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IN THE THIRD JUDICIAL DISTRICT COURT  
SUMMIT COUNTY, STATE OF UTAH

FILED BY 

ROBERT PILOT,

Plaintiff,

v.

EARL N. HILL,

Defendant.

**RULING AND ORDER ON PLAINTIFF'S  
MOTION TO AMEND COMPLAINT TO  
CONFORM TO THE EVIDENCE AT  
TRIAL**

Case No. 140500187

Judge Kara Pettit

This matter came before the Court on Plaintiff's Motion to Amend Complaint to Conform to the Evidence at Trial. After briefing was completed, including a supplemental brief by Defendant to which Plaintiff responded, the Court held a hearing on the Motion on July 20, 2016. After consideration of the parties' written submissions, pertinent case law and oral arguments, the Court rendered its decision on the record at the hearing, denying the Motion to Amend. Upon the Court rendering its decision, Plaintiff requested the opportunity for supplemental briefing on the issue of implied consent. The Court granted this request.

On August 4, 2016, Plaintiff filed his Supplemental Brief on Implied Consent. On August 19, 2016, Defendant filed his Memorandum in Opposition to Plaintiff's Supplemental Brief on Implied Consent. On August 26, 2016, Plaintiff filed his Reply in support of Supplemental Brief on Implied Consent. On August 29, 2016 Plaintiff filed a Request to Submit for Decision the Supplemental Brief on Implied Consent, in which Plaintiff requested another hearing before the Court. On August 30, 2016 Defendant filed an Objection to Plaintiff's Request for Hearing.

The Court agrees with Defendant that the parties have had ample opportunity to present their arguments fully to the Court by way of written submissions and oral argument, and additional oral argument is not necessary, nor will it assist the Court in rendering its decision. Therefore, the Court respectfully declines to set this matter for hearing again.

The Court has carefully reviewed and considered the parties' supplemental briefs and the case law cited therein and is not persuaded that the decision it rendered at the hearing on July 20, 2016 is incorrect.

Plaintiff moves the Court, pursuant to Rule 15(b) of the Utah Rules of Civil Procedure, to allow him to amend his complaint, after the jury rendered its verdict, to conform to the evidence at trial. Specifically, Plaintiff seeks to change the Tier designation of his complaint from Tier 2 to Tier 3. *See* Motion at 11 and Proposed Amended Complaint attached as Exhibit C to Motion, ¶ 4. Plaintiff's March 26, 2014 complaint alleged: "The amount in controversy exceeds the sum of \$10,000.00 and is more than \$50,000. This is a Tier II case."<sup>1</sup> Complaint, ¶4. Plaintiff's proposed Amended Complaint alleges: "The amount in controversy exceeds the sum of \$300,000. This is a Tier III case." Proposed Amended Complaint, ¶4.

As the Court noted at oral argument, it agrees with Plaintiff that the pertinent analysis is under Rule 15(b), not 15(a), and thus, Defendant's arguments regarding 15(a) are inapplicable.

Rule 15(b) provides:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Utah R.Civ.P. 15(b).

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<sup>1</sup> Defendant incorrectly quotes this paragraph in his briefing as "less than \$50,000."

Rule 15(b) has two parts, one mandatory and one discretionary. *Gen. Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 505–06 (Utah 1976). The discretionary situation applies when an objection is made to evidence on the ground that it is outside the scope of the pleadings. *Eldridge v. Farsnworth*, 2007 UT App. 243, ¶37, 166 P.3d 639. Defendant conceded, as he must, that he did not object to evidence presented at trial regarding damages above \$299,999. Specifically, this evidence was Mr. Nicolatus’ expert testimony that Plaintiff suffered lost earning capacity of more than \$600,000. Thus, the Court again agrees with Plaintiff that the appropriate analysis is under the mandatory portion of Rule 15(b).

