IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-TS-00289

SPOTLITE SKATING RINK, INC

Appellant

vs.

BIANCA ZWYACA BARNES BY AND THROUGH MOTHER AND NEXT FRIEND, VEARLY BARNES, ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES AND AS ADMINISTRATRIX OF THE ESTATE OF BIANCA ZWYACA BARNES

Appellees

Appeal of the Judgment of the Washington County Circuit Court, Honorable Richard A. Smith, Circuit Judge, in Bianca Zywaca Barnes, By and Through Mother and Next Friend, Vearly Barnes on Behalf of the Wrongful Death Beneficiaries and as Administratrix of the Estate of Bianca Zywaca Barnes vs. Spotlite Skating Rink, Inc., Cause No. CI2002-128

REPLY BRIEF OF APPELLANT SPOTLITE SKATING RINK, INC.

ORAL ARGUMENT NOT REQUESTED

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Introduction

The verdict and judgment against Spotlite based on Bianca Barnes' death due to her colloid cyst cannot stand in this case because all evidence shows her death was not a foreseeable consequence of her fall. Rather, the dislodging of Bianca's rare and undiagnosed colloid cyst which resulted in her death was undeniably an "unusual, improbable, [and] extraordinary occurrence" for which Spotlite cannot be held responsible. In any event, Appellees cannot recover for Bianca's alleged negligent supervision and care claims against Spotlite because Spotlite breached no duty owed to Bianca in this case. When analyzed under the applicable legal standard, the record contains no evidence supporting a finding that Spotlite failed to meet its duty of supervision in this case; nor does it contain any evidence that Spotlite failed to meet its duty of providing appropriate medical attention. Finally, if this Court should decline to reverse and render judgment in favor of Spotlite, the judgment should be reversed and remanded because it was an abuse of discretion to allow the plaintiff's economist to testify regarding Bianca's lost wages, lost entitlements and lost fringe benefits. Plaintiff's economist failed to consider the requisite "facts and data" necessary to allow his opinion on these matters to be presented to the jury; accordingly, his testimony should have been excluded under *Daubert* and Rule 702 of the Mississippi Rules of Evidence.

Law and Argument

I. The Judgment Should Be Reversed and Judgment Rendered for Spotlite Because Bianca's Death Was Not a Foreseeable Consequence of Any Alleged Negligence On Its Part.

The verdict and judgment against Spotlite based on Bianca's death due to the colloid cyst must be reversed because it was not a foreseeable consequence Spotlite's alleged negligence; but rather her death was an "unusual, improbable, [and] extraordinary occurrence" that **no** expert testified could be predicted. *See* Brief of Appellant at 8-10; 16-17 (and cases cited therein). In

spending four pages in her brief describing the **cause** of Bianca's death (Brief of Appellees at 30-33), Ms. Barnes ignores the basic premise of Spotlite's defense: Even taking as true that Bianca's fall was the "precipitating cause" of the colloid cyst being dislodged, there is **no** evidence that the dislodging of the cyst was a **foreseeable consequence** of Bianca's fall. On the contrary, the unchallenged expert testimony in this case shows the cyst was a very rare congenital problem that no one knew Bianca had.[1] As this Court held in *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703 (Miss. 2005), plaintiff must prove not only "cause in fact," **but also** whether the damages were of the sort "which reasonably should be *anticipated* (or foreseen before the fact)" as a result of a defendant's alleged negligence. *Id.* at 713 (emphasis in original).

Ms. Barnes, however, invokes the "eggshell plaintiff theory (Brief of Appellees at 33-34, citing *Deas v. Andrews*, 411 So. 2d 1286 (Miss. 1982)); and argues that a defendant need not "foresee the particular type of injury suffered," but rather simply that "an injury" would result from the defendant's actions. Brief of Appellees at 33, 36, quoting *Robley v. Blue Cross/Blue Shield of Mississippi*, 935 So. 2d 990, 997 (Miss. 2006). But these cases have no factual or legal application here. In *Deas*, the Court simply held that the trial court did not err in rejecting defendant's jury instruction on apportionment of damages with respect to damages based on the **aggravation** of the plaintiff's **known** pre-existing atherosclerosis condition where that

