

2001

Mary Sawyers, United Television, Inc., KTVX v. Michael Jensen, M.D. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY SAWYERS and UNITED)	
TELEVISION, INC., aka KTVX,)	
)	Appeal No. 2001 1023-SC
Defendants/Appellants,)	
)	
vs.)	Fourth District Court
)	Case No. 970400512 CV
MICHAEL JENSEN, M.D.,)	
)	(Honorable Ray M. Harding, Jr.
Plaintiff/Appellee.)	Presiding District Court Judge)

APPELLANTS' OPENING BRIEF

**ON APPEAL FROM A FINAL JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT FOR UTAH COUNTY, STATE OF UTAH
HONORABLE RAY M. HARDING, JR., PRESIDING DISTRICT COURT JUDGE**

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Statement of Jurisdiction

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) of the Utah Code Annotated 1953.

Issues Presented for Review

1. Did the District Court Err When it Denied Summary Judgment and Submitted to the Jury (And Did not Set Aside Its Verdict On) Dr. Jensen's Claim for False Light Invasion of Privacy Grounded on The First Two Broadcasts Because Those Claims Were Time-Barred Under the Applicable Statute of Limitations for Defamatory Falsehoods Causing Injury?

Issue Preserved Below: Motion for Summary Judgment (May 22, 2000); Motion for Directed Verdict (Nov. 29, 2000); Motion for Judgment Notwithstanding the Verdict ("JNOV") (March 27, 2001). [R. 2741; 2998-3002; 5968; 6038-6040; 6844 at 12.]

Standard of review: "The trial court's application of a statute of limitations presents a question of law which [is reviewed] for correctness." *Estes v. Tibbs*, 979 P.2d 823, 824 (Utah 1999); *see also Snow v. Rudd*, 998 P.2d 262 (Utah 2000) (reversing denial of summary judgment motion on statute of limitations grounds).

2. Did the District Court Err When it Denied Summary Judgment and Submitted to the Jury (And Did Not Set Aside Its Verdict On) Dr. Jensen's Three Alternative Claims Asserting An Invasion of His Sphere of Personal Privacy, Solitude or Seclusion, Premised Exclusively Upon the Defendant's Recording of Conversations In Which Ms. Sawyers Was A Participant, in the Course of Receiving Professional Medical Services Rendered by Dr. Jensen?

Issue Preserved Below: Motion for Summary Judgment (May 22, 2000), Motion for Directed Verdict (Nov. 16, 2000); Motion for JNOV (Mar. 27, 2001). [R. 2741; 2951-2964; 5701, 5720-5724; 5968, 6042-6050.] *Standard of Review:* The question whether one's expectation of privacy is an objectively *reasonable* one, as is required for an

intrusion claim, is one of law, reviewed for correctness. *In re A.C.C.*, 44 P.3d 708, 710 (Utah 2002); *United States v. Garzon*, 119 F.3d 1446, 1449 (10th Cir. 1997); *see also Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988). A decision to grant or deny a motion for summary judgment is reviewed for correctness. *State ex rel. Office of Recovery Servs. v. McCoy*, 999 P.2d 572, 574 (Utah 2000). Similarly, when a motion for judgment notwithstanding the verdict is premised upon a matter of law, the decision is reviewed for correctness. *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992).

3. Did the District Court Commit Plain Error When it Submitted to the Jury Dr. Jensen's Claims for False Light Invasion of Privacy Where the Defendants' Broadcasts Focused Exclusively on Dr. Jensens' Discharge of His Professional Duties as State Licensed and Regulated Medical Care Practitioner?

Issue Not Preserved Below: Because this purely legal question was not presented to the court below, *but see infra* n. 22, this Court addresses this issue under the “plain error” standard of review. *See Berenda v. Langford*, 914 P.2d 45, 51, n.1 (Utah 1996).

4. Did the District Court Err When it Denied Summary Judgment and Submitted to the Jury (And Did Not Set Aside Its Jury's Verdict On) Dr. Jensen's Claims for Defamation and False Light Because the Defendants' Broadcasts Were Substantially True?

Issue Preserved Below: Motion for Summary Judgment (May 22, 2000); Motion for Directed Verdict (Nov. 16, 2000); Motion for JNOV (Mar. 27, 2001). [R. 2741, 2964-2965, 2975-2997; 5701, 5706-5719; 5968, 6028-6038]. *Standard of review:* Whether liability was imposed on the basis of published statements that were substantially true, and thereby constituted “a forbidden intrusion on the field of free expression,” is a question of law, reviewed *de novo*. *See Masson v. New Yorker Magazine*, 501 U.S. 496,

516 (1991), *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991) (whether statements are substantially true as a matter of law is properly decided by the court); *Ogden Bus Lines v. K S L, Inc.*, 551 P.2d 222, 224 (Utah 1976) (same); accord *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988) (“substantial truth” subject to independent appellate review); *Locricchio v. Evening News Ass’n*, 476 N.W.2d 112, 124 (Mich. 1991) (same). The standards for review of rulings on motions for summary judgment and post-trial motions are the same as set forth above under issue 2.

5. Did the District Court Err When it Did Not Set Aside the Jury’s Verdict On Dr. Jensen’s Claims for Economic Damages Allegedly Flowing From the Defendants’ Third Broadcast, Where There Was No Evidence That Dr. Jensen Suffered Any Economic Damages as a Result of That Broadcast?

Issue Preserved Below: Motion for JNOV (Mar. 27, 2001), Motion for a New Trial and to Alter or Amend the Judgment (Mar. 27, 2001). [R. 5960, 5987-5989; 5968, 6040-6042.] *Standard of review:* This Court reviews whether there is “substantial evidentiary support” for the jury’s verdict awarding economic damages as a proximate result of the defendants’ wrongful conduct by viewing the evidence marshalled in support of the verdict in the light most favorable to the appellee. *Water & Energy Sys. Tech., Inc. v. Keil*, 48 P.3d 888, 892 (Utah 2002); *Fitz v. Synthes USA*, 990 P.2d 391, 392-93 (Utah 1999). The standard of review for post-trial motions is the same as stated above under issue 2.

6. Must the Jury's Award of Punitive Damages on the Defamation and False Light Claims Be Vacated Because There is No Clear and Convincing Evidence That the Defendants Published the Statements At Issue with Actual Malice?

Issue Preserved Below: Motion for Directed Verdict (Nov. 16, 2000); Motion for JNOV (Mar. 27, 2001). [R. 5701-5703; 5968, 6024-6025; 6849 at 37-38; 6844 at 18.] *Standard of review:* “The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992). Questions of law are reviewed for correctness. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

Constitutional Provisions and Statutes, etc.
(whose interpretation is determinative)

U.S. Const. Amend. 1 [Addendum 1]

Utah Const., Art. 1 Sec. 15 [Addendum 2]

Utah Code Ann. §§ 45-2-3; 76-9-401(1) & (2); 76-9-402(1)(a) & (b); 78-12-29(4); 58-37-4(2)(b)(iii)(A) [Addendum 3]

Utah Admin. Code R156-37-11(11) & (14) (1994) [Addendum 4]

Statement of the Case

A. Nature Of The Case

This is an appeal from a final judgment of the Fourth Judicial District Court in and for Utah County (Case No. 970400512CV), Judge Ray Harding, Jr. presiding. The plaintiff/appellee Michael Jensen, M.D. (“Dr. Jensen”) asserted various tort and statutory claims (as identified below) against defendants/appellants Mary Sawyers and KTVX-TV

(“defendants”) based upon the preparation and broadcast of three separate news reports concerning (1) Dr. Jensen’s prescribing practices that were, by his own admission, in violation of governing law and regulations, and (2) the disciplinary proceedings instituted against Dr. Jensen by the Utah Division of Professional and Occupational Licensing (“DOPL”) as a result of those violations.

B. The Course Of Proceedings And Disposition In The Court Below

Dr. Jensen filed this action on June 27, 1997, alleging claims for fraud, negligent misrepresentation, defamation, intentional interference with prospective economic relations, and negligence. [R. 9.] In December 1998, defendants moved for summary judgment on the fraud and negligent misrepresentation claims in their entirety, and on the other three claims only insofar as they were based on the September 5, 1995 and June 17, 1996 broadcasts, on the grounds that those broadcasts were barred by the one-year statute of limitations provided in Utah Code Ann. § 78-12-29(4). [R. 250, 363.]

In January 1999, Dr. Jensen moved to amend his Complaint to add four additional claims: (1) invasion of privacy/intrusion upon seclusion; (2) violation of Utah Code Ann. § 76-9-401 *et seq.*; (3) violation of 18 U.S.C. § 2511; and (4) invasion of privacy/false light. [R. 383.] Following a hearing on April 4, 1999, the trial court granted Dr. Jensen’s Motion to Amend Complaint, and granted defendants’ Motion for Summary Judgment on the fraud and negligent misrepresentation claims, and on the defamation claim, insofar as that claim was based on the September 5, 1995 and June 17, 1996 broadcasts, but denied summary judgment on the other claims based on those broadcasts. [R. 1016, 1142.]

On May 22, 2000, defendants filed a Motion for Summary Judgment on Dr. Jensen's remaining claims on grounds of statute of limitations, substantial truth, lack of actual malice, fair report and public interest privileges, insufficient specificity in pleading the claims, lack of proof of elements of claims for intrusion, statutory violations and tortious interference. [R. 2741, 3029.] Following a hearing on August 24, 2000, Judge Harding denied that motion in its entirety. [R. 4137.]

A trial before a jury of eight was held from October 30 through December 4, 2000. Defendants made written and oral motions for a directed verdict during the trial on all claims, [R. 5701, 5725; 6849 at 4-39; 6844 at 12], which motions were granted as to the negligence claim but denied as to all other claims. [R. 6844 at 12, 25.]

The jury found no liability on Dr. Jensen's claims for violation of the federal wiretap statute and tortious interference based on the first broadcast [R. 5762-5763] [Addendum 5], and found that Dr. Jensen had suffered no damages as a result of the violation of Utah Code Ann. §§ 76-9-402(1)(c) & 403. [R. 5764-5767.] The jury found in favor of Dr. Jensen and awarded him \$520,000 in economic damages, \$85,000 in general damages, and \$245,300 in punitive damages on the false light claim premised upon the first two broadcasts (Sept. 6, 1995 and June 17, 1996); \$1,000,000 in economic damages, \$500,000 in general damages, and \$450,600 in punitive damages on the false light or defamation claim premised upon the third (Nov. 6, 1996) broadcast [R. 5774-5777] and \$90,000 each on the two statutory and one common law intrusion claims. [R. 5768-5773.] The jury also awarded Dr. Jensen \$25,000 in general damages and \$25,000 in punitive damages (with no pecuniary damages) on his tortious interference claim. [R.

5760-5761.] The trial court entered a nonfinal judgment for those amounts on March 13, 2001. [R. 5888.]

On March 27, 2001, defendants filed a Motion for JNOV and a Motion for New Trial and to Alter or Amend the Judgment. [R. 5968, 6052; 5960, 6019.] By Order dated October 25, 2001, the trial court denied in part the Motion for Judgment Notwithstanding the Verdict, denied the Motion for a New Trial, and denied in part the Motion to Alter or Amend the Judgment. [R. 6782.] [Addendum 6] The trial court granted defendants' judgment notwithstanding the verdict on Dr. Jensen's claims for violation of Utah Code Ann. §§ 76-9-402(c) and 76-9-403. [R. 6781-6782.] The trial court also ruled that the jury's award of the damages under the three claims for intrusion and violation of Utah Code Ann. §§ 76-9-403(a) and (b) were duplicative, and therefore reduced the three separate awards (of \$50,000 in compensatory damages and \$40,000 in punitive damages on each claim) by \$180,000 to leave a single award of \$90,000. *Id.*

On November 21, 2001, Defendants filed a timely Notice of Appeal from the trial court's final judgment of October 25, 2001. [R. 6787.] Dr. Jensen filed his Notice of Cross-Appeal on December 3, 2001. [R. 6806.]

C. Statement Of The Facts Relevant To The Issues Presented For Review

At the time of the relevant events, Dr. Jensen was a physician practicing medicine pursuant to a license issued by Utah's Division of Occupational and Professional Licensing ("DOPL"). [Pl.'s Ex. 39 ¶¶ 1-2.¹] All of Dr. Jensen's actions that were reported upon by the defendants (and that served as the basis for all claims) were

performed in his *professional* capacity, as a licensed physician, and subject to regulation, oversight, and administrative sanctions by the DOPL. Utah Code Ann. §58-1-401(2)(a) (1999).

1. At a Social Gathering, Dr. Jensen Violates The Regulations That Govern the Prescribing of Controlled Substances

On or about July 4, 1995, Dr. Jensen attended a party at the home of his acquaintance Lisa Johnson. [R. 6845 (Johnson) at 56; R. 6849 (Roth) at 102; R. 6865 (Jensen) at 79.] At the party, Dr. Jensen wrote a prescription for Ms. Johnson for Fastin, a Schedule IV controlled substance (amphetamine) that is used as a diet pill. [Pl.’s Ex. 23.] Ms. Johnson had never been a patient of Dr. Jensen’s. [R. 6845 (Johnson) at 61; R. 6866 (Jensen) at 137.] It was undisputed that Johnson told Dr. Jensen she was not interested in using the diet pills, [R. 6866 (Jensen) at 121 lines 24-25 & 140 lines 5-11; R. 6856 at 14 & R. 6865 at 107 lines 12-18; R. 6845 (Johnson) at 59], but Dr. Jensen nonetheless wrote out the prescription and gave it to Johnson. [R. 6865 (Jensen) at 85; R. 6849 (Roth) at 109-10; R. 6845 (Johnson) at 59]. Prior to prescribing Fastin, Dr. Jensen did not conduct any physical examination of Ms. Johnson [R. 6866 (Jensen) at 128-131], nor did he “determine[] . . . through review of the records of prior treatment . . . that [Johnson] ha[d] made a substantial, good faith effort to lose weight in a treatment program . . . without the utilization of controlled substances.” *See* Utah Admin. Code R156-37-11(14)(a) (1995); [Pl.’s Ex. 16; R. 6845 (Johnson) at 61; R. 6866 (Jensen) at 139 line 13 - 140 line 4]. Johnson was not “obese” at that time. [R. 6849 (Roth) at 105.]

¹ All of the admitted trial exhibits are contained in a single box. [R. 6863.]

Dr. Jensen did not determine whether there were contraindications to her use of Fastin. [R. 6845 (Johnson) at 61.] In fact, Ms. Johnson has a heart condition that could have been seriously aggravated if she took the amphetamine Dr. Jensen had prescribed. [R. 6845 (Johnson) at 89; R. 6849 (Roth) at 116-17.] It is undisputed that Dr. Jensen's prescribing of Fastin to Ms. Johnson was in violation of Utah Admin. Code R156-37-11(14).

2. KTVX Decides to Investigate; Sawyers' Phone Call to Dr. Jensen Confirms Her Suspicion That Dr. Jensen Freely Dispenses Controlled Substances in Violation of State Regulations

Geoff Roth, then the managing editor at KTVX, witnessed Dr. Jensen's actions at the party. [R. 6849 (Roth) at 102-112.] Roth discussed these events with John Edwards, then the news director at KTVX, [*Id.* at 113-115; R. 6864 (Edwards) at 26 lines 10-24], and prepared a "story idea." [Pl.'s Ex. 25.] Edwards and Roth agreed to assign defendant Mary Sawyers, a KTVX reporter who often reported on health and medical issues, to investigate the matter for a possible news story. [R. 6859 (Roth) at 115; R. 6864 (Edwards) at 26-28, 32 line 5 - 34 line 6.] Sawyers first spoke with Lisa Johnson and confirmed Roth's recollection of the events at her party. [R. 6847 (Sawyers) at 90.]

Some time later in July 1995, Sawyers phoned Dr. Jensen to discuss diet pills.² Sawyers asked Dr. Jensen: "What is it that you prescribe [for weight loss]?" Dr. Jensen responded: "Right now what is used most is just Fastin and something called Pondimin.

² Dr. Jensen testified that he understood from his secretary, Laurie Scott, that Sawyers had called the FirstMed Clinic and stated that she was desperate to lose five pounds in two weeks or she'd lose her job as an on-air reporter, [R. 6865 (Jensen) at 119; R. 6856 at 24, lines 17-20; R. 6868 (Scott) at 71-75, 79-80], a claim that Sawyers denied.

Traditionally what has been used is Dexedrine. *Dexedrine technically is illegal to use as a diet pill...*[unintelligible]...sometimes I find people have other disorders that I feel comfortable using Dexedrine with.” [Defs. Ex. 93 at 4 (emphasis added); *see also* Pl.’s Ex. 27.³] During the phone call, Dr. Jensen also stated that many doctors “are reluctant to prescribe prescription diet pills,” but “I really am not.” [Defs. Ex. 93 at 3.] Sawyers told Dr. Jensen she had been on a diet recently and had not lost much weight, [*Id.* at 2], but also that she wished to lose only ten pounds. [*Id.* at 4.] Dr. Jensen told Sawyers that he had prescribed “Dexedrine” to one of his patients (who had put on 20 extra pounds while on her mission) and she had lost that weight in a month-and-a-half. [*Id.* at 5.] Sawyers asked Jensen whether he could prescribe diet pills for her without her having to come to his office (as he had for Ms. Johnson); Jensen told Sawyers that he could not call in the prescription, and that she should come in for an office visit. Sawyers agreed. [*Id.* at 7.]

3. After Station Personnel Decide the Matter is Worthy of Further Investigation, Sawyers Visits Dr. Jensen to Obtain Diet Pills

After Sawyers had conducted additional research into the law that governs a licensed doctor’s prescribing of controlled substances for weight loss [R. 6864 (Sawyers) at 180-181; R. 6871 at 88-89, 138; R. 6843 at 111; *see also* Pl.’s Ex. 233], and after she discussed her findings with Edwards [R. 6871 (Sawyers) at 138], defendants determined that they would further investigate whether Dr. Jensen made a practice of prescribing controlled substances for weight loss without complying with governing regulations.

³ Because “Dexedrine” (Dextroamphetamine) is a Schedule II controlled substance, *see* Utah Code Ann. §58-37-4(2)(b)(iii)(A); 21 U.S.C. § 812(c) (2002), it is illegal to

[R. 6864 (Edwards) at 29-30.] Sawyers and Edwards agreed that they would not carry a story about Dr. Jensen if they discovered that he complied with governing regulations when Sawyers visited him as a patient. [R. 6847 (Sawyers) at 18 lines 1-7; *Id.* at 95 line 7 – 96 line 1; R. 6864 (Edwards) at 32 lines 5-10.]

On July 27, 1995, Sawyers went to the FirstMed clinic where Dr. Jensen practiced part-time. [R. 6867 (Jensen) at 155-156.] The FirstMed clinic was open to the public and treated walk-in patients. [R. 6867 (Katour) at 7 lines 4-6, *Id.* at 8-9; R. 6868 (Scott) at 58 line 17 - 59 line 20.] During the office visit, Dr. Jensen wrote a three-month prescription for Fastin and Pondimin (the diet pill combination “Phen-Fen”) and gave it to Sawyers. [Defs.’ Ex. 77A; R. 6847 (Jensen) at 100 lines 14-15.] It was undisputed that Dr. Jensen prescribed these drugs to Sawyers without first conducting a physical examination. [R. 6866 (Jensen) at 194 lines 10-22.] Although Dr. Jensen’s medical assistant had taken Sawyers’ blood pressure [R. 6847 (Sawyers) at 109; R. 6867 (Katour) at 12-13], Dr. Jensen did not ask Sawyers any questions about her blood pressure history prior to giving her the Phen-Fen prescription; nor did he ask whether she had ever had diabetes (or any other illness, disease, or pre-existing medical conditions)⁴ that might constitute contraindications for Phen-Fen. [Pl.’s Ex. 33; Defs. Ex. 99.] Nor did Dr. Jensen listen to Sawyers’ heart or lungs. [R. 6866 (Jensen) at 185 lines 11-16, 194 lines

prescribe Dexedrine for weight loss. Utah Admin. Code R156-37-11(11)(1995); [Pl.’s Ex. 16].

⁴ Sawyers did fill in a medical conditions checklist prior to entering the patient examination room [R. 6871] (Sawyers), at 55 lines 13-18; R. 6866 at 17 lines 3-6], but did not know whether Dr. Jensen had reviewed it [R. 6847 (Sawyers), R. 6866 at 203 line

1-8.] Prior to giving Sawyers the prescription, Dr. Jensen did not ask whether she was on any medications at the time,⁵ including medications to control high blood pressure. [R. 6847 (Sawyers) at 168-69.] Neither he nor his assistant ever took her weight or asked her what she weighed. [R. 6866 (Jensen) at 188 lines 5-9; R. 6867 (Katour) at 14-15.] Sawyers, who is 5'4" tall, weighed approximately 123 pounds at the time and was not overweight. [R. 6847 (Sawyers) at 181; *see also* R. 6857 (Van Komen) at 170-71.]

