

2008

Gary B. Ferguson vs. Williams & Hunt INC, Elliot J. Williams, George A. Hunt, and Kurt Frankenburg: Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

No 20080273

GARY B. FERGUSON,
Plaintiff/Appellant,

vs.

WILLIAMS & HUNT, INC., ELLIOTT J. WILLIAMS, GEORGE A. HUNT, and
KURT FRANKENBURG,

Defendants/Appellees.

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JURISDICTIONAL STATEMENT

This appeal is from the final judgment of the Honorable Tyrone Medley, The Third Judicial District Court in and for Salt Lake County, State of Utah. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue I: The trial court misinterpreted and misapplied binding Utah precedent and black letter defamation law in granting defendants' directed verdict request. The trial court erroneously directed the verdict for the defendants regarding the claims for defamation and intentional interference with economic relations pertaining to the Utah Medical Insurance Association ("UMIA") because it applied a subjective standard based on Alaska law, rather than the applicable Utah precedent, which required an objective standard when determining that the defendants did not abuse their claimed conditional privilege. (R. at 864-350).

In *Brehany v. Nordstrom*, 812 P.2d 49, 57 (Utah 1991), this Court explained:

On appeal, the standard we use to review a directed verdict granted at the close of evidence is whether reasonable minds would agree that no substantial evidence supported each element of a cause of action. *Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982). To that end, we examine the evidence in the light most favorable to the losing party. If there is a reasonable basis in the evidence that would support a verdict in favor of the losing party, the directed verdict cannot stand. *Graystone Pines*, 652 P.2d at 898. But a directed

verdict is appropriate if, on uncontested facts and under the applicable law, one party is entitled to judgment.

In addition to misapplying the law, the trial court erred in directing the verdict in this case because contested facts existed: “Whether a statement is entitled to the protection of a conditional privilege presents a question of law; whether the holder of the privilege lost it due to abuse presents a question of fact.” *O’Connor v. Burningham*, 2007 UT 58, ¶ 38, 165 P.3d 1214, 1224 (citing *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 53, 116 P.3d 271; *Brehany*, 812 P.2d at 58; *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P.2d 272, 274-75 (1951)).

Issue II: The trial court erroneously granted defendants’ motion for summary judgment on Plaintiff’s claim for intentional interference with prospective economic relations regarding Siegfried & Jensen.

The trial court should have denied defendants’ motion for summary judgment. “In reviewing the [trial] court’s grant of summary judgment, we review the court’s legal decisions for correctness, giving no deference, and review the facts and inferences therefrom in the light most favorable to the nonmoving party.” *Young v. Wardley Corp.*, 2008 UT App 104, ¶ 7, 182 P.3d 412, 414 (quoting *Brockbank v. Brockbank*, 2001 UT App 251, ¶ 10, 32 P.3d 990 (internal quotation marks omitted)); see *Woodbury Amsource, Inc. v. Salt Lake County*, 2003 UT 28, ¶ 4, 73 P.3d 362 (“We review the district court’s summary judgment ruling for correctness, granting no deference to its legal conclusions.”).

Issue III: The trial court erroneously granted defendants' motion for summary judgment on plaintiff's claims against defendant Frankenburg. The trial court should have denied summary judgment on the claims against defendant Frankenburg because disputed issues of material fact existed.

"In reviewing the [trial] court's grant of summary judgment, we review the court's legal decisions for correctness, giving no deference, and review the facts and inferences therefrom in the light most favorable to the nonmoving party." *Young*, 2008 UT App 104, ¶ 7, 182 P.3d at 414.

Issue IV: The trial court erroneously granted defendants' motion in limine precluding Plaintiff from offering any evidence of the fact that members of the firm consumed alcohol in the office, of any alleged affair between firm employees, of Plaintiff's surgical procedure scheduled for May 6, 2005, and of Plaintiff's brother's suicide. Plaintiff needed this evidence to meet his burden of proof to show defendants abused the conditional privilege.

The trial court should have denied defendants' motion in limine and allowed the evidence to show motive and malice. This Court reviews the trial court's legal conclusions in a motion in limine for correctness. *Ford v. Am. Express Fin. Advisors, Inc.*, 2004 UT 70, ¶ 33, 98 P.3d 15, 24.

STATEMENT OF THE CASE

The trial court entered the final judgment in this matter on February 26, 2008, which entered no cause of action Judgment and the judge's Order also dated February 26, 2008, which granted defendants' motion for directed verdict on the

Plaintiff's claims of defamation and intentional interference with economic relations, (R. at 836-839), as well as the Order dated February 26, 2008, which granted defendants' motion in limine and the grants of summary judgment on defendants' motion for reconsideration of the Court's order regarding Plaintiff's claim for wrongful termination, intentional infliction of emotional distress and intentional interference with prospective economic relations regarding Siegfried & Jensen and all claims against defendant Frankenburg. (R. at 840-843). Appellant filed his notice of appeal on March 21, 2008. (R. at 844-846).

STATEMENT OF FACTS

On May 5, 2005, defendants wrongfully terminated Plaintiff/Appellant Gary B. Ferguson ("Ferguson") from his employment with Williams & Hunt, Inc. ("the law firm"), where he had been employed as an attorney since 1991, and he was one of the founding partners/shareholders. (R. at 863-61; 864-180 to -181). Ferguson was a medical malpractice defense lawyer who had built virtually his entire professional practice around one client — UMIA — during his employment at the law firm; UMIA was also the law firm's largest client.

Before his termination, Ferguson had a solid working relationship with UMIA, and UMIA sent him direct referrals for legal work. (R. at 864-278). However, defendants knowingly, in reckless disregard for the truth, and with malice defamed Ferguson to representatives of UMIA by falsely informing them that he had been over-billing for his time. The law firm did this in order to avoid Ferguson being allowed by UMIA to take the medical malpractice files that he

was currently handling at the time of his termination to another firm and continue handling the medical malpractice defense on those cases. Defendants intended their false communication to UMIA to harm Ferguson and prevent him from getting any future cases from UMIA after the law firm terminated him. (R. at 185, Ex. A at 28-29, 71-72). Defendants refused to take the “over-billing” concerns to UMIA before terminating Ferguson because they knew that would yield a result contrary to their plan to defame Ferguson and destroy his ability to compete for UMIA’s business — when approached after the fact, UMIA found no over-billing and had no complaints. (R. at 185, Ex. I; 864-290). Defendants could have terminated Ferguson for any reason; however they defamed him in a calculated manner in order to eliminate a competitor and endeavored to kill Ferguson’s career as a medical malpractice attorney.

Ferguson was terminated for his unwillingness to participate in the law firm drinking ritual. (R. at 185, Ex. A at ¶¶ 8-11, 16). The claim of over-billing was merely a retaliatory act on the part of the defendants to what they perceived as a slight against them by Ferguson and was used as a tool to ensure that all of the partners would vote to remove Ferguson as a partner in the firm. The defendants knew at the time that the computer log sheet was not a sufficient basis to claim that an attorney had over-billed; they merely used this claim out of ill will and malice toward Ferguson, which is evident in the firm meeting where the over-billing was discussed only as one of the several reasons for the “reasons we want him out.” (R. at 185, Ex. J).

Defendants fired Ferguson the day before surgery to remove a suspected cancerous thyroid. (R. at 7, ¶ 40). The defendants knew that Ferguson's disability policy would terminate the day he was fired. The defendants knew that one of the recognized complications of a thyroidectomy was loss of the ability to speak. Defendants knew that Ferguson could end up unemployable as a trial lawyer as a result of the surgery, and if terminated, he would have no disability insurance. This action, as much as anything, proves malice on defendants' part. (R. at 185, Ex. C at ¶¶ 16, 20, 24).

Defendants terminated and defamed Ferguson because he attempted to have them obey the laws against sexual harassment with respect to male attorneys having sexual relationships with subordinates. (R. at 185, Ex. C, ¶ 18).

