

2017

**Jodi Kranendonk, Plaintiff/ Appellee/ Cross-Appellant, v. Gregory & Sw App, PLLC Dba Craig Swapp & Associates and Erik Highberg, Defendants/ Appellants/Crossappellee.**

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JODI KRANENDONK,

Plaintiff/ Appellee/ Cross-Appellant,

v.

GREGORY & SWAPP, PLLC dba  
CRAIG SWAPP & ASSOCIATES and  
ERIK HIGHBERG,

Defendants/ Appellants/ Cross-  
Appellee.

Case No. 20160377-SC

REPLY BRIEF OF CROSS-APPELLANT

Appeal from the Third Judicial District Court, Salt Lake County,  
Judge Royal Hansen

---0000000---

Michael D. Zimmerman

Linda M. Jones

Clemens A. Landau

ZIMMERMAN JONES BOOHER

341 South Main Street, Fourth Floor

Salt Lake City, UT 84111

Gregory J. Sanders

Patrick C. Burt

KIPP AND CHRISTIAN, P.C.

10 Exchange Place, 4<sup>th</sup> Floor

Salt Lake City, UT 84111

*Attorneys for Appellants/Cross-  
Appellees Gregory & Swapp, PLLC  
dba Craig Swapp & Associates and  
Erik Highberg*

Shaun L. Peck (#7595)

Brandon J. Baxter (#9122)

Matthew David Lorz (#13284)

John D. Luthy (#8880)

PECK HADFIELD BAXTER & MOORE, LLC

399 North Main Street, Suite 300

Logan, UT 84321

speck@peckhadfield.com

bbaxter@peckhadfield.com

mlorz@peckhadfield.com

jluthy@peckhadfield.com

(435) 787-9700

*Attorneys for Appellee/Cross-Appellant  
Jodi Kranendonk*

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UTAH APPELLATE COURTS

JUN 26 2017

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KIPP AND CHRISTIAN, P.C.

10 Exchange Place, 4<sup>th</sup> Floor

Salt Lake City, UT 84111

*Attorneys for Appellants/Cross-  
Appellees Gregory & Swapp, PLLC  
dba Craig Swapp & Associates and  
Erik Highberg*

Shaun L. Peck (#7595)

Brandon J. Baxter (#9122)

Matthew David Lorz (#13284)

John D. Luthy (#8880)

PECK HADFIELD BAXTER & MOORE, LLC

399 North Main Street, Suite 300

Logan, UT 84321

speck@peckhadfield.com

bbaxter@peckhadfield.com

mlorz@peckhadfield.com

jluthy@peckhadfield.com

(435) 787-9700

*Attorneys for Appellee/Cross-Appellant  
Jodi Kranendonk*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
ARGUMENT .....	1
I.    THIS COURT SHOULD REVERSE THE TRIAL COURT'S FAILURE TO AWARD MS. KRANENDONK HER LITIGATION EXPENSES.....	1
A.    Ms. Kranendonk has provided a compelling rationale for awarding litigation expenses for an attorney's breach of fiduciary duty. ....	2
B.    Defendants conflate "costs" under rule 54(d) of the Utah Rules of Civil Procedure with reasonable and necessary "litigation expenses" under <i>Campbell</i> , resulting in arguments that are unsupported by the law. ....	5
1. <i>Defendants are mistaken when they assert that the trial court                   already determined which of Ms. Kranendonk's litigation                   expenses were reasonable and necessary.</i> .....	5
2. <i>Defendants are mistaken when they assert that the measure of                   reasonable and necessary "litigation expenses" under Campbell                   is subject to the same statutory constraints as are "costs" under                   rule 54(d).</i> .....	8
II.    THIS COURT SHOULD REVERSE THE TRIAL COURT'S EXCLUSION OF THE EVIDENCE THAT HIGHBERG CALLED MS. KRANENDONK A "MORON" AND A "PAIN IN THE ASS." ....	13
A.    The trial court erroneously based its rule 403 analysis on a determination that Highberg's "moron" and "pain in the ass" comments were not relevant. ....	13
B.    Ms. Kranendonk preserved her foregoing <i>Jaeger</i> -based argument for appeal. ....	16
C.    The trial court abused its discretion by failing to conclude that the probative value of Highberg's "moron" and "pain in the ass" comments was not substantially outweighed by the danger of unfair prejudice. ....	18
D.    The trial court's errors in excluding Highberg's "moron" and "pain in the ass" comments were not harmless. ....	21

1.	<i>The trial court's error in basing its rule 403 analysis on a relevancy determination was not harmless.....</i>	21
2.	<i>The trial court's abuse of discretion in excluding Highberg's "moron" and "pain in the ass" comments was not harmless.....</i>	23
CONCLUSION .....		24
CERTIFICATE OF COMPLIANCE WITH RULE 24(g)(5)(B) .....		25
CERTIFICATE OF SERVICE.....		26

## TABLE OF AUTHORITIES

### Utah Cases

<i>438 Main Street v. Easy Heat, Inc.</i> , 2004 UT 72, 99 P.3d 801 .....	18
<i>Armed Forces Ins. Exch. v. Harrison</i> , 2003 UT 14, 70 P.3d 35 .....	9, 10, 11, 12
<i>Beck v. Farmers Ins. Exchange</i> , 701 P.2d 795 (Utah 1985) .....	2
<i>Brown v. Glover</i> , 2000 UT 89, 16 P.3d 540 .....	21
<i>Campbell v. State Farm Mut. Automobile Ins. Co.</i> , 2001 UT 89, 65 P.3d 1134, rev'd on other grounds, 538 U.S. 408 (2003) .....	1, 2, 3, 4, 5, 6, 7, 8, 10, 12
<i>Dugan v. Jones</i> , 615 P.2d 1239 (Utah 1980) .....	10, 11, 12
<i>Frampton v. Wilson</i> , 605 P.2d 771 (Utah 1980) .....	11
<i>In re Clark's Estate</i> , 354 P.2d 112 (Utah 1960) .....	10
<i>Kerby v. Moab Valley Healthcare, Inc.</i> , 2015 UT App 280, 362 P.3d 944 .....	22
<i>Klatt v. Commonwealth Edison Co.</i> , 211 N.E.2d 720 (Ill. 1965) .....	23
<i>Life v. Sunbanks, Ltd.</i> , 176 Wash. App. 1005, 2013 WL 4501459 .....	23
<i>Morgan v. Morgan</i> , 795 P.2d 684 (Utah Ct. App. 1990) .....	8, 11
<i>Patterson v. Patterson</i> , 2011 UT 68, 266 P.3d 828 .....	17