At trial, for the first time,⁶ Dr. Jensen claimed that he “intended” to conduct a physical examination of Sawyers *after* he had given her the Phen-Fen prescription, but, he claimed, Sawyers left his office abruptly before he could conduct the examination. [See, e.g., R. 6865 (Jensen) at 130-131; & R. 6866 (Jensen) at 40-41.] The videotape of the interview indicated no expression of intent to require further examination either before Dr. Jensen handed Sawyers the prescription or immediately thereafter. [Defs. Ex. 99; R. 6847 (Sawyers) at 140-41.]

In addition, during the office visit, the following exchange occurred:

Jensen: If Fastin d[oesn't] work for you [for weight loss], I would be willing to work with you maybe using Dexedrine. *It is technically not legal* for that reason.

Sawyers: For weight loss?

23 – 204 line 7], and Dr. Jensen was unable to produce a copy of it. [R. 6866 (Jensen), at 190 lines 11-28.]

⁵ Although Dr. Jensen later claimed that he began his discussion with Sawyers by asking her whether she was presently on any medications, [Pl.'s Ex. 37 at 7], the recording of their conversation does not so indicate. [Defs. Ex. 99.] At trial, Jensen testified that he asked Sawyers whether she was taking any medications *after* he had already given her the prescription, (and after the videotape ended). [R. 6866 (Jensen) at 183, 188.]

⁶ Dr. Jensen had never previously made any such claim – not to the DOPL, nor in his sworn deposition. [R. 6867 (Jensen) at 146, 151, 73-76; *see also* Defs. Ex. 86.]

Jensen: Right. Dexedrine is used for Attention Deficit Disorder. . . . The other one is Narcolepsy. People fall asleep at the wheel. So *those are the legal reasons to use those medicines*.

. . .

Sawyers: So, what, do you just put down Attention Deficit Disorder?

Jensen: I usually, usually put Narcolepsy in an adult. We all deal with fatigue and tiredness, and *you can just say I am tired*. . . .

[Defs. Ex. 99 at 2-3 (emphasis added).⁷]

In addition, during the office visit, Dr. Jensen made the following statements (describing the Fastin capsules):

Jensen: You can actually take a small amount of the capsule and bite it and at that moment you get that effect. *It is technically a way of abusing these, okay*.⁸ Uhm. And it could be dangerous if you bit an entire capsule. Okay. But it is one way of breaking that time release form of it. Grinding it on your teeth.

. . .

Sawyers: So, if I start to crash, just take a pill and bite on it?

Jensen: You would actually take the capsule, open it up, and then put just a[...]. You can sometimes go like that. [(demonstrating)]

Sawyers: Oh. The granules, pebbles, okay.

Jensen: You can just bite them. Ideally you wouldn't get into a situation where you need to do that. You could take caffeine on top of this if you needed to. Okay. . . .

⁷ Later, during the same office visit, Dr. Jensen reiterated that if the Phen-Fen prescription did not prove effective, he'd "work with [her] a little bit, and [uh] with other things." [Defs. Ex. 99 at 4.]

⁸ Remarkably, at trial, Dr. Jensen denied that he had told Sawyers that grinding Fastin granules between the teeth was a way "of abusing" the drug. [R. 6867 (Jensen) at 43-46. *But see* Defs.' Ex. 99 at 7.]

Id. at 7 (emphasis added).

Dr. Jensen knew Sawyers was a journalist employed by Channel 4. [R. 6865 (Jensen) at 104, lines 19-25.] Nevertheless, at no time during the office visit did Dr. Jensen tell Sawyers that he wanted his conversation with her to be “confidential” or that Sawyers should not disclose it to any third party. [Defs. Ex. 99.] Unbeknownst to Dr. Jensen, his professional interaction with Sawyers was recorded by Sawyers, by means of a hidden video camera she had brought with her into the examination room. [Pl.'s Ex. 34; R. 6871 (Sawyers) at 21; R. 6864 (Edwards) at 39 line 15-40 line 3.] Sawyers and Edwards had determined, prior to Sawyers’ visit, that there was no other reasonable means to gather proof of Dr. Jensen’s prescribing practices because if Dr. Jensen was aware that she was recording their interaction, he would likely alter his conduct in the camera’s presence. [R. 6871 (Sawyers) at 29-35; R. 6847 (Sawyers) at 94; R. 6864 (Edwards) at 44 lines 3-13.]

4. Dr. Jensen Writes Another Phen-Fen Prescription Without Complying with Applicable State Regulations

Later the same day that Dr. Jensen had prescribed Phen-Fen to Sawyers, a nurse practitioner at the FirstMed Clinic, Sandra Peterson Katour, approached him and asked if he’d be willing to write her a prescription for Phen-Fen as well. [R. 6867 (Katour) at 18-19; R. 6856 (Jensen) at 18.] Dr. Jensen admitted that although he did not perform a physical examination or obtain a medical history from her, he wrote out a Phen-Fen prescription for Katour. [R. 6856 (Jensen) at 18; R. 6867 (Katour) at 18-19; 23-24.]

5. KTVX Continues Its Investigation Into Dr. Jensen's Prescribing Practices

On or about August 22, 1995, Mary Sawyers met with David Robinson, then the Director of the DOPL. [R. 6871 (Sawyers) at 83-86; R. 6850 (Robinson) at 193.] After viewing the videotape of Sawyers' July 27, 1995 office visit with Dr. Jensen, Robinson concluded as follows:

I think that when you look at the intent of that physician, it's clear that he knows that he is violating the law and is offering excuses for it. And I think he's doing so with potential jeopardy to his patients. I don't think that's in the best interest of his patients. I am very concerned about it.

[R. 6850 (Robinson) at 201; Pl.'s Exs. 19 & Defs. Ex. 115] [See Addendum 7].

Robinson asked Sawyers and KTVX-TV not to broadcast the portion of the tape where Dr. Jensen had instructed her how to bite down on the time-release granules so as not to instruct the general public how to abuse a drug (which request the defendants honored). [R. 6864 (Sawyers) at 148-49; Defs. Ex. 107 & 108.] Robinson asked Sawyers for a copy of the full tape and referred the matter to the DOPL's Bureau of Investigators and to the federal Drug Enforcement Administration. [R. 6850 (Robinson) at 196.]

On or about August 29, 1995, Sawyers conducted a follow-up interview with Dr. Jensen, videotaped with his consent, during which Sawyers and Dr. Jensen discussed diet pills and weight loss. [R. 6866 (Jensen) at 8-9; Pl.'s Ex. 37.] Sawyers questioned Dr. Jensen about his professional conduct during her earlier visit to his medical clinic. [R. 6866 (Jensen) at 10-11.] Dr. Jensen confirmed that his two previous statements to Sawyers regarding Dexedrine were correct: Dexedrine could not legally be prescribed for

weight loss. [Pl.'s Ex. 37 at 6.] Confronted with his earlier statement that if Phen-Fen didn't work for Sawyers he was willing to "work with" her in prescribing Dexedrine (and write up a false diagnosis of narcolepsy to justify the prescription), Dr. Jensen claimed that in light of his additional research (confirming the illegality of such conduct)⁹ prescribing Dexedrine "is something that, uh, is not a possibility now." [Pl.'s Ex. 37 at 6.]

6. The First Broadcast

On September 5, 1995, during its evening newscasts, KTVX aired a story regarding diet pills, including the combination Phen-Fen. [Pl.'s Exs. 19 & Defs. Ex. 115] The broadcast included portions of Sawyers' taped patient visit with Dr. Jensen inside the examination room. *See id.*

On September 5, 1995, (the date of the first of defendants' three broadcasts), Dr. Jensen was working: (1) as an independent contractor at the Columbia FirstMed Clinic for approximately 10-15 hours per week, at \$45 per hour, without benefits [R. 6868 (Johnson) at 14 lines 15–25; 16 lines 10–12]; (2) as an independent contractor at the Art City Family Medical Center for approximately 20-40+ hours per week, at \$70 per hour, without benefits, [R. 6867 (Jensen) at 155-56], and (3) as a part-time independent contractor at Columbia's WorkMed Clinic. [R. 6866 (Jensen) at 34-35 & 65.] On September 6, 1995, the Columbia FirstMed Clinic terminated Dr. Jensen's part-time

⁹ As part of his "research," after he confirmed with a pharmacist that Dexedrine could not legally be prescribed for weight loss, Dr. Jensen asked whether there was any "way around" this law, including his writing up a diagnosis of narcolepsy. [R. 6856 (Jensen) at 34–39; Defs.' Ex. 245.]

employment at the clinic, [R. 6866 (Jensen) at 33 line 20–34 line 13; R. 6856 (Jensen) at 27 line 17], and Dr. Jensen also lost hospital privileges at Mountain View Hospital. [R. 6856 (Jensen) at 27 lines 21-24.]

7. IHC Removes Dr. Jensen From Its Insurance Panels

On or about September 22, 1995, IHC Health Plans removed Dr. Jensen from its insurance panels, citing his “unprofessional” and “possibly illegal” conduct that was portrayed on the KTVX broadcast. [Pl.’s Ex. 199; R. 6866 (Jensen) at 63 lines 18-25.] As a result, he became ineligible to bill IHC Health Plans for providing medical services to patients insured by IHC. [R. 6866 (Jensen) at 64 lines 1-18.] When Dr. Jensen later sought reinstatement to IHC Health Plans [Pl.’s Ex. 200], he was denied reinstatement because he was not board eligible or board certified, which was then a prerequisite for approval as an IHC-insured provider. [Pl.’s Ex. 199 at 3; R. 6866 (Jensen) at 66; *Id.* at 112-115.]

8. DOPL Institutes Formal Disciplinary Proceedings Against Dr. Jensen

On June 17, 1996, the DOPL filed a Petition against Dr. Jensen alleging two counts of “unprofessional conduct,” based on the medical care he provided to Sawyers during her office visit. [Pl.’s Ex. 38] [Addendum 8]. That Petition alleged that:

3. a. On or about July 27, 1995, Dr. Jensen . . . gave Sawyers prescriptions for Fastin (Phentermine Hydrochloride) and Pondimin (Fenfluramine Hydrochloride), each a Schedule IV controlled substance. Prior to providing these prescriptions, Dr. Jensen failed to perform a thorough physical examination or determine from Sawyers that she had made a substantial good-faith effort to lose weight in a treatment program . . . without the utilization of controlled substances, and failed to inquire [about] . . . possible contraindications to the controlled substances he had prescribed.

b. During the visit, Dr. Jensen described to Sawyers how she could accelerate and enhance the stimulant qualities of Fastin by opening the capsule and “biting” the granules contained therein.

c. Dr. Jensen also told Sawyers that if Fastin did not produce the desired weight-loss results she sought, he would be willing to “work with” her “maybe using Dexedrine” (Dextroamphetamine), a Schedule II controlled substance, though he acknowledged to Sawyers the use of Dexedrine for weight control is “technically not legal.” Respondent told Sawyers he would use narcolepsy as the claimed reason for prescribing Dexedrine, since its use for that purpose is permitted. *Id.*

The DOPL Petition alleged that Dr. Jensen violated Utah Admin. Code R156-37-11(14)(a) and (b), and engaged in “unprofessional conduct” as defined by Utah Code Ann. § 58-1-501(2)(a), (b), and (g). [Pl.’s Ex. 38.] The DOPL Petition further alleged that Dr. Jensen’s “unprofessional conduct” constituted grounds for imposing sanctions on his licenses to practice medicine and to administer and prescribe controlled substances, under its authority to “revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon” the license of a respondent practitioner. *Id.* at 10-11; Utah Code Ann. §58-1-401(2)(a).

9. The Second Broadcast

On June 17, 1996, (the day the DOPL Petition was filed), KTVX broadcast a news story reporting that DOPL had filed its Petition against Dr. Jensen. [See Pl.’s Ex. 20 (tape) & Defs. Exs. 128A (transcript)] [Addendum 9]. Dr. Jensen testified that he was

“fired” from the IHC WorkMed Clinic shortly after the June 17, 1996 broadcast, allegedly as a result of that broadcast. [R. 6866 (Jensen) at 67 lines 4-21.]¹⁰

10. Dr. Jensen Settles with DOPL, Admits He Violated Regulation

On or about October 30, 1996, Dr. Jensen voluntarily entered into a Stipulation and Order with DOPL to resolve the claims of unprofessional conduct contained in the DOPL Petition. [Pl.’s Ex. 39 (“DOPL Stipulation”)] [Addendum 10]. By signing the DOPL Stipulation, Dr. Jensen admitted “that he failed to comply with some of the requirements of [Utah Controlled Substance Rules] 156-37-11(14)(a) and (b) as set forth in paragraph 3 of the [DOPL] petition.” *Id.* [See also R. 6867 (Jensen) at 94 (admitting that the Stipulation was correct).] Dr. Jensen stipulated to a public reprimand, and agreed to meet quarterly with DOPL’s Physicians’ Licensing Board for a period of one year and to complete courses on medical ethics and proper prescribing practices. *Id.*

11. The Third Broadcast

On November 6, 1996, KTVX broadcast a news story that reported on several doctors who had been charged with unprofessional conduct and/or disciplined by DOPL. [See Pl.’s Ex. 21; Defs. Ex. 132A] [Addendum 11]. The November 6, 1996 broadcast was primarily based upon a book, entitled *Questionable Doctors*, prepared and published by a Washington, D.C. watchdog group. *Id.* The news report profiled several doctors who were listed in the book, including Dr. E. Barry Topham, whose Utah license was

¹⁰ Despite this testimony, Dr. Jensen continued to earn income from working on a contract basis for IHC during 1996, 1997, 1998, and 1999, at least part of which was derived from the IHC WorkMed Clinic. [R. 6850 (Stuart) at 130 lines 7-16; 132 lines 1-8; 133 lines 20-23; 135 lines 12-21.]

suspended in 1991 after he was found to have had sexual relations with a patient; Dr. Wesley Harline, a Utah physician who continued to practice medicine four years after DOPL had charged him with performing illegal abortions and disfiguring patients; and Dr. Sherman Johnson, who “was sent to jail for giving a patient a lethal dose of Demarol.” [*Id.* at 1-2; *see also* R. 6847 (Sawyers) at 127 (noting that the patient who died was an addict).]

The news report raised questions about the efficacy of the state regulatory oversight of the medical profession. It also included the following brief segment:

AND WHAT ABOUT DR. MICHAEL JENSEN?

IN JULY 1995, WE CAUGHT HIM ON CAMERA
PROMISING ME ILLEGAL DRUGS FOR WEIGHT LOSS.

[Statement by Dr. Michael Jensen]: “If Fastin didn’t work
for you, I’d be willing to work with you, maybe using
Dexedrine. It’s technically not legal for that reason.”

THE STATE FILED AN ACTION AGAINST JENSEN
LAST JUNE.

BUT AGAIN, THE CASE IS IN THE HANDS OF
LAWYERS. . .

AND DR. JENSEN IS STILL PRACTICING.

[Defs. Ex. 132A at 2.] The taped piece then described how other Utah-based doctors whose medical licenses had been revoked by DOPL were subsequently reinstated. Then, as soon as the taped segment ended, Sawyers appeared live in the studio and stated:

ONE POSTSCRIPT TO OUR STORY: YESTERDAY
WE GOT WORD THAT ACTION HAS BEEN TAKEN
AGAINST DR. MICHAEL JENSEN.

HE’S THE ONE WE CAUGHT ON TAPE PROMISING
ME ILLEGAL DRUGS.

THE STATE WILL ALLOW JENSEN TO KEEP HIS
LICENSE, BUT HE WILL RECEIVE A PUBLIC
REPRIMAND WHICH REQUIRES HIM TO ATTEND A

WORKSHOP ON PROPER PRESCRIBING. . .AND A
COURSE ON MEDICAL ETHICS. *Id.*

12. Dr. Jensen's Damages Presentation

Dr. Jensen did not present any evidence establishing that he lost any job, position, or was denied any work opportunities as a result of the third (Nov. 6, 1996) broadcast. To the contrary, following that broadcast he *found new work* in nursing homes. [R. 6866 (Jensen) at 98 line 17 - 99 line 15.] In addition, Dr. Jensen continued to work at the Art City Family Medical Center after the November 6, 1996 broadcast, until he *voluntarily* quit that position in 1998. [R. 6867 (Jensen) at 155 lines 7-10.] Dr. Jensen did not claim (or prove) that any patient or potential patient (or employer) refused to deal with him as a result of anything published in the November 6, 1996 broadcast. Although Dr. Jensen testified that his work hours at the Art City Family Medical Center decreased "over time," [R. 6855 (Jensen) at 185 line 24 – 186 line 2; 187 lines 5-8], he offered no evidence (other than his own, unsubstantiated statement of belief) that *the reason* for the decrease in hours was any information broadcast by defendants. [R. 6855 (Stuart) at 145 line 5 – 146 line 11.] No evidence was proffered regarding the amount of decreased time, when the alleged decrease occurred, or the amount of economic loss that Dr. Jensen may have suffered as a result. [R. 6855 (Jensen) at 185, line 24 – 187, line 13.]

Summary of Argument

Dr. Jensen's claims of "false light invasion of privacy" that were premised upon the defendants' programs broadcast on September 5, 1995 and June 17, 1996 (which claims were pleaded only *after* defendants had moved to dismiss Dr. Jensen's *defamation*

claims as time-barred) are subject to the same statute of limitations that applies to all claims for damage to reputation resulting from allegedly injurious falsehoods, no matter what label a plaintiff attaches to such claims.

The three alternative (and redundant) claims for invasion of Dr. Jensen's personal privacy, arising from Sawyers' surreptitious recording of her conversation with Dr. Jensen while being professionally treated by him as a patient, are not actionable because Dr. Jensen did not have an objectively reasonable expectation of privacy in his professional care for, and treatment of, Sawyers.

Similarly, a claim for "invasion of privacy" by being portrayed in a false light requires that some private and personal aspect of the plaintiff's life be the subject of the false light portrayal. Because all three of defendants' broadcasts focused exclusively on Dr. Jensen's conduct as a state licensed and regulated medical professional, he cannot, as a matter of law, prevail on a claim for "invasion of his personal privacy." Accordingly, the District Court plainly erred in submitting these claims to the jury.

The District Court also erred when it submitted to the jury (and did not set aside the verdict on) Dr. Jensen's claims for defamation and false light because all three of the defendants' broadcast reports were substantially true: Dr. Jensen admitted at trial that he had prescribed controlled substances to three separate women (Sawyers, Johnson, and Katour) without first conducting any meaningful physical examination or medical history to rule out contraindications; he also admitted he had instructed Sawyers how to "abuse" a drug, and admitted that he made the statements about Dexedrine. The minor

inaccuracies in detail that he contends were false did not add to the “sting” of these admittedly true facts. Accordingly, the broadcasts are not actionable.

The jury's award of \$1 million in pecuniary damages flowing from the third (Nov. 6, 1996) broadcast must be vacated because there is a complete lack of evidence that Dr. Jensen suffered any economic losses as a result of that broadcast.

The punitive damages awarded to Dr. Jensen on the basis of the defendants' speech on a matter of public concern cannot be sustained on appeal because the Court cannot find, after independently reviewing the record, that there is clear and convincing evidence that defendants entertained serious doubts as to truth of the statements contained in the broadcasts.

Argument

1. THE DISTRICT COURT ERRED WHEN IT DENIED SUMMARY JUDGMENT AND SUBMITTED TO THE JURY (AND DID NOT SET ASIDE ITS VERDICT ON) DR. JENSEN’S CLAIM FOR FALSE LIGHT INVASION OF PRIVACY FOR THE FIRST TWO BROADCASTS, BECAUSE THOSE CLAIMS WERE TIME BARRED UNDER THE APPLICABLE STATUTE OF LIMITATIONS

The District Court correctly ruled that Dr. Jensen’s defamation claims arising from the September 5, 1995 and June 17, 1996 broadcasts were time-barred under Utah Code Ann. § 78-12-29(4) [R. 1016, 1142], but erred when it ruled the same statute of limitations did not bar the false light claims based on the same broadcasts. [R. 4137.]

As this Court has repeatedly recognized, “the nature of the cause of action, or of the right sued upon, and not the form of action, is the test by which to determine which statute of limitations applies.” *Cathco v. Valentinier Crane Brunjes Onyon Architects*,

944 P.2d 365, 369 (Utah 1997); *see also Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 14 (Utah 1990) (court decides which statute of limitations to apply "by the nature of the action and not by the pleading labels chosen"); *Holm v. B & M Service, Inc.*, 661 P.2d 951, 953 (Utah 1983) (same).

A false light claim is “‘closely allied’ with an action for defamation,” and the same considerations apply to each. *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997). As this Court stated in *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 907 (Utah 1992), “a false light invasion of privacy claim based on defamatory statements [is] governed by the statute of limitations for libel.” *Id.* at 906 n. 37 (citing *Eastwood v. Cascade Brdcst’g Co.*, 722 P.2d 1295, 1299 (Wash. 1986))¹¹; *see also West v. Media General Convergence*, 53 S.W.3d 640, 648 (Tenn. 2001) (in recognizing the false light tort, holding that the statute of limitations for defamation applies to that claim, in recognition of the fact that “application of different statutes of limitation for false light and defamation cases could undermine the effectiveness of limitations on defamation claims”); *Mittleman v. United States*, 104 F.3d 410, 415 (D.C. Cir. 1997) (same); *Rumbauskas v. Cantor*, 649 A.2d 853, 857-58 (N.J. 1994) (same); *Wagner v. Campbell Cty., Wyo.*, 695 F. Supp. 512, 517 (D. Wyo. 1988) (same); *Meyer Land & Cattle Co. v. Lincoln Cty. Conserv’n Dist.*, 31 P.3d 970, 974 (Kan. Ct. App. 2001) (same); *Gashgai v. Leibowitz*, 703 F.2d 10, 13 (1st Cir. 1983) (same).

