

2008

# Michael H. Jensen v. Allen K. Young : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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MICHAEL H. JENSEN,

Plaintiff/Appellant,

v.

ALLEN K. YOUNG,

Defendant/Appellee.

Case No.:20080727

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**BRIEF OF APPELLANT**

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**APPEAL FROM A FINAL JUDGMENT OF THE  
FOURTH DISTRICT COURT OF UTAH COUNTY**

---

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### **STATEMENT OF JURISDICTION**

This is an appeal from a summary judgment issued by the Honorable Samuel McVey, Fourth District Court, dismissing a legal malpractice action by Dr. Michael H. Jensen (“Jensen”), against Appellee Allen K. Young (“Young”). The Utah Supreme Court has original appellate jurisdiction pursuant to Utah Code Annotated § 78A-3-102.

### **STATEMENT OF ISSUES PRESENTED**

**ISSUE:** Did the trial court err in granting summary judgment on the ground that the four year statute of limitations had run on Jensen’s legal malpractice action by April of 2003 when Jensen did not discover his injury until this Court overturned a jury verdict in his favor in 2005?

**Standard of Appellate Review:** The Utah Supreme Court reviews a trial court’s decision granting summary judgment for correctness, giving no deference to its legal conclusions. See Progressive Cas. Ins. Co. v. Ewart, 2007 UT 52, ¶9, 167 P.3d 1011. All facts and reasonable inferences are viewed in the light most favorable to the non-moving party. See id. at ¶2.

**Preservation of Issue:** Young raised and briefed this issue in his summary judgment memoranda. (R. 388-180; 749-565.)<sup>1</sup> Jensen also addressed this issue in his Memorandum in Opposition to the Motion for Summary Judgment. (R. 548-430.)

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES, RULES, AND REGULATIONS**

Utah Code Ann. § 78B-2-307(3) (2008) states, “An action may be brought within four years: (3) for relief not otherwise provided by law.”

Rule 56 of the Utah Rules of Civil Procedure is determinative of the issues presented and is included in the Addendum due to its length. Utah R. Civ. P. 56.

**STATEMENT OF THE CASE**

**A. Nature of the Case.**

This is a legal malpractice case brought by Jensen against Young. It arises out of a claim Jensen brought against United Television, Inc. (KTVX or Channel 4) and Mary Sawyers, a reporter for Channel 4 News for damages caused by three defamatory broadcasts that were harmful to Jensen’s reputation and ultimately to his medical practice. The three broadcasts occurred respectively on September 5, 1995; June 17, 1996; and November 6, 1996. See Jensen v. Sawyers, 2005 UT 81, ¶¶ 12-17, 130 P.3d

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<sup>1</sup> For reference, each file in the record is reverse paginated. Therefore, the page number of the first page of a document is higher than the page number of the last page of the same document. In this brief, we cite the first page first, although it is the higher number, i.e. (R. 30-22).

325. Young filed suit on Jensen's behalf in June of 1997, following the third broadcast. Jensen's causes of action included fraud and misrepresentation, intentional interference with prospective economic relations, negligent misrepresentation, defamation of character, and negligence. Id., ¶ 18. Sawyers and KTVX filed for summary judgment based on the one year statute of limitations for defamation, and Jensen's defamation claim was dismissed. His fraud and misrepresentation claims were also dismissed. Id. However, the court simultaneously allowed Jensen, represented by counsel he hired to replace Young, to amend his complaint to add claims including false light invasion of privacy that would not be affected by the one year statute of limitations for defamation. Id., ¶ 20. The Jury returned a verdict in Jensen's favor and awarded him \$2,940,900 in damages. On appeal, this Court overturned the jury verdict, holding that Jensen's false light invasion of privacy claims were barred by the one year statute of limitations for defamation. Id., ¶ 143.

On February 7, 2007, Jensen filed this suit against Young alleging malpractice for failure to file suit before the statute of limitations ran. Jensen had not done so earlier because, until this Court reversed the jury verdict in 2005, he did not believe he had been injured by Young's mistake since his claim was successful and he was awarded a multimillion dollar jury verdict.

**B. Course of Proceedings.**

After discovery was completed, Young filed a Motion for Summary Judgment on Jensen's legal malpractice claims on three grounds:

- 1) That Jensen's malpractice claims were barred by the four year statute of limitations for legal malpractice.
- 2) That an attorney-client relationship had not formed between Young and Jensen prior to the second broadcast.
- 3) That Jensen's punitive damage claim relating to the first and second broadcast was effectively barred by the Supreme Court's decision in Jensen v. Young.

(R. 386-385.)

Jensen filed an opposition memorandum (R. 548-430), arguing that the discovery rule should apply to toll the statute of limitations until after the issuance of Jensen v. Young. Young filed a reply memorandum (R. 749-563), as well as a supplemental memorandum. (R. 898-767.) Jensen opposed the supplemental memorandum, but later consented to it during oral arguments. (R. 958 p. 2-3.)