<i>State in Interest of A.R.</i> , 937 P.2d 1037 (Utah Ct. App. 1997) .....	7
<i>State v. Coy</i> , 433 N.W.2d 714 (Iowa 1988) .....	23
<i>State v. Gardiner</i> , 814 P.2d 568 (Utah 1991) .....	10
<i>State v. Jaeger</i> , 1999 UT 1, 973 P.2d 404 .....	15, 16, 17
<i>State v. James</i> , 819 P.2d 781 (Utah 1991) .....	16
<i>State v. Jones</i> , 2016 UT 4, 365 P.3d 1212 .....	15
<i>State v. Low</i> , 2008 UT 58, 192 P.3d 867 .....	16
<i>State v. Ruiz</i> , 2014 UT App 143, 329 P.3d 836 .....	18, 19
<i>Stevensen 3rd East, LC v. Watts</i> , 2009 UT App 137, 210 P.3d 977 .....	6, 9, 10
<i>Young v. State</i> , 2000 UT 91, 16 P.3d 549 .....	11
<i>Zavala v. Zavala</i> , 2016 UT App 6, 366 P.3d 422 .....	17

### Rules

Utah R. Civ. P. 54(d).....	1, 5, 6, 8, 9, 10, 11, 12
Utah R. Evid. 401 .....	15
Utah R. Evid. 403 .....	13, 15, 16, 17, 18, 21, 22, 24

## ARGUMENT

### **I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S FAILURE TO AWARD MS. KRANENDONK HER LITIGATION EXPENSES.**

In her opening brief, Ms. Kranendonk demonstrated (1) that litigation expenses are recoverable for an attorney's breach of fiduciary duty where the attorney's conduct in litigation is largely responsible for them and (2) that Defendants' litigation conduct is largely responsible for her expenses. (Br. of Appellee and Cross-Appellant ("Br. of Cross-Appellant") 62-65.) In response, Defendants do not dispute that their litigation conduct is largely responsible for Ms. Kranendonk's litigation expenses. (See Reply Br. of Appellants and Br. of Cross-Appellees ("Br. of Cross-Appellees") 34-38.)

They still contend, however, that Ms. Kranendonk should not be awarded her reasonable and necessary litigation expenses. Their argument rests, first, on the assertion that "Ms. Kranendonk has not provided any rationale for extending the . . . award of litigation expenses in *Campbell* to all cases involving a breach of fiduciary duty." (*Id.* at 36.) Second, Defendants contend (1) that, in any event, the trial court already awarded Ms. Kranendonk her reasonable and necessary expenses and (2) that an award of "litigation expenses" under *Campbell* is subject to the same statutory constraints as an award of "costs" is under rule 54(d) of the Utah Rules of Civil Procedure. (*Id.* at 37-39.) Defendants are mistaken on all counts.



- A. Ms. Kranendonk has provided a compelling rationale for awarding litigation expenses for an attorney's breach of fiduciary duty.

In *Campbell v. State Farm Mutual Automobile Insurance Co.*, 2001 UT 89, 65 P.3d 1134, *rev'd on other grounds*, 538 U.S. 408 (2003), this Court recognized "that breach of a fiduciary obligation is a well-established exception to the American rule precluding attorney fees in tort cases generally" and awarded fees against an insurer who breached its fiduciary duty. *Id.* ¶ 122. The Court then said: "For the same reasons detailed in the . . . section regarding attorney fees, we conclude that litigation expenses are [also] recoverable in this limited type of action[.]" *Id.* ¶ 127. By "this limited type of action," the Court plainly meant actions where an insurer breaches its fiduciary duty to its insured and then engages in "litigation conduct [that is] largely responsible for [the insured's litigation expenses]."<sup>1</sup> See

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<sup>1</sup> In her opening brief, Ms. Kranendonk quoted *Campbell's* holding regarding litigation expenses as follows: "[O]ur determination [is] that litigation expenses may be awarded in [insurer breach of fiduciary duty cases] in which the defendant's litigation conduct has been largely responsible for them." (Br. of Cross-Appellant 62 (quoting *Campbell*, 2001 UT 89, ¶ 127, 65 P.3d 1134).) Defendants note that, without alteration, the foregoing quotation reads: "[O]ur determination [is] that litigation expenses may be awarded in *bad faith insurance cases*"; and they now assert that "[t]he language of *Campbell* does not support Ms. Kranendonk's generous alteration" of that quotation. (Brief of Cross-Appellees 36 n.11 (quoting *Campbell*, 2001 UT 89, ¶ 127, 65 P.3d 1134 (emphasis added)).) Defendants are again mistaken. *Campbell* involved third-party insurance bad faith. See 2001 UT 89, ¶¶ 120-22, 65 P.3d 1134. In the third-party insurance context, an insurer acts in bad faith when it breaches its fiduciary duty. See *id.*; *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 799-800 (Utah 1985). Thus, when *Campbell* says that "litigation expenses may be awarded in bad faith

*id.* In short, this Court concluded that if attorney fees are awardable for breach of fiduciary duty, so are litigation expenses, and for the same reasons. *See id.*

The Court then restated those reasons as follows:

For the same reasons detailed in the . . . section regarding attorney fees, we conclude that litigation expenses are recoverable in this limited type of action; their availability will: (1) decrease incentives for insurers to act in bad faith; (2) encourage insurers to act reasonably; and (3) contribute to actual compensation for plaintiffs for financial cost to them of the breach.

