

1998

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

Utah Court of Appeals

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BRIEF

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DOCKETING

IN THE UTAH COURT OF APPEALS

JANICE L. DEBRY,

PLAINTIFF/APPELLANT,

VS.

DELBERT T. GOATES, M.D.

DEFENDANT/APPELLEE.

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CASE No. 981420

PRIORITY No. 15

OPENING BRIEF OF APPELLANT

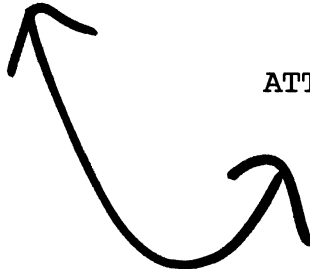
This is an appeal from the trial court's order granting the defendant/appellee's motion for summary judgment, entered in the Third District Court of Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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FILED

MAY 5 - 1999

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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	:	
PLAINTIFF/APPELLANT,	:	
	:	CASE No. 981420
VS.	:	
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	:	PRIOTY No. 15
DELBERT T. GOATES, M.D.	:	
	:	
DEFENDANT/APPELLEE.	:	

OPENING BRIEF OF APPELLANT

This is an appeal from the trial court's order granting the defendant/appellee's motion for summary judgment, entered in the Third District Court of Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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IN THE UTAH COURT OF APPEALS

JANICE L. DEBRY,	:	
	:	
PLAINTIFF/APPELLANT,	:	
	:	CASE No. 981420
VS.	:	
	:	
	:	PRIOTY No. 15
DELBERT T. GOATES, M.D.	:	
	:	
DEFENDANT/APPELLEE.	:	

JURISDICTION

Utah Code Ann. §78-2a-3(2)(j) provides this Court's jurisdiction over this appeal transferred to this Court by the Utah Supreme Court.

**ISSUES PRESENTED FOR REVIEW, STANDARDS OF APPELLATE REVIEW,
PRESERVATION OF THE ISSUES**

1. Did the trial court err in granting summary judgment on the basis that Debry failed to establish a doctor-patient relationship?

The granting of summary judgment presents questions of law, to be reviewed without deference for correctness. See e.g. Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1111-12 (Utah 1991).

This issue was addressed in Ms. Debry's memorandum opposing summary judgment (e.g. R. 237-238).

2. Did the trial court err in granting summary judgment on the basis that Ms. Debry waived the doctor-patient privilege?

The granting of summary judgment presents questions of law, to be reviewed without deference for correctness. See e.g. Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1111-12 (Utah 1991).

This issue was addressed in Ms. Debry's memorandum opposing summary judgment (e.g. R. 239-242).

STATUTES AND RULES

The following statutes and rules pertain:

Utah Code Ann. §58-60-102

In addition to the definitions in Section 58-1-102, as used in this chapter:

(1) "Client" or "patient" means an individual who consults or is examined or interviewed by a mental health therapist acting in his professional capacity.

(2) "Confidential communication" means information, including information obtained by the mental health therapist's examination of the client or patient, which is:

(a) (i) transmitted between the client or patient and a mental health therapist in the course of that relationship; or

(ii) transmitted among the client or patient, the mental health therapist, and individuals who are participating in the diagnosis or treatment under the direction of the mental health therapist, including members of the client's or patient's family; and

(b) made in confidence, for the diagnosis or treatment of the client or patient by the mental health therapist, and by a means not intended to be disclosed to third persons other than those individuals:

(i) present to further the interest of the client or patient in the consultation, examination, or interview;

(ii) reasonably necessary for the transmission of the communications; or

(iii) participating in the diagnosis and treatment of the client or patient under the direction of the mental health therapist.

(3) "Hypnosis" means, regarding individuals exempted from licensure under this chapter, a process by which one individual induces or assists another individual into a hypnotic state without the use of drugs or other substances and for the purpose of increasing motivation or to assist the individual to alter lifestyles or habits.

(4) "Individual" means a natural person.

(5) "Mental health therapist" means an individual licensed under this title as a:

(a) physician and surgeon, or osteopathic physician engaged in the practice of mental health therapy;

(b) registered psychiatric mental health nurse specialist;

(c) psychologist qualified to engage in the practice of mental health therapy;

(d) clinical social worker;

(e) certified social worker;

(f) marriage and family therapist; or

(g) professional counselor.

(6) "Mental illness" means a mental or emotional condition defined in an approved diagnostic and statistical manual for mental disorders generally recognized in the professions of mental health therapy listed under Subsection (5).

(7) "Practice of mental health therapy" means treatment or prevention of mental illness, including:

(a) conducting a professional evaluation of an individual's condition of mental health, mental illness, or emotional disorder consistent with standards generally recognized in the professions of mental health therapy listed under Subsection (5);

(b) establishing a diagnosis in accordance with established written standards generally recognized in the professions of mental health therapy listed under Subsection (5);

(c) prescribing a plan for the prevention or treatment of a condition of mental illness or emotional disorder; and

(d) engaging in the conduct of professional intervention, including psychotherapy by the application of established methods and procedures generally recognized in the professions of mental health therapy listed under Subsection (5).