**C. Disposition of the Court Below.**

The Fourth District Court entered summary judgment dismissing Jensen's claims on July 22, 2008. (R. 947-944.) The court held that summary judgment was appropriate because the statute of limitations began to run on Jensen's claims, at the latest, on April 22, 1999, which is the date on which Jensen's defamation claim was dismissed and he was allowed to amend his complaint. (R. 945.) The court deemed as a potential question of fact whether Young and Jensen formed an attorney-client relationship prior to the second broadcast, but declined to address that question because the statute of limitations effectively dismissed all of Jensen's claims. (R. 946.) Once his complaint was dismissed, Jensen timely filed for this appeal. (R. 951-949.)

**D. Statement of Relevant Facts.**

**1. Timeline of Critical Dates and Events.**

The following is an outline of critical events and dates to assist the Court in the review of Jensen's appeal.

**i. The Chanel 4 Broadcasts.**

1. September 5, 1995- First broadcast aired by KTVX on Jensen.
2. June 17, 1996- Second broadcast aired by KTVX on Jensen.
3. November 6, 1996- Third broadcast aired by KTVX on Jensen.

**ii. Trial Court Procedural History in Jensen v. Sawyers.**

1. September 6, 1995- Columbia FirstMed terminated Jensen's employment. Mountain View Hospital in Utah County revoked Jensen's privileges to practice medicine at the facility. IHC Health Plans removed Jensen from its insurance panel. The Department of Professional Licensing started an investigation of Jensen.
2. September 1995- Jensen meets with Young to discuss filing a lawsuit against KTVX in conjunction with the first broadcast. Young informed Jensen that prior to acceptance of the lawsuit, he wanted to wait for the outcome of the DOPL investigation. Young also told Jensen that the case was likely worth a lot of money, and discussed his success in past cases. At the time, Jensen believed Young to be his lawyer, even though no retainer agreement had been signed.
3. April 9, 1997- Jensen signed a fee agreement retaining Young to represent him in filing suit against KTVX and Sawyers.
4. June 27, 1997- Young filed a Complaint on Jensen's behalf asserting claims for defamation arising out of the three broadcasts.

5. January 28, 1999- Young formally withdrew as Jensen's attorney.
6. April 22, 1999- The trial court grants KTVX and Sawyer's Motion for Partial Summary Judgment dismissing Jensen's defamation claims arising from the First and Second Broadcast because the Complaint was filed after the defamation statute of limitations had expired.
7. April 22, 1999- The same day that Jensen's defamation claims were dismissed, the trial court allowed Jensen to amend his Complaint to plead false light invasion of privacy relating to both the First and Second Broadcast.
8. October 25, 2001- Final judgment was entered by the trial court in Jensen v. Sawyers reflecting a jury verdict in favor of Jensen for false light invasion of privacy on the First and Second Broadcasts. Jensen was awarded \$520,000.00 in economic loss damages, \$85,000.00 in general damages, and \$245,300.00 in punitive damages. The jury also returned a verdict for Jensen on the Third Broadcast for false light invasion of privacy and defamation,

awarding him \$1,000,000.00 in economic loss, \$500,000.00 in general damages, and \$450,600.00 in punitive damages.

**iii. Appellate Procedural History in Jensen v. Sawyers.**

1. November 15, 2005- The Supreme Court ruled that Jensen's claims for false light invasion of privacy on the First and Second Broadcasts were barred by the one year defamation statute of limitations. The Court reversed the \$1,000,000.00 economic loss award relating to the Third Broadcast, ruling that there was no evidence to support that award because the evidence demonstrated that all of Jensen's economic loss was caused by the First Broadcast.

**iv. Trial Court Procedural History in Jensen v. Young.**

1. February 7, 2007- Jensen filed suit against Young for legal malpractice.
2. July 23, 2008- The trial court grants Young's Motion for Summary Judgment finding that Jensen's legal malpractice claims began to run not later than April 22, 1999. This is the day when the trial court in Jensen v. Sawyers dismissed the defamation claims arising from the First and Second Broadcasts and simultaneously allowed Jensen to



amend his Complaint to plead false light invasion of privacy.

Consequently, under the trial court's paradigm, the statute of limitations on Jensen's legal malpractice claim expired on April 21, 2003.

## **2. Events leading to the underlying claim.**

The events leading to Jensen's original claim against Mary Sawyers and KTVX began when Sawyers, a reporter for Channel 4 news, approached Jensen about obtaining weight loss medication because, as she told Jensen, she had gained weight and was in danger of losing her job as a news reporter because she looked bad on camera. Jensen, 2005 UT 81, ¶ 4. Jensen told Sawyers she should come to his office to discuss treatment options, not knowing he would be the victim of a news channel sting operation.

