

2006

Joseph R. Fox Linda A. v. Brigham Young University, Inc. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Thomas W. Seiler; Robinson, Seiler & Anderson; Attorney for Defendant/Appellee; .
Joseph R. Fox, Pro Se; Linda A. Fox, Pro Se; Plaintiffs/Appellants.

Recommended Citation

Brief of Appellant, *Fox v. Brigham Young University*, No. 20061132 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/7023

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEAL

JOSEPH R. FOX and LINDA A. FOX,

Plaintiffs and Appellants,

Number

vs.

BRIGHAM YOUNG UNIVERSITY, INC.,
a Utah Corporation,

Defendant and Appellee.

BRIEF OF APPELLANTS

Utah Court of Appeal Case

20061132

District Court Case Number

040401488

APPEAL of a Judgment of Dismissal from the Fourth District Court, Utah County,
State of Utah, the Honorable Fred D. Howard, presiding.

Thomas W. Seiler
Attorney for Defendant and Appellee
PO Box 1266
2500 North University Blvd.
Provo, Utah 84603-1266
801-375-1920

Joseph R. Fox, Pro Se
Linda A. Fox, Pro Se
Plaintiffs and Appellants
1149 East 1630 South
Spanish Fork, Utah 84660
801-798-3635

FILED
UTAH APPELLATE COURTS

APR 13 2007

IN THE UTAH COURT OF APPEAL

JOSEPH R. FOX and LINDA A. FOX,

Plaintiffs and Appellants,

vs.

BRIGHAM YOUNG UNIVERSITY, INC.,
a Utah Corporation,

Defendant and Appellee.

BRIEF OF APPELLANTS

Utah Court of Appeal Case Number

20061132

District Court Case Number

040401488

APPEAL of a Judgment of Dismissal from the Fourth District Court, Utah County,
State of Utah, the Honorable Fred D. Howard, presiding.

Thomas W. Seiler
Attorney for Defendant and Appellee
PO Box 1266
2500 North University Blvd.
Provo, Utah 84603-1266
801-375-1920

Joseph R. Fox, Pro Se
Linda A. Fox, Pro Se
Plaintiffs and Appellants
1149 East 1630 South
Spanish Fork, Utah 84660
801-798-3635

TABLE OF CONTENTS

Section	Pages
Table of Authorities	3
Jurisdiction of Court of Appeal	5
Statement of Issues	6
First Issue Findings of Fact	6
Standard of Review	7
Issue Preserved in the Trial Court	10
Second Issue Conclusions of Law	11
Standard of Review	12
Issue Preserved in the Trial Court	12
Third Issue Validity of Utah Code §78-27-33	13
Standard of Review	13
Issue Preserved in the Trial Court	14
Constitutional Provisions, Statutes, Ordinances, Rules and Regulations	15
Article 8, Section 4, Constitution of Utah	15
Utah Code §78-27-33	15
Utah Code §78-27-36	16
Rule 801(2), Utah Rules of Evidence	16
Rule 803(4), Utah Rules of Evidence	16
Rule 701, Utah Rules of Evidence	16

Utah Supreme Court Pro Curium Order	16
Preliminary Note to Utah Court Rules	17
Rule 41(b), Utah Rules of Civil Procedure	17
Nature of the Case	17
Course of Proceedings	18
Trial Court Disposition	19
Statement of Facts	20
Summary of Arguments	26
Argument	30
Introduction	30
Context of Decision	30
Scope of Lay Testimony	31
Medical Damages	45
Utah Code §78-27-33	45
Conclusion	48
Addendum	

TABLE OF AUTHORITIES

Alder v. Bayer Corp., 61 P.3d 1068, 2002 UT 115, ¶¶ 20, 86-88. Brief Pages 41, 43, and 44.

Beard v. K-Mart Corporation, 12 P.3d 1015(Utah 2000), 2000 UT App 285, ¶¶ 5, 13-16. Brief Pages 32-36.

Bd. of Ed. of Jordan School District v. Sandy City, 94 P.3d 234, 236-237, 2004 UT 37. Brief Page 46.

Bus. Aviation of S.D., Inc. v. Medivest, Inc., 882 P.2d 662, 665 (Utah 1994). Brief Page 46.

Byrd v. Delasancha, 195 S.W.3d 834, 837-838 (Texas 2006) Brief Page 34.

Choi v. Anvil, 32 P.3d 1, 3-4 (Alaska 2001). Brief Pages 30, 34.

Chryst v. Braun, 2005 UT App 470 (Utah App. 11/03/2005) Brief Page 8.

Dodge-Farrar v. American Cleaning Services Company, Inc., 137 Idaho 838, 54 P.3d 954 (Idaho App. 09/11/2002) Brief Page 33.

Godesky v. Provo City Corp., 690 P.2d 541, 544 (Utah 1984). Brief Page 9.

Goebel v. Salt Lake City Southern Railroad Co., 104 P.3d 1185, 2004 UT 80, ¶¶ 10, 12, 19-22. Brief Page 9.

Grand County v. Emery County, 52 P.3d 1148, 2002 UT 57, ¶ 6. Brief Page 13.

In re Marriage of Gonzalez, 2000 UT 28, ¶ 23, 1 P.3d 1074. Brief Page 13.

Jerz v. Salt Lake County, 822 P.2d 770, 773 (Utah 1991). Brief Page 14.

Jordan v. Smoot, 380 S.E.2d 714, 715 (Ga. Ct. App. 1989). Brief Page 36

Lovendahl v. Jordan Sch. Dist., 2002 UT 130, ¶ 21, 63 P.3d 705. Brief Page 46.

Miller v. Weaver, 2003 UT 12, ¶ 17, 66 P.3d 592. Brief Page 46.

Parks v. Utah Transit Auth., 2002 UT 55, ¶ 4, 53 P.3d 473. Brief Page 13.

Perrine v. Kennecott Mining Corp., 911 P.2d 1290, 1292 (Utah 1996). Brief Page 14.

Riggins v. Bechtel Power Corp., 722 P.2d 819, 824 (Wash. Ct. App. 1986). Brief Page 33.

Robertson v. Sixpence Inns of Am., 789 P.2d 1040, 1047 (Ariz. 1999) Brief Page 9.

Sch. Bds. Ass'n v. State Bd. of Educ., 2001 UT 2, ¶ 9, 17 P.3d 1125. Brief Page 13.

State ex rel. Div. Consumer Prot. v. GAF Corp., 760 P.2d 310, 313 (Utah 1988). Brief Page 14.

State v. Daniels, 2002 UT 2, ¶ 30, 40 P.3d 611. Brief Page 13.

State v. Rothlisberger, 2006 UT 49, ¶ 11-16, 18-21, 34-35. Brief Page 31.

Steffensen v. Smith's Management, 820 P.2d 482, 486-487 (Utah App. 1991), *aff'd*, 862 P.2d 1342 (Utah 1993). Brief Page 41.

Stevenett v. Wal-Mart Stores Inc., 977 P.2d 508, 511 (Utah 1999). Brief Page 45.

Stevensen v. Goodson, 924 P.2d 339, 347 (Utah 1996). Brief Page 10.

Utah Dep't of Transp. v. 6200 South Assocs., 872 P.2d 462, 465 (Utah Ct. App. 1994). Brief Page 10.

Walton v. Gallbraith, 166 N.W.2d 605, 606 (Mich. Ct. App. 1969). Brief Page 37.

Williams v. KFC Nat'l Mgmt. Co., 391 F.3d 411, 420-422 (New York, 2d Cir. 2004). Brief Page 43.

Wilson Supply, Inc. v. Fradan Manufacturing Corp., 54 P.3d 1177, 2002 UT 94. Brief Page 8.

Zachowicz v. United States, 140 F.3d 381, 389-391 (2d Cir. 1998). Brief Page 42.

Constitution of Utah, Article 8, Section 4. Brief Page 15.

Utah Code §78-27-33. Brief Page 15, 19, and 22.

Utah Code §78-27-36. Brief Pages 46, 47, and 48.

Utah Code § 78-2-2(4). Brief Page 6.

Rule 701, Utah Rules of Evidence. Brief Page 16.

Rule 803(4), Utah Rules of Evidence. Brief Page 45.

Rule 801(2), Utah Rules of Evidence. Brief Page 45.

Rule 41(b), Utah Rules of Civil Procedure. Brief Page 8.

Utah Supreme Court Pro Curium Order. Brief Page 16.

Preliminary Note to the Utah Court Rules. Brief Page 17.

JURISDICTION OF THE COURT OF APPEAL

The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2 (3) (g) and (j). This appeal is subject to assignment to the Utah Court of Appeal pursuant to Utah Code Ann. § 78-2-2(4). Accordingly, this appeal was assigned to the Utah Court of Appeal from the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

First Issue (Causation)

Whether the trial court erred in its findings 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.

(B) No lay witness can, by the ordinary use of the lay witness's senses, testify 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 the physical intervention of any actor." (Findings of Fact, Record 916, ¶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 915, ¶14)

Standard of Review

The trial court's ruling was in the context of the defendant's motion to exclude expert testimony regarding causation during which the plaintiffs stipulated that they would not call any expert witnesses. The trial court concluded that due to Linda's pre-

existing arthritic condition in her knee, the plaintiffs could not, as a matter of law, sustain their cause of action without calling expert witnesses to prove causation. The trial court held that its decision was dispositive of the case and granted defendant's oral motion to dismiss, presumably under Rule 41(b) of the Utah Rules of Civil Procedure. (Transcript, Record 924, 63-67)

We review a trial court's findings of fact according to the standard set out in Utah Rule of Civil Procedure 52(a), which provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*; see also *Orton*, 970 P.2d at 1256-57; *Consolidation Coal Co. v. Div. of State Lands & Forestry*, 886 P.2d 514, 522 (Utah 1994); *Reid v. Mut. of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). "A trial court's factual finding is deemed 'clearly erroneous' only if it is against the clear weight of the evidence." *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989); see also *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 773 (Utah 1995); *Reid*, 776 P.2d at 899-900. *Wilson Supply, Inc. v. Fradan Manufacturing Corp.*, 54 P.3d 1177, 2002 UT 94, ¶12.

In the context of a bench trial, the directed verdict's procedural counterpart is a motion to dismiss pursuant to rule 41(b). See Utah R. Civ. P. 41(b); see also *Grossen*, 1999 UT App 167 at ¶8. [U] *Chryst v. Braun*, 2005 UT App 470 (Utah App. 11/03/2005)

Under rule 41(b) of the Utah Rules of Civil Procedure, the court may dismiss if "(1) the claimant has failed to introduce sufficient evidence to establish a prima facie

case, or (2) the trial court is not persuaded by that evidence." *Walker v. Union Pac. R.R.*, 844 P.2d 335, 340 (Utah Ct. App. 1992). "As with a directed verdict, whether dismissal was appropriate for failure to make a prima facie case is a question of law reviewed for correctness." *Grossen*, 1999 UT App 167 at ¶8 (citation omitted). [U] *Chryst v. Braun*, 2005 UT App 470 (Utah App. 11/03/2005)

When reviewing the grant of a directed verdict, the appellate court reviews the decision of the trial court for correctness. For a directed verdict to be appropriate, the evidence must be such that reasonable minds could not differ on the facts based on the evidence presented at trial. *Mgmt. Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982). We examine the evidence in the light most favorable to the losing party, and if that evidence and the reasonable inferences drawn therefrom would support a judgment in favor of the losing party, we must reverse. *Id.* If evidence raises a "question of material fact," it is reversible error for a trial court to grant a motion for directed verdict. See *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933. *Goebel v. Salt Lake City Southern Railroad Co.*, 104 P.3d 1185, 2004 UT 80, ¶ 10 (Utah 10/01/2004).

The question of proximate causation "is generally reserved for the jury." *Steffensen*, 820 P.2d at 486 (citing *Godesky v. Provo City Corp.*, 690 P.2d 541, 544 (Utah 1984)). Consequently, the trial court may rule as a matter of law on this issue only 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." *Steffensen*, 820 P.2d at 487

(citing *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 789 P.2d 1040, 1047 (Ariz. 1990) (en banc). Two standards of review exist for reviewing questions regarding the admissibility of evidence. See *Utah Dep't of Transp. v. 6200 South Assocs.*, 872 P.2d 462, 465 (Utah Ct. App. 1994). "With respect to the trial court's selection, interpretation, and application of a particular rule of evidence [or procedure], we apply a correction of error standard. When the rule . . . requires the trial court to balance specified factors to determine admissibility, 'abuse of discretion or reasonability is the appropriate standard.'" *Id.* (citation omitted); see also *Stevensen v. Goodson*, 924 P.2d 339, 347 (Utah 1996) (stating trial court "is allowed considerable . . . discretion in the admissibility of expert testimony, and in the absence of a clear showing of abuse, this court will not reverse"). However, "even where error is found, reversal is appropriate only in those cases where, after review of all of the evidence presented at trial, it appears that 'absent the error, there is a reasonable likelihood that a different result would have been reached.'" *Utah Dep't of Transp.*, 872 P.2d at 465 (citation omitted). Moreover, the person asserting error has the burden to show not only that the error occurred but also that it was substantial and prejudicial. See *Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987), as cited in *Stevenett v. Wal-Mart Stores Inc.*, 977 P.2d 508, 511 (Utah 1999).

Issue Preserved in Trial Court

The issues relating to causation were preserved in the trial court in the Affidavit of Linda A. Fox (Record, commencing on page 083); in the Affidavit of Joseph R. Fox (Record, commencing on page 075); in the Affidavit of Linda A. Fox (Record,

commencing on page 467); in Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (Record, commencing on page 337); in Plaintiffs' Response to Defendant's Motion in Limine (Record pp. 883-874), and in the Bench Trial Transcript (Record p. 924, at transcript pages 13 - 24).

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, Record 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, Record p. 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, Record p. 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, Record p. 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, Record p. 914, ¶6.)

