

2007

Michael Reid Nielsen v. Lorenzo M. Spencer : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL REID NIELSEN,	:	
)	BRIEF OF APPELLEE
Plaintiff/Appellee	:	
)	
v.	:	
)	
LORENZO M. SPENCER,	:	
)	Appellate Case No:20070431-CA
Defendant/Appellant	:	Trial Court No. 010700616

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

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FILED

JUN 22 2007

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LORENZO M. SPENCER,

Defendant/Appellant

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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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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2.

STATEMENT OF ISSUES PRESENTED

1. Whether under Nielsen's Claim for Wrongful Bringing of a Civil Suit, it Was Properly Determined That Spencer Brought the Underlying Lawsuit for Alienation of Affections Without Probable Cause?

Where there were disputed facts regarding Spencer's reasonable belief, this was a issue of fact, and "shall not be set aside unless clearly erroneous." *Turnbaugh v. Anderson*, 793 P.2d 939, 941 (Utah Ct. App. 1990). This issue was not preserved and is not plain error or an exceptional circumstance.

2. Whether under Nielsen's Claim for Wrongful Bringing of a Civil Suit, it Was Properly Determined That Spencer Underlying Action for Alienation of Affections was Terminated on the Merits?

This is an issue of law and should be reviewed for correctness. *Dipoma v. McPhie*, 2000 UT App 130, ¶ 4, 1 P.3d 564. This issue was not preserved and is not plain error or an exceptional circumstance.

3. Whether the Trial Court Properly Instructed the Jury On Nielsen's Claim For Abuse of Process?

Challenges to jury instructions are reviewed under a correctness standard. *Child v. Gonda*, 972 P.2d 425, 429 (Utah 1998). This issue is harmless and does not merit review.

4. Whether the Trial Court Properly Awarded Pre-judgment Interest on the Award of \$95,000?

“A trial court’s decision to grant or deny prejudgment interest presents a question of law which we review for correctness.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶16, 82 P.3d 1064. This issue is harmless and does not merit review.

5. Whether under Nielsen’s Claim for Wrongful Bringing of a Civil Suit, the Special Damages Were Properly Awarded?

This is an issue of law and should be reviewed for correctness. *Dipoma*, 2000 UT App 130, ¶ 4. This issue was not preserved and is not plain error or an exceptional circumstance.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES & REGULATIONS**

Utah Code Ann. § 78-2-2; See Addendum A.

Utah Code Ann. § 78-27-44; See Addendum A.

Utah R. Civ. P. 41; See Addendum A.

Utah R. Civ. P. 51; See Addendum A.

Utah R. Civ. P. 54; See Addendum A.

Utah Rules of Appellate Procedure; Rule 24, See Addendum A.

STATEMENT OF THE CASE

I. Nature of the Case

The case began in 1996 when Appellant Lorenzo Spencer (“Spencer”) brought a suit for alienation of affections against Appellee Michael Nielsen (“Nielsen”). Spencer admitted that he knew when he brought the case, he would not win, but did so to bury Nielsen in attorneys’ fees and legal costs to defend himself. (R.1119, pp.435-36). Spencer improperly used that case to harass Nielsen and his family. *Id.* For over five years Spencer engaged in

persistent and dilatory tactics intending to frustrate the judicial process. (R. 802, ¶ 19). After Nielsen had spent \$95,000.00 in costs and fees, the case finally came to an end in his favor. *Id.*; *See also* (R. 648, Exhibit 68).

To recover from defending that case, Nielsen brought this case in 2001 against Spencer for wrongful bringing of a civil suit and abuse of process. (R. 1-7). A jury trial found in favor Nielsen on both claims. (R. 1035). Nielsen was awarded \$95,000 under his wrongful bringing of a civil suit claim to compensate him for his past legal expenses and awarded nothing for his abuse of process claim. *Id.* After more than twelve years of litigation, Spencer now is appealing seven issues, all of which are either unpreserved, harmless error, or not well taken.

II. Course of Proceedings

A. The Underlying Action Filed by Spencer for Alienation of Affections was Dismissed in April, 2001.

On May 3, 1996, Spencer brought a complaint against Nielsen alleging three causes of action, one of which was alienation of affection. Spencer's alienation of affection claim against Nielsen was dismissed as a sanction for failing to comply with discovery requests on April 3, 2001. R. 802). The underlying trial court made the following findings of fact in the Order of Dismissal:

a. "The Court finds that this is a unique case in which the [Spencer's] conduct in failing to fully respond to discovery has been egregious." (R. 802, ¶ 1).

b. "The Court had previously considered [Spencer's] failure to answer discovery and the defendant's Motions for Sanctions at three separate hearings." (R. 802, ¶ 2).

c. "Despite the Court's orders and the threat of sanctions in these hearings, [Spencer] has consistently refused to produce the required documents and information." (R. 802, ¶ 3).

d. "The court stated that the court's order [to dismiss] was based upon years of failure by [Spencer] to provide discovery; the court's belief that this wasn't something the court did quickly or the decision the court made after just a single incident, but was made based on history. At the hearing on October 29, 1999, [Spencer] admitted their failure to produce." (R. 802, ¶ 19).

e. "...The Court finds that the plaintiff's behavior and conduct was willful, was in bad faith, and was the fault of [Spencer] and that [Spencer] engaged in persistent and dilatory tactics intending to frustrate the judicial process." (R. 802, ¶ 22).

f. "The Court holds that the persistent, dilatory tactics of [Spencer] continued even after a very clear order that the case would be dismissed by default if the order was not complied with; however, [Spencer] has still not complied with the order, even to the date of the hearing November 7, 2000. The Court finds that the failure to comply with discovery has prejudiced [Nielsen] in this case...and that it affected [Nielsen's] ability to properly defend the case and engage in relevant discovery, all of which frustrated the judicial process and impeded [the] trial." (R. 802, ¶ 23).

g. "The Court finds that [Spencer's] failure to produce and answer discovery was not due to [Spencer] or his counsel's inability, but because of the fault of [Spencer] that was willful and in bad faith." (R. 802, ¶ 24).

h. "The Court finds that the sanction of the dismissal of the alienation of affections cause of action and the punitive damages claims is warranted under the facts and circumstances of the case." (R. 802, ¶ 27).

B. Wrongful Use of Civil Proceedings and Abuse of Process Filed by Nielsen in December, 2001.

After the termination of the alienation of affections action, Nielsen filed a complaint against Spencer on December 18, 2001 for the wrongful use of civil proceedings and abuse of process.

A jury trial was held in June 2006. The trial court met with Counsel of both parties and reviewed proposed jury instructions submitted by both parties. Both parties proposed an

instruction of the wrongful use of a civil proceeding, which set before the jury the issue of Spencer's reasonable belief. (R. 472, 615). Nielsen proposed an instruction requesting his special damages of attorneys' fees and lost wages. (R. 625). Spencer did not propose an instruction that general damages must be awarded, if special damages were awarded. Spencer did not propose an instruction which defined what constituted a 'willful act' under the abuse of process claim. The trial court adopted Nielsen's instruction regarding the elements of the underlying claim for alienation of affections, which established that the underlying case terminated as a discovery sanction.

At the conclusion of the three day jury trial the jury made the following findings of fact:

1. Spencer brought a civil suit against Nielsen without a reasonable belief that he would prevail. Spencer did not believe in the existence of the facts upon which the claim was based, and did not reasonably believe that under those facts the claim may be valid under the applicable law. (R. 615-616).
2. The civil suit was commenced or continued by Spencer for the primary purpose of harassment or annoyance or "malice" and a primary purpose other than that of securing the proper adjudication of a claim. (R. 615).
3. The acts or conduct of Nielsen was not the controlling or effective cause of the alienation, and that there were other causes which contributed to the alienation. (R. 618).
4. Spencer wrongfully brought a civil action by bringing the lawsuit against Nielsen for alienation of affections, according to the jury instructions. (R. 640).
5. Nielsen suffered damages for Spencer's wrongfully bringing the civil action in the amount of \$95,000. (R. 640).
6. Spencer committed abuse of process in bringing and continuing the lawsuit against Nielsen, according to the jury instructions. (R. 641). Nielsen was not awarded any damages for Spencer's under this claim. (R. 641).

The trial court, after the verdict of the jury was rendered, entered judgment in favor of Nielsen and against Spencer for both causes of action.