Defendants terminated and defamed Ferguson knowing that part of the reason he worked so many hours in a compressed time was because he was taking a portion of the month of May 2005 off of work for family celebrations: his son graduating from medical school and his daughter doing her dissertation for her Ph.D. during the same time period. (R. at 185, Ex. C at ¶¶ 41, 42; 864-107 to -109, -229 to -230). And, defendants Hunt and Williams knew Ferguson's brother, Christopher Ferguson, committed suicide after being terminated from his position as a nurse anesthetist. (R. at 185, Ex. C at ¶ 26).

Defendants defamed Ferguson due to what they perceived as a slight against them by Mr. Ferguson and was used as a tool to ensure that all of the partners would vote to remove Ferguson as a partner in the firm. The defendants

knew at the time that the computer log sheet was not a sufficient basis to claim that an attorney had over-billed. They merely used this claim out of ill will and malice toward the Ferguson, which is evident in the firm meeting where the over-billing was discussed only as one of the several reasons for the “reasons we want him out.” (R. at 185, Ex. E at 89-96; Ex. J). Even at the time after the supposed investigation had taken place by the law firm, Williams, who had performed the investigation, was unable to point to any specific case where Ferguson had over-billed. (R. at 185, Ex. E at 98-101; 864-158).

Defendants moved for summary judgment on the basis of the privilege to communicate a matter to another that concerns the reasons for an employee’s discharge. (R. at 864-150 to -151). That privilege is not absolute, it is conditional or qualified, and the principal factual dispute in this case should have prevented the directed verdict in this case, and contrary to defendants’ representations at trial for the need of “mountains of evidence” contrary to the defamatory statement (R. at 864-336, -345), defendants knew that they had no credible evidence that Ferguson had over-billed UMIA.

There is no policy in place, nor is it common practice in the legal community, to limit the time an attorney bills a client to the time the attorney spends using the office computer; however, the “proof” submitted by the law firm to UMIA for Ferguson’s “over-billing” came from defendants investigating the times Ferguson logged in and out of the law firm’s computer server, and determining that only time spent logged on to the firm’s server was considered

time Ferguson was working. (R. at 185, Ex. E at 37-38; 864-169 to -170, -234). And, this investigation only comprised Ferguson's desktop computer, not his laptop, which defendants never produced information about in discovery. (R. at 864-242). Defendant Williams testified that he did not have the information to draw the over-billing conclusions when presented with particular billing entry examples. (R. at 864-206 to -207). He even agreed that accusing Ferguson of over-billing without having investigated any of those entries would be unreasonable, but that he did not do so. (R. at 864-207). Williams further testified that the law firm was "unable to determine which specific entries — typically were unable to determine which specific entries reflected bills for work he [Ferguson] did not do." (R. at 864-224 to -225).

As Mr. Osowski testified at his deposition:

Well, he [Williams] advised me that as his duty as general counsel for UMIA, that he had a duty to disclose that Gary's billing practices had come under question. He indicated that they decided to keep track of when he was logging on and off his computer, and that within the first couple of days of doing that, that I think Gary had some kind of medical problem he had to take care of or had a medical appointment and came in about midday and left around five o'clock and billed UMIA for approximately 11 hours of work that day.

(R. at 185, Ex. G at 9-10). The log in/log out monitoring had never been used to track billable time for any other attorney at the law firm, (R. at 185, Ex. E at 38), in fact defendant Williams had no familiarity regarding computer log in/log out times before the law firm began investigating Ferguson. (R. at 864-191). Medical malpractice attorneys spend a good deal of their billable time away from the office

taking depositions, researching case law, doing medical research, meeting with clients, meeting with expert witnesses and doctors after hours. (R. at 864-142). This was Ferguson's method of legal practice, and was also the practice of the other trial lawyers at the law firm, including defendant Williams.

Before the law firm terminated Ferguson, defendant Williams contacted Martin Osowski of UMIA and told him that he had a trust issue with Ferguson's billings, and informed him the law firm planned to fire Ferguson. (R. at 185, Ex. H at 31). Williams told Osowski "we had formed the belief, after reviewing information we'd collected, that we could not trust the accuracy of [Ferguson's] bills." (R. at 864-233). He said: "It appeared to us that he was billing more than he actually worked." (R. at 864-233). Williams told Osowski that the law firm was terminating Ferguson because he had over-billed UMIA. (R. at 185, Ex. G at 20; 864-233). Based on this communication, the law firm sent a false message to UMIA and Osowski that UMIA could not trust Ferguson to tell the truth about the time he had spent on UMIA cases, and that UMIA had been over-billed for Ferguson's work, according to defendant Williams, and "that was the reason for termination." (R. at 185, Ex. G at 25; 864-258 to -259).

Osowski testified that he trusted the attorneys who handled medical malpractice defense work for UMIA to bill for the time they spent on his cases, actual time, not "time that was made up." (R. at 185, Ex. G at 11). He expected to pay for time they actually spent working, whether in the office or not. *Id.* He could not recall ever before having discussed with defendant Williams any

concerns about Ferguson's representation of physician insureds for UMIA. *Id.* at 12. Neither had he ever had any complaints from his company's claims department with respect to either the amount of time that Ferguson was billing, or the way he was representing their clients. *Id.* at 12-13. Indeed, the trial court initially found: "There appears to be competent evidence in the record that there were no complaints by UMIA of the plaintiff over-billing them." (R. 862-19 to -20). Ferguson testified that "the UMIA adjusters encourage us to spend the time to do it right. So no, they've never — they've never even once suggested that I was spending too much time defending their doctors." (R. at 863-67). No complaints. (R. at 863-69 to -70).

Defendants knew Ferguson had developed a substantial business relationship with UMIA and with its physician insureds while working at the law firm. (R. at 32, ¶¶ 34, 35; 864-278). As of 2005, the year of his termination, 100 percent of Ferguson's work was for UMIA. (R. at 863-69). Defendants knowingly defamed Ferguson to UMIA representatives by falsely informing them he had been over-billing for his time to avoid Ferguson being allowed by UMIA to take the medical malpractice files he was currently handling at the time of his termination to another firm and continue handling the medical malpractice defense on those cases, thereby "poisoning the well." (R. at 864-117). Defendants knew that if Ferguson was simply terminated, that he would take his to-date billing, current files, about 20 files (R. at 864-284), and future work away from the law firm and transfer them to his new employer. Had UMIA not been falsely told by

defendants that Ferguson had over-billed for his time, Ferguson's client base would likely have continued to include UMIA insured physicians and medical malpractice defense. (R. at 185, Ex. G at 15-16, 24-25; Ex. B at 11, 33, 35-37; Ex. E at 111).

As a result of the meeting between Williams and Martin Osowski, Mr. Osowski and UMIA made the decision not to assign new cases to Ferguson. (R. at 864-258 to -259). Williams had anticipated that this would be the result. (R. at 864-259). As Mr. Osowski later stated in his deposition, the reasons the files stayed at the law firm, when Ferguson left was simple: "It was an issue of trust." (R. at 185, Ex. G at 20-21). The law firm had told him that Ferguson had "over-billed" his company. (R. at 864-117, -258). The issue of trust was not what he knew personally or what he had seen by way of evidence, rather, it was what he had been told by defendant Williams. (R. at 185, Ex. G at 20).

Arthur Glenn, Vice President for Claims of UMIA, testified that he was responsible for assigning cases to counsel as needed to represent UMIA's physicians. (R. at 185, Ex. B at 4). When the law firm terminated Ferguson, he called Mr. Glenn and informed him he had been accused by the law firm of over-billing UMIA. (R. at 864-283). Ferguson then asked Mr. Glenn specifically if UMIA had ever had any complaint or problem with his billing, and Mr. Glenn told Ferguson that he had not ever had any complaint or problem with his billing, (R. at 864-119), and testified to that same fact. (R. at 864-280, -283). Mr. Glenn had reviewed Ferguson's bills against other bills submitted by attorneys at the law firm

as part of the spot review he conducted every month. (R. at 185, Ex. B at 7-9; 864-280 to -281).