Standard for Review

Generally, we review a trial court's legal conclusions for correctness, according the trial court no particular deference." Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); see also Newspaper Agency Corp. v. Auditing Div. of State Tax Comm'n, 938 P.2d 266, 267 (Utah 1997). Wilson Supply, Inc. v. Fradan Manufacturing Corp., 54 P.3d 1177, 2002 UT 94, ¶11.

Issues Preserved in Trial Court

The issues relating to the court's conclusions were preserved in the trial court in the Affidavit of Linda A. Fox (Record, commencing on page 083); in the Affidavit of Joseph R. Fox (Record, commencing on page 075); in the Affidavit of Linda A. Fox (Record, commencing on page 467); Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (Record, commencing on page 337); Plaintiffs' Response to Defendant's Motion in Limine (Record pp. 883-874), and in the Bench Trial Transcript (Record p. 924, at transcript pages 13 – 24 and 63-67).

The issues relating to the court's conclusions on medical damages were preserved in the trial court in Plaintiffs' Response to Defendant's Motion in Limine

(Record pp. 883-874) and in the Bench Trial Transcript (Record p. 924, at transcript pages 16, 27 and 63-67).

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(2) and Rule 803(4).

Standard of Review

This issue was raised for the first time in the defendant's oral argument in support of its Motion in Limine. Whether a statute is constitutional is a question of law, which the court of appeal reviews for correctness, giving no deference to the trial court. *Grand County v. Emery County*, 2002 UT 57, ¶ 6, 52 P.3d 1148 (quoting *State v. Daniels*, 2002 UT 2, ¶ 30, 40 P.3d 611). Furthermore, the reviewing court presumes the legislation being challenged is constitutional, and resolves any reasonable doubts in favor of constitutionality. *Id.*; see also *Utah Sch. Bds. Ass'n v. State Bd. of Educ.*, 2001 UT 2, ¶ 9, 17 P.3d 1125.

We review questions of statutory interpretation for correctness, giving no deference to the district court's interpretation. *Parks v. Utah Transit Auth.*, 2002 UT 55, ¶ 4, 53 P.3d 473. Our aim in construing a statute is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. *In re Marriage of Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d 1074, *Bd. of Ed. of Jordan Sch. Dist.*, *supra*, ¶ 8.

Pursuant to our rules of statutory construction, we look first to the statute's plain

language to determine its meaning. . "We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592; see also *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) ("[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful." (citation and quotation omitted)); *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) ("[T]erms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion." (citation and quotation omitted)); *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991) ("It is our duty to construe each act of the legislature so as to give it full force and effect. When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to be in harmony and avoid conflicts."). In addition, "[i]t is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result." *State ex rel. Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988), *Id.* ¶ 9.

Issue Preserved in Trial Court

The issues relating to the constitutionality and implied repeal of UCA §78-27-33, as amended, were preserved in the trial court as recorded in the Bench Trial Transcript (Record p. 924, at bench trial transcript pages 56 - 63).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND
REGULATIONS

Article 8, Section 4, Constitution of Utah, provides in pertinent 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.

Utah Code Annotated 78-37-33, provides: 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. Amended by Chapter 282, 1998 General Session. (The amendment changed the language from "law enforcement officer" to "peace officer".)

Utah Code Annotated 78-37-36, provides: Right of rescission or disavowal of release, settlement, or statement by injured person in addition to other provisions. The rights provided by this act are intended to be in addition to, and not in lieu of, any rights of rescission, rules of evidence, or provisions otherwise existing in the law.

Utah Rules of Evidence, Rule 801(d)(2) provides in part: 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.

Utah Rules of Evidence, Rule 803(4), states in pertinent part: The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

Utah Rules of Evidence, Rule 701, provides: If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Utah Supreme Court Pro Curium Order, September 10, 1985, In Re: Rules of Procedure and Evidence To Be Used in the Courts of This State, provides in part:

"Pursuant to the provisions of Article 8, Section 4, the Constitution of Utah, as amended, the Court adopts all existing statutory Rules of Procedure and Evidence not inconsistent or superseded by the rules of Procedure and Evidence heretofore adopted by this court. Effective as of July 1985."

The Preliminary Note to the Utah Court Rules states, in part: Any existing statutes inconsistent with these rules... will be impliedly repealed.

Rule 41(b), Utah Rules of Civil Procedure, provides: Involuntary dismissal; effect thereof. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided iRule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Nature of the Case

This is a pro se, negligence based, personal injury case for which the Plaintiff Linda Fox seeks money damages for, inter alia, medical expenses, lost income,

disfigurement, and change of life style, and for which the Plaintiff Joseph Fox seeks money damages for lost consortium. A defective step on the west stairway of the Harman Building on the campus of BYU caused the Plaintiff Linda Fox to fall and break her leg below the knee as she was exiting the Harman Building after she purchased a ticket to Women's Conference 2004. Specifically, the cause of Linda's fall was a worn out, loose metal nosing on the steps. The Defendant had notice of the defective step nosing and failed to give notice to the Plaintiff and failed exercise reasonable care in repairing the step. At the time of her fall, the Plaintiff Linda Fox suffered from a slightly symptomatic arthritic condition in her knee. There is no expert testimony that her pre-existing condition was a material factor in her fall. (Record p. 037; Second Amended Complaint).

Course of Proceedings

This case proceeded to a scheduled bench trial before the Fourth District Court, Utah County, Provo District. Prior to taking evidence, the trial court heard oral arguments on the defendant's motion to exclude any expert testimony that might be offered by the plaintiffs concerning causation and damages. Neither the plaintiffs nor the defendant had identified any expert witnesses as required by the Utah Rules of Civil Procedure. The plaintiffs stipulated that they did not intend to call any expert witnesses. (Record p. 924; Bench Trial Transcript pp. 2-4 and 13-14).

Also, during oral argument, the defendant, for the first time, raised the issue of the constitutionality of UCA 78-27-33, as amended, in regard to the admission into evidence of certain statements reportedly made by Linda Fox to the defendant's EMTs at the scene of her fall. The plaintiffs denied having made the statements and opposed the admission of evidence of the statements because the foundational provisions of the statute had not been satisfied by the defendant. There was no dispute that the defendant had not complied with the statute. The court heard arguments from both parties. (Record p. 924; Bench Trial Transcript pp. 44-63)

Trial Court Disposition

After hearing oral arguments, the court ruled that the statute, UCA 78-27-33, as amended, was unconstitutional and that it had been impliedly repealed by order of the Supreme Court, and, therefore, it would admit the EMTs' evidence of Linda's statements. There was no other evidence of Linda's statements. (Record 924; Bench Trial Transcript pp. 63-64).

With regard to the defendant's motion to exclude expert testimony, and the plaintiffs' stipulation in this regard, the court concluded that the plaintiffs could not, as a matter of law, in view of Linda's arthritic condition in her knee, sustain their prima facie burden of proof concerning causation without presenting expert testimony that her pre-existing condition was not a material factor in her fall. (Apart from the fact that she had the condition and her disputed statement, as reported by the EMTs, that as she was descending the stairs her foot came out from underneath her, there was no other

evidence that her condition was a material factor in her fall.) Further, the court ruled that Linda could not sustain her burden of proof on medical expense damages, even though she had paid for the services, without expert testimony as to the necessity and reasonableness the treatment she received. The court held that its decision in this regard was dispositive of the issues on causation and damages. Accordingly, the court granted the defendant's oral motion to dismiss under Rule 41(b) of the Utah Rules of Civil Procedure. (Record p. 924; Bench Trial Transcript pp. 63-68.)

Statement of Facts

Fact No 1. In the spring of 2003, Linda Fox saw Dr. Jackson for pain in her right knee and was diagnosed with arthritis in her right knee. An x-ray showed that a portion of the cartilage in the knee joint was missing. Dr. Jackson told Linda that she would have to have her knee replaced sometime in the future, but to put it off as long as possible. Dr. Jackson did not restrict Linda's activities. (Record p. 924, Bench Trial Transcript p. 23; Affidavit of Linda Fox, Record p. 467, 466.)

Fact No. 2. On April 20, 2004, Linda purchased a ticket to Women's Conference in the Harman Building on the campus of the Defendant. (Affidavit of Linda Fox, Record 082, pp. 082-083.)

Fact No. 3. As Linda left the Harman Building, she descended the west stairway. The steps were narrow such that the ball of her foot overhung the metal nosings on the front edge of each step. Near the bottom of the stairway, as she stepped down, she heard the metal nosing clatter as she stepped onto it, she felt the metal nosing

move under her foot, she saw her foot slip off the nosing, and she saw her right foot come out from underneath her. She fell in a twisting, sitting fashion onto the stairway with her right leg under her. She felt intense pain and was unable to move her leg from underneath her. (Affidavit of Linda Fox, Record 467, 467-464; Affidavit of Linda Fox, Record 083, pp. 082-081.)

Fact No. 4. Linda did not feel any unusual pain or discomfort in her right knee as she descended the stairway until after her fall. (Affidavit of Linda Fox, Record 467, p. 465.)

Fact No. 5. At the time of her fall, Linda's knee was not unstable and did not prevent her from carrying on an active routine that included using stairs, housework, exercise, and part-time employment in retail sales and as a cafeteria lunch worker during which she was required to carry loads up to 60 pounds. (Bench Trial Transcript, Record 924, pp. 23-24; Affidavit of Linda Fox, Record 467, 466; Affidavit of Linda Fox, Record 081, 84)

Fact No. 6. It was the loose and worn condition of the metal nosing that caused Linda to fall and not the condition of her knee. (Affidavit of Linda Fox, Record 467, 464)

Fact No. 7. At the scene of her fall, Linda reportedly said to EMT Noah Converse that her knee went out as she was going down the stairs. (Affidavit of Noah Converse, Record 269, p. 267; Utah EMS Incident Report, Record p. 262)

Fact No. 8. Linda doesn't remember specifically what she said to the EMTs assisting her, but after her foot slipped off the step and her body twisted and she felt

severe pain in her knee, her knee would not support her and she could not walk. (Affidavit of Linda Fox, Record 467, 465-464)

Fact No. 9. Linda was not given a copy of her statement reported by the EMTs as required by Utah Code 78-27-33, as amended. (Affidavit of Linda Fox, Record 467, p. 465, ¶7; Bench Trial Transcript, Record 924, p. 61)

Fact No. 10. Linda was transported by the EMTs to the emergency room at Utah Valley Regional Medical Center where she was treated for a broken leg by the imposition of an external fixator. (Affidavit of Linda Fox, Record 083, p. 081; Bench Trial Transcript, Record 924, Transcript pp. 15-16)

Fact No. 11. After 11 weeks, her leg was healed and the fixator was removed. (Bench Trial transcript, Record 924, Transcript p. 16)

Fact No. 12. The Plaintiffs incurred and paid medical expenses in the sum of approximately \$34,000.00. (Statement of Damages, Record 0773, p. 0772; Summary of Charges and Payments, Addendum no. 11; Bench Trial Transcript 924, Transcript pp. 16-17, 27; Objections to Plaintiffs' Proposed Exhibits, Record 728, 727, Tab 2)

Fact No. 13. The Plaintiffs stipulated that they would not call an expert witness in support of their claims. (Plaintiffs' Response to Defendant's Motion in Limine, Record 883; Bench Trial Transcript, Record 924, Transcript pp. 13-24.)

Fact No. 14. The Defendant did not replace any of the metal nosings prior to Linda's fall. (Affidavit of William Trapp, Record 274; Affidavit of Kendall Wilson, Record 278; Defendant's Answers to Plaintiffs' First Set of Interrogatories, Interrogatory Nos. 11 and 22, Addendum no. 10.)

Fact No. 15. The Defendant did not give Linda notice of the defective conditions on the stairway. (Defendant's Answers to Plaintiffs' First Request for Admissions, Addendum no. 9, Request No. 31; Affidavit of Linda Fox, Record 083, 082 ¶3)

Fact No. 16. Loose metal plates were dangerous. (Email between Tom Overson and Wayne Lott, dated August 23, 2003, Record 208, Defendant Brigham Young University's Exhibit List, Exhibit 80, Record 644, 639)

Fact No. 17. In the summer of 2003, the Defendant determined that the stairway needed to be replaced; costs estimates were submitted to administration on December 5, 2003 (Record p. 0202), and a contract awarded April 7, 2004 (Record p. 0201). The contract was actually signed by the Defendant on April 20, 2004, the date of the Linda's fall, and by the contractor on April 22, 2004, two days later. (Defendant's Answers to Plaintiffs' First Set of Interrogatories, Addendum no. 10, Interrogatory No. 20; Brigham Young University Short Form Contract No. 5332, Addendum no. 6)

Fact No. 18. Within two weeks of Linda's fall, the Defendant tore down the stairway and commenced rebuilding the stairway. (Affidavit of Joseph Fox, Record 075, ¶35)

Fact No. 19. The Defendant did not preserve any of the metal nosings. (Defendant's Responses to Plaintiff's Second Request for Production of Documents, Record 419, 418, Request No. 1)

Fact No. 20. Between April 20, 2004 and April 30, 2004, the Plaintiff Joseph Fox inspected and photographed the stairway where Linda had fallen. (Affidavit of

Joseph Fox, Record 075, pp. 075-052)

Fact No. 21. On April 28, 2004, David Lawrence, of the defendant's Office of Risk Management, photographed and inspected the stairway where the plaintiff reportedly fell and reported: "My inspection of the stairs shows some deterioration in the cement and some of the wide metal walk strips (on the edge of each step) make a clack noise when you step on them. They seem flush with the step but have missing screws so they aren't tight to the cement. Nothing I saw concerning the above seemed to be a noteworthy hazard and none near the area, I was shown by custodial, she was thought to have fallen.

