

1998

Janice L. Debry v. Delbert T. Goates, M.D., : Brief of Appellee

Utah Court of Appeals

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CKET NO: 981420

IN THE SUPREME COURT OF THE STATE OF UTAH

JANICE L. DEBRY

Plaintiff/Appellant,

vs

DELBERT T. GOATES, M.D.,

Defendant/Appellee

Case No: 981420

District Court No 960906212

Priority No 15

BRIEF OF APPELLEE
DELBERT T. GOATES, M.D.APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
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Utah Court of Appeals

JUN 17 1999

Julia D'Alesandro
Clerk of the Court**FILED**

JUN 17 1999

CLERK SUPREME COURT
UTAH

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CITATION TO THE RECORD

This Brief contains references to the record on appeal. Citations to the record are designated by the abbreviation “R.”

Defendant/Appellee Delbert T. Goates, M.D. (“Dr. Goates”), by and through his counsel of record, P. Keith Nelson and Mark L. McCarty of the law firm Richards, Brandt, Miller & Nelson, respectfully submits the Brief of Appellee Delbert T. Goates, M.D., as follows:

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j), providing for jurisdiction over this appeal transferred from the Utah Supreme Court.

STATEMENT OF ISSUES

Plaintiff/Appellant Janice L. DeBry’s first issue on appeal concerns the trial court’s granting of summary judgment based upon the fact that Ms. DeBry failed to establish there was a doctor-patient relationship between her and Dr. Goates. The granting of summary judgment presents a question of law, which is reviewed for correctness without deference to the trial court. Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 1111-1112 (Utah 1991).

Ms. DeBry’s second issue on appeal concerns the trial court’s granting of summary judgment based upon Ms. DeBry’s waiver of the doctor-patient privilege, even if it is assumed that one existed. The granting of summary judgment is a question of law to be reviewed for correctness with no deference given to the trial court’s legal analysis. Id.

Ms. DeBry completely ignores the record by failing to inform this Court that she, in fact, had placed her mental state into question during the prior proceeding, Janice L. DeBry v. Robert J. DeBry, civil No. 944901038DA (“DeBry Divorce”).

Any and all further issues presented before the Third District Court have been waived. Armstrong Rubber Co. v. Bastian, 657 P.2d 1346 (Utah 1983).

DETERMINATIVE STATUTES

Utah Code Ann. § 58-60-113:

Evidentiary privilege for mental health therapists regarding the admissibility of any confidential communication in administrative, civil, or criminal proceedings is in accordance with Rule 506 of the Utah Rules of Evidence.

Rule 506 of the Utah Rules of Evidence:

(a) *Definitions.* As used in this rule:

(1) “Patient” means a person who consults or is examined or interviewed by a physician or mental health therapist.

(2) “Physician” means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(3) “Mental health therapist” means a person who is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor while that person is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) *General rule of privilege.* If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient’s life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist, including guardians or members of the patient’s family who are present to further the interest of the patient because they are reasonably necessary for the transmission

of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) *Exceptions.* No privilege exists under this rule:

(1) *Condition as element of claim or defense.* As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(2) *Hospitalization for mental illness.* For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(3) *Court ordered examination.* For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

Utah Code Ann. § 78-24-8(4):

(4) A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. However, this privilege shall be deemed to be waived by the patient in an action in which the patient places his medical condition at issue as an element or factor of his claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information,

interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

STATEMENT OF THE CASE

A. FACTUAL SUMMARY.

On or about September 5, 1996, Janice L. DeBry filed a lawsuit against Delbert T. Goates, M.D., alleging that Dr. Goates committed medical malpractice based upon the *Affidavit of Delbert T. Goates* ("Dr. Goates' Affidavit"), which was filed in the DeBry Divorce case. (R. 1-4). Dr. Goates answered the Complaint on October 3, 1996, and requested a jury trial. (R. 7-9).

Ms. DeBry filed a *Motion to Amend Complaint* wherein she alleged medical malpractice, slander per se, and emotional distress against Dr. Goates. (R. 20-27). All claims in DeBry's *Amended Complaint* stemmed from the filing of Dr. Goates' Affidavit in the DeBry Divorce case. Dr. Goates filed his answer to the Amended Complaint on or about March 13, 1997. (R. 50-52).