C. Ruling Granting Nielsen's Claim for Prejudgment Interest

Following the trial, Spencer objected to the award of pre-judgment interest. (R. 961). Spencer agreed the amount of attorney's fees and expenses of the first case was obviously used by the jury in awarding \$95,000.00, but objected that the claim was not a personal injury. (R. 1094). A hearing was held on August 29, 2006. (R. 1026). After additional briefing and argument the Court made the following findings:

1. "[Utah] Supreme Court, as early as 1907, included malicious prosecution as a personal injury tort. *Fell v. Union Pacific RY*, 88 P. 1003 (Utah 1907)...our supreme court, in the *Gilbert* case...stated that the wrongful use of civil proceeding is the civil counter part of malicious prosecution. Therefore, the Court concludes that an action for wrongful use of civil proceedings 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..." (R. 1097-98).

2. "[Nielsen], 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 attorneys' fees and costs claimed by the [Nielsen] for defending the underlying action, the Court concludes that they are special damages. (R. 1098).

3. "...therefore [Nielsen] is entitled to interest at the legal rate on the special damages from the date the action was terminated in his favor." (R. 1098).

D. Ruling Denying Spencer's Motion for New Trial.

Spencer then petitioned the trial court to grant a new trial, making three unpreserved arguments. First, that "the jury was not instructed on the essential requirement that the underlying action must be dismissed on the merits." (R. 1110). Second, that "the jury was not properly instructed on the abuse of process claim" regarding the requirement of a "willful

act in the use of the process not proper in the regular course of the proceeding.” (R. 1111). Third, that the jury verdict failed to award general damages while awarding special damages for attorneys’ fees. (R. 1111)

These objections were to the jury instructions Nos. 14, 16, 19 and 20. Jury Instruction No. 20 is an instruction Spencer, himself, offered to the court. (R. 475). Furthermore, Instruction No. 14 mirrors Spencer’s proposed instruction No. 28. (R. 470). Spencer’s objections, including the objections concerning the jury verdict, were not raised at any time while the jury was empaneled or before the jury was discharged. Spencer’s Motion for New Trial came before the trial court, and after review of the memoranda submitted by the parties and hearing oral argument, the trial court denied the Motion due to lack of preservation, and made the following findings:

1. The Court gave the parties time to submit...jury instructions or new instructions and then reviewed them. (R. 1189).
2. The Court, after careful review of the jury instructions, reviewed those instructions in detail with counsel. (R. 1190).
3. Counsel, after review of the Court’s draft of instructions, approved them. *Id.*
4. That there is no question that both parties had adequate opportunity during the trial to raise any objections to any of the jury instructions and the issues presented by the Motion for New Trial. *Id.*
5. That at no time were there any objections made or even issues raised concerning the final draft of the instructions given on wrongful bringing of civil action, abuse of process and special verdict form, the three items listed in the Motion for New Trial. *Id.*
6. That the Court, particularly in a civil trial, relies upon counsel to assist the Court in knowing what the law is and in making all objections as needed. *Id.*

7. In this case, both parties had every opportunity to make any objections to the jury instructions and special verdict form to the Court prior to the Court submitting the jury instructions to the jury and prior to the jury being discharged. *Id.*

8. Therefore, the Court holds that [Spencer] waived each of the three objections to the Jury Instructions and Special Verdict raised in the Motion for New Trial. (R. 1191).

9. Since [Spencer] has waived the instructions listed in the Motion for New Trial, they are not appropriate for a Motion for New Trial as they are being raised for the first time...[and] the Court does not consider the merits of the individual instructions objected to in the Motion. *Id.*

STATEMENT OF FACTS

The facts are viewed by the Appellate and Supreme Court in the light most favorable to the jury verdict and thus recited accordingly. *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 2, 40 P.3d 1119.

I. FACTS REGARDING SPENCER'S LACK OF REASONABLE BELIEF AND ABUSE OF PROCESS.

A. Spencer Believed His Marriage Was a Failure From the Beginning.

Spencer testified that his wife Jewelya never loved him and that she was never committed to the marriage, that it was a fraud and deceit from the beginning. (R. 1201, p. 178). (R. 648, Plaintiff's Exhibit No.34, ¶ 37). As early as their honeymoon, Spencer told Jewelya he wanted to divorce her. (R. 1200, p. 39). This threat of divorce was continually repeated throughout the marriage, along with the threat that Jewelya would be left alone to raise her handicap son without financial support. (R. 1200, pp. 39-40). It was not a question of if they would get divorced but when they would be divorced. *Id.* Prior to 1988, when she

initiated a relationship with Nielsen, Jewelya consulted with three different attorneys about her rights in the event of a divorce. (R. 1200, pp. 46-48).

I. Abuse

In 1983, Spencer began a pattern of physical abuse that included hitting, kicking, choking and shaking Jewelya. (R. 1200, pp. 48-49). Spencer fractured Jewelya's arm. (R. 1200, p. 114). He would grab her and shake her against the wall and on one occasion he slammed her head into the kitchen cabinets. (R. 1200, p. 48). He would scream at her until he was spitting in her face. (R. 1200, p. 48). He backhanded her. (R. 1200, p. 50). Jewelya fear for her physical safety to the degree that she obtained a protective order, called the police, and on several occasions ran to a neighbor's home for help. (R. 1201, pp. 184, 252-254; 1200 p. 104). Spencer claimed that Jewelya also abused him. (R. 1201, p. 191).

In addition to the physical abuse, Spencer verbally and emotionally abused Jewelya. He frequently called her a "f---ing whore," referred to her as being mentally sick, and a bad mother. (R. 1200, p. 42). He also accused her of tricking him into marrying her and not being worthy to be his wife. *Id.* Spencer constantly accused Jewelya of having sexual affairs. (R. 1201, p. 204). There were occasions when Spencer's abusive behavior extended to the children: he physically abused his daughter, called the twin girls "bastards" to their faces, and told them that they were not his children. (R. 1200, p. 56). Allegations were made on both parts that: Spencer never loved Jewelya, Jewelya never loved Spencer, Jewelya was never attracted to Spencer, Spencer constantly threatened divorce, and Jewelya continually begged to stay married. (R. 1199, p. 423; 1200, pp. 38-40, 178-179).

2. *Mutual Infidelity*

Infidelity had always been a mutual problem in the marriage. (R. 1201, p.194) Prior to 1988, Spencer had at least two different affairs, telling both of his plans to divorce Jewelya. (R. 1200, pp. 78-80; 1201, p.218). In addition, Spencer pursued and engaged in sexual relationships with at least two students from his real estate school. *Id.* The husband of one student brought a law suit against Spencer for alienation of affections. (R. 1200, p. 66). In all there were seventeen alleged affairs during this marriage. Jewelya alleged that Spencer had affairs with women named: Jill, Leanne, Rochelle, and the Avon Lady. (R. 1200, pp. 83-84; 1201, p. 198). Spencer alleged that Jewelya had affairs with Craig Stayner, Jeff Stayner, their accountant, Jewleya's brother-in-law Hal Latimer, Jewelya's personal injury attorney, the cable repairman, Mike Nielsen, Dr. Kravitz, Ron Richards, Shane Lindsey, Randy Miller, Dr. Holde, Dale the dentist, and David Jordan. (R. 1200, pp. 74-76; 1201 pp. 203-207). In addition to adultery on both sides, Spencer visited strip bars, and was arrested for solicitation of sex. (R. 1200, p. 60; 1201, p. 256).

3. *Separations*

There were a number of separations between Jewelya and Spencer, most of them due to Spencer's verbal and emotional abuse of Jewelya. One lasted approximately two weeks: another lasted four months, both were before 1988. (R. 1200, pp. 43-44). Jewelya often left with the children to stay in a motel so that they could get away from Spencer and his behavior. (R. 1200, p. 44). Similarly, there were many instances when Spencer went to a hotel. (R. 1201, p. 181). In addition, Spencer often was working away from home 5 days a

week, up to 40 weeks a year. (R. 1200, p. 44). Spencer admitted that the separations caused serious problems in their marriage. (R. 1201, p. 179).