Ms. Sawyers made an appointment with Jensen, and appeared for treatment at his office wearing a hidden camera and recorder, which she used to record her visit with Dr. Jensen. Id., ¶ 7. Jensen prescribed two weight loss drugs, and he and Sawyers had a conversation about possible alternative medication if what was prescribed was ineffective, including use of the drug Dexedrine. Id. Sawyers later met with Jensen to interview him about the weight loss drugs, and confronted him about whether the drugs he prescribed, and the manner in which he prescribed them were safe. Id. Portions of the

recordings from Sawyers's initial appointment and her interview with Jensen were later used in three Channel 4 news broadcasts, originally aired on September 5, 1995; June 17, 1996; and November 6, 1996, in which Jensen was accused of prescribing the medication too freely, and prescribing medicines that should not be taken together. Id., ¶ 12. The broadcasts resulted in damage to Jensen's medical career, and action by the State Department of Professional Licensing (DOPL). Id., ¶ 14. Jensen retained attorney Max Wheeler to defend him in the DOPL investigation, and sought additional counsel to represent him in a civil suit against Sawyers and KTVX for the injury the broadcast caused. (R. 291.)

### **3. Jensen's relationship with Young.**

Soon after the first broadcast, Jensen was introduced to Young, who offered his services regarding possible claims against Sawyers and KTVX. (R. 661.) Two to three weeks later, Jensen and Young met in Young's office. (R. 656.) Young was shown the tape of the first broadcast, and informed Jensen that he liked the case, calling it "sexy." Id. He said he was willing to take the case. (R. 488-487.) However, Young informed Jensen that, prior to taking the case, he wanted to wait for the outcome of the DOPL investigation. (R. 655.) Young also told Jensen that the case was likely worth a lot of money, and discussed his success in past cases. (R. 294.) At the time, Jensen believed Young to be his lawyer, even though no retainer agreement had been signed. (R. 483.)

Although Jensen and Young discussed the case and the possibility of bringing defamation as a cause of action, Young did not warn Jensen about any issues with the short, one year statute of limitations for defamation claims.

From the time of the first meeting until November of 1996, after the airing of the third broadcast, Jensen and Young's contact was limited. Jensen believes that he met with Young briefly sometime after the second broadcast to show him a recording of the broadcast. (R. 288, 486-485.) However, his concern during that time was mostly with defending himself against the DOPL investigation, which concluded on October 30, 1996. (R. 213.) Jensen also met with other attorneys during that time to discuss his injuries and possible claims against others, including the state, although he decided not to pursue those claims or retain those attorneys. (R. 631-629, 479-474, 285-284.) Nonetheless, Jensen considered Young to be his attorney for the purposes of suing KTVX and Sawyers, and believed that he had accepted the case. (R. 483.)

Jensen and Young met more frequently after the third broadcast. Jensen sent Young a letter and a recording of the third broadcast on November 12, 1996. (R. 601.) Young responded to him that, "we shouldn't sit on this any longer, the third newscast is inflammatory and we need to file a complaint." (R. 273.) Jensen signed a fee agreement on April 9, 1997 for Young to represent him against KTVX and Sawyers. (R. 261-260.) On June 27, 1997, more than one year after the first and second broadcasts, Young filed a

complaint asserting claims for defamation arising out of each of the three broadcasts. (R. 314-306.)

**4. The underlying case after the statute of limitations was missed.**

Shortly after filing the complaint, Young contacted Jensen and informed him that there was a one year statute of limitations on defamation claims and that he had “blown” the statute with respect to the first and second broadcasts. (R. 473.) However, rather than taking responsibility for the mistake, or informing Jensen of the potentially severe consequences, Young tried to downplay the mistake. When Jensen asked how missing the statute of limitations affected his case, Young responded, “I’m sure this is an issue, but I’m going after fraud and also defamation. It’s not like we just—you know—dinner’s ruined. We can work with this.” (R. 473.) Young downplayed the defamation cause of action and insisted that Jensen’s actionable claims arising from the first and second broadcasts arose from claims of fraud. (R. 441.) Young withdrew as Jensen’s counsel on unrelated grounds on January 28, 1999. (Docket, Jensen v. Sawyers, Fourth District Court, Provo, Case No. 9704000512.)

Thereafter, Sawyers and KTVX filed a motion for summary judgment based on the missed statute of limitations, and also seeking to dismiss the fraud causes of action that Young had alleged on Jensen’s behalf. Jensen, 2005 UT 81, ¶18. Jensen, through his replacement counsel concurrently sought to amend his complaint to include claims of

false light invasion of privacy. Id., ¶19-20. The trial court granted both motions. At the time his defamation claims were dismissed, Jensen admittedly knew that his case had been “disadvantaged.” (R. 248-245.) However, Young’s mistake was apparently remedied. The trial proceeded, and the jury issued a verdict in Jensen’s favor on his false light claims, awarding him \$2,940,900 in damages. Jensen, 2005 UT 81, ¶ 22.

Jensen did not realize the gravity of Young’s mistake until this Court overturned his award in 2005. Id., ¶ 143. The Court held that his false light claim was barred by the one year defamation statute of limitations, and significantly reduced his award. Id. Upon discovering his injury, Jensen brought this suit in 2007 to recover damages from Young.

### **SUMMARY OF THE ARGUMENT**

This Court should overturn the trial court’s grant of summary judgment and, due to the special circumstances of this case, apply the discovery rule to toll the statute of limitations until after the issuance of this Court’s opinion in Jensen v. Sawyers.

The application of the discovery rule analysis dictates that when an injured party does not know, and should not have known of his injury, the Court applies a balancing test to determine if special circumstances warrant application of the discovery rule. In a legal malpractice case, where damages and injury are speculative and remote at the time the malpractice is committed, injury is not ascertainable until the resolution of the underlying suit from which the malpractice arose.

