

2009

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

Utah Supreme Court

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Richard D. Burbidge; Jefferson W. Gross; Andrew J. Dymek; Burbidge; Mitchell & Gross; Attorneys for Appellee.

Philip R. Fishlerl; Peter H. Christensen; Sade A. Turner; Strong & Hanni; Attorneys for Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL H. JENSEN,

Plaintiff/Appellant,

v.

ALLEN K. YOUNG,

Defendant/Appellee.

Case No.: 20080727

REPLY BRIEF OF APPELLANT

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

Richard D. Burbidge
Jefferson W. Gross
Andrew J. Dymek
BURBIDGE MITCHELL & GROSS
215 S. State Street, Suite 920
Salt Lake City, UT 84111
Attorneys for Defendant/Appellee

Philip R. Fishler, #1083
Peter H. Christensen, #5453
Sadé A. Turner, # 11181
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Attorneys for Plaintiff/Appellant Jensen

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Peter H. Christensen, #5453
Sadé A. Turner, # 11181
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Attorneys for Plaintiff/Appellant Jensen

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I. **ARGUMENT**

Young's Appellee Brief hinges on three arguments. First, Young incorrectly argues that the statute of limitations on Dr. Jensen's legal malpractice claim tolled at the very latest on April 21, 2003, which is four years after the trial court in the underlying matter dismissed Dr. Jensen's defamation claims on summary judgment. Second, Young argues in the alternative that no attorney-client relationship existed between Jensen and Young prior to the tolling of the statute of limitations on the First Broadcast, which was on September 5, 1996 ("First Broadcast"). Rather, Young asserts that an attorney-client relationship did not exist until April 9, 1997 when the parties entered into a written retainer agreement. Third, because the Supreme Court in Jensen v. Sawyers, 130 P.3d 325 (Utah 2005), dismissed Dr. Jensen's award for punitive damages relating to what the Court called the "least defensible" Third Broadcast, the punitive damages allocated to the First and Second Broadcasts must also be dismissed.

With respect to Young's first point, the discovery rule applies to toll Jensen's legal malpractice claims where Jensen had no reason to believe he had been injured by Young's malpractice until nearly two years after the expiration of the original statute of limitations. The facts support Jensen's reasonable belief because not only did the trial court allow Jensen to amend the complaint to plead false light, it also denied KTVX's motion for summary judgment to dismiss the false light claim, and Jensen went on to

receive a \$2,800,900.00 jury verdict. Second, more than sufficient conflicting evidence exists to preclude judgment as a matter of law that no attorney-client relationship existed between Jensen and Young prior to the running of the statute of limitations for the First Broadcast. Moreover, even accepting Young's position as true, Jensen was still owed a duty by Young based on the relationship formed during their first meeting, which took place a few weeks after the First Broadcast. Finally, based on its own standard articulated in the underlying Jensen v. Sawyers case, the Court must conduct an independent review of the record which is not before the Court because that record has not been incorporated into the Jensen v. Young record, before it can dismiss punitive damages relating to the first two broadcasts. Additionally, sufficient evidence exists in the Jensen v. Sawyers record to demonstrate clear and convincing evidence of actual malice with respect to the two broadcasts.

A. BASED ON THE UNIQUE FACTS OF THIS CASE, THE DISCOVERY RULE APPLIES TO TOLL JENSEN'S LEGAL MALPRACTICE CLAIMS.

If there ever was a situation for the discovery rule to apply in a legal malpractice case, the unique facts and circumstances of Jensen's legal malpractice claims certainly warrant its application to promote justice and prevent severely undue hardship.

This is not a situation where Jensen knew that Young's malpractice had fatally damaged his claims before the original statute of limitations expired, yet he simply chose not to pursue a cause of action against Young until after missing the four year statute of

limitations. Rather, Jensen reasonably believed that Young's malpractice had been remedied. Moreover, unlike the fact pattern in Williams v. Howard, 970 P.2d 1282 (Utah 1998), no one, especially not Young, ever advised Jensen of the statute of limitations on a legal malpractice claim.

