

2007

# Michael Reid Nielsen vs. Lorenzo M. Spencer : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL REID NIELSEN,	)	
	)	<b>BRIEF OF THE APPELLANT</b>
Plaintiff/Appellee	)	
vs.	)	
LORENZO M. SPENCER	)	
	)	<b>Appellate Case No. 20070431-CA</b>
Defendant/Appellant	)	Trial Court No. 010700616

---

THIS IS AN APPEAL FROM THE SECOND DISTRICT COURT  
DAVIS COUNTY, STATE OF UTAH

---

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UTAH APPEALS COURT  
DEC 1

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## **LIST OF ALL PARTIES**

All parties to the proceeding are contained in the caption of the case.

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- C. Second Amended Proposed Judgment on Special Verdict, entered December 29, 2006. (Rec. 1101-1104).
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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has jurisdiction to hear this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated. This appeal is subject to assignment to the Utah Court of Appeal under Section 78-2-2(4), Utah Code Annotated; and has been assigned to the Utah Court of Appeals pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure. (Rec. 1197).

## **STATEMENT OF ISSUES**

**1. Issue:** Was Spencer’s underlying action for alienation of affection, brought “without probable cause” as required to sustain a claim for wrongful use of civil proceedings?

**Standard of Review:** A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000); *State v. Leyva*, 951 P.2d 738 (Utah 1997).

**Preservation for Review:** The legal standard to establish a claim for wrongful use of civil proceedings; and whether the dismissal of the prior action, as a discovery sanction, meant that the action was brought “without probable cause,” was raised in the trial court. (Rec. 1199, pg. 544-554).

**Plain Error Rule and Exceptional Circumstances:** If not properly preserved at trial, this issue should still be addressed on appeal under the plain error rule, *State v. Dunn*, 850 P.2d 1201 (Utah 1993), or based on the exceptional circumstances.

*State v. Lopez*, 873 P.2d 1127 (Utah 1994).

**2. Issue:** Was the termination of Spencer’s underlying action for alienation of affection “on the merits,” as required to sustain a claim for wrongful use of civil proceedings?

**Standard of Review:** A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000).

**Preservation for Review:** The legal standard to establish a claim for wrongful use of civil proceedings; and whether the dismissal of the prior action, based solely as a discovery sanction, constituted a dismissal “on the merits,” was raised in the trial court. (Rec.1199, pg. 544-554).

**Plain Error Rule and Exceptional Circumstances:** If not properly preserved at trial, this issue should still be addressed on appeal under the plain error rule, *State v. Dunn*, 850 P.2d 1201 (Utah 1993), or based on the exceptional circumstances. *State v. Lopez*, 873 P.2d 1127 (Utah 1994).

**3. Issue:** Was there a “willful act in the use of the process, not proper in the regular course of the proceeding,” in Spencer’s underlying action for alienation of affection, sufficient to sustain a claim for abuse of civil process?

**Standard of Review:** A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000).

**Preservation for Review:** The legal standard to establish a claim for abuse of civil process, and whether any of the items listed in the jury instructions could alone, constitute an abuse of process, was raised before the trial court. (Rec. 1199, pg.544-546).

**Plain Error Rule and Exceptional Circumstances:** If not properly preserved at trial, this issue should still be addressed on appeal under the plain error rule, *State v. Dunn*, 850 P.2d 1201 (Utah 1993), or based on the exceptional circumstances. *State v. Lopez*, 873 P.2d 1127 (Utah 1994).

4. **Issue:** Is Nielsen on his wrongful use of civil proceedings claim, entitled to prejudgment interest on a damage award of \$95,000.00 for the attorneys' fees he incurred in defending the underlying action brought against him?

**Standard of Review:** A trial court's decision to grant or deny prejudgment interest presents a question of law, reviewed for correctness. *Smith v. Fairfax Realty Inc.*, 82 P.3d 1064 (Utah 2003).

**Preservation for Review:** This issue was raised before the trial court. The issue was briefed (Rec. 962-1094), and the court issued its Ruling on Plaintiff's Motion For Prejudgment Interest and Costs, on November 30, 2006. (Rec. 1096-1100).

5. **Issue:** Are the attorneys' fees, awarded as damages under Nielsen's wrongful use of civil proceeding claim, "special damages" under Section 78-27-44 U.C.A., entitling Nielsen to prejudgment interest on his fees, pursuant to 78-27-44 U.C.A.?

**Standard of Review:** The interpretation of a statute is reviewed for correctness, giving no deference to the trial court's interpretation. *Summit Water Distrib. Co. v. Mountain Reg'l Water Special Serv. Dist.*, 108 P.3d 119 (Ut.App. 2005).

**Preservation for Review:** This issue was raised before the trial court. The issue was briefed (Rec. 962-1094) and the court issued its ruling interpreting this statute on November 30, 2006. (Rec. 1096-1100).

**6. Issue:** Did Nielsen properly make a claim in his complaint for prejudgment interest on "special damages actually incurred," as required by the Statute, in order to be entitled to prejudgment interest under Section 78-27-44 U.C.A.?

**Standard of Review:** The interpretation of a statute is reviewed for correctness, giving no deference to the trial court's interpretation. *Summit Water Distrib. Co. v. Mountain Reg'l Water Special Serv. Dist.*, 108 P.3d 119 (Ut.App. 2005).

**Preservation for Review:** This issue was raised before the trial court. The issue was briefed (Rec. 962-1094), and the court issued its ruling interpreting this Statute on November 30, 2006. (Rec. 1096-1100).

**7. Issue:** Is the trial court's interpretation that on Nielsen's tort claim, the award of \$95,000.00 under the Special Verdict form, is all "special damages" with no general damages, contrary to the law?

**Standard of Review:** A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000); *State v. Leyva*,

951 P.2d 738 (Utah 1997).

**Preservation for Review:** This issue was raised before the trial court. The issue was briefed (Rec. 962-1094), and the court issued its ruling interpreting the Special Verdict form on November 30, 2006. (Rec. 1096-1100).

## **STATEMENT OF THE CASE**

### **Nature of Proceedings:**

In 1996, the Defendant/Appellant, Lorenzo Spencer (“Spencer”) brought an action against the Plaintiff/Appellee, Michael Nielsen (“Nielsen”) for alienation of affection, intentional infliction of emotional distress and negligent infliction of emotional distress. Nielsen had been involved in an ongoing sexual relationship with Spencer’s wife, Jewelya Spencer (“Jewelya”), and fathered twins through Jewelya, while she was married to Spencer. Nielsen met Jewelya again in California in 1995, and Jewelya subsequently filed for divorce in 1996. (Rec. 741-746) (Civil No. 960700147-PI)

The trial court dismissed Spencer’s intentional and negligent infliction of emotional distress claims based upon the statute of limitations. (See Findings on Motion for Summary Judgment, Rec. 809, ¶s 5 & 6). The court then ruled that Spencer failed to produce certain documents in discovery; and therefore dismissed the remaining claim for alienation of affection, as a discovery sanction, under Rule 37(b)(2)(C). (See Findings on Motion to Dismiss, Rec 802, ¶ 22).

After the dismissal of the alienation of affection claim against him, Nielsen filed this action against Spencer on December 18, 2001, for wrongful use of civil proceeding and abuse of process. (Rec. 1-7) Nielsen claimed that the alienation of affection claim was brought against him without probable cause, because Spencer knew that he could not prevail on his claim against Nielsen. (Rec. 2, ¶ 8). Nielsen also filed an abuse of process claim, alleging that Spencer engage in dilatory tactics in the alienation of affection case, by failing to produce certain documents, pursuant to discovery requests. (Rec. 4, ¶ 14). Nielsen claimed that Spencer's intent with the alienation of affection lawsuit was to harass, and embarrass Nielsen, and cause him to incur substantial time and expense. (Rec. 4, ¶ 16). Nielsen sought damages for his attorneys' fees incurred in defending the alienation of affection claim, attorneys' fees for bringing the current action, as well as, lost earnings and benefits, loss of employment time, emotional distress, mental pain and suffering, medical expenses, and other expenses to be determined according to proof. Nielsen also sought punitive damages. (Rec. 3, ¶ 10, & 6, ¶ 18). Nielsen made no claim for prejudgment interest; and did not make any claim for "special damages actually incurred" for medical or hospital care, under Section 78-27-44 U.C.A. (Rec. 3-7).

The matter was set for trial and jury instruction were prepared by Spencer's counsel on the wrongful use of civil proceedings (Rec. 472), including instructions: that even good marriages have difficulties and the existence of marital problems does not justify or excuse a person's intrusion into the marriage relationship (Rec. 476); that the law recognizes that the enticing away of another man's wife is an act inherently wrong

and necessarily known to be wrong (Rec. 474); and that the person's intrusion need not be the sole cause of the alienation of affection, but that person may be liable if his actions or conduct was the controlling or the effective cause of the alienation, even though there were other causes that might have contributed to the alienation. (Rec. 477).

Jury instructions were also prepared by Spencer's attorney regarding the abuse of civil process (Rec. 473) including instructions that: Nielsen must prove that Spencer maliciously used the legal process against Nielsen primarily to accomplish a purpose for which it was not designed (Rec. 473); and that even a pure spite motive is not sufficient to state a claim for abuse of process where the process is used only to accomplish the result for which it was created, (Rec. 475).

A 3 day jury trial was held on June 7-9 2006. (Rec. 588-593). At trial Nielsen testified that he did meet Spencer's wife, Jewelya, on numerous occasions, while she was married to Spencer, and had sex with her. (Rec. 1199, Trans. pg. 455). He also admitted that he had an ongoing sexual relationship with Jewelya and suspected that he was the father when she later became pregnant. (Rec. 1199, Trans. pg. 456). After Jewelya became pregnant, Nielsen continued to have sexual relations with her. (Rec. 1199, Trans. pgs. 461-463). Blood tests later confirmed that Nielsen was the father of the twin girls born to Jewelya, while she was married to Spencer. (Rec. 1199, pg. 428 & 463).

Although Nielsen admitted at trial that he had had sexual relations with Jewelya and had fathered two children with her while she was married to Spencer,



Nielsen argued that Spencer and his wife had other marital problems and that Nielsen's extra-marital affair, the fathering of two children, and the on-going sexual relations with Spencer's wife; was not the "controlling cause" of the alienation of affection in their marriage; and therefore, because there were other problems in the marriage, Spencer's alienation of affection lawsuit against Nielsen, constituted a wrongful use of civil proceedings. (Rec. 1199, Trans. pg. 570, 579-580).

Nielsen also claimed that Spencer abused the legal process by engaging in one or more of the following acts, in pursuing his alienation of affection claim against Nielsen: (a) attempting to take depositions of Nielsen's wife and mother; (b) intentionally causing crucial evidence to be lost or destroyed; (c) misrepresenting facts in order to mislead Nielsen, causing him to incur additional expense and time; (d) engaging in delay tactics, causing Nielsen to incur additional expenses and attorneys' fees; (e) designating numerous witnesses; and (f) improperly attempting to influence witnesses to misstate facts. (Jury Instruction No. 19, Rec. 620). Spencer objected to this list of items and argued that they (particularly standing alone) were not sufficient to constitute an abuse of the civil process. (Rec. 1199, pg. 544-547). The court ruled that any one of these acts alone, would be sufficient for abuse of process, and it was a matter for the jury to decide. (Rec. 1199, pg.544-545). Nielsen argued to the jury, at the close of trial, that any one of these actions standing alone, was sufficient to constitute an abuse of the civil process. (Rec. 1199, Trans. pgs. 582-585).