[1] Indeed, plaintiff's medical expert, Dr. Brogdon, testified that: "colloid cysts are fairly rare. . . . It's an unusual tumor. It's about one percent or less of all the brain tumors that occur . . . ." Tr. 394:18-19, 378:11-23. In fact, Dr. Brogdon stated that he had only seen a "handful" of colloid cysts in his 53 years of practice. 395:2, 468:7-12. Given that colloid cysts are extremely uncommon, it logically follows that it is extremely uncommon that a fall would dislodge a colloid cyst and cause the death of a person. *See also* Tr. 545:28-29 (colloid cysts are not normally caused by trauma but rather "are a congenital problem"); Tr. 550:14-23 (fall had "nothing to do" with development of colloid cyst); Tr. 558:15-20 ("nothing that could have been done or was omitted would have made any difference. Bianca Barnes is an unfortunate child who has a congenital problem that was undiagnosed. . . . . We simply cannot reverse that process."); Tr. 663:11-12 ("colloid cyst is a very rare condition"); Tr. 702:14-29, 703:1-14 (fall unrelated to colloid cyst or symptoms (of the cyst blocking the flow of fluid) had already started, causing the fall); Tr. 758:13-15 ("[Bianca] had something that nobody knew she had, which was a colloid cyst of the third ventricle, and nobody knew that."). *See* Brief of Appellant at 8-10.

instruction provided no guidance to the jurors "for distinguishing or apportioning 'damages that would have existed from his previous condition without the aggravation.'" *Deas*, 411 So. 2d at 1293.

Similarly, the *Robley* decision also concerned the **aggravation** of a **known** pre-existing migraine headache condition. *Robley*, 935 So. 2d at 996-97. Though decided after *Womack*, the Court in *Robley* made no differentiation between "cause in fact" and whether the medical condition at issue was "the type of damage which reasonably should be anticipated" -- the test applied in *Womack* and applicable here. *Womack*, 908 So. 2d at 713. That the Court did not make this distinction in *Robley* makes sense because the **aggravation** of a **known** medical condition (as in both *Deas* and *Robley*) is a wholly separate issue from the situation in *Womack* and in this case: Aggravation of a known pre-existing medical condition is not at issue; rather, the resulting medical conditions caused by the defendant's alleged negligence in *Womack* -- and in the case at hand[2] -- were wholly unforeseeable from the outset. As such, the general propositions upon which Ms. Barnes relies do not apply for the sound reason announced in *Womack*: "The 'eggshell plaintiff' theory does not obviate the necessity to show foreseeability." *Womack*, 908 So. 2d at 715.

Instead, the applicable legal standard is the long-standing Mississippi precedent addressed in *Womack* and wholly ignored by Appellees: "[R]emote possibilities are not within the rules of negligence as respects foreseeability. . . these rules do not demand 'that a person should prevision or anticipate an unusual, improbable, or extraordinary occurrence, though such happening is within the range of possibilities. . . . *Remote possibilities do not constitute negligence from the judicial standpoint.*'" *Womack*, 908 So. 2d at 712-13 (emphasis in original), quoting *Gulf Refining Co. v. Williams,* 185 So. 234, 235-36 (Miss. 1938); *also citing Donald v.*

[2] The medical condition in *Womack* was a stroke (908 So. 2d at 712-13); the dislodging of Bianca's undiagnosed colloid cyst was the medical condition in this case.

Amoco Prod. Co., 735 So. 2d 161, 175 (Miss. 1999) ("A defendant is obligated solely to safeguard against reasonable probabilities and is not charged with foreseeing all occurrences, even though such occurrences are within the range of possibility."); and *Smith v. U.S.*, 284 F. Supp. 259, 262 (D.C. Miss. 1967) ("A person charged with negligence in that he should have anticipated the probability of injury from an act done by him is not bound to a prevision or anticipation which would include an unusual, improbable or extraordinary occurrence, although such happening is within range of possibilities."); *see also Foster by Foster v. Bass*, 575 So. 2d 967, 975-76 (Miss. 1990) (adoption agency held not liable for failure to detect PKU disease in adoptive child where agency "had no reason to know . . . or experience giving it cause to inquire about a test for the disease."); *Mauney v. Gulf Refining Co.*, 9 So. 2d 780, 780-81 (Miss. 1942); *Dillon v. Greenbriar Digging Service, Ltd.*, 919 So. 2d 172, 177 (Miss. Ct. App. 2005); *Ware v. State,* 790 So. 2d 201, 214 (Miss. Ct. App.2001). *See* Brief of Appellant at 8-10; 13, 16-17. **None** of these cases were addressed by Appellees.