*Id.* Then the Court observed that the insurer's defense in that case had been "labored, vexatious and burdensome" and that the insurer "knew or should have known that its oppressive defense . . . would be extremely costly to plaintiffs." *Id.* Finally, the Court noted that the foregoing "observations underscore[d] the policy reasons supporting [its] determination that litigation expenses may be awarded in insurance [breach of fiduciary duty] cases in which the defendant's litigation conduct has been largely responsible for them." *Id.*

The Court's rationale in *Campbell* for allowing an award of litigation expenses against an insurer for breach of fiduciary duty is equally applicable here because allowing an award of litigation expenses against an attorney for breach of fiduciary duty will (1) decrease incentives for attorneys to breach their

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insurance cases," it is saying *exactly* that litigation expenses may be awarded in insurer breach of fiduciary duty cases. Ms. Kranendonk's replacement of the phrase "bad faith insurance cases" with the phrase "insurer breach of fiduciary duty cases" is, therefore, not a "generous alteration," as the Swapp Firm claims. Instead, it is a precise restatement of *Campbell*'s holding.

fiduciary duties, (2) encourage attorneys to act reasonably, especially when they discover they have made mistakes, and (3) contribute to actual compensation for clients for the financial cost caused by their attorney's breach of duty.

Moreover, just as the *Campbell* insurer's burdensome defense underscored the policy reasons supporting an award of litigation expenses for an insurer's breach of fiduciary duty, Defendants' burdensome defense here likewise underscores the reasons supporting an extension of the *Campbell* holding to cases of attorney breach of fiduciary duty.<sup>2</sup>

Concededly, Ms. Kranendonk did not unfold in her opening brief the foregoing rationale to the extent that she has here. But she relied on it by reference when she cited the Court's conclusion in *Campbell* that if fees are awardable for breach of fiduciary duty, then, for the same reasons, expenses are recoverable as well, and then said: "Likewise here, for the same reasons detailed above regarding attorney fees, the Court should conclude that litigation expenses are recoverable for an attorney's willful breach of fiduciary duty where the

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<sup>2</sup> Because expenses are not recoverable under *Campbell* unless the fiduciary's litigation conduct was largely responsible for them — i.e., the fiduciary's litigation conduct was knowingly burdensome — the holding sought here would not result in expenses being recoverable in nearly every breach of fiduciary duty case as Defendants' suggest (*see* Br. of Cross-Appellees 36). It would, however, mean that they are recoverable here since Defendants have tacitly conceded that they knew or should have known that their litigation conduct was largely responsible for Ms. Kranendonk's expenses.

attorney's litigation conduct is largely responsible for those expenses." (Br. of Cross-Appellant 62.) Based on the compelling rationale articulated by the Court in *Campbell*, relied on by reference in Ms. Kranendonk's opening brief, and unfolded more fully here, the Court should extend *Campbell*'s holding regarding litigation expenses and conclude that litigation expenses are recoverable for an attorney's breach of fiduciary duty when the attorney's litigation conduct has been largely responsible for them.

**B. Defendants conflate "costs" under rule 54(d) of the Utah Rules of Civil Procedure with reasonable and necessary "litigation expenses" under *Campbell*, resulting in arguments that are unsupported by the law.**

**1. *Defendants are mistaken when they assert that the trial court already determined which of Ms. Kranendonk's litigation expenses were reasonable and necessary.***

Defendants argue that, even if litigation expenses are awardable here, "Ms. Kranendonk has not attempted to show – and cannot show – that the district court abused its discretion in awarding [only] \$17,911.82 in litigation expenses." (Br. of Cross-Appellees 37.) Implicit in Defendants' foregoing statement is the assertion that the trial court already awarded Ms. Kranendonk her litigation expenses and determined which of them were reasonable and necessary. (*See id.*) Defendants' assertion mistakenly conflates "costs" with "litigation expenses." The trial court expressly distinguished between "costs" and "litigation expenses" and then declined to award "litigation expenses," as the trial court explained:

“There is a distinction to be understood between the legitimate and taxable ‘costs’ and other ‘expenses,’ of litigation which may be ever so necessary, but are not properly taxable as costs.”

(R. 7700 (citation omitted).)

[Ms. Kranendonk] argues that all costs—including litigation expenses—should be awarded as consequential damages in accordance with *Campbell* . . . . However . . . , the Court declines to extend *Campbell* to encompass the breach of fiduciary duty established herein and awards only those costs properly taxable in accordance with rule 54.

(R. 7700 n.3.) As the trial court understood, an award of “costs” under rule 54(d) of the Utah Rules of Civil Procedure is different from *Campbell*’s award of “litigation expenses.” See *Stevensen 3rd East, LC v. Watts*, 2009 UT App 137, ¶ 62, 210 P.3d 977 (citations omitted). “Costs are defined as ‘those fees which are required to be paid to the court and to witnesses, and . . . which the statutes authorize to be included in the judgment.’” *Id.* ¶ 63 (citation omitted). “Costs” may not include expenses for “trial exhibits, photographs, and certified copies of documents, . . . photocopying costs, . . . and . . . ‘[a]ny amount paid over [a] statutory allowance’ for witnesses, travel, or service of process fees.” *Id.* (citations omitted). Furthermore, the *amount* of “costs” that are awardable is limited to the amounts in “‘the fee schedule set by statute.’” *Id.* (citation omitted).