When Mr. Glenn reviewed the billing statements from the law firm for the first five months of 2005, and he created a spreadsheet to review for evidence that Ferguson had over-billed UMIA. (R. at 864-286). The spreadsheet created by Mr. Glenn supported Ferguson. (R. at 185, Ex. I). Mr. Glenn knew Ferguson was working on “several big cases” for UMIA. (R. at 185, Ex. B at 12). He also indicated he would expect that a lawyer working on big, complex, medical malpractice cases would have spent more time than another attorney working a simpler file. *Id.*

The spreadsheet showed implicitly that Ferguson had not over-billed UMIA. (R. at 185, Ex. I; 864-290). This spreadsheet showed, for example, that, on a trip to Virginia Beach to take depositions, Ferguson billed an hour less for the trip than did UMIA co-counsel representing another physician. It showed that Mr. Ferguson had actually under-billed UMIA for his time. (R. at 185, Ex. B at 17-18). It also showed an entry for 22 hours of billable time that had been incorrectly logged as two-days’ worth of time for one day entry. The time billed was correct, but the billing date was incorrect, based on inaccuracies of the computer billing system in place at the law firm. *Id.* at 18-19. When asked whether he had formed an opinion as to whether UMIA had been over-billed for Ferguson’s time, Mr. Glenn testified that “I didn’t find anything unusual in the billing that I would consider overbilling.” (R. at 185, Ex. B at 22). The billing program used by the

law firm frequently recorded two days' worth of billable time on one day. (R. at 185, Ex. A at 78-80; Ex. D). For this reason, no one could rely on a day's entry of time as the actual amount of time worked for any specific day by that attorney. And, the trial court found that Ferguson "appears to be competent to offer testimony regarding the inaccuracies of the computer time program there at the firm." (R. at 862-19).

Mr. Glenn met with the lawyers from the law firm and told them his findings, "nothing unusual," *id.*, based on the spreadsheet. (R. at 864-291). The lawyers at the meeting told Mr. Glenn that the basis for firing Ferguson was not something Mr. Glenn would see on the bills, rather, they said they had a computer program that they ran in their office, and it was based on the findings of log on and log off times. (R. at 864-291). Defendants did not give Mr. Glenn the April 18, 2005 time records before their meeting. (R. at 864-304). Defendants told Mr. Glenn that Ferguson had billed more hours that quarter than either Elliott Williams or Bruce Jensen, and that he had over-billed UMIA for his work. (R. at 185, Ex. B at 24; 864-292 to -293). The lawyers did not show Mr. Glenn any proof, not a single paper, of evidence. (R. at 185, Ex. B at 25; 864-299 to -300, -304). When Mr. Glenn asked the lawyers how much UMIA had been over-billed, and how they would even know the amount, they told him defendant Williams "was working with Marty on that, Mr. Osowski." (R. at 185, Ex. B at 28). The statement made by the lawyers to Mr. Glenn was false: Mr. Osowski gave no indication in his deposition that he was ever working on the amount with

defendant Williams, or that he had any involvement after his initial meeting with the lawyers. Mr. Osowski stated that money was reimbursed to UMIA, an “approximately a \$10,000 credit” against a future bill. (R. at 185, Ex. G at 16). When asked whether he had discussions with any other member of the law firm about the matter, he testified that he had not, before Ferguson’s termination, and “may have afterwards just in passing.” (R. at 185, Ex. G at 15-16).

Ferguson had a long-standing working relationship with Mr. Glenn, and had done previous work for him in the early 1980’s when he worked for Aetna. (R. 863-57; 864-277). Mr. Glenn testified that Ferguson had asked him “if he’d still be able to do work for UMIA after he left Williams and Hunt.” (R. at 864-283). But that would be Marty Osowski’s decision. (R. at 864-284). Mr. Glenn further testified that the following day after his conversation with Ferguson, his boss, Marty Osowski called him and told him Ferguson “had been terminated for- I think his words were “billing integrity,” and to let my guys know that we weren’t to use him on any other cases,” (R. at 185, Ex. B at 11), and “we weren’t to assign any more work to Gary.” (R. at 864-284).

Trial lawyers do not normally limit billing time to only that time spent using a computer in the office; nonetheless, this formed the foundation for defendants’ assertion that Ferguson over-billed UMIA. (R. at 185, Ex. E at 37-38; 864-169 to -170, -234). Trial lawyers often work outside of the law office attending depositions, meeting with witnesses and clients, including expert witnesses, researching case law, doing medical research, and working on laptop

computers. (R. at 863-73 to -74, -92; 864-142). Ferguson often took work with him outside of the office, and on a daily basis. (R. at 185, Ex. A at 74). Having his desktop computer logged on or off had nothing to do with the actual amount of time Ferguson put into defending a doctor and there were no log on/log off requirements at the law firm. (R. at 863-74 to -76; 864-191 to -192). Ferguson's billing recordation practices included using a handwritten calendar and using the law firm's billing system template. (R. at 864-102 to -103).

SUMMARY OF THE ARGUMENTS

Issue I: The trial court misinterpreted and misapplied binding Utah precedent and black letter defamation law in granting defendants' directed verdict request. The trial court erroneously directed the verdict for the defendants regarding the claims for defamation and intentional interference with economic relations as pertaining to the UMIA because it applied a subjective standard based on Alaska law, rather than the applicable Utah precedent, which required an objective standard when determining that the defendants did not abuse their claimed conditional privilege.

In *Brehany v. Nordstrom*, 812 P.2d 49, 57 (Utah 1991), this Court explained:

On appeal, the standard we use to review a directed verdict granted at the close of evidence is whether reasonable minds would agree that no substantial evidence supported each element of a cause of action. *Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982). To that end, we examine the evidence in the light most favorable to the losing party. If there is a reasonable basis in the evidence that would

support a verdict in favor of the losing party, the directed verdict cannot stand. *Graystone Pines*, 652 P.2d at 898. But a directed verdict is appropriate if, on uncontested facts and under the applicable law, one party is entitled to judgment.

The trial court should have applied the binding precedent from *O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214, and *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 116 P.3d 271, which used the correct objective Restatement standard, rather than the *Mt. Juneau Enterprises, Inc. v. Juneau Empire*, 891 P.2d 829 (Alaska 1995) and *DeNardo v. Bax*, 147 P.3d 672 (Alaska 2006) cases, which applied an incorrect subjective standard. This Court in *O'Connor* properly stated:

Because the existence of defamatory content is a matter of law, a reviewing court can, and must, conduct a **context-driven** assessment of the alleged defamatory statement and reach an independent conclusion about the statement's susceptibility to a defamatory interpretation. This is not to say that the responsibility of determining whether a statement is defamatory as a matter of law falls to the reviewing court. In the first instance, it does not. Rather, the reviewing court must answer the question of defamatory susceptibility as a matter of law in a nondeferential manner.

2007 UT 58, ¶ 26, 165 P.3d at 1222 (emphasis added). This Court stated the same in *Wayment*:

Evidence of "malice" in this context may include indications that the publisher "made [the statements] with ill will, [that the statements] were excessively published, or [that the publisher] did not reasonably believe his or her statements." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992); *see also Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P.2d 272, 275 (1951) (relying on authority requiring the employer to have " 'an **honest belief** in the truth of the statement' " (quoting *Harrison v. Garrett*, 132 N.C. 172, 43 S.E. 594, 596 (1903))); *Hales v. Commercial Bank*, 114 Utah 186, 197 P.2d 910, 913 (1948) (" 'The

publisher's lack of belief in the truth of the defamatory matter published, or his lack of **reasonable grounds** for so believing, while immaterial to the existence of the privileged occasion, **is important** as constituting an abuse of the occasion which deprives him of the protection which it would otherwise afford.' ” (quoting Restatement of Torts § 594 cmt. b (1938))).