Under this analysis, if the Court finds that the issue was tried by express or implied consent, it must “treat the issues in all respects as if they had been raised in the pleadings.” *Keller v. Southwood N. Med. Pavilion*, 959 P.2d 102, 105 (Utah 1998). There is no dispute that Defendant did not expressly consent to try this matter as a Tier 3 case. Thus, Plaintiff argued in his opening memorandum that: “The issue of damages above the Tier-II limit was tried before the Jury with Defendant’s implied consent.” Motion to Amend Complaint to Conform to Evidence at Trial at 4; *see generally* Section B of Motion to Amend Complaint to Conform to Evidence at Trial. Plaintiff’s position is that because Mr. Nicolatus testified, without objection, that Plaintiff sustained lost earning capacity of more than the Tier 2 limit, Defendant impliedly consented to trying the issue of damages above the Tier 2 limit, and Plaintiff should be allowed to recover Tier 3 damages.<sup>2</sup> The Court respectfully disagrees.

As the Utah Supreme Court held in *Hill v. Estate of Allred*, 2009 UT 28, ¶ 47, 216 P.3d 929, a case relied upon by Plaintiff in his opening and other memoranda:

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<sup>2</sup> Notably, as Defendant reminded the Court at oral argument, the jury did not award Plaintiff any damages for lost earning capacity. Instead, the jury awarded \$19,484 for economic damages and \$621,505 for non-economic damages. Thus, Plaintiff is seeking to amend his complaint to Tier 3 in order to recover the non-economic damages awarded by the jury that exceed the Tier 2 limit.

Implied consent to try an issue “may be found where one party raises an issue material to the other party's case or where evidence is introduced without objection, where it appear[s] that the parties understood the evidence [is] to be aimed at the unpleaded issue.” *Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct.App.1987) (first alteration in original) (citation and internal quotation marks omitted). Further, the “test for determining whether pleadings should be deemed amended under Utah R. Civ. P. 15(b) is whether the opposing party had a fair opportunity to defend and whether it could offer additional evidence if the case were [retried] on a different theory.” *Id.* at 785 (internal quotation marks omitted). “[W]hen evidence is introduced that is relevant to a pleaded issue and the party against whom the amendment is urged has no reason to believe a new issue is being injected into the case, that party cannot be said to have impliedly consented to trial of that issue.” *Keller*, 959 P.2d at 105 (internal quotation marks omitted).

*Hill v. Estate of Allred*, 2009 UT 28, ¶¶ 47-48, 216 P.3d 929, 940–41.

In *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998), cited by the *Hill* Court, the Utah Supreme Court stated:

A finding of implied consent “depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial.” *Domar Ocean Transp. v. Independent Refining Co.*, 783 F.2d 1185, 1188 (5th Cir.1986) (quoting *Jimenez v. Tuna Vessel GRANADA*, 652 F.2d 415 (5th Cir.1981)). A party may give implied consent when it does not object to the introduction of evidence at trial. *See General Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Utah 1976). However, “[w]hen evidence is introduced that is relevant to a pleaded issue and the party against whom the amendment is urged has no reason to believe a new issue is being injected into the case, that party cannot be said to have impliedly consented to trial of that issue.” *Domar Ocean Transp.*, 783 F.2d at 1188.2 In applying rule 15(b), the trial court should assess whether the parties tried an issue by express or implied consent. *See Colman v. Colman*, 743 P.2d 782, 785 (Utah Ct.App.1987).

*Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998). Thus, in order to find implied consent under the Utah Supreme Court’s directives, this Court must find that Defendant had reason to believe that the issue of recovery of Tier 3 damages, which was not presented by the pleadings, entered the case at trial.

Plaintiff plead his complaint as Tier 2. Pursuant to Rule 8(a) of the Utah Rules of Civil Procedure:

A party who claims damages but does not plead an amount must plead that the damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that

qualifies for tier 1 or tier 2 discovery constitutes a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15.

Utah R. Civ. P. 8(a).

