundation. This is just a
3 record.

4 MR. FOX: Okay. If he comes in and testifies, what's he
5 going to say? Is he going to say, "I treated Mrs. Fox
6 unreasonably?" Of course not.

7 THE COURT: I'm not --

8 MR. FOX: He won't say that.

9 THE COURT: I'm not asking that.

10 MR. FOX: Okay.

11 THE COURT: I'm really asking is it conceivable that
12 these medical records are going to be received by this Court?
13 Are you going to --

14 MR. FOX: It's not going to happen, your Honor. Well,
15 it might -- the Court can decide. I will say that. But we're
16 not going to -- we'll object to the use of any medical records.
17 So --

18 THE COURT: Well, my question is this. Do I need to
19 hear this case, then, to see if I'm going to receive these
20 medical records? I'm on a motion that needs decision making that
21 may be dispositive. It's going to turn on whether I receive the
22 medical records or not.

23 MR. FOX: Okay.

24 THE COURT: That's what I'm wondering.

25 MR. FOX: So how do we approach that? You're saying --

1 THE COURT: That's my question.

2 MR. FOX: -- it's a factual issue whether or not you
3 receive the medical records?

4 THE COURT: No, my question --

5 MR. FOX: We're going to oppose the introduction of any
6 medical records in this case. Is that what you want to hear?

7 THE COURT: That's what I wanted -- well, not what I
8 want to hear, I --

9 MR. FOX: I know, you want to know --

10 THE COURT: -- just want to know --

11 MR. FOX: -- what our position is.

12 THE COURT: -- what your position is.

13 MR. FOX: That's our position.

14 THE COURT: I see. What is the basis for that?

15 MR. FOX: Well, first of all, we don't have a witness to
16 testify. There's no witness been identified by the defense to
17 testify with regard to those medical records.

18 THE COURT: All right. Which would be, what, custodian?

19 MR. FOX: It could be a custodian. They didn't identify
20 a custodian nor the doctors.

21 THE COURT: All right. They told me they identified the
22 documents. If they have not I guess I need to look at that.

23 MR. FOX: Well, they have -- they put the documents in
24 their disclosure; I won't deny that. The documents were in
25 there -- when we exchanged exhibits those documents were in their

1 exhibits.

2 THE COURT: All right. This is my question, then.
3 Is -- tell me where I'm wrong. It seems conceivable they've
4 designated the documents as an exhibit I would allow a custodian
5 to give foundation as to the medical records. Where upon I would
6 expect I would probably receive these medical records. Is it
7 unfair to presume such for purposes of this discussion on this
8 motion?

9 MR. FOX: The problem with that I foresee is that the
10 medical records contain conclusions that there will be no
11 foundation.

12 THE COURT: Admittedly they would.

13 MR. FOX: So that's the only --

14 THE COURT: But they are what they are, and the parties
15 can bring in evidence and testimony regarding the content of the
16 records. That's what trials are about. But those records would
17 be before me, and that's why I'm asking. I don't know why -- if
18 I have to -- otherwise I've got to do this. I'll defer this
19 motion and ask you to bring in the custodian and we'll hear the
20 testimony and see if the records come in or not. That's what
21 I'll do. Then I can address the motion.

22 MR. SEILER: Your Honor, may I -- we may not have to go
23 there.

24 THE COURT: Well, that's -- I know, but this is an
25 important premise because --

1 MR. SEILER: I understand that.

2 THE COURT: -- it's part of the discussion of whether or
3 not her condition is such and so. You suggest this based on the
4 records and they dispute it admittedly.

5 MR. SEILER: Your Honor, can I -- may I just --

6 THE COURT: All right. You've objected to the records.
7 Go ahead --

8 MR. FOX: I object to --

9 THE COURT: -- Mr. Seiler.

10 MR. FOX: -- the records, your Honor.

11 THE COURT: Go ahead, Mr. Seiler.

12 MR. SEILER: Your Honor, I think we've learned that
13 there will be no medical records in the plaintiff's case in
14 chief.

15 THE COURT: I understand that.

16 MR. SEILER: If there are no medical records in the
17 plaintiff's case in chief how do you get any evidence in about
18 what is reasonable and necessary --

19 THE COURT: I understood that, but my question had to do
20 with your theory that it clearly was her condition. How is that
21 before me?

22 MR. SEILER: It probably isn't until we call --

23 THE COURT: That's my question.

24 MR. SEILER: -- the doctor, and that's probably true.
25 But we have -- we already have plaintiff's representation that

1 they're not going to put in any testimony about what the
2 causation was. They're not going to say one thing about whether
3 or not the medical record -- or whether or not the medical
4 treatment, whatever it is that she received, was reasonable and
5 necessary. Maybe what they should have done is put an ice pack
6 on her and sent her home.

7 THE COURT: I understand.

8 MR. SEILER: You know, so if there is no such testimony
9 then I don't know how they can ever prove the damage. You see
10 what I'm saying?

11 THE COURT: I do.

12 MR. SEILER: Okay. I just want to make sure I wasn't --
13 sometimes I think I understand something so well that I don't
14 explain it very well.

15 THE COURT: No, but that's part of it and this condition
16 is part of it, too.

17 MR. SEILER: Right. What was her condition? Was her
18 bone broken?

19 THE COURT: Well, that isn't established by -- I agree
20 that whether the cause of the breaking of the bone might relate
21 to the condition as is described in the medical records.

22 MR. SEILER: Exactly.

23 THE COURT: That's why I'm wondering whether the medical
24 records might be coming in or not.

25 MR. SEILER: So -- but we do have the other causation

1 issue, your Honor, and that is what was the condition of the
2 stairs.