"However, the edges of the metal strips, which form the edge of each stair, seemed worn down to me and allowed slipping if one had one's weight on them. I wouldn't say they were slick per se, but they were slicker than the cement they were attached to. I don't know yet, but they appear to have had a pattern on them originally (20 years old?) but has now worn down. I am concerned that there were no railing options other than at the far edges of these quite wide stairs." (Defendant Brigham Young University's Exhibit List, Exhibit 121, Record 644, 637, Claim Detail with Notes, dated April 26, 2004; Record 728, Objection to Plaintiffs' Proposed Exhibits, Tab 12, Claim Detail with Notes, dated April 26, 2004, and Exhibit A, Tab 12, Addendum, no. 12)

Fact No. 22. The Defendant withdrew its proffer of medical records in support of its claim that Linda's knee was a material factor in her fall. (Bench Trial Transcript, Record 924, Transcript pp. 43-47)

Fact No. 23. The Defendant relied solely on the EMTs statements with regard to its claims that Linda's pre-existing condition was a material factor in her fall. (Bench Trial Transcript, Record 924, Transcript pp. 43-47)

Fact No. 24. Defendant denied that its EMT personnel made a written report regarding the services rendered Linda Fox. (Defendant's Answers to Plaintiff's First Request for Admissions, Addendum no. 9, Request 20.)

Fact No. 25. Argument of Counsel for Defendant that Linda's knee was a material factor in her fall. (Bench Trial Transcript, Record 924, Transcript pp. 11-12)

Fact No. 26. Only one documented repair and several undocumented repairs were made to the stairway between August 2003 and April 20, 2004. (Affidavit of William Trapp, Record 274; Affidavit of Kendall Wilson, Record 278)

Fact No. 27. The stairway was routinely inspected. (Affidavit of William Trapp, Record 274, pp. 272-271)

Fact No. 28. Utah Code §78-27-33 was amended in 1998 by the Utah Legislature to change the wording from "law enforcement officer" to "peace officer".

Fact No. 29. According to the Defendant, Linda fell higher up on the stairway (Claim Detail with Notes, Addendum no. 12; Affidavit of Noah Converse, Record 269, p. 266, ¶¶14-16)

Fact No. 30. According to Linda, she fell 2 or 3 steps from the bottom of the stairway. (Affidavit of Linda Fox, Record 083, p. 082-081, ¶6, and p. 078)

Fact No. 31. The EMTs lifted Linda into a wheelchair at the bottom of the stairway. (Affidavit of Linda Fox, Record 467, p. 465, ¶6)

Fact No. 32. No one marked the exact location of Linda's fall. (Affidavit of Linda Fox, Record 467, p. 465, ¶6; Claim Detail with Notes, Addendum no. 12)

Fact No 33. A man, later identified as George Talbot, told Linda Fox that a year before he had fallen on the stairs and had broken his arm. (Affidavit of Linda Fox, Record 467, p. 465, ¶6; Defendant Brigham Young University's Exhibit List, Exhibit 79, Record 644, p. 640; Supervisor Report of Accident, August 25, 2003, Addendum no. 7)

Fact No. 34. Witness subpoenaed for trial by Plaintiffs: George Talbot, Record p. 669; Wayne Lott, Record p. 657; Ed Cozzens, Record p. 713; Jon Overman, Record p. 693; Kendall Wilson, Record p. 651; William Trapp, Record p. 708;

Summary of Arguments

Linda Fox fell on the west stairway of the Harman Building on the Defendant's campus after purchasing a ticket to Women's Conference 2004 and broke her leg and incurred medical expenses of approximately \$34,000.00. Linda's fall was caused by a defective metal step nosing that was worn and loose. The Defendant had notice of the defective conditions on the stairway as early as August 2003, and had decided that summer to replace the stairway. Despite having decided to replace the stairway, the Defendant did not give the Plaintiff notice of its dangerously defective conditions. The stairway was not replaced until shortly after Linda's fall.

The Plaintiff Linda Fox suffered from arthritis in her right knee resulting in some missing cartilage. However her condition did not alter her daily routine, which

included regular exercise and two part-time employments requiring prolonged standing and carrying loads up to 60 pounds. There was no evidence that her knee was unstable.

The Plaintiffs appeal the trial court's decision, sitting as the trier of fact, not to take testimony in the trial of the above matter because the Plaintiffs did not have an expert witness to testify that Linda's arthritic knee was not a material factor in her fall. Further, the court would not take testimony because the Plaintiffs did not have an expert witness to testify that the treatment Linda received for her broken leg was reasonable and necessary, even though the Plaintiffs had paid for the medical services.

The Plaintiffs contend that they can establish a prima facie case for negligence relying solely on lay testimony.

In some cases, expert testimony is required when causation involves knowledge, facts and conclusions beyond one's common experience. However, a lay person may testify according to her perceptions and draw conclusions therefrom even though an expert could so testify, as long as such facts and conclusions do not require specialized knowledge or experience.

This is a prosaic slip and fall case where the issues are uncomplicated and straightforward.

In this case Linda is competent to testify concerning the manner of her fall as she descended the west stairway. She can testify that when she stepped down onto the worn and loose metal nosing, she heard the nosing clatter and felt it move under her foot; that she saw her foot come out from underneath her off the step, and that her left leg swung over her right leg as she fell in a twisting, sitting fashion on the stairway.

Further she is competent to testify that she felt severe pain in her right leg and that she could not move her right leg from underneath her. The facts of her fall, the pain she experienced , and the injuries she suffered are all well within the knowledge and experience of a lay person. Nearly everyone has had some experience with a broken bone.

After her fall, Linda was transported to the Emergency Room at Utah Valley Regional Medical Center where she was treated for a broken leg. Her bones were immobilized using a surgical pin and an external fixator which she wore for about 11 weeks until the bones were healed, whereupon the fixator was surgically removed. These medical procedures are common for a broken leg like the one Linda suffered.

The only evidence that Linda's arthritic knee was a factor in her fall is that Linda admitted to the condition and that she reportedly said to the EMTs assisting her that her leg came out from underneath her. The Plaintiffs dispute the statement and objected to the introduction of the statements under the provisions of Utah Code §78-27-33, as amended. The Court ruled that the statute had been impliedly repealed and admitted the statement. Further, the Court ruled, that in the absence of expert testimony to the contrary, it could only speculate as to the cause of Linda's fall, and accordingly dismissed the Plaintiff's case.

The Plaintiffs paid approximately \$34,000.00 for Linda's treatment.

The Plaintiffs contend in this appeal that Linda's statement should not have been admitted. But even if admitted, the combination of the bare fact that she suffered a pre-existing condition and her statement that her leg came out from underneath her do not

outweigh her testimony concerning the facts surrounding her fall. The Defendant takes the Plaintiff where it finds her. If her pre-existing condition was aggravated by her foot slipping off the defective step, the Defendant is still liable for her injuries.

Furthermore, it is axiomatic that if a negligent act were deemed wrongful because that act increased the chances that a particular type of accident would occur, and a mishap of that very sort did happen, this is enough to support a finding by the trier of fact that the negligent behavior caused the harm.

Moreover, where a strong causal link exists, it is up to the negligent party to bring in evidence denying but for cause and suggesting that the wrongful conduct had not been a substantial factor.

Since there is a strong causal link between the Defendant's negligence in maintaining the stairway and Linda's fall, and it is the very type of accident that could happen on a poorly maintained stairway, the burden was placed on the Defendant to come forward with evidence suggesting that some other cause was a material factor. The Defendant's bald assertion that it was Linda's pre-existing condition does not meet this standard. In fact, the only way that the Defendant could assert that Linda's pre-existing condition were the "other cause", would be through expert testimony, since whether her arthritic knee was a substantial factor in her fall is beyond the ken of ordinary experience.

Argument

Introduction

Generally, this appeal concerns to what extent plaintiffs may rely on lay testimony in presenting a prima facie negligence claim resulting from a slip and fall accident where the Plaintiff Linda Fox had a pre-existing arthritic condition in her knee which did not limit her activity, and she was otherwise healthy. The plaintiffs assert that it was a defective metal nosing of the Defendant's steps that caused Linda's fall, not her pre-existing condition. The Defense had no medical evidence that her pre-existing condition contributed to her fall. This appeal is important because unless the plaintiffs are able to rely on lay testimony for their prima facie case, the costs of using expert witnesses in the litigation, as required by the trial court, will exceed the claimed damages, and the plaintiffs will be compelled to abandon their otherwise legitimate claims. See *Choi v. Anvil*, 32 P.3d 1, 3 (Alaska 2001).

Context of Decision

Prior to taking testimony on the date set for trial, the trial court heard oral arguments from the Defendant and the Plaintiffs on the Defendant's motion to exclude expert testimony on the issues of causation and damages. The plaintiffs stipulated that they would not call expert witnesses and instead intended to rely solely on lay testimony. The trial court ruled as a matter of law that because of Linda's pre-existing condition, without expert testimony adducing that her condition was not a material factor in her fall, the plaintiffs' claims would fail, and the Court dismissed the plaintiffs' complaint, presumably under Rule 41(b), Utah Rules of Civil Procedure.

Scope of Lay Testimony

The boundary line for lay testimony was set forth in the recent case of *State v. Rothlisberger*, 2006 UT 49 (Utah 09/08/2006). There the Utah Supreme Court stated that lay fact testimony has always been a primary, acceptable source of evidence in our system. Accordingly, lay fact testimony need not satisfy rule 701 or 702 but is admissible so long as it complies with other portions of the Utah Rules of Evidence, including the relevancy rules in Article IV and rule 602's requirement that a witness have personal knowledge of the matter about which he or she is testifying. *Id.* ¶36. However, the Court held that lay fact testimony cannot cross the line into regions where specialized knowledge or experience is the basis for the testimony. *Id.* ¶ 37.

In determining the line for lay testimony the Court held that the distinction must be based on the level of knowledge that witnesses have from which they can draw their conclusions. As long as that testimony does not require scientific, technical, or other specialized knowledge, it is within the ken of the average bystander and admissible from a lay witness. In other words, the average bystander could provide the testimony *Id.* ¶34.

The Court went on to state that a common-sense inquiry was required of whether a juror would be able to understand the evidence without specialized knowledge. *Id.* ¶33. Accordingly, just because a fact may be established scientifically, does not mean that an expert can be the only witness. Facts and conclusions that may be drawn by any average bystander may be provided by non-expert testimony. *Id.* ¶35.

The line for lay testimony is demonstrated in *Beard v. K-Mart*, 12 P.3d 1015, 2000 UT App 285. Darlene Beard was injured when a K-Mart employee unintentionally struck her in the head with his elbow. The next day Darlene went to a doctor complaining of head, neck, knee, and foot pain. She eventually underwent surgeries on her neck and wrists and K-Mart objected that the surgeries were not causally connected to the accident in its store.

K-Mart argued 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. *Id.* ¶11.

The Court reasoned that the question is not whether the accident at K-Mart caused Beard injury, but rather whether injuries sustained 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. (Emphasis added.) (Citations omitted.) 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., 722 P.2d 819, 824 (Wash. Ct. App. 1986): 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. Beard, ¶16.

Other states have reached similar conclusions with regard to lay testimony. For example in Dodge-Farrar v. American Cleaning Services Company, Inc., 137 Idaho 838, 54 P.3d 954 (Idaho App. 09/11/2002), Ruth Dodge-Farrar injured her knee, ankle and back when she slipped on the defendant's floor. In considering Ruth's testimony regarding her fall and the injuries she sustained, the Idaho Court ruled: When alleged injuries are of a common nature and arise from a readily identifiable cause, there is no need for the injured party to produce expert testimony. Choi v. Anvil, 32 P.3d 1, 3 (Alaska 2001). Requiring expert testimony in all such cases would needlessly increase the cost of litigation, discourage injured persons from bringing small but legitimate claims, and also burden defendants who might feel compelled to hire their own experts in response. Id.

The Idaho Court reasoned, that a layperson may testify to the causation of medical symptoms or of injuries where such causation is within the usual and ordinary experience of the average person. For example, if a person fell down some steps, landing on a knee, and immediately thereafter felt pain in the knee, saw an open wound on the knee, and within minutes or hours observed that the knee was swelling, that lay

person could provide reliable testimony that the pain, wound and swelling were caused by the fall. A layperson could also testify that medical care obtained to treat those immediate symptoms was causally related to the fall. As the claimed symptoms and treatment become more separated in time from the fall, however, the causal relationship becomes more doubtful and tenuous, and expert testimony becomes necessary to establish causation. As time passes, the possibility that prior or subsequent injuries or unrelated disease processes may play a causal role makes lay opinion unreliable and inadequate to sustain a claim. Accordingly, lay testimony on causation must be limited to the symptoms which are proximate enough to the injury that lay opinion can be deemed competent and reliable. Just where within the time continuum the line must be drawn to exclude lay testimony is necessarily a decision committed to the trial court's discretion based upon the facts and circumstances of the particular case. In addition, even as to symptoms that appear immediately after the traumatic event, lay opinions may be foreclosed if the causation question is not a matter within the common knowledge and experience of the average person. Thus, in the foregoing hypothetical, a layperson might be precluded from testifying that a skin rash which appeared on her arms immediately after the fall was causally related to the fall.

Also, in *Byrd v. Delasancha*, 195 S.W.3d 834 (Tex.App. Dist.5 06/27/2006), the Texas Court set a similar standard. Byrd sustained soft-tissue injuries from an auto accident. Byrd did not offer expert medical testimony to support the causal relationship between the accident and the injuries. The Texas Court ruled that to establish causation in a personal injury case, a plaintiff must prove the conduct of the defendant caused an

event and that this event caused the plaintiff to suffer compensable injuries. See *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984). The causal nexus between the event sued on and the plaintiff's injuries must be shown by competent evidence. See *Morgan*, 675 S.W.2d at 732. Lay testimony is adequate to prove causation if general experience and common sense will enable a lay person to determine the causal relationship between the event and the condition with reasonable probability. See *Morgan*, 675 S.W.2d at 733; *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970); *Parker v. Employer's Mut. Liab. Ins. Co.*, 440 S.W.2d 43, 46 (Tex. 1969). In areas of common experience, a jury should generally be entitled to decide causation with or without medical testimony. See *Fid. & Guar. Ins. Underwriters, Inc. v. La Rochelle*, 587 S.W.2d 493, 496 (Tex. App.-Dallas 1979, writ dismissed). Generally, lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation. See *Morgan*, 675 S.W.2d at 733. In such cases, lay testimony can provide both legally and factually sufficient evidence to prove the causal relationship. See *Blankenship v. Mirick*, 984 S.W.2d 771, 775 (Tex. App.-Waco 1999, pet. denied). The fact that the testimony of causation comes from the injured party alone does not prevent it from having probative force if given credit by the jury. See *Fid. & Guar. Ins.*, 587 S.W.2d at 497. *Byrd*, supra 837-838.