4. *Counseling*

Due to the serious problems in their marriage, Jewelya and Spencer underwent marital counseling with professional counselors, and with ecclesiastic leaders. (R. 1200, pp. 44-45). Aside from Spencer's abusive and manipulative behavior, another purpose of this counseling was to convince Jewelya that she could not date other men while she was married to Spencer. (R. 648, Plaintiff's Exhibit No. 34 ¶ 37; R. 1201, pp. 174-175). Jewelya felt it was appropriate for her to have romantic relationships with other men. *Id.* Spencer was later found to be narcissistic. (R. 1201, p. 301). Dr. Garner found that Spencer would blame others to protect himself, follow a pattern of attacking and seeking revenge, lacked empathy, and felt that the rules did not apply to him. (R. 1201, pp. 305-306). Dr. Gardner found that Spencer's marriage was not filled with genuine feeling of love and a bond of affection and suffered difficulties and stress from the beginning. (R. 648, Plaintiff's Exhibit 61). If Dr. Gardner's professional opinion, Spencer's marriage was doomed for failure from the beginning due to emotional and personality problems manifested by Spencer. *Id.*

5. *Numerous Lawsuits*

Throughout the marriage, Spencer was involved in numerous lawsuits. (R. 1201, pp. 207-208). Some suits were for his breaches of real estate obligations, mortgages, contracts, bills and other obligations. *Id.* He was sued for alienation of affections, and in this suit under his direction, Jewelya counter-sued the Thompsons, alleging that Ms. Thompson alienated

the affection between Jewelya and Spencer. (R. 1200, pp. 68-69; 1201, pp.225-226, 233-234). In all, there were over fifteen separate lawsuits. Spencer also testified that this extensive litigation was a problem in the marriage. (R. 1201, p. 207).

B. Spencer Brought the Underlying Case to Harass Nielsen Knowing He Would Not Prevail, and Knowingly Abused the Process.

In 1990, Spencer threatened that he would sue Nielsen for alienation of affections. Spencer testified that he understood what was required to win an alienation of affection suit from previously defending a suit. (R. 1200, p. 66; 1201 pp.226-227). He understood he must first have a good marriage. *Id.* Spencer knew that he would not prevail if Jewelya was the pursuer. *Id.* He knew that Jewelya was the pursuer. Spencer proclaimed, during a tape recorded conversation to Nielsen, he knew he would not win the suit, but that he would bring the suit to bury Nielsen by paying to defend the suit. (R. 1199, p. 435). Spencer later intentionally lost or destroyed this taped conversation. (R. 648, Plaintiff's Exhibit 57; 1199, p. 436). Spencer commenced and continued the case for the primary purpose of harassing and annoying Nielsen. As part of this harassment, Spencer attempted to take the depositions of Nielsen's mother and wife. (R. 1199, pp. 444-45; 1201, pp.259-260, 399-400).

Spencer purposefully lied and misrepresented facts during the discovery process in order to mislead Nielsen from possible defenses, and to force Nielsen to incur additional expense and time. Spencer lied about the state of his marriage in his deposition, and in his affidavit. (R. 648, Plaintiff's Exhibit No. 34, ¶ 37). He concealed that he felt it was a fraud from the very beginning. *Id.* He lied about the abuse. (*Id.* at ¶ 33-38). Spencer concealed his

arrest for sex solicitation. (R. 648, Exhibit 57.) Spencer lied about his infidelity.(R. 1201 pp.209-210).

Additionally, Spencer designated numerous witnesses in his Initial Disclosures, which he knew would not assist his case in order to force Nielsen to do exhaustive investigative work causing him to incur additional expenses and attorneys' fees. This list included the entire congregation of his church. (R. 1201, p. 260). Spencer sought out witnesses and improperly attempted to influence them to misstate facts in their testimony to mislead Nielsen. (R. 1200, pp. 86). He asked Jewelya to lie for him in her deposition and trial testimony, and he promised in return to cooperate in their divorce proceeding *Id.*

Nielsen incurred about \$95,000 in attorney's fees and cost defending the suit for alienation of affections. (R. 1199, p. 440).

C. Spencer Knew His Wife Jewelya Initiated/ Pursued the Relationship With Nielsen.

In February of 1988 Jewelya contacted Nielsen to renew their friendship because she was not happily married. (R. 1200, pp. 51-53; 1199, p. 422). She sought out the relationship because she needed to have someone to talk to and a safe place away from Spencer's abuse. (R. 1199, pp. 423-24). She sought advice on her marriage problems and Nielsen encouraged Jewelya to make her marriage work. (R. 1200, pp. 51-52). Jewelya was the pursuer in the relationship; she would often call Nielsen from hotels and ask him to come and meet her. (R. 1199, pp. 424-25). Jewelya became obsessed with the relationship and would telephone

Nielsen's office frequently and bring him gifts. *Id.* Nielsen tried to break off the relationship on several occasions, and repeatedly asked her to stay away. (R. 1199, pp. 437-38).

In Spring of 1988, Jewelya's pursuit of Nielsen became intimate. (R. 1199, p. 425). Nielsen never wanted the relationship to evolve intimately, but he allowed it. (R. 1199, p. 426). Once the sexual relationship with Nielsen stopped, Jewelya continued to rely on him for emotional support. Nielsen's only contact was for visitation of his daughters. (R. 1199, p. 429).

D. Spencer knew that Nielsen Did Not Alienate Jewelya's Affections, and Spencer Ended the Marriage.

In spite of the history of abusive behavior and the difficulties in their marriage, Jewelya testified that she continued to try to resolve the marital problems. (R. 1200, pp. 40-43). Instead of cooperating with Jewelya to resolve the problems, Spencer's abusive behavior increased. *Id.* Spencer was not willing to change his behavior or attitudes to save the marriage, and he continued his abuse toward Jewelya and the twins. (R. 1200, pp. 71-73). In 1996, Jewelya met Spencer and tried again to discuss with him ways of saving their marriage. Jewelya had prepared a plan for preserving the marriage, which required Spencer to get appropriate counseling for his violent and abusive behavior. However, Spencer was not interested, therefore Jewelya was forced to file for divorce in 1996. *Id.*; *See also* (R. 1201, p. 211). In the divorce, Spencer claimed the collapse of the marriage was solely Jewelya's fault. (R. 1201, pp. 208-209)

SUMMARY OF ARGUMENT

After the Jury found that Spencer had wrongfully brought a civil suit and abused the process, Spencer brought this appeal of seven issues, all of which are either unpreserved, harmless error, or not well taken. Moreover, where required, Spencer failed to show plain error, exceptional circumstances, and properly marshal the evidence.

First, the jury found that when Spencer filed his alienation of affections action, he lacked reasonable belief that he would prevail when he brought the underlying case against Nielsen. Because this factual issue was disputed, it was a proper jury question. Without a reasonable belief that he would prevail, Spencer did not have probable cause. This Court should rule that this issue was not properly preserved before the jury was excused and the evidence was not properly marshaled on appeal.

Second, the trial court properly instructed the jury that the underlying action filed by Spencer was dismissed as a discovery sanction and therefore terminated in favor of Nielsen. The dismissal was a substantial termination, similar to a dismissal for failure to prosecute, and is on the merits. It was not a technical dismissal, i.e., lack of jurisdiction, statute of limitations. This Court should rule that this issue was not properly preserved before the jury was excused and that the prior action was clearly terminated on its merits in favor of Nielsen.

Third, the trial court properly instructed the jury on the requirement of the abuse of process claim. The jury properly found Spencer had an ulterior purpose and that he committed one or more of the acts listed in the instruction. Each of the items listed in Jury

Instruction 19, is a willful act in the use of the process, not proper in the regular course of the proceedings.

Fourth, the trial court properly awarded prejudgment interest. In a case for wrongful bringing of a civil suit, attorneys' fees and costs are special damages. As past special damages, Nielsen had a statutory right under U.C.A. Section 78-27-44 to prejudgment interest. The trial court properly used its discretion in awarding prejudgment interest, even though it was not requested in the Complaint. Notwithstanding, Nielsen has an independent right to prejudgment interest under common law where the attorneys' fees were undisputed as to their reasonableness, they were complete and mathematically calculable, and they were paid prior to this trial.

Finally, this case for wrongful bringing of a civil suit is distinguishable from a typical tort such as auto accident personal injury cases, in that the special damages of attorneys' fees do not result from the general damages. Therefore awarding special damages under these circumstances where general damages were not requested was proper. This Court should rule that this issue was not properly preserved before the jury was excused

ARGUMENT

I. UNDER NIELSEN'S CLAIM FOR WRONGFUL BRINGING OF A CIVIL SUIT, IT WAS PROPERLY DETERMINED THAT SPENCER BROUGHT THE UNDERLYING LAWSUIT FOR ALIENATION OF AFFECTIONS WITHOUT PROBABLE CAUSE.

A. Because This Issue Was Not Preserved and Does not Involve Not Plain Error or an Exceptional Circumstances, it Should Not Be Addressed on Appeal.

