

2008

# Melany Zoumadakis v. Uintah Basin Medical Center, Dr. Mark Mason, Lloyd Meilson, Carolyn Smith and John Does 1-10: Reply Brief

Utah Court of Appeals

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Carolyn Cox; Holme, Roberts & Owen, LLP; Attorney for Appellees.

Jay L. Kessler; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

MELANY ZOUMADAKIS,  
Plaintiff/Appellant,

UTAH BASIN MEDICAL  
 CENTER, and individuals DR.  
 MARK MASON, LLOYD  
 NIELSON, CAROLYN SMITH, and  
 JOHN DOES 1-10.  
 Defendants/Appellees.

(ORAL ARGUMENT

REQUESTED)

App. Case No. 20080067

APPELLANT REPLY BRIEF

**Appeal from the May 22, 2007, Order granting  
Defendants' Partial Summary Judgment,  
and the December 17, 2007, jury verdict  
of the Eighth Judicial District Court signed by  
Judge John R. Anderson.  
(All parties contained in caption)**

**Carolyn Cox, Esq.**  
**Attorney for Appellees**  
**Holme, Roberts & Owen, LLP**  
**299 South Main Street**  
**Suite 1800**  
**Salt Lake City, Utah 84111-2263**

**Jay L. Kessler, Esq.**  
**Attorney for Appellant**  
**Kessler Law Office, L.L.C.**  
**9087 West 2700 South**  
**Suite 9**  
**Magna, Utah 84044**

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IN THE UTAH COURT OF APPEALS

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MELANY ZOUMADAKIS,  
Plaintiff/Appellant,

v.

UINTAH BASIN MEDICAL  
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MARK MASON, LLOYD  
NIELSON, CAROLYN SMITH, and  
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Defendants/Appellees.

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Attorney for Appellees  
Holme, Roberts & Owen, LLP  
299 South Main Street  
Suite 1800  
Salt Lake City, Utah 84111-2263

Jay L. Kessler, Esq.  
Attorney for Appellant  
Kessler Law Office, L.L.C.  
9087 West 2700 South  
Suite 9  
Magna, Utah 84044

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CENTER, and individuals DR.  
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Defendants/Appellees.

**All parties to this action admit and agree that the Utah Court of Appeals has jurisdiction in this matter, and as such jurisdiction is proper.**

## ARGUMENT

**1. THE JURY VERDICT IN FAVOR OF DR. MASON MUST BE REVERSED  
A. APPELLANT HAS SUFFICIENTLY MARSHALED THE EVIDENCE**

Defendant's first argument against Plaintiff's appeal is that she did not sufficiently marshal the evidence. Specifically, the Defendant claims that Ms. Zoumadakis did not "marshal all of the evidence" and failed "to present any argument why such evidence is insufficient to support the verdict". (Appellee Brief-pg 10).

Plaintiff's brief outlined all of the statements that could be used to support the jury verdict that Dr. Mason's statements were not published. These statements included Dr. Mason, Lloyd Nielsen, and Karlene Jensen all stating that they "did not recall" the exact words which were used stating that the Plaintiff was "playing doctor without a license". (Appellee Brief-pgs 19-20).

The Court exhibits evidence the defamatory words, and the marshaled statements can be the **only** defense against whether the statements were in fact published by Dr. Mason. The Defendant has not produced anything else that the Plaintiff could have marshaled which was omitted. Every scrap of evidence supporting the verdict was marshaled.

The Defendant asserts that because Vicky Holzman's document which is in Ms. Zoumadakis' employment personnel file, (Trial Exhibit 1), characterized Dr. Mason statement that Ms. Zoumadakis was a "Home Health nurse playing doctor without a license"; that the Plaintiff had a duty to call Ms. Holtzman as a witness to clarify that is exactly what he said. If Ms. Holzman did not hear Dr. Mason make that statement, then the defense should have called her as a witness, which they did not. The document is proof of a published defamatory statement.

Further, Lloyd Nielsen's "Corrective Disciplinary Action document, which is also in Ms. Zoumadakis' employment personnel file, irrefutably states, "He [Dr. Mason] states she is a home health nurse playing MD without a license." (Trial Exhibit 3).