“Actions claiming more than \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for Tier 2.” Utah R. Civ. P. 26(c)(3). Discovery proceeded at a Tier 2 level. As part of this Tier 2 discovery, Mr. Nicolatus provided a report estimating that Plaintiff’s lost earning capacity exceeded \$600,000 if he did not receive additional education.

Plaintiff produced this report as part of Tier 2 discovery, to support his claim for recovery under his Tier 2 Complaint, but Plaintiff did not give any indication to Defendant that he intended to revoke his waiver of the right to recover damages above the Tier 2 limit, or that he intended to pursue a right to recover damages of more than \$299,999 at trial. The Court agrees with Defendant that there is no “evidence in the record that Defendant or Defendant’s counsel expressly or impliedly consented to have the Court consider the case for Tier 3 damages.” Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Amend Complaint to Conform to the Evidence at Trial at 6. The Court finds that Defendant had no reason to believe the evidence presented by Plaintiff’s expert was being introduced to allow Plaintiff to recover damages above \$300,000, and was not simply introduced to establish what, if any, injuries Plaintiff suffered for purposes of recovering damages up to \$299,999. *See* Defendant’s Memorandum in Opposition to Plaintiff’s Supplemental Brief on Implied Consent at 4; *see Hill v. Estate of Allred*, 2009 UT 28, ¶ 49, 216 P.3d 929, 941.

Moreover, the Court agrees with Defendant that because he had no notice of Plaintiff’s intent to attempt to recover damages greater than \$299,999, Defendant did not have a fair opportunity to defend. Defendant asserts that if he had known that Plaintiff was seeking to undo

his waiver and attempt to recover more than \$299,999 in damages, Defendant's litigation decisions--including what discovery to conduct, what experts to retain, whether to elect reports or depositions--would have been different in light of the increased risk. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion to Amend Complaint to Conform to the Evidence at Trial at 8 and Defendant's Memorandum in Opposition to Plaintiff's Supplemental Brief on Implied Consent at 6. This is significant and precisely why the Advisory Committee Notes state: "It would be unfair for a party to plead a smaller amount of damages in order to take advantage of the streamlined discovery and then seek to recover greater damages." Advisory Comm. Note, Utah R. Civ. P. Rule 8. Moreover, although not binding upon the Court, the fact that the Advisory Committee contemplated, and rejected, the precise procedure attempted by Plaintiff in this case is supportive of the Court's finding:

**Question:** What if a jury awards an amount in excess of the tier limits? May a motion to amend to conform to the evidence be made at that point?


**Answer:** No. Under Rule 8(a), a party who pleads a case as a tier 1 or tier 2 case has waived any right to recover damages above the applicable tier limits. Thus, unless the party has appropriately amended its pleading pursuant to Rule 15, the tier limit restricts the amount of damages that can be awarded. An award in excess of the tier must be reduced by the court to the applicable tier limit. The choice of a lower tier confers the benefit of no significant discovery in return for the party's giving up the chance to obtain greater damages. It would be inequitable if a party were allowed to plead a case into tier 1, prevent the defense from conducting the discovery befitting a larger claim, and then recover an amount in excess of the tier limit.

Civil Procedures Committee FAQs About Disclosure and Discovery, Discovery tiers – Effect of discovery tier on limiting the judgment.

For the reasons set forth by the Court at oral argument on July 20, 2016, in addition to the reasons set forth in this Ruling, the Court DENIES Plaintiff's Motion to Amend to Conform to the Evidence at Trial.

DATED this 18th day of October, 2016.

DISTRICT COURT JUDGE



A handwritten signature in black ink, appearing to read 'Kara Pettit', is written over a horizontal line.

Judge Kara Pettit

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140500187 by the method and on the date specified.

MANUAL EMAIL: JESSICA J JOHNSTON jjohnston@strongandhanni.com  
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10/18/2016

/s/ BRIDGETTE BLONQUIST

Date: \_\_\_\_\_

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Deputy Court Clerk