1. Jensen Reasonably Believed Young's Malpractice Had Been Remedied.

When evaluating the application of the discovery rule in this case, it is critical to look at the situation from Jensen's perspective. Young cites to the portion of the Williams case which states that the statute of limitations on a legal malpractice claim "begins to run upon the occurrence of the last event required to form the elements of the cause of action." Id. at 1284; (Aple's Br. at p. 23.) Young argues that at the very latest, the "last event" to form the elements of Jensen's cause of action occurred on April 22, 1999 when the defamation claims were dismissed in the underlying Jensen v. Sawyers case. (Aple's Br. at p. 24.) Young also argues that the special circumstances exception of the discovery rule is "reserved 'for more egregious circumstances.'" (Aple's Br. at p. 25.)

Young correctly states that the special circumstances exception of the discovery rule can only be applied where the aggrieved party did not and could not have discovered the claim prior to the expiration of the statute of limitations and it would be "truly 'irrational' or 'unjust' to apply a statute of limitations." Grynberg v. Questar Pipeline Co., 70 P.3d 1, 17 (Utah 2003). The reason for cautiously applying the discovery rule to

toll a statute of limitations is that “liberal tolling could potentially cause greater hardships than it would ultimately relieve.” Id.

Young’s myopic argument ignores the three pivotal facts in this case which clearly demonstrate that application of the ordinary statute of limitations is truly irrational and unjust, thereby mandating application of the special circumstances exception of the discovery rule. First, on April 22, 1999, the same day Jensen’s defamation claims were dismissed, the trial court allowed Jensen to amend his complaint to plead an alternative theory of false light invasion of privacy. (R. 345-44, ¶¶ 20-21.) Second, after the complaint was amended, the trial court denied KTVX’s motion for summary judgment seeking dismissal of these amended claims, including that for false light invasion of privacy. (R. 344, ¶ 21.) Third, Jensen did not know of the extent of his damages until November 15, 2005 when this Court issued its ruling in the underlying matter wherein Jensen’s jury verdict was reduced by nearly \$2,395,900.00. (R. 323, ¶ 143.)

Prior to April 21, 2003, which is the latest date Young argues the legal malpractice claim could have been timely filed, Jensen had one trial court ruling allowing him to amend his defamation claims to false light invasion of privacy (R. 345-44, ¶¶ 19-20) and a second trial court ruling denying KTVX’s motion for summary judgment dismissing the amended false light claims. (R. 344, ¶ 21.) Not only did Jensen have the two trial court rulings upholding the amended false light claims, but he also had a 2001 jury award in

excess of \$2,800,900.00. (R. 344, ¶ 22.) With a multi-million dollar jury verdict in hand nearly two years before Young argues the statute of limitations expired, Jensen did not have the slightest reason to believe he had been injured by Young's malpractice before the statute of limitations expired.

Young's brief recites statements from Jensen's former attorney, Dale Gardiner, in attempt to establish that Jensen knew the extent of his damages before the original statute of limitations expired. (Aple's Br. at pp. 16-17.) Young claims that because Gardiner billed Jensen \$14,228.23 in legal fees, that he had sustained requisite damage to provide Jensen sufficient notice of his legal malpractice cause of action. (Aple's Br. at pp. 16, 20-21.) Young improperly uses the testimony from Gardiner in an attempt to establish Jensen knew he had been damaged by Young before April 21, 2003. (Aple's Br. at pp. 16-17, 20-21.) Clearly, Gardiner's testimony is not evidence of Jensen's state of mind and the argument ignores the three trial court rulings which formed the foundation for Jensen's reasonable belief that he was uninjured by Young's malpractice.

More importantly, Young's arguments ignore Jensen's own statements that he did not believe he had been injured by Young's malpractice until after the Supreme Court overturned the false light claims on November 15, 2005. In his deposition, Jensen states that at the point his defamation claims were dismissed, he did not know if he was injured

by the dismissal of the claims (R. 248) and that it was his belief that his attorneys were working to perform “damage control.” (R. 248-47.)

