

2001

Mary Sawyers and United Television, INC, aka KTVX v. Michael Jensen, M.D., : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARY SAWYERS and UNITED
TELEVISION, INC., aka KTVX,

Defendants/Appellants,

v.

MICHAEL JENSEN, M.D.,

Plaintiff/Appellee.

Supreme Court No. 2001 1023-SC

Fourth District Court
Case No. 970400512 CV

(Honorable Ray M. Harding, Jr.,
Presiding, District Court Judge)

CORRECTED BRIEF OF APPELLEE/CROSS-APPELLANT'S 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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Michael Jensen, M.D., respectfully submits his Corrected Brief of Appellee/Cross-Appellant's Brief. The statement of jurisdiction, the issues presented for review, the applicable constitutional rules, statutes, etc. and statements of the case are combined. Only the argument responding to the Appellants' brief and the cross-appeal argument are separately identified.

I. STATEMENT OF JURISDICTION

The Court has jurisdiction to hear an appeal of a judgment entered after a jury verdict and the cross-appeal under Utah Code Ann. § 78-2-2(3)(j).

II. ISSUES PRESENTED FOR REVIEW

A. Whether the judgment should be affirmed on: (1) whether the Media Defendants' broadcasts focused only on Dr. Jensen's professional duties; (2) whether the statements were substantially true; (3) whether Dr. Jensen sustained economic damages; and (4) whether there was clear and convincing evidence of malice; each requiring a marshaling of the evidence and a demonstration of insufficiency. *Crookston v Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

B. Whether this Court should review a pretrial denial of summary judgment after an adverse trial judgment. This is an issue of law and inherently can only be raised in this Court.

C. Whether the district court correctly declined to apply the defamation one-year statute of limitations to false light invasion of privacy claims. The Appellants identified where this issue was presented below. This is an issue of law determined by *Cox v Hatch*, 761 P.2d 556 (Utah 1988), which ruled that defamation and invasion of privacy are separate and distinct torts affecting separate and different interests.

D. Whether a physician has a reasonable expectation of privacy not to be secretly videotaped in his examination room when all of the physicians who testified on the subject said

that Dr. Jensen should have an expectation of privacy. This issue was raised in R. 2741; 2951-64; 5701; 5720-24; 5968 and 6042-50. This is an issue of fact resolved by the jury. *Crookston v Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

E. Whether a reasonable jury could conclude that the Media Defendants' false posing as a patient, installing a hidden video camera in the doctor's examination room, and using selected tape bites to deceptively portray a physician as one offering illegal drugs and comparing this to physicians who rape or kill their patients, was highly offensive. This issue was preserved by the Special Verdict. The trial court makes the threshold determination of offensiveness followed by the jury resolving the question of fact. The verdict is not overturned if there is evidence supporting the jury's verdict. *See Stien v Marriot Ownership Resorts*, 944 P.2d 374 (Utah Ct. App. 1997).

F. Whether Media Defendants trespassed and intended to subject Dr. Jensen to eavesdropping or surveillance under § 76-9-402(1)(a), when the reporter falsely represented herself as "a patient needing to lose weight to keep her job" and took a hidden camera into the examination room to do a prescribed story? ("Story idea", App. 1) This issue is created by the verdict. Whether a trespass occurred is a factual issue. *Steele v Breinholt*, 747 P.2d 433 (Utah Ct. App. 1987). A challenge requires a marshaling of evidence and demonstration of insufficiency. *Crookston v Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

G. Whether the Media Defendants installed "any device for... recording" when without anyone's consent, they installed a hidden videotape camera in Dr. Jensen's examination room? UCA Section 76-9-402 suggests this is a question of fact.

H. Whether any of the Media Defendants' broadcasts placed Dr. Jensen in a false light?

This issue is created by the jury's verdict. A challenge requires a marshaling of evidence and a demonstration of insufficiency. *Crookston v Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

I. Whether a reasonable jury could find that the media's three Dr. Jensen stories were each false? This issue was preserved by the Special Verdict and is a factual question requiring the Appellant to marshal the evidence and demonstrate insufficiency. *See Crookston v Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991).

J. Whether a reasonable jury could find that Dr. Jensen suffered economic loss caused by the Media Defendants' three stories? This is a factual jury issue not to be set aside unless a marshaling of the evidence and demonstration of insufficiency clearly shows the jury's finding was erroneous. *See Masson v New Yorker Magazine*, 501 U.S. 496 (1991); *Fitz v Synthes (USA)* 1999 UT 103, 990 P.2d 391; *Crookston v Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

K. Whether a reasonable jury could find malice, warranting punitive damages? This issue was preserved by the Special Verdict. Whether malice exists is a jury question reviewable under the clearly erroneous standard. *See Nash v Craigco, Inc.*, 585 P.2d 775, 777 (Utah 1978).

L. Whether the jury's awards on the common-law intrusion was an invasion of privacy claim and whether, the § 76-9-402(1)(a) claim and the § 76-9-402(1)(b) claim were duplicative warranting a two-thirds reduction? This issue was raised by the Appellant's Motion for New Trial and to Alter or Amend the Judgment [R. 5960], and is a question of law reviewed for correctness. *See Steenblik v Lidfield*, 906 P.2d 872, 881 (Utah 1995).

M. Whether the misconduct in gathering information claims relate to the misconduct in broadcasting information claims so that Dr. Jensen should be awarded an attorney's fee incurred for all of his claims? This issue was raised in the motion for attorney's fees proceedings [R.

6872]. The issue of whether attorney's fees should be awarded on a particular claim is a question of law reviewed for correctness. *See Keith Jorgensen's, Inc. v Ogden City Mall Co.*, 2001 UT App 128, ¶11.

N. Whether Dr. Jensen should have been awarded "necessary disbursements" for expert witness fees, out-of-pocket costs and deposition transcripts? This issue was raised in a motion to enter a judgment for costs and necessary disbursements. [R. 6215.] It requires an interpretation of Rule 54, which is reviewed for correctness. *See Carrier v Pro-Tech Restoration*, 944 P.2d 346 (Utah 1997).

III. CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

In addition to the Media Defendants' citations, Utah Code Ann. §§ 76-9-403 and 76-9-406, Rule 54(d) Utah Rules of Civ. Proc.; Utah Const. Art. VIII Section 4; Utah Administrative Code R. 156-37-3 are determinative.

IV. STATEMENT OF THE CASE

A. Nature of the Case -- Course of Proceedings -- Lower Court Disposition

United Television Inc. ("KTVX") and its former reporter Mary Sawyers (collectively referred to as "Media Defendants") appealed a Judgment entered by Judge Ray Harding, Jr. in the 4th Judicial District, Civil No. 970400512CV, after a month-long trial with a jury verdict in favor of Dr. Jensen on his defamation, invasion of privacy, and intentional interference with prospective economic relations claims. The jury also awarded punitive damages.

Dr. Jensen is cross-appealing a reduction of a portion of the verdict as duplicative; a denial of attorney's fees incurred on defamation and false light claims and for work performed

by attorney Wesley Sine; and a denial of necessary disbursements as costs.¹

B. Statement of the Facts Relevant to the Issues Presented for Review.

1. Dispositive Facts

a. Prior to the three broadcasts at issue², Dr. Jensen was a general practitioner practicing at FirstMed Clinic and also at the Springville Utah Family Clinic. He has since been reduced to practicing medicine in nursing homes.³ At no time did the Media Defendants contend that Dr. Jensen was a public official or public figure.

b. United Television owned and operated Channel 4, KTVX. Mary Sawyers (“Ms. Sawyers”) was a KTVX reporter. [R. 6864 (Sawyers) at 109; R. 6861 (Kimball) at 13.]

c. After a month-long trial, 112 exhibits, and 39 witnesses, the jury entered a verdict in Dr. Jensen’s favor on his defamation, invasion of privacy, and intentional interference with prospective economic relations claims.

d. By use of a special verdict, the jury found that a Nov. 6, 1996 broadcast defamed Dr. Jensen or placed him in a false light. The Media Defendants did not marshal the evidence supporting the jury verdict. Dr. Jensen does not intend to take on their burden, but lists some of the facts supporting the verdict: Ms. Sawyers falsely stated: “Dr. Michael Jensen – He’s the one we caught on tape promising me illegal drugs.” [Pl.’s Ex. 21.] What Dr. Jensen said was “if Fastin didn’t work for you, I would be willing to work with you uh *maybe* using Dexedrine.”

¹Dr. Jensen is aware that expert witness fees are almost always not taxed as costs, but believes that this case presents an ideal situation for modifying or reversing the existing law.

²The trial exhibit tape of the three broadcasts is attached as App. 2.

³In the pecking order of medical practice, practicing in nursing homes is the least desirable. [R. 6866 (Jensen) at 102.]

[Def.'s Ex. 99 at 2 (emphasis added).] Prior to any broadcast, he also corrected himself. He said he had done some additional research and could not now prescribe Dexedrine for weight loss. The Media Defendants' witness, Dr. Van Komen, testified that Dexedrine is not an illegal drug. [R. 6857 (Van Komen) at 145.] The story also represented that Dr. Jensen passed out drugs to addicts and killed a patient. [Pl.'s Ex. 21.] It placed Dr. Jensen in the same false light categories as physicians who perform illegal abortions, disfigure patients, pass out drugs to drug addicts, sexually abuse patients, and kill patients with lethal injections. [Pl.'s Ex. 21.]

e. The jury awarded pecuniary losses of \$1 million and general damages of \$500,000. The Media Defendants did not marshal the evidence. Some supportive facts are: Economist Dr. Frank Stuart testified that Dr. Jensen's pecuniary losses were \$1,595,783.00 to \$2,195,094.00. [R. 6850 (Stuart) at 69 & Pl.'s Ex. 210.] CPA Dean Smith testified that Dr. Jensen's pecuniary losses were \$1,022,600.00 to \$2,179,800.00. [R. 6850 (Smith) at 175 & Pl.'s Ex. 211.] Dr. Jensen testified that he was emotionally damaged. [R. 6866 (Jensen) at 118-19.] He stated he felt like "the rotten egg." He testified he was treated differently by his patients. A patient left after learning Dr. Jensen was the treating physician. [R. 6866 (Jensen) at 42-45.] Dr. Jensen testified he was ridiculed. A pharmacist refused to fill a prescription because he thought that Dr. Jensen had lost his medical license. [R. 6856 (Jensen) at 28.] He can no longer work in a family practice. Hospital privileges have been permanently lost. [R. 6856 (Jensen) at 28-29 and R. 6866 (Jensen) at 63-66.] Dr. Rosen testified that after the November 6, 1996 broadcast, Dr. Jensen was distraught and hurt. [R. 6848 (Rosen) at 90-91.]

f. The jury also found the Media Defendants' September 5, 1995 and June 17, 1996 broadcasts placed Dr. Jensen in a false light, and awarded \$600,000 in pecuniary loss, and

\$100,000 in general damages. Again, the Media Defendants have failed to marshal the evidence supporting this portion of the verdict. Some of the supporting fact areas follow: 1) Dr. Frank Stuart testified that Dr. Jensen's pecuniary losses were \$1,595,783.00 to \$2,195,094.00. [R. 6850 (Stuart) at 56-57, 69 & Pl.'s Exs. 209 & 210.]; 2) Dean Smith, CPA, testified that Dr. Jensen's pecuniary losses were \$1,022,600.00 to \$2,179,800.00. [R. 6850 (Smith) at 172, 175 & Pl.'s Ex. 211.]; and 3) Dr. Jensen testified that he was mentally hurt after the first two broadcasts. [R. 6866 (Jensen) at 118-19.] Dr. Jensen testified he was fired the day after the first broadcast and intensely investigated for eight months which greatly disrupted his life. [R. 6856 (Jensen) at 27.] Dr. Jensen testified he still suffers ridicule from the two broadcasts. [R. 6856 (Jensen) at 28.] Dr. Jensen testified that he was removed from IHC insurance privileges, and he can no longer work in a family practice. His hospital privileges have been taken away. [R. 6856 (Jensen) at 28-29 and R. 6866 (Jensen) at 63-66.]

g. The jury also found an intrusion upon Dr. Jensen's seclusion and awarded general damages of \$50,000. Some supporting facts are: Dr. Jensen testified the Media Defendants entered into his examination room with a hidden camera. [R. 6866 (Jensen) at 55.] Dr. Rosen testified that the examination room is a "private place" for physicians. [R. 6848 (Rosen) at 89.] Dr. Badger testified that he would not allow a hidden camera in an examination room because it invades a physician's privacy. [R. 6869 (Badger) at 21.] Dr. Purser and Dr. Canfield each testified that the examination room is a private place for physicians. [R. 6869 (Purser) at 127; R. 6869 (Canfield) at 181-82.] Physicians also testified that secret videotaping in an examination room was highly offensive. [R. 6869 (Canfield) at 181.]

h. The jury found that KTVX violated § 76-9-402(1)(a), which prohibits anyone from

trespassing⁴ with the intent to subject anyone to eavesdropping or surveillance in a private place, and awarded general damages of \$50,000. The Media Defendants did not marshal the facts. Some facts supporting the verdict are: The video showed the jurors how Ms. Sawyers falsely posed as a patient and recorded her trespass into the examination room. [Pl.'s Ex. 33.] All physicians who testified on the subject said the examination room is a private place for physicians. *Sæ* para. g above. Ms. Sawyers testified that she did not receive permission to video Dr. Jensen or use a hidden camera. [R. 6871 (Sawyers) at 57.]

i. Next, the jury found that the Media Defendants violated § 76-9-402(1)(b), which prohibits the installation of any device for observing, photographing, or recording, without consent. Some facts supporting the verdict are: The video showed how Ms. Sawyers falsely posed as a patient and recorded her visit in Dr. Jensen's examination room without permission. The video shows how Ms. Sawyers concealed her hidden camera in a day planner and installed it in the examination room. [Pl.'s Ex. 33.] Both Ms. Sawyers and Dr. Jensen testified that he did not consent to the secret videotaping. [R. 6871 (Sawyers) at 57.]

j. The jury found that the Media Defendants interfered with Dr. Jensen's prospective economic relations and awarded \$25,000 in general damages. Some facts supporting the verdict are: Dr. Jensen testified he is treated differently by his patients. [R. 6866 (Jensen) at 42-45.] He testified he cannot work in a family practice because without IHC coverage, most patients will not see him. His hospital privileges were taken away. [R. 6856 (Jensen) at 28-29 and R. 6866 (Jensen) at 63-66.] Dr. Jensen has been reduced to seeing patients in nursing homes, the last

⁴If consent to come on the premises is falsely induced, a trespass occurs. *Sæ* State v. Hawkins, 967 P.2d 966 (Utah Ct. App. 1998).

place a physician would want to work. [R. 6866 (Jensen) at 102.]

k. The jury also found that the Media Defendants' misconduct justified an award of punitive damages in conformity with § 78-18-1 *et seq.* The Media Defendants do not marshal the evidence. Some supporting facts are identified in para. "l" below.

l. The jury awarded punitive damages of \$450,600 stemming from the November 6, 1996 broadcast; \$245,300 from the September 5th and June 17th broadcasts; \$40,000 in punitive damages on the common law intrusion claim, and \$40,000 each on the two statutory privacy violations of §§ 76-9-402(1)(a) and 76-9-402(1)(b). Finally, the jury awarded \$25,000 for KTVX's intentional interference with prospective economic relations. Some supporting facts are: [t]he Media Defendants always intended to do a sensational story ("Storyidea," App. 1); Ms. Sawyers repeatedly and falsely posed as a patient needing diet drugs to keep her job. She repeatedly tried to persuade Dr. Jensen to prescribe drugs over the phone knowing it was wrongful.⁵ During the first broadcast Ms. Sawyers states that Dr. Jensen never asked if she had high blood pressure or diabetes. However, Dr. Jensen's assistant took Ms. Sawyers blood pressure, and Dr. Jensen had Ms. Sawyer's blood pressure test results at the time he gave Ms. Sawyers the prescription. [R. 6865 (Jensen) at 125-26; R. 6866 (Jensen) at 56.] Dr. Jensen testified he asked Ms. Sawyers if she had diabetes. [R. 6866 (Jensen) at 56.] Further, diabetes is not a contraindication to taking diet pills. [R. 6866 (Jensen) at 56.] Ms. Sawyers falsely reported that Dr. Jensen promised her Dexedrine an illegal drug, but Dr. Jensen said "maybe" and, before any broadcast, later explained that when he said Dexedrine was technically illegal to use as a diet pill, he meant that the rules and regulations discouraged using a Schedule II

⁵Utah Code Ann. § 58-37-8(3)(a)(ii).

substance. Consequently, he informed Ms. Sawyers that he would not prescribe Dexedrine. [R. 6865-6866 (Jensen) at 116.] Dr. Hirsche testified that a doctor may vary the way medicine is used for the good of a patient and that he did not consider Dr. Jensen to be suggesting a false diagnosis to Ms. Sawyers. [R. 6871 (Hirsche) at 133.] On June 17, 1996, the Media Defendants aired the second broadcast. [Pl.'s Ex. 20.] They falsely represented that Dr. Jensen gave Ms. Sawyers a prescription without following state law. They reported: 1) the physician must determine that the patient made a good-faith effort to lose weight; 2) the physician must perform a physical examination; and 3) the physician must rule out the existence of health conditions that would be aggravated by the drug. Ms. Sawyers stated Dr. Jensen did none of these. But Dr. Jensen did determine Ms. Sawyers made a good-faith effort to lose weight. He had her medical history, asked questions, and knew her blood pressure. He was not able to finish the examination only because she abruptly left before the examination was completed. Finally, Dr. Jensen did rule out any contraindications. [R. 6866 (Jensen) at 139; 192; R. 6865 (Jensen) at 85; 130-31.] Ms. Sawyers reported that the State said Dr. Jensen broke the law a second time when he made the Dexedrine statement. Dr. Jensen's statement, however, was not illegal. [R. 6865 (Jensen) at 116; R. 6871 (Hirsche) at 133.] Further, the State was never after his license. [R. 6857 (Allred) at 99.] On November 6, 1996, the Media Defendants did their third broadcast. [Pl.'s Ex. 21.] Using earlier excerpts, they placed Dr. Jensen in the same category as physicians who: performed illegal abortions; disfigured patients; sexually abused patients; passed out drugs to drug addicts; or killed patients with lethal injections. [Pl.'s Ex. 21.] Further, Ms. Sawyers stated: "Dr. Michael Jensen – He's the one we caught on tape promising me illegal drugs." [Pl.'s Ex. 21.] DOPL Chairman Dr. Van Komen testified that Dexedrine is not an illegal drug. Rather

“illegal drugs are Scheduled 1, such as cocaine and marijuana.” [R. 6857 (Van Komen) at 145.]

m. Later the district court ruled the jury’s awards under §§ 76-9-402(1)(a) and 76-9-402(1)(b) and the common law intrusion claim were duplicative and reduced them by two-thirds.

n The district court also declined to award attorney’s fees for work performed on the broadcast claims and for work performed by attorney Wesley Sine.

o. The Court declined to award necessary disbursements which included the following expert witness costs:

1) BYU Communications Professor Alfred D. Pratte, in the amount of \$4,667.50. The trial court allowed only \$18.50. Professor Pratte testified the Media Defendants did not comply with journalism standards.

