

2007

Michael Reid Nielsen vs. Lorenzo Spencer : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

C. Richard Henriksen; Henriksen and Henriksen, P.C.; Attorney for Appellee.

Budge W. Call; Bond and Call L.C.; Attorney for Appellant.

Recommended Citation

Reply Brief, *Nielsen v. Spencer*, No. 20070431 (Utah Court of Appeals, 2007).
https://digitalcommons.law.byu.edu/byu_ca3/282

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

MICHAEL REID NIELSEN,)	
Plaintiff/Appellee)	APPELLANT'S REPLY BRIEF
vs.)	
LORENZO 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

C. Richard Henriksen
HENRIKSEN & HENRIKSEN, P.C.
320 South 500 East
Salt Lake City, Utah 84102
(801) 521-4145
Attorney for Appellee,
Michael Nielsen

Budge W. Call
BOND & CALL L.C.
8 East Broadway, Suite 720
Salt Lake City, Utah 84111
(801) 521-8900
Attorney for Appellant,
Lorenzo Spencer

FILED
UTAH APPELLATE COURTS
FEB 25 2008

IN THE UTAH COURT OF APPEALS

MICHAEL REID NIELSEN,)	
)	APPELLANT’S REPLY BRIEF
Plaintiff/Appellee)	
vs.)	
LORENZO SPENCER,)	Appellate Case No. 20070431-CA
)	Trial Court No. 010700616
Defendant/Appellant)	

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

C. Richard Henriksen
HENRIKSEN & HENRIKSEN, P.C.
320 South 500 East
Salt Lake City, Utah 84102
(801) 521-4145
Attorney for Appellee,
Michael Nielsen

Budge W. Call
BOND & CALL L.C.
8 East Broadway, Suite 720
Salt Lake City, Utah 84111
(801) 521-8900
Attorney for Appellant,
Lorenzo Spencer

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	-iv-
FACTS RELEVANT TO ISSUES IN REPLY	1
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. SPENCER HAD “PROBABLE CAUSE” TO BRING HIS ALIENATION OF AFFECTION CLAIM, WHICH IS A LEGAL QUESTION FOR THE COURT, NOT THE JURY	12
A. This Court should consider the lack of probable cause issue	12
B. Spencer had a reasonable belief in the existence of undisputed facts to reasonably believe he <i>may</i> have a valid legal claim, giving him probable cause to file his alienation of affection claim ..	13
C. Even if the right to have the court determine probable cause, as a matter of law, was waived or not preserved; the evidence when marshaled does not support a finding of no probable cause ...	14
D. The jury can resolve the alleged existence of facts that are in dispute, but the court is still to make the final determination as to whether or not there was probable cause to file the action	15
II. THE TERMINATION OF THE UNDERLYING ACTION AS A DISCOVERY SANCTION WAS NOT “ON THE MERITS” IN ORDER TO SUSTAIN A CLAIM FOR WRONGFUL USE OF CIVIL PROCEEDINGS	17
A. This Court should rule on the termination on the merits issue	17
B. Whether the underlying proceeding was terminated on the merits is a question of law for the court to decide	18
C. The dismissal as a discovery sanction should not be considered on the merits for purposes of bringing a wrongful use of civil proceeding action	19

III. NO DAMAGES WERE AWARDED FOR ABUSE OF PROCESS . .	19
IV. IT CANNOT BE DETERMINED THAT THE DAMAGES IN THIS CASE MUST BE “SPECIAL DAMAGES” UNDER § 78-27-44 UCA TO AWARD PREJUDGMENT INTEREST	20
A. Special damages were never properly pled under § 78-27-44 to receive prejudgment interest on paid medical expenses; and the right to amend cannot be raised for the first time on appeal	21
B. Nielsen cannot argue for the first time on appeal that he is entitled to prejudgement interest under common law	21
C. Nielsen is not entitled to prejudgment interest under common law because he made a claim for general damages under a personal injury tort	21
D. Nielsen is not entitled to prejudgment interest under common law because he submitted the amount of damages, including the reasonableness of his attorneys’ fees, to the jury for determination . .	22
E. The trial court cannot determine post-judgment, that all of the damages awarded under the Special Verdict form must be special damage, entitled Nielsen to prejudgment interest	23
CONCLUSION	24

TABLE OF AUTHORITIES

Utah Cases:

<i>Bjork v. April Indus., Inc.</i> , 560 P.2d 315 (Utah 1977)	11, 22
<i>Fell v. Union Pacific Railway Co.</i> , 98 P. 1003 (Utah 1907)	10, 22
<i>Gilbert v. Ince</i> , 981 P.2d 841 (Utah 1999)	7, 13, 15
<i>Gleave v. Denver Rio Grande Western Railroad Co.</i> 749 P.2d 660 (Ut.App. 1988) ...	20
<i>Hatch v. Davis</i> , 102 P.3d 774 (Ut.App 2004) aff'd 147 P.3d 383 (Utah 2006) ..	8, 18, 19
<i>Iron Head Constr. Inc. v. Gurney</i> , 2008 UTCA (20060841-1010408)	10, 22
<i>James Constructors, Inc. v. Salt Lake City Corp.</i> , 888 P.2d 665 (Ut.App. 1994) ..	11, 23
<i>Spears v. Warr</i> , 44 P.3d 742 (Utah 2002)	6, 8, 12, 17
<i>State v. Cram</i> , 46 P.3d 230 (Utah 2002)	9, 10, 21, 22
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993)	12
<i>State v. Evans</i> , 20 P.3d 888 (Utah 2001)	12, 18
<i>State v. Hatson</i> , 846 P.2d 1276 (Utah 1995)	13, 18
<i>State v. Lopez</i> , 873 P.2d 1127 (Utah 1994)	18