For damages, Nielsen sought \$15,960.00 for lost earnings; \$95,000.00 for the attorneys' fees he incurred in defending the alienation of affection lawsuit, and \$86,000.00 for attorneys fees he incurred in bringing the current action; for a total amount of \$178,960.00. (Rec. 1199, pg. 589). Nielsen also sought punitive damages. (Rec. 1199, pg. 589-590).

Spencer maintained that the list of items for abuse of process, particularly standing alone, were not sufficient to constitute an abuse of process. (Rec. 1199, pg. 544-547). Spencer further argued that the dismissal of the alienation of affection claim, as a discovery sanction, did not constitute a dismissal on the merits, nor did it show a lack of probable cause by Spencer in filing his alienation of affection claim against Nielsen. (Rec. 1199, pg. 553). After all, Nielsen had admitted that he had sexual relations with Spencer's wife, fathering twins. (Rec. 1199, pg. 455).

There was no ruling by the court, as a matter of law, that the prior alienation of affection claim was filed by Spencer without probable cause, or that the alienation of affection claim was terminated in favor of Nielsen on the merits. There was no ruling by the court, as a matter of law, that Spencer's failure to comply with discovery requests in the alienation of affection lawsuit, or that any action taken by Spencer in the alienation of affection lawsuit, taken alone or collectively, was a "willful act not proper in the regular course of the proceeding," constituting an abuse of civil process.

Spencer objected to the jury instructions prepared regarding the wrongful use of civil proceeding and abuse of process, Instructions 16 & 19. (Rec. 617 & 620, respectively). Spencer's counsel complained about Instruction 16, that the dismissal by Judge Dawson of the alienation of affection claim was not based on the merits of the case and did not mean that the action was improperly filed, but that it was only dismissed as a discovery sanction. (Rec. 1199, pg. 553).

Instruction 16 attempts to set forth the elements that Spencer must prove in order to prevail on his alienation of affection claim. (Rec. 617). It requires that Spencer prove that: (1) he and his wife, Jewelya were happily married and had a genuine love for each other, (2) that the love and affection so existing was alienated and destroyed, (3) and that Nielsen made willful, intentional, wrongful, and malicious acts toward Jewelya, which were the controlling or effective cause that brought about the loss and alienation of such love and affection. (Rec. 617). In reality, the jury was being asked not to determine if Spencer had probable cause to file his alienation of affection claim, but rather to determine the underlying case, i.e., whether Nielsen was the "controlling cause" of the alienation of affection between Spencer and Jewelya.

Spencer's counsel also objected to Instruction 19 and complained that the list of items (particularly when standing alone) did not constitute a wrongful use of the civil proceedings. (Rec. 1199, pg. 544-546). The trial court denied his objections saying one was sufficient, and it was a matter for the jury to decide. (Rec. 1199, pg. 454-546).

After trial, the jury found in favor of Nielsen and against Spencer, using a Special Verdict form, the jury awarded Nielsen \$95,000.00 on his wrongful use of civil proceeding claim. (Rec. 640-641) The jury also found in favor of Nielsen on his abuse of process claim, but did not award any damages under this claim. No punitive damages were awarded. (Rec. 640-641).

After the Special Verdict was returned, a Judgment on Special Verdict was prepared (Rec. 955-958), it provided for prejudgment interest on the \$95,000.00 damage award, from September 20, 2001, to the date of the Verdict, in an amount of \$44,333.36. (Rec. 958, ¶ 6). Spencer filed an objection to this, arguing that there should be no pre-judgment interest awarded, without a statute or contract. (Rec. 962 & 965, ¶ 1). Nielsen filed a response to Spencer's objections (Rec. 969-991), arguing that the \$95,000.00 amount awarded, was the amount Nielsen had asked for his attorneys' fees in defending the alienation of affection case, and apparently the jury accepted this amount. (Rec. 971). Nielsen also filed an Amended Proposed Judgment on Special Verdict (Rec. 987-990), increasing the amount of prejudgment interest to \$86,447.86, by dating it back to May 3, 1996, the date Spencer filed his alienation of affection lawsuit. (Rec. 990, ¶ 6). Also for the first time Nielsen claimed that he was entitled to prejudgment interest on the damage award, based on 78-27-44 U.C.A. (Rec. 971). Spencer responded, arguing that 78-27-44 U.C.A. was not applicable in this case, and even if it was, Nielsen should not be awarded prejudgment interest back to May 3, 1996, because Nielsen's cause of action could not

have arisen until the alienation of affection claim was dismissed in 2001. (Rec. 993).

A hearing was held on August 29, 2006. (Rec. 1026). After the hearing the parties submitted additional cases. On November 30, 2006, the trial court issued its Ruling on Plaintiff's Motion For Prejudgment Interest and Costs. (Rec. 1096-1100). The trial court ruled that Nielsen was entitled to prejudgment interest on the damages as provided in 78-27-44 UCA. (Rec. 1096). The trial court further ruled that the \$95,000.00 amount awarded constituted "special damages" for purposes of 78-27-44, citing Rule 9(g) of the Utah Rules of Civil Procedure. (Rec. 1098). The trial court however, did not allow prejudgment interest back to May 3, 1996, but ruled that since the cause of action did not accrue until the alienation of affection action was terminated in 2001, Nielsen was only entitled to prejudgment interest from the date of termination in 2001. (Rec. 1098).

On December 29, 2006, the trial court entered a Second Amended Proposed Judgment on Special Verdict. (Rec. 1101-1104). On January 5, 2007, Spencer filed a Motion for New Trial (Rec. 1106) arguing: that the alienation of affection claim was not brought without probable cause; that it was not dismissed on the merits; that there was no wrongful use of the civil proceeding in the alienation of affection action; that the jury was not properly instructed, and that the court's interpretation of the Special Verdict form, i.e., that the \$95,000.00 amount awarded as general damages for attorneys' fees, constituted "special damages" under 78-27-44 U.C.A., for medical bills actually incurred, was in error and contrary to the law. (Rec. 1109-1114).

The trial court denied Spencer's Motion for New Trial. Its Order Denying Defendant's Motion for New Trial, was entered on May 1, 2007. (Rec. 1189-1192). On May 25, 2007, Spencer filed his Notice of Appeal. (Rec. 1193).

**Statement of Facts:**

1. Nielsen filed his Complaint in this action on December 18, 2001, alleging two causes of action: wrongful bringing of civil proceedings; and abuse of process. (Rec. 1-7).

2. Nielsen claimed that Spencer's alienation of affection claim was brought against him without probable cause, because Spencer knew his wife never loved him and because he knew that he could not prevail on his alienation of affection claim against Nielsen. (Rec. 2 ¶ 8).

3. In his wrongful bringing of civil proceedings claim, Nielsen alleges that on or about April 3, 2001, Spencer's alienation of affection claim against Nielsen was dismissed as a sanction for failing to comply with discovery requirements. (Rec. 3, ¶ 9).

4. Nielsen sought damages under his wrongful bringing of civil proceeding claim, for attorneys' fees and costs incurred in defending the alienation of affection suit, attorneys' fees incurred in pursuing his lawsuit, lost earnings and benefits, loss of employment time, emotional distress, mental pain and suffering, medical expenses, and other expenses, to be determined according to proof; and other

consequential damages to be determined according to proof. (Rec. 3, ¶ 10).

5. In his abuse of process claim, Nielsen alleges that Spencer engaged in persistent and dilatory tactics intending to frustrate the judicial process during discovery of the alienation of affection action when he failed to produce certain documents. (Rec. 4, ¶ 14). Nielsen alleges that Spencer attempted to harass and embarrass Nielsen and cause him to incur additional expense and time by the following actions: (a) attempting take the depositions of Nielsen's mother and wife, (b) causing crucial evidence to be lost or stolen, (c) misrepresenting facts to mislead Nielsen from possible defenses, and to force Nielsen to incur additional time and expense, (d) engaging in delay tactics causing Nielsen to incur additional attorneys' fees, (e) designating numerous witnesses to force Nielsen to do exhaustive investigative work causing him to incur additional attorneys' fees and expense, (f) and attempting to influence other witnesses to misstate the facts. (Rec. 5, ¶ 17).

6. Nielsen sought damages under his abuse of process claim for attorneys' fees and costs incurred in defending the alienation of affection claim, attorneys' fees incurred in pursuing his lawsuit against Spencer, lost earnings and benefits, loss of employment time, emotional distress, mental pain and suffering, medical expenses, and other expenses, to be determined according to proof; and other consequential damages to be determined according to proof. (Rec. 6, ¶ 18). Nielsen further sought an award of punitive damages. (Rec. 6, ¶ 20).

7. The case was tried before a jury on June 7, 8, & 9, 2007. The first witness called was Jewelya. (Rec. 1200, Trans. pg. 35). She testified that she married Spencer on September 30, 1981.(Rec. 1200, Pg. 37). She testified that she worked hard to make her marriage with Spencer, work. (Rec. 1200, Pg. 40). She didn't want a divorce, she wanted to correct the problems in their marriage. (Rec. 1200, Pg. 41). She didn't ever want a divorce. (Rec. 1200, pg. 43).

8. At this time Jewelya was contacted by Nielsen, a high school boyfriend. Jewelya and Nielsen had been sexually active in high school. (Rec. 1200, pgs.51-52) Jewelya and Nielsen continued to meet and Nielsen began an intimate sexual relationship with Jewelya, knowing that she was married to Spencer. (Rec. 1200, pg. 53).

9. As a result of Nielsen's sexual relations with Jewelya, twin girls were born, Brooklyn and Danielle. (Rec. 1200, pg. 53). Jewelya suspected that the children belonged to Nielsen, but did not tell Spencer. (Rec. 1200, pg. 53). She eventually told Spencer about her sexual relationship with Nielsen. (Rec. 1200, pg. 55). She told Spencer that the girls, Brooklyn and Danielle, belonged to Nielsen and not to him. (Rec. 1200, pg. 56). She told Spencer this when the children were approximately 18 months old. (Rec. 1200, pg. 57). Blood tests were done on the children approximately 6 months later, which confirmed that the children belonged to Nielsen, and not to Spencer. (Rec. 1200, pg. 57). After this time, Nielsen continued his sexual relationship with Jewelya. (Rec. 1200, pg. 58).



10. Some time after this, Jewelya received a call from a woman, Shauna Thompson, who claimed that she had had a sexual encounter with Spencer. Jewelya wasn't shocked or angry about the call. (Rec. 1200, pg. 59) She knew first hand, "how something like that could happen, when you didn't mean it to." (Rec. 1200, pg. 60).

11. Shuana Thompson claimed to have a tape recording of a conversation she had with Spencer regarding the encounter. (Rec. 1200, pg. 61). Jewelya met with Thompson to obtain the tape, which she did; and then she destroyed the tape. (Rec.1200, pg 63).