On November 21, 1997, the Third District Court, Judge Homer F. Wilkinson, granted Dr. Goates' *Motion for Order to Unseal Divorce File of Janice L. DeBry v. Robert J. DeBry*, civil No. 944901038DA, in order for Dr. Goates to adequately defend the action brought by Ms. DeBry. (R. 90-92). The *Order to Unseal Divorce File* also stated that all materials within the file were deemed confidential and not be disseminated to third parties. (R. 91). The DeBry

Divorce case had been sealed at all times relevant to the matter between Ms. DeBry and Dr. Goates. (R. 90-92; R. 189 at p. 78, lines 17-25, and p. 80, lines 1-11).¹

On March 23, 1998, Dr. Goates filed a *Motion for Summary Judgment* (R. 226-227), together with a *Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment* (R. 107-223). Ms. DeBry filed *Plaintiff's Memorandum of Points and Authorities with Supporting Affidavits in Opposition to Defendant's Motion for Summary Judgment* on April 8, 1998. (R. 230-307). Dr. Goates filed a *Reply Memorandum in Support of Defendant's Motion for Summary Judgment* on April 20, 1998. (R. 331-366).

Ms. DeBry filed a *Motion to Strike Plaintiff's Deposition*, as well as a *Memorandum in Support of Motion to Strike Plaintiff's Deposition* and a *Counter Affidavit of Counsel re Plaintiff's* [sic] *in Support of Plaintiff's Motion to Strike Deposition*, on April 8, 1998, due to the fact she had not read the deposition or made changes. (R. 308-312). Dr. Goates filed a *Memorandum in Opposition to Plaintiff's Motion to Strike Plaintiff's Deposition* on April 14, 1998. (R. 318-330).

Judge Homer F. Wilkinson heard oral argument of the parties concerning Dr. Goates' Motion for Summary Judgment, and granted the Motion on June 22, 1998. (R. 544-547). Ms. DeBry's Motion to Strike was denied. (R. 544-547). Ms. DeBry filed a *Notice of Appeal* on July 20, 1998. (R. 550).

¹ It should also be noted that Ms. DeBry testified that Dr. Goates' Affidavit, which is the subject matter of this lawsuit, was never introduced into evidence and that Dr. Goates was never called to testify during the DeBry Divorce case regarding the information in his Affidavit. (R. 189 at p. 78, lines 17-25).

B. STATEMENT OF FACTS RELEVANT TO ISSUES FOR REVIEW.

The subject matter of this lawsuit arose during the course of a divorce proceeding between Ms. DeBry and her former husband, Robert J. DeBry, DeBry v. DeBry, civil No. 944901038DA. In the course of the DeBry Divorce proceeding, Mr. DeBry filed a *Motion for Mental Examination of Janice DeBry*, a *Memorandum in Support of Motion for Mental Examination of Janice DeBry*, and the *Affidavit of Delbert T. Goates*, which indicated that “Mrs. DeBry experiences the traits of a narcissistic personality disorder (as more fully defined in DSM-III-R).” (R. 125-127). Ms. DeBry had made claims, through an affidavit, requesting payments from Mr. DeBry totaling \$4,500.00 per month, to be used for medical, dental, and mental health expenses. (R. 361).

Pursuant to an *Order* entered by the Third District Court in the DeBry Divorce case on December 20, 1994, Mr. DeBry’s Motion for Mental Examination was denied due to Plaintiff’s retraction of her claims for expenses of counseling and therapy. (R. 128-132, specifically R. 130). A trial was ultimately held in the DeBry Divorce case. However, the trial did not involve any issues regarding Ms. DeBry’s mental state or condition, pursuant to the District Court’s Order of December 20, 1994.

At her deposition, Ms. DeBry testified that at no time was she ever a patient of Dr. Goates, that Dr. Goates’ Affidavit was never introduced into evidence during the DeBry Divorce trial, that Dr. Goates did not testify at the DeBry Divorce trial, that the entire DeBry Divorce case was sealed, and that her mental state had become an issue during the DeBry Divorce matter. (R. 189 at p. 78, lines 17-25; R. 182 at pp. 52-53). Dr. Goates was deposed by Ms. DeBry’s

attorney in the DeBry Divorce proceedings, thereby making him a potential witness concerning her mental state, thereby waiving any potential privilege, in the event a privilege ever existed. (R. 187 at p. 71, lines 21-24).