¹¹ *Russell* also cites *Lashlee v. Sumner*, 570 F.2d 107, 108-09 (6th Cir. 1978), which holds that the defamation statute of limitations applies to an emotional distress claim based on an allegedly libelous report. *Id.*

The purpose of this rule is to prevent the type of procedural manipulation that Dr. Jensen perpetrated below – a circumvention of the time limit provided for filing defamation claims by simply re-labeling his cause of action. *See Eastwood*, 722 P.2d at 1296 (“Where a given set of facts gives rise to a defamation cause of action, it cannot be recharacterized as a false light invasion of privacy cause of action for statute of limitations purposes”). If the defamation statute of limitations is not applied to false light actions which are essentially defamation actions, the “statute will become meaningless because parties will invariably claim a ‘false light’ invasion of privacy instead of a defamation.” *Sullivan v. Pulitzer Brdcst’g Co.*, 709 S.W.2d 475, 480 (Mo. 1986); *see also Heekin v. Columbia Brdcst’g, Inc.*, 789 So. 2d 355, 358 (Fla. Ct. App.), *review denied*, 799 So.2d 216 (Fla. 2001); *Magenis v. Fisher Brdcst’g, Inc.*, 798 P.2d 1106, 1109 (Or. Ct. App. 1990).

In this case, Dr. Jensen’s false light claim was based entirely on the broadcast statements that served as the basis for his defamation claim,¹² *see, e.g.* R. 3122 ¶¶ 31-41, and alleged the same damages as his dismissed defamation claim. *Compare* R. 3122 (Second Am. Compl.) ¶¶ 43-45, *with* R. 1062 (Am. Compl.) ¶¶ 56, 60. Tellingly, Dr. Jensen did not even assert his claim for false light invasion of privacy until *after* the defendants had moved to dismiss his defamation claims as untimely filed, *see supra* at 5, in a transparent effort to resurrect the time-barred defamation claim. Accordingly, Dr. Jensen’s false light claims based on the September 5, 1995 and June 17, 1996 broadcasts

are subject to the statute of limitations contained in Utah Code Ann. § 78-12-29(4), and should therefore be dismissed as time-barred.

2. THE DISTRICT COURT ERRED WHEN IT DENIED SUMMARY JUDGMENT AND SUBMITTED TO THE JURY, AND DID NOT SET ASIDE ITS VERDICT ON, DR. JENSEN’S THREE ALTERNATIVE CLAIMS ASSERTING AN INVASION OF HIS PRIVACY

a. There Was No Intrusion Into Dr. Jensen’s Sphere of Personal Privacy.

To prevail on a claim for intrusion, a plaintiff must demonstrate that defendants “intruded into a private place, or otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs.” RESTATEMENT (SECOND) TORTS § 652B, cmt. c (1977). Dr. Jensen’s expectation of privacy in the place alleged to have been intruded upon must be a *reasonable* expectation. *Id.* The question whether one’s expectation of privacy is an objectively *reasonable* one, is one of law, reviewed *de novo*. *In re A.C.C.*, 44 P.3d 708, 710 (Utah 2002); *see also Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988) (holding that plaintiff did not have a reasonable expectation of privacy against being photographed in public place).

Not only is there a diminished expectation of privacy in the workplace, *see e.g. Cox*, 761 P.2d at 564; *Medical Lab. Mgmt. Consultants v. American Brdcast’g Cos.*, 306 F.3d 806, 818 (9th Cir. 2002); *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1281 n.20 (Nev. 1995), courts have specifically held that audio or video recording of one’s *business* activities conducted in an office open to the

¹² See *Logan v. West Coast Benson Hotel*, 981 F. Supp. 1301, 1321 (D. Or. 1997) (when a claim characterized as “false light” alleges the same facts as a claim for defamation, defamation limitations period applies).

public is *not* an intrusion into one's private sphere, as a matter of law. *Berosini*, 895 P.2d at 1281; *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362, 1382 (D. Kan. 1996).¹³ This general rule has been applied to the specific context of medical professionals providing care or treatment to members of the public. *See J.H. Desnick v. American Brdcast'g Cos., Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995); *Medical Lab.*, 306 F.3d at 818.

The evidence presented at trial¹⁴ demonstrated, *inter alia*, that the medical clinic was open to the public; Sawyers was invited to the clinic and into the patient examination room by Dr. Jensen; Dr. Jensen communicated freely with Sawyers (who he knew was a news reporter); he never told her to treat their conversations as “confidential,” and she was under no obligation to do so.¹⁵ Most importantly, the two did not discuss any of *Dr. Jensen's* private affairs; their conversation consisted entirely of a professional medical “examination” of, and medical advice to, Sawyers. Under these undisputed facts, as a

¹³ When one offers professional services to members of the public who are complete strangers, as was Sawyers to Dr. Jensen, there can be no expectation of privacy in the communications the businessperson “voluntarily discloses” in the course of that relationship. *See Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

¹⁴ *See supra* at 12 and n.6.

¹⁵ The patient-physician evidentiary privilege belongs exclusively to the patient, not to the physician. *See, e.g., State v. Anderson*, 972 P.2d 86, 89-90 (Utah Ct. App. 1998). Accordingly, a physician has no reasonable basis to expect that anything he says to the patient in the course of his professional services will be or remain “private.” *See, e.g. Commonwealth v. Alexander*, 708 A.2d 1251, 1257-58 (Pa. 1998) (plurality opinion); *In re Lifschutz*, 467 P.2d 557, 562 (Cal. 1970) (compelled disclosure of patient information “does not violate any constitutional privacy rights of the psychotherapist”). Notably, the defendants’ tendered jury instruction, correctly setting forth this proposition of law [R. 5116] was refused by Judge Harding. [R. 6844 at 21.]

matter of law, Dr. Jensen did not have an objectively reasonable expectation of privacy¹⁶ in his *professional* interaction with Ms. Sawyers. *See, e.g., Medical Lab.*, 306 F.3d at 817-18 (no intrusion where undercover “customers” surreptitiously recorded their conversations with medical lab technicians; such conduct did not intrude “into their personal lives, intimate relationships, or any other private affairs” of the lab technicians, who could have no reasonable expectation of privacy “in the location or contents of the conversation”); *Desnick*, 44 F.3d at 1352-53 (no intrusion where surreptitious recording of physicians’ interaction with “test” patients did not involve “intimate personal facts” about physicians and thus there was “no invasion of a legally protected interest in . . . privacy”); *see also Commonwealth v. Alexander*, 708 A.2d 1251, 1257-58 (Pa. 1998) (plurality) (doctor has no reasonable expectation of privacy in how he prescribes controlled substances to “patients”); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148-49 (9th Cir. 1990) (same).¹⁷

The addition of a hidden camera does not alter this analysis. Under both federal and state law, conversations can be recorded with the knowledge and consent of only one of the participants. *See* 18 U.S.C. § 2511; Utah Code Ann. § 76-9-402(2). The analysis is the same under the Fourth Amendment where an informant, instead of an undercover

¹⁶ Because the test is one of *objectively* reasonable expectations, the proffered testimony of Dr. Jensen’s professional colleagues’ own *subjective* expectations is irrelevant.

¹⁷ The trial court’s reliance on *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) to find that Dr. Jensen had a reasonable expectation of privacy in his professional interactions with Sawyers, [R. 6751], is misplaced. *Dietemann* has been squarely rejected by courts that have addressed recordings made in business offices that were open to the public in contrast to Dietemann’s *private* practice that he operated *out of his home*:

police officer, does the surreptitious tape recording. *See e.g., Alexander*, 708 A.2d at 1257-58 (no violation of a doctor's right of privacy occurred where police informant surreptitiously taped his interactions with a doctor in the doctor's office concerning the doctor's prescribing practices); *Forster*, 896 F.2d at 1148-49 (same, with respect to undercover law enforcement agents posing as patients). If an agent of the state (for example, a DOPL officer) may freely enter a physician's office open to the public and conduct surreptitious video or tape recording of business activities conducted there, all without a warrant, a private news reporter has all the more justification to engage in similar investigations. *Desnick*, 44 F.3d at 1353; *Berosini*, 895 P.2d at 1280-81. As the *Medical Labs* court stated, in words that apply with full force here, "[P]laintiff could have no reasonable expectation of limited privacy in a workplace interaction with [a] stranger that was purely professional and touched upon nothing private and personal to [the plaintiff] himself." *Id.* at 818.¹⁸ Those considerations resonate strongly in this case, where KTVX's investigation centered upon allegations of significant misconduct against a physician who was all too willing to prescribe powerful and addictive stimulant amphetamines to first-time, walk-in patients, posing a substantial risk to the public's health and safety. Just as the defendants had done in *Desnick* and *Medical Laboratory*, Sawyers obtained access to Dr. Jensen's medical facilities seeking professional care and

"Dietemann was not in business, and did not advertise his services or charge for them. His quackery was *private*." *Desnick*, 44 F.3d at 1352-53 (emphasis added).

¹⁸ *See also Sundheim v. Board of Cty. Comm'rs*, 904 P.2d 1337, 1351 (Colo. Ct. App. 1995), *aff'd*, 1996 WL 617372 (Colo. 1996) ("when an intrusion into a commercial establishment is based upon the nature of the business activities there taking place . . . the business owner may not have a reasonable expectation of privacy in those activities").

treatment as a member of the general public (although Sawyers did not conceal the fact that she was a journalist). In *Desnick* and *Medical Laboratory*, the courts found, as a matter of law, that under these circumstances no intrusion upon the defendant's solitude or seclusion had occurred. The same is true in this case.

b. The Jury Should Not Have Been Allowed to Determine Whether Defendants' Actions Were "Highly Offensive"

The trial court must make a threshold determination of offensiveness as a basis for the existence of a cause of action for intrusion. *Stien*, 944 P.2d at 378. To satisfy this threshold showing, the defendants' conduct must amount to more than poor taste or judgment; the requisite "offensiveness" is "an *exceptional* kind of prying into another's *private* affairs." *Medical Lab.*, 306 F.3d at 819 (emphasis added) (citing RESTATEMENT (SECOND) TORTS § 652B); *Stien*, 944 P.2d at 378. Based upon facts similar to those involved in *Desnick* and *Medical Laboratory*, this case did not meet the *Stien* threshold standard. In the present case, as in *Desnick*, despite the fact that surreptitious recording took place, "[n]o embarrassingly intimate details of anybody's life were publicized . . . [t]here was no eavesdropping on a private conversation; the testers recorded their own conversations with the . . . physicians." *Desnick*, 44 F.3d at 1353 (emphasis added). Similarly, in *Medical Laboratory*, where a reporter interviewed and surreptitiously taped plaintiff about medical testing that affects the health and safety of the public, the court determined that, as a matter of law, the defendant's conduct could not be deemed "highly offensive": "The covert videotaping of a business conversation among strangers in business offices does not rise to the level of an exceptional prying into another's private

affairs.” *Medical Lab.*, 306 F.3d at 819-20. Accordingly, the jury should not have been permitted to render an opinion whether defendants’ conduct was “highly offensive.”

c. Dr. Jensen Also Did Not Establish That Defendants Violated Utah Code Ann. § 76-9-402(1)(a) or (b)

Judge Harding erred when he submitted to the jury (and refused to set aside its verdict on) Dr. Jensen’s claims under Utah Code Ann. §§ 76-9-402(1)(a) & (b). Section 76-9-402(1)(b) is inapplicable because the uncontroverted evidence demonstrated that Sawyers did not “install” any device in a “private place.” Even if carrying a recording device on one’s person could be deemed to “install a device,” as demonstrated above, the patient examination room within the FirstMed Clinic is not a “private place” as defined by section 76-9-401(1). Although it may be a “private place” from the vantage point of a *patient* who is examined therein, Dr. Jensen, a licensed professional physician, is not a person “entitled to privacy there,” whose consent was needed to “install” the recording device. Utah Code Ann. § 76-9-402(1)(b); *see, e.g., Forster*, 896 F.2d at 1148-49; *Cox*, 761 P.2d at 564; *Medical Lab.*, 30 F. Supp. 2d at 1188.

Similarly, by its own terms, section 76-9-402(1)(a) cannot apply here. Under that section, one must “trespass” on property with the intent to “eavesdrop,” or to conduct “other surveillance in a private place.” Even if it could be said that Sawyers “trespass[ed]” on property when she entered the patient examination room upon invitation and consent of Dr. Jensen (which is not a “trespass”), as a matter of law Sawyers did not “eavesdrop” as that term is defined by section 76-9-401, since she was a

party to the conversation recorded.¹⁹ Therefore, she cannot be found to have “trespassed with the intent to *eavesdrop*” on her own conversation. In addition, for the reasons stated above, the patient examination room is not a “private place” from the vantage point of Dr. Jensen, so Sawyers could not, as a matter of law, be found to have “trespassed with the intent to subject another person to . . . surveillance *in a private place*.”²⁰

For the reasons stated above, the Court should vacate the judgment below on each of the three alternative “invasion of privacy by intrusion,” and statutory privacy claims and order that judgment be entered on those claims in favor of defendants.

3. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT SUBMITTED TO THE JURY DR. JENSEN’S CLAIMS FOR FALSE LIGHT INVASION OF PRIVACY ON THE BASIS OF THE DEFENDANTS’ BROADCASTS THAT FOCUSED EXCLUSIVELY ON DR. JENSEN’S PERFORMANCE IN HIS PROFESSIONAL CAPACITY AS A STATE-LICENSED AND REGULATED PHYSICIAN

To even reach this question (with respect to the first two broadcasts), the Court must first find that Dr. Jensen’s claim for false light invasion of privacy is subject to the four-year statute of limitations instead of the one-year statute applicable to defamation claims. And, the Court may not find the four-year statute applicable unless it determines that the claim for invasion of privacy protects a right or interest separate and distinct from

¹⁹ “Eavesdrop” means “to overhear, record, amplify, or transmit any part of a wire or oral communication of others *without the consent of at least one party thereto* by means of any electronic, mechanical or other device.” Utah Code Ann. § 76-9-401(2) (emphasis added).

²⁰ Finally, judgment should also be entered in favor of United Television on this claim due to the obvious confusion of the jury. The jury found that Sawyers did *not* violate § 76-9-402(1)(a), but that United Television (her employer) *did* violate this section. [See R. 5771.] Of course, United Television could only act through its agent, Sawyers. Accordingly, it is impossible to reconcile those verdicts.

damage to one's reputation, *i.e.*, the right of *privacy*. See, *e.g.*, *Cox v. Hatch*, 761 P.2d 556, 563-64 & n.7 (Utah 1988). However, it is undisputed that all three of the defendants' broadcasts focused exclusively upon Dr. Jensen's public conduct as a licensed professional medical care provider. In other words, none of his "private" conduct was the subject of the defendants' broadcasts.²¹ Under these circumstances, *as a matter of law*, Dr. Jensen cannot state a claim for violation of his personal right to privacy. Accordingly, the multi-million dollar judgment here, which is premised upon a non-cognizable cause of action, clearly constitutes a "manifest injustice," which amounts to plain error. See, *e.g.*, *State v. Haston*, 846 P.2d 1276, 1277 (Utah 1993) (finding reversible plain error where defendant may be subject to criminal penalties "for a crime which is not recognized in Utah"); see also *Poindexter v. Atchison, Topeka & Santa Fe R.R. Co.*, 168 F.3d 1228, 1232 (10th Cir. 1999) (reversible plain error found where case submitted to jury without objection²² resulted in "miscarriage of justice" or was "patently plainly erroneous and prejudicial").

This Court has recognized that common law torts that redress an "invasion of privacy," protect "an individual's interest in being let alone." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906 (Utah 1992); *Cox*, 761 P.2d at 563-64 & n.7; see

²¹ "[A]llegations of misconduct against a local doctor . . . are certainly matters of public concern." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 902 (Utah 1992); see also *Lee v. Calhoun*, 948 F.2d 1162, 1165 (10th Cir. 1991) (recognizing "the public concern in policing failures in the medical profession").

²² Although defendants did not expressly argue below that Dr. Jensen could not bring a "false light invasion of privacy" claim based upon broadcasts focusing on his professional conduct as a physician, defendants *did* argue that Jensen lacked any

also R. 6754, 6764 (trial court's ruling that "[t]he false light claim protects the plaintiff's privacy interests invaded by the broadcasts.") (emphasis added). "In order to be actionable, an action for false light [invasion of privacy] must involve the private affairs of the subject, and cannot relate to any matter which is inherently 'public' or 'of legitimate interest to the public.'" 62A AM. JUR. 2D, *Privacy* § 126 at 734-35. It is for this reason that courts have held that publication of information concerning the discharge of a public official's duties or of an individual's performance of *professional services* cannot give rise to a claim for false light "invasion of privacy." See, e.g., *Patton v. Royal Indus., Inc.*, 70 Cal. Rptr. 44, 48 (Ct. App. 1968) (affirming dismissal of false light claim where there was no "statement of fact relative to [the plaintiff's] private lives or any other secret matter . . . [the challenged statements] reflected exclusively upon the professional standing of the plaintiffs in the public view. There was no invasion of the rights of privacy."); *Parano v. O'Connor*, 641 A.2d 607, 610 (Pa. Super. Ct. 1994) (dismissing false light claim brought by hospital administrator on basis of statements critical of his administration of the hospital because the statements concerned his public image as a public figure); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781 (Ariz. 1989) (holding that there can be no false light invasion of privacy claim premised upon publication focusing on discharge of public officials' duties); *Hagler v. Democrat-News, Inc.*, 699 S.W.2d 96 (Mo. Ct. App. 1985) (same); see also *Estill v. Hearst Publ'g Co.*, 186 F.2d 1017, 1022 (7th Cir. 1951) ("It is the unwarranted publicizing of a person's

cognizable privacy interest in his professional conduct within the patient examination room. [See, e.g., R. 2741, 2959-2963; 5701, 5722-5724.]

private affairs and activities which furnishes the basis for the cause of action.”) (emphasis added); *cf.* RESTATEMENT (SECOND) TORTS § 652D at 386 (1977) (“nor is [a person’s] privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public”).

“Some factual situations so clearly and unquestionably do not result in an invasion of privacy that the courts should so declare as a matter of law.” *Langworthy v. Pulitzer Publ’g Co.*, 368 S.W.2d 385, 390 (Mo. 1963). Here, this Court should declare that as a matter of law a licensed physician has no expectation of privacy in how he conducts his *professional* duties that directly affect the public’s health and safety. As the United States Supreme Court has stated, “insofar as his *professional* career is involved, [the plaintiff] is substantially without a right to privacy.” *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967) (citation omitted) (emphasis added).²³ Individuals who work in highly regulated areas of commerce have a lower expectation of privacy in connection to their work-related activities in those areas. *See, e.g., New York v. Burger*, 482 U.S. 691, 700 (1987) (an expectation of privacy “is particularly attenuated in commercial property employed in ‘closely regulated’ industries”).

Because each of the broadcasts that form the basis of Dr. Jensen’s claims was directed exclusively at Dr. Jensen’s performance of his professional duties, and did not

²³ Similarly, case law decided under the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7)(c), has recognized that information in government’s hands is not exempt from disclosure as “an unwarranted invasion of personal privacy” when the information “relat[es] to business judgments and relationships,” even where the “disclosure might tarnish someone’s professional reputation.” *Washington Post Co. v. United States Dep’t of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988).

involve any matters that can reasonably be considered personal and “private” to him, as a matter of law he cannot prevail on a claim for “invasion of privacy.” To permit a plaintiff to recover a multi-million dollar judgment premised on a legal claim that is “not warranted under the law,” *Pridgin v. Wilkinson*, 296 F.2d 74, 76 (10th Cir. 1961), would “seriously affect[] the fairness, integrity or public reputation of judicial proceedings,” and is thus plain error. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir. 1984).