3 THE COURT: Uh-huh.

4 MR. SEILER: We have Mrs. Fox saying she doesn't know
5 the location where she fell. If she doesn't know the location of
6 where she fell, how can she say what's wrong with it?
7 Furthermore, her testimony in her deposition was to the effect
8 that she went down the stairs -- or as she went up the stairs she
9 heard some clinking. As she came down the stairs she saw her
10 foot slide out. It doesn't say that she saw that there was some
11 defect. So if she can't --

12 THE COURT: The testimony is that she heard the clinking
13 of the tread going up?

14 MR. SEILER: Yes.

15 THE COURT: But not coming down?

16 MR. SEILER: I'm not sure if she says that coming down
17 or not, your Honor. I'd have to go back and look at her
18 deposition, to be candid with the Court as I try to be. But my
19 point is, your Honor, how do we know what the reasonable repair
20 system is, what was damaged at the time on the stairs? We don't
21 know that. If he can't know that how can he go forward?

22 We have no expert that says this is how you're supposed
23 to repair the stairs, this is when you're supposed to repair
24 them. This is -- you know, you ought to have a one week, a 10-
25 year --

1 THE COURT: (Inaudible) generalized one that the stairs
2 are defective as a whole, they were put on notice eight months
3 before these stairs are defective?

4 MR. SEILER: I don't think that that's even close, your
5 Honor. What if a road was defective as a whole?

6 THE COURT: Is that their position?

7 MR. SEILER: That is their position. They think that
8 because someone fell on some stair that we don't know what stair
9 it was, that that somehow means that all the stairs are
10 defective, and indeed that witness will testify he's not sure
11 what made him fall. After that the testimony is quite clear that
12 there was a maintenance program. I mean there was a significant
13 maintenance done. They went back and screwed down every single
14 tread -- or every single metal nosing, I'm sorry, on the tread
15 that was loose. They inspected it daily and those kind of
16 things. We have no testimony -- we have nobody who will say to
17 the Court on the plaintiff's behalf the inspection program nor
18 the repair program was not what you should do. Not (inaudible).

19 THE COURT: Okay. I'm going to return back to the
20 records. You've designated the medical records but not a
21 custodian expert witness?

22 MR. SEILER: I better look, your Honor, before I --

23 THE COURT: Would you?

24 MR. SEILER: Before I speak out of turn.

25 THE COURT: All right.

1 (Counsel confers with Mr. Thomas)

2 THE COURT: I notice, Mr. Fox, while he's looking that
3 you have designated Dr. Faux as a witness. Did you not intend to
4 call him?

5 MR. FOX: We had designated him as a witness, but in
6 view of the fact that the defense had not identified any experts,
7 nor had they identified any custodian for medical records, we
8 decided not to call him as a witness.

9 THE COURT: I see.

10 MR. SEILER: I'm having trouble finding this pleading,
11 your Honor. I'm sorry.

12 THE COURT: That's all right. Do you want to take a
13 brief minute recess to look?

14 MR. SEILER: If that wouldn't offend the Court any.

15 THE COURT: That would be fine. We'll take a recess and
16 I'll consider your pleadings while we're waiting.

17 MR. SEILER: Okay. Thank you, your Honor.

18 THE COURT: I think I'll reread some of this. Thank
19 you.

20 MR. FOX: You're welcome.

21 COURT BAILIFF: All rise.

22 (Short recess taken)

23 COURT BAILIFF: This Court is again in session.

24 THE COURT: Please be seated. I'll note for the record
25 both parties and Counsel are present. Mr. Seiler?

1 MR. SEILER: Yes, your Honor. Your Honor, I would point
2 the Court to the plaintiff's witness list for trial, which
3 includes Dr. Jonathan Faux as a party to likely -- it says --
4 indicates witnesses plaintiffs expect to call at trial. I think
5 that we're entitled to rely upon those people they expect to
6 call. I think that is the rule. I did not find a separate
7 witness list other than there is one that has all the fact
8 witnesses that is part of the exhibits that we've provided to
9 Counsel -- or the opposing party.

10 THE COURT: So you designated the treating physician as
11 a fact witness?

12 MR. SEILER: No. No, no, that's not --

13 THE COURT: What did you do?

14 MR. SEILER: The plaintiff's witness list for trial
15 includes Dr. Jonathan Faux as a party expected to be called at
16 trial.

17 THE COURT: Okay. I see.

18 MR. SEILER: And then I didn't want the Court to think
19 we didn't give the Court --

20 THE COURT: Oh, I beg your pardon. Go ahead.

21 MR. SEILER: I didn't want you to believe that there was
22 no witness list. There was a witness list of by and large fact
23 witnesses that was part of the exhibit list and was designated in
24 our exhibit designation.

25 THE COURT: You designated all fact witnesses?

1 MR. SEILER Yes, but that does not include Dr Faux on
2 this list. I don't want the Court to be misled about that. But
3 it does -- he is included on the plaintiff's witness list for
4 trial as one that is expected to be called, and reasonably we
5 should.

6 THE COURT: I see. Okay. All right. Let me ask you
7 this question. I'm of the mind -- I believe that this motion has
8 critical aspects to the substantial issues of the case, and I
9 understand your position. I'm also concerned about these medical
10 records as to how it may affect this motion. Therefore, the
11 Court would exercise its discretion to allow the calling of a
12 custodian of the records. Presumably if that custodian were
13 called that person would come in and say, "Yes, Utah Valley
14 Regional Medical Center keeps records -- medical records in the
15 regular course of their business."

16 I assume, Mr. Fox, that you objected to the medical
17 records because there's not designated custodian; is that true?

18 MR. FOX: Also to the information contained in the
19 medical records. First of all, the medical records won't --
20 didn't -- do not diagnose Mrs. Fox's preexisting condition.

