

2001

Mary Sawyers and United Television, Inc., aka KTVX v. Micahel Jensen, M.D. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

DEFENDANTS'/APPELLANTS' REPLY/ANSWER BRIEF

Case No. 2001 1023-SC

Trial Court Civil No. 970400512 CV
(Fourth District)
Judge Ray M. Harding, Jr.

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Pursuant to Rule 24(g) of the Utah Rules of Appellate Procedure, Defendants/
Appellants, Mary Sawyers and KTVX-TV, hereby respectfully submit their
Reply/Answer Brief.

**I. DR. JENSEN’S REQUEST FOR SUMMARY AFFIRMANCE
IS UNWARRANTED**

In his appellee’s brief, Dr. Jensen attempts to distract the Court with
mischaracterizations of the issues and unsupported claims that appellants have failed to
adequately marshal the evidence supporting the verdicts. As demonstrated below, the
appellants have raised three issues that require the Court to decide pure questions of law:
(1) whether the trial court erred in applying the “catch-all” tort statute of limitations to
claims for libel (that plaintiff had merely re-labeled claims for “false light invasion of
privacy”), and thereby permitted the plaintiff to circumvent the statute of limitations for
libel;¹ (2) whether plaintiff’s statutory and common law intrusion claims are legally
insufficient for failure of plaintiff to show violation of any expectation of privacy that is
objectively reasonable,² and (3) whether plaintiff’s “false light” *invasion of privacy* claim

¹ Dr. Jensen also asserts that a trial court’s denial of a summary judgment motion
is not reviewable on appeal after a trial. Corrected Br. of Appellee at 24-25. Although
Dr. Jensen cites numerous authorities from outside this jurisdiction, his counsel
apparently neglected to review the authorities cited in the appellant’s opening brief. *See*
Snow v. Rudd, 998 P.2d 262 (Utah 2000) (reversing trial court’s denial of motion for
summary judgment on issue of statute of limitations on appeal after completion of jury
trial). The issue is moot in any event, since the same record that was made on the motion
for summary judgment was also made at trial. Opening Br. 1-2.

² Dr. Jensen concedes that “most jurisdictions require the court to make an initial
determination that the [plaintiff’s] expectation of seclusion or solitude is ‘objectively
reasonable.’” Corrected Appellee’s Br. at 30 n.9.

fails for the same reason. Because three of the six questions presented by this appeal require this Court to resolve pure questions of law, there is no basis for affirmance on grounds of failure to marshal the evidence.

Defendants have also raised three issues that *do* call upon the Court to assess the sufficiency of the evidence in support of the jury verdicts: (1) the defendants' broadcasts are "substantially true" and therefore not actionable as libel or false light publicity, (2) there is no competent evidence demonstrating that the plaintiff suffered any economic losses that were proximately caused by the allegedly false statements contained in the defendants' *third* broadcast, and (3) there is no clear and convincing evidence of "actual malice" necessary to sustain an award of punitive damages, and As to each of these issues the defendants readily concede that they bear the burden of marshalling the evidence in support of the verdicts below. However, as demonstrated in the remainder of this brief, the plaintiff's Response does not point to any material evidence in support of any of these verdicts that was not cited by the defendants in their Opening Brief.

**II. THE STATUTE OF LIMITATIONS GOVERNING LIBEL CLAIMS
MUST APPLY TO ALL LIBEL CLAIMS
THAT ARE SIMPLY RE-LABELED "FALSE LIGHT"**

Dr. Jensen asserts that the "catch-all" statute of limitations for "torts having nowhere else been provided for in this statute" should apply to his re-labeled libel claims. Corrected Appellee's Br. at 5. Dr. Jensen does not (and cannot) dispute that it was not until after the defendants moved to dismiss his libel claims on the first two broadcasts as untimely filed that he filed an Amended Complaint that simply re-labeled those claims "false light invasion of privacy." *See* Opening Br. at 5, 25. Ignoring this Court's

footnote in *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906 n.37 (Utah 1992), which stated that “a false light invasion of privacy claim based on defamatory statements [is] governed by the statute of limitations for libel,” Dr. Jensen cites authorities (including unreported decisions) from other jurisdictions that have applied a longer statute of limitations to an invasion of privacy claim.³ Corrected Appellee’s Br. at 26. Of course, none of the still valid cases he has cited are binding on this Court, and the Court should adhere to the rule it embraced in *Russell, supra*. Moreover, were the Court to indulge Dr. Jensen’s legerdemain in relabeling a “libel claim” as one for “false light” here – in a case that pertains to his business and professional conduct and reputation (from which claims for emotional distress are derivative) and not his private life affairs – that would send a clear signal to all future plaintiffs that the Utah statute of limitations for libel is meaningless. *See, e.g., Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 480 (Mo. 1986) (under facts remarkably similar to those of the present case, the Court noted that “if the defamation statute of limitations is not applied, such a statute would become meaningless because parties will invariably claim a ‘false light’ invasion of privacy instead of a defamation.”).

³ Indeed, the two Kansas authorities cited by Dr. Jensen have been disavowed by Kansas’ Court of Appeals. *See Meyer Land & Cattle Co. v. Lincoln Cty. Conservation Dist.*, 31 P.3d 970, 974-75 (Kan. Ct. App. 2001) (finding that false light invasion of privacy claim, as well as all other “misrepresentation-based claims” that arise from the same publication “are essentially allegations of defamation, and all are similarly time-barred” under the one-year statute of limitations for defamation). Similarly, the unreported United States District Court for the District of Oregon decision Dr. Jensen cites has also been rejected by Oregon’s Court of Appeals. *See Magen v. Fisher Broad., Inc.*, 798 P.2d 1106, 1109 (Or. Ct. App. 1990).

Dr. Jensen argues that the Court of Appeals' analysis in *Hodges v. Howell*, 4 P.3d 803 (Utah Ct. App. 2000), is dispositive. Dr. Jensen's reliance upon *Hodges* is completely misplaced. In *Hodges*, the Court of Appeals concluded that the elements and "basic nature of the alleged violation of the plaintiff's right" of a claim for alienation of affections are "not sufficiently related" to the elements and basic nature of the alleged violation of the plaintiff's right in a claim for seduction that the statute of limitations for seduction should govern both actions. *Id.* at 806-07. The Court of Appeals concluded that comparing the claims of "alienation of affection" and "seduction" was akin to comparing apples and oranges: "Indeed, the two torts do not even share an identity of plaintiffs and defendants." *Id.* at 806.

Here, even though the two causes of action that Dr. Jensen sequentially pleaded (based upon the identical set of facts) are at least nominally distinct legal claims, they cannot be characterized as "not sufficiently related" to have the same statute of limitations apply.⁴ Where, as here, both claims are based upon the purported falsity of statements concerning the plaintiff's business and professional conduct and not his personal or private affairs, the distinction between the two is entirely ephemeral. While it is true that this Court has recognized "false light" and "libel" as distinct causes of action, that fact alone does not resolve the issue of which statute of limitations should apply. When the Tennessee Supreme Court, like this Court, recognized "false light invasion of

⁴ Indeed, Colorado's Supreme Court recently decided that the claims of false light and libel were so closely related that there was no need to recognize a separate claim for false light under that state's common law. *See Denver Publ'g Co. v. Bueno*, 54 P.3d 893 (Colo. 2002).

privacy” as a cognizable claim independent of the claim for libel, it determined that the two claims were sufficiently related to one another that “application of different statutes of limitation for false light and defamation cases could undermine the effectiveness of limitation on defamation claims.” *West v. Media General Convergence*, 53 S.W.3d 640, 648 (Tenn. 2001); *see also* authorities cited in Opening Br. at 24-25. Notably, the authoritative RESTATEMENT OF TORTS states that a plaintiff asserting both libel and false light claims premised on the same publication is entitled to recover on only one of the two closely related claims, not both. *See* RESTATEMENT (SECOND) TORTS § 652E cmt. b (1977).