(8) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-60-109.

(9) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-60-110, and may be further defined by division rule.

Utah Code Ann. §58-60-113

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

Utah Code Ann. §58-60-114

(1) A mental health therapist under this chapter may not disclose any confidential communication with a client or patient without the express consent of:

(a) the client or patient;

(b) the parent or legal guardian of a minor client or patient; or

(c) the authorized agent of a client or patient.

(2) A mental health therapist under this chapter is not subject to Subsection (1) if:

(a) he is permitted or required by state or federal law, rule, regulation, or order to report or disclose any confidential communication, including:

(i) reporting under Title 62A, Chapter 4a, Part 4, Child Abuse or Neglect Reporting Requirements;

(ii) reporting under Title 62A, Chapter 3, Part 3, Abuse, Neglect, or Exploitation of Disabled Adult;

(iii) reporting under Title 78, Chapter 14a, Limitation of Therapist's Duty to Warn;

(iv) reporting of a communicable disease as required under Section 26-6-6;

(b) the disclosure is part of an administrative, civil, or criminal proceeding and is made under an exemption from evidentiary privilege under Rule 506, Utah Rules of Evidence; or

(c) the disclosure is made under a generally recognized professional or ethical standard that authorizes or requires the disclosure.

Utah Code Ann. §78-24-8

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) (a) Neither a wife nor a husband may either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage.

(b) This exception does not apply:

(i) to a civil action or proceeding by one spouse against the other;

(ii) to a criminal action or proceeding for a crime committed by one spouse against the other;

(iii) to the crime of deserting or neglecting to support a spouse or child;

(iv) to any civil or criminal proceeding for abuse or neglect committed against the child of either spouse; or

(v) if otherwise specifically provided by law.

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in his capacity as an employee.

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

(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.

(5) A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

(6) A sexual assault counselor as defined in Section 78-3c-3 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication as defined in Section 78-3c-3 made by the victim.

Utah Rule of Civil Procedure 35

(a) **Order for examination.** When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of examining physician.**

(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

(c) Right of party examined to other medical reports. At the time of making an order to submit to an examination under Subdivision (a) of this rule, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial, or may make such other order as is authorized under Rule 37.

Utah Rule of Civil Procedure 56

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah Rule of Evidence 506

(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 addition.

(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.

STATEMENT OF THE CASE
NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

Ms. Debry filed suit against Delbert E. Goates, M.D., in a complaint alleging medical malpractice as a result of an affidavit Goates wrote, which was filed by Ms. Debry's former husband in Ms. Debry's divorce case, Janice L. Debry v. Robert J. Debry, Civil No. 94401038DA (R. 69-80) (R. 1-3).¹

After Goates filed his answer to the complaint (R. 7-9), Debry obtained leave of the trial court and filed an amended complaint alleging medical malpractice, slander per se, and intentional infliction of severe emotional distress, stemming from the issuance of the affidavit (R. 21-27, 49). Goates then filed an answer to the amended complaint (R. 50-52).

Goates moved for summary judgment (R. 107-223, 226-227), Debry opposed the motion (R. 230-307), and Goates filed a reply memorandum in support (R. 331-366).

Judge Wilkinson heard the motion and granted it in an order dated and filed on June 22, 1998 (R. 544-547).

Debry filed a timely notice of appeal on July 20, 1998 (R. 550).

STATEMENT OF FACTS

During the course of a divorce between Ms. Debry and her former husband, Robert Debry, which was being heard by Judge Homer

¹ The record of the divorce case, which is also on appeal, in case number 960571-CA, has been supplemented to the record in this case. Unless expressly noted that reference is being made to the divorce case, citations to the record are to the district court pleadings files in this case.

F. Wilkinson, the defendant in this case, Delbert T. Goates, M.D., signed an affidavit on behalf of Mr. DeBry, indicating that Ms. DeBry was mentally ill, and recommending that excessive alimony might exacerbate her conditions. The affidavit stated,

My name is Delbert T. Goates. I give the following testimony under oath.

1. I am an adult and child psychiatrist.

2. I have had numerous consultations with Jan DeBry from June 17, 1990 to the present.

3. In addition, I have had consultations with her current husband, her first husband and all of her children.

4. In my opinion, Mrs. DeBry experiences the traits of a narcissistic personality. Features of this condition include pathological exaggeration, interpersonal exploitation, and feelings or fantasies of grandiosity. However, persons with this disorder also demonstrate a charming and even charismatic exterior.

5. In my opinion, this has been a lifelong condition which was acquired prior to her late adolescence.

6. I am aware that Mrs. DeBry has been in intensive psychotherapy regarding her depression (a common concomitant condition) for several years with several therapists. Further evaluation addressing her personality traits is certainly warranted as an impediment to her optimal function and the treatment of her depression.[sic]

7. Reasonable alimony will sustain Mrs. DeBry's needs. There can be a psychological or therapeutic component to alimony. Excessive alimony might feed Mrs. DeBry's grandiose fantasies and exploitive tendencies for enhanced self-worth and delusions of grandeur.