2005 UT 25, ¶ 53, 116 P.3d 271 (emphasis added).

In addition to misapplying the law, the trial court erred in directing the verdict in this case due to the questions of fact involved: “Whether a statement is entitled to the protection of a conditional privilege presents a question of law; whether the holder of the privilege lost it due to abuse presents a question of fact.” *O’Connor*, 2007 UT 58, ¶ 38, 165 P.3d at 1224 (citing *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 53, 116 P.3d 271; *Brehany*, 812 P.2d at 58; *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P.2d 272, 274-75 (1951)). Questions of contested facts abounded at the close of Plaintiff’s evidence that showed the defendants abused the qualified or conditional privilege and the defendants acted with malice based on an objective standard. Ferguson met his burden at trial (and could have presented more evidence of malice were it not for the trial court’s motion in limine ruling precluding certain evidence also appealed herein, see Issue IV, *infra*) showing that the privilege was abused by proving that the defendants acted with malice and with reckless disregard as to the truth or falsity of the over-billing allegations, and/or knowing the matter to be false.

Issue II: The trial court erroneously granted defendants’ motion for summary judgment on plaintiff’s claim for intentional interference with prospective economic relations regarding Siegfried & Jensen.

The trial court should have denied defendants’ motion for summary judgment. “In reviewing the [trial] court’s grant of summary judgment, we review the court’s legal decisions for correctness, giving no deference, and review the facts and inferences therefrom in the light most favorable to the nonmoving party.” *Young*, 2008 UT App 104, ¶ 7, 182 P.3d at 414; *see Woodbury Amsource, Inc. v. Salt Lake County*, 2003 UT 28, ¶ 4, 73 P.3d 362 (“We review the district court’s summary judgment ruling for correctness, granting no deference to its legal conclusions.”).

Issue III: The trial court erroneously granted defendants’ motion for summary judgment on plaintiff’s claims against defendant Frankenburg because genuine issues of material fact and procedural deficiencies precluded such a ruling. “In reviewing the [trial] court’s grant of summary judgment, we review the court’s legal decisions for correctness, giving no deference, and review the facts and inferences therefrom in the light most favorable to the nonmoving party.” *Young*, 2008 UT App 104, ¶ 7, 182 P.3d at 414.

Issue IV: The trial court erroneously granted defendants’ motion in limine precluding Plaintiff from offering any evidence of the fact that members of the firm consumed alcohol in the office, of any alleged affair between firm employees, of Plaintiff’s surgical procedure scheduled for May 6, 2005, and of Plaintiff’s

brother's suicide, and should have allowed the evidence to show motive and malice. Plaintiff needed this evidence to meet his burden of proof to show defendants abused the conditional privilege. This Court reviews the trial court's legal conclusions in a motion in limine for correctness. *Ford v. Am. Express Fin. Advisors, Inc.*, 2004 UT 70, ¶ 33, 98 P.3d 15, 24.

ARGUMENT

Important public policy reasons underlie speedy judicial determinations in defamation actions, including matters such as witness memories fading and quick redress of the defamation itself. *See* Utah Code Ann. § 78-12-29(4) (providing one year statute of limitations for libel and slander actions). The trial court's summary judgment orders, motion in limine ruling, and directed verdict preempted the jury's ability to determine justice in this matter.

I. THE TRIAL COURT MISINTERPRETED AND MISAPPLIED BINDING UTAH PRECEDENT AND BLACK LETTER DEFAMATION LAW IN GRANTING DEFENDANTS' DIRECTED VERDICT REQUEST

This Court recently and explicitly addressed conditional privilege law in the defamation context in the *O'Connor* case. 2007 UT 58, 165 P.3d 1214. The trial court failed to follow this precedent in which this Court failed to find a high school basketball coach a public figure, but found a familial conditional privilege under Restatement (Second) of Torts section 597, which conditional privilege still needed to be proven as a question of fact on remand, and explained:

It is important to note that our reference to the Parents in this context is not limited to immediate family members of basketball team

members, but also includes statements made by third parties so long as the statements were published “within the generally accepted standards of decent conduct” under the conditional privilege described in section 595 and recognized by this court in *Brehany*. See Restatement (Second) of Torts § 595(1)(b); *Brehany*, 812 P.2d at 58. This standard does not shield defamatory statements that abuse the conditional privilege, but it does protect those defendants who are not immediate family members of women on the team. The Parents may have abused and therefore lost this conditional privilege as a refuge if, for example, they knew their statements regarding Mr. O’Connor were false or acted with a reckless disregard as to their falsity, see Restatement (Second) of Torts § 600, exceeded the privilege’s purpose in making their statements, see *id.* § 603, or made statements to an individual or in a manner not reasonably believed to be necessary for the accomplishment of the privilege’s purpose, see *id.* §§ 604, 605, 605A. See also *Hales v. Commercial Bank*, 114 Utah 186, 197 P.2d 910, 913 (1948) (“ ‘The publisher’s lack of belief in the truth of the defamatory matter published, or his lack of reasonable grounds for so believing, while immaterial to the existence of the privileged occasion, is important as constituting an abuse of the occasion which deprives him of the protection which it would otherwise afford.’ ” (quoting Restatement of Torts § 594 cmt. b (1938))). Although we have not yet had occasion to formally adopt all the potential means to abuse the privilege cited in the Restatement, they all enjoy close ties to common sense and thus appear worthy of our confidence.

O’Connor, 2007 UT, ¶ 37, 165 P.3d at 1224 (emphasis added). An older, but nonetheless applicable case, the *Hales v. Commercial Bank*, 197 P.2d 910 (1948) decision, remains good law and the same renewed reasoning is found in this Court’s more recent decision *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 116 P.3d 272 (Utah 2005). Thus, analogously, the language from the *Hales* quote above, “lack of belief in the truth” mirrors section 600’s “knows the matter to be false” language while “lack of reasonable grounds for so believing” mirrors sections 600’s “acts in reckless disregard” language. These are objective

tests. The trial court should not have dismissed the *O'Connor/Hales* precedent in favor of Alaska precedent. (R. 864-333 to -335). Based on this Court's confidence in the Restatement conditional privilege provisions, analysis of each section applicable to this case highlights the trial court's error in granting the directed verdict in this case.

A. The Trial Court Erroneously Interpreted Restatement (Second) of Torts Principles Inherent in and Consistent with Utah Law

The applicable Restatement (Second) of Torts sections include:

§ 593. Elements Of Conditional Privilege Arising From Occasion

One who publishes defamatory matter concerning another is not liable for the publication if

- (a) the matter is published upon an occasion that makes it conditionally privileged and
- (b) the privilege is not abused.¹

Comment:

a. The rules describing occasions that give rise to a conditional privilege are stated in §§ 594 to 598A. The rules governing the exercise of a conditional privilege arising from the occasion are stated in §§ 599 to 605A.

b. The privilege to publish defamatory matter that arises out of a conditionally privileged occasion is not personal to those who publish it for the purposes indicated in §§ 594-598A inclusive. It is available also to those to whom those persons give authority to publish defamatory matter on their behalf, if the authorization is a reasonable means of accomplishing the purpose of the privilege. Thus a newspaper publisher is privileged to publish an obviously

¹ This is a question of fact, *O'Connor*, 2007 UT 58, ¶ 38, 165 P.3d at 1224, and in the present case the Statement of Facts shows that Plaintiff met his burden to show the abuses.

defamatory advertisement if the person inserting it is conditionally privileged to publish the defamatory matter contained in it and publication in the newspaper is a reasonable method of giving it the publicity necessary to accomplish the purpose for which the privilege is given. (See § 612).

c. Relation of privilege to constitutional requirement of fault as to falsity. A conditional privilege is one of the methods utilized by the common law for balancing the interest of the defamed person in the protection of his reputation against the interests of the publisher, of third persons and of the public in having the publication take place. The latter interests are not strong enough under the circumstances to create an absolute privilege but they are of sufficient significance to relax the usual standard for liability. Thus the traditional balance at common law had been attained in the past by holding that a person having a conditional privilege was not subject to the normal strict liability for a defamatory communication but was liable only if he did not believe the statement to be true or lacked reasonable grounds for so believing. This adjustment of the conflicting interests has now been subjected to necessary modification by the recent holding of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, (1972) 418 U.S. 323, that strict liability in defamation is unconstitutional and that a publisher can be held liable only if he was at fault amounting at least to negligence regarding the falsity of the statement. (See § 580B).