21 THE COURT: They don't what?

22 MR. FOX: They don't diagnose her preexisting condition.
23 There's no information in there on that.

24 THE COURT: I'm not speaking to that. I'm speaking to
25 the admissibility of these records and what your objection would

1 be about the records, which seemingly would come in with a
2 custodian. Are you --

3 MR. FOX: They did not identify a custodian.

4 THE COURT: Okay, this is my question now.

5 MR. FOX: Okay. For the Court's information, if the
6 Court will check the record, we did subpoena Dr. Faux but decided
7 not to bring him because there was no -- because the defense did
8 not designate a custodian or a doctor.

9 THE COURT: Because of what?

10 MR. FOX: Because they did not designate a custodian or
11 a doctor and there was no way they could bring in medical
12 records. So that's why we didn't --

13 THE COURT: Yeah, I understand that.

14 MR. FOX: We released Dr. Faux from that subpoena.

15 THE COURT: Okay. All right. Back to my question,
16 then. If the custodian were called, presumably the custodian
17 could lay foundation for the admission of these records. What
18 would your objection be?

19 MR. FOX: My objection would -- well, as far as the
20 custodian is concerned, the only objection we would have is that
21 the custodian was not identified in pre-trial disclosures, and we
22 prepared our case on that basis, your Honor.

23 THE COURT: Okay. That's what I assumed would be your
24 objection.

25 MR. FOX: Yes.

1 THE COURT: You object to the calling of a custodian
2 because a custodian was not identified.

3 MR. FOX: That's correct.

4 THE COURT: I think that's what I said. Is that your
5 objection?

6 MR. FOX: Yes.

7 THE COURT: So your objection is over the course
8 discretion to allow the calling of a custodian.

9 MR. FOX: Yes.

10 THE COURT: All right. Would you have any other
11 objection?

12 MR. FOX: Well, I have an objection to the records
13 themselves because if you're going to call the custodian, the
14 custodian of the -- it depends on which records we're talking
15 about, the --

16 THE COURT: Let me put it --

17 MR. FOX: -- hospital records or we're talking about
18 Dr. Faux's records. We'd talk about two separate custodians.

19 THE COURT: I guess I understood them to be the same.
20 Are they different?

21 MR. FOX: They're different.

22 MR. SEILER: There are -- the records we would ask the
23 custodian to testify about are from IHC, and they are on the date
24 of the injury.

25 THE COURT: Okay. These are the hospital records.

1 MR. FOX: Well, that makes it incomplete, your Honor,
2 because then that puts --

3 THE COURT: I'm only looking for what they're relying
4 on They identify them as those hospital records. I don't know
5 what they are.

6 MR. FOX: Well, the problem is the content of the
7 record. The content of the record may or may not be the result
8 of the doctor's examination. Dr. Murdoch was not the treating
9 physician.

10 THE COURT: I'm not getting into that. Okay, this is my
11 question, then. I'm going to defer this case and allow -- we'll
12 take a recess and I'll allow you to go get your custodian,
13 Mr. Seiler. I'm interested to know if these records are coming
14 in. I'm simply asking you whether you're going to object to the
15 admission of these records --

16 MR. FOX: I will.

17 THE COURT: -- based on foundation.

18 MR. FOX: That's correct.

19 THE COURT: So if I call this custodian --

20 MR. FOX: And then he establishes --

21 THE COURT: -- you don't think this custodian is going
22 to answer that question did they keep these records in the
23 regular course --

24 MR. FOX: I'm sure they will.

25 THE COURT: And would they not then be admitted?

1 MR. FOX: The only other objection we'd have is that
2 they contain information of an injured person's statement that's
3 not admissible. That would be our other reservation.

4 THE COURT: Well, the records are going to be in and
5 you're going to dispute what they -- I assume you dispute that
6 she even made those statements.

7 MR. FOX: That's correct.

8 THE COURT: But those are contained in a history, and
9 they would be part of the medical record that you dispute. Is
10 that not true? I'm not trying to quarrel with you about it, I'm
11 just trying to understand --

12 MR. FOX: I understand what you're saying. If you're
13 going to allow them to establish a foundation for admitting the
14 medical records --

15 THE COURT: Yeah, based on a custodian, because I don't
16 view a custodian --

17 MR. FOX: -- then that's the Court's discretion and I
18 accept that. The Court is well aware of the objection that we'll
19 make.

20 THE COURT: That's what I'm trying to do is make a
21 record of your objection.

22 MR. FOX: That's fine.

23 THE COURT: Okay.

24 MR. FOX: And that's our objection.

25 THE COURT: Do you need to require this? Do you want me

1 to defer this and get this custodian or can you stipulate to
2 that?

3 MR. FOX: Well, now you're taking --

4 THE COURT: That's what I'm asking you.

5 MR. FOX: No. I think that the custodian should come --

6 THE COURT: I'll defer it, then.

7 MR. FOX: Okay. I think the custodian -- so we can
8 examine the custodian on foundation.

9 THE COURT: All right. I'm going to do this because I
10 think it's efficient as to this case. It may determine where
11 this case goes.

12 MR. FOX: And I'm not arguing at all with the Court in
13 that regard.

14 THE COURT: But just -- but some people can make
15 stipulations and some cannot. I understand that. I'm just
16 simply asking.

17 MR. FOX: We would not stipulate to the foundation.

18 THE COURT: All right. Then we're going to take a
19 recess. Mr. Seiler, I'm going to direct that you seek out a
20 custodian for the medical records. When you're ready we'll
21 resume with that custodian.

22 MR. SEILER: Thank you, your Honor.

23 MR. FOX: So will he --

24 THE COURT: We'll do it now.

25 MR. FOX: I assume that's going to take some time.

1 THE COURT: Yes. We're going to take a recess for that.

2 MR. FOX: So should we stay here this morning or we come
3 back? How do you want to handle that?

4 THE COURT: You can -- I'll take a recess and you can
5 advise me when you're ready. I assume it could be done within an
6 hour or two and he'll -- you can communicate as to what you think
7 you should do in that interim. You can leave your materials.