8. Mrs. DeBry's current therapists might be able to use these Court proceedings for therapeutic purposes. Therefore, it is recommended that the Court work with Mrs. DeBry's current therapists on the issue of whether, and when, and how Mrs. DeBry should be confronted with my affidavit, herein.

(R. 76-78).² (Addendum I, Goates' Affidavit).

Mr. Debry filed the Goates affidavit on May 26, 1994, in conjunction with his motion for a mental examination of Janice Debry, which was filed on May 27, 1994 (R. 122-127 in this case, R. 26-28, 48-55 in the divorce file). The memorandum supporting the motion for a mental examination of Janice Debry provided,

Rule 35 of the Utah Rules of Civil Procedure provides that:

(a) Order for examination. When the mental . . . condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party or person to submit to a . . . mental examination by a suitably licensed or certified examiner. . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

In this case, the mental condition of Janice Debry is at issue for three reasons:

First, plaintiff Janice DeBry is spending \$3000-\$5000 per month for psychotherapy. Plaintiff will undoubtedly seek a support award which includes substantial sums for psychotherapy. Therefore, defendant should be entitled to a mental examination to determine whether the metal [sic] illness predated the marriage, and how much continuing therapy is necessary and appropriate.

Second, this Court will be called upon to determine an appropriate amount of temporary support and alimony.

² Mr. Debry attempted to persuade at least one other doctor to diagnose Ms. Debry with narcissistic personality disorder, and filed a complaint against the doctor with the Utah Division of Occupational Licensing when the doctor refused to do so. The Division later dismissed the complaint, finding it to be without merit (296-299).

However, the Affidavit of Dr. Delbert Goates, filed herewith, shows that plaintiff suffers from grandiose delusions. Therefore, plaintiff's demands for support may be artificially inflated because of plaintiff's alleged mental illness.

Third, defendant seeks the appointment of a conservator for plaintiff. Defendant should be entitled to a mental examination to lay the predicate for the conservatorship hearing. [at this juncture footnote 2 appears, the text of which is as follows: There are several reasons to appoint a conservator; not the least of which, is that Mrs. DeBry's mental illness will make it impossible for her to enter into any reasonable settlement negotiations. If the case is to be settled, it would have to be through a conservator.]

(R. 122-123).³

On December 20, 1994, Judge Wilkinson denied the motion for an independent medical examination in the divorce case, with the proviso that if Ms. DeBry claimed expenses for counseling and therapy, Mr. DeBry was entitled to an independent psychiatric examination (R. 256-257).

³ Mr. DeBry simultaneously filed an affidavit indicating,

My name is Robert J. DeBry. I give the following testimony under oath:

1. I have been advised by competent mental health professionals that my wife suffers from a sever [sic] narcissistic personality disorder (also known as a mental illness).

2. I have made extensive inquiry to determine the best facility in the United States to diagnose and treat this disorder. The Menninger Clinic in Topeka, Kansas was on top of everyone's list.

3. I asked my wife if she would voluntarily go in for a one week evaluation. She agreed to go if I would give her extra money to pay some outstanding bills she had incurred.

4. Based upon her promise, I gave her approximately \$18,000 in extra support payments.

5. Mrs. DeBry spent the money, and then canceled two days prior to the scheduled evaluation.

6. In the meantime, Mrs. DeBry is spending \$3,000-\$5,000 per month for psychotherapy. I question the value and effectiveness of that therapy.

(R. 305-06).

Ms. Debry later filed this suit, alleging that in issuing the affidavit without Ms. Debry's prior approval and without invoking Ms. Debry's doctor/patient privilege, Goates violated Ms. Debry's doctor/patient privilege and committed medical malpractice (R. 1-4). In her amended complaint, Ms. Debry added an allegation that the issuance of the affidavit constituted slander per se, arguing that the contents of the Goates affidavit were false and intended to injure Ms. Debry and her reputation (R. 24-25). She also added an allegation that the issuance of the affidavit constituted intentional infliction of severe emotional distress (R. 25-26).

In his motion for summary judgment, Goates argued that there was no doctor-patient relationship between him and Ms. Debry, and thus he owed and breached no duty to her in issuing the affidavit (R. 110-111), and that if there was a doctor-patient relationship, Ms. Debry waived the privilege when Ms. Debry placed her medical condition at issue in the Debry divorce (R. 112-113). Goates also argued that his affidavit did not constitute slander per se (R. 114-115), that he was absolutely privileged by the judicial privilege (R. 115-117), that his conduct was insufficiently outrageous to sustain a claim of intentional infliction of severe emotional distress (R. 117-119), and that Debry had not established proximate cause between her injuries and the Goates affidavit (R. 119-120).