Jensen did not know of his injuries because at the time when Young missed the statute of limitations, and even when the trial court dismissed Jensen's defamation claims, injury was too speculative and remote for Jensen to ascertain. This is because Jensen was allowed to amend his complaint, and as a layman, he believed that Young's mistake was remedied. It was not until this Court overturned his multimillion dollar verdict in 2005 that Jensen realized he had been injured by the dismissal of the defamation claims several years earlier. To rule that Jensen could have known of his injury prior to that time would require clairvoyance beyond what should be expected of a lay individual. Further, it would prevent Jensen from fully recovering for his injuries, as his damages were merely speculative at the time the trial court in this case found that the legal malpractice cause of action had run.

Once it is shown that the party did not know, and could not have known of his injuries, the Court should balance the hardship the statute of limitations places on the plaintiff against any prejudice to the defendant resulting from the difficulties of proof caused by the passage of time. In this case, to not apply the discovery rule would essentially bar Jensen's claim entirely. If the discovery rule did not apply, he would have been forced to bring a claim at a time when he could not assert a non-speculative injury, and thus would not be able to assert malpractice. At very best, he could have recovered attorneys' fees for the cost of amending his complaint—a fraction of what he was injured

by Young's malpractice. Because the facts required to litigate this case were easily discoverable through deposition and through a written record, Young would not be greatly burdened by the passage of time. In fact, the arguments he would have made defending the legal malpractice action if it were filed earlier are all still available to him at this time. In short, Young would not be greatly burdened by the application of the discovery rule. Conversely, if this Court does not apply the rule, Jensen will suffer great injustice.

In order to ensure just results in this rare case where Jensen's malpractice injury is masked by a favorable jury verdict, this Court should hold that the discovery rule applies to toll the statute of limitations until the jury's verdict was overturned by an adverse appellate decision. Not applying the discovery rule in this rare circumstance would leave injured parties, such as Dr. Jensen, without recourse simply because they prevailed in the trial of the underlying case.

The requirements for application of the discovery rule are met here, as Jensen did not know, and should not have known of his injury, and thus the nature of this case creates an extraordinary circumstance. Therefore, Appellant asks this Court to overturn the grant of summary judgment and apply the discovery rule in this case.

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS HAD RUN ON JENSEN'S LEGAL MALPRACTICE CLAIM BECAUSE EXTRAORDINARY CIRCUMSTANCES WARRANT THE APPLICATION OF THE DISCOVERY RULE TO TOLL THE STATUTE OF LIMITATIONS UNTIL THIS COURT RULED IN THE UNDERLYING MATTER.**

This Court's opinion in Jensen v. Sawyers was one of the facts that ultimately gave rise to Jensen's cause of action against Young, because it was not until the case was decided on appeal that Jensen knew he had been damaged by Young's negligence. Because of the extraordinary circumstances in this case, this Court should overturn the grant of summary judgment and apply the discovery rule to toll the four year statute of limitations for legal malpractice until after this Court issued its decision in Jensen v. Sawyers.

The discovery rule is a judicially created doctrine that serves to toll the statute of limitations until after "the plaintiff learns of or in the exercise of reasonable diligence should have learned of the facts which give rise to the cause of action." Williams v. Howard, 970 P.2d 1282, 1284 (Utah 1998). The rule applies in three situations: "1) where mandated by statute, 2) where a plaintiff is unaware of a cause of action because of the defendant's misleading conduct or concealment, and 3) where application is warranted by the existence of special circumstances that would, based on a balancing test, render the application of the statute of limitations unjust or irrational." Id. at 1285.



This case creates special circumstances that warrant the application of the discovery rule because Jensen did not know, and could not have known that he was injured by Young's negligence until this Court overturned a multimillion dollar jury verdict in his favor, revealing his injury for the first time. Requiring Jensen to bring his claim prior to this Court's ruling in the underlying matter would force him to seek damages that were too speculative and remote to constitute injury, and would stand as a bar to recovery for the full extent he was injured. Applying the traditional statute of limitations in this case, that the trial court held began at the time Jensen's defamation claims were dismissed in the underlying matter on April 22, 1999, creates a situation that is truly unjust and irrational.

**A. Dr. Jensen did not know and could not have known of his cause of action until the issuance of this Court's decision in the underlying matter.**

When applying the discovery rule because of special circumstances, the Court must first look to whether the injured party knew or should have known of his injury before the running of the statute of limitations. Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992). If the injured party knew or should have known of his cause of action before the running of the statute of limitations, there is little justification to allow application of the discovery rule. Because the statute of limitations generally begins to run upon the happening of the last event necessary to complete the cause of action, Id at 1128-29, it follows that under the discovery rule, the statute should only begin to run

upon the discovery of the last event necessary to complete the cause of action. Hence, the injured party must have “become aware of his injuries or damages and a possible cause of action before the statute of limitations expires,” to prevent application of the discovery rule. Williams, 970 P.2d at 1285.