Additional authorities

Choi v. Anvil, 32 P.3d 1, 3 (Alaska 09/07/2001) Our case law requires expert testimony only when the nature or character of a person's injuries require the special

skill of an expert to help present the evidence to the trier of fact in a comprehensible format. In *Houger v. Houger*, we considered an argument that an expert was necessary to establish that an injured worker was medically unfit for work. We rejected that argument, noting that "there are numerous . . . matters involving health and bodily soundness, not exclusively within the domain of medical science, upon which the ordinary experience of everyday life is entirely sufficient.. We have since affirmed this principle and required expert medical testimony to establish a causal connection only where there is no reasonably apparent (as distinguished from obvious) causal relationship between the event demonstrated and the result sought to be proved."

Additional references distinguished in *Beard*, *supra*, are relevant and contain similar statements regarding the admissibility of lay testimony:

In *Jordan v. Smoot*, 380 S.E.2d 714, 715 (Ga. Ct. App. 1989), 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 plaintiff testified that she visited a chiropractor the day of the accident and following the accident and that the 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). Beard, ¶14. In *Walton v. Gallbraith*, 166 N.W.2d 605, 606 (Mich. Ct. App. 1969), in *Walton*, the plaintiff sued the defendant for neck, back, and shoulder injuries caused by a car accident. See *id.* 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 . . . 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). Beard, ¶ 15.

In *Riggins v. Bechtel Power Corp.*, 722 P.2d 819, 824 (Wash. Ct. App. 1986), The Washington Court observed, when the results of an alleged act of negligence are within the experience and observation of an ordinary lay person, the trier of fact can draw a conclusion as to the causal link without resort to medical testimony. *Bennett; Sacred Heart Med. Ctr. v. Carrado*, 92 Wash. 2d 631, 600 P.2d 1015 (1979). Of course,

the injured person is competent to testify as to her past and present condition. The weight of such testimony is for the jury.

Therefore, contrary to Court's findings (A), (C), and (E), and the related conclusions (A), (B), and (C), above, that Linda could only testify that she descended the stairway and fell; that Linda fell without the physical intervention of any actor; and that Linda does not know where she fell, Linda is competent to testify according to Facts No. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15, 30, 31, 32, and 33, as stated above and taken from the record. These facts are within the scope of Linda's personal knowledge and are not based on any specialized knowledge or experience. These are facts that any victim of an accident could testify to as a lay witness. These facts provide factual support for the Plaintiffs' prima facie case for duty, breach, causation and damages.

Specifically, with respect to (C) Linda is competent to testify that her foot slipped off a defective metal nosing and she fell. And the Court did not rule out the possibility that the stairway was the cause of Linda's fall. (Record p. 924, Bench Trial Transcript, pp. 64-65) The argued dilemma facing the Court was which of two plausible arguments to accept: that the stairway caused the fall or Linda's pre-existing condition caused the fall. (id.) These alternatives will be addressed later.

With respect to finding (D) above, that "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", the Facts Nos. 20 and 21, above, are undisputed. Both Joseph Fox

and David Lawrence inspected the stairs after Linda's fall. Although neither individual was identified as an expert, both were competent to testify as lay witnesses to what they observed on the stairway and their conclusions, as long as their testimony was not based on specialized knowledge and training. For example, David could testify that the nosings were missing screws and not tight to the cement; that the nosing made noise when stepped on; that the nosings moved under foot; that the nosing were worn; that the edge of the nosings were worn down and allowed slipping if one had one's weight on them, and that the nosings were slicker than the cement. (See Addendum no. 12) These are observations any person could make when viewing the stairway. By the same standard, Joseph Fox could testify that he inspected the stairway and made similar observations as reported in his affidavit at Fact 20. Furthermore, Joseph demonstrated the general deterioration of the stairway by taking photographs of the steps, both in the vicinity of where Linda claims she fell and where the Defendant claims she fell, and when he lifted up one of the metal nosing to show that it was not attached to the stairway. Accordingly, both David and Joseph are competent to testify as to what they observed and reported concerning the condition of the stairway. These facts are direct and circumstantial evidence of the defective condition of the stairway and of location where Linda fell and support the Plaintiffs' prima facie case for duty, breach, and causation. The importance of these observations is heightened by the fact that shortly after Linda's fall, the Defendant destroyed all evidence of the condition of the stairway at the time of Linda's fall. (Fact No. 19)

Furthermore, Plaintiffs' subpoenaed witnesses William Trapp, George Talbott, Wayne Lott, Ed Cozzens, Jon Overman, and Kendall Wilson, see Fact Nos. 16, 17, 18, 26, all employees or agents of the Defendant, could give further testimony concerning the condition of the stairs before Linda fell on them as well as the Defendant's knowledge of the dangerous conditions on the stairway and the Defendant's attempts to repair and ultimately to rebuild the stairway. The documentary and oral testimony provided by these witnesses supports the Plaintiffs' prima facie case for duty, breach, and causation, including notice to the Defendant of the defective conditions on the stairway and the reasonableness of the Defendant's attempts to repair the stairway.

The Plaintiffs agree with the Court's finding (B) above. However, the Plaintiffs contend that given the clear weight of the evidence that Linda's pre-existing condition did not adversely affect her life style, that the stairs were in disrepair, and that a defective metal nosing caused Linda to fall, shifted the burden to the Defendant to come forward with expert testimony ruling out the probability that the defective metal nosing was not the cause of her fall and that her fall was caused by her pre-existing condition. Defendant's unadorned assertion that Linda's knee was the cause of her fall is merely a technically hypothetical assertion without the foundation of expert testimony and does not require rebutting evidence from the Plaintiffs.

As noted earlier, the Court identified two plausible causes for the Linda's fall: the defective stairway or her pre-existing condition. The Court ruled that she carried the burden of proving that her condition was not the cause of her fall. (Record p. 924,

Trial Transcript pp. 65-66)

The only evidence before the Court that Linda's pre-existing condition was the cause of her fall was her alleged statement to the EMTs that her leg gave out and her acknowledgment that she had an arthritic knee. See Fact Nos. 1, 7, 8, and 9.

The fact that Linda had an arthritic knee is not evidence that her knee caused her to fall. There was no evidence before the Court that an arthritic knee could cause a person to fall, especially a person who had not fallen before and who led an active life style which included daily exercise, use of stairs, and working two part-time employments which required standing and lifting loads up to 60 pounds. Furthermore, her statement, if she made it at all, to the EMTs was inadmissible under Utah Code §78-27-33, as amended.

Proximate cause is generally defined as "that cause which, in natural and continuous sequence, (unbroken by an 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." *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)); accord *Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 486 (Utah App. 1991), *aff'd*, 862 P.2d 1342 (Utah 1993).

In the case of *Alder v. Bayer Corp.*, 61 P.3d 1068, 2002 UT 115, ¶¶ 87-88 (Utah 11/26/2002), the Utah Supreme Court citing *Zuchowicz v. United States*, 140 F.3d 381,

389-391 (2d Cir. 03/20/1998), ruled who bears the causal burden that "[I]t is well established that causation 'may be proved by circumstantial evidence,' . . . Drawing upon opinions of Chief Judge Cardozo in New York and Chief Justice Traynor in California, the court concluded: [I]f (a) a negligent act was deemed wrongful because that act increased the chances that a particular type of accident would occur, and (b) a mishap of that very sort did happen, this was enough to support a finding by the trier of fact that the negligent behavior caused the harm. Id. at 390. The court further noted that "[w]here such a strong causal link exists, it is up to the negligent party to bring in evidence denying but for cause and suggesting that in the actual case the wrongful conduct had not been a substantial factor." Id. at 390-91. In the instant case, AGFA's safety specifications mandated ten complete room air exchanges per hour precisely to reduce the risk of toxic chemical exposure. The alleged harm occurred in the absence of adequate air exchange. Under the reasoning of *Zachowicz*, this alone is sufficient to support causation and AGFA bears the burden of refuting the presumption of "but for" causation.

Individuals routinely feel the effects of a wide array of common phenomena whose mechanisms remain unexplained by science, including, for example, the law of gravity, the nature of light, the source of personality, and the process of cell differentiation. If a bicyclist falls and breaks his arm, causation is assumed without argument because of the temporal relationship between the accident and the injury. The law does not object that no one measured the exact magnitude and angle of the forces

applied to the bone. Courts do not exclude all testimony regarding the fall because the mechanism of gravity remains undiscovered. Legally, an observable sequence of condition ----> event ----> altered condition, has been found sufficient to establish causation even when the exact mechanism is unknown. Therefore, we hold that Technicians enjoy the same opportunity to prove that which they can, as do the victims of more prosaic injuries. Alder, ¶ 88.

The Plaintiffs do not have to eliminate all possible causes for Linda's fall. In Williams v. KFC National Management Co., 391 F.3d 411, 422 (2d Cir. 2004) (Calabresi, J., concurring) the New York Court found that Williams was injured when she slipped and fell on a greasy sidewalk. She claimed the grease came from a KFC dumpster that crossed the sidewalk. There was only circumstantial evidence that the grease came from the dumpster. Under New York law, Williams was not required to adduce the most reasonable explanation for the accident, nor was she required to eliminate all other possible causes for her fall. To establish a prima facie case of negligence based wholly on circumstantial evidence, "[i]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." The law does not require that plaintiff's proof "positively exclude every other possible cause" of the accident but defendant's negligence. Rather, her proof must render those other causes sufficiently "remote" or "technical" to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence.

Linda's fall on the stairs, her broken leg, and the medical treatment she received was one continuous event, or following the reasoning of Zachowicz: the Defendant had allowed its stairway to fall into disrepair increasing the likelihood that someone would fall. In fact over a period of eight months at least two people fell on the stairs. (Fact Nos. 3 and 33) When Linda started down the stairs her leg wasn't broken, while on the stairs she slipped and fell on a dangerous step, after she fell her leg was broken, and she immediately received medical treatment. The causal relationship linking her fall with her broken leg and the consequent medical treatment are all temporally connected and well within the common knowledge and experience of a lay person, as such they do not require expert testimony to link them together, and the plaintiffs should be allowed to so testify. Furthermore, because of the strong causal link between the defective conditions on the stairway, her fall and the injuries she suffered, the burden is on the Defendant to "bring in evidence denying but for cause and suggesting that in the actual case the wrongful conduct had not been a substantial factor." (Alder, *supra*, ¶86)

Applying the foregoing facts and rules to the Conclusions of Law, the Trial Court erred in concluding that no witness could testify as to the condition of the stairs. The Court based this conclusion solely on the fact that the Plaintiffs were not going to call an expert witness. But, as pointed out earlier, the Plaintiffs and well as the Plaintiffs' subpoenaed witnesses were all competent to testify as to the condition of the stairs. Also, the conclusion that no witness could testify that the stairs were dangerous is in error. It is common knowledge that a person can slip and fall on a worn and unsound surface, especially in the absence of hand rails. The factual and legal conclusion that

the stairs were dangerous was for the Court to decide once it heard the evidence, and the Plaintiffs were entitled to produce their evidence using lay testimony. It was then up to the Defendant to come forward with evidence that the stairs were not the proximate cause of the Plaintiff's injuries.

With respect to medical damages, the plaintiffs are competent to testify to medical expenses that they paid from their personal knowledge. Again the only basis for the Court's finding and conclusion in this regard, Conclusion (D), above, was the absence of expert testimony. The Utah Court of Appeal has decided in Stevenett v. Wal-Mart Stores Inc., 977 P.2d 508, 1999 UT App 80, ¶31, that expert testimony is not required to lay a foundation for medical bills and that the Plaintiffs were competent to do so, especially where the Plaintiffs had paid the bills. The Court found that payment was some evidence that the charges were reasonable and necessary.

Utah Code §78-27-33

The Trial Court held that Utah Code §78-27-33, as amended, was impliedly repealed because it conflicted with Rule 803(4), Utah Rules of Evidence. (Record 924, Bench Trial Transcript, pp. 53-55, 63-64). In the Court's order, however, the Defendant changed the ruling to apply the court's reasoning to Rule 801(2), (Record 911-907) which was not argued before the court. The Plaintiffs assume that the Court was made aware of this change when it signed the order. Therefore, in the interests of expediency, the Plaintiffs present their arguments in relation to Rule 801(2).

In *Board of Education of Jordan School District v. Sandy City Corp.*, 94 P.3d 234, 2004 UT 37, ¶ 9 (Utah 05/04/2004), the Utah Supreme Court set forth certain rules for determining whether a statute was impliedly repealed.

Pursuant to our rules of statutory construction, we look first to the statute's plain language to determine its meaning. *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶21, 63 P.3d 705. "We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12, ¶17, 66 P.3d 592; see also *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) ("[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful." (citation and quotation omitted)); *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) ("[T]erms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion." (citation and quotation omitted)); *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991) ("It is our duty to construe each act of the legislature so as to give it full force and effect. When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to be in harmony and avoid conflicts."). In addition, "[i]t is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result." *State ex rel. Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) (citations omitted).

Utah Code §78-27-36, provides that the rights provided by this act are intended

to be in addition to, and not in lieu of, any rights of rescission, rules of evidence, or provisions otherwise existing in the law.

The intent of the Legislature in enacting subsection 33 is expressed in subsection 36 and shows that subsection 33 was not intended to conflict with the rules of evidence. The Legislature amended subsection 33 in 1998 to change "law enforcement officer" to "peace officer". It is clear from that amendment that in 1998, the Legislature did not deem the statute to be impliedly repealed by the order of the Supreme Court on September 10, 1985, as decided by the Trial Court. (Record, p. 909) I believe that it is safe to assume that legislative counsel was aware of the Supreme Court's order.