At the conclusion of the DeBry Divorce case, Ms. DeBry filed this lawsuit against Dr. Goates for medical malpractice, and subsequently amended her Complaint to include claims of slander per se and infliction of emotional distress. (R. 22-27). All of the alleged causes of action stemmed from Dr. Goates' Affidavit filed in the DeBry Divorce proceeding. (R. 22-27).

Dr. Goates filed a Motion for Summary Judgment based upon Ms. DeBry's failure to show that there was a doctor-patient relationship between Ms. DeBry and Dr. Goates or, in the alternative, that even if Plaintiff could overcome her own statements, Ms. DeBry had waived any doctor-patient relationship, to the extent one existed. Dr. Goates also argued that any statements made by Dr. Goates during the DeBry Divorce proceeding were absolutely privileged. Ms. DeBry had waived any privilege by placing her mental state at issue in the DeBry Divorce case by claiming \$4,500.00 per month in medical, dental, and mental health expenses. (R. 361). In the Motion for Summary Judgment, Dr. Goates also asked that all remaining elements of Ms. DeBry's Complaint be dismissed. (R. 226-227, and 107-223).

Ms. DeBry filed a Motion to Strike her deposition testimony, alleging that she had not read or made changes to it. (R. 308-309). Ms. DeBry further claimed that she was never given the opportunity to review or amend her deposition. (R. 313-314). Dr. Goates filed a *Memorandum in Opposition to Plaintiff's Motion to Strike Plaintiff's Deposition*, including a sworn affidavit from the court reporter (*Affidavit of Susan Hellberg-Young, CSR, RPR*)

indicating that Ms. DeBry was provided with the opportunity to make any changes she deemed necessary, and that she had failed to do so. (R. 315-330).

The Third District Court entered an Order granting Dr. Goates' Motion for Summary Judgment in favor of Dr. Goates as to each cause of action. The District Court ruled that there was not a doctor-patient relationship, that the privilege belongs to the Plaintiff, and that even if there were a doctor-patient relationship, the relationship, and attendant privilege, was waived at the time Dr. Goates' Affidavit was submitted in the DeBry Divorce case. The Third District Court also denied Ms. DeBry's Motion to Strike her deposition. (R. 544-547).

SUMMARY OF ARGUMENTS

A. THE TRIAL COURT CORRECTLY RULED THAT THERE WAS NOT A DOCTOR-PATIENT RELATIONSHIP BETWEEN DR. GOATES AND MS. DEBRY AS A MATTER OF LAW.

Dr. Goates presented abundant testimony, specifically the testimony of Ms. DeBry, that Dr. Goates did not act as Ms. DeBry's treating physician, and that no doctor-patient privilege applied. Contrary to the assertions of Ms. DeBry, the doctor-patient privilege is the privilege of Ms. DeBry, not Dr. Goates. Dr. Goates belief as to a doctor-patient privilege is irrelevant when Ms. DeBry is adamant in her testimony that a doctor-patient relationship never existed. (R. 175 at p. 25, lines 2-3; R. 180 at p. 42, lines 15-19; R. 180 at p. 43, lines 1-12; R. 182 at p. 52, lines 22-25; R. 190 at p. 83, lines 16-24; R. 201 at p. 129, lines 17-19; R. 202 at p. 130, lines 20-25; R. 202 at p. 131, lines 1-5). The trial court did not err in ruling that as a matter of law, there was no doctor-patient privilege between Ms. DeBry and Dr. Goates to be violated. Therefore there could be no cause of action for medical malpractice.

B. ANY DOCTOR-PATIENT PRIVILEGE WHICH HAD BEEN ESTABLISHED PRIOR TO THE FILING OF DR. GOATES' AFFIDAVIT WAS WAIVED THROUGH THE ACTIONS OF MS. DEBRY IN PLACING HER MENTAL CONDITION BEFORE THE COURT.

Through her own testimony, Ms. DeBry admits that her mental condition became an issue in the DeBry Divorce case, the proceeding in which Dr. Goates' Affidavit was filed. (R. 182 at pp. 52-53). Ms. DeBry was seeking monetary payments from her ex-husband in an attempt to pay for her psychological counseling, thereby placing her mental state at issue in the DeBry Divorce proceeding. (R. 217-223; R. 361). Further, Ms. DeBry admits that Dr. Goates became a witness, or potential witness, in the DeBry Divorce case, and that Dr. Goates had been deposed by her counsel of record in the DeBry Divorce proceeding. (R. 187 at p. 71, lines 21-24). Ms. DeBry has, therefore, waived any privilege, to the extent one ever existed.