When Nielsen was questioned further regarding whether or not Dr. Mason spoke the defamatory words to him, he said under oath, "Correct". Dr. Nielsen tried to waiver from the statements he wrote in trial exhibit 3, by further stating "something, and I don't know if that is the exact word but it was that, yes. That is what he said." (Trial Transcript 660 of record-page 110-paras 12-19).

Plaintiff does not dispute her marshaling obligation, and believes that she has brought to light any statement or other evidence to support the jury's verdict that Dr. Mason did not publish the statements, but believes that the jury did not understand the jury instructions, because the evidence does not support the verdict.

Finally, as asserted by the Defendant, Dr. Mason testified similarly as Nielsen and

Jensen did that "I don't remember the exact words I used." He also stated he did not recall again, and then went into a discourse as to how the term "playing doctor without a license" is a "very common colloquialism". (Trial Transcript 660 of record-page 198-paras 8-24 and page 199-paras 1-7). Dr. Mason never refutes that he said the defamatory words to Nielsen or Holtzman. As such the defamatory words were published.

## **B. THE JURY VERDICT FAILS ON ALL GROUNDS**

Although a jury verdict can be sustained on other grounds if one ground fails, Ms. Zoumadakis' claim of defamation against Dr. Mason has been proven on all elements. Plaintiff has already clearly and succinctly outlines how after publication has been proven, that the other defamation elements of how the statements made by Dr. Mason were false and defamatory; how there was either no qualified privilege, or the qualified privilege was overcome by a showing of Dr. Mason's malice; and how Ms. Zoumadakis suffered horrible damages specifically because of the defamation against her by her lost income, lost benefits, damaged reputation, severe anxiety and depression, medical bills loss of life's enjoyments, and a lost home. All of these elements of defamation have been sufficiently outlined in her opening brief. (See Appellant Brief-pages 22-28).

Without further belaboring the same evidence, it is clear that the jury verdict must be overturned, and that Ms. Zoumadakis be awarded her damages.

## **2. THE SUMMARY JUDGMENT AWARD FOR ALL DEFENDANTS SHOULD BE REVERSED, AS THE COURT ERRED BY FINDING THAT THERE WERE NOT GENUINE MATERIAL ISSUES OF FACT IN DISPUTE, AND THAT MALICE OBTIATED ANY QUALIFIED PRIVILEGE.**

### **A. Dr. Mason's Statement was not true.**

Defendant Mason states that just because a patient claims something, such as that the Plaintiff smelled of alcohol, that it makes Dr. Mason's statement true. Ms. Zoumadakis has consistently denied the statement, and deserved to have her denial heard



on the merits.

Dr. Mason presented an affidavit of the patient (who died not long after he signed it) stating what he thought he smelled. The court held that summary judgment was correct because Dr. Mason only stated what was reported to him. This is in error because at the very least Dr. Mason had a duty to investigate the patient's statement. He did not, but used the statement to maliciously remove Ms. Zoumadakis as a nurse from UBMC. Keep in mind that much testimony was given by Chris Dalsing, former director of UBMC's Physical Therapy Department as to the lack of voracity of this specific patient. (Court Record-page 311). If Dr. Mason spoke to anyone at UBMC about this specific patient he may have thought twice about filing his complaint.

**B. Dr. Mason's Statement was not subject to a qualified privilege. The patient's statements were not true.**

As stated in the opening brief, "Ordinarily, the question of whether the statements were maliciously published would be one for a trier of fact." Lind v. Lynch, 665 P.2d 1276, 1278, 1279 (Utah 1983).

Just the fact that someone complains does not make it a true statement. Yes, they complained, but Dr. Mason knew that the complaint was false because of the patient's history. Cris Dalsing testified at trial and in his deposition that this particular patient had made numerous complaints against everyone, and nothing ever came of the complaints. (Court Record-page 311). Dr. Mason did absolutely no investigation into the truth of the patient's statements. If he did not know of the patient's history as alleged in defendant's brief, and did discuss the matter with UBMC, they should have told him about the unsupported complaints as stated by Mr. Dalsing. It is improper to hold that just because someone makes a statement and that statement is communicated, that the statement is true. The jury should have heard these claims on the merits.