A much more analogous case to the present one than *Hodges* is this Court’s decision in *Tollman v. K-Mart Enters. of Utah, Inc.*, 560 P.2d 1127 (Utah 1977), which is cited by the Court of Appeals in *Hodges*. In *Tollman*, this Court held that the same statute of limitations at issue in this case, § 78-12-29(4), applied to a claim for “false arrest,” even though “false arrest” is not among the tort claims listed in the statute. This Court concluded that the claim of “false imprisonment,” which is contained in the statute, is sufficiently related in nature to the claim of “false arrest” that the one-year statute of limitations should apply: “Variance in nomenclature does not change the essential nature of the wrong.” 560 P.2d at 1128. Thus, to determine the appropriate statute of limitations, the Court must look “to the basic nature of the alleged violation of the plaintiff’s right” irrespective of what label a plaintiff attaches to his claim. Most tellingly, for purposes of deciding the present controversy, the Court recognized “the fact that Sec. 78-12-29(4) U.C.A. . . . appears to cover [all of] the various invasions of

personal liberty.” *Id.* In words that apply equally well to the present case, the Court concluded “it would be quite illogical to suppose that all other invasions of personal liberty were limited to one year by that Section, but there was a separate, but unmentioned, tort of ‘false arrest’ which should have a four-year statute of limitations governed by the ‘catch-all’ Section 78-12-25(2) U.C.A.” *Id.* Accordingly, under this Court’s own precedent of *Tollman* and the numerous authorities set forth in appellants’ Opening Brief at 24-25, the Court must find that the one-year statute of limitations applies to Dr. Jensen’s untimely libel claims that he merely re-labeled as claims for “false light.”

**III. DR. JENSEN HAS NOT DEMONSTRATED
HE HAD AN OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY
IN THE CONDUCT OF HIS PROFESSIONAL MEDICAL SERVICES**

At page 28 of his Corrected Appellee’s Brief, Dr. Jensen asserts that there are four prongs to an intrusion claim.⁵ Dr. Jensen claims all of these issues present questions of fact for the jury, but he is plainly mistaken: Prong 3 “whether Dr. Jensen had a reasonable expectation of privacy as a state-licensed and regulated physician” (which is essentially the same question posed by prong 1), presents a question of *law* for the court. *See infra* at 7-11. In fact, the question presented in prong 3 is the only issue the Court needs to resolve in order to reverse *all* of Dr. Jensen’s claims labeled “invasion of privacy,” whether common law intrusion, statutory violations (which require unauthorized recording “in a private place”), or false light “invasion of privacy.” For all

⁵ His prong 4 concerns substantial truth, which is a defense to defamation and false light, but plays no role in a claim for intrusion.

such claims, the threshold question – one of law for the court to decide – is whether Dr. Jensen had an *objectively reasonable* expectation of privacy in his conduct of his professionally licensed medical care rendered in the confines of a commercial business establishment. If this Court answers that question in the negative, as defendants maintain it should, then none of Dr. Jensen’s claims for violation of his right to privacy can be sustained.

It is well settled that the tort of intrusion upon solitude or seclusion requires an intentional invasion into an aspect of the plaintiff’s personal life in which he has *both* a subjective *and* an *objectively reasonable* expectation of privacy. *See Medical Lab. Mgmt. Consultants v. American Broad. Co.*, 306 F.3d 806, 812-13 (9th Cir. 2002) (citations omitted); *see also* Corrected Appellee’s Br. at 30 n.9; RESTATEMENT (SECOND) TORTS § 652B cmt. c at 379; W. Page Keeton, et al., PROSSER & KEETON ON TORTS, § 117 at 855 (5th ed. 1984) (“[T]he thing into which there is an intrusion or prying must be, *and be entitled to be*, private.”) (emphasis added). It is equally well settled that the question whether a person’s expectation of privacy in a particular set of circumstance was an *objectively* reasonable one is a question of law, for the court. *See, e.g.*, Opening Br. 26-28 (citing authorities); *see also State v. Shreve*, 667 P.2d 590, 591 (Utah 1983) (*per curiam*).

Dr. Jensen’s reliance upon *Sanders v. American Broadcasting Company* is unavailing because Utah’s statutes, unlike California’s, do not require all parties to consent to the recording of a conversation. *See Medical Lab. Mgmt. Consultants*, 306 F.3d at 815-16 (expressly distinguishing *Sanders* and *Shulman* decisions because

California's Invasion of Privacy Act prohibits electronic recording of any "confidential communication" without the consent of *all* parties to the communication). Utah's law, like Arizona's law at issue in the *Medical Lab. Consultants* case, "reflects a policy decision by the state that the secret recording of a private conversation by a party to that conversation does not violate another party's right to privacy." *Id.* at 816. More tellingly, the Ninth Circuit concluded that even if it assumed Arizona would follow California's unique approach to recognizing "limited privacy" (which protects against unconsented *recording* of one's conversation), it would not find a violation in cases such as Dr. Jensen's interaction with Mary Sawyers, in which **no personal and intimate details of Dr. Jensen's life were recorded by the defendants**: "Protection for privacy interests generally apply only to private matters." *Id.* at 816 (citation omitted)⁶; *see also Wilkins v. National Broad. Co.*, 84 Cal. Rptr. 2d 329, 332 (Ct. App. 1999) (affirming summary judgment for defendants on intrusion claim premised upon surreptitious recording of a meeting where recorded conversation did not capture any of the plaintiffs' "personal lives, intimate relationships, or any other private affairs"); *Desnick v. American Broad. Co.*, 44 F.3d 1345, 1352-53 (7th Cir. 1995) (affirming summary judgment for media defendants on intrusion claim where undercover reporters "videotaped physicians engaged in professional, not personal communications with strangers (the testers

⁶ *See also* W. Page Keeton, et al., PROSSER & KEETON ON TORTS, § 117 at 854 (intrusion requires "intentional interference with another's . . . *private* affairs and concerns.") (emphasis added); *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 481 (Mo. 1986) (Blackmar, J., concurring) (in a false light case, where allegations concerning the plaintiff "are proper matters of public concern, [they are charges] to which the plaintiff has no right to privacy.").

themselves), . . . there was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center’s physicians.”).⁷

Similarly, Dr. Jensen’s reliance upon the *Dietemann* and *Copeland* decisions is unavailing because both cases involved surreptitious recording inside the uniquely private setting of the plaintiffs’ *homes*, not while plaintiffs (as here) were rendering state-licensed professional services in a commercial business office setting.⁸ See *Desnick*, 44 F.3d at 1352-53 (distinguishing *Dietemann* from case where undercover reporters surreptitiously recorded licensed doctors’ professional interactions in a commercial office setting). Dr. Jensen’s attempt to distinguish two cases cited by the defendants is also unavailing: (1) Dr. Jensen brushes aside *Washington Post v. United States Dep’t of Justice*, 863 F.2d 96 (D.C. Cir. 1988), as a supposedly inapposite FOIA case. Of course, Exemption (7)(C) of the FOIA authorizes nondisclosure of information which would constitute “an unwarranted invasion of personal privacy.” Courts interpreting that language have held that it does not apply to “information relating to business judgments and relationships . . . even if disclosure might tarnish someone’s professional reputation.” *Id.* at 100. (2) Dr. Jensen dismisses *New York v. Burger*, 482 U.S. 691 (1987), as a purportedly inapposite Fourth Amendment case. Of course, for there to be a violation of

⁷ *Shulman* and *Sanders* are also distinguishable because in both cases the defendants recorded intimate details of the plaintiffs’ *personal* and private lives.