The rationale underlying these cases -- and entirely applicable here -- is that it would "impose too heavy a responsibility for negligence to hold the tortfeasor accountable for what was unusual and unlikely to happen, or for what was only remotely and slightly probable." *Mauney*, 9 So. 2d at 781. Bianca died from an undiagnosed rare medical condition. That Bianca's cyst dislodged and clogged a ventricle resulting in her death is surely an "unusual, improbable, or extraordinary occurrence." Holding Spotlite liable for her death here would "impose too heavy a responsibility for negligence" - - an impermissible result under Mississippi law.

II. Pursuant To Mississippi Supreme Court Precedent, Spotlite Did Not Breach Its Duty To Supervise Bianca Barnes.

Ms. Barnes misstates the long-standing rule governing a skating rink's duty to supervise as announced by the Mississippi Supreme Court in *Blizzard v. Fitzsimmons*, 10 So. 2d 343 (Miss.

1942). Ms. Barnes states "*Blizzard* . . . went on to hold once the skating rink employees are aware a skater is not sufficiently experienced to skate uninjured without aid, the rink has a duty to take the skater from the floor or provide such assistance as is necessary to prevent falls." Brief of Appellees at 22.

While the *Blizzard* Court did hold that a skating rink has a duty to remove a skater from the floor or to provide such assistance as is necessary to prevent falls, it did not hold that such a duty attaches once skating rink employees discover that a skater is "not sufficiently experienced to skate." The Court held that the duty attaches once skating rink employees discover that a skater has a "total inability" to skate and is "helpless" to skate. *Id.* at 344-45. Lacking sufficient experience to skate is not the equivalent of a total inability to skate and being helpless to skate. Furthermore, the *Blizzard* Court did not hold that such a duty attaches once skating rink employees discover that a person can not skate "uninjured." The Court held that the duty attaches once skating rink employees discover that a person is skating in such a manner as to expose herself to "a likelihood of some *serious* injury." *Id.* at 345 (emphasis added).

In the instant case, Bianca fell one time. To hold that one fall should have put Spotlite on notice that Bianca had a total inability to skate and was exposing herself to a likelihood of serious injury is not only contrary to the Mississippi Supreme Court's holding in *Blizzard*, but also contrary to sound public policy. In *Blizzard*, the Supreme Court found that the skate rink's liability should attach after two series of falls. *Id.* The Court was not clear as to how many falls were contained in a series (the skater fell some forty to fifty times), but it is obviously not one fall. The Court's ruling is based on sound public policy considerations and principles of fairness: if a skate rink's liability attaches after one fall, then this means liability will *always* attach when someone falls.

Ms. Barnes argues that because Spotlite's skate guard, Marvin Miller, was told that Bianca did not know how to skate, "this clearly moves up the time at which the duty of watchfulness attaches under *Blizzard* so that a series of falls are not necessary for liability." Brief of Appellees at 24. Even if Miller was told that Bianca did not know how to skate,[3] this does not mean that he knew Bianca had a total inability to skate and was helpless to skate. In fact, the evidence suggests that Bianca was not helpless to skate as her mother testified that she was a "very, very good skater." Tr. 786:10-13.

For this Court to hold that a skating rink must provide assistance to every skater that it knows is a beginning skater would impose an unreasonable burden on the skating rink industry. It would require a skating rink to hire numerous additional skate guards to assist the legion of beginning skaters. This, of course, would effectively shut down the average skating rink due to the substantially increased costs of hiring a large number of additional guards. Furthermore, imposing such an expansive duty to supervise and assist would exponentially increase a skating rinks potential liability which would shut down the average skating rink due to the substantially increased costs of liability insurance.

There must be a balance of duties and responsibilities between skating rink operators and skaters. This Court delineated such duties in *Blizzard* when it held that a skating rink has a duty to provide assistance, by either removing the skater from the floor or preventing falls, when it discovers that the skater has a total inability to skate which exposes the skater to a likelihood of serious injury. *Blizzard*, 10 So. 2d at 344-45. Implicit in this holding is that a skater is responsible for the typical falls and stumbles inherent in the activity. In other words, the skater

[3] Ms. Barnes resorts to manufacturing evidence when she states: "Based (sic) Miller's observations, [Bianca] was scared, unsteady, and inexperienced confirming what he had been told." Brief of Appellees at 24. No where in the record does Miller, or anyone else, state that Bianca appeared scared or unsteady—perhaps this is why Ms. Barnes does not follow her statement with a citation. On the contrary, Miller testimony indicates that Bianca was confident and that she was "persistent in [that] she wanted to do it by herself." Tr. 1071:14-20, 28.

is responsible for the typical falls and stumbles associated with losing his or her balance and the skating rink is responsible for failing to prevent the atypical falls and stumbles that it knows are associated with a person's total inability to skate and which are likely to cause serious injury.