2) Editor of the “Journal of Mass Media Ethics,” Dr. Ralph Barney, in the amount of \$1,989.65. The trial court allowed only \$18.50. He testified that the Media Defendants did not conduct the kind of journalism investigation and analysis that would justify using a hidden camera.

3) Prominent Utah County Physician, Dr. Blaine Hirsche (now deceased), in the amount of \$1,500.00. The trial court allowed only \$26.60 as a witness and service fee. He testified that Dr. Jensen met the community standard of medical care. He also testified how physicians view and abide by DOPL prescription regulations.

4) Physician Dr. Michael Rosen, in the amount of \$9,790.00. The trial court did not allow any of Dr. Rosen’s costs. Dr. Rosen testified that Dr. Jensen met the standard of care for general practitioners in the medical community.

5) CPA Dean Smith, in the amount of \$13,725.00. The trial court allowed

only \$67.50 of Mr. Smith's costs. Mr. Smith testified and described Dr. Jensen's pecuniary losses.

6) Economist, Dr. Frank Stuart, in the amount of \$26,129.66. The trial court allowed only \$67.50. He testified about the reduction of Dr. Jensen's income and losses.

p. The parties timely filed their notice of appeal and notice of cross-appeal.

2. Response to the Media Defendants' Statement of Facts

The foregoing are the dispositive facts relevant to the issues presented for review. The problems with the Media Defendants' Statement of Facts are first, instead of marshaling the facts in support of the verdict, they seek to retry their case on appeal. *See South Central Utah v Auditing Div.*, 951 P.2d 218, 226 (Utah 1997). Second, many of the facts are not relevant to the issues for review. Third, many of the "factual" allegations are actually argument. Fourth, each allegation is not numbered, making it difficult to respond. Nevertheless, to weed out what is and is not a statement of fact relevant to an issue for review, Dr. Jensen responds as follows:

a. The heading on page 8 is not a statement of fact. It is legal argument. What occurred at the party was not a part of the claims at issue. Most importantly, they omit and misconstrue facts as follows: Lisa Johnson was romantically involved with KTVX's managing editor, Roth. [R. 6849 (Roth) at 103.] Mr. Roth authored the "Story idea". *See* App. 1. Then Ms. Johnson told Dr. Jensen that as a "*Deseret News*" food critic, she was required to frequently eat out. [R. 6865 (Jensen) at 82; R. 6845 (Johnson) at 57.] Ms. Johnson said she was exercising and asked about weight-reducing options. [R. 6865 (Jensen) at 82; R. 6845 (Johnson) at 57.] Dr. Jensen responded with different options including prescriptions. [R. 6865 (Jensen) at 83; R. 6845 (Johnson) at 57.] The assertion that Ms. Johnson was not interested in using diet pills is contrary

to the evidence believed by the jury. Dr. Jensen testified Ms. Johnson asked him for diet pills. [R. 6865 (Jensen) at 82-83.] Only after he informed her of the contraindications did she say she would not be taking medication. [R. 6865 (Jensen) at 82-83 & 107; R. 6845 (Johnson) at 59.] Contrary to the statement that “Ms. Johnson had never been a patient of Dr. Jensen’s”, the evidence at trial was she could be considered his patient. [R. 6866 (Jensen) at 126-28.] The Media Defendants misstate that before “prescribing Fastin, Dr. Jensen did not conduct any physical examination of Ms. Johnson.” Appellants’ Brief at 8. At trial, however, there was testimony that Dr. Jensen complied with the community’s standard of medical care. [R. 6848 (Rosen) at 105; R. 6871 (Hirsche) at 109.] Dr. Jensen asked whether she was on medications, and asked questions about her general health. He also knew her exercise routine indicated that her general health was good. [R. 6865 (Jensen) at 85-86; R. 6866 (Jensen) 129-130.] The Media Defendants misstate “. . . nor did he [Dr. Jensen] ‘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.’” Appellants’ Brief at 8. Prior to prescribing Fastin, Dr. Jensen determined that Ms. Johnson made a good faith effort to lose weight. [R. 6866 (Jensen) at 139.] Further, Dr. Jensen asked her to come to his clinic for monitoring and treatment. [R. 6865 (Jensen) at 88.] Later, Ms. Johnson told Dr. Jensen that she would not use the prescription. [R. 6856 (Jensen) at 14; R. 6845 (Johnson) at 59.] The Media Defendants misstate “Dr. Jensen did not determine whether there were contraindications to the use of Fastin.” Appellants’ Brief at 9. Dr. Jensen testified he told Ms. Johnson about the contraindications of Fastin. [R. 6865 (Jensen) at 85.] The Media Defendants state “[i]n fact, Ms. Johnson has a heart condition that could have been seriously aggravated if

she took the amphetamine Dr. Jensen prescribed.” Appellants’ Brief at 9. That is probably why after Dr. Jensen explained the contraindications of Fastin to her, she told him that she would not fill the prescription. Media Defendants misstate “[i]t is undisputed that Dr. Jensen’s prescribing of Fastin to Ms. Johnson was in violation of Utah Admin. Code R156-37-11(14).” Reg 156-37-3 reads that “nothing in these rules is intended to impose any limitations on a physician . . . to administer or dispense controlled substances in accordance with generally accepted medical practice.”⁶ Physicians testified that Dr. Jensen’s conduct met the medical standard of care and the jury believed them. [R. 6848 (Rosen) at 105; R. 6871 (Hirsche) at 109.]

b. The heading on p. 9 is factually wrong. Media experts testified that the claimed investigation was deficient. [R. 6848 (Pratte) at 177-78.]

c. Mr. Roth did more than discuss the social event with his news director. He recommended that Ms. Sawyers falsely pose as a patient, and try to trick Dr. Jensen into prescribing diet drugs. [R. 6849 (Roth) at 117.]

d. Ms. Sawyers did not call to discuss diet pills. She called to falsely portray herself as a patient and to wrongfully persuade him to prescribe drugs. When Dr. Jensen refused, she avoided an appointment, and again asked for drugs. [R. 6865 (Jensen) at 119; R. 6866 at 24; R. 6868 (Scott) at 71-75, 79-80]. Further, she first spoke with Dr. Jensen’s office manager, Laurie Scott (“Scott”), who relayed the following information: Ms. Sawyers said she wanted him to prescribe diet pills over the phone. She said she needed to lose 5 pounds before her next story because “it’s a dog-eat-dog world out there” and she was receiving management pressure to lose weight or lose her job. Ms. Sawyers said she wanted Dr. Jensen to prescribe pills immediately

⁶The court ruled that the regulations were guidelines, not law [R. 1016, 1021-22].

and that she was too busy and tired to go to Utah County. She also said the overweight people get the “crappy shifts” on TV and that is why Shelly Osterloh never had prime time coverage. [R. 6868 (Scott) at 72-75.] Dr. Jensen believed that Ms. Sawyers was about to lose her job because of her weight. [R. 6865 (Jensen) at 119.]

e. Heading No. 3 and the paragraph thereafter are wrong. The truth was that when the Media Defendants’ scheme to trick Dr. Jensen into prescribing drugs over the phone failed, they decided to have Ms. Sawyers again falsely pose as a patient, secretly videotape him, and persuade him to prescribe diet drugs. [R. 6849 (Roth) at 117.]

f. The description of what occurred at the First Med Clinic is wrong. Dr. Jensen’s examination of Ms. Sawyers included, but was not limited to the following: A comprehensive medical history was taken; blood pressure, pulse and respiration were charted by Dr. Jensen’s staff and reviewed by him – he wrote on the chart that Ms. Sawyers had no medical problems [R. 6865 (Jensen) at 125-26.]; a determination was made that Ms. Sawyers was not on any medication and was not allergic to drugs [R. 6866 (Jensen) at 189; R. 6865 at 128.]; her age and gender were noted [R. 6865 (Jensen) at 127-28.]; her eyes, coloring, hands and feet appeared normal. [R. 6866 (Jensen) at 186, 193.] *Sæ* App. 3. After considering the medical information, conducting a lengthy interview, and noting Ms. Sawyers’ expressed desire to lose weight to save her job, he prescribed Fastin and Pondimin and continued his examination. [R. 6865 (Jensen) at 126-30; Defs.’ Ex. 77A; R. 6847 (Sawyers) at 100.] Deceitfully, as Dr. Jensen was about to complete his work (including weighing Ms. Sawyers and listening to her heart), she abruptly exited the examination room. She had what she wanted. [R. 6865 (Jensen) at 130-31; R. 6866 (Jensen) at 192 lns. 17-19.] Dr. Jensen testified he asked Ms. Sawyers if she had diabetes. [R.

6866 (Jensen) at 56.] Also, diabetes is not a contraindication to diet pills. [R. 6866 (Jensen) at 56.]

g. Media Defendants' misstate that Ms. Sawyers was not overweight, implying that Dr. Jensen should not have prescribed Phen-Fen. Appellants' Brief at 12. Physicians testified that Dr. Jensen was within the standard of care in prescribing diet pills. [R. 6871 (Hirsche) at 109; R. 6848 (Rosen) at 105.] Further, after viewing the tape, Dr. Purser stated doctors look at the patient's body habitus and size. He said: "if you look at that video, you can see that her derriere hangs out over the sides of the chair," implying that she looked large enough for him to prescribe diet medication. [R. 6869 (Purser) at 102.]

h. On page 12 of the Media Defendants' Brief, they quote a portion of the hidden camera transcript. Citing this exchange is misleading and demonstrates the Media Defendants' failure to marshal the facts. Dr. Jensen testified that before any broadcast he told Ms. Sawyers that when he said Dexedrine was technically illegal to use as a diet pill, he meant that the rules and regulations discouraged a Schedule II substance, which is Dexedrine, to be used as weight reduction. [R. 6865 (Jensen) at 116.] The regulations, which Sawyers read, state that they are guidelines and the lower court so ruled. Dr. Hirsche testified doctors may vary the way medicine is used for the good of a patient, and he did not consider Dr. Jensen to be suggesting a false diagnosis. [R. 6871 (Hirsche) at 133.] Most importantly, prior to the first story, Dr. Jensen did an on-camera interview and he explained he had done additional research; and said Dexedrine was used for weight loss when he was in medical school, but that it was not used now. [Pl.'s Ex. 37 at 6] The Media Defendants left Dr. Jensen's correction out of any of their stories. They leave it out now.

i. On page 13 of the Media Defendants' Brief, they quote another portion of Defs. Ex. 99. Citing this exchange again demonstrates a failure to marshal. Dr. Jensen explained that he was referring to the fact that he had some patients on Fastin, one of which stated that when Fastin wore off, she would get tired and could not function, and that he had had a similar experience. He also testified he believed Ms. Sawyers had work fatigue, so he explained to her a way to avoid crashing once Fastin wore off. [R. 6865 (Jensen) at 138-40.] Dr. Hirsche testified that Dr. Jensen was not telling her how to abuse the drugs, he was telling her how not to abuse it. [R. 6871 (Hirsche) at 133.]

j. The Media Defendants misstate: "[a]t 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." This statement makes it sound as if Dr. Jensen knew that she was doing a story on him. He did not. [R. 6864 (Sawyers) at 116 (testified that she did not tell Dr. Jensen she was going to photograph him); R. 6871 (Sawyers) at 57-60.] Nor did Dr. Jensen know Ms. Sawyers was recording with a hidden camera. [R. 6871 (Sawyers) at 60.] Dr. Jensen believed he was treating a patient for weight loss who feared losing her job because KTVX determined she was overweight. [R. 6871 (Sawyers) at 58-59; R. 6865 (Jensen) at 99-100, 119; R. 6866 (Jensen) at 36, 58, 117-18.]

k. The heading on page 15 and subsequent paragraphs are incorrect. The Media Defendants did not continue their investigation. Instead, they showed a portion of the hidden camera tape and not the second on-camera interview tape to DOPL, and asked what it would do about Dr. Jensen. [R. 6871 (Sawyers) at 83-84; Pl.'s Ex. 19.] Further, Ms. Sawyers did not disclose to DOPL that the hidden camera tape did not show the last 15 minutes of the

examination because it shut off prematurely. [R. 6871 (Sawyers) at 84-85; R. 6866 (Jensen) at 39.]

l. The only reason Ms. Sawyers did a second interview was because she bungled the installing of the hidden camera. She lacked video of Dr. Jensen. [R. 6871 (Sawyers) at 63-64.] Consequently, Ms. Sawyers did a second on-camera interview. [R. 6866 (Jensen) at 8-9; Pl.'s Ex. 37.] Dr. Jensen did not confirm the "illegality" of his earlier Dexedrine statement. Dr. Jensen told Ms. Sawyers that prescribing Dexedrine is something that cannot be done now in conformity with state regulations. [Pl.'s Ex. 37 at 6.] The Media Defendants never included that statement in any broadcast. [Pl.'s Ex.s 19, 20, 21.] Further, as explained to the jury, physicians, based on medical judgment, are allowed to make prescriptions outside the regulations. [R. 6865 (Jensen) at 116; R. 6871 (Hirsche) at 133.] The Court ruled the regulations were guidelines. [R. 1016, 1021-22]

m. On September 5, 1995, they aired the first false light broadcast.⁷ [Pl.'s Ex. 19 & Defs. Ex. 115.] It falsely represented that Dr. Jensen offered illegal drugs to Ms. Sawyers. [Pl.'s Ex. 19 & Defs. Ex. 115.] It further falsely insinuated that Lynette Singleton was Dr. Jensen's patient by showing her picture and stating that she had easily obtained diet pills from her doctor. [Pl.'s Ex. 19 & Defs. Ex. 115.] She was not. The broadcast showed clips of the hidden camera interview and the second interview, while making the viewer think that Ms. Sawyers had done one continuous interview. [Pl.'s Ex. 19 & Defs. Ex. 115.] The story did not include Dr. Jensen's filmed correction. [Pl.'s Ex. 19.]

n. Following the first broadcast, IHC dropped Dr. Jensen from its insurance plans. [R.

⁷No one at KTVX had any hidden-camera experience. [R. 6864 (Edwards) at 19.]

6866 (Jensen) at 63.] Dr. Jensen cannot bill the largest insurance provider in the state for medical services to patients. [R. 6866 (Jensen) at 64.] Dr. Jensen was denied reinstatement. [R. 6866 (Jensen) at 66, 112-15; Pl.'s Ex. 199.] He was also fired from the FirstMed Clinic. [R. 6866 (Jensen) at 62.]

o. In section 8 of their Brief, the Media Defendants fail to admit they hounded DOPL to go after Dr. Jensen. [R. 6871 (Sawyers) at 83-85.]

p. On June 17, 1996 Media Defendants aired the second false light broadcast. [Pl.'s Ex. 20.] They falsely said Dr. Jensen gave Ms. Sawyers a prescription without following state law. The broadcast reported: 1) physicians must determine that the patient made a good-faith effort to lose weight; 2) physicians must perform a thorough physical examination; and 3) physicians must rule out the existence of health conditions that would be aggravated by the drug. Ms. Sawyers stated that Dr. Jensen did none of these. However, he did determine that Ms. Sawyers had made a substantial good-faith effort to lose weight. Also, he was not able to finish the examination because she abruptly left his office. And Dr. Jensen did rule out contraindications. [R. 6866 (Jensen) at 139; 192 lns. 17-19; R. 6865 (Jensen) at 85; 130-31.] Ms. Sawyers also said Dr. Jensen broke the law a second time when he made the Dexedrine statement. However, as described above, the statement was not illegal. [R. 6865 (Jensen) at 116; R. 6871 (Hirsche) at 133.]

q. On November 6, 1996, the Media Defendants defamed Dr. Jensen. [Pl.'s Ex. 21.] Using excerpts from earlier broadcasts, the Media Defendants placed Dr. Jensen in the same category as physicians who: perform illegal abortions; disfigure patients; sexually abuse their patients; pass out drugs to drug addicts; and/or kill patients with lethal injections. The story

implied Dr. Jensen was the physician who gave drugs to addicts. [Pl.'s Ex. 21.] Ms. Sawyers repeated her statement regarding the promise of illegal drugs, knowing what Dr. Jensen really said was "if Fastin didn't work for you, I would be willing to work with you uh *maybe* using Dexedrine." [Def.'s Ex. 99 at 2 (emphasis added).] She also knew from the second interview Dr. Jensen would not prescribe Dexedrine to her. [Pl.'s Ex. 37 at 6.] Additionally, the Physicians Licensing Board Chairman testified that Dexedrine is not an illegal drug. Rather, "illegal drugs are Schedule 1 such as cocaine and marijuana." [R. 6857 (Van Komen) at 145.]

r. The Media Defendants wrongfully state that Dr. Jensen did not present any evidence showing that he lost any job, position or was denied work opportunities as a result of the third broadcast. Appellant's Brief at 21. Dr. Jensen's economic losses were earlier summarized. While Dr. Jensen did finally find employment after being fired from nearly all the positions he was then working at because of the broadcasts, working as a nursing home physician is the last place Dr. Jensen wanted to work as a physician. [R. 6866 (Jensen) at 102 (Dr. Jensen testified that nursing home medicine is one of the least desirable type of jobs for a physician).] Further, without IHC coverage, many patients cannot be treated by Dr. Jensen because they will not receive reimbursement from insurance. [R. 6866 (Jensen) at 63-64.]