⁸ Cf. *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (recognizing clear distinction between expectations of privacy outside and inside one’s home: “In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying . . . eyes.”).

one's Fourth Amendment rights through a warrantless search, the court must also find (as in an intrusion claim) that the plaintiff had an objectively reasonable expectation of privacy in the areas searched. *See State v. Shreve*, 667 P.2d 590, 591 (Utah 1983) (*per curiam*);⁹ *see also Forster v. County of Santa Barbara*, 896 F.2d 1146, 1149 (9th Cir. 1990) (holding that plaintiff doctor had no reasonable expectation of privacy in his medical treatment of undercover patients who recorded their interaction with the plaintiff).

Most tellingly (in fact, dispositively), Dr. Jensen devotes *none* of his response brief to attempting to distinguish or explain the four pivotal cases of (1) *Desnick*, (2) *Medical Labs Consultants*, (3) *Forster v. County of Santa Barbara*, 896 F.2d 1146 (9th Cir. 1990), and (4) *Commonwealth v. Alexander*, 708 A.2d 1251 (Pa. 1998), each of which holds that professionally licensed doctors have no reasonable expectation of privacy in the conduct of their professional medical care conducted in the confines of commercial business settings. In all four of these factually indistinguishable cases, the courts found no violation of any objectively reasonable expectation of privacy when third parties (posing as patients) surreptitiously recorded licensed physicians' professional interactions with them. Dr. Jensen only mentions, but does not address *Medical Labs Consultants*; the other three cases are not even *cited* in Dr. Jensen's 50-page brief. Dr. Jensen's failure to even acknowledge these persuasive leading precedents betrays his

⁹ *See also* 2 Dobbs, *Law of Torts* § 426 at 1201 (2002) (noting that conduct of private parties that constitutes tort of intrusion can constitute Fourth Amendment violation when committed by governmental actors).

inability to refute the weight of those authorities,¹⁰ which show as a matter of law that a state-licensed medical professional has no *objectively* reasonable expectation of privacy¹¹ in providing professional medical services to patients within a business establishment. Accordingly, none of Dr. Jensen's claims for "invasion of privacy" (including intrusion and false light "invasion of privacy"¹²) can, as a matter of law, be sustained.

**IV. THE ALLEGED FALSITY OR "FICTIONALIZATION"
OF DEFENDANTS' BROADCAST CANNOT, BY ITSELF,
CONSTITUTE AN "INVASION OF PRIVACY"
IF THE BROADCASTS FOCUS EXCLUSIVELY
ON PLAINTIFF'S BUSINESS AND PROFESSIONAL CONDUCT**

Dr. Jensen cites *Time, Inc. v. Hill*, 385 U.S. 374 (1967), to support his assertion that a medical professional has a claim for "invasion of privacy" premised on a report focused exclusively on his *professional* conduct, "when the reported material contains falsehoods." Corrected Appellee's Br. at 32. However, *Time, Inc. v. Hill* is *not* a case involving the "false light invasion of privacy" tort; the case arose under New York's civil rights statutes §§ 50, 51, which authorizes recovery for an unauthorized exploitation of an individual's commercially marketable public persona. See *Messenger v. Gruner & Jahr Printing*, 94 N.Y.2d 436, 441 (2000) ("[R]ecognizing the legislature's pointed objective

¹⁰ Of course, Dr. Jensen cannot now address those cases in his Reply Brief in support of his cross-appeal. See Utah R. App. P. 24(g).

¹¹ To be objectively reasonable, an expectation of privacy must be "one that society is prepared to recognize as reasonable." *State v. Shreve*, 667 P.2d at 591.

¹² "In order to be actionable, an action for false light [invasion of privacy] must involve the *private* affairs of the subject, and cannot relate to any matter which is inherently 'public' or 'of legitimate interest to the public.'" 62A AM. JUR. 2D, *Privacy*

in enacting sections 50 and 51, we have underscored that the statute is to be narrowly construed and ‘strictly limited’ to the non-consensual commercial appropriations of the name, portrait or picture of a living person.”) (citing *Finger v. Omni Publs. Int’l*, 77 N.Y.2d 128, 141 (1990)); see also *Howell v. New York Post Co.*, 81 N.Y.2d 115, 125 (1993); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440 (1982) (stating that New York’s statute and common law do not recognize a claim for “false light invasion of privacy”). In essence, the claim at issue under New York law in *Time, Inc. v. Hill* is accurately described as one for “misappropriation of a plaintiff’s name, persona, image, or likeness for commercial advantage,” which the RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION correctly recognizes as a *commercial* tort, *not* an invasion of personal privacy. See RESTATEMENT (THIRD) UNFAIR COMPETITION § 46 cmt. b (1994). Dr. Jensen did not (and cannot) claim that the defendants improperly misappropriated his name, persona, image, or likeness for their commercial advantage; instead, he pleaded a claim for the invasion of his personal *privacy*. Thus, Dr. Jensen’s argument simply ignores the long line of cases cited in Appellant’s Opening Brief at 26-28, 34-36 that hold that certain aspects of a plaintiff’s life – *e.g.*, one’s discharge of his official or professional duties – cannot, as a matter of law, give rise to a claim for “invasion of privacy” *irrespective* of the truth or falsity of the broadcast. Accordingly, Dr. Jensen’s “invasion of privacy” (false light) claims must fail, as a matter of law.

§ 126 at 734-35. See *Russell*, 842 P.2d at 902 (“Allegations of misconduct against a local doctor . . . are certainly matters of public concern. . .”).

**V. DR. JENSEN HAS FAILED TO DEMONSTRATE
THAT THE DEFENDANTS' PUBLISHED STATEMENTS
ARE NOT SUBSTANTIALLY TRUE**

Dr. Jensen is correct that the question whether allegedly defamatory statements are substantially true is generally a jury question, but it is also a question that the defendants argued in their motions for summary judgment, for a directed verdict, and for JNOV. *See* Opening Br. at 2. This Court therefore reviews those rulings for correctness (of course, while looking at the evidence in the light most favorable to the plaintiff). Furthermore, the Court must determine whether the published statements were substantially true by exercising the Court's own "independent appellate review." Opening Br. at 2-3. On this issue, Dr. Jensen's primary response is his claim that the defendants failed to sufficiently marshal the evidence in support of the jury's verdict. Corrected Appellee's Br. at 22-24. Not only is this assertion without merit,¹³ Dr. Jensen has himself failed to acknowledge or respond to the evidence cited in the Appellants' Opening Brief that demonstrates the

¹³ Dr. Jensen's assertion that the defendants/appellants failed to cite numerous facts in support of the falsity of published statements concerning his treatment of Mary Sawyers is demonstrably erroneous. The appellants did cite to the evidence that Dr. Jensen claims is relevant: (a) Jensen believed, based on Sawyers' alleged representation to his receptionist, that she was desperate to lose weight or she would lose her job, Opening Br. at 9 n.2; (b) Jensen's medical assistant did take Sawyers' blood pressure and recorded it on an intake form, *id.* at 11, 20; (c) Sawyers filled out a medical history form prior to meeting with Dr. Jensen, *id.* at 11 n.4, 47; (d) during her office visit with him, Dr. Jensen indicated that "maybe" he'd prescribe Dexedrine if Fen-Phen did not work out of her, *id.* at 12, 46; (e) that Dr. Jensen claimed at trial that he intended to conduct a thorough physical examination of Ms. Sawyers but was prohibited from doing so when she abruptly left the examination room, *id.* at 12, 47; (f) that prior to the defendants' first broadcast, Dr. Jensen told Sawyers he had reconsidered his earlier statements in which he had indicated a willingness to prescribe Dexedrine for weight loss, *id.* at 15-16, 46, 49; (g) the second broadcast stated that DOPL was "going after" Jensen's license, *id.* at 49.

substantial truth of the gist of the defendants' broadcast – that Dr. Jensen prescribed controlled substance weight loss medications (“Fen-Phen”) to patients without first conducting any meaningful physical examination or medical history as required by state law. Once again, what is most telling about Dr. Jensen's brief is that he has completely ignored the undisputed facts cited in the appellants' brief: that on the same day that Dr. Jensen wrote out the Fen-Phen prescription for Mary Sawyers, he also wrote the same prescription for his nurse practitioner Sandra Peterson-Katour without conducting any physical examination or obtaining any medical history from her. *See* Opening Br. at 14.¹⁴ Thus, the question raised on appeal is whether these *undisputed* facts – that Dr. Jensen prescribed controlled substances to Peterson-Katour without performing a medical examination of any kind – renders the defendants' published statements concerning his similar conduct with Mary Sawyers substantially true. *See* Opening Br. at 38-40. By not disputing that this incident occurred, nor contending that it differed in any material way from what was depicted in the broadcast, Dr. Jensen effectively concedes that the gist of the defendants' broadcast – that on one occasion he prescribed controlled substances for weight loss without conducting legally adequate medical evaluations – was substantially true.