Cases from other Jurisdictions:

<i>Armco Inc. v. Southern Rock Inc.</i> , 778 F.2d 1134 (5 th Cir. 1985)	16
<i>Palmer Development Corp. v. Gordon</i> , 723 A.2d 881 (Me. 1999)	8, 18
<i>Pankratz Implement Co. v. Citizens Nat. Bank</i> , 130 P.3d 57 (Kan. 2006)	13, 18

<i>Prewitt v. Sexton</i> , 777 S.W.2d 891 (Ky. 1989)	16
<i>Robb v. United States Fidelity and Guar. Co.</i> , 798 F.2d 788 (5 th Cir. 1986)	16
<i>Sheldon Appel Co. v. Albert & Oliver</i> , 47 Cal.3d 863 (1989)	16
<i>Westar Mortg. Corp. v. Jackson</i> , 61 P.3d 823 (N.M. 2002)	16
<i>Williams v. Coombs</i> , 179 Cal.App.3d 626 (1986)	16

Utah Rules and Statutes:

Section 78-27-44 Utah Code Annotated	8, 10, 20, 22, 23, 24, 25
Restatement (Second) Torts, Section 673	8, 18
Restatement (Second) Torts, Section 675	7, 13
Restatement (Second) Torts, Section 681	7, 15, 16

FACTS RELEVANT TO ISSUES IN REPLY

1. In this action, Nielsen claimed that Spencer's alienation of affection claim was brought against him without probable cause, making the question as to whether Spencer had probable cause to file the underlying action, an issue in the case. (Rec. 2 ¶ 8).

2. In his wrongful use of civil proceeding claim, Nielsen asserts that the alienation of affection action was brought against him to harass and humiliate him. (Rec. 3, ¶ 10). Nielsen sought general damages under this tort claim for emotional distress, mental pain and suffering, and other damages, to be determined according to proof at trial. (Rec. 3, ¶ 10). Nielsen also sought punitive damages under his tort claims. (Rec. 6, ¶ 20).

3. At trial Spencer's wife ("Jewelya") testified that she was contacted by Nielsen, whom she had been sexually intimate with in high school (Rec. 1200, pgs.51-52). They met and Nielsen began an intimate sexual relationship with her, knowing that she was married to Spencer. (Rec. 1200, pg. 53).

4. As a result of Nielsen's sexual relations with Jewelya, twin girls were born. (Rec. 1200, pg. 53). Jewelya suspected that the twins belonged to Nielsen, but did not tell Spencer. (Rec. 1200, pg. 53). She eventually told Spencer about Nielsen and that the girls belonged to Nielsen. (Rec. 1200, pgs.55-56). Blood tests were eventually done confirming that the twins belonged to Nielsen. (Rec. 1200, pg. 57). After this time, Nielsen continued his sexual relationship with Jewelya. (Rec. 1200, pg. 70).

5. Later in 1995, Nielsen met Jewelya in Southern California. In January 1996, Jewelya and Spencer separated. (Rec. 1200, pg. 85). In March 1996, Jewelya filed for divorce. (Rec. 1200, pg. 71).

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

7. Spencer went to marriage counseling on and off with Jewelya. (Rec. 1201, pg. 178). Sometimes they would separate to cool down. One time they stayed separated for a month. (Rec. 1201, pg. 179, 182).

8. Spencer testified that there was no physical abuse during the marriage (Rec. 1201, pg. 183); but he did have one sexual encounter, after learning of Nielsen's ongoing sexual escapades with his wife. (Rec. 1201, pg. 195-196).

9. Spencer was involved in a number of lawsuits as a landlord, involving minor landlord-tenant disputes (Rec. 1201, pg. 207), and one department store, ZCMI, trying to collect on Jewelya's charge card. (Rec. 1201, pg. 208).

10. After learning of Nielsen's sexual escapades with his wife, Spencer approached Nielsen at work and made a tape recording of their conversation. (Rec. 1201, pg. 245). Spencer told Nielsen to leave his wife and family alone, and that if he didn't, he would sue. (Rec. 1201, pg. 246).

11. In the alienation of affection lawsuit, Spencer disclosed the existence of this tape, and indicated that it would be produced. (Rec. 1201, pg. 248). However, Spencer could not find the tape. (Rec. 1201, pgs. 248-249).

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

13. Spencer did not file his action against Nielsen just to cause him mental distress or incur legal expenses. (Rec. 1201, pg. 383). Spencer loved his wife and he wanted their marriage to work. They had been married for over 15 years and had several children that depended on them. (Rec. 1201, pg. 373). Nielsen had destroyed Spencer's dreams, his home, and his marriage. (Rec. 1199, pg. 514).