8 MR. SEILER: Thank you, your Honor.

9 THE COURT: Thank you.

10 COURT BAILIFF: All rise. This Court is in recess.

11 (Recess taken)

12 COURT BAILIFF: We're again in session.

13 THE COURT: Please be seated. My clerk advises me that
14 you had some discussion.

15 MR. SEILER: Yes, your Honor. We have had some
16 discussion and have determined that we simply won't offer those
17 medical records. We do have witnesses as to the Emergency
18 Medical Service people who have the same -- for our purposes the
19 same information, that is that she said that her leg went out
20 from underneath her.

21 THE COURT: Well, no, the purpose and intent of my
22 discussion is to be able to make a decision on this motion
23 knowing what the record is. What is the record?

24 MR. SEILER: I think the record is that the two
25 medical records -- one from Dr. Faux and one from Dr. Murdoch --

1 at least at this point aren't admitted Whether they'll ever be
2 admitted we don't know.

3 THE COURT: No, my question is not that.

4 MR. SEILER: Okay.

5 THE COURT: My question is is how are these statements
6 that you refer to in your motion made of record for the motion.

7 MR. SEILER: And what we're suggesting to the Court is
8 that the record from the emergency medical technician or medical
9 service personnel to the same effect is what the Court can rely
10 upon. It says, "Upon arrival" --

11 THE COURT: Is that a deposition?

12 MR. SEILER: It is in the sworn testimony of Nolan
13 Converse that we took his trial testimony pursuant to the Court's
14 order. I do have a copy of that transcribed and I have a disc.
15 I have both.

16 THE COURT: He is what?

17 MR. SEILER: He was the Emergency Medical Service person
18 on the scene -- one of the two.

19 THE COURT: So he's made some record?

20 MR. SEILER: He has.

21 THE COURT: A report, rather?

22 MR. SEILER: He's made a report, and the report says --
23 let me find it here. It says, "Knee went out as patient was
24 going down stairs." That's in one report. In the other report
25 it says, "Patient reported she was going down the stairs when her

1 knee gave out and she fell down one stair." In both cases the --

2 THE COURT: Both reports from Mr. Converse?

3 MR. SEILER: Yes. Mr. Converse supervised Mr. Starr,
4 who will be here to testify, and is on our witness list. He
5 supervised Mr. Starr as he wrote this, told him generally what to
6 write, the handwritten one.

7 THE COURT: Just follow my questions for a minute.

8 MR. SEILER: Okay.

9 THE COURT: I don't mean to confuse the matter --

10 MR. SEILER: No.

11 THE COURT: -- or make it complicated, but I just want
12 to understand the record. Mr. Converse has -- he would lay the
13 foundation for this report?

14 MR. SEILER: For each of them. There are --

15 THE COURT: Of the two reports?

16 MR. SEILER: Yeah. There's one that's handwritten,
17 there's one that's dictated, as with Mr. Starr.

18 THE COURT: And he was the --

19 MR. SEILER: Emergency Medical Service --

20 THE COURT: -- EMT that responded?

21 MR. SEILER: Right. They're volunteers.

22 THE COURT: And you deposed him?

23 MR. SEILER: Yes, pursuant to the Court's order.

24 THE COURT: And this is a designated witness and this is
25 expected --

1 MR. SEILER: Yes.

2 THE COURT: Okay. Now that's how you would get it in.
3 Is this something you agree is part of the record or not?

4 MR. SEILER: I'm not sure that Mr. Fox does or doesn't
5 agree that's part of the record, but it's certainly how it would
6 come in, and it has been given to the Court --

7 THE COURT: That's my question.

8 MR. SEILER: -- in affidavit form.

9 THE COURT: Let me -- I don't -- the reason why I'm
10 asking --

11 MR. SEILER: Maybe I misunderstood.

12 THE COURT: -- this question, Mr. Seiler, so that you
13 understand is that you've brought a motion in limine, and this
14 discussion is about do I need to hear all this testimony to
15 address this motion? If you want to just get down to hearing the
16 testimony we'll hear it and then we'll make a motion, but it
17 just -- it wastes our time.

18 MR. SEILER: I --

19 THE COURT: If you can agree to this record I can hear
20 the motion. If not, then I've got to decide if I should call him
21 or what should I do.

22 MR. SEILER: Okay.

23 THE COURT: How is this record before me?

24 MR. SEILER: The record is before you in the way of an
25 affidavit from Mr. Converse and in the way of the Court ordered

1 trial testimony that was taken last week in Missouri.

2 THE COURT: Okay. Mr. Fox, is that true?

3 MR. FOX: What he says is true, your Honor. We object
4 to the statement, though. I think it's a foundational objection
5 because under the statute an injured person's statement can't be
6 admitted.

7 THE COURT: An injured person's statement what?

8 MR. FOX: An injured person's statement. Under the
9 statute an injured person's statement is not admissible into
10 evidence unless that person is given an opportunity to disavow
11 the statement within 15 days. That never happened. So it's a
12 foundational question whether or not they can even use that
13 statement in evidence.