12. Shuana Thompson's husband sued both Spencer and Jewelya for alienation of affection; and Jewelya filed a counterclaim against Shauna for alienation of affection, abuse of process and false imprisonment. (Rec. 1200, pg. 66). This lawsuit was settled for \$4,500.00. (Rec. 1200, pgs. 68 & 386)

13. After Jewelya told Spencer about her sexual relationship with Nielsen and that the girls belonged to Nielsen; Nielsen continued his sexual relationship with Jewelya. (Rec. 1200, pg. 70). A paternity suit was filed against Nielsen and an agreement was reached in the paternity action requiring support payments from Nielsen for the twin girls. (Rec. 1200, pg. 112).

14. After this time in late 1995, Nielsen met Jewelya in Southern California. Soon after this, Jewelya and Spencer separated in January of 1996 (Rec. 1200, pg. 85), and in March of 1996, Jewelya filed for divorce. (Rec. 1200, pg. 71).

15. Jewelya testified that Lorenzo did not want a divorce. (Rec. 1200, pg. 72). Even when he made threats of a divorce, she knew that he was not serious, and it was only an attempt to get her to behave. (Rec. 1200, pg. 98).

16. The next day of trial, Lorenzo Spencer testified. Spencer testified that he went to marriage counseling on and off with Jewelya. (Rec. 1201, pg. 178). That they would sometimes separate to cool down (Rec. 1201, pg. 182); and that one time they stayed separated for a month. (Rec. 1201, pg. 179).

17. Spencer testified that there was no physical abuse during the marriage (Rec. 1201, pg. 183), but that he did hold Jewelya's arms down one time to stop her from throwing things. (Rec. 1201, pg. 185).

18. Spencer testified that he did have one sexual encounter with Shauna Thompson, after he learned of Jewelya's ongoing sexual relationship with Nielsen. (Rec. 1201, pg. 195-196). Spencer was told by Dr. Taylor Hartman, that this might make him feel better, but he did not blame the encounter on Dr. Hartman. (Rec. 1201, pg. 195).

19. Spencer testified that after he learned of Nielsen's sexual relations with his wife, he inquired as to whether she had had sexual relations with other male friends and acquaintances. (Rec. 1201, pgs. 200-207)

20. Spencer testified that he was involved in a number of lawsuits as a landlord, involving minor landlord tenant disputes (Rec. 1201, pg. 207), and one department store, Z.C.M.I., collecting on Jewelya's charge card. (Rec. 1201, pg. 208). Nielsen introduced this evidence to show other stress in Spencer and Jewelya's marriage,

which he did not create. (Rec. 1201, pg. 208).

21. Spencer testified that his lawsuit against Nielsen for alienation of affection was dismissed because of his counsel's failure to produce discovery regarding these lawsuits. He testified that he provided the discovery to counsel, but his counsel failed to produce it. (Rec. 1201, pg. 239). The Order granting summary judgment was admitted as Trial Ex. 53, and read into court, it states "the court specifically finds that there is just cause under Rule 37(B)(2)(c) to dismiss the plaintiff's cause of action for alienation of affection and all punitive damages." (Rec. 1201, pg. 241). The Order further says, "[A]ll of which frustrated the judicial process and impeded trial on the merits and made it impossible or much more difficult to ascertain whether the allegations of plaintiff's complaint had any factual merit." (Rec. 1201, pg. 242).

22. After learning of Nielsen's sexual relations with his wife, Spencer testified that he approached Nielsen at work to meet with him about the situation, and made a tape recording of their conversation. (Rec. 1201, pg. 245). Spencer told him to leave his wife alone, and that he would pursue him and sue, if he didn't leave his wife and family alone. (Rec. 1201, pg. 246).

23. In Spencer's alienation of affection lawsuit against Nielsen, Spencer disclosed the existence of the tape, and indicated in discovery that the tape would be duplicated and produced. (Rec. 1201, pg. 248). However, the tape was never found and was never produced. (Rec. 1201, pgs. 248-249).

24. In Spencer's alienation of affection lawsuit against Nielsen, Nadine Nielsen, his mother, and Lorrie Nielsen, his wife, were subpoenaed as deposition witnesses. Nielsen's lawyer complained that the mother was too old, that she had health problems, and that neither her nor the wife, had any information relevant to the case. (Rec. 1201, pg. 257-258). A motion to strike the subpoena was filed and granted.

25. Spencer testified that he thought Nadine Nielsen, Mr. Nielsen's mother and Lorrie Nielsen, his wife, would have discoverable information. Spencer talked to Nadine Nielsen in a ShopKo parking lot and she said that she had told Mike to leave Jewelya alone. (Rec. 1201, pg. 414). Spencer thought that she and Nielsen's wife, would have information about Nielsen's affair with Spencer's wife, such as whether they knew about it, when they found out, how long it had been going on, Nielsen's activities at the time, and those types of things. (Rec. 1201, pg. 374). Once Nielsen's attorney objected and the court ruled that Spencer's attorney could not depose them. Spencer and his attorney complied with the court's order and did not depose Nielsen's mother or wife. (Rec. 1201, pg. 374-375).

26. In the alienation of affection case, Spencer's counsel listed the couple's entire Bountiful L.D.S. ward, as persons who may have possible information or may be used as a character witnesses. (Rec. 1201, pg. 260). As the case proceeded to trial, and before the final disclosure of witnesses for trial, the number was to be whittled down. (Rec. 1201, pg. 260).

27. At trial Nielsen's counsel tried to get Spencer to admit, that based on the extra-marital affairs, infidelity on both sides, and accusations of physical abuse (while denied by Spencer); Spencer understood in his own heart and mind that he really did not have a happy marriage in May of 1996, when he filed his alienation of affection suit against Nielsen. This accusation was denied by Spencer. (Rec. 1201, pg. 262).

28. Spencer testified that they were still trying to keep their marriage together, that in his heart he really wanted the marriage to work, that he had loved his wife for 15 years, and they had children that depended on them. (Rec. 1201, pg. 373).

29. In regards to the missing audio tape of Spencer's conversation with Nielsen, Spencer testified that he thought he knew where the tape was when he answered the discovery; but he could not find it after searching through boxes and boxes of tapes. He would frequently record not only his own speeches, but speeches of other people (Rec. 1201, pg. 377); and there had been several moves. (Rec. 1201, pg. 378).

30. In regards to the discovery sanction in the alienation of affection case, this had to do with lawsuits that were filed involving Spencer, which Nielsen's attorney confronted him about in his deposition. (Rec. 1201, pg. 381). These lawsuits are not sealed and are a matter of public record. At the time of the deposition, Mr. Nielsen's attorney indicated that he could and would obtain those records on his own. (Rec. 1201, pg. 381). He knew about the lawsuits during Spencer's deposition. (Rec. 1201, pg. 382).

31. Spencer testified that he did not file his action against Nielsen to cause him distress or to cause him to incur large legal expenses. (Rec. 1201, pg. 383).

The lawsuit filed by the Thompsons for alienation of affection was settled for a mere \$4,500.00. (Rec. 1201, pg. 386). Spencer loved his wife and he wanted the marriage to work. (Rec. 1201, pg. 373).

32. Nielsen also testified at trial. He testified that he was sexually intimate with Jewelya during high school. (Rec. 1199, pg. 419). After Nielsen learned that Jewelya and Lorenzo lived across the street from where he got his haircut, he initiated contact with Jewelya by buying her a birthday card and putting it in their mailbox. (Rec. 1199, pgs. 421-422). This lead to a phone call from Jewelya and Nielsen soon met Jewelya for lunch. (Rec. 1199, pg. 422).

33. Nielsen testified that he and Jewelya continued to have lunches (Rec. 1199, pg. 423); and then they met at a hotel and they were sexually intimate. (Rec. 1199, pg. 425). Nielsen admitted at trial that he went too far. He had free will. He didn't blame Jewelya, but accepted full responsibility for his actions. (Rec. 1199, pg. 426).

34. Nielsen further testified that he was sexually involved with Jewelya at least a dozen times over a period of two, three, or more, years. (Rec. 1199, pg. 426). He testified that he had sexual relations with her after it was learned that he was the father of the twin girls. (Rec. 1199, pg. 427) He also testified that he continued his sexual relations with Jewelya, after Spencer knew the twins belonged Nielsen. (Rec. 1199, pg. 427). The sexual relations continued because Nielsen was "pretty needy in that regard" (Rec. 1199, pg. 428), but Nielsen believed and knew, that it was a mistake. (Rec.1199, pg. 428).

35. Nielsen testified that it was his wife, Lorrie who pushed to have tests done to determine if the twin girls belonged to Nielsen. She is the one who said, "I've got to know, we can't go on like this." (Rec. 1199, pg. 428). Therefore, Nielsen did talk to his wife about his sexual relations with Jewelya and Nielsen's wife did have relevant information about the case. (Rec. 1199, pg. 428). Nielsen's wife also went to counseling with Nielsen to discuss the matter, how to resolve it, how to reveal it to the twins, and when. (Rec. 1199, pg. 429).

36. After the twins were born, Nielsen did have visitation, and the twins would be taken to his mother's house, Nadine Nielsen. Jewelya wanted the twins to feel that Nadine was their grandmother. (Rec. 1199, pg. 430). Therefore, Nielsen's mother did have relevant information about the case and that Nielsen had fathered twins with Jewelya. Nielsen never told the twins that he was their father, he doesn't know who told them. (Rec. 1199, pg. 430).

37. Later in 1995 Nielsen met Jeweyla in Southern California and they spent two days together and the last night at his hotel. (Rec. 1199, pg. 431-432) Although Nielsen claimed that nothing sexual happened, he admitted that they were intimate, that it didn't look good, and that it shouldn't have happened. (Rec. 1199, pg. 432).

38. Nielsen testified that it was after his California rendezvous with Jewelya that Spencer confronted him at his office in the latter part of 1995 or early 1996. (Rec. 1199, pg.433). Nielsen claimed that in their discussion he said he knew the California rendezvous looked bad, but nothing sexual happened. He then said that he and

Spencer discussed other times when Nielsen and Jewelya had been sexually intimate, without telling Spencer. (Rec. 1199, pg. 434). In this conversation Nielsen claimed that Spencer told him that if he didn't leave his wife alone, he would come after Nielsen and make his life miserable. (Rec. 1199, pg. 435).

39. Nielsen testified that the alienation of affection lawsuit that Spencer filed against him, supposedly to harass him, laid dormant for a couple of years. (Rec. 1199, pg. 439). Nielsen testified that he paid his first attorney, Tom Branch \$8,000.00, and Henriksen & Henriksen \$87,483.42, to defend the alienation of affection lawsuit. (Rec. 1199, pg. 440). Nielsen also testified that in the current lawsuit he had incurred \$55,966.00, with an additional \$10,000 likely after trial. (Rec. 1199, pg. 441).

40. Nielsen testified that he lost about 7 days a year, 8 hours a day at \$30.00 an hour for a total of \$8,400.00 over 5 years, in defending the alienation of affection lawsuit. (Rec. 1199, pg. 442); and \$7,560.00 in pursuing his case against Spencer. (Rec. 1199, pg. 443).

41. Nielsen testified that he did not seek any medical treatment and did not have any claim for medical expenses against Spencer. (Rec. 1199, pg. 444). Nielsen testified at trial, that to the best of his knowledge, his wife knew nothing about his relationship with Jewelya prior to June of '90, and that he did not tell his mother about his encounters with Jewelya. (Rec. 1199, pg. 444). He testified that his mother had health problems and when his mother was served with papers, she didn't understand what it was



all about, and she was very upset. (Rec. 1199, pg. 444).