On the other hand, "litigation expenses," such as full expert witness fees, litigation travel expenses, trial exhibits, etc., are allowed under the *Campbell* rule that Ms. Kranendonk asks the Court to apply here. See *Campbell*, 2001 UT 89, ¶¶ 12, 127, 65 P.3d 1134 (affirming award of "\$400,747.78 for litigation expenses").

Because "costs" and "litigation expenses" are different and the trial court expressly did not award Ms. Kranendonk litigation expenses, the trial court has not already determined which of her expenses were reasonable and necessary. Thus, there is no determination of reasonable and necessary litigation expenses for this Court to review for an abuse of discretion as Defendants suggest.

Rather, there is only the legal question of whether litigation expenses are recoverable for an attorney's breach of fiduciary duty. See *id.* ¶ 127. The Court should hold that they are when the attorney's litigation conduct is largely responsible for them, see *id.*, and then remand for the trial court to determine in the first instance which of Ms. Kranendonk's litigation expenses were reasonable and necessary, cf. *State in Interest of A.R.*, 937 P.2d 1037, 1041 (Utah Ct. App. 1997) (stating in a Fourth Amendment context that "[r]easonableness is in the first instance for the [trial court] to determine").

2. *Defendants are mistaken when they assert that the measure of reasonable and necessary "litigation expenses" under Campbell is subject to the same statutory constraints as are "costs" under rule 54(d).*

Defendants' last argument with regard to litigation expenses is that, even if litigation expenses are recoverable for an attorney's breach of fiduciary duty where the attorney's litigation conduct is largely responsible for the expenses, such an award "must . . . be limited to the expenses recoverable under rule 54(d) of the Utah Rules of Civil Procedure." (Br. of Cross-Appellees 37.) This argument is at odds with *Campbell* and, if adopted, would render an award of "litigation expenses" meaningless.

Defendants' argument is at odds with *Campbell* because the Court said there "that the appropriate measure for awarding litigation expenses is whether such expenses are reasonable and necessary," 2001 UT 89, ¶ 128, 65 P.3d 1134, and made no mention of the statutory limits placed on cost awards under rule 54(d). *See id.* ¶¶ 126-30. The statutory limits applied to costs awards under rule 54(d) allow for recovery of only filing fees, service of process fees, statutory witness fees, and essential deposition costs, *see Morgan v. Morgan*, 795 P.2d 684, 686-87 (Utah Ct. App. 1990), yet the *Campbell* plaintiffs were awarded over \$400,000 in litigation expenses, 2001 UT 89, ¶ 12, 65 P.3d 1134, an amount plainly not constrained by the statutory limits applicable under rule 54(d).

Finally, Defendants' argument, if adopted, would render an award of "litigation expenses" meaningless since such an award would equate to the award of "costs" that a prevailing party already is entitled to in most cases. *See* Utah R. Civ. P. 54(d). As noted above, the purpose of an award of litigation expenses for an attorney's breach of fiduciary duty would be to (1) decrease attorneys' incentives to breach their fiduciary duties, (2) encourage attorneys to act reasonably, especially when they discover they have made mistakes, and (3) contribute to actual compensation for clients for the financial cost caused by their attorney's breach of duty. None of these purposes would be served if "litigation expenses" were interpreted to be the same as the "costs" already "allowed as of course to the prevailing party." Utah R. Civ. P. 54(d).

For their argument, Defendants rely on *Armed Forces Insurance Exchange v. Harrison*, 2003 UT 14, 70 P.3d 35, and *Stevenson 3rd East, LC v. Watts*, 2009 UT App 137, 210 P.3d 977. (Br. of Cross-Appellees 37-38.) However, these cases are inapplicable here. In *Stevenson 3rd*, "[t]he trial court ruled . . . that [the plaintiff's] litigation expenses, namely, [its] expert witness fees and photocopying costs, were recoverable as consequential damages." 2009 UT App 137, ¶ 23, 210 P.3d 977. The Court of Appeals disagreed. *See id.* ¶¶ 62-68. The Court of Appeals noted the difference between "costs" and "litigation expenses" and then observed that, while "'costs shall be allowed as of course to the prevailing party



unless the court directs otherwise,” *id.* ¶¶ 62-63 (quoting Utah R. Civ. P. 54(d)), “[c]osts *and* litigation expenses are awardable as consequential damages only in limited circumstances,” *id.* ¶ 66 (emphasis added). It then held that *Stevenson 3rd* did not present one of those limited circumstances. *See id.* For that reason, the Court of Appeals overturned the trial court’s award of full expert witness fees and photocopying expenses as litigation expenses. *Id.* ¶ 68. If this Court extends *Campbell*, as urged, and determines that an attorney’s breach of fiduciary duty *is* among the limited circumstances where litigation expenses are recoverable, then *Stevenson 3rd* is plainly inapplicable.

In *Armed Forces*, this Court addressed in dicta<sup>3</sup> the recoverability of reasonable and necessary expert witness fees as consequential damages of fraud. *See* 2003 UT 14, ¶¶ 38-43, 70 P.3d 35. The Court in *Armed Forces* acknowledged that in *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980), it held that in fraud cases ““the defrauded party may recover any additional damages which are a natural and

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<sup>3</sup> Dicta is that portion of a court’s opinion that is “not necessary to the decision of that case.” *In re Clark’s Estate*, 354 P.2d 112, 115 (Utah 1960). The part of *Armed Services* that Defendants rely on is the portion addressing the awardability of “expert fees . . . sought as an ‘element of fraud-based damages.’” (Br. of Cross-Appellees 37-38 (citing *Armed Forces*, 2003 UT 14, ¶¶ 41-43, 70 P.3d 35).) Because the Court said in *Armed Forces* that it “need not reach” the issue of the awardability of expert fees as an element of fraud-based damages, 2003 UT 14, ¶¶ 38, 41-43, 70 P.3d 35, the portion of that case relied on by Defendants is dicta, *see In re Clark’s Estate*, 354 P.2d at 115. “[T]his [C]ourt is not bound by earlier dicta.” *State v. Gardiner*, 814 P.2d 568, 572 (Utah 1991).