One consequence of this holding is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of a conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose. (See § 600). For explanation of this in more detail, see the Special Note to Topic 3, immediately preceding § 593; and see § 580B, Comment 1.

Another significant consequence of all this is that the courts will now find it necessary to reassess the circumstances under which it is appropriate to grant a conditional privilege. If a proper adjustment of the conflicting interests of the parties indicates that a publisher should be held liable for failure to use due care to determine the truth of the communication before publishing it, a conditional privilege is not needed and should not now be held to apply. The conditional privilege should be confined to a situation where the court feels that it is appropriate to hold the publisher liable only in case he knew of the falsity or acted in reckless disregard of it. This should be borne in mind in contemplating each of the sections on conditional privilege.

§ 594. Protection Of The Publisher's Interest

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief² that

- (a) there is information that affects a sufficiently important interest of the publisher, and
- (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

§ 595. Protection Of Interest Of Recipient Or A Third Person

(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief³ that

- (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
- (b) the recipient is one to whom the publisher is under a legal duty⁴ to publish the defamatory matter or is a person to whom its

² Defendants testified in ways that wholly belied any "correct or reasonable belief" that Ferguson was over-billing UMIA. *See* Statement of Facts; (R. at 864-191, -206 to -207, -224 to -225, -233 to -234, -240, -258 to -259).

³ *Accord O'Connor*, 2007 UT 58, 165 P.3d 1214; *Wayment*, 2005 UT 25, 116 P.3d 271; Utah Code Ann. § 45-2-3. Privileged publication or broadcast defined:

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

(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.

publication is otherwise within the generally accepted standards of decent conduct.⁵

(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

(a) the publication is made in response to a request⁶ rather than volunteered by the publisher or

(b) a family or other relationship exists between the parties.

§ 596. Common Interest

An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe⁷ that there is information that another sharing the common interest is entitled to know.

⁴ As further evidence of the malice engaged in by making the defamatory statements at issue in this case selectively to only UMIA, Ferguson's main client, no one at the law firm fulfilled their ethical or legal duty to report the over-billing to the Utah State Bar. (R. at 864-259 to -261).

⁵ See, e.g., Issue IV, *infra*, regarding the law firm's false conflict reporting to Ferguson's new law firm and calculated timing in firing him the day before his surgery.

⁶ UMIA made no such request, indeed, Mr. Glenn had no concerns about Ferguson's preparation for depositions, (R. at 864-303), or billing. (R. at 864-280).

⁷ Defendants admitted in trial testimony that the computer log on/log off records were not sufficient in and of themselves to correctly or reasonably form the belief

§ 599. General Principle

One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege.

Comment:

a. The privileges described in §§ 594-598A are conditional ones, that is, the protection that they give is conditioned upon the manner in which the privilege is exercised. The unreasonable exercise of the privilege is an abuse of it that defeats the protection otherwise afforded. The privilege may be abused because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter (see §§ 600-602); because the defamatory matter is published for some purpose other than that for which the particular privilege is given (see § 603); because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege (see § 604); or because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged. (See §§ 605, 605A).

that Ferguson was over-billing UMIA, (R. at 185, Ex. E at 37-38; 864-169 to -170, -234), defendants did not provide the Timekeeper information (Defendants' Trial Ex. No. 3) to Mr. Glenn to have the opportunity to analyze even though it was created on April 18, 2005 — before the May 20, 2005 meeting, (R. at 864-304), and particularly in light of Mr. Glenn's spreadsheet exhibiting no apparent billing abuses, (R. at 185, Ex. I), and the realities and practicalities of modern law practice occurring outside the office and on computers other than solely the lawyer's desktop computer.

§ 600. Knowledge Of Falsity Or Reckless Disregard As To Truth

Except as stated in § 602, one who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he

- (a) knows the matter to be false, or
- (b) acts in reckless disregard as to its truth or falsity.

Comment:

a. The traditional common law system of a set of conditional privileges with possible loss of the privilege through its abuse, as set forth in §§ 593-605A, involves a process of balancing competing interests in accordance with the facts. The traditional balance at common law had been attained in the past by holding that a person having a conditional privilege was not subject to the normal strict liability for a defamatory communication but was liable only if he did not believe the statement to be true or lacked reasonable grounds for so believing.

This adjustment of the conflicting interests has now been subjected to necessary modification by the recent holding of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, that strict liability in defamation is unconstitutional and that a publisher can be held liable only if he was at least negligent regarding the falsity of the statement. (See § 580B). This holding has affected particularly the provisions of this Section.

b. One consequence of the holding is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to amount to abuse of a conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose. The policy upon which the conditional privilege is based then no longer applies, and except as stated in § 602, the publisher is not given the protection that the privilege will otherwise afford, if the matter turns out to be false. (See the Special Note to Topic 3, immediately preceding § 593; and see §§ 599, Comment d, and 580B, Comment l.)

Reckless disregard as to truth or falsity exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.⁸ The standard here is the same whether

⁸ Believing that a lawyer's desktop computer log on and log off times adequately reflect detailed billing and form the sole basis for documenting billings proves

liability will be imposed for a defamatory communication about a public official or a public figure. (See § 580A, especially Comment d).

c. This Section applies to the privileges set forth in §§ 594-598A. As indicated in § 599, Comment c, the provisions of §§ 600-605A do not apply to the privileges expressed in §§ 611 and 612.

d. If the defamatory matter turns out to be true, the publisher has a complete defense under the rule stated in § 581A, even though he believed it to be false or acted in reckless disregard as to its truth or falsity.

B. The Trial Court Erroneously Relied on the *Mt. Juneau* and *DeNardo* Alaska Defamation Cases, Because Utah and Alaska Define and Analyze Malice in the Conditional Privilege Context Differently

The trial court's reliance on *Mount Juneau Enterprises, Inc. v. Juneau Empire*, an Alaska Supreme Court decision, to order a directed verdict in this case was misplaced and wrong. 891 P.2d 829 (Alaska 1995). The Alaska case is not on point for two critical reasons: (1) it was a public figure defamation case, whereas the present case involves a private individual defamation case and (2) the actual malice standard applied in *Mount Juneau* is distinct from the conditional privilege malice inquiry required under Utah law, and the trial court should have applied binding precedent from this Court to determine that defendants had forfeited their conditional privilege, or at least that factual issues existed regarding abuse of the conditional privilege.

Mount Juneau addressed defamation in the context of a public figure

highly probable to be wrong and therefore in reckless disregard of the realities inherent in lawyers' practices. (R. at 185, Ex. E at 37-38; 864-169 to -170, -234).

involved in a public concern. 891 P.2d at 829. In *Mount Juneau* the plaintiffs, who sought to build a tram from downtown Juneau to the top of Mount Juneau, brought a libel action against Juneau Empire, a newspaper, for two articles written about the plaintiffs and their business. *Id.* at 833-34. The plaintiffs claimed that the “newspaper acted with malice and negligence in publishing” the articles, which contained some inaccuracies about financial difficulties and hazardous substance found on the plaintiffs’ property. *Id.* at 834. To begin, the court discussed the applicability of the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) actual malice standard. *Id.* The court found that the actual malice standard applied because Charles Keen, the president of Alaska Trams, was a public figure; he “voluntarily sought public approval of the ambitious tramway project.” *Id.* at 837. The court continued by stating that even if Keen was not a public figure, the actual malice standard was applicable because Alaska courts apply the actual malice standard to defamation cases regarding issues of public concern and interest. *Id.* The court found that at least one of the newspaper articles contained “matters of public interest;” as the article scrutinized the affects of hazardous substances located on the proposed tramway property. *Id.* at 838. Therefore, the court applied the *New York Times* actual malice standard, which “focuses on the defendant’s subjective intent.” *Id.* Because the court found the plaintiffs presented no evidence of actual malice, the defendant was not liable for defamation and summary judgment for the defendant was affirmed. *Id.* at 841. The holding, however, hinged on the fact that Keen was a public figure and the

tramway was a public concern.