The malice shown by Dr. Mason against Ms. Zoumadakis has been carefully outlined in our prior brief. The malice includes: Dr. Mason's inability to prove that Ms. Zoumadakis was playing doctor without a license; Dr. Mason threatening to take his home health care business to Applegate Home Health if Ms. Zoumadakis sees any of his patients; and communicating false statements from a patient that had a history of untrue complaints. (Pg 194 and 196 of Record), (Trial Transcript 660 of Record-page 111-paras 7-24 and page 112- paras 1-24 and page 125-paras 1-20). As such, this matter should have been heard on the merits.

**C. The defamatory statements of Carolyn Smith were not speculative.**

As stated in the previous brief Carolyn Smith was Dr. Mason's assistant at the time of the defamation. Because of the great discrepancy between what Ms. Zoumadakis told Smith on the phone and what Dr. Mason thought what happening, it was not beyond the pale or "speculative" that she told Dr. Mason untrue defamatory statements that damaged the Plaintiff.

Even if the trial record is not used to reverse summary judgment, it was clearly stated by Ms. Zoumadakis that she did not speak to Dr. Mason, and only spoke to Ms. Smith regarding the treatment of some of his patients, and this led to Dr. Mason's charge of Ms. Zoumadakis "Playing doctor with a license", non-speculative defamation of character. It is not speculative to properly assume that Ms. Smith communicated falsehoods to Dr. Mason which became the subject of his complaints to UBMC.

Certainly there was enough evidence to hear this matter on the merits.

Regarding whether there was a qualified privilege regarding Ms. Smith's statements to Dr. Mason, as stated in the previous brief, a qualified privilege can be obviated if malice can be shown to be the root cause of the defamatory statements. Lind v. Lynch, 665 P.2d 1276, 1278, 1279 (Utah 1983).

As stated in our previous brief, it is unknown why Smith would tell Dr. Mason that Ms. Zoumadakis was questioning his care. It is very possible that because Smith and Mason worked closely together every day, that they talked often about either nurse complaints or patient complaints, and that they became tired of Ms. Zoumadakis quoting Medicare rules or her asking for help for wounds that were not healing. Whatever the reason, Smith's testimony evidences malice because neither her nor Mason could articulate how Ms. Zoumadakis was questioning Mason's care, notwithstanding the defamatory statements. Further, even though Ms. Zoumadakis wanted to talk to Dr. Mason about the care of patients, Dr. Mason testified that he was told by his nurse, [Ms. Smith] that Ms. Zoumadakis refused to talk to him. (Trial Transcript 660 of Record-page 222-paras 16-24; and page 223-paras 1-10).

If we get past the allegation that Smith's statements were speculative, then it would be up to the jury to determine if Smith said her defamatory statements with malice to overcome any qualified privilege.

**D. Lloyd Nielson's statements in the Corrective Disciplinary Action were defamatory and untrue, published in Ms. Zoumadakis' employee file which is used for third person future employers, and was not subject to a qualified privilege.**

The Court granted summary judgment on behalf of Lloyd Nielsen, holding that the items in the Corrective Disciplinary Report were true, were not published to third parties, and were subject to a qualified privilege. (Court record-page 444)

**1. The statements in the Disciplinary corrective report were untrue.**

Whether the statements in the report were true or not is a material fact in dispute which should be decided by the jury. Whether or not Mr. Nielson knew they were true is also a fact that needed to be decided by the jury. As stated previously, just because a person makes a statement (Dr. Mason) does not make it true, and the fact-finder needs to

decide if Nielson knew the statements were not true yet published it in the Plaintiff employee file. Clearly, Mr. Nielson had not one shred of evidence that Ms. Zoumadakis was playing doctor without a license, as no evidence was presented alleging so.

Ms. Zoumadakis repeatedly stated that she did not have alcohol on her breath, did not play doctor without a license, and did not question the doctor's care of patients. The defamatory report stated otherwise. This matter should have gone to the jury.

**2. The items in the Corrective Disciplinary Action were published to third parties.**

The Corrective Disciplinary Report was made a part of Ms. Zoumadakis employee file. In the trial against Dr. Mason, although Ms. Jensen stated that the things in employee files are not disseminated to prospective employers, she stated that as a hiring nurse, if she saw these defamatory items in a nurse's file looking for work, that she would not hire her. Clearly published to be used for hiring and giving recommendations. (Trial Transcript 661 of Record-page 155-paras 2-15). Also, somehow the statements in this report became public knowledge in the community.

