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Black v. DJO Global INC Clerk's Record v. 2 Dckt. 47812

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ISB #5587

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LINDA BLACK

Plaintiff,

vs.

DJO GLOBAL, INC; EMPI; DJO GLOBAL,
INC. dba EMPI, DJO, LLC; BLACKSTONE
CAPITAL PARTNERS V, L.P.,

Defendants.

Case No. CV-2017-7353

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S AMENDED MOTION
TO RECONSIDER

Defendants DJO Global, Inc., EMPI, DJO Global, Inc. d/b/a EMPI and DJO, LLC, by and through their counsel of record Joshua S. Evett of the firm Elam & Burke, P.A., hereby submit their opposition to Plaintiff's Amended Motion to Reconsider.

I. INTRODUCTION

Plaintiff's motion does not challenge the facts (and absence of facts) relied upon by this Court in granting Defendants' Motion for Summary Judgment. Accordingly, the Court should deny the motion.

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S AMENDED MOTION TO RECONSIDER - 1

II. ARGUMENT

A. The Court Applied the Correct Standard on Summary Judgment

While Plaintiff cites a long list of cases that appear to be good law, there remain no facts in the record which dictate reconsideration of the Court's decision granting summary judgment. It is Plaintiff's burden to present "proof excluding the possibility of" other "reasonable causes" of her alleged injury. *Doty v. Bishara*, 123 Idaho 329, 332, 848 P.2d 387, 390 (1992), citing *Farmer v. International Harvester*, 97 Idaho 742, 747, 533 P.2d 1306, 1311 (1976).

In opposing Defendants' summary judgment motion Plaintiff failed to "exclude the possibility" that her burn resulted from Bart McDonald's failure to adhere to the instructions and warnings in the Rich-Mar manual for use of carbon electrode pads and the use of pads at high power settings.

The Court correctly noted in its Memorandum Decision and Order that the manual explicitly instructed that a "moistened interface (cloth or sponge)" must be used between the electrode and patient to avoid electrical burns. (*Id.*, p. 6.) The Court also correctly noted that the manual warned that "extra caution" was required at power settings above 40mA to avoid burns by "using an adequate conductive medium and by frequently using an alternate electrode placement." (*Id.*) The Court recognized that Mr. McDonald did not follow the instructions and warnings and that it was un rebutted that these "omissions could have led to the electrical burns Black experienced on December 21, 2015." (*Id.*, p. 7.)

Still Plaintiff has not presented any evidence that her burns did not result from Bart McDonald's failure to heed the Rich-Mar manual's instructions and warnings. Mr. McDonald has testified in deposition and provided two affidavits (the first executed September 13, 2019, the second executed November 1, 2019) to the Court. He has never contended that he followed the

manual's instructions and warnings. Instead, in his latest affidavit he argues that he has "never used" a "moisture barrier when administering similar treatments," (Second Affidavit of Bart McDonald, ¶ 7), and that "no moistened interface is required when administering the treatment I was using for Linda Black." (*Id.*, ¶ 6.)

Mr. McDonald's personal opinions aside, there is no dispute that the Rich-Mar manual contains the explicit instructions and warnings noted by the Court, instructions and warnings which are given to avoid an electrical burn of the type Plaintiff asserts she sustained. Whether or not it has been Mr. McDonald's practice over the years to never use a moistened interface, or vary electrode placement at high power settings, is irrelevant. It remains undisputed that Mr. McDonald did not follow the Rich-Mar manual's instructions and warnings, and Plaintiff has produced no evidence excluding McDonald's admitted failure to follow the manual as the cause of the burn.

It is Plaintiff's burden to show that Mr. McDonald's failure to comply with the manual's instructions and warnings did not cause her burn. Because she has not done that the Court appropriately granted summary judgment.

B. McDonald is Not Qualified to Opine That the Pads Were Defective

In his second affidavit, Mr. McDonald again asserts that Plaintiff's burns were caused by "defective pads," (*id.*, ¶ 20), even though the Court has ruled that he is not qualified to offer an opinion on defect, and even though he presents no evidence to the Court of what the actual defect was. In fact, it remains undisputed that when Mr. McDonald visually inspected the pads there was no visible defect. (Evelt Affidavit, Ex. E, McDonald Deposition, p. 81, ll. 19-23.)

Plaintiff cannot carry her burden of proof by "merely proving the fact of the occurrence of an accident." *Farmer*, 553 P.2d at 1313 (Idaho 1976). That, however, is what she is trying to

do. Plaintiff presents no foundation to qualify Mr. McDonald as an expert in medical device design or manufacture under IRE 702. There were no physical signs of defect, the pads did not burn Plaintiff during her first three treatments, and Plaintiff has not presented the Court with any evidence of the specific defect that allegedly led to her burn.

Boiled down to its essence, Plaintiff's argument is that because she was burned the pads were defective. Under *Farmer*, that is not enough to sustain her burden of proof.