42. Nielsen testified that he sought a court order preventing Spencer from proceeding with discovery or deposing his wife or mother. The court granted his motion, and afterwards there was no violation of the order, or any attempt by Spencer to depose Nielsen's wife or mother. (Rec. 1199, pg. 445).

43. On cross-examination, Nielsen again confirmed that he had had a sexual relationship with Jewelya and continued to have an ongoing sexual relationship with her. (Rec. 1199, pg. 455). That Jewelya became pregnant and delivered twins (Rec. 1199, pg. 455), and after this time, he continued to have ongoing sexual relations with her. (Rec. 1199, pg. 456). Sometimes in a vehicle, sometimes in a motel or hotel. (Rec. 1199, pg. 462). He felt terrible after the first time, but he continued to do it. (Rec. 1199, pg. 462).

44. Nielsen on cross-examination read from his deposition where he indicated that it was right after June of 1990 he spoke with Spencer about the affair and fathering the children; and it was him who wanted to meet with Spencer, but Spencer did not want to meet. (Rec. 1199, pg. 459).

45. Nielsen admitted that he had visitation with the children at his mother's home, and that his mother told him to stay away from Jewelya, and she did not approve of his relationship with Jewelya. (Rec. 1199, pgs. 463-464). His mother knew about the situation, but Spencer was not allowed to take her deposition to find out what

else she knew. (Rec. 1199, pg. 464).

46. Nielsen testified that he did not have sex with Jewelya in Southern California in July of 1995, but he admitted that he had intimate contact with her at that time. (Rec. 1199, pg. 465).

47. Nielsen further testified that his relationship with Jewelya did cause damage to Jewelya and Lorenzo's marriage. "It wasn't a good thing." (Rec. 1199, pg. 465). Nielsen further conceded that the revelation that he was the father of the twins, would have caused further stress and damage to the marriage. (Rec. 1199, pg. 466). And the fact he continued to have sexual relations with Jewelya, also would have caused stress and damage to the marriage. (Rec. 1199, pg. 466).

48. When the alienation of affection lawsuit was dismissed by Judge Dawson, Nielsen sought his attorneys' fees at that time, but the Judge refused stating, "I'm going to dismiss this, but you know, dismissal is enough, I'm not going to award you any attorneys' fees. If Mr. Spencer appeals and the case comes back then I will take a look at the attorneys' fees." (Rec. 1199, pg. 468-469).

49. Nielsen conceded that Spencer did not know what Nielsen's wife knew about the affair and that Spencer may have wanted to find out what she knew about it. (Rec. 1199, pg. 470). Nielsen also admitted that he also listed dozens of witnesses in his discovery answers in the alienation of affection case, many of the same witnesses listed by Spencer. (Rec. 1199, pg. 470).

50. Nielsen testified that he has never told the twins that he is their father and that he does not discuss that with them. He realizes that Spencer would have bonded with the twins before learning that he was not their true father. (Rec. 1199, pg. 473).

51. Spencer was later called on his own case, and testified that at least once a month when he traveled he would take Jewelya with him to places like: San Diego, San Fransico, Los Angeles, Phoenix, Dallas, Philadelphia, New York, Australia, Victoria Island, Vancouver; and Southern Florida, Ft. Lauderdale, Miami, and Tampa. (Rec. 1199, pg. 496) He also took her to Hawaii and Acapulco and Cancun, with a nanny to watch the children. (Rec. 1199, pg. 497).

52. Spencer further testified that he never told Jewelya that he didn't want to be married to her in this life, let alone forever; but that he wanted them to prepare to go to the L.D.S temple to have their marriage sealed forever. (Rec. 1199, pg. 498).

53. Spencer testified that one of the twins, Brooklyn had an eye condition, a cataract; and needed surgery. (Rec. 1199, pg. 498). Spencer was contacted by the doctor about giving blood prior to the surgery; and was told by Jewelya at that time, that he might not be the father. (Rec. 1199, pg. 498).

54. Spencer testified that regardless as to whether his encounter with Nielsen regarding his wife occurred in 1990 or 1995, he did not purposely destroy the tape recording of their conversation. (Rec. 1199, pg. 502). He thought he had it and he spent hours looking for it, but couldn't find it. It is possible that it was inadvertently

recorded over. (Rec. 1199, pg. 502). He had also moved several times. (Rec. 1201, pg. 378)

55. Spencer admitted in his testimony that he and Jewelya did not have a perfect marriage, but that they loved each other very much prior to Nielsen's involvement and that they were anticipating going to the temple and have their marriage sealed and their children sealed to them. (Rec. 1199, pg. 503).

56. Spencer admitted in his testimony that he was mad the night Jewelya told him about Nielsen and that he did call Nielsen that same night to ask him why. (Rec. 1199, pg. 504). Nielsen was mad at Jewelya for telling Spencer saying they had an agreement they weren't going to tell. (Rec. 1199, pg. 505) Spencer further admitted that he may have called Nielsen a name and threatened a lawsuit, if Nielsen did not leave his wife alone. (Rec. 1199, pg. 505).

57. Spencer testified that it was like getting hit in the gut with a baseball bat, to look at your two little girls and know that they're not yours, that you're not their real father. (Rec. 1199, pg. 505).

58. Spencer testified that he never mentioned anything about how much money he made to Nielsen. He never said that he would bury him at any cost. And he never said he didn't care if he won a lawsuit or not. (Rec. 1199, pg. 506).

59. Spencer testified that he made Jewelya promise him that she would no longer see Nielsen and that when he saw the children he would do so under certain

arrangements and restrictions and that she was not to remain with him and the children. (Rec. 1199, pg. 507).

60. Spencer testified that when he learned of Nielsen's rendezvous with Jewelya in Southern California in 1995, he was devastated. (Rec. 1199, pg. 508).

61. Spencer testified that after Jewelya divorced him they had problems, because Jewelya would deny him visitation of his children. Jewelya went to jail several times for denying visitation. (Rec. 1199, pg.510). Spencer did not want to see her in jail, but only wanted to see his children. (Rec. 1199, pg. 512). Eventually there was a custody change ordered in the divorce proceeding, changing custody of one of their children, Colton, to Spencer. (Rec. 1199, pg. 512).

62. Spencer testified that the main reason his marriage with Jeweyla failed was because of the constant affair between Nielsen and Jewelya. (Rec. 1199, pg. 513) Nielsen had destroyed his marriage, his family, and his life. Spencer had lost his marriage, his home, the association with his wife and children. Everything he had dreamed of when he married Jewelya in the first place, was lost. That is why he filed his alienation of affection claim. (Rec. 1199, pg. 514).

63. After testimony, in reviewing the jury instructions, Spencer's attorney objected to Instruction No. 19, regarding the elements for abuse of process, (Rec. 620) particularly paragraph 2, and the list of items that followed. The court denied the objection, and received the instruction. (Rec. 1199, pg. 544). The court stated, "[i]t

certainly is argument but they've got to find some of that and those are the only issues that have been raised relative to ways in which they abuse process. So they've got to find that one of those." (Rec. 1199, pg. 545). Spencer's counsel raised the question as to whether one of them is enough and the court responded, "[i]t is if they think it is. I say one or more. One may be. That's something you can argue to them. That's a question of whether it is. It may be. (Rec. 1199, pg. 545).

64. The court compared the case to a negligence case stating, "first of all you've got to file the civil process against the defendant, that he used the civil process for a purpose other than that for which it was intended in one or more ways - all he's got to find one way. (Rec. 1199, pg. 545, lines 19-22) To which, Spencer's counsel responded, "[a]ctually abuse of process he has to show that the process that was filed was inappropriate. My client wasn't married or they didn't have that kind of thing." (Rec. 1199, pg. 545, lines 23-25) To which the court said, "not really." The objections were denied. (Rec. 1199, pg. 547, lines 1 & 12).

65. Spencer's counsel also objected to Instruction No. 16, and complained that Judge Dawson did not dismiss the alienation of affection case because it was a bad faith filing, but rather it was dismissed because of the failure to comply with discovery orders. (Rec. 1199, pg. 553, lines 12-15).

## SUMMARY OF ARGUMENT

The dismissal of the underlying action, that Spencer brought against Nielsen for alienation of affection, as a discovery sanction under Rule 37(b)(2)(C) does not establish that the underlying action was brought “without probable cause,” in order to sustain a claim for wrongful use of civil proceedings. *Gilbert v. Ince*, 981 P.2d 841 (Utah 1999). Furthermore, the lack of probable cause, is a question of law for the court to determine, not the jury.<sup>1</sup> *Id.* In addition, the dismissal of the underlying action as a discovery sanction, does not constitute a termination “on the merits,” in order to sustain a claim for wrongful use of civil proceedings. *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff’d* 147 P.3d 383 (Utah 2006). Furthermore, the question as to whether a matter has been determined on the merits is a question of law for the court to decide, not the jury. *Palmer Development Corp. v. Gordon*, 723 A.2d 881 (Me. 1999), Restatement (Second) Torts, Section 673).

Spencer’s alleged conduct in the alienation of affection action, as listed in Jury Instruction 19, (Rec. 620) do not (particularly when standing alone) constitute, “a willful act in the use of the process, not proper in the regular course of the proceeding,” sufficient to sustain a claim for abuse of process. *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff’d* 147 P.3d 383 (Utah 2006). Furthermore, while the question of an ulterior purpose should be a question of fact for the jury, the question as to what constitutes a

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<sup>1</sup> Moreover, the jury in this case was never asked to determine if there was probable cause to file the alienation of affection claim, but rather the jury was asked to determine whether Nielsen was the controlling cause of the alienation of affection.

“willful act in the use of the process, not proper in the regular course of the proceeding,” should be a question of law for the court, and not for the jury to decide. *Id.*

The special damage provision of Section 78-27-44 U.C.A., allowing prejudgment interest on “special damages” actually incurred for medical treatment, should not apply in this case, where the recovery is a general damage award for attorneys’ fees incurred in defending the underlying action on a wrongful use of civil proceeding claim. Particularly when the amount and reasonableness of the fee was not determined until trial by the jury. Furthermore, “special damages” under Section 78-27-44 U.C.A., are not the same as special damages as far as pleading requirements are concerned. *Gleave v. Denver Rio Grande Western Railroad Co.*, 749 P.2d 660 (Ut.App. 1988). They are limited in scope to expenses paid to those who are injured so they can receive immediate medical and hospital care, if necessary. *Id.* at 672, reviewing Senate Bill 153 and legislative history of Section 78-27-44 U.C.A. In this case, Nielsen specifically testified that he did not seek medical treatment and had no claim for any medical expenses against Spencer. (Rec. 1199, pg. 444).

Finally, the trial court’s interpretation of the Special Verdict form, that the amount of \$95,000.00 awarded is not general damages, but rather all “special damages” under Section 78-27-44 U.C.A., with no general damages being awarded; is contrary to the law and the requirement that there must be an award of general damages, before there can be any special damages awarded for personal injury torts. *Balderas v. Starks*, 138 P.3d 75 (Ut.App. 2006).