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

15. Nielsen testified that he and Jewelya continued to have lunches (Rec. 1199, pg. 423); and then they met at a hotel and were sexually intimate. (Rec. 1199, pg.

425). Nielsen admitted at trial that he went too far. He had free will. He didn't blame Jewelya, but accepted full responsibility for his actions. (Rec. 1199, pg. 426).

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

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

18. Nielsen testified that Spencer filed the alienation of affection lawsuit against him solely to harass and embarrass him. (Rec. 1199, pg. 439). Nielsen also testified at trial about the humiliation he suffered and that it had a "horrific effect" on him and his family. (Rec. 1199, pgs. 435, 436, 442, 444, 449).

19. Nielsen testified that he had incurred attorneys fees of approximately \$187,960.00 to defend the alienation of affection lawsuit and to bring his current lawsuit. (Rec. 1199, pgs. 440 441). No testimony was given as to exactly what amounts had

actually been paid for attorneys' fees, for which lawsuit, when any payments were made, or the specific amount of any payments made.

20. Nielsen testified about his lost earnings, but did not testify as to any medical treatment or the payment of any medical expenses. Nielsen did not incur any expenses for medical treatment. (Rec. 1199, pg. 444).

21. Nielsen conceded that his relationship with Jewelya did cause damage to Jewelya and Lorenzo's marriage. "It wasn't a good thing." (Rec. 1199, pg. 465). Nielsen further conceded that the revelation that he was the father of the twins, would have caused further stress and damage to the marriage. (Rec. 1199, pg. 466). He realizes that Spencer would have bonded with the twins before learning that he was not their true father. (Rec. 1199, pg. 473). He also conceded that his continual sexual relations with Jewelya would have caused stress and damage to the marriage. (Rec. 1199, pg. 466).

22. Spencer admitted that he and Jewelya did not have a perfect marriage, but that they loved each other very much prior to Nielsen's involvement. They anticipated going to the LDS temple and having their marriage sealed and their children sealed to them for eternity, according to their religious beliefs. (Rec. 1199, pg. 503).

23. Spencer admitted that he was mad the night Jewelya told him about Nielsen and that he did call Nielsen to ask him why. (Rec. 1199, pg. 504). Spencer further admitted that he may have called Nielsen a name and threatened a lawsuit, if Nielsen did not leave his wife alone. (Rec. 1199, pg. 505).

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

25. Spencer made Jewelya promise him that she would no longer see Nielsen and that when he saw the children he would do so under certain restrictions; and that she was not to remain with him and the children. (Rec. 1199, pg. 507).

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

27. Spencer testified that the main reason his marriage with Jeweyla failed was because of the constant affair and sexual escapades between Nielsen and his wife. (Rec. 1199, pg. 513). Nielsen had destroyed his marriage, his family, and his life. Spencer had lost everything he had dreamed of when he married Jewelya. That is why he filed his alienation of affection claim. (Rec. 1199, pg. 514).

SUMMARY OF ARGUMENT

Nielsen in his wrongful use of civil proceedings claim, alleges that Spencer filed his alienation of affection claim against him without probable cause. A lack of probable cause is a necessary element to establish a claim for wrongful use of civil proceeding. Therefore, the lack of probable cause was an issue before the trial court, and thus, preserved for review on appeal. *Spears v. Warr*, 44 P.3d 742 (Utah 2002).

One has probable cause if he reasonably believes in the existence of facts upon which his claim is based, and reasonably believes that under those facts, his claim

may be valid under the law. *Restatement (Second) of Torts, Section 675, fn 9; Gilbert v. Ince*, 981 P.2d 841 (Utah 1999).

Spencer had a reasonable belief in the existence of facts sufficient to support his claim for alienation of affection. Nielsen had an affair with Spencer's wife and fathered two children. These undisputed facts were admitted at trial. Therefore, Spencer's belief in the existence of such facts, when he filed his alienation of affection claim, must have been reasonable.

Furthermore, if the jury in the alienation of affection lawsuit, would have determined that Nielsen's conduct was the controlling cause of the alienation of affection, Spencer would have prevailed on his claim. Therefore, his alienation of affection claim, based on these admitted facts, was valid under the law; and Spencer's belief that based on these facts he *may* have a valid claim under the law, must have been reasonable.

Moreover, the lack of probable cause to establish a claim for wrongful use of civil proceeding, is a question of law for the court to decide, and not the jury. The jury can be asked to resolve questions as to a person's intent, or his reasonable belief in certain facts, when disputed; but it is up to the court to determine the legal issue as to whether or not, under the established facts, probable cause existed to assert a claim under the law. *Restatement (Second) of Torts, § 681 B*. Based on the undisputed facts, admitted in this case; Spencer, as a matter of law, had probable cause to file his alienation of affection claim against Nielsen.