V. SUMMARY OF ARGUMENT

A. Appellee's Argument

Dr. Jensen's 'false light invasion of privacy' claims are not time-barred. A 'false light invasion of privacy' is one of four different categories falling under the INVASION OF PRIVACY TORT. Invasion of Privacy is not a defamation tort. It is a separate and distinct tort. Consequently, it is not subject to the one-year statute of limitation in § 78-12-29(4) which

covers defamation, slander and libel. *See Cox v Hatch*, 761 P.2d 556 (Utah 1988) wherein both torts are analyzed. A 'false light tort claim' is based upon true or false statements which place the individual in a false light to his detriment. In contrast a defamation tort consists of false statements which injure the reputation of the individual.

Dr. Jensen's invasion of privacy by way of intrusion arises from the surreptitious video recording of Dr. Jensen by Ms. Sawyers while being treated as a patient in a private examination room with the door closed. They are actionable. All the doctors who were asked testified that they would be highly offended if secretly taped while treating a patient. They all had the expectation that the examination room was a private place for the physician.

Dr. Jensen was also the subject of the Media Defendants' attempt to show that DOPL was not properly performing its function to regulate doctors under its charge. The Media Defendants tried to mold Dr. Jensen to its predetermined "Story idea" in order to put pressure on DOPL to change its way and to go after Dr. Jensen.

Each of the broadcasts were not substantially true. The first broadcast's innuendo was that Dr. Jensen was Lynette Singleton's doctor from whom she had obtained diet pills very casually. He was not. Many of the Media Defendants' statements were flat-out false as exemplified by Ms. Sawyers repeated allegation that Dr. Jensen had promised her illegal drugs. He did not. In the second broadcast the Media Defendants alleged that the State was going after the license of Dr. Jensen. *See* Defendants/Appellants Exhibit 9. The truth according to a DOPL Assistant Attorney General and also the head of the physicians licensing board was that DOPL never sought revocation of Dr. Jensen's license. [R. 6857 (Allred) at 99.] Further, Dr. Jensen did not instruct Ms Sawyers how to abuse a drug but instructed her as how not to abuse

the drug. [R. 6865 (Jensen) at 139-141.]

Dr. Jensen testified that he was injured most by the third broadcast. From this broadcast, the clinic, which had supported him throughout the ordeal of the earlier two broadcasts, warned him that if the notoriety continued they would have to let him go. They then started to cut back his hours. The cut in hours forced him to go into the nursing home industry with its poor pay, long hours, and serious mental stress due to the terminal illnesses of nursing home patients. The jury had the unique opportunity of being able to see the hidden camera tape, the interview tape, and the three broadcasts which were produced. From that they were able to determine the truth or falsity of the broadcasts and the statements contained therein.

B. Cross-Appellant's Argument

The Media Defendants could not have done the three broadcasts without the hidden camera video. As the hidden camera episode violated § 76-9-402(1)(a) and (b), and under § 76-9-406 attorney fees are allowed where there has been a violation of § 76-9-401 *et al.*, the Media Defendants should be assessed attorney fees for all damage caused by their violation of 76-9-402(1)(a) and (b). Further, the gathering of information claims are the proximate cause of the broadcast claims in such a way as to justify an attorney's fee award on all claims.

The jury's award was not duplicative and all of Dr. Jensen's claimed costs should be awarded as necessary disbursements.

VI. APPELLEE'S ARGUMENT

A. The Issues of Fact Raised by the Media Defendants in this Appeal Must, as a Matter of Law, be Determined in Favor of Dr. Jensen. The Media Defendants Failed to Marshal the Evidence.

When challenging a jury's verdict, the appellant must "marshal the evidence in support

of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.” *Harding v Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093, 1097.

The marshaling process is not unlike becoming the devil’s advocate. Counsel must remove himself or herself from the client’s shoes and fully assume the adversary’s position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court’s finding resting upon the evidence is clearly erroneous.

Nedy v Bennett, 2002 UT App 189, ¶ 11, 51 P.3d 724, 727-28 (citation omitted).

The duty to marshal is not “satisfied by merely making the ‘pertinent excerpts from the record readily available to a reviewing court,’ nor by presenting ‘in minute detail all the evidence before’ the trial court.” *Id.* (citations omitted.) Instead, the appellant must marshal all the evidence in support of the findings and show why, given all of the evidence supporting the findings, the findings are against the clear weight of the evidence.” *Harris v IES Assoc.*, 2003 UT App. 112, ¶ 40, 471 Utah Adv. Rep. 9. “The marshaled facts should ‘correlate particular items of evidence with the challenged findings,’ supporting the findings with all available evidence in the record, and only then should an appellant attempt to demonstrate how the challenged findings are clearly erroneous.” *Nedy*, 2002 UT App 189, ¶ 12, 51 P.3d 724, 728. ‘In the face of an appellant’s failure to properly marshal the evidence, the appellate court’s “most likely action is summary affirmance of the challenged trial court decision.” *Id.*

In this case, the Media Defendants make six arguments. All but the first raise issues of fact, *i.e.*, whether the evidence supported a motion for summary judgment, a directed verdict, or a motion to set aside the verdict. Nowhere do the Media Defendants marshal the evidence.

All they do is argue selective evidence favorable to their position. The Media Defendant's arguments do not even begin to meet their marshaling burden. *See Crookston v Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991). When an appellant fails to marshal the evidence, it cannot show that the findings are clearly erroneous and the reviewing court must presume that the evidence supported the verdict. *Harding*, 2002 UT 108, ¶ 21, 57 P.3d at 1097. As a result, the findings of fact of the trial court and the jury must be accepted as true. The Media Defendants' failure to meet their marshaling burden is alone sufficient grounds to reject any challenges to the jury's findings. *See Crookston*, 817 P.2d at 800.

Furthermore, it is now too late for the Media Defendants to remedy their failure to meet their marshaling burden. "[A] party must marshal all of the evidence supportive of the verdict in its *opening brief*." *Harding*, 2002 UT 108, ¶ 21 n3, 57 P.2d at 1097, n3. (emphasis added). Rule 24(c), Utah R. App. Proc., further dictates, the failure to marshal the evidence cannot be remedied in a reply brief. An appellant cannot reserve its sufficiency of the evidence challenge and wait to marshal the evidence in a reply brief. Such a procedure would deprive the appellee of any opportunity to respond and defend the sufficiency of the evidence and the findings of fact. *See Atlas Steel, Inc., v Utah State Tax Comm'n*, 2002 UT 112, ¶41, 61 P.3d 1053, 1062.

B. An Appellate Court Does Not Review a Pretrial Denial of Summary Judgment After Jury Trial and Adverse Judgment on the Merits.

Sections 1, 2 & 4 of the Media Defendants' argument are based on a summary judgment denial. Many jurisdictions, including the Tenth Circuit, have ruled that a summary judgment denial is not reviewable on appeal after a trial. *See Whalen v Unit Rig Inc.*, 974 F.2d 1248 (10th Cir. 1992). "[S]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." *Id.* at 1251. (quoting *Holley v Northrup Worldwide*

Aircraft Servs., Inc., 835 F.2d 1375, 1377-78 (11th Cir. 1988).

Judicial economy does not allow an appeal of a denial of summary judgment after a full trial because the purpose of summary judgment is to eliminate the time, trouble and expense of a trial. *See McBride v Jones*, 615 P.2d 431 (Utah 1980). A summary judgment motion becomes moot. *See Pabuta v Massey-Ferguson, Inc.*, 170 F.3d 125 (2d Cir. 1999); *Gregory v Kilbride*, 565 S.E.2d 685 (N.C. Ct. App. 2002); *Chesapeake Paper Prods. Co. v Stone & Webster Eng'g Corp.*, 51 F.3d 1229 (4th Cir. 1995) (Court of Appeals will not review a pretrial denial of motion for summary judgment after full trial and final judgment on merits); *Watson v Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994) (same); *Metropolitan Life Ins. Co. v Golden Triangle*, 121 F.3d 351 (8th Cir. 1997) (agreeing with the 9th and Federal Circuits that once a party lost at summary judgment and subsequently loses after a trial, the denial of summary judgment cannot be appealed).

C. The Tort of False Light Invasion of Privacy is Governed by the Utah Four-Year Statute of Limitation. It is Not an Enumerated Exception to the Residual Four-Year Limitation Period of UCA § 78-12-25(3).

The scope of the four-year limitation period in subsection (3) of § 78-12-25 has been clear for over 100 years: “torts having nowhere else been provided for in the statute. . . [are] embraced under the general provisions of Section 20, [now sub-section (3)] of UCA § 78-12-25.” *See Thomas v Union Pac. R.R. Co.*, 1 Utah 235 (1875). As the Utah Appellate Court acknowledged in *Hodges v Howell*, 2000 UT App 171, ¶9, 4 P.3d 803, 805, section 78-12-25(3) “applies to all actions for relief that [are] not otherwise covered by any other section.” citing *Branting v Salt Lake City*, 47 Utah 296, 311, 153 P. 995, 1001 (1915). *See also, Olsen v Hooley*, 865 P.2d 1345, 1347 n.1 (Utah 1993) (“A cause of action . . . that is not subject to a specific statutory limitation period is governed by the residual four-year limitation period found in § 78-12-25(3).”)

Utah courts have *never* held that any specific statute of limitation applies to a false light

invasion of privacy claim. There is, however, compelling case law applying other states' catch-all provision to false light invasion of privacy claims. The U.S. Court of Appeals for the 10th Circuit upheld a Kansas court ruling that the "statute of limitations for an invasion of privacy claim" fell under the two-year tort catch-all provision. *Newcomb v Engle*, 827 F.2d 675, 678 (10th Cir. 1987); *see also, Jones v HCA Health Services of Kansas, Inc.*, 1998 WL 159505 * 17 (D. Kan. 1998) (the court refused to apply the 1-year defamation statute of limitation, holding that the two-year catch-all statute of limitations applies to "invasion of privacy actions including those based on false light publicity"). Similarly, in *Ault v Hustler Magazine, Inc.*, 1986 WL 20896 * 6 (D. Or. 1986) the court noted that the Oregon legislature, like the Utah legislature, had not "enumerated the statute of limitations for invasion of privacy" and held that the two-year statute of limitations for invasion of privacy applied. In *Jensen v Times Mirror Company*, 634 F. Supp. 304, 315 (D. Conn. 1986) the federal court found that a false light claim is not otherwise covered by a specific statute of limitation, the all embracing three-year tort statute of limitations applied.

Even though the tort of false light invasion of privacy is not specifically enumerated in any statute of limitation, the Media Defendants mistakenly argue that the one-year statute of limitation for "defamation" should apply. *See Utah Code Ann. § 78-12-29(4)* (1996). They say the nature of those two torts are so "closely allied" that the same limitation period applies to each. The Utah Supreme Court has held that the statute of limitation to be applied is determined "by the nature of the action and not by the pleading labels chosen." *Davidson Lumber Sales, Inc. v Bonneville Inv., Inc.*, 794 P.2d 11, 14 (Utah 1990). In *Cathco, Inc. v Valentin Crane Brunjes Onyon Architects*, 944 P.2d 365, 369 (Utah 1997), the Court reaffirmed explaining, "[f]or purposes of determining the statute of limitations, it is the gravamen of the claim which governs, not the form in which it is pleaded." Just because two torts may both involve the same conduct,

that does not “ally” the two closely enough to share the same limitation period. Application of this test in *Hodges v Howell*, *supra* is instructive, as the factual analysis of *Hodges*, is so similar to the present case that it dictates the conclusion that defamation and false light are distinct and separate. In *Hodges* the issue was which limitation period applied to the tort of “alienation of affection.” No limitation period for this tort is specified in statute. The plaintiff argued alienation of affection is so “closely related with” seduction that they should share the one year limitation period. The Utah Appellate Court recognized both torts may involve the same conduct, *i.e.*, sexual relations, but that sexual relations was not an essential element of alienation of affection, finding that the elements of the torts were not the same and the interests protected were not the same. The court concluded that they were not sufficiently related to share the same limitation period.

Using this same analysis, the Supreme Court in *Russell v Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992), held that the invasion of privacy is “distinct” from defamation. The Court recognized that the tort of defamation only protects an individual’s reputation while the tort of invasion of privacy, false light, protects an “individual’s interest in being let alone.” The gravamen of a false light invasion of privacy action constitutes “publicity that unreasonably places the other in a false light before the public. *See Cox v Hatch*, 761 P.2d 556, 563 (Utah 1988); RESTATEMENT (SECOND) OF TORTS, § 652A & 652E (1977). Unlike defamation, the statements complained of in an action for false light need not be false. In fact, “an action for invasion of privacy may be the only available remedy when the statements complained of are not themselves false, but merely place plaintiff in a false light.” *Russell*, 842 P.2d at 906-907. The Court concluded that an invasion of privacy claim such as false light invasion of privacy is distinct from a defamation claim. They are not “so closely allied” so as to share the same limitation period.

The trial court correctly applied the four-year residual limitation period of § 78-12-25(3).

D. The Evidence Clearly Supports and the Jury Properly Found the Media Defendants' Intrusion was Substantial and Highly Offensive.

The Media Defendants make four arguments relating to the sufficiency of the evidence on the invasion of privacy claims: 1) whether there was an intrusion into Dr. Jensen's "sphere of personal privacy;" 2) whether the Media Defendants' actions were "highly offensive;" 3) whether Dr. Jensen had a reasonable expectation of privacy as a state-licensed and regulated physician; and 4) whether the defamatory and false-light statements were "substantially true."

All of these involve issues of fact and were found in favor of Dr. Jensen by the jury on the evidence. Although, the Media Defendants cite to numerous cases whose fact situations result in a ruling against the plaintiff, they are all fact specific and distinguishable. Nowhere do the Media Defendants marshal the evidence supporting the jury's findings upheld by the lower trial court in not directing a verdict for Appellants or in granting a judgment notwithstanding the verdict.

1. The Media Defendants Tortuously and Unreasonably Intruded Upon Dr. Jensen's "Sphere of Personal Privacy"

A successful plaintiff must prove two elements to establish an intrusion upon seclusion claim: (a) there was "an intentional substantive intrusion, physically or otherwise upon the solitude or seclusion of the complaining party", and (b) the intrusion "would be highly offensive to a reasonable person." *See Stien v Marriott Ownership Resorts, Inc.*, 944 P.2d 374, (Utah Ct. App. 1997). The rationale is that one should be protected against intrusion by others into one's private "space" or private affairs. ".... this intrusion tort gives redress for interference with one's 'right to be left alone'." *People for the Ethical Treatment of Animals v Bobby Berossini, Ltd.*, 895 P.2d 1269 (Nev. 1995). To have a protectable interest in "seclusion," a plaintiff must show that he

had an actual expectation of “seclusion or solitude” and that that expectation was reasonable, both issues of fact.

Where the intrusion takes place is not determinative of whether an expectation of privacy is reasonable. *See Sanders v American Broadcasting Companies*, 978 P.2d 67, 77 (Cal. 1999). *Sanders* involved a TV reporter recording a conversation between the reporter and a telepsychic. The California Supreme Court held that since the workplace where the conversation took place was not generally open to the public, the plaintiff had a reasonable expectation of privacy against a TV reporter’s covert videotaping even though the plaintiff lacked a reasonable expectation of complete privacy because he was visible and audible to other coworkers. *Id.* The unreasonableness depended not on location but the nature of the intrusion, i.e., “a television reporter’s covert videotaping of the conversation” that was meant to be private. *Id.* Likewise, the communication between a doctor and his patient is meant to be kept private.

2. The Media Defendants’ Intrusion was “Highly Offensive.”

The determination of the second element of the tort, *i.e.* whether the intrusion was highly offensive to a reasonable person, is within the province of the jury. And the jury in this case so found. Utah law also provides that the court must make a threshold determination of “offensiveness.” In doing so the court considers such factors as “the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”⁸ *Stien*, 944 P.2d at 379. Although the Media Defendants have not marshaled any

⁸This is an interesting judicial gloss. As explained in *Stien*, it appears that the court must make an initial determination that the claim is supported by sufficient evidence to withstand a motion for summary judgment and/or a motion for a directed verdict before the claim may be submitted to the jury. The trial court made that determination twice and on the evidence before the jury, the jury found for Dr. Jensen on the claim of intrusion.

evidence, there was ample evidence upon which the trial judge based his ruling on “objective offensiveness,”⁹ and upon which the jury found that the Media Defendants violated Dr. Jensen’s right to privacy from unreasonable intrusion. *See supra* Statement of Facts 1.g. and R . 6849 (Taylor) at 229.

Numerous courts have considered strikingly similar factual situations and found that the plaintiff had a reasonable expectation of privacy and that the intrusion was highly offensive. The Ninth Circuit’s opinion in *Dietman v Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), is illustrative. In *Dietman*, the object of the intrusion was an individual who was ostensibly practicing medicine without a license. *Life Magazine* entered into an arrangement with the District Attorney’s Office whereby *Life*’s employees would visit the plaintiff, obtain pictures, and record the diagnosis and treatment discussion. *Life* would obtain evidence for the health department to be used against the plaintiff and could then publish the pictures and the recorded conversation.