proximate consequence of the defendant's misrepresentations."'" *Armed Forces*, 2003 UT 14, ¶ 43, 70 P.3d 35 (quoting *Dugan*, 615 P.2d at 1250). Yet the Court then instructed the *Armed Forces* trial court on remand to limit the amount of expert witness fees it awarded in that fraud case to the amount allowed for witness fees under rule 54(d), saying: "No Utah statute provides for extra compensation to expert witnesses in fraud cases. In *Young* we made it clear that 'even if *necessary*, fees paid over the amount allowed by statute are not properly taxable as costs, and are therefore not recoverable." *Id.* (quoting *Young v. State*, 2000 UT 91, ¶ 16, 16 P.3d 549).

The Court's *Armed Forces* dicta apparently states the view that, notwithstanding the holding in *Dugan* that "any" consequential damages are recoverable in fraud cases, litigation expenses (like full expert witness fees) are not—i.e., that fraud is not one of the limited circumstances where litigation expenses are recoverable as consequential damages. This reading is supported by the fact that to support its dicta *Armed Forces* cites only cases that treat expert witness fees as "costs" under rule 54(d). *See id.* (citing *Young*, 2000 UT 91, ¶¶ 14-16, 16 P.3d 549 (distinguishing "'costs' and other 'expenses,' of litigation, which may be ever so necessary, but are not properly taxable as costs" and holding that it was error to award an expert witness fee "as a cost"); *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980) (same); *Morgan*, 795 P.2d at 686-87 (same)). The *Armed*

*Forces* opinion cites no case where full expert witness fees or other “litigation expenses” were awarded but then capped at the statutory limits applicable to “costs” under rule 54(d). *See id.*

If *Armed Forces* is read as just explained – i.e., as expressing the opinion that fraud is not one of the limited circumstances where litigation expenses are recoverable as consequential damages – it is inapplicable here since this is a breach of fiduciary duty case wherein Ms. Kranendonk relies on *Campbell* for an award of litigation expenses, not a fraud case wherein the plaintiff relies on *Dugan* for an award of litigation expenses.

Defendants assert that *Armed Forces* must be read as holding that awards of “litigation expenses” are capped at the statutory limits applicable to awards of “costs” under rule 54(d). (Br. of Cross-Appellees 37-38.) Defendants’ reading of *Armed Forces* should be rejected because (1) it treats the dicta therein as a holding; (2) it would result in awards of “litigation expenses” and awards of “costs” being equal, which (as noted above) would undermine the purposes behind an award of litigation expenses; and (3) it is at odds with the opinion’s treatment of the expert witness fees requested therein as “costs” rather than as “expenses” (as also noted above).

II. THIS COURT SHOULD REVERSE THE TRIAL COURT'S EXCLUSION OF THE EVIDENCE THAT HIGHBERG CALLED MS. KRANENDONK A "MORON" AND A "PAIN IN THE ASS."

- A. The trial court erroneously based its rule 403 analysis on a determination that Highberg's "moron" and "pain in the ass" comments were not relevant.

In her opening brief, Ms. Kranendonk first argued, with regard to the exclusion of Highberg's "moron" and "pain in the ass" comments, that the trial court's exclusion of those comments amounted to an erroneous relevancy determination, not a rule 403 analysis. (Br. of Cross-Appellant 67.) Defendants disagree (Br. of Cross-Appellees 44-46), but they are mistaken.

During oral argument at trial, Ms. Kranendonk's counsel observed that for Ms. Kranendonk to prove her punitive damages claim, she had to show that Highberg acted with a "malicious, willful, wanton or reckless" motive when he deceived her. (R. 8778.) Counsel then observed that "the impression that the Jury [had] been left with" by Highberg's testimony was that he was "the knight in shining armor who loved his client and was driven by the magnanimous intent to protect her from all the stress and worry that would be caused . . . by . . . telling her the truth." (R. 8779.) Thus, counsel argued, Highberg had opened the door to evidence that he actually "harbor[ed] ill will toward Ms. Kranendonk," i.e., that he considered her a "pain in the ass" and "moron" (R. 8780), and the

issue was now whether “the probative value [of that evidence] outweighs the prejudice” (R. 8782).

The trial court responded as follows:

I’m anticipating that [defense counsel] is going to argue something like when Mr. Highberg made these statements in his needle notes about how he . . . thought of her as a pain in the rear or that she was a moron would suggest frustration, but *it hardly suggests that he was acting against her interest intentionally.*

. . . He may have cared deeply about her. He may have been very interested in prosecuting her case . . . and the fact that he got a little irritated with her from time to time because she persisted in asking the same question over and over and that sort of thing, *that is not directly on point. That doesn’t suggest that he didn’t care about her . . .*

(R. 8783-84 (emphasis added).)

In response, Ms. Kranendonk’s counsel stated:

. . . [T]hat’s an inference for the Jury to draw. I mean that’s what they have to do and reasonable inferences they’re allowed to draw from the evidence. [Highberg’s “moron” and “pain in the ass” comments are] one of the best points of evidence we have if not the only point we have about his state of mind about Jodi Kranendonk. . . . [T]he inference that could be drawn is that he didn’t tell her because he didn’t care about her. He thought she was a pain in the ass. Thought she was a moron[.] [A]nd you know what? I’m not going to tell her [about missing the statute of limitations] until later[.]

(R. 8784.) In the end, however, the trial court excluded Highberg’s “moron” and “pain in the ass” comments based on this conclusion: “[I]t just appears that he was making a note to himself to suggest that there were times she was a little irritating and he was getting a little impatient in some ways.” (R. 8788.)