Since the question of probable cause is not a factual finding, but a question of law, Spencer is not required to marshal the evidence to challenge it. Regardless, even if Spencer waived (or failed to preserve) his right at trial, to have the issue of probable cause decided by the court as matter of law, leaving the matter as a factual determination for the jury, with all the evidence marshaled in favor of no probable cause; the admitted facts alone (that Nielsen had a sexual affair with Spencer's wife and fathered two children) is enough to establish that Spencer had probable cause to file his claim for alienation of affection against Nielsen. Under such facts a reasonable jury cannot find that Spencer lacked any probable cause to file his claim for alienation of affection

A dismissal of the underlying action on the merits is also necessary to bring a claim for wrongful use of civil proceeding. Therefore, whether Spencer's underlying action for alienation of affection was dismissed on the merits, was an issue before the trial court, and thus, preserved for review on appeal. *Spears v. Warr*, 44 P.3d 742 (Utah 2002).

The dismissal of the underlying action as a discovery sanction, does not constitute a termination on the merits. *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff'd* 147 P.3d 383 (Utah 2006). Furthermore, the question as to whether a matter has been terminated on the merits is a question of law for the court, and not the jury. *Palmer Development Corp. v. Gordon*, 723 A.2d 881 (Me. 1999), *Restatement (Second) Torts, Section 673*. There was no such ruling by the court in this case. There was never any decision rendered in the underlying action on the merits. The claim was dismissed as a

discovery sanction. Failure to cooperate in discovery may result in the dismissal of a case, and even attorneys' fees or other sanctions under the rules of civil procedure, but it should not constitute a termination on the merits, opening up a claim for wrongful use of civil proceeding every time a case is dismissed for discovery reasons.

Nielsen concedes that no damages were awarded on his abuse of process claim, and Nielsen has not appealed this ruling. Furthermore, what constitutes a "willful act in the use of the process, not proper in the regular course of the proceeding," is a question of law for the court (Nielsen admits this in his brief, pg. 31). The trial court did not make any ruling on this issue as a matter of law and erred in leaving this matter for the jury to decide. (Rec. 1199, pg. 545).

The special damage provision of § 78-27-44 U.C.A. allows prejudgment interest on "special damages" actually incurred for medical treatment, when it is properly alleged in the complaint. This was not alleged in the complaint in this case and there were no damages in this case for paid medical expenses. Therefore, Nielsen is not entitled to prejudgment interest on his damage award under § 78-27-44 U.C.A. Since there were no such damages in this case amending would be a futile act; and since Nielsen did not seek to amend his pleading at the trial court level, Nielsen cannot raise this claim or right, for the first time on appeal. *State v. Cram*, 46 P.3d 230 (Utah 2002).

Nielsen also argues for the first time in his appeal brief, that he should be entitled to prejudgment interest under common law. However, at trial Nielsen relied on §

78-27-44 U.C.A. to argue and obtain prejudgment interest. The trial court did not consider or award prejudgment interest under common law. Therefore, Nielsen cannot claim for the first time on appeal, that he is entitled to prejudgment interest under common law. *State v. Cram*, 46 P.3d 230 (Utah 2002).

Regardless, Nielsen is not entitled to prejudgment interest under common law, because his claim for wrongful use of civil proceeding is a personal injury tort, which precludes prejudgment interest under common law. *Iron Head Constr. Inc. v. Gurney*, 2008 UTCA (20060841-010408) citing *Fell v. Union Pacific Railway Co.*, 88 P. 1003 (Utah 1907).

Furthermore, Nielsen sought general damages under his tort claim for emotional distress, and mental pain and suffering, all in an amount to be determined by the jury at trial. Nielsen testified about his humiliation and emotional distress. The experience was “horrific” for his family and he suffered humiliation and mental anguish. (Rec. 1199, pgs 435, 436, 442, 444, 449). Nielsen further alleged in his complaint and argued at trial, that the alienation of affection action was brought against him to humiliate and embarrass him. (Rec. 1199 pg. 582). Prejudgment interest is not allowed for such damages, determined by the jury at trial. *Iron Head Constr. Inc. v. Gurney*, 2008 UTCA (20060841-010408) citing *Fell v. Union Pacific Railway Co.*, 88 P. 1003 (Utah 1907).

In addition, the damages Nielsen sought were not fixed or calculable with mathematical certainty, as required to support an award of prejudgment interest. For

instance, there was no evidence of what attorneys' fees were actually paid, to whom they were paid, on which lawsuit they were paid, the date they were paid, or the actual amount that was paid, all of which would be required to fix the amount of damages or make them calculable with mathematical certainty. *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977).

Moreover, Nielsen elected to submit the value, or amount of his damages, including the reasonableness of his attorneys' fees, to the jury for determination. (Rec. 1199, pg. 560) Since the reasonableness of Nielsen's attorneys fees were at issue and submitted to the jury for determination; Nielsen is not entitled to prejudgment interest. *James Constructors, Inc. v. Salt Lake City Corp.*, 888 P.2d 665 (Ut.App. 1994).

Finally, it cannot be determined from the Special Verdict form, what amount of damages are for Nielsen's general damages, including those for humiliation, emotional anguish, and mental pain and suffering; and what amount, if any, is for his attorneys' fees. Nielsen sought a total of \$178,960.00 in attorneys' fees, which the jury rejected. The jury could have also determined that \$95,000.00 was too much for Nielsen's alleged attorneys' fees, but awarded this amount to compensate Nielsen for his reasonable attorneys' fees, plus his general damages, including Nielsen's alleged humiliation, emotional distress, and mental suffering.