When subsection 33 is read in conjunction with Rule 801(2) it is clear that subsection 33 is foundational and not inconsistent and speaks to a policy that favors an injured person who may be at a disadvantage before her potential opponent. The subsection merely lays a foundation on which certain statements are admissible as a policy of law.

Rule 801(2) provides in part that a statement is not hearsay if 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... .

An injured person's statement is not admissible under the rule, not because it would or would not be hearsay, but because as a matter of policy, a person under the

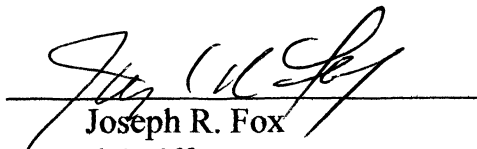
stress of an injury should not be held to statements she may make to a potential opposing party. The rule helps level the playing field. The rule errors in favor of the injured party, who at the time, may be at the mercy of the opposing party or its agents. The rule is limited in scope so that once the injured party has regained her senses, she can be held to statements against her interest on the same playing field as any other person. Subparagraph (B) by its terms provides for an adoption of the statement. Subsection 33 provides the method for implementing subparagraph (B).


Furthermore, §§ 78-27-32, 34, 35, and 36 and illustrative of this public policy in protecting injured persons from potentially aggressive opponents.

Conclusion

In conclusion, the Plaintiffs are competent to testify to facts within their personal knowledge and to conclusions based thereon that do not require expertise. Under this standard, the Plaintiffs can establish a prima facie case for causation and damages contrary to the findings and conclusions of the Trial Court. Therefore, the Plaintiffs pray that the Court of Appeal set aside the Trial Court's judgment of dismissal and remand the this case for trial.

Dated, April 13, 2007


Joseph R. Fox
Plaintiff


Linda A. Fox
Plaintiff

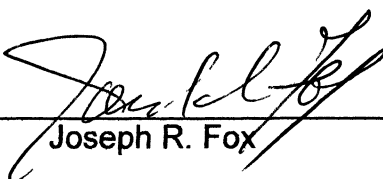
ADDENDUM

Document Title	Document No.
Judgment of Dismissal with Prejudice	1
Findings of Fact and Conclusions of Law	2
Order Denying Plaintiffs' Objections to Testimony	3
Wayne Lott email to Tom Oveson	4
Cost Estimate	5
BYU Short Form Contract	6
Supervisor's Report of Accident	7
Utah EMS Incident Report	8
Defendant's Answers to Plaintiffs' Request for Admissions ..	9
Defendant's Answers to Plaintiffs' Interrogatories	10
Summary of Charges and Payments	11
Claim Detail with Notes	12

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Appellants Brief was mailed by first class mail this date to the following: Thomas W. Seiler, Attorney for Defendant, PO Box 1266, 2500 North University Avenue, Provo, Utah 84603-1266.

Dated: April 13, 2007



Joseph R. Fox

COPY

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

12/12/06 WDT Deputy

Thomas W. Seiler, #2910
Lori D. Huntington #6252
ROBINSON, SEILER & ANDERSON, LC
Attorneys for Defendant
80 North 100 East
PO Box 1266
Provo, Utah 84603-1266
Telephone: (801) 375-1920
Facsimile: (801) 377-9405

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

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 Dec, 2006.

BY THE COURT:

/S/ FRED D. HOWARD

JUDGE FRED D. HOWARD
Fourth District Court

COPY

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

12/12/06 MDT Deputy

Thomas W. Seiler, #2910
Lori D. Huntington #6252
ROBINSON, SEILER & ANDERSON, LC
Attorneys for Defendant
80 North 100 East
PO Box 1266
Provo, Utah 84603-1266
Telephone: (801) 375-1920
Facsimile: (801) 377-9405

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

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

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 Dec, 2006.

BY THE COURT:

/S/ FRED D. HOWARD

JUDGE FRED D. HOWARD
Fourth District Court

Approved as to form:

LINDA A. FOX -- Plaintiff

JOSEPH R. FOX -- Plaintiff

COPY

FILED

Fourth Judicial District Court
of Utah County, State of Utah

12/12/06 WMA Deputy

Thomas W. Seiler, #2910
Lori D. Huntington #6252
ROBINSON, SEILER & ANDERSON, LC
Attorneys for Defendant
80 North 100 East
PO Box 1266
Provo, Utah 84603-1266
Telephone: (801) 375-1920
Facsimile: (801) 377-9405

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.

916

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

910

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).

///

///

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 Dec, 2006.

BY THE COURT:

/S/ FRED D. HOWARD

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

Kristy Thomas

Tom Oveson

From: <wayne.lott@byu.edu>
To: <phpwo@byu.edu>
Sent: Monday, August 25, 2003 9:50 AM
Subject: Work Request

Description: Evaluate how to repair front step plates. Loose metal nose plates are dangerous. Had employee fall Friday, August 22 and break his arm after his shoe heel hooked on metal plate.

After estimate is approved make necessary repairs.

AcctNumber: 12 210020 6230

CustRef#:

BldgLoc: HCEB

RoomLoc: Front steps

Requestor: Wayne Lott


ReqPhone: 84147

ReqAddress: 396 HCEB

DepCol: Division of Cont Educ

ColRepName: Bauer, Gary

AcctAuth: Wayne J. Lott



8/25/2003



COST ESTIMATE

Facilities Planning Department

Job Description	Work Order Number	W2627
REPAIR FRONT STEP PLATES	Building	HCEB
OPTION 1 OVERLAY EXISTING STEPS AND ADD RAILINGS	Designer	PAUL REESE
	Estimator	CLARENCE VELLINGA
	Date Prepared	Dec 5 2003 <i>CRV</i>

Note This is an estimate only you will be billed the actual costs Any variance from the scope as listed will alter the cost All scope changes will require approval

DESCRIPTION	TOTAL
SCOPE. OVERLAY EXISTING STEPS WITH 4" OF CONCRETE AND INSTALL RAILING TO MEET CODE WORK TO BE DONE BY CONTRACTOR FOR QUESTION OR DETAILS CONTACT PAUL REESE AT 2-5552	
CONTRACTOR COSTS	\$43,940 00
DESIGN CONTINGENCY	\$4 390 00
BYU INVOLVEMENT	
INSPECTION FEE	\$1,320 00
GROUNDS	\$750 00

APPROVALS <i>[Signature]</i> 2/9/04 Requestor Date <i>[Signature]</i> 2/9/04 College Representative Date <i>[Signature]</i> 2-9-04 Dean/Executive Director Date <i>[Signature]</i> 2/10/04 Vice President Date	SUB-TOTAL \$50,400 00 PLANNING COSTS \$2 520 00 TOTAL ESTIMATED COST \$52,920 00	SOURCE OF FUNDING Account Number <input checked="" type="checkbox"/> Department Pays 12310020 6230 <input type="checkbox"/> Retained Earnings <input type="checkbox"/> College Projects <input type="checkbox"/> Other
---	---	--

BRIGHAM YOUNG UNIVERSITY
PHYSICAL PLANT DEPARTMENT
237 BRWB, PROVO, UT 84602

SHORT FORM CONTRACT NO. 5332

To Overman Concrete
1675 North 1820 West
Provo, UT 84604

Contract Date 19 April 2004
Project No C4503616-1665-00300
Work Order No W-2627

(Hereinafter called "Contractor")

Brigham Young University of Provo, UT (hereinafter called "Owner") engages the contractor to perform and complete the following described work, on the terms and subject to the conditions hereafter set forth (including the Contract documents identified below):

A. IDENTIFICATION OF CONTRACT DOCUMENTS: Furnish all labor and materials to do the work as contained in the plans and specifications entitled "**HCEB - West Stairs Upgrade**" dated 23 March 2004, and prepared by Brigham Young University Planning Department. The Church of Jesus Christ of Latter-day Saints Brigham Young University Standard Contract Requirements are a part of this contract.

B. COMPENSATION:

Total compensation for the above work shall be \$44,495.00

C. TIME OF COMPLETION:

The work shall be completed on or before 25 May 2004


D. OWNER'S REPRESENTATIVE IS :

Edwin Cozzens

E. CONTRACTOR'S REPRESENTATIVE IS:

Jon Overman

The Contractor agrees to perform the work covered by this Contract and to comply with and be bound by all of the terms and conditions contained in the Contract Documents.


BRIGHAM YOUNG UNIVERSITY

4/26/04
DATE


CONTRACTOR

4/22/04
DATE

DISTRIBUTION

1. Legal counsel
2. Contractor
3. PhP Accounting
4. Financial Services

THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS
CHURCH EDUCATIONAL SYSTEM
CONTRACT

Risk Management & Safety Dept.
SUPERVISOR'S REPORT OF ACCIDENT
 (For all BYU Personnel)

FOR OFFICE USE ONLY	
ENTERED <u>2003 0815739</u>	Case No
Dates (21 days) _____ (45) _____	
<input type="checkbox"/> NO DOCTOR	<input type="checkbox"/> EXPOSURE <input type="checkbox"/> DENIED
<input checked="" type="checkbox"/> APPROVED	Auth Init <u>SWC</u>

THE RECEIPT OF THIS REPORT IS NOT AN ADMISSION OF LIABILITY

EMPLOYEE: The pink copy of this form is provided for your information and personal file. SEE REVERSE SIDE FOR ADDITIONAL WORKERS' COMPENSATION INFORMATION.

Full Name of Injured/Ill Individual GEORGE J. TALBOT Date of Birth 31 Jan 1940
 Local Address 2421 N. 750 E Provo UT 84604 Telephone 801-375-1380 8-7159
 (Street & Number) (City) (State) (Zip) (Home) (Work Ext)
 Social Security Number 528-54-0862 Marital Status M Age 63 Sex M
 No. of Minor Dependents under 18 yrs. old 0 Job Title DIRECTOR - BYU TRAVEL STUDY
 Date Hired at BYU 1 Sept 1973 OR Approx. Length of Service at BYU 30 ☐ Days ☐ Weeks ☐ Months ☒ Years
 Department TRAVEL Study - Cont. Educ. Name of Supervisor Wayne J. Lott
 (Department or division where individual is regularly employed) (Please Print)
 Name of Health Insurance Company DMBA Name of Personal Physician Robert W. Taylor

★ MEDICAL INFORMATION AUTHORIZATION ★

I AUTHORIZE THE BYU RISK MANAGEMENT & SAFETY DEPT. TO OBTAIN OR RELEASE INFORMATION RELATING TO THIS CLAIM.
 I UNDERSTAND, AGREE AND CONSENT THAT THIS AUTHORIZATION SHALL REMAIN IN EFFECT INDEFINITELY.

A photocopy of this authorization shall be accepted as granting the same authority as the signed original.

George J. Talbot 25 August 2003
 Individual's Signature Date

 Witness of Signature

NOTE: FAILURE TO COMPLETE ALL SECTIONS OF THIS FORM DELAYS CLAIM REVIEW AND/OR PAYMENT OF BENEFITS

Accident: Date 22 Aug 2003 Day of Week Friday Hour of Day 6:10 ☐ AM ☒ PM Hour Shift Began 8:00 ☐ AM ☒ PM
 Location of Accident or Exposure West stairs of the Herman Conference Center Bldg
 (Building, room, parking lot, off-campus address, etc)
 How Did the Accident Occur? _____
 (Name the chemical which irritated skin, identify the object and weight being lifted, pulled, etc)

Check (✓) all below that apply: <input type="checkbox"/> ACT OF OTHER THAN INJURED <input type="checkbox"/> DEFECTIVE EQUIPMENT / MATERIALS <input type="checkbox"/> EXPOSURE TO PHYSICAL AGENTS (Envir Heat, Low Temp, Plants, Insects, etc) <input type="checkbox"/> HORSEPLAY <input type="checkbox"/> IMPROPER PROCEDURES / INSUFFICIENT TRAINING	<input type="checkbox"/> IMPROPER / LACK OF PROTECTIVE EQUIPMENT -WAS SAFETY APPAREL / EQUIPMENT PROVIDED? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> MEDICAL CONDITION <input type="checkbox"/> POOR HOUSEKEEPING / MAINTENANCE <input type="checkbox"/> UNSAFE ACT BY INDIVIDUAL
--	---

Describe the Injury or Illness in Detail and Indicate the Body Part(s) Affected Heel tap Caught in metal Ridge on stairs - Fell Head Long Down the stairs - Broke right Arm

Did Individual Receive Medical Care? Yes X No _____ (Check ✓) Health Center _____ Hospital ✓ X-Rays

Attending Physician's Name Ron Baird / Todd Seamus Referred to: Specialist's Name _____

Did Individual Lose Any Work Time Due to the Accident (other than the shift in which accident occurred)? Yes _____ No Not Yet

If Yes, Date Individual Left Work _____ and Date Returned to Work _____

Number of Hours Individual Works Per Day _____ Number of Days Individual Works Per Week _____

Check (✓) Part-time ☐ Full-time. Staff ☐ Admin ☒ Faculty ☐ Wage of Salary \$ _____ ☐ Hour ☐ Day ☐ Month ☐ Year
 (receives benefits) (including room and board)

25 August 2003 398 HCEB 1 8 4147
 (Date accident was reported to supervisor) (Full Time Supervisor's Signature) (Campus address) (Phone extension)
25 August 2003
 (Date supervisor filled out report)

NOTICE: IMMEDIATELY REPORT ALL FATALITIES, SERIOUS INJURIES AND OCCUPATIONAL ILLNESSES TO RISK MANAGEMENT & SAFETY DEPT.; REPORT MINOR INJURIES WITHIN 24 HOURS.

