

2002

# Lori Haase v. Ashley Valley Medical Center and Columbia Ashley Valley Medical Center and John Doe Defendants 1 through 10 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LORI HAASE, an individual,

Plaintiff/Appellant and  
Cross Appellee,

vs.

Case No. 20020524-CA

ASHLEY VALLEY MEDICAL  
CENTER and COLUMBIA ASHLEY  
VALLEY MEDICAL CENTER and  
JOHN DOE DEFENDANTS 1  
THROUGH 10,

Eighth Judicial District Court  
No. 98-0800377

Defendants/Appellees and  
Cross Appellant.

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**REPLY BRIEF OF APPELLEE/CROSS APPELLANT  
ASHLEY VALLEY MEDICAL CENTER**

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APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT  
UINTAH COUNTY, STATE OF UTAH  
THE HONORABLE DOUGLAS L. CORNABY

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## **INTRODUCTION**

Appellee/Cross-Appellant Ashley Valley Medical Center ("the Hospital") submits this reply to the answer of Appellant/Cross-Appellee Lori Haase ("Haase"). This brief begins with a reply to Haase's answer to the arguments of the Hospital. The Hospital then provides a response to new issues raised by Haase in her reply brief, offered only if the Court declines the Hospital's concurrent motion to strike the new arguments.

## **REPLY ARGUMENTS**

### **I.**

#### **HAASE DOES NOT REFUTE THE HOSPITAL'S ARGUMENT THAT DR. HAWKES' PERSONAL MEDICAL RECORDS SHOULD NOT HAVE BEEN ADMITTED.**

##### **A. Haase Misrepresents the Record in Arguing That Because Dr. Madsen Believed Dr. Hawkes Was Impaired, Agency Theory Imparts That Belief to the Hospital.**

Haase argues that because Dr. Madsen was a member of the Medical Executive Committee and Governing Board when Dr. Hawkes was initially credentialed in 1993, his knowledge of Dr. Hawkes' alleged impairment should be imputed to the Hospital. Reply Brief at 2. That issue need not be reached, however, as the record unequivocally shows that Dr. Madsen never believed that Dr. Hawkes had an impairment which caused him to be dangerous or a threat to patients.

The most significant misrepresentation here lies in Haase's failure to acknowledge Dr. Madsen's testimony that he did not, at any time prior to April of 1996, believe that Dr. Hawkes was a threat to the safety of patients at the Hospital. Transcript at 1116, lines 1-4.



Haase asserts: "If the Hospital didn't know what Dr. Madsen knew, it should have known. If it was ignorant, its ignorance was the fault of its own agent and medical staff member." Reply Brief at 2. Haase would have the Court believe that Dr. Madsen considered Dr. Hawkes to be a danger to patients and failed to disclose that to the Hospital. At no point, however, does she explicitly argue that Dr. Madsen felt Dr. Hawkes was a danger to patients.

This is true notwithstanding the attempt to mischaracterize the military discharge disability issue. Reply Brief at 2. Again, Haase neglects to point out testimony of Dr. Madsen which defeats her characterization of the facts. Haase persisted in asserting that Dr. Hawkes was "rated 90% disabled." Reply Brief at 3. Dr. Madsen testified that a 90 percent disability rating from the military does not mean that Dr. Hawkes was 90 percent disabled, it means that 90 percent of whatever disability he might have is military service-related. Transcript at 1115, lines 14-23.

At no point in the record does Haase establish that Dr. Madsen formed an opinion that Dr. Hawkes was a danger to patients, or that he considered Dr. Hawkes to be 90% disabled. Any characterization to the contrary misrepresents Dr. Madsen's testimony and his actions. As there is no evidence that Dr. Madsen held such opinions, the argument that the Hospital should be charged, on an agency theory, with knowledge of opinions never held is an irrelevant non sequitur.

**B. Haase Incorrectly Asserts That Repeated Objections Are Necessary to Preserve an Issue.**

Haase concedes that the Hospital objected to the introduction of the personal medical records of Dr. Thomas Hawkes. Reply Brief at 5. She then asserts that the Hospital did not

make a subsequent objection, with the unsupported and incorrect presumption "apparently, the Hospital was as convinced as the Court that the necessary foundation for admission of the records had been established by Dr. Madsen's testimony." Reply Brief at 5.

Haase cites no authority nor offers any legal analysis supporting the proposition that continued objections must be on the record in order to preserve the issue. She merely asserts that the objection was waived because it wasn't offered multiple times. Such an unsupported conclusory argument should be rejected.

**C. Haase Misunderstands the Issue When She Asserts That the Hospital Was Aware of the Contents of Dr. Hawkes' Personal Medical Records in 1999.**

The basis for objection to the admission or use of Dr. Hawkes' medical records was that the Hospital had not seen, nor had any reason to see, these records prior to the surgery on Mrs. Haase in early 1996. Appellee's Brief at 8-9. Dr. Madsen testified that he did not consider Dr. Hawkes to be a threat to the safety of patients (Transcript at 1116, lines 1-4) and Haase offers no authority for her implication that the Hospital should have forced Dr. Hawkes to produce his medical records prior to April of 1996 in order to question the medical judgment of Dr. Madsen.

As Haase offers no analysis of relevant authority in her answer, the Hospital responds by reiterating that there is no authority before this Court, nor was there any before the trial court, which establishes that the Hospital had any duty to demand that Dr. Hawkes produce his personal medical records prior to 1996. Absent any legal duty, there can be no breach of duty. The decision to admit the records (and to allow literally hours of discussion of the

contents) without establishing that the Hospital should have known what was in those records, was more prejudicial than probative and was reversible error.

**D. The Argument That the Use of Dr. Hawkes' Personal Medical Records by Dr. Pasternak at Trial Was Not a Major Factor" is Disingenuous and Incorrect.**

It has been consistently asserted that had the Hospital been able to argue to the jury that Dr. Pasternak never met Dr. Hawkes, never interviewed his treating physicians, and never reviewed any of his medical records, his credibility in making the medical determination that Dr. Hawkes was dangerous would have been undermined. Appellee's Brief at 11. Indeed, Dr. Pasternak was the only witness who appeared in person before the jury with testimony that Dr. Hawkes was probably an unsafe physician when he operated on Lori Haase. Haase is disingenuous because she made much of the significance of the records at trial and in closing argument. Transcript at 1517, lines 13-18.

It was error to allow admission of the records at trial. Dr. Pasternak could not be deposed regarding his opinion of the records, Dr. Madsen could not be deposed regarding his opinion of the records, and there was no notice to allow the defense to obtain expert review or opinion.

Haase also asserts "there was nothing preventing the Hospital from trying to retain an expert to testify that Dr. Madsen's illuminating treatment records do not reflect treatment of a dangerously impaired surgeon." Reply Brief at 7-8. This too is disingenuous because even Haase did not know until after the trial had started that Dr. Madsen's records would be produced. Reply Brief at 6, n.3. The records were produced because of the efforts of counsel for another plaintiff in another case and were only made available to Haase because

the Court felt that was appropriate. Transcript at 36, lines 21-25 and at 37, lines 1-12. Haase was by coincidence able to benefit; had she not retained a credentialing expert (Dr. Pasternak) who was also a physician, she could not have taken full advantage of the unexpected order of the trial court.<sup>1</sup>

The suggestion that the Hospital, after the start of trial, could have secured an appropriate expert to review the records is frivolous, but even if that were theoretically possible it would not refute the threshold arguments that there was no foundation for testimony about the records and that their introduction was more prejudicial than probative.