4. THE DISTRICT COURT ERRED WHEN IT DENIED SUMMARY JUDGMENT AND PERMITTED THE JURY TO CONSIDER (AND DID NOT SET ASIDE THE VERDICT ON) DR. JENSEN’S CLAIMS FOR DEFAMATION AND FALSE LIGHT BECAUSE DEFENDANTS’ BROADCASTS WERE SUBSTANTIALLY TRUE

To meet his burden of proving falsity, Dr. Jensen must show that the “substance, the gist” of the matter is untrue. *See Auto West, Inc. v. Baggs*, 678 P.2d 286, 290-91 (Utah 1984) (“Insignificant inaccuracies . . . are immaterial, providing that the defamatory charge is true in substance.”) (citation omitted); *Brehany v. Nordstrom, Inc.*, 812 P.2d at 49, 57-58 (Utah 1991) (same); MUJI 10.4 (“A statement is considered to be true if it is substantially true or that the gist of the statement is true.”).²⁴ The test is whether the publication as a whole “produces a different effect upon the reader than that which would be produced by the literal truth of the matter.” *Anderson v. Cramlet*, 789 F.2d 840, 843 (10th Cir. 1986). The United States Supreme Court embraced this test as

²⁴ Substantial truth is also a complete defense to a false light claim. RESTATEMENT (SECOND) OF TORTS § 652E, cmt. a (1977); *see also Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988); *Stien*, 944 P.2d at 380 (false light claim is closely allied with defamation

mandated by the First Amendment in *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991):

it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details . . . inaccuracies do not amount to falsity so long as the “substance, the gist, the sting of the libelous charge be justified.” Put another way, the statement is not considered false unless it “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.”

In short, a minor inaccuracy that does not materially alter the “gist” of the allegation is not actionable, because it is “substantially true.” *See, e.g., Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140 (10th Cir. 2000) (per curiam) (statement accusing plaintiff of “stock fraud” was substantially true, although he had only been accused of making deceptive statements that adversely affected stock price); *Anderson*, 789 F.2d at 843-45 (statement that plaintiff father had “kidnapped” his child was substantially true where he conceded he did not have custodial parent’s consent to take the child); *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1411 (9th Cir. 1990) (where Board of Medical Examiners had adjudged plaintiff incompetent, it was substantially true to report statement by director of board of medical examiners that plaintiff “was a menace to the health and safety of the people of Arizona”).

In each of the cases cited above, the court held that the “gist” or “sting” of the alleged libel was the general accusation of fault or wrongdoing, not the precise details *subsidiary* to the general charge. *See Herbert v. Lando*, 781 F.2d 298, 310-12 (2d Cir. 1986) (statements “should not be actionable if they merely imply the same view, and are claim and the same considerations apply to each); *Sack on Defamation* § 12.3.1 at 12-18

simply an outgrowth of and subsidiary to those claims upon which . . . there can be no recovery”); *Church of Scientology Int’l v. Time Warner, Inc.*, 932 F. Supp. 589, 594 (S.D.N.Y. 1996) (same); *Nicholson v. Promoters on Listings*, 159 F.R.D. 343, 355 (D. Mass. 1994) (same). Significantly, these determinations were made as a matter of law.

Here, while some of the defendants’ published statements may not have been *literally* true (e.g., Dr. Jensen had not literally “promised” Sawyers he’d prescribe Dexedrine for her if Phen-Fen did not work²⁵), the “gist” and “sting” of the broadcasts as

(2001).

²⁵ A more accurate description of this “promise” would have been to describe it as an “offer.” See *infra* n.26 (quoting DOPL Petition). However, Jensen’s “willing[ness]” to “work with” Sawyers in prescribing Dexedrine on July 27, 1995 cannot be seriously questioned. Although Dr. Jensen broached the subject subtly using the word “maybe,” by the end of the conversation he made clear that if the patient was willing to “just say [she is] tired,” he would prescribe Dexedrine for narcolepsy, as he had done for others in the past. [Def’s. Ex. 99 at 2-3.] Nor does the fact that Dr. Jensen on a later date recanted that “offer,” after realizing he’d been “caught” in the earlier exchange in which he declared his willingness to document a false diagnosis to support an illegal prescription, in any way alter the “gist or sting” of the description of the earlier candid interaction. More importantly, the defendants’ third broadcast provided the audience with video of Dr. Jensen making the statement that allegedly constituted a “promise,” so that defendants’ characterization was “opinion” that the viewer could evaluate against Dr. Jensen’s own words. See *Riley v. Harr*, 292 F.3d 282, 289, 292 (1st Cir. 2002) (statement of opinion premised upon fully disclosed facts is not actionable); accord *Reddick v. Craig*, 719 P.2d 340, (Colo. Ct. App. 1985) (same); RESTATEMENT (SECOND) TORTS § 566 cmt. c & Illustr. 4 & 5 (1977).

In addition, use of the term “illegal” to describe Dr. Jensen’s offer of Dexedrine is accurate because conduct in violation of state laws and regulations is accurately described as “illegal.” See, e.g., *Price v. Walters*, 918 P.2d 1370, 1376-78 (Okla. 1996) (finding report that plaintiff had violated federal regulations was “substantially accurate” where challenged press release stated that “[Plaintiff] Broke Law”). Utah’s Administrative Code regulations have the force of law. See *V-1 Oil Co. v. Department of Env’tl. Quality*, 904 P.2d 214, 218 (Utah Ct. App. 1995); *Horton v. Utah State Retirement Bd.*, 842 P.2d 928, 932 (Utah Ct. App. 1992). Moreover, physicians have been convicted under federal drug laws for prescribing controlled substances without conducting physical exams or taking medical histories. See, e.g., *United States v. Moore*, 423 U.S. 122 (1975); *United*

a whole – that Dr. Jensen prescribed controlled substances without performing a thorough physical examination or taking a medical history, (and having indicated that he was willing to give Sawyers a false diagnosis²⁶ such as narcolepsy because he fully understood and appreciated that Dexedrine was “technically not legal” for weight loss therapy)²⁷ – was uncontrovertibly *substantially* truthful.

Moreover, the facts that Dr. Jensen admitted at trial²⁸ but were *not* broadcast, demonstrate conclusively that the “crux” of the broadcasts as a whole – their gist or sting – was substantially true. Dr. Jensen *admitted* that:

- in addition to writing the Phen-Fen prescription for Sawyers, he also, that same day, wrote out an identical prescription to his assistant, Sandra Peterson Katour, without conducting any physical examination, medical history, or ruling out contraindications [*see supra* at 14];
- he had written a Fastin prescription for Lisa Johnson, a non-patient of his, also without conducting any physical examination, medical history, or ruling out contraindications [*see supra* at 8-9]²⁹;

States v. Rosenberg, 515 F.2d 190, 192 (9th Cir. 1975) (doctor convicted of distributing controlled substances when he prescribed Dexedrine without performing physical examinations); *United States v. Fellman*, 549 F.2d 181, 182 (10th Cir. 1977).

²⁶ As the DOPL put it, the hidden camera footage established that Dr. Jensen had “offered to prescribe a controlled substance for a condition that is contrary to its indicated use and suggested his willingness to make an unsubstantiated diagnosis to support that prescription.” See Pl.’s Ex. 38 at 6 (¶ 11) (emphasis added).

²⁷ Dr. Jensen not only acknowledged his awareness of this fact during the July 27, 1995 interaction with Sawyers, he had also stated in his prior phone conversation with Sawyers that “Dexedrine technically is illegal to, uh, use as a diet pill.” [Defs.’ Ex. 93 at 4.]

²⁸ For purposes of defeating a claim for libel, it is immaterial when the true facts become known or are discovered. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) (holding that truthful publications are not actionable, “[a]nd it makes no difference that the true facts were unknown until the trial”).

²⁹ In contrast to Sawyers, whose blood pressure had been taken by a nurse, neither Katour nor Johnson were checked for high blood pressure, accelerated pulse, or any other “vital

- he had suggested and demonstrated to Sawyers how to open the time-release capsules of Fastin and to grind the granules on her teeth that in his own words, was “a way of abusing” this drug. [*see supra* at 13]

Thus, *the facts that Dr. Jensen admitted were true*³⁰ are as damaging to his reputation as the broadcast allegations that he contends were false. *See, e.g., Brehany*, 812 P.2d at 58 (holding that two plaintiffs had “admitted at trial that they had used illegal drugs” and that “[t]hese admissions justified the trial court’s dismissal of their defamation claims”); *accord Lindemuth v. Jefferson Cty. Sch. Dist. R-1*, 765 P.2d 1057, 1058 (Colo. App. 1988) (“plaintiff’s sworn . . . testimony constitute[s] an admission of the substantial truth of the allegedly defamatory statements.”). In sum, the broadcasts are not actionable because they did not “make [Dr. Jensen] *significantly* worse off than a completely or literally truthful publication would have.” *Pope v. Chronicle Publ’g Co.*, 95 F.3d 607, 613 (7th Cir. 1996) (emphasis added); *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) (“Falsehoods that do not harm the plaintiff’s reputation more than a full recital of the true facts about him would do are . . . not actionable.”).

signs.” Notably, Dr. Jensen did not claim that these other woman told him they desperately needed to lose weight, or they could lose their jobs (as he claimed he understood about Sawyers). Nor did he claim that they did not permit him to conduct a physical examination (as he claimed with respect to Sawyers).

³⁰ Moreover, during his closing arguments, Dr. Jensen’s counsel conceded that “Dr. Jensen prescribed diet medications too freely.” [R. 6858 (Gardner) at 12 lines 23-24.] *See United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (statements of counsel in closing arguments constitute judicial admissions that are binding on his client); *Larson v. A.T.S.I.*, 859 P.2d 273, 275-76 (Colo. Ct. App. 1993) (same).

5. THE DISTRICT COURT ERRED WHEN IT DID NOT SET ASIDE THE JUDGMENT ON DR. JENSEN'S CLAIMS FOR ECONOMIC DAMAGES ALLEGEDLY FLOWING FROM THE DEFENDANTS' THIRD BROADCAST

“The fact of damages must be proven with reasonable certainty and the amount by a reasonable though not necessarily precise estimate.” *Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 774 (Utah 1986). Damages in tort *must* be predicated on a factual and legal connection (“proximate cause”) between the wrongful act or acts of defendants and the damage incurred. *See Clark v. Farmers Ins. Exchange*, 893 P.2d 598, 600 (Utah App. 1995); *Canyon Country Store v. Bracey*, 781 P.2d 414, 418 (Utah 1989).

Here, the jury awarded Dr. Jensen \$1 million in pecuniary damages on the basis of the third (November 6, 1996) broadcast alone.³¹ [R. 5782.] However, there was *no* evidence demonstrating that Dr. Jensen had suffered any economic losses as a result of that broadcast. The evidence of Dr. Jensen’s economic damages at trial was based almost entirely on the change of Dr. Jensen’s medical practice from family to nursing home practice, which occurred, *according to Dr. Jensen and his experts*, as a result of Dr. Jensen’s loss of IHC Health Plans privileges in September 1995, *more than a year prior to the November 6, 1996 broadcast*. When asked about the basis for his economic damages, Dr. Jensen testified: “The key one is that I don’t have IHC insurance privilege and I cannot work in the family practice any more because of that” [R. 6856 (Jensen) at 29 lines 2-5; R. 6866 at 103.] Dr. Jensen further testified that his lack of IHC

³¹ As further indication of the irrationality of the jury’s verdict on this claim, the jury found defendants had tortiously interfered with Dr. Jensen’s prospective contractual relations by broadcasting the November 6, 1996 report [R. 5761], but it awarded Dr. Jensen no pecuniary losses as a result of that purported interference. *Id.*

Health Plan insurance privileges limits where he can work, and because he does not have such privileges, *he is limited to nursing home work* or similar work for which he can bill Medicare and Medicaid. [R. 6866 (Jensen) at 101 lines 8-15; 103 lines 16-20.]

Similarly, Dr. Jensen's economic expert Frank Stuart testified that Dr. Jensen suffered lost income as a result of the change in his medical practice from family practice to nursing homes, that occurred in September, 1995, [R. 6850 (Stuart) at 144 lines 12-14; 144 lines 12-14; 145 lines 4-9; *Id.* at 57 line 25-58 line 10] as a direct result of Dr. Jensen's being removed from IHC insurance panels at that time. [R. 6867 (Jensen) at 156 lines 10-18.] L. Deane Smith similarly testified that the basis for Dr. Jensen's economic damages was the "substantial change" in the nature of Dr. Jensen's medical practice, and he specifically identified September, 1995 as the starting point for comparing Dr. Jensen's actual versus expected income. [R. 6850 (Smith) at 163 line 13-164 line 22; 165 lines 14-23; 168 lines 9-21.] In sum, all of Dr. Jensen's experts based their economic damage calculations on the substantial change in the nature of Dr. Jensen's practice (from general/family practice to nursing home practice) that was occasioned by his loss of IHC Health Plans privileges in September 1995, over a year before the broadcast that is at issue here.

Dr. Jensen produced *no* evidence that he was rejected from a job as a result of the November 6, 1996 broadcast,³² that IHC refused to reinstate him as a result of the broadcast, or that he suffered any other economic harm due to *that* broadcast. (Although

³² In contrast, Dr. Jensen testified that he was fired from the IHC FirstMed Clinic in September 1995 [R. 6866 (Jensen) at 33 -34] and by the IHC WorkMed clinic in June,

Dr. Jensen did testify regarding some negative events which may have occurred after November 6, 1996, *i.e.* that his work hours at Art City Family Medical Center decreased “over time,” [R. 6855 (Jensen) at 187], he produced no evidence that such effects occurred, if at all, *because of* the November 6, 1996 broadcast. [R. 6855 (Stuart) at 145 line 5 – 146 line 11; R. 6848 (Rosen) at 88 lines 4-12; 118 line 1-6.]]³³ *See, e.g., Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521-22 (10th Cir. 1987) (rejecting the “fallacy” of “assuming a causal connection between two events merely because one follows the other” because such “reasoning is not a reasonable inference but is mere speculation and conjecture” and requiring direct proof of causal link between actionable defamation and claimed economic losses).

In sum, Dr. Jensen produced no evidence that anything *occurred* subsequent to the November 6, 1996 broadcast—much less that anything occurred *because of* that broadcast—which had any demonstrable effect on his future income stream. Under these circumstances, as a matter of law, the third broadcast cannot be deemed to have caused the economic damages Dr. Jensen claims to have suffered a result of the third broadcast. *See Gardner v. Airway Motor Coach Lines, Inc.*, 166 P.2d 196, 196 (Utah 1946) (finding no basis to award lost profits damages where plaintiff had abandoned business venture prior to the defendant’s acts); *see also Gould v. Mountain States Tel. & Tel. Co.*, 309

1996. *Id.* at 67 lines 4 - 21]

³³ To meet their burden of marshalling the evidence, defendants can only point to the testimony that Dr. Jensen cited in his post-trial brief to support this portion of the judgment (none of which establishes that economic losses were caused by the Nov. 6, 1996 broadcast): [R. 6866 (Jensen) at 112 line 21 – 114 line 21; R. 6855 at 185 line 24,

P.2d 802, 806 (Utah 1957) (“proof of loss of profits must not be completely speculative nor uncertain *as to fact . . .*”) (emphasis added).

Because the jury’s economic damages award on the November 6, 1996 broadcast is wholly lacking in evidentiary support, the Court should vacate the jury’s award of economic damages on that broadcast.

6. THE JURY’S AWARD OF PUNITIVE DAMAGES ON THE DEFAMATION AND FALSE LIGHT CLAIMS MUST BE VACATED BECAUSE THERE IS NO FINDING NOR CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS PUBLISHED THE STATEMENTS AT ISSUE WITH CONSTITUTIONAL ACTUAL MALICE

Before punitive damages may be awarded against a media defendant on the basis of speech on a matter of public concern,³⁴ there must be a finding, by clear and convincing evidence, that the defendant published false and defamatory statements either while knowing that the statements were false or while entertaining serious doubts as to their truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (stating that without such a rule, “jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985); *see also* MUJI 10.12. On appeal, such a finding is subject to *de novo* review, under the Court’s constitutional duty to conduct an “independent appellate review” of the evidence of actual malice. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

187 line 13; R. 6856 at 28 line 25-29 line 9. *But see* R. 6856 (Jensen) at 27 line 12-28 line 6 (testifying that aforementioned damages flowed from first broadcast).]

The evidence presented below cannot support a finding that the defendants published any of the allegedly false and defamatory statements while knowing the statements to be false or while entertaining serious doubts as to their truth.³⁴ Notably, in its post-verdict ruling, the trial court found that there was evidence of common law malice, *e.g.*, “willfulness and excessive publication,” [R. 6749, 6762, 6764], but did not point to *any* evidence (and certainly not “clear and convincing” evidence) to satisfy the constitutional standard of “knowing falsity or reckless disregard for the truth.” *See Cox v. Hatch*, 761 P.2d 556, 559 n.3 (Utah 1988) (discussing difference between common law and constitutional forms of “actual malice”).

³⁴ *See supra* n. 21.

³⁵ Moreover, the trial court did not adequately instruct the jury that this was what they were required to find in order to award punitive damages. [See R. 6841 (Instr. 67).] The trial court merely instructed the jury it must find that defendants “published a defamatory falsehood about Dr. Jensen knowing it was false or in reckless disregard of whether it was true.” *Id.* No further instruction was given, as had been requested by defendants [R. 5134], into the meaning of “reckless disregard of the truth.” *But see* MUJI 10.12 Comments (stating that if the plaintiff is a private figure “an instruction on the meaning of knowing falsehood or reckless disregard would be *necessary*.”) (emphasis added); *see also* MUJI 10.7 (providing a 466-word definition of “Knowing Falsehood or Reckless Disregard as to Truth or Falsity”). The magnitude of this omission cannot be overstated. As the Supreme Court has recognized, the term “actual malice” “can confuse as well as enlighten.” *Masson v. New Yorker Magazine Co.*, 501 U.S. 496, 511 (1991). As now-Justice Ginsburg explained while still a Circuit Court judge, “the risk is considerable that jurors will not comprehend the difference between reckless disregard and mere neglect or carelessness, or will confuse or blend the separate issues of falsity and actual malice.” *Tavoulareas v. Piro*, 817 F.2d 762, 806 (D.C. Cir. 1987) (Ginsburg, J., concurring); *see also Wynn v. Smith*, 16 P.3d 424, 431 (Nev. 2001) (finding reversible error in jury instruction that defined actual malice as requiring only doubts, not “serious doubts” as to truth). Since the issue in this appeal is whether there is sufficient (clear and convincing) evidence to support a finding of actual malice, the trial judge’s error in instructing the jury means that the jury’s verdict on this issue is entitled to no weight by this Court.

Similarly, all of the evidence that Dr. Jensen proffered to establish the defendants' alleged "recklessness" focused exclusively on the common law form of "recklessness,"³⁶ meaning a high degree of carelessness, sloppiness, or "an extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers." MUJI 10.7 (stating unequivocally that such conduct does *not* satisfy the legal definition of "actual malice," which requires, instead, "a finding that the defendant had a high degree of awareness that the statement[s] was probably false, but went ahead and published the statement anyway.") Dr. Jensen's reliance upon the fact that defendants purportedly used "duplicity" and "surreptitious" methods to "trap" him (and thereby "expose" his violations of state laws and regulations) is completely unavailing to establish "actual malice;" that standard focuses solely on "the defendant's attitude . . . toward the *truth or falsity* of the material published" and not his "attitude toward the plaintiff's privacy" or reputation. *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 252 (1974) (emphasis added).

The following evidence might be pointed to in support a finding of knowing falsity or reckless disregard of the truth³⁷:

(1) defendants published the statement that Jensen had "promised [Sawyers] illegal drugs" even though the offer of Dexedrine was not an iron-clad promise, and, furthermore, prior to the first broadcast, Jensen had told Sawyers that he'd "found that that we cannot do . . . [it's] not a possibility now for weight loss." Pl.'s Ex. 37 at 6.

³⁶ [See, e.g., R. 6393, 6427, 6398-6400.]

³⁷ The evidence arguably in support of such a finding is set forth here pursuant to the appellants' burden to marshal such evidence. See Utah R. App. P. 24(a)(9).

However, Sawyers believed her report was accurate because she had caught Jensen on tape offering her a drug that she knew (and confirmed with DOPL) was illegal to prescribe for weight loss [R. 6845 (Sawyers) at 46 lines 9-18], and this confirmed Jensen's statements, from their earlier phone conversation, that he was willing to "work with her" in prescribing Dexedrine; the fact that Jensen later reneged on this promise, after learning that he had been caught, did cause her to doubt or change her belief in the truth of that statement. [R. 6847 (Sawyers) at 173; 11/20 at 15 -16.]

(2) Sawyers reported that Jensen "never asked me if I have high blood pressure," even though her videotape showed that Jensen's nurse had taken her blood pressure. R. 6847 (Sawyers) at 164 lines 17-23. Also, the statement "He gave me prescriptions . . . without weighing me or giving me a physical" was knowingly false because Dr. Jensen intended to perform a physical examination but was prevented from doing so when Sawyers left the clinic abruptly.

However, Sawyers believed her statements were true because Dr. Jensen never inquired about her history of blood pressure or whether she was on medications that lower blood pressure. [R. 6847 (Sawyers) at 167-68.] Actual malice is not proven unless defendant is shown to have been aware of probable falsity of the gist of a report, not the false but subsidiary details contained therein. *See Herbert v. Lando*, 781 F.2d 298, 312 (2d Cir. 1986); *Nicholson v. Promoters On Listings*, 159 F.R.D. 343, 355 (D. Mass. 1994). In addition, it was undisputed that Dr. Jensen did give Sawyers the prescriptions before he weighed her or performed a physical examination. [R. 6866 (Jensen) at 194 lines 10 - 12.]. Moreover, Sawyers refuted Dr. Jensen's new claim, *see supra* n. 6, that she left the clinic abruptly and prevented him from performing a physical examination [R. 6847

(Sawyers) at 102; *Id.* at 182-184], so there was no evidence that she believed that statement was untrue.