Spencer waived this issue by not properly preserving it. Spencer never requested the trial court to make a legal determination on probable cause. Moreover, Spencer did not object to putting the issue of reasonable belief in front of the jury; in fact this issue was included in Spencer's own proposed instruction. (R. 470). The portion of the record Spencer claims preserves this issue, has nothing to do with probable cause and refers primarily to the claim for abuse of process. (R. 1199, p. 544).

It is a well established rule that a party who fails to bring an issue before the trial court is generally barred from raising it for the first time on appeal. *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551. "The objection must be specific enough to put the trial court on notice of every error which is complained of on appeal." *VanDyke v. Mountain Coin Mach. Distribs., Inc.*, 758 P.2d 962, 965 (Utah Ct. App.1988).

The elements of a Wrongful Bringing of a Civil Suit were set forth in Jury Instruction Nos. 14 and 15. Jury Instruction No. 14 asked the jury to determine whether Spencer had a reasonable belief that he would prevail when he brought the underlying suit. (R. 615). Likewise, Jury Instruction No. 15 set forth that reasonable belief is based on the facts, and whether Spencer believed that under those facts, his claim was valid. (R. 616). It is important to note that Jury Instruction No. 14 is not substantially different from Spencer's own proposed Jury Instruction No. 28. (R. 470).

Spencer did not object to giving the jury the limited issue of fact regarding his reasonable belief, an element of probable cause, in Jury Instruction Nos. 14 or 15; and therefore his current objection is waived. *VanDyke*, 758 P.2d at 964; *See also* Utah R. Civ.

P. 51(f). Furthermore, by proffering his own similar instruction, Spencer himself has invited any alleged error. Under the invited error doctrine, the Appellate and Supreme Courts will decline to review, even under plain error or manifest injustice, when counsel, either by statement or act, affirmatively represented to the trial court that he or she had no objection to the proceedings. *Pinder*, 2005 UT 15, ¶ 62; *Fuller v. Zinik Sporting Good Co.*, 538 P.2d 1036, 1037 (Utah 1975) (It is invited error to fail to tender a proper written instruction).

Under the test set forth in *State v. Dunn*, Spencer has failed to meet his burden in establishing plain error by (i) proving that an error exists, and also (ii) that the alleged error should have been so obvious and fundamental to the trial court, that the trial court erred in submitting the case to the jury. 850 P.2d 1201 (Utah 1993). Spencer failed to adequately explain “why the trial court committed plain error by not recognizing the magnitude of the error and by not stepping in on its own to avoid or remedy it.” *State v. Robinson*, 2006 UT 64, ¶ 14, 147 P.3d 448 (internal quotations omitted). Where Spencer’s reasonable belief at the time he brought the alienation of affections suit was disputed at the trial, this was a proper issue of fact and there was no obvious and fundamental error by the trial court.

Spencer has failed to show any exceptional circumstances which are “reserv[ed] for the most unusual circumstances where our failure to consider an issue that was not properly preserved for appeal would have resulted in manifest injustice.” *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 23, 94 P.3d 186. The concept of exceptional circumstances is elusive, ill-defined, and applies only to rare procedural anomalies one. *Dunn*, 850 P.2d at 1209 n.3.

Spencer's only argument for exceptional circumstances is new development or clarification in Utah law. However, the only Utah cases cited throughout the section are *Gilbert v. Ince*, 1999 UT 65, 981 P.2d 841 and *Baird v. Intermountain School Federal Credit Union*, 555 P.2d 877 (Utah 1976). Moreover, the non-binding cases cited by Spencer were all published at least five years prior to this trial. Any clarification given by the Utah Supreme Court in two cases decided eight and thirty years before the trial is not "new development or clarification in the law."

Therefore, where this issue is not plain error or an exceptional circumstance, this Court should dismiss it for lack of preservation.

B. This Issue Should Be Dismissed Because Spencer Failed to Properly Marshal the Evidence.

"To successfully attack findings of fact, an appellant must first marshal all the evidence supporting the findings and then demonstrate that even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the finding." *Turnbaugh*, 793 P.2d at 941; Utah R. App. P. 24(a)(9). Spencer had the duty of marshaling "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991). Where Spencer failed to fully comply with this requirement, the appellate court is required to assume that the findings are correct, and the appeal will thus necessarily fail. *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998).

Spencer did not properly marshal the facts; the limited facts given are not properly cited. When compared with the facts and testimony heard by the jury concerning Spencer's belief when he filed the suit, it is clear that the "challenger [did not] present...every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Majestic Inv. Co.*, 818 P.2d at 1315. Therefore, where Spencer has not given this Court a "basis from which to conduct a meaningful review of facts challenged on appeal," this Court should "show no reluctance to affirm when the appellant fails to adequately marshal the evidence." *Id.* at 1313; *State v. Larsen*, 828 P.2d 487 (Utah Ct. App. 1992)

C. The Trial Court Properly Gave the Factual Issue of Reasonable Belief to the Jury Where It Was a Disputed Issue.

There were disputed facts regarding Spencer's probable cause and his belief in whether he would prevail. Therefore, it was proper for the jury to decide this issue. Probable cause is defined as "One who takes an active part in initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he 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." *Gilbert*, 1999 UT 65, ¶ 19.

Restatement (Second) of Torts Section 681B instructs that if the facts are undisputed, it is the province of the court to determine probable cause, but if the facts are in dispute, it is the province of the jury to resolve the facts to enable the court to make the determination. The trial court properly followed the request by Spencer's counsel in his proposed instruction

that the jury determine whether Spencer “knew from the beginning that he could not prevail in his action for alienation of affections...” (R. 470). The legal determination of probable cause was not given the jury. (R. 615-16). The trial court, after the issues had been duly tried and the jury having duly rendered its verdict, ordered and adjudged that Spencer wrongfully brought a civil action by bringing the lawsuit against the Plaintiff for alienation of affections. (R. 955).

Where Spencer’s belief at the time he filed the underlying suit was disputed by the parties, the trial court properly followed the law by allowing the “jury [to] determine[] the circumstances under which the proceedings were initiated in so far as maybe necessary to determine whether the Defendant had probable cause for initiating them.” Rest 2d Torts § 681B(2)(a) and Note 1(c). This is harmonious with longstanding Utah precedent recognizing that elements of probable cause are properly given the jury. *Sweatman v. Linton*, 241 P. 309, 313 (Utah 1925) (“The question as to whether Linton in good faith believed that there was probable cause for the prosecution of Plaintiff, or whether he acted maliciously in causing the prosecution of the Plaintiff was for the jury.”); *see also Straka v. Voyles*, 252 P. 677, 678 (Utah 1927).

Spencer incorrectly cites to several cases to support his position that probable cause is solely a legal finding. Unlike this case, all the cases cited by Spencer did not have disputed facts regarding the reasonable belief of the defendant. *See, e.g., Weststar Mortg. Corp. v. Jackson*, 61 P.3d 823 (N.M. 2002) (“the essential facts on which the issues of probable cause...are not in dispute”); *Robb v. United States Fidelity and Guar. Co.*, 798 F.2d

788 (5th Cir. 1986) (“The undisputed facts...at the time it filed subrogation suit were clearly adequate to give...probable cause...”); *Williams v. Coombs*, 179 Cal. App.3d 626 (Cal. Ct. App. 1986) (“[t]here is no dispute about what defendant did or didn’t do, or about what he knew or didn’t know.”); *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863 (Cal. 1989) (“there were no disputed questions of fact relevant to probable cause to be submitted to the jury...”); and *Prewitt v. Sexton*, 777 S.W.2d 891 (Ky. 1989) (court ruled on “uncontradicted evidence”).

Consistent with the Restatement, many courts, including those cited by Spencer, have upheld that when the facts are in dispute, elements of probable cause are given to the jury. *See, e.g., Chervin v. Travelers, Ins. Co.*, 858 N.E.2d 746 (Mass. 2006); *Kingsland v. City of Miami*, 369 Fed. 3rd 1210 (11th Cir. 2004); *Prewitt*, 777 S.W.2d at 895; and *Sheldon Appel Co.*, 47 Cal.3d at 879.

In this case, Spencer’s lack of probable cause was disputed by Spencer at the trial. This dispute is admitted by Spencer. (*See* Brief of Appellant, p.37). The following section sets forth more than sufficient evidence of Spencer’s lack of belief that he would prevail in the underlying action. Therefore, pursuant to case law, and in particular the law cited by Spencer, the trial court made no error by giving the jury the disputed issue of Spencer’s reasonable belief.

D. Spencer Lacked No Probable Cause Where the Jury Found that He Did Not Have a Reasonable Belief He Would Prevail When He Filed the Underlying Suit.