Haase substantially misrepresents the record when she describes as "meritless" the Hospital's allegation that "production of Dr. Madsen's records was ordered only in another case." Reply Brief at 6 (citing Brief of Appellee at 7). The Hospital did not state, either on page 7 or anywhere else, that the records were only ordered produced in another case.

The Hospital's point here is that it was more than unfair surprise to the Hospital that the records were produced, Haase had done nothing to secure their production other than send a subpoena to Dr. Madsen just before trial. The Court, without discussion of the reason for its decision, announced from the bench that because of a ruling it intended to make in another case, it was appropriate to order Dr. Madsen to turn over his medical records to Haase. Transcript at 37, lines 1-8.

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<sup>1</sup> A second coincidence is relevant: the order was only available at trial because Judge Cornaby happened to be assigned both of the cases in question.

The Court: . . . I have here two different folders from last Wednesday when that was argued, and that was in Hatch versus Dr. Hawkes and Ashley Valley Medical Center.

It's my intention to order Dr. Madsen to reveal those to Counsel for Hatch . . . .So verbally the others haven't got notice yet, but they will get notice, and I see no reason to not make the same ruling in this case.

Transcript at 36-37, lines 22-25 and at 37, lines 1-8.

As Haase did nothing during the discovery process to compel the production of Dr. Madsen's records, indeed did not even attempt to subpoena those records until just before trial, the Hospital had no reason to suspect that they would be admitted into evidence and therefore had no reason to attempt to review them or to engage an expert to counter any opinions that might be offered about them. The trial court, in making a key ruling in this case based upon motions filed and arguments heard in another case, committed reversible error.

## **II.**

### **HAASE IS INCORRECT IN ASSERTING THAT PRIOR DEPOSITION TESTIMONY OF DR. HAWKES WAS ADMISSIBLE UNDER SEVERAL EXCEPTIONS TO THE HEARSAY RULE.**

#### **A. The Testimony of Dr. Hawkes Was Not Admissible under Rule 803(3).**

Haase asserts that Rule 803(3) makes Dr. Hawkes' testimony in 1997 regarding his physical condition or health "expressly admissible" as an exception to the hearsay rule. Reply Brief at 10. Haase offers no authority and no legal analysis, and her conclusory argument substantially misstates the law.

The Supreme Court of Utah addressed this question in 1999 in a case Haase fails to discuss. State v. Jaeger, 973 P.2d 404 (Utah 1999). Rule 803(3) allows admission only of statements of a declarant's "then existing mental, emotional, or physical condition." Id. at 408 (quoting Utah R.Evid. 803(3)). In Jaeger, a witness's statements were with respect to her condition prior to the time at which the testimony was offered. Id. at 409. The Court made clear that Rule 803(3) does not allow the admission of testimony other than a declarant's "**then existing** state of mind." Id. (emphasis added). Indeed, Rule 803(3) expressly excludes "a statement of memory or belief to prove the fact remembered or believed . . . ." Id. (quoting Utah R.Evid. 803(3)).

Dr. Hawkes' deposition testimony in 1997 would be admissible (if at all) under Rule 803(3) only to establish his state of mind or medical condition on the day he gave the testimony, fourteen months after the surgery on Lori Haase. It is not admissible to establish his condition or state of mind in March or April of 1996. Moreover, some of the testimony was not about his physical or mental condition and would not be admissible under even the most liberal construction of Rule 803(3).

The deposition is not admissible under Rule 803(3).

**B. Haase Offers No Authority for Her Argument That Dr. Hawkes' Statements Were Admissible under Rule 804(b)(3).**

Haase argues that Dr. Hawkes' deposition should be admitted pursuant to Rule 804(b)(3). Reply Brief at 10-11. She asserts that Dr. Hawkes' statements "were so far against his interest" that they should be admitted. Reply Brief at 11.

The first legal impediment is that the application of Rule 804(b)(3) requires that declarant be aware that he is making a statement against his interest. Roberts v. City of Troy, 773 F.2d 725, 729 (6th Cir. 1985). Without a showing of that requisite awareness, the exception cannot apply. Id.

Haase does not offer evidence that Dr. Hawkes knew at the time of his deposition that statements he made regarding his health care and military history would be against his interest. Indeed, if Dr. Hawkes had given any thought to the significance of statements he made regarding his medical condition, he might have concluded that it was in his interest to explain the extent to which he was taking medication under a physician's care rather than more informally or even illicitly. If it did occur to Dr. Hawkes that rumors of his use of medication might be used against him in his malpractice case, he may have been motivated to show that his use was only on the direction of responsible physicians after thorough evaluation of his condition.

This interpretation is more likely than the interpretation that he made statements regarding his medical history knowing that they were against his interest. The record supports the conclusion that it is much more likely that Dr. Hawkes made these statements intending to clear rumors and allegations against his character or reputation or medical condition, and that he felt they were helpful rather than being against his interest. The deposition testimony of Dr. Hawkes includes the following passage:

Question: Okay. Have you ever had any drug or substance addiction problem or attended a clinic for that sort of thing?

Answer: I was – when I had my neck surgery, I came back and people were – accused me of going into a drug rehabilitation. It greatly upset me. So I went down and had myself drug tested and put myself in a drug clinic.

Question: Now, wait a second. People accused you of what?

Answer: They accused me of going to Texas to go through a withdrawal problem.

Question: And you didn't. You went down there –

Answer: I went down to get my neck surgery, but I came back and that was the word in town. So I thought I could clear myself. So I went down, and I enrolled in one of the drug programs. First of all, I talked with the addictionologist. I was very concerned of the accusation. Together we decided, "Well, let's go ahead and put you in for four days." They put me in for four days.

Transcript at 455, lines 21-25 and at 456, lines 1-16.

Later, in his deposition testimony, Dr. Hawkes provides additional evidence that his disclosures were intended to clear his reputation: "And again, I just did that. I did it voluntarily. I just wanted to clear myself." Transcript at 458, lines 2-3. It is illogical to suggest that an individual who explicitly states that he is making efforts to clear his name makes those statements knowing, or even assuming, that they are against his interest. Such an argument turns common sense on its head.



In addition, the Court erred in allowing entire sections of the deposition to be read into the record. Rule 804(b)(3) does not allow unrestricted introduction of entire sections of a proceeding just because some statements in that proceeding may be against the interest of the declarant. Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431, 2435 (1994). The Supreme Court was clear in its analysis:

Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded.

114 S.Ct. at 2435.

The court stated clearly that Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." Id. The court also found that this principle "is especially true when the statement implicates someone else." Id.

In this case, therefore, although the Hospital argues that Dr. Hawkes did not knowingly make statements against his interest and therefore that none of his statements should have been admitted, even a finding that he knowingly made self-inculpatory statements would only allow the admission of statements which were explicitly and directly against his interest, thus the introduction of complete sections of his deposition was error.