C. ANY STATEMENTS MADE BY DR. GOATES IN THE DEBRY DIVORCE PROCEEDING WERE ABSOLUTELY PRIVILEGED.

Ms. DeBry admits that Dr. Goates was a witness, or potential witness, in the DeBry Divorce proceeding. (R. 187 at p. 71, lines 21-24; R. 187 at p. 72, lines 1-16). Ms. DeBry had placed her mental state at issue through the filing of her affidavit seeking support, and Dr. Goates filed his affidavit during the DeBry Divorce proceeding. (R. 361; R. 284).

Under Utah law, there is an absolute privilege associated with statements made during a juridical proceeding which concern or reference the subject matter of the proceeding, and which are made by a witness to the judicial proceeding. Price v. Armour, 949 P.2d 1251 (Utah 1997) (citations omitted). The privilege acts to bar subsequent actions based upon those statements. Id. at 1258.

Ms. DeBry's claim is barred in that any statements made by Dr. Goates were absolutely privileged, as they were made in the course of a judicial proceeding.

D. MS. DEBRY HAS WAIVED ALL FURTHER ISSUES ON APPEAL.

Ms. DeBry's Issues Presented for Review, Statement of Facts, and Summary of Argument indicate that she is no longer pursuing her claims for slander per se or infliction of emotional distress against Dr. Goates. (Appellant Brief at pp. 1, 9-15).

Ms. DeBry has failed to argue that the Third District Court erred in granting summary judgment in favor of Dr. Goates on the issues of slander per se and intentional infliction of emotional distress. The Appellate Court should refuse to consider issues that are not raised with specificity in an appellant's brief. Issues not raised and briefed by the appellant are considered abandoned or waived. 5 Am. Jur. 2d Appellate Review § 557 (1995).

The Utah Supreme Court has refused to consider issues that are not raised in an appellant's brief. In the case of Armstrong Rubber Co. v. Bastian, 657 P.2d 1346 (Utah 1983), the Utah Supreme Court held that issues not argued in the appellant's brief are deemed to be abandoned. In Armstrong, the Supreme Court stated:

Defendant has not favored us with any argument in his brief on that subject, and we can only assume that he has abandoned his objection thereto.

Id. at 1348.

More recently in the case of Burns v. Summerhays, 927 P.2d 197 (Utah App. 1996), the Utah Court of Appeals refused to consider issues raised by the appellant because the appellant had failed to provide adequate legal analysis or authority in support of any of his

claims or assertions. The court stated that the appellant's brief must sufficiently comply with the briefing requirements under Utah Rules of Appellate Procedure § 24 to allow the court to understand what the particular errors being alleged were, where in the record those errors can be found, and why the alleged errors form the basis for reversal on appeal. *Id.* at 199 *citing* Demetropoulos v. Vreeken, 754 P.2d 960, 962, *cert denied* 765 P.2d 1278 (Utah 1988).

Ms. DeBry has similarly failed to brief either the slander per se or intentional infliction of emotional distress issue, include any citations to the record, or provide legal authority for her claim of error. Therefore, these claims are waived under the case law of the State of Utah.²

In the event Ms. DeBry attempts to raise any of these issues in her Reply Brief, Dr. Goates has proven that the statements were absolutely privileged under the case law of the State of Utah, and that no action for defamation or intentional infliction of emotional distress can survive. (R. 107-121). The trial court properly ruled that as a matter of law, Ms. DeBry's claims must fail.

² See also Reid v. Anderson, 211 P.2d 206 (Utah 1949); Bott v. DeLand, 922 P.2d 732 (Utah 1996); and Hamilton v. Park Dale Care Center, Inc., 904 P.2d 1110 (Utah App. 1995).