To say that Highberg's comments "[did]n't suggest that he did not care about Ms. Kranendonk," were "not directly on point," and "hardly suggest[] that he was acting against her interest intentionally"; and to then conclude that "it just appears that he was making a note to himself to suggest that there were times she was a little irritating and he was getting a little impatient in some ways" is to say that Highberg's comments had no tendency to make it more probable that Highberg had ill motives when he deceived Ms. Kranendonk. In short, the trial court based its rule 403 ruling on a relevancy determination. See Utah R. Evid. 401 (defining relevant evidence as that which "has any tendency to make a fact more or less probable").<sup>4</sup>

In *State v. Jaeger*, 1999 UT 1, 973 P.2d 404, this Court noted "the common misconception that rule 403 is a relevancy rule" and held that when a trial court bases a rule 403 analysis on "relevancy" instead of "policy," that "constitute[s]

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<sup>4</sup> Defendants essentially concede this point when they also say that "[t]he [trial] court determined that the excluded comments did not connect the frustration Mr. Highberg experienced . . . with his failing to tell her promptly of the missed filing deadline." (Br. of Cross-Appellees 48.)

Alternatively, the trial court weighed the competing inferences that could be drawn from Highberg's "moron" and "pain in the ass" comments and decided that one inference was more credible than the other. (See R. 8788.) However, because the weighing of inferences is the jury's task, *State v. Jones*, 2016 UT 4, ¶ 24, 365 P.3d 1212 ("Weighing evidence in search of the most reasonable inference to be drawn therefrom is the role of the factfinder at trial."), even under this interpretation of the trial court's analysis, the trial court erred by weighing inferences instead of weighing probative value against the danger of unfair prejudice.

error.” *Id.* ¶ 21. Thus, by basing its rule 403 analysis on relevancy instead of policy, the trial court here erred. *See id.* Accordingly, this Court should remand for retrial of the punitive damages issue and give guidance, in light of Sections C and D below, to aid the trial court in making a proper rule 403 analysis of the admissibility of Highberg’s “moron” and “pain in the ass” comments. *See State v. Low*, 2008 UT 58, ¶ 61, 192 P.3d 867 (stating that the Court has discretion to address “issues presented on appeal that will likely arise during retrial” for the “purpose[] of providing guidance on remand”); *State v. James*, 819 P.2d 781, 795 (Utah 1991) (“Issues that are fully briefed on appeal and are likely to be presented on remand should be addressed by this [C]ourt.”).

**B. Ms. Kranendonk preserved her foregoing *Jaeger*-based argument for appeal.**

Defendants argue that Ms. Kranendonk did not preserve the foregoing argument for appeal. (Br. of Cross Appellees 42-44.) Again, they are mistaken. As noted above, Ms. Kranendonk’s counsel argued below that a jury could draw from Highberg’s “moron” and “pain in the ass” comments an inference in Ms. Kranendonk’s favor on the issue of whether Highberg was acting to protect Ms. Kranendonk when he deceived her or whether he was acting out of disregard for her rights. (R. 8777-78, 8784.) By arguing that there was “an inference for the Jury to draw” in her favor (R. 8784) and that the rule 403 issue should be decided based on whether “the probative value outweighs the prejudice” (R. 8782), Ms.

Kranendonk brought to the trial court's attention the very *Jaeger*-based argument she now makes on appeal — that the rule 403 issue in this case should not be decided based on relevancy but, rather, on an analysis of whether the “probative value [of Highberg’s comments] is substantially outweighed by a danger of . . . unfair prejudice,” Utah R. Evid. 403. Hence, Ms. Kranendonk preserved her *Jaeger*-based argument for appeal. See *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 (“An issue is preserved for appeal when it has been ‘presented to the district court in such a way that the court has an opportunity to rule on [it].’” (alteration in original) (citation omitted)).

In support of their preservation argument, Defendants cite *Zavala v. Zavala*, 2016 UT App 6, ¶ 39, 366 P.3d 422, for the proposition that “to preserve an appellate argument that the district court failed to properly conduct a multi-factored legal analysis, a litigant must ‘specify [the] particular factor that the court had failed to consider.’” (Br. of Cross-Appellees 43.) But here, Ms. Kranendonk is not arguing that the trial court failed to properly conduct a multi-factored legal analysis; she is arguing that the trial court should have ruled Highberg’s “moron” and “pain in the ass” comments relevant and conducted rule 403’s single-factored analysis (i.e., whether the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice, see Utah R. Civ. P. 403), the same argument she made below.



Defendants also cite *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 52, 99 P.3d 801, for the proposition that “a blanket objection to the district court’s findings [is] insufficient to preserve for appeal the argument that the district judge should have ‘articulate[d], in greater detail, the steps by which he reached his ultimate conclusion.’” (Br. of Cross-Appellees 43.) But again, Ms. Kranendonk is not arguing that the trial court failed to articulate in sufficient detail the steps by which it reached its relevancy determination; she is arguing that it should not have based its rule 403 holding on a determination that Highberg’s “moron” and “pain in the ass” comments were irrelevant, an argument she made below.