From Jensen’s perspective, the damage control performed by his attorneys was in fact, extremely successful. Prior to April 21, 2003, two trial court rulings told Jensen that his lawsuit against KTVX had not been injured due to Young’s malpractice. Jensen further believed he was uninjured by Young after the amended claims led to a nearly \$3,000,000.00 jury verdict. Moreover, Jensen’s damages were incapable of being measured until the Supreme Court decision was issued in the underlying Jensen v. Sawyers case. Based upon the unique fact pattern in this case, along with notions of justice and rationality, the discovery rule should be applied to toll the legal malpractice statute of limitations until November 15, 2005 when this Court overturned Jensen’s 2001 jury verdict.

2. No One Ever Advised Jensen of the Statute of Limitations on a Legal Malpractice Claim.

Young argues that because Jensen had discussed a possible legal malpractice claim against Young with other attorneys as early as 1997, Jensen knew of his damage before the running of the original four year statute of limitations. (Aple’s Br. at p. 27.) While Jensen knew Young had committed malpractice, he did not believe he had been irreparably injured by Young’s failure to timely file the Complaint.

Young told Jensen that he failed to file a timely complaint relating to the defamation claims associated with the First and Second Broadcasts. (R. 516-14, 441.) However, at the time Young revealed his malfeasance, he simultaneously downplayed his failure to timely file by leading Jensen to believe that his case was primarily based on claims of fraud and therefore, his defamation claims were essentially unnecessary. (R. 473, 441.) Clearly, the advice provided by Young regarding Jensen's lost defamation claims, at best, obscured the severity of any potential injury.

Ultimately, a lay client cannot reasonably be expected to know of a possible malpractice tort when the professional minimizes its existence because "professional malpractice law does not charge a layperson with the knowledge of a professional and does not foster such distrust of our profession." Brown v. Behles & Davis, 135 N.M. 180, 184 (N.M. Ct. App. 2004). An attorney has a fundamental obligation to communicate important information to his client and explain matters to the extent necessary so that the client can make informed decisions. UTAH R. PROF. COND. 1.4(b). Important information undoubtedly includes communicating to the client when the attorney commits malpractice, if the attorney has knowledge of the malpractice. As a professional, the attorney has a duty to fully inform the client of the existence of a possible injury. See UTAH R. PROF. COND. 1.4(b).

A review of the Williams case provides a stark contrast between that attorney's communication with his client after missing a statute of limitations and the lack of communication from Young to Jensen. The attorney in the Williams case, Mr. Jackson Howard, failed to file a notice with a governmental entity before the one-year statutory deadline expired. See Williams, 970 P.2d at 1284. Eleven days after Howard discovered the mistake, he met with the client to account for the mistake and to tell the client that his cause of action was most likely barred by the statutory deadline. Id. One week later, the client also received a letter in which Howard again acknowledged the mistake and "accepted responsibility for any loss that [Williams] sustained by reason of [Howard's] failure..." Id. The attorney stated that "'to the extent that Springville City should be liable' to Williams, Howard was similarly liable." Id. Howard also advised the client of a potential conflict of interest in retaining him to represent the client in any other causes of action that had not expired, and he recommended the client take the letter to another attorney for independent legal advice concerning the matter. Id.

Unlike the attorney in Williams, Young did not advise Jensen that as a result of his failure to file a timely Complaint, Jensen may not be able to recover anything from KTVX. (R. 520-19, 473, 441.) Young did not memorialize this failure in writing, nor did he explain that to the extent that KTVX would have been liable for damages Young was similarly liable. (R. 520-19, 473, 441.) Young continued to represent Jensen for nearly

two years after he missed the statute of limitations on the defamation claims (R. 521) despite the potential conflict of interest. Young never suggested that Jensen seek independent legal advice regarding the matter. (R. 521-19, 473, 441.) Rather, Young downplayed the importance of the defamation claim and focused Jensen on the fraud claim as the cause of action central to his recovery against KTVX. (R. 516-14, 473, 441.) Even when the defamation, fraud, and negligent misrepresentation claims were dismissed on summary judgment in the underlying matter (R. 375, 345-44, ¶ 20), Jensen did not have any reason to discover the malpractice cause of action because his attorneys were simultaneously allowed to amend Jensen's complaint to plead the alternative false light invasion of privacy cause of action. (R. 344-43, ¶ 20.)