ARGUMENT

POINT I

MS. DEBRY HAS FAILED TO ESTABLISH THAT THERE WAS A DOCTOR-PATIENT RELATIONSHIP BETWEEN DR. GOATES AND MS. DEBRY

Ms. DeBry argues that her “will or opinion certainly does not control the existence of a doctor-patient relationship”, and that it is Dr. Goates’ belief as to the existence of a doctor-patient relationship with Ms. DeBry that is controlling. (Appellant Brief at p. 19). In essence, Ms. DeBry is asking this Court to create a relationship which she does not believe exists. (R. 175 at p. 25, lines 2-3; R. 180 at p. 42, lines 15-19; R. 180 at p. 43, lines 1-12; R. 182 at p. 52, lines 22-25; R. 190 at p. 83, lines 16-24; R. 201 at p. 129, lines 17-19; R. 202 at p. 130, lines 20-25; R. 202 at p. 131, lines 1-5).

In making her argument, Ms. DeBry ignores Utah law concerning the doctor-patient privilege. Utah Code Ann. § 58-60-113 states that Rule 506 of the Utah Rules of Evidence applies to the admissibility of any privileged or confidential communications involving a mental health therapist in any administrative, civil, or criminal proceeding. Rule 506(c) specifically defines who may claim the privilege.

The privilege may be claimed **by the patient**, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(Emphasis added).

The doctor-patient privilege is for the benefit of the patient. Therefore, Ms. DeBry must have been a patient in order for the privilege to apply. State v. Carter, 888 P.2d 629 (Utah 1995).

During the course of Ms. DeBry's deposition, she was asked on at least twelve separate occasions whether a doctor-patient relationship existed between her and Dr. Goates. Her answer on each and every instance was an emphatic "no". Ms. DeBry testified that she was never a patient of Dr. Goates. (R. 175 at p. 25, lines 2-3; R. 179 at p. 38, lines 6-13; R. 179 at p. 41, lines 3-8; R. 180 at p. 42, lines 15-19; R. 180 at p. 43, lines 1-12; R. 182 at p. 52, lines 22-25; R. 190 at p. 83, lines 16-24; R. 192 at p. 91, lines 11-16; R. 201 at p. 129, lines 17-19; R. 202 at p. 130, lines 20-25; R. 202 at p. 131, lines 1-5). During questioning **by her own counsel**, Ms. DeBry testified as follows:

Q. Did you yourself see Dr. Goates as a patient regarding your mental state?

A. No. . . .

Q. Did he counsel you as to any mental disorder that you yourself might have suffered from?

A. No.

Q. Did you seek this kind of advice from Dr. Goates?

A. No.

(R. 201 at p. 129, lines 17-19; R. 202 at p. 130, line 25; R. 202 at p. 131, lines 1-5).

In support of her position that **her** belief as to a doctor-patient relationship is irrelevant, Ms. DeBry cites to the Kansas case of State v. Pitchford, 697 P.2d 896 (Kan. App. 1985). (Appellant Brief at p. 16-17). Pitchford involved a drunk driver who had been treated for

injuries sustained in an automobile accident, even though he objected to the treatment. The State then attempted to question the treating physician at a subsequent trial.

Mr. Pitchford argued that he was able to assert the doctor-patient privilege because, in hind sight, he was in fact a patient of the doctor who treated him. It was the **State** that argued that no doctor-patient privilege applied because Mr. Pitchford had attempted to forego medical treatment. Id. at 897. In denying the State's argument, the Kansas court stated that **the patient is the one with the privilege**. Id. at 899. Unlike Ms. DeBry, Mr. Pitchford never denied the existence of the doctor-patient relationship, but merely resisted the initial treatment.

Ms. DeBry **vehemently denied** that Dr. Goates was ever her doctor. She cannot now bring a cause of action based upon a doctor-patient relationship which, by her own admission, never existed. (R. 175 at p. 25, lines 2-3; R. 180 at p. 42, lines 15-19; R. 180 at p. 43, lines 1-12; R. 182 at p. 52, lines 22-25; R. 190 at p. 83, lines 16-24; R. 201 at p. 129, lines 17-19; R. 202 at p. 130, lines 20-25; R. 202 at p. 131, lines 1-5). As in Pitchford, the Utah Supreme Court has stated that the privilege belongs to the "client" or patient, not the doctor. State v. Carter, 888 P.2d 629 (Utah 1995). Ms. DeBry admits that no such relationship existed, therefore, no privilege existed.