¹⁴ Dr. Jensen did not dispute these facts, but only disputed Peterson's further testimony that at that same time, Jensen also gave her a second Fen-Phen prescription for Peterson's mother, without ever seeing her or knowing anything about her health or medical history. R. 6867 (Katour) at 18-19, 23-24; R. 6856 (Jensen) at 18.

**VI. DR. JENSEN HAS FAILED TO (AND CANNOT) POINT TO ANY
EVIDENCE PROVING THAT HE SUFFERED ECONOMIC LOSSES
THAT WERE PROXIMATELY CAUSED
BY THE DEFENDANTS' *THIRD* BROADCAST**

Once again, Dr. Jensen derides the defendants for allegedly having failed to marshal the evidence in support of economic losses he claims were proximately caused by the defendants' third broadcast. Corrected Appellee's Brief at 38 –39. However, Dr. Jensen is unable, either in this section of his brief or in his statement of facts, to point to *any* record evidence demonstrating he suffered *any* economic losses as a proximate result of the defendants' third broadcast. Instead, Dr. Jensen points only to his own bald and unsupported claim, during his own testimony at trial, that he was “financially damaged by these broadcasts.” *See* R. 6866 (Jensen) at 104.¹⁵ Defendants can hardly be faulted for having omitted such a hollow and unsupported assertion – without any demonstrable proof offered in support of that assertion – as a failure to “marshal the evidence” that would support of the jury's verdict.

Dr. Jensen also cites to his own unsupported assertion at trial that he unilaterally quit his job at the Art City Family Medical Center because “*he understood* that his employer cut back his hours and would fire him.” Corrected Appellee's Br. at 40 (emphasis added). However, Dr. Jensen did not present *any evidence* at trial demonstrating that his own “understanding” that he'd be fired if he did not quit his job

¹⁵ During his testimony, Dr. Jensen also claimed that he was “incredibly injured” by all three broadcasts. *See* R. 6866 (Jensen) at 118-19. But even this unsupported conclusory assertion does not even claim, much less *prove*, that he suffered any *financial* losses as a result of any of the broadcasts.

was well-founded or that any of his superiors ever informed him that he was to be terminated¹⁶ (or, most importantly, that any such alleged employment decision was triggered by the defendants' *third* broadcast). Indeed, Dr. Jensen testified that it was his "understanding" that he'd be fired only "if the newscasts continued" in the future, after the third broadcast, and *not* as a result of it. *See* R. 6866 (Jensen) at 98: 14-16.

Moreover, the director of that clinic, Michael Rosen, testified that the management of that clinic had specifically decided *not* to terminate Dr. Jensen after the first of the defendants' broadcasts (which was the only time any of Dr. Jensen's patients expressed an unwillingness to be treated by him). R. 6848 (Rosen) at 88: 4-12. And Rosen testified that Dr. Jensen's employment at the clinic ended solely as a result of Dr. Jensen's own *voluntary* action. *Id.* at 118:1-6. Thus, Dr. Jensen did not offer any competent evidence demonstrating that any adverse employment action that he claims he *expected* to be taken against him was attributable to his employer's *response* to the defendants' *third* broadcast. In other words, the "proof" he points to is, in reality, no proof at all, but pure speculation and conjecture on his part. *See Dunn v. McKay, Burton, McMurray & Thurman*, 584 P.2d 894, 896 (Utah 1978) (award of damages "cannot properly be based on speculation and conjecture" . . . the plaintiff must establish, through competent evidence, that he "suffered injury and damage and also that it was proximately caused by the negligence of the defendant"); *Gould v. Mountain States Tel. & Tel. Co.*, 309 P.2d

¹⁶ Indeed, Dr. Jensen corrected himself to make clear he was *not* so notified, when he began his statement "They told me – or it was my understanding . . ." R. 6866 (Jensen) at 98: 15.

802, 806 (Utah 1957) (“The award for loss of prospective profits by the jury on the present state of proof is clearly the result of speculation and conjecture.”).

Dr. Jensen also points to his testimony that on one occasion a single lady patient was waiting to see him, recognized him, and said “I will not see Dr. Jensen.” R. 6866 (Jensen) at 43. What Dr. Jensen omits from his brief is the fact that this single instance of a “lost customer” occurred shortly after (and as a result of) the defendants’ *first* broadcast, long *before* the third story was broadcast. R. 6866 (Jensen) at 43: 16-17 (indicating that the incident occurred “within the first month after the first broadcast”).¹⁷ Thus, as a matter of law, Dr. Jensen did not present any evidence of economic losses he suffered that were proximately caused by the defendants’ *third* broadcast. *See Gould*, 309 P.2d at 806 (“Plaintiff has not shown a single instance of the loss of prospective business *caused by the defendant’s breach*, and any award for loss of prospective profits must necessarily be based upon speculation and conjecture.”) (emphasis added).

Finally, Dr. Jensen asserts that two of his expert witnesses on damages, Dr. Frank Stuart and L. Deane Smith, both testified as to the amount of economic losses that Dr. Jensen suffered as a result of the defendants’ broadcasts. *See* Corrected Appellee’s Br. at 40. In fact, both of these witnesses testified that Dr. Jensen’s economic losses all flowed from his loss of coverage by IHC health plans, which occurred in September 1995, more than one full year prior to the defendants’ third broadcasts. *See* Appellants’ Opening Br.

¹⁷ In his brief, Dr. Jensen erroneously asserts that the incident occurred “after the third broadcast.” Corrected Appellee’s Br. at 40. Dr. Jensen also testified that a similar incident had occurred “directly after the second broadcast,” R. 6866 at 44: 18-21, but never offered *any* evidence of lost patients resulting from the *third* broadcast.

at 40-42 (summarizing and providing record citations for Stuart's and Smith's trial testimony). In his Response Brief, Dr. Jensen does not cite to any testimony from these witnesses (or any other witnesses) purporting to establish a causal link between the defendants' *third* broadcast and any economic losses thereafter purportedly suffered by Dr. Jensen.

In sum, it is clear that the defendants met their burden of *attempting to* marshal any and all evidence in support of the verdict. Moreover, in his Response Brief, Dr. Jensen has failed to meet *his* burden of citing any evidence in the record that actually demonstrated that defendants' *third* broadcast was the proximate cause of economic losses he suffered thereafter. Accordingly, the Court must vacate the jury's award of \$1,000,000 in economic damages that were premised upon the third broadcast.

**VII. DR. JENSEN HAS NOT POINTED TO ANY EVIDENCE
THAT WOULD PERMIT THIS COURT
TO FIND CLEAR AND CONVINCING PROOF
THAT DEFENDANTS PUBLISHED WITH ACTUAL MALICE¹⁸**

Dr. Jensen erroneously asserts that only common law malice is required for punitive damages. *See* Corrected Appellee's Br. at 43. Here, Dr. Jensen confuses the standard of fault for *liability* in a private figure case (which is negligence), and the standard of fault required to impose *punitive damages* upon a media defendant in a private figure case where the publication is on a matter of public concern. *See* MUJI

¹⁸ Inexplicably, Dr. Jensen devotes two pages of his brief to argue that neither the public interest nor fair reports privilege applies to the defendants' broadcasts. *See* Corrected Appellee's Br. at 41-42. However, the Court will search in vain the defendants' Opening Brief for any argument by appellants asserting those privileges on appeal.