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [jury] to judge the credibility of the witnesses.” *Turnbaugh*, 793 P.2d at 941. A finding is only clearly erroneous if it is against the clear weight of the evidence. *Id.* After hearing and weighing the evidence presented at trial, the jury found that under the weight of the evidence that, Spencer did not have a reasonable belief that he would prevail in his underlying action.

Nielsen does not wish to burden this Court with repeating all the many facts previously set forth in the Statement of Facts pages 8-14, from which the jury made their determination of Spencer’s belief. However, this section will summarize some key facts which were not marshaled by Spencer.

First, the clear testimony, black and white under oath, by Spencer is that he believed that his marriage was a fraud from the very beginning. (R. 1201, p.178; Plaintiff’s Exhibit No. 34, ¶ 37). This was stated within months of his underlying complaint. The evidence was clear that the marriage was a disaster from the beginning and that Spencer and Jewelya were not happily married and there was no genuine love and affection between them. He threatened divorce on the honeymoon. (R. 1200, p.39). There was serious physical, emotional, and verbal abuse. (R. 1200, pp. 42-49). Spencer and Jewelya had many separations as a result of the abuse, and in addition, Spencer was out of town 5 days a week and 40 weeks a year. *Id.* There was mutual infidelity, including seventeen alleged and/or proved extra marital relationships. (R. 1200, pp. 74-76, 83-84).

In a tape recorded conversation, Spencer admitted to Nielsen that he knew he would not win this case, but nonetheless he would bury Nielsen in legal costs and attorneys' fees. (R. 1199, p. 435). Spencer knew what was required to win a suit for alienation of affection. (R. 1200, p. 66). He knew he did not meet those elements. *Id.*

Lastly, Spencer knew that Nielsen was not the controlling cause of any alienation of affection. Beyond the above facts, the jury also heard that Jewelya felt it was acceptable to have romantic relationships with other men. (R. 1201, pp. 174-175). Jewelya sought out and pursued Nielsen. (R. 1200, pp. 51-53). It was Spencer who ended their marital relationship. (R. 1200, pp. 71-73). He refused to get counseling and help for his abusive behavior. *Id.* He was diagnosed as being narcissistic. (R. 1201, p. 301). He would blame others to protect himself, followed a pattern of attacking and seeking revenge, lacked empathy, and felt that the rules did not apply to him. (R. 1201, pp. 305-06).

Pursuant to the above summarized facts and those detailed previously in the Statement of Facts, the jury was reasonable in finding that Spencer did not have a reasonable belief he would prevail and therefore the Court properly found that Spencer wrongfully filed a civil suit. Pursuant to the jury's finding that Spencer had no reasonable belief he would prevail, there could be no probable cause by law. *Gilbert*, 1999 UT 65, ¶ 19.

II. UNDER NIELSEN'S CLAIM FOR WRONGFUL BRINGING OF A CIVIL SUIT, IT WAS PROPERLY DETERMINED THAT SPENCER'S UNDERLYING ACTION FOR ALIENATION OF AFFECTIONS WAS TERMINATED ON THE MERITS.

A. Because This Issue Was Not Preserved and Does not Involve Not Plain Error or an Exceptional Circumstances, it Should Not Be Addressed on Appeal.

Spencer has not properly preserved this issue and, as explained in section I (A), it should not be heard on appeal. During the seven years this case was litigated, Spencer never asked the trial court to determine this issue as a matter of law, nor did he file a Motion to Dismiss, Summary Judgment, or ask the Court for a Directed Verdict regarding this issue. Spencer did not make any specific objection whatsoever pertaining to the merits of the underlying case. When this issue was presented to the trial court for the first time in Spencer's Motion for New Trial, it refused to consider the merits of the motion and found the issue had been waived where it was not properly preserved. *Pinder*, 2005 UT 15, ¶ 45-46.

The objection cited by Spencer as preservation of this issue is a discussion regarding Jury Instruction No. 16 in which Spencer's objection was sustained by the Court. (R. 1199, pgs 551-554). The trial court determined that the underlying case was dismissed as a discovery sanction which, as explained below, was a determination on the merits. Spencer's only objection in chambers was, "I would suggest this insertion, 'in failing to respond to discovery orders was' and the rest of it *I don't have a problem with*, willful, bad faith was the fault of Mr. Spencer and that he engaged in persistent and dilatory tactics." (R. 1199, pg. 552) (emphasis added). This objection was not specific to this issue, and was sustained by the Court.

Given the uniformity of law, that dismissal for discovery abuse is on the merits, as discussed below, this issue does not qualify under the plain error or exceptional

circumstances exceptions to the preservation rule as explained in section I(A). Spencer nakedly alleges that the trial court “should have known that the dismissal...was not on the merits.” Yet as shown below, Spencer fails to provide any law, even non-authoritative law, which would make it “obvious” that such dismissal was not on the merits.

Spencer has failed to show recent clarification as an exceptional circumstance. He cited to *Hatch v. Davis*, 2004 UT App 378, 102 P.3d 774, and claimed that “the appellate courts recently clarified..the termination of the underlying action must be on the merits.” However, this “clarification” was not recent, but was made two years prior to the trial.

Therefore, because this issue has been waived, and does not meet plain error or exceptional circumstances, this Court should not address it.

B. The Underlying Suit Dismissed by Discovery Sanctions Was Terminated on its Merits in Favor of Mr. Nielsen.

A judgment resulting from sanctions against Spencer for years of failure to comply with multiple discovery orders and “engaging in persistent dilatory tactics intending to frustrate the judicial process” is a termination on the merits and provides the basis for the subsequent action of a wrongful bringing of a civil suit. This is an issue of law and should be reviewed for correctness. *Dipoma*, 2000 UT App 130, ¶ 4. The trial court instructed the jury that this case was terminated by a discovery sanction in favor of Nielsen. (R. 617).

This Court in *Hatch v. Davis* held, “the termination must *reflect* on the merits of the underlying action” to initiate a claim for wrongful use of civil proceedings. 2004 UT App 378, ¶ 23, 102 P.3d 774, *aff’d* 2006 UT 44, 147 P.3d 383 (Quoting *Lackner v. LaCroix*, 602

P.2d 393, 394 (Cal. 1979)). In *Hatch*, this court adopted the distinguishment made by the California Courts between dismissals on technical grounds (i.e. lack of jurisdiction, statute of limitations) and a substantive termination (i.e. failure to prosecute). 2004 UT App 378, ¶ 23 (relying on *Lackner*, 602 P.2d at 395). “It is not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following a trial on the merits.” *Lackner*, 602 P.2d at 394. “A dismissal for failure to prosecute... does reflect on the merits of the action...the reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted.” *Id.* at 395 (emphasis in original); *see also Curry v. Educoa Preschool, Inc.*, 580 P.2d 222 (Utah 1978) (dismissal for failure to prosecute is a final judgment on the merits).

In *Lumpkin v. Friedman*, the California Court found that, like a dismissal for failure to prosecute, a judgment resulting from a discovery sanction is a favorable termination on the merits. 131 Cal.App.3d 450, 452 (Cal. Ct. App.1982). “Our equating of the failure to comply with discovery procedures with the failure diligently to prosecute an action...is predicated on the well-recognized rule permitting an inference, where a party fails to produce evidence which he might reasonably be expected to produce, that the evidence would be unfavorable to that party. *Id.* at 456. “A plaintiff who neglects to produce essential evidence, subpoena necessary witnesses or present evidence in a proper form and thereby suffers a judgment against him cannot be heard to claim that he lost on purely technical grounds.” *Id.* at 455.

There is no legal basis to Spencer's claim that a termination based on a discovery sanction under Rule 37(b)(2)(c) is not on the merits. Every court which has ruled on this specific issue has found that dismissal for a discovery sanction is "like the dismissal for failure to prosecute..[which] reflects adversely on the merits of the action based on the natural assumption that one does not simply abandon a meritorious action once instituted..." See *Ross v. Kish*, 145 Cal.App.4d 188, 199-202 (Cal. Ct. App. 2006); *United Holy Church of America, Inc. v. Kingdom Life Ministries*, 848 N.E.2d 886 ¶ 7 (Ohio Ct. App. 2006); *Cult Awareness Network v. Church of Scientology Int.*, 685 N.E.2d 1347, 1353 (Ill. 1997); *Nagy v. McBurney*, 392 A.2d 365, 368 (R.I. 1978); and *Brantley v. Sparks*, 306 S.E.2d 337, 338 (Ga. Ct. App. 1983).