14 THE COURT: Okay. Let's move on to that, then.

15 MR. SEILER: Okay. I have a copy of the statute, too,
16 which Mr. Fox refers.

17 THE COURT: Could I ask you another question
18 interrupting you? Is her arthritic condition before the Court?

19 MR. SEILER: It is.

20 MR. FOX: Well -- no, it isn't.

21 MR. SEILER: It is in this sense. She testified that
22 she had one and it's in her deposition.

23 THE COURT: She testified to what?

24 MR. SEILER: That she had an arthritic condition
25 of her leg.

1 THE COURT: Okay.

2 MR. SEILER: Or knee.

3 THE COURT: She doesn't dispute her condition?

4 MR. SEILER: Excuse me?

5 THE COURT: She does not dispute her condition?

6 MR. SEILER: No, your Honor.

7 THE COURT: Go ahead.

8 MR. SEILER: Okay. So we have a statute that says --
9 and I've given the Court a copy of it -- 78-27-33, statement of
10 an injured person. It says, "Excepted otherwise provided in this
11 Act any statement, either written or oral, obtained from an
12 injured person within 15 days of an occurrence or while this
13 person was confined in a hospital or sanitarium as a result of
14 injuries sustained in the occurrence which statement is obtained
15 by a person whose interest is adverse or may become adverse to
16 the injured person, except a peace officer, shall not be
17 admissible as evidence in any civil proceeding brought by or
18 against the injured person for damages sustained unless," and
19 there's some exceptions there. I don't believe the exception
20 portions apply.

21 So we have two different things to talk about, your
22 Honor. One is how is the volunteer Emergency Medical Service
23 personnel's interest adverse to Mrs. Fox. It is not adverse. If
24 there was potentially a malpractice claim that time has come and
25 gone as it happened in April of 2004. It's a two-year statute.

1 The second question is how is this -- how can --

2 THE COURT: Who did Mr. Converse work for?

3 MR. SEILER: He didn't work for anybody. He was a
4 volunteer for Brigham Young Univ -- for the Emergency Medical
5 Service team at BYU, but there's no employment.

6 THE COURT: Well, is he a volunteer employee?

7 MR. SEILER: Not a employee, he's a volunteer volunteer.

8 THE COURT: Is he a voluntary agent of BYU? Is he
9 adverse because he's a volunteer agent?

10 MR. SEILER: No, he's not an agent, your Honor. He's
11 simply a person that volunteers his time and goes to scenes when
12 he's told to go. You tell them that there's somebody injured and
13 he shows up. He drives a van that is provided for --

14 THE COURT: Is it --

15 MR. SEILER: Excuse me.

16 THE COURT: Go ahead.

17 MR. SEILER: That BYU provides. So the first question
18 is is how is Mr. Converse or Mr. Starr adverse to the plaintiff?
19 His interests are not adverse. The statement simply isn't given
20 to somebody that's adverse. Secondly, your Honor, the --

21 THE COURT: Well, what's his position? He seems like an
22 agent of BYU. Why isn't he an agent of BYU?

23 MR. SEILER: Because he's a volunteer, your Honor. He
24 doesn't have any --

25 THE COURT: A volunteer doesn't mean he's not an agent.

1 MR. SEILER: Well, he doesn't have any relationship with
2 BYU other -- well, he was a student, but other than --

3 THE COURT: I mean he's authorized to do this even as a
4 volunteer. He can't just go in there without their approval.
5 He's seemingly -- he's not working for their benefit or their
6 behest or -- he's implemented by them. Why isn't he an agent?

7 MR. SEILER: Because all he does, your Honor, is
8 volunteer his time.

9 THE COURT: Well, I understand that he volunteers his
10 time. I understand he's a volunteer.

11 MR. SEILER: Okay.

12 THE COURT: But it's not like he has authority to go to
13 BYU just by a person that decides to help people. What if he
14 were doing this by himself? Could he just go up and say, "I'm
15 going to be your EMT? I'll respond to all" --

16 MR. SEILER: He could but didn't.

17 THE COURT: No, he has to do it at their behest, doesn't
18 he?

19 MR. SEILER: Could but didn't. Anybody could show up
20 and say, "I'll help." That's true.

21 THE COURT: You mean you could decide to respond as an
22 EMT on campus at BYU with your van to provide medical treatment
23 for people if you chose to?

24 MR. SEILER: That's actually true, your Honor. That's
25 not what happened, but --

1 THE COURT: You could just go around and do that?

2 MR. SEILER: The persons that are --

3 THE COURT: Well, let's suppose you could do, but the
4 fact that he volunteers doesn't mean -- I just don't understand
5 why he's not an agent.

6 MR. SEILER: Okay. Again, your Honor, it's a volunteer
7 position. It is like if -- if he didn't want to go on a shift
8 there's no consequence. If he just didn't show up there's no
9 consequence to him.

10 THE COURT: But if he does, does that mean that he --
11 okay. You don't think they direct him? If he does show up and
12 they do provide him with the implements you don't think he's then
13 under their umbrella?

14 MR. SEILER: I don't think so.

15 THE COURT: They don't direct him?

16 MR. SEILER: They don't direct him. They do field calls
17 because calls will go the EMT volunteer service. It's not a
18 police department thing, it's over at the Wilkinson Center, and
19 they make calls and dispatch and they show up at the calls. So
20 the Court can decide if that person is governed in some way by
21 BYU, but the person has no adverse interest. Mr. Converse's
22 interest is not adverse to --

23 THE COURT: Well, that's the question of an agency. He
24 might be if he's their agent.

25 MR. SEILER: And I understand that part of the problem.

1 If -- you know, frankly, I think he's okay, but I'm not -- that's
2 not where I -- that's not the end of this discussion. This
3 statute, however, your Honor, is simply unconstitutional. The
4 reason it's unconstitutional is based upon Article 8 Section 4 of
5 the Utah Constitution.

6 Article 4 of the Utah Consti -- or Article 4 Section --
7 I'm sorry, Article 8 Section 4 of the Utah Constitution says,
8 "The Utah Supreme Court shall adopt rules and procedure -- Rules
9 of Procedure and Evidence to be used in the courts of the state,
10 and shall by rule manage the appellate process. The legislature
11 may amend the Rules of Procedure and Evidence adopted by the
12 Supreme Court by a vote of two-thirds of all members of both
13 houses of legislature. Except as otherwise provided in this
14 Constitution, the Supreme Court by rule may authorize" -- now
15 we're beyond where it applies.