In a further attempt to avoid *Blizzard's* holding, Ms. Barnes resorts to challenging the viability of the case. Ms. Barnes argues that *Blizzard* is no longer good law because its holding is based on the assumption of the risk defense which has been subsumed into comparative negligence which means that a child between the ages of 7 and 14 can not be liable for contributory negligence unless she has "exceptional capacity." Brief of Appellees at 25. Once again, Ms. Barnes misreads *Blizzard*. The *Blizzard* case is not based on the assumption of the risk defense; it is based on the duty to supervise. It sets forth when exactly a skating rink has a duty to remove a skater from the rink floor or to provide assistance to prevent further falls. If the skating rink's duty is not triggered, then it is not liable.

Ms. Barnes also cites to a New Jersey case, *Derricotte v. United Sates of Am.*, 794 A.2d 867 (N.J. Super. Ct. 2002), for the proposition that a skating rink should be held liable for negligent supervision "where a skating rink employee who knew [a] child was inexperienced allowed a child to skate unaided." Brief of Appellees at 22. Besides the fact that the plaintiff in *Derricotte* was not a child, but a grown woman in her mid-thirties, Ms. Barnes also grossly misstates the holding of the case.

In *Derricotte*, a skating rink distributed leaflets advertising free roller skating lessons on Saturday mornings, in which the rink was closed to the general public and used exclusively for skate lessons. *Id.* at 231. When the plaintiff came to the rink to obtain a free lesson, an instructor provided her with a few minutes of instruction in a carpeted area and told her to go onto the rink by herself. *Id.* When the plaintiff attempted to skate, she fell backwards and

injured herself. *Id.* The court held that the rink was liable for the plaintiff's damages because it negligently provided her with roller skating lessons. *Id.* at 234.

Derricotte is not analogous to the instant case: Spotlite did not advertise that it was giving free roller skating lessons; it did not close its operations to the general public to offer lessons; Bianca did not come to Spotlite for the purpose of obtaining lessons; and Spotlite did not offer, nor did it provide, Bianca with roller skating lessons.

Finally, Ms. Barnes argues that, "given the posture of the case, Spotlite cannot rely on Miller's testimony to support its argument Miller did everything he should have done by watching Bianca and immediately coming to her aid after she fell." Brief of Appellees at 26. Miller testified that he guided Bianca onto the skate floor, but let her skate unaided after she "persisted in [that] she wanted to do it by herself"; that he was watching Bianca the entire time she skated; and that, as soon as she fell, he rushed to her aid, picked her up, and took her off of the skate floor. Tr. 1071:27-29, 1072:1-8. Ms. Barnes argues that "it was Bianca's 13 year old cousin, Courtney Weatherspoon, not Miller, who went over to Bianca and helped her get up, walk to the front of the rink, and sit down at one of the tables before any rink personnel came to Bianca's aide." Brief of Appellees at 26. While Courtney testified that she helped Bianca get up and helped move her to a table, she never testified that Miller was not also assisting Bianca. Moreover, neither Courtney, nor anyone else, testified that rink personnel did not come to Bianca's aid until she sat Bianca down at one of the tables.

III. Spotlite Did Not Breach A Duty To Provide Bianca Barnes With Reasonable Medical Care Because Spotlite's Actions Were Reasonable In Light Of What It Could Anticipate.

While Ms. Barnes sets-forth the general rule that a business must use reasonable care to see that one injured on its premises receives proper care, she completely ignores the corollary rule that a business is not liable if the care it provides is "reasonable in light of what it could

In furtherance of her argument, Ms. Barnes relies on a California case, *Thomas v. Studio Amusements, Inc.*, 123 P.2d 552 (Cal. App. 1942) and states: "In *Thomas*, after the skater fell, she was taken by an employee to a first aid room where she was examined. The employee decided she was not injured and did not summons medical assistance. In fact, her hip was broken. The court sustained a jury verdict against the rink, on the theory of breach of the duty to promptly secure medical attention could have led to an aggravation of her injuries."