ARGUMENT

I. SPENCER HAD “PROBABLE CAUSE” TO BRING HIS ALIENATION OF AFFECTION CLAIM, WHICH IS A LEGAL QUESTION FOR THE COURT, NOT THE JURY

A. This Court should consider the probable cause issue on appeal.

The lack of probable cause was alleged by Nielsen in his complaint and is a necessary element to establish the claim of wrongful use of civil proceeding. Therefore, the lack of probable cause was an issue before the trial court that had to be ruled on in this case. Since this was an issue before the trial court, alleged in Nielsen’s pleadings, this issue was adequately preserved for appeal. *Spears v. Warr*, 44 P.3d 742 (Utah 2002).

If not adequately preserved, it should still be consider under the plain error rule. Plain error is established when (i) an error exists (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable result. *State v. Dunn*, 850 P.2d 1201 (Utah 1993). First, there was an error in this case because Spencer had probable cause as matter of law. Second, the trial court should have known based on the admitted facts, i.e. the affair by Nielsen and fathering of two children, that Spencer had probable cause for filing his alienation of affection claim against Nielsen. Finally, the error was harmful, because Nielsen’s claim should have been dismissed based upon the existence of probable cause. *State v. Evans*, 20 P.3d 888 (Utah 2001).

If plain error does not exist, the matter should still be reviewed to clarify the law. *State v. Haston*, 846 P.2d 1276 (Utah 1995). The Utah Supreme Court, in dealing with this issue, did not specifically address the differing responsibilities of the court and the jury at trial in such cases, to determine the existence of probable cause. *Gilbert v. Ince*, *supra*, footnote 13. Therefore, a clarification in the law is needed on the differing responsibilities of the court and jury, in determining probable cause in such cases.

Finally, an exception to the preservation rule is recognized when the issue raised is solely a question of law, based on undisputed facts. *Pankratz Implement Co. v. Citizens Nat. Bank*, 130 P.3d 57 (Kan. 2006). In this case the existence of probable cause can be found based on undisputed facts, and the presences of such probable cause defeats Nielsen's claim of wrongful use of civil proceeding, thus ultimately resolving the case. Therefore, this Court can find, as a matter of law, that Spencer had probable cause, based on undisputed facts, to file his alienation of affection claim; and therefore, Nielsen's claim for wrongful use of civil proceeding should be dismissed.

B. Spencer had a reasonable belief in the existence of undisputed facts to reasonably believe he *may* have a valid legal claim, giving him probable cause to file his alienation of affection claim.

One has probable cause if he reasonably believes in the existence of the underlying facts upon which his claim is based, and reasonably believes that under those facts his claim *may* be valid under the law. *Restatement (Second) of Torts, Section 675, fn 9; Gilbert v. Ince*, 981 P.2d 841 (Utah 1999).

Spencer had a reasonable belief in the existence of underlying facts sufficient to support his claim for alienation of affection. Nielsen had an affair with Spencer's wife and fathered two children. These facts were admitted at trial. Therefore, Spencer's belief in the existence of these facts, when he filed his alienation of affection claim, must have been reasonable.

Furthermore if the jury, in the alienation of affection lawsuit, would have determined that Nielsen's conduct was the controlling cause in the alienation of affection, Spencer would have prevailed on his claim. Therefore, his alienation of affection claim, based on these admitted facts, *was* valid under the law; and Spencer had a reasonable belief that based on these facts he had a claim that *may* be valid under the law.

C. Even if the right to have the court determine probable cause, as a matter of law, was waived or not preserved; the evidence when marshaled does not support a finding of no probable cause.

Since the question of probable cause is not a factual finding but a question of law, Spencer is not required to marshal the evidence to overcome the decision on probable cause. This Court is not required to assume that a jury's decision is correct, when the question ruled on is not a finding of fact, but a rule of law. Regardless, even if Spencer waived (or failed to preserve) his right to have the issue of probable cause determined by the court, as a matter of law; and the matter is to be left as a factual determination by the jury in this case; with all the evidence marshaled in favor of the finding of no probable cause; the admitted facts alone, i.e., that Nielsen had a sexual

relationship with Spencer's wife and fathered two children, knowing that she was married to Spencer at the time, is sufficient to establish that Spencer had probable cause to file his claim for alienation of affection. A reasonable jury under such circumstances cannot find that Spencer lacked any probable cause to file his claim for alienation of affection. With these admissions, no matter what evidence is marshaled against Spencer, while a jury may find that Nielsen's actions was not the controlling cause in the alienation of affection, it cannot find that Spencer lacked any probable cause to file his alienation of affection claim against Nielsen.¹

D. The jury can resolve the alleged existence of facts that are in dispute, but the court is still to make the final determination as to whether or not there was probable cause to file the action.

The question of probable cause should have been decided by the court as a legal question and not left to the jury to decide. In *Gilbert v. Ince*, 981 P.2d 841 (Utah 1999) the Utah Supreme Court noted that the *Restatement (Second) of Torts Section 681B*, delineates the responsibilities of the court and the jury in such cases,² but because the case was decided on a directed verdict, the Utah Supreme Court did not address the proper allocation of such decision-making duties at trial. *Id.* at 846, fn 13.