(3) The first broadcast could be viewed as suggesting that Lynette Singleton had obtained her diet pills from Dr. Jensen, when Sawyers knew that she had not. [R. 6866 (Jensen) at 54 lines 18-21.]

However, Sawyers testified that she did not believe she was creating the false impression that Singleton was a patient of Dr. Jensen [R. 6847 (Sawyers) at 108, 156-57; R. 6845 at 45 lines 10 - 23], and the record does not demonstrate otherwise. Actual malice cannot be shown unless the defendant had actual knowledge that a particularly defamatory implication would be conveyed by the broadcast and intended to convey that implication.

Newton v. National Brdcst'g Co., 930 F.2d 662, 686 (9th Cir. 1990); *Dixon v. Ogden Newspapers, Inc.*, 416 S.E.2d 237 (W. Va. 1992).

(4) The third broadcast suggested that Dr. Jensen was one of the physicians included in the book *Questionable Doctors*, when Sawyers knew that he was not listed in that book. [R. 6847 (Sawyers) at 129.]

However, that broadcast did *not* state that Dr. Jensen was listed in the book at that time; instead, it pointed viewers to two sources for finding doctors against whom the DOPL had filed a petition: the book and the DOPL website, where Jensen was listed. [See Defs.' Ex. 263; R. 6847 (Sawyers) at 124.] Moreover, it was undisputed that Jensen was included in the subsequent editions of the book *Questionable Doctors*. [See R. 6864 (Sawyers) at 168-70.]

(5) The studio "lead-in" to the third report stated "What would you do if you found out your doctor was passing out drugs to addicts?" which Dr. Jensen maintained was directed at him. [R. 6866 (Jensen) at 95, lines 21-25.]

In fact, that broadcast featured another doctor, Sherman Johnson, who, as described in the broadcast, “was sent to jail for giving a patient [who was an addict] a lethal dose of Demerol.” [R. 6847 (Sawyers) at 127.] Thus, neither Sawyers, nor the studio anchor who delivered the studio lead-in, believed that that statement referred to Dr. Jensen and thus was false.

(6) The third broadcast again stated that Dr. Jensen had been “caught on tape promising me illegal drugs for weight loss”, and Sawyers knew that he had not made any such “promise,” and had since reneged on the “promise” in any case.

Sawyers’ well-founded belief in the truth of her statement is shown by the record. [See R. 6847 (Sawyers) at 173; R. 6845 at 15-16; R. 6864 at 152 lines 16-20;] *see also supra* n.25.

(7) Both the second broadcast’s statement that “DOPL is going after the license of a Utah doctor,” and the third broadcasts statements “Dr. Jensen is still practicing,” and “The State will allow Jensen to keep his license” suggested that Dr. Jensen’s medical license had been placed in jeopardy by the DOPL Petition, but Sawyers knew (only after the second broadcast), that DOPL was not seeking to revoke his license. R. 6862 (Allred) at 99–100; R. 6845 (Sawyers) at 13-14, 18.

However, the second broadcast was based on the allegations in the DOPL Petition alone, which stated that DOPL had the authority to “revoke, suspend, restrict, [or] place on probation” a doctor’s license. *See supra* at 18. There is certainly no actual malice in relying upon an official record. *St. Amant v. Thompson*, 390 U.S. 727, 731-33 (1968). The third broadcast’s statement that Dr. Jensen was “still practicing” conveyed that the DOPL disciplinary process took a long time (a point specifically addressed on camera by Dr. George Van Komen, and, like the statement, “the State will allow Jensen

to keep his license,” is not false; accordingly these statements cannot be the basis for a finding of actual malice.

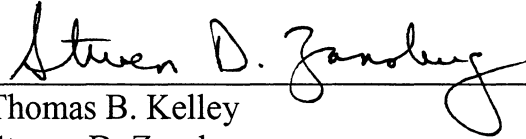
In sum, upon completing its constitutionally-mandated independent review of the record, this Court must conclude that there is *no* evidence –much less “clear and convincing” evidence”-- that the defendants actually harbored *any* doubts, much less *serious* doubts, that Dr. Jensen was willing to dispense (and did dispense) controlled substances for weight loss in violation of state laws and regulations. Accordingly, the jury’s award of punitive damages on the basis of the defendants’ broadcasts must be vacated.

Conclusion

For the reasons set forth above, defendants respectfully ask that the Court find that the judgment entered below cannot stand and order that the case be dismissed with prejudice.

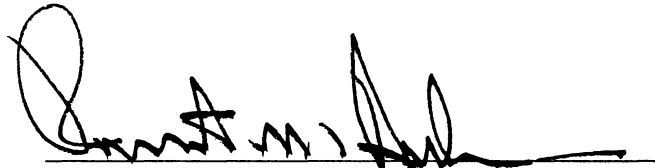
DATED: March 28, 2003.

FAEGRE & BENSON LLP

A handwritten signature in black ink, reading "Steven D. Zansberg", written over a horizontal line.

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A handwritten signature in black ink, appearing to read "Robert M. Anderson", written over a horizontal line.

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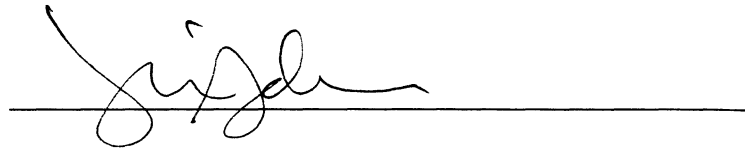
ATTORNEYS FOR
DEFENDANTS/APPELLANTS
MARY SAWYERS AND KTVX-TV

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing Appellants' OPENING BRIEF to be hand delivered, this 21st day of March, 2003, to the following:

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Addenda

Addendum 1

Constitution of the United States of America, Amend. 1

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Addendum 2

Constitution of Utah, Art. I Sec. 15

Section 15. [Freedom of speech and of the press – Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

1896

Addendum 3

Utah Code Annotated 45-2-3

45-2-3. Privileged Publication or Broadcast Defined.

A privileged publication or broadcast which shall not be considered as libelous or slanderous per se, is one made:

- (1) In the proper discharge of an official duty.
- (2) In any publication or broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.
- (3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.
- (4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.
- (5) By a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or the publication or broadcast of the matter complained of was for the public benefit.

Utah Code Annotated 58-37-4(2)(b)(iii)(A)

58-37-4. Schedule of controlled substances – Schedule I through V – Findings required – Specific substances included in schedules

(2) Schedules I, II, III, IV, and V consist of the following drugs or other substances by the official name, common or usual name, chemical name, or brand name designated:

...

(b) Schedule II:

...

(iii) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(A) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

...

Utah Code Annotated 76-9-401(1) & (2); 76-9-402(1)(a) & (b)

76-9-401. Definitions

For purposes of this part:

(1) “Private place” means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance.

(2) “Eavesdrop” means to overhear, record, amplify, or transmit any part of a wire or oral communication of others without the consent of at least one party thereto by means of any electronic, mechanical, or other device.

...

76-9-402. Privacy Violation.

(1) A person is guilty of privacy violation if, except as authorized by law, he:

(a) Trespasses on property with intent to subject anyone to eavesdropping or other surveillance in a private place; or

(b) Installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place or uses any such unauthorized installation;

...

Utah Code Annotated 78-12-29(4)

78-12-29. Within One Year.

An action may be brought within one year:

...

(4) for libel, slander, assault, battery, false imprisonment, or seduction;

...

Addendum 4

Utah Administrative Code R156-37-11 (11), (14) (1994)

R156-37-11 Restrictions Upon the Prescription, Dispensing and Administration of Controlled Substances

...

(11) A practitioner shall not prescribe, dispense or administer a Schedule II controlled stimulant for purposes of weight reduction or control.

...

(14) A prescribing practitioner may prescribe, dispense or administer a Schedule III or IV controlled substance for purposes of weight reduction in the treatment of obesity only as an adjunct, in accordance with the F.D.A approved labeling for the product, in a medically supervised program of weight reduction based on caloric restriction, provided that all of the following conditions are met:

- (a) before initiating treatment utilizing a Schedule III or IV controlled substance, the prescribing practitioner determines through review of his own records of prior treatment, or through review of the records of prior treatment which another treating prescribing practitioner or weight-loss program has provided to the prescribing practitioner, that the patient has made a substantial good-faith effort to lose weight in a treatment program utilizing a regimen of weight reduction based on caloric restriction, nutritional counseling, behavior modification, and exercise, without the utilization of controlled substances, and that said treatment has been ineffective;
- (b) before initiating treatment utilizing a Schedule III or IV controlled substance, the prescribing practitioner obtains a thorough history, performs a thorough physical examination of the patient, and rules out the existence of any recognized contraindications to the use of the controlled substance to be utilized;
- (c) the practitioner shall not prescribe, dispense or administer any Schedule III or IV controlled substance when he knows or has reason to believe that a recognized contraindication to its use exists;
- (d) the practitioner shall not prescribe, dispense or administer Schedule III or IV controlled substances for weight reduction for a period longer than twelve weeks in any one-year period. The one year period shall begin counting the first day of the drug therapy as indicated on the prescriber instructions for use;

- (e) the practitioner shall not prescribe, dispense or administer any Schedule III or IV controlled substance in the treatment of a patient who he knows or should know is pregnant; and
- (f) the practitioner shall not initiate or shall discontinue prescribing, dispensing or administering all Schedule III or IV controlled substances for weight reduction immediately upon ascertaining or having reason to believe:
 - (i) that the patient has failed to lose weight while under treatment with a controlled substance or controlled substances over a period of 28 days, which determination shall be made by a scheduled weighing of the patient at least every fourteenth day, except that a patient who has never before received treatment for obesity utilizing any controlled substance who fails to lose weight during his first such treatment attempt may be treated with a different controlled substance for an additional fourteen days;
 - (ii) that the patient has developed tolerance (decreasing contribution of the drug toward further weight loss) to the anorectic effects of the controlled substance being utilized;
 - (iii) that the patient has a history of drug abuse or shows a propensity for alcohol abuse; or
 - (iv) that the patient has consumed or disposed of any controlled substance other than in compliance with the prescribing practitioner's directions.

Addendum 5

SPECIAL VERDICT FORM

12-1-00 @ 3:42 PM Deputy AW

The verdict in this case will be determined by your answers to a series of questions set forth below. Make sure that you read the questions and notes carefully.

NOVEMBER 6, 1996 BROADCAST

1. Did Mary Sawyers defame or place Dr. Michael Jensen in a false light in the November 6, 1996 broadcast?

Yes X

No _____

2. Did United Television, Inc. a.k.a. KTVX defame or place Dr. Michael Jensen in a false light in the November 6, 1996 broadcast?

Yes X

No _____

If you answered "Yes" to questions 1 or 2, please proceed to the next question. If you answered "No" to both questions, please proceed to page 3.

3. Did Dr. Jensen sustain any damages as a result of the defamation or false light in the November 6, 1996 broadcast?

Yes X

No _____

If you answered "Yes" to this question, please state the amount of damages sustained. If you answered "No" to this question, please proceed to page 3.

Pecuniary Loss:

\$ 1,000,000.00

General Damages:

\$ 500,000.00

4. Assuming that all the fault that caused Dr. Michael Jensen's damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

a. Michael Jensen

0 %

b. Mary Sawyers

25 %

c. United Television, Inc.

75 %

d. IHC Inc.

0 %

e. Intermountain Health Care, Inc.

0 %

f.	IHC Health Plans, Inc.	<u>0</u> %
g.	Division of Occupational and Professional Licensing ("DOPL")	<u>0</u> %
h.	David Robinson	<u>0</u> %
i.	J. Craig Jackson	<u>0</u> %
j.	Paul Allred	<u>0</u> %
k.	Max D. Wheeler	<u>0</u> %
Total		100%

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Defamation and False Light claims from the November 6, 1996 broadcasts against Mary Sawyers?

Yes X

No _____

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Defamation and False Light claims from the November 6, 1996 broadcasts against United Television?

Yes X

No _____

SEPTEMBER 5, 1995 & JUNE 17, 1996 BROADCASTS

1. Did Mary Sawyers place Dr. Michael Jensen in a false light in either or both of the September 5, 1995 or June 17, 1996 broadcasts?

Yes X

No _____

2. Did United Television, Inc. a.k.a. KTVX place Dr. Michael Jensen in a false light in either or both of the September 5, 1995 or June 17, 1996 broadcasts?

Yes X

No _____

If you answered "Yes" to questions 1 or 2, please proceed to the next question. If you answered "No" to both questions, please proceed to page 5.

3. Did Dr. Jensen sustain any damages as a result of the false light in either or both of the September 5, 1995 or June 17, 1996 broadcasts?

Yes X

No _____

If you answered "Yes" to this question, please state the amount of damages sustained. If you answered "No" to this question, please proceed to page 5.

Pecuniary Loss:

\$ 600,000

General Damages:

\$ 100,000

4. Assuming that all the fault that caused Dr. Michael Jensen's damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

a. Michael Jensen 15 %

b. Mary Sawyers 25 %

c. United Television, Inc. 60 %

d. IHC Inc. 0 %

e. Intermountain Health Care, Inc. 0 %

f. IHC Health Plans, Inc. 0 %

g.	Division of Occupational and Professional Licensing ("DOPL")	<u>0</u> %
h.	David Robinson	<u>0</u> %
i.	J. Craig Jackson	<u>0</u> %
j.	Paul Allred	<u>0</u> %
k.	Max D. Wheeler	<u>0</u> %
Total		100%

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Invasion of Privacy-False Light claim in either or both of the September 5, 1995, or June 17, 1996 broadcasts, against Mary Sawyers?

Yes X

No _____

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Invasion of Privacy-False Light claim in either or both of the September 5, 1995, or June 17, 1996 broadcasts, against United Television?

Yes X

No _____

INVASION OF PRIVACY–COMMON LAW INTRUSION UPON SECLUSION

1. Did Mary Sawyers intrude upon Dr. Michael Jensen's seclusion?

Yes X

No _____

2. Did United Television, Inc. a.k.a. KTVX intrude upon Dr. Michael Jensen's seclusion?

Yes X

No _____

If you answered "Yes" to questions 1 or 2, please proceed to the next question. If you answered "No" to both questions, please proceed to page 7.

3. Did Dr. Jensen sustain any damages as a result of the intrusion upon seclusion?

Yes X

No _____

If you answered "Yes" to this question, please state the amount of damages sustained. If you answered "No" to this question, please proceed to page 7.

Pecuniary Loss:

\$ 0

General Damages:

\$ 50,000.00

4. Assuming that all the fault that caused Dr. Michael Jensen's damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

- | | | |
|----|--|-------------|
| a. | Michael Jensen | <u>0</u> % |
| b. | Mary Sawyers | <u>50</u> % |
| c. | United Television, Inc. | <u>50</u> % |
| d. | IHC Inc. | <u>0</u> % |
| e. | Intermountain Health Care, Inc. | <u>0</u> % |
| f. | IHC Health Plans, Inc. | <u>0</u> % |
| g. | Division of Occupational and Professional Licensing ("DOPL") | <u>0</u> % |

h.	David Robinson	<u>0</u> %
i.	J. Craig Jackson	<u>0</u> %
j.	Paul Allred	<u>0</u> %
k.	Max D. Wheeler	<u>0</u> %
Total		100%

5 Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Invasion of Privacy–Common Law Intrusion Upon Seclusion claim against Mary Sawyers?

Yes X

No _____

6 Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Invasion of Privacy–Common Law Intrusion Upon Seclusion claim against United Television?

Yes X

No _____

UTAH CODE ANN. §76-9-402(1)(a)-PRIVACY VIOLATION

1. Did Mary Sawyers violate Utah Code Ann. §76-9-402(1)(a)?

Yes _____

No X

2. Did United Television, Inc. a.k.a. KTVX violate Utah Code Ann. §76-9-402(1)(a)?

Yes X

No _____

If you answered "Yes" to questions 1 or 2, please proceed to the next question. If you answered "No" to both questions, please proceed to the page 9.

3. Did Dr. Jensen sustain any damages as a result of the violation of Utah Code Ann. §76-9-402(1)(a)?

Yes X

No _____

If you answered "Yes" to this question, please state the amount of damages sustained. If you answered "No" to this question, please proceed to page 9.

Pecuniary Loss:

\$ 0

General Damages:

\$ 50,000.00

4. Assuming that all the fault that caused Dr. Michael Jensen's damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

a. Michael Jensen

0 %

b. Mary Sawyers

0 %

c. United Television, Inc.

100 %

d. IHC Inc.

0 %

e. Intermountain Health Care, Inc.

0 %

f. IHC Health Plans, Inc.

0 %

g. Division of Occupational and Professional Licensing ("DOPL")

0 %

h.	David Robinson	<u>0</u> %
i.	J. Craig Jackson	<u>0</u> %
j.	Paul Allred	<u>0</u> %
k.	Max D. Wheeler	<u>0</u> %

Total	100%
-------	------

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann. §76-9-402(1)(a)–Privacy Violation claim against Mary Sawyers?

Yes X No _____

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann. §76-9-402(1)(a)–Privacy Violation claim against United Television?

Yes X No _____

UTAH CODE ANN. §76-9-402(1)(b)–PRIVACY VIOLATION

1. Did Mary Sawyers violate Utah Code Ann. §76-9-402(1)(b)?

Yes X No _____

2. Did United Television, Inc. a.k.a. KTVX violate Utah Code Ann. §76-9-402(1)(b)?

Yes X No _____

If you answered “Yes” to questions 1 or 2, please proceed to the next question. If you answered “No” to both questions, please proceed to page 11.

3. Did Dr. Jensen sustain any damages as a result of the violation of Utah Code Ann. §76-9-402(1)(b)?

Yes X No _____

If you answered “Yes” to this question, please state the amount of damages sustained. If you answered “No” to this question, please proceed to page 11.

Pecuniary Loss: \$ 0

General Damages: \$ 50,000.00

4. Assuming that all the fault that caused Dr. Michael Jensen’s damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

- | | | |
|----|---------------------------------|-------------|
| a. | Michael Jensen | <u>0</u> % |
| b. | Mary Sawyers | <u>50</u> % |
| c. | United Television, Inc. | <u>50</u> % |
| d. | IHC Inc. | <u>0</u> % |
| e. | Intermountain Health Care, Inc. | <u>0</u> % |
| f. | IHC Health Plans, Inc. | <u>0</u> % |

g.	Division of Occupational and Professional Licensing ("DOPL")	<u>0</u> %
h.	David Robinson	<u>0</u> %
i.	J. Craig Jackson	<u>0</u> %
j.	Paul Allred	<u>0</u> %
k.	Max D. Wheeler	<u>0</u> %

Total 100%

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann. §76-9-402(1)(b)–Privacy Violation claim against Mary Sawyers?

Yes X No _____

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann. §76-9-402(1)(b)–Privacy Violation claim against United Television?

Yes X No _____

UTAH CODE ANN. §76-9-402(1)(c)–PRIVACY VIOLATION

1. Did Mary Sawyers violate Utah Code Ann. §76-9-402(1)(c)?

Yes X No _____

2. Did United Television, Inc. a.k.a. KTVX violate Utah Code Ann. §76-9-402(1)(c)?

Yes X No _____

If you answered “Yes” to questions 1 or 2, please proceed to the next question. If you answered “No” to both questions, please proceed to page 13.

3. Did Dr. Jensen sustain any damages as a result of the violation of Utah Code Ann. §76-9-402(1)(c)?

Yes _____ No X

If you answered “Yes” to this question, please state the amount of damages sustained. If you answered “No” to this question, please proceed to page 13.

Pecuniary Loss: \$ _____

General Damages: \$ _____

4. Assuming that all the fault that caused Dr. Michael Jensen’s damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

- a. Michael Jensen _____%
- b. Mary Sawyers _____%
- c. United Television, Inc. _____%
- d. IHC Inc. _____%
- e. Intermountain Health Care, Inc. _____%
- f. IHC Health Plans, Inc. _____%
- g. Division of Occupational and Professional Licensing (“DOPL”) _____%

h. David Robinson _____%

i. J. Craig Jackson _____%

j. Paul Allred _____%

k. Max D. Wheeler _____%

Total 100%

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann. §76-9-402(1)(c)–Privacy Violation claim against Mary Sawyers?

Yes _____

No _____

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann §76-9-402(1)(c)–Privacy Violation claim against United Television?

Yes _____

No _____

UTAH CODE ANN. §76-9-403—COMMUNICATION ABUSE

1. Did Mary Sawyers violate Utah Code Ann. §76-9-403?

Yes X No _____

2. Did United Television, Inc. a.k.a. KTVX violate Utah Code Ann. §76-9-403?

Yes X No _____

If you answered "Yes" to questions 1 or 2, please proceed to the next question. If you answered "No" to both questions, please proceed to page 15.

3. Did Dr. Jensen sustain any damages as a result of the violation of Utah Code Ann. §76-9-403?

Yes _____ No X

If you answered "Yes" to this question, please state the amount of damages sustained. If you answered "No" to this question, please proceed to page 15.