**C. The Exception of Rule 804(b)(1) Does Not Apply Because Counsel for Dr. Hawkes Did Not Have an Identical Motive to Develop or Clarify Dr. Hawkes' Testimony.**

Haase asserts that the Hospital cannot meet the burden of "establishing a lack of similar motive of a witness examination . . . ." Reply Brief at 12. Haase also characterizes Dr. Hawkes' testimony as "made in a civil action in which he was attempting to defeat liability by demonstrating he was a fit and able surgeon." Reply Brief at 12. This is a conclusory mischaracterization of the facts. Haase offers no evidence that, in the sections of the deposition she offered, Dr. Hawkes was attempting to demonstrate his fitness and ability. She offers no authority for the implied assertion that fitness and ability are even elements of a medical malpractice action.

The deposition was taken in a case which was exclusively a medical malpractice action, and the issue in such actions is whether there was a breach of the standard of care, not why there may have been such a breach. Accordingly, had the matter gone to trial, the admissibility of any information related to why Dr. Hawkes might have committed a breach of the standard of care could have been challenged by his counsel. When the deposition was taken, the parties anticipated that Dr. Hawkes would be present at trial, and counsel for Dr. Hawkes had no reason to aggressively pursue evidentiary objections, he was only motivated to make objections appropriate to the more liberal rules of discovery.

In support of her argument that the Hawkes deposition would be admissible under Rule 804(b)(1), Haase offers New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646 (10th Cir. 1989). Haase offers no citation to a particular page or section of the case, nor does

she provide any discussion of the rule of the case or analysis of its application to the facts here. However, the case does stand for a proposition central to the Hospital's argument. The holding, rather than affirming a predecessor-in-interest claim, was to reject that claim because there was no evidence that counsel for the party making the statement in question was disposed to protect the interest of the other party. Id. at 652.

The court concluded that where there is no explicit disposition to protect the interests of other parties, there can be no "like motive" and therefore no finding that the party offering the statement was a predecessor in interest. Id. The court also rejected without comment the argument that the statements could have been admitted under the residual exception of Rule 804(b)(5). Id.

The case is explicit in its interpretation of the Rule to require "like motive to develop testimony about the same material facts" as the necessary basis for establishing a predecessor in interest. Id. (quoting Lloyd v. American Export Lines, 580 F.2d 1179, 1187 (3rd Cir. 1978)). The core of the Hospital's argument on this issue always has been that the facts necessary to establish a claim of medical malpractice in a case against Dr. Hawkes are not the same material facts as those necessary to establish a case of negligence in credentialing against Ashley Valley Medical Center. In argument for its Motion in Limine to exclude the deposition of Dr. Hawkes, the Hospital asserted "the hospital and the physician have separate and distinct legal interests, and indeed the plaintiff has brought separate and distinct legal claims against the hospital and the physician. The claim for Dr. Hawkes was for negligence in the performance of medical care, the claim against the hospital is for negligence in its

administrative functions prior to the provision of that medical care." Memorandum Supporting Motion in Limine at 7.

For the Hospital, the material facts are with respect to the credentialing and retention of the surgeon. For the separate medical malpractice case against the surgeon, the material facts were those establishing whether the surgeon breached the standard of care. There is no authority supporting the implication that the material facts in these distinct causes of action are the same. Issues of concern to the Hospital, issues such as developing testimony regarding the circumstances under which Dr. Hawkes chose to be evaluated in the Day Spring Program, or the specifics of any involvement the Hospital had in his treatment for pain, or the extent to which he disclosed his medical condition to the Hospital, are all matters which are suggested by his deposition in various places but which counsel for Dr. Hawkes had no motive to develop or clarify as they had no relevance to the elements of the tort of medical malpractice.

**D. Haase Offers No Case Law Supporting Her Assertion That the Residual Exceptions of Rules 803 and 804 Should Apply.**

Although Haase offers Rule 803(24) and Rule 804(b)(5)<sup>2</sup>, the analysis is identical as the rules differ only in that Rule 804(b)(5) applies only when the declarant is unavailable. Utah v. Lenaburg, 781 P.2d 432, 440 (Utah 1989). Haase offers no authority for her argument that the residual exceptions of 803(24) and 804(b)(5) are applicable, despite the availability of recent Utah appellate court opinions on this issue.

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<sup>2</sup> Haase repeatedly refers to Rule 804(5). Reply Brief at 13. The Hospital assumes this is an incorrect reference to Rule 804(b)(5).

Haase neglects to discuss or even to acknowledge the procedural requirement that the companion residual exceptions found in Rules 803(24) and 804(b)(5) require "concurrent notice that a proponent intends to rely on one of the residual exceptions." State v. Webster, 32 P.3d 976, 981-982 (Utah App. 2001). Haase ignores an explicit requirement in the final sentence of the rule: "[A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." Id. (quoting Utah R.Evid. 804(b)(5)). Failure to give pretrial notice of the intent to rely upon either of the residual exceptions defeats the availability of either exception and admission of testimony under those exceptions would be reversible error. Id. at 983.

The Hospital concedes that Haase mentioned the residual exceptions in a reply to a motion in limine, but the reference did not state her intent to rely upon those exceptions and was offered only as an additional defense. At no time did she make an affirmative statement of her intent to rely on the residual exceptions with the required specificity regarding the statement to be offered. Id. at 982.

As conceded by Haase, the "catch all" exceptions apply only to "a statement not specifically covered by any of the foregoing exceptions . . . ." Reply Brief at 13 (quoting Rule 803(24)). As argued above, statements made by Dr. Hawkes of his prior mental state

and physical condition are specifically excluded by Rule 803(3). Therefore, they are specifically covered by a foregoing exception and Rule 803(24) cannot apply.

Rule 804(b)(5) does not allow admission of evidence covered by other Rules. The Rules explicitly exclude hearsay testimony regarding health conditions, existing prior to the testimony, and the legislative history makes clear the intent that the residuals not be used to circumvent an otherwise applicable restriction. As this Court recently noted in affirming a narrow construction of the residual exceptions, Utah courts "look to the reason, spirit and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject." 32 P.3d at 983 (quoting Mountain States Tel. and Tel. Co. v. Payne, 782 P.2d 464, 466 (Utah 1989)).

The intended limitation of a trial court's discretion when allowing admissibility under the residual exceptions to the hearsay rule is clearly articulated in the Advisory Committee's Note to the Rules. "Exception 24 and its companion provision in Rule 804(b)(5) . . . do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate trustworthiness within the spirit of the specifically stated exceptions." 2 John Strong et al, McCormick on Evidence, Appendix A at 647 (5th ed. 1999). The Senate Committee on the Judiciary Report on the Federal Rules of Evidence expressed a similar view of the restrictive intent of the residual exception:

"It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rule 803 and 804(b). . . . It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and

caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule."

McCormick, supra, Appendix A at 649.

The text and the legislative history of the residual exceptions establish that they do not apply to the admission of Dr. Hawkes' deposition.