This is the second case that Ms. Barnes has mischaracterized. The *Thomas* case does not hold that a skating rink should be held liable for aggravating a skater's injuries if it fails to secure medical attention as a result of incorrectly determining the skater was not injured. Nor does the *Thomas* court sustain a jury verdict against a skating rink based on breach of the duty to properly secure medical attention which led to the aggravation of a skater's injuries. The case deals with a skating rink's liability for improperly handling an injured skater which aggravates the skater's injury. The pertinent facts of *Thomas* are as follows:

> After her fall appellant was unable to rise and she was picked up from the floor by two instructors, who put her on her feet and rolled her . . . to the first aid room, where appellate was laid down on a table. Here respondent Berman, who was dressed in a white coat or jacket, told appellant he was a doctor, in answer to appellant's question to that effect. Berman stretched, pulled and rubbed appellant's leg and "pounded" her thigh with his open hand. He informed appellant that her injury was not serious and that she would be able to go to work the next day. He then assisted appellant to her feet and to walk out of the rink to a waiting car. Appellant was unable to get into the car and sat sideways on the running board, from which position Berman pulled appellant into the car and assisted her to the seat.

123 P.2d at 541-42.

The court sustained a jury verdict that Berman had improperly handled the plaintiff in the first aid room which resulted in aggravating her injuries. *Id.* at 544-45 ("Here the question is whether Berman's acts aggravated appellant's injuries . . . ."). Applying *Thomas'* actual holding

and facts, not the manufactured version, we see that it is not applicable to the instant case. Spotlite did not aggravate Bianca's injuries by improperly handling her after she fell.

Spotlite provided Bianca with reasonable medical care in light of what it could have anticipated. After Bianca had fallen, the skate guard, Marvin Miller, rushed to her aid, picked her up, and took her off of the skate floor. Tr. 1072:6-8. He took her to the sitting area and examined her head. Tr. 1072:16-17. Miller did not see any cuts, or bumps or bleeding. Tr. 1072:23-27, 1084:21-24. He got a towel from his locker, put some ice in it, and put it on Bianca's head. Tr. 1073:2-12. He then tried to call Bianca's mom several times at home, but could not reach her. Tr. 1073:17-19, 23-26. Bianca told him that she was "alright." Tr.1075:16.

The attendant at the concession stand also came by to check on Bianca. Tr.1057:7-12. She asked Bianca if she was feeling any pain, but Bianca just said that she was hot. Tr. 1060:28-29, 1061:1-3. The attendant got Bianca a bag of ice to rub on her forehead and around her neck. Tr. 1058:7-10. Bianca told the attendant that she was "okay." Tr. 1064:12-15. The attendant said "if you need me, call me, and I'll come back." Tr. 1058:17-18. When the attendant went to check on Bianca twenty or thirty minutes later, she had gone back to the dance floor. Tr. 1058:18-20, 1061:21-29.

Spotlite could not have reasonably anticipated that a minor fall—or any fall—would cause a cyst to dislodge in Bianca's head, clog a ventricle, and cause her death. The medical attention that Spotlite provided Bianca was reasonable under the circumstances. Spotlite provided care commensurate with the injury—a minor fall causing no apparent harm.

IV. The Trial Court Erred in Allowing Plaintiff's Economist to Testify Regarding Bianca's Lost Wages, Lost Entitlements and Lost Fringe Benefits.

As Spotlite showed in its opening brief, plaintiff's economist, Dr. George Carter, should not have been allowed to testify regarding Bianca's lost wages, lost entitlements and lost fringe benefits because his testimony on these issues did not meet the "reliability" standard under

Daubert v. Merrill Dow Pharms., Inc., 509 U.S. 579 (1993) and Miss. R. Evid. 702. In particular, Dr. Carter failed to consider the requisite "facts and data" necessary to allow his opinion to be presented to the jury, including, but not limited to: (1) The existence of a congenital brain tumor in the Bianca, which could have shortened her life span (and ultimately did); (2) Bianca's precocity, intellect, or school performance to date, which obviously could affect her scholastic achievement; and (3) Bianca's home and community environment, economic status, and other environmental predictors, all of which were left out of Dr. Carter's base assumptions. *See* Brief of Appellant at 17-19.