C. Res Ipsa Does Not Apply

The Court's refusal to accept a res ipsa theory was correct. There was no evidence of "exclusive control" over the pads by Defendants. Furthermore, there is no evidence in the record that would permit "an average layperson to infer, based upon common knowledge and experience, that the plaintiff would not have suffered those injuries in the absence of the defendant's negligence." *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 566 (2012). Given that an "average layperson" has no experience in the design and manufacture of an electrical medical device, such as a carbon electrode pad, there is no way for an "average layperson" in this case to infer that Defendants' negligence resulted in a defectively designed or manufactured pad. This is even more the case considering Mr. McDonald's admission that he did not follow the Rich-Mar manual's instructions and warnings.

III. CONCLUSION

The Court's reasoning was correct and it should reaffirm its grant of summary judgment.

DATED this 31st day of December, 2019.

ELAM & BURKE, P.A.

By: Josh Evett
Joshua S. Evett, Of the firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned, being sworn, says that on the 31st day of December, 2019, he caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court, which sent a Notice of Electronic Filing to the following persons:

Allen H. Browning
Steve Carpenter

allen.browning.law@gmail.com



Joshua S. Evett

4845-2791-9280, v. 1

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Linda Kaye Black
vs.
DJO Global, INC, EMPI , DJO Global INC dba
EMPI , Blackstone Capital Partners V.L.P

Case No. CV-2017-7353

Court Minutes

JUDGE: Tingey, Joel E.
CLERK: Andrea Jenkins
HEARING TYPE: Motion for Reconsideration

DATE: January 07, 2020
LOCATION: 5
COURT REPORTER: Jack L. Fuller
INTERPRETER:

Parties Present:

Browning, Allen Harry **Attorney of
Record**
Evelt, Joshua S. **Attorney of
Record**

Parties:

Linda Kaye Black Attorney: Steven Carpenter
DJO Global, INC; EMPI ; Attorney: Joshua S. Evelt;
DJO Global INC dba EMPI ;
Blackstone Capital Partners
V.L.P

Hearing Start Time: 8:30 AM

Journal Entries:

- Mr. Carpenter presented argument in support of the plaintiff's motion for reconsideration.
Mr. Evelt provided argument in opposition.
Mr. Peterson addressed the Court with rebuttal argument.
The Court took the matter under advisement.

BONNEVILLE COUNTY
IDAHO

2020 JAN -9 AM 8:41

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LINDA BLACK, Plaintiff v. DJO GLOBAL, INC, and EMPI; Defendants,	Case No. CV-2017-7353 ORDER
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This matter is before the Court on the Plaintiff's motion for reconsideration. On October 17, 2019, this Court entered a Decision granting Defendants' motion for summary judgment and a corresponding Judgment dismissing the complaint.

Plaintiff's motion is supported by the Second Affidavit of Bart McDonald. However, the Court continues to find that McDonald is not qualified to testify as to whether there was a latent defect in the electrode pads. In essence, McDonald testifies that since there was a burn, the pads must have been defective. Such conclusory testimony is impermissible in establishing a defect, particularly where the record reflects other possible causes such as a failure to follow the instructions contained in the Rich Mar muscle stimulator manual.

Ultimately, this Court finds no basis to reconsider its prior Decision and Judgment. Plaintiff's motion for reconsideration is denied.

IT IS SO ORDERED.

DATED this 9 day of January, 2020.


JOEL E. TINGEY
DISTRICT JUDGE

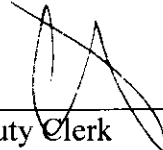
CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of January, 2020, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; by email, or facsimile, or by causing the same to be hand-delivered.

Allen H. Browning
Allen.browning.law@gmail.com

Joshua S. Evett
jse@elamburke.com

Clerk of the District Court
Bonneville County, Idaho

By  _____
Deputy Clerk

Allen H. Browning, ISB#3007
Steve Carpenter, ISB#9132
David Brown, ISB#7430
Attorneys for Appellant
1615 Grandview Drive
Idaho Falls, Idaho 83402
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY
IN THE DISTRICT COURT OF THE STATE OF IDAHO

LINDA BLACK ,)	CV-2017-7353
)	Case No. CV 17-7353
Appellant)	
vs.)	NOTICE OF APPEAL
)	
DJO GLOBAL INC; EMPI; DJO)	
GLOBAL, INC. dba EMPI, DJI, LLC;)	
BLACKSTONE CAPITAL PARTNERS)	
V L.P.,)	
)	
Respondent)	

TO: THE ABOVE NAMED RESPONDENT(S) DJO GLOBAL INC; EMPI; DJO GLOBAL, INC. dba EMPI, DJI, LLC; and BLACKSTONE CAPITAL PARTNERS V L.P., AND THE PARTY'S ATTORNEY, JOSHUA S. EVETT, P.O. BOX 1539, BOISE, IDAHO, 83701, AND THE CLERK OF THE ABOVE ENTITLED COURT BONNEVILLE COUNTY DISTRICT COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant Linda Black appeals against the above-named respondents to the Idaho Supreme Court from Decision and Order Re: Motion to Reconsider entered in the above entitled action on the 9th day of January, 2020, Honorable Judge Joel E. Tingey