Where the injury caused by legal malpractice is only materialized by an adverse judgment against the injured party in the underlying matter, any injury is too speculative or remote for the party to ascertain prior to that final judgment. Wagner v. Sellinger, 847 A.2d 1151, 1156 (D.C. 2004). This is especially true in instances, such as this, where the attorney’s negligence has seemingly been remedied, and any real injury is only apparent after a final judgment. Because he could not ascertain the injury until this Court’s ruling in Jensen v. Sawyers in 2005, Dr. Jensen did not, and could not have discovered the malpractice committed by Young prior to the running of the statute of limitations.

- i. Dr. Jensen did not know of his injury prior to this Court’s ruling in the underlying matter because his claim was seemingly remedied, as Young had assured him it could be.*

For the discovery rule to apply due to special circumstances, the injured party must be unaware of his injuries or damages and a possible cause of action until after the statute of limitations expires. Williams, 970 P.2d at 1285. In Williams, an attorney discovered that he had failed to file a complaint before the statute of limitations had run, completely barring his client’s claim. Upon discovery of the mistake, the attorney met

with his client to discuss the mistake and its potential impact on the case. Id. at 1283-84. The attorney also wrote a letter to his client stating that he accepted responsibility for “any loss that [his client] sustained by reason of [the attorney’s] failure.” Id. When a malpractice action was filed more than four years after the incident, the court declined to apply the discovery rule because the client was made aware of his injury and cause of action well before the statute of limitations had run. Id. at 1285. The court noted, “the discovery rule does not apply to a plaintiff who becomes aware of his injuries or damages *and* a possible cause of action before the statute of limitations expires.” Id. (emphasis added). If the injured party is unaware of his injury or unaware of the cause of action, the court should proceed to apply the special circumstances balancing test.

Unlike in Williams, Jensen was not aware of his injury until after the statute of limitations had run. Nor could he have reasonably been expected to know of his injury and resulting damages. In fact, it appeared to Jensen that he was uninjured by Young’s malpractice because Jensen had received a multimillion dollar jury verdict. Even when the defamation claims were dismissed on summary judgment in the underlying matter, Jensen did not have reason to immediately discover the malpractice cause of action because his attorneys were simultaneously allowed to amend his claim of defamation to false light invasion of privacy. (R. 248-245.) Young’s representations to Jensen that “dinner isn’t ruined,” because his case centered on causes of action other than defamation

served further to convince Jensen that the mistake was not fatal to his case, and could be remedied. (R. 473.) The trial court supported Young's representations when it allowed Jensen to amend his complaint and the jury awarded him a more than generous verdict based on his other claims. Jensen, 2005 UT 81 at ¶22. The favorable verdict making Young's mistake seem inconsequential, there was no way for Jensen to understand the true consequence of the mistake or comprehend that he had been damaged until this Court ruled in Jensen v. Sawyers.

- ii. *The injuries caused by Young's malpractice were too speculative and remote for Jensen, as a lay individual, to ascertain until after this Court's final judgment in the underlying matter.*

When it is uncertain whether a client will sustain injury from legal malpractice until after a judgment or settlement in the underlying matter, injury and damages are too speculative and remote to be ascertained. See Wagner, 847 A.2d at 1156; Lucey v. Law Offices of Pretzel & Stouffer, 703 N.E.2d 473, 478 (Ill. App. Ct. 1998); Welborn v. Shipman, 608 So.2d 334, 335 (Ala. 1992); K.J.B., Inc. v. Drakulich, 811 P.2d 1305, 1306 (Nev. 1991) (per curium); Johnson v. Cornett, 474 N.E.2d 518 (Ind. Ct. App. 1985).

In Wagner, the plaintiffs had retained the defendant attorney to pursue a medical malpractice claim. 874 A.2d at 1154. After some time, plaintiffs felt that the attorney had handled their case poorly, and it was apparent that the attorney had "failed to properly prosecute the case." Id. at 1155. Replacement counsel advised plaintiffs that their

attorney had “vastly compromised and damaged their causes of action.” Id. Plaintiffs were forced to settle their medical malpractice claim for significantly less than it was worth, and thereafter brought a legal malpractice claim against their attorney, who filed for summary judgment based on the statute of limitations. Id.

When plaintiffs appealed from summary judgment in the attorney’s favor, the D.C. Court of Appeals held that the statute of limitations did not begin to run until the underlying matter had been resolved, reasoning that plaintiffs were not able to ascertain their injury until the completion of the underlying medical malpractice suit. Id. at 1155-56. The court relied on the leading malpractice treatise, Mallen & Smith, Legal Malpractice, § 22.11, at 380 (5th ed. 2000), which states that:

An attorney’s negligent error in the prosecution of a lawsuit may create only the potential for injury.... If that potential is not realized until later – if its occurrence depends on “a contingent or future event” – then the injury is not sustained until the contingent or future event occurs.

Wagner, 847 A.2d at 1156.

The court reasoned that if plaintiffs were required to sue their attorney prior to the completion of the underlying case, there would have been “no way to articulate any injury that could yield ascertainable damages.” Id. The court issued this ruling despite the fact that plaintiffs admitted that they were aware at the time they hired replacement counsel that their attorney had damaged their case. Id. at 1155.