As stated in our previous brief, it is beyond reason that the items in an employee file would not be subject to review by a further prospective employer. At the very least, a phone call from a prospective employer would disseminate the gist of the information, which is highly defamatory.

**3. Nielson's malice in publishing the Report overcomes any qualified privilege.**

As stated in our previous brief, the evidence of Mr. Nielson's malice includes:

1. Stating in the report that Ms. Zoumadakis was "playing doctor without a license" even though there was not any evidence to prove the statement. When asked in trial what Mason said to him as to how the Plaintiff was playing doctor without a

license, he stated that she would go into homes and question Dr. Mason's orders. Nothing was stated by Mason regarding her prescribing anything, nor actually practicing or playing doctor without a license. (Trial Transcript 660 of Record-page 205-paras 3-24; and page 206-paras 1-10).

Although the accusations were refuted by Ms. Zoumadakis, it is a genuine issue of material fact in dispute which should have gone to the jury, and is not evidence of "playing doctor without a license".

2. Mr. Nielson not allowing Ms. Zoumadakis to speak or even write a letter to Dr. Mason to find out what happened. The letter Ms. Zoumadakis prepared was confiscated by Nielson and never given to Mason. (Trial Transcript 661 of Record-page 61-paras 10-24).

Mason complained that the Plaintiff never tried to talk to him, and Zoumadakis complained that Mason would not talk to her. Nielson undermined any communication between the two, specifically to get rid of the Plaintiff.

3. As stated in our previous brief, Nielson gave Ms. Zoumadakis an impossible task in the Corrective Disciplinary Action. (Court file-pages 196-197). It would have been impossible to follow the rules in the Corrective Disciplinary Action.

Mr. Nielsen noted on the bottom of the Action that Ms. Zoumadakis refused to sign the Action and she was terminated. (Court record-pages 196-19).

As stated previously, although the allegations were "very serious" (as Nielsen stated in trial) none of the charges were reported to the Nursing Board or Division of Licensing for investigation.

The whole purpose of the Corrective Disciplinary Action was to terminate Ms. Zoumadakis' employment evidencing malice.

**E. UBMC's statements to the Utah Department of Workforce Services were untrue and defamatory and subjected the Plaintiff to fraud upon the State.**

Defendants claim that the false statement that the Plaintiff quit rather than was fired is not defamatory because it does not impugn Ms. Zoumadakis' "honesty, integrity, virtue, or reputation...". (Defendant's Brief on page 22).

As stated in our opening brief, when Ms. Zoumadakis was fired for not signing the Corrective Disciplinary Action, she filed for unemployment benefits. UBMC retaliated, stating that she was not entitled to benefits because she quit rather than was fired. (Court Record-page 277). The Administrative Court held that " This person is eligible for unemployment insurance benefits because the reason for his or her discharge from your firm or organization was not disqualifying". (Court Record-page 276).

The items in Ms. Zoumadakis' file with DWS are public record. As such, it was *completely defamatory that UBMC stated that she voluntarily quit when she was terminated from her job.* By publishing these false statements against the Plaintiff, and it being in her file, the credibility of Ms. Zoumadakis will be diminished to future employers and to DWS if she ever needs benefits in the future. Further, Ms. Zoumadakis may have been subject to fraud allegations by the State of Utah because of the statements of UBMC to DWS.

**F. UBMC'S and Carlene Jensen's Statements made in the Quarterly Review Meeting that were heard by Cris Dalsing and other Employees were untrue, defamatory, and not protected by a Qualified Privilege.**

Defendant claims that summary judgment was appropriate because the Plaintiff failed to present evidence that lower level employees were present who may have heard the *defamatory remarks.* In Plaintiff's objection to motion for Summary Judgment, she outlines and quotes Cris Dalsing's deposition transcript stating that in the quarterly

meeting Ms. Jensen stated loud enough to be heard by other employees the defamatory remarks, and made no attempt to tell anyone that the statements were confidential. (See Objection to Summary Judgment-Page 11-Quoting Cris Dalsing Depo-page 40).(Court record-page 311-312; and page 280).

The fact that after this meeting took place that it spread throughout Ms. Zoumadakis' community that she was "drinking on the job" evidences that somehow the defamatory statements were published, more likely than not from Ms. Jensen's statements. (Court Record- pages 283-293). We submit that this is not speculative, and is evidence of defamatory statements being published into the community by UBMC.