Pecuniary Loss: \$ _____

General Damages: \$ _____

4. Assuming that all the fault that caused Dr. Michael Jensen's damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

- a. Michael Jensen _____%
- b. Mary Sawyers _____%
- c. United Television, Inc. _____%
- d. IHC Inc. _____%
- e. Intermountain Health Care, Inc. _____%
- f. IHC Health Plans, Inc. _____%
- g. Division of Occupational and Professional Licensing ("DOPL") _____%
- h. David Robinson _____%

i. J. Craig Jackson _____%

j. Paul Allred _____%

k. Max D. Wheeler _____%

Total 100%

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann §76-9-403--Communication Abuse claim against Mary Sawyers?

Yes _____

No _____

6 Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's Utah Code Ann §76-9-403--Communication Abuse claim against United Television?

Yes _____

No _____

**18 U.S.C. §2511–INTERCEPTION AND DISCLOSURE OF WIRE, ORAL, OR
ELECTRONIC COMMUNICATIONS**

1. Did Mary Sawyers violate 18 U.S.C. §2511?

Yes _____

No X _____

2. Did United Television, Inc. a.k.a. KTVX violate 18 U.S.C. §2511?

Yes _____

No X _____

If you answered “Yes” to questions 1 or 2, please proceed to the next question. If you answered “No” to both questions, please proceed to page 17.

3. Did Dr. Jensen sustain any damages as a result of the violation of 18 U.S.C. §2511?

Yes _____

No _____

If you answered “Yes” to this question, please state the amount of damages sustained. If you answered “No” to this question, please proceed to page 17.

Pecuniary Loss: \$ _____

General Damages: \$ _____

4. Assuming that all the fault that caused Dr. Michael Jensen’s damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

- | | | |
|----|--|---------|
| a. | Michael Jensen | _____ % |
| b. | Mary Sawyers | _____ % |
| c. | United Television, Inc. | _____ % |
| d. | IHC Inc. | _____ % |
| e. | Intermountain Health Care, Inc. | _____ % |
| f. | IHC Health Plans, Inc. | _____ % |
| g. | Division of Occupational and Professional Licensing (“DOPL”) | _____ % |

h.	David Robinson	_____%
i.	J. Craig Jackson	_____%
j.	Paul Allred	_____%
k.	Max D. Wheeler	_____%

Total	100%
-------	------

5. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's 18 U.S.C. §2511 claim against Mary Sawyers.

Yes_____ No_____

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's 18 U.S.C. §2511 claim against United Television.

Yes_____ No_____

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS

1. Did Mary Sawyers intentionally interfere with Dr. Michael Jensen's prospective economic relations?

Yes X

No ~~X~~ *DA*

2. Did United Television, Inc. a.k.a. KTVX intentionally interfere with Dr. Michael Jensen's prospective economic relations?

Yes X

No ~~X~~ *DA*

If you answered "Yes" to questions 1 or 2, please proceed to the next question. If you answered "No" to both questions, you have completed the special verdict form.

3. If so, did the intentional interference with prospective economic relations occur in: (please check any or all that apply)

a. September 5, 1995 Broadcast

b. June 17, 1996 Broadcast

X

c. November 6, 1996 Broadcast

X

d. Other conduct

4. Did Dr. Jensen sustain any damages as a result of the intentional interference with his prospective economic relations?

Yes X

No _____

If you answered "Yes" to this question, please state the amount of damages sustained. If you answered "No" to this question, you have completed the special verdict form.

Pecuniary Loss:

\$ 0

General Damages:

\$ 25,000

5. Assuming that all the fault that caused Dr. Michael Jensen's damages totals 100%, please indicate the percentage of that fault attributable to each of the following:

a. Michael Jensen

0 %

b.	Mary Sawyers	<u>50</u> %
c.	United Television, Inc.	<u>50</u> %
d.	IHC Inc.	<u>0</u> %
e.	Intermountain Health Care, Inc.	<u>0</u> %
f.	IHC Health Plans, Inc.	<u>0</u> %
g.	Division of Occupational and Professional Licensing ("DOPL")	<u>0</u> %
h.	David Robinson	<u>0</u> %
i.	J. Craig Jackson	<u>0</u> %
j.	Paul Allred	<u>0</u> %
k.	Max D. Wheeler	<u>0</u> %

Total 100%

6. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's intentional interference with prospective economic relations claim against Mary Sawyers?

Yes X

No _____

7. Do you find that the assessment of punitive damages is appropriate in Dr. Jensen's intentional interference with prospective economic relations claim against United Television?

Yes X

No _____

DATED this 1 day of December, 2000.

[Signature]
Foreperson

SPECIAL VERDICT FORM

10-4-00 Lee Deputy

In the following causes of action, you as the jury, determined that the assessment of punitive damages is appropriate. The amount of punitive damages awarded to Dr. Jensen will be determined by your answers to the following questions. Please make sure that you read the questions carefully.

NOVEMBER 6, 1996 BROADCAST

1. Please state the amount of punitive damages awarded to Dr. Jensen against Mary Sawyers as a result of the false light and defamation found in the November 6, 1996 broadcast.

\$ 600.00

2. Please state the amount of punitive damages awarded to Dr. Jensen against United Television, Inc. a.k a. KTVX as a result of the false light and defamation found in the November 6, 1996 broadcast.

\$ 450,000.00

SEPTEMBER 5, 1995 & JUNE 17, 1996 BROADCASTS

1. Please state the amount of punitive damages awarded to Dr. Jensen against Mary Sawyers as a result of the false light found in the September 5, 1995 and June 17, 1996 broadcasts.

\$ 300.00

2. Please state the amount of punitive damages awarded to Dr. Jensen against United Television, Inc. a.k.a. KTVX as a result of the false light found in the September 5, 1995 and June 17, 1996 broadcasts.

\$ 245,000.00

INVASION OF PRIVACY–COMMON LAW INTRUSION UPON SECLUSION

1. Please state the amount of punitive damages awarded to Dr. Jensen against Mary Sawyers as a result of her intrusion upon Dr. Jensen's seclusion.

\$ -0-

2. Please state the amount of punitive damages awarded to Dr. Jensen against United Television, Inc. a.k.a. KTVX as a result of its intrusion upon Dr. Jensen's seclusion.

\$ 40,000.00

UTAH CODE ANN. §76-9-402(1)(a)–PRIVACY VIOLATION

1. Please state the amount of punitive damages awarded to Dr. Jensen against United Television, Inc. a.k.a. KTVX as a result of its privacy violation under Utah Code Ann. §76-9-402(1)(a).

\$ 40,000.00

UTAH CODE ANN. §76-9-402(1)(b)–PRIVACY VIOLATION

1. Please state the amount of punitive damages awarded to Dr. Jensen against Mary Sawyers as a result of her privacy violation under Utah Code Ann. §76-9-402(1)(a).

\$ -0-

2. Please state the amount of punitive damages awarded to Dr. Jensen against United Television, Inc. a.k.a. KTVX as a result of its privacy violation under Utah Code Ann. §76-9-402(1)(b).

\$ 40,000.00

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS

1. Please state the amount of punitive damages awarded to Dr. Jensen against Mary Sawyers as a result of her intentional interference with his prospective economic relations.

\$ - 0 -

2. Please state the amount of punitive damages awarded to Dr. Jensen against United Television, Inc. a.k.a. KTVX as a result of its intentional interference with his prospective economic relations.

\$ 25,000.00

DATED this 41 of December, 2000.


Foreperson

Addendum 6

WESLEY F. SINE 2967
Attorney for Plaintiff
IBM Building Suite 355
420 East South Temple Street
Salt Lake City, Utah 84111
Telephone: 801 364-5125
Fax: 801 521 0732

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
10/29/01 Deputy

Dale F. Gardiner, Esq.
PARRY ANDERSON & MANSFIELD
60 East South Temple, Suite 1270
Salt Lake City, Utah 84111
Telephone: 801 521 3434
Fax: 801 521 3484

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

MICHAEL JENSEN, M.D.,

Plaintiff,

vs.

MARY SAWYERS and UNITED
TELEVISION, INC., AKA. KTVX,
Defendants.

ORDER

Case No. 97-00400512CV
Judge Ray Harding, Jr.

The following motions came before the Court for oral argument on September 18 2001:

(1) Defendants' MOTION FOR NEW TRIAL AND TO ALTER OR AMEND THE
JUDGMENT and 2) Defendants' MOTION FOR JUDGMENT NOTWITHSTANDING THE
VERDICT.

Defendants were represented by Robert M. Anderson, Esq. and Jennifer K. Anderson,
Esq , and Plaintiff was represented by Wesley F. Sine and Dale F. Gardiner, Esq , The parties fully
briefed the issues and the Court being fully apprised therein.

NOW THEREFORE, the Court having issued its Ruling on the motion on September 26,
2001 and for the reasons and findings contained therein, it is hereby ordered:

0002

1. DEFENDANTS' MOTION FOR NEW TRIAL IS DENIED.

2. DEFENDANT MOTION TO ALTER OR AMEND THE JURY VERDICT IS DENIED IN PART AND GRANTED IN PART The judgment entered on or about March 13, 2001 contains actual damage awards of \$50,000 and punitive damage awards of \$40,000.00 on each of the following claims: Common Law Intrusion upon Seclusion; Violation of U.C.A. 76-9-402(1)(a); and Violation of U.C.A. 76-9-402(1)(b). Those claims are based on the same facts and seek the same relief, and the damage awards on those claims are thus duplicative. The court vacates \$100,000.00 of the total actual damage award and \$80,000.00 of the punitive damage award as duplicative.

3. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IS DENIED IN PART AND GRANTED IN PART. Judgment is granted in favor of Defendants on Plaintiff's claims under Utah Code Ann. Section 76-9-402(1)(c) and 76-9-403. The ultimate damage award is unaffected. All other parts of Defendants' motion for j.n.o.v. are denied.

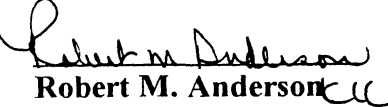
4. THE JUDGMENT ENTERED ON MARCH 13, 2001 IS NOW A FINAL JUDGMENT. The post judgment interest as set forth in the Judgment entered March 13, 2001 shall be corrected to 7.34% interest for the duration of the judgment..

DATED this ^{25th} day of October, 2001

BY THE COURT:


Honorable Ray M. Harding, Jr.

Approved as to Form

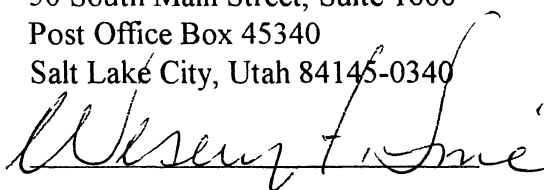

Robert M. Anderson
Attorney for Defendant



CERTIFICATE OF SERVICE

I hereby certify that on the ^{22nd}~~19th~~ day of October, 2001, I caused a true and correct copy of
the foregoing order to be hand-delivered to the following

Robert M Anderson
Jennifer K Anderson
Bradley M Strassberg
VAN COTT, BAGLEY, CORNWALL, & McCARTHY
50 South Main Street, Suite 1600
Post Office Box 45340
Salt Lake City, Utah 84145-0340



1/26/01 REP Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

MICHAEL JENSEN, M.D.,

Plaintiff,

v.

MARY SAWYERS and UNITED
TELEVISION, INC., a.k.a. KTVX,

Defendants.

RULING

Case No. 970400512

Judge Ray M. Harding

This matter comes before the Court on Defendants' Motion for Judgment Notwithstanding the Verdict and Defendants' Motion for New Trial and to Alter or Amend the Judgment. The Court has reviewed the file, considered the parties' memoranda, heard oral arguments, and being fully advised in the premises issues the following:

RULING

MOTION FOR NEW TRIAL AND TO ALTER OR AMEND THE JUDGMENT

Rule 59 of the Utah Rules of Civil Procedure governs Motions to Amend Judgment and Motions for New Trial. Defendants rely on three of the grounds listed in the rule as a basis for their motion:

- (5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
- (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
- (7) Error in law.

Rule 59(a). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

In *Bowden v. The Denver & Rio Grande Western Railroad Co.*, the Utah Supreme Court stated,

We reaffirm our commitment that “The right of jury trial . . . is . . . a right so fundamental and sacred to the citizen . . . [that it] should be jealously guarded by the courts.” But once having been granted such right and a verdict rendered, it should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of error. Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or grant a new trial.

286 P.2d 240, 244 (Utah 1955).

Excessive Damages

In order to receive a new trial on the grounds of excessive damages, the Defendants must meet the standard set forth in *Paul v. Kirkendall*, 123 Utah 627, 629; 261 P.2d 670, 671 (Utah 1953):

Rule 59(a) (5), Utah Rules of Civil Procedure, provides that a new trial may be granted on grounds of excessive or inadequate damages, *appearing to have been given under the influence of passion or prejudice*. It is not enough, under this rule nor under the code provision which it supplanted, merely to allege that the amount itself is excessive. The amount of the verdict is ordinarily a matter exclusively for the jury and on the ground of adequacy of the verdict alone, the court may not interfere with the jury's verdict unless it clearly appears that the award was rendered under misunderstanding or prejudice. If inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the court as to the law applicable to the case as to satisfy the court that the verdict was rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interest of justice and grant a new trial.

The Utah Supreme Court has said,

The verdict here was admittedly liberal. But the mere fact that it was more than another jury, or more than this court, might have given, or even more than the evidence justified, does not conclusively show that it was the result of passion, prejudice or corruption on the part of the jury.

Duffy v. Union Pacific Railroad, 118 Utah 82, 89 (Utah 1950).

Defendants cannot show that the jury disregarded the testimony of Plaintiff's economic experts. “To justify a new trial for excessive damages under Rule 59(a)(5), Utah R. Civ. P., the damage award must be more than generous; it must be clearly excessive on any rational view of

the evidence.” Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078, 1084 (Utah 1985).

The fact that much of the jury’s award is for “soft” damages does not mean that such damages are not recoverable, although it may reflect on how high an award of punitive damages may be without being excessive. See Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811-812 (Utah 1991).

The Court finds no evidence of passion or prejudice on the part of the jury as to actual damages. The Court now examines punitive damages.

Any motion for a new trial on the question of punitive damages requires that the trial court engage in a two-part inquiry: (i) whether punitives are appropriate at all, i.e., whether the evidence is sufficient to support a lawful jury finding of defendant's requisite mental state, and (ii) whether the amount of punitives is excessive or inadequate, appearing to have been given under the influence of passion or prejudice.

Crookston, 817 P.2d at 807.

The jury was presented sufficient evidence of wilfulness and excessive publication that a reasonable jury could find punitive damages warranted. *Crookston* sets forth seven factors to consider when determining the reasonableness of a punitive damage award.

The stated list of factors we have said must be considered in assessing the amount of punitives to be awarded include the following seven: (i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded.

Id. at 808.

Crookston also has given the Utah courts a guidepost to follow in interpreting what appears to be “given under the influence of passion or prejudice.”

The general rule to be drawn from our past cases appears to be that where the punitives are well below \$ 100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of \$ 100,000, we have indicated some inclination to overturn awards having ratios of less than 3 to 1.

In these patterns, we find that guidelines emerge for trial courts faced with challenges to punitive damage awards on the grounds of excessiveness under rule 59(a)(5). If the ratio of punitive to actual damages falls within the range that this court has consistently upheld, then the trial court may assume that the award is not excessive. In denying a rule 59(a)(5) motion for a new trial, the trial court need not give any detailed explanation for its decision if the punitive damage award falls within this ratio range. If the award exceeds the ratios set by our past pattern of decision, the trial court is not bound to reduce it. However, if such an award is upheld, the trial judge must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts.

Id. at 810-11.

The punitive damages in this case greatly exceed \$100,000. Therefore, the presumption against excessiveness of an award of punitive damages less than three times the amount of actual damages does not apply. For the larger punitive damage awards, *Crookston* cites cases upholding a 1 to 1 and a ½ to 1 ratio. *See id.* at 810, *citing Von Hake v. Thomas*, 705 P.2d 766, 772 (Utah 1985) and *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106, 1113 (Utah 1985). The ratio in this case is closer to 1/3 punitive to 1 actual damages (\$840,900 punitive damages to \$2,375,000 actual damages). This ratio appears to be smaller than others listed as acceptable in *Crookston*. However, as the punitive damage award is considerably larger than \$100,000, this Court will provide some guidance as to why the award appears appropriate. The relative wealth of at least one of the Defendants, United Television, is very large. The jury found and there was evidence to support a finding that the impact on the Plaintiff's life and lifestyle were great. The fact that Defendant's made three separate broadcasts over the course of more than a year based on the same hidden camera interview suggests a probability of future recurrence. The amount of actual damages is very high and could warrant an even higher punitive damage award; however, the jury appears to have considered that some of the actual damages were soft and awarded a comparatively small ratio of punitive damages. This Court does not find the damages, actual or punitive, to be so excessive as to be the result of passion or prejudice.

0701

Insufficient Evidence

On the subject of insufficient evidence, the Utah Supreme Court has said,

Even though a trial judge may disagree with a verdict, mere disagreement is not sufficient reason to order a new trial. The power of a trial judge to order a new trial is to be used in those rare cases when a jury verdict is manifestly against the weight of the evidence. Because there is inherent tension between the right of a litigant to have a jury decide a case and the right of a trial judge to order a new trial in the interests of justice and because of the added expense and inconvenience of a new trial, the granting of “a new trial on an evidentiary basis under Rule 59(a)(6) should be exercised with forbearance.”

Goodard v. Hickman, 685 P.2d 530, 532 (Utah 1984).

Defendants assert that Plaintiff failed to prove that the allegedly tortious actions of Defendants caused Plaintiff economic harm. As a corollary to that assertion, Defendants contend that most of the damage to Plaintiff stemmed from non-actionable true statements made by the Defendants. As the jury did not state which statements it found that put Plaintiff in a false light, Defendants assert that it appears from the size of the jury award that the jury made an impermissible award of damages based on true or privileged statements.

The Court disagrees. The jury instructions clearly set forth what types of statements are actionable and requires that the jury find proximate cause. Instruction 21 states,

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

Instruction 56, which sets forth the standard for evaluating defamation claims, states in part, “[i]n considering damages, if any, you should consider those pecuniary losses and general damages which the plaintiff has shown by the preponderance of the evidence to have sustained that were *proximately caused* by the publication of the *false* statements.” (emphasis added). The Court will not indulge in mere speculation that the jury disregarded the instructions. Evidence existed that Plaintiff was fired from IHC’s WorkMed after the second broadcast and his hours at

the Art City Medical Clinic were cut because of the third broadcast. Plaintiff showed damages arising from each broadcast and actionable statements within each broadcast. Defendants do not show additional bad conduct by the Plaintiff after the first broadcast. The Court rejects Defendants' contention that none of the statements they recite are capable of defaming or placing the Plaintiff in a false light when examined by a reasonable person.

Defendants argue that because the jury declined to find liability for intentional interference on the September 5, 1995 broadcast, they likely found the statements in that broadcast true or non-actionable and the false light award based on that broadcast are patently inconsistent. Plaintiffs argue that the failure to award intentional interference damages for the first broadcast merely shows that the jury did not find intent to interfere until repeated broadcasts, but that does not undercut a finding of libel. "Where the possibility of inconsistency in jury interrogatories or special verdicts exists, the courts will not presume inconsistency; rather, they will seek to reconcile the answers if possible." Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078, 1083 (Utah 1985).

Plaintiff also points out that Defendants made no objection based on the alleged ambiguity in the verdict form.

Furthermore, Johnson Construction failed to object to the verdict before the jury was discharged. When special interrogatories or verdicts are ambiguous, counsel has an obligation either to object to the filing of the verdict or to move that the cause be resubmitted to the jury for clarification. If a party fails to take appropriate action before the discharge of the verdict, that party generally may not later move for a new trial on the ground that the verdict was defective.

Id.

The Court holds that the jury instructions were adequate and the jury was properly instructed on proximate cause, false light, and defamation and the jury did not need to specify which statements they found actionable.

Errors in Law

Statute of Limitations

The issue of the applicable statute of limitations for false light claims was resolved by the Court at the summary judgment stage. Utah Code Ann. § 78-12-29 does not specifically apply to false light claims. Defendants rely on footnote 37 of *Russell v. Thompson Newspapers, Inc.*, 842 P.2d 896, 906 (Utah 1992). *Eastwood v. Cascade Broadcasting Co.*, 106 Wash.2d 466, 722 P.2d 1295, 1299 (Wash. 1986) appears in the string cites in the footnote as an example of cases that have applied heightened standards of defamation to related claims. The issue addressed by the *Russell* Court was not the statute of limitations. Where the statute of limitations is not specified the default provisions apply. This Court holds that false light claims fall within the four years specified by Utah Code Ann. § 78-12-25.

Public Concern Privilege

The Court has previously rejected Defendants' argument that there exists a public concern privilege in Utah independent of the privilege of Fair Comment on a Matter of Public Concern. *Seegmiller* clearly states the standard for private figure plaintiffs on matters of public concern.