### **III.**

#### **HAASE DOES NOT REFUTE THE HOSPITAL'S ARGUMENT THAT THERE WAS INADEQUATE FOUNDATION TO ADMIT MANUAL DEXTERITY TEST RESULTS AND THAT THOSE RESULTS WERE MORE PREJUDICIAL THAN PROBATIVE.**

The Hospital objected to the introduction of the dexterity test results on the grounds that there was no foundation "establishing that the test in 1997 was reliable as a reflection of Dr. Hawkes' condition two to four years earlier, or indeed at any time in the past." Brief of Appellee at 15. The Hospital's appellate argument concisely asserts: "Absent any expert testimony that connects the 1997 test result with some reliable determination of Dr. Hawkes' manual dexterity on the day of the surgery on Haase in 1996, the results are more prejudicial than probative and leave the jury to speculate as to their significance." Brief of Appellee at 15-16.

Haase does not address this argument, indeed she does not even acknowledge the argument. Her answer focuses on whether the test results are hearsay, and even as to this assertion she offers no citation to authority, no analysis, only the conclusory assertion that the test cannot be hearsay because it was videotaped. Reply Brief at 14.

Haase does not refute the Hospital's argument that, absent expert testimony connecting the test results to the condition of Dr. Hawkes prior to the surgery, there is inadequate foundation to present the results to the jury.

#### **IV.**

#### **HAASE FAILS TO ADDRESS THE CORE OF THE HOSPITAL'S ARGUMENT WITH RESPECT TO THE TESTIMONY OF DR. PAULOS.**

The Hospital, in addition to its general objection to testimony by videotape, argues that the testimony of Dr. Paulos in its entirety should not have been admitted. Appellee's Brief at 18-19.

Haase contends that the only objection to videotaped testimony is to the testimony of Dr. Richard Jackson. Reply Brief at 16. This contention is disingenuous, however, as Haase is well aware that there were persistent objections both on and off the record to having any of these witnesses appear by videotape. The record supports this assertion:

The Court: I'm concerned about all of these being done by either telephone or video. I haven't agreed to it. Counsel apparently hasn't agreed to it. . . .  
If you were going to talk about substantive things he would require them to be here.

Transcript at 467, lines 19-25.

Additional perspective on the true context in which these objections are raised arises shortly thereafter:



The Court: Is this what's going to happen with all of these; you're going to offer and you're going to object to them?

The Court: How many are we going to have this problem with tapes on?

Mr. Mortensen: This is the last tape.

The Court: And then the others we have are telephone conferences?

Mr. Mortensen: Two of those. They are expected to be brief.

The Court: And we'll show your – I assume you are objecting?

Mr. Harrison: Yes, Your Honor. I continue to object. The Court knows my objection and my position.

Transcript at 468, lines 17-19 and at 469, lines 9-13.

This section of the transcript makes clear that the Hospital consistently objected to the use of videotapes and that Haase was well aware of those consistent objections. For her to suggest now that the objection was with respect to only one videotape is misleading.

Haase makes no reply to the Hospital's analysis of case law which requires that videotapes be edited. Indeed, she offers no authority or legal analysis whatsoever. She offers no rebuttal to the Hospital's claim that it was more prejudicial than probative to allow the jury to hear an extended discussion by Dr. Paulos of what he would have said had he been asked, with no foundation establishing that the Hospital had an obligation to ask, or even a reason to ask.

Haase does not refute the argument of lack of foundation or of prejudice greater than probative value.

**V.**

**HAASE OFFERS NO AUTHORITY IN REBUTTAL TO  
THE HOSPITAL'S ARGUMENT THAT DR. MARGARET  
ENSIGN WAS NOT QUALIFIED TO TESTIFY AS AN  
EXPERT WITNESS.**

Haase offers no contrary authority, indeed does not even engage in criticism of the Hospital's analysis of relevant authority supporting its argument that Dr. Margaret Ensign should not have been allowed to testify as an expert witness on physician impairment. Haase merely repeats the testimony of Dr. Ensign at trial with no legal analysis. Reply Brief at 22.

Haase asserts that there is no basis for concluding that Dr. Ensign's testimony that Dr. Hawkes was impaired made any difference to the outcome of the trial. Reply Brief at 23. This assertion is based on the gross misrepresentation that "Dr. Ensign was only one of some 20 witnesses to offer opinions and observations as to the surgeon's apparent impairment." Reply Brief at 23. Haase offers no citation to the record in support of that claim. In fact, Dr. Ensign was one of only three witnesses to testify that Dr. Hawkes was or may have been impaired when he operated on Lori Haase.<sup>3</sup>

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<sup>3</sup> Adequate citations to the record are prohibited here by space constraints and by reason. However, only six witnesses commented on observations regarding Dr. Hawkes. Drs. Pasternak, Stryker and Ensign testified that they believe Dr. Hawkes either was or may have been impaired when he operated on Lori Haase. Kathy Hawkins testified that she saw Dr. Hawkes on one occasion at a football game when she believed he was not sober, and former employees Holly Kurtz and Elvira Bullock said that on one or two occasions, while working for Dr. Hawkes in his private office, they considered his speech to be slurred. The attempt of Haase to mislead this Court by stating that 20 witnesses offered opinions and observations regarding the apparent impairment of Dr. Hawkes does not serve the interest of justice.

One witness testified that she saw Dr. Hawkes attempt to enter a high school football game when exhibiting behaviors which led her to conclude that he was not sober. Transcript at 285, lines 8-10. Two other witnesses, both of whom were working for Dr. Hawkes in his private office practice, testified that on one or two occasions, perhaps at the same time, they believed that Dr. Hawkes had slurred speech. Transcript at 573, lines 5-10; Transcript at 352, lines 2-16.

The Hospital does not agree that "a couple" of instances of perceived slurred speech over a three-year period and one appearance at a football game, apparently having consumed alcohol, constitute evidence of apparent impairment. However, even if Haase is given the benefit of great latitude in interpreting that testimony, there are a total of six witnesses who testified about opinions and observations of alleged impairment prior to the surgery on Haase, not twenty. This kind of misrepresentation of the record does not assist the Court of Appeals in reviewing the issues.

## **VI.**

### **HAASE DOES NOT REFUTE THE HOSPITAL'S ARGUMENT THAT REFERENCES TO THE DAY SPRING RECORDS WAS PREJUDICIAL ERROR.**

Haase does not refute, indeed completely ignores, the argument that without adequate foundation the Day Spring records should not have been discussed in front of the jury. She does, however, assert that the Hospital failed to identify "any particular passage from the trial record containing a reversibly erroneous reference to the surgeon's treatment at Day Spring." Although the Hospital does not know what precisely Haase means by the phrase "reversibly

erroneous reference" and is not assisted by the presentation of any case law by Haase, the assertion that the Hospital failed to identify any passage which it considered to be prejudicial error is false.

There are multiple citations to the record showing the Hospital's objection at trial to any reference to the Day Spring records. Brief of Appellee at 24, 25. The Hospital also objected, and was twice sustained, in its objection to the characterization by counsel of Day Spring as a "drug addiction clinic." Transcript at 805, lines 13-17.

More specifically, the Hospital not only provides a citation, but quotes a passage of the record in which the Hospital specifically objected to allowing a plaintiff's witness to quote from Day Spring records. Appellee's Brief at 26. The specificity of the Hospital's argument<sup>4</sup> has been completely disregarded by Haase. Again, she offers no authority or analysis.