Because the present case does not involve public figure or public concern issues, it clearly differs from *Mount Juneau*. Thus, the *New York Times* actual malice standard is not applicable. *Id.* at 835. The Alaska Supreme Court recognized that there are different standards that apply when dealing with public figures and private individuals. The court stated: “if the defamation plaintiff is a private individual, then states may apply their own standard of liability [instead of the *New York Times* actual malice standard] so long as they do not impose liability without fault.” *Id.* Thus, because the present case presents a private individual suing for defamation regarding a private issue, the trial court should have applied Utah state defamation law.

The two distinct malice standards distinguish this case from *Mount Juneau*. See *Brehany*, 812 P.2d at 59 (“Although the common law term and the New York Times term use the same words, they denote different legal concepts.”). In *Mount Juneau* the *New York Times* actual malice standard was applied to determine fault. 891 P.2d at 838. In the present case, however, the trial court should have applied common law malice to determine if the conditional privilege, which shields liability, had been abused and forfeited. This Court, in *Wayment*, clarified the distinction between the two malice standards applied in defamation cases: “While ‘[a]ctual malice refers to the constitutionally mandated level of fault necessary in public figure cases,’ malice in the context of a conditional privilege ‘is simply a means of determining when the privilege . . . is forfeited.’” 2005 UT 25, ¶ 53, 116

P.3d at 288 n.19 (citing *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904 (Utah 1992)). This Court elaborated:

proof of knowledge of or reckless disregard for a statement's falsity would satisfy either standard. *See* Restatement (Second) of Torts § 600 (1977) (providing that knowledge of or reckless disregard for a statement's falsity constitutes an abuse of a conditional privilege). While in the public figure context, such proof demonstrates the required level of fault, the same proof serves in the privilege context to demonstrate the publisher's "hostility or ill will," *Brehany*, 812 P.2d at 59.

Id. The facts in this case showed hostility or ill will sufficient to forfeit any privilege.

The *New York Times* actual malice standard is narrow and cannot be substituted for common law malice when analyzing a conditional privilege. The Alaska Supreme Court explained that to recover damages in a public figure defamation case, a plaintiff must prove that the statements at issue were with made actual malice, meaning "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Mount Juneau*, 891 P.2d at 834-35. On the other hand, this Court defined malice, with regard to a conditional privilege inquiry, to mean statements made with "ill will," statements that were "excessively published," or statements where the speaker "did not reasonably believe his or her statements." *Wayment*, 116 P.3d at 288. Comparison of the definitions demonstrates that proof of actual malice always fulfills common law malice, but proof of common law malice does not always fulfill actual malice. *Id.* at 288 n.19. Proof that a speaker did not reasonably believe his statements to be

true is an easier standard to satisfy than the requirement of knowledge or reckless disregard of falsity to satisfy the actual malice standard. This Court left no room for speculation — malice in regard to conditional privilege and actual malice in regard public officials or public figures are two distinct terms that courts should not use interchangeably. *See Brehany*, 812 P.2d at 59; *Wayment*, 116 P.3d at 288.

Under this binding Utah precedent, the defendants forfeited their conditional privilege. A conditional privilege, which shields liability from defamation, extends to “employer’s communication to employees and to other interested parties concerning the reasons for an employee’s discharge.” *Brehany*, 812 P.2d at 58. If, however, a plaintiff can demonstrate the statements were made with malice or there was an abuse of the privilege, the speaker forfeits the privilege. *See id.* at 59; *O’Connor*, 2007 UT 58, ¶ 37, 165 P.3d at 1224; *Wayment*, 2005 UT 25, ¶ 53, 116 P.3d at 288. As discussed earlier in this brief, the *O’Connor* case embraced the Restatement concept that an abuse of a conditional privilege forfeits the liability shield. 2007 UT 58, ¶ 37, 165 P.3d at 1224. Abuse of a conditional privilege includes: knowing a statement is false, acting with reckless disregard as to the statement’s falsity, exceeding the privilege’s purpose in making the statement, or making “statements to an individual or in a manner not reasonably believed to be necessary for the accomplishment of the privilege’s purpose.” *Id.* And, in Utah, whether a conditional privilege exists is a question of law, but forfeiture of the privilege is one of fact. *Id.* 2007 UT 58, ¶ 38, 165 P.3d at 1224; *Wayment*, 2005 UT 25, ¶¶ 53-54, 116 P.3d at 288. The existence of malice

or abuse forfeits the conditional privilege, placing liability for the defamatory statements on the speaker, here defendants/appellees.

Undisputedly, the present case presents a conditional privilege situation. The communication to UMIA about Ferguson allegedly over-billing and the law firm firing him for this reason fits into the Court's definition — UMIA, who was allegedly being over-billed by Ferguson, was an interested party regarding his termination. What remains disputed, however, is whether the privilege was forfeited by the defendants' malice or by an abuse of the privilege.

The defendants did forfeit their privilege by acting with malice. Under Utah case law and the Restatement, as already noted, malice occurs when a statement is made with ill will or when the speaker did not reasonably believe his statements. The facts demonstrate not only that the defendants had no reasonable belief that their statements to UMIA were true, but also acted with ill will towards Ferguson.

The *Wayment* case further illustrated the necessary level of malice or sufficient evidence of malice required to overturn a summary judgment ruling, which was based on the presence of a conditional privilege. In that case a television reporter, Holly Wayment, wanted to start a foundation to help children with cancer. *Id.* 2005 UT 25, ¶ 10, 116 P.3d at 276. Wayment approached an area health care provider to get monetary support for the foundation. *Id.* Her supervisor, however, thought the funding was a conflict of interest, since the news channel occasionally covered the provider's activities, and Wayment was then told

she would be fired, unless she resigned, because of the conflict. *Id.* 2005 UT 25, ¶¶ 9, 11, 116 P.3d at 276-77. Shortly after resigning, Wayment brought suit for defamation regarding false statements concerning her termination. *Id.* Wayment claimed that Fischer and Benedict had falsely reported to others that she had been terminated because she had taken money from the health care provider, had used her reporter status to set up the foundation, and was “in bed” with the provider. *Id.* The only admissible evidence offered by the Plaintiff was Wayment’s own account of events and one witness’s deposition testimony about statements Benedict said to him. *Id.* 2005 UT 25, ¶¶ 51-52, 116 P.3d at 287-88. The *Wayment* court, however, found the record contained “sufficient evidence to raise a genuine issue of fact regarding whether [the speaker] reasonably believed the truth of his communication.” *Id.* 2005 UT 25, ¶ 54, 116 P.3d at 288. The court rejected the conditional privilege asserted by the defendants and remanded to the district court to determine the issue of malice. *Id.* 2005 UT 25, ¶ 56, 116 P.3d at 289.

The present case encompasses an evidentiary situation more compelling than that in *Wayment*. By the standard set in *Wayment*, Ferguson offers more than sufficient evidence to raise a genuine issue of fact regarding whether the defendants acted with malice. The defendants’ assertion of over-billing relied unreasonably on time Ferguson was logged onto his office computer. It is common and an accepted practice, however, that medical malpractice attorneys are required to work many hours away from the office — taking depositions, meeting

with clients or experts, performing medical research and investigation, etc. (R. at 863-73 to -74, -92; 864-142). Also Ferguson presented evidence of inaccuracies in the computer billing system that the defendants nevertheless relied upon for their allegations of over-billing. (R. at 862-19). Ferguson even had evidence from Mr. Glenn, UMIA's claims manager, confirming that Ferguson had not over-billed UMIA. (R. at 185, Ex. I).