¹All of the evidence raised by Nielsen claiming that Spencer failed to marshal the evidence, deals with whether Nielsen was the controlling cause of the alienation of affection in their marriage, not with the lack of probable cause to file the underlying action.

²§681B provides that it is the function of the court to determine whether the defendant had probable cause for his action. (See complete *Restatement (Second) of Torts*, § 681B attached in the Addendum to Appellant's Opening Brief, as Exhibit E).

Most courts have held that the determination of probable cause is for the court and not the jury to decide. *Armco, Inc. v. Southern Rock Inc.*, 778 F.2d 1134, 1137 (5th Cir. 1985)(whether probable cause existed is a question for the court and is distinguishable from the jury's role in finding probable cause in negligence cases); and *Weststar Mortg. Corp. v. Jackson*, 61 P.3d 823, 832 (N.M. 2002)(probable cause is a question of law to be decided by trial judge, and trial court erred in submitting this legal determination to the jury). See also, *Robb v. United States Fidelity and Guar. Co.*, 798 F.2d 788, 791 (5th Cir. 1986); *Williams v. Coombs*, 179 Cal.App. 3d 626 (1986); *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863 (1989); and *Prewitt v. Sexton*, 777 S.W.2d. 891 (Ky. 1989).

This issue should now be addressed on appeal, and this Court should follow Restatement §681B and the line of cases holding that it's the responsibility of the court to determine the existence of probable cause in such cases, and not the jury. The court is in a better position to determine if probable cause legally exists to support a legal cause of action. If there are issues of fact in dispute the court needs resolved to make this determination, the jury can be called upon to resolve those specific factual issues that are in dispute, as provided for in *Restatement 681B(2)(a)*. However, the ultimate determination is up to the court; and when sufficient facts are undisputed to establish probable cause, as in this case, the court should find probable cause as a matter of law. *Weststar Mortg. Corp. v. Jackson*, 61 P.3d 823, 832 (N.M. 2002).

Based on the undisputed facts in this case, Spencer clearly had probable cause to bring his alienation of affection claim against Nielsen; and the court should have made this determination, as a matter of law, dismissing Nielsen's wrongful use of civil proceeding claim. *Id.* at 832.

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

A. This Court should rule on the termination on the merits issue.

A termination on the merits of the underlying action was alleged by Nielsen in his complaint and is a necessary element to establish the claim of wrongful use of civil proceeding. Therefore, this was an issue before the trial sufficient to preserve it for review. Furthermore, the claim that the underlying action was dismissed only as a discovery sanction and not on the merits, was raised in the trial court by Spencer's counsel.(Rec. 1199, pgs. 551-554). Since this matter was before the trial court and ruled on, this issue was preserved for appeal. *Spears v. Warr*, 44 P.3d 742 (Utah 2002).

If not adequately preserved by the trial court's ruling, it should still be considered under the plain error rule. The claim for wrongful use of civil proceeding requires, a termination of the prior proceedings on the merits. That did not happen in this case. Therefore, an error exists. Second, the trial court should have known that the dismissal of the alienation of affection claim for discovery reasons, was not on the merits. Third, a ruling by the court that there was no prior termination on the merits, would have

dramatically changed the outcome of the case. *State v. Evans*, 20 P.3d 888 (Utah 2001).

If plain error does not exist, it should still be reviewed in order to clarify the law in Utah. *State v. Haston*, 846 P.2d 1276 (Utah 1995); *State v. Lopez*, 873 P.2d 1127 (Utah 1994). In the recent case of *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff'd* 147 P.3d 383 (Utah 2006)³ the appellate courts recently clarified that in the context of a claim for wrongful use of civil proceeding, the termination of the underlying action must be on the merits. *Id.* This clarification was not made until after the trial in this case.

Finally, an exception to the preservation rule applies to this matter as well, as the issues involve a question of law, based on undisputed facts. If the dismissal as a discovery sanction does not constitute a termination on the merits as a matter of law, Nielsen's claim must be dismissed, and the matter is resolved. *Pankratz Implement Co. v. Citizens Nat. Bank*, 130 P.3d 57 (Kan. 2006).

B. Whether the underlying proceeding was terminated on the merits is a question of law for the court to decide.

The issue as to whether there was a favorable termination on the merits is a question of law for the court to decide, and not the jury. *Palmer Development Corp. v. Gordon*, 723 A.2d 881 (Me. 1999). *Restatement (Second) Torts, Section 673*. There was no such ruling by the court in this case. There was never any decision rendered in the underlying action on the merits of Spencer's alienation of affection claim. The trial court recognizing that the previous claim for alienation of affection was not dismissed on the

³*Hatch v. Davis* was affirmed on August 11, 2006, over a month after the trial was held in this case.

merits, should have ruled that there was no termination of the prior proceeding “on the merits” to sustain a claim for wrongful use of civil proceeding. *Id.* Nielsen’s claim for wrongful use of civil proceeding should have then been dismissed.