10.12 (requiring constitutional “actual malice” for imposition of punitive damages); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985). Not only does Dr. Jensen erroneously urge that only common law malice need be established to sustain an award of punitive damages, he fails to cite any record evidence that would sustain a finding (by the requisite “clear and convincing evidence” standard) of actual malice; instead, Dr. Jensen merely states that “the jury found that the evidence satisfied the high public official standard for malice,” and then argues that “defendants cannot justify their malice by facts learned after their actions.” Corrected Appellee’s Br. at 44.¹⁹ Dr. Jensen’s cavalier reliance upon the jury’s verdict on the question of actual malice ignores binding authority from the United States Supreme Court holding that the First Amendment requires appellate courts to exercise “independent appellate review” of the evidence of actual malice. *See* Opening Br. at 44 (citing *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). Here, as demonstrated by the extensive recitation of the record evidence, *see* Opening Br.

¹⁹ Dr. Jensen confuses the reason why defendants have cited to the undisputed testimony that he prescribed Fen-Phen to Sandra Peterson-Katour without conducting any medical examination or medical history. These undisputed facts, although learned by the defendants after the broadcasts at issue, are not offered to justify the defendants’ state of mind at the time of the broadcast, but to demonstrate that the allegations in the broadcasts were substantially true. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) (holding that truthful publications are not actionable, “[a]nd it makes no difference that the true facts were unknown until the trial”).

at 44-37,²⁰ the record compels the Court's independent conclusion that there was not clear and convincing evidence presented below establishing that the defendants published their broadcasts knowing them to be false or while entertaining serious subjective doubts as to their truth.

VIII. ANSWER TO ISSUES RAISED IN CROSS-APPEAL

Pursuant to Utah R. App. P. 24(g), defendants hereby answer the points and contentions raised by cross-appellant Dr. Jensen in his Corrected Appellee's Brief.

A. The Trial Court Properly Declined to Award Reasonable Attorneys' Fees on Non-Overlapping Claims.

Dr. Jensen asserts that he is entitled to attorneys' fees on his non-compensable claims (defamation and false light) because, he contends, those claims overlap legally and/or factually with his compensable statutory information-gathering claim. Corrected Appellee's Br. at 46.

Prevailing parties may collect attorneys fees on non-compensable claims only when those claims substantially overlap with compensable claims. *See Keith Jorgensen's, Inc. v. Ogden City Mall Co.*, 26 P.3d 872, 879 (Utah App. 2001). Claims are deemed not to overlap if they require proof of different elements and sets of facts. *Cf. Brown v. David K. Richardson Co., Inc.*, 978 P.2d 470 (Utah App. 1999). The question

²⁰ For the Court's benefit, the appellants have appended to this brief the transcripts of the phone conversation between Mary Sawyers and Dr. Jensen, prior to her office visit, and of her hidden camera recording of her office visit with Dr. Jensen, to further demonstrate that defendants had no *reason* to doubt the truth of their broadcasts.

of whether a party is entitled to attorneys' fees is a question of law reviewed for correctness. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1988).

The trial court correctly concluded that Dr. Jensen's claims arising from the manner in which information was gathered shared neither a common core of facts nor related legal theories with his claims for defamation and false light that are based on falsity of the content of the broadcasts and defendants' care with respect to truth. *See* R.6779 (Order July 31, 2001) at 5: 1-2. Dr. Jensen's invasion of privacy claims based upon newsgathering claims are not "inextricably linked" with, and require different proof than, the broadcast-based claims of defamation and false light. *Compare* R. 6841 Jury Instructions Nos. 26-33 *with* Nos. 40-48. Because the claims did not substantially overlap, the trial court was correct in concluding that Dr. Jensen was not entitled to attorney's fees on his non-compensable claims.

B. The Trial Court Correctly Concluded that Attorney Sine's Allocation of Fees Was Deficient.

Dr. Jensen asserts that the District Court erred when it rejected Mr. Sine's request for attorney's fees because he failed to properly allocate them. *See* R. 6776 (Ruling September 27, 2001) at 8: 17-18.

A party who is entitled to reasonable attorneys' fees on some claims but not others must segregate the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees. *See Cottonwood Mall Co. v. Sine*, 830

P.2d 266, 269-70 (Utah 1992). A party who requests an award of attorney fees has the burden of presenting evidence sufficient to support an award. *See Cottonwood Mall Co.*, 830 P.2d at 269-70.²¹ A trial court's determination of what constitutes a reasonable fee will not be disturbed absent an abuse of discretion. *See Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, 1188 (Utah 2002).

Here, Attorney Sine failed to comply with the allocation requirements, even when ordered to do so by the trial court, and instead submitted a list of fees divided into two columns. The trial court's conclusion that this submission did not comport with the allocation standards was not an abuse of its discretion. *See Valcarce*, 961 P.2d at 318.

C. The Trial Court Correctly Declined to Award All of Dr. Jensen's Claimed Costs.

1. The defendants complied with Rule 54(d)(2).

Dr. Jensen asserts that he should be awarded all of his claimed costs because the defendants filed an "objection" rather than a "motion" opposing the costs claimed under Rule 54(d)(2). *See* Corrected Appellee's Br. at 46. This Court has repeatedly and consistently treated "objections" and "motions" synonymously. *See Graco Fishing & Rental Tools v. Ironwood Exploration, Inc.*, 766 P.2d 1074, 1080 (Utah 1987) (noting that "*objections* to costs must be filed within seven days") (emphasis added); *see also Suniland Corp. v. Radcliffe*, 576 P.2d 847, 849 (Utah 1978) ("The *objection* to the cost

²¹ A failure to allocate fees between compensable and non-compensable claims "constitutes grounds for complete denial." *Wilde v. Wilde*, 35 P.3d 341, 349 (Utah App. 2001), *cert. denied*, 42 P.3d 951 (Utah 2002); *Utah Farm Prod. Credit Ass'n v. Cox*, 627 P.2d 62, 66 (Utah 1981).

bill was filed by [defendant]”) (emphasis added). Accordingly, Dr. Jensen’s claim that defendants failed to comply with Rule 54(d)(2) should be rejected.

2. The costs claimed by Dr. Jensen were properly rejected as not being “necessary disbursements.”

Dr. Jensen complains that the trial court failed to award him costs that are authorized under neither Utah Rule of Civil Procedure 54(d)(2) nor this Court’s precedents. *See* Corrected Appellee’s Br. at 47-48. Nevertheless, Dr. Jensen insists that he should recover the costs of expert witness fees and equipment, among other expenses, because they were “necessary.” *Id.* A trial court’s decision to award or deny taxable costs will not be disturbed absent an abuse of discretion. *See Lyon v. Burton*, 5 P.3d 616, 637 (Utah 2000).