In addition, the trial court properly found the suit was terminated on the merits, where "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits." Utah R. Civ. P. 41(b) (emphasis added); *see also Donahue v. Smith*, 2001 UT 46 ¶ 6, 27 P.3d 552. Unlike the cases cited by Spencer, the underlying alienation action in our case was not dismissed on technical grounds or for procedural reasons, similar to the cases listed above, it was dismissed on the merits of the case for failure to comply with discovery and essentially prosecute the case. (R. 809).

Unnecessarily, Spencer, assuming arguendo, that this issue was not determined by the court, argues that the jury could not find that the underlying action was dismissed on the

merits. Certainly, the jury would have reasonably found, after hearing the all the evidence, that Spencer failed to pursue his case, respond to discovery, and abandoned his action and that the prior action terminated on the merits. The underlying court found: Spencer's conduct had been "egregious" (R.809, ¶ 1); "consistently refused to produce the required documents and information" (*Id.* at ¶ 3); there were years of failure to provide discovery (R.809, ¶ 19); his behavior and conduct was willful, was in bad faith, and was his fault (R.809, ¶ 22); he engaged in persistent and dilatory tactics intending to frustrate the judicial process" (R.809, ¶ 22); he impeded the trial even after a very clear order that the case would be dismissed by default if the order was not complied with (R.809, ¶ 23); and Spencer's conduct was not due to his or his counsel's inability, but was willful and in bad faith. (R.809, ¶ 24).

Because Spencer, similar to the plaintiff in *Lumpkin*, continually refused to produce evidence which he was reasonably expected to produce, the underlying court found "that the sanction of the dismissal of the alienation of affections...[was] warranted under the facts and circumstances of the case." (R.809 ¶ 27)(emphasis added). Therefore, finding that the alienation of affections case was dismissed on the merits is consistent with the law and the findings of fact, and should be upheld by this Court.

III. THE COURT PROPERLY INSTRUCTED THE JURY ON THE CLAIM FOR ABUSE OF PROCESS.

Spencer appeals only whether the court properly determined as a matter of law that the acts listed in Jury Instruction 19 constituted "willful acts" of abuse of process, but cites

no supporting case law. Although the jury found in favor of Nielsen, that Spencer had abused the process, since the jury awarded no monetary damages for this claim, regardless of the outcome of this issue, it would have no effect on the amount of damages.

Jury Instruction No. 19 properly sets forth the elements for Nielsen's claim of abuse of process, by requiring the jury to find "first, an ulterior purpose [and] second, an act in the use of the process not proper in the regular prosecution of the proceedings." *Hatch*, 2004 UT App 378, ¶ 34. Following the MUJI 3.1 pattern and *Gilbert*, 1999 UT 65 ¶ 17, Instruction No. 19 properly instructs the jury that in order to find that Spencer used the civil process for a purpose other than that for which it was intended, Nielsen had to establish that Spencer willfully acted in one or more of the following ways:

- a. Defendant attempted to take the depositions of Plaintiff's mother and wife for no purpose whatsoever.
- b. Defendant intentionally caused to be lost or destroyed crucial evidence.
- c. Defendant purposefully lied and misrepresented facts in order to mislead the Plaintiff from possible defenses, and to force Plaintiff to incur additional expense and time.
- d. Defendant engaged in delay tactics which caused Plaintiff to incur additional expenses and attorneys' fees.
- e. Defendant designated numerous witnesses which he knew would not assist his case in order to force the Plaintiff to do exhaustive investigative work cause him to incur additional expenses and attorneys' fees.
- f. Defendant improperly attempted to influence other witnesses to misstate facts to mislead the Plaintiff.

Nielsen does not dispute that this is a legal issue. The trial court properly concluded that whether Spencer committed one of the acts listed in the instruction is a factual issue, and the purpose behind the act is also an issue of fact, but each of the willful acts themselves according to the law would be improper uses of the process. (R. 1199, pp. 544-46). The jury found that Spencer had indeed committed one or more of the above acts.

Each of the acts listed in Instruction No. 19 points to “conduct independent of legal process itself that corroborates the alleged improper purpose.” *Hatch*, 2004 UT App 378, ¶ 35. Spencer does not offer any evidence otherwise. “To establish improper use of process, plaintiff must show some act or threat directed to an immediate objective not legitimate in the use of the process.” *Id.* The evidence clearly demonstrated this in the instant case.

Cases from other jurisdictions have defined “process” broadly. “Through developing case law the word ‘process’ as used in the tort ‘abuse of process’ is not restricted to the narrow sense of that term...rather, it has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process.” *Nienstedt v. Wetzel*, 651 P.2d 876, 880-81 (Ariz. Ct. App.1982) (citing *Barquis v. Merchants Collection Assn.*, 496 P.2d 817(Cal. 1972); and *Foothill Industrial Bank v. Mikkelsen*, 623 P.2d 748 (Wyo.1981)); See also *In re American Continental Corporation/Lincoln Sav. & Loan Securities Litigation*, 845 F.Supp. 1377, 1385 -1386 (D.Ariz.1993). The abuse of process tort is a catch-all category to cover improper uses of the judicial machinery that did not fit within the earlier established, action of malicious prosecution. *Barquis*, 496 P.2d 817 fn 4.

In the instant case, Spencer abused the legal process by conducting independent acts not authorized by the process to carry out an ulterior purpose which was not the purpose for which it was intended. Spencer urges this Court to find as a matter of law, that each of the acts listed Instruction No. 19 (i.e. taking depositions for no purpose whatsoever) are proper uses of the process. Appellee's Statement of Facts, section II B set forth the factual background of each of the acts listed.

The first act of attempting to take the depositions for no purpose whatsoever is a perversion of the process. *See Nienstedt*, 651 P.2d at 880-81; *See also Hopper v. Drysdale*, 524 F.Supp. 1039 (D.Mont.1981). Spencer insufficiently cites the underlying court order concerning the depositions. (*See* Appellant's Brief, p. 42). The underlying trial court held that "[i]t is unlikely that [these] deposition[s]...would bear any fruit or otherwise relevant evidence as to the issue in dispute in this case... it appears that the deposition[s]...would only be used to annoy and embarrass [Nielsen's] family."

Second, intentionally causing to be lost or destroying crucial evidence is also a willful act, which falls outside the purpose of legal process. Spencer does not have a legitimate right in the normal course of the discovery process to purposefully lose or destroy crucial evidence. The trial court properly instructed the jury that they could make an adverse inference regarding this evidence. *See Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah 1994).

Third, the act of purposefully lying and misrepresenting facts in order to mislead the Nielsen from possible defenses, and to force Nielsen to incur additional expense and time is

a willful act which falls outside the purpose of the legal process. This act specifically referred to Spencer's willful and improper use of discovery. The trial court properly ruled that if the jury found that Spencer in answering discovery purposefully lied and misrepresented the facts, that would not be a legitimate use of the process.

Fourth, engaging in delay tactics which caused Plaintiff to incur additional expenses and attorneys' fees also displays perversion of the process not proper in the regular course of proceedings. Spencer again wishes this court to overlook the underlying court's finding that Spencer's "behavior and conduct was wilful, was in bad faith, and was the fault of [Spencer] and that [Spencer] engaged in persistent, and dilatory tactics, intending to frustrate the judicial process" (R. 802, ¶ 22).

Fifth, Spencer urges this Court to find that designating numerous witnesses, including his entire church congregation, whom he knew would not assist in his case, in order to force the Plaintiff to do exhaustive investigative work and cause him to incur additional expenses and attorneys' fees, is a proper use of the process. Clearly, this is not proper in the regular course of discovery proceedings.

The sixth act specifically refers to Spencer attempting to influence witnesses just prior to their deposition and trial testimony and encouraging them to misstate facts to mislead the Plaintiff to his favor. Again, Spencer incorrectly asks this Court to find that this is a proper use of process.

Therefore, where the trial court properly set forth the law in Jury Instruction No. 19, this Court should affirm the trial court's ruling.

IV. THE TRIAL COURT PROPERLY AWARDED PRE-JUDGMENT INTEREST ON THE AWARD OF \$95,000.

Nielsen is entitled to prejudgment interest, where attorneys' fees in a wrongful bringing case are special damages, as such they apply to section 78-27-44 of the Utah Code, and the trial court had discretion to award prejudgment interest even when not requested in the complaint. Nevertheless, where Nielsen is entitled to prejudgment interest under common law for his calculable damages, any alleged errors in application of Section 78-27-44 of the Utah Code is harmless error.