C. The dismissal as a discovery sanction should not be considered on the merits for purposes of bringing a wrongful use of civil proceedings action

The dismissal of the underlying action as a discovery sanction, does not constitute a termination on the merits. *Hatch v. Davis*, 102 P.3d 774 (Ut.App. 2004) *aff’d* 147 P.3d 383 (Utah 2006). Spencer failed to cooperate in discovery in his alienation of affection case and as a result had his case dismissed.⁴ Failure to cooperate in discovery of a case may result in the dismissal of that case, but it should not constitute a termination on the merits to support a claim of wrongful use of civil proceedings. Such a penalty is not provided for under the rules of civil procedure regarding discovery sanctions, and such a ruling by this court will result in parties being afraid to let their claims be dismissed, other than on the merits, for fear of being later sued for wrongful use of civil proceedings.

III. NO DAMAGES WERE AWARDED FOR ABUSE OF PROCESS

Nielsen concedes that no damages were awarded on his abuse of process claim and Nielsen did not appeal this finding. However, what constitutes a “willful act in the use of the process, not proper in the regular course of the proceeding,” is a question of law for the court (Nielsen admits this in his brief, pg. 31) and the court did not make any

⁴The trial court in the underlying case could have awarded attorneys’ fees at the time the case was dismissed as a discovery sanction, but chose not to.

ruling on this issue as a matter of law.

The court is in a much better position to determine what is so outside the regular course of proceeding, as to constitute an abuse of process. For instance, Spencer's attorney subpoenaed Nielsen's wife and mother for depositions. Nielsen's attorney filed an objection. A hearing was held and the court ruled that Spencer could not take their depositions. Spencer and his attorney complied with the court's ruling. The court could have easily found that such proceedings in discovery matters, is not so irregular in the regular course of proceeding, as to constitute an abuse of process. The court erred in leaving this issue for the jury to decide. (Rec. 1199, pg. 545).

**VI. IT CANNOT BE DETERMINED THAT THE DAMAGES
IN THIS CASE MUST BE "SPECIAL DAMAGES" UNDER
§78-27-44 UCA TO AWARD PREJUDGMENT INTEREST**

**A. Special damages were never properly pled under § 78-27-44
to receive prejudgment interest on paid medical expenses; and
the right to amend cannot be claimed for the first time on appeal.**

The special damage provision of § 78-27-44 U.C.A., allows prejudgment interest on "special damages" actually incurred for medical treatment, when it is properly alleged in the complaint. This provision does not apply in this case because it was not properly alleged in the complaint, as required by the Statute. *Gleave v. Denver Rio Grande Western Railroad Co.*, 749 P.2d 660 (Ut.App. 1988).

Furthermore, there were no paid medical expenses sought in this case. Therefore, giving leave to Nielsen to amend his complaint will be a futile act, as Nielsen will not be able to allege such prepaid expenses to comply with the Statute. *Id.*

Moreover, in *Gleave* the Plaintiff filed his motion to amend his complaint at the trial court level, which motion was granted in part and denied in part. *Id.* at 671. In this case, Nielsen failed to file any motion to amend at the trial court level, and thus, cannot raise this claim, or seek this remedy, for the first time on appeal. *State v. Cram*, 46 P.3d 230 (Utah 2002).

B. Nielsen cannot argue for the first time on appeal that he is now entitled to prejudgment interest under common law

Nielsen relied solely on § 78-27-44 U.C.A. to obtain prejudgment interest at the trial court level and the trial court ruled that he was entitled to interest under the provisions of § 78-27-44. The trial court made no ruling on the common law and this was never argued or briefed by the parties. Nielsen cannot change his argument and claim for the first time on appeal, that he is entitled to prejudgment interest under the common law. *State v. Cram*, 46 P.3d 230 (Utah 2002).

C. Nielsen is not entitled to prejudgment interest under common law, because he made a claim for general damages under a personal injury tort.

Even if this court considers Nielsen's new argument for the first time on appeal, Nielsen is not entitled to prejudgment interest under common law, because he brought a personal injury tort claim, the wrongful use of civil proceeding, claiming that the underlying action was brought against him to humiliate and harass him. He further sought general damages under his tort claim for emotional distress, and mental pain and suffering, in an amount to be determined at trial. Since Nielsen's brought a personal

injury tort claim he is not entitled to prejudgment interest on his damages under common law.⁵ *Iron Head Constr. Inc. v. Gurney*, 2008 UTCA (20060841-010408) citing *Fell v. Union Pacific Railway Co.*, 88 P. 1003 (Utah 1907). Also the damages Nielsen sought under his tort claim included general damages for emotional distress, and mental pain and suffering. Prejudgment interest is not allowed on such general damages brought under tort claims. *Iron Head Constr. Inc. v. Gurney*, 2008 UTCA (20060841-010408) citing *Fell v. Union Pacific Railway Co.*, 88 P. 1003 (Utah 1907).

D. Nielsen is not entitled to prejudgment interest under common law, because he submitted the amount of damages, including the reasonableness of his attorneys fees, to the jury for determination.

Nielsen is further not entitled to prejudgment interest under common law because the damages were not fixed or calculable with mathematical certainty as to a particular time, as required to support a prejudgment interest award. There was no evidence provided as to what amount of attorneys' fees were actually paid by Nielsen, to whom or on what case they were paid, or when they were paid, in order to fix or calculate the amount of damages for prepaid expenses, with mathematical certainty. *Bjork v. April Indus., Inc.* 560 P.2d 315, 317 (Utah 1977).