In reply, Ms. Debry argued that the evidence established that there was a doctor-patient relationship (R. 237-238), and that Ms. Debry did not waive the privilege (R. 238-242). Ms. Debry also argued that the affidavit did constitute slander per se (R. 243-

244), that Goates was not entitled to claim the judicial privilege (R. 242-243), that Goates' conduct was sufficiently outrageous to sustain a claim of intentional infliction of intentional infliction of severe emotional distress (R. 244-245), and that Debry had established that the issuance of the Goates affidavit was the proximate cause of her injuries (R. 245-246).

In the minute entry granting summary judgment, Judge Wilkinson stated, "The court finds the privilege belongs to the plaintiff. The court finds there was not a doctor-patient relationship. Defendant's motion for summary judgment is granted." (R. 544). [Addendum II, Court's Minute Entry]. The order prepared by counsel for Goates and signed by Judge Wilkinson states, "Defendant's Motion for Summary Judgment is granted and plaintiff's Complaint and each and every cause of action thereof shall be and is hereby dismissed with prejudice and on the merits on the basis that plaintiff has not established that a physician/patient relationship existed between her and Dr. Goates, and that even if a physician/patient relationship did exist, that relationship was waived at the time Dr. Goates submitted his affidavit in the divorce case." (R. 545-546) [Addendum III, Court's Order].

SUMMARY OF ARGUMENT

Summary judgment was entered on two basis: there was no doctor-patient relationship between Goates and Debry, and Debry waived the doctor-patient privilege prior to Goates' issuance of the affidavit.

Review of the governing law demonstrates that there was indeed a doctor-patient relationship between Goates and Debry, and that Debry did not waive her doctor-patient privilege prior to Goates' issuance of the affidavit.

To the extent that the facts underlying these two issues were in dispute, the trial court should have resolved them in Ms. Debry's favor in ruling on the summary judgment motion.

Because the trial court erred in granting summary judgment, this Court should reverse the trial court's order granting summary judgment and remand this case for a trial.

ARGUMENT

I. THERE WAS A DOCTOR-PATIENT RELATIONSHIP BETWEEN GOATES AND DEBRY.

For purposes of confidential communications between a doctor and patient, Utah Rule of Evidence 506(a)(1)⁴ defines a patient as "a person who consults or is examined or interviewed by a physician or mental health therapist." 506(a)(2) defines physician as "a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state." And 506(a)(3) defines "mental health therapist" as "a person who is or is reasonably believed by the patient to be licensed or certified

⁴ In the trial court, Goates at times argued that the question of the doctor-patient privilege was governed by Utah Code Ann. §78-24-8 (e.g. R. 111). The Advisory committee Note to Rule 506 indicates that the rule "is intended to supersede Utah Code Ann. §78-24-8(4)". See also Utah Code Ann. §58-60-113 ("Evidentiary privilege for mental health therapists regarding admissibility of any confidential communication in administrative, civil, or criminal proceedings is in accordance with Rule 506 of the Utah Rules of Evidence.").

in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered person is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction." Similarly, Utah Code Ann. §58-60-102 (1) and (5) define a patient or client as "an individual who consults or is examined or interviewed by a mental health therapist acting in his professional capacity[,]" and include within the definition of mental health therapist physicians "engaged in the practice of mental health therapy."

While there is a dearth of Utah case law on this particular point, decisions from other courts demonstrate that the existence of a doctor-patient relationship turns on a number of factors, including whether the doctor has performed tests, prescribed medications, and undertaken medical responsibility for the patient. See e.g. Middleton v. Beckett, 960 P.2d 1213, 1216-17 (Colo.App. 1998) (no doctor-patient relationship existed between psychiatrist and motorist he examined, where psychiatrist performed no tests, prescribed no medication, and had undertaken no responsibility for motorist's medical care, and where motorist placed his condition in issue in medical malpractice action).

The patient's will or opinion certainly does not control the existence of a doctor-patient relationship, for such a relationship may exist without the patient's consciousness or consent and even over her objection, where a physician attends the patient for the purposes of providing professional aid. See e.g. State v. Pitchford, 697 P.2d 896, 900 (Kan. App. 1985). In

Pitchford, the court rejected the government's argument that the defendant had no doctor-patient relationship because he did not consult with or voluntarily submit to the doctor for medical treatment but was combative and resisted medical treatment when the police brought him to the hospital. 697 P.2d at 900. The court explained persuasively why the patient's attitude toward medical treatment does not control, stating,

The State's literal reading [of the statute governing privilege], however, would render the physician-patient privilege inapplicable to many persons needing medical treatment the most. Persons brought to a hospital unconscious, in severe shock, or otherwise unable to consult or submit to a doctor would not be "patients" under the State's interpretation. Neither would persons involuntarily committed to various mental health institutions where the sole object is involuntary treatment. Such an interpretation is unreasonable and is not mandated by the statute. "The rule of privilege may apply where a physician attends a person for the purpose of giving professional aid even though the person attended is unconscious or unaware of his presence, does not consent, or actually objects to being treated." 97 C.J.S., Witnesses §294(e)[.]