**C. The trial court abused its discretion by failing to conclude that the probative value of Highberg’s “moron” and “pain in the ass” comments was not substantially outweighed by the danger of unfair prejudice.**

With regard to whether, under a proper rule 403 analysis, it was an abuse of discretion to exclude Highberg’s “moron” and “pain in the ass” comments, Ms. Kranendonk argued in her opening brief that *State v. Ruiz*, 2014 UT App 143, 329 P.3d 836, strongly suggests that it is an abuse of discretion to exclude the only effective rebuttal evidence to a party’s self-serving testimony on a relevant issue. (Br. of Cross-Appellant 68-69) Defendants do not disagree.<sup>5</sup>

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<sup>5</sup> Defendants say that “a district court does not abuse its discretion by admitting otherwise inadmissible evidence if that evidence is *necessary* to rebut the ‘central inference’ of testimony presented by another litigant.” (Br. of Cross-Appellees 47 (quoting *Ruiz*, 2014 UT App 143, ¶ 42, 329 P.3d 836).) They also say that “a

Instead, Defendants argue that Highberg's excluded comments "were not necessary to rebut the 'central inference' of Mr. Highberg's testimony." (Br. of Cross-Appellees 49.) Specifically, they say that to rebut Highberg's testimony that he acted solely out of a personal solicitation that he felt for Ms. Kranendonk, Ms. Kranendonk should have (1) "used the remainder of the Needles notes to suggest Mr. Highberg's frustration" or (2) "asked [Highberg on cross-examination] if he found Ms. Kranendonk hard to deal with and therefore might have had a malicious motive towards her." (*Id.* at 48-49.) Neither the redacted Needles notes nor cross-examination of Highberg could have *effectively* rebutted the central inference of Highberg's testimony. *See Ruiz*, 2014 UT App 143, ¶ 42, 329 P.3d 836 (stating that "only [the challenged evidence] could have *effectively* rebutted" the "central inference" of defendant's testimony (emphasis added)).

Nothing in the redacted Needles notes suggests that Highberg felt animus toward Ms. Kranendonk. (*See* Pl.'s Exhibit 6 at DEF0033, attached in Addendum I

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district court does not abuse its discretion when it refuses to admit otherwise inadmissible evidence that is *unnecessary* to rebut a central inference of testimony presented by another litigant." (*Id.*) But they never address Ms. Kranendonk's assertion that it *is* an abuse of discretion to exclude otherwise inadmissible evidence when that evidence becomes *necessary* to rebut the central inference of another litigant's testimony. (*See id.* 46-49.)

to Br. of Cross-Appellees.) They indicate, at most, mild annoyance due to the Kranendonks repeat inquiries regarding a trial date:<sup>6</sup>

- “[Mr. Kranendonk] wants to know when trial is. I will call him back today to explain (again) we are years away from that. Discovery phase is just beginning and we don’t even have all the records yet because she is not done treating. I may need to refer them out.” (*Id.*)
- “[Ms. Kranendonk] is calling constantly asking when her trial date is. I have told her several times we [won’t] get the trial date until we certify it ready for trial which [won’t] happen until discovery is complete.” (*Id.*)

Only the unredacted version of the notes is effective to rebut the inference that Highberg deceived Ms. Kranendonk only because he cared for her:

- “[Mr. Kranendonk] wants to know when trial is. I will call him back today to explain (again) we are years away from that. Discovery phase is just beginning and we don’t even have all the records yet because she is not done treating. *These people are becoming a pain in the ass.* I may need to refer them out.” (R. 5919, attached in Addendum I to Br. of Cross-Appellees.)
- “*This client is a moron.* She is calling constantly asking when her trial date is. I have told her several times we [won’t] get the trial date until we certify it ready for trial which [won’t] happen until discovery is complete.” (*Id.*)

Likewise, cross-examining Highberg about his motives for deceiving Ms.

Kranendonk without the possibility of impeaching him with his “moron” and “pain in the ass” comments would have been wholly ineffective. He simply could have maintained that his deceit of Ms. Kranendonk was motivated by a

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<sup>6</sup> There are more Needles notes entries in Defendants’ file for Ms. Kranendonk than the two quoted here. However, the vast majority of the additional entries (24 of 28 of them) were made by persons other than Highberg, and none of them contain anything to suggest even mild annoyance toward Ms. Kranendonk. (See Pl.’s Exhibit 6 at DEF0033, attached in Addendum I to Br. of Cross-Appellees.)

desire to protect her, despite feeling a mild annoyance due to her “constantly asking when her trial date is.” (Pl.’s Exhibit 6 at DEF0033, attached in Addendum I to Br. of Cross-Appellees.)

Because Defendants tacitly concede that it is an abuse of discretion to exclude the only effective rebuttal evidence to a party’s self-serving testimony and then fail to identify any other evidence that could have been used to effectively rebut the inference that Highberg was motivated only by his care for Ms. Kranendonk, the Court should hold that it was an abuse of discretion to exclude Highberg’s “moron” and “pain in the ass” comments.

**D. The trial court’s errors in excluding Highberg’s “moron” and “pain in the ass” comments were not harmless.**

Defendants argue that, in any event, the trial court’s failure to conduct a rule 403 analysis and its exclusion of Highberg’s “moron” and “pain in the ass” comments were harmless.<sup>7</sup> (Br. of Cross-Appellees 49-51.)

**1. *The trial court’s error in basing its rule 403 analysis on a relevancy determination was not harmless.***

First, Defendants make the bald assertion that if Judge Reese had done a proper rule 403 analysis, instead of making a relevancy determination, he would have reached the same conclusion that Judge Himonas did prior to trial. (See Br.

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<sup>7</sup> Ms. Kranendonk did not expressly demonstrate in her opening brief why the trial court’s errors were harmful. However, “if an appellant responds in the reply brief to a new issue raised by the appellee in its opposing brief, the issue is not waived.” *Brown v. Glover*, 2000 UT 89, ¶ 24, 16 P.3d 540.

of Cross-Appellees 50.) However, prior to trial, Judge Himonas properly held that Highberg's "moron" and "pain in the ass" comments *were relevant* because of "the indifference and disregard" they showed toward Ms. Kranendonk's rights; and, although he said that at that point their probative value was substantially outweighed by the danger of unfair prejudice, he also said that "this is one issue that may be readdressed as the evidence is developed" at trial. (R. 8229-30, 5389.)