Life’s employees went to plaintiff’s home, misinterpreted why they were there, and by using the ruse that “they were sent there by a friend,” gained entrance into his den or office, equipped with “gadgets” he used in his diagnosis. While the plaintiff “examined” one of the employees, the other took a picture. The conversations were transmitted by radio transmitter hidden in a purse to a tape recorder in a parked automobile. Consequently, the plaintiff was arrested on the charge of practicing medicine without a license, and an article including the picture later appeared in *Life Magazine*.

On these facts the Ninth Circuit affirmed a trial court judgment for invasion of privacy. *Dietman*, 449 F.2d at 248. The Ninth Circuit recognized that the plaintiff invited the *Life*

⁹Most jurisdictions require the court to make an initial determination that the expectation of seclusion or solitude is “objectively reasonable.”

employees into his “den/office” and that the *Life* employees were parties to the recorded conversations. Nevertheless, the court found that such a trespass was an intrusion “into spheres from which an ordinary man in plaintiff’s position could reasonably expect that the particular defendant should be excluded.” *Id.* at 249. The court explained:

Plaintiff’s den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant’s employees to the den. One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. *A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g. in the case of doctors and lawyers.*

Id. (Emphasis added). News gathering does not create a license to trespass or to intrude by electronic means into another’s office. *See Copeland v Hubbard Broadcasting, Inc., d/b/a KSTP T.V.*, 526 N.W.2d 402, 405 (Minn. 1995) (whether homeowners consent to allow a student into their home for educational purposes encompassed consent to videotape events in the home for a broadcast, is a factual issue precluding summary judgment.)

3. As a State Regulated and Licensed Physician, Dr. Jensen still had a Reasonable Right to an Expectation of Privacy.

Dr. Jensen had a reasonable expectation that his examination room is within a sphere of privacy for the doctor. This expectation was affirmed by every physician asked at trial. Doctors Rosen, Purser, Badger and Canfield all testified the patient examination room is a “private place.” Dr. Badger explained that he would consider a camera in his patient room as an invasion of his privacy. *See* Statement of Facts No. 8. Even the Media Defendants’ expert witness, Dr. Jack Taylor, agreed. [R. 6849 (Taylor) at 229.] The nature of medical practice dictates that a

physician must have an area where he may speak openly to his patient without it being broadcast to the general public. Doctors must know their communications will not be broadcast so they can be candid in discussing a patient's health problems and remedies.

The Media Defendants deny such a need of private seclusion. They urge two strings of cases they say stand for the notion that "a physician has no expectation of privacy in how he conducts his professional duties;" and that there is a "diminished expectation of privacy in the workplace." The Media Defendants' analysis is wrong. In support of their first proposition, the Media Defendants proffer 3 cases. The first, *Washington Post Co. v United States Dept. of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988), was a Freedom of Information Act case and has nothing to do with the case at bar. The D.C. Circuit held that unless there was a specific statutory exemption from production, all documents held by the government were to be produced pursuant to a FOIA request. The second proffered case was *New York v Burger*, 482 U.S. 691 (1987), a case involving a warrantless search. It has nothing to do with a civil tort for invasion of privacy. Finally, Media Defendants cite *Time, Inc. v Hill*, 385 U.S. 374 (1967) claiming that this case espouses that when one's "professional career is involved," an individual "is substantially without a right to privacy." However, that case makes no such holding. Moreover, *Time* is not an expectation of privacy case. Rather, *Time* held that a "newsworthy person" may not have an expectation of privacy insofar as his newsworthy status is concerned, but he does have a right to privacy when the reported material contains falsehoods, even if the falsehoods relate to the newsworthy event.

Although a public figure is substantially without a right of privacy, the Supreme Court found that insofar as the published comments were 'fictionalized,' the public figure had a claim for false light invasion of privacy.

But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of the essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here.

Time, 385 U.S. at 389-390. The Media Defendants also relied on, *Spahn v Messner, Inc.*, 18 N.Y.2d 324 (1966) which has a similar holding as *Time*. Warren Spahn, a well known baseball pitcher, a public figure, was successful in stopping the publication of an unauthorized, fictionalized, biography.

The issue on appeal in the case at bar is factual. Did the Media Defendants fictionalize the encounter with Dr. Jensen? Did they make changes in the wording calculated to mislead the public? Did they broadcast false statements and omit correct statements which would have revealed the truth? The jury determined that the Media Defendants did.

It is unnecessary to review each of the Media Defendants' authorities in purported support of their claim that the false light claim should have been dismissed. Whether a statement is true or false or calculated to mislead, is a factual question. Nowhere do they present the evidence which would allow this court to make a determination as to whether the jury had sufficient evidence to support its findings.

The Media Defendants' second line of cases is proffered to suggest the "location" i.e. "work place" is the determining factor of the reasonableness of the privacy expectation. The cases proffered by the Media Defendants demonstrates this is not true. And why? Because again "reasonable expectation" is an issue of fact. *Sanders*, 978 P.2d at 67. No one equates the expectation of privacy between a doctor and his patient discussing medical problems in a closed examination room with the expectation of privacy of a conversation in the administrative office

of a medical laboratory involving a discussion with the laboratory's owner about general laboratory procedures, *Medical Laboratory Management Consultants v American Broadcasting Company*, 306 F.3d 806 (9th Cir. 2002); with an area backstage at the Stardust Hotel where employees could at all times hear and see what Berosini was doing, *Berosini*, 895 P.2d at 1279; with the expectation of privacy where an employer knowingly monitors and records its employees' business and personal calls, *Ali v Douglas Cable Communications*, 929 F. Supp. 1362 (D Kan. 1996); and with the expectation of the secrecy of a telephone number that is recorded by the phone company in the phone company's exchange for legitimate business purposes, *Smith v Maryland*, 442 U.S. 735 (1979). Further reliance on Smith is misplaced. *Smith* dealt with whether obtaining a phone number automatically recorded by the phone company when dialed by a defendant, violated Fourth Amendment Rights. It has nothing to do with the offering of professional services to a "complete stranger."

E. The Media Defendants' Representations in the Three Broadcasts were not Substantially True and the Jury so found on the Evidence.

In an attempt to overcome the factual determination that the statements in the broadcast were defamatory and placed Dr. Jensen in a false light, the Media Defendants rely on claims such as: the broadcasts contained "substantial truth," and "while some of the defendants'" published statements may not have been *literally* true . . . the "gist" and "sting" of the broadcasts as a whole . . . were incontrovertibly *substantially* truthful, and, "[i]n 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." The Media Defendants' argument does not raise an appealable issue. Importantly, the jury was properly instructed on the issue of a "false statement".¹⁰ And

¹⁰The trial court instructed the jury on the definition of a "false statement" as it relates to both the defamation and false light claims. Instruction No. 50 in pertinent part essentially followed

after hearing all the evidence, the jury did not find that the broadcasts were “substantially” or “literally” true or that Dr. Jensen was not “significantly worse off” as a result of the Media Defendants’ misrepresentations, half truths and innuendo that cast him in a false light.

Further, the Media Defendants’ argument is inaccurate. When one compares what was said in the broadcasts with the facts the Media Defendants left out of their Brief, one can see the defamation, and the false light. In all broadcasts, they deliberately left out conversations with Dr. Jensen and made inferences which cast him in a false light.

Inferential false light was recognized in *Russell v ABC, Inc.*, 1995 WL 330920 (N.D. Ill. 1995) where the Court noted that plaintiff complained the “defendants took her statements out of context and incorporated them into the broadcast in such a way that a viewer would wrongly infer that she was an unscrupulous and dishonest merchant”. This the court found to be a “classic example of a false light invasion of privacy claim.” *Id.* at * 5. “It is not plaintiff’s statements themselves that allegedly injured her reputation, it was how defendants used those statements in their program and allegedly harmed her.” *Id.* See also, *Haynes v Allred A. Knoph, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993). A jury in the case at bar could and did conclude that the way in which the Media Defendants presented out-takes, played sound bits, and omitted material, placed Dr. Jensen in a false light, and injured his reputation. See *Ritzmann v Weekly World News, Inc.*, 614 F. Supp. 1336 (N.D. Tex. 1985) (holding that “whether the publication does actually place the subject in a false light and whether that false light would be highly

the Media Defendants’ proposed instruction No. 36. The instruction covered all the issues of “substantial truth as raised by the Media Defendants in their opening brief. The court instructed, *inter alia*, “The statement to be true, need not be absolutely, totally or literally true, but must be substantially true. A statement is considered to be true if it is substantially true or that the gist of the statement is true. When a statement is so near the truth that fine distinctions must be drawn on words pressed out of their ordinary usage to sustain any claim of falsity, you are to consider the statement as being true.”

offensive to a reasonable person are questions of fact”). *Id.* at 1340-41.

The following examples are offered not in an effort to marshal all the evidence, as that is the responsibility of the Appellants, but to indicate to the Court that there was evidence to support the jury’s finding that the broadcasts were not “substantially true.”

Representation: “During our visits he [Dr. Jensen] never asked if I had high blood pressure.

Truth: Prior to Dr. Jensen prescribing any pills, his assistant took Ms. Sawyers’ blood pressure. [R6865 (Jensen) at 125 - 126.] The Media Defendants admit this fact in footnote 29 on page 39 of their Opening Brief.

Representation: “He never asked . . . if I had diabetes.”

Truth: Ms. Sawyers filled out her medical history and a complete medical checklist. Dr. Jensen reviewed this history prior to prescribing any pills. She also told Dr. Jensen she did not have diabetes. [R. 6865 (Jensen) at 125 - 128.]

Representation: “Dr. Jensen did none of these.”

Truth: In making this claim the Media Defendants did not explain Ms. Sawyers provided her medical history, and that her blood pressure, pulse and respiration were charted. [R 6865 (Jensen) at 125 - 126.] Further, Dr. Jensen knew that Ms. Sawyers did not have any drug allergies. [R. 6865 (Jensen) at 128.] This part of the visit was not recorded by Ms. Sawyers. Dr. Jensen also reviewed the medical history and knew that Ms. Sawyers claimed she would lose her job if she did not lose weight. [R. 6868 (Scott) at 72-75.] Additionally, the recording device turned off before the consultation with Dr. Jensen was completed. [R. 6866 (Jensen) at 39 and R. 6871 (Sawyers) at 60-61.] Finally, Ms. Sawyers abruptly changed the subject and left the examination room before Dr. Jensen had completed his examination. [R. 6865 (Jensen) at 85; 130-31.]

Representation: “. . . Dr. Michael Jensen. He’s the one we caught on tape promising me illegal drugs.”

Truth: Dexedrine is not an “illegal drug.” [R. 6857 (Van Komen) at 145.] It was, however, not proper to prescribe Dexedrine for weight

loss. Dr. Jensen did not offer to prescribe Dexedrine [Def.'s Ex. 99.] At most, he stated he may be able to. *Id.* The Media Defendants admit that "Dr. Jensen did not literally 'promise' Sawyers he'd prescribe Dexedrine for her..." *Sæ* Appellants' Brief p. 38. After Dr. Jensen reviewed the regulations he discovered that it was no longer proper in Utah to prescribe Dexedrine for weight loss and he told Ms. Sawyers this before the first broadcast. [Pl.'s Ex. 37 at 6.]

Representation: "The state is going after Dr. Jensen's license."

Truth: The State of Utah did not seriously consider revoking Dr. Jensen's license. [R. 6857 (Allred) at 99.]

Although Dr. Jensen is a private person, and actual malice need not be shown, the Media Defendants knew that material in their broadcasts was false and included it to cast Dr. Jensen in a false light.

F. The Trial Court did Not Abuse its Discretion in Affirming the Jury's Award of Damages as a Result of the Media Defendants' Third Broadcast.

After hearing all the evidence, the jury found that Dr. Jensen suffered economic damages of \$1,000,000 as a result of the Media Defendants' third broadcast. In denying the motion for a new trial and to set aside the economic damages flowing from the broadcast, the trial court reasonably found the jury acted within its proper bounds. In reviewing a trial judge's ultimate decision to grant or deny a new trial or remittitur, an appellate court will only reverse if there is no reasonable basis for that decision. *Sæ Crookston v Fire Ins. Exch.*, 817 P.2d 789, 805 (Utah 1991). Further, an appellate court "will not disturb this determination absent a gross abuse of discretion." *Sheets v Salt Lake County*, 45 F.3d 1383, 1390 (10th Cir. 1995). The jury's award of damages should not be set aside on appeal unless the jury award is "so excessive . . . as to shock the judicial conscience". The amount and allocation of damages must be left to the sound discretion of the jury. *Sæ Burtenshaw v Bountiful Irr. Co.*, 61 P.2d 312, 316 (1936) ("We recognize

the fact that damages are not always susceptible to exact and accurate proof and a great deal of latitude must be taken by the jury in fixing the amount of damages in such case. . . . In many cases, although substantial damages are established, their amount is insofar as susceptible of pecuniary admeasurement, either entirely uncertain or extremely difficult of ascertainment; in such cases plaintiff is not denied all right of recovery, and the amount is fixed by the jury in the exercise of sound discretion under proper instruction of the court.”)

Following the jury’s verdict in favor of Dr. Jensen and awarding damages, the Media Defendants argued that the jury’s award of damages relating to the third broadcast was not supported by the evidence. Thus, they submitted to the scrutiny of the trial judge the jury’s determination of economic damages. The trial court considered the motion and reviewed the award in light of the evidence and the form of verdict given the jury by the trial court. The trial court found that some of the separate damages awarded were duplicative and reduced the judgment. But the trial court denied the motion for a new trial and refused to reduce or vacate the amount of the jury’s award of damages relating to the third broadcast, thus giving further solidarity to the judgment. Under these circumstances not only must the appellate court give deference to the trial court, the appellate court sustains the verdict and the trial court’s refusal to set aside the verdict unless the trial court “abused its discretion”.

When the determination of the jury has been submitted to the scrutiny and judgment of the trial judge, his [or her] action thereon should be regarded as giving further solidarity to the judgment. See *Elkington v Foust*, 618 P.2d 37, 41 (Utah 1980). Or, as we said in *Geary v Cain*, 69 Utah at 358, 255 P. at 423, “[I]n case of doubt, the deliberate action of the trial court should prevail.”

Crookston, 817 P.2d at 806.

Whether there is a reasonable basis for the trial court’s decision is a question of fact. The

Media Defendants recognized this in framing this issue for this court, *i.e.*, “there was no evidence demonstrating that Dr. Jensen had suffered any economic losses as a result of that broadcast.” But in recognizing that the issue is factual, they still did not give this Court the evidence to enable it to decide whether the evidence relied on by the jury and by the trial court was sufficient. They failed to marshal the evidence.

Although the Media Defendants pay lip service to this obligation, they fail miserably. The words of the Utah Supreme Court in *Crookston, supra*, apply here: “[the Media Defendants have] made no attempt to marshal the evidence in support of the jury findings.... In fact, all [the Media Defendants] have. . . done is argue selected evidence favorable to its position. That does not begin to meet the marshaling burden it must carry. This failure alone is grounds to reject . . . the attack on the findings.” This is clear from a review of the language on page 41 of Appellants’ Brief. The Media Defendants simply argue:

Here, the jury awarded Dr. Jensen \$1 million in pecuniary damages on the basis of the third (November 6, 1996) broadcast alone. [R 5782.] However, there was no evidence demonstrating that Dr. Jensen had suffered any economic loss as a result of that broadcast. The evidence of Dr. Jensen’s economic damage 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*. [R. 6856 (Jensen) at 29, lines 2 - 5; R. 6866 at 103.]

The Media Defendants refer to or quote some statements made by Dr. Jensen and his experts of the effect of the first broadcast on Dr. Jensen’s practice. After doing this exercise, the Media Defendants state parenthetically on pages 42-43:

Although Dr. Jensen did testify regarding some negative events which may have occurred after November 6, 1996, *i.e.*, that his work hours at Our City Family Medical Center decreased over

time, . . . [cite omitted] he produced no evidence that such effects occurred, if at all, because of the November 6, 1996 broadcast.³³
(emphasis added)

Cites to the record are omitted. In support of the underlined statement, the Media Defendants cite to the following footnote 33 on pg. 43, which also fails to meet the marshaling burden:

To meet their burden of marshaling the evidence, [Media] 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). [cites omitted]

The Media Defendants then set forth a string of cites to the trial testimony of Dr. Jensen. That is the sum and substance of the Media Defendants' attempt at marshaling. Nowhere do the Media Defendants refer to Dr. Jensen's statement that he was financially damaged by each of the three broadcasts, [R 6866 (Jensen) at 104] or that after the third broadcast he had to find another job because he understood that his employer cut back his hours and would fire him. [R. 6866 (Jensen) at 98-99.] Further, he testified that he had been "incredibly injured" by the *three* broadcasts. [R. 6866 (Jensen) at 118-119.] There was also testimony that after the third broadcast, when Dr. Jensen was seeing patients, a lady in the waiting room saw him, recognized him from the broadcast, threw up her arms and said, "I will not see Dr. Jensen." [R. 6866 (Jensen) at 43.] This is not the only factual testimony that supports the jury's and trial court's finding of damages that resulted from and after the third broadcast. Dr. Frank Stuart also testified that he prepared a study wherein he looked at all the facts of the case and made an assessment of all the economic losses suffered by Dr. Jensen as a result of all three broadcasts. [R. 6850 (Stuart) at 35.] Dr. Stuart testified that Dr. Jensen's pecuniary losses were between \$1,595,783.00 to \$2,195,094.00 including benefits lost. [R. 6850 (Stuart) at 69 & Pl.'s Ex. 210.] CPA Smith also testified on Dr. Jensen's losses.