We are persuaded that the necessary degree of fault which must be shown in a defamation action brought by a "private individual" against the media is negligence. The need to provide the media with a margin for error is most clear and compelling in cases involving public officials and public figures. The requirement of actual malice in the constitutional sense provides that margin for error which permits the freest flow of information likely to be of importance in deciding matters of public import, without extinguishing all protection for reputational interests. But an appropriate reduction of the motivation for self-censorship, and the promotion of full-blown discussion of public issues does not require the same "breathing space" when a private individual is the plaintiff, especially when the latitude which the media enjoys may be expanded in matters of public concern by a qualified privilege.

Seegmiller at 973.

Cox v. Hatch made clear that *Seegmiller* was analyzed as a statement of a matter of public interest.

In *Seegmiller*, we had no occasion to discuss the public interest issue because the trial court had held that the defamatory statement concerned a matter of public interest and that ruling was not challenged on appeal.

We did, however, refer to the "public issue" qualified privilege, which provided the basis for the decision in *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222 (Utah 1976), and *Williams v. Standard-Examiner Publishing Co.*, 83 Utah 31, 27 P.2d 1 (1933). In both of these cases, the basic privilege was not directly rooted in the First Amendment, but was founded on a similar common law policy.

Cox at 559, n.3. The confusion arises because *Seegmiller* also discusses a "public issue" privilege based on *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222 (Utah 1976), which the Court found inapplicable to the *Seegmiller* facts.

The conditional public concern privilege of *Ogden Bus Lines* is rather narrow. *Ogden Bus Lines* treats comments made in a KSL editorial.

There is no evidence in the record showing or tending to show that any statements of fact made by defendant in the editorial concerning any plaintiff were false. On the contrary, the facts therein stated are shown by the evidence to be true, and therefore are not actionable.

A respectable legal authority states the following rule:

It is firmly established that matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers, and in radio and television broadcasts, but by members of the public generally, and such comments and criticisms are not actionable, however severe in their terms, unless they are made maliciously

It seems clear to this court that problems affecting our schools are matters in which the public has a legitimate interest and would be within the rule set forth above. *This court has adopted this rule.*

Ogden Bus Lines v. KSL, Inc., 551 P.2d 222, 224 (Utah 1976) (emphasis added). The Court continues saying,

In the *Williams* case, this court held the defendant newspaper was performing a duty "of a moral or social character of imperfect obligation." Further, this court quoted approvingly from a leading authority as follows:

. . . . A fair and bona fide comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication

The court also quoted the following from another leading authority as follows:

. . . . The right of comment is not restricted to a restatement of the naked facts. As a general rule it may include the right to draw inferences or express opinions from facts established. The soundness of the inferences or opinions is immaterial whether they are right or wrong, provided they are made in good faith and based upon the truth

Id. at 224-25.

It is apparent that *Ogden Bus Lines* was decided on a common law privilege raising the degree of fault that must be proved for a fair comment on a matter of public concern. To the extent that the New York and Colorado cases extend beyond opinion and commentary, they are dicta. Interestingly, the New York case was reversed by *Commercial Programming Unlimited v. Columbia Broadcasting Systems, Inc.*, 378 N.Y.S.2d 69 (N.Y. App. 1975). The Colorado case was overruled in part by *Diversified Management v. Denver Post*, 653 P.2d 1103 (Colo. 1982) on other grounds. Read in context, the New York and Colorado cases are merely cited to demonstrated the malice standard applicable to a conditional privilege, not to establish the scope of that privilege.

Russell v. Thompson, 842 P.2d 896 (Utah 1992), also discussed the common law public concern privilege as being one of “fair comment”:

Fair comment is a common law defense to an action for defamation. The fair comment defense privileges a statement when it involves a matter of public concern, and is based on true or privileged facts, and represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm. According to the majority rule, the privilege applies only to an expression of opinion, not to a false statement of fact, whether it is expressly stated or implied from an expression of opinion.

Id. at 902. The Court also stated that “[t]he fair comment privilege does not protect assertions of fact like the statement at issue here.” *Id.* at 903.

Utah has not adopted a broader privilege and is unlikely to do so. A broad privilege requiring constitutional malice any time the matter is one of public concern would undo the *Seegmiller* negligence standard, which, incidentally, involved a media defendant.

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Dr. Jensen is clearly a private figure plaintiff. His prescribing practices and diet medications are matters of public concern. See Russell v. Thompson, 842 P.2d 896, 902 (Utah 1992) (“Allegations of misconduct against a local doctor and nurse are certainly matters of public concern”). See also Seegmiller, 626 P.2d at 978 (suggesting that public health and safety issues strengthen an argument that a matter is of public concern).

Since Plaintiff is a private figure and the matter is one of public concern, the correct standard of fault is negligence under *Seegmiller*. Following *Russell*, a qualified privilege exists for Defendants’ *comments* on matters of public concern.

Motion to Alter or Amend Judgment

Duplicative Damages

Defendants object to allegedly duplicative awards. Utah case law is somewhat sparse on the subject. Defendants cite *Steenblich v. Lichfield*, 906 P.2d 872, 881 (Utah 1995), for the proposition that causes of action “based on the same set of facts,” are duplicative and all but one should be vacated. While *Steenblich* dealt with an award of punitive as well as treble damages, it also pointed out that a statutory award and common law award both based on same facts should be considered duplicative. See *id.* The two sets of damages obviously fulfilled the same punitive purpose and one was vacated.

In *Brown v. Richards*, 840 P.2d 143, 153 (Utah App. 1992), the Utah Court of Appeals considered duplicative damages as to actual rather than punitive damages. In *Brown*, the trial court ruled that the damages on the fraud claim and the damages on the breach of warranty claim were duplicative:

A jury is allowed wide discretion in awarding damages. *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1083 (Utah 1985). Courts must defer to the jury’s determination of damages unless (1) the jury disregarded competent evidence, (2) the award is so excessive beyond rational justification as to indicate the effect of improper factors in the determination, and (3) the award was rendered under a misunderstanding. *Id.* at 1084. No such errors appear in this case to justify the trial court in striking the jury’s award. The trial court’s ruling amounted to nothing more than mere speculation that the awards were duplicative.

We therefore reverse the trial court's ruling and reinstate the jury's award of \$100,000 to Richards for Brown's breach of warranty.

Brown v. Richards, 840 P.2d 143, 153 (Utah App. 1992). In this case, the Court of Appeals even states in footnote seven,

Arguably, Richards need not even prove that there was a nonduplicative basis for the jury's award because the proof required to prove fraud differs from that required to prove a breach of warranty.

Id. However, this footnote is in reference to part of the claim for breach of warranty that was nonduplicative in any case.

Defendants' assertion that the defamation and false light claims are duplicative fails.

For the same reason that an intentional infliction of emotional distress claim is distinct from a defamation claim, invasion of privacy is also distinct. The invasion of privacy claim protects an individual's interest in being let alone. This interest is distinct from the interest in reputation. Further, an action for invasion of privacy may be the only available remedy when the statements complained of are not themselves false, but merely place the plaintiff in a false light.

Russell v. Thompson Newspapers, Inc., 842 P.2d 896, 906-7 (Utah 1992). Additionally, defamation and false light claims require proof of different facts. For instance, defamation requires proof of falsity and false light does not. Likewise, intentional interference with prospective business relations requires vastly different proof and protects Plaintiff's business interests rather than his privacy or reputational interests. The false light claim protects Plaintiff's privacy interests invaded by the broadcasts. Because the courts have determined that these claims protect different interests and require different facts, defamation and false light claims are nonduplicative.

On the other hand, the statutory and common law privacy claims protect the Plaintiff's privacy interests invaded by the hidden camera surveillance and are based on the exact same facts. Therefore, the awards based on these facts are duplicative.

Other jurisdictions give the following guidance:

It is well established that “double recovery is precluded when alternative theories seeking the same relief are pled and tried together. “If a federal claim and a state claim arise from the same operative facts, and seek identical relief, an award of damages under both theories will constitute double recovery.” Where a jury award duplicates damages, the court, either sua sponte or on motion of a party, should reduce the judgment by the amount of the duplication. The question of whether damage awards are duplicative is one of fact, reviewable under the clearly erroneous standard.

Mason v. Oklahoma Turnpike Authority, 115 F.3d 1442, 1459 (10th Cir. 1997), *aff’d in part, rev’d in part*, 124 F.3d 217 (10th Cir. 1997) (citations omitted).

The plaintiff may be able to pursue several theories of recovery; if liability is found on each, the plaintiff would be required to make an election among awards if duplication or double recovery would otherwise result.

Central Security and Alarm Co, Inc. v. Precision Security Alarm Corporation, 918 P.2d 1340, 1346 (N.M. App. 1996). The standard appears to be that the allegedly duplicative claims must “arise from the same operative facts and seek identical relief” before a court will find the damages duplicative. The *Brown* case states that mere speculation is not enough to find duplication.

This Court also notes that the statutory privacy claims arise under a criminal statute, which includes a provision for civil enforcement. While the three subparts of Utah Code Ann. §76-9-402 provide three different means of finding a defendant has committed a privacy violation, a defendant may only be punished one way for the same act:

A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision.

Utah Code Ann. § 76-1-402(1).

It appears that while the legislature intended to show various ways in which the abuse could be accomplished, the abuse is the same in each circumstance. Utah Code Ann. § 76-9-402(1)(a) appears to require intent and trespass to make an attempted but not fully realized privacy violation actionable. The criminal episode has progressed farther in 402(1)(b) and intent

is established by the installation itself and need not be proved separately. In each case, the criminal episode is the same and the interest to be protected is the victim's privacy. This is one violation actionable three ways. The Court will not award separate damages under each of the three ways that Plaintiff can show that the same privacy violation occurred.

The Court finds that Plaintiff's claims under Utah Code Ann. §§ 76-9-402 arise under the same operative facts and seek identical relief. Plaintiff argues that a finding of trespass distinguishes § 76-9-402(1)(a) from the others. While that may be true, Plaintiff's recovery is based on privacy interests and not real property interests violated by trespass. In addition, a trespass was found only because of the "installation" of the camera. Likewise, the common law intrusion on seclusion claim arises under the same facts and seeks identical relief to the statutory awards. Therefore, the Court will vacate two of the three invasion of privacy claims (76-9-402(1)(a), 76-9-402(1)(b), common law intrusion upon seclusion).

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A trial court is justified in granting a motion for j.n.o.v. only when the court concludes that there is no competent evidence to support the verdict after examining the evidence and all reasonable inferences therefrom in a light most favorable to the nonmoving party.

Collins v. Wilson, 984 P.2d 960, 964 (Utah 1999). The Utah Supreme Court has also said,

In deciding whether to grant a new trial, a trial court has some discretion, and we reverse only for abuse of that discretion. In passing on a motion for a j.n.o.v., however, a trial court has no latitude and must be correct.

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 799 (Utah 1991).

Defendants claim that there is no competent evidence to support Plaintiff's common law invasion of privacy claim. The Court has already rejected Defendants' argument that a doctor's patient examination room cannot be a private place as a matter of law. The Court was persuaded by Plaintiff's analogy to a lawyer's office where attorney and client consult. The Court finds *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d at 1352, and *Medical Laboratory Management Consultants v. American Broadcasting Companies*, 30 F. Supp. 1182,

distinguishable. Plaintiff cites *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971), for the proposition that a patient examination room is a private place. The office in *Dietemann* was attached to the home. Defendants seek to distinguish on that basis. The Court accepts the argument of Plaintiff and notes that the door was closed and Plaintiff knocked before entering.

Defendants argue that no embarrassing details about the doctor were disclosed and seek to analogize the scenario in *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Utah App. 1997). In *Stien*, the intrusion was an obvious parody. This Court already made a threshold determination of offensiveness and will not second guess the jury's ultimate determination that the intrusion was highly offensive.

Defendants' contend that any damage Plaintiff may have suffered from the intrusion was limited to publication damages. The Court disagrees. The eventual discovery by Plaintiff that his seclusion was intruded upon damages a sense of security and well-being. It subjects Plaintiff to a fear of future intrusions.

Statutory Privacy Claims

To recover under Utah Code Ann. § 76-9-402(1)(a), a Plaintiff must show trespass and eavesdropping or other surveillance. Defendants assert that Mary Sawyers clearly did not eavesdrop. The Court agrees. "Eavesdrop" is defined in Utah Code Ann. § 76-9-401(2). As Defendant Sawyers consented to the recording, eavesdropping does not apply. "Other surveillance," however, is still a viable means for Plaintiff to establish a violation. There was also sufficient evidence to find trespass. Evidence was presented in the form of the recorded solicitation by Defendant Sawyers for a consultation under false pretenses from which the jury could find a "trespass." See *Shiffman v. Empire Blue Cross & Blue Shield*, 256 A.D.2d 131 (N.Y. App. 1998).

The Court will likewise find competent evidence to support the jury verdict on section 402(1)(b). The evidence was sufficient in the form of a video showing Defendant Sawyers

placing the camera in a set position to support a finding of installation needed for Utah Code Ann. § 76-9-402(1)(b).

While the issue may be moot in the absence of monetary damages, Defendants are entitled to judgment notwithstanding the verdict on the Utah Code Ann. § 76-9-402(1)(c) and § 76-9-403 claims. Plaintiff did not present evidence that the camera placed on the public reception desk could pick up sounds from within private consultation rooms. Likewise, Defendant Sawyers was a sender and/or receiver within the meaning of Utah Code Ann. § 76-9-403 and gave her consent. The jury awarded no damages on either of these claims, so the j.n.o.v. does not affect the ultimate damages award.

[W]e recognized that where the proof of a compensable claim and otherwise non-compensable claim are closely related and require proof of the same facts, a successful party is entitled to recover its fees incurred in proving all of the related facts.

Kurth v. Wiarda, 991 P.2d 1113, 1116 (Utah App. 1999).

The Court holds that the actual damages described in Utah Code Ann. § 76-9-406 are those damages that are not exemplary damages as described later in the section. The Court rejects Defendants' argument that actual damages are those that are not general damages. The Court finds no evidence of jury confusion by jury instruction 56 ("Pecuniary loss is loss that is actual, such as loss of income General damages are those that are the natural and necessary result of an act").

False Light and Defamation Claims

Defendants' substantial truth, causation, statute of limitations, and privilege arguments have been discussed previously. As they are insufficient to warrant a new trial, the Court finds they are also insufficient to meet the higher j.n.o.v. standard.

Intentional Interference Claim

The Court finds there was competent evidence sufficient to uphold Plaintiff's claim for intentional interference with prospective economic relations.

Punitive Damages

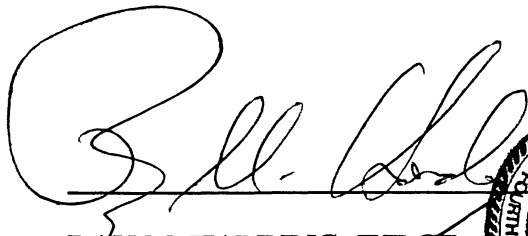
This Court has previously found there was competent evidence of malice sufficient to sustain the jury's award of punitive damages.


CONCLUSION

For the above reasons, the Court hereby rules as follows:

1. Defendants' Motion for New Trial is DENIED.
2. Defendants' Motion to Amend the Jury Verdict is DENIED in part and GRANTED in part. There are three duplicative awards of \$50,000 actual damages and \$40,000 punitive damages each. The Court will vacate two of those. The Court vacates \$100,000 of the total actual damage award and \$80,000 of the total punitive damage award as duplicative.
3. Defendants' Motion for Judgment Notwithstanding the Verdict is DENIED in part and GRANTED in part. Judgment is granted in favor of Defendants on Plaintiff's claims under Utah Code Ann. §§ 76-9-402(1)(c) and 76-9-403. The ultimate damage award is unaffected.
4. Counsel for Plaintiff shall prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED this 26th day of September, 2001.


RAY M. HARDING, JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling with postage prepaid thereon this 27 day of September, 2001, to the following:

Robert Anderson / Jennifer Anderson, 50 South Main St. #1600, PO Box 45340, Salt Lake City,
UT 84145-0340

Wesley F. Sine, IBM Bldg #355, 420 East South Temple, Salt Lake City, UT 84111

Dale F. Gardiner, 60 East South Temple #1270, Salt Lake City, UT 84111


Deputy Court Clerk

Addendum 7

Transcript
September 5, 1995 Broadcast
Produced by Plaintiff (MHJ4386)

Kimberly Perkins: And a police officer is placed on paid leave after he shoots an alleged rapist. Those stories in just a moment. But, first an exclusive investigator's report.

Brent Hunsaker: They've been called miracle diet pills. Pills so popular the manufacturer can't keep up with demands.

Kimberly Perkins: But are doctors prescribing these pills too freely? Promising miracle weight loss but perhaps risking their patients' health? News 4 Utah investigator Mary Sawyers has been taking a look at these so-called miracle pills and a doctor who's prescribing them.

Brent Hunsaker: Mary, what are these pills all about?

Mary Sawyers: Well, Brent, the most common names are Pondimin and Fastin. Those are the most common brand names. The amphetamine derivatives have long been FDA approved for weight loss. But a few years ago Dr. Michael Weintraub studied the two drugs in combination. He found that his subjects were losing an average of 16 percent of their body weight in 34 weeks. While the drugs do work for some people, they're not meant for everyone and doctors must follow specific guidelines when prescribing them.

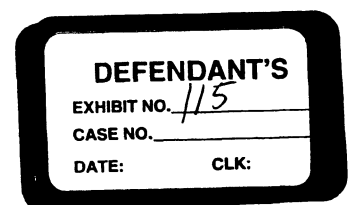
Mary Sawyers: When Lynette Singleton got married five years ago she weighed 126 pounds. After an accident forced her to cut down on exercise and a prescription hormone increased her appetite, she gained 70 pounds. In the last two months she's dropped 30 of those pounds by taking daily doses of two prescription diet pills. Pills she read about in *Readers Digest*.

Lynette Singleton: I approached my doctor with them and he prescribed them. Laughs. It was easy to get the pills.

Mary Sawyers: Perhaps it's too easy. We heard that Dr. Michael Jensen prescribed diet pills for some one at a dinner party who didn't need to lose weight. So I went to see him to see if he'd do the same for me. But I took along a hidden camera.

Dr. Michael Jensen: I'm Dr. Jensen.

Mary Sawyers: I'm Mary Sawyers. (Unintelligible background noises).



Mary Sawyers: Dr. Jensen gave me prescriptions for Fastin and Pondimin without weighing me or giving me a physical. During our visit he never asked if I have high blood pressure or diabetes, both conditions which could be aggravated by the drugs.

Dr. Michael Jensen: Someone like you is a perfect candidate for this. Okay. Uh, people lose somewhere between 10 and 20 pounds a month and, you know, you can get really lean with this.

Mary Sawyers: And if those drugs didn't work for me, the doctor said he'd prescribe something else.

Dr. Michael Jensen: If Fastin didn't work for you, I would be willing to work with you uh maybe using Dexedrine. It's technically not legal for that reason.

Mary Sawyers: In fact it is illegal to prescribe Dexedrine for weight loss.

Mary Sawyers: So, what, you just put down attention deficit disorder?

Dr. Michael Jensen: I usually, usually put narcolepsy in an adult. We all deal with fatigue and tiredness.

Mary Sawyers: Uh hum.

Dr. Michael Jensen: And you can just say I am tired.

Mary Sawyers: I showed the tape to the man who heads the division which gave Dr. Jensen his license.

David Robinson: When you look at the intent of that physician, uh it's clear that he knows that he is violating the law and is offering excuses for it and I think he is doing so uh with potential jeopardy to his patients.

Mary Sawyers: There are strict guidelines all doctors must follow when prescribing drugs for weight loss. The first is that the drugs be used only for people who are obese.

Dr. Michael Jensen: Selected individuals, uh, uh, treating them uh with a weight loss medication uh is warranted in my practice. Uh, I'm not speaking for other people, but uh in selected cases for people that are relatively thin.

Mary Sawyers: Could there be some action taken against this doctor's license?

David Robinson: We're very interested in looking at it.

Mary Sawyers: Now, the State Division of Licensing and the Federal Drug Enforcement Agency both opened investigations into Dr. Jensen's prescribing practices.

Brent Hunsaker: So, Mary, with those investigations and your story, what does the doctor have to say for himself now.

Mary Sawyers: Well, Brent, he called tonight. He says he's sorry. He called and said he's learned a valuable lesson from all of this. He says he will have to change his prescribing practices, now.

Kimberly Perkins: There might be a number of doctors thinking twice tonight. Thanks, Mary.

Mary Sawyers: You're welcome.

Addendum 8

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
Heber M. Wells Building
160 East 300 South - Box 146741
Salt Lake City, Utah 84114-6741
Telephone: (801) 530-6628



BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF	:	
MICHAEL H. JENSEN, M.D.	:	P E T I T I O N
TO PRACTICE MEDICINE AND TO	:	
ADMINISTER AND PRESCRIBE	:	CASE NO. DOPL-96-162
CONTROLLED SUBSTANCES	:	
IN THE STATE OF UTAH	:	

PRELIMINARY STATEMENT

These claims were investigated by the DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING ("Division") upon complaint that MICHAEL H. JENSEN, M.D. ("Respondent"), has engaged in acts and practices which constitute violations of the Division of Occupational and Professional Licensing, UTAH CODE ANN., as amended, §§ 58-1-1 (1953), et seq.