In Lucey, the court similarly held that the statute of limitations does not run on a legal malpractice action until the underlying suit, if there is one, is resolved. 703 N.E. 2d at 476. In that case, the defendant attorney gave plaintiff negligent legal advice in 1989, which caused the plaintiff to be sued later that year. Id. at 475-76. Plaintiff brought a malpractice action in 1995, after the statute of limitations had run, but before the underlying suit was resolved. Id. The Illinois Appellate Court reversed the trial court's dismissal of the case based on the statute of limitations, and instead held that the action was still premature, barring conclusion in the underlying matter. Id. at 476. The court found that without resolution of the underlying matter, the plaintiff would be unable to prove damages, leaving the plaintiff unable to sustain a malpractice claim because "damages must be incurred and are not presumed, and the plaintiff must affirmatively plead and **prove** that he suffered injuries as a result of the attorney's malpractice." Id. (internal citations omitted). Until actual, non-speculative damages occur, the statute of limitations cannot run because there is no cause of action, and injury is not discoverable.

The Nevada Supreme Court came to the same conclusion in K.J.B., holding that plaintiffs to a legal malpractice action filed their claim prematurely because the underlying matter had not yet concluded. 811 P.2d at 1306. The court noted that, "Where there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby

making premature the cause of action for professional negligence.” Id. The court dismissed the malpractice action without prejudice, allowing plaintiffs to re-file the action once the underlying matter had resolved and damages were no longer speculative.

The Indiana Court of Appeals held in Johnson that a cause of action for legal malpractice did not accrue, and thus the statute of limitations did not begin to run until the final order of the court in the underlying matter was signed, even when the court had already announced its forthcoming ruling from the bench. 474 N.E.2d at 518. Defendants argued that the statute should begin to run when the trial court announced its decision from the bench, but the court held that even at that point, the decision could be altered in some way before it was signed. Id. It was only after the decision of the court was made final through a written and signed order that damages were sufficiently ascertainable to accrue the cause of action and commence the running of the statute of limitations. Id.

Although Jensen had some understanding that his claim was disadvantaged, (R. 248-245), the resulting injury was undiscoverable until after this Court ruled in Jensen v. Sawyers because any damages sustained by Jensen were too speculative and remote to be ascertained. As described in Mallen & Smith’s treatise, Young’s missing the statute of limitations in the underlying matter created the potential for injury, which was only materialized upon this Court’s ruling, a clear example of a “contingent event” that determines whether and when an injury occurs. Just like the plaintiffs in Wagner, Jensen

could not possibly ascertain his injuries at the time when Young withdrew and was replaced as counsel, even though Jensen incurred extra expense when his replacement counsel amended his complaint. (R. 883-882.) When four years had passed from the time Young missed the statute of limitations, Jensen was the recipient of a nearly \$3 million jury verdict, believing that his replacement counsel had effectively remedied Young's mistake, and that he was not injured. Jensen's injuries were so remote at the time the statute of limitations would have run that, as was the case in Lucey, K.J.B., and Johnson, he was essentially not yet injured. Certainly, it would be unreasonable to expect him to bring a claim against Young at that time, and irrational to encourage such a claim without evidence of damages.

The Johnson case, supra, is particularly persuasive because the statute of limitations was tolled until the final order of the court in the underlying matter was signed, even where the court had already announced its intended ruling. If damages were too speculative to cause the statute of limitations to run in that instance because the court could alter its decision prior to issuing a final order, a pending appeal that has potential to significantly alter the trial court's decision would also cause damages to be too speculative or remote. This is especially true considering that Jensen, as a lay individual, likely could not understand the potential significance of appellate review, nor predict that this Court would overturn his jury verdict. Jensen did not know, and could not have



known of his damages until the final judgment of this Court in the underlying matter, due to the remote and speculative nature of his damages. Therefore, the lack of knowledge requirement is satisfied, and this Court should move forward with a balancing test.

**B. Application of the balancing test evidences that this case presents special circumstances that make the application of the ordinary statute of limitations unjust and irrational.**

The discovery rule should apply to toll the statute of limitations because special circumstances exist where Jensen did not suffer any damage or injury that would have put a reasonable person on notice of the need for further inquiry into the malpractice claim until after this Court's opinion in Jensen v. Sawyers was issued. The special circumstances exception dictates that the discovery rule is applied where application of the normal statute of limitations is unjust or irrational. Williams, 970 P.2d at 1285; Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995). When applying the special circumstances exception, the court must "balance the hardship imposed on the plaintiff against any prejudice to the defendant resulting from the difficulties of proof caused by the passage of time." Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992). Here, application of the statute of limitations is unjust, and the balance swings in favor of Dr. Jensen because: 1) without application of the discovery rule, Jensen would lose his entire claim, and would be unable to recover to the extent of the injuries caused by Young, whether he filed prior to the running of the normal statute of limitations or

not; 2) Young's ability to defend against the legal malpractice action has not been affected by the passage of time since the evidence of the case is readily available, is not remote or stale, and Young's arguments would be substantially the same as those he would have made had Jensen brought this claim earlier; and 3) as discussed above, it was impossible for Dr. Jensen as a lay man to realize his injury prior to the running of the normal statute of limitations.