In contrast, Judge Reese did not even believe that Highberg's comments were relevant and did not even mention rule 403's standard of probative value being substantially outweighed by the danger of unfair prejudice. (*See* 8776-78, 8783-84, 8787-88.) If Judge Reese had properly applied rule 403 instead of making an erroneous relevancy determination, there is a reasonable likelihood that a different result would have been reached. Indeed, any time a judge properly applies the law there is a reasonable likelihood that he will reach a different result than if he fails to properly apply the law. Thus, Judge Reese's error in conducting a relevancy analysis (or usurping the jury's role and weighing competing inferences) instead of conducting a proper rule 403 analysis was prejudicial. *See Kerby v. Moab Valley Healthcare, Inc.*, 2015 UT App 280, ¶ 24, 362 P.3d 944 (stating that an error is not harmless if "there is a reasonable likelihood that a different result would have been reached absent the error").

2. *The trial court's abuse of discretion in excluding Highberg's "moron" and "pain in the ass" comments was not harmless.*

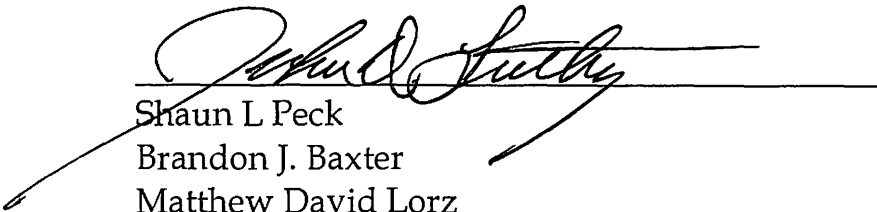
Finally, Defendants argue that, regardless of the analysis that led to their exclusion, "any error in not admitting the Needles notes in their entirety was equally harmless." (Br. of Cross-Appellees 50.) But the only support they offer for that argument is an assertion that the "the other Needles notes that had been admitted [and cross-examination based on them] could have served [the same] purpose" as Highberg's redacted comments. (*Id.*) However, as explained above, the redacted Needles notes and any cross-examination based on them could *not* have served the same purpose as the unredacted notes. *See supra* pp. 19-21. The unredacted Needles notes were the only evidence that could have effectively rebutted Highberg's self-serving testimony that he deceived Ms. Kranendonk only to protect her, and exclusion of the only evidence on an essential element of a party's claim is always prejudicial. *See, e.g., Life v. Sunbanks, Ltd.*, 176 Wash. App. 1005, 2013 WL 4501459, \*5 (holding that "the trial court's improper exclusion of [the] only evidence [on the central issue] of actual notice was not harmless"); *State v. Coy*, 433 N.W.2d 714, 714 (Iowa 1988) (holding that exclusion of "the only direct evidence . . . of the elements of the offense" was not harmless); *Klatt v. Commonwealth Edison Co.*, 211 N.E.2d 720, 727 (Ill. 1965) (holding that the improper exclusion of "the only evidence tending to establish willful and wanton misconduct . . . may hardly be called harmless").

## CONCLUSION

This Court should reverse the trial court's refusal to award Ms. Kranendonk her reasonable and necessary litigation expenses and remand for a determination of those expenses. This Court should also reverse the trial court's exclusion of Highberg's "moron" and "pain in the ass" comments; remand for retrial of her punitive damages claim; and provide guidance regarding a proper rule 403 analysis in this case since the issue will likely arise during retrial.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of June 2017.

PECK HADFIELD BAXTER & MOORE, LLC



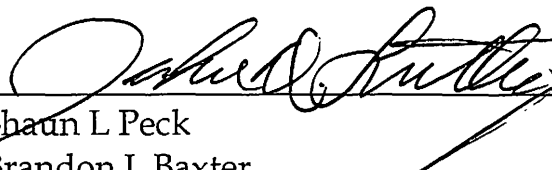
Shaun L Peck  
Brandon J. Baxter  
Matthew David Lorz  
John D. Luthy  
*Attorneys for Appellee/Cross-Appellant  
Jodi Kranendonk*

CERTIFICATE OF COMPLIANCE WITH RULE 24(g)(5)(B)

The foregoing Reply Brief of Cross-Appellant complies with the type-volume limitation of rule 24(g)(5)(D) of the Utah Rules of Appellate Procedure. This brief has been prepared using 13-point Book Antiqua, a proportionally-spaced typeface. Excluding the parts of the brief exempted under rule 24(f)(1)(B), this brief contains 6,145 words according to the undersigned counsel's word processing system, Microsoft Word 2010.

DATED this 26<sup>th</sup> day of June 2017.

PECK HADFIELD BAXTER & MOORE, LLC



Shaun L Peck  
Brandon J. Baxter  
Matthew David Lorz  
John D. Luthy  
*Attorneys for Appellee/Cross-Appellant*  
*Jodi Kranendonk*

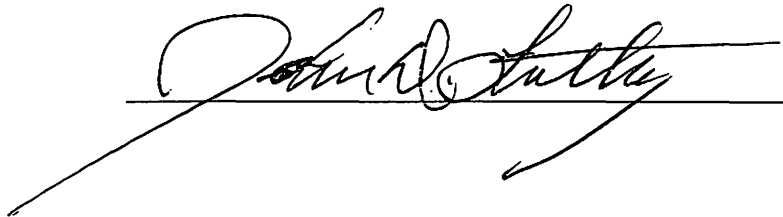


CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of June 2017, I caused true and correct copies of the foregoing Reply Brief of Cross-Appellant to be served via first class United States Mail, postage prepaid, upon the following:

Michael D. Zimmerman  
Linda M. Jones  
Clemens A. Landau  
ZIMMERMAN JONES BOOHER  
341 South Main Street, Fourth Floor  
Salt Lake City, UT 84111

Gregory J. Sanders  
Patrick C. Burt  
KIPP AND CHRISTIAN, P.C.  
10 Exchange Place, 4<sup>th</sup> Floor  
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "John D. Tully", is written over two horizontal lines.