Distribution: White, Risk Management & Safety Dept., Yellow, Health Center/Hospital, Blue, Supervisor, Pink, Injured/Ill Individual

Visitor
transport

WHITE - Provider
CANARY - EMS Office
PINK - Hospital

UTAH EMS INCIDENT REPORT

Bureau of Emergency Medical Services, Utah Department of Health

NO 001050

Service Number: 268210		District Code: 001		Incident Date: 11/2/04		Incident Time: 13:26	
Incident Street Location: Harmon Blvd		City: Bldg		Location: 6		Patient Source: 005	
Dispatch Date:		Incident Reported Time:		Dispatch Notified Time:		Arrived At Patient Time:	
Left Scene Time:		Arrived Destination Time:		Back In Service Time:		PM/EMT Number:	
Response / Transport:		Bodily Fluids Exposure:		CPR Information:		Safety Equipment Usage:	
To Scene: <input type="checkbox"/> Lights / Siren <input checked="" type="checkbox"/> Silent Run		Exposure: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Was CPR initiated prior to EMS Arrival? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Safety equipment usage? (Seat belt, helmet, etc) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
From Scene: <input type="checkbox"/> Lights / Siren <input checked="" type="checkbox"/> Silent Run		Types:		By Whom? <input type="checkbox"/> Citizen <input checked="" type="checkbox"/> 1st Responder		Reason:	
Patient Last Name: Fox		Responsible Party:		Telephone Number:		Odometer Readings:	
Street Address: 5723 17504		Street Address:		Telephone Number:		Beginning:	
City: Spanish Fork		City:		Telephone Number:		At Scene:	
State: UT		State:		Telephone Number:		Ending:	
Zip Code:		Zip Code:		Telephone Number:		Billable Miles:	
Telephone Number: 801-748-3635		Primary Insurance Number:		Group Insurance Number:			
Social Security Number: 546-82-3515		Medicare Number:		Medical Number:			
Sex: F		Current Medications:		Allergies:			
Date of Birth: 06/10/48		Allergies: None					
Chief Complaint: Injured knee due to fall on stairs							
Past Medical History: No cardiac in knee due to arthritis							
Narrative: Knee went out as patient was going down stairs. Upon arrival, knee was obviously swollen and deformed. Patient said she fell down only one stair and was moving so we immediately ruled out spine injury. Knee and leg were unable to be moved by patient. Upon palpation, pain was indicated just under knee and deformity on both sides of leg were noted. A vacuum splint was applied and patient was given a ride to the UVMC-ER.							
REVISED TRAUMA SCORE		GLASGOW COMA Scale		Vitals		Time	
RESPIRATORY RATE		Eyes Open		Initial		Pulse: 86	
NUMBER OF RESPIRATIONS IN 15 SECONDS MULTIPLY BY 4		To Pain		Repeat		Blood Pressure: 14	
10-29		Verbal Response		Repeat		Temperature: 99.0	
2-29		No response		Skin Condition			
3-29		Incoherent response		Skin Color			
4-29		Obeisance		L. Motor Function			
5-29				R. Motor Function			
6-29				Sensory			
7-29				Pulse			
8-29				ECG			
9-29				Rhythm			
10-29				Code			
11-29				Modifications Given			
12-29				Time			
13-29				Dose			
14-29				Code			
15-29							
16-29							
17-29							
18-29							
19-29							
20-29							
21-29							
22-29							
23-29							
24-29							
25-29							
26-29							
27-29							
28-29							
29-29							
30-29							
31-29							
32-29							
33-29							
34-29							
35-29							
36-29							
37-29							
38-29							
39-29							
40-29							
41-29							
42-29							
43-29							
44-29							
45-29							
46-29							
47-29							
48-29							
49-29							
50-29							
51-29							
52-29							
53-29							
54-29							
55-29							
56-29							
57-29							
58-29							
59-29							
60-29							
61-29							
62-29							
63-29							
64-29							
65-29							
66-29							
67-29							
68-29							
69-29							
70-29							
71-29							
72-29							
73-29							
74-29							
75-29							
76-29							
77-29							
78-29							
79-29							
80-29							
81-29							
82-29							
83-29							
84-29							
85-29							
86-29							
87-29							
88-29							
89-29							
90-29							
91-29							
92-29							
93-29							
94-29							
95-29							
96-29							
97-29							
98-29							
99-29							
100-29							
101-29							
102-29							
103-29							
104-29							
105-29							
106-29							
107-29							
108-29							
109-29							
110-29							
111-29							
112-29							
113-29							
114-29							
115-29							
116-29							
117-29							
118-29							
119-29							
120-29							
121-29							
122-29							
123-29							
124-29							
125-29							
126-29							
127-29							
128-29							
129-29							
130-29							
131-29							
132-29							
133-29							
134-29							
135-29							
136-29							
137-29							
138-29							
139-29							
140-29							
141-29							
142-29							
143-29							
144-29							
145-29							
146-29							
147-29							
148-29							
149-29							
150-29							
151-29							
152-29							
153-29							
154-29							
155-29							
156-29							
157-29							
158-29							
159-29							
160-29							
161-29							
162-29							
163-29							
164-29							
165-29							
166-29							
167-29							
168-29							
169-29							
170-29							
171-29							
172-29							
173-29							
174-29							
175-29							
176-29							
177-29							
178-29							
179-29							
180-29							
181-29							
182-29							
183-29							
184-29							
185-29							
186-29							
187-29							
188-29							
189-29							
190-29							
191-29							
192-29							
193-29							
194-29							
195-29							
196-29							
197-29							
198-29							
199-29							
200-29							
201-29							
202-29							
203-29							
204-29							
205-29							
206-29							
207-29							
208-29							
209-29							
210-29							
211-29							
212-29							
213-29							
214-29							
215-29							
216-29							
217-29							
218-29							
219-29							
220-29							
221-29							
222-29							
223-29							
224-29							
225-29							
226-29							
227-29							
228-29							
229-29							
230-29							
231-29							
232-29							
233-29							
234-29							
2							

David B. Thomas (3228)
Attorney for Defendants
Brigham Young University
A-350 ASB
P. O. Box 21333
Provo, UT 84602-1333
Telephone: (801) 422-4722

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

Joseph R. Fox and Linda A. Fox,	:	DEFENDANT'S ANSWERS
	:	TO PLAINTIFFS' FIRST REQUEST
Plaintiffs,	:	FOR ADMISSIONS
vs.	:	
Brigham Young University,	:	
a Utah Corporation	:	Case No. 040401488
	:	Judge Taylor
Defendants.	:	

Pursuant to Rule 36 of the Utah Rules of Civil Procedure, Defendant, Brigham Young University provides the following responses to Plaintiffs' First Request for Admission.

GENERAL OBJECTION

Defendant objects to Plaintiffs' First Request for Admission, generally and so far as it seeks admissions or responses which is privileged, not relevant to the subject matter involved in the pending action, does not relate to a claim or defense in the pending action, or is not reasonably calculated to lead to the discovery of admissible evidence. In addition, defendant generally objects to the plaintiffs' request in so far as they are unduly burdensome and vexatious and they seek specificity beyond that which is required under the rules of discovery.

Without waiving the general objection stated herein, the defendant responds to the plaintiffs' requests as follows:

REQUEST FOR ADMISSIONS

REQUEST NO. 1: Admit that, on and before April 20, 2004, the defendant was and is the sole and exclusive owner and operator of the Harmon Building and Conference Center on the campus of BYU.

RESPONSE TO REQUEST NO. 1: Admitted

REQUEST NO. 2: Admit that the photograph in the upper left-hand corner of Exhibit A attached to the complaint on file herein depicts the west stairway of the Harmon Building and Conference Center as the west stairway appeared on or about April 20, 2004.

RESPONSE TO REQUEST NO. 2: Denied.

REQUEST NO. 3: Admit that the west stairway of the Harmon Building and Conference Center referred to in the preceding Request was, on or about April 20, 2004, intended for the use of patrons entering and leaving the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 3: Denied.

REQUEST NO. 4: Admit that on and before April 20, 2004, the west stairway adjacent the west doors at the Harmon Building and Conference Center, as depicted in Exhibit A attached to the complaint on file herein, was used by patrons of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 4: Denied

REQUEST NO. 5: Admit that tickets to Women's Conference were being sold in the Harmon Building on April 20, 2004.

RESPONSE TO REQUEST NO. 5: Admitted.

REQUEST NO. 6: Admit that the plaintiff Linda A. Fox purchased a ticket to Women's Conference in the Harmon Building on April 20, 2004.

RESPONSE TO REQUEST NO. 6: Denied.

REQUEST NO. 7: Admit that the plaintiff Linda A. Fox was a business invitee of the defendant when she descended the west stairway of the Harmon building after purchasing a ticket to Women's Conference on April 20, 2004.

RESPONSE TO REQUEST NO. 7: Denied.

REQUEST NO. 8: Admit that the plaintiff Linda A. Fox was found injured on the west stairway of the Harmon Building and Conference Center by the defendant's employees on April 20, 2004.

RESPONSE TO REQUEST NO. 8: Admitted.

REQUEST NO. 9: Admit that the plaintiff Linda A. Fox was found injured on the west stairway of the Harmon Building and Conference Center by the defendant's employees on April 20, 2004 after purchasing a ticket to Women's Conference.

RESPONSE TO REQUEST NO. 9: Denied.

REQUEST NO. 10: Admit that the plaintiff Linda A. Fox fell on the west stairway of the Harmon Building and was injured after purchasing a ticket to Women's Conference on April 20, 2004.

RESPONSE TO REQUEST NO. 10: Denied.

REQUEST NO. 11: Admit that on April 20, 2004, one or more of the defendant's employees inquired of the plaintiff Linda whether she had fallen on the west stairway.

RESPONSE TO REQUEST NO. 11: Admitted.

REQUEST NO. 12: Admit that on April 20, 2004, one or more of the defendant's employees

were informed that the plaintiff Linda had fallen and was injured on the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 12: Admitted.

REQUEST NO. 13: Admit that on April 20, 2004, defendant's employees from the Harmon Building and Conference Center called the defendant's EMT personnel to come to the aid of the plaintiff Linda.

RESPONSE TO REQUEST NO. 13: Denied.

REQUEST NO. 14: Admit that on April 20, 2004, one or more of defendant's employees from the Harmon Building and Conference Center spoke with the plaintiff Linda after she had fallen on the west stairway.

RESPONSE TO REQUEST NO. 14: Admitted.

REQUEST NO. 15: Admit that before April 20, 2004, one or more persons have been injured while using the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 15: Denied.

REQUEST NO. 16: Admit that before April 20, 2004, an employee of the defendant had been injured while using the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 16: Denied.

REQUEST NO. 17: Admit that on April 20, 2004, the defendant's EMT personnel came to the aid of the plaintiff Linda after she had fallen on the west stairway.

RESPONSE TO REQUEST NO. 17: Denied.

REQUEST NO. 18: Admit that on April 20, 2004, the plaintiff Linda had informed employees of the defendant that she had fallen and been injured on the west stairway of Harmon Building

and Conference Center.

RESPONSE TO REQUEST NO. 18: Admitted.

REQUEST NO. 19: Admit that on April 20, 2004, the defendant's EMT personnel put a splint, or other device, on the plaintiff Linda's right leg.

RESPONSE TO REQUEST NO. 19: Denied.

REQUEST NO. 20: Admit that on April 20, 2004, the defendant's EMT personnel made a written report regarding the services rendered the plaintiff Linda.

RESPONSE TO REQUEST NO. 20: Denied.

REQUEST NO. 21: Admit that on April 20, 2004, the defendant's EMT personnel, or some other employee, placed a notice on the plaintiff Linda's vehicle which was parked in the 60 minute parking adjacent the west stairway.

RESPONSE TO REQUEST NO. 21: Denied.

REQUEST NO. 22: Admit that the notice referred to in the preceding Request stated that the plaintiff Linda had broken her leg.

RESPONSE TO REQUEST NO. 22: Denied.

REQUEST NO. 23: Admit that on April 20, 2004, the defendant's EMT personnel treated the plaintiff Linda for a broken leg.

RESPONSE TO REQUEST NO. 23: Denied.

REQUEST NO. 24: Admit that on April 20, 2004, the defendant's EMT personnel transported the plaintiff Linda to the Emergency Room at Utah Valley Regional Medical Center.

RESPONSE TO REQUEST NO. 24: Denied.

REQUEST NO. 25: Admit that on April 20, 2004, the defendant's EMT personnel were

informed by hospital personnel that the plaintiff Linda had a broken leg.

RESPONSE TO REQUEST NO. 25: Denied.

REQUEST NO. 26: Admit that on or about April 23, 2004, the defendant's EMT personnel, who had come to the aid of Linda on the west stairway, visited Linda in her hospital room seeking to recover the splint they had used to immobilize her right leg.

RESPONSE TO REQUEST NO. 26: Denied.

REQUEST NO. 27: Admit that on April 20, 2004 the west stairway of the Harmon Building and Conference Center where the plaintiff was found by the defendant's employees was in disrepair.

RESPONSE TO REQUEST NO. 27: Denied.

REQUEST NO. 28: Admit that on April 20, 2004, the defendant owed a duty to the plaintiff Linda to use ordinary care in maintaining the west stairway in good repair.

RESPONSE TO REQUEST NO. 28: Denied.

REQUEST NO. 29: Admit that on April 20, 2004, the defendant owed a duty to the plaintiff Linda to inspect the west stairway for defects and to repair the defects or to warn the plaintiff Linda of the defects.

RESPONSE TO REQUEST NO. 29: Denied.

REQUEST NO. 30: Admit that on or before April 20, 2004, the defendant failed to repair the defects in the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 30: Denied.

REQUEST NO. 31: Admit that on April 20, 2004, the defendant did not inform the plaintiff Linda of any defects in the west stairway.

RESPONSE TO REQUEST NO. 31: Admitted.

REQUEST NO. 32: Admit that on April 20, 2004, the defendant did not warn the plaintiff Linda not to use the west stairway.

RESPONSE TO REQUEST NO. 32: Admitted.

REQUEST NO. 33: Admit that on April 20, 2004, the defendant was negligent in its duty to maintain the west stairway in a reasonably safe condition.

RESPONSE TO REQUEST NO. 33: Denied.

REQUEST NO. 34: Admit that on April 20, 2004, that a defective condition on the stairway of the Harmon Building and Conference Center was the proximate cause of the plaintiff Linda's injuries.

RESPONSE TO REQUEST NO. 34: Denied.

REQUEST NO. 35: Admit that on and before April 20, 2004, the steps of the west stairway of the Harmon Building and Conference Center were deteriorating.