## ARGUMENT

### **I. THE UNDERLYING ACTION WAS NOT BROUGHT “WITHOUT PROBABLE CAUSE” TO SUSTAIN A CLAIM FOR WRONGFUL USE OF CIVIL PROCEEDINGS**

In *Gilbert v. Ince*, 981 P.2d 841 (Utah 1999), the Utah Supreme Court held that the claim for wrongful use of civil proceedings required (1) use of the proceedings without “probable cause,” and primarily for a purpose other than that of securing the proper adjudication of justice; and (2) except in *ex parte* actions, the proceedings are terminated in favor of the person against whom they were brought. (emphasis added). (Restatement (Second) Torts, Section 674).

The Utah Supreme Court in *Gilbert v. Ince*, *supra*, cited *Baird v. Intermountain School Federal Credit Union*, 555 P.2d 877 (Utah 1976) stating that the claim for the wrongful use of civil proceeding is recognized only when the civil suit is shown to have been brought without *probable cause*, and it is usually said to require malice. *Id.* at 878 (emphasis added). The Utah Supreme Court in *Gilbert* thus held, that Gilbert had the obligation to prove that Ince acted without probable cause. *Id.* at 846.

The Court in *Gilbert* cited the Restatement (Second) of Torts in defining “probable cause” in the context of a wrongful use of civil proceeding claim, as follows:

On who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he [or she] reasonably believes in the existence of the facts upon which the claim is based, and . . . . correctly or reasonably believes that under those facts the claim may be valid under the applicable law. *Restatement (Second) of Torts Section 675, fn 9.*

In this case, Spencer had a reasonable believe in the underlying facts upon which his claim for alienation of affection was based. Nielsen had an affair with Spencer's wife, Jewelya, and fathered two children with Jewelya, while she was married to Spencer. In deed, these underlying facts were admitted by both Nielsen and Jewelya at trial. (Rec. 1199, pgs. 455-457, and Rec. 1200, pgs. 53-58, respectively). Therefore, there can be no doubt, but that Spencer had a reasonable belief in these underlying facts; and neither the court nor the jury, could reasonably find that Spencer lacked "probable cause" to bring his alienation of affection claim against Nielsen.<sup>2</sup> Based on these undisputed facts, the trial court should have ruled, as a matter of law, that Spencer did not lack the probable cause necessary to file his claim for alienation of affection.

The questions is whether the party bringing the action has "probable cause" or a reasonable belief in the facts upon which the claim is based. *Id.* It is not necessary, and it should not be required, that the party bringing the action believe for a certainty that he will ultimately prevail on his claim, under the law. Particularly, since the lay person relying on the facts he reasonably believes to be true, is not trained in the law.<sup>3</sup> It is only

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<sup>2</sup>Of course the jury in the underlying action (if it had not been dismissed for discovery reasons) would have been able to determine if Nielsen's conduct was the controlling cause of the alienation, for Spencer to prevail in that case; but that determination is different than the question of probable cause to file, which was at issue in this case.

<sup>3</sup>Spencer's counsel was correct at trial, when he pointed out to the judge, that for Nielsen to prevail he would have to show that Spencer's belief in the underlying facts was not reasonable, i.e. that Spencer was not married to Jewelya or that nothing happened to make Spencer reasonably believe that there was an affair, or that kind of thing going on. (Rec. 1199, pg. 545).

relying on the facts he reasonably believes to be true, is not trained in the law.<sup>3</sup> It is only required that he believes that under those facts the claim *may* be valid under the applicable law. *Id.* at 846. Spencer's claim for alienation of affection may have been valid under the law based upon the facts he believed to be true, and which were proven true at trial. Nielsen had a sexual relationship with Spencer's wife, during their marriage and fathered two children. The jury in the alienation of affection case based on these facts, could have easily determined that Nielsen was the controlling cause of the alienation of affection in their marriage.<sup>4</sup> Therefore, Spencer had probable cause to file his alienation of affection claim.

Furthermore, the question of probable cause should have been decided by the court as a legal question and not left to the jury. In *Gilbert v. Ince*, 981 P.2d 841 (Utah 1999) the Utah Supreme Court noted that the Restatement (Second) of Torts Section 681B, delineates the responsibilities of the court and the jury in such cases,<sup>5</sup> but because the case was decided on a directed verdict, the Court did not address the proper

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<sup>3</sup>Spencer's counsel was correct at trial, when he pointed out to the judge, that for Nielsen to prevail he would have to show that Spencer's belief in the underlying facts was not reasonable, i.e. that Spencer was not married to Jewelya or that nothing happened to make Spencer reasonably believe that there was an affair, or that kind of thing going on. (Rec. 1199, pg. 545).

<sup>4</sup>The fact that Judge Dawson dismissed the alienation of affection claim as a discovery sanction does not mean that the sexual affair by Nielsen did not occur, or that it could not have been the controlling factor in the alienation of affection case.

<sup>5</sup>§681B provides that it is the function of the court to determine whether the defendant had probable cause for his action. (See complete Restatement (Second) of Torts, § 681B attached in Addendum as Exhibit E).

existed is a question for the court and is distinguishable from the jury's role in finding probable cause in negligence cases); and *Weststar Mortg. Corp. v. Jackson*, 61 P.3d 823, 832 (N.M. 2002)(probable cause is a question of law to be decided by trial judge, and trial court erred in submitting this legal determination to the jury). See also, *Robb v. United States Fidelity and Guar. Co.*, 798 F.2d 788, 791 (5<sup>th</sup> Cir. 1986); *Williams v. Coombs*, 179 Cal.App. 3d 626 (1986); *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863 (1989); and *Prewitt v. Sexton*, 777 S.W.2d. 891 (Ky. 1989).

This issue should now be addressed on appeal, and this court should follow Restatement §681B and the line of cases holding that it's the responsibility of the court to determine the existence of probable cause in such cases, and not the jury. The court is in a better position to determine if probable cause exists to support a legal claim. If there are issues of fact in dispute the court needs resolved to make this determination, the jury can be called upon to resolve those factual issues, as provided for in Restatement §681B(2)(a). However, the ultimate determination is up to the court; and when sufficient facts are undisputed, as in this case, to establish probable cause, the court should find probable cause as a matter of law. *Weststar Mortg. Corp. v. Jackson*, 61 P.3d 823, 832 (N.M. 2002)(where there is no evidence to dispute probable cause, the trial court should determine probable cause as a matter of law). Based on the undisputed facts in this case, Spencer clearly had probable cause to bring his alienation of affection claim against Nielsen; and the court should have determined, as a matter of law, that Spencer had probable cause to bring his claim for alienation of affection against Nielsen. *Id.* at 832.

Plain Error and Exceptional Circumstances. Whether the prior dismissal based on discovery meant the matter was filed without probable cause was raised at trial by Spencer's counsel. (Rec. pgs. 544-554) If not properly raised, the matter should still be considered by this court under the principles of plain error and/or exceptional circumstances. To demonstrate plain error a party must establish that (i) an error exists (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable result. *State v. Dunn*, 850 P.2d 1201 (Utah 1993). As stated above there was an error in this case because probable cause was present. Therefore, the first element is met. Second, the trial court should have known that based on the admitted facts and extra-marital affair by Nielsen, that Spencer had probable cause for his alienation of affection claim. Finally, the error made was harmful, as the court should have determined that Spencer had probable cause to bring his alienation of affection claim. Absent the error, the outcome of the case would have been much more favorable for Spencer. *State v. Evans*, 20 P.3d 888 (Utah 2001).

If not plain error, the court should still review the matter on appeal based on the exceptional circumstances. Exceptional circumstances have been recognized where there has been a new development or clarification in the law. *State v. Haston*, 846 P.2d 1276 (Utah 1995); *State v. Lopez*, 873 P.2d 1127 (Utah 1994). In this case the law was not clear, as the Utah Supreme Court did not previously address the differing responsibilities of the court and the jury in determining probable cause at the time of trial in such cases. *Gilbert v. Ince*, *supra*, footnote 13.

Finally, an exception to the preservation rule is recognized when the issue raised is solely a question of law, and it is based on admitted facts. *Pankratz Implement Co. v. Citizens Nat. Bank*, 130 P.3d 57 (Kan. 2006); *Jones v. Hansen*, 867 P.2d 303 (Kan. 1994); *Nutt v. Knutson*, 795 P.2d 30 (Kan. 1989). In this case the existence of probable cause is present based on admitted facts, and its presences ultimately resolves the case.

**II. BASED ON THE FACTS AT TRIAL A JURY COULD NOT REASONABLY FIND A LACK OF “PROBABLE CAUSE” FOR SPENCER’S CLAIM OF ALIENATION OF AFFECTION.**

Assuming for argument purposes, that the lack of probable cause is solely a question of fact for the jury (or that the right for a legal determination from the court was not preserved), with the admission of Nielsen that he had a sexual relationship with Jewelya during her marriage to Spencer, and that Nielsen fathered two children with Jewelya during her marriage to Spencer; a reasonable jury cannot find a lack of probable cause. With these admissions the disputed evidence, even when marshaled against Spencer, is insufficient for the jury to find that Spencer lacked probable cause to file his alienation of affection claim against Nielsen.

The disputed facts marshaled against Spencer on this claim are as follows: Spencer had a sexual encounter with Shanua Thompson, there was physical abuse in the marriage, Spencer would leave home for business and speaking engagements, Spencer was charged with sexual solicitation, Spencer threatened to sue Nielsen when he found out about the affair and the twins, Spencer and Jewelya would fight in their marriage and sometimes separate, Spencer and Jewelya at one time separated for a full month, Spencer

inquired if Jewelya had sexual encounters with other men, Spencer was under stress from other lawsuits he filed as a landlord, and a suit against Jewelya on her ZCMI charge card, Spencer approached Nielsen at his employment and threatened him with a lawsuit and told Nielsen that he would bury him in costs and attorneys' fees, Spencer recorded the conversation and the later destroyed the tape because it was incriminating against him.

Even with all of these facts marshaled against him, based on the admitted fact that Nielsen had an ongoing sexual relationship with his wife, and fathered two children, Spencer had sufficient probable cause under the law, to file his alienation of affection lawsuit, and argue to the jury in his alienation of affection case, that it was Nielsen's ongoing sexual relations and improper conduct with his wife, that was the controlling factor in destroying his marriage.

A reasonable jury cannot determine that Spencer lacked probable cause to file his alienation of affection claim against Nielsen; therefore, the jury's finding of wrongful use of civil proceeding against Spencer, should be vacated.

### **III. THE TERMINATION OF THE UNDERLYING ACTION AS A DISCOVERY SANCTION WAS NOT "ON THE MERITS" IN ORDER TO SUSTAIN A CLAIM FOR WRONGFUL USE OF CIVIL PROCEEDINGS**

In *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff'd* 147 P.3d 383 (Utah 2006), it was held and affirmed, in the context of a claim for wrongful use of civil proceedings, that termination in favor of the person against whom the underlying action was brought requires that the termination must be "on the merits" of the underlying

action. *Id. citing Lackner v. LaCroix*, 602 P.2d 393 (Calif. 1979).

The termination of the underlying alienation of affection claim, in this case was a discovery sanction based on Rule 37(b)(2)(C). (Rec. 802, ¶ 22) It was not on the merits. Neither the court, nor the jury, made any determination of the alienation of affection claim based on its merits.<sup>6</sup> Therefore, there was no termination of the prior action on the merits, as required to sustain a claim for wrongful use of civil proceedings. *Hatch v. Davis, supra*.