The defendants also acted with ill will towards Ferguson. The defendants knowingly fired Ferguson the day before he was to have a suspected cancerous thyroid removed, terminating Ferguson's disability policy, and stranding him without disability insurance if anything went amiss during surgery. (R. at 7, ¶ 40). The evidence shows that the defendants acted with malice; under the circumstances they could not have reasonably believed their statements that Ferguson over-billed UMIA and his termination was accompanied by ill will. And the abovementioned is only the egregious evidence showing malice, there are many other examples. In *Wayment* this Court overturned a summary judgment concerning a similar employment issue, in analyzing malice with respect to a conditional privilege, based on fewer facts and less compelling evidence. Following binding Utah precedent clearly presents a reasonable basis in the evidence that would support a verdict in favor of Ferguson and the directed verdict should not stand.

The trial court also incorrectly relied on the Alaska Supreme Court's analysis in *DeNardo v. Bax*, which addressed conditionally privileged defamatory

statements and when such privileges are waived. 147 P.3d 672 (Alaska 2006). In that case, DeNardo accused a former co-worker, Joy Bax, of defamation because she informed other co-workers that she thought DeNardo might be stalking her. *Id.* at 675. The court recognized that a privilege existed for Bax's statement to her co-workers, as a "sufficiently important interest . . . [was] at stake," namely her and her co-workers' safety. *Id.* at 678-79. The court further explained that malice was one manner in which a person could waive a privilege and be liable for their statements. *Id.* at 679. The Alaska court's definition of malice mirrored the *New York Times* actual malice standard; it defined malice to be when a "publisher had knowledge or reckless disregard as to the falsity of the defamatory matter." *Id.* The court continued by stating "the actual malice test for determining abuse of a conditional privilege is *subjective*, at the summary judgment stage the court must determine 'whether there is a genuine issue of material fact on whether [the defendant] entertained *serious doubts* as to the truth of the statements.'" *Id.* at 680 (citing *Mount Juneau Enters., Inc. v. Juneau Empire*, 891 P.2d 829, 834 (Alaska 1995) (emphasis added)). The court, however, determined that DeNardo failed to present evidence demonstrating that Bax "entertained serious doubts" about the truth of her statements. *DeNardo*, 147 P.3d at 680. As a result, the court found no malice in Bax's statement, and, thus upheld the privilege. *Id.*

The trial court's reliance on *DeNardo* to uphold the conditional privilege here was misplaced, because the Alaska malice test, outlined in *DeNardo*, and the Utah malice test differ. In *DeNardo* the Alaska Supreme Court limited its

definition of malice to knowledge and reckless disregard for falsity. *DeNardo*, 147 P.3d at 679. This Court, in *Wayment*, however, importantly included in its malice definition statements where the speaker “did not reasonably believe his or her statements.” 2005 UT 25, ¶ 53, 116 P.3d at 288. Although *Wayment* does not define reasonable belief, *Black’s Law Dictionary* states that it “denote[s] the fact that the actor believes that a given fact or combination of facts exist, and that the circumstances which he knows, or should know, are such as to cause a reasonable man so to believe.” *Black’s Law Dictionary* 1265 (6th ed. 1990). Thus, whether a person reasonably believes his statement is not a pure subjective test, there is both a subjective and objective component to the test. Utah case law, therefore, demands that the speaker’s knowledge (subjective component) and the circumstances surrounding a statement (objective component) be examined to determine if the statement was not reasonably believed, or in other words made with malice. This is different from the *DeNardo* court’s characterization of malice, which that court specified was only a subjective test. *DeNardo*, 147 P.3d at 680. The two standards differ substantially: Alaska case law requires a subjective inquiry into whether the speaker had “serious doubts” as to the truth of the matter, whereas Utah case law requires both a subjective and objective inquiry into whether the speaker did not have a “reasonable belief” that the statement was true. In light of *Wayment*, which is binding Utah precedent, the trial court erroneously relied on the *DeNardo* malice test to grant a directed verdict based on conditional privilege in the present case.

Based on Utah precedent and Restatement black letter law, the trial court should not have granted defendants' directed verdict request with the evidence presented by the Plaintiff that defendants abused any available conditional privilege. The jury should have had the opportunity to weigh the evidence.

A jury is entitled to draw reasonable inferences from circumstantial evidence, where the reasonable inferences themselves are more than speculation and conjecture. *Galloway v. United States*, 319 U.S. 372 (1943). The line between "reasonable inferences" and mere speculation escapes precise definition; however, the Third Circuit has effectively described the process of distinguishing between reasonable inferences and impermissible speculation:

The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncrasies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated, "the essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Tose v. First Pa. Bank, N.A., 648 F.2d 879, 895 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981) (quoting *Galloway*, 319 U.S. at 395)). Logically, a computer program that only logs on and off times for only a lawyer's desktop computer does not permit the reasonable inference that times billed in excess of the in-office computer use are improper. Indeed, the inference and evidence is that logging on

or off had nothing to do with the law firm until it decided to cover its tracks and attempted to justify its termination and defamation of Ferguson.

II. THE TRIAL COURT ERRONEOUSLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS

To establish intentional interference with economic relations, a Plaintiff must prove (1) that defendant intentionally interfered with the Plaintiffs existing or potential economic relations, (2) for an improper purpose or by improper means; and (3) damages. *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). Courts look at the predominant purpose underlying the defendant's conduct. *Id.* at 307 n.9. Improper purpose exists when the actor's predominant purpose is spite or ill will. *Id.* The improper means test requires that the means used to interfere are contrary to law. *Id.* Defamation is specifically listed as an improper means. *Id.* "To satisfy the alternative of improper purpose, the defendant's purpose to injure the plaintiff must predominate over all other purposes, including the long-range purpose of achieving some personal economic gain." *Id.* at 312.

Defendants knew, and admitted, Ferguson had built a business relationship with UMIA and its physician insureds. (R. at 864-278). Defendants knew that UMIA was his (and their) chief source of physician clients, and thereby, revenues. (R. at 185, Ex. E at 13; 863-69). At best, there exists a factual dispute over whether they acted knowingly to destroy Ferguson's reputation with UMIA for

defendants' own purposes. Defendants told UMIA that Ferguson had over-billed for an improper purpose; their actions were motivated out of spite and ill will towards him stating to UMIA that they had "lost confidence in him" and "there were trust issues." (R. at 185, Ex. E at 111). Defendants used an improper means — defaming Ferguson's professional reputation — so that UMIA would keep its files with the law firm. (*Id.* at 864-259). Ferguson has suffered substantial and obvious damage with his major client gone, (R. at 863-69), and has been required to change his entire practice as a result of defendants' tortious conduct. Ferguson immediately realized this: "EJW poisoned the well with UMIA." (R. at 864-117). Indeed, he had, the day before Ferguson's termination, and neither defendant Hunt nor defendant Williams denies it. Williams met with Martin Osowski and the UMIA files that had been previously assigned to Ferguson remained at the law firm after his termination. (R. at 864-259).

III. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON THE CLAIMS AGAINST DEFENDANT FRANKENBURG BECAUSE GENUINE ISSUES OF MATERIAL FACT AND PROCEDURAL DEFICIENCIES PRECLUDED SUCH A RULING

Plaintiff's claims relating to defendant Frankenburg were highlighted in the defendants' motion for reconsideration of summary judgment, (R. at 470-479), for the first time and argued at the January 1, 2008 hearing. (R. at 857-4 to -5, -8 to -11). This issue was not properly raised below, and was outside the scheduling order, so there was nothing to reconsider. Ferguson alleged in his complaint that all of the defendants, including Frankenburg, acted together, with knowledge of

the falsity of their accusations, and with knowledge that defendant Williams, Frankenburg's partner, was defaming Ferguson as a way of getting him out of the firm, and destroying his ability to compete with the firm forever. These allegations were evidenced in the depositions and affidavits provided on summary judgment, including the Affidavit of Gary Ferguson. (R. at 185, Ex. C). Frankenburg's time to object to the plan that Elliot Williams devised, has passed before the motion for reconsideration of the summary judgment in which this claim was not first raised, and defendant Frankenburg thereby waived his right to challenge the claims against him, and the trial court should not have granted summary judgment in his favor.