Pitchford at 900 (citations omitted).

In ruling that there was no doctor-patient relationship in the instant matter, Judge Wilkinson was likely relying on the deposition of Ms. Debry.⁵

⁵ Out of an abundance of caution, Ms. Debry marshals the evidence in support of the trial court's ruling, and demonstrates herein that the trial court was incorrect as a matter of law.

Ms. Debry testified that she was taking Synthroid, Paxil, Klonopin, and Trazodone at the time of her deposition, and that this medication might cloud her memory, that it would not influence her judgment, and that she did not know if it impaired her ability to answer questions (R. 170, p. 5, R. 171 p.6, R. 178 pp. 34-35).

In her deposition, Ms. Debry testified that Goates was appointed during her first divorce to assess the proper custodial placement of her children (R. 179 pp. 38-39). She indicated that she and Mr. Debry went to Goates to insure that Ms. Debry would get custody of her children from the former marriage, and she maintained that she did not like Goates and never saw Goates for her own personal needs (R. 179, pp. 40-41, R. 180 pp. 42-43). She testified that he never discussed his diagnosis of her supposedly narcissistic personality disorder with her, and she indicated that she was never his patient and that he did not diagnose her (R. 192 pp. 52-53). She testified that she never went to see him alone, without her children (R. 190 p. 82). She maintained that he was never her doctor, but was the doctor for her children, who recommended that she be awarded custody (R. 190 p. 83). She testified that she was never his client and he was never her counselor (R. 192 page 90). She maintained that she did not see him as a patient regarding her mental state, but did acknowledge that he did perform psychological testing of her and her first husband in assessing the custody issue in their divorce (R. 201, page 129). She testified that he did not give her any other

tests, did not counsel her about a mental disorder, and that she did not seek this type of advice (R. 202, p. 131).

In contrast, Debry conceded that he prescribed medication for her (R. 177, pp. 31-32, R. 179, p. 40), and a notarized pharmacist's list indicated that Goates had prescribed Desyrel, Prozac, Valium, and Lopressor to Ms. Debry (R. 294-95).

Under the rationale explained in Pitchford, Judge Wilkinson should not have rested the summary judgment order on Ms. Debry's subjective opinion about whether or not there was a doctor-patient relationship. This is particularly so, given the evidence establishing the existence of a doctor-patient relationship.

Goates' affidavit, which is the basis for the suit, essentially represents that Goates was Debry's doctor and that she was his patient, indicating that she had consulted with him numerous times, and including his diagnoses (R. 284-286).

During the discovery process, Goates conceded that he was Debry's doctor. In response to Ms. Debry's request for admissions, he admitted that he had a doctor-patient relationship with Ms. Debry, that he counseled Ms. Debry, and that he had written prescriptions for Ms. Debry (R. 287-288).

Goates told Dr. Jack Jenson that he had a doctor-patient relationship with Debry (R. 297).

The panel opinion from the pre-litigation hearing recognized that Goates had a doctor-patient relationship with Debry and violated her privilege when he issued the affidavit (R. 291-93).

In sum, there was ample evidence of a doctor-patient relationship. See Utah Rule of Evidence 506; Utah Code Ann. §58-60-102; Middleton and Pitchford, *supra*.

In ruling that there was no doctor-patient privilege, the trial court failed to observe the foregoing legal standards defining the doctor-patient relationship.

Judge Wilkinson also failed to recognize that while questions of privilege are normally questions of law for Courts to determine, when the facts underlying the privilege are in dispute, those facts are to be submitted to the jury. See Berry v. Moench, 331 P.2d 814, 818 (Utah 1958)(in discussing the common interest privilege in a case wherein a physician wrote a letter discussing his patient's psychiatric history, the court indicated, "If the facts upon which the privilege would rest are not in dispute, whether the privilege exists is a question for the court to determine. If they are in dispute the jury must determine the facts and upon them the court determines the question of privilege.")(footnote citing to the Restatement of Torts omitted).

Finally, the trial court overlooked the cardinal rules governing the adjudication of summary judgment motions -- that summary judgment is to be granted only when there are no material factual disputes, and that all facts and inferences are to be drawn in favor of the party opposing summary judgment -- Ms. Debry in this case. See e.g. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982)(in summary judgment, all facts and inferences are to be drawn in favor of party opposing summary judgment).

At a minimum, the trial court erred in resolving the facts in favor of Goates and in granting summary judgment where the material facts underlying the existence of the doctor-patient relationship were in dispute. See Berry and Bowen, supra.

This Court should therefore reverse the portion of Judge Wilkinson's ruling granting summary judgment on the basis that there was no doctor-patient relationship.