In Williams, this Court declined to apply the discovery rule because, as discussed above, the plaintiff in that case knew of the injury and the cause of action arising from his attorney's mistake. 970 P.2d at 1282. However, the Court noted that one circumstance that requires the application of the discovery rule is when failure to apply it would produce an unjust or irrational result, based on a balancing test.

The fact that a party's entire claim would be barred without application of the discovery rule creates a substantial hardship weighing in favor of that party. Klinger v. Knightly, 791 P.2d 868, 872 (Utah 1990). In Klinger, this Court applied the discovery rule in a boundary dispute where the trial court had granted summary judgment based on the running of the statute of limitations to a surveyor added as a third party defendant. Id. at 868. This Court reversed, applying the discovery rule under the special circumstances exception. Id. at 872. In balancing the burdens placed on both parties, the court held that "the obvious prejudice to defendants is that without application of the discovery rule,

their cause of action is completely barred...” Id. at 872. There were no other hardships weighing in the defendant’s favor, yet the court still applied the discovery rule. Id.

A factor in this Court’s decision in Klinger was the fact that the evidence required for the surveyor to defend against the third party claim was not remote or stale. Id. Indeed, the primary evidence against the surveyor was a written and signed survey certificate, which was still available. Id. The Court considered the nature of how the surveyor would defend against the claim to be influential in swaying the balance of special circumstances toward applying the discovery rule.

The special and unusual circumstances of this case weigh in favor of applying the discovery rule and tolling the statute of limitations until this Court’s ruling in Jensen v. Sawyers. The hardships Jensen would face if the rule were not applied are much greater than the burden placed on Young due to the passage of time. First, as in Klinger, if the discovery rule were not to apply, Jensen would have no recourse for his injuries caused by Young’s malpractice. If he had filed within the ordinary statute of limitations, he would have been unable to state a claim because he would not be able to assert any non-speculative injury or damages. At the very most, he would only have been able to recover attorneys’ fees for amending his complaint, amounting to only \$14,000, (R. 897), when a jury had found he was injured to a much greater extent. See Jensen, 2005 UT 81, ¶ 22. If the discovery rule did not apply in this situation, Jensen would be left with an extensively

damaged reputation and career, and no recourse to recover his losses, whether his claim was filed within the ordinary statute of limitations or not.

Furthermore, Young would not be greatly burdened by defending against a malpractice action at this time, rather than at the time when the normal statute of limitations would have run. The evidence here, as in Klinger, is not stale or remote. All of the facts surrounding the legal malpractice are generally recorded in depositions already taken, as well as the record of Jensen v. Sawyers. Any arguments Young could make in defending this action, such as, *inter alia*, lack of attorney-client relationship or lack of injury are as viable at this time as they would have been had Jensen filed suit earlier. Therefore, Young will not be substantially burdened by the application of the discovery rule, in juxtaposition to Jensen, who will face severe and undue hardship if the rule was not applied.

Failure to apply the discovery rule in this situation would be particularly unjust and irrational because at the time Young allowed the statute of limitations to pass, Jensen understood only that his case had been “disadvantaged.” (R. 248-245.) Yet he also believed that Young’s mistake could be remedied. (R. 248-245.) A successful remedy appeared to have been effected when Jensen was allowed to amend his complaint and litigate his claim to a final judgment in his favor. He did not realize that he was actually injured until his award was reversed by this Court in 2005.

Appellee may argue that Jensen was on notice of his injury when the trial court dismissed his defamation claim in 1999. (R. 946.) However, it is unlikely that Dr. Jensen, who is not legally trained, would understand that he had been injured when, at the same time his defamation claim was dismissed, he was allowed to amend his complaint. Finding that Jensen knew or should have known that he was damaged prior to this Court's decision assumes he would realize that his judgment in the trial court would be reversed on appeal and should bring suit against his attorney after he was essentially made whole by a multimillion dollar jury verdict.

The facts of this case demonstrate the very type of special circumstances with attendant irrational and unjust results, which the discovery rule is intended to prevent. To find otherwise places an unreasonable burden of legal clairvoyance upon Dr. Jensen. Because applying the normal statute of limitations in this case would have such an effect, this Court should apply the discovery rule and run the statute of limitations from the time that Jensen v. Sawyers was decided.

### **CONCLUSION**

For the foregoing reasons, Appellant requests this Court to reverse the trial court's grant of summary judgment and find that the discovery rule applies to toll the statute of limitations on Jensen's malpractice claim until the date of this Court's 2005 decision in Jensen v. Sawyers.

DATED this 4<sup>th</sup> day of August.

STRONG & HANNI

By 

Philip R. Fishler

Peter H. Christensen

Sadé A. Turner

Attorneys for Plaintiff/Appellant Jensen

## ADDENDUM

Utah Rule of Civil Procedure states as follows:

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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

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

such a response.

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

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.