The sole Utah case cited by Ms. DeBry in support of her position concerning the existence of a doctor-patient privilege is Berry v. Moench, 331 P.2d 814. Berry not only pre-dates the Utah Rules of Evidence, but concerned a conditional common law privilege which permits a physician to make disclosures of confidential information reasonably necessary to protect substantial interests of third persons. Id. at 817. The issue before the Berry court

concerned whether there was a substantial interest which would allow a doctor to convey confidential information about a patient. Id. at 818. Unlike the matter before this Court, there was no dispute that a doctor-patient relationship existed, not that there had been a release of confidential information concerning Mr. Berry, by his physician, to a third party, his prospective wife. Id. at 816.

Ms. DeBry has gone to great lengths in an attempt to create an issue of fact. At the trial court level, Ms. DeBry prepared a Motion to Strike her own deposition after Dr. Goates filed his Motion for Summary Judgment. Ms. DeBry claimed that she had not read her deposition nor made changes to her testimony. (R. 308-309).

Ms. DeBry is employing a similar tactic before this Court by claiming that she was on medication during her deposition, and therefore her testimony should be ignored. (Appellant Brief at p. 18). As with Ms. DeBry's Motion to Strike, even if assumed true, Ms. DeBry was given ample opportunity to "remember" that Dr. Goates was, in fact, her physician, and even now makes no attempt to argue that Dr. Goates acted as her physician at any time. Further, this "fact" was not raised before the Third District Court and is not properly before this Court on appeal. The Court should ignore such blatant attempts to circumvent her own sworn testimony.

Ms. DeBry also improperly cites to confidential evidence presented at the Prelitigation Hearing. (Appellant Brief at p. 19). Utah Code Ann. § 78-14-15(1) states that such citations to a prelitigation hearing is strictly prohibited.

Evidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction.

(Emphasis added).

Ms. DeBry's citations to the Panel Opinion are clearly inappropriate, and should be ignored by this Court.

POINT II

MS. DEBRY WAIVED HER PRIVILEGE, IF ONE EVER EXISTED

As argued *supra*, Ms. DeBry has admitted that her mental or emotional condition was an element of a claim or defense in the DeBry Divorce case. Ms. DeBry's factual summary is incorrect, as is her reading of Rule 506(d)(1).

In the course of the DeBry Divorce, Ms. DeBry filed a *Motion for Temporary Restraining Order and Order to Show Cause*, which was supported by an affidavit signed by Ms. DeBry. (R. 217-223). Ms. DeBry's affidavit sought \$4,500.00 per month for medical, dental, and **counseling expenses**. (R. 361). Ms. DeBry admits that she filed this affidavit and that she was seeking monetary support in order to pay for her mental health counseling. (R. 180 at p. 45, lines 7-25; R. 181 at pp. 46-48; R. 182 at p. 53, lines 1-9). Ms. DeBry testified at her deposition as follows:

Q. Your mental state then became an issue for the parties and for the court for a period of time; isn't that correct?

A. Yes.

Q. And it remained so until the latter part of that year, at which time agreement was made that your mental status wouldn't become an issue in the overall divorce proceedings. That's a true statement, isn't it?

A. I believe so.

Q. But during that period of time, your own doctors were consulted as to whether or not you did have some kind of a personality disorder or some kind of an emotional disturbance that would require an independent medical exam; is that correct?

A. If I understand what you're saying, it is correct.

(R. 182 at p. 53, lines 1-16).

Rule 506(d) of the Utah Rules of Evidence states:

No privilege exists under this rule:

(1) **Condition as element of claim or defense.** As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense; . . .

(Emphasis added).

Rule 506 of the Utah Rules of Evidence does not condition the waiver of a privilege upon the patient (*i.e.*, Ms. DeBry) being the party that places her mental state or emotional condition at issue in the court proceeding. Ms. DeBry's affidavit placed her mental condition at issue. (R. 359-366).

Ms. DeBry cites the case of Styers v. Superior Court In and For County of Mohave, 779 P.2d 352 (Ariz. App. 1989), to support her position that she did not waive her privilege by placing her mental state at issue. (Appellant Brief at p. 23-25). While the Styers case involved a divorce action, the similarities end there.

The **sole** issue before the court in Styers involved whether a wife could subpoena and receive mental health records of her soon-to-be ex-husband concerning mental health treatments he received prior to their marriage. Id. at 354 *n.* 2. There was no debate over support payments to be made by either party for mental health counseling. Further, the approximately \$20,000.00 in post-marital mental health treatments were agreed-to by the wife, and the records of those treatments were never being requested. Id. at 353. However, the Arizona court stated that the **privilege surrounding the pre-marital records would be waived if the underlying condition was placed at issue.** Id. at 354 (emphasis added).