Young points to the fact that Jensen discussed a legal malpractice claim against Young with various attorneys including his former counsel, Dale Gardiner in an effort to show that Jensen knew of his injury long before the original statute of limitations ran. (Aple's Br. at pp. 16-17, 28.) However, Young's argument ignores the fact that none of these attorneys, especially not Young, notified Jensen of the four year statute of limitations associated with a legal malpractice claim.

Ultimately, Jensen could not have reasonably been made aware of the legal malpractice causes of action against Young due to the trial court allowing the defamation

claims to be amended to false light. As such, the foregoing provides an additional, unique circumstance for applying the discovery rule.

B. YOUNG'S ARGUMENT THAT JENSEN COULD HAVE EITHER OBTAINED A TOLLING AGREEMENT OR A MOTION TO STAY LEGAL PROCEEDINGS IS BASED UPON PURE SPECULATION AND IGNORES THE FACT THAT JENSEN DID NOT KNOW THE EXTENT OF HIS INJURIES.

Young argues that Jensen had two other options that would have allowed Jensen to file his legal malpractice claim before the original statute of limitations expired on April 21, 2003. The first option would have been for Jensen to enter into a tolling agreement with Young whereby Young would have voluntarily agreed to toll the statute of limitations until the Supreme Court decided the Jensen v. Sawyers case. (Aple's Br. at p. 36.) The second proposed option would have been for Jensen to file his malpractice case against Young and then obtain an order from the trial court staying the action pending a final decision in the Jensen v. Sawyers case. (Id.)

While Jensen theoretically could have asked for a tolling agreement, the likelihood of Young agreeing to such a request is purely speculative. There is nothing in the record to suggest that Young would have voluntarily entered a tolling agreement. Moreover, based on the facts available to all the parties prior to the November 15, 2005 Supreme Court decision, Jensen did not have any non-speculative injury.

Young also suggests that Jensen could have filed a complaint against Young and then obtained a motion to stay proceedings until the appellate process in the underlying case was complete. (Aple's Br. at p. 36.) The assertion that a court would have agreed to a motion to stay is similarly, based on mere speculation. A court could have just as likely denied a potential motion to stay, leaving Jensen without the ability to assert the true measure of his damages as they were unquantifiable prior to November 15, 2005.

Furthermore, alternatives suggested by Young ignore the fact that Jensen did not believe he had been injured by Young's malpractice, therefore did not think a tolling agreement or a lawsuit was necessary. Jensen could not have known that he would be damaged in the amount of \$2,395,900.00 any time before the Court's November 15, 2005 decision in Jensen v. Young.

C. THIS COURT SHOULD NOT HOLD THAT, AS A MATTER OF LAW, NO ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN JENSEN AND YOUNG PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS FOR THE FIRST BROADCAST BECAUSE SUFFICIENT CONFLICTING EVIDENCE EXISTS AS TO THE FORMATION OF THE RELATIONSHIP AND BECAUSE, EVEN ACCEPTING YOUNG'S POSITION AS TRUE, YOUNG STILL OWED JENSEN A DUTY BASED ON THEIR FIRST MEETING.

Summary judgment on the grounds that Jensen and Young had not formed at least an implied attorney-client relationship prior to the running of the statute of limitations for the First Broadcast is inappropriate. During Jensen's first meeting with Young, Young provided sufficient legal advice to establish an express, or at the very least an implied

attorney-client relationship so that Young owed a duty to Jensen. Summary judgment is likewise improper because the record contains sufficient conflicting evidence as to whether an attorney-client relationship formed that the question should be left to a jury. See Sorenson v. Beers, 585 P.2d 458, 460 (Utah 1978).