16 So you have the Utah Supreme Court adopting the Rules of
17 Evidence. Then we have the Court's minute entry that discusses
18 this matter. The first page is the fax cover sheet from the --
19 from Pat Bartholomew of this Court, your Honor. It says,
20 "Pursuant to the provisions of Article 8 Section 4 the
21 Constitution of Utah as amended, the Court adopts all existing
22 statutory Rules of Procedure and Evidence not inconsistent or
23 superceded by the Rules of Procedure and Evidence heretofore
24 adopted by this Court." So in 1985 after the time that the
25 statute in question was adopted the Court says, "We'll take the

1 statutory rules that aren't inconsistent." According to Utah
2 Court rules --

3 THE COURT: So you're suggesting that this declared that
4 statute unconstitutional?

5 MR. SEILER: Absolutely. Well, it's -- the Constitution
6 says the Supreme Court makes the Rules of Evidence. The Court
7 adopts all of the rules not inconsistent with their own rules.

8 THE COURT: Are you suggesting, then, that that ruling
9 of 1985 declared that statute unconstitutional?

10 MR. SEILER: It doesn't declare it dead on, your Honor.
11 What it says is is that the only Rules of Evidence that remain
12 are those that are not inconsistent with the rules adopted by the
13 Utah Supreme Court.

14 THE COURT: Okay. Is it inconsistent?

15 MR. SEILER: Yes, absolutely. It's inconsistent with
16 Rule 803(4), statements for purposes of medical diagnosis or
17 treatment. "Statement made for purposes of medical diagnosis or
18 treatment and ascribing medical history for present or past
19 symptoms, pain or sensations or the inception, or general
20 character of the cause or external source thereof, insofar as
21 reasonably pertinent to be -- or to diagnosis or treatment are
22 all" -- they're not excluded. They're all exceptions to the
23 hearsay rule.

24 So then we have from the Utah Court Rules at the last
25 sentence of the second paragraph of the document I just provided

1 to the Court, "Any existing statutes inconsistent with these
2 rules, if and when these rules are adopted by the Supreme Court,
3 will be impliedly repealed." So the Court adopts the Rules of
4 Civil Procedure and the Court Rules indicate that the statute is
5 repealed, the very statute that is the subject of the objection.

6 Then in Rule 803 -- let's see, I already read 803.
7 Never mind, your Honor. Then we have the history that shows when
8 Section 78-27-33 was adopted in 1973, if that's helpful to the
9 Court, which would be some 12 years before the Court (inaudible).

10 So it's my position, your Honor, that the state
11 legislature -- this statute is unenforceable, and frankly,
12 unconstitutional and violative of Section 8 of the Utah
13 Constitution.

14 THE COURT: All right. So the crux of this question,
15 then, is the Court would have to make a decision about the
16 admissibility of these reports of Mr. --

17 MR. SEILER: And the testimony of Mr. Converse and
18 Mr. Starr.

19 THE COURT: Mr. Converse. Is that right?

20 MR. SEILER: That's correct, your Honor.

21 THE COURT: I assume -- I'll hear from Mr. Fox, but I
22 assume he takes a different view; is that right? All right.
23 But let me make sure I understand this, Mr. Seiler. Your
24 motion, then, is standing on the statement that you made that you
25 would -- that the record would be established with the deposition

1 testimony of Mrs. Fox where she does not dispute her medical
2 condition, and then Mr. Converse and Mr. Starr is it?

3 MR. SEILER: Yes.

4 THE COURT: And the reports of her statements upon
5 treatment?

6 MR. SEILER: Yes, sir.

7 THE COURT: Which you think are admissible under this
8 theory?

9 MR. SEILER: I do.

10 THE COURT: And given that, you think that poses an
11 alternative theory on causation?

12 MR. SEILER: It does.

13 THE COURT: All right. Anything else?

14 MR. SEILER: I think not, your Honor.

15 THE COURT: Then I'll hear from Mr. Fox.

16 MR. FOX: Since the defendant hasn't raised the issue of
17 constitutionality of the statute until now, I'm not really
18 prepared to address that. Our reliance upon this statute has
19 been before the defendant for quite some time -- for months or
20 years.

21 THE COURT: How do I know that? You --

22 MR. FOX: I think in the motion for summary judgment
23 that the Court decided last summer it was raised in that.

24 THE COURT: Well, that may be true, but I'm still at
25 trial so I guess I've got to decide --

1 MR. FOX: Okay. I'd like to draw the Court's attention
2 to Utah Code 78-27-36. I have a copy of it here. I only have
3 one copy. It's just fortuitous that I even have that.

4 THE COURT: It's 27-36?

5 MR. FOX: Section 878-27-36. It's a short sentence that
6 merely says that, "The rights provided by this Act are intended
7 to be in addition to and not in lieu of any rights of recission,
8 rules of evidence or provisions otherwise existing in the law."
9 I think it's clear that the legislature in enacting the injured
10 person's statute had in -- took -- enacted that statute in view
11 of the Rules of Evidence.

12 THE COURT: But they're inconsistent; are they not?

13 MR. FOX: No, they're in addition to. They're not
14 inconsistent at all. Article 78 subsection (27) contains a host
15 of rules that are in addition to other statutes, the comparative
16 negligence statute being one of those. You know, the comparative
17 negligence changed the law with respect to affirmative defenses.

18 THE COURT: Well, I guess I misunderstood that
19 78-27-33 --

20 MR. FOX: No, 36 is the one I'm referring to.

21 THE COURT: I understand.

22 MR. FOX: Uh-huh.

23 THE COURT: I'm referring to 33 now.

24 MR. FOX: Okay, 33, but --

25 THE COURT: Is not -- you disagree that 33 is not

1 inconsistent with the Rules of Evidence that's cited by
2 Mr. Seiler?