Utah courts have interpreted “costs” recoverable under Rule 54(d) to mean “those fees which are ‘required to be paid to the court and to witnesses,’” *see Lloyd’s Unlimited v. Nature’s Way Marketing, Ltd.*, 753 P.2d 507, 512 (Utah App. 1988), and have uniformly distinguished taxable costs from other litigation expenses, regardless of the alleged “necessity” of those expenses. *See Coleman v. Stevens*, 17 P.3d 1122, 1125 (Utah 2000). As this Court noted in *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980), and reaffirmed this year in *Armed Forces Insurance Exchange v. Harrison*, 70 P.3d 35, 46 (Utah 2003), “there is a distinction to be understood between legitimate and taxable costs and other expenses of litigation which may be ever so necessary, but are not taxable

as costs.” The trial court’s decision to adhere to the requirements of Utah law and allow only those costs authorized by statute and case law was not an abuse of discretion.²²

Nor is Dr. Jensen’s assertion that the *Frampton* ruling violates the Open Courts clause of the Utah Constitution well taken. *See* Corrected Appellee’s Br. at 48. Dr. Jensen asserts that a litigant is deprived of due process of law by the legislature’s determination that only statutorily-specified costs, rather than all conceivable expenses incurred in litigation, may be recovered. *See id.* Article I, section 11 of the Utah Constitution provides that all persons shall have reasonable access to the courts and shall enjoy due process of law. *See Jensen v. State Tax Comm’n*, 835 P.2d 965 (Utah 1992) (concluding that where taxpayers were required to pay, but were unable to pay, as a deposit the full amount of taxes assessed, penalties, and interest before seeking judicial review, the open courts provision was violated, but noting that when a taxpayer is able to pay the deposit, she must do so). In this case, Dr. Jensen “received a hearing with no preconditions, obstacles, or other limitations.” *Burgandy v. State of Utah*, 983 P.2d 586, 589 (Utah App. 1999), *cert. denied*, 994 P.2d 1271 (Utah 1999). The potential that Dr. Jensen would have to pay all or some his own costs did not impede or restrict “reasonable access” to access the courts in violation of the Utah Constitution.

²² Dr. Jensen does not contend that the trial court abused its discretion, but urges instead that *Frampton* was wrongly decided.

D. The Trial Court Correctly Concluded that the Three Separate Awards on Dr. Jensen's Gathering of Information Claims Were Duplicative.

Dr. Jensen asserts that the trial court erred in finding that the damage awards on the common law intrusion upon seclusion claim was duplicative of the two statutory privacy claims. *See* Corrected Appellee's Br. at 48.

A jury verdict which awards duplicate damages based on the same conduct must be vacated. *See Steenblik v. Lichfield*, 906 P.2d 872, 881 (Utah 1985); *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1459 (10th Cir. 1997). The question of whether damage awards are duplicative is one of fact, reviewable under the clearly erroneous standard. *See Mason*, 115 F.3d at 1459.

Here, the trial court determined that all three of Dr. Jensen's three invasion of privacy claims arose "under the same operative facts and [sought] identical relief." *See* R. 6781-82. The trial court reasoned that that the additional element of "trespass" found in Utah Code Ann. § 76-9-402(1)(a) did not sufficiently distinguish it from Utah Code Ann. § 76-9-402(1)(b) and the common law privacy claims because all three claims were aimed at punishing the same conduct, *viz.* invasion of privacy by surreptitious recording of Dr. Jensen's interaction with Sawyers.

Indeed, all three of the invasion of privacy (two statutory and one common law) claims upon which Dr. Jensen prevailed were premised upon the identical set of facts. *See* R. at ¶¶ 5-22, 23-25. Under these circumstances, the trial court's conclusion does not amount to clear error. *See Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 699 (Utah 2002).

Respectfully submitted this 1st day of October, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing **DEFENDANTS'/APPELLANTS' REPLY/ANSWER BRIEF** to be mailed, postage prepaid, this 2nd day of October, 2003, to the following:

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Addendum 12

Jensen v. Sawyers and United Television

**TRANSCRIPT
TAPE NO. 5**

July __, 1995

Telephone call - Mary Sawyers and Michael Jensen

Sawyers: Is Michael Jensen there, please?

Receptionist: He is not. He will be here at 6:00 o'clock.

Sawyers: Oh, 6:00 tonight?

Receptionist: Yes.

Sawyers: Uh. Where would I reach him during the day?

Receptionist: He works for us from 6 to 8 at night.

Sawyers: Oh. Only for two hours? Is he busy that whole time?

Receptionist: Uh. That depends. Did you need to come in, or?

Sawyers: No. Actually I just need to talk to him. It was more of a personal nature.

Receptionist: Yeah. He'll be here til 6:00.

Sawyers: Alright. Thank you.

Receptionist: Uh huh. Bye. Bye.

Dial tone.

Sound of numbers being dialed.

Sawyers: This is Mary. Hello. Hello.

Dial tone.

Sound of numbers being dialed.

Busy signal.

Sawyers: This is Mary.

Jensen: Yes Mary. Hi, Dr. Jensen.

Sawyers: Oh, hi. How are you.

Jensen: Good.

Sawyers: Thanks for calling me back. I'm sorry to be bothering you at work. I tried a couple of times but that was the only number I could find.

Jensen: That's okay. That's fine.

Sawyers: Uh. Geoff Roth, who is our new managing editor.

Jensen: Uh huh.

Sawyers: Told me you might be able to help me. I told him that I have been on this diet lately and haven't been able to lose much weight.

Jensen: Uh huh.

Sawyers: And he said that you prescribed some pills for one of his friends. Some, I don't know what they are, some diet pills.

Jensen: Uh huh.

Sawyers: Could you do that for me?

Jensen: Yeah. I probably could.

Sawyers: Okay.

Jensen: So, uh.

Sawyers: What do you need to know?

Jensen: Uh. To prescribe something like that, I would prefer to see you as a patient.

Sawyers: Uh huh.

Jensen: Is that something you could arrange very easily?

Sawyers: Uh. Well, I don't know. It depends on my insurance. What kind of insurance do you use?

Jensen: Okay. I'm covered with almost every plan there is.

Sawyers: IHC Care?

Jensen: Yup.

Sawyers: Okay.

Jensen: In fact, I'm probably. That's probably the main insurance that is covered through me.

Sawyers: Do you have another. Are you at another? Do you have your own practice besides this uh?

Jensen: Uh. Actually I will be in about ten days. I have been --. I have had an injury and been hospitalized.

Sawyers: Uh.

Jensen: And, uh, but, uh, actually I'm the guy to talk about weight loss.

Sawyers: Okay.

Jensen: I know a lot about it. I ran the OptiFast program here at Utah Valley for about three years and also many physicians are reluctant to prescribe prescription diet pills. I really am not. I think they work. Laughs. I think they work great.

Sawyers: Uh huh.

Jensen: So, uh.

Sawyers: What is it that you prescribe?

Jensen: Uh. Right now what is used most is Fastin and something called Pondimin.

Sawyers: Uh huh.

Jensen: Traditionally what has been used is Dexedrine. Dexedrine technically is illegal to, uh, use as a diet pill. Though I, uh, sometimes I find people have other disorders that I uh feel comfortable using Dexedrine with.

Sawyers: Uh huh.

Jensen: All of these medications are related. They are technically amphetamines which are speed.

Sawyers: Uh huh.

Jensen: Uh. And if used properly I don't find them dangerous or addicting. So.

Sawyers: So Fastin and this other thing are similar?

Jensen: Yes, they are.

Sawyers: So, its, its basically like taking speed?

Jensen: That's correct.

Sawyers: But you don't think its harmful?

Jensen: Not, not if it is taken properly. Uh. I suggest patients, uh, take, uh, not take a pill one day out of the week and that way they don't develop a tolerance to that. Uh. I took Fastin for one month, uh, and I took it each day and I went through a withdrawal that lasted about a day and a half which was semi unpleasant but it wasn't that bad.

Sawyers: Um.

Jensen: Uh, but, uh, I don't think these things are highly addictive particularly if you, if you kind of give yourself a break one day a week. But they really work.

Sawyers: How, I mean, I don't need to lose a lot of weight. I would, just like 10 pounds mainly.

Jensen: Uh. Then you would be a perfect candidate. Uh. For example, I have a friend who just got off a mission who, who is usually a really thin, you know, college type girl, and she picked up, oh probably an extra 20 pounds on her mission and I have had her on, uh actually on Dexedrine for about a month and a half and she is down to her ideal weight. And it's, it happened oh over about a month a half. Most people lose somewhere between 10 and 20 pounds a month on these medicines.