Though Ms. Barnes agrees that these factors should be taken into consideration, she cites *Greyhound* for the proposition that "there is a rebuttable presumption that the deceased child's income would have been the equivalent of the national average as set forth by the United States Department of Labor" (*Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1277 (Miss. 2000)), and therefore the factors identified above should only be used to rebut this presumption. Brief of Appellees at 39.[5] But *Greyhound* was decided prior to this Court's adoption of the *Daubert* standard under Miss. R. Evid. 702 in 2003; the rebuttal presumption it creates effectively puts the cart before the horse by allowing an expert to use certain assumptions without taking into account the post-*Daubert* "reliability" requirements that Mississippi law now mandates. In short, the "tightened" gate-keeping responsibility of the trial court under Miss. R. Evid. 702 and *Daubert* requires a different result: In keeping with *Daubert's* reliability requirement, the factors

[5] Ms. Barnes also tries to draw similarities to the presumptions of undue influence in *inter vivos* gift cases and the presumption in *Greyhound* (Brief of Appellees at 40), but there is no comparison. Economic testimony and the underlying methodologies are subject to judicial scrutiny as scientific or expert testimony under Rule 702. The rebuttable presumption in *inter vivos* cases is not based on scientific, mathematical, or complicated grounds, nor is it subject to judicial scrutiny under Rule 702. This analogy lacks merit.

itemized above should have been accounted for in **forming** Dr. Carter's opinions. Because Dr. Carter considered none of these factors, his opinion on lost wages should have been excluded.

Ms. Barnes' reliance on *Walker v. Yellow Freight Systems, Inc.* 1999 WL 757022 (E.D. La. 1999) and *Ferrarelli v. United States*, 1992 WL 893461 (E.D. N.Y. 1992) is also unavailing. Brief of Appellees at 43-45.[6] These factual distinguishable cases do nothing to show Dr. Carter's assumptions were sufficient support for allowing his testimony before the jury over Spotlite's *Daubert* challenge. *Walker* involved a grown man, who was killed while at work. *Walker*, 1999 WL 757022 at *1. The decedent had an established work history, and at the time of his death, was already providing for his mother, who was claiming damages for his lost earning capacity, thus the court did not exclude the economist's testimony. *Walker*, 1999 WL 757022 at *8. Similarly, *Ferrarelli* dealt with the wrongful death of a husband and father of three when the deceased was roughly thirty years of age. *Ferrarelli*, 1992 WL 893461 at *1. In particular, the deceased involved a grown man, with established patterns of household services, an established work and salary history, and other competent evidence on which the plaintiff's economist based his assumptions. *Id.* at *1-*2. In comparison, Bianca Barnes was a ten year old girl when she died, without any prior work history. The courts' determinations in *Walker* and *Ferrarelli* to allow the economists to testify --where much more information was available and considered -- are simply not applicable here.

Notably, Ms. Barnes does not even address Spotlite's challenge with respect to the patently speculative nature of Dr. Carter's calculations with respect to future benefits and entitlements. It was likewise in error for the trial court to allow his testimony on future benefits such as Medicare and Social Security which may not even be recognized; or unemployment

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[6] Ms. Barnes also cites *Lee v. U.S. Taekwondo Union*, 2006 WL 278692 (D. Hawaii, Jan. 26, 2006) (in Lexis form), but this case does not appear to be applicable in any way. It is attached as APP 1 for the Court's reference.

compensation and workers' compensation where Dr. Carter had assumed full-time employment over the course of Bianca's life. Though Dr. Carter separately assessed these items, they are, in fact, an inherent part of the wages earned over one's life and covered by the recovery of lost wages.

CONCLUSION

For the foregoing reasons and as detailed in Spotlite's opening brief, Spotlite respectfully requests that this Court reverse the jury verdict and decision of the trial court and render a judgment in favor of Spotlite that it is not liable for the death of Bianca and that plaintiff may not recover any damages against it. Alternatively, Spotlite respectfully requests that this Court reverse and remand for a new trial because it was reversible error to allow the testimony of plaintiff's economist on lost wages, lost entitlements and lost fringe benefits to be presented to the jury.

THIS, the 29th day of October, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing Reply Brief of Appellant Spotlite Skating Rink, Inc. to be delivered by United States mail, postage prepaid, to the following:

Honorable Richard A. Smith
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CIRCUIT COURT JUDGE

George F. Hollowell, Jr.
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COUNSEL FOR PLAINTIFF

SO CERTIFIED, this the 29th day of October, 2007.

LeAnn W. Nealey

LeAnn W. Nealey

Not Reported in F.Supp.2d, 2006 WL 278692 (D.Hawai'i)
(Cite as: Not Reported in F.Supp.2d)

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Lee v. U.S. Taekwondo Union
D.Hawai'i,2006.
Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.
Dae Sung LEE, Plaintiff,
v.
UNITED STATES TAEKWONDO UNION, a Colorado nonprofit Corporation; United States Olympic Committee, a federally chartered nonprofit corporation, Defendants.
No. Civ. 04-00461SOM-LEK.