II. MS. DEBRY DID NOT WAIVE THE DOCTOR-PATIENT PRIVILEGE.

As noted above, in the minute entry granting summary judgment, Judge Wilkinson stated, "The court finds the privilege belongs to the plaintiff. The court finds there was not a doctor-patient relationship. Defendant's motion for summary judgment is granted." (R. 544). The order prepared by counsel for Goates and signed by Judge Wilkinson states, "Defendant's Motion for Summary Judgment is granted and plaintiff's Complaint and each and every cause of action thereof shall be and is hereby dismissed with prejudice and on the merits on the basis that plaintiff has not established that a physician/patient relationship existed between her and Dr. Goates, and that even if a physician/patient relationship did exist, that relationship was waived at the time Dr. Goates submitted his affidavit in the divorce case." (R. 545-546).

The divorce case records in Janice L. Debry v. Robert J. Debry, district court case number 944901038, have been supplemented to the record for this appeal.⁶ These records

⁶ The divorce case is also being appealed, in case number 960571-CA.

demonstrate that Ms. Debry had not waived the privilege at the time that the Goates affidavit was filed.

Ms. Debry's original divorce complaint did not raise her mental health as a claim or defense (R. 248-253; R. 1-6 in the divorce case).

Mr. Debry's counterclaim did attack Ms. Debry's mental health, indicating,

13. Plaintiff suffers from a severe personality disorder, which is a mental illness, which mental illness predates the marriage between the plaintiff and the defendant. The mental illness remains intractable and persistent, despite extensive therapy. The mental illness has rendered the plaintiff incapable of handling funds and monies. Therefore, a conservator should be appointed for and on behalf of the plaintiff to manage her financial affairs and to ensure that any sums of money that are paid by defendant are properly accounted for.

(R. 15 in divorce case). This counterclaim was filed on March 29, 1994 (R. 11 in divorce case).

Ms. Debry denied paragraph 13 of the counterclaim in her reply filed on April 7, 1994 (R. 18-19 in divorce case).

Mr. Debry then filed the Goates affidavit on May 26, 1994 (R. 24-26 in the divorce case), in conjunction with his motion for a mental examination under Utah Rule of Civil Procedure 35, which was filed on May 27, 1994 (R. 48-55 in the divorce case).

Under any conceivable Utah statute or rule, there was no waiver of privilege by Ms. Debry at the time that the Goates affidavit was filed, because at the time of the filing of the affidavit, Ms. Debry had not raised her mental health as an

element or factor in any claim or defense. See Utah Rule of Evidence 506(d),⁷ Utah Code Ann. §58-60-114(1) and (2)(b),⁸ Utah Code Ann. §78-24-8(4),⁹ Rule of Civil Procedure 35.¹⁰

Reference to case law confirms that there was no waiver on the facts of this case. Compare Styers v. Superior Court In and

⁷ That rule provides, in relevant part,

(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[.]

⁸ That statute provides, in relevant part,

(1) A mental health therapist under this chapter may not disclose any confidential communication with a client or patient without the express consent of:

- (a) the client or patient;
- (b) the parent or legal guardian of a minor client or patient; or
- (c) the authorized agent of a client or patient.

(2) A mental health therapist under this chapter is not subject to Subsection (1) if:

....

(b) the disclosure is part of an administrative, civil, or criminal proceeding and is made under an exemption from evidentiary privilege under Rule 506, Utah Rules of Evidence[.]

⁹ That statute provides, in relevant part,

(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.

¹⁰ This rule governed Mr. Debry's original motion for a mental evaluation of Ms. Debry, and states in relevant part,

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

For County of Mohave, 779 P.2d 352 (Ariz.App. 1989)(in divorce proceedings wherein husband sought distribution of debt for his psychiatric counseling during the marriage, there was no waiver of privilege concerning premarital psychiatric treatment); with Clawson v. Walgreen Drug, 162 P.2d 759, 764 (Utah 1945)("a patient cannot testify concerning what was said and done by his physician in the treatment of the injuries which are the subject of the litigation and then close the physician's mouth by claiming privilege.").¹¹

The trial court's ruling that Ms. Debry waived the doctor-patient privilege was likely based on Ms. Debry's deposition testimony.¹²

She testified during the deposition that it was in response to her effort to get \$4,500 a month for medical, dental and counseling that Mr. Debry filed the Goates' affidavit (R. 181, pp. 48-49). Counsel for Ms. Debry clarified that the Goates' affidavit was filed four days prior to any request by Ms. Debry for support (R. 192 p. 50). Ms. Debry again testified that it was in response to her request for support that Mr. Debry moved to have her examined (R. 182, p. 50).¹³

¹¹ There is not a great deal of Utah case law on the question of waiver of the privilege. However, the plain language of the statutes and rules is dispositive.

¹² Out of an abundance of caution, Ms. Debry marshals the evidence in support of the trial court's ruling, and demonstrates herein that the trial court was incorrect as a matter of law.

¹³ Ms. Debry testified that she was taking Synthroid, Paxil, Klonopin, and Trazodone at the time of her deposition, and that this medication might cloud her memory, that it would not influence her judgment, and that she did not know if it impaired her ability to answer questions (R. 170, p. 5, R. 171 p.6, R. 178 pp. 34-35).