1. An Express Attorney-Client Relationship Was Formed Between Jensen and Young Because Legal Advice Was Sought and Given to An Extent That Young Owed Duties to Jensen.

Contact between an attorney and an individual seeking legal advice does not have to be extensive to form an attorney-client relationship. Indeed, Utah courts have held that summary judgment based on the lack of an attorney-client relationship was inappropriate in a case where contact between the attorney and the client was minimal. See Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah Ct. App. 1990)(holding that summary judgment was inappropriate in a case where the attorney had been hired by a party potentially adverse to plaintiff, and plaintiff had never met with attorney prior to the transaction giving rise to the malpractice). The Utah Rules of Professional Conduct also create a duty to provide competent legal advice even to a potential client—someone who has merely sought the attorney’s advice: “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” See UTAH R. PROF. COND. 1.1. Other courts have also held that a limited attorney-client relationship

forms simply from an initial client meeting where the attorney renders an opinion as to the merits of the case, regardless of whether the client is able to retain the attorney. See Togstad v. Miller, 291 N.W.2d 686 (Minn. 1980)(per curiam). Therefore, because Jensen sought legal advice regarding his claim against KTVX and Mary Sawyers, and Young rendered legal advice regarding that claim, an express attorney-client relationship formed such that summary judgment is inappropriate.

The duty to render competent legal advice when sought is sufficient to establish a limited attorney-client relationship, even if the attorney is not formally retained. Togstad, 291 N.W.2d at 693. In that case, the Minnesota Supreme Court ruled that an attorney had committed malpractice when he advised a potential client that she did not have a good medical malpractice claim, and failed to inform her of the two year statute of limitations. Id. The Court found that because the plaintiff “sought and received legal advice under circumstances which made it reasonably foreseeable to [the attorney] that [the plaintiff] would be injured if the advice was negligently given,” that an attorney-client relationship had formed. Id. The court found that the attorney was negligent in failing to act competently in investigating the merits of the claim, Id., similar to what the Utah Rules of Professional Conduct require, and that he was further negligent in failing to inform the plaintiff of the applicable statute of limitations. Id. at 694. Therefore, although the attorney never agreed to take the case, he still owed a duty to the plaintiff to provide

competent legal advice with respect to the merits of her claim and the statute of limitations. The existence of the duty essentially established a limited attorney-client relationship with respect to the duty.

In the present case, Jensen and Young's relationship was much more extensive than that in Togstad. Similar to the plaintiff in Togstad, Jensen sought legal advice concerning a potential claim that faced a short statute of limitations, and he was given initial advice by way of Young confirming that he had a good case, that was potentially worth a lot of money. (R. 488-87.) However, unlike in Togstad, Young did not merely decline to take the case or advise Jensen that his case was weak. Instead, Young expressed interest in the case. (R. 297-96.) He told Jensen that the case was strong and further attempted to advertise his services to Jensen by discussing his success in previous cases. (R. 294-93.) Nevertheless, he stated his desire to wait to begin work on the case until after the DOPL investigation (R. 297-96), despite the fact that there was a one year statute of limitations, of which he did not inform Jensen. (R. 295.) Young did in fact appear as Jensen's counsel after the conclusion of the DOPL investigation. (R. 194.) The sole reason for the delay of the execution of the written retention agreement was Young's desire to wait until Jensen was finished with the DOPL investigation. (R. 483-82, 297-96.) Unlike the attorney in Togstad, Young was familiar with defamation cases, and should have known of the statute of limitations. Jensen relied to his detriment on Young's

advice to wait until after the DOPL investigation to pursue the case, therefore meeting the Togstad standard.