**THE FOURTH DISTRICT COURT'S ORDER GRANTING**  
**SUMMARY JUDGMENT**

Richard D. Burbidge (#0492)  
Jefferson W. Gross (#8339)  
Andrew J. Dymek (#9277)  
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Attorneys for Defendant

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

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MICHAEL H. JENSEN,

Plaintiff,

vs.

ALLEN K. YOUNG,

Defendant.

)  
) **ORDER FOR SUMMARY**  
) **JUDGMENT AND DISMISSAL WITH**  
) **PREJUDICE**

)  
) Civil No. 070400519  
) Judge Samuel D. McVey  
)

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Defendant Allen K. Young's ("Young") Motion for Summary Judgment came on regularly before the above-entitled Court on June 30, 2008 at 10:00 a.m. before the Honorable Samuel D. McVey, Judge. Richard D. Burbidge of Burbidge, Mitchell & Gross appeared on behalf of Defendant Young. Phillip Fishler of Strong & Hanni appeared on behalf of Plaintiff Michael H. Jensen ("Jensen").

The Court notes that a supplemental brief in support of the Motion for Summary Judgment was filed on behalf of Young, to which a motion to strike was filed. At oral argument, counsel for Jensen withdrew the objection to the supplemental brief. The

Court has considered all of the pleadings supporting and opposing the Motion for Summary Judgment, and having heard the arguments of counsel, and being fully advised in this matter, HEREBY ORDERS, JUDGES AND DECREES AS FOLLOWS:

1. The Court has reviewed and is aware of the asserted factual issues concerning the initial formation of the attorney/client relationship between Jensen and Young. The Court finds that at least during the period of February through April 1997, Young had been retained by Jensen and a retainer agreement was executed. Further, the Court deems potential questions of fact regarding an earlier attorney/client relationship between Jensen and Young not to raise material issues of fact as to the determinative issue concerning the application of the statute of limitations in this matter.

2. The record reflects that in approximately June of 1997 Young told Jensen that he had “blown” the statute of limitations. Jensen asserts that Young said he could “fix it” or mitigate the effects by virtue of the fraud claim that had been asserted. There may be some basis to assert that there was passive concealment on the part of Young, although unintended, but the effects of any such concealment, intended or not, passive or active, disappeared when Jensen retained the services of his new counsel, Dale Gardiner, and others in January 1999. When the defamation claims on the first and second broadcasts were dismissed on April 22, 1999 (together with the fraud claim with which Jensen claims Young thought the damages for missing the statute on the first and second broadcasts could be mitigated or cured), it is undisputed that Jensen knew he had been

“disadvantaged.” Shortly thereafter Mr. Gardiner spoke with Jensen on more than one occasion about suing Young. Mr. Gardiner advised Jensen that he would not sue Young because he had made the decision not to sue lawyers. At that time Jensen was aware that both the defamation and fraud claims were gone and although Gardiner asserted other claims, it is clear from the record that he at no time provided any assurance that they would resurrect the defamation claims that had been dismissed.

3. Accordingly, an analysis of claims of concealment or of special circumstances is not necessary in light of the undisputed fact that the Jensen knew or should have known of the claims against Young not later than approximately April 22, 1999, well within the applicable four year statute of limitation period. In that regard, while Jensen argues that he did not know the full extent of his damages, it is not necessary for a party to know everything about the claim or all of the elements of damage. All that is necessary is that there is sufficient knowledge of the claim that a reasonable person would investigate further.

ACCORDINGLY, Defendant Young’s Motion for Summary Judgment is hereby granted and the complaint and all claims thereunder are hereby dismissed with prejudice and on the merits.

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DATED this \_\_\_\_ day of July, 2008.

BY THE COURT:

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HONORABLE SAMUEL D. McVEY  
FOURTH DISTRICT COURT JUDGE

Approved as to form:

STRONG & HANNI

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Phillip R. Fishler  
Attorneys for Plaintiff Jensen

**CERTIFICATE OF SERVICE**

On the date below written, the undersigned hereby certifies that a true and correct copy of the within **ORDER FOR SUMMARY JUDGMENT AND DISMISSAL WITH PREJUDICE** was served as follows:

**VIA FACSIMILE ONLY**

Philip R. Fishler

Peter H. Christensen

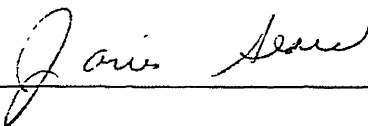
**STRONG & HANNI**

3 Triad Center, Suite 500

Salt Lake City, Utah 84180

Facsimile: (801) 596-1508

DATED this the 3<sup>rd</sup> day of July, 2008.

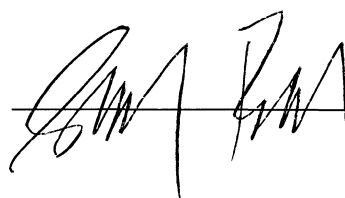
  
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CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of August, a true and correct copy of the foregoing was served by the method indicated below to the following:

Richard D. Burbidge  
Andrew J. Dymek  
BURBIDGE MITCHELL & GROSS  
The Parkside Tower  
215 S. State Street, Suite 920  
Salt Lake City, UT 84111

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ CM/ECF System



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