Assuming arguendo that Ms. Debry had been correct in her testimony that the Goates affidavit was filed by Mr. Debry in response to her request for

In contrast, Ms. Debry testified that her mental state became an issue in the divorce after the Goates affidavit was filed (R. 182, p. 53).

Once again the trial court erred in relying on the Ms. Debry's opinion on the issue concerning waiver of privilege, because that issue is governed by the statutes, rules and case law quoted above, which demonstrate that there was no waiver on the facts of this case. See e.g. Utah Rule of Evidence 506(d); Styers, supra.

Judge Wilkinson also failed to recognize that while questions of privilege are normally questions of law for Courts to determine, when the facts underlying the privilege are in dispute, those facts are to be submitted to the jury. See Berry v. Moench, 331 P.2d 814, 818 (Utah 1958)(in discussing the common interest privilege in a case wherein a physician wrote a letter discussing his patient's psychiatric history, the court indicated, "If the facts upon which the privilege would rest are not in dispute, whether the privilege exists is a question for the court to determine. If they are in dispute the jury must determine the facts and upon them the court determines the question of privilege.")(footnote citing to the Restatement of Torts omitted).

Finally, the trial court overlooked the cardinal rules governing the adjudication of summary judgment motions -- that summary judgment is to be granted only when there are no material factual disputes, and that all facts and inferences are to be

alimony to pay for therapy, such a request would not have constituted a claim or defense, and thus would not have constituted a waiver of the privilege. See e.g. Utah Rule of Evidence 506(d); Styers, supra.

drawn in favor of the party opposing summary judgment -- Ms. Debry in this case. See e.g. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982)(in summary judgment, all facts and inferences are to be drawn in favor of party opposing summary judgment).

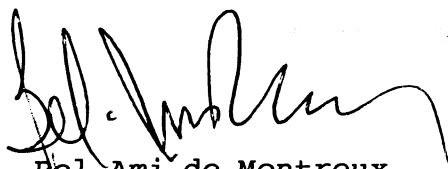
At a minimum, the trial court erred in resolving the facts in favor of Goates and in granting summary judgment where the material facts underlying the waiver of the doctor-patient relationship were in dispute. See Berry and Bowen, *supra*.

This Court should therefore reverse the portion of Judge Wilkinson's ruling granting summary judgment on the basis that Ms. Debry waived her doctor-patient relationship prior to the issuance of the Goates affidavit.

CONCLUSION

This Court should reverse the trial court's order granting summary judgment, and remand this matter to the trial court for trial.

Dated this 5th day of May, 1999.



Bel-Ami de Montreux
Counsel for Ms. Debry

CERTIFICATE OF MAILING/DELIVERY

I, Bel-Ami de Montreux, hereby certify that I have caused to be hand-delivered/mailed, first-class postage prepaid, eight copies of the brief, including the original signature copy, to the Utah Court of Appeals, and two copies of the brief to P. Keith Nelson and Mark L. McCarty at Richards, Brandt, Miller & Nelson, Key Bank Tower, 7th floor, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110-2465 this 5th day of May, 1999.

A handwritten signature in black ink, appearing to be 'Bel-Ami de Montreux', written over the printed name.

Bel-Ami de Montreux

Addendum I

DON R. PETERSEN (2576), for:
HOWARD, LEWIS & PETERSEN
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Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JANICE DEBRY,)	
)	
Plaintiff,)	AFFIDAVIT OF DELBERT T. GOATES
)	
vs.)	
)	
ROBERT DEBRY,)	Case No. 944901038DA
)	
Defendant.)	Judge John A. Rokich
)	

My name is Delbert T. Goates. I give the following testimony under oath:

1. I am an adult and child psychiatrist.
2. I have had approximately twenty consultations with Jan DeBry from June 17, 1990 to the present.
3. In addition, I have had consultations with her current husband, her first husband and all of her children.
4. In my opinion, Mrs. DeBry experiences the traits of a narcissistic personality disorder (as more fully defined in DSM-III-R). Features of this condition include

pathological exaggeration, interpersonal exploitation, and feelings or fantasies of grandiosity. However, persons with this disorder also demonstrate a charming and even charismatic exterior.

5. In my opinion, this has been a lifelong condition which was acquired prior to her late adolescence.

6. I am aware that Mrs. DeBry has been in intensive psychotherapy regarding her depression (commonly occurring with narcissism) for several years with several therapists. Further evaluation addressing her personality traits is certainly warranted as an impediment to her optimal function and the treatment of her depression.

7. If the Court requires an additional independent evaluation, I would suggest a conjoint evaluation of the Menninger Clinic in Topeka, Kansas. Menninger is probably the foremost clinic in the United States for persons with this type of problem. The evaluation would give guidance as to diagnosis, prognosis, and recommended therapy.

8. Reasonable alimony will sustain Mrs. DeBry's needs. There can be a psychological or therapeutic component to alimony. Excessive alimony might feed Mrs. DeBry's grandiose fantasies and exploitive tendencies for enhanced self-worth and delusions of grandeur.