Certainly, if the court in Togstad could find a limited relationship and a duty to give competent legal advice when an attorney declines to take a case, this Court should find that a relationship exists when an attorney shows interest in a case, attempts to offer his services, and then delays work on the case pending the outcome of a potentially lengthy administrative investigation even when he knows of a short statute of limitations for the potential claim. The Utah Rules of Professional Conduct establish a duty to act competently when giving advice in this type of situation. That duty essentially creates a limited attorney-client relationship with respect to the advice rendered, or the advice that should have been rendered during Jensen and Young's first meeting with respect to the statute of limitations and the potential problems with delaying action—advice that should have been rendered whether or not Young was inclined to accept the case. Certainly, a reasonable jury could find, based on this duty, that a relationship was formed between Jensen and Young. Therefore, summary judgment is inappropriate.

2. The Record Provides Sufficient Evidence That An Implied Attorney-Client Relationship Was Formed Before The Statute of Limitations Ran on The First Broadcast, Such That Summary Judgment Would Be Improper.

Summary judgment is inappropriate because there is sufficient evidence to establish a material issue of fact as to an implied attorney-client relationship between

Jensen and Young. The central question in deciding whether an implied attorney-client relationship existed is whether Jensen reasonably believed, prior to the running of the statute of limitations for the first broadcast, that he was represented by Young, based on Young's conduct toward Jensen. Breuer-Harrison, 799 P.2d at 727. The Court must look to Young's actions or inactions, and Jensen's reasonable interpretation of those actions with respect to the relationship. The record provides enough evidence that a jury could find that Jensen reasonably believed Young to be his attorney at the time that the statute of limitations ran on the first broadcast, even though it also contains evidence to the contrary. Because summary judgment is improper where conflicting evidence exists as to the formation of an attorney-client relationship, this Court should not grant summary judgment based on the lack of an attorney-client relationship in this case. See Sorenson, 585 P.2d at 460 (holding that, in malpractice cases, summary judgment should only be granted due to lack of attorney-client relationships "when all the facts entitling the moving party to a judgment are clearly established or admitted").

In Breuer-Harrison, the Utah Court of Appeals addressed whether an attorney-client relationship existed between the buyer of property and the attorney, hired by the seller, who aided in closing the sale. In reversing summary judgment for the attorney, the court noted that the establishment of an attorney-client relationship is based largely on the subjective belief of the client. Id. at 727. However, that relationship must be

“reasonably induced by representations or conduct of the attorney.” Id. In other words, the client’s belief must be reasonable. Id. at 728. Therefore, the Court must look both to Jensen’s subjective belief as to the existence of an attorney-client relationship, along with Young’s representations and actions that induced that belief.

The Court of Appeals in Breuer-Harrison, examined the facts upon which the plaintiff based his belief that he was represented. That evidence came almost entirely from deposition testimony. Id. at 729. The court found that the plaintiff had no contact with the attorney prior to the closing of the property sale, and that the plaintiff had also sought to hire an additional attorney to check the validity of the title. Id. Nevertheless, the court held that summary judgment was inappropriate because the plaintiff testified that “he thought [the attorney] was acting as his attorney,” Id. This, combined with the type of documents that the attorney prepared, created sufficient disputed material facts to preclude summary judgment. Id. at 729. Breuer-Harrison is in keeping with Sorenson, supra, where this Court found that, because of a “conflict in the evidence presented by the depositions of the parties as to whether an attorney-client relationship existed,” summary judgment was inappropriate. 585 P.2d at 460. Therefore, where there is conflicting evidence as to the formation of an attorney-client relationship, summary judgment is precluded.

Young's argument that Jensen never believed that he was represented by Young until after the statute of limitations had run on the first broadcast is premised entirely on one letter written by Jensen on February 6, 1997, after the statute of limitations had run, which stated "I realize you have not yet taken this case." (Aple's Br. at pp. 39-45.) However, this letter alone is insufficient to justify a grant of summary judgment for Young because the record contains conflicting evidence as to Jensen's reasonable belief that he was represented by Young. Jensen's letter to Young was written shortly after Jensen received a letter from Young requesting information on the outcome of the DOPL investigation and stating that Young would then decide whether to take the case. (R. 203, 200-198.) Both letters were written after the statute of limitations had run for the first claim. (R. 230, 198.) Therefore, it is entirely plausible that Jensen understood Young to be his attorney earlier in their relationship, prior to the running of the statute of limitations, and that Young's letter served to put Jensen on notice that Young did not recognize the relationship. Indeed, this is in keeping with Jensen's testimony that as early as their first meeting, he considered Young to be his attorney. (R. 288-87.)