Defendant Frankenburg is a principal in, and an employee of, the law firm, and was sued in that capacity as well as in his individual capacity. (R. at 2, ¶ 8). On or around May 12, 2005, UMIA representatives met with Jensen at the law firm's offices and gave the files for the cases Ferguson had been handling, to attorneys Carolyn Jensen and Kurt Frankenburg, both employees and shareholders at the law firm. (R. at 8, ¶ 49;).

Ferguson then secured a position as a plaintiff's personal injury lawyer with a Salt Lake City law firm, Siegfried & Jensen. The position does not pay a current salary, nor does it provide the same benefits he had been entitled to as an employee and shareholder of the firm. (R. at 11, ¶ 64). Defendants Hunt and Frankenburg thereafter contacted Siegfried & Jensen representatives and falsely advised them that Ferguson had conflicts in any Siegfried & Jensen case in which

the law firm represented a party. (R. at 185, Ex. E at 114). The representatives indicated that the law firm would move to disqualify Siegfried & Jensen on each such case if it hired Ferguson. (R. at 11, ¶ 65). At the time of their representations, Hunt and Frankenburg knew such representations were false. Cases within the law firm were not the subject of firm-wide meetings, and Ferguson had only one potential conflict with any case at the firm. That conflict case (“the Pack case”) was known to all the parties concerned, and it was agreed by Ferguson and Siegfried & Jensen the case would be referred to other counsel so there would be no conflict. Ferguson had no personal knowledge of any of the other cases such that he would have been disqualified, and thereby Siegfried & Jensen disqualified from representation. (R. at 11-12, ¶ 66). Defendants knew that no such conflict existed, but knowingly, intentionally, and falsely insisted otherwise, thereby attempting to further deprive Ferguson of a prospective business opportunity. (R. at 12, ¶ 67).

Ferguson was thereafter forced to hire counsel to act on his behalf with respect to the law firm’s assertions that he had a conflict that prevented him from working for Siegfried & Jensen. His attorney made inquiry into the situation and provided Ferguson with advice and counsel. (R. at 12, ¶ 68). The law firm thereafter withdrew its objection to Ferguson’s employment with Siegfried & Jensen, conceding that no real or imagined conflict existed to prevent such employment. (R. at 12, ¶ 69).

IV. THE TRIAL COURT ERRONEOUSLY GRANTED DEFENDANTS’

MOTION IN LIMINE ON FOUR ISSUES BECAUSE EACH DIRECTLY RELATED TO THE COMMON LAW MALICE INQUIRY AND WERE PROPER EVIDENCE

The trial court granted defendants' motion in limine to preclude testimony about four issues, including members of the law firm's drinking practices at their firm location, the claimed allegation of affairs between employers and employees, Ferguson's medical procedure, and Ferguson's brother's suicide. (R. at 857-28). The trial court found this evidence irrelevant, "irrespective of how this Court ruled on the motion for reconsideration. They do not meet our statutory definition — our rule definition for relevance." (R. at 857-28 to -29). The judge further found this evidence to have "zero relevance" and that prejudice outweighed any probative value. (R. at 857-29). However, this evidence was relevant to show common law malice.

The trial court should have allowed this evidence to further illustrate the atmosphere within which the defamation occurred. This evidence also was relevant to timing and to context. Each of these pieces of evidence would have gone to establish the ill will and malice against Ferguson that ultimately lead to the defamatory statements made about him to UMIA. The point and relevancy of the evidence goes to support the Utah common law malice standard. Each of these pieces of evidence, when added to the other evidence and circumstances elaborated in the facts of this case, including the lack of investigation and the manner in which the termination occurred, proves probative of the common law malice question under Utah and Restatement principles.

The precluded evidence would have provided information relating to the foundation and motivation for defendants' conduct toward Ferguson. This foundation relating to Ferguson's unpopular requests that members of the law firm stop ingesting so much alcohol during work hours and that the law firm follow up with a sexual harassment policy when an extra-marital affair was taking place helps define the contours of the malice required to defeat any conditional privilege. These items, while clearly prejudicial to defendants, are not unfairly prejudicial given the context of the allegations that were made against Ferguson. The defendants did not parse words when they called Ferguson a cheat, a liar, and a thief. And when a highly visible lawyer is accused of over-billing; liar, cheat and thief are the operative destructive terms for any self-respecting and honest lawyer. Honesty and integrity are the tools of a lawyer's trade, especially a lawyer who has earned the trust of the most important and more prominent medical malpractice insurance company in the State of Utah.

Considering the over-billing statements made by the defendants, Ferguson should have been able to introduce evidence to prove the context necessary to meet his burden of proof discussed more fully in Issue I, *supra*, and why his former partners would behave in such a manner. Any unfair prejudice that may result would not substantially outweigh the value of evidence of malice, motive, and plan. Utah R. Evid. 404(b). Indeed, such evidence was also important for cross-examination purposes, and to test the credibility of the defendant party witnesses. This is an important part of a plaintiff's case and should not be

disturbed by Rule 403. *State v. Branch*, 743 P.2d 1187 (Utah 1987). Motivation and bias are crucial items in cases involving claims of conduct involving malice, which is why this kind of evidence is generally allowed in criminal cases. *See State v. Paterson*, 656 P.2d 438 (Utah 1982).

Evidence of Ferguson's medical procedures was relevant both to his damages (as he was very apprehensive about his upcoming surgery and his partners knew it), and also probative of the defendants' malice when they would choose to terminate him on a day when he would be at his most vulnerable, and more likely to be unable to fully defend himself and consider his options. Ferguson's surgery was scheduled for May 6, 2005, the day following the date on which he was fired, and when Williams and Hunt fired Ferguson they did so fully knowing that the next day he was scheduled to have surgery. (R. at 7, ¶¶ 40, 41).

Finally, the fact that Ferguson's brother committed suicide is relevant in the context that his partners also knew of this fact, and they knew that Gary's brother committed suicide in relation to being terminated from his employment. Like the planned defamation, the fact that the law firm did this at a time when Ferguson was personally struggling emotionally was no mistake.

CONCLUSION

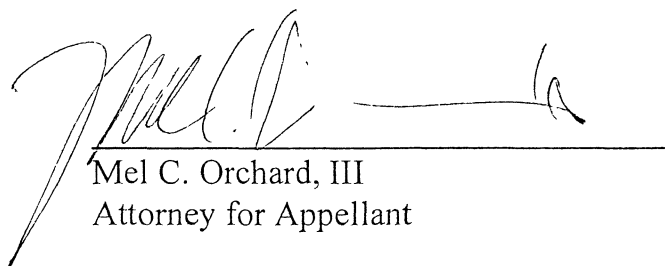
The trial court, through summary judgment, motion in limine ruling, and directed verdict upon close of Plaintiff's evidence disregarded the genuine issues of material fact and the reasonable bases in the evidence that would support a verdict in Ferguson's favor. The trial court failed to apply Utah law as enunciated

by this Court. As support for its directed verdict, the trial court cited opinions from this Court, which prove integral to the defamation issues central to this case, yet the trial court ignored the applicable Utah precedent and Restatement black letter law and, then incorrectly applied Alaska law. As in this case, when defendants abuse a conditional privilege, this therefore exposes them to liability for defamation.

For all the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's summary judgment order, motion in limine ruling, and directed verdict and remand this case for trial.

DATED this 15th day of July 2008.

THE SPENCE LAW FIRM, LLC



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