Sawyers: So, is there a time, I mean you can't take them only for a certain amount of time. Do they become harmful if you take them for a longer period of time?

Jensen: Uh, not necessarily. Uh. Legally its been. Uh the FDA has uh or the DEA, I'm not sure who has made it so that Fastin and Pondimin can only be prescribed three months out of the year. Uh. So, if somebody had a different disorder, for example, attention deficit disorder which is hyperactivity, uh which is seen in children, or narcolepsy, people falling asleep at the wheel or just difficulty with staying awake, uh, I'll prescribe longer than that. But, as a physician, you really got to be able to document uh why you are prescribing these things. Because, they, they are actually class two substances which are the highest controlled substance there is.

Sawyers: So, you can't prescribe them for longer than that amount of time if you are prescribing them for somebody to lose weight?

Jensen: That's right. Now one thing I haven't checked out uh is there are about five different kinds of these medications on the market and whether you can go from one to the other. And I can give a pharmacist a call and uh do that. But if you only want to lose 10 pounds, that's easy.

Sawyers: Uh huh.

Jensen: I can tell you right now.

Sawyers: So, you think I could do that in how long?

Jensen: I think you could do it in one month.

Sawyers: Oh, really.

Jensen: Yup.

Sawyers: And you think that I could keep it off?

Jensen: Uh. I have found that people that go on these medications, what it does is suppresses your appetite so much that you don't even want to eat and, uh, during that time period basically you develop a regimen that you get used to and, uh, and if it is properly done, yes, you keep the weight off.

Sawyers: So, I thought Geoff said that you prescribed some for his friend. You --. Is she a patient of yours? I mean, I need to come in for a visit?

Jensen: Yes. Actually these medications because they are so highly controlled, it is something that I can't even call in. I have to write it out.

Sawyers: Uh huh.

Jensen: On a script. So, uh.

Sawyers: So she's a patient of yours too?

Jensen: Yeah. I'm not sure who, who we are, who we are talking about.

Sawyers: It was some party. He just said uh I met this doctor at a party. I think his friend's named Lisa and he said uh that he was either told or he was there when you, you know, prescribed some diet pills and he says, I don't know, you know, what if he could prescribe them to you over the phone.

Jensen: Yeah. I know who that is then. Uh, it was Lisa Johnson who wrote *How to Date a Millionaire*.

Sawyers: Oh.

Jensen: Laughter. So, uh.

Sawyers: So, she's one of your patients, too?

Jensen: Uh. She's actually a long time friend of mine. I just happened to be at that party. So, uh.

Sawyers: But you couldn't prescribe then for me without coming in?

Jensen: Uh. I really prefer, uh, it would be considered very bad medicine for me to prescribe an amphetamine over the phone. Even, you know, I realize it would be inconvenient for you.

Sawyers: Right. I could probably.

Jensen: I think it would be worth it for you.

Sawyers: Okay. So, you know, would it be better then if I come to your practice? I mean, or.

Jensen: Uh. You, what would probably, and I don't know what your work hours are and stuff like that but presently I am working just from 6:00 to 8:00 nearly every day.

Sawyers: Uh huh.

Jensen: At this clinic that you called. Uh, I will be starting at my new practice next week and will be working uh Thursday, Friday and Monday.

Sawyers: Uh huh.

Jensen: And just depending. Those will be regular hours. Those are like 9 to 5 hours when these others are --. Uh. I am also working a 12 hour day Thursday at this clinic.

Sawyers: Uh huh.

Jensen: And that will be from 8 to 8.

Sawyers: Okay, but you're down, that's down south, isn't it, where?

Jensen: Yes.

Sawyers: Where are you at?

Jensen: Yes. Uh. The clinic that you called is actually called First Med and it is on 8th North in Orem. That's the same road the Osmond Studio is on.

Sawyers: Okay. Let me do this. Let me look at my, because I am getting ready for a series here, let me look at my schedule and then see when I could get in. Uh, and then, uh, just call and make an appointment at this 224 number?

Jensen: Um. I think that would be probably best for you.

Sawyers: Okay. I need to see . . .

Jensen: I am making a transition right now and you will find me hard to get besides at this clinic.

Sawyers: Uh huh. I'll see if I can get, I need to see if I can get a referral from my primary care physician too.

Jensen: Okay.

Sawyers: I'll do that and then I'll give you a call back.

Jensen: Okay. Great

Sawyers: Okay. Thank's a lot.

Jensen: Bye.

Addendum 13

Jensen v. Sawyers and United Television

**TRANSCRIPT
TAPE NO. 3**

July __, 1995

Patient Visit - Mary Sawyers and Michael Jensen

Jensen: I'm Dr. Jensen.

Sawyers: I'm Mary Sawyers.

(Pause in tape).

Knock on door.

Jensen: Hello. I'm Dr. Jensen.

Sawyers: I'm Mary Sawyers. We talked on the phone. Nice to meet you.

Jensen: Well.

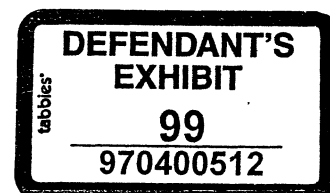
Sawyers: So, that's what you did to you?

Jensen: Yeah. I broke my achilles tendon right in half so. Uh. Mary, is there a certain thing that you know, have heard of, or whatever that you want to do with this or do you want me to just school you on what's available?

Sawyers: I just want the safest, easiest way to lose weight.

Jensen: Okay. Uh. Let me tell you what the current thinking is right now. Uh. What is used and these are technically appetite suppressants, but they're related to uh speed, which is an amphetamine, and they really suppress your appetite. I have taken it before and I'm pretty lean and I lose weight taking stuff like that. Uh. Dexedrine uh and Ritalin are two things that. Most people have heard of Ritalin.

Sawyers: Yes. They give it to hyperactive kids, don't they?



Jensen: Uh huh. And these medications are sister drugs to those. The ones that are approved for weight loss right now are Fastin and currently one thing that is sort of the vogue thing right now is to use Fastin and Pondimin which they are two sister drugs, but Fastin is a long acting medication you take one time a day. Pondimin people will take three times a day just before meals. Pondimin is a little unusual in that it is supposed to be a stimulant but when taken with Fastin it actually uh suppresses. You are kind of hyperactive affects.

Sawyers: So, they take them together.

Jensen: What you. Yes, you do. And I, and I haven't done it, I'm just familiar with it. This is what you will read in. Apparently there is a *Readers Digest* article recently. But a lot of people will, are talking about it. And it's something that's been recently quite publicized as being highly effective. Now, if you are a person that has relatively good control and just needs a little bit of a push, I would suggest just going on Fastin. I could give you an additional prescription for Pondimin if you want if things are not working.

Sawyers: Try one and then see.

Jensen: Uh huh. I think you can increase or double or triple your chances of side effects if you take both of them at once. One of our nurses in the clinic was doing that and it just didn't work. She didn't feel right. Now, I have taken Fastin before and uh I feel okay. I don't know if you are much of a caffeine user but I think you get similar side effects as caffeine using Fastin. Okay. Uh. If Fastin didn't work for you, I would be willing to work with you uh maybe using Dexedrine. It is technically not legal for that reason.

Sawyers: For weight loss?

Jensen: Right. Dexedrine is used for attention deficit disorder. In other words maintaining concentration. I took Ritalin for my boards. You can concentrate . . .

One, two, three four. (Other background voices).

Jensen: The other one is narcolepsy. People fall asleep at the wheel. So those are the legal reasons to use those medicines. I don't.

(Background noise)

Jensen: I have quite a few adults with attention deficit disorder (background voice) on Dexedrine and I haven't run into a problem once with drug addiction.