Jan. 26, 2006.

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MOLLWAY, J.

I. *INTRODUCTION.*

***1** The only remaining claim before this court is Plaintiff Dae Sung Lee's claim that he was removed as coach of the 2004 United States Olympic Taekwondo Team because of his race, in violation of 42 U.S.C. § 1981. Defendants United States Olympic Committee and United States Taekwondo Union (collectively, "Defendants") move to strike Lee's claim for damages to his Taekwondo school. This part of the motion is denied.

The motion also seeks to prohibit the introduction at trial of evidence regarding lost profits and other damages allegedly suffered by Lee's Taekwondo school. Because such evidence is relevant to the financial losses Lee claims he personally sustained, this part of the motion is denied.

II. *ANALYSIS.*

A. *The Court Declines to Strike Lee's Claim For Damages To His Taekwondo School.*

Lee "is not seeking damages on behalf of" his Taekwondo school. Opposition at 10. Instead, Lee is seeking only damages he has individually sustained. *See* Verified Complaint for Damages, Injunction and Declaratory Relief (July 28, 2004) ¶ 23 ("PLAINTIFF has suffered general damages resulting from public embarrassment, humiliation, mental anguish, damage to his character, damage to his professional reputation which has taken decades to build, as well as special damages for *his* loss of future business and personal earnings and loss of future business opportunities."(emphasis added)). The motion to strike the school's damage claim is therefore premised on a faulty assumption.

Even if Lee were claiming damages for his Taekwondo school, the motion to strike that claim would be denied, as the motion was filed after the court deadline for such motions. Rule 16(b) of the Federal Rules of Civil Procedure requires this court to enter scheduling orders limiting the time to file motions. Rule 16(b) states that such scheduling orders "shall not be modified except upon a showing of good cause."*Id.;seealsoZivkovic v. S. Cal. Edison Co.,* 302 F.3d 1080, 1087 (9th Cir.2002) ("In general, the pretrial scheduling order can only be modified upon a showing of good cause. "(quotations omitted)); *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 608 (9th Cir.1992) ("The scheduling order controls the subsequent course of action unless modified by the court. Orders entered before the final pretrial conference may be modified upon a showing of 'good cause.' " (internal citation and quotations omitted)).

"Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment. The district court may modify the

pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Johnson,* 975 F.2d at 609 (quoting the 1983 Advisory Committee notes for Rule 16). The Ninth Circuit says that "the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end."*Id.* (internal citation omitted).

*2 The Ninth Circuit has explained:
A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.... [A] district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [a party's] case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier.

Johnson, 975 F.2d at 610 (quotations and citation omitted).

The Amended Rule 16 Scheduling Order in this case required dispositive motions to be filed by November 2, 2005. Because Defendants' motion to strike Lee's claim for damages to his Taekwondo school was not filed until November 15, 2005, and because Defendants failed to seek amendment of the dispositive motions' cut-off or to demonstrate good cause, the portion of Defendants' motion seeking to strike the damages claim is denied because it is untimely. *SeeU.S. Dominator, Inc. v. Factory Ship Robert E. Resoff,* 768 F.2d 1099, 1103-04 (9th Cir.1985) (holding that district courts may deny as untimely motions filed after a cut-off date), *superseded by statute on other grounds, Simpson v. Lear Astronics Corp.,* 77 F.3d 1170, (9th Cir.1996); *Doe v. Haw. Dep't of Educ.,* 351 F.Supp.2d 998, 1007-08 (D.Haw.) (dismissing as untimely a counter-motion for summary judgment that was filed after the dispositive motions cut-off), *recon. denied,*351 F.Supp.2d 1021 (D.Haw.2004).

Defendants argue that their motion is not a dispositive motion. The say that an order striking a damage claim "would not 'dispose' of any claim or any element of a claim in this litigation."Reply at 5. But the very title of the motion seeks a dispositive ruling, as it seeks "TO STRIKE PLAINTIFF'S CLAIM FOR DAMAGES TO THE TAEKWONDO SCHOOL OWNED BY NON-PLAINTIFF UNITED STATES TAEKWONDO CENTER."The body of the motion contends that "Plaintiff has asserted a claim for the damages suffered by United States Taekwondo Center, Inc. ('USTC')" and that "Defendants seek an order striking Plaintiff's claim for lost profits or other damages to USTC."Motion at 7. A motion that seeks to strike a claim is, in essence, a dispositive motion akin to a motion for summary judgment or a motion to dismiss. Such a motion is untimely.