Evidence supporting Jensen's reasonable belief that an attorney-client relationship existed also includes that Young and Jensen had an extensive discussion of the case shortly after the First Broadcast. (R. 297, 294-93.) In that meeting, they discussed the merits of the case, the timing of the broadcast, and whether Young believed Jensen had a

good case. (R. 297, 294-93.) Young told Jensen that he liked the case, and that he wanted to pursue it, but that he would have to wait until after the DOPL investigation had concluded. (R. 297-96.) After the broadcast, Jensen periodically contacted Young. He provided him a copy of the Second and Third Broadcasts. (R. 289.) He testified that he considered himself “in touch” with Young. (R. 654.) Indeed, it is probable that Young also recognized the relationship, as he did nothing to suggest to Jensen that there was no relationship, even when Jensen continued to provide Young with information involving his case. Similar to the plaintiff in Breuer-Harrison, Jensen testified that from the time of their first meeting, he believed Young to be his attorney. (R. 288-87.) Jensen’s relationship with Young was more substantial than the relationship between the attorney and plaintiff in Breuer-Harrison, where the attorney had been hired by another party, and the plaintiff had never met with the attorney. These facts are sufficient for a jury to find that Jensen reasonably believed Young was his attorney, and therefore, summary judgment based on the lack of an attorney-client relationship would be inappropriate, even considering the conflicting evidence argued by Young.

Young’s additional argument that Jensen did not believe that an attorney-client relationship existed between himself and Young because he discussed his case with other lawyers is also not dispositive. It is merely evidence that a jury should weigh against the evidence that Jensen did reasonably believe that a relationship existed. Interpreting these

facts in Jensen's favor, as this Court is required to do when determining judgment as a matter of law, the fact that Jensen discussed the case with other attorneys does not negate Jensen and Young's relationship. Simply because Jensen sought a second opinion as to his case, as he testified in his deposition (R. 652), does not nullify his relationship with Young, or Young's duty to provide competent legal advice.

Because there are sufficient conflicting issues of material fact as to whether Jensen reasonably believed that he had formed an attorney-client relationship with Young, summary judgment on these grounds is inappropriate.

D. ACCORDING TO THE STANDARD ARTICULATED BY THIS COURT, AN INDEPENDENT REVIEW OF THE RECORD MUST BE UNDERTAKEN BEFORE PUNITIVE DAMAGES RELATING TO THE FIRST AND SECOND BROADCAST CAN BE DISMISSED.

Young's argument that this Court should enter judgment, as a matter of law, on Jensen's claim for punitive damages as to the First and Second Broadcasts is based on this Court's conclusion that there was no actual malice in the Third Broadcast, and that the Third Broadcast was "the least defensible of the three." Jensen v. Sawyers, 130 P.3d at 346-37. However, this Court's decision as to the Third Broadcast was based on its independent review of the record in Jensen v. Sawyers. Here, the Court is unable to review the record in the instant case because the record in Jensen v. Sawyers is not part of this case's record on appeal. Based on the standard of independent review of the record, dismissal of the punitive damages flowing from the first two broadcasts based solely on

the Court's finding of the lack of actual malice with respect to the Third Broadcast in Jensen v. Sawyers is inappropriate.

In Jensen v. Sawyers, the Utah Supreme Court applied the standard articulated in Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), to justify an independent review of the record to determine whether there was clear and convincing evidence of actual malice. Jensen, 130 P.3d at 347. Although the Court found no evidence of actual malice with respect to the Third Broadcast, it is illogical and mistaken to automatically assume that, even assuming the Third Broadcast was the “least defensible of the three [broadcasts],” the Court could find a lack of actual malice with respect to the First and Second Broadcasts without performing the requisite review of the underlying record.