A. The Trial Court Properly Found Nielsen's Award of \$95,000 for Past Attorneys' Fees and Court Expenses Constituted Special Damages.

In a Wrongful Bringing of a Civil Suit, expenses actually incurred for attorneys' fees and court expenses are special damages. *Cates v. Eddy*, 699 P.2d 912 (Wyo. 1983); and *Gerard v. Ross*, 204 Cal. App.3d 968, 977 (Cal. Ct. App. 1989) (award for \$8,200 as special damages consisting of attorneys' fees and costs with no general damages, affirmed on other grounds). Distinguishable from average personal injury cases, as set forth in section V, Utah Courts have found that in the limited instances where attorneys' fees are incurred in repairing the harm done by a tort, such fees and costs constitute special damages. *See Gillmore v. Cummings*, 904 P.2d 703, 708 (Utah Ct. App. 1995).

In *Corbett v. Semons*, this court explained:

special damages are those expenses that plaintiffs have paid out of pocket, for which they have used their own money and which they will not get until the settlement of their action. Getting interest on their out-of-pocket expenses will provide a total recoupment of any expenses that they have had from the time

of the accident until they are paid in full by a recovery at court or by settlement.

904 P.2d 229 (Utah Ct. App. 1995) (*citing Gleave v. Denver & Rio Grande Western R. Co.*, 749 P.2d 660 (Utah Ct. App. 1988)).

In this case the attorneys' fees and court costs constitute expenses that Nielsen paid out of pocket repairing the harm done by the wrongfully brought suit for which he will not get compensated until the settlement of this action and thus under these circumstances the attorneys' fees are special damages.

B. The Trial Court Properly Found That Nielsen Had A Statutory Right to Prejudgment Interest Under Utah Code Ann. Section 78-27-44.

In all actions brought to recover damages for personal injuries sustained because of the tort of another, the plaintiff may claim interest on any of his special damages. Utah Code Ann. § 78-27-44. It is undisputed that the wrongful bringing of a civil suit is a personal injury tort. Therefore by statute, "it is the duty of the court, in entering judgment...to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, interest on that amount calculated at the legal rate." *Id.*

Section 78-27-44 is not limited to special damages of medical expenses; the statute only excludes *future* medical expenses, *future* loss in wages or earnings, and loss of *future* earning capacity. *Id.* at (3). Utah Courts have applied section 78-27-44 to all past special damages. *Corbett*, 904 P.2d 229 (applies to lost earning capacity); *Gleave*, 749 P.2d at 673 (applies to lost wages).

Spencer has not accurately cited this Court's holding in *Gleave*, where this Court specifically recognizes that non-medical special damages such as lost wages are entitled to prejudgment interest. 749 P.2d at 673. The Court notes that the statute only limits the special damages entitled to prejudgment interest to those damages "which arise in the period between the act giving rise to the cause of action and the entry of judgment in plaintiff's favor." *Id.* at 672. "The legislative history and the statutory language reveal the legislature's intent to distinguish between special damages accruing between the date of the injurious act and the entry of judgment (such as medical expenses or lost wages) and those...that will arise subsequent to entry of judgment, and to authorize prejudgment interest only on the former category of special damages." *Id.* at 673.

Therefore this Court should affirm the trial courts determination that attorneys' fees, although they are non-medical special damages, nonetheless entitle Nielsen to prejudgment interest under section 78-27-44 of the Utah Code.

C. Courts Are Entitled to Award Prejudgment Interest at Their Own Discretion, Whether or Not the Interest Is Requested in the Complaint.

The trial court had discretion to award prejudgment interest regardless of whether it was originally requested in the complaint. *Gleave*, 749 P.2d at 671. While prejudgment interest *may* be requested in a complaint, it is not required by statute but left at the Court's discretion. *See* Utah Code Ann. § 78-27-44. In *Gleave*, this Court affirmed the trial court's discretion to award prejudgment interest under § 78-27-44 and then allowed plaintiff to amend his complaint *after trial* to include prejudgment interest claims. 749 P.2d at 671; *See*

also Utah R. Civ. P. 54(c)(1) (“every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings”).

If this Court determines that section 78-27-44 mandates that prejudgment interest must be requested in the complaint, then Nielsen respectfully requests that this Court use its discretion to remand this issue to the trial court so that Nielsen’s motion to amend the complaint may be granted. However, since there is a separate and independent basis for the same prejudgment interest as discussed in the proximate section, the Court should affirm the awarded interest.

D. Any Alleged Error is Harmless, Where Nielsen Would Be Entitled to Pre-Judgment Interest Under Utah Common Law.

This Court should affirm the ruling of the trial court where the claimed error is harmless, as Nielsen is entitled to pre-judgment interest under Utah common law regardless of whether this court finds that Section 78-27-44 applies. Even if the Court assigned an incorrect reason, but reached the correct result, the appellate court should affirm. *See Jespersen v. Jespersen*, 610 P.2d 326, 328 (Utah 1980) (“[W]e are inclined to affirm a trial court’s decision whenever we can do so on proper grounds even though the trial court may have assigned an incorrect reason for its ruling.”); *Foss Lewis & Sons Const. Co. v. General Ins. Co. of America*, 517 P.2d 539, 540 (Utah 1973) (“Whether or not the judge gave the correct reason for his ruling is of no importance, since he should be affirmed if he reached the correct result.”).

The Utah Supreme Court has recognized for over a century that prejudgment interest should be awarded in all cases where the damages are complete and can be measured by fixed rules of evidence and known standards of value. *Smith v. Fairfax Realty Inc.*, 2003 UT 41 ¶ 18, 82 P.3d 1064 (citing *Fell v. Union Pac. RY. Co.*, 88 P. 1003, 1006 (Utah 1907)). Under common law, even if this Court finds that the Attorneys' fees are general damages, Nielsen is still entitled to prejudgment interest. *Id.* This common law right to pre-judgment interest is a separate and unrelated to the statutory right under Utah Code Ann. § 78-27-44. *Id.* at ¶ 20.

"As a matter of public policy, award of pre-judgment interest simply serves to compensate the party for depreciating value of amount owed over time." *Trail Mountain Coal Co. v. Utah Div. of State Lands and Forestry*, 921 P.2d 1365, 1370 (Utah 1996). "Prejudgment interest may be awarded to provide full compensation for actual loss." *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, 993 P. 2d, 222. When the amount of loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time. *Smith*, 2003 UT 41 at fn 5.

Spencer cites to *James Constructors, Inc. v. Salt Lake City Corp.*, where after a trial to determine the reasonableness of the fees, this Court held, that a prevailing party may not receive prejudgment interest on attorneys' fees when the reasonableness of those fees are in dispute. 888 P.2d 665, 671-73 (Utah Ct. App. 1994). This case is distinguishable because the reasonableness of the past attorneys fees and costs was not disputed in this case. There was no evidence offered by Spencer to dispute the reasonableness of the fees, what legal

work was actually performed, how much legal work was reasonably necessary to adequately defend the matter, and whether the attorneys' billing rate was consistent with the rates customarily charged in the locality for similar services. *Id.* at 670. Therefore, where the reasonableness of the fees are not in dispute, prejudgment interest is permitted for attorneys' fees. See *First Security Bank of Utah v. J.B.J. Feedyards, Inc.*, 653 P.2d 591 (Utah 1982) (prejudgment interest awarded on attorneys' fees for defending a wrongful attachment); See also *Kraatz v. Heritage Imports* 2003 UT App 201, ¶¶ 65 & 76, 71 P.3d 188 (this Court, recognizing its former ruling in *James Constructors, Inc.*, found that if the attorneys' fees were paid prior to judgment then the damage is complete and the amount of the loss is fixed thus, prejudgment interest was appropriate).

In this case Nielsen's attorneys' fees and court costs were complete and fixed before the trial. (R. 648, exhibit 68). Unlike other personal injury damages, these special damages were not continuing and did not reach beyond the time of trial. *Cf. Fell*, 88 P. at 1006. Therefore, where these damages were calculated with mathematical accuracy and not ascertained by the jury, under the above Utah Common law, prejudgment interest is appropriate independent of Utah Code Ann. § 78-27-44.

V. THE JURY PROPERLY AWARDED SPECIAL DAMAGES WITHOUT GENERAL DAMAGES.

A. Because This Issue Was Not Preserved and Does not Involve Not Plain Error or an Exceptional Circumstances, it Should Not Be Addressed on Appeal.