As previously outlined, there is a genuine material issue of fact in dispute as to whether the statements made by UBMC were true or not, and published by UBMC nurses who were at that meeting, and these items should have been decided by the jury. As such, summary judgment should be reversed, and this matter be heard on the merits by a jury.

**G. UBMC'S Nurse's statements are attributable to the Defendants, were untrue, and Defamatory, and Evidences UBMC's Defamation of Character against Ms. Zoumadakis.**

Defendants claim that the unidentified nurses who spread the defamatory statements against Ms. Zoumadakis does not attach to UBMC because of the doctrine of respondeat superior, and that the nurses acted outside the scope of their employment, quoting Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) (Defendants' brief-page 25).

In Birkner, a social worker sexually touched a patient which was admittedly non-therapeutic. In fact, it was against the State rules and the therapists rules of behavior. (Birkner at 1057). The Utah Supreme court correctly ruled in that case that the therapist acted outside the scope of his employment, and Salt Lake County was exonerated.

In the present matter, some of the defamatory remarks came directly from Dr. Mason (playing doctor without a license), put into Ms. Zoumadakis' file without any investigation by UBMC and its agents, and allowed to get out into the community by publishing it in Ms. Zoumadakis employment file, the Dept. of Workforce Services file (Quit rather than being fired), was disseminated in the Quarterly Review Meeting without a warning regarding confidentiality; and spread into the community by various un-named nurses (as stated in Plaintiff's affidavits). The Defendants are improperly trying to add the doctrine of respondeat superior as a hurdle to a charge of defamation even when the defamatory remarks and the publication came directly from the defendants themselves.

As stated previously, UBMC should not be responsible for defamatory statements community members discuss among themselves, unless those defamatory statements came from UBMC, and were published by UBMC. The court erred in making the blanket assumption that all statements made among community members could not be attached to UBMC. Ms. Zoumadakis was not given the chance to prove that these statements which community members discussed came from UBMC nurses, who improperly heard these statements from UBMC

As such summary judgment should be reversed as against UBMC.

**H. Thacker's Statements to Cook further evidences UBMC's Defamation against Ms. Zoumadakis.**

As stated previously whether the statements were true or not should have been under the purview of the jury, and Ms. Thacker's statements are further evidence that UBMC had improperly disseminated defamatory statements about Ms. Zoumadakis that was getting into the community. Ms. Zoumadakis never had alcohol on her breath when visiting patients. There was no cause of action against Ms. Thacker, neither did there need to be.



It is false that Ms. Zoumadakis “did not provide any evidence to dispute Thacker’s affidavit” as stated in defendants’ brief regarding a prior report of a smell of alcohol. (Defendants’ Brief page 29). Ms. Zoumadakis stated at every occasion that she never had an alcohol problem on the job, and that Cris Dalsing nor Linda Cook were ever aware that any report of this kind was ever leveled against Ms. Zoumadakis. (See Objection and Countermotion for Summary Judgment-pages 11-12).

As stated in our opening brief, Ms. Cook was the director of Uintah Home Health when Ms. Zoumadakis began work there. She never received any complaints about Ms. Zoumadakis. She stated that Melany’s direct supervisor always gave her good evaluations. Ms. Cook moved to a branch office in Vernal, Utah. Ms. Thacker came to her branch and told her that Ms. Zoumadakis had been fired for having alcohol on her breath when visiting a client. Ms. Thacker told Ms. Cook that there were other complaints about Melany before, but Ms. Cook said she never saw any. Lloyd Nielson told Ms. Cook not to give Ms. Zoumadakis a letter of recommendation as her previous supervisor, but to only write one as her friend. (Court record-page 289).

### **CONCLUSION**

Ms. Zoumadakis maintains that the jury’s verdict is not supported by the evidence, and that the evidence in fact supports her contention that she was subject to defamation and should be awarded her damages against Dr. Mason.

Further, Ms. Zoumadakis asserts that there were serious genuine issues of material fact in dispute that should have allowed her other defamation claims to go to trial. It is unknown why the court allowed Dr. Mason’s claims to go to court to determine if there was malice, yet did not do the same for the other questions of qualified privilege.