Furthermore, the issue as to whether there was a favorable termination on the merits is a question of law for the court to decide, and not a question for the jury. *Palmer Development Corp. v. Gordon*, 723 A.2d 881 (Me. 1999). Restatement (Second) Torts, Section 673. The trial court recognizing that the previous claim for alienation of affection was dismissed as a discovery sanction, rather than on its merits, should have ruled, as a matter of law, that there was no termination of the prior proceeding “on the merits” to sustain a claim for wrongful use of civil proceeding. *Id.*

The claim that the alienation of affection claim was never dismissed based on the merits, but only as a discovery sanctions, was raised before the trial court by Spencer’s counsel. (Rec. 1199, pgs. 551-554). Including the fact that the earlier proceeding was only dismissed as a discovery sanction. (Rec. 1199, pg. 553). If not properly raised, the matter should still be considered by this court under the principles of

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<sup>6</sup>In fact, in dismissing the alienation of affection case as a discovery sanction, Judge Dawson stated that it was impossible to ascertain whether the allegations of plaintiff’s complaint had any factual merit. (Rec. 1201, pg. 242).



plain error or exceptional circumstances.

Plain Error and Exceptional Circumstances. Again to demonstrate plain error a party must establish that (i) an error exists (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable result. *State v. Dunn*, 850 P.2d 1201 (Utah 1993). As stated above, the claim for wrongful use of civil proceeding requires, “a termination of the prior proceedings on the merits.” That did not happen in this case. Therefore, an error exists and the first element is met. Second, the trial court should have known that the dismissal of the alienation of affection claim for failure to comply with discovery was not on the merits. In fact Judge Dawson in dismissing the action stated that it was impossible to ascertain whether the allegations in the complaint had any factual merit. (Rec. 1201, pg. 242). Third, a ruling by the trial court that there was no prior termination on the merits, would have dramatically changed the outcome of the case, resulting in a much more favorable result for Spencer. *State v. Evans*, 20 P.3d 888 (Utah 2001).

If not reviewable under the plain error rule, it should be reviewed under the exceptional circumstances rule based upon a clarification in the law. *State v. Haston*, 846 P.2d 1276 (Utah 1995); *State v. Lopez*, 873 P.2d 1127 (Utah 1994). In the recent case of *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff’d* 147 P.3d 383 (Utah 2006)<sup>7</sup> the appellate courts recently clarified that in the context of a claim for wrongful use of civil

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<sup>7</sup>*Hatch v. Davis* was affirmed on August 11, 2006, over a month after the trial was held in this case.

proceeding, the termination of the underlying action must be on the merits. *Id.*

And finally, this matter is also a question of law, based on undisputed facts therefore, the exception to the preservation rule should be applied. *Pankratz Implement Co. v. Citizens Nat. Bank*, 130 P.3d 57 (Kan. 2006)

**IV. BASED ON THE FACTS AT TRIAL, A JURY COULD NOT REASONABLY FIND THAT THE UNDERLYING ACTION WAS DISMISSED ON THE MERITS TO SUSTAIN A CLAIM FOR THE WRONGFUL USE OF CIVIL PROCEEDING.**

Assuming for argument purposes, that the question as to whether the underlying case was dismissed on the merits is solely a question for the jury (or that the right for a legal determination from the court was not preserved), based on the undisputed facts in this case, and the Order entered by Judge Dawson, a reasonable jury could not find that the alienation of affection claim was dismissed on the merits.

It was undisputed in this case, that the alienation of affection claim was dismissed by Judge Dawson, not based on the merits, but as a discovery sanction under Rule 37(b)(2)(C). (Rec. 802, ¶ 22). Judge Dawson even made a specific finding in his Order of dismissal that due to the lack of discovery, it was impossible to have a trial on the merits or to ascertain whether the allegations of Plaintiff's complaint, had any factual merit. (Rec. 1201, pg. 242).

Therefore, based on these undisputed facts, a reasonable jury cannot find the exact opposite from Judge Dawson's ruling; and determine that the dismissal of the alienation of affection claim was on the merits. Since there was no dismissal of the

alienation of affection claim based on the merits, Nielsen cannot prevail on his claim for wrongful use of civil proceeding to recover his attorneys' fees and the jury's finding entered against him on this claim should be vacated.<sup>8</sup>

**V. THERE WAS NO WILLFUL ACT IN THE USE OF LEGAL PROCESS, SO OUTSIDE THE REGULAR COURSE OF THE PROCEEDINGS, TO CONSTITUTE AN ABUSE OF PROCESS**

In *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff'd* 147 P.3d 383 (Utah 2006), two separate elements for abuse of process were set forth: (1) an ulterior purpose; and (2) "a willful act in the use of the process not proper in the regular course of the proceeding." *Id.* quoting William Prosser, Law of Torts, Section 121 at 857, 4<sup>th</sup> edition, 1971). While the purpose or intent is a question of fact for the jury, the issue as to whether an act is "a willful act in the use of the process not proper in the regular course of the proceeding," should be an issue of law for the court to decide.

The court is in the best position, and has the superior knowledge and experience, to determine exactly what is "outside the regular course of proceeding" and what is not. For example, in this case, Spencer subpoenaed Nielsen's mother and wife for depositions, with proper notice, and Nielsen's counsel had an opportunity to object, based on age, hardship, etc. The court held a hearing and granted Nielsen's motion to prevent the depositions. After the court's ruling no further attempt was made by Spencer or his

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<sup>8</sup>Any claim for attorneys' fees as a sanction was available to Nielsen in the alienation of affection case and this was considered by Judge Dawson; however, Judge Dawson felt dismissal alone was sufficient, and did not feel the sanction of attorneys' fees should be added. (Rec. 804, ¶ 27). Although he did indicate that he might reconsider the fee request, if the matter came back to him after appeal. (Rec. 809, ¶ 2).

counsel to depose these individuals. The court could have easily determined that issuing subpoenas and having hearings on discovery requests was not outside the regular course of the proceedings, given the issues involved in the case. The jury had no basis to make this determination.

Likewise, each individual item listed by Nielsen as an abuse of the civil process (Instruction 19, Rec. 620) does not constitute “a willful act outside the regular course of the proceeding, not proper in the regular course of the proceeding.” Particularly when standing alone, and the trial court erred in allowing the jury to determine that any one of these items could constitute such an abuse.<sup>9</sup> Since the actions listed alone cannot singularly constitute an abuse of process, the jury finding for abuse of process should be vacated.

The legal requirements for abuse of process, and whether the items listed in Jury Instruction 19 alone can constitute an abuse of process, was raised in the trial court by Spencer’s counsel. (Rec. 1199, pg. 544-546). If not properly raised, the matter should still be considered by this court under the principles of plain error and/or exceptional circumstances.

Plain Error and Exceptional Circumstances. Again to demonstrate plain error a party must establish that (i) an error exists (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable

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<sup>9</sup>In fact, some of the individual items listed do not even constitute use of the legal process, such as losing or destroying evidence, misrepresenting facts, engaging in delay tactics, and attempting to influence witnesses. (Rec. 620)

likelihood of a more favorable result. *State v. Dunn*, 850 P.2d 1201 (Utah 1993). As stated above there was an error in this case. The claim for abuse of process requires (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular course of the proceeding. Since the items listed for the jury to consider do not constitute a use of the civil process and/or a willful use of the civil process not proper in the regular course of the proceedings, the first element is met. Second, the trial court should have known that whether there was an abuse of the legal process, is a question of law for the court to determine and not the jury; and that the items listed for the jury standing alone do not constitute a use of the process not proper in the regular course of the proceedings. Such a ruling by the trial court would have dramatically changed the outcome of the case, and would have resulted in a more favorable result for Spencer. *State v. Evans*, 20 P.3d 888 (Utah 2001).

**VI. ATTORNEYS' FEES FOR WRONGFUL USE OF CIVIL PROCEEDING CONSTITUTES GENERAL DAMAGES  
THUS, NOT ALLOWING PREJUDGMENT INTEREST**

A trial court's decision to grant or deny prejudgment interest is a question of law, reviewed for correctness. *Smith v. Fairfax Realty Inc.*, 82 P.3d 1064 (Utah 2003). Where the amount of the damage is to be ascertained by the jury at trial, prejudgment interest is not allowed. *Cornia v. Wilcox*, 898 P.2d 1379 (Utah 1995); *Canyon Country Store v. Barcey*, 781 P.2d 414, 422 (Utah 1989).

In this case, Nielsen in his complaint asks for his reasonable attorneys' fees and costs in defending the prior suit, and in pursuing this matter. He also asks for lost

earnings and benefits, loss of employment time, emotional distress, mental pain and suffering, medical expenses, and other expenses, *to be determined according to proof*.<sup>10</sup> (emphasis added, Rec. 1-7). Nielsen cannot receive prejudgment interest on his damage award of attorneys' fees, because his entitlement and the reasonableness of the fee, was not determined until trial. *James Constructors, Inc., v. Salt Lake City, Corp.*, 888 P.2d 665, 671 (Ut.App. 1994).

**VII. ATTORNEYS' FEES AWARDED FOR WRONGFUL USE OF CIVIL PROCEEDINGS DOES NOT CONSTITUTE "SPECIAL DAMAGES" UNDER 78-27-44 U.C.A. ENTITLING NIELSEN TO PREJUDGMENT INTEREST**

Section 78-27-44 U.C.A. provides:

**78-27-44. Personal injury judgments – Interest authorized.**

(1) In all actions brought to recover damages for personal injuries sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or willful intent of that other person, corporation, association, or partnership, and whether that injury shall have resulted fatally or otherwise, the plaintiff in the complaint may claim interest on the special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action.

(2) It is the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, or found by the court, interest on that amount calculated at the legal rate as defined in Section 15-1-1, from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment

"Special damages" under Section 78-27-44 U.C.A., are not the same as special damages insofar as pleading requirements are concerned. *Gleave v. Denver Rio*

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<sup>10</sup> The Special Verdict form does not breakdown any of the damage award into any of these specific categories. (Rec. 640-641).

*Grande Western Railroad Co.*, 749 P.2d 660 (Ut.App. 1988). “Special damages” under Section 78-27-44 U.C.A., are limited in scope. They are limited to expenses paid to those who are injured so they can immediately receive necessary *medical and hospital care*. (emphasis added). *Id.* at 672, reviewing Senate Bill 153 and legislative history of Section 78-27-44 U.C.A.

In this case Nielsen asked the jury to award him \$95,000.00 for the attorneys’ fees he had spent in defending the alienation of affection case. (Rec. 1199, pg. 439). It was not to reimburse Nielsen for any out-of-pocket expenses actually paid to others to receive necessary medical and hospital care. In fact, Nielsen testified at trial that he did not seek any medical treatment and had no claims against Spencer for medical expenses. (Rec. 1199, pg. 444). Therefore, since Nielsen did not incur any medical expenses in this case, and his damage award was for his attorneys’ fees; this award should not be classified as “special damages” under 78-27-44 UCA, to entitle Nielsen to prejudgment interest. *Id.*

**VIII. NIELSEN FAILED TO MAKE A CLAIM IN HIS COMPLAINT FOR PREJUDGEMENT INTEREST ON “SPECIAL DAMAGES ACTUALLY INCURRED” AS REQUIRED TO BE ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST UNDER SECTION 78-27-44 U.C.A.**

Nielsen in his complaint does not make any claim for “interest on special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action,” as required under Section 78-27-44 U.C.A. Nielsen in his Complaint does not make any claim for prejudgment interest. (Rec. 1-7) Nielsen does not make any

claim for prejudgment interest based on his medical expenses under Section 78-27-44. (Rec. 1-7). Nielsen at trial, testified that he did not seek any medical treatment and had no claims against Spencer for medical expenses. (Rec. 1199, pg. 444).