In the case of Middleton v. Beckett, 960 P.2d 1213 (Colo. App. 1998), which has been cited by Ms. DeBry, the court stated that the **privilege asserted by the patient is personal to the patient.** Id. at 1216. However, the court further stated that when a patient initiates a civil action or injects the issue of their physical or mental condition into the case, the patient waives his or her physician/patient privilege with respect to any condition raised. Id. at 1217.

Ms. DeBry argues that Mr. DeBry had placed her mental state at issue prior to the filing of her affidavit seeking support for mental health counseling, which placed her mental state at issue. (Appellant Brief at pp. 24-25). Ms. DeBry seems to argue that somehow an issue of fact is created thereby, as to whether or not she waived her privilege. This position is contrary

to Rule 506 of the Utah Rules of Evidence, is not supported by any case law, and should be ignored by this Court.

POINT III

DR. GOATES' STATEMENTS WERE MADE IN THE COURSE OF A COURT PROCEEDING, AND WERE ABSOLUTELY PRIVILEGED

Any statement made by Dr. Goates was absolutely privileged under Utah law. The Utah Supreme Court recently addressed the issue of absolute privilege in the case of Price v. Armour, 949 P.2d 1251 (Utah 1997).

The court in Price reiterated the elements of absolute privilege as stated in Allen v. Orteza, 802 P.2d 1307 (Utah 1990), which must be satisfied in order for an absolute privilege to exist:

1) the statement must have been made during or in the course of a judicial proceeding; 2) the statement must include some reference to the subject matter of the proceeding; and 3) the statement must have been made by someone acting in the capacity of a judge, juror, witness, litigant, or counsel.

Price at 1256 *citing* Allen at 1311, *quoting* Restatement (Second) of Torts § 588 (1977).

“The whole purpose of the judicial privilege is to ensure free and open expression by all participants in judicial proceedings by **alleviating any and all fear that participation will subject them to the risk of subsequent actions.**” Id. at 1258 (emphasis added).

Ms. DeBry has failed to cite a single case which grants exceptions to the absolute privilege. Dr. Goates' Affidavit was made in the course of the DeBry Divorce proceeding, his statements were relevant to the issue of the need for mental health counseling or excessive

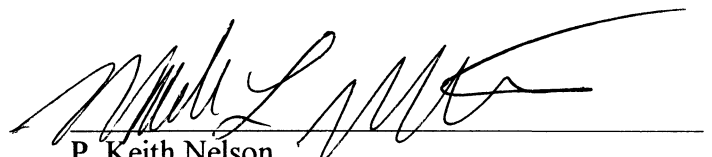
alimony, and Dr. Goates was acting as a witness in the DeBry Divorce proceeding. (R. 187 at p. 71, lines 20-24). Further, Dr. Goates was deposed by Ms. DeBry's divorce counsel specifically concerning his affidavit. (R. 187, p. 71, lines 21-24). Ms. DeBry, therefore, made Dr. Goates a material witness regardless of any doctor-patient privilege, and any statement made by Dr. Goates was absolutely privileged, and no legal proceeding may be brought against him for his participation in the DeBry Divorce matter. **"Participation in judicial proceedings will be inhibited unless all claims arising from the same statements are prohibited. Id."** (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should deny Ms. DeBry's appeal and leave undisturbed the ruling of the Third District Court below.

DATED this 17th day of June, 1999.

RICHARDS, BRANDT, MILLER & NELSON

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P. Keith Nelson

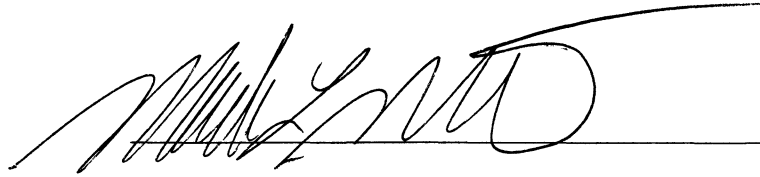
Mark L. McCarty

Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 17th day of June, 1999, to the following:

Bel-Ami de Montreux, Esq.
MONTREUX FRERES, P.C.
180 South 300 West, Suite 208
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Bel-Ami de Montreux", is written over a horizontal line.