PARTIES

1. The Division is a Division of the Department of Commerce of the State of Utah and is established by virtue of UTAH CODE ANN. § 13-1-2 (Supp. 1994).
2. Respondent is licensed by the Division under the Medical Practice Act to practice medicine and under the

Controlled Substances Act to administer and prescribe controlled substances. He was so licensed at all times material to the allegations contained herein.

STATEMENT OF ALLEGATIONS

3. a. On or about July 27, 1995, Respondent met in an office visit with Mary Sawyers. During that visit, Respondent gave Sawyers prescriptions for Fastin (Phentermine Hydrochloride) and Pondimin (Fenfluramine Hydrochloride), each a Schedule IV controlled substance. Prior to providing these prescriptions, Respondent failed to perform a thorough physical examination or determine from Sawyers that she had made a substantial good-faith effort to lose weight in a treatment program utilizing a regimen of weight reduction based on caloric restriction, nutritional counseling, behavior modification, and exercise without the utilization of controlled substances, and failed to inquire of or otherwise determine from Sawyers the existence of conditions indicating possible contraindications to the controlled substances he had prescribed.

b. During the visit, Respondent, described to Sawyers how she could accelerate and enhance the stimulant qualities of Fastin by opening the capsule and "biting" the granules contained therein.

c. Respondent also told Sawyers that if Fastin did not produce the desired weight-loss results she sought, he would be willing to "work with" her "maybe using Dexedrine" (Dextroamphetamine), a Schedule II controlled substance, though he acknowledged to Sawyers the use of Dexedrine for weight control is "technically not legal." Respondent told Sawyers he would use narcolepsy as the claimed reason for prescribing Dexedrine, since its use for that purpose is permitted.

APPLICABLE LAW

4. UTAH CODE ANN. § 58-1-401(2)(a)(1994) provides in pertinent part that:

The division may refuse to issue a license to an applicant and may refuse to renew or may revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee in any of the following cases:

(a) the applicant or licensee has engaged in unprofessional conduct as defined by statute under this title.

5. UTAH CODE ANN. § 58-1-501 (2)(1994) defines "unprofessional conduct" to include:

(a) violating, or aiding or abetting any other person to violate, any statute, rule, or order regulating an occupation or profession under this title.

(b) violating or aiding or abetting any other person to violate, any generally accepted professional or ethical standard applicable to an occupation or profession

regulated under this title.

(g) practicing or attempting to practice an occupation or profession regulated under this title through gross incompetence, gross negligence, or a pattern of incompetency or negligence.

6. UTAH ADMIN. CODE R156-37-9(7) (1994) provides in pertinent part that:

[T]he Division may deny issuance of a license or may revoke, suspend, restrict or place on probation a controlled substance license if the applicant or licensee:

(7) violates restrictions upon controlled substances, prescriptions and administration as contained in these rules:

7. UTAH ADMIN. CODE R156-37-11(14) (1994) provides in pertinent part that:

(14) A prescribing practitioner may prescribe, dispense or administer a Schedule III or IV controlled substance for purposes of weight reduction in the treatment of obesity only as an adjunct, in accordance with the F.D.A. approved labeling for the product, in a medically supervised program of weight reduction based on caloric restriction, provided that all of the following conditions are met:

(a) before initiating treatment utilizing a Schedule III or IV controlled substance, the prescribing practitioner determines through review of his own records of prior treatment, or through review of the records of prior treatment which another treating prescribing practitioner or weight-loss program has provided to the prescribing practitioner, that the patient has made a substantial good-faith effort to lose weight in a

treatment program utilizing a regimen of weight reduction based on caloric restriction, nutritional counseling, behavior modification, and exercise, without the utilization of controlled substances, and that said treatment has been ineffective;

(b) before initiating treatment utilizing a Schedule III or IV controlled substance, the prescribing practitioner obtains a thorough history, performs a thorough physical examination of the patient, and rules out the existence of any recognized contraindications to the use of the controlled substance to be utilized;

COUNT I

8. Paragraphs 1 through 7 are incorporated by reference as if fully stated herein.

9. Because Respondent did not determine, through review of his own records of prior treatment, or through review of the records of prior treatment which another treating prescribing practitioner or weight-loss program had provided to the prescribing practitioner, that the patient had made a substantial good-faith effort to lose weight in a treatment program utilizing a regimen of weight reduction based on caloric restriction, nutritional counseling, behavior modification, and exercise, without the utilization of controlled substances, and that said treatment had been ineffective; did not obtain a thorough history, perform a thorough physical examination of the patient, and rule out the existence of any recognized

contraindications to the use of the controlled substance to be utilized, Respondent has violated Utah Administrative Code R156-37-11(14)(a) and (b), constituting "unprofessional conduct" as defined under Utah Code Ann. § 58-1-501(2)(a), and grounds for sanctioning his licenses as provided under Utah Code Ann. § 58-1-401(2)(a).

COUNT II

10. Paragraphs 1 through 7 are incorporated by reference as if fully set forth herein.

11. Because Respondent advised a patient how to misuse a controlled substance and offered to prescribe a controlled substance for a condition that is contrary to the indicated use and suggested his willingness to make an unsubstantiated diagnosis to support that prescription, as described in paragraph 3 above, Respondent has engaged in conduct constituting "unprofessional conduct" under Utah Code Ann. § 58-1-501(2)(a) (b) and (g), constituting grounds for imposing a sanction against his licenses as provided under Utah Code Ann. § 58-1-401(2)(a).


WHEREFORE, the Division requests the following relief:

1. that Respondent be adjudged and decreed to have engaged in the acts alleged herein;
2. that by engaging in the above acts, Respondent

be adjudged and decreed to have violated the heretofore
enumerated provisions of the Division of Occupational and
Professional Licensing Act and the Utah Controlled Substances
Act;


3. that an Order be issued imposing an appropriate
sanction against the licenses of Respondent to practice medicine
and to administer and prescribe controlled substances in
accordance with the provisions of Utah Code Ann. § 58-1-
401(2)(a), and Utah Admin. Code R156-37-9 (7).

DATED this 12th day of JUNE, 1996.



Division of Occupational &
Professional Licensing
Department of Commerce

APPROVED FOR FILING:



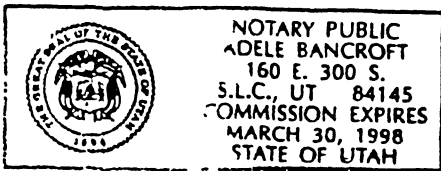
R. Paul Allred
Assistant Attorney General

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

On the 12TH day of JUNE, 1996, personally
appeared before me L. Del Mortensen, and after being duly sworn,
deposes and says; that he has read the foregoing Petition and
knows the contents thereof; and the same is true to the best of
his knowledge except as to matters stated on information and
belief, and that as to those matters he believes it to be true.

L. Del Mortensen
Investigator
Division of Occupational &
Professional Licensing

SWORN AND SUBSCRIBED to before me this 12 day of June,
1996.



(Seal)

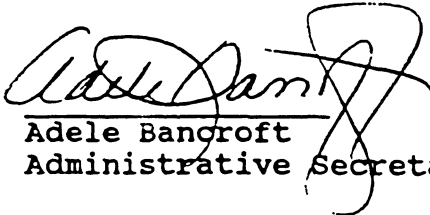
Adele Bancroft
NOTARY PUBLIC

My Commission Expires:
3-30-98

MAILING CERTIFICATE

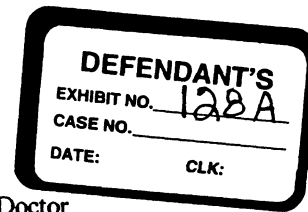
I hereby certify that on the 14 day of June 1996, a true and correct copy of the foregoing **PETITION AND NOTICE OF AGENCY ACTION** was sent first class mail, postage prepaid, to the following:

**MICHAEL HENRIE JENSEN
1900 NORTH OAK LANE
PROVO UT 84604-2125**


Adele Bancroft
Administrative Secretary

Addendum 9

Transcript
June 17, 1996 Broadcast
Produced by Plaintiff (MHJ4386)



Kimberly Perkins: The State is going after the license of a Utah County Doctor.

Brent Hunsaker: Based on the News 4 Utah investigation, the state charges that Dr. Michael H. Jensen violated the professional code of conduct. His alleged offense, he misprescribed diet pills.

Kimberly Perkins: News 4 Utah's medical reporter Mary Sawyers follows up.

Dr. Michael Jensen: I'm Dr. Jensen.

Mary Sawyers: I'm Mary Sawyers.

Mary Sawyers: This is Dr. Michael Jensen. Last July he gave me prescriptions for Pondimin and Fastin a combination therapy often referred to as the Phen-Fen diet.

Dr. Michael Jensen: Someone like you is a perfect candidate for this. Okay. Uh. People lose somewhere between 10 and 20 pounds a month and, you know, you can get really lean with this.

Mary Sawyers: But he gave me the drugs without following state law. The law says before prescribing drugs for weight loss a doctor must first determine that the patient has tried to lose weight in a treatment program. He must also give the patient a thorough physical exam. And he must rule out the existence of health conditions which might be aggravated by the drug. Dr. Jensen did none of these and so the state has filed a complaint against him alleging unprofessional conduct. The state says Jensen also broke the law a second time when he told me this.

Dr. Michael Jensen: If Fastin didn't work for you, I'd be willing to work with you, uh, maybe using Dexedrine. It's technically not legal for that reason.

Mary Sawyers: In fact, it's illegal to prescribe Dexedrine for weight loss. Jensen says he hasn't seen the complaint and doesn't want to comment on the allegations. Last year he told me he never intended to break the law.

Dr. Michael Jensen: Selected individuals, uh, uh, treating them uh with a weight loss medication, uh, is warranted in my practice. Uh, I'm not speaking for other people, uh, but in selected cases for people that are relatively thin.

Mary Sawyers: If found guilty, Jensen's license could be suspended or revoked. Mary Sawyers News 4 Utah.

Kimberly Perkins: Now, since our investigation, Intermountain Health Care has dropped Dr. Jensen from its panel of physicians but he is currently working for a family practice in Springville.

Addendum 10



R. PAUL ALLRED (No. 4785)
Assistant Attorney General
JAN C. GRAHAM (No. 1231)
Attorney General
Consumer Rights Division
Box 14087
160 East 300 South
Salt Lake City, UT 84114-0872
Telephone: (801) 366-0310
Counsel for the Division of
Occupational and Professional Licensing

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
MICHAEL H. JENSEN, M.D.	:	
TO PRACTICE MEDICINE AND TO	:	STIPULATION AND ORDER
ADMINISTER AND PRESCRIBE	:	
CONTROLLED SUBSTANCES	:	Case No. DOPL-96-162
IN THE STATE OF UTAH	:	

Respondent Michael H. Jensen, M.D., ("Respondent") and the
Division of Occupational and Professional Licensing ("the
Division"), by and through their counsel of record, hereby
stipulate and agree as follows:

1. Respondent is and has been a licensee of the Division
at all times relevant to this action.
2. Respondent admits to the jurisdiction of the Division
over him and the subject matter of this action.

3. Respondent acknowledges that he enters into this Stipulation and Order voluntarily, and that no promise or threat whatsoever has been made by the Division, or any member, officer, agent or representative of the Division, to induce him to enter into this Stipulation and Order.

4. Respondent acknowledges that he has been informed of his right to be represented by counsel, and is represented by Max D. Wheeler.

5. Respondent understands that he is entitled to a hearing before the Physicians Licensing Board (the "Board") at which time he may present to the Board evidence on his behalf, present his own witnesses and confront adverse witnesses. Respondent acknowledges that by executing this Stipulation and Order, he waives his right to: (1) a hearing before the Board on this matter; (2) present evidence on his behalf; (3) present his own witnesses; and (4) confront adverse witnesses, together with such other rights as to which he may be entitled in connection with said hearing.

6. On or about June 12, 1996, the Division filed a petition alleging Respondent has engaged in the following conduct:

a. prescribing Schedule IV controlled substances for the purpose of weight reduction without complying with the requirements of R156-37-11(14) (a) and (b); and

b. advising a patient how to misuse a controlled substance and offering to make an unsubstantiated diagnosis to support a prescription.

See Petition, paragraph 3 copy of which is attached hereto as Exhibit A and is incorporated herein by reference.

7. Respondent admits that he failed to comply with some of the requirements of R156-37-11(14) (a) and (b) as set forth in paragraph 3 of the petition. Therefore, Respondent agrees that a public reprimand may be prepared and issued by the Board. In addition, the Respondent agrees to abide by the following terms and conditions:

a. For a period of one year from the date of this Stipulation and Order, Respondent shall meet with the Board on a quarterly basis, beginning with the Board's first meeting from the date of this Stipulation and Order, or at such other greater or lesser frequency as determined by the Board;

b. Attend and successfully complete one of the following educational programs within (1) year from the date of this Stipulation and Order:

(1) William Vilensky's course in "Controlled and Dangerous Substances" cosponsored by the Forensic and Educational Consultants in Alcohol and Drug Abuse and Kennedy Memorial Hospital-University Medical Centers.

(Vilensky's course is held semiannually in May and November of each year.)

(2) The Oregon Board of Medical Examiners' "Appropriate Prescribing Workshop".

c. Respondent shall propose an ethics course for Board approval, which shall be completed within one year from the date of this Stipulation and Order.

d. In the event Respondent leaves Utah to reside or practice in another state, Respondent shall notify the Board, in writing, his intention to do so, including the expected dates of departure and return. Such notice shall be provided no later than 14 days prior to Respondent's departure. Any such periods of residency outside Utah shall not be applied to the reduction of the terms and conditions

of this Stipulation and Order, unless Respondent sufficiently establishes, to the Board's satisfaction, continued compliance with the terms and conditions of the Stipulation and Order. The licensing authorities of the jurisdiction to which Respondent moves shall be notified by Respondent of this Stipulation and Order within 7 days of Respondent's arrival;

e. Prior to end of the one year period, the Respondent may make a written request of the Board for early termination. The Board shall have the discretion to accept, reject or modify Respondent's request.

f. ~~If Respondent successfully completes the terms and conditions of the Stipulation and Order, the Division shall immediately thereafter lift any restrictions on his licenses.~~ If, ~~on the other hand,~~ Respondent hereafter violates any of the terms and conditions of the Stipulation and Order in any respect, or violates any state or federal laws, rules, or regulations concerning controlled substances or the practice of medicine, the case will be referred to the Division for investigation and, where appropriate, a hearing shall be conducted before the Utah Board to

RPA [signature] RPA [signature]

determine whether further sanctions should be ^{issued}issues against Respondent's licenses.

8. Respondent acknowledges the Stipulation and Order, upon approval by the Director of the Division, shall be the final compromise and settlement of this matter. Respondent further acknowledges that the Director may not accept the terms and conditions of the Stipulation and Order. If this Stipulation and Order is rejected by the Director, it shall be deemed null and void and without any force or affect whatsoever.

9. The Stipulation and Order constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, understandings or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Stipulation and Order.

10. Respondent acknowledges this Stipulation and Order, if adopted by the Director of the Division, will be classified as a public document and may be released to the public upon request. In addition, the Division is authorized to inform other state and federal agencies of the action taken herein and of the content of this Stipulation and Order.

11. Respondent acknowledges he has read, understands and accepts the terms and conditions of this Stipulation and Order.

DATE: 10-30-96

DATE: 10-30-96

BY: R. Paul Allred
R. PAUL ALLRED
Assistant Attorney General

BY: Michael H. Jensen
MICHAEL H. JENSEN
Respondent

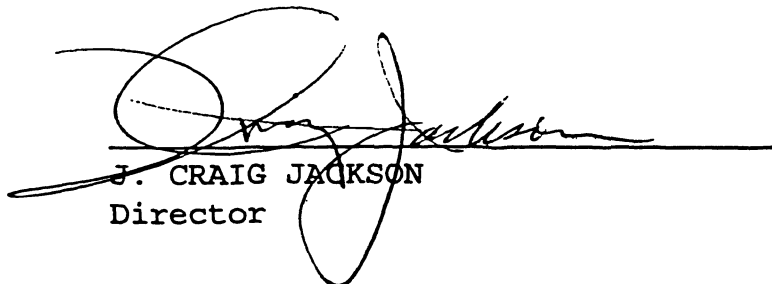
Approved as to Form:

BY: Max D. Wheeler
MAX D. WHEELER
Attorney for Respondent

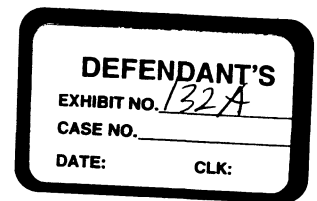
ORDER

The above Stipulation is hereby approved by the Division of Occupational and Professional Licensing and constitutes my Findings of Fact and Conclusions of Law in connection with the Petition in this matter. The terms and conditions of the Stipulation are hereby adopted as an Order of the Division of Occupational and Professional Licensing.

DATED this 31st day of October, ~~1995~~ 1996


J. CRAIG JACKSON
Director

Addendum 11



Transcript
November 6, 1996 Broadcast
Produced by Plaintiff (MHJ4386)

- Kimberly Perkins: What would you do if you found out your doctor was passing out drugs to addicts or worse yet, sexually abusing his patients.
- Randall Carlisle: Well, he may be but you might never find out about it. News 4 Utah medical reporter Mary Sawyers joins us now to tell us why. And, Mary, isn't this information available to the public?
- Mary Sawyers: Well, Randall, it is. You, you're glad it is. But most people don't know how to find it. Tonight I'll tell you how and introduce you to some of some of these so-called questionable doctors.
- J. C.: I hope they take his license away. That he will never be a doctor again. Or in any profession where he can use people like that.
- Mary Sawyers: She's talking about this man, Dr. E. Barry Topham. We found his name in this book, *Questionable Doctors*. It's published by a Washington watchdog agency.
- Dr. Sydney Wolfe:
(Public Citizen) Utah is one of the worst states in the country in terms of how few serious disciplinary actions it takes against doctors.
- Mary Sawyers: Public Citizen's book says Topham's license was suspended in 1991 after he engaged in sexual relations with a patient. But there are some new allegations against Topham you won't find in this book. This woman says that in March of 1994 while Topham was removing her moles, he also made unwelcome sexual advances.
- J. C.: He just immediately leaned over and kissed my breast and then inserted his fingers between my legs.

Mary Sawyers: Topham denies the allegations, claiming J. C. made up the story for money. The doctor refused an interview but his attorney provided us with this statement. "J. C. unlawfully extorted \$500 from Dr. Topham by threatening to ruin his career by going public with her false accusations and by threatening him with physical harm." The state division of licensing investigated and found enough evidence to file an action against Topham. That was more than two years ago. Lawyers are still trying to work out a settlement and the doctor is still in business.

Dr. George Van Komen: We would like to see things move quicker. We would like to see these actions take place. But we live in a country where you're innocent til proven guilty. And we believe in a system where everyone has their day in court.

Mary Sawyers: But why do some of these cases drag on for years? Why is Dr. Wesley Harline still practicing four years after the state accused him of performing abortions illegally, disfiguring patients, even using silicone when patients asked for saline breast implants. And what about Dr. Michael Jensen? In July 1995 we caught him on camera promising me illegal drugs for weight loss.

Dr. Michael Jensen: If Fastin didn't work for you, I'd be willing to work with you, uh, maybe using Dexedrine. It's technically not legal for that reason.

Mary Sawyers: The state filed an action against Jensen last June. But, again, the case is in the hands of lawyers and Dr. Jensen is still practicing. In fact, it's rare for this state to strip a doctor of his license. According to this book, between 1986 and 1994, 26 Utah doctors lost their licenses. That's about three a year. But some of those doctors will get their licenses back. Sherman Johnson's right to practice medicine was suspended in 1992 after he was sent to jail for giving a patient a lethal dose of Demerol. But the state agreed to give his license back within five years and next year Johnson can once again legally practice medicine.

Mary Sawyers: Now one postscript to our story. Yesterday we got word that action has now been taken against Dr. Michael Jensen. He's the one we caught on tape promising me illegal drugs. The state will allow Jensen to keep his license but he'll receive a public reprimand which requires him to attend a workshop on proper prescribing and a course on medical ethics.

Kimberly Perkins: Mary, this book is eye opening. How do we get a copy?

Mary Sawyers: Well, you can get it, Kimberly, by calling Public Citizen at

1-202-588-1000 and make sure you specify you want the Utah copy of the book. It costs \$15.00. Remember, the book only has doctors who have been disciplined. It will not include doctors who are only facing allegations of misconduct. To find out about those allegations you can contact the state division of licensing. Their number is 530-6628. Or you can access that information on the internet at www.commerce.state.ut.us. Long address, but they have all the information there. You can find out about malpractice suits and find out about disciplinary actions.

Randall Carlisle: Good report. Information we all need to know. Thank you, Mary.

Mary Sawyers: You're welcome.