In *Gleave v. Denver Rio Grande Western Railroad Co.*, 749 P.2d 660 (Ut.App. 1988), the plaintiff was required to amend his complaint to include a claim for prejudgment interest under Section 78-27-44 U.C.A., before prejudgment interest could be awarded. The statute requires the Plaintiff to make his claim for interest on the special damages in his complaint, before it is the duty of the court, “to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, or found by the court, interest on that amount.” 78-27-44 U.C.A.

In this case, there was no claim made in the complaint for such “special damages” and there was no determination of such “special damages actually incurred” by the jury. Therefore, Nielsen is not entitled to have his damage award for attorneys’ fees deemed to be “special damages” under 78-27-44 U.C.A., to entitle him to prejudgment interest.

**IX. THE TRIAL COURT’S INTERPRETATION OF THE SPECIAL VERDICT, THAT IT AWARDS \$95,000 IN SPECIAL DAMAGES WITH NO GENERAL DAMAGES IS CONTRARY TO THE LAW**

The trial court’s ruling that the amount of the jury verdict is all special damages with no general damages (Rec. 1096-1100), is contrary to the law.

It is improper for a jury to award special damages for personal injury torts, without awarding any general damages. *Balderas v. Starks*, 138 P.3d 75 (Ut.App. 2006);



*Langton v. International Transport Inc.*, 491 P.2d 1211, 1214 (Utah 1971). Therefore, the trial court's ruling regarding prejudgment interest based on this determination of special damages under 78-27-44 U.C.A., needs to be reversed.

This matter was preserved. The Special Verdict form does not designate that the \$95,000.00 amount awarded is special damages. Therefore, Spencer is not objecting to the form of the Special Verdict; but rather, the trial court's subsequent interpretation of the Verdict form in November 2006, which is contrary to the law. *Id.*

### **CONCLUSION**

Based on the admitted facts at trial, Spencer had "probable cause" to bring a claim against Nielsen for alienation of affection. This is a question of law that should have been decided by the court. Regardless, a reasonable jury based on the admitted facts at trial, cannot find that Spencer lacked sufficient probable cause to file his alienation of affection claim against Nielsen. Moreover, the dismissal of the alienation of affection claim as a discovery sanction, does not constitute a termination "on the merits," in order to sustain a claim for wrongful use of civil proceedings. This also is a question of law for the court to decide, and not the jury. Regardless, based on the undisputed facts and the Order of Judge Dawson, a reasonable jury cannot find that the alienation of affection case was dismissed on the merits.

The alleged actions that Nielsen claims Spencer took in the underlying alienation of affection action, do not (particularly when standing alone) constitute a "willful act in the use of the process, which is not proper in the regular course of the

proceeding,” in order to sustain a claim for abuse of process. Furthermore, while the question of an ulterior motive is a question of fact for the jury, the question as to what constitutes a “willful act in the use of the process, not proper in the regular course of the proceeding,” should be a question of law for the court to determine.

The provision of Section 78-27-44 U.C.A., which allows prejudgment interest on special damages actually incurred for medical treatment, should not apply in this case on a general damage claim for attorneys’ fees, incurred in defending an underlying action, on a wrongful use of civil proceeding claim. Particularly when the entitlement to the fee and the amount was not determined until trial.

Furthermore, “special damages” under Section 78-27-44 U.C.A., are not the same as special damages as far as pleading requirements are concerned. They are limited in scope to expenses paid to those who are injured so they can receive immediate medical and hospital care, if necessary. They should not be awarded in this case where there is no claim for medical expenses.

Finally, the trial court’s interpretation of the Special Verdict form that the amount awarded of \$95,000.00 is all “special damages” under Section 78-27-44 U.C.A., with no general damages, is contrary to the law; as there must be an award of general damages before there can be any award of special damages for personal injury torts. Therefore, the \$95,000.00 award cannot be all “special damages” to support an award of

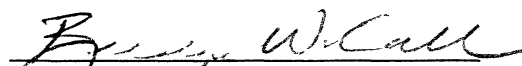
prejudgment interest under Section 78-27-44 U.C.A.

Based upon the foregoing, the Verdict reached and Judgment entered in the above case should be reversed and/or set aside. The claims for wrongful use of civil proceeding and abuse of process should be ordered dismissed, as a matter of law, based on the failure of the legal elements, as set forth above.

Alternatively, the Verdict and Judgment should be reversed and/or set aside and the case remanded back to the trial court with proper instructions on the legal requirements necessary for Nielsen to prevail on his claims for wrongful use of civil proceedings and abuse of process.

DATED this 17 day of December, 2007.

BOND & CALL L.C.

  
Budge W. Call

**MAILING CERTIFICATE**

I hereby certify that on the 17 day of December, 2007, I did mail, postage prepaid, 2 true and correct copies of the foregoing **BRIEF OF THE APPELLANT**, to the following:

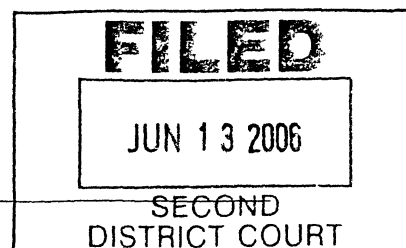
C. Richard Henriksen, Jr  
HENRIKSEN & HENRIKSEN P.C.  
320 South 500 East  
Salt Lake City, UT 84102

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### **ADDENDUM**

- A. Special Verdict, dated June 9, 2006. (Rec. 640-641).
- B. Ruling on Plaintiff's Motion for Prejudgment Interest and Costs.  
Dated November 30, 2006. (Rec. 1096-1100).
- C. Second Amended Proposed Judgment on Special Verdict,  
entered December 29, 2006. (Rec. 1101-1104).
- D. Section 78-27-44 Utah Code Annotated.
- E. Restatement (Second) Torts, Section 618B.

EXHIBIT “A”



IN AND FOR THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

MICHAEL REID NIELSEN,

Plaintiff,

v.

LORENZO M. SPENCER,

Defendant.

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SPECIAL VERDICT

Civil No. 010700616

Judge Rodney S. Page

At the end of each question submitted to you the jury, indicate whether or not you adopt it as your verdict by answering Yes or No. The agreement of six or more jurors is required to answer each question, unanimous agreement on each question is not necessary.

We, the Jury, present our answers to the questions submitted by the Court, to which we have all agreed:

PLAINTIFF'S CAUSE OF ACTION - WRONGFUL BRINGING OF A CIVIL ACTION

1. Did the Defendant wrongfully bring a civil action by bringing the lawsuit against the plaintiff for alienation of affections, according to the instructions?

Yes ~~XX~~ No \_\_\_\_\_

If you have answered the preceding question yes, please state the amount of damages you are awarding the Plaintiff for the Defendant's wrongfully bringing a civil action.

\$ 95,000<sup>00</sup>

Special Verdict



010700616

VD19103620

PLAINTIFF'S CAUSE OF ACTION - ABUSE OF PROCESS

2. Did the Defendant commit abuse of process in bringing and continuing the lawsuit against the Plaintiff, according to the instructions?

Yes ~~XX~~ No \_\_\_\_\_

If you have answered the preceding question yes, please state the amount of damages you are awarding the Plaintiff for the Defendant's Abuse of Process.

\$ 0

PUNITIVE DAMAGES

3. If, but only if, you awarded damages in answer to question 1 or 2, answer this question: Has Plaintiff proved by clear and convincing evidence that the acts of Defendant were a result of willful and malicious or intentionally fraudulent conduct or conduct that manifested a knowing and reckless indifference toward, and a disregard of, the rights of others?

ANSWER: Yes \_\_\_\_\_ No ~~XX~~

When you have answered the appropriate questions, please have your foreperson sign this verdict form and return to the Court.

Neil Reed  
Jury Foreperson

June 9th, 2006 5:41 PM  
Date



EXHIBIT “B”

**FILED**

NOV 30 2006

SECOND DISTRICT COURT, STATE OF UTAH

SECOND  
DISTRICT COURT

COUNTY OF DAVIS, FARMINGTON DEPARTMENT

Michael Reid Nielsen  
Plaintiff,

v.

Lorenzo M. Spencer  
DefendantRULING ON PLAINTIFF'S MOTION FOR  
PREJUDGMENT INTEREST AND  
COSTS

Case No. 010700616

Judge: Rodney S. Page

COMES NOW THE COURT, and having considered plaintiff's proposed judgment for prejudgment interest and for costs, and the memorandum submitted in support thereof, and defendant's memorandum in opposition thereto, and the arguments of counsel, and being fully advised in the premises, rules as follows:

The crux of plaintiff's argument on the interest question is that a cause of action for wrongful use of a civil proceeding is a personal injury action and therefore plaintiff is entitled to prejudgment interest on special damages as provided in Section 78-27-44 UCA, 1953 as amended. Plaintiff claims that prejudgment interest should be awarded on the attorney's fees awarded as special damages; and further, that the interest should be calculated from the date the wrongful civil action was filed.

As to the question of whether an action for wrongful bringing of a civil action is a personal injury, it is important to note that over the years, several different causes of action involving the inappropriate use of the courts and court proceedings have emerged. They have been referred to by various terms, and those terms have often been used interchangeably.

Ruling on Plaintiff's Motion for Prejudgment Interest a



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To clarify this confusion our Supreme Court has stated that there are three different categories of similar, but distinct, torts involving abuse and manipulation of the public judicial process: 1) abuse of process; 2) malicious prosecution; and 3) wrongful use of civil proceedings. *Gilbert vs Ince* 981 P2nd 841 (UT 1999). The Court went on to indicate that *abuse of process* occurs when one uses legal process against another primarily to accomplish a purpose for which it is not designed; that *malicious prosecution* relates only to criminal actions and pertains to a private person who improperly initiates or procures the initiation of criminal proceedings against another who is not guilty of the offense charged; and that *wrongful use of a civil proceeding* occurs when one initiates or maintains a civil proceeding against another for an improper purpose and without a justifiable basis. *Gilbert, Supra*.

The elements of malicious prosecution and wrongful use of civil proceedings are very similar, except that one involves action of a prosecuting authority and the other a private party. Both require that the action be terminated in favor of the person against whom they were brought.

On the question of whether the wrongful use of a civil proceeding is an action for personal injury, it is important to note that our Supreme Court, as early as 1907, included malicious prosecution as a personal injury tort. *Fell vs Union Pacific RY*, 88 P. 1003 (UT 1907). The Tenth Circuit Court of Appeals has adopted a similar position. *Public Service Co. Of Colo. vs Continental Casualty*, 26 F. 3rd 1508 (10<sup>th</sup> Cir 1994).

Our Supreme Court, in the *Gilbert* Case cited above, stated that the wrongful use of civil proceeding is the civil counterpart of malicious prosecution. Therefore, the Court

concludes that an action for wrongful use of civil proceeding is a cause of action for personal injury; and that pursuant to Section 78-27-44, plaintiff is entitled to interest on the special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action.