3 MR. FOX: I agree that it's inconsistent with that Rule
4 of Evidence, that's correct.

5 THE COURT: That's the problem.

6 MR. FOX: That's the problem.

7 THE COURT: Okay.

8 MR. FOX: It is a foundational issue that a statement
9 made by an injured person is not admissible in evidence, and what
10 I'm -- unless that person receives a copy of the statement and
11 has -- within 15 days of making the statement and has an
12 opportunity then to disavow the statement. What I'm saying is
13 that Section 36 indicates that the legislature enacted that in
14 view of the Rules of Evidence. It wasn't like they ignored the
15 Rules of Evidence; they were --

16 THE COURT: I understood that, but --

17 MR. FOX: Okay.

18 THE COURT: -- I guess my question is what if they say
19 that, but the two rules are inconsistent, then I'm still left
20 with this problem of inconsistency --

21 MR. FOX: That's correct.

22 THE COURT: -- and I've got to make a decision.

23 MR. FOX: That's correct.

24 THE COURT: So I'm just trying to make sure I'm with
25 you.

1 MR. FOX: I think the Court understands the problem --

2 THE COURT: Okay.

3 MR. FOX: -- and I understand it also.

4 THE COURT: Okay. There is seemingly an inconsistency.

5 MR. FOX: That's correct.

6 THE COURT: All right. Go ahead.

7 MR. FOX: That's -- and what we have in the reports,
8 what the evidence will show is that when we took the deposition
9 of Mr. --

10 MR. SEILER: Converse.

11 MR. FOX: -- Converse, I asked him what the purpose of
12 his report was, and he said the purpose of the report was a
13 medical/legal report. It's a medical/legal report unless
14 something comes up with regard to the services that they render.

15 So I believe that the report itself has the potential of
16 being adverse. Mr. Converse testified that he was an EMT -- a
17 licensed EMT, that he worked for the Emergency Medical Services
18 at BYU, which is a volunteer organization, but nevertheless an
19 organization of BYU. That he was -- his services were voluntary,
20 that he used BYU's truck, BYU's splint, BYU's equipment. He
21 received the call from BYU's dispatcher. They -- so I think that
22 we can make an argument that he is an agent of BYU, and there is
23 at least a potential for adversity in the record that he kept.
24 He identified the record as a medical/legal record, which applies
25 that it has some adverse characteristics.

1 THE COURT: So you think he's potentially adverse and
2 governed by this -- what do you say --

3 MR. FOX: Well, he is potentially adverse and now he's
4 become adverse because he reported things that we dispute, so
5 he's an adverse --

6 THE COURT: Okay.

7 MR. FOX: He's put himself in an adverse position.

8 THE COURT: What do you say about the other arguments
9 about -- that Mr. Seiler made about the rules and the -- his
10 statement?

11 MR. FOX: With respect to the consti --

12 THE COURT: You still think -- you don't -- the
13 inconsistency arguments, unconstitutionality, do you have any
14 response to this?

15 MR. FOX: As far as constitutionality is concerned, I
16 don't have a response because I'm not prepared -- this is the
17 first I've heard of this argument and so we're not prepared to
18 address that at this time. As far as inconsistency, it's a
19 modification of the Rules of Evidence, that's for sure, and it's
20 a foundational issue, and that's our position, your Honor, on
21 that. They can't admit that -- the injured person's statement
22 into evidence unless there is -- certain foundation is
23 established. We don't have that foundation. Mr. Converse in his
24 aff --

25 THE COURT: I guess I don't understand. I mean I

1 understand what the statute says, but I don't understand what
2 you're saying. He's saying, "Well, this statute has these
3 things." If I understood his argument he's suggesting that the
4 Supreme Court has essentially declared it unconstitutional
5 because it's inconsistent with the rules that they've adopted.
6 That's what I understand it to be.

7 MR. FOX: I -- that's probably his position, yes.

8 THE COURT: And you say you're not prepared to address
9 that today.

10 MR. FOX: We're not prepared to address the
11 constitutionality of the issue.

12 THE COURT: And you still stand on statute?

13 MR. FOX: That's correct.

14 THE COURT: Okay.

15 MR. FOX: And that's our position.

16 THE COURT: All right. That helps. Thank you.

17 Mr. Seiler?

18 MR. SEILER: Your Honor, I believe the Supreme Court's
19 ruling and the Utah Constitution is clear that if there is an
20 inconsistency, which Mr. Fox has agreed with the Court there is
21 one between the statute and the Rules of Evidence that the
22 statute is ineffective. That makes it ineffective. I don't
23 think there's any question.

24 THE COURT: How is it ineffective?

25 MR. SEILER: It is ineffective because it is an attempt

1 to -- it is inconsistent with the Rules of Evidence adopted by
2 the Utah Supreme Court.

3 THE COURT: Okay. I want to review that again because
4 it turns on whether I admit this evidence or not.

5 MR. SEILER: Okay.

6 THE COURT: Specifically let's speak to the
7 inconsistency.

8 MR. SEILER: Okay. The Rules of Evidence make
9 declarations made for medical treatment purposes admissible.
10 This statute says it's not admissible unless certain events
11 occur.

12 THE COURT: Okay.

13 MR. SEILER: Those events aren't particularly relevant
14 because no one argues they did occur. So you're having the state
15 legislature pass an act in 1973, some 12 years before the Court
16 issued its memorandum decision or it's decision that I provided
17 to the Court in 1985, and the Court specifically says, "We -- I
18 better read it because if I don't I might misspeak. It says,
19 "The Court adopts all existing statutory Rules of Procedure and
20 Evidence not inconsistent or superceded by the Rules of Procedure
21 and Evidence heretofore adopted by this Court," effective July 1,
22 1985.