B. *The Defendants' Motion to Preclude Evidence is Denied.*

The second part of Defendants' motion seeks to prevent the introduction of evidence at trial regarding lost profits and other damages allegedly suffered by Lee's Taekwondo school, which is a corporate body. This part of the motion also seeks to preclude the introduction of evidence regarding any diminution in value of the corporation's stock. As this second part of the motion is not dispositive, it is not governed by the November 2, 2005, dispositive motions' cut-off date. The motion is instead an early motion in limine that argues that such evidence is irrelevant because Lee's Taekwondo school has no claim for damages. This part of the motion is also denied.[FN1]

FN1. On January 4, 2006, Lee filed a motion to amend his Complaint to add his Taekwondo school as a co-Plaintiff to assert economic losses caused to the school by Defendants' alleged violation of § 1981. Lee explained that the motion was filed in case he was precluded from offering the school's losses because the school was not a party. That motion is currently set for hearing before Magistrate Judge Leslie E. Kobayashi on February 3, 2006. If Magistrate Judge Kobayashi grants the motion to amend the Complaint, then Defendants' motion to preclude the

> introduction of evidence at trial regarding lost profits and other damages allegedly suffered by the school will be moot, as the school's damages will certainly be relevant. At the hearing on this motion, this court inquired whether the motion for leave to amend would be withdrawn if the court denied the motion to preclude evidence of the school's losses. Lee's counsel could not respond definitively.

***3** Evidence regarding Lee's compensation from his Taekwondo school is relevant to the damages Lee personally suffered because of the alleged § 1981 violation. Lee appears prepared to present evidence that his personal earnings were tied to the school's revenue. Under those circumstances, it makes no sense to preclude evidence of the school's revenue. This is not the typical case in which an employee's salary or wages do not vary if the employer has a good or a bad year.

The Ninth Circuit's decision in *Gomez v. Alexian Brothers Hospital of San Jose,* 698 F.2d 1019 (9th Cir.1983), is instructive. In *Gomez,* a Hispanic plaintiff sued a hospital under Title VII, § 1981, and § 1985(3).*Id.* at 1020.The plaintiff had put together a proposal to run the emergency room at a hospital using a company called American Emergency Services Professional Corporation Medical Group ("AES"). Although hospital representatives allegedly told him that he had the best proposal, the contract was awarded to another physician group, allegedly because the plaintiff had proposed to staff the hospital with "too many brown faces." *Id.* The district court granted summary judgment to the hospital on the § 1981 and § 1985(s) claims, holding that "it was AES, not [the] plaintiff individually, which sought the contract and which was injured by defendants' alleged discriminatory conduct."[FN2]*Id.* In relevant part, the Ninth Circuit reversed summary judgment in favor of the hospital on Gomez's § 1981 claim. After noting that the "same discriminatory conduct can result in both corporate and individual injuries," the Ninth Circuit reasoned that the plaintiff's alleged deprivation of employment, humiliation, and embarrassment were injuries suffered by the plaintiff, not just by AES. *Id.* at 1021.

> FN2. The district court also granted summary judgment to the hospital on Gomez's Title VII claims, holding that Title VII only applies to employment relationships. *Gomez,* 698 F.2d at 1020.

In the second to the last paragraph of *Gomez,* and in the context of the plaintiff's Title VII claim, the Ninth Circuit stated that the plaintiff was "entitled to have his Title VII claim tried on the merits."*Id.* In the final paragraph of the opinion, the Ninth Circuit then said that the "same [was] true of plaintiff's claim under §§ 1981 and 1985(3),"*id.* at 1022, indicating that the plaintiff had a right to a trial on the merits of those claims because he might have been personally injured for purposes of § 1981 and § 1985(3).

Like the individual plaintiff in *Gomez,* Lee can recover damages he personally suffered as a result of Defendants' alleged violation of § 1981. Evidence regarding Lee's compensation from his Taekwondo school is relevant to those damages.

V. *CONCLUSION.*

For the forgoing reasons, the motion is denied.

IT IS SO ORDERED.

D.Hawai'i,2006.
Lee v. U.S. Taekwondo Union
Not Reported in F.Supp.2d, 2006 WL 278692 (D.Hawai'i)

END OF DOCUMENT

CERTIFICATE OF FILING

I, LeAnn Nealey, certify that I have had hand-delivered the original and three copies of the Reply Brief of Appellant Spotlite Skating Rink, Inc. and an electronic diskette containing same on October 29, 2007, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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