Moreover, Nielsen submitted the value of his damages, including the reasonableness of his attorneys fees, to the broad discretion of the jury to determine. (Rec.

⁵Not only did Nielsen not seek prejudgment interest under common law, but in his argument for prejudgment interest under § 78-27-44 U.C.A., he argued that his claim for wrongful use of civil proceeding was a personal injury tort. (Rec. 1096). Nielsen cannot now claim the exact opposite on appeal. *State v. Cram*, 46 P.3d 230 (Utah 2002).

1199, pg. 560) Since Nielsen put the reasonableness of his attorneys fees at issue and submitted the matter to the jury to be determined, he is not entitled to prejudgment interest on his damages under common law. *James Constructors, Inc. v. Salt Lake City Corp.*, 888 P.2d 665 (Ut.App. 1994).

E. The trial court cannot determine post-judgment, that all of the damages awarded under the Special Verdict form must be special damages, entitling Nielsen to prejudgment interest

Finally, considering all the damages sought by Nielsen, the trial court cannot determine from the Special Verdict form that the \$95,000.00 awarded is all “special damages” under § 78-27-44 U.C.A., or that it is all attorneys fees for that matter, to award prejudgment interest. Nielsen sought damages beyond his attorneys’ fees. He sought general damages for his emotional distress, his humiliation and his mental pain and suffering.(Rec. 3, ¶ 10, & 6, ¶ 18). Nielsen testified at trial about how the experience was “horrific” for his family and how he suffered humiliation and mental anguish. (Rec. 1199, pgs 435, 436, 442, 444, 449). Nielsen also alleged in his complaint and argued at trial, that the alienation of affection action was brought against him solely to humiliate and embarrass him. (Rec. 1199 pg. 582). These damages are alleged the complaint and were part of Nielsen’s claims when the jury deliberated. There was no stipulation by counsel or instruction to the jury, limiting Nielsen’s damage claim to the payment of attorneys’ fees he had paid to defend the underlying action.

In fact at trial Nielsen actually sought a total of \$178,960.00 in attorneys' fees, which the jury refused to award. The jury determined that this amount was too high. The coincidence that the total amount awarded happened to coincide with the amount Nielsen sought in attorneys' fees to defend the alienation of affection is not enough for the trial court to determine that the total amount awarded was for attorneys' fees in defending the alienation of affection case and no other damages. The jury could have determined that the amount of \$95,000.00 was too much solely for Nielsen's attorneys' fees, but sufficient to compensate Nielsen for his attorneys' fees as well as, his humiliation, emotional distress, and mental pain and suffering. The trial court simply cannot determine from the Special Verdict form that the full amount awarded is only for attorneys' fees or that it constitutes special damages under Section 78-27-44 U.C.A.

CONCLUSION

Based on the admitted facts at trial, Spencer had probable cause, as a matter of law, to file his claim against Nielsen for alienation of affection. Furthermore, the dismissal of the alienation of affection claim as a discovery sanction, does not constitute a termination on the merits. As a result, Nielsen's claim for wrongful use of civil proceeding should have been dismissed as a matter of law.

There was no "willful act in the use of the process, not proper in the regular course of the proceeding," which is a legal issue, and Nielsen's abuse of process claim should have been dismissed, as a matter of law.

Nielsen did not properly plead for special damages as required under § 78-27-44 U.C.A.; and did not have any medical expenses in this case, so he is not entitled to prejudgment interest under this Statute. Furthermore, since Nielsen did not have any medical expenses in this case, his request to amend his complaint to include such expenses would be futile. Moreover, Nielsen did not seek to amend his complaint at the trial court level and therefore cannot seek this relief for the first time on appeal.

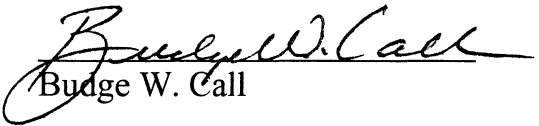
In addition, Nielsen cannot claim for the first time on appeal that he is entitled to prejudgment interest under common law. Regardless, Nielsen is not entitled to prejudgment interest under common law because his claim is a personal injury tort; and he seeks general damages. Furthermore, Nielsen did not establish a complete and fixed amount of damages at a particular time to support an award of prejudgment interest; and moreover, submitted the amount of his damages, including the reasonableness of his attorneys' fees to the jury for determination at the time of trial.

Based on the Special Verdict form, the trial court cannot determine that all of the damages that were awarded are "special damages" under § 78-27-44 U.C.A. or that the damages awarded are only for Nielsen's attorneys' fees.

Based upon the foregoing, the Verdict reached and Judgment entered in the above case should be reversed and/or set aside; and the claims for wrongful use of civil proceeding and abuse of process should be dismissed, as a matter of law.

DATED this 25 day of February, 2008.

BOND & CALL L.C.


Budge W. Call

MAILING CERTIFICATE

I hereby certify that on the 25 day of February 2008, I did mail, postage prepaid, 2 true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** to the following:

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