It is true that in presenting their damage calculations at trial, Dr. Jensen's experts did not compartmentalize the damages by broadcast. Instead, as Dr. Stuart explained, he prepared his damage calculations based on all of the facts of the case. It was left to the trial court's verdict form for the jury and ultimately for the trial court itself to apply the content of the three broadcasts and the testimony relating to Dr. Jensen's damages to the experts calculation of damages suffered by Dr. Jensen and to allocate these damages among the broadcasts. The jury did that, and the trial judge who sat through the month-long trial and heard all the evidence found the allocation to be reasonable based on the evidence. The trial court did not abuse its discretion. The damage award and judgment must be affirmed.

G. The Media Defendants' Misstatements are Not Protected by the Public Interest or Fair Report Privileges and they are Not Entitled to a De Novo Review.

The Media Defendants' statements concerning a private individual are not protected by the constitutional actual malice standard. But in this case that is irrelevant. The Media Defendants knew that material in their broadcasts was false and intentionally omitted facts which would have shown that the statements made and inference intentionally created in the broadcasts were false. The jury found malice and awarded punitive damages in accordance with Utah Code Ann. § 78-18-1. The Media Defendants asserted two qualified privileges against Dr. Jensen's defamation and false light claims, now claiming that unless the evidence was sufficient to overcome these privileges, punitive damages were not warranted. These privileges protect the media from liability for defamatory statements and false light unless "constitutional malice" is found. The Media Defendants are wrong. "Constitutional malice" is not the standard, but Utah Code Ann. § 78-18-1(1)(a) is. And, the jury found malice.

The Media Defendants asserted the "public concern" privilege and the "fair and true

report of official proceeding” privilege. Although neither is applicable, both are defeated by the jury necessarily finding “malice,” i.e. that the Media Defendants’ statements were known by them to be false, or in making these statements that they had reckless disregard for the truth.

In *Seegmiller v KSL, Inc.*, 626 P.2d 968 (Utah 1981) this court was called upon to decide the degree of fault which a “private figure” must prove in a defamation action against a media defendant. KSL argued that a conditional privilege applied to media comment on “a matter of public interest.” The court concluded there is no “public issue”, or “public concern” privilege in Utah and found: “[w]e are persuaded that the necessary degree of fault which must be shown in a defamation case brought by a “private individual” against the media is negligence.

Also, Dr. Jensen is not a public figure. In the U.S. Supreme Court’s opinion of *Gertz v Robert Welch, Inc.*, 418 U.S. 323 (1974), the court affirmed that a public figure is one who is thrust or thrusts himself into notoriety at the forefront of a public controversy or who by reason of their achievements or the vigor and success of their own efforts seek public attention. The *Gertz* court explained that to become a public figure “involuntarily” is “exceedingly rare.”¹¹ Dr. Jensen is not one of those “exceedingly rare” individuals who has “involuntarily” gained notoriety by his achievement. He is not a “public figure.” He did not seek fame or notoriety. He has not thrust himself to the forefront of any public controversy. Being the subject of a media story does not do the trick because the media would always have the privilege that the *Gertz* court and

¹¹As quoted by this Court in *Seegmiller*, “[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classified as public figures. . . Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntarily public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.”

this court in *Seegmiller, infra*, found not to exist. There is no constitutional privilege for the Media Defendants when commenting on a private individual's actions. And there is no right of *de novo* review by the Appellate Court. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

H. The Jury was Shown Clear and Convincing Evidence Supporting a Finding of Malice. Subsequently, the Trial Court Found Evidence Sufficient to Support the Jury's Finding of Malice when it Denied the Media Defendants' Motion for a New Trial.

The jury was instructed under Jury Instruction 67 that “[b]efore any award of punitive damages can be considered on Plaintiff’s Defamation or False Light claims, the plaintiff must prove by clear and convincing evidence that the Defendant published a defamatory falsehood about Plaintiff knowing it was false or in reckless disregard of whether it was true or false and that the Defendant acted with ‘personal malice’ toward Plaintiff. Personal malice means that the Defendant acted with hatred or ill will towards Plaintiff, or with an intent to injure Plaintiff, or acted willfully or maliciously towards Plaintiff.”

The District Court in its order denying Defendants’ Motions for New Trial, to Alter or Amend the Judgment and Judgment Notwithstanding the Verdict ruled that “there was competent evidence of malice sufficient to sustain the jury’s award of punitive damages.” See Defendants’ Ex. 6, Court Order of September 26, 2001.

Under instruction 67, the jury was held incorrectly to the higher standard established in *Gertz* and set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which bars media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth. *New York Times* involved a public official suing for libel. Dr. Jensen is not a public official. Even so, the jury found that the evidence satisfied the high public official standard for malice.

I. Defendants Cannot Justify their Malice by Facts Learned after their Actions.

The Defendants argue that actions which they learned at trial justify their earlier actions. Malice is not justified by facts to which they were not privy at the time of the acts, and the Media Defendants' portrayal of the facts is not accurate. Dr. Jensen's nurse was an individual he had known for a long period of time. He knew her medical history. And she was a medical professional. The Media Defendants try to conclude, based on the evidence, that Dr. Jensen was derelict in issuing her a prescription.

The same argument goes to Ms. Johnson. Dr. Jensen was knowledgeable of her medical and physical history due to the 10 years of his involvement with her. The testimony from numerous medical experts is that they often issued prescriptions away from the office in special fact situations. Dr. Jensen did nothing wrong, but the Media Defendants wanted it to be wrong to substantiate their preconceived Story. Without the false allegations of prescribing illegal drugs, no physical examination, etc., no viewer would have thought anything wrong with what Dr. Jensen did in issuing a prescription to Ms. Sawyers. Therefore, they create a scenario to justify their Story. The jury saw through the lies and false innuendos, and based on the evidence presented, returned a verdict punishing the Media Defendants.

VII. CROSS-APPELLANTS' ARGUMENT

A. Dr. Jensen should be Awarded Reasonable Attorneys' Fees on all of his Overlapping Claims.

Prevailing parties are entitled to attorneys' fees on non-compensable claims that partially overlap, either factually or legally, compensable claims. *Dejarue Inc. v U.S. Energy Corp.*, 1999 UT App 993 P.2d 222 (contract and tort claims based on related legal theories involving common core of facts); *Kunth v Wiarda*, 1999 UT App 335, 991 P.2d 113, 116 (noncompensable claim

partially overlapped mechanic's lien action). In the instant action the lower court recognized the overlapping claim concept, but misapplied it:

Some of Plaintiff's claims are based on obtaining information and some are based on the broadcast of information. There is not a core of facts common to all claims and the legal theories are unrelated. Order July 31, 2001 p. 5, lines 1-2. [R. 6779.]

The court then awarded fees only on the gathering of information claims.

Although Dr. Jensen's claims can loosely be categorized as gathering of information claims and broadcast claims, that does not mean that the claims do not overlap. The opposite is true. The media usually argue that the right or ability to gather information is central to its ability to publish. *See, e.g. Nixon v Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (media urged the court to find a constitutional right to have witness recordings copied); *Branzburg v Hayes*, 408 U.S. 665, 679-80 (1972) (media requested constitutional protection from identifying sources); *Gannett Co. v DePasquale*, 443 U.S. 368 (1979) (petition to overturn the exclusion of the press from pretrial proceedings).

That the gathering of information overlaps the media's ability to place Dr. Jensen in a false light is demonstrated in the instant case. First, the Media Defendants used a sensational news "story idea". They wanted to trick a doctor into wrongfully prescribing diet pills. [R. 6849 (Roth) at 117.] They tried to persuade Dr. Jensen to do so over the phone even though they knew it was wrong. When that failed, Ms. Sawyers committed a criminal act by falsely posing as a patient needing diet medication¹² and secretly videotaped Dr. Jensen in his examination room [Def.'s Ex. 102.] They then selected bits of the tape, ignored Dr. Jensen's statements in the second interview, and edited material out of context to broadcast three false but sensational

¹² Utah Code Ann. § 76-9-402.

stories consistent with their preconceived story.

In short, the gathering of the information was motivated by the Media Defendants' original intent to do a sensational story. The misconduct committed in gathering information gave the Media Defendants the ability to follow through with their original intent. In other words, Dr. Jensen's claims overlap and are related to each other because each claim was part of an overall scheme. Consequently, Dr. Jensen should be awarded reasonable attorneys' fees on all of his claims.

B. Attorney Sine's Allocation of Fees between Recoverable and Nonrecoverable Fees was Sufficient.

The lower court declined to award attorney's fees to attorney Sine because "Mr. Sine simply separated his time into two columns – compensable claims and other matters." Ruling September 27, 2001, p. 8 lines 17-18. [R. 6776.] But, "an allocation is sufficient if the substance of the process results in separating recoverable from nonrecoverable fees. *Keith Jorgensen's Inc. v Ogden City Mall Co.*, 2001 UT App 128, 26 P.3d 872, 880. *Brown v David K. Richardson Co. Inc.*, 1999 UT App 109, 978 P.2d 470. If the court closely examines Attorney Sine's submissions, it will see the criteria for fees was met. [R. 6714.]

C. Dr. Jensen should be Awarded all of His Claimed Costs because the Media Defendants Failed to Comply with Rule 54(d)(2) and all of Dr. Jensen's Costs were "Necessary Disbursements".

1. The Media Defendants failed to comply with Rule 54(d)(2).

Dr. Jensen timely filed his Verified Memorandum of costs and necessary disbursements. They total \$122,952.66. Rule 54(d)(2) clearly directs: "A party dissatisfied with the costs claimed may, within seven days. . . file a motion to have the bill of costs taxed by the Court. . . ." The Media Defendants never filed a motion to tax costs, only an objection. [R. 6074.]

2. The costs claimed by Dr. Jensen should be awarded as “necessary disbursements.”

An application for an award under Rule 54(d)(2) is for “costs and necessary disbursements.” Dr. Jensen’s Verified Memorandum included not only the costs allowed by statute, but also deposition transcript costs, expert witness fees, court equipment expenses, and out-of-pocket costs to take depositions. [R. 5941.] The lower court did not quarrel that Dr. Jensen’s claimed costs were necessary disbursements. Instead, it strictly applied the rule annunciated in *Frampton v Wilson*, 605 P2d 771, 774 (Utah 1980) and explained:

The Utah Supreme Court has stated that ‘there is a distinction to be understood’ between legitimate and taxable costs and other expenses of litigation which may ever be so necessary, but are not taxable as costs. [R. 6764])

The *Frampton* rationale is that since costs were not recoverable at common law under the American rule, they are allowable only in amounts and in a manner provided by statute. *Frampton v Wilson*, 605 P2d at 774.

There are several compelling reasons why the *Frampton* rule should be reversed or modified. First, unlike the *Frampton* rule, Rule 54(d), does not distinguish between taxable costs and necessary litigation expenses. Rule 54(d)(2) specifically provides that a party is to file a verified memorandum of “costs and necessary disbursements.” The *Frampton* rule completely removes the phrase “and necessary disbursements” out of Rule 54(d).

Further, the *Frampton* rule follows the federal system, but the jurisdiction of federal courts and Utah courts lead to different outcomes. In the federal system, the United States Supreme Court’s jurisdiction is limited to cases or controversies. No rule-making jurisdiction is specified. In contrast, under Article VIII Section 4 of the Utah Constitution, the Utah Supreme Court is

specifically given judicial rule-making powers.¹³ Consequently, the issue of what necessary disbursements should be awarded under its own Rule 54(d), is a question that should not be left entirely to the legislature.

Finally, the *Frampton* rule needs to be reversed or modified in light of the Open Court's clause in Utah's Constitution. Plainly, "every person, for an injury done to him" cannot "have a remedy by due course of law" in an open court if the court refuses to award "necessary disbursements" to a prevailing party, but instead limits recoverable costs to those conservatively specified by the legislature.

D. The Jury Awards on Dr. Jensen's Gathering of Information Claims are Not Duplicative

As set forth earlier, the common-law intrusion claim protects a person from a highly offensive intrusion upon his solitude or seclusion. The jury received ample evidence supporting the jury's award on the common-law intrusion claim. In addition, the legislature has provided for a statutory privacy claim under § 76-9-401 et seq. In doing so, the legislature provided three claims for recovery and separated them. It is evident from the verdict, that the jury also viewed claims as separate and distinct by virtue of the fact that the jury did not award damages under § 76-9-402(1)(c). The jury found that the Media Defendants trespassed on property with intent to subject Dr. Jensen to eavesdropping or surveillance. The jury also found that the Media Defendants installed a hidden camera without Dr. Jensen's consent. The trespass violated § 76-9-402(1)(a) and the installation violated § 76-9-402(1)(b). In summary, the structure and content of the statute shows that the common-law intrusion claim is separate and distinct from the separate statutory privacy claims. Consequently, the jury, by awarding damages under each of

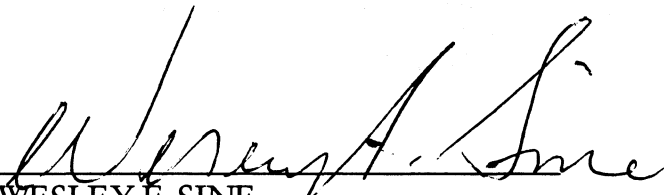
¹³The legislature can overturn or amend a Supreme Court rule by a 2/3 vote. Utah Const. Art. VIII § 4.


the claims, did not award a duplicate recovery.

VIII. CONCLUSION

For the foregoing reasons, the judgment entered in favor of Dr. Jensen should be upheld and the remittitur entered on the gathering of information claims should be reversed. Dr. Jensen should be awarded reasonable attorneys' fees on all of his claims as well as a judgment for necessary disbursements.

Dated this 1 day of ~~July~~, 2003.


WESLEY F. SINE

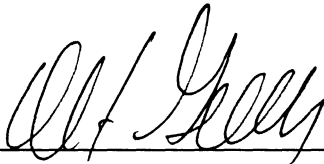

DALE F. GARDINER
DOUGLAS J. PARRY
CRAIG R. KLEINMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two correct copies of the foregoing
CORRECTED BRIEF OF APPELLEE/CORRECTED CROSS APPELLANT'S BRIEF
was mailed via U.S. mail, postage prepaid on this 2nd day of July 2003, to the
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Appendices

APPENDIX

1. Dr. Jensen "Story Idea" composed by Geoff Roth (Plaintiff's Trial Exhibit 25).
2. Video of KTVX Channel 4 News Broadcasts (Plaintiff's Trial Exhibits 19, 20 & 21).
 - a. September 5, 1995 "Diet Doctor."
 - b. June 17, 1996 "The State is Going after Dr. Jensen's License."
 - c. November 6, 1996 "Questionable Doctors."
3. Mary Sawyers Physical Exam Form (Plaintiff's Trial Exhibit 30).
4. Copy of Rule 54, Utah Rules of Civil Procedure.
5. Copy of Article VIII, § 4, Constitution of Utah.
6. Controlled Substance Rules for DOPL (Plaintiff's Trial Exhibit 16).

Appendix 1

story idea:

while at a party tuesday night - a dr. michael jensen was talking to a guest about weight loss. he started telling her an easy way to lose weight that he uses all the time is prescription diet pills (a form of amphetamines). after discussing this with the guest for less than half an hour he gave her a prescription for 3 months worth of prescription diet pills, not having a clue about the guest's medical history. the recipient of this prescription later told me she had a heart condition that would be seriously be affected if she had taken the pills. Also, the doctor suggested to the guest that she could lose 20 pounds with this method. The guest is thin and did not need to lose any weight.

I was present during this whole incident and the doctor knew who I was and where I worked. John and I think it would be a great story to call this guy up, say you are a reporter from channel 4 who wants to lose some weight, and heard thru me that he would prescribe diet pills. We should record the phone conversation and later videotape him should he agree to write out a prescription without performing a medical exam first.

his name and phone # are on the attached prescription he wrote out at the party. Also, this guy comes from a prominent Utah family. His dad used to be the athletic director at BYU and he played football for BYU several years ago.



UTV 0030

Appendix 2

Please see attached
VHS Video Tape

Appendix 3

ENCOUNTER RECORD

REC TIME: 18:03

1000 EAST HWY 6 PAYSON, UTAH 846
FED. I.D. #87-0033048

[illegible]

Appendix 4

referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

Referee's failure to file report within time specified by statute, court order, or stipulation

as terminating reference, 71 A.L.R.4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922.

PART VII. JUDGMENT

Rule 54. Judgments; costs.

(a) *Definition; form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment upon multiple claims and/or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.*

(c)(1) *Generally.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) *Judgment by default.* A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) *Costs.*

(d)(1) *To whom awarded.* Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) *How assessed.* The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(d)(3) [Deleted.]

(d)(4) [Deleted.]

(e) *Interest and costs to be included in the judgment.* The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.
(Amended effective January 1, 1985.)

Compiler's Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

This rule is similar to Rule 54, F.R.C.P.

Cross-References. — Continuances, discretion to require payment of costs, U.R.C.P. 40(b).

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, U.R.C.P. 62(h).

Witness fees, taxing as costs, § 78-46-30.

NOTES TO DECISIONS

Absence of express determination.

Amendment of pleadings.

Appeal as of right.

Certification not determinative.

Costs.

— In general.

— Challenge of award.

— Depositions.

— Discretionary.

— Expenses of preparation for action.

— Extension of time for filing.

— Failure to object.

— Liability of state.

— Mediation.

— Service on adverse party.

— Statutory limits.

— Untimely filing of memorandum.

— When not demanded.

Default judgments.

Effect of partial final judgment.

Final order.

— Appealability.

— Attorney's fee award.

— Certification.

— Claims for relief.

— Complete disposal of claim or party.

— Effect of counterclaim.