Special damages are a particular type of damage which are the natural consequence of the injury cause, but are not the type of damages that necessarily flow from the harmful act. Special damages must be pled specifically so that the opposing party has an adequate opportunity to defend against the plaintiff's claim. Rule 9(g) of the *Utah Rules of Civil Procedure* requires special pleading of special damages, not specific amounts.

Plaintiff, in his complaint, pled special damages for costs and expenses of defending the underlying civil action. Given the facts submitted to the jury, and the fact that the jury award was the exact amount of attorney's fees and costs claimed by the plaintiff for defending the underlying action, the Court concludes that they are special damages.

The statute provides that interest on special damages shall be calculated from the date of the occurrence of the act giving rise to the cause of action.

The Law provides that a tort cause of action accrues when all of the elements come into being and the claim is actionable. Given the elements of wrongful use of civil proceedings, that cause of action did not accrue until the wrongful action was terminated in plaintiff's favor; therefore plaintiff is entitled to interest at the legal rate on the special damages from the date the action was terminated in his favor.

The cases cited by plaintiff on that issue are not on point, and deal primarily with the issue of at what point coverage should be extended for insurance purposes.

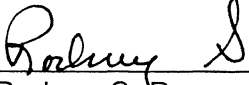
As to costs, Rule 54(d) of the *Utah Rules of Civil Procedure* provides for the awarding of costs to the prevailing party. Plaintiff is entitled to his reasonable costs and they are not precluded by the jury award in this case, as that clearly did not include the costs of this action.

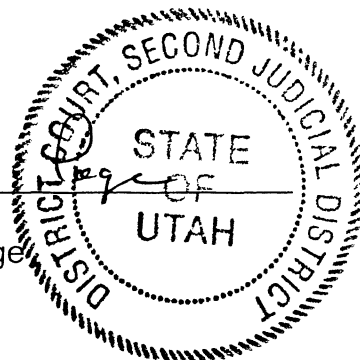
The Court finds that the costs requested by the plaintiff are reasonable. As to the requests for costs of depositions, costs of depositions are taxable, when the Court is persuaded that they were taken in good faith and, in light of the circumstances, appeared to be essential for the development and presentation of the case. In this case, the status of the Spencer marriage at the time of plaintiff's involvement was critical, and the testimony of Mr. Spencer and his ex-wife were core to that issue. There was no less expensive way to provide that discovery prior to trial. The Court grants costs to the plaintiff as requested.

Plaintiff's counsel is directed to prepare a judgment in accordance with the Court's ruling and to submit the same to opposing counsel at least five days prior to the time it is submitted to the Court for signature.

Dated this 30<sup>th</sup> day of November, AD 2006

BY THE COURT:

  
Rodney S. Page  
District Court Judge



## CERTIFICATE OF MAILING

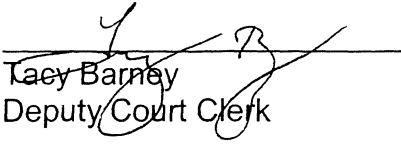
I hereby certify that I mailed a true and correct copy of the foregoing ruling to:

C. Richard Henriksen, Jr.  
320 South 500 East  
Salt Lake City, Utah 84102

Budge W. Call  
Judge Building  
8 East Broadway, Suite 720  
Salt Lake City, Utah 84111

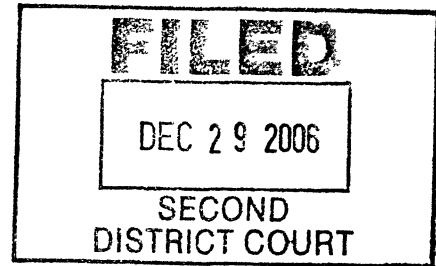
postage prepaid this 30<sup>th</sup> day of November, AD 2006.

Alyson Brown  
Clerk of Court

By   
Tacy Barney  
Deputy Court Clerk

## EXHIBIT “C”

C. RICHARD HENRIKSEN, JR., #1466  
HENRIKSEN & HENRIKSEN, P.C.  
Attorneys for Plaintiff  
320 South 500 East  
Salt Lake City, Utah 84102  
Telephone: (801) 521-4145  
Facsimile: (801) 355-0246



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

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MICHAEL REID NIELSEN,	:	<b>SECOND AMENDED PROPOSED</b>
	)	<b>JUDGEMENT ON SPECIAL VERDICT</b>
Plaintiff,	:	
	)	
v.	:	
	)	
LORENZO M. SPENCER,	:	Civil No. 010700616
	)	
Defendant.	:	Judge Rodney S. Page

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The above captioned case was tried before this Court and a jury on June 7, 8, and 9, the Honorable Rodney S. Page, District Court Judge, presiding. C. Richard Henriksen, Jr. represented the Plaintiff and Brent A. Chipman represented the Defendant.

The jury returned with the following special verdict:

We, the Jury, present our answers to the questions submitted by the Court, to which we have all agreed:

PLAINTIFF'S CAUSE OF ACTION- WRONGFUL BRINGING OF A CIVIL ACTION

JUDGMENT ENTERED

by *h*

Second Amended Proposed Judgment on Special Verdict



JD19387368

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1. Did the Defendant wrongfully bring a civil action by bringing the lawsuit against the Plaintiff for alienation of affections, according to the instructions?

Yes   X   No           

If you have answered the preceding question yes, please state the amount of damages you are awarding the Plaintiff for the Defendant's wrongfully bring a civil action.

\$   95,000.00  

#### PLAINTIFF'S CAUSE OF ACTION– ABUSE OF PROCESS

2. Did the Defendant commit abuse of process in bringing and continuing the lawsuit against the plaintiff, according to the instructions ?

Yes   X   No           

If you have answered the preceding question yes, please state the amount of damages you are awarding the Plaintiff for the Defendant's Abuse of Process.

\$   0.00  

#### PUNITIVE DAMAGES

3. If, but only if, you awarded damages in answer to question 1 or 2, answer this question: Has Plaintiff proved by clear and convincing evidence that the acts of Defendant were a result of willful and malicious or intentionally fraudulent conduct, or conduct that manifested a knowing and reckless indifference toward, and a disregard of, the rights of others?

ANSWER: Yes            No   X

When you have answered the appropriate questions, please have your foreperson sign this verdict form and return to the Court.

/s/ Neil Reed  
Jury Foreperson

June 9, 2006  
Date

The issues having duly been tried and the jury having duly rendered its verdict, it is hereby ORDERED and ADJUDGED:

1. That the Defendant wrongfully brought a civil action by bringing the lawsuit against the Plaintiff for alienation of affections.
2. That the damages awarded to the Plaintiff for the Defendant's wrongfully bringing a civil action is \$95,000.00.
3. That the Defendant committed abuse of process in bringing and continuing the lawsuit against the Plaintiff.
4. That the Plaintiff recover nothing for the Defendant's Abuse of Process.
5. That the acts of the Defendant were not proved by clear and convincing evidence to be a result of willful and malicious or intentionally fraudulent

conduct or conduct that manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.

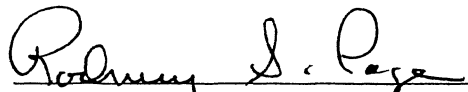
6. That the Plaintiff is awarded statutory pre-judgment interest on 10% per annum on the special damages awarded of \$95,000.00 from April 3, 2001 to date of Judgment.

7. That the Plaintiff is awarded its costs of Court for the current case, Nielsen v. Spencer, Civil No. 010700616 in the amount of \$1,499.10.

8. The entire judgment, including prejudgment interest and costs shall bear interest at the post-judgment rate of 6.36% per annum.

DATED this 26<sup>th</sup> day of December, 2006.

BY THE COURT:

  
Rodney S. Page  
District Court Judge

Approved as to Form and Content:

---

Budge W. Call  
Attorney for Defendant

**CERTIFICATE OF MAILING**

I hereby certify that on the 5 day of December, 2006, a true and correct copy of **SECOND AMENDED PROPOSED JUDGMENT ON SPECIAL VERDICT**, was mailed, postage prepaid, to the following:

BUDGE W. CALL  
BOND & CALL  
8 EAST BROADWAY, SUITE 720  
SALT LAKE CITY, UTAH 84111

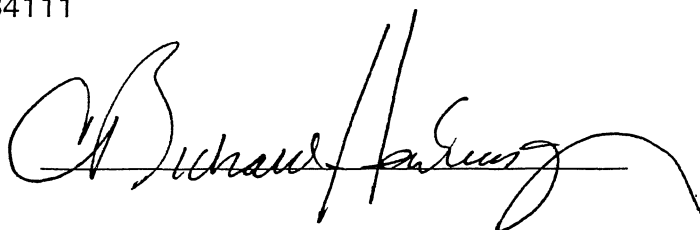
A handwritten signature in black ink, appearing to read "Richard H. Hargis", written over a horizontal line.

EXHIBIT “D”

## **es and Session Law**

### **- Judicial Code**

#### **r 27 - Miscellaneous Provisions**

#### **4 Personal injury judgments -- Interest authorized.**

#### **14. Personal injury judgments -- Interest authorized.**

In all actions brought to recover damages for personal injuries sustained by any person, resulting from or caused by the tort of any other person, corporation, association, or partnership, whether by negligence or willful misconduct of that other person, corporation, association, or partnership, and whether that injury shall have resulted fatally or not, the plaintiff in the complaint may claim interest on the special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action.

It is the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, or found by the court, interest on that amount computed at the legal rate, as defined in Section 15-1-1, from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment.

As used in this section, "special damages actually incurred" does not include damages for future medical expenses, loss of future wages, or loss of future earning capacity.

Added by Chapter 123, 1991 General Session

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EXHIBIT “E”

**§ 681A. Burden of Proof**

In an action for wrongful civil proceedings the plaintiff has the burden of proving, when the issue is properly raised, that

- (a) the defendant has initiated, continued or procured the civil proceedings against him;
- (b) the proceedings were terminated in his favor;
- (c) the defendant did not have probable cause for his action;
- (d) the primary purpose for which the proceedings were brought was not that of securing the proper adjudication of the claim on which the proceedings were based;
- (e) he suffered special harm, and the extent of the harm;
- (f) the circumstances make the recovery of punitive damages appropriate.

**Comment:**

*a.* The rules stated in this Section are analogous to those stated as to an action for malicious prosecution in § 672, with the exception that Subsection (2) of that Section, dealing with the defendant's burden of proving the guilt of the accused, is not here applicable. With that exception, the Comments under § 672 are applicable to this Section, in so far as they are pertinent.

**§ 681B. Functions of Court and Jury**

(1) In an action for wrongful civil proceedings, the court determines whether

- (a) a civil proceeding has been initiated;
- (b) the proceeding was terminated in favor of the plaintiff;
- (c) the defendant had probable cause for his action;
- (d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.



Ch. 30                      WRONGFUL CIVIL PROCEEDINGS                      § 681B

**(2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines**

**(a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;**

**(b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;**

**(c) the circumstances under which the proceedings were terminated;**

**(d) the amount that the plaintiff is entitled to recover as general and special damages;**

**(e) whether punitive damages are to be awarded, and if so, in what amount.**

**Comment:**

*a.* The rules stated in this Section are analogous to those stated as to the action for malicious prosecution in § 673. The Comments under that Section are therefore applicable here so far as they are pertinent.