Also disingenuous is the assertion of Haase that it was necessary to refer to the Day Spring treatment records in order to impeach the Hospital CEO. Reply Brief at 24. The Day Spring records were not used to impeach Mr. Perry. The section of the transcript to which Haase refers is a record of the plaintiff's questioning of Mr. Perry at trial regarding when he first became aware that Dr. Hawkes had gone to the Day Spring Program. Transcript at 197,

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<sup>4</sup> "Had the Court made its ruling before Dr. Pasternak testified, the Hospital could have challenged that portion of the foundation for his opinion. The delay in that critical ruling deprived the Hospital of that challenge. Had a challenge to the foundation for Dr. Pasternak's opinion been sustained, it is likely that the jury would have reached a different conclusion. Allowing the jury to hear testimony from Dr. Pasternak and from Haase about these records before ruling on their admissibility was prejudicial error." Appellee's Brief at 26.

lines 8-25 and at 198, lines 1-3. Mr. Perry testified that when he was deposed in November of 2001 he had no memory of ever being aware that Dr. Hawkes had been to Day Spring, but that when he had an opportunity following his deposition to review private notes that he kept his memory was refreshed. Id. Haase mischaracterizes the record when she says "he eventually admitted he had learned of the surgeon's Day Spring stay . . . and that was contrary to his deposition testimony." Reply Brief at 24. The question at issue was when Mr. Perry knew that Dr. Hawkes went to the Day Spring Program, and Mr. Perry answered that question and clarified his deposition testimony as a lack of memory subsequently refreshed by his own notes. The Day Spring records were not required, nor did Haase use them in this instance, to impeach Mr. Perry.

Haase incorrectly asserts that the Hospital offered no specific citation of prejudicial error in discussing the content of records, and she incorrectly asserts that she was required to use the records in order to impeach a witness. This is the total substance of her reply to the Hospital's argument, and it is inadequate.

## **ANSWER TO NEW ARGUMENTS**

### **INTRODUCTION**

Haase offers four new arguments in her reply brief. These are original appellate issues for her, not responses to arguments raised by the Hospital. The Hospital filed separately a Motion to Strike and supporting memorandum, the arguments of which are incorporated here by reference to the extent not explicitly repeated. The following answers

to these new appellate issues are proffered for consideration only if the Court declines to grant the Motion to strike the new arguments and wishes argument on the new claims.<sup>5</sup>

With respect to each of the four new issues, the Hospital objects to their consideration the grounds that they do not comply with the Rules of Appellate Procedure. A more detailed argument is provided in the Memorandum in Support of the Hospital's Motion to Strike, incorporated here by reference, but the following summary of the objection to the legal insufficiency of the new arguments is offered for the convenience of the Court.

The four new arguments fail to comply with the requirement of Rule 24(a)(5) in that there is no citation to the record showing that the issue was preserved in the trial court or, in the alternative, an explicit statement "of grounds for seeking review on an issue not preserved in the trial court." Utah Medical Products, Inc. v. Searcy, 958 P.2d 228, 234 (Utah 1998) (citing Rule 24(a)(5)). See also, Meyer v. Bartholomew, 690 P.2d 558, 559 (Utah 1984) (matters asserted for the first time on appeal are rejected). For an issue to be reviewed on appeal, there must be "a contemporaneous objection or some other form of preservation of a claimed error" as part of the trial court record. State v. Lafferty, 20 P.3d 342, 370 (Utah 2001).

The four new arguments also fail to comply with the requirements of Rule 24(a)(9) for adequate citation to, and meaningful analysis of, relevant authorities. Rule 24(a)(9)

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<sup>5</sup> The page limitations of Rule 24(g) do not contemplate space for answering new issues in reply briefs, nor do they offer any guidance on this question. The Hospital's reply to Haase's answer is within the page limit of the Rules. The Hospital assumes that a motion to file an over-length reply is not required, under the circumstances, for pages needed to answer new arguments.

"unambiguously" requires "citations to the authorities, statutes, and parts of the record relied upon." Associated General Contractors v. Department of Natural Resources, 38 P.3d 291, 303 (Utah 2001) (citing Utah R.App.P. 24(a)(9)). Moreover, it is not enough just to provide citations to authority, appellants must provide "development of that authority and reasoned analysis based on that authority." State v. Jaeger, 973 P.2d 404, 410 (Utah 1999) (citing State v. Thomas, 961 P.2d 299, 305 (Utah 1998)). Briefs which lack meaningful analysis of authority are inadequate and will not be considered. 973 P.2d at 410. See also, State v. Wareham, 772 P.2d 960, 966 (Utah 1998) (contentions not supported by legal analysis and relevant authority must be disregarded). The Supreme Court of Utah has consistently declined to address arguments not adequately briefed. Water & Energy Systems Technology, Inc. v. Keil, 48 P.3d 888, 894 (Utah 2002) (quoting State v. Thomas, 961 P.2d 299, 304 (Utah 1998)).

## **I.**

### **THE TRIAL COURT PROPERLY DECLINED TO ADMIT THE DAY SPRING EVALUATION RECORDS.**

Haase offers no authority nor any legal analysis for her conclusory assertion that the trial court should have admitted the records of Dr. Hawkes' evaluation at the Day Spring Program.

As her only proffer of authority, Haase quotes from a document which was not admitted or discussed at trial, a document which she misrepresents as an authorization from Dr. Hawkes to the Hospital granting permission to review his medical records. The document in question, provided by Haase as Addendum 3 to her Reply Brief, is a copy of a

form sent to the Hospital from Intermountain Health Care requesting information regarding Thomas Hawkes, M.D., related to his application for participation in the Intermountain Health Care hospital network. The form confers no such authorization upon Ashley Valley Medical Center.

The trial court was correct in declining to admit the records, and should have gone further in declining to allow a discussion of the content of those records, but as a threshold argument Haase fails to comply with the requirements for preservation of the issue and for adequate briefing. Her argument should be rejected.

## **II.**

### **THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT THE TESTIMONY OF DR. RAYMOND MIDDLETON FOR THE PURPOSE OF DISCUSSING HIS ENTRIES IN DR. HAWKES' DAY SPRING RECORDS.**

Haase asserts error in the trial court's refusal to admit the testimony of Dr. Raymond Middleton, a physician whose involvement with Thomas Hawkes, M.D., is reflected in the excluded Day Spring records. Reply Brief at 29. Haase offers no citation to the record indicating that the issue was preserved in the trial court nor a statement of grounds for review notwithstanding the failure to preserve the issue in the trial court. Matters not properly preserved at trial will be rejected on appeal. 690 P.2d at 559.

In addition to her failure to show by citation to the record that the issue was properly preserved, Haase fails to provide meaningful analysis of relevant authority. Indeed, she offers no authority for this assertion of error, neither statute nor case. She offers only two paragraphs of citations to Dr. Middleton's deposition transcript and one paragraph of



conclusory assertions. Reply Brief at 29-30. There is no analysis of the Court's articulated basis for its ruling, a basis which is available in the record and could have been discussed.