— No just reason for delay.

— Review of finality.

— Separate claims.

Inconsistent oral statements.

Interest on judgment.

Judgment based on unpleaded theory.

Judgment in favor of nonparty.

Motion to reconsider.

Pleading in the alternative.

Presumption of finality.

Real party in interest.

Relief not demanded in pleadings.

Specific performance request.

Statute of limitations.

Unpleaded issue tried by consent.

Cited.

Absence of express determination.

In action based on alleged breach of loan

agreement, where trial court improperly dismissed plaintiff-corporation's complaint with prejudice and granted defendant-bank judgment on its counterclaim and cross-claim, judgment on cross-claim and counterclaim would be subject, on remand, to revision since all claims presented had not been adjudicated and since trial court made no express determination as required by this section. *M & S Constr. & Eng'g Co. v. Clearfield State Bank*, 24 Utah 2d 139, 467 P.2d 410 (1970).

Amendment of pleadings.

Under Rule 15(b) and Subdivision (c)(1) of this rule, amendments should be allowed if a case has actually been tried on a different issue or a different theory than had been pleaded. *First Sec. Bank v. Colonial Ford, Inc.*, 597 P.2d 859 (Utah 1979).

Appeal as of right.

Where the requirements of this rule concerning appeal of orders in multi-party or multi-claim actions are satisfied, the parties are entitled to appeal such orders as a matter of right, and the Supreme Court does not have discretion to refuse to review the orders. *Pate v. Marathon Steel Co.*, 692 P.2d 765 (Utah 1984).

After a party or parties have availed themselves of the provisions of Subdivision (b), allowing an entry of judgment on "fewer than all of the claims or parties," an appeal may be had on the adjudicated claims or by those parties. *All Weather Insulation, Inc., v. Amiron Dev. Corp.*, 702 P.2d 1176 (Utah 1985).

Certification not determinative.

This rule does not necessarily mean there is a final judgment merely because the court's order so recites; there was in fact no final judgment where the trial court denied defendant's motion to dismiss, thus leaving the parties in court, then entered an order that the denial was a final judgment. *Little v. Mitchell*, 604 P.2d 918 (Utah 1979).

Costs.**—In general.**

Costs were not recoverable at common law and are therefore generally allowable only in the amounts and in the manner provided by statute. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

"Costs," as used in Subdivision (d)(1), means those fees which are required to be paid to the court and to witnesses, and which the statutes authorize to be included in the judgment. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

Subdivision (d)(2) provides a process of review by a trial court of the amount claimed to be a party's costs, not a process for appeal of the award. *State ex rel. State Dep't of Social Servs. v. Ruscetta*, 742 P.2d 114 (Utah Ct. App. 1987).

—Challenge of award.

If a memorandum of costs is filed before judgment and costs in specific amounts are awarded in that judgment, then a party dissatisfied with those costs may have the right of moving to alter or amend the costs in the judgment under Rule 59(a)(3), enjoying thereby the time period of ten days to do so rather than the more restricted period of seven days under Subdivision (d)(2) of this rule. *Nelson v. Newman*, 583 P.2d 601 (Utah 1978).

Because a challenge to the amount of litigation expenses awarded is similar to a challenge to the amount of attorney fees awarded or the amount of costs awarded under Utah R. Civ. P. 54(d), the court reviews such awards under an abuse of discretion standard. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 432 Utah Adv. Rep. 44, — P.3d —, cert. granted, — U.S. —, 122 S. Ct. 2326, 153 L. Ed. 2d 158 (2002).

—Depositions.

Where depositions were taken but witnesses then testified at trial, costs of the depositions were not properly includable within the cost bill. *Hull v. Goodman*, 4 Utah 2d 163, 290 P.2d 245 (1955).

Expenses of taking depositions of defendants and general contractor in materialman's action under § 14-2-2 were assessable as costs where necessary to protect plaintiff's rights. *Lawson Supply Co. v. General Plumbing & Heating Co.*, 27 Utah 2d 84, 493 P.2d 607 (1972).

Defendant was not entitled to the cost of taking depositions where the depositions were not used at trial and there was no evidence presented that they were necessarily incurred for the preparation of defendant's case. *Nelson v. Newman*, 583 P.2d 601 (Utah 1978).

Costs of depositions are taxable subject to the limitation that the trial court is persuaded that they were taken in good faith and, in light of the circumstances, appeared to be essential for the development and presentation of the case; deposition costs should be allowable as necessary and reasonable where the development of the case is of such a complex nature that discovery cannot be accomplished through the less expensive methods of interrogatories, requests for admissions and requests for the production of documents. *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984).

The party claiming entitlement to the costs of depositions has the burden of demonstrating that the depositions were reasonably necessary; determining whether that burden is met is within the sound discretion of the trial court. *Lloyd's Unlimited v. Nature's Way Mktg., Ltd.*, 753 P.2d 507 (Utah Ct. App. 1988).

Trial court's conclusory statement that deposition costs were "reasonable and necessary" was not sufficient to allow determination on appeal of the basis for the court's determination; therefore the issue was remanded to the trial court to determine whether the costs were "necessary and reasonable" to the development of defendant's case and, if so, to state the basis for its decision to include the deposition costs in its award of costs. *Anderson v. Sharp*, 899 P.2d 1245 (Utah Ct. App. 1995).

—Discretionary.

Subdivision (d) leaves the question of costs somewhat in the discretion of the courts. *Hull v. Goodman*, 4 Utah 2d 163, 290 P.2d 245 (1955).

The trial court can exercise reasonable discretion in regard to the allowance of costs, but has a duty to guard against any excesses or abuses in the taxing thereof. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980); *Hatanaka v. Struhs*, 738 P.2d 1052 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987).

In modification of divorce decrees under the continuing jurisdiction of the trial court, the question of the ability or inability of a party to pay costs is a factual matter that lies in the discretion of the trial court. *Hardy v. Hardy*, 776 P.2d 917 (Utah Ct. App. 1989).

Trial court had discretion to award deposition and photocopying costs even though such costs were not provided for in this rule, as doing so was consistent with the terms of the disputed contract. *Chase v. Scott*, 2001 UT App 404, 38 P.3d 1001.

—Expenses of preparation for action.

In a habeas corpus proceeding by parents against a child-placement agency to obtain custody of a child, expense items incurred by the agency in the taking of depositions and securing certified copies of a marriage license and divorce decree in preparing for the action appeared to be reasonable and incurred in good faith, and these costs should have been allowed to the prevailing agency as a matter of course. *Thomas v. Children's Aid Soc'y*, 12 Utah 2d 235, 364 P.2d 1029 (1961), overruled on other grounds, *Wells v. Children's Aid Soc'y*, 681 P.2d 199 (Utah 1984).

The trial court did not err in not awarding the costs incurred by a wife in a divorce action who, after the suit was filed, secured the services of an appraiser who was able to testify at length about his opinion of the identity, nature and net value of the marital estate after his inspection of various property and documents. His research and preparation, although essential to the presentation of the case, could not be considered a "cost." *Stevens v. Stevens*, 754 P.2d 952 (Utah Ct. App. 1988).

—Extension of time for filing.

Where, in spite of diligent efforts, a party did not learn of the entry of judgment until more

than five days after it was entered, an extension of time for filing a motion for costs was warranted. *Board of Comm'rs of State Bar v. Petersen*, 937 P.2d 1263 (Utah 1997).

—Failure to object.

Defendant waived any error as to the costs allowed the plaintiff where defendant waited 23 days after filing of cost bill before filing any objection. *Suniland Corp. v. Radcliffe*, 576 P.2d 847 (Utah 1978).

—Liability of state.

The general terms of a statute giving costs to the prevailing party do not include the state. *Tracy v. Peterson*, 1 Utah 2d 213, 265 P.2d 393 (1954).

The state is not liable for costs unless there is some statute or rule of court which expressly or by clear implication includes it. Section 78-27-13 does not authorize the taxation of costs against the state but only provides the source from which such costs shall be paid when authorized. *Tracy v. Peterson*, 1 Utah 2d 213, 265 P.2d 393 (1954).

The Uniform Act on Paternity, Chapter 45a of Title 78, makes no provision for an award of costs against the state. *State ex rel. State Dep't of Social Servs. v. Ruscetta*, 742 P.2d 114 (Utah Ct. App. 1987).

A fire protection district is not an agency of the state and, therefore, costs may be awarded against it. *Lyon v. Burton*, 2000 UT 19, 5 P.3d 616.

—Mediation.

Where the defendant did not convince the court that the expenses incurred during mediation were unreasonable or were not "necessarily incurred," the court did not exceed its permitted range of discretion in making an award for such costs. *Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80, 977 P.2d 508.

—Service on adverse party.

This rule requires that only one verified copy be served and it is to be served to the court; there is no requirement that the copy served upon the party from whom costs are claimed be verified. *Barton v. Carson*, 14 Utah 2d 182, 380 P.2d 926 (1963).

—Statutory limits.

Award of costs in excess of those expressly allowed by statute for service of subpoena, witness fees and preparation of model, photographs and certified copies of documents was improper even though the costs represented the actual expenses incurred; fact that Supreme Court has on occasion approved taxing of expense of depositions as costs should not be taken as opening the door to other expenses of the character claimed in the instant case. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

Witness fees, travel expenses, and service of process expenses are chargeable only in accordance with the fee schedule set by statute. *Morgan v. Morgan*, 795 P.2d 684 (Utah Ct. App. 1990).

Witness compensation in excess of the statutory schedule is generally inappropriate as a

cost. *Morgan v. Morgan*, 795 P.2d 684 (Utah Ct. App. 1990).

—Untimely filing of memorandum.

Although plaintiff filed an unverified memorandum of costs within five days after entry of judgment, because he did not file a verified memorandum of costs until after the five-day period, plaintiff was not entitled to an award of costs. *Walker Bank & Trust Co. v. New York Term. Whse. Co.*, 10 Utah 2d 210, 350 P.2d 626 (1960).

Plaintiffs who were contractually entitled to attorney fees, costs, and expenses, and applied for them five weeks after judgment in their favor, were not barred from receiving an award of such fees by Subdivision (d)(2) because the rule does not apply to expenses or attorney fees. *Howe v. Professional Manivest, Inc.*, 829 P.2d 160 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992).

Failure of defendants to file a verified memorandum of costs within five days of the judgment required that an award of costs be deleted from the judgment. *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

The requirement that a verified memorandum of costs be filed within five days after the entry of judgment is mandatory and leaves no discretion to the court. *Lyon v. Burton*, 2000 UT 19, 5 P.3d 616.

—When not demanded.

Fact that plaintiff did not ask for attorney fees in his complaint did not preclude trial court from awarding them to him since this rule indicates that there shall be liberality of procedure to reach result which justice requires. *Palombi v. D & C Bldrs.*, 22 Utah 2d 297, 452 P.2d 325 (1969).

District court's award of attorney fees in excess of the fees demanded in the complaint and of costs where no costs were demanded was proper where the proof at trial showed the party was entitled to such relief. *Pope v. Pope*, 589 P.2d 752 (Utah 1978).

Default judgments.

Subdivision (c)(2) and Rule 55 prescribes the procedure to be followed by trial courts in entering judgments against defaulting parties, and courts are not at liberty to deviate from those rules just because one party is in default and is not entitled to be heard on the merits of the case. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

Effect of partial final judgment.

The entry of a final judgment as to fewer than all of the parties or claims does not affect the ability of the district court to proceed with respect to the remainder of the claims and parties; and when an appeal is taken from such a judgment, it only brings before the Supreme Court that portion of the action with respect to which the judgment has been entered, and the rest of the action remains in the trial court and is not necessarily affected by the appeal. *Lane v. Messer*, 689 P.2d 1333 (Utah 1984).

Final order.

—Appealability.

The final judgment rule, Subdivision (b), ap-

plies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive the appellate court of jurisdiction over an appeal. *First Sec. Bank v. Conlin*, 817 P.2d 298 (Utah 1991).

Appeal of an order that was not final and neither certified nor eligible for certification under Subdivision (b) was not properly taken, and the remedy was dismissal of the appeal. *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323 (Utah 1991).

Defendants, who did not seek permission to file an interlocutory appeal under Rule 5 of the Utah Rules of Appellate Procedure and who had, because no final judgment had been entered in the cases, alternative avenues under Rules 54(b) and 65B(e) of the Utah Rules of Civil Procedure for bringing their claims before the appellate courts, were not entitled to appeal as a matter of right. *Tyler v. Department of Human Servs.*, 874 P.2d 119 (Utah 1994).

Judgment as to plaintiff and one defendant was not final, and thus not appealable, where claims against second defendant remained pending even though automatic stay for bankruptcy proceeding temporarily protected him from having to defend the litigation in state court. *Donohue v. Mouille*, 913 P.2d 776 (Utah Ct. App. 1996).

Where plaintiff had appealed a 1993 trial court order declaring the summary judgment against him final, but did not file notice of appeal from the 1995 trial court order certifying the case after a temporary remand, the appeals court still had jurisdiction to hear the case because the trial court clearly intended to certify the 1993 order under Rule 54(b), but failed to incorporate its terminology and the temporary remand to remedy its minor technical error resulting in the 1995 order acted as an order nunc pro tunc, relating back to the 1993 order. *Don Houston, M.D., Inc. v. Intermountain Health Care, Inc.*, 933 P.2d 403 (Utah Ct. App. 1997).

Juvenile court's dismissal of a motion to stay an adjudication of child neglect was not an order or judgment eligible for certification under Subdivision (b), and the facts did not authorize treatment of the appeal as a petition for permission to appeal an interlocutory order under Utah R. App. P., Rule 5. *B.W. v. State*, 950 P.2d 939 (Utah Ct. App. 1997).

Section 78-31a-19 allows a party to seek review of any order denying a motion to compel arbitration, regardless of whether the order is a final judgment or has otherwise been designated as final by the district court under this rule. *Pledger v. Gillespie*, 1999 UT 54, 982 P.2d 572.

Orders and judgments that are not final can be appealed only if such appeals are statutorily permissible, if the appellate court grants permission under Rule 5 of the Utah Rules of Appellate Procedure, or if the trial court expressly certifies them as final for purposes of appeal under Subdivision (b) of the this rule. *Bradbury v. Valencia*, 2000 UT 50, 397 Utah Adv. Rep. 7.

—Attorney's fee award.

Because a trial court's initial attorney's fee determination in a class action was not a final order, it was subject to revision by the same judge who entered it until a final judgment was handed down. Therefore, the law-of-the-case doctrine was not offended by the trial court's revision of its earlier order. *Plumb v. State*, 809 P.2d 734 (Utah 1990).

—Certification.

Failure to have an order certified for appeal under Rule 54(b) deprives appellate courts of jurisdiction over the appeal. *Donohue v. Mouille*, 913 P.2d 776 (Utah Ct. App. 1996).

In a quiet title action, where the facts supporting the defendant railroad company's claim of ownership of a parcel of land and the legal theories supporting its claim did not overlap but where the separate facts all related to a single land ownership claim, the Supreme Court could not certify partial summary judgment under Subdivision (b) because the action did not involve multiple claims for relief. *Weiser v. Union Pac. R.R.*, 932 P.2d 596 (Utah 1997).

A court order was properly certified after summary judgment was granted for all claims against a deceased's estate and the court made the required finding that there was no just reason for delay and expressly ordered the entry of judgment. *Pasquin v. Pasquin*, 1999 UT App 245, 988 P.2d 1, cert. denied, 994 P.2d 1271 (Utah 2000).

—Claims for relief.

Where liability has been decided but the extent of damage remains undetermined, there is no final order for purposes of appellate review. This is also the case where the trial court's order disposes of a request for declaratory and injunctive relief but leaves unresolved other equitable and legal claims for relief. *Olson v. Salt Lake City Sch. Dist.*, 724 P.2d 960 (Utah 1986).

—Complete disposal of claim or party.

An order that does not wholly dispose of a claim or a party is not "final" and will not be appealable. *Pate v. Marathon Steel Co.*, 692 P.2d 765 (Utah 1984); *Backstrom Family Ltd. Partnership v. Hall*, 751 P.2d 1157 (Utah Ct. App. 1988).

Summary judgment that did not dispose of all claims of all parties in a consolidated case, and had not been certified as a final judgment pursuant to Subdivision (b), was not a final judgment for purposes of appellate jurisdiction. *Steck v. Aagaire*, 789 P.2d 708 (Utah 1990); *Sneddon v. Graham*, 821 P.2d 1185 (Utah Ct. App. 1991), cert. denied, 843 P.2d 516 (Utah 1992).

Partial summary judgment granted on one of plaintiff's three alleged causes of action was not eligible for certification under this rule, because the remaining causes of action in plaintiff's complaint were based upon the same operative facts as those disposed of by the trial court's grant of partial summary judgment. *Furniture Distrib. Ctr. v. Miles*, 821 P.2d 1165 (Utah 1991).

Because only part of the claims were resolved

by a trial court's ruling, and the question of the remedy remained to be determined, the summary judgment ruling failed to dispose completely of either a claim or a party as required by Subdivision (b) of this rule. *American Sav. & Loan Ass'n v. Gibson*, 839 P.2d 797 (Utah 1992).

— **Effect of counterclaim.**

Because a counterclaim was still pending before the trial court, a summary judgment that dismissed each cause of action in the complaint with prejudice was not a final, appealable order. *U.P.C., Inc. v. R.O.A. General, Inc.*, 1999 UT App 303, 990 P.2d 945.

— **No just reason for delay.**

Pursuant to the requirement in Subdivision (b) that the trial court "may direct the entry of a final judgment ... only upon an express determination by the court that there is no just reason for delay" and, because this determination by the trial court is subject to judicial review under an abuse of discretion standard, a brief explanation should accompany all future certifications so that the appellate court may render an informed decision on that question. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

— **Review of finality.**

The initial question of whether an order is eligible for certification under Subdivision (b), i.e., whether the order is "final," is a question of law. Therefore, the appellate court will review the trial court's decision on this point for correctness. *Kennecott Corp. v. State Tax Comm'n*, 814 P.2d 1099 (1991).