RESPONSE TO REQUEST NO. 35: Denied.

REQUEST NO. 36: Admit that on April 20, 2004, the steps of the west stairway were fitted with metal nosings.

RESPONSE TO REQUEST NO. 36: Denied.

REQUEST NO. 37: Admit that on and before April 20, 2004, the concrete surface underneath the metal nosings of the steps of the west stairway of the Harmon Building and Conference Center was decaying.

RESPONSE TO REQUEST NO. 37: Denied.

REQUEST NO. 38: Admit that on and before April 20, 2004, there were gaps in the concrete surface underneath the metal nosings of the steps of the west stairway of the Harmon Building

and Conference Center.

RESPONSE TO REQUEST NO. 38: Denied.

REQUEST NO.39: Admit that on April 20, 2004, the metal nosings on the steps of the west stairway were more than 20 years old.

RESPONSE TO REQUEST NO. 39: Admitted.

REQUEST NO. 40: Admit that on April 20, 2004, the metal nosings on the steps of the west stairway of the Harmon Building and Conference Center were loose in the vicinity where the plaintiff Linda was found injured by the defendant's employees.

RESPONSE TO REQUEST NO. 40: Denied.

REQUEST NO. 41: Admit that on April 20, 2004, the metal nosings on the steps of the west stairway of the Harmon Building and Conference Center in the vicinity of where the plaintiff Linda was found injured by the defendant's employees clattered when stepped on.

RESPONSE TO REQUEST NO. 41: Denied.

REQUEST NO. 42: Admit that on or after April 20, 2004, repairs were made to the metal nosings of the west stairway in the vicinity of where the injured plaintiff Linda was found by the defendant's employees.

RESPONSE TO REQUEST NO. 42: Defendant specifically objects to Request No. 42 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence since all repairs made to the stairs of the Harmon Building are inadmissible under the doctrine of subsequent remedial repair.

REQUEST NO. 43: Admit that on April 20,2004, the runs of the steps of the west stairway did not conform to the requirements of the 1994 version of the Uniform Building Code.

RESPONSE TO REQUEST NO. 43: Denied.

REQUEST NO. 44: Admit that on April 20, 2004, the risers of the steps of the west stairway did not conform to the requirements of the 1994 version of the Uniform Building Code.

RESPONSE TO REQUEST NO. 44: Denied.

REQUEST NO. 45: Admit that the costs of construction, remodeling, and repairs to the Harmon Building and Conference Center exceeded \$1,000,000.00 in the past 5 years.

RESPONSE TO REQUEST NO. 45: Defendant specifically objects to Request No. 45 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and thus denies the same.

REQUEST NO. 46: Admit that the costs of construction, remodeling, and repairs of buildings, lands, and improvements on the campus of BYU have exceeded \$5,000,000.00 each year for the past five years.

RESPONSE TO REQUEST NO. 46: Defendant specifically objects to Request No. 45 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and thus denies the same.

REQUEST NO. 47: Admit that the costs of construction, remodeling, and repairs of buildings, lands, and improvements on the campus of BYU have exceeded \$10,000,000.00 each year for the past five years.

RESPONSE TO REQUEST NO. 47: Defendant specifically objects to Request No. 45 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and thus denies the same.

REQUEST NO. 48: Admit that the costs of construction and repairs of buildings, lands, and

improvements on the campus of BYU have exceeded \$25,000,000.00 each year for the past five years.

RESPONSE TO REQUEST NO. 48: Defendant specifically objects to Request No. 45 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and thus denies the same.

REQUEST NO. 49: Admit that the defendant has spent more than one hundred million dollars for constructing, improving, and repairing buildings and lands on the campus of BYU since the construction of the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 49: Defendant specifically objects to Request No. 45 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and thus denies the same.

REQUEST NO. 50: Admit that since the original construction of the west stairway of the Harmon Building and Conference Center, the defendant has spent more than \$1,000,000.00 in construction, remodeling, repairs, and improvements for the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 50: Defendant specifically objects to Request No. 45 on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and thus denies the same.

REQUEST NO. 51: Admit that on or before April 20, 2004, the west stairway of the Harmon Building and Conference Center was required by applicable building codes to have intermediate hand rails.

RESPONSE TO REQUEST NO. 51: Denied.

REQUEST NO. 52: Admit that within the year before April 20, 2004, the defendant's employees did not regularly inspect the west stairway of the Harmon Building and Conference Center for defects.

RESPONSE TO REQUEST NO. 52: Denied.

REQUEST NO. 53: Admit that within the year before April 20, 2004, the defendant's employees did not maintain records of inspections of the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 53: Denied.

REQUEST NO. 54: Admit that within the year before April 20, 2004, the defendant's employees did not budget for repairs and maintenance of the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 54: Denied.

REQUEST NO. 55: Admit that within the year before April 20, 2004, the defendant's employees or agents did not obtain a Provo City building permit for repairs and maintenance to the west stairway of the Harmon Building and Conference.

RESPONSE TO REQUEST NO. 55: Admitted.

REQUEST NO. 56: Admit that within the year before April 20, 2004, the defendant's employees did not enter into a contract with an outside firm for repairs and maintenance of the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 56: Defendant specifically objects to Request No. 56 as not being reasonably calculated to lead to the discovery of admissible evidence on the basis that evidence of repair are inadmissible under the doctrine of subsequent remedial repair.

REQUEST NO. 57: Admit that within the year before April 20, 2004, the defendant's employees did not enter into contract with an outside firm to renovate the west stairway of the Harmon Building and Conference Center.

RESPONSE TO REQUEST NO. 57: Denied.

Dated this 16th day of August, 2004.

A handwritten signature in black ink, appearing to read "David B. Thomas", written over a horizontal line.

David B. Thomas
Attorney for Defendant Brigham Young University

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S ANSWERS TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS was sent by U.S. Mail, first class, postage prepaid, on the 16th day of August, 2004 to the following:

Joseph R. Fox and Linda A. Fox
572 South 1750 East
Spanish Fork, Utah 84660



Tamera S. Gustin

David B. Thomas (3228)
Attorney for Defendants
Brigham Young University
A-350 ASB
P. O. Box 21333
Provo, UT 84602-1333
Telephone: (801) 422-4722

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

Joseph R. Fox and Linda A. Fox,	:	DEFENDANT'S ANSWERS TO
	:	PLAINTIFFS' FIRST SET OF
Plaintiffs,	:	INTERROGATORIES
vs.	:	
Brigham Young University,	:	
a Utah Corporation	:	Case No. 040401488
	:	Judge Taylor
Defendants.	:	

Pursuant to Rule 33 of the Utah Rules of Civil Procedure, defendant provides the following answers to Plaintiffs' First Set of Interrogatories:

GENERAL OBJECTION

Defendant objects to Plaintiffs' First Set of Interrogatories to the Defendant generally and insofar as it seeks to impose burdens and obligations upon defendant beyond those imposed by the Utah Rules of Civil Procedure. Specifically, defendant objects to plaintiffs' interrogatories on the grounds that they are unduly burdensome and vexatious and that they seek specificity beyond that which is required under the rules of discovery.

Without waiving the objection stated herein, the defendant responds to plaintiffs'

interrogatories as follows:

INTERROGATORIES

1. State the name and address of each and every person who provided information in answering these interrogatories.

ANSWER TO INTERROGATORY NO. 1:

David Lawrence
122 Thomas House
Brigham Young University
Provo, Utah 84602

Paul Byrd
1520 WSC
Brigham Young University
Provo, UT 84602

Cory Starley
739 E. Scenic Drive
Spanish Fork, UT 84660

Jim Dain
DIR Building SVCS
PF Director's Office
217 BRWB
Provo, UT 84602

Cory Dean Muhlestein
Area Supervisor
Custodial Shop
2294 CONF
Provo, UT 84602

Arthur W. Trapp (Bill)
Building Supervisor
Custodial Shop
2294 CONF
Provo, UT 84602

Wayne Lott
396 HCEB
Provo, UT 84602

Paul Reese
SR Design Engineer
PF Director's Office
240 BRWB
Provo, UT 84602

Noah Converse
1722 W. 680 N.
Pleasant Grove, UT 84602

Scott Starr
Missionary Training Center
2005 N. 900 E.
Provo, UT 84606-1783

Duane Sweat
Skilled Craft Supervisor
PF Director's Office
277 BRWB
Provo, UT 84602

Kendall Wilson
Carpenter
Carpenter Shop
277 BRWB
Provo, UT 84602

2. For each person identified in answer to the preceding interrogatory, state for each person the information provided by that person.

ANSWER TO INTERROGATORY NO. 2: David Lawrence provided the risk management report.

Paul Byrd provided the names and address of the EMS personnel.

Wayne Lott provided information about the physical plants work on the stairs

Cory Lynn Starley is a BYU student employee in the Continuing Education department located in the Harmon Bldg. He was exiting the building when he saw a woman sitting on the stairway over to his right and about half way down the stairs holding her leg, between the first and second landing. Cory went back in the building and called the EMSs. After he called, he returned to the stairs and stayed with Linda A. Fox until the EMSs came.

Cory Dean Muhlestein is the area supervisor in the Custodial Shop. His office overlooks the west stairway of the Harmon Building where Linda A. Fox fell. He saw her when a BYU student was attending her. He also provided information about custodial maintenance of the stairs.

Paul Reese is a Senior Design Engineer in the PF Director's Office. He provided information about repair and maintenance of the buildings.

Duane Sweat is the Skilled Craft Supervisor of PF Director's Office. He provided information about work done on the steps.

Kendall Wilson is the concrete specialist carpenter in the Carpenter Shop. He provided information about work done on the Harmon Building west stairway.

Scott Starr is one of the EMS personnel that responded to the accident. He provided information about her treatment.

Noah Converse is one of the EMS personnel that responded to the accident. He provided information about her treatment.

3. State each and every fact, opinion, conclusion, and rule of law upon which the defendant will rely in defending the plaintiffs' claims for damages.

ANSWER TO INTERROGATORY NO. 3: Defendant objects to Interrogatory No. 3 on the basis that before the Court are not only the original Complaint and the First Amended Complaint, but a Second Amended Complaint for which a motion to amend is pending. Defendant has not filed an answer in the case since which Complaint needs to be answered has not been determined by the Court. Thus, it is impossible at this time to articulate or define defenses or any statements concerning opinions, conclusions, or rules of law.

4. State the name and address of each witness that the defendant will, or may, call to testify in

defense of the plaintiffs' claims and in support of the defendant's defenses.

ANSWER TO INTERROGATORY NO. 4: Since plaintiffs' attempted amendment of their Complaint is still pending before the Court and since defendant has not answered, discovery has not been appropriately defined, thus, defendant has not identified through discovery the witnesses that will be called.

5. For each witness identified in the preceding interrogatory, state in detail the substance of the witness's testimony.

ANSWER TO INTERROGATORY NO. 5: See Answer to Interrogatory No. 4 above.

6. State the name and address of the each and every person responsible for the repairs and maintenance of the west stairway of the Harmon Building and Conference Center for the past 10 years.

ANSWER TO INTERROGATORY NO. 6: Paul Reese, Wayne Lott, Cory Muhlestein, and Kendal Wilson. See addresses in Answer to Interrogatory No. 1.

7. State the names and addresses of the defendants EMT personnel who rendered services to the plaintiff Linda on April 20, 2004.

ANSWER TO INTERROGATORY NO. 7: Defendant maintains no EMT personnel. The voluntary EMS personnel who provided services to Linda on April 20, 2004 were Noah Converse and Scott Starr, see addresses provided in Answer to Interrogatory No. 1 above.

8. State the names and addresses of each and every employee of the defendant selling tickets to Women's Conference in the Harmon Building on April 20, 2004.

ANSWER TO INTERROGATORY NO. 8: Defendant has been unable to identify each and every individual selling tickets to the Women's Conference in the Harmon Building on April 20,

2004, but will supplement this answer as such information is available.

9.

ANSWER TO INTERROGATORY NO. 9: No interrogatory is found for No. 9, thus no response is provided.

10. State the names and addresses of each and every person who performed maintenance and repairs on the west stairway of the Harmon Building and Conference Center within the past 5 years.

ANSWER TO INTERROGATORY NO. 10: See Answer to Interrogatory No. 6.

11. State in detail the repairs and maintenance performed on the west stairway of the Harmon Building and Conference Center for the past 5 years.

ANSWER TO INTERROGATORY NO. 11: Maintenance and repairs on the west stairs of the Harmon Building and Conference Center has been varied and ranges from snow removal and sweeping to minor repair and upkeep. Such maintenance and repairs have been done on an as needed basis or when a specific request is made.

12. State the name and address of the person, or persons, who has custody of the records of expenditures for repairs and maintenance of the Harmon Building and Conference Center, including the west stairway for the past 5 years.

ANSWER TO INTERROGATORY NO. 12: Duane Sweat, see address in Answer to Interrogatory No. 1 above; BYU Accounting Office, D-148 ASB, Provo, UT 84602.

13. If not previously stated, state the name and address of the person, or persons, who have custody of the plans and specifications for the construction, remodeling, renovation, repair, and maintenance of the Harmon Building and Conference Center, including the west stairway.

ANSWER TO INTERROGATORY NO. 13: Defendant objects to Interrogatory No. 13 insofar as it requests information concerning renovation or repairs which have taken place since April 20, 2004 as not being reasonably calculated to lead to the discovery of admissible evidence since subsequent remedial repair is not admissible as evidence. Without waiving such objection, the person having custody of the plans and specifications for the construction of the Harmon Building and Conference Center is Ed Cozzens, 202 BRWB, Provo, UT 84602.

14. State the name and address of each and every person, employee or otherwise, who has been injured using the west stairway of the Harmon Building and Conference Center within the past 10 years.

ANSWER TO INTERROGATORY NO. 14: Defendant is unaware of the name and address of anyone who has been injured using the west stairway of the Harmon Building and Conference Center within the last ten years.

15. State each and every reason, whether fact, opinion, or conclusion, why, on April 20, 2004, there were no intermediate hand rails on the west stairway of the Harmon Building and Conference Center.