As the records were not admitted, testimony from a physician regarding notes he made in the record should not have been admitted. There was no error.

### **III.**

#### **THE TRIAL COURT DID NOT ERR IN DECLINING TO ALLOW AN ASSESSMENT OF PUNITIVE DAMAGES.**

Haase asserts error in the decision of the trial court not to allow punitive damages. Reply Brief at 31. Haase offers no citation to the record indicating that the issue was preserved in the trial court nor a statement of grounds for review notwithstanding the failure to preserve the issue in the trial court. Matters not properly preserved at trial will be rejected on appeal. 690 P.2d at 559.

In addition to the failure to show that the issue was properly preserved, Haase fails to provide meaningful analysis of relevant authority. Indeed, she offers no authority for her claim that the trial court erred in declining to allow punitive damages. She begins by arguing that the trial court rejection of punitive damages is a directed verdict and should be analyzed as such. Reply Brief at 31. She offers no authority and no analysis in support of this assertion. She then offers a precis of the Utah punitive damages statute followed by two pages of hyperbole and self-serving citations to the record. Reply Brief at 32-33. She offers no case law, however, establishing that the “facts” she proffers, even if true, would be grounds for punitive damages.

For example, she argues that 15 "red flags" of a "dangerously impaired surgeon" were admitted into evidence. Reply Brief at 33. As examples of these indicators, Haase asserts that Dr. Hawkes had been sued for malpractice, had been treated for pain and sleep deprivation in 1995, had disagreements with some orthopedic colleagues, and had financial difficulty. She also repeats her thematic reference to an incident in which Dr. Hawkes was felt by one witness to be inebriated at a high school football game. Reply Brief at 33 (referencing Addendum 1 to Haase' Reply Brief).

These are "facts" in the sense that they are accurate statements, but no witness testified that these particular facts, alone or taken together, establish that Dr. Hawkes was a dangerously impaired surgeon, nor did any witness testify that the Hospital's action or inaction with respect to any of these issues evidences reckless disregard for Mrs. Haase or any other patient. There was no basis for awarding punitive damages.

#### **IV.**

#### **THE TRIAL COURT DID NOT ERR IN RECOGNIZING THE PEER REVIEW AND QUALITY IMPROVEMENT PRIVILEGE CONFERRED UPON HOSPITALS BY THE UTAH LEGISLATURE.**

Haase claims error in the trial court's recognition of the statutory peer review privilege. Reply Brief at 34-36. She asserts a distinction between "fitness" and "performance" as the definitional distinction between credentialing and peer review. Reply Brief at 34. As with the proceeding three issues, however, Haase offers no authority for that argument. She asserts, with no authority or analysis, that the peer review privilege "is to protect the care provider whose performance is under review by his peers" and that the peer

review privilege ends with the death of a physician reviewed. Reply Brief at 36. With no citation to authority supporting her argument and no meaningful analysis of authority, her brief on this issue is inadequate and should be disregarded.

Haase cites, with no reference to the page numbers she considers relevant, and no analysis, Benson ex rel v. IHC Hosps (sic), 866 P.2d 537 (Utah 1993). As elsewhere in her brief, Haase cites here as supporting authority a case that directly contradicts her argument. She argues that the privilege "is to protect the care provider whose performance is under review." Reply Brief at 36.

To the contrary, Benson clearly states the privilege is "to protect health care providers who furnish information regarding the quality of health care rendered by any individual or facility . . ." Id. at 539-540 (quoting U.C.A. § 58-12-43(7)). Clearly, the rationale is the need to protect the physicians who review their peers, not the physician who is the individual rendering health care.

Haase also fails to acknowledge that in 1996 the Utah Legislature, in response to Benson, corrected ambiguity regarding the privilege, repealing § 58-12-43(7) and revising § 26-25-1 et seq, including the privilege itself at § 26-25-3 (1996). From 1996 to the present, that statute has defined the privilege.

### **CONCLUSION**

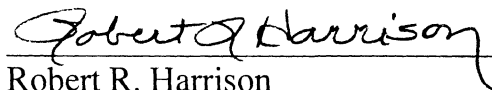
As to her answer to arguments presented in the Hospital's initial brief, Haase fails in each case to offer meaningful analysis of authority contradicting the Hospital's arguments. Indeed, she does not counter the Hospital's legal analysis at any point. She does not

contradict, or even discuss, a single case offered by the Hospital. Such an answer is legally inadequate and should be disregarded.

As to the new arguments Haase attempts to offer in her Reply Brief, the Hospital reiterates its objection to that attempt on the grounds that the Rules of Appellate Procedure do not allow presenting original appellate arguments in stages. Moreover, even if such an approach were allowed, Haase is still required to comply with other provisions of the Rules for preserving issues and for adequate briefing. In each of her new arguments, she fails to do so. All of the new arguments presented in her Reply Brief should be stricken and disregarded.

DATED this 18 day of February, 2003.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in cursive script, reading "Robert R. Harrison", is written over a horizontal line.

Robert R. Harrison

David W. Slagle

Attorneys for Appellee/Cross-Appellant

**CERTIFICATE OF SERVICE**

I state that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached **REPLY BRIEF OF APPELLEE/CROSS APPELLANT ASHLEY VALLEY MEDICAL CENTER** (Case Number 20020524-SC, In the Utah Court of Appeals) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen  
Matheson, Mortensen, Olsen & Jeppson  
Attorneys for Plaintiff/Appellant  
648 East 100 South  
Salt Lake City, Utah 84102

and causing the same to be mailed, first class, postage prepaid, on the 18 day of February, 2003.

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**ADDENDUM**

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE  
PORTIONS OF APPELLANT'S REPLY BRIEF

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IN THE UTAH COURT OF APPEALS

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LORI HAASE, an individual,

Plaintiff/Appellant and  
Cross Appellee,

vs.

ASHLEY VALLEY MEDICAL  
CENTER and COLUMBIA ASHLEY  
VALLEY MEDICAL CENTER and  
JOHN DOE DEFENDANTS 1  
THROUGH 10,

Defendants/Appellees,  
and Cross Appellant.

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**MEMORANDUM IN SUPPORT OF  
MOTION TO STRIKE PORTIONS  
OF APPELLANT'S REPLY BRIEF**

Case No. 20020524-CA

Eighth Judicial District Court  
No. 98-0800377

Appellee/Cross Appellant Ashley Valley Medical Center hereby files its  
Memorandum in Support of Motion to Strike Portions of Appellant's Reply Brief.

## **INTRODUCTION AND STATEMENT OF FACTUAL GROUNDS**

Appellant/Cross Appellee Lori Haase (“Haase”) filed a motion for permission to file an over-length reply memorandum on January 06, 2003. Appellee/Cross Appellant Ashley Valley Medical Center (“the Hospital”) filed a memorandum in opposition to that motion on January 10, 2003, on the grounds that Haase requested the additional pages not for an over-length reply but rather to argue additional issues in her appeal. The Court, by order dated January 14, 2003, allowed Haase to file the entire brief and instructed the Hospital to file a motion to strike any portions to which it objected.