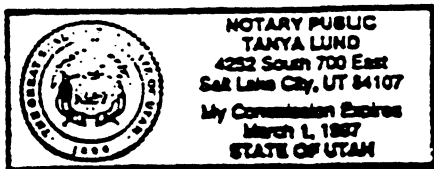
9. Mrs. DeBry's current therapists might be able to use these Court proceedings for therapeutic purposes. Therefore, it is recommended that the Court work with Mrs. DeBry's current therapists on the issue of whether, and when, and how Mrs. DeBry should be confronted with my affidavit, herein.


DATED this 28 day of March, 1994.

By: 
DELBERT T. GOATES, M.D.

STATE OF UTAH)
) ss:
COUNTY OF SALT LAKE)

SWORN AND SUBSCRIBED TO before me this 28th day of
March, 1994.




NOTARY PUBLIC
RESIDING IN: Salt Lake

My Commission Expires:

March 1, 1997

SP103-B.002/1

Addendum II

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

JANICE L DEBRY,	:	MINUTES
Plaintiff,	:	SUMMARY JUDGMENT
	:	
vs.	:	Case No: 960906212 MP
	:	
DELBERT E MD GOATES,	:	Judge: HOMER WILKINSON
Defendant.	:	Date: June 10, 1998

Clerk: jaredl

PRESENT

Plaintiff's Attorney(s): BEL AMI DEMONTREUX
Defendant's Attorney(s): P. KEITH NELSON
Video

HEARING

COUNT: 7.40

DEFENDANT ARGUES IN FAVOR OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

COUNT: 8.06

PLAINTIFF RESPONDS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

COUNT: 8.17

DEFENDANT REPLIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND THE SAME IS SUBMITTED.

COUNT: 8.21

AS READ INTO THE RECORD, THE COURT NOW BEING FULLY BRIEFED AND ADVISED IN THE PREMISES FINEDS AND RULES AS FOLLOWS:

PLAINTIFF'S MOTION TO STRIKE THE AFFIDAVIT / DEPOSITION OF THE PLAINTIFF IS DENIED.

THE COURT FINDS THE PRIVILEGE BELONGS TO THE PLAINTIFF.

THE COURT FINDS THERE WAS NOT A DOCTOR / PATIENT RELATIONSHIP. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

DEFENDANT IS TO PREPARE THE ORDER. THE TRIAL DATE IS STRICKEN.

Addendum III

P. KEITH NELSON [A2391]
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Attorneys for Defendant, Delbert T. Goates, M.D.
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FILED DISTRICT COURT
Third Judicial District

JUN 22 1998

By  SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JANICE L. DEBRY,

Plaintiff,

vs.

DELBERT T. GOATES, M.D.,

Defendant.

**ORDER OF DISMISSAL
WITH PREJUDICE**

Civil No. 960906212

Judge Homer F. Wilkinson

Defendant Delbert T. Goates, M.D.'s Motion for Summary Judgment and Plaintiff's Motion to Strike Plaintiff's Deposition came on regularly for hearing before the Honorable Homer F. Wilkinson pursuant to notice on June 10, 1998. Both parties appeared through counsel and presented oral argument. The Court having heard oral argument, having reviewed the memoranda filed by both parties, and otherwise being fully advised in the premises, and it appearing just and proper, it is hereby ORDERED, ADJUDGED, and DECREED as follows:


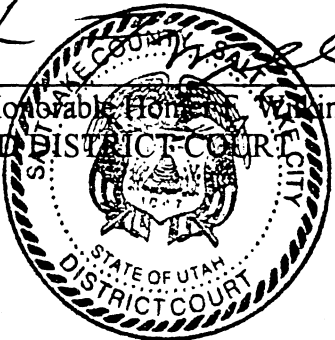
1. Plaintiff's Motion to Strike is denied;
2. Defendant's Motion for Summary Judgment is granted and plaintiff's

Complaint and each and every cause of action thereof shall be and is hereby dismissed with

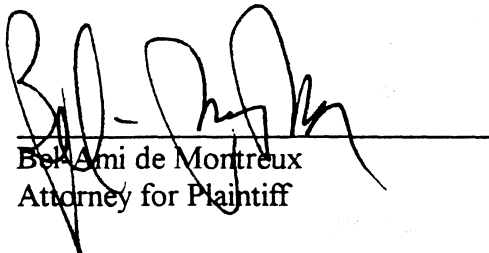
prejudice and on the merits on the basis that plaintiff has not established that a physician/patient relationship existed between her and Dr. Goates, and that even if a physician/patient relationship did exist, that relationship was waived at the time Dr. Goates submitted his affidavit in the divorce case. Both parties are to bear their own respective costs and attorneys' fees.

DATED this 22 day of June, 1998.

BY THE COURT:


The Honorable Homer A. Wilkinson
THIRD DISTRICT COURT


APPROVED AS TO FORM:


Ber Ami de Montreux
Attorney for Plaintiff