ANSWER TO INTERROGATORY NO. 15: Defendant objects to Interrogatory No. 15 on the basis that the question is vague and ambiguous as to the term "intermediate hand rails" so as to make the question not only unintelligible, but precludes defendant from otherwise responding. To the extent relevant, defendant asserts that the west stairway of the Harmon Building and Conference Center has always met the applicable building code.

16. State each and every reason, whether fact, opinion, or conclusion, why, on April 20, 2004, the metal nosings on the steps of the west stairway of the Harmon Building and Conference

Center were loose.

ANSWER TO INTERROGATORY NO. 16: Defendant specifically objects to Interrogatory No. 16 as assuming facts that are not in evidence. In addition, plaintiff has not alleged nor asserted that loose metal nosings of the stairs was the cause or even reasonably related to her fall, nor is she able to identify where she did fall. Whether metal nosings on the stairway in places other than where plaintiff is or is not loose, is not evidence reasonably calculated to lead to the discovery of admissible evidence and therefore, defendant objects to Interrogatory No. 16.

17. State the date of each and every inspection conducted of the west stairway of the Harmon Building and Conference Center for the past 5 years.

ANSWER TO INTERROGATORY NO. 17: The west stairway of the Harmon Building and Conference Center is regularly checked if not on a daily, a weekly basis, by the custodial shop staff and employees. In addition, Physical Plant conducts a one and five year inspection for the purpose of determining whether such facilities need to be replaced. The last five year check took place in the year 2000.

18. For each inspection identified in the preceding interrogatory, state the name and address of the person, or persons, conducting the inspections.

ANSWER TO INTERROGATORY NO. 18: Paul Reese, see address above in Answer to Interrogatory No. 1, and Cory Dean Muhlestein, see address in Answer to Interrogatory No. 1 above.

19. State in detail each and every statement, whether written or oral, made by the plaintiff Linda to the defendant's employees, or to any other person known to the defendant, on April 20, 2004, and thereafter.

ANSWER TO INTERROGATORY NO. 19: Linda A. Fox said that she has no cartilage in her knee due to arthritis. She did not remember tripping or slipping when she fell. She said that her knee just went out. When asked if there were any physical conditions that contributed to her fall, she answered that there were not. She said she was familiar with the west stairway of the Harmon Building because she used to work in the building. She said that the stairway was difficult to navigate because their dimensions were too narrow and different from the more standard dimensions she was used to using. She said she could not walk and she was sure her leg was broken. She said she did not hold BYU responsible at all because of the bad condition of her knee and her familiarity of the stairway. She also reported that she and her family had been talking the night before about the bad condition of her knees. She indicated that there was surprise expressed by her family that she had not had a serious accident because of the weakened condition of her knees.

20. State in detail each and every statement, observation, comment, or complaint, whether written or oral, made to the defendant concerning the condition of the west stairway of the Harmon Building and Conference Center within the past 5 years, whether by an employee or otherwise.

ANSWER TO INTERROGATORY NO. 20: Defendant objects to the broad sweeping nature of Interrogatory No. 20 insofar as it is both burdensome and vexatious, and to the extent that it is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving such objection, in the summer of 2003 Physical Plant determined that the stairs needed to be replaced with estimates on the cost for replacement being submitted to the administration on December 5, 2003. A contract for the replacement of the stairs was awarded on April 7, 2004.

21. State the name and address of the manufacturer and person or firm who provided and installed the metal nosings on the steps of the west stairway of the Harmon Building and Conference Center.

ANSWER TO INTERROGATORY NO. 21: Zwick Construction Company, Salt Lake City, UT.

22. State the name and model number of the metal nosings on the steps of the west stairway of the Harmon Building and Conference Center.

ANSWER TO INTERROGATORY NO. 22: Unknown.

23. State the name and address of the defendant's employee who spoke to the plaintiff Joseph on or about April 23, 2004, on the steps of the west stairway of the Harmon Building and Conference Center.

ANSWER TO INTERROGATORY NO. 23: Bill Trapp, see address in Answer to Interrogatory No. 1.

24. State in detail each and every statement and report whether written or oral, made by the employee identified in the preceding interrogatory concerning the conversation with the plaintiff Joseph on or about April 23, 2004.

ANSWER TO INTERROGATORY NO. 24: Bill Trapp indicates that he saw Joseph R. Fox from his office window pulling up the metal nosing of the stairs in various places. After watching him, Bill indicates that he went down and spoke with Mr. Fox. Bill Trapp indicates that after watching Mr. Fox scrape out the concrete and pull up the nosing, he asked him, "What the hell do you think you are doing?" Fox responded, "They are loose." Trapp responded, "Well, they are now." Trapp asked Fox to stop and leave.

25. State the date that the defendant contacted for the renovation of the west stairway of the

Harmon Building and Conference Center.

ANSWER TO INTERROGATORY NO. 25: Defendant objects to Interrogatory No. 25 as not being reasonably calculated to lead to the discovery of admissible evidence since renovation or repair of the west stairway after April 20, 2004 is inadmissible as evidence of subsequent remedial repair and thus, not admissible.

Dated this 17th day of August, 2004.

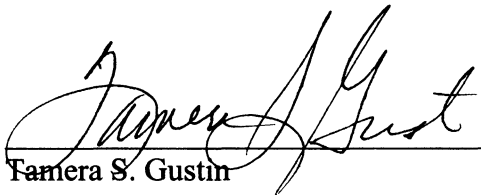
A handwritten signature in black ink, appearing to read "David B. Thomas", written over a horizontal line.

David B. Thomas
Attorney for Defendant Brigham Young University

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES was sent by U.S. Mail, first class, postage prepaid, on the 17th day of August, 2004 to the following:

Joseph R. Fox and Linda A. Fox
572 South 1750 East
Spanish Fork, Utah 84660



Pamela S. Gustin

SUMMARY OF CHARGES AND PAYMENTS

Provider	Charges	Payments
(*same account)		
UVRMC/Hosp. Acceptance	\$25,433.37	\$25,218.00
Dr. Brent Murdock**	\$810.00	\$675.00
Dr. Douglas Murdock**	\$427.00	
Dr. Jay Gassman	\$312.00	
Dr. J. Faux/Central Utah Med Clinic*	\$3,159.00	\$4,300.00
UV Radiology	\$567.00	\$586.00
Dr. Craig Patten**	\$427.00	
Central Surgical Center	\$1,053.00	\$900.00
Central Utah Multi-Specialty Clinic*	\$146.16	
Mt. Land Collections (Gassman)		\$358.00
NAR Collections/D. Murdock**		\$532.00
Bonnville Collections		\$300.00
Utah Valley Emergency Physicians/D Murdock**		\$350.00
CCA Collections		\$106.00
Petersen's Medical	\$420.32	\$420.32
KMART Pharmacy	\$234.11	\$234.11
 Total	 \$32,988.96	 \$33,979.43

Claim Detail with Notes

Claim RF0005864473 **Claimant** Fox, Linda Anne
Loss Date 4/20/2004 **Case Type** Indemnity **Status** Open **Coverage** General Liability
Report Date 4/26/2004 **Description** Female visitor fell on HCEB exterior stairs. She suffered a fracture of tibula plateau with a stay at the UVRMC.
Effective Date

See "Notes" to General Counsel.

	Paid	Reserves	Location	84282-BYU Physical Facilities		
Medical	\$0	\$100,000				
Indemnity	\$0	\$0				
Legal, Etc.	\$0	\$12,500				
Total	\$0	\$112,500	Total Incurred	\$112,500	Recoveries	\$0

04, Legal - LAWRENCEDW

General Counsel:

husband reported wife's claim. Wife was in hospital after fracturing leg on HCEB stairs. He said to me that she told him that her "legs gave out". She had purchased a ticket to woman's conference inside the building and was descending the west exterior stairs.

It appears to be a serious injury (fractured tibia plateau of the right leg of a 55 year-old woman) that has requires a hospital stay, surgery, screws, and restricted mobility. It will also require surgery to remove hardware and possible knee replacement.

According to husband, his wife has no health & accident insurance.

Inspection of the stairs shows some deterioration in the cement and some of the wide metal walk strips (on edge of each step) make a clack noise when you step on them. They seem flush with the step but have missing screws so they aren't tight to the cement. Nothing I saw concerning the above claim to be a noteworthy hazard and none near the area, I was shown by custodial, she was thought to have fallen.

However, the edges of the metal strips, which form the edge of each stair, seemed worn down to me and allowed slipping if one had one's weight on them. I wouldn't say they were slick per se, but they were slicker than the cement they were attached to. I don't know yet, but they appear to have had a rough surface on them originally (20 years old?) but has now worn down. I am also concerned that there were no railing options other than at the far edges of quite wide stairs.

Nevertheless, this does not make the stairs a hazard but less safe than they could be and maybe worse when wet.

Husband had inspected the stairs one day himself and found a metal strip he could actually pull up, but according to building maintenance, the strip was loose at the time of the accident and not at the area where she fell anyway.

Set my reserve considering the seriousness of the injury and the potential for some liability exposure.

04, Legal - LAWRENCEDW

Working on location of loss but have more info.

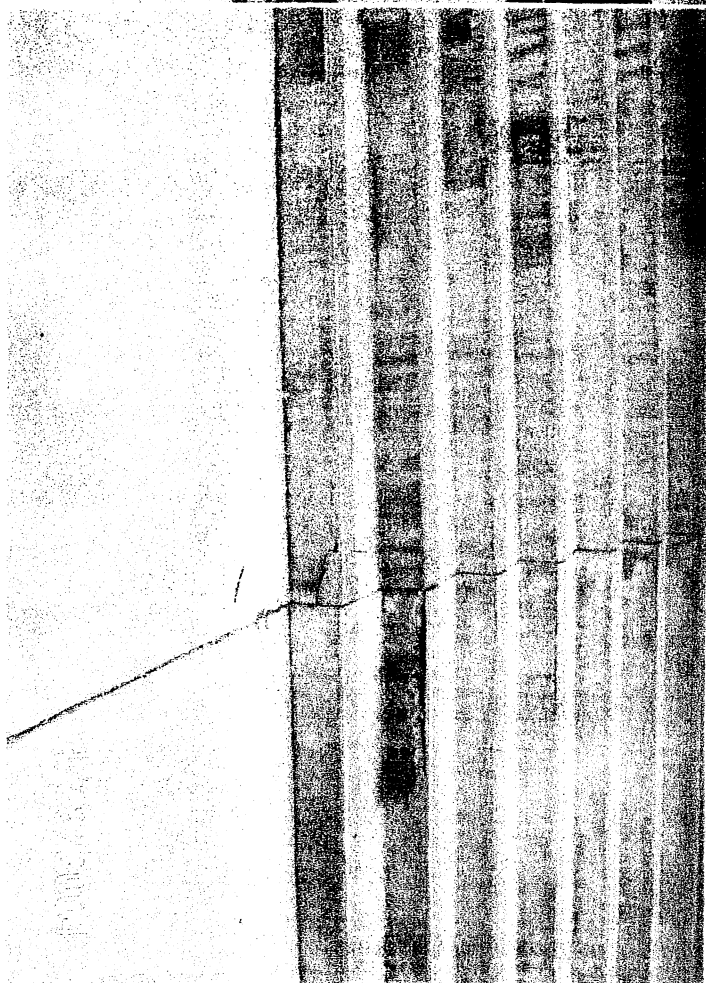
Report indicates: Patient reported that she was going down the stairs when her knee gave out and she fell down one stair. It also says claimant didn't hold BYU responsible; and that she also said. that the stairs in this area are too narrow and have always been dangerous.

Utah EMT report indicates: past medical history of patient is. No cartilage in knee due to arthritis It doesn't say which knee.

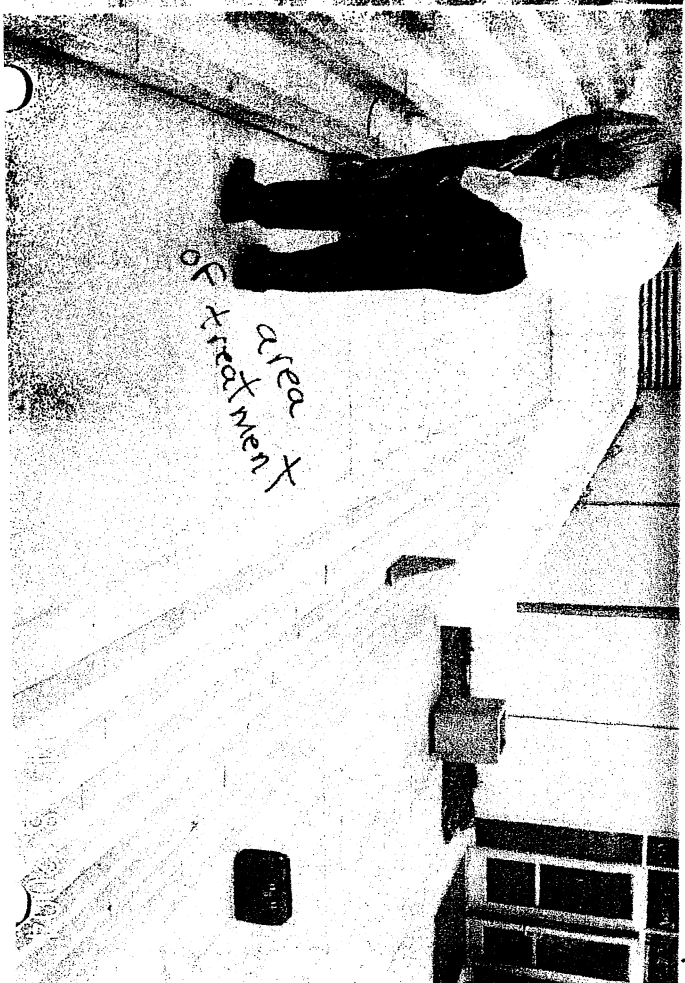
Tuesday, February 16, 2005

Page 1 of 1

approx area of Fall



cone a result of Joe Fox Exploration



area of treatment