Haase submitted her reply, including four issues not argued in her original brief, on January 16, 2003. Although Haase asserts that she “reserved” the right to argue the new issues for the first time in her reply, there is no provision in the Utah Rules of Appellate Procedure allowing an appellant to delay arguing issues until her reply to the appellee’s answer to her original brief. There is no case law supporting or implying such an interpretation of the Rules.

## **STATEMENT OF RELIEF REQUESTED**

With this motion, the Hospital asks the Court to strike the four new arguments on the grounds of failure to comply with the requirements of Rule 24 of the Rules of Appellate Procedure. The new arguments should be stricken because they may not be presented in a reply brief. Even if it were permissible to brief new issues in a reply, the



briefing of these issues does not comply with the Rule 24 because Haase fails to show that the issues were preserved and fails to offer meaningful analysis of relevant authority.

## **ARGUMENT**

### **I.**

#### **NEW ARGUMENTS IN THE HAASE REPLY SHOULD BE STRICKEN ON THE GROUNDS THAT THEY WERE NOT ARGUED IN HER ORIGINAL BRIEF.**

In her original brief, Haase identified several issues which she “wishes to preserve her right” to argue in her reply brief. Haase Brief at 2-3. Her original brief offers no authority for any such right. In her reply, she offers argument on four of those issues. Reply Brief at 25-36. Nothing in the Utah Rules of Appellate Procedure or in the case law allows an appellant to raise new appellate issues in a reply to the appellee’s answer. Haase offers no citation to a provision in the Rules for such a right nor any case law implying such a right.

To the contrary, the Rules explicitly limit reply briefs “to answering any new matter set forth in the opposing brief.” Utah R.App.P. 24(c). Any attempt to broaden that limit violates accepted rules of construction.

Utah jurisprudence has long recognized the maxim *expressio, unius est exclusio alterius*, the canon of construction under which the expression of one thing excludes others. Field v. Boyer, 952 P.2d 1078, 1086-1087 (Utah 1998 ) (Russon, *dissenting*) (citing Salt Lake City v. Ohms, 881 P.2d 844, 855 (Utah 1994)). Following this canon of

construction, the express limitation of Rule 24(c) to “answering any new matter” raised in the appellee’s response excludes the introduction of new arguments by the appellant in a reply brief.

Although there appear to be no cases which address the precise approach Haase attempts, this Court has consistently rejected consideration of issues raised for the first time in a reply brief. In Re Adoption of S.L.F., 27 P.3d 583, 587 n.1 (Utah App. 2001)(quoting Maack v. Resource Design & Constr., Inc., 875 P.2d 570, 575 n.3 (Utah App. 1994))(quoting State v. Phathamavong, 860 P.2d 1001, 1004 (Utah App. 1993)) (“The rule is well settled that the court will not consider issues raised for the first time in a reply brief.”).

The clear intent of Rule 24(a) is that an appellant will present all of that party's contentions on appeal in the original appellate brief. 860 P.2d at 1003-1004 (“It is the responsibility of the moving party to raise in its . . . motion *all* of the issues on which it believes it is entitled to [prevail].”)(emphasis in the original)(quoting White v. Kent Medical Ctr. Inc., 810 P.2d 4, 8 (Wash. App. 1991)).

Additional authority supports the Hospital’s position that issues not argued in Haase’ original appellate brief should be “deemed waived and abandoned.” Rukavina v. Triatlantic Ventures, Inc., 931 P.2d 122,125 (Utah 1997). In Rukavina, the Utah Supreme Court made clear that the argument section of a party’s brief must contain the contentions of the appellant. Id. (quoting American Towers Ass'n, Inc. v. CCI Mechanical, Inc., 930

P.2d 1182, 1185 n.5 (Utah 1996) (citing Pixton v. State Farm Mut. Auto. Ins. Co., 809 P.2d 746, 751 (Utah App. 1991)).

Pixton cited an Alaska case for the proposition that “points initially raised on appeal but not briefed are considered abandoned.” 809 P.2d at 751 (citing Union Oil of Calif. v. State, 677 P.2d 1256, 1259 (Alaska 1984)). Though the associated citations were omitted by the Court of Appeals in its opinion, Union Oil cites Wetzler v. Wetzler, 570 P.2d 741, 742 n.2 (Alaska 1977). Wetzler cites Kupka v. Morey, 541 P.2d 740 (Alaska 1975), in which the rule subsequently articulated in Pixton was applied in the context of new arguments presented in a reply brief.

In Kupka, the Alaska Supreme Court rejected new arguments submitted in a reply brief notwithstanding related references in the opening brief. 541 P.2d at 747. Although Kupka doesn’t reveal whether the appellant made a similar assertion of having “reserved” the right to argue the issues later, the facts are nevertheless substantially the same as those now before the Court and, consistent with its earlier reliance on the Union Oil line of cases, the Court should reject Haase’ new arguments.

Consistent with Rule 24(j), any portion of a reply brief which exceeds the limitations of Rule 24(c) may be stricken upon motion. State v. Kruger, 6 P.3d 1116, 1120 (Utah 2000). All new issues argued in Haase’ reply brief should be stricken.

## **II.**

### **THE NEW ISSUES RAISED BY HAASE SHOULD BE STRICKEN ON THE GROUNDS THAT SHE FAILS TO COMPLY WITH THE REQUIREMENTS FOR APPELLATE ARGUMENT.**

Although the Hospital asserts that the four new arguments should be stricken because they were not presented in the original brief, even if that were not the rule of law the arguments fail to comply with Rule 24(a) and should be stricken as inadequate.

The four new arguments fail to comply with the requirement of Rule 24(a)(5) in that there is no citation to the record showing that the issue was preserved in the trial court or, in the alternative, an explicit statement "of grounds for seeking review on an issue not preserved in the trial court." Utah Medical Products, Inc. v. Searcy, 958 P.2d 228, 234 (Utah 1998) (citing Rule 24(a)(5)). See also, Meyer v. Bartholomew, 690 P.2d 558, 559 (Utah 1984) (matters asserted for the first time on appeal are rejected). For an issue to be reviewed on appeal, there must be "a contemporaneous objection or some other form of preservation of a claimed error" as part of the trial court record. State v. Lafferty, 20 P.3d 342, 370 (Utah 2001).

Haase offers no form of preservation of the claimed errors at trial, and no argument that she be allowed to appeal issues not properly preserved. Her arguments do not comply with Rule 24(a)(5) and should be stricken.

The four new arguments also fail to comply with the requirements of Rule 24(a)(9) for adequate citation to, and meaningful analysis of, relevant authorities. In addition to

being properly before the appellate court through proper preservation, arguments must be adequately briefed. The Supreme Court of Utah has consistently declined to address arguments not adequately briefed. Water & Energy Systems Technology, Inc. v. Keil, 48 P.3d 888, 894 (Utah 2002) (quoting State v. Thomas, 961 P.2d 299, 304 (Utah 1998)).

The Supreme Court of Utah has repeatedly admonished counsel to comply with Rule 24(a)(9) which "unambiguously" requires "citations to the authorities, statutes, and parts of the record relied upon." Associated General Contractors v. Department of Natural Resources, 38 P.3d 291, 303 (Utah 2001) (citing Utah R.App.P. 24(a)(9)).