23 So if the Supreme Court is the one that gets to adopt
24 the Rules of Evidence and they say, "Yeah, we're going to take on
25 the statutory rules if they're not inconsistent with the Rules of

1 Evidence," and this statute is inconsistent with the Rules of
2 Evidence that makes it not effective and not enforceable, and I
3 think --

4 THE COURT: Because it would otherwise make inadmissible
5 the statement for treatment.

6 MR. SEILER: Exactly.

7 THE COURT: All right.

8 MR. SEILER: Does the Court have other questions?

9 THE COURT: No, I just want to make sure I understand
10 the theories, the discussion -- what would be incumbent upon this
11 Court is the admissibility of this evidence, then. You're
12 tendering and offering that evidence you think -- you object to
13 it?

14 MR. FOX: That's correct.

15 THE COURT: Okay.

16 MR. FOX: I don't want to --

17 THE COURT: Go ahead. Go ahead.

18 MR. FOX: If the issue turns on whether it's
19 inconsistent or not, I think that's for the Judge to decide.

20 There are lots of situations where one statute has --

21 THE COURT: In this case --

22 MR. FOX: -- on its face an inconsistency with another
23 statute and the Court has to reconcile that inconsistency if it
24 can.

25 THE COURT: Well, I'm just thinking of it in terms of

1 respect your objection, Mr. Fox, on that subject, and I
2 understand you take a different view and understandably why.

3 However, I am persuaded to grant the motion. I believe
4 and am persuaded with Mr. Seiler's arguments regarding the fact
5 that the response -- that Ms. Fox, Linda Fox, cannot give
6 testimony as a lay person regarding the nature, the necessity or
7 the extent of her treatment and whether it was necessary and
8 reasonable, or if the expenses incurred for that treatment were
9 necessary or reasonable. That only an expert that is involved in
10 that field can give testimony as to the reasonableness of the
11 expenses incurred and the necessity of the treatment. One might
12 argue that you don't apply fix -- fixating braces to knees unless
13 they're necessary, but that's not something this Court can
14 speculate on. It requires expertise.

15 With the assumptions of the record that have been
16 referred to, I'm also persuaded to grant the motion on the
17 question of proximate cause. The Court notes that the record
18 shows that Ms. Fox suffered from a degenerative condition in her
19 knee prior to her fall at the Harmon building. I understand that
20 she was advised of a future required knee replacement by her
21 physician.

22 The Court has, therefore, before it two plausible and
23 alternative explanations as to why she fell. It is possible that
24 Brigham Young University negligently maintained the stairway, and
25 that that negligence created a dangerous condition that caused

1 Mrs. Fox to fall and injure her leg. However, based on the
2 record, it is possible to argue -- arguably it is possible that
3 Ms. Fox had a physical condition that caused her leg to do as she
4 described, to go out from underneath her and caused her fall --
5 her to fall or otherwise fall on well maintained stairs, or even
6 possibly not-so-well maintained stairs.

7 In any event, it is Mrs. Fox's burden to demonstrate the
8 cause of her fall. Mrs. Fox is simply not in a position to offer
9 reliable testimony that discloses the possibility that her
10 condition could not have been the cause of her fall on the Harmon
11 Building steps. That matter would require the testimony of a
12 qualified medical expert who would opine as to whether a person
13 with Ms. Fox's condition could safely negotiate a stairway.

14 I note and I've read this case several times, the Utah
15 Court of Appeals has noted the need for positive expert testimony
16 to establish a causal link between the defendant's negligent act
17 and the plaintiff's injury depends upon the nature of the injury.
18 There must be expert testimony that the negligent act probably
19 caused the injury. In that regard I'm unpersuaded that Utah has
20 adopted a burden shifting theory as described by the plaintiff in
21 the Connecticut case referred to in the opposing memorandum.

22 In this case the issue is not so much of a post accident
23 injury but rather the pre-accident condition that may have been
24 the cause of her fall. Mrs. Fox presents no witness that is
25 qualified to address this issue. In short, plaintiffs have set

1 forth nothing to direct the Court to one or the other theory.
2 The Court is unable to speculate as to a plausible cause for her
3 injuries. With the burden being the plaintiffs, the Court cannot
4 see how the plaintiff could prevail in their case without expert
5 testimony on the subject of causation.

6 Now I understand you take a different view of this
7 matter, Mr. Fox, and I respect that view. This is a critical
8 question, and I have not taken it lightly, and I believe that if
9 the Court hears evidence as to different potential causation and
10 then makes a decision, I am simply speculating as to the decision
11 of what causation I'm persuaded by, and I cannot do that -- have
12 expert testimony and that would be reversible error, in my
13 opinion, though you take a different view. I understand that.

14 Having said that, where does that leave us with this
15 case?

16 MR. FOX: Well, it sounds like the Court has made a
17 directed verdict with respect --

18 THE COURT: It sounds like that --

19 MR. FOX: -- with respect to causation.

20 THE COURT: I believe that's probably true, which would
21 be an element of negligence.

22 MR. FOX: That's right.

23 THE COURT: Is this case founded solely on negligence?

24 MR. FOX: Yes.

25 MR. SEILER: It is.

1 THE COURT: Is there any other business I need to
2 address?

3 MR. SEILER: I don't believe so.

4 THE COURT: All right. Thank you very much. Have a
5 good day.

6 MR. FOX: Thank you.

7 COURT BAILIFF: All rise. This Court is in recess.

8 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

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

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

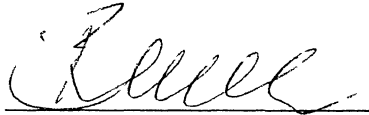
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

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

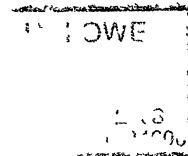
That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 19th day of January 2007.

My commission expires:
February 24, 2008



Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



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