presiding, as well as the decision and Order of Dismissal dated October 17, 2019 and Judgment dated October 17, 2019.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph one (1) above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
3. The issues on appeal are: Whether the District Court erred when it found the Testimony of Bart McDonald inadmissible as expert testimony under Idaho Rule of Evidence 702; Whether the District Court erred when it held that Plaintiff did not and cannot establish *res ipsa loquitur*; and whether the District Court erred when it held that Plaintiff did not establish a *prima facie* case for negligence.
4. Has an order been entered sealing all or any portion of the record? No.
5. (a) Is a reporter's transcript requested? Yes.
(b) The appellant requests the preparation of the following portions of the reporter's transcript in hard copy electronic format both (check one): The reporter's standard transcript as defined in Rule 25(c), I.A.R.
The Appellant requests transcripts of the following hearings, with Court Reporter Jack Fuller present at all hearings:
10/10/19 – Motion for Summary Judgment
01/07/20 – Motion for Reconsideration
The total number of pages being requested is approximately 30 pages.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:
- 12/17/18 – Stipulated Dismissal of Defendant Blackstone Partners V L.P.;
 - 12/18/18 – Order Granting Dismissal of Defendant Blackstone Partners V L.P.;
 - 08/29/19 – Defendants' Motion for Summary Judgment;
 - 08/29/19 – Memorandum in Support of Defendants' Motion for Summary Judgment;
 - 08/29/19 – Affidavit of Joshua S. Evett in Support of Defendants' Motion for Summary Judgment, including all attachments and exhibits;
 - 09/26/19 – Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, including all attachments and exhibits;
 - 10/04/19 – Reply Memorandum in Support of Defendants' Motion for Summary Judgment;
 - 10/04/19 – Supplemental Affidavit of Joshua S. Evett in Support of Defendants' Motion for Summary Judgment, including all attachments and exhibits;
 - 10/11/19 – Second Supplemental Affidavit of Joshua S. Evett in Support of Defendants' Motion for Summary Judgment, including all attachments and exhibits;
 - 10/17/19 – Memorandum and Decision Order;
 - 10/31/19 – Plaintiff's Motion to Reconsider;
 - 10/31/19 – Plaintiff's Memorandum in Support of Motion for Reconsideration, including all attachments and exhibits;
 - 11/01/19 – Plaintiff's Amended Memorandum in Support of Motion for Reconsideration, including all attachments and exhibits;

12/31/19 – Defendants’ Opposition to Plaintiff’s Amended Motion to Reconsider.

01/09/20 - Order

7. Civil Cases Only. The appellate requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court.

The only exhibits requested are those attached to filings made in this case; they should be included in #6 of this Notice of Appeal.

8. I certify:

- (a) That a copy of this notice of appeal has been served on Court Reporter Jack Fuller at the following address:

Jack Fuller
Court Reporter for
Judge Joel E. Tingey
605 N. Capital Ave.
Idaho Falls, Idaho, 83402

- (b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript (\$120.00)
- (c) That the estimated fee for preparation of the clerk's or agency's record (\$120.00) has been paid.
- (d) That the appellate filing fee (\$129) has been paid.

(e) That service has been made upon all parties required to be served pursuant to
Rule 20.

DATED THIS 14 day of February, 2020.

A handwritten signature in black ink, appearing to be 'AHB', written over a horizontal line.

Allen H. Browning
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of February, 2020, a true and correct copy of the foregoing document was delivered to the following attorney of record by placing same in the U.S. mail in a postage-paid envelope, hand delivery, or facsimile.

Joshua S. Evett
ELAM & BURKE, P.A.
P.O. Box 1539
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 FAX (208) 384-5844
 HAND DELIVERY
 COURTHOUSE BOX
 EMAIL/EFILE

Jack Fuller
Court Reporter for
Judge Joel E. Tingey
605 N. Capital Ave.
Idaho Falls, Idaho, 83402

US MAIL
 FAX (208) 384-5844
 HAND DELIVERY
 COURTHOUSE BOX
 EMAIL/EFILE



Legal Assistant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Linda Kaye Black
vs.
DJO Global, INC, EMPI , DJO Global INC
dba EMPI , Blackstone Capital Partners
V.L.P

Supreme Court No. 47812-2020
District Court No. CV-2017-7353
Clerk's Certificate of Service

I, Laura Spoklie, Deputy Clerk of the District Court of the Seventh Judicial District, of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above entitled cause was electronically compiled at my direction, and is a true, full and correct Record of the pleadings and documents as requested by the parties.

I further certify that I have caused to be served the Clerk's Record and Reporter's Transcript (if requested), along with copies of all Exhibits offered or admitted; No Exhibits submitted; Pre-sentence Investigation, or Other Confidential Documents; or Confidential Exhibits (if applicable) to each of the Attorneys of Record or Parties in this case as follows:

CERTIFICATE OF SERVICE

I certify that on February 25, 2020, I served a copy of the attached to:

Allen Harry Browning
Joshua S. Evett

filings.allen.browning.law@gmail.com
jse@elamburke.com

By E-mail
 By E-mail

Penny Manning
Clerk of the Court

Dated: 4/02/2020

By: Laura Spoklie
Deputy Clerk