Moreover, it is not enough just to provide citations to authority, appellants must provide "development of that authority and reasoned analysis based on that authority." State v. Jaeger, 973 P.2d 404, 410 (Utah 1999) (citing State v. Thomas, 961 P.2d 299, 305 (Utah 1998)). Briefs which lack meaningful analysis of authority are inadequate and will not be considered. 973 P.2d at 410. See also, State v. Wareham, 772 P.2d 960, 966 (Utah 1998) (contentions not supported by legal analysis and relevant authority must be disregarded).

The rule in Utah is clear as to both points: (1) appellants must cite to the record showing the preservation of issues for review, or present argument as to why issues not preserved should be reviewed, and (2) to be adequate, an appellate argument must include meaningful analysis of relevant authority. Noncompliant aspects of each of the four new arguments from Haase are set forth below.

1. Haase asserts error in the trial court's refusal to allow admission of Day Spring records. Reply Brief at 25. Haase offers no citation to the record indicating that the issue was preserved in the trial court nor a statement of grounds for review notwithstanding the failure to preserve the issue in the trial court. Matters not properly preserved at trial will be rejected on appeal. 690 P.2d at 559.

In addition to the failure to show that the issue was properly preserved below, Haase fails to provide meaningful analysis of relevant authority. Indeed, she offers no authority for this assertion of error, neither statute nor case. She offers only a conclusory criticism of the basis for the Court's decision, Reply Brief at 25, and provides, as a full-page footnote, a quotation from a document which is not even what she proffers it to be.<sup>1</sup>

2. Haase asserts error in the trial court's refusal to admit the testimony of Dr. Raymond Middleton, a physician whose involvement with Thomas Hawkes, M.D., is reflected in the excluded Day Spring records. Reply Brief at 29. Haase offers no citation to the record indicating that the issue was preserved in the trial court nor a statement of grounds for review notwithstanding the failure to preserve the issue in the trial court. Matters not properly preserved at trial will be rejected on appeal. 690 P.2d at 559.

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<sup>1</sup> The document in question, provided by Haase as Addendum 3, is a copy of a form request sent to the Hospital from Intermountain Health Care for information regarding Thomas Hawkes, M.D., related to his application for participation in the Intermountain Health Care hospital network. Haase describes it as an authorization from Dr. Hawkes to Ashley Valley Medical Center allowing the Hospital to inquire into his medical records.

In addition to her failure to show by citation to the record that the issue was properly preserved, Haase fails to provide meaningful analysis of relevant authority. Indeed, she offers no authority for this assertion of error, neither statute nor case. She offers only two paragraphs of citations to Dr. Middleton's deposition transcript and one paragraph of conclusory assertions. Reply Brief at 29-30. There is no analysis of the Court's articulated basis for its ruling, a basis which is available in the record and could have been discussed.

3. Haase asserts error in the decision of the trial court not to allow punitive damages. Reply Brief at 31. Haase offers no citation to the record indicating that the issue was preserved in the trial court nor a statement of grounds for review notwithstanding the failure to preserve the issue at trial. Matters not properly preserved at trial will be rejected on appeal. 690 P.2d at 559.

In addition to the failure to show that the issue was properly preserved, Haase fails to provide meaningful analysis of relevant authority. Indeed, she offers no authority for her claim that the trial court erred in declining to allow punitive damages, nor even any authority establishing that punitive damages are available in an action for negligence in credentialing a physician.<sup>2</sup>

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<sup>2</sup> Punitive damages are not available in all causes of action. See, e.g., Norman v. Arnold, 2002 UT 81, 453 Utah Adv. Reports 457 (punitive damages not available in breach of contract).

She begins by arguing that the trial court rejection of punitive damages is essentially a directed verdict and should be analyzed as such, Reply Brief at 31, but offers no authority and no analysis in support of this assertion. She then offers a two-line precis of the Utah punitive damages statute followed by two pages of hyperbole and misrepresentation.<sup>3</sup> Reply Brief at 32-33. She offers no case law, however, establishing that the “facts” she proffers, even if true, would be grounds for punitive damages.

Haase completely fails to meet the requirement for reasoned analysis of relevant authority and her argument should be stricken. 48 P.3d at 894.

4. Haase claims error in the trial court’s recognition of the statutory peer review privilege. Reply Brief at 34-36. She asserts a distinction between “fitness” and “performance” as the definitional distinction between credentialing and peer review. Reply Brief at 34. Haase offers no authority for that argument. She then asserts, with no authority,<sup>4</sup> that the peer review privilege “is to protect the care provider whose performance is under review by his peers” and that the peer review privilege ends with the death of a physician reviewed. Reply Brief at 36. As there is no meaningful analysis

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<sup>3</sup> For example, Haase asserts “[T]here is strong evidence that the hospital placed profits before patients . . . .” Reply Brief at 32. She offers no citation to any such evidence, however, only a speculative quotation from her own closing argument. Id.

<sup>4</sup> Although the hospital is not responding to the merits of the Haase arguments in this motion to strike, the attention of the Court is invited to the fact that the argument here cannot be supported by authorities because the authorities are to the contrary.



of, or citation to, relevant authority, her brief on this issue is inadequate and should be disregarded.

### **CONCLUSION**

The Utah Rules of Appellate Procedure make no provision for, nor does any case law suggest an implied provision for, a reservation of the right in an appellant's brief to make additional original arguments in a reply to the appellee's answer. Haase offers no authority in support of her attempt to present appellate issues in stages. Her attempt to include new issues in her reply is inconsistent with the Rules and with prior decisions of this Court, and should fail.

Even if there were an implied provision for reserving the briefing of original issues until submission of a reply brief, the briefing of new issues by Haase in her reply is inadequate. For each of the four new issues, she fails to show that the issues were preserved at trial, and offers no meaningful analysis of relevant authority. Her briefing on these issues should be stricken.

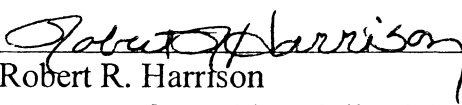
Ashley Valley Medical Center's motion to strike all new arguments, found on pages 25 through 36 of the Reply Brief, should be granted.<sup>5</sup>

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<sup>5</sup> The Reply Brief sets forth arguments regarding the four new issues at pages 25 through 36. That section of the brief is identified as Section One, but it appears that the proper identification would have been Section Two. Because of this misidentification, the Hospital refers to the pages rather than the section headings.

DATED this 18 day of February, 2003.

SNOW, CHRISTENSEN & MARTINEAU

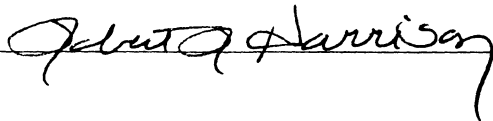
  
Robert R. Harrison  
Attorneys for Ashley Valley Medical Center

CERTIFICATE OF SERVICE

I state that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PORTIONS OF APPELLANT'S REPLY BRIEF** (Case Number 20020524-CA, in the Utah Court of Appeals) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen  
Matheson, Mortensen, Olsen & Jeppson  
Attorneys for Plaintiff  
648 East 100 South  
Salt Lake City, Utah 84102

and causing the same to be mailed, first class, postage prepaid, on the 18 day of February, 2003.

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