## **REPLY TO CROSS-APPEAL**

### **1. It was proper to deny Summary Judgment regarding Dr. Mason's statement that Melany Zoumadakis was "Playing doctor Without a License".**

Defendant Mason argues that Ms. Zoumadakis' claims against him are "only unsupported speculation". (See Defendants' brief-page 33), and that Plaintiff's claims were "unsubstantiated argument and conclusions". (Id.).

In rebuttal, Dr. Mason provided no evidence to support his statement that Ms. Zoumadakis was "Playing doctor without a license". She gave no prescriptions, administered no medical treatment without a doctor's affirmation, and did nothing to undermine Dr. Mason's medical orders. It is serious business to be "Playing doctor without a license", and there were no charges to the nursing board or any other government agency, nor any internal investigation at UBMC. (Trial Transcript 660 of Record-page 208-paras 2-12).

It is our belief that given the severity of the unsupported statement "Playing doctor without a license", the court was well within it's right to find out through a jury of fact-finders whether or not Dr. Mason acted with malice to obviate a qualified privilege, and to determine whether or not the defamatory statement he made was indeed true. the evidence at trial proved Dr. Mason acted with malice and that the statement was false.

### **2. The District Court was correct to deny Dr. Mason's Directed Verdict.**

Defendant Mason argues that a directed verdict should have been granted at the close of Plaintiff's case in chief, because Ms. Zoumadakis did not meet her burden of proving that Dr. Mason maliciously told Lloyd Nielsen and Vicky Holzman that Ms. Zoumadakis was "Playing doctor without a license".

As stated previously when asked in trial (In Plaintiff's case-in-chief), what Mason said to Lloyd Nielsen as to how the Plaintiff was playing doctor without a license, Dr.

Mason stated that Ms. Zoumadakis would go into homes and question Mason's orders. Nothing was stated by Mason regarding her prescribing anything, nor actually practicing or playing doctor without a license. The statement was false! (Trial Transcript 660 of Record-page 205-paras 3-24; and page 206-para 1-10).

Further, Dr. Mason testified that he would send all of his patients to another health care center if Ms. Zoumadakis was called on to see his patients. (Trial Transcript 660 of Record-page 202-para 17-24; and page 203-para 1-23).

Dr. Mason further testified of his ill will toward Ms. Zoumadakis by stating that "she exhibited a lot of attitude. She seemed to kind of be a know it all attitude and tended to be a little smart in her comments. And somewhat disagreeable if I tried to explain my position" (Trial Transcript 660 of Record-page 223-para 19-24).

Dr. Mason felt that Ms. Zoumadakis complained a lot to him, and he felt that she was questioning his care with the patients. This led to his filing a complaint with UBMC (Plaintiff's employer), stating that she was "Playing doctor without a license". (Trial Transcript 660 of Record-page 234-para 1-24; and page 225-para 1-13).

Clearly, a directed verdict was improper. There was abundant evidence showing that Dr. Mason wanted Ms. Zoumadakis gone, and acted with malice by complaining that she was "Playing doctor without a license", to her employers, who subsequently fired her.

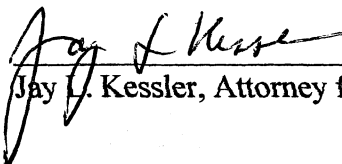
### **CONCLUSION**

Because Dr. Mason published a false statement to the plaintiff's employer which got her fired, and that he did so with the necessary malice to obviate a qualified privilege, the denial of Dr. Mason's summary judgment motion with regard to his statement "Playing doctor without a license" should be upheld. Further, given the evidence outlined

above, the court was correct to deny a directed verdict.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of February, 2009.

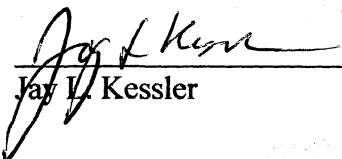
KESSLER LAW OFFICE

  
Jay L. Kessler, Attorney for Appellant

### CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of February, 2009, I sent via hand-delivery or United States Mail two copies of the foregoing Appellant Reply Brief to the following:

Carolyn Cox, Esq.  
Attorney for Appellees  
Holme, Roberts & Owen, LLP  
299 South Main Street  
Suite 1800  
Salt Lake City, Utah 84111-2263

  
Jay L. Kessler