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

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

Sawyers: But the Dexedrine you wouldn't suggest before I tried the other stuff.

Jensen: Uh. Going with Fastin is in essence a cleaner way. Its approved for weight loss. Its a sister drug to Dexedrine and, uh.

Sawyers: Is it speed as well?

Jensen: Uh huh.

Sawyers: So, which is an amphetamine, right?

Jensen: Yes. They are all amphetamines.

Sawyers: So, are they the same things that you buy like in the store, just.

Jensen: Not technically. The ones that you buy in the store are actually sort of a hybrid. They're, the caffeine is in a group in and of itself and they are more related to caffeine. Uh.

Sawyers: These are just more powerful?

Jensen: Considerably. I would say five to ten times more powerful.

Sawyers: So you don't think it can be harmful?

Jensen: Uh. I suggest that people not take one once a week. Uh. I took Fastin for a month once and then just stopped and I went through some withdrawals for about a day and a half. I didn't feel good. Uh. But it didn't last very long. But there was no question that. And one thing that you'll find, you probably, well, uh, you almost certainly lead a really rigorous life style and.

Sawyers: I never know when I'm going to be working.

Jensen: Yeah. And it's tempting for somebody with that, you know, kind of a drive to use these as a stimulant.

Sawyers: Uh huh.

Jensen: You'll have tremendous energy when you take these. So, which is great.

Sawyers: So if I have to stay up all night and cut a series. That's why I was down here. I was down in Springville shooting for a child abuse series.

Jensen: Uh. Uh. But that's what I would suggest. I will write you a prescription for Fastin and the other thing I like about this is I can give you two refills with each of these. I am giving you a three month supply right now. Dexedrine I can't do that with. I have to give it to you each month.

Sawyers: Okay.

Jensen: Okay. But, uh, like I said, if this isn't working for you, uh, I'll work with you a little bit and with other things. Uh. Is there anything as far as eating, things like that?

Sawyers: I like it. Laughs.

Jensen: Okay. Uh. What we'll. There are other things you can do. Uh. Medically I think we have big armament for weight loss right now that we didn't have in the past.

Sawyers: I read about something or I heard something on the air today about rats and its a new drug they are injecting in rats for obesity. Did you hear about that?

Jensen: No.

Sawyers: No.

Jensen: It seems funny people often hear these things before I do. So.

Sawyers: Well, it is something that they are injecting into rats and they were losing like thirty percent of their body weight.

Jensen: Oh, really. I'm not sure. Well, uh, where was it listed? Where did you find your information?

Sawyers: Uh, National Public Radio. On the radio.

Jensen: So, the radio.

Sawyers: I think it came out of *Science*, one of those journals.

Jensen: Hum. Yes, *Science* is kind of a lay journal. It is not really a medical journal, but, its like *Popular Mechanics*. But hold on.

Sawyers: So, then once you lose, you've lost your desired weight, then you can, I mean, what, does it suppress your appetite even after that?

Jensen: What it does, uh. You don't want to eat. You actually have to think, I mean, you eat, you know, just to stay healthy. And by the time you reach the three month period, and you may choose to go on, on an interval where you don't take it for a month in between. But you will have the prescription on hand. Uh. But this is the time to actually uh have eating habits and form patterns that are lasting. Okay. I'll go over some of those.

Sawyers: This is real interesting. Really. I mean I, you hear about all these weight loss programs. I went on Jenny Craig last year.

Jensen: Uh huh.

Sawyers: I lost some weight but I started to gain most of it back. If these work, maybe I should. Didn't you say that you helped a woman lose like thirty pounds, or some BYU person.

Jensen: Oh, yeah. Yeah.

Sawyers: Sounds like an interesting story. If they work, I should do a story.

Jensen: Uh. But someone like you is a perfect candidate for this. Okay. Uh. People can lose somewhere between ten and twenty pounds a month and, you know, you can get really lean with this. And, uh.

Sawyers: Can you lose too much weight, though? I mean, not that I would be worried about, you know, I mean, I think I.

Jensen: Well, you could be if you were thinking in anorexic ways. But probably not.

Sawyers: You just stop taking them when you get to your correct weight.

Jensen: Yeah. Uh.

Sawyers: So these are just the one a day?

Jensen: Uh hum. And this is what I would suggest you starting with. Uh. I'm a little bit concerned that you function properly. Okay.

Sawyers: Yeah. I do want.

Jensen: So. Uh. It suggests these need to be taken late morning. I think you can gauge when you take them. I would start out initially at say eight o'clock. I'd eat a little bit of food with it because I think it can upset your stomach a little bit. Uh. And you can tell when these wear off. With me, they wear off right about eight o'clock and I just like my battery had run out.

Sawyers: Uh huh. You mean eight o'clock in the morning. Take it at eight o'clock in the morning.

Jensen: Yeah. About eight o'clock at night is when I would notice this, this feeling, okay.

Sawyers: Oh. Okay.

Jensen: Okay. I need to tell this to you just because I think it may be an issue with your work. But, the, the time capsule itself is like a Contact time capsule and say it ran out and you were in the middle of something and this is like ruining things. You can actually take a small amount of the capsule and bite it and at that moment you get that effect. It is technically a way of abusing these, okay. Uh. And it could be dangerous if you bit an entire capsule. Okay. But it is one way of breaking that time release form of it. Grinding it on your teeth

Sawyers: You don't automatically have.

Jensen: Yeah.

Sawyers: Okay. That could be a problem.

Jensen: Yes. Because normally what I did in the morning, I would take it. I would grind some of that. I would wake right up and just go. You know, and I actually threw my last prescription away just because of the way I live. The way I think. I'm just compulsive. And you stop, you know, this isn't good for me right now. I'm not really uh losing more weight than I want to and this is giving me energy. I'm just going to abuse.

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

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

Sawyers: Oh. The granules, pebbles, okay.

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

Sawyers: Well, hopefully I could figure out a schedule that won't.

Jensen: Yes.

Sawyers: You think in the morning is better.

Jensen: Uh. It's suggested that these be taken at about ten o'clock usually.

Sawyers: Oh.

Jensen: But that's not when I took them. I would take them at about eight. Uh. (Pause). These come in a uh generic form and I would suggest getting a brand name.

Sawyers: It is that much different?

Jensen: Uh. In this case I think it is. Okay. And I need to look up Pondimin because that is just not something that I use a lot. To get everything straight.

Sawyers: Fastin is, that's what the doctors use it for is for weight loss?

Jensen: Yeah. That's what it is made for.

(Long pause in tape).

Jensen: Uh. Do you know how these things have worked for Lisa?

Sawyers: I don't. I don't know. I haven't asked Geoff. I should ask him. I only met her once. She doesn't look like she needs to lose much weight to me, but.

Jensen: Uh. In the hips. She is a little hip heavy. She dresses right. (Pause). Pondimin is difficult to find right now. Fastin, probably not. Uh. You can find Pondimin. If you choose to fill the Pondimin, I'd give yourself ten days at least before you.

Sawyers: So. Then if I fill this one, I take it in combination.

Jensen: Yes.

Sawyers: Just once a day.

Jensen: Interestingly, legally you take both of these in combination for three months which I think is pretty generous by the DEA. So. Uh. Its been approved and so uh.

Sawyers: So, its the same, its just a different kind of amphetamine.

Jensen: Yes. Uh. One way of thinking about it is like uh Ibuprofen, Naproxin, Naprosin are sister drugs. They are related to aspirin.

Sawyers: Just some work better for different people or something?

Jensen: Uh hum. Pondimin is sugar acting. This is a long acting _____ . These are tablets. So these will only work say maybe two to four hours. Let's see what the half life is. Twenty hours it says. Uh. Let's see. Uh. That's a metabolize two to four hours. So. Uh. You know, average it out to three hours. So.

(Pause).

(Tape ends).