There are three requirements under Subdivision (b) for a party seeking certification of finality of an order: First, there must be multiple claims for relief or multiple parties to the action; second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action; third, the trial court, in its discretion, must make a determination that there is no just reason for delaying the appeal. *Donohue v. Mouille*, 913 P.2d 776 (Utah Ct. App. 1996).

— **Separate claims.**

When the degree of factual overlap between the issue certified for appeal and the issues remaining in the trial court is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are not separate claims for purposes of Subdivision (b). *Kennecott Corp. v. State Tax Comm'n*, 814 P.2d 1099 (1991); *FMA Leasing Co. v. Citizens Bank*, 823 P.2d 1065 (Utah 1992).

To be eligible as an appealable order under Subdivision (b), the court's ruling must dispose of a "separate claim." A "separate claim" must arise from different facts than those underlying the remaining causes of action. *Webb v. Vantage Income Properties*, 818 P.2d 1 (1991); *Donohue v. Mouille*, 913 P.2d 776 (Utah Ct. App. 1996).

Plaintiff's alleged three causes of action, all of which arose out of the same set of operative facts, constituted only one "claim" for purposes

of this rule. *Furniture Distrib. Ctr. v. Miles*, 821 P.2d 1165 (Utah 1991).

A claim is not separate if a decision on claims remaining in the trial court would render moot the issues on appeal. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

Pursuant to the requirement of U.R.C.P. 52(a) that the trial court "find the facts specially," in order to facilitate appellate review of a judgment certified as final under Subdivision (b) of this rule, the trial court should enter findings supporting its determination that such an order is final and the findings should explain the lack of factual overlap between the certified and remaining claims. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

— **Inconsistent oral statements.**

Oral statements of opinion by the trial court inconsistent with the findings and conclusions ultimately rendered do not affect the final judgment. *McCollum v. Clothier*, 121 Utah 311, 241 P.2d 468 (1952).

— **Interest on judgment.**

Interest follows a judgment as a matter of law and is collectible even though the clerk of court fails to include the same in the judgment signed by him. *Dairy Distribs., Inc. v. Local 976, Western Conference of Teamsters*, 16 Utah 2d 85, 396 P.2d 47 (1964).

In an action on an oral contract, a party's failure to specifically plead a request for pre-judgment interest was of no consequence because the interest issue is injected by law into every action for the payment of past due money. *Fitzgerald v. Critchfield*, 744 P.2d 301 (Utah Ct. App. 1987).

When a judgment is reversed on appeal, the new judgment subsequently entered by the trial court may bear interest only from the date of entry of that new judgment. *Mason v. Western Mtg. Loan Corp.*, 754 P.2d 984 (Utah Ct. App. 1988).

— **Judgment based on unpleaded theory.**

Where plaintiff alleged only an express contract and he sought no amendment of his pleadings nor offered any proof to establish a quantum meruit theory, court erred in granting judgment for plaintiff based on the theory of quantum meruit. *Taylor v. E.M. Royle Corp.*, 1 Utah 2d 175, 264 P.2d 279 (1953).

Although a complaint may sound in contract, it is not prejudicial error for a court to allow recovery on the basis of quantum meruit, where defendant was not denied a fair opportunity to meet the change in theory of recovery. *PLC Landscape Constr. v. Piccadilly Fish 'n Chips, Inc.*, 28 Utah 2d 350, 502 P.2d 562 (1972).

Complaint for foreclosure of a lien was defective because of the nature of relief sought even though it did not demand judgment for personal liability on contract and judgment was granted for such personal liability, since this rule provides that a judgment shall grant the relief to which a party is entitled even though it is not demanded. *Motivated Mgt. Int'l v. Finney*, 604 P.2d 467 (Utah 1979).

In a dispute over the appropriation of assets and goodwill of a business corporation, it was error for trial court to liquidate assets of the

corporation where the issues upon which such action rested were neither pleaded nor raised by parties, nor tried. *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733 (Utah 1984).

Judgment in favor of nonparty.

Subdivision (c)(1) is consistent with the general principle that a trial court may not render judgment in favor of a nonparty. Courts can generally make a legally binding adjudication only between the parties actually joined in the action. *Hiltsley v. Ryder*, 738 P.2d 1024 (Utah 1987).

Subdivision (c)(1) cannot dispense entirely with the necessity that a claimant make some claim in the lawsuit against the defendant. *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987).

A court may not grant relief to a nonparty. *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987).

Judgment creditors who participated as parties in a lien case could not recover in a separate fraudulent conveyance case, where they had not moved to intervene and were never parties in the separate case. *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987).

Motion to reconsider.

Although a motion to reconsider is not expressly available under the Utah Rules of Civil Procedure, Subdivision (b) does allow by implication for the possibility of a judge's changing his or her mind in cases involving multiple parties or multiple claims. *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct. App. 1988).

When summary judgment had been granted on some issues but a final judgment in the case had not been entered, the summary judgment was "subject to revision" under Subdivision (b); a motion to reconsider was a reasonable means of requesting such a revision and was therefore permitted. *Timm v. Dewsnap*, 851 P.2d 1178 (Utah 1993).

The law of the case doctrine did not preclude the trial court from revisiting a prior ruling on a summary judgment motion. *Trembley v. Mrs. Fields Cookies*, 884 P.2d 1306 (Utah Ct. App. 1994).

It was within the trial court's discretion to reconsider, under Subdivision (b), its denial of summary judgment, basing its reconsideration on cases, decided after the original denial, that presented the case in a different light because of factual similarities. *Trembley v. Mrs. Fields Cookies*, 884 P.2d 1306 (Utah Ct. App. 1994).

Pleading in the alternative.

In action by architect against owners for value of his services, the alternate remedies of an action on the contract or in quasi contract under the theory of quantum meruit could be pleaded in alternative form and inserted by amendment late in the proceedings. *Parrish v. Tahtaras*, 7 Utah 2d 87, 318 P.2d 642 (1957).

Presumption of finality.

Subdivision (b) allows courts to readjust prior rulings in complex cases as subsequent developments in the case might require, unless those rulings disposed of entire claims or parties and those rulings were specifically certified as final. The "law of the case" doctrine nonetheless pro-

notes a measure of predictability in such cases by creating a kind of presumption that the court's prior rulings, even if not certified as final, were correct and should stand. *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct. App. 1988).

Real party in interest.

Where surety's pleadings in action on bond stated that it deemed plaintiff's partial assignment of right of action on bond as a breach of contract releasing its liability, plaintiff had sufficient notice and surety was entitled to show that plaintiff was not real party in interest as a result of the assignment even though this specific defense was not pleaded. *Prudential Fed. Sav. & Loan Ass'n v. Hartford Accident & Indem. Co.*, 7 Utah 2d 366, 325 P.2d 899 (1958).

Relief not demanded in pleadings.

Where plaintiff's prayer for relief does not include punitive damages but he adduces the necessary requirements for such damages at trial, he can claim punitive damages under Subdivision (c) without a formal amendment to the pleadings. *Behrens v. Raleigh Hills Hosp.*, 675 P.2d 1179 (Utah 1983).

Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. However, although Subdivision (c)(1) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried. *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733 (Utah 1984); *Farr v. Brinkerhoff*, 829 P.2d 117 (Utah Ct. App. 1992).

Every final judgment shall grant the relief to which the party is entitled, even if the party has not demanded such relief in his pleadings. *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287 (Utah 1984).

In consonance with Subdivision (c)(1), it would have been proper for the court to have reformed the contract if a mutual mistake of fact had been established by clear and convincing evidence even though the issue of mutual mistake was not raised and such relief was not demanded by the pleadings. *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287 (Utah 1984); *Clark v. Second Circuit Court*, 741 P.2d 956 (Utah 1987).

Subdivision (c)(1) requires trial courts to be liberal in awarding appropriate relief justified by the facts developed at trial, as long as failure to request a particular form of relief does not prejudice a party in the preparation or trial of the case. If there is no prejudice, it is necessary only that the relief granted be supported by the evidence and be a permissible form of relief for the claims litigated. *Henderson v. For-Shor Co.*, 757 P.2d 465 (Utah Ct. App. 1988).

The rule laid down in *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287 (Utah 1984), i.e., that Subdivision (c)(1) allows a court to reform a document if a mutual mistake is established, even if the issue of mutual mistake was not raised and reformation was not demanded in the pleadings, also applies when the mistake is

unilateral and reformation is appropriate. *Guardian State Bank v. Stangl*, 778 P.2d 1 (Utah 1989).

Specific performance request.

In action on real estate contract calling for paying of purchase price in installments, plaintiff's prayer for specific performance was construed as request for judgment for installments in arrears and attorneys' fees. *Woodard v. Allen*, 1 Utah 2d 220, 265 P.2d 398 (1953).

Statute of limitations.

A provision of a divorce decree requiring the defendant to execute and deliver appropriate instruments to transfer an interest in a corporation to the plaintiff created a judgment in plaintiff's favor, making her action for enforcement subject to an eight-year statute of limitations. *Kessimakis v. Kessimakis*, 1999 UT App 130, 977 P.2d 1226.

Unpleaded issue tried by consent.

Where an issue is raised at trial without objection by the nonraising party, where both sides present evidence on the issue, and where there is no evidence that the nonraising party was surprised or misled by the introduction of the issue, the fact that such issue was not raised in the pleadings or on a motion to amend does not vitiate a finding on such issue. *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P.2d 517 (1957).

Where defendants did not plead subsequent agreement as an affirmative defense to action on prior agreement, and although plaintiff objected to evidence on issue of subsequent agreement, when it was overruled, he made no request for a continuance nor did he make any representation to the court that he was taken by surprise or otherwise at a disadvantage in meeting that issue, trial court properly allowed issue to be raised and properly received contract in evidence. *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86 (1963).

Cited in *Morris v. Russell*, 120 Utah 545, 236 P.2d 451, 26 A.L.R.2d 947 (1951); *Leger Constr., Inc. v. Roberts, Inc.*, 550 P.2d 212 (Utah 1976); *Salt Lake City Corp. v. Layton*, 600 P.2d 538 (Utah 1979); *South Shores Concession, Inc. v. State*, 600 P.2d 550 (Utah 1979); *Myers v. Morgan*, 626 P.2d 410 (Utah 1981); *Bernard v.*

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Rule 55. Default.

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) *Judgment.* Judgment by default may be entered as follows:

(b)(1) *By the clerk.* Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if:

(b)(1)(A) the default of the defendant is for failure to appear;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) *By the court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) *Setting aside default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) *Plaintiffs, counterclaimants, cross-claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) *Judgment against the state or officer or agency thereof.* No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985; November 1, 2002.)

Amendment Notes. — The 2002 amendment deleted former Subdivision (a)(2), relating to notice to a party in default; in Subdivision (b)(1), substituted "amount claimed" for "amount due" and "served pursuant to Rule

4(d)(1)" for "served otherwise than by publication or by personal service outside of this state"; and made related and stylistic changes.

Compiler's Notes. — This rule is similar to Rule 55, F.R.C.P.

NOTES TO DECISIONS

Damages.
Divorce action.
Entry of default not warranted.
Failure to plead.

Judgment.
— Conduct of counsel.
— Default entry necessary.
— Failure to follow rule.

Appendix 5

are presumed to be proper unless there is no substantial evidence to sustain them. *Schad v. Turner*, 27 Utah 2d 345, 496 P.2d 263 (1972); *Wilson v. Turner*, 27 Utah 2d 368, 496 P.2d 711 (1972); *Leggroan v. Turner*, 27 Utah 2d 403, 497 P.2d 17 (1972); *Zumbrunnen v. Turner*, 27 Utah 2d 428, 497 P.2d 34 (1972).

Legislative enlargement or abridgement of powers.

The powers given court by this provision cannot be enlarged or abridged by the legislature. *State ex rel. Robinson v. Durand*, 36 Utah 93, 104 P. 760 (1908).

COLLATERAL REFERENCES

Journal of Contemporary Law. — Judicial Socialization: An Empirical Study, 11 J. Contemp. L. 423 (1985).

Key Numbers. — Courts ⇐ 248.

Sec. 4. [Rule-making power of Supreme Court — Judges pro tempore — Regulation of practice of law.]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 1.

Compiler's Notes. — Former Article VIII contained no comparable provisions.

Cross-References. — Supreme Court rule-making process, Rule 11-101, Code of Judicial Administration.

NOTES TO DECISIONS

ANALYSIS

Judge pro tempore.
Regulation of judicial conduct.
Regulation of practice of law.
Cited.

Judge pro tempore.

Appointment of a judge pro tempore to hear and decide a divorce action does not violate the provisions of § 30-3-4, since a properly appointed pro tempore judge becomes the equal in every respect to the regular judge. *Harward v. Harward*, 526 P.2d 1183 (Utah 1974).

Circuit judge appointed by state court administrator to serve temporarily as a district judge pursuant to § 78-3-24 and former § 78-4-15 was not a judge pro tempore and was not subject to the legal restrictions pertaining to that status. *Cahoon v. Cahoon*, 641 P.2d 140 (Utah 1982).

Regulation of judicial conduct.

The Supreme Court is constitutionally obligated to review the Judicial Conduct Commission's proceedings, but the court has no authority to undertake initial review of matters related to compliance with the judicial canons of ethics. In re Greenwood, 135 Utah Adv. Rep. 27 (1990).

Regulation of practice of law.

This section gives the Supreme Court the power to govern the practice of law and to discipline bar members. This power necessarily includes control over the procedures used to discipline bar members. In re Crandall, 784 P.2d 1193 (Utah 1989).

Cited in *Stewart v. Coffman*, 748 P.2d 579 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Government, 1995 Utah L. Rev. 1.

Sec. 2. [Supreme court — Chief justice — Declaring law unconstitutional — Justice unable to participate.]

COLLATERAL REFERENCES

Utah Law Review. — Note, Death Qualification and the Right to an Impartial Jury Under the State Constitution: Capital Jury Selection in Utah After *State v. Young*, 1995 Utah L. Rev. 365.

A.L.R. — Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.
Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution, 91 A.L.R.5th 437.

Sec. 3. [Jurisdiction of Supreme Court.]

NOTES TO DECISIONS

Cited in *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148 (Utah 1995).

Sec. 4. [Rule-making power of Supreme Court — Judges pro tempore — Regulation of practice of law.]

NOTES TO DECISIONS

ANALYSIS

Regulation of appellate practice.
Regulation of practice of law.
Sentencing procedure.
Cited.

Regulation of appellate practice.

This section authorizes the Supreme Court to promulgate rules, such as Utah R. Crim. P. 26, that limit appellate review; § 5 of this article does not restrict that authority to constitutional and statutory provisions. *City of Kanab v. Guskey*, 965 P.2d 1065 (Utah Ct. App. 1998).

Regulation of practice of law.

Only the Utah Supreme Court has rule-making power over the practice of law and the procedures of the Bar. *Barnard v. Sutliff*, 846 P.2d 1229 (Utah 1992).

Section 78-21-25, prohibiting the unauthorized practice of law, does not encroach on the exclusive jurisdiction of the Supreme Court to regulate the practice of law as granted by this provision, in violation of the separation of powers doctrine found in Utah. Const., Art. V, § 1. *Board of Comm'rs of State Bar v. Petersen*, 937 P.2d 1263 (Utah 1997).

Because the Supreme Court has exclusive jurisdiction over attorney discipline matters, a trial court correctly determined that it lacked subject matter jurisdiction to vacate an order of the Supreme Court disbarring an attorney. *Schwenke v. Smith*, 942 P.2d 335 (Utah 1997).

Sentencing procedure.

Section 76-8-207 does not violate this constitutional provision, although it was passed with less than two-thirds majority vote, since the statute was enacted twelve years before this provision was added to the constitution. *State v. Carter*, 256 Utah Adv. Rep. 3 (Utah 1995).

Cited in *Carter v. Utah Power & Light Co.*, 800 P.2d 1095 (Utah 1990); *Barnard v. Utah State Bar*, 804 P.2d 526 (Utah 1991); *State v. James*, 819 P.2d 781 (Utah 1991), cert. denied, 982 P.2d 88 (Utah 1999); *Bailey v. Utah State Bar*, 846 P.2d 1278 (Utah 1993); *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148 (Utah 1995); *In re Worthen*, 926 P.2d 853 (Utah 1996); *A.B. v. State*, 936 P.2d 1091 (Utah Ct. App. 1997), cert. granted, 945 P.2d 1118 (Utah 1997); *Grand County v. Rogers*, 2002 UT 25, 44 P.3d 734.

COLLATERAL REFERENCES

Utah Law Review. — Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution, 1992 Utah L. Rev. 153.
Recent Developments in Utah Law — Judi-

cial Decisions — Government, 1995 Utah L. Rev. 1.

Utah Rules of Evidence 1983 — Part III, 1995 Utah L. Rev. 683.

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

NOTES TO DECISIONS

ANALYSIS

In general.
Appeal from justice court.
Educational institution proceedings.
Right to appeal.

In general.

The purpose behind this section is to prevent the chilling effect on the constitutional right to appeal which the possibility of a harsher sentence would have on a defendant who might be able to demonstrate reversible error in his conviction. *State v. Babbel*, 813 P.2d 86 (Utah 1991), cert. denied, 502 U.S. 1036, 112 S. Ct. 883, 116 L. Ed. 2d 787 (1992).

This section does not create a constitutional right to judicial review of all state or local administrative agency rulings; where there is no specific, statutorily prescribed method for judicial review of an agency action, review is available by extraordinary writ. *Department of Env'tl. Quality v. Golden Gardens Water Co.*, 2001 UT App 173, 27 P.3d 579.

Appeal from justice court.

Utah R. Crim. P. 26, limiting appellate review of cases originating in the justice courts, does not offend this section and effectively limited review during the period when the

limitation was imposed only by rule and not concurrently by statute. *City of Kanab v. Guskey*, 965 P.2d 1065 (Utah Ct. App. 1998).

Educational institution proceedings.

District court correctly determined it did not have jurisdiction under the Utah Administrative Procedures Act (UAPA) to review college parking committee's decision upholding fine for failing to have disabled placard visible while parked in a handicapped zone. The plain language of § 63-46b-1(2)(d) exempts from UAPA actions relating to student discipline in any educational institution and nothing in this section gives district courts appellate jurisdiction over such decisions. *Wisden v. Dixie College Parking Comm.*, 935 P.2d 550 (Utah Ct. App. 1997).

Right to appeal.

The right of a criminal defendant to pursue a direct appeal is a fundamental constitutional right, but a defendant who filed an appeal, then personally requested that it be withdrawn, only to later file a petition seeking extraordinary relief, bore the burden of proving a constitutional violation since the prior judgment carried a presumption of validity. *Bruner v. Carver*, 920 P.2d 1153 (Utah 1996).

Sec. 8. [Vacancies — Nominating commissions — Senate approval.]

(1) When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees.

(2) The Legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission.

(3) The Senate shall consider and render a decision on each judicial appointment within 60 days of the date of appointment. If necessary, the Senate shall convene itself in extraordinary session for the purpose of

Appendix 6

(b) The duties and responsibilities of the committee may include:

(i) review reports and other written materials available to the committee with respect to nurses on probation;

(ii) meet with nurses on probation to determine their progress and compliance with any probationary order;

(iii) report to the division and board any information which may indicate that a nurse is not in compliance with the terms and conditions of probation, or in any other way a threat to the public interest in the practice of nursing; and

(iv) advise the division and board with respect to any applicants for a license who may be considered for licensure under terms of probation or restriction.

(5) Psychiatric Mental Health Nurse Specialist Peer Review Committee.

(a) There is hereby created a Psychiatric Mental Health Nurse Specialist Peer Review Committee which is advisory to the board which shall be made up of five nurses currently licensed as a Advanced Practice Registered Nurses - Psychiatric Mental Health Nurse as follows and the Executive Administrator of the Board of Nursing as an ex-officio member:

(i) two educators/administrators; and
(ii) three advanced practice registered nurses-psychiatric mental health nurse specialist.

(b) The chairperson of the committee may act as a representative of the committee to the Prescriptive Practice Board, but may not be a member of the Prescriptive Practice Board.

(c) The duties and responsibilities of the committee may include:

(i) review applications for licensure and make appropriate recommendations to the Board of Nursing and division; and

(ii) review applications for prescriptive authority and make appropriate recommendations to the Prescriptive Practice Board and division.

1993 58-1-6(1), 58-1-8(1), 58-31-4

R156-37. Controlled Substances Rules of the Division of Occupational and Professional Licensing.

R156-37-1. Title.

R156-37-2. Authority.

R156-37-3. Purpose.

R156-37-4. Definitions.

R156-37-5. Licensing.

R156-37-6. Application for License.

R156-37-7. Waiver of License.

R156-37-8. Access to Records, Facilities and Inventory.

R156-37-9. Grounds for Revocation or Denial.

R156-37-10. Records.

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

R156-37-12. Emergency Verbal Prescription of Schedule II Controlled Substances.

R156-37-13. Disposal of Controlled Substances.

R156-37-14. Surrender of Suspended or Revoked License.

R156-37-15. Herbal Products.

R156-37-1. Title.

These rules shall be known as the "Controlled Substance Rules of the Division of Occupational and Professional Licensing."

R156-37-2. Authority.

(1) The Executive Director of the Department of Commerce has delegated to the Division of Occupational and Professional Licensing all of the Department's duties, responsibilities and authority as provided in Title 58, Chapter 37.

(2) These rules are promulgated in accordance with the provisions of Title 58, Chapters 1 and 37.

R156-37-3. Purpose.

The purpose of these rules is to regulate controlled substances to prevent their harmful use. Nothing in these rules is intended to impose any limitations on a physician or other licensed practitioner to administer or dispense controlled substances in accordance with generally accepted medical practice in this state, to maintain or detoxify a person as an incidental adjunct to medical or surgical treatment of conditions other than addiction, or to administer or prescribe narcotic drugs to persons with intractable pain in which no other course of treatment or care is possible or none has been found after reasonable efforts.

R156-37-4. Definitions.

(1) All definitions set forth in Title 58, Chapters 1, 17 and 37 shall apply to these rules.

(2) The following additional definitions shall apply to these rules:

(a) "DEA" means the Drug Enforcement Administration of the United States Department of Justice;

(b) "Schedule II Controlled Stimulant" means any material, compound, mixture, or preparation listed in Subsection 58-37-4(2)(b)(iii).

R156-37-5. Licensing.

(1) Consistent with provisions of law, the division may issue a controlled substance license to manufacture, produce, distribute, dispense, prescribe, obtain, administer, analyze, or conduct research with controlled substances in Schedules I, II, III, IV, and/or V to qualified persons. Licenses shall be issued to qualified persons in the following categories:

- (a) pharmacist;
- (b) optometrist;
- (c) podiatrist;
- (d) dentist;
- (e) osteopathic physician;
- (f) physician and surgeon;
- (g) physician assistant;
- (h) veterinarian;
- (i) nurse practitioner;
- (j) naturopath;
- (k) pharmaceutical researcher;
- (l) drug outlets located in the state of Utah licensed as a:

- (i) retail pharmacy;
- (ii) hospital pharmacy;
- (iii) institutional pharmacy;
- (iv) pharmaceutical manufacturer;
- (v) pharmaceutical wholesaler/distributor;
- (vi) branch pharmacy;
- (vii) nuclear pharmacy; or
- (viii) veterinary pharmaceutical outlet;
- (m) pharmaceutical dog trainer;
- (n) pharmaceutical teaching organization;
- (o) analytical laboratory;
- (p) state or local agency performing animal euthanasia; and

(q) Utah Department of Corrections for the conduct of execution by the administration of lethal injection under its statutory authority and in accordance with its policies and procedures.

(2) A license may be restricted to the extent determined by the division, in collaboration with appropriate licensing boards, that such restriction is necessary to protect the public health, safety or welfare, or the welfare of the licensee. A person receiving such a restricted license shall manufacture, produce, obtain, distribute, dispense, prescribe, administer, analyze, or conduct research with controlled substances only to the extent of the terms and conditions under which the restricted license is issued by the division.

(3) The division shall not issue a controlled substance license to any person upon a finding that the issuance of a license would endanger the public health, safety or welfare.

R156-37-6. Application for License.

(1) An applicant for a controlled substance license shall submit an application form in content as approved and furnished by the division, and shall pay the required fee as established by the division under the provisions of Subsection 63-38-3(2).

(2) Any person seeking a controlled substance license based upon their qualification listed under R156-37-5 shall be currently licensed by the state in the appropriate professional license classification and shall maintain that license classification as current at all times while holding a controlled substance license issued by the state.

(3) Upon receiving an application for a controlled substance license from a qualified person, the division may issue the license or may assign the application to a qualified and appropriate licensing board for review and recommendation to the division with respect to issuance of a license.

(4) The division or the reviewing board may request from the applicant all information which is reasonable and necessary to permit an evaluation of the applicant's qualifications and the public interest in the issuance of a controlled substance license to the applicant. The division shall have the right to conduct site inspections, review research protocol, conduct interviews with persons knowledgeable about the applicant, and conduct any other investigation which is reasonable and necessary to determine the suitability of the applicant to receive a controlled substance license.

(5) The division shall not issue a controlled substance license to any person upon a finding by the division that the issuance of the license enabling the applicant to engage in authorized activities with controlled substances would or could reasonably be expected to pose a threat to the public health, safety, or welfare.

(6) The division may require an applicant to pass an examination on the subject of controlled substance laws.

R156-37-7. Waiver of License.

(1) Individuals employed by an agency of the State or any of its political subdivision, who are specifically authorized in writing by the state agency or the political subdivision to possess specified controlled substances in specified reasonable and necessary quantities for the purpose of euthanasia upon animals, shall be exempt from having a controlled substance license if the agency or jurisdiction employing that individual has obtained a controlled substance license, a DEA registration number, and uses the controlled

substances according to a written protocol in performing animal euthanasia.

(2) Law enforcement agencies and their sworn personnel are exempt from the licensing requirements of the Controlled Substance Act to the extent their official duties require them to possess controlled substances; they act within the scope of their enforcement responsibilities; they maintain accurate records of controlled substances which come into their possession; and they maintain an effective audit trail. Nothing herein shall authorize law enforcement personnel to purchase or possess controlled substances for administration to animals unless such purchase or possession is in accordance with a duly issued controlled substance license.

R156-37-8. Access to Records, Facilities and Inventory.

Applicants for licensure and all licensees shall make available for inspection, to the extent they exist, during regular business hours and at other reasonable times in the event of an emergency, their controlled substance stock or inventory, records required under the Utah Controlled Substances Act and these rules or under the Federal controlled substance laws, and facilities related to activities involving controlled substances.

R156-37-9. Grounds for Revocation or Denial.

In addition to the acts and practices enumerated in Subsection 58-37-6(4)(a) of the Controlled Substances Act, the 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:

(1) has prescribed to himself or administered to himself without prescription issued by another licensed practitioner any Schedule II or III controlled substances;

(2) has violated any federal or state law relating to controlled substances;

(3) prescribed or administered a controlled substance for a condition he is not licensed to treat or is not competent to treat;

(4) fails to deliver to the division the license certificate upon an action which revokes, suspends or limits the license;

(5) fails to maintain controls over controlled substances which would be considered by a prudent practitioner to be effective against diversion, theft or shortage of controlled substances;

(6) is unable to account for shortages of controlled substances in his inventory;

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

(8) knowingly prescribes, sells, gives away, or administers, directly or indirectly, or offers to prescribe, sell, furnish, give away, or administer any controlled substance to a drug dependent person, as defined in Subsection 58-37-2(14), except for legitimate medical purposes as permitted by law.

R156-37-10. Records.

(1) Records of purchase, distribution, dispensing, prescribing, and administration of controlled substances shall be kept according to state and federal law. Prescribing practitioners shall keep accurate records reflecting the examination, evaluation and treatment of all patients. Patient medical records shall accurately reflect the prescription or administration of controlled substances in the treatment of the patient, the purpose for which the controlled sub-

stance is utilized and information upon which the diagnosis is based. Practitioners shall keep records apart from patient records of each controlled substance purchased, and with respect to each controlled substance, its disposition, whether by administration or any other means, date of disposition, to whom given and the quantity given.

(2) Any licensee who experiences any shortage or theft of controlled substances shall immediately file the appropriate forms with the Drug Enforcement Administration, with a copy to the division directed to the attention of the Investigation Bureau. He shall also report the incident to the local law enforcement agency.

(3) All records required by federal and state laws or rules must be maintained by the licensee for a period of five years. If a licensee should sell or transfer ownership of his files in anyway, those files shall be maintained separately from other records of the new owner.

(4) Prescription records may be maintained electronically so long as:

(a) the original of each prescription, including telephone prescriptions, is maintained in a physical file and contains all of the information required by federal and state law; and

(b) there is a physical printout of the controlled substances dispensed each day that details the prescription number, the quantity of each drug dispensed, the prescribing practitioner and the dispensing pharmacist. Each pharmacist that is documented on the printout as having dispensed a controlled substance shall sign his name to the printout, attesting to the accuracy of the data detailed, or shall make appropriate changes and then sign his name.

(5) All records relating to Schedule II controlled substances received, purchased, administered or dispensed by the practitioner shall be maintained separately from all other records of the pharmacy or practice.

(6) All records relating to Schedules III, IV and V controlled substances received, purchased, administered or dispensed by the practitioner shall be maintained separately from all other records of the pharmacy or practice.

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

(1) A practitioner may prescribe or administer the Schedule II controlled substance cocaine hydrochloride only as a topical anesthetic for mucous membranes in surgical situations in which it is properly indicated and as local anesthetic for the repair of facial and pediatric lacerations when the controlled substance is mixed and dispensed by a registered pharmacist in the proper formulation and dosage.

(2) A practitioner shall not prescribe or administer a controlled substance without taking into account the drug's potential for abuse, the possibility the drug may lead to dependence, the possibility the patient will obtain the drug for a nontherapeutic use or to distribute to others, and the possibility of an illicit market for the drug.

(3) When writing a prescription for a controlled substance, each prescription shall contain only one controlled substance per prescription form and no other legend drug or prescription item shall be included on that form.

(4) A prescription for a Schedule II controlled substance shall not be written for a quantity greater

than medically necessary and in no case in quantities greater than a 30-day supply.

(5) If a practitioner fails to document his intentions relative to refills of controlled substances in Schedules III through V on a prescription form, it shall mean no refills are authorized. No refill is permitted on a prescription for a Schedule II controlled substance.

(6) Refills of controlled substance prescriptions shall be permitted for the period from the original date of the prescription as follows:

TABLE

Schedules III and IV	Six (6) months from the original date of the prescription.
Schedule V	One (1) year from the original date of the prescription.

(7) No refill may be dispensed until such time has passed since the date of the last dispensing that 80% of the medication in the previous dispensing should have been consumed if taken according to the prescriber's instruction.

(8) No prescription for a controlled substance shall be issued or dispensed without specific instructions from the prescriber on how and when the drug is to be used.

(9) Refills after expiration of the original prescription term requires the issuance of a new prescription by the prescribing practitioner.

(10) Each prescription for a controlled substance and the number of refills authorized shall be documented in the patient records by the prescribing practitioner.

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

(12) A practitioner shall not prescribe or administer a Schedule II controlled stimulant for any purpose except:

(a) the treatment of narcolepsy as confirmed by neurological evaluation;

(b) the treatment of abnormal behavioral syndrome (attention deficit disorder, hyperkinetic syndrome), and/or related disorders;

(c) the treatment of drug-induced brain dysfunction;

(d) the differential diagnostic psychiatric evaluation of depression;

(e) the treatment of depression shown to be refractory to other therapeutic modalities, including pharmacologic approaches, such as tricyclic antidepressants or MAO inhibitors;

(f) in the terminal stages of disease, as adjunctive therapy in the treatment of chronic severe pain or chronic severe pain accompanied by depression;

(g) the clinical investigation of the effects of such drugs, in which case the practitioner shall submit to the division a written investigative protocol for its review and approval before the investigation has begun. The investigation shall be conducted in strict compliance with the investigative protocol, and the practitioner shall, within sixty days following the conclusion of the investigation, submit to the division a written report detailing the findings and conclusions of the investigation; or

(h) in treatment of depression associated with medical illness after due consideration of other therapeutic modalities.

(13) A practitioner may prescribe, dispense or administer a Schedule II controlled stimulant when properly indicated for any purpose listed in paragraph (12) of this rule, provided that all of the following conditions are met:

(a) before initiating treatment utilizing a Schedule II controlled stimulant, the practitioner obtains an appropriate history and physical examination, and rules out the existence of any recognized contraindications to the use of the controlled substance to be utilized;

(b) the practitioner shall not prescribe, dispense or administer any Schedule II controlled stimulant when he knows or has reason to believe that a recognized contraindication to its use exists;

(c) the practitioner shall not prescribe, dispense or administer any Schedule II controlled stimulant in the treatment of a patient who he knows or should know is pregnant; and

(d) the practitioner shall not initiate or shall discontinue prescribing, dispensing or administering all Schedule II controlled stimulants immediately upon ascertaining or having reason to believe that the patient has consumed or disposed of any controlled stimulant other than in compliance with the treating practitioner's directions.

(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 (a 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 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.

R156-37-12. Emergency Verbal Prescription of Schedule II Controlled Substances.

(1) Prescribing practitioners may give a verbal prescription for a Schedule II controlled substance if:

(a) the quantity dispensed is only sufficient to cover the patient for the emergency period, not to exceed 72 hours;

(b) the prescribing practitioner has examined the patient within the past 30 days, the patient is under the continuing care of the prescribing practitioner for a chronic disease or ailment, or the prescribing practitioner is covering for another practitioner and has knowledge of the patient's condition; and

(c) a written prescription is delivered to the pharmacist within three working days of the verbal order.

(2) A pharmacist may fill an emergency verbal or telephonic prescription from a prescribing practitioner for a Schedule II controlled substance if:

(a) the amount does not exceed a 72 hour supply; and

(b) the filling pharmacist reasonably believes that the prescribing practitioner is licensed to prescribe the controlled substances or makes a reasonable effort to determine that he is licensed.

R156-37-13. Disposal of Controlled Substances.

(1) Any disposal of controlled substances by licensees shall:

(a) be consistent with the provisions of 1307.21 of the Code of Federal Regulations; or

(b) require the authorization of the division after submission to the division (Attention: Chief Investigator) of a detailed listing of the controlled substances and the quantity of each. Disposal shall be conducted in the presence of one of its investigators or a division authorized agent as is specifically instructed by the division in its written authorization.

(2) Records of disposal of controlled substances shall be maintained and made available on request to the division or its agents for inspection for a period of five years.

R156-37-14. Surrender of Suspended or Revoked License.

(1) Licenses which have been restricted, suspended or revoked shall be surrendered to the division within 30 days of the effective date of the order of restriction, suspension or revocation. Compliance with this section will be a consideration in evaluating applications for relicensing.

R156-37-15. Herbal Products.

The division shall not apply the provisions of the Controlled Substance Act or these rules in restricting citizens or practitioners, regardless of their licensee status, from the sale or use of food or herbal products that are not scheduled as controlled substances by State or Federal law.