Spencer has waived his objection, because he failed to object to before the jury was discharged to: Jury Instruction No. 24, the special verdict form, and Nielsen's request for damages consisting only of Attorneys' fees and lost wages. *Balderas v. Starks*, 2006 UT App 218, ¶18, 138 P.3d 75; *VanDyke*, 758 P.2d at 964. When the jury awards only special damages, the Supreme Court will allow the decision to stand when there was no objection. *Langton v. International Transport, Inc.*, 491 P.2d 1211, 1214 (Utah 1971). "This is not some hyper-technical requirement...rather, the rule requiring an objection if there is some ambiguity serves the objective of avoiding the expense and additional time for a new trial by having the jury which heard the facts clarify the ambiguity while it is able to do so." *Balderas*, 2006 UT App 218, ¶18.

Nielsen in his opening statement, through the evidence presented at trial, in the jury instructions, and during closing arguments only requested that the jury award the special damages of attorneys' fees/costs and lost wages. Nielsen never requested or claimed any general damages during the trial, and Spencer did not object. Spencer did not object to Jury Instruction No. 24, or the Special Verdict Form, nor was there any objection made after the verdict was received and while the jury was still empaneled. Spencer never asked that the jury be instructed that they must award general damages if they are to award the special damages requested by Nielsen and therefore he cannot now claim error. *Fuller*, 538 P.2d at 1037. Spencer is estopped from taking advantage of an error produced by his own invited error as has been previously explained. The trial court in denying Spencer's Motion for New

Trial found this issue unpreserved and refused to address it on its merits. This Court should likewise refuse to address this issue where it has been waived.

B. The Trial Court Correctly Affirmed the Award of Special Damages Without General Damages.

Spencer broadly alleges that an award of special damages generally cannot be made without an award of general damages. He relies solely on two auto accident personal injury cases. However, in every appellate case researched (including both cases cited by Spencer) where the jury awarded only special damages, the verdict was upheld because the objection had been waived. Notwithstanding, these two auto accident cases are distinguishable from this case.

First, the type of damages requested in this case are distinguishable from those in the auto accident cases. In an auto accident case, the plaintiff typically files suit to recover for physical injury and pain/suffering, which are general damages. Plaintiff then can ask for the special damages to cover the cost of medical bills, lost wages, and property damages resulting from the general damages. In a wrongful bringing of a civil action, one of the largest damages is the attorneys fees and cost which are not recoverable in a typical personal injury case.

The damages in this case are distinguishable from personal injury cases, in which the special damages flow from the general damages, i.e. doctor bill, hospital bill, lost wages. Typically the special damages relate to the general damages, which may be physical injuries, pain, suffering, etc. Attorneys' fees cannot be sought in those cases. It is inconsistent and

irregular to receive a verdict for medical expenses (special damages) resulting from of pain and suffering (general damages) without first acknowledging an injury (general damages).

Unlike other personal injury cases, in a wrongful bringing of a civil action case, a party can consistently seek for special damages without seeking for general damages. Attorneys' fees do not arise from wrongful bringing general damages, which are: humiliation, embarrassment, shame, public disgrace, and loss of reputation. *See Cates*, 669 P.2d 912. A person can incur attorneys' fees without having his reputation damaged or needing to seek medical treatment. *See Gerard*, 204 Cal. App.3d at 977 (award affirmed special damages consisting of attorneys' fees and costs with no general damages).

The next striking dissimilarity is that in auto accident cases most often the plaintiff is the objecting party, objecting to the jury's failure to award general in order to get more than just the special damages. In those cases the plaintiff asked and argued for general damages throughout the trial, including in the jury instructions. Here, Nielsen never sought to prove general damages, and never asked the jury for them. His only claim during the trial was for attorneys' fees and lost wages.

Spencer has not cited any cases which stand for the proposition that Mr. Nielsen in a wrongful bringing of a civil action case must get an award of general damages in order to get an award of special damages. Essentially, this action does not equate to an auto accident personal injury case. To the contrary, this case is about Nielsen striving to recuperate thousands of dollars incurred defending the underlying action. These damages were in fact attorneys' fees and costs which Nielsen presented to the jury, and were correctly awarded.

The award is not irregular, but it is consistent with the jury instructions and the damages requested. Therefore, this Court for the forgoing reasons should affirm the jury award of special damages.

CONCLUSION

Based on the foregoing, where some of the issues presented by Spencer were not preserved and did not fall under the plain error or exceptional circumstances exceptions, this Court should refuse to review these issues on their merits. Furthermore, where Spencer failed to marshal the facts properly, this Court should affirm the lower verdict. Lastly this Court should affirm the trial court where the remaining alleged errors are harmless because they would not result in a more favorable outcome for Spencer.

Alternatively, if this Court chooses to review any of the raised issues on their merits, the Court should affirm the factual finding of the jury where they were proper and not clearly erroneous, and affirm the legal finding of the court where such finding were correct by law.

Nielsen requests just damages for this appeal, which include costs, and reasonable attorney fees.

DATED this 22 day of January, 2008,



C. Richard Henriksen, Jr.
Robert M. Henriksen
Attorneys For Appellee

ADDENDUM A

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review

those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 302, 2001 General Session

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Last revised: Thursday, November 29, 2007

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.

(3) 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.

Amended by Chapter 123, 1991 General Session

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Last revised: Thursday, November 29, 2007

Rule 24 Briefs

(a) Brief of the appellant The brief of the appellant shall contain under appropriate headings and in the order indicated

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties The list should be set out on a separate page which appears immediately inside the cover

(a)(2) A table of contents, including the contents of the addendum, with page references (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited

(a)(4) A brief statement showing the jurisdiction of the appellate court

(a)(5) A statement of the issues presented for review, including for each issue the standard of appellate review with supporting authority and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court, or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule

(a)(7) A statement of the case The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below A statement of the facts relevant to the issues presented for review shall follow All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule

(a)(8) Summary of arguments The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief It shall not be a mere repetition of the heading under which the argument is arranged

(a)(9) An argument The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on A party challenging a fact finding must first marshal all record evidence that supports the challenged finding A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award

(a)(10) A short conclusion stating the precise relief sought

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick If the addendum is bound separately, the addendum shall contain a table of contents The addendum shall contain a copy of

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief,

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion, in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service, and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision the transcript of the court's oral decision, or the contract or document subject to construction

(b) Brief of the appellee The brief of the appellee shall conform to the requirements of paragraph (a) of this rule except that the appellee need not include

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant, or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant The appellee may refer to the addendum of the appellant

(c) Reply brief The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal Reply briefs shall be limited to answering any new matter set forth in the opposing brief The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule No further briefs may be filed except with leave of the appellate court

(d) References in briefs to parties Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc

(e) References in briefs to the record References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g) References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber References to exhibits shall be made to the exhibit numbers If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected

(f) Length of briefs Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs

(g) Briefs in cases involving cross-appeals If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders Each party shall be entitled to file two briefs No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee

(h) Permission for over length brief While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court Whether the motion is granted or denied, the draft brief will be destroyed by the court

(i) Briefs in cases involving multiple appellants or appellees In cases involving more than one appellant or appellee including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any

appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Note. Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original)(quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal, effect thereof

(a)(1) By plaintiff Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules Unless otherwise stated in the notice of dismissal the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim

(a)(2) By order of court Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule an action may only be dismissed at the request of the plaintiff on order of the court based either on

(a)(2)(i) a stipulation of all of the parties who have appeared in the action, or

(a)(2)(ii) upon such terms and conditions as the court deems proper If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice

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

(c) Dismissal of counterclaim, cross-claim, or third-party claim The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing

(d) Costs of previously-dismissed action If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order

(e) Bond or undertaking to be delivered to adverse party Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained

Rule 51. Instructions to jury; objections.

(a) Preliminary instructions. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case.

(b) Interim instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. A party may request an interim instruction.

(c) Final instructions. The court shall instruct the jury at the conclusion of the evidence as may be needed.

(d) Request for instructions. Parties shall file requested jury instructions at the final pretrial conference or at any other time directed by the court. If a party relies on a statute, rule or case to support or object to a requested instruction, the party shall provide a citation to or a copy of the statute, rule or case. The court shall provide the parties with a copy of the approved instructions, unless the parties waive this requirement.

(e) Written instructions. Whenever practical, jury instructions should be in writing. At least one written copy shall be provided to the jury. The court shall provide a written copy to any juror who requests one.

(f) Objections to instructions. Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

(g) Arguments. Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

Rule 54 Judgments, costs

(a) Definition, form "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment

(c)(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs

(d)(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of January, 2008, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was mailed, first class, postage pre-paid, to the following:

BUDGE W. CALL
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