While the traditional standard for examining a trial court's findings of fact is the “clearly erroneous” standard, appellate courts will give somewhat less credence to the trial court in situations where constitutional rights—in this case, First Amendment rights—are at issue. Bose 466 U.S. at 499-500, see also Time, Inc. v. Pape, 401 U.S. 279, 284 (1971). In those cases, appellate courts are not bound by the factual findings of the trial court, and should “re-examine the evidentiary basis on which [the trial court's] conclusions are founded.” Time, 401 U.S. at 284. Nevertheless, Bose makes clear that “due regard” must be given to the trial judge's opportunity to observe the demeanor of the witnesses and other facts when making an independent factual determination. Bose,

466 U.S. at 499-500. The standard set forth in Bose requires the Court to make an independent analysis of the record to determine whether actual malice existed. 466 U.S. at 499.

In this case, the record the Court must examine is that of Jensen v. Sawyers. In rendering its opinion in Jensen v. Sawyers, the Court did not make an independent review of the record to determine whether it could find sufficient evidence of actual malice with respect to the first two broadcasts so as to support the jury's award of punitive damages, where the claims relating to the first two broadcasts were dismissed in their entirety based on their vulnerability to the one-year defamation statute of limitations. Jensen, 130 P.3d at 337. This Court clearly stated that it did not conduct the requisite independent review of the record with respect to the first two broadcasts, stating:

In spite of our impression that the third broadcast was likely the least defensible of the three, we conclude that its content does not reveal actual malice and therefore we vacate the award of punitive damages.

Id. 130 P.3d at 346-347, (emphasis added).

The Court's "impression" regarding what was "likely" with respect to the defensibility of the Third Broadcast compared to the first two is not a holding based on an independent review of the first two broadcasts. Based on the need to conduct an independent review of the record, and the fact that the appropriate record to be reviewed is not before the Court, the Court is, at this point, unable to make the requisite

independent review of the record to make a determination as to the punitive damages for the First and Second Broadcasts under the standard articulated in Bose. Young's suggestion that the Court can make this finding simply based on its finding that the Third Broadcast showed no actual malice is improper and falls far short of the standard articulated in Bose.

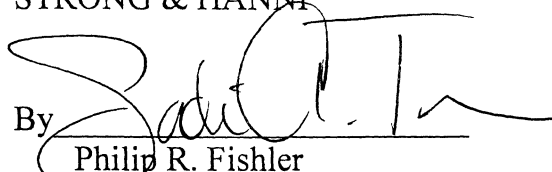
II. CONCLUSION

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. Jensen also requests that the Court find that sufficient conflicting material issues of fact exist to render judgment as a matter of law with respect to the formation of an attorney-client relationship inappropriate. Finally, Jensen requests the Court delay addressing the issue relating to the punitive damages flowing from the First and Second Broadcasts as premature where the Court is not in a position to conduct an independent review of the record.

DATED this 30th day of October, 2009.

STRONG & HANNI

By

A handwritten signature in black ink, appearing to read "Sadé A. Turner", written over a horizontal line.

Philip R. Fishler

Peter H. Christensen

Sadé A. Turner

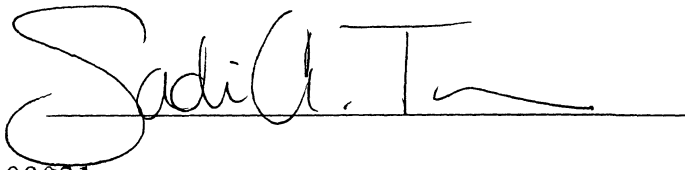
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, a true and correct copy of

the foregoing was served by the method indicated below to the following:

Richard D. Burbidge	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Andrew J. Dymek	<input type="checkbox"/> Hand Delivered
BURBIDGE MITCHELL & GROSS	<input type="checkbox"/> Overnight Mail
The Parkside Tower	<input type="checkbox"/> Facsimile
215 S. State Street, Suite 920	<input type="checkbox"/> CM/ECF System
